



## CONSULTATION PAPER

### Guidance Note 19 – Insider participation in control transactions

#### Why is the Panel consulting?

Guidance Note 19 was issued in June 2007 (with a minor amendment made in December 2007).

While the Panel was primarily motivated to issue Guidance Note 19 in the context of an increase in private equity bids, Panel decisions have since considered issues of management of conflicts outside of private equity and sometimes outside the strict scope of Guidance Note 19. The Panel proposes to revise Guidance Note 19 to clarify the Panel's approach to insider participation in control transactions (**Revised Guidance Note**).

#### What is the Panel proposing?

Attached is a draft Revised Guidance Note. The main proposed changes are to:

- Explicitly articulate the policy bases for the guidance note and clarify its scope
- Broaden the definition of insider to capture a shareholder with material non-public information obtained through its nominee on the target board
- Broaden the definition of participating insider to include an insider who is a bidder or potential bidder or who has a relationship with a bidder or potential bidder
- Clarify the Panel's expectations as to when an insider should disclose to the board or relevant sub-committee any approach that might lead to a control proposal
- Provide a non-exhaustive list of factors that the Panel will consider when determining whether unacceptable circumstances exist based on recent Panel decisions.

The section previously titled 'Provision of Information to Potential Rival Bidders' has been removed and the relevant principles, including those enunciated in *Goodman Fielder Limited 02*<sup>1</sup>, will be addressed in proposed revised Guidance Note 7.

#### Invitation to comment

The final Revised Guidance Note will be determined by the Panel after taking into account the comments received as part of the consultation process.

Comments are sought generally from the public regarding the Panel's proposed Revised Guidance Note. In particular, submissions are sought on the following questions:

1. Do you agree with the updated definition of insider?

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<sup>1</sup> [2003] ATP 5

2. Do you agree with the updated definition of participating insider?
3. Do you agree with the guidance provided (in paragraphs 11 to 14) in relation to when an insider should notify the board or any relevant sub-committee of the target of any approaches that might lead to a control proposal?
4. Do you agree that, if all directors are participating insiders, the target should consider appointing at least one independent director to form an independent board committee?
5. Is the guidance provided under the heading 'Protocols' useful? Please explain.
6. Is the list of factors that may give rise to unacceptable circumstances useful? Please explain.
7. Do you agree with the other amendments made to the Guidance Note? Please identify any other amendments you think should be made.

### **Submissions**

Comments on the draft Revised Guidance Note are due by **Tuesday, 28 February 2023**.

Please send any submissions or consultation enquiries to [takeovers@takeovers.gov.au](mailto:takeovers@takeovers.gov.au).

Please note that your submission will be published unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

Please refer to our [privacy policy](#) for more information about how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by the Panel.

Wednesday, 14 December 2022



**Australian Government**

**Takeovers Panel**

**CONSULTATION DRAFT**

**Guidance Note 19 – Insider Participation in Control Transactions**

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**Background**

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1. This guidance note has been prepared to assist market participants understand the Panel’s approach to situations where there is involvement or potential involvement by an insider (as defined below) with a bidder<sup>1</sup> in a takeover bid or potential bid for a target<sup>2</sup>.
2. This note applies to takeover bids, schemes of arrangements and any other transactions that affect or are likely to affect control or potential control of a company or the acquisition or proposed acquisition of a substantial interest in a company. For convenience, the terms ‘bid’, ‘bidder’ and ‘target’ are used. The examples are illustrative only and nothing in the note binds the Panel in a particular case.
3. The Panel’s primary concerns in those situations are to ensure that:
  - (a) consideration by the target board and management of the bid, and

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<sup>1</sup> Bidder includes the bidder and its associates

<sup>2</sup> The target may be a listed body, a listed managed investment scheme or an unlisted company with more than 50 members

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any competing proposal, is undertaken free from any actual influence, or appearance of influence, from participating insiders and

- (b) any disclosure of target company confidential information to the bidder or potential bidder is subject to appropriate controls.
4. The policy bases for this note are that insider participation in a control transaction should not inhibit:
- (a) the acquisition of control over voting shares taking place in an efficient, competitive and informed market (section 602(a)<sup>3</sup>) and
  - (b) shareholders and directors being given enough information to enable them to assess the merits of a proposal (section 602(b)(iii))<sup>4</sup>.

### Scope

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5. There is considerable overlap between the issues which are discussed in this guidance note and legal, fiduciary and statutory duties in relation to conflicts of interests. The Panel's role is to determine whether unacceptable circumstances exist under section 657A having regard to the purposes of Chapter 6 as set out in section 602, not to determine whether there has been a breach of directors' or employees' duties or other obligations under the law<sup>5</sup>. Nevertheless, the overlap does not "prevent the Panel exercising its jurisdiction in relation to matters that do fall within its jurisdiction and role"<sup>6</sup>.
6. The term "**insider**" means either or both of:
- (a) any officer<sup>7</sup> or adviser of the target who is in a position to influence the target's consideration of the bid
  - (b) any person with material non-public information in relation to the target or its business obtained through that person's role as an

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<sup>3</sup> Unless otherwise indicated, all references are to the *Corporations Act 2001* (Cth)

<sup>4</sup> In some circumstances, section 602(c) may apply. See *Yancoal Australia Limited* [2014] ATP 24 at [97]-[103] and *Energy Resources of Australia Limited* [2019] ATP 25 at [188]-[195]

<sup>5</sup> Market participants need to ensure they consider and address all of the legal consequences and obligations that flow from control transactions with insider participation

<sup>6</sup> *Flinders Mines Limited 02 and 03* [2019] ATP 2 at [20]

<sup>7</sup> "Officer" is defined in section 9 and includes (among other things) a director or secretary of the corporation, or a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation or who has the capacity to affect the corporation's financial standing. Where the target is a listed investment scheme, a reference to officer includes the directors of the responsible entity

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officer or adviser, or former officer or adviser, of the target or through that person's nominee<sup>8</sup> on the board of the target.

