Australian Government
Takeovers Panel

Guidance Note 6 – Minimum bid price

Background

1. This guidance note has been prepared to assist market participants understand the Panel's approach to the minimum bid price requirement in s621(3).[1]
2. The examples are illustrative only and nothing in the note binds the Panel in a particular case.
3. Section 621(3) says:

   The consideration offered for securities in the bid class under a takeover bid must equal or exceed the maximum consideration that the bidder or an associate provided, or agreed to provide, for a security in the bid class under any purchase or agreement during the 4 months before the date of the bid.
4. The section is ***"fundamental to the policy and operation of Chapter 6"***.[2]
5. ASIC Regulatory Guide 163[3] also addresses s621(3), and Class Order 00/2338 applies to quoted securities as bid consideration.[4] Compliance with RG 163 will generally meet the Panel's policy.

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[1] References are to the ***Corporations Act 2001*** (Cth) unless otherwise indicated

[2] ***Email Limited (No 3)*** [2000] ATP 5 at [39]

[3] RG 163: "***Takeovers: Minimum Bid Price Principle - s621***" (issued 19/12/00)

[4] Similar relief may be available on case by case basis for unquoted securities: RG 163.21

Application

6. Section 621(3) applies to both cash and non-cash consideration.

7. Section 621(4) requires non-cash consideration to be valued at the time the offer is made. This means the day the bidder starts to post its offers.[5]

8. Section 621(3) applies to the consideration paid for securities within a class.[6]

Unacceptable circumstances

9. In considering whether unacceptable circumstances exist, the Panel looks at whether the policy of s621(3) and s602 has been met. The Panel does not take a technical approach.[7] It considers the following factors:

   (a) whether the bid consideration (cash equivalent[8]) is equal in value to the highest consideration given by the bidder or an associate over the four months before the bid and

   (b) cash equivalence for quoted scrip is usually measured by reference to the weighted average market price[9] over 2 full trading days.[10] No single sale or quote should be used. If there has been any risk of market manipulation, another basis may be appropriate.[11]

10. The Panel recognises the days needed for printing and dispatch, and generally allows up to 5 business days for printing and preparation

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[5] For an application of this, see ***Rinker Group Ltd*** [2006] ATP 35 at [32]

[6] ***Skywest Ltd*** [2004] ATP 10 at [63]: "… ***The policy underpinning subsection 602(c) requires equality of opportunity between holders of bid class securities; it does not extend to requiring equality of opportunity between different classes of securities, such that holders of Skywest shares should be able to receive equal consideration to that received by Convertible Note holders…."***

[7] In ***GoldLink IncomePlus Ltd 02*** [2008] ATP 19 the Panel declined to make a declaration where the pre-bid agreement was amended so that no higher consideration could be paid to the pre-bid acceptor than under the bid. See also ***Normandy Mining Ltd 06*** [2001] ATP 32, ***GasNet Australia Ltd*** [2006] ATP 22

[8] In ***Email Limited (No 3)*** [2000] ATP 5, the valuation of preference shares as part consideration under a bid was taken as the midpoint of the range

[9] See also RG 163.22

[10] See also RG 163.31

[11] This may warrant ASIC relief

prior to posting the documents.[12] Thus, the Panel generally will not consider it unacceptable for a bidder to use the weighted average market prices over 2 full trading days ending up to 5 business days before posting the document.[13]

11. It may also give rise to unacceptable circumstances if the bid consideration is foreign money and the bidder treats the bid as a cash bid.[14]

Example: Bidder offers US dollars, and then buys on-market on ASX in Australian dollars at a price which, according to exchange rates prevailing during the currency of the bid, is a higher price but does not increase its price under the bid.[15]

Remedies

12. ~~11.~~ The Panel has a wide power to make orders (including remedial orders) if the minimum bid price principle is contravened.~~14~~[16]

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Third Issue	XX 2011

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[12] If the bidder is offering quoted scrip, the bidder's statement must include 'the market price per security': s636(1)(h)(ii). ASIC also allows 5 days: RG 163.10 and Class Order CO 00/2338, which has modified s621 so a bidder can value target securities over 2 full trading days ending up to 5 business days before the date of the bid

[13] ***Taipan Resources NL (No 10)*** [2001] ATP 5 at [104]

[14] The Panel would be likely to treat foreign money as non-cash consideration, since foreign money must be exchanged before Australian shareholders are able to spend it and its value varies over time.

