



In the matter of Sydney Gas Limited 01
[2006] ATP 9

Catchwords:

ASX Listing Rules; breach of confidentiality undertaking; canvassing by parties of issues before the Panel in the media; conditional offers; consent; content of bidder's statement; convertible notes; debt facilities; dilution of shareholders; disclosure in bidder's statement; dispatch of documents; financing offer; forward looking statements; frustrating action; gas reserves; interim order; material omission of costs information; misleading certainty; misleading information; misleading presentation; multiple documents; printer's proof; replacement bidder's statement; revenue forecasts; revoke acceptances; risks; shareholder approval; supplementary bidder's statement; voting proxy.

Corporations Act 2001 (Cth) section 602(b)(iii), 636(3), 715A

ASIC Class Order 00/344, ASIC Policy Statement 159, 170

Panel Guidance Note 16

Pancontinental v Goldfields (1995) 16 ACSR 463, 472

Volante Group Ltd [2006] ATP 2

ASX Listing Rules 7.1, 7.9, 10.11.

Sydney Gas Limited, Queensland Gas Company Limited

These are the Panel's reasons for making a declaration of unacceptable circumstances in relation to the affairs of Sydney Gas Limited and requiring Queensland Gas Company Limited to issue a replacement bidder's statement.

SUMMARY

1. Sydney Gas Limited (**Sydney Gas**) applied for a declaration of unacceptable circumstances and final orders in relation to the bidder's statement that Queensland Gas Company Limited (**Queensland Gas**) lodged in relation to its scrip takeover offer for all of the ordinary shares in Sydney Gas (**Original Bidder's Statement**).
2. Prior to the Panel concluding its proceedings, Queensland Gas dispatched the Original Bidder's Statement and a supplementary bidder's statement (**First Supplementary Bidder's Statement**). The First Supplementary Bidder's Statement contained information concerning recertification of Queensland Gas's gas reserves and some additional disclosure which partially addressed complaints made by Sydney Gas concerning the Original Bidder's Statement.
3. Queensland Gas asserted that it could not hold back dispatch of the Original Bidder's Statement because it needed to have its offer closing date occur before 1 April 2006, when Sydney Gas was due to redeem \$10 million of convertible notes, in order for Sydney Gas to be able to avail itself of a financing offer from Queensland Gas (**Finance Offer**).
4. The Panel found that the Original Bidder's Statement and First Supplementary Bidder's Statement, together and individually, gave rise to unacceptable circumstances in that they gave inadequate disclosure (and in some cases inadequate prominence) in relation to:
 - (a) the corrections that Queensland Gas made in the First Supplementary Bidder's Statement;
 - (b) the uncertainties, timing and steps associated with the Finance Offer;

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- (c) the various approvals required for the Finance Offer to be effective;
 - (d) the uncertainties and volatility associated with costs of production which Queensland Gas might incur in generating the revenues forecast in the revenue forecasts¹;
 - (e) Queensland Gas's role in the development and operation of the Chinchilla power station;
 - (f) Queensland Gas's disclosure of its gas reserves; and
 - (g) the fact and effects of the proxy set out in clause 6.8(f)(ii) of the Original Bidder's Statement (a proxy clause).
5. The Panel decided that it was not against the public interest to make a declaration of unacceptable circumstances and did so on 9 March 2006. (see Annexure A to these reasons)
6. The Panel concluded that Queensland Gas's assertions as to the necessity to dispatch the Original Bidder's Statement by 28 February 2006 were unfounded, and Queensland Gas conceded as much in its submissions, once it acknowledged that it would likely require the approval of Sydney Gas shareholders for the Finance Offer.
7. On 9 March 2006, the Panel made final orders that (see Annexure B to these reasons):
- (a) Queensland Gas make immediate disclosure to the market and Sydney Gas shareholders of the Panel's decision and orders;
 - (b) Queensland Gas dispatch a complete replacement bidder's statement to remedy the information deficiencies which the Panel identified (the information deficiencies are set out in the Panel's orders, see Annexure B to these reasons);
 - (c) no further acceptances under the Original Bidder's Statement and Supplementary Bidder's Statement would be valid;
 - (d) any acceptances received under the Original Bidder's Statement and First Supplementary Bidder's Statement be revoked; and
 - (e) QGC extend the closing date of its offer until at least one month after the date of dispatch of the replacement bidder's statement.
8. On 11 April 2006, Queensland Gas advised that it had dispatched the replacement bidder's statement.
9. On 8 March 2006, following a confidential, preliminary decision from the Panel to the parties to the proceedings, Queensland Gas announced to the market that because of the Panel's preliminary advice, Queensland Gas considered that a defeating condition of its bid was likely to be triggered and that there was likely to be considerable delay in the closing date of its offer. As a consequence, both Sydney Gas and Queensland Gas shares were placed into a trading halt by Australian Stock Exchange Limited (**ASX**). ASX lifted the trading halt after Queensland Gas made the disclosures required by the Panel in relation to the Panel's final orders.

¹ The Panel considers that while it may be arguable as to whether Queensland Gas was required under the Corporations Act to include the revenue forecasts in the Original Bidder's Statement, once Queensland Gas had decided to include the information, it could not do so in a misleading manner.

THE PROCEEDINGS

10. These reasons relate to an application (**Application**) to the Takeovers Panel from Sydney Gas on 22 February 2006 in relation to the affairs of Sydney Gas.

THE PANEL & PROCESS

11. The President of the Panel appointed Michael Ashforth, Braddon Jolley (sitting President) and John O’Sullivan (sitting Deputy President) as the sitting Panel (**Panel**) for the proceedings (**Proceedings**) arising from the Application.
12. The Panel adopted the Panel’s published procedural rules for the purposes of the Proceedings.
13. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

APPLICATION

Background

14. On 20 January 2006, Queensland Gas announced its intention to make a takeover bid for Sydney Gas.
15. On 14 February 2006 Queensland Gas lodged the Original Bidder’s Statement with the Australian Securities and Investments Commission (**ASIC**), filed it with ASX and served it on Sydney Gas in relation to its scrip offer takeover bid for all of the ordinary shares in Sydney Gas.
16. Sydney Gas considered that the Original Bidder’s Statement contained deficiencies, and correspondence passed back and forth between the lawyers for Queensland Gas and Sydney Gas. Queensland Gas revised the Original Bidder’s Statement based on its correspondence with Sydney Gas and on the basis of a recertification of Queensland Gas’s gas reserves which Queensland Gas announced on 20 February 2006. Queensland Gas provided a copy of the draft replacement bidder’s statement to Sydney Gas on 20 February 2006.
17. On 15 February 2006, Queensland Gas sought, under ASIC Class Order 00/344, consent from ASIC, to dispatch the replacement bidder’s statement to Sydney Gas shareholders without extending the timetable for its offer². Queensland Gas had not advised Sydney Gas that it was making such an application, but when ASIC advised Sydney Gas of the application, Sydney Gas objected on two bases:
 - (a) that it had not had sufficient time to review the changes proposed by Queensland Gas; and
 - (b) Queensland Gas had not remedied all of the deficiencies which Sydney Gas considered were in the Original Bidder’s Statement.

² Under the Corporations Act, if Queensland Gas had lodged a replacement bidder’s statement it would be required to wait fourteen days before dispatching it to Sydney Gas shareholders. ASIC has issued Class Order 00/344 under which, if either the target company or ASIC consents, the bidder may dispatch the replacement bidder’s statement in a shorter period than 14 days after lodging it with ASIC.