7. An entity which has such information through its role as an adviser to the target is not an insider where it is acting in a different capacity in relation to a bid or potential bid, if there are appropriate and effective information barriers in place and the material non-public information is quarantined from that part of the entity which is so acting.
8. The term "**participating insider**" includes:
  - (a) any insider who is given an understanding by, or enters or proposes to enter into an agreement with, a potential bidder that the insider will gain or benefit<sup>9</sup> from the bidder making a successful bid<sup>10</sup>, for example, by:
    - (i) acquiring equity in, or options or other derivatives or like interests over such equity in:
      - (A) the target
      - (B) the bid vehicle or a related entity
      - (C) the bidder or a related entity
      - (D) another entity whose performance is related to the performance of the target or
      - (E) funds managed by the bidder or related entities or
    - (ii) agreeing to enter into, or forming an understanding about entering into, employment or other agreements that will apply if the target is acquired by the bidder and are reasonably likely to cause a real or perceived conflict of interests for the insider because of their value, for example significant levels of compensation, or cash or fee incentives, based on the performance of the target or elements of the target<sup>11</sup> and
  - (b) any insider who is a bidder or potential bidder or who has a relationship<sup>12</sup> with a bidder or potential bidder, including:

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<sup>8</sup> Whether in their capacity as director or as observer

<sup>9</sup> Including obtaining a "financial benefit"

<sup>10</sup> See paragraph 10(c)

<sup>11</sup> The Panel acknowledges that it is market practice for private equity bidders to often refrain from discussing the terms of such agreements with insiders for as long as reasonably possible, noting that such discussions would result in these insiders becoming participating insiders. The Panel considers this practice is not unacceptable so long as no tacit arrangements are in place

<sup>12</sup> The Panel is only concerned with existing and past relationships that are relevant in the context of the transaction, having regard to the nature and materiality of the relevant relationship and, in the case of a past relationship, how recently it ceased to exist

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- (i) through a significant economic interest in the bidder<sup>13</sup> or as a controlling shareholder of the bidder
  - (ii) as a nominee of the bidder<sup>14</sup> on the board of the target<sup>15</sup> or another company
  - (iii) as an employee of the bidder<sup>16</sup>
  - (iv) as a relative of the bidder<sup>17</sup> or
  - (v) as an adviser to the bidder.
9. In relation to participating insiders in paragraph 8(b), the Panel will consider with appropriate modification the procedures, protocols and disclosure requirements discussed below, taking into account the nature of the relationship and control transaction.
10. The Panel intends that the description of participation should not include:
- (a) an offer by a potential bidder to continue the person's existing equity, compensation or other arrangements with the target or enter into new arrangements on similar terms to the existing arrangements
  - (b) fees or other arrangements entered into between the target and an adviser under which the adviser would gain or benefit from the bidder making a successful bid or
  - (c) any participation in a control transaction which is on the same terms as afforded to all other shareholders in the target<sup>18</sup>.

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<sup>13</sup> *Keybridge Capital Limited 04, 05 & 06* [2020] ATP 6

<sup>14</sup> Whether in their capacity as director or observer

<sup>15</sup> *Realm Resources Limited* [2018] ATP 13

<sup>16</sup> *Energy Resources of Australia Limited* [2019] ATP 25

<sup>17</sup> *Bullseye Mining Limited 02* [2018] ATP 20

<sup>18</sup> This exception applies to circumstances where an insider enters into an agreement with the bidder pursuant to which the insider agrees to sell its shares in the target to the bidder (i.e., what is commonly referred to as a "pre-bid agreement"), but only to the extent that the consideration being paid to the insider is the same as that available under the bid to all other shareholders in the target (see *North Queensland Metals Limited 02* [2010] ATP 7 at [23] and *Payne v Adelaide Steamship Co Ltd & ORS* (1976) 14 ACLR 252)

## **Addressing potential conflicts of interests**

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### **Notification by insiders**

11. The Panel considers that insiders<sup>19</sup> should promptly inform the board or any relevant sub-committee of the target of any approaches that might lead to a control proposal, taking into account the likelihood of the underlying control proposal being made. The Panel considers that insiders should take reasonable steps to ensure that any conflict (real or perceived) is avoided<sup>20</sup> until appropriate disclosure to the board or relevant sub-committee has been made.
12. In any event, the Panel expects insiders to inform the board or any relevant sub-committee of any approaches that might lead to a control proposal being made prior to entering or proposing to enter into any agreement, arrangement or understanding with the proponent of the potential control proposal, where such agreement, arrangement or understanding might curtail the board's or any relevant sub-committee's opportunity to consider the proposal or any competing proposal.
13. The Panel expects insiders to obtain the consent of the board or relevant sub-committee before they provide any non-public information<sup>21</sup>.
14. The Panel considers that it would be prudent for companies to make such requirements clear to their management and boards, and that bidders seeking to gain the support of insiders should also make any proposed discussions subject to such requirements.

### **Independent board committee**

15. As soon as the board of a company becomes aware or informed of a bid or potential bid for the company, in which there is, or is likely to be, participation by insiders, it should establish appropriate protocols. Normally this will involve appointing an independent board committee (**IBC**) consisting of those directors who are not participating insiders to oversee the application of these protocols and the process in the interests of target shareholders.

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<sup>19</sup> Where the insider is an adviser, the Panel expects that this would generally only apply to a current adviser

<sup>20</sup> For example, by abstaining from attending relevant meetings

<sup>21</sup> In any event, insiders owe a duty of confidentiality to the target (see sections 182 to 185 as applicable)

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16. Any directors who are participating insiders should not be present at, or participate in or vote on, any consideration by the board of the bid or any competing bid<sup>22</sup>.
17. If all directors are participating insiders, companies should consider appointing at least one independent director to form an IBC. If no independent director is appointed, the Panel will have regard to the effect of the lack of independence in the circumstances and the extent to which any other measures have been adopted to address the effect.