[15] In ***Rinker Group Limited 01*** [2006] ATP 35, the Panel did not need to decide this issue as an undertaking not to buy shares on-market was given

~~14~~[16] In ***Taipan Resources NL (No 9)*** [2001] ATP 4 the Panel ordered shares which were acquired in contravention of s606 to be divested, one basis being that the acquisition would have required an increased bid price under s621(3). See [2001] ATP 4 at [49]

Australian Government
Takeovers Panel

Guidance Note 12 – Frustrating action

Introduction

1. This guidance note has been prepared to assist market participants understand the Panel's approach to actions that could frustrate a bid or potential bid. ~~Usually such actions are taken by a target.~~

   Examples of frustrating action:

   1. Significant issuing or repurchasing shares, or issuing convertible securities or options[1]

   2. Acquiring or disposing of a major asset, including making a takeover bid

   3. Undertaking significant liabilities or changing the terms of its debt

   4. Declaring a special or abnormally large dividend

   5. Significant change to company share plans.

2. The examples are illustrative only and nothing in the note binds the Panel in a particular case.

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[1] A small number of convertible securities may be significant if this could, for example, prevent the tax benefits of 100% ownership. ~~But compare~~In ***Bigshop.com.au Ltd (No 2)*** [2001] ATP 24 at [45] ~~which considered that a~~the Panel ~~might not regard~~ said that a small issue of shares under an employee option plan ~~to be unacceptable~~might trigger a defeating condition but not be such a threat to the bid as to be a frustrating action

3. The policy basis for this note is that it is shareholders who should decide on actions that may:

   - interfere with the reasonable and equal opportunity of the shareholders to participate in a proposal or
   - inhibit the acquisition of control over their voting shares taking place in an efficient, competitive and informed market.

4. Some ASX Listing Rules require shareholder approval for transactions for similar policy reasons.[2]

Frustrating action

5. In this note the following definitions apply:

~~Term~~	~~Meaning~~
frustrating action	an action by a target, whether taken or proposed, by reason of which: • a bid may be withdrawn[3] or lapse • a potential bid is not proceeded with
potential bid	a genuine potential bid communicated to target directors publicly or privately which is not yet a formal bid under Chapter 6[4]

6. A bidder may make its bid (potential bid) subject to any conditions it chooses, with exceptions.[5] It must set out the conditions clearly. As this note extends to potential bids, it is incumbent on a potential bidder to make it clear to the target what conditions would apply if a bid were

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[2] See principally rules 7.1, 7.6 and 7.9, but also rules 10.1, 11.2 and 11.4

[3] Section 652B (with ASIC approval; see RG 59) or s652C. References are to the ***Corporations Act 2001*** (Cth) unless otherwise indicated

[4] Includes announcements to which s631 applies but not limited to these: ***MacarthurCook Ltd*** [2008] ATP 20

[5] See Division 4 of Part 6.4. For example, a bid must not include a condition dependent on an event within the sole control of the bidder. A bidder could not rely on a condition that offended Part 6.4 to establish unacceptable circumstances

made.[6] This will help establish that it was a genuine potential bid and that the target was aware of the condition in issue.

7. An action that triggers a condition is a frustrating action, but whether the action gives rise to unacceptable circumstances will depend on its effect on shareholders and the market in light of ss602(a)[7] and (c)[8] and s657A.

Examples

1. An action triggering a condition not commercially critical to the bid is unlikely to give rise to unacceptable circumstances.

2. An action that triggers a 'condition' in a potential bid may not give rise to unacceptable circumstances if the bidder indicated that it would proceed only if the bid was recommended and the directors have rejected the approach.