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18. In the meantime, on 22 February 2006, Sydney Gas applied for a declaration of unacceptable circumstances submitting that, in summary:
 - (a) statements in the Original Bidder's Statement were misleading, or provided inadequate detail, or were third party statements that required consent under section 636(3)(b) of the Corporations Act 2001 (*Cth*)³; and
 - (b) Queensland Gas should not include as a term of the offer that accepting Sydney Gas shareholders give Queensland Gas a proxy even when the offer had not become unconditional.
19. ASIC advised Queensland Gas that it did not consent to the proposed replacement bidder's statement being despatched before 6 March 2006.
20. Queensland Gas therefore prepared the First Supplementary Bidder's Statement, which, on its front cover, was titled "Reserves Upgrade and Ancillary Matters" dated 27 February 2006 which addressed those issues on which Sydney Gas and Queensland Gas had reached agreement, but did not address all of Sydney Gas's concerns.
21. On or about 28 February 2006 Queensland Gas dispatched to Sydney Gas shareholders the unchanged Original Bidder's Statement and the First Supplementary Bidder's Statement in one package.
22. At the Panel's request, Queensland Gas agreed to draft, and include in the package containing the Original Bidder's Statement, a letter which brought the existence of the proceedings before the Panel to Sydney Gas shareholders' attention and which advises that:
 - (a) the contents of the Original Bidder's Statement and the First Supplementary Bidder's Statement were the subject of the Panel's proceedings; and
 - (b) the Panel may make orders requiring corrective disclosure or additional disclosure to Sydney Gas Limited shareholders.

Declaration and orders sought

23. Sydney Gas sought interim orders under section 657E(1) that Queensland Gas delay the dispatch of the Original Bidder's Statement until the deficiencies were corrected. The Panel did not make any interim orders.
24. Sydney Gas sought a declaration under section 657A and final orders under section 657D that, in summary:
 - (a) Queensland Gas correct the information deficiencies;
 - (b) Queensland Gas give Sydney Gas and the Panel a printer's proof of the corrected bidder's statement and not dispatch it until it has been considered by Sydney Gas and the Panel to be appropriate; and
 - (c) the bid period be extended by 14 days, or such other period as the Panel may determine, to enable Sydney Gas sufficient time to prepare its target's statement after receiving a corrected replacement bidder's statement.

³ All statutory references are to the Corporations Act, unless otherwise stated.

DISCUSSION

General disclosure

25. Queensland Gas announced on 20 February 2006 that its gas reserves had been recertified, with increases of 7% in proved reserves, 26% in proved and probable reserves and 186% in proved, probable and possible reserves. Queensland Gas included these recertification figures in the draft replacement bidder's statement which it provided to Sydney Gas with the First Supplementary Bidder's Statement.
26. When Queensland Gas prepared amendments to its Original Bidder's Statement regarding recertification of reserves, it planned to issue a replacement bidder's statement which incorporated the Original Bidder's Statement, information contained in the reserves upgrade announced on 15 February and "correction of errata identified since lodgement of the Original Bidder's Statement". It applied to ASIC for approval on 15 February 2006 under Class Order 00/344 so that it could despatch a single document. In support of its application its lawyers wrote to ASIC that:

"... Queensland Gas considers that it is inappropriate, in relation to this information, for Queensland Gas to be put in the position of either dispatching a combination of documents to shareholders in Sydney Gas ... or lodging a new bidder's statement and starting the time period specified in section 633(1) Step 6. Queensland Gas acknowledges that for Queensland Gas to adopt the former alternative would involve it in running the risk adverted to in Policy Statement 159 ... of potentially providing information in a less comprehensible fashion than might otherwise be the case and, accordingly, possibly for giving rise to unacceptable circumstances"
27. ASIC's Policy Statement 159 reflects the objective of the law in section 602(b)(iii). It makes it clear that supplementary statements are designed to counteract a misleading or confusing statement sent to holders. The law does not require all supplementary statements to be dispatched to shareholders. However, as ASIC makes clear in its policy statement, despatch may be required, for example, by the Panel. The Panel also makes a similar point in its Guidance Note 16 on Correction of Takeovers Documents, and section 715A says the information in a disclosure document must be worded and presented in a clear, concise and effective manner.
28. When the correction is known before despatch of the bidder's statement, clearly it is preferable for a holder to receive all the information together (and better still if it is clearly collated). Otherwise, there is a real risk that the misleading or confusing information in the bidder's statement remains uncorrected because the shareholder does not expect a supplementary to exist at that stage. Alternatively, even if the shareholder becomes aware of the existence of a supplementary statement posted on the ASX website and reads the material, an impression will have been formed in his or her mind that could have been avoided if a collated replacement bidder's statement had been given to them in the first place.
29. Moreover, even when a supplementary statement might be despatched to shareholders rather than merely being posted on ASX, a single replacement bidder's statement is preferable to an original statement and a separate supplementary statement. This principle underpins the ASIC class order. Of course, if the supplementary statement is simple, there may be little risk of confusion for

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shareholders and the cost and inconvenience of reprinting the entire original bidder's statement can be avoided. The supplementary bidder's statement that Queensland Gas proposed to despatch was not in that category. The changes were numerous, material, presented in a manner that was likely to mislead, and made reconciling the documents difficult.

30. The example of *Pancontinental v Goldfields*⁴ is applicable to this situation. In that case one of the issues was whether a shareholder could have extracted an earnings forecast from material scattered throughout the prospectus. The court said:

An offeree, when faced with a complex and lengthy prospectus, such as the present document, should not have to forage through the whole prospectus, seeking out fragments of information in order to piece together the assumptions and construct a forecast of earnings, from a number of disparate and indirect scattered references in a 250 page document. If the information is there the offeror should perform the exercise and not leave it to the offeree to make assumptions.

31. In the same vein, the Panel's Guidance Note 16 says at para 16.9:

The Panel prefers that information be provided in fewer, more comprehensive (and comprehensible) documents delivered to target shareholders, rather than either to multiply the numbers of documents provided or to rely too heavily on the ability of the market and the press to distribute corrective information.⁵ The Panel also considers that it is preferable for a document or statement to be amended before it is distributed rather than to have a complex collage of similar, but differing, messages before shareholders.⁶ This concern is less where the supplementing information adds to, rather than corrects an inaccuracy in, the original document.

32. Queensland Gas's First Supplementary Bidder's Statement was divided into 3 annexures. The first (Annexure A) set out an announcement by Queensland Gas to ASX concerning the reserves recertification and upgrade, the second (Annexure B) reproduced several sections of the Original Bidder's Statement with the recertification information inserted, and the third (Annexure C) set out "supplemental information and correction of errata".
33. The "supplemental information and correction of errata" primarily related to issues and corrections which Sydney Gas had raised with Queensland Gas concerning the Original Bidder's Statement. However, the fact that Annexure C had been generated in response to complaints from the target shareholders' company and directors was not clear from either the face of the document or the contents.
34. The Panel finds that the First Supplementary Bidder's Statement did not clearly identify that it contained substantive corrections. It gave too little prominence to them and failed to describe the errors or deficiencies in the bidder's statement that the disclosures in Annexure C were supposed to be correcting.

⁴ (1995) 16 ACSR 463, 472

⁵ See, for example, the Panel decisions in *Brickworks 02*, *BigShop 03*, *Pinnacle 9* [2001] ATP 25, *Vincorp* [2001] ATP 6, *Alpha Healthcare and Mildura Cp-operative Fruit Company Ltd* [2004] ATP 5 at [98].

⁶ *ASIC Class Order 00/344*, *ASIC Policy Statement 159* at [159.29] – [159.38], *ASIC Policy Statement 25* at [25.63] and *Infratil 02* and *BreakFree 02* [2003] ATP 30.

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35. The Panel does not intend to lay down a rule to the effect that there should only ever be one document when the need for change is known at the time of the issue of the bidder's statement. But when the need is known, and the corrections are voluminous or significant, the bidder must have sound reasons for not consolidating the information into one comprehensive and comprehensible document and must present the supplementary document in a clear and not misleading manner. The Panel did not consider that the reasons Queensland Gas put forward for pressing ahead with the Original Bidder's Statement and First Supplementary Bidder's Statement in face of opposition from Sydney Gas, and ASIC declining to consent to a shorter period, were convincing.
36. Further, in this respect, the Panel had regard to the title of the First Supplementary Bidder's Statement. It was called

“RESERVES UPGRADE AND ANCILLARY MATTERS.”

The title gives no clue to shareholders that the document includes substantive corrections.

37. Accordingly, the Panel considered that the form and content of the Original Bidder's Statement and First Supplementary Bidder's Statement were confusing and likely to mislead Sydney Gas shareholders. The deficiencies that remained even after issue of the First Supplementary Bidder's Statement were sufficiently material and wide-ranging, and the possibility of confusion from possibly a third document sufficiently great, that they could only be adequately remedied by requiring a replacement bidder's statement to be prepared, approved by the Panel and dispatched to Sydney Gas shareholders.