### Protocols

18. When considering what processes and protocols to adopt and when applying them to manage the bidding and negotiation process and potential conflicts of interests of participating insiders, the IBC should have regard to the nature of the relationship and control transaction and the effect that any such processes and protocols could have on the interests of shareholders in order to ensure that the principles set out in section 602 are upheld.
19. The protocols should seek to:
  - (a) establish rules concerning information disclosure and access, confidentiality and related matters
  - (b) preclude influence by participating insiders on the target's response to any proposal (recognising that the IBC may need to obtain information from participating insiders, including to assist with the preparation of the target's statement and to comply with section 638<sup>23</sup>)
  - (c) ensure that the IBC has appropriate advice, including independent legal and financial advice when appropriate<sup>24</sup>
  - (d) ensure that the appointment of any advisers and experts does not put at risk the (actual or perceived) integrity of the process, for example by participating insiders being involved in the appointment<sup>25</sup> and
  - (e) ensure that shareholders' best interests are advanced in the face of any proposal involving participating insiders, including through the IBC's approach or attitude to potential rival bidders and the

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<sup>22</sup> The Panel acknowledges that there are circumstances where a director who is a participating insider may wish to present, in that capacity, the merits of the bid to the board but considers that it should not be involved in any consideration by the board of the bid or any competing bid

<sup>23</sup> *Bulletproof Group Limited* [2018] ATP 3 at [17]

<sup>24</sup> *Energy Resources of Australia Limited* [2019] ATP 25 at [82]-[83]

<sup>25</sup> *Strategic Minerals Corporation NL* [2018] ATP 2 at [62]-[68]



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proper ongoing conduct of the company's business during the period.

20. Because each situation is different, the Panel does not wish to prescribe what processes or protocols an IBC should adopt to manage potential conflicts of interests of participating insiders in order to ensure that the principles in section 602 are upheld. Where it receives an application, the Panel will examine the protocols adopted in each matter on a case-by-case basis. However, as an illustrative example, the Panel sets out some protocols that an IBC may adopt, where appropriate to a company's circumstances. Each IBC will need to consider and adopt protocols appropriate to its company's circumstances. Examples of protocols that an IBC may consider adopting include:
- (a) informing participating insiders and bidders that the IBC will control any process and the degree of any involvement by participating insiders. To assist compliance with this, the IBC may require a representative of the target company to be present at all meetings between participating insiders and the bidder or potential bidder
  - (b) requiring participating insiders to:
    - (i) cease communications or involvement with any bidder or potential bidder, except as permitted under the protocols established by the IBC or
    - (ii) in appropriate circumstances, stand aside or resign from their management/board positions in order to pursue the proposed bid (recognising that certain legal and equitable obligations, including with respect to confidentiality and use of information may continue notwithstanding such resignation and subject to the board's ongoing right to require assistance from those insiders during any leave of absence)
  - (c) advising participating insiders that they must not provide any corporate information<sup>26</sup> to anyone<sup>27</sup> without the express approval of the IBC and following entry into an appropriate confidentiality agreement between the target company (represented by the IBC) and the person
  - (d) requiring that none of the participating insiders discusses the bid or any competing proposal with customers, suppliers or other employees of the target company unless specifically requested to do so by the IBC, and only on terms and conditions approved by the IBC and

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<sup>26</sup> Including the existence of any potential bidder or the details of any potential bid

<sup>27</sup> Including any employee, customer or supplier of the target

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- (e) requiring participating insiders to disclose to the target company any material non-public information about the target company which they have provided to the bidder or potential bidder with whom they are or may be involved.
21. In addition, the Panel would normally expect that an IBC would adopt processes and protocols to monitor, manage and control the flow of information to all actual and potential bidders, including those that are involved with participating insiders.

### **Disclosure to shareholders**

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#### **Material information about the target**

22. The IBC should carefully consider all information provided to any potential bidder to determine whether such information should be included in the target's statement so as to give target shareholders enough information to enable them to assess the merits of the proposal. The Panel considers that, as a general principle, the target should seek to ensure that a bidder who is involved with participating insiders does not have an advantage over shareholders in relation to material information about the target company<sup>28</sup>. For example, a target should carefully compare the level and detail of information which was provided to the bidder against the level of information disclosed in the target's statement.
23. Similar requirements clearly also apply to a bidder who receives information from the target or from participating insiders. For example, a bidder should carefully compare the level and detail of information which was provided to the financiers to the bid against the level of information disclosed in the bidder's statement.

#### **Adequate disclosure of insider participation**

24. The bidder and the IBC should ensure that there is adequate disclosure to target shareholders, whether in the bidder's statement or target's statement, including information as to:
- (a) the identity of any participating insiders
  - (b) an explanation of any relationship<sup>29</sup> between the participating insider (or persons connected to the participating insider) and the proponent of the control transaction

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<sup>28</sup> Such information advantage may include forward looking information, while recognising that such information shared with a bidder may not always be in a form or of a nature that is appropriate for disclosure in a target's statement

<sup>29</sup> See footnote 12

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- (c) details of any incentive, participation and fees offered to participating insiders
- (d) the process, and the protocols adopted by the IBC to address potential conflicts of interests and
- (e) the identity of the persons behind a bidder to the extent required by section 602<sup>30</sup>.

### Unacceptable circumstances

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25. The Panel is more likely to find that unacceptable circumstances exist where appropriate protocols have not been established and followed to ensure:
- (a) potential conflicts of interests are adequately addressed and
  - (b) an efficient, competitive and informed market for control of securities of the target, and the principles set out in section 602, are upheld.
26. In all matters, the Panel will consider the circumstances as a whole. The following factors may, alone or together with other factors, give rise to unacceptable circumstances:
- (a) whether sufficient measures are taken to ensure the integrity of the process, for example through independent advice to the IBC<sup>31</sup> and the maintenance and integrity of minutes for the IBC and board meetings<sup>32</sup>
  - (b) whether shareholders are provided with adequate disclosure in relation to the participating insider's relationship with the bidder, any potential or actual conflicts and how these have been addressed<sup>33</sup>
  - (c) in the context of a fundraising with a significant control effect, whether the involvement of an insider is likely to influence the company's fundraising decision in a manner which may not be in the best interests of shareholders<sup>34</sup> and whether appropriate

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<sup>30</sup> *Strategic Minerals Corporation NL* [2018] ATP 2 at [47]

<sup>31</sup> *Energy Resources of Australia Limited* [2019] ATP 25 at [82]-[83]; *Strategic Minerals Corporation NL* [2018] ATP 2 [62]-[68]; *Warrnambool Cheese and Butter Factory Company Holdings Limited 02* [2016] ATP 11 at [18] and [23]