3. A proposed scheme, requiring target board support, cannot be frustrated if the target board does not support it.[9]

8. Section 657A(3) requires the Panel to take into account the actions of directors when considering the purposes in s602(c) in relation to the acquisition of a substantial interest. This includes actions that caused or contributed to the acquisition not proceeding. The provision was introduced in 1994:

"The purpose of this provision is to ensure that the scope of unacceptable circumstances includes cases where the directors of a target company by their action, including such action which caused or contributed to the acquisition not proceeding, did not give shareholders of the company all reasonable and equal opportunities to participate in any benefits accruing to the company."[10]

Overlap with directors' duties

9. The Panel creates new rights and obligations.[11] It does not enforce directors' duties – that is for a court.

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[6] Includes any pre-conditions to the bid set out in a potential bid

[7] Acquisition of control over voting shares takes place in an efficient, competitive and informed market

[8] As far as practicable, holders of the relevant class of shares all have a reasonable and equal opportunity to participate in any benefits

[9] ***Transurban Group*** [2010] ATP 5. However, if the potential bidder included an alternative that was a genuine potential bid, which did not require board support, actions by the target may still give rise to unacceptable circumstances

[10] Explanatory Memorandum to the ***Corporations Legislation Amendment Bill 1994,*** para [344]

[11] ***Precision Data Holdings Ltd v Will***s (1992) 173 CLR 167; ***AG (Cth) v Alinta Ltd*** [2008] HCA 2

10. Undertaking a frustrating action may give rise to unacceptable circumstances regardless of whether it is consistent with, or a breach of, directors' duties. It is not to the point that there is no express requirement in the law for shareholder approval of frustrating action.

Unacceptable circumstances

11. In considering whether frustrating action gives rise to unacceptable circumstances, the Panel is guided by the following.

Considerations surrounding the bid

(a) how long the bid has been open and its likelihood of success (if a potential bid, of proceeding)[12]

(b) any clearly stated objectives of the bidder and whether the condition is commercially critical to the bid

(c) whether it is 'unreasonable' for a bidder to rely on the condition before the Panel[13]

Examples:

1. A condition that is overly restrictive or is invoked unreasonably[14]

2. A condition that requires the target's co-operation such as recommending the bid or allowing due diligence

3. A condition restricting target directors from seeking competing proposals where they have not entered a no-talk agreement

4. A condition that the target enters a material transaction that is outside its business plans.

(d) whether the bidder can waive the condition

(e) the market price compared to the bid price

Considerations surrounding the frustrating action

(f) whether there is a competing proposal already

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[12] That is, for a bid whether, having regard to the level and rate of acceptances, it is reasonable to conclude that target shareholders have rejected the bid. It may not be reasonable to conclude this if the bid is still conditional and the final bid close date is not known

[13] The bidder is free to choose the bid conditions but the frustrating action may not give rise to unacceptable circumstances. One example may be where the condition is not commercially critical to the bid

[14] ***Pinnacle VRB Ltd (No 8)*** [2001] ATP 17 at [49(e)]

(g) whether the frustrating action was undertaken by the target in the ordinary course of its business. A bidder must accept that the target's normal business will continue normally[15]

(h) whether there is a legal or commercial imperative for the frustrating action

Examples

1. Action to comply with a court order, legislative requirement or government directive regarding its licence

2. Action to avoid a materially adverse or to achieve a materially favourable financial consequence

3. A transaction announced before the bid

(i) whether the frustrating action materially affects the financial or business position of the target[16]

(j) the process the target undertook in considering whether to take the action, for instance -

- the impact the acquisition may have on regulatory approval for the transaction (eg, ACCC approval)
- the "chilling effect" that the frustrating action has on any potential auction

(k) how advanced the negotiations on the frustrating action were when the bid was made or communicated.

12. The following are some examples of actions that may give rise to unacceptable circumstances:

(a) issuing new shares (or convertible securities), or repurchasing shares, if significant in the context of the target's issued capital or the bid

(b) acquiring a major asset, including by making a takeover bid, or disposing of one

(c) undertaking significant liabilities or materially changing the terms of its debt (where the takeover would not have given rise to these changes)

(d) declaring a special or abnormally large dividend

(e) significantly changing company share plans or

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15 Relevant factors include the target's business plans and the size and nature of the transaction

16 It must be reasonable for the bidder to regard the impact as adverse

(f) entering into joint ventures.