Disclosure in relation to the Financing Offer

Background

38. Sydney Gas had convertible notes on issue, of which \$9.925 million matured on 1 April 2006 and \$19.658 million would be repayable on 1 June 2006. Sydney Gas informed the Panel and Queensland Gas that it had cash to meet the repayment of the first tranche.
39. Queensland Gas had offered to fund the repayment through the issue by Sydney Gas to Queensland Gas of 60 million convertible notes of 50 cents each, at 6% coupon. The offer was contained in a letter to Sydney Gas dated 20 January 2006, which was annexed to the Original Bidder's Statement. The funding offer was conditional on:
- (a) all the conditions to the Queensland Gas offer being fulfilled or waived by Queensland Gas; and
 - (b) the Sydney Gas board consisting of a majority of directors nominated or approved by Queensland Gas.
40. Queensland Gas's offer contained conditions (among others) to the effect that:

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- (a) cash at bank of the Sydney Gas Group⁷ did not fall below \$15 million plus the amounts required by the deed of the convertible notes to be held in respect of interest⁸;
- (b) a 50% minimum acceptance condition; and
- (c) a prescribed occurrence condition that Sydney Gas not issue convertible notes except with shareholder approval.

Queensland Gas disclosure

41. The Original Bidder's Statement contained statements that:

"...Queensland Gas has sent a letter to Sydney Gas offering to provide Sydney Gas with funds to pay the redemption in full at what Queensland Gas believes are commercially attractive rates, conditional in effect on the success of Queensland Gas's Offer",

"Queensland Gas's proposal provides certainty of repayment",

"If the relevant conditions are satisfied Sydney Gas will be able to implement a low cost financing solution" and

"This solution will avoid diluting Sydney Gas shareholders now".

42. Sydney Gas submitted that Queensland Gas had made inadequate disclosure in the Original Bidder's Statement regarding both the conditional nature of the finance offer and the potential delays in being able to deliver those funds.

43. In the First Supplementary Bidder's Statement (Annexure C) Queensland Gas said:

If implemented, the Finance Offer will provide certainty of repayment of the Sydney Gas Convertible Notes. Section 2.9 of the Original Bidder's Statement sets out a number of conditions to the implementation of the Finance Offer. In addition, it is possible that if the ASX Listing Rules apply at the time that Sydney Gas accepts the Finance Offer, a number of other conditions will need to be satisfied."

44. The First Supplementary Bidder's Statement then referred to Listing Rules 7.1, 7.9 and 10.11.

Panel's discussion

45. The Panel considered that Queensland Gas had provided inadequate and misleading information on the Finance Offer, especially as to the timing and steps required to implement it. The Panel noted the relative prominence given by Queensland Gas to the "certainty of funding" references. Approximately one fifth of the substantive paragraphs in the Chairman's letter in the Original Bidder's Statement concerned the Finance Offer and its benefits for Sydney Gas shareholders. No like prominence was given to the correcting information in the First Supplementary Bidder's Statement.

⁷ As defined in the Original Bidder's Statement.

⁸ At the time of Original Bidder's Statement, Sydney Gas's last reported cash position was from its 31 December 2005 half yearly report issued on 8 March, and it was \$24 million. Therefore, it was likely that if Sydney Gas redeemed the April 2006 tranche of convertible notes out of its cash reserves it would breach one of the defeating conditions to the Queensland Gas offer, and if it borrowed money, or issued shares to raise money, to redeem the 1 April convertible notes it would breach another of the defeating conditions to the Queensland Gas Offer.

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46. The information principle occupies a fundamental position in takeovers regulation. Section 602(b)(iii) requires that a target's shareholders and directors are given enough information to enable them to assess the merits of the proposal. By section 636 a bidder's statement must include specified information and any other information known to the bidder that is material to the making of the decision by the shareholder (other than value of securities offered). Section 670A provides that a person must not give a bidder's statement if there is a misleading or deceptive statement in it or an omission from it of material required by section 636 or 638.
47. The Panel finds that many of Queensland Gas's statements concerning the Finance Offer were misleading by omission. For example, Queensland Gas said the funding proposal:
- "... provides certainty of repayment of the Sydney Gas convertible notes, thereby avoiding significant dilution to Sydney Gas shareholders that would surely follow if redemption was to be funded by means of a further issue of equity".*
48. However, this statement was not clearly qualified by reference to the conditions of the funding offer (i.e. Queensland Gas's successful bid and board control), or to the dilutionary effect of redemption of Queensland Gas's convertible notes.

Dilution caused by convertible notes

49. In particular, the Panel was concerned that Queensland Gas had claimed to Sydney Gas shareholders that the Funding Offer would avoid the significant dilution which it claimed a further issue of equity would cause to them. This was clearly misleading and wrong. In fact, the convertible notes which Queensland Gas was offering to Sydney Gas would dilute existing Sydney Gas shareholders significantly, and cause a greater dilution to Sydney Gas shareholders than would the convertible notes which were due for redemption⁹. In addition, if Sydney Gas were to fund the redemption by a pari passu rights issue, Sydney Gas shareholders who took up their entitlements would not be diluted at all. It was also misleading to imply that any other equity raising than Queensland Gas's convertible note offer would be dilutive to Sydney Gas shareholders.
50. Queensland Gas also failed to mention that at least the first tranche of Sydney Gas's convertible notes could be redeemed out of Sydney Gas's cash resources without the need for Sydney Gas to issue further equity, and that Sydney Gas had so informed Queensland Gas.

⁹ The existing Sydney Gas convertible notes had a face value of \$0.60. The convertible notes which Queensland Gas proposed that Sydney Gas issue to it in return for funding to redeem the two tranches of existing convertible notes would have a face value of \$0.50. Queensland Gas in submissions and correspondence to Sydney Gas argued that the \$0.50 face value, and conversion rate of one note to one share was materially above the Sydney Gas share price. However, Queensland Gas did not include this information in the Original Bidder's Statement or First Supplementary Bidder's Statement, and it did not disclose the difference in the number of shares (and thus dilution) issued on conversion of the existing versus the proposed Sydney Gas convertible notes. If converted the existing convertible notes would convert to 50 million shares, whereas the convertible notes proposed by Queensland Gas would convert to 60 million shares.

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Bridging finance

51. Queensland Gas in its correspondence to Sydney Gas on 20 February 2006 raised the possibility of offering Sydney Gas a bridging finance facility in the event that it had not satisfied all of the conditions set out in its Finance Offer. In the First Supplementary Bidder's Statement Queensland Gas advised of its offer to provide bridging finance. However, the terms of the bridging finance offer were not clearly set out. The Panel considered that Queensland Gas should have made a clear statement of the terms of the bridging finance that it was prepared to offer Sydney Gas.

ASX Listing Rules

52. The Panel considered that Queensland Gas's disclosure of the Listing Rule implications for the implementation of the Finance Offer in the Original Bidder's Statement was inadequate. While Queensland Gas made additional disclosures in the First Supplementary Bidder's Statement, following complaints by Sydney Gas, the Panel considered that the disclosures were inadequate in a number of respects. In addition, the Panel has set out its concerns above about the additional information being placed at the end of the First Supplementary Bidder's Statement, with no indication on the cover or in the index that there was material information about the risks and uncertainties of the Finance Offer.
53. There were likely to be circumstances under which Queensland Gas would need to procure Sydney Gas to obtain a waiver from ASX Listing Rule 7.1 before the Finance Offer could be concluded. Some discussion therefore was warranted of the history of ASX granting similar waivers and the timing and other issues concerning that rule, such as the possible voting restrictions applicable and their effect if shareholder approval was required. Similarly, some discussion of the potential need for Listing Rule 7.9 and 10.11 approvals was warranted together with the factors affecting such approval.
54. The Panel considered that Queensland Gas's disclosure of the possible need for approval under Chapter 2E (related party transactions) was inadequate. Queensland Gas submitted that the transaction would come within an exception for arm's length transactions. The Panel did not accept that this was so self evidently correct that Queensland Gas had no obligation to discuss the matter.