<sup>32</sup> *Energy Resources of Australia Limited* [2019] ATP 25 at [89]

<sup>33</sup> *Strategic Minerals Corporation NL* [2018] ATP 2 at [68]; *Investa Office Fund* [2016] ATP 6 at [47]-[54]; *Hastings Diversified Utilities Fund 02* [2012] ATP 11 at [27]

<sup>34</sup> *Smoke Alarms Holdings Limited* [2020] ATP 2 at [38] and [40]; *Energy Resources of Australia Limited* [2019] ATP 25 at [87]-[91] and [139]

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- processes are implemented to consider funding alternatives<sup>35</sup>
- (d) whether, as a result of an inadequate negotiation process, the terms of a transaction involving a participating insider are onerous to target shareholders or otherwise unacceptable and are not supported by ordinary commercial considerations<sup>36</sup>
  - (e) the timing, the implementation and the effectiveness of the protocols<sup>37</sup>
  - (f) competing bidders being given less information than that given to the bidder involving a participating insider, unless appropriate protocols are in place to ensure that the IBC's consideration of the competing bids is not influenced by the participating insider<sup>38</sup> and
  - (g) a participating insider providing material non-public information to a potential bidder without the consent of the IBC or the board, or coming to an understanding with a potential bidder without first providing sufficient information to the IBC or the board for it to consider the transaction.

### Remedies

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27. The Panel has wide powers to make orders.<sup>39</sup> It may, for example:
- (a) require further disclosure<sup>40</sup>
  - (b) commission an independent expert's report or a revised independent expert's report<sup>41</sup>
  - (c) restrict participating insiders from exercising their voting rights on future resolutions relating to the control transaction<sup>42</sup>

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<sup>35</sup> *Strategic Minerals Corporation NL 06* [2020] ATP 8 at [30]; *Yancoal Australia Limited 02 & 03* [2017] ATP 15 at [24]; *Warrnambool Cheese and Butter Factory Company Holdings Limited 02* [2016] ATP 11 at [18]

<sup>36</sup> *Smoke Alarms Holdings Limited* [2020] ATP 2 at [32]-[33]; *Benjamin Hornigold Limited 05, 06 & 07* [2019] ATP 18 at [129]

<sup>37</sup> *PM Capital Asian Opportunities Fund Limited 01* [2021] ATP 17 at [59]; *Molopo Energy Limited 01 & 02* [2017] ATP 10 at [219]-[221]; *Molopo Energy Limited 03R, 04R & 05R* [2017] ATP 12 at [221]

<sup>38</sup> See *Goodman Fielder 02* [2003] ATP 5 and Guidance Note 7: [Lock-up devices]

<sup>39</sup> section 657D

<sup>40</sup> *Strategic Minerals Corporation NL* [2018] ATP 2; *Investa Office Fund* [2016] ATP 6

<sup>41</sup> *Strategic Minerals Corporation NL* [2018] ATP 2

<sup>42</sup> *Bullseye Mining Limited 02* [2018] ATP 20

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- (d) extend the bid period and require the offer of withdrawal rights<sup>43</sup>
- (e) cancel acceptances<sup>44</sup> and
- (f) restrict participating insiders from participating in some or all of the benefits accruing to them through the transaction.

### Publication history

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First Issue	7 June 2007
Second Issue	18 December 2007
Third Issue	[INSERT]

### Related material

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GN 12: Frustrating action  
GN 7: [Lock-up devices]

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<sup>43</sup> *Keybridge Capital Limited 04, 05 & 06* [2020] ATP 6

<sup>44</sup> *Benjamin Hornigold Limited 05, 06 & 07* [2019] ATP 18



**GUIDANCE NOTE 19: INSIDER PARTICIPATION IN CONTROL  
TRANSACTIONS CONSULTATION DRAFT**

**Overview**

1. ~~This~~ **Guidance Note** ~~provides takeover~~ **19 – Insider  
Participation in Control Transactions**

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**Background**

1. ~~This guidance note has been prepared to assist~~ market participants ~~with guidance on~~ understand the Panel’s approach to situations where there is involvement or potential involvement by ~~the management, directors or external advisers of a target company~~<sup>1</sup> an insider (as defined below) with ~~the~~ bidder<sup>2</sup> (~~insiders or participating insiders~~ (see paragraphs 10 to 13

<sup>1</sup>“Companies” include listed managed investment schemes and listed bodies.

<sup>2</sup>Bidder includes the bidder and its associates.

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~~below))<sup>1</sup> in a takeover bid or potential bid for ~~the~~a target ~~company~~  
(~~bid~~)<sup>32</sup>.~~

2. This note applies to takeover bids, schemes of arrangements and any other transactions that affect or are likely to affect control or potential control of a company or the acquisition or proposed acquisition of a substantial interest in a company. For convenience, the terms 'bid', 'bidder' and 'target' are used. The examples are illustrative only and nothing in the note binds the Panel in a particular case.
3. ~~2-~~The Panel's primary concerns in those situations are to ensure that:
  - (a) consideration by the target board and management of the bid, and any competing proposal, is undertaken free from any actual influence, or appearance of influence, from participating insiders; and
  - (b) any disclosure of target company confidential information to the bidder or potential bidder is subject to appropriate controls.
- ~~3. This Guidance Note sets out when the Panel may declare circumstances arising from such situations to be unacceptable having regard to the purposes of Chapter 6 of the Corporations Act 2001 (Act), set out in section 602 of the Act.~~

~~Panel's jurisdiction—directors' duties etc~~

4. The policy bases for this note are that insider participation in a control transaction should not inhibit:
  - (a) the acquisition of control over voting shares taking place in an efficient, competitive and informed market (section 602(a)<sup>3</sup>) and
  - (b) shareholders and directors being given enough information to enable them to assess the merits of a proposal (section 602(b)(iii))<sup>4</sup>.