Not unacceptable circumstances

13. If a frustrating action creates for shareholders a choice between the proposals, the frustrating action will not generally give rise to unacceptable circumstances.

14. The Panel generally does not consider it an answer to unacceptable circumstances that, for example, a transaction may be lost because of the time involved in calling a general meeting. Relevant factors include the value of the transaction to the target and why it could ~~n'ot~~not be conditional on shareholder approval. However, the Panel recognises that shareholders may be given a choice in different ways, as suits the particular transaction dynamics.

Examples:

1. Directors announcing that they will enter into an agreement after a specified, reasonable time,[17] ***unless control would pass*** ~~***has by then passed***~~ ***to the bidder if the bid were then to be declared unconditional***[18]

2. Seeking prior shareholder approval or making the frustrating action conditional on shareholder approval[19]

3. Entering an agreement conditional on the bid failing or which contains a cooling-off clause which a new management might exercise

15. If a target offers to seek shareholder approval, time is needed to prepare adequate information for shareholders to decide between the competing proposals and to hold the meeting. The Panel will consider issues such as:

(a) what is a reasonable time to prepare the notice of meeting

(b) whether the bidder is willing to extend its bid to allow the holding of the meeting[20]

(c) how long the target has been considering the proposed action

(d) the benefits to target shareholders of the proposed action and

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[17] Reasonable time may be affected by the length of the bid period or the status of any bid conditions

[18] This could include acceptances or acceptances through an acceptance facility

[19] ***Pinnacle VRB Ltd (No 5)*** [2001] ATP 14 at [50]

[20] Conversely it may point to unacceptable circumstances that the bidder is prepared to extend its bid yet the target is not prepared to seek shareholder approval

(e) whether the bidder agrees not to rely on the defeating condition should the resolution fail. This may require the bidder to vary or waive the condition.

16. In general it will not give rise to unacceptable circumstances for a target:

- not to facilitate a bid
- to seek alternatives (without frustrating the bid)[21] or
- to recommend rejection of a bid (if the directors consider this in the best interests of shareholders).[22]

17. One of the factors that the Panel will take into account in deciding whether unacceptable circumstances exist is whether, before undertaking a corporate action, the target notified[~~23~~] the potential bidder[23] that it intends to take the action if the potential bidder does not make its bid or formally announce its proposed bid[24] within a reasonable time.[25]

Remedies

~~17.~~~~18.~~18. The Panel has wide powers to make orders,[26] including to:

(a) prevent an action or transaction from proceeding

(b) require the target to seek shareholder approval of the action or transaction and

(c) unwind an action or transaction.

~~18.~~~~19.~~19. The Panel may override directors' decisions even if they were made consistently with directors' duties.

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[21] This might even involve, for example, breaching a 'no talk' bid condition provided the directors did not agree to that condition

[22] The bid may nevertheless be subject to such conditions

~~[23] The parties should consider disclosure issues~~

[23] The parties should also consider disclosure issues

[24] Section 631. This is not a safe harbour and there may be other factors that mean a declaration of unacceptable circumstances is made notwithstanding. ***MacarthurCook Limited*** [2008] ATP 20 may be an example of circumstances in which such a notification may have assisted

[25] Normally 2 weeks, but will depend on the circumstances

[26] Section 657D

Publication History

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Related material

GN 7 Lock-up devices

Australian Government
Takeovers Panel

Guidance Note 13 – Broker handling fees

Introduction

1. This guidance note has been prepared to assist market participants understand the Panel's approach to broker handling fees.[1]
2. The examples are illustrative only and nothing in the note binds the Panel in a particular case.
3. Fees not tied to acceptance of a bid (eg, a telemarketing agent) are not the subject of this note.
4. In this note the following definition applies.

Broker handling fees	Fees offered by bidders to brokers who solicit acceptances of a bid from their clients. The broker either stamps the acceptance form or initiates the message in CHESS

[1] A similar approach may be taken in respect of other fees offered in other types of control transactions

Excessive fees

5. If broker handling fees are excessive, they may create incentives for a broker to:

   - pressure shareholders to accept a bid or
   - advise shareholders to accept a bid prematurely.