Timing impracticalities

55. In view of the regulatory requirements involving shareholder approval and their time requirements, the Panel considered that Queensland Gas should also have informed Sydney Gas shareholders that it was not feasible for Sydney Gas to call a shareholders' meeting to consider and implement the funding offer before the scheduled closing date of Queensland Gas's offer or the scheduled date for redemption of the first tranche of Sydney Gas's convertible notes.

Chapter 6 approval of conversion of convertible notes

56. The Panel considered that the issue of shareholders' approval under the Corporations Act in connection with the conversion of the Queensland Gas

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convertible notes was adequately discussed in the Bidder's Statement and addressed in the First Supplementary Bidder's Statement.

Conclusion

57. The Panel accepts that a bidder's statement must be read as whole and be read together with any supplementary statements. However, the drafting, structure and presentation of the information in this case led the Panel to conclude that it was misleading or confusing.
58. The Panel also found that the reasons which Queensland Gas put forward for urgency in dispatching the Original Bidder's Statement and First Supplementary Bidder's Statement to Sydney Gas shareholders proved to be illusory once properly tested. It was clear that there was virtually no prospect of achieving the preconditions for the Funding Offer within a one month timetable when no preparations for any Sydney Gas shareholder meetings had been commenced, and that this should not have been put forward by Queensland Gas in such an unqualified way as a reason for dispatching the Original Bidder's Statement and First Supplementary Bidder's Statement prior to resolution of the Panel proceedings.

Recertification of Reserves

59. Queensland Gas's application to ASIC for consent to dispatch a replacement bidder's statement was precipitated by the recertification of its reserves. Queensland Gas told ASIC that the extent of the reserves and their categorization were matters of significant importance in assessing the value of Queensland Gas shares.
60. ASIC rejected Queensland Gas's application for Class Order relief under CO 00/344, resulting in Queensland Gas electing to send Sydney Gas shareholders the Original Bidder's Statement and First Supplementary Bidder's Statement. While it would have been preferable for Queensland Gas to correct the recertification in a replacement bidder's statement rather than dispatch two documents, the Panel does not think the recertification information was misleading or confusing. The Panel did not consider that the significant number of changes involved would be difficult for Sydney Gas shareholders to understand or assimilate.
61. The Panel was prepared to give Queensland Gas's corrections to information some more latitude given that the changes were positive (that is, they improved the attractiveness of the Queensland Gas offer) than if the changes had been negative (that is, they would have reduced the attractiveness of the Queensland Gas offer). The Panel considered that the positive changes carried less likelihood, if misleading or confusing, of adversely affecting Sydney Gas shareholders.

Description of Queensland Gas's gas reserves

62. The Panel thought that the description of Queensland Gas's share of reserves in the Original Bidder's Statement was misleading and that the First Supplementary Bidder's Statement did not fully address the Panel's concerns. The Original Bidder's Statement did not clearly and consistently identify that Queensland Gas only owned part of the relevant gasfields, and the Original Bidder's Statement variably stated entire gasfield reserves and gas to which Queensland Gas was entitled.

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63. Queensland Gas has a 90% interest in the Berwyndale South gasfield (with Sentient Gas Australia Pty Ltd holding a 10% interest) and has a 59.375% interest in the Argyle gasfield (with Pangaea Oil and Gas Pty Limited holding a 40.625% interest). Sydney Gas submitted that therefore the quoted statements were misleading in that they imply that the number of petajoules of gas sales under contract specified were directly attributable to Queensland Gas rather than to Queensland Gas and its relevant joint venturer. The Panel agreed with Sydney Gas's criticisms of the Original Bidder's Statement. Queensland Gas remedied some of the deficiencies in the First Supplementary Bidder's Statement following correspondence from Sydney Gas, specifically in section 1.4 of the Original Bidder's Statement. However, the First Supplementary Bidder's Statement did not address these issues throughout the bidder's statement and therefore the Panel required Queensland Gas to specify clearly in a replacement bidder's statement the proportions of the reserves which were attributable to Queensland Gas wherever the reserves were stated.

Forward Looking Statements as to Revenue

64. Queensland Gas provided a forecast of its future revenue in its Original Bidder's Statement, but provided no information on the quantum or volatility of the costs of producing that revenue.
65. Sydney Gas submitted that the Original Bidder's Statement contained highly subjective and unsubstantiated forward-looking statements about the future financial performance of Queensland Gas and contracts underpinning future revenue. It pointed to information on page 25:
- the chairman saying – *“we would anticipate that a year into our three year current gas sales contracts, Queensland Gas's revenue stream will be about \$30 million a year”*;
- “the minimum revenue expected to be generated for Queensland Gas under these contracts in the first 12 months in which all three contracts are in operation will be \$27.4m”*; and
- “the revenue generated for Queensland Gas would rise to \$39.0m if all options to make or require delivery of gas under those contracts were exercised by the relevant parties.”*
66. Sydney Gas submitted that those statements did not give shareholders enough information to assess the risks and costs associated with achieving the results, and that Queensland Gas was required to provide full forecasts for its financial position, performance and cash flow (required under section 636(1)(g) and 713(5)) or at least to disclose the assumptions underlying the revenue forecasts.
67. Queensland Gas responded that it had disclosed all the assumptions for its revenue guidance. Further, Queensland Gas said that while such information, regarding the costs of producing the gas to which the revenue forecasts related, might be desirable it was not required. As set out below, Queensland Gas later advised the Panel that one of the reasons that it had not provided any information on costs of production was that the potential volatility and uncertainty of the costs of production for the revenue were such that Queensland Gas considered that it had no reasonable basis for any cost forecast that it might put into the Original Bidder's Statement.
68. The Panel does not think it was appropriate for Queensland Gas to provide revenue forecasts alone. A revenue forecast without showing, for example, the cost of production was misleading to Sydney Gas shareholders. While the additional

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information that Queensland Gas should have disclosed with a revenue forecast would not require 'bottom line' numbers, there should have been some reasonable commentary about costs of production or profit. Queensland Gas included the revenue forecasts without any cost qualifications or warnings, despite repeated requests by Sydney Gas to remove the forecasts or adequately qualify them with cost forecasts and volatilities. The Panel considers that inclusion of the revenue forecast on page 24 of the Original Bidder's Statement, without additional disclosure, constituted misleading and inadequate information.

69. The Panel considered that the revenue forecasts would have been unlikely to give rise to unacceptable circumstances if they were part of full financial forecasts. Those full financial forecasts would have had to include a full discussion of risk factors and volatility issues relating to production volumes and costs of production and sufficient information to assess the sensitivity of the forecast revenues and costs to changes in relevant variables.
70. Alternatively, even if the revenue forecasts were not part of full financial forecasts, they might not have given rise to unacceptable circumstances if they were accompanied by clear and prominent cautions and sensitivity information. However, if a bidder's statement or target's statement includes a revenue forecast and the types of caveats make it meaningless, or a potentially misleading distraction, then the forecast may be required to be formally withdrawn, together with very clear and prominent disclosure as to why. Consideration would be given by the Panel also to how the misleading impression created might be reversed.
71. Both the quality of, and amount of, disclosure in respect of the assumptions was inadequate. The forecasts invite readers to take into account a large and purportedly stable and predictable revenue stream, yet Queensland Gas flagged significant volatility of profitability in its submissions to the Panel. The disclosures do not allow Sydney Gas shareholders to assess the reasonableness of the forecast revenues or how much weight to give them.
72. The Panel wrote to Queensland Gas advising of its concerns and advised Queensland Gas of three ways in which Queensland Gas could address the problems with the revenue forecasts i.e. if:
 - (a) they were part of full financial forecasts, including a full discussion of the risk factors and volatility issues relating to production volumes and costs of production, similar in nature to Queensland Gas's submissions to the Panel on this subject and sufficient information to assess the sensitivity of the forecast revenues and costs to changes in relevant variables; or
 - (b) they were accompanied by:
 - (i) clear and prominent cautions as to considering them without careful reading of a full discussion of the risk factors and volatility issues relating to production volumes and costs of production, similar in nature to Queensland Gas's submissions to the Panel on this subject; and
 - (ii) they were accompanied by sufficient information to assess the sensitivity of the forecast revenues and costs to changes in relevant variables; or

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(c) the revenue forecasts were formally withdrawn by Queensland Gas. A very clear and prominent disclosure as to why the original revenue forecasts were misleading and unreliable would be required to be given to Sydney Gas shareholders with full disclosure of the risks and other factors which affected the revenue forecasts in order to remedy any misleading impression that the revenue forecasts have already planted in Sydney Gas shareholders' minds.

