



Australian Government

Takeovers Panel

AMENDMENT OF GN 18

PUBLIC CONSULTATION RESPONSE STATEMENT

21 JULY 2014

Introduction

On 10 January 2014, the Takeovers Panel released a Consultation Paper seeking public comments on amendments to Guidance Note 18 *Takeover Documents*.

Comments on the Consultation Paper were due by 28 February 2014 and the Panel received 4 submissions in response. The Panel thanks those who made submissions for their comments. Attached to this response statement are extracts of the submissions relevant to GN 18 (Annexure A).

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 main comments received from respondents.

Minor proposed changes to reflect current practice (eg, on Wrap Information) have been incorporated into the final guidance note.

Attached is a copy of the final GN 18, in mark up to show the changes from the draft circulated with the Consultation Paper (Annexure B).

Material comments received and Panel's conclusions

Best practice guidance

Comment

A number of respondents submitted that aspects of the proposed guidance were too prescriptive - for example, the 'best practice' guidance on the contents of a summary section of a bidder's or target's statement.

Response

The proposals were intended to influence the development of more accessible documents, and guide those who were less familiar with the preparation of bidder's statements and target's statements. The Panel did not intend to be prescriptive, and changes have been made to more clearly reflect that. Accordingly, the Panel has

removed reference to ‘best practice’ guidance and made it clear that the example is just that, and the contents of a summary will depend on the particular transaction. The contents of a summary section contained in the table under paragraph 20 has been moved to Appendix A as an example of what the Panel considers most likely to be of importance. There have also been some additions to the example contents in the table.

Summaries

Comment

One respondent submitted that summaries may not be necessary for simple bids.

Response

The Panel considers that summaries are useful even for simple bids. The Panel’s encouragement of summaries that are accessible, in particular to retail shareholders, remains and is consistent with ASIC guidance in relation to prospectuses in ASIC [Regulatory Guide 228 Prospectuses: Effective disclosure for retail investors](#).

Page limit

Comment

In response to the question in the consultation paper about whether the Guidance Note should specify a page limit for the summary section, a number of respondents submitted that a page limit was unnecessary.

Response

The Panel has not specified a page limit.

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ANNEXURE A

Extracts of Submissions

Submission
from
Allens

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Date 28 February 2014 Confidential Email
From Greg Bosmans / Gadi Bloch
To **Allan Bulman**, Director, Takeovers Panel
Email takeovers@takeovers.gov.au

Dear Allan

Submission on Consultation Paper – Guidance Note 18 – Takeover Documents

Thank you for the opportunity to comment on the Takeovers Panel's Consultation Paper regarding proposed amendments to Guidance Note 18 – Takeover Documents (**GN18**).

Our comments are as follows.

- 1 Allens endorses the proposition that takeover documents should be presented as clearly, concisely and effectively as possible. In our experience, takeover documents that are prepared with the assistance of experienced legal and financial advisers are already presented in such a manner.
- 2 For this purpose, the preparer of a takeover document will, in some cases, preface a takeover document with a summary section in a form similar to that suggested by the Panel. However, this is by no means the norm. In many instances, the preparer will consider that the accessibility of the document may be best served by adopting a different stylistic approach. For example, a preparer may include elements of the relevant information in different preliminary sections of the takeover document, rather than in one consolidated summary section.
- 3 Accordingly, while we consider that it may be helpful to takeover participants generally for the Panel to identify particular items of information which the preparer of a takeover document should consider including in a summary section, we do not consider that it would be helpful for the Panel to frame this in terms of 'best practice guidance'.
- 4 The draft amended GN18 seeks not to be unduly prescriptive as to the structure and content of a summary section and, in theory, continues to provide sufficient flexibility for a takeover document to be structured as the preparer considers most appropriate, taking into account the purpose of the document and the circumstances of the bid concerned, provided that structure is clear, concise and effective. However, preparers of takeover documents may potentially feel obliged to observe any 'best practice guidance' advanced by the Panel, if for no other reason than to mitigate the risk of an interested party seeking to impugn the document before the Panel merely on the basis of a departure from that guidance.
- 5 Regardless of the manner in which the Panel expresses any guidance as to the content of a summary section of a takeover document, we do not consider that it is necessary or appropriate for