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<sup>1</sup> Bidder includes the bidder and its associates

~~<sup>3</sup>In this Guidance Note, the term "bid" may include takeover bids, schemes of arrangements and other control transactions. The Panel recognises that the courts regulate schemes of arrangement. However, the issues discussed in this Guidance Note may arise in circumstances where the issues are not supervised by the court.~~<sup>2</sup> The target may be a listed body, a listed managed investment scheme or an unlisted company with more than 50 members

<sup>3</sup> Unless otherwise indicated, all references are to the *Corporations Act 2001* (Cth)

<sup>4</sup> In some circumstances, section 602(c) may apply. See *Yancoal Australia Limited* [2014] ATP 24 at [97]-[103] and *Energy Resources of Australia Limited* [2019] ATP 25 at [188]-[195]

### Scope

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- ~~5. 4. There is considerable overlap between the issues which are discussed in this Guidance Note and directors' and employees' duties, employment law and the duties and terms of engagement of advisers. This guidance applies to these issues where they affect the principles set out in section 602 of the Act, including the maintenance of an efficient, competitive and informed market for a company's securities where the company is subject to a takeover bid.~~
- ~~6. 5. — The Panel expects that all relevant parties will comply with their guidance note and legal, fiduciary and statutory duties (and seek advice on these as required), but its primary concern in relation to conflicts of interests. The Panel's role is to determine whether unacceptable circumstances exist in the context of a takeover bid under section 657A having regard to the purposes of Chapter 6 as set out in section 602, not to determine whether there has been a breach of directors' or employees' duties or other obligations under the law<sup>5</sup>. The Panel Nevertheless, the overlap does not regard it as being its role to determine and enforce such duties and obligations "prevent the Panel exercising its jurisdiction in relation to matters that do fall within its jurisdiction and role"<sup>6</sup>.~~
- ~~6. — Market participants need to take care to consider and address all of the legal consequences and obligations that flow from control transactions with insider participation. The circumstances discussed in this Guidance Note may also raise issues which extend beyond the scope of this Guidance Note. Merely because a person adheres to the policy discussed in this Guidance Note does not mean that their actions will be sufficient to comply with the person's broader legal obligations.~~
- ~~7. — The discussion in this Guidance Note is not an exhaustive discussion on conflicts of interests and directors' duties generally and only addresses the topic in the context of the principles set out in section 602.~~

#### *Private Equity and other buy-outs*

- ~~8. — The issues discussed in this Guidance Note are applicable to all takeover bids (irrespective of the source of funding). However, some of the issues have recently been brought to prominence by the increase in the number of private equity bids or other buy-outs which frequently have features which make this Guidance Note particularly relevant for such bids.~~

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<sup>5</sup> Market participants need to ensure they consider and address all of the legal consequences and obligations that flow from control transactions with insider participation

<sup>6</sup> Flinders Mines Limited 02 and 03 [2019] ATP 2 at [20]



## GN 19 Insider Participation in Control Transactions

~~9. The Panel is concerned not to discriminate between private equity bidders and other types of bidders in its application of the principles set out in section 602 of the Act.~~

### Participating Insiders

~~7. 10. For the purposes of this Guidance Note, the~~The term “insider” means either or both of:

- (a) any officer<sup>7</sup> or adviser of the target ~~company~~ who is in a position to influence the target’s consideration of the bid;
- (b) any person with ~~significant~~material non-public information in relation to the target or its business obtained through that person’s role as an officer or adviser, or former officer or adviser, of the target ~~company~~ or through that person’s nominee<sup>8</sup> on the board of the target.

~~8. 11.~~ An entity which has such information through its role as an adviser to the target ~~will~~is not ~~be regarded as~~ an “insider” ~~for the purposes of this Guidance Note~~ where it is acting in a different capacity in relation to a bid or potential bid, if there are appropriate and effective ~~Chinese walls~~information barriers in place and the ~~significant~~material non-public information is quarantined from that part of the entity which is so acting.

~~9. 12.~~ The term “participating insider” ~~means insiders (as defined above)~~includes:

(a) any insider who ~~are~~is given an understanding by, or ~~enter~~enters or ~~propose~~proposes to enter into an agreement with, a potential bidder that ~~they~~the insider will gain or benefit<sup>49</sup> from the bidder making a successful bid<sup>10</sup>, for example, by:

- (i) ~~(a)~~ acquiring equity in, or options or other derivatives or like interests over such equity in:
  - (A) ~~(i)~~ the target;
  - (B) ~~(ii)~~ the bid vehicle or a related entity;
  - (C) ~~(iii)~~ the bidder or a related entity;

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<sup>7</sup> “Officer” is defined in section 9 and includes (among other things) a director or secretary of the corporation, or a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation or who has the capacity to affect the corporation’s financial standing. Where the target is a listed investment scheme, a reference to officer includes the directors of the responsible entity

<sup>8</sup> Whether in their capacity as director or as observer

<sup>49</sup> Including obtaining a “financial benefit”.

<sup>10</sup> See paragraph 10(c)

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- ~~(D) (iv)~~ another entity whose performance is related to the performance of the target~~;~~ or
  - ~~(E) (v)~~ funds managed by the bidder or related entities~~;~~ or
  - ~~(ii) (b)~~ agreeing to enter into, or forming an understanding about entering into, employment or other agreements that will apply if the target is acquired by the bidder and are reasonably likely to cause a real or perceived conflict of ~~interest~~interests for the insider because of their value, for example significant levels of compensation, or cash or fee incentives, based on the performance of the target or elements of the target.<sup>511</sup> and
- (b) any insider who is a bidder or potential bidder or who has a relationship<sup>12</sup> with a bidder or potential bidder, including:
- (i) through a significant economic interest in the bidder<sup>13</sup> or as a controlling shareholder of the bidder
  - (ii) as a nominee of the bidder<sup>14</sup> on the board of the target<sup>15</sup> or another company
  - (iii) as an employee of the bidder<sup>16</sup>
  - (iv) as a relative of the bidder<sup>17</sup> or
  - (v) as an adviser to the bidder.