73. The Panel notes that in its initial submissions to the Panel as to why the Panel should not commence proceedings in relation to the Sydney Gas application, Queensland Gas advised the Panel that “supplementary disclosure could be made” and “in QGC’s submission any harm which arose from the dispatch of the Bidder’s Statement at the earliest time permitted by the Corporations Act could be remedied by supplementary disclosure.” However, in its correspondence with Sydney Gas and in its submissions to the Panel, after the Panel had acted on the basis of those assurances and allowed the Original Bidder’s Statement to be dispatched, Queensland Gas submitted that such additional disclosure was impossible, as it had no “reasonable grounds for estimating each of these variables in a sufficiently reliable way that it could be presented to investors as a forecast of profit or cash flow”.

Chinchilla Power Station

74. Sydney Gas submitted that the following statements in relation to the Chinchilla power station were misleading because they suggest that Queensland Gas is a developer of the Chinchilla power station rather than a joint venturer whose role was limited to supplying gas and paying a toll to on-sell electricity:

“Queensland Gas also plans to develop the 200 MW Chinchilla Power Station ... in conjunction with EIT...”

“Supplying gas directly to an on-site power station provides significant cost savings through eliminating the need for dehumidification and high pressure compression of the gas, as well as the need for a pipeline. As a result, Queensland Gas expects that it will be one of the country’s lowest cost producers of electricity.”

“The planned 200 MW capacity of the Chinchilla Power Station would almost double Queensland Gas gas sales under contract from 15.4PJ to approximately 28.4 PJ per annum...”

75. Moreover, Sydney Gas submitted that it was misleading for Queensland Gas to talk about expecting to be one of the country’s lowest cost producers of electricity, which it said was a forward looking statement, without disclosing the reasonable basis for it.

76. Queensland Gas said the disclosures sufficiently described the situation, which was still a proposal. Sydney Gas said that the reference to expecting to be one of the country’s lowest cost producers of electricity, if not a forward-looking statement, at least required the maker to have a reasonable basis for the expectation. Queensland Gas submitted that it had a reasonable basis, but that the law did not require that it be disclosed (unless it was itself material). Queensland Gas invited the Panel to consider some submissions on its claims about its cost of electricity production confidentially, although it did not follow up when the Panel sought submissions on why the material needed to be confidential.

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77. The Panel considered that Queensland Gas's disclosure was inadequate and misleading concerning its future involvement in the Chinchilla power station. While the First Supplementary Bidder's Statement provided some better disclosure, the statements were likely to lead Sydney Gas shareholders to consider that Queensland Gas was currently involved in, or contracted to, the supply or production of electricity and that it was the primary developer of the Chinchilla power station. The first clear and intelligible description of Queensland Gas's role was provided in Queensland Gas's submission to the Panel. Queensland Gas's involvement in the supply or production of electricity should be clearly stated in a single place, rather than scattered through the Original Bidder's Statement and First Supplementary Bidder's Statement. Sydney Gas shareholders should know whether Queensland Gas has contracts or agreements to supply electricity and the terms of any such supply, or whether Queensland Gas has none, and the actual role of Queensland Gas in the development and operation of the Chinchilla power station, and Queensland Gas's future role in the Chinchilla power station.
78. Lastly, the Panel considered that Queensland Gas was required to give more information about expecting to be one of the country's lowest cost producers of electricity. Queensland Gas made submissions on the difficulties in forecasting volumes and costs of gas production. This undermined its assertions as to having a reasonable basis on which to make the forward looking statement. Target shareholders needed significantly more information than Queensland Gas disclosed in order to be able to make an assessment (ASIC Policy Statement 170).

Debt facilities

79. Queensland Gas had the following debt facilities:
- (a) Rothschild for \$16 million;
 - (b) Investec Bank (Australia) Ltd for \$15 million;
 - (c) Meridian International Capital Limited for \$9 million; and
 - (d) Cornell Capital Partners for \$25 million.
80. Sydney Gas submitted that, because Queensland Gas had told Sydney Gas shareholders that its purported "creative debt finance packages" were a benefit of being a shareholder in Queensland Gas and one of the many reasons to accept the Queensland Gas Offer, it should disclose the arrangements for these debt finance packages, including their terms, such as maturity, interest rate, other relevant costs and what they were contingent upon. Queensland Gas submitted that this information would interest a competitor but was not information an investor required.
81. Sydney Gas submitted that because of the prominent statement about the creative debt facilities, the circumstances here warranted more. Sydney Gas submitted that its shareholders reasonably needed to know more about the debt facilities, to make their investment decision and assess the merits of the Queensland Gas proposal, because Queensland Gas says in the Original Bidder's Statement:

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- (a) one of the reasons for accepting its offer of Queensland Gas shares is the quality of the Queensland Gas management team which has, among other things, "*obtained creative debt finance packages to develop Queensland Gas's assets*"; and
- (b) it has entered into a number of debt facilities with sophisticated investment banks or financiers (not with standard relationship commercial banks), will be able to conduct all its projected operational development with its current debt facilities, and will offer to fund the repayment of the two tranches of Sydney Gas convertible notes.

82. While the Panel does not consider that bidders offering scrip must routinely disclose full details of the terms of all their debt facilities, as Queensland Gas referred to its debt facilities as 'creative' it would have been desirable for Queensland Gas to have explained the statement and disclosed whether these creative debt packages carried unusual risks.

Proxy undertaking for conditional acceptances

83. Clause 6.8 of the Original Bidder's Statement said:

"By signing and returning the Acceptance Form or by otherwise validly accepting this Offer, you will have:

...

(f) irrevocably appointed Queensland Gas, or any nominee (or nominees) of Queensland Gas as your agent and attorney to exercise all the powers and rights attaching to your Sydney Gas Shares including, but not limited to:

...

(ii) whether or not this Offer or any Offer Contract has become unconditional, attend and vote at any general meeting (or meeting of any class of members of Sydney Gas) or appoint a proxy or proxies to attend and vote on your behalf in respect of your Sydney Gas Shares at any such meeting and in that regard Queensland Gas must vote and must direct any proxy to vote on each resolution the passing or defeat of which might adversely affect the likelihood of the Offer being successful (eg by triggering a Defeating Condition) and to do so in that way which would prevent that effect arising;

...."

84. Sydney Gas submitted that where the offer was still subject to a defeating condition the proxy clause was unacceptable. Queensland Gas submitted that the proxy was clearly drawn to shareholders' attention and was more limited than the usual proxy condition which frequently gives the bidder unfettered discretion once the offer became unconditional.
85. The Panel has previously considered that a similar term did not give rise to unacceptable circumstances if it was properly and adequately disclosed. However, the Panel considered that clause 6.8(f) was inadequately disclosed and explained and was misleading. The limited disclosure that Queensland Gas made about the effect of the proxy, under "How to Accept the Offer", was not adequate to draw the effect and implications of the proxy to shareholders' attention.

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86. Indeed, the Panel did not accept Queensland Gas's submissions as to the operation of clause 6.8(f) and became concerned that the wording appeared to be open to dispute. On its terms, the proxy may have been expressly unlimited and irrevocable, regardless of whether the Queensland Gas offer was or was not still conditional. If this was unintended the drafting should be amended. If it was intended, this should have been disclosed prominently and in the clearest terms. Also, the effect of the grant of the proxy on who can vote at any Sydney Gas shareholders' meeting to consider the Finance Offer should have been disclosed, especially if it may have had the effect of the shares of the accepting shareholders not being able to be voted in favour of the Finance Offer.