6. Broker handling fees may facilitate the acquisition of shares in an efficient, competitive and informed market[2] by encouraging the provisions of information to shareholders. It detracts from an efficient, competitive and informed market if shareholders accept for reasons other than price or their best interests.

7. Excessive broker handling fees may:

   - offend sections 602(a), (b) or (c)[3]
   - offend sections 623 or 621(3)[4] or
   - give rise to conflicts for the brokers.[5]

8. In considering whether excessive fees give rise to unacceptable circumstances, the Panel considers the following factors:

   (a) whether the fees exceed reasonable compensation for the time and expense incurred in talking to clients about the bid and processing acceptances. In the absence of other factors, the Panel considers a fee up to 0.75% of the consideration payable to an accepting shareholder, capped at $750 for a single acceptance, is generally not unacceptable

   (b) whether there is a minimum amount for a single acceptance. In the absence of other factors, the Panel considers that a minimum fee up to $50 for a single acceptance is generally not unacceptable. A minimum fee may encourage brokers to contact clients with small holdings. Appropriate protections should exist against arrangements such as share splitting which seek to take advantage of any minimum or maximum (see paragraph 12)

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[2] Section 602(a). Unless otherwise indicated, references are to the *Corporations Act 2001 (Cth)*

[3] Acquisition of shares in an efficient, competitive and informed market: s602(a). Reasonable time or enough information to assess the bid: ss602(b)(ii) and (iii). Equal opportunity to participate in any benefits: s602(c)

[4] Collateral benefits not allowed: s623. Minimum bid price requirement: s621(3). See also GN 6; ***Taipan Resources NL (No. 10)*** [2001] ATP 5 at [89]-[90]

[5] The Corporations Act regulates a broker's dealings with clients: for example, s945A

(c) whether the fees are consistent with other types of fees and commissions normally charged by brokers for advisory and transaction-related services. A fee consistent with other types of fees is not likely to create an undue incentive for the broker

(d) whether different rates of broker handling fees are offered depending on the number of shares in an acceptance (eg, a bidder might offer a higher rate for acceptances of small parcels to encourage targeting of retail shareholders). If a sliding scale is used, the upper and lower ends should come within the guidelines above. Otherwise, sliding scales may create an incentive for brokers to apply more pressure on retail clients, who usually need more protection than institutional clients and

(e) whether the fees are changed during the bid. In the absence of other factors, the Panel considers that an increase is generally not unacceptable if the fees remain within the guidelines above. If the fees are decreased, this may lead to the same type of pressure as a fee that is available for only a limited time.

Availability of fees

9. If broker handling fees are available for only a limited time, they may create incentives for a broker to advise shareholders to accept prematurely. It detracts from the policy of allowing shareholders a reasonable time to consider the merits of the bid if, by accepting early, they may lose the opportunity of considering another bid.[6]

10. In considering the time that broker handling fees are available, the Panel will normally take the following factors into account:

(a) once the fee is offered, it should generally be available for the balance of the bid period (including extensions unless this has been expressly excluded). The Panel does not seek to limit when the bidder may first offer a broker handling fee

(b) in special circumstances**,** the broker handling fee may cease before the end of the offer period

Example: if the bid period has been long and ample notice has been given of the bidder's intention to withdraw the fee

(c) once withdrawn, the fee should not be reinstated, even on different terms.

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6 ***Normandy Mining Limited (No 5)*** [2001] ATP 29 at [22]

Terms

11. To reduce concerns about collateral benefits or equal opportunity, the offer of a broker handling fee should expressly:

    (a) not apply to acceptances by the broker or its associates and

    (b) include a term that, by lodging an acceptance for which a fee is claimed, the broker represents that:

        (i) neither it nor its associate is the accepting shareholder and

        (ii) the fee will not be passed on or shared directly or indirectly with the accepting shareholder.

12. To reduce concerns about share splitting, a bidder may expressly reserve the right to aggregate acceptances for the purpose of determining the broker handling fee payable to a broker if it reasonably believes a person has structured holdings to take advantage of the fee.

13. Broker handling fee offers should generally not be subject to a minimum aggregate level of acceptances before a broker is eligible to receive any handling fees. Such a requirement may result in brokers imposing unacceptable pressure on clients once the broker is close to attaining the minimum level.