Our Ref GZBM: GMBM:150230

gzbm A0128432794v2 150230 27.2.2014

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the Panel to specify a page limit for such a summary, whether as a single figure or a range. As recognised in the draft amended GN18, the length of any summary will depend on the nature of the bid concerned (with some of the more obvious variables including the nature of the consideration being offered, the conditions and terms of the offer and the existence or otherwise of any competing takeover proposals). We consider that a statement of general principle such as that contained in the draft amended GN18 (ie, that the summary be short enough to be comprehended quickly) is all that is required.

Please contact us if you have any queries in relation to this submission.

Regards

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Submission
from
Herbert Smith Freehills

Guidance Note 18: Takeover Documents

1 Summary

In response to the Panel's invitation for comments on the following issues in relation to Guidance Note 18 Takeover Documents:

- (1) *Do you consider Panel guidance on the content of summaries in takeover documents useful?*

It is useful for the Panel to suggest that every bidder's statement and target's statement should contain a short summary upfront. However, we suggest that the Panel's guidance on the content and form of summaries is too prescriptive and would be counterproductive.
- (2) *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.*

As above, we suggest that the Panel's proposed structure for summaries in takeovers documents is too prescriptive, and detailed guidance on the structure of summaries is counterproductive.
- (3) *Should the Guidance Note specify a page limit for a summary, either as a single figure or a range?*

We do not view a page limit as beneficial as each takeover bid (including as to complexity) is different.

Again, we have set out further detail below.

2 Guidance on structure and content of summaries

The inclusion, upfront in takeover documents, of a summary of the offer that is 'accessible to retail shareholders' is a positive addition to Guidance Note 18. Therefore, we have no issue with the inclusion of the Panel's references to accessibility in paragraphs 1(b), 3, 10, 11 and 12 of the Draft Guidance Note.

However, we suggest that each bidder and target should be able to decide on the content and form of a summary section in their takeover documents, depending on what is needed in the circumstances of each particular bid (taking into account, among other things, the complexity of the particular takeover bid). The move of disclosure law and practice from "checklist" approaches to encouraging the discloser to apply judgement and thought and to emphasis what is important from the perspective of investors has enhanced disclosure. It would be a retrograde step to go back to a "checklist" approach.



For example, the summary categories which may be helpful for a complex bid offering a combination of foreign scrip and foreign currency cash would likely be quite different from what is helpful in the context of a simple domestic cash bid.

We find the Panel's draft guidance on the content and form of a summary section in takeover documents is quite prescriptive. We propose that paragraphs 13-20 are unnecessary to include in Guidance Note 18, and that these matters are best left to the judgement of the parties, which are subject to obligations not to be misleading or deceptive.

In particular, we are of the view that prescribing a page limit for a summary, or a particular font size for takeover documents is unnecessary. We are not aware of significant issues having arisen in practice, where common sense and self-interest in getting the disclosing party's message across clearly have tended to drive legible disclosure. We suggest that these types of presentation issues continue to be left to parties and their advisers.

Submission
from
Law Council of Australia

Mr Allan Bulman
Director, Takeovers Panel
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28 February 2014

Dear Mr Bulman

Response to Consultation Paper on Accessible Documents

This is a submission by the Corporations Committee of the Business Law Section of the Law Council of Australia (the **Committee**) in response to the Consultation Paper issued by the Takeovers Panel (the **Panel**) in early January this year on revisions to Guidance Note 18 on Takeover Documents.