Consents

87. The Original Bidder's Statement referred to IRESS as the source of certain information. This was replaced in the First Supplementary Bidder's Statement by references to 'market data providers'. In this way Queensland Gas sought to avoid the need to obtain consent for inclusion of the statements from IRESS. In addition, the Original Bidder's Statement said that Mr Andrew Purcell had indicated that he would welcome the opportunity to consider an offer of employment as Sydney Gas's Chief Executive Officer, but did not state that he had consented to being quoted. Mr Purcell subsequently gave his consent so this aspect was resolved.
88. The Panel has previously declined to consider that not obtaining consent from a market data provider, such as IRESS, constituted unacceptable circumstances: Volante Group Ltd [2006] ATP 2. The Panel considered that the removal of attribution to IRESS in favour of "market information providers" remedied the unacceptability but notes that the disclosure still constituted a breach of section 636(3). ASIC's policy on section 636(3) is clearly stated. Making an application for, and gaining, relief is not unduly difficult or burdensome and should be pursued by bidders or targets who seek to use information in a similar way. In this case, the breach does not give rise to unacceptable circumstances because:
- (a) the figures to which the IRESS attribution applied appeared to be straight raw market data, with no analysis by IRESS, and appeared to be accurately transposed; and
 - (b) by not attributing the data to any person, Queensland Gas assumed responsibility and liability for the accuracy of the data.

Others

89. The Panel noted that Queensland Gas's offer was subject to a defeating condition that was likely to be triggered if Sydney Gas redeemed all or any of its convertible notes in April and June 2006 using its existing cash reserves, or borrowed monies, or issued new shares to fund the redemption. The Panel sees no basis for considering that Sydney Gas taking steps to redeem the notes when due, or steps to fund the redemption, would constitute frustrating action that gave rise to unacceptable circumstances, even if such steps or repayment triggered the defeating condition.

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Preparation of the replacement bidder's statement

90. The Panel advised parties of its views in a preliminary decision on 07 March 2006 and advised the parties of the orders it was currently minded to make and provided them with an opportunity to make submissions on those orders, especially in relation to any unfair prejudice which the orders might cause. On 09 March 2006, having considered the submissions, the Panel made its final orders. On 22 March 2006 Queensland Gas delivered the first draft of its replacement bidder's statement to the Panel. On 5 April, the Panel advised that it had no objection to the fourth redraft of the replacement bidder's statement.
91. Annexure C provides a timeline of the steps in finalising and approving the replacement bidder's statement.

08 March Announcement

92. The Panel provided parties with its initial, preliminary decision at 4.04 p.m. on 7 March 2006. The document was expressly stated to be:
 - (a) the Panel's preliminary view;
 - (b) confidential within the proceedings; and
 - (c) not to be disclosed outside the proceedings until the Panel had published its decision.
93. At 11.40 a.m. on 8 March 2006, Queensland Gas, announced to the market that :

“As a result of input by the Takeovers Panel, QGC has formed the view that there may be considerable delay in the closing date of its offer for all the shares of SGL.

QGC is concerned that the market is trading in shares of both QGC and SGL on a basis that does not have regard to the practical consequences of any such delay. In the view of QGC, it now seems quite likely that a defeating condition of the QGC offer could be triggered”
94. At 1.34 p.m. shares in Sydney Gas were placed into a trading halt at the request of Sydney Gas following a 16% fall in price after the announcement by Queensland Gas. At 3.10 p.m. shares in Queensland Gas were also placed into a trading halt at the request of Queensland Gas following a 10% fall in price after the announcement by Queensland Gas. ASX advised that the trading halt would be lifted after Queensland Gas made the announcements required by the Takeovers Panel.
95. The Panel was concerned that Queensland Gas announced the effect of the Panel's preliminary decision before the decision was finalised, without consulting the Panel and in breach of a confidentiality undertaking that Queensland Gas had given the Panel.
96. Queensland Gas submitted that it considered that it was compelled by section 674 of the Corporations Act to disclose the information (which it considered to be price sensitive) to the market. Queensland Gas noted that Rule 8.5(d) and the note to Rule 8.5 of the Panel Rules for Proceedings indicate that Rule 8 (Disclosures and Confidentiality) does not affect compliance by a person with continuous disclosure obligations.

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97. QGC's announcement, and the Panel's views about it, did not specifically bear on the matters before the Panel and were not taken into account by the Panel in reaching its decision. It was therefore unnecessary to consider this aspect of the matter further for the purposes of these particular proceedings, or to consider any other legal issues which may have been relevant to the 8 March Announcement. However, the Panel considers that the position of Queensland Gas on the application of the continuous disclosure rules was incorrect.

DECISION

98. The Panel considers that the absence of certain information, the misleading nature of some statements and the confusing nature of the Original Bidder's Statement and the First Supplementary Bidder's Statement are circumstances in relation to the affairs of Sydney Gas that are unacceptable:

- (a) having regard to the effect of these circumstances on:
 - (i) control or potential control of Sydney Gas; and
 - (ii) the acquisition or proposed acquisition of a substantial interest in Sydney Gas by Queensland Gas; and
- (b) because they constitute, or give rise to, a contravention of sections 636(1)(g), 636(1)(m) and 670A,

by causing Sydney Gas shareholders to make decisions whether or not to hold their Sydney Gas shares, accept the Queensland Gas Offer, or dispose of them in other ways, on the basis of misleading and inadequate information and causing the market for control of Sydney Gas shares not to be efficient competitive and informed. The Panel considers the deficiencies it has identified are material to Sydney Gas shareholders' assessment of the merits of the Queensland Gas Offer.

99. Having regard to the effect, discussed above, and to the matters referred to in section 657A(3), the Panel considers that the unacceptable circumstances identified would cause the acquisition of control of Sydney Gas shares to take place in a market which was not efficient, informed and competitive, and that Sydney Gas shareholders would not have all, or enough, material information¹⁰ to allow them to assess the merits of the Queensland Gas Offer.
100. Having regard to the contravention of sections 636(1)(g), 636(1)(m) and 670A, discussed above, and to the matters referred to in section 657A(3), the Panel considers that the unacceptable circumstances identified would cause the acquisition of control of Sydney Gas shares to take place in a market which was not efficient, informed and competitive, and that Sydney Gas shareholders would not have all, or enough, material information about the Queensland Gas Offer to allow them to assess the merits of the Queensland Gas Offer.

¹⁰ By "enough information" the Panel infers that shareholders must have enough *non-misleading* information, and that the inclusion of misleading information in the documents provided to shareholders on which to make their decision is likely to cause them not to have enough information.

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101. Having regard to the policy considerations which underlie the purposes of Chapter 6, as set out in section 602, the Panel considers that it would not be against the public interest to make a declaration of unacceptable circumstances.
102. The Panel considered that the information deficiencies identified by the Panel, as set out in Annexure B to this decision (**information deficiencies**), were material and likely to cause Sydney Gas shareholders to consider that the Queensland Gas Offer was more desirable and advantageous than they would have if they had been given the information required to correct the information deficiencies in a clear and prominent manner. The Panel considers that this was likely to cause more Queensland Gas shareholders to accept the Queensland Gas Offer and in turn would affect the success of the Queensland Gas Offer (and thus control or potential control of Sydney Gas) and Queensland Gas's proposed acquisition of a substantial interest in Sydney Gas.
103. The Panel considered that the information deficiencies were material. The Panel considered that because of the information deficiencies the shareholders of Sydney Gas did not have enough information to enable them to assess the merits of the Queensland Gas Offer and, for the reasons given above, the Original Bidder's Statement and First Supplementary Bidder's Statement contravened section 636(1)(g).
104. The Panel considered that the Original Bidder's Statement and First Supplementary Bidder's Statement did not adequately disclose:
- (a) the corrections made at the request of Sydney Gas to correct inadequacies in the Original Bidder's Statement, that Queensland Gas made in the First Supplementary Bidder's Statement;
 - (b) the uncertainties, timing and steps associated with the Finance Offer;
 - (c) the various approvals required for the Finance Offer to be effective;
 - (d) the uncertainties and volatility associated with costs of production which Queensland Gas might incur in generating the revenues forecast in the revenue forecasts¹¹; and
 - (e) the fact and effects of the proxy set out in clause 6.8(f)(ii),
- and therefore the Original Bidder's Statement and First Supplementary Bidder's Statement contravened section 636(1)(m).
105. The Panel considered that the Original Bidder's Statement and First Supplementary Bidder's Statement were misleading and deceptive, and constituted material omissions, for the reasons set out above. Therefore the Original Bidder's Statement and First Supplementary Bidder's Statement contravened section 670A.