10. In relation to participating insiders in paragraph 8(b), the Panel will consider with appropriate modification the procedures, protocols and

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~~<sup>5</sup>The Panel would be concerned if the spirit and intention of this Guidance Note were sought to be avoided by the timing of any understanding or agreement, or by making any agreement or understanding tacit.~~

<sup>11</sup> The Panel acknowledges that it is market practice for private equity bidders to often refrain from discussing the terms of such agreements with insiders for as long as reasonably possible, noting that such discussions would result in these insiders becoming participating insiders. The Panel considers this practice is not unacceptable so long as no tacit arrangements are in place

<sup>12</sup> The Panel is only concerned with existing and past relationships that are relevant in the context of the transaction, having regard to the nature and materiality of the relevant relationship and, in the case of a past relationship, how recently it ceased to exist

<sup>13</sup> Keybridge Capital Limited 04, 05 & 06 [2020] ATP 6

<sup>14</sup> Whether in their capacity as director or observer

<sup>15</sup> Realm Resources Limited [2018] ATP 13

<sup>16</sup> Energy Resources of Australia Limited [2019] ATP 25

<sup>17</sup> Bullseye Mining Limited 02 [2018] ATP 20

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disclosure requirements discussed below, taking into account the nature of the relationship and control transaction.

11. ~~13.~~ The Panel intends that the description of participation should not include:
- (a) an offer by a potential bidder to continue the person's existing equity, compensation or other arrangements with the target or enter into new arrangements on similar terms to the existing arrangements<sup>6</sup>;
  - (b) fees or other arrangements entered into between the target and an adviser under which the adviser would gain or benefit from the bidder making a successful bid<sup>7</sup>; or
  - (c) any participation in a control transaction which is on the same terms as afforded to all other shareholders in the target<sup>18</sup>.

### **Addressing ~~Potential Conflicts~~potential conflicts of ~~Interests~~interests**

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#### Notification by insiders

12. ~~14.~~ The Panel considers that insiders<sup>19</sup> should promptly inform the board or any relevant sub-committee ~~or the board~~ of the target ~~company~~ of any approaches that might lead to a ~~change of control proposal being tabled and~~ control proposal, taking into account the likelihood of the underlying control proposal being made. The Panel considers that insiders should take reasonable steps to ensure that any conflict (real or perceived) is avoided<sup>20</sup> until appropriate disclosure to the board or relevant sub-committee has been made.
13. In any event, the Panel expects insiders to inform the board or any relevant sub-committee of any approaches that might lead to a control

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~~<sup>6</sup> The Panel would not consider new arrangements to be equivalent to the continuation of existing arrangements if the management receive cash or other benefits on termination of the existing arrangements i.e. new arrangements would not be viewed as "rolled over" if the management cash out the old arrangements prior to entering the new ones with the bidder.~~

<sup>18</sup> This exception applies to circumstances where an insider enters into an agreement with the bidder pursuant to which the insider agrees to sell its shares in the target to the bidder (i.e., what is commonly referred to as a "pre-bid agreement"), but only to the extent that the consideration being paid to the insider is the same as that available under the bid to all other shareholders in the target (see *North Queensland Metals Limited 02* [2010] ATP 7 at [23] and *Payne v Adelaide Steamship Co Ltd & ORS* (1976) 14 ACLR 252)

<sup>19</sup> Where the insider is an adviser, the Panel expects that this would generally only apply to a current adviser

<sup>20</sup> For example, by abstaining from attending relevant meetings

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proposal being made prior to entering or proposing to enter into any agreement, arrangement or understanding with the proponent of the potential control proposal, where such agreement, arrangement or understanding might curtail the board's or any relevant sub-committee's opportunity to consider the proposal or any competing proposal.

14. The Panel expects insiders to obtain the consent of the board or relevant sub-committee ~~or the board's consent~~ before they provide any non-public information<sup>21</sup>.
15. ~~15.~~ The Panel considers that it would be prudent for companies to make such requirements clear to their management and boards, and that bidders seeking to gain the support of insiders should also make any proposed discussions subject to such requirements.

### Independent board committee

16. ~~16.~~ As soon as the board of a company becomes aware or informed of a bid or potential bid for the company, in which there is, or is likely to be, participation by insiders, it should establish appropriate protocols. Normally this will involve appointing an independent board committee (IBC) consisting of those directors who are not participating insiders to oversee the application of these protocols and the process in the interests of target shareholders.
17. Any directors who are participating insiders should not be present at, or participate in or vote on, any consideration by the board of the bid or any competing bid<sup>22</sup>.
18. If all directors are participating insiders, companies should consider appointing at least one independent director to form an IBC. If no independent director is appointed, the Panel will have regard to the effect of the lack of independence in the circumstances and the extent to which any other measures have been adopted to address the effect.

### Protocols

19. ~~17.~~ When considering what processes and protocols to adopt and when applying them to manage the bidding and negotiation process and potential conflicts of interests of participating insiders, the IBC should have regard to the nature of the relationship and control transaction and the effect that any such processes and protocols could have on the

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<sup>21</sup> In any event, insiders owe a duty of confidentiality to the target (see sections 182 to 185 as applicable)

<sup>22</sup> The Panel acknowledges that there are circumstances where a director who is a participating insider may wish to present, in that capacity, the merits of the bid to the board but considers that it should not be involved in any consideration by the board of the bid or any competing bid

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interests of shareholders in order to ensure that the principles set out in section 602 ~~of the Act~~ are upheld. ~~These include ensuring that:~~

- ~~(a) the acquisition of control over voting shares of listed companies takes place in an efficient, competitive and informed market; and~~
- ~~(b) the holders of shares in a company:
  - ~~(i) know the identity of the person who proposes to acquire a substantial interest in the company;~~
  - ~~(ii) have reasonable time to consider the proposal; and~~
  - ~~(iii) have enough information to assess the merits of the proposal.~~~~

20. ~~18.~~ The protocols should seek to:

- (a) establish rules concerning information disclosure and access, confidentiality and related matters;
- (b) preclude influence by participating insiders on the target's response to any proposal (recognising that the IBC may need to obtain information from participating insiders, including to assist with the preparation of the target's statement and to comply with section 638 ~~of the Act~~<sup>23</sup>);
- (c) ensure that the IBC has appropriate advice, including independent legal and financial advice when appropriate<sup>24</sup>
- (d) ensure that the appointment of any advisers and experts does not put at risk the (actual or perceived) integrity of the process, for example by participating insiders being involved in the appointment<sup>25</sup> and
- (e) ~~(d)~~ ensure that shareholders' best interests are advanced in the face of any proposal involving participating insiders, including through the IBC's approach or attitude to potential rival bidders and the proper ongoing conduct of the company's business during the period.