The Committee makes the following submissions:

1. Whilst the Committee agrees with the Panel that there is merit in promoting the use of summaries to make takeover documents more accessible, it considers that the proposed revisions to Guidance Note 12 are too prescriptive (e.g. specifying the use of size 10 font and best practice guidance on the contents of a summary section).
2. Whether a summary will enhance accessibility will depend on the complexity and scale of the control transaction. For example, in circumstances involving a relatively small scale simple cash bid, requiring a summary may impede, rather than enhance accessibility. It may result in unnecessary repetition resulting in the document being longer than otherwise needs to be the case.
3. Given the above comments, the Committee considers that it is not beneficial to the market for the Panel to include such prescriptive guidance in Guidance Note 18 on the length, appearance and structure/content of summaries. As flagged above, what is appropriate will vary depending on the control transaction.
4. The Committee is of the view that the market would be better served by the Panel paring back its guidance so as not to be too prescriptive. For instance, rather than prescribing what the summary section should contain, it may be better for the Panel to more generally note that the summary should include the matters which are most likely to be of importance to target shareholders and their decision whether to accept or reject a bid. It may also be beneficial to refer to ASIC

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Regulatory Guide 228 and note that it contains illustrations of matters that should be considered in preparing the summary section.

5. The Committee further considers that there is no need to specify a page limit for the summary section. The statement in paragraph 14 of the proposed revised Guidance Note noting that the length will depend on the control transaction should suffice as adequate guidance.
6. If, contrary to our submission, the Panel decides to retain the proposed section on 'Structure of a summary', the Committee considers that it would be beneficial to include a statement in the Guidance Note that in bids offering foreign scrip as consideration, accessibility may be enhanced by including in the summary section a description of the key issues in relation to the foreign scrip being offered. Currently, information on foreign scrip being offered as part of the offer consideration is not particularly accessible. It is generally placed towards the back of takeover documents and can be lengthy, complex and difficult for retail shareholders to understand.

The Committee would be pleased to discuss any aspect of this submission. Please contact the chair of the Committee, Bruce Cowley on (07) 3119 6213, if you would like to do so.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'John Keeves', with a long horizontal stroke extending to the right.

John Keeves
Chairman, Business Law Section

Submission
from
Macquarie Capital (Australia) Limited

Accessible documents


Whilst the proposed “best practice guidance on the contents of a summary section” in takeover documents is not inherently objectionable, it does seem overly prescriptive in so far as it suggests a summary section “should consist of the [specified] headings and related contents and that a specific font size need be used (as sensible as that might be). In our view, it would be far preferable if the Panel simply expressed the view that every bidder’s statement and target’s statement should contain a short summary upfront that provides key information for retail shareholders in an accessible form. As the draft Guidance Note acknowledges, this is already common practice. And we doubt Panel guidance will ever succeed in reducing the front section of takeover documents to a standardized *pro forma*.

This submission has been prepared by Macquarie Capital (Australia) Limited and does not necessarily reflect the view of other members of the Macquarie Group.

If you have any questions in relation to this submission, please do not hesitate to contact Michael Hoyle on (03) 9635 9148.

Yours faithfully

Macquarie Capital (Australia) Limited



Michael Hoyle
Division Director
Macquarie Capital



Kristen Jung
Division Director
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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

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
 - (b) create more accessible takeover documents.
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 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

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

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

² Sections 633 and 635

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

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.

Appearance

15. The accessibility of the information is affected by the typeface used, consistency of the font and point size,⁶ 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.~~16. Headings aid interpretation and navigation. Sub-headings may also be appropriate.

StructureContent and structure of a summary

- ~~18.~~17. ~~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~~ The contents will depend on the particular case.

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).*

⁶ It should be legible, eg, 10 point

Attachment A is an example of what the Panel considers most likely to be of importance.⁷ eConsideration should be given to placing more important information in the particular case nearer the front.

19.18. _____ It may also improve accessibility to provide cross-references to detailed information in the remainder of the document.⁸

20.19. _____ The summary would normally most naturally follow the Chairman's letter.