Orders

106. The Panel considered the effects on Sydney Gas shareholders that the information deficiencies caused. The Panel considered that the shareholders of Sydney Gas were

¹¹ The Panel notes that this information might affect the value of Queensland Gas shares offered under the bid, but it is also likely to affect the risk preferences of different Sydney Gas shareholders without also affecting the value of Queensland Gas shares, therefore the information was required to be disclosed under section 636(1)(m).

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the persons primarily affected by the information deficiencies, while the general market for Sydney Gas and Queensland Gas shares were also affected by the information deficiencies. The Panel considered that the most appropriate way of remedying the unacceptable circumstances of the information deficiencies was to order that Queensland Gas make appropriate disclosure to correct the information deficiencies. The Panel considered that this would both remedy the effects and ensure that the Queensland Gas Offer proceeded as if the information deficiencies had not occurred.

107. The Panel considered the effects of Sydney Gas shareholders receiving the Original Bidder's Statement, the First Supplementary Bidder's Statement and then a further supplementary bidder's statement ordered by the Panel to remedy the information deficiencies. The Panel considered that this would not allow Sydney Gas shareholders to assimilate the correcting and additional information adequately. The Panel considered that the proper remedy was to require Queensland Gas to prepare a new replacement bidder's statement and give a copy to Sydney Gas shareholders. Similarly, the Panel considered that as the Sydney Gas shareholders would receive a complete new document, with material new information in it, they should have an adequate time to consider the Queensland Gas Offer once they had adequate information. The Panel considered that the legislature has indicated that one month is an appropriate time to consider takeover documents and decide on whether or not to accept the offer. Therefore, the Panel considered that the Queensland Gas Offer should remain open for one month from the time at which the replacement bidder's statement which the Panel had ordered was dispatched to Sydney Gas shareholders.
108. The Panel considered the effect of the information deficiencies on those persons who had accepted the Queensland Gas Offer prior to receiving adequate information in the form ordered by the Panel. The Panel considered that as the information deficiencies were material it was unsafe to allow any acceptances to stand. The Panel could only be assured that the effects of the information deficiencies had been remedied by voiding acceptances so far received and ordering that no acceptances were valid until the replacement bidder's statement had been dispatched to Sydney Gas shareholders. In that way, the Panel could be assured that Sydney Gas shareholders would have adequate information before them and would have been notified of the corrective information prior to a decision to accept or reject the Queensland Gas Offer.
109. The Panel considered the magnitude of the effects on Sydney Gas shareholders of the unacceptable circumstances and the magnitude of the effects of its orders on those shareholders and considered that the orders were proportionate to the effects of the unacceptable circumstances on the Sydney Gas shareholders and were proportionate in ensuring that the Queensland Gas Offer proceeded as if the unacceptable circumstances had not occurred.
110. The Panel considered the magnitude of the effects on Sydney Gas shareholders of the unacceptable circumstances and the magnitude of the effects of its orders on Queensland Gas. It considered that the adverse effects of the orders on Queensland Gas were proportionate to the effects of the unacceptable circumstances on the Sydney Gas shareholders and were proportionate in ensuring that the Queensland Gas Offer proceeded as if the unacceptable circumstances had not occurred.

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111. In saying this, the Panel took into account a range of Queensland Gas's own actions, and the fact that it found that Queensland Gas's reasons for pressing ahead with the Original Bidder's Statement and First Supplementary Bidder's Statement in the face of Sydney Gas's criticisms were unsound. The Panel considered that Queensland Gas had ample opportunity to remedy the deficiencies or to wait for the determination of the Panel's proceedings. Queensland Gas chose to press ahead. Additional costs or delays caused by the Panel's orders were materially contributed to by Queensland Gas. Therefore, the threshold for considering them to cause unfair prejudice is materially higher.
112. Having considered submissions on proposed orders, the Panel did not consider that any person would be unfairly prejudiced by its proposed orders and ordered:
- (a) Queensland Gas to immediately advise the market, in a form approved by the Panel, of the following:
 - (i) the bidder's statement and supplementary bidder's statement contained information deficiencies identified by the Panel;
 - (ii) the nature of the information deficiencies;
 - (iii) Queensland Gas would prepare and send each Sydney Gas shareholder a replacement bidder's statement which, to the satisfaction of the Panel, addressed in one document:
 - (A) the information in the bidder's statement and supplementary bidder's statement and the information deficiencies and
 - (B) an explanation of what changes had been made from the bidder's statement and supplementary bidder's statement;
 - (iv) No further acceptances under the bidder's statement and supplementary bidder's statement would be valid;
 - (v) Any acceptances received under the bidder's statement and supplementary bidder's statement would be revoked;
 - (vi) Queensland Gas would extend the closing date of its offer until at least one month after the date of dispatch of the replacement bidder's statement.
 - (b) Any acceptance under the bidder's statement and supplementary bidder's statement, whether in paper form or electronically, before the date of the replacement bidder's statement was revoked.
 - (c) Each accepting Sydney Gas shareholder was to be informed by pre-paid letter that the acceptance under the bidder's statement and supplementary bidder's statement had been revoked.
 - (d) Queensland Gas was to prepare and send to each Sydney Gas shareholder a replacement bidder's statement which, to the satisfaction of the Panel, addressed in one document:
 - (i) the information in the bidder's statement and supplementary bidder's statement and the information deficiencies; and

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- (ii) an explanation of what changes had been made from the bidder's statement and supplementary bidder's statement.
- (e) Queensland Gas was to extend the closing date of its offer until at least one month after the date of dispatch of the replacement bidder's statement.
- (f) The date by which Sydney Gas was required to dispatch its target's statement was extended to the date 1 week after the date of dispatch of the replacement bidder's statement.

113. The Panel made no order for costs.

Braddon Jolley
President of the Sitting Panel
Decision dated 9 March 2006
Reasons published 19 May 2006

ANNEXURE A – Declaration



**Corporations Act
Section 657A
Declaration of Unacceptable Circumstances**

In the matter of Sydney Gas Limited

WHEREAS

- A. On 20 January 2006 Queensland Gas Company Limited (**QGC**) announced its intention to make a takeover offer for Sydney Gas Limited (**SGL**).
- B. On 14 February 2006 QGC lodged and served a bidder's statement (**Original Bidder's Statement**).
- C. On 22 February 2006 the Takeovers Panel (**Panel**) received an application dated 22 February 2006 from SGL under section 657C of the Corporations Act 2001 (Cth) in relation to the affairs of SGL.
- D. On or about 28 February 2006 QGC despatched to SGL shareholders the Original Bidder's Statement and a supplementary bidder's statement dated 27 February 2006 (**Supplementary Bidder's Statement**). QGC had prepared a replacement bidder's statement but did not obtain ASIC or SGL consent to substitute it for the Original Bidder's Statement and decided not to wait two weeks before dispatch of its bidder's statements and offer.
- E. The Original Bidder's Statement and the Supplementary Bidder's Statement contain information deficiencies, in that:
 - (a) they omit certain material information,
 - (b) some statements are misleading in material respects, and
 - (c) they are confusing(**information deficiencies**).
- F. The information deficiencies give rise to unacceptable circumstances in relation to the affairs of SGL by causing SGL shareholders to make decisions whether or not to hold their shares, accept the QGC takeover offer, or dispose of the shares in other ways on the basis of misleading and inadequate information and causing the market for control of SGL shares not to be efficient competitive and informed.
- G. The Panel considers that the circumstances are unacceptable circumstances:
 - (a) having regard to the effect of the circumstances on:
 - (i) the control or potential control of SGL; and
 - (ii) the proposed acquisition of a substantial interest by QGC in SGL; and

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(b) because they constitute, or give rise to, a contravention of sections 636(1)(g), 636(1)(m) and 670A of the Corporations Act.

H. The Panel considers that it would not be against the public interest to make a declaration of unacceptable circumstances.

Under section 657A of the Corporations Act, the Panel declares that the information deficiencies constitute unacceptable circumstances in relation to the affairs of SGL.

