



Australian Government

Takeovers Panel

Guidance Note 19 – Insider Participation in Control Transactions

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Background

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 bidder¹ in a takeover bid or potential bid for a target².
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 any competing proposal, is undertaken free from any actual influence, or appearance of influence, from participating insiders

¹ Bidder includes the bidder and its associates

² 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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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)³) and
 - (b) shareholders and directors being given enough information to enable them to assess the merits of a proposal (section 602(b)(iii))⁴.

Scope

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 law⁵. Nevertheless, the overlap does not "*prevent the Panel exercising its jurisdiction in relation to matters that do fall within its jurisdiction and role*"⁶.
6. The Panel recognises that the topic of insider participation is complex and context specific. This guidance note does not aim to be exhaustive in setting out all the circumstances in which an insider may, or may not, become a participating insider. The Panel's approach to the principles set out in this guidance note is one of substance over form.
7. The term "**insider**" means either or both of:
- (a) any officer⁷ of the target who is in a position to influence the target's consideration of the bid

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

⁴ 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]

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

⁶ *Flinders Mines Limited 02 and 03* [2019] ATP 2 at [20]

⁷ "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 significantly 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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- (b) any person with material non-public information in relation to the target or its business obtained through that person's role as an officer, or former officer, of the target⁸.
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 benefit⁹ from the bidder making a successful bid, 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 incentives, based on the performance of the target or elements of the target¹⁰ and
 - (b) any insider who is a bidder or potential bidder or who has a relationship¹¹ with a bidder or potential bidder, including:
 - (i) through a significant economic interest in the bidder¹² or as a controlling shareholder of the bidder

⁸ There may be circumstances where the Panel considers a person, other than an officer or former officer of the target, with material non-public information in relation to the target or its business to be an insider, such as a current or former adviser of the target

⁹ Including obtaining a “financial benefit”

¹⁰ 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

¹¹ 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

¹² *Keybridge Capital Limited 04, 05 & 06 [2020] ATP 6*

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- (ii) as a nominee of the bidder¹³ on the board of the target¹⁴ or another company
 - (iii) as an employee of the bidder¹⁵
 - (iv) as a relative of the bidder¹⁶ 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 commercially equivalent terms to the existing arrangements or
 - (b) any participation in a control transaction which is on the same terms¹⁷ as afforded to all other shareholders in the target¹⁸.

Addressing potential conflicts of interests

Notification by insiders

11. The Panel considers that insiders 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

¹³ Whether in their capacity as director or observer

¹⁴ *Realm Resources Limited* [2018] ATP 13

¹⁵ *Energy Resources of Australia Limited* [2019] ATP 25

¹⁶ *Bullseye Mining Limited 02* [2018] ATP 20

¹⁷ The Panel will look to the substance over the form (see paragraph 6) when considering whether an offer genuinely affords equal participation to all shareholders, including where the transaction includes an offer of equity

¹⁸ 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)

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perceived) is avoided¹⁹ 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 information²⁰.
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. When directors of the company are, or may become, participating insiders, 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 shareholders²¹.
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 bid²².
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

¹⁹ For example, by abstaining from attending relevant meetings

²⁰ In any event, insiders owe a duty of confidentiality to the target (see sections 182 to 185 as applicable)

²¹ If the proposed bid includes an offer of unlisted stub equity, an insider who may receive a material stake or special advantages or rights from a holding of stub equity may be regarded as lacking independence unless and until they rule out taking up the equity or commit to taking it up for no more than a small portion of their shareholding

²² 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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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 638²³)
 - (c) ensure that the IBC has appropriate advice, including independent legal and financial advice when appropriate²⁴
 - (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 appointment²⁵ 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 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 in light of the core principles of this guidance note²⁶. However, as an illustrative example, the Panel sets out some protocols

²³ *Bulletproof Group Limited* [2018] ATP 3 at [17]

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

²⁵ *Strategic Minerals Corporation NL* [2018] ATP 2 at [62]-[68]

²⁶ See paragraph 3

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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 with whom they are involved
 - (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 standing aside or 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 information²⁷ to anyone²⁸ 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 discuss 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.
21. In addition, the Panel would normally expect that an IBC would adopt processes and protocols to monitor, manage and control the flow of

²⁷ Including the existence of any potential bidder or the details of any potential bid

²⁸ Which may include (depending on the circumstances) employees, customers or suppliers of the target

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

Disclosure to shareholders

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 company²⁹. 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 relationship³⁰ between the participating insider (or persons connected to the participating insider) and the proponent of the control transaction
 - (c) details of any incentive and participation 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

²⁹ 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

³⁰ See footnote 11

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by section 602³¹ or section 636(1)(a).

Unacceptable circumstances

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 IBC³² and the maintenance and integrity of minutes for the IBC and board meetings³³
 - (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 addressed³⁴
 - (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 shareholders³⁵ and whether appropriate processes are implemented to consider funding alternatives³⁶
 - (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

³¹ *Strategic Minerals Corporation NL* [2018] ATP 2 at [47]

³² *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]

³³ *Energy Resources of Australia Limited* [2019] ATP 25 at [89]

³⁴ *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]

³⁵ *Smoke Alarms Holdings Limited* [2020] ATP 2 at [38] and [40]; *Energy Resources of Australia Limited* [2019] ATP 25 at [87]-[91] and [139]

³⁶ *Strategic Minerals Corporation NL 06* [2020] ATP 8 at [30]

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supported by ordinary commercial considerations³⁷

- (e) the timing, the implementation and the effectiveness of the protocols³⁸
- (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 insider³⁹ 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 which may lead to an agreement or arrangement with a potential bidder without first providing sufficient information to the IBC or the board for it to consider the transaction.

Remedies

27. The Panel has wide powers to make orders.⁴⁰ It may, for example:
- (a) require further disclosure⁴¹
 - (b) commission an independent expert's report or a revised independent expert's report⁴²
 - (c) restrict participating insiders from exercising their voting rights on future resolutions relating to the control transaction⁴³
 - (d) extend the bid period and require the offer of withdrawal rights⁴⁴
 - (e) cancel acceptances⁴⁵ and
 - (f) restrict participating insiders from participating in some or all of the benefits accruing to them through the transaction.

³⁷ *Smoke Alarms Holdings Limited* [2020] ATP 2 at [32]-[33]; *Benjamin Hornigold Limited 05, 06 & 07* [2019] ATP 18 at [129]

³⁸ *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]

³⁹ See *Goodman Fielder 02* [2003] ATP 5 and its principles recognised in Guidance Note 7: Deal protection

⁴⁰ section 657D

⁴¹ *Strategic Minerals Corporation NL* [2018] ATP 2; *Investa Office Fund* [2016] ATP 6

⁴² *Strategic Minerals Corporation NL* [2018] ATP 2

⁴³ *Bullseye Mining Limited 02* [2018] ATP 20

⁴⁴ *Keybridge Capital Limited 04, 05 & 06* [2020] ATP 6

⁴⁵ *Benjamin Hornigold Limited 05, 06 & 07* [2019] ATP 18

Publication history

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Related material

GN 12: Frustrating action

GN 7: Deal protection