[Note: The deleted table below has been moved to Annexure A]

Headings	Bidder's Statement	Target's Statement
Offer consideration	Details of the consideration offered	<i>Describe if the target considers this helpful</i>
Reasons to accept/reject offer	(i) Reasons to accept the offer (ii) Expert's conclusion (if one is appointed by bidder)	(i) Reasons to accept/reject the offer (ii) Expert's conclusion (if one is appointed by target)
Recommendation ⁹	N/A	Recommendations of the target's directors (or reasons no recommendation given)
Key dates	(i) Date offer opens (ii) Date offer closes (iii) Date bidder must advise status of conditions (iv) Date of payment (v) A qualification that dates (ii), (iii) and (iv) are correct at the time but the offer may be extended or	<i>Describe if the target considers this helpful</i>

⁷ RG 228 (Prospectuses: Effective disclosure for retail investors), at [228.46]-[228.57], also identifies matters that should be considered in preparing a summary section

⁸ Particular information may be important enough to be included under 'Other key issues' in the summary rather than simply cross-referred

⁹ See paragraph 39 and following

Headings	Bidder's Statement	Target's Statement
	withdrawn (if applicable)	
Conditions and terms of offer	(i) A summary of the key conditions of the offer (ii) A description of what happens if the conditions are not fulfilled (iii) Cross reference to the full list (iv) Explain security holders' ability or inability to withdraw acceptances	<i>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)</i>
Bidder information	Description of the identity of the bidder and its intentions¹⁰	<i>Describe if the target considers this helpful</i>
Summary of expert's report (if any)¹¹	(If the bidder has appointed an expert) (i) Expert's conclusion (ii) Main reasons for the expert's conclusion (iii) Cross reference to the full report	<i>(If relevant) the target's response, if any, to the bidder's expert's report</i> <i>(If the target has appointed an expert)</i> (i) Expert's conclusion (ii) Main reasons for the expert's conclusion (iii) Cross reference to the full report
Key risks	A description of the key risks for shareholders from the bidder's viewpoint if shareholders accept or	A description of the key risks for shareholders from the target's viewpoint if shareholders accept or

¹⁰ ~~See paragraph 36 and following. The bidder may need to provide a cross reference to parts~~

¹¹ ~~See paragraph 44 and following~~

Headings	Bidder's Statement	Target's Statement
	reject the offer	reject the offer
Action to take	How to accept the offer	How to accept or reject the offer, consistent with any directors' recommendations
Other key issues (Use of sub-headings here may be helpful)	Description of any unusual features of, or key issues raised by, the offer from the bidder's viewpoint. Examples — tax issues	Description of any unusual features of, or key issues raised by, the offer, from the target's viewpoint. Example — tax issues

Marketing information

21.20. Marketing information¹² in any takeover document, particularly in the summary section, is the type of information 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

22.21. 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 them¹³ and

¹² 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

¹³ 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)

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

~~23-22.~~ 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 statement¹⁴ or revised bidder's statement¹⁵ 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 bid¹⁶

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

Example: a Help Line telephone number

~~24-23.~~ 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 statement¹⁷

Broker valuation¹⁸

~~25-24.~~ A bidder (target)¹⁹ 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.

~~26-25.~~ The Panel considers that, with any broker valuation in a takeover document, there should be clear disclosure of:

¹⁴ Section 643

¹⁵ ASIC Class order 00/344

¹⁶ 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

¹⁷ 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

¹⁸ "Price recommendations" may be a more accurate description

¹⁹ Also other entities in respect of other control transaction disclosure documents

- (a) the criteria used to select the valuation or valuations and
- (b) any potential conflict the broker or brokers may have.²⁰ 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.

~~27.26.~~ 27.26. Moreover the broker's consent²¹ 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.

~~28.27.~~ 28.27. 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

~~29.28.~~ 29.28. 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.²² 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.

~~30.29.~~ 30.29. 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"

²⁰ Brokers are required to have adequate arrangements for the management of conflicts of interest: s912A(1)(aa)

²¹ Section 636(3)

²² The Panel considered that it was not required in the circumstances in *Southcorp Limited* [2005] ATP 4 at [10]

- (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 value²³ and
- (h) any other material information²⁴

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.