21. ~~19.~~ Because each situation is different, the Panel does not wish to prescribe what processes or protocols an IBC should adopt to manage potential conflicts of interests of participating insiders in order to ensure that the principles in section 602 ~~of the Act~~ are upheld. Where it receives an application, the Panel will examine the protocols adopted in each matter on a case-by-case basis. However, as an illustrative example, the

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<sup>23</sup> [Bulletproof Group Limited \[2018\] ATP 3 at \[17\]](#)

<sup>24</sup> [Energy Resources of Australia Limited \[2019\] ATP 25 at \[82\]-\[83\]](#)

<sup>25</sup> [Strategic Minerals Corporation NL \[2018\] ATP 2 at \[62\]-\[68\]](#)

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Panel sets out some protocols that an IBC may adopt, where appropriate to a company's circumstances. Each IBC will need to consider and adopt protocols appropriate to its company's circumstances. Examples of protocols that an IBC may consider adopting include:

- (a) informing participating insiders and bidders that the IBC will control any process and the degree of any involvement by participating insiders. To assist compliance with this, the IBC may require a representative of the target company to be present at all meetings between participating insiders and the bidder or potential bidder;
- (b) requiring participating insiders to:
  - (i) cease communications or involvement with any bidder or potential bidder, except as permitted under the protocols established by the IBC; or
  - (ii) in appropriate circumstances, stand aside or resign from their management/board positions in order to pursue the proposed bid (recognising that certain legal and equitable obligations, including with respect to confidentiality and use of information may continue notwithstanding such resignation and subject to the board's ongoing right to require assistance from those insiders during any leave of absence);
- (c) advising participating insiders that they must not provide any corporate information<sup>726</sup> to anyone<sup>827</sup> without the express approval of the IBC and following entry into an appropriate confidentiality agreement between the target company (represented by the IBC) and the person;
- (d) requiring that none of the participating insiders discusses the bid or any competing proposal with customers, suppliers or other employees of the target company unless specifically requested to do so by the IBC, and only on terms and conditions approved by the IBC; and
- (e) requiring participating insiders to disclose to the target company any material "non-public" information about the target company which they have provided to the bidder or potential bidder with whom they are or may be involved.

22. ~~20.~~ In addition, the Panel would normally expect that an IBC would adopt processes and protocols to monitor, manage and control the flow

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~~7. including~~<sup>26</sup> Including the existence of any potential bidder or the details of any potential bid-

~~8. including~~<sup>27</sup> Including any employee, customer or supplier of the target-

## GN 19 Insider Participation in Control Transactions

of information to all actual and potential bidders, including those that are involved with participating insiders.

21. ~~The Panel is more likely to find that unacceptable circumstances exist where appropriate protocols have not been established and followed to ensure that:~~
- ~~(a) potential conflicts of interest are adequately addressed; and~~
  - ~~(b) an efficient, competitive and informed market for control of securities of the target, and the principles set out in section 602, are upheld.~~
22. ~~The Panel notes that the above discussion is not an exhaustive discussion on conflicts of interests generally and only addresses the topic in the context of the principles set out in section 602. Market participants should note that solely complying with the example protocols discussed above may not necessarily be adequate or sufficient in terms of their duties and responsibilities to manage all conflicts of interests faced by participating insiders. Market participants should also note that, in certain instances, ratification of a participating insider's conflicts of duties by a target board, for example through the participating insider obtaining the board's consent or following the IBC's protocols, may not be adequate or sufficient to cure a breach of that insider's duties.~~

### **Provision of Information to Potential Rival Bidders**

23. ~~There is currently no general requirement that a target company must provide equal access to information about the target company to rival bidders. In *Goodman Fielder 02* [2003] ATP 5, the sitting Panel considered that Goodman Fielder directors needed to explain to their shareholders why they had given access to rival bidders but not Burns Philp, "both to the resolve the apparent anomaly and to provide additional information about the bid process" [para 96]. The Panel considers that the principles enunciated in *Goodman Fielder 02* continue to be appropriate principles.~~
24. ~~The Panel would normally expect that, in circumstances where target directors have not provided equal access to information to potential rival bidders, they would have sound reasons for their decision<sup>9</sup>, given the effect or potential effect of their decision on an efficient competitive and informed market for the target company and its securities that a selective release of such information to some (but not all potential bidders) by the target company may cause<sup>10</sup>.~~

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<sup>9</sup> *Goodman Fielder 02* [2003] ATP 5 at [96].

<sup>10</sup> ~~An effect on the efficient, competitive and informed market for securities of the company will, necessarily, have some effect on the interests of shareholders of the company.~~



~~25. If participating insiders are involved in a takeover bid or potential takeover bid, and other potential bidders are given less information than that given to the bid involving participating insiders, the Panel, if it receives an application, would likely scrutinise closely the circumstances, and reasons given by target directors in support of their decision to withhold that same information from the other potential bidders (and especially where the bid involving participating insiders is recommended by the target board). This is to ensure that the reasons and the outcome are consistent with the purposes of Chapter 6, and in particular, with the existence of an efficient, competitive and informed market for the securities in the target company.~~

### **Disclosure to ~~Shareholders~~shareholders**

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#### **Material information about the target**

- ~~23.~~ ~~26.~~ The IBC should carefully consider all information provided to any potential bidder to determine whether such information should be included in the target's statement so as to give target shareholders enough information to enable them to assess the merits of the proposal. The Panel considers that, as a general principle, the target should seek to ensure that a bidder who is involved with participating insiders does not have an advantage over shareholders in relation to material information about the target company <sup>1428</sup>. For example, a target should carefully compare the level and detail of information which was provided to the bidder against the level of information disclosed in the target's statement.
- ~~24.~~ ~~27.~~ Similar requirements clearly also apply to a bidder who receives information from the target or from participating insiders. ~~A bidder should consider the information to be disclosed in its bidder's statement very carefully.~~ For example, a bidder should carefully compare the level and detail of information which was provided to the financiers to the bid against the level of information disclosed in the bidder's statement.

