



Australian Government

Takeovers Panel

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Panel Publishes Revised Guidance Notes

Guidance Note 7: Lock-up devices

Guidance Note 12: Frustrating action

Guidance Note 14: Funding arrangements

Guidance Note 17: Rights issues

The Takeovers Panel today published revised versions of Guidance Notes 7, 12, 14 and 17.

This is part of the Panel's planned process of simplification and includes a review of the currency and consistency of the guidance notes.

The Panel issued a consultation draft of the guidance notes in May 2009. It received 5 submissions and has taken them into account and made further changes.

Some of the more important changes are identified below.

Guidance Note 7: Lock-up devices

Guidance Note 7 deals with the Panel's approach to lock-up arrangements in control transactions.

Following consultation, it has been made clearer that the guidance note applies to any control transaction.

The section on break fees makes explicit the need for the triggers for payment of the fee to be reasonable, and refers to "naked no vote" break fees. As well, the 1% guideline for break fees has been clarified.

The section on restriction agreements has been re-written to reflect that different types of restrictions and safeguards can be brought together in combination, which can change the overall impact of the agreement.

Guidance Note 12: Frustrating action

Guidance Note 12 deals with the Panel's approach to actions of a target or potential target company that may lead to an offer lapsing, being withdrawn or not proceeding.

The Panel has clarified that shareholders may be given a choice in different ways. It has also made it clear that, if the choice is by waiting to see if the bid will succeed before undertaking the frustrating action, the time that must be allowed for that may be affected by the length of the bid period or the status of any bid conditions.

Following consultation, more examples have been included in the guidance note.

Guidance Note 14: Funding arrangements

Guidance Note 14 provides guidance on funding arrangements for the cash component of bid consideration.

The rewrite reduces the amount of internal cross-referencing and brings related subjects together.

The consultation draft asked for comments on whether:

- (a) it was necessary to require a bid condition to that effect that payment cannot be made earlier than transfer of the shares and
- (b) off-market bids that are conditional on finance should be required to include a condition that precisely matches the financing conditions of the financier.

Based on the responses received, the Panel decided it was not necessary to make these changes. However, the Panel did expand on the requirements for disclosure of an accountant's certificate as to funding and exchange rate risk management.

Guidance Note 17: Rights issues

Guidance Note 17 provides guidance on circumstances that the Panel is likely to declare to be unacceptable in relation to rights issues.

As well as updating references, the rewrite removes concepts of presumption and onus, and instead outlines factors relevant to the Panel's consideration of unacceptable circumstances. Following consultation it has been made clearer that the Panel looks at the effect of the rights issue beyond what is reasonably necessary for fundraising.

A subcommittee (annexure A) was established to consider the submissions and finalise the drafting of the guidance notes. The Panel thanks them for their work.

Copies of the revised Guidance Notes are available on the Panel's website (www.takeovers.gov.au). A copy of the response document can be found on the consultation page.

Allan Bulman
Director, Takeovers Panel
Level 10, 63 Exhibition Street
Melbourne, VIC 3000
Ph: +61 3 9655 3597
allan.bulman@takeovers.gov.au

Annexure A

Subcommittee:

Guy Alexander
John Fast
Byron Koster
Andrew Lumsden
Marie McDonald
Jennifer Seabrook
Peter Scott