31.30. 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.

32.31. 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

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

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

²⁴ See also paragraph on conflicts

²⁵ See also section on broker valuations

34.33. 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.

35.34. 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.²⁶ 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 traded²⁷
- (b) there is not a clear explanation of the reason for selecting the particular date for the comparison²⁸
- (c) the comparison is not like-for-like and the method used to calculate it, if not the most reasonable, is not adequately explained²⁹
- (d) statements as to value are included without a reasonable basis for them being disclosed.³⁰

Intentions

36.35. 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.

37.36. 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

²⁶ *General Property Trust* [2004] ATP 30; *Programmed Maintenance Services Limited* [2008] ATP 7 at [24]; *Minemakers Limited* [2012] ATP 8 at [56]

²⁷ *Queensland Ores Limited* [2009] ATP 8

²⁸ *Magna Pacific (Holdings) Limited* [2007] ATP 2 at [46]; *Minemakers Limited* [2012] ATP 8 at [56]

²⁹ *Programmed Maintenance Services Limited 02* [2008] ATP 9 at [35]; *Minemakers Limited* [2012] ATP 8 at [56]

³⁰ *Tully Sugar Ltd* [2009] ATP 26 at [18]; *Minemakers Limited* [2012] ATP 8 at [56]

the principles in ss 602(a) and (b)(iii).³¹ 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.³²

~~38.37.~~ The section is not subject to a materiality threshold or a confidentiality carve-out.³³

Recommendations

~~39.38.~~ The Panel encourages target directors to make a recommendation.³⁴ They do not necessarily need to value the target's shares to do so.³⁵

~~40.39.~~ 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.³⁶

Information outside takeovers documents

~~41.40.~~ Unacceptable circumstances can apply in any control transaction.³⁷

~~42.41.~~ 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.³⁸ Accurate, reliable information and properly reasoned views will

³¹ *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

³² *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

³³ *National Foods Limited 01* [2005] ATP 8 at [40]

³⁴ See s638(3); GN 22 (Recommendations and Undervalue Statements)

³⁵ 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

³⁶ *Tully Sugar Limited 01R* [2010] ATP 1 at [16]

³⁷ Section 657A. See GN 1 (Unacceptable circumstances)

³⁸ 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]

best assist offeree shareholders and promote an efficient, competitive and informed market.³⁹

43.42. 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.⁴⁰

Expert's report⁴¹

44.43. Expert's reports are required in some situations⁴² and desirable in others.⁴³ The Panel encourages the use of expert's reports in appropriate situations, even when not required.⁴⁴

45.44. An expert's report should be as clear, concise and effective as possible.⁴⁵ It should be written with the intended audience in mind (in most cases, the offeree shareholders).⁴⁶ Thus it should set out the expert's conclusions, assumptions and reasons so they are accessible to the target audience.⁴⁷

46.45. While it is a matter for the expert what information to rely on and disclose,⁴⁸ the basis of the valuation should be set out sufficiently to allow an assessment of its reliability⁴⁹ and material implications of the transaction terms should be clearly explained.⁵⁰

³⁹ *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]

⁴⁰ *Foster's Group Limited* [2011] ATP 15 at [34]

⁴¹ See also ASIC RG 111 (Content of expert reports) and RG 112 (Independence of experts)

⁴² For example s 636(2), s 640

⁴³ For example, *Sirtex Medical Ltd* [2003] ATP 22 at [66]

⁴⁴ Note that consent is required: s636(3); s638(5)

⁴⁵ See also ASIC RG 111 (Content of expert reports) at [111.84]

⁴⁶ *Northern Energy Corporation Limited* [2011] ATP 2 at [111]-[112]

⁴⁷ *Bowen Energy Limited* 02R [2009] ATP 19 at [71]; *Northern Energy Corporation Limited* [2011] ATP 2 at [98]