#### **Adequate disclosure of insider participation**

- ~~25.~~ ~~28.~~ The bidder and the IBC should ensure that there is adequate disclosure to target shareholders, whether in the bidder's statement or target's statement, including information as to:
- (a) the identity of any participating insiders;

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<sup>1428</sup> Such information advantage may include forward looking information, while recognising that such information shared with a bidder may not always be in a form or of a nature that is appropriate for disclosure in a target's statement



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- (b) an explanation of any relationship<sup>29</sup> between the participating insider (or persons connected to the participating insider) and the proponent of the control transaction
- (c) ~~(b)~~-details of any incentive, participation and fees offered to participating insiders;
- (d) ~~(e)~~-the process, and the protocols adopted by the IBC to address potential conflicts of ~~interest~~interests and
- (e) ~~(d)~~-the identity of the persons behind a bidder to the extent required by ~~sections~~section 602<sup>30</sup>.

### Unacceptable circumstances

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26. ~~29.~~ The Panel is more likely to find that unacceptable circumstances exist where ~~target shareholders appropriate protocols~~ have not been ~~given adequate information or where a bidder that is involved with participating insiders has an advantage over~~ established and followed to ensure:

- (a) potential conflicts of interests are adequately addressed and
- (b) an efficient, competitive and informed market for control of securities of the target, and the principles set out in section 602, are upheld.

27. In all matters, the Panel will consider the circumstances as a whole. The following factors may, alone or together with other factors, give rise to unacceptable circumstances:

- (a) whether sufficient measures are taken to ensure the integrity of the process, for example through independent advice to the IBC<sup>31</sup> and the maintenance and integrity of minutes for the IBC and board meetings<sup>32</sup>
- (b) whether shareholders are provided with adequate disclosure in relation to the participating insider's relationship with the bidder, any potential or actual conflicts and how these have been

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<sup>29</sup> See footnote 12

<sup>30</sup> Strategic Minerals Corporation NL [2018] ATP 2 at [47]

<sup>31</sup> Energy Resources of Australia Limited [2019] ATP 25 at [82]-[83]; Strategic Minerals Corporation NL [2018] ATP 2 [62]-[68]; Warrnambool Cheese and Butter Factory Company Holdings Limited 02 [2016] ATP 11 at [18] and [23]

<sup>32</sup> Energy Resources of Australia Limited [2019] ATP 25 at [89]

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addressed<sup>33</sup>

- (c) in the context of a fundraising with a significant control effect, whether the involvement of an insider is likely to influence the company's fundraising decision in a manner which may not be in the best interests of shareholders<sup>34</sup> and whether appropriate processes are implemented to consider funding alternatives<sup>35</sup>
- (d) whether, as a result of an inadequate negotiation process, the terms of a transaction involving a participating insider are onerous to target shareholders or otherwise unacceptable and are not supported by ordinary commercial considerations<sup>36</sup>
- (e) the timing, the implementation and the effectiveness of the protocols<sup>37</sup>
- (f) competing bidders being given less information than that given to the bidder involving a participating insider, unless appropriate protocols are in place to ensure that the IBC's consideration of the competing bids is not influenced by the participating insider<sup>38</sup> and
- (g) a participating insider providing material non-public information about the target company, because to a potential bidder without the consent of the IBC or the board, or coming to an understanding with a potential bidder without first providing sufficient information that it has received from the target company or from to the IBC or the board for it to consider the transaction.

### Remedies

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28. The Panel has wide powers to make orders.<sup>39</sup> It may, for example:

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<sup>33</sup> Strategic Minerals Corporation NL [2018] ATP 2 at [68]; Investa Office Fund [2016] ATP 6 at [47]-[54]; Hastings Diversified Utilities Fund 02 [2012] ATP 11 at [27]

<sup>34</sup> Smoke Alarms Holdings Limited [2020] ATP 2 at [38] and [40]; Energy Resources of Australia Limited [2019] ATP 25 at [87]-[91] and [139]

<sup>35</sup> Strategic Minerals Corporation NL 06 [2020] ATP 8 at [30]; Yancoal Australia Limited 02 & 03 [2017] ATP 15 at [24]; Warrnambool Cheese and Butter Factory Company Holdings Limited 02 [2016] ATP 11 at [18]

<sup>36</sup> Smoke Alarms Holdings Limited [2020] ATP 2 at [32]-[33]; Benjamin Hornigold Limited 05, 06 & 07 [2019] ATP 18 at [129]

<sup>37</sup> PM Capital Asian Opportunities Fund Limited 01 [2021] ATP 17 at [59]; Molopo Energy Limited 01 & 02 [2017] ATP 10 at [219]-[221]; Molopo Energy Limited 03R, 04R & 05R [2017] ATP 12 at [221]

<sup>38</sup> See Goodman Fielder 02 [2003] ATP 5 and Guidance Note 7: [Lock-up devices]

<sup>39</sup> section 657D

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- (a) require further disclosure<sup>40</sup>
- (b) commission an independent expert's report or a revised independent expert's report<sup>41</sup>
- (c) restrict participating insiders from exercising their voting rights on future resolutions relating to the control transaction<sup>42</sup>
- (d) extend the bid period and require the offer of withdrawal rights<sup>43</sup>
- (e) cancel acceptances<sup>44</sup> and
- (f) restrict participating insiders from participating in some or all of the benefits accruing to them through the transaction.

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### Publication ~~History~~history

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First Issue            7 June 2007  
Second Issue        18 December 2007

Third Issue        [INSERT]

### Related material

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GN 12: Frustrating action  
GN 7: [Lock-up devices]

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<sup>40</sup> Strategic Minerals Corporation NL [2018] ATP 2; Investa Office Fund [2016] ATP 6

<sup>41</sup> Strategic Minerals Corporation NL [2018] ATP 2

<sup>42</sup> Bullseye Mining Limited 02 [2018] ATP 20

<sup>43</sup> Keybridge Capital Limited 04, 05 & 06 [2020] ATP 6

<sup>44</sup> Benjamin Hornigold Limited 05, 06 & 07 [2019] ATP 18

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