Braddon Jolley

President of the Sitting Panel

Dated 09 March 2006

Annexure B - Final Orders



**Corporations Act
Section 657D
Orders**

In the matter of Sydney Gas Limited

Pursuant to:

- (a) section 657D of the *Corporations Act 2001* (Cth); and
- (b) a declaration of unacceptable circumstances in relation to the affairs of Sydney Gas Limited (**SGL**) made by the Panel on 9 March 2006,

the Takeovers Panel **ORDERS**:

1. Queensland Gas Company Limited (**QGC**) is to immediately advise the market, in a form approved by the Panel, of the following:
 - (a) the Original Bidder's Statement and Supplementary Bidder's Statement contain information deficiencies identified by the Panel as set out in the annexure to these orders (**information deficiencies**);
 - (b) the nature of the information deficiencies;
 - (c) QGC will prepare and send each SGL shareholder a replacement bidder's statement which, to the satisfaction of the Panel, addresses in one document:
 - (i) the information in the Original Bidder's Statement and Supplementary Bidder's Statement and the information deficiencies and
 - (ii) an explanation of what changes have been made from the Original Bidder's Statement and Supplementary Bidder's Statement;
 - (d) no further acceptances under the Original Bidder's Statement and Supplementary Bidder's Statement will be valid;
 - (e) any acceptances received under the Original Bidder's Statement and Supplementary Bidder's Statement will be revoked;
 - (f) QGC will extend the closing date of its offer until at least one month after the date of dispatch of the replacement bidder's statement.
2. Any acceptance under the Original Bidder's Statement and Supplementary Bidder's Statement, whether in paper form or electronically, before the date of the replacement bidder's statement is revoked.

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3. Each accepting SGL shareholder is to be informed by pre-paid letter that the acceptance under the Original Bidder's Statement and Supplementary Bidder's Statement has been revoked.
4. QGC is to prepare and send to each SGL shareholder a replacement bidder's statement which, to the satisfaction of the Panel, addresses in one document:
 - (a) the information in the Original Bidder's Statement and Supplementary Bidder's Statement and the information deficiencies; and
 - (b) an explanation of what changes have been made from the Original Bidder's Statement and Supplementary Bidder's Statement.
5. QGC is to extend the closing date of its offer until at least one month after the date of dispatch of the replacement bidder's statement.
6. The date by which SGL is required to dispatch its target's statement is extended to the date 1 week after the date of dispatch of the replacement bidder's statement.

Braddon Jolley

President of the Sitting Panel

Dated 09 March 2006

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Information deficiencies:

General

1. Supplementary Bidder's Statement's cover not clearly identifying that it contained substantive corrections
2. Annexure C to the Supplementary Bidder's Statement given too little prominence;
3. Failing to describe the errors or deficiencies in the Original Bidder's Statement which the disclosures in Annexure C were correcting

Disclosure in relation to the Finance Offer

4. No clear and intelligible explanation of:
 - (a) The conditional nature of the Finance Offer (as defined in the Supplementary Bidder's Statement)
 - (b) The potential delays in being able to deliver the funds to Sydney Gas under the Finance Offer
 - (c) Timing and steps required to implement the Finance Offer
 - (d) The "certainty of funding" references without qualifications as above
5. Absence of references to dilution by redemption of the Queensland Gas convertible notes
6. Absence of reference to the possibility of the potential equity fundraising as a method which may involve no dilution of Sydney Gas shareholders
7. Absence of reference to the possibility that at least the first tranche of Sydney Gas convertible notes could be redeemed out of Sydney Gas's cash resources
8. Absence of sufficient references to regulatory constraints:
 - (a) The circumstances under which Queensland Gas will need to procure Sydney Gas to obtain a waiver from ASX in relation to Listing Rule 7.1 approval, the history of ASX granting similar waivers and the timing and other issues which such a waiver would present
 - (b) The possible voting restrictions under Listing Rule 7.1 and their effect on the likelihood of approval not being granted
 - (c) The potential need for Listing Rule 7.9 and 10.11, and possibly Chapter 2E of the Corporations Act, approval and the factors affecting such approval
 - (d) Whether Queensland Gas has applied to the ASX for any waivers of the Listing Rules
 - (e) Whether it is feasible to call a shareholders' meeting before the scheduled closing date of the Offer or the scheduled date for redemption of the first tranche of Sydney Gas's convertible notes to satisfy some of the regulatory approvals
9. No clear statement of the terms of the bridging finance that Queensland Gas is prepared to offer Sydney Gas

Takeovers Panel

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Recertification of Reserves

10. Insufficient prominence to the statements in Annexure B of the Supplementary Bidder's Statement in relation to the division of gas reserves attributable to Queensland Gas and its partners

Forward Looking Statements as to Revenue

11. Absence of at least one of the following in relation to revenue forecast in the Original Bidder's Statement:
12. Full financial forecasts, including a full discussion of the risk factors and volatility issues relating to production volumes and costs of production and sufficient information to assess the sensitivity of the forecast revenues and costs to changes in relevant variables
13. A full discussion of the risk factors and volatility issues relating to production volumes and costs of production together with a clear and prominent caution as to the implications of these on the revenue forecast

Alternatively, at Queensland Gas's election, Queensland Gas may formally withdraw the revenue forecast provided it makes very clear and prominent disclosure why the original revenue forecasts were misleading and unreliable and withdrawn.

Chinchilla Power Station

14. No clear and intelligible description of Queensland Gas's role in developing the Chinchilla Power Station.
15. No clear and intelligible description of Queensland Gas's future role in the Chinchilla power station
16. Absence of sufficient information for Sydney Gas shareholders to make an informed assessment of the statement that "... Queensland Gas expects that it will be one of the country's lowest cost producers of electricity."
17. Queensland Gas's involvement in the supply or production of electricity should be clearly stated in a single place
18. No clear and intelligible description of whether Queensland Gas has contracts or agreements to supply electricity and the terms of any such supply

Proxy undertaking for conditional acceptances

19. No clear and intelligible explanation of the term of Queensland Gas's offer in section 6.8(f) of the Original Bidder's Statement, and the implications of that term
20. No clear and intelligible explanation of the effect of the grant of the proxy on who can vote at any Sydney Gas shareholders' meeting to consider the Finance Offer

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Chronology of replacement bidder's statement

- 07 March Panel sent its preliminary decision to parties (which set out all of the issues that were in the final decision) seeking comments from parties
- 09 March The Panel sent its final decision to parties following parties' submissions on the preliminary decision, requiring replacement bidder's statement
- 16 March Queensland Gas requested the Panel's consent to include supplementary information in the replacement bidder's statement in addition to the disclosure that the Panel had ordered
- 17 March Panel agreed to Queensland Gas request
- 20 March 2.06 p.m. Panel email to Queensland Gas asking for advice as to Queensland Gas's progress on replacement bidder's statement
- 22 March 8.33 p.m. Queensland Gas first draft replacement bidder's statement to Panel and other parties. Queensland Gas advised when it delivered it that its directors hadn't signed off on it and may make further changes.
- 24 March 7.31 p.m. Friday Sydney Gas provided comments on draft replacement bidder's statement.
- 27 March 1.55 p.m. Monday Panel response to replacement bidder's statement with list of specific issues which it required Queensland Gas to correct prior to dispatch. Still no advice from Queensland Gas as to whether the board had signed off or whether the Panel was looking at the final version.
- 30 March 5.00 p.m. Second redraft from Queensland Gas
- 31 March 6.21 p.m. Panel response to Queensland Gas on second redraft saying it was basically happy, but two points set out in earlier decision were still not covered by Queensland Gas.
- April 03 8.54 p.m. Third redraft from Queensland Gas, still not advising sign off by Queensland Gas board.

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- April 04 8.32 p.m. Fourth redraft from Queensland Gas as printer's proof with further minor changes
- 9.05 p.m. Marked up version of replacement bidder's statement from Queensland Gas showing changes in printer's proof. The Panel was provided for the first time with a black and white version, all previous versions had had coloured pictures and graphs and charts and maps. No advice from Queensland Gas that the final document would be black and white.
- April 05 8.21 a.m. Mark-ups of charts and tables that weren't marked up in the printer's proof or the marked up version
- April 05 4.51 p.m. Panel advised Queensland Gas that it had no further objection to the replacement bidder's statement.