⁴⁸ *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]

⁴⁹ *Goodman Fielder* 02 [2003] ATP 5 at [70]; *Bowen Energy Limited* 02R [2009] ATP 19 at [80]

⁵⁰ *Becker Group Limited* 01 [2007] ATP 13 at [91]-[94]

47.46. Care is needed when using an expert's report not prepared for the specific purpose.⁵¹

48.47. An expert's report that is required to comply, or says it complies, with an industry standard (eg, JORC) must do so.⁵²

Publication History

First Issue 15 December 2006

Second Issue 20 April 2012

Third Issue ~~1~~21 July 2014

Related material

GN 5: Specific remedies: information deficiency

GN 22: Recommendations and Undervalue Statements

⁵¹ *Great Mines Limited* [2004] ATP 1

⁵² *Namakwa Diamond Company NL 02* [2001] ATP 9; *Bowen Energy Limited 02R* [2009] ATP 19; *Northern Energy Corporation Limited* [2011] ATP 2

Attachment AExample of a takeover document summary*(Headings may be placed in any appropriate order)*

Headings	Bidder's Statement	Target's Statement
Offer consideration	Details of the consideration offered	<i>Describe if the target considers this helpful</i>
Reasons to accept/reject offer	(i) Reasons to accept the offer (ii) Expert's conclusion (if one is appointed by bidder)	(i) Reasons to accept/reject the offer (ii) Expert's conclusion (if one is appointed by target)
Recommendation ⁵³	N/A	Recommendations of the target's directors (or reasons no recommendation given)
Key dates	(i) Date offer opens (ii) Date offer closes (iii) Date bidder must advise status of conditions (iv) Date of payment (v) A qualification that dates (ii), (iii) and (iv) are correct at the time but the offer may be extended or withdrawn (if applicable)	<i>Describe if the target considers this helpful</i>
Conditions and terms of offer	(i) A summary of the key conditions of the offer (ii) A description of what happens if the conditions are not fulfilled	<i>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</i>

⁵³ See paragraph ~~39~~38 and following

	<p>(iii) Cross-reference to the full list</p> <p>(iv) <u>Explain the time when the conditions need to be satisfied and the bidder's ability to waive its conditions</u></p> <p>(v) Explain security holders' ability or inability to withdraw acceptances</p>	<i>condition has been or will be triggered)</i>
Bidder information	Description of the identity of the bidder and its intentions ⁵⁴	<i>Describe if the target considers this helpful</i>
Summary of expert's report (if any) ⁵⁵	<p>(If the bidder has appointed an expert)</p> <p>(i) Expert's conclusion</p> <p>(ii) Main reasons for the expert's conclusion</p> <p>(iii) Cross-reference to the full report <u>and bidder's statement (where applicable)</u></p>	<p>(If relevant) the target's response, if any, to the bidder's expert's report</p> <p>(If the target has appointed an expert)</p> <p>(i) Expert's conclusion</p> <p>(ii) Main reasons for the expert's conclusion</p> <p>(iii) Cross-reference to the full report <u>and target's statement (where applicable)</u></p>
Key risks	A description of the key risks <u>for shareholders if they accept or reject the offer</u> , from the bidder's viewpoint if shareholders accept or reject the offer	A description of the key risks <u>for shareholders if they accept or reject the offer</u> , from the target's viewpoint if shareholders accept or reject the offer

⁵⁴ See paragraph ~~36~~35 and following. The bidder may need to provide a cross reference to parts

⁵⁵ See paragraph ~~44~~43 and following

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Action to take	How to accept the offer	How to accept or reject the offer, consistent with any directors' recommendations
Other key issues (Use of sub-headings here may be helpful)	Description of any unusual features of, or key issues raised by, the offer from the bidder's viewpoint. Examples - tax issues, <u>foreign scrip issues</u>	Description of any unusual features of, or key issues raised by the offer, from the target's viewpoint. Example - tax issues, <u>foreign scrip issues</u>