Disclosure of the fees

14. Under the Corporations Act, brokers must disclose to their clients benefits they will receive in connection with advice they give.

15. The Panel expects that meaningful disclosure regarding the fees will be made at the time the broker recommends acceptance (or rejection) to the client. Blanket disclosure about the possibility of receiving benefits generally would not satisfy this.

16. As well, the fees and terms should be disclosed in the bidder's statement (or supplementary bidder's statement if applicable). It may be appropriate also to announce the fees and terms to the market.

Unacceptable circumstances

17. The Panel will consider a broker handling fee offer as a whole (ie, all aspects of it, not aspects in isolation) when determining whether it gives rise to unacceptable circumstances.

Remedies

18. The Panel has a wide power to make orders (including remedial orders), or accept undertakings,[7] if a broker handling fee gives rise to unacceptable circumstances. Remedies will be designed to:

    (a) protect the rights or interests of any person or group affected by the circumstances, including target shareholders and actual or potential rival bidders and

    (b) ensure that the takeover proceeds (as far as possible) as it would have if the circumstances had not occurred.

19. Remedies may include:

    (a) giving shareholders who accepted after the broker handling fee offer was made the right to withdraw their acceptances

    (b) canceling contracts resulting from acceptances after the broker handling fee offer was made

    (c) restraining payment by the bidder of the broker handling fee and

    (d) varying the terms of the broker handling fee offer.

20. While some of the issues raised in this note may be resolved by splitting the fee with, or passing it on to, the client, this may offend sections 623 or 602(c).[8]

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Related material

GN 21 Collateral benefits

[7] For example, ***AurionGold Ltd*** [2002] ATP 13. In ***Ausdoc Group Limited*** [2002] ATP 9 the Panel accepted undertakings that a break fee would not be claimed or paid

[8] Similarly, if the broker or its associate is the accepting shareholder

Australian Government
Takeovers Panel

Guidance Note 15 –Trust scheme mergers

Background

1. This guidance note has been prepared to assist market participants understand the Panel's approach to mergers by listed trusts and managed investment schemes.
2. The examples are illustrative only and nothing in the note binds the Panel in a particular case.
3. Part 5.1[1] does not apply to a typical managed investment scheme.[2]

Trust schemes

4. The acquisition of interests in listed managed investment schemes is regulated by s606.[3] Accordingly, the acquisition of more than 20% is prohibited unless it falls within s611 or ASIC grants a modification or exemption.

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[1] Arrangements and Reconstructions. References are to the ***Corporations Act 2001*** (Cth) unless otherwise indicated

[2] It is not a company, foreign company or non-company to which Part 5.1 applies. Holders are typically not members or creditors of the trustee

[3] Because of the application of chapter 6 to managed investment schemes: see s604. They are also regulated by chapter 5C

5. It is possible to merge managed investment schemes using a trust scheme, which is usually effected by amendment of the constitution following one or more votes of holders in the target. There are generally two types:

   (a) a redemption scheme: this involves the merger of managed investment schemes by one (target) redeeming all the interests of holders except interests held by the other (acquirer).[4] Cash or interests in the acquirer may be paid to the former holders in the target as consideration for the redemption. Under a redemption scheme, the target can be delisted before any units in it are issued to the acquirer. This avoids breach of s606 and the need for ASIC modification of item 7[5] and

   (b) transfer scheme: this involves the merger of managed investment schemes by the transfer to one (acquirer[6]) of all the interests in the other (target). Transfer schemes cannot be implemented without a vote under s611 item 7. Under item 7,[7] votes cannot be cast in favour by persons proposing to acquire or dispose of interests, so this requires an ASIC modification or exemption.[8]

Policy

6. Redemption schemes and transfer schemes follow similar procedures. They have a similar effect on holders (perhaps apart from tax consequences) through different mechanisms. The Panel considers that the principles in s602 and the other policies and protections of Chapter 6 should apply to trust scheme mergers and looks at the effect of a scheme against them.

7. A trust scheme is similar to a member's schemes of arrangement under Part 5.1. It is as flexible as a members' scheme of arrangement and, like a scheme of arrangement, there are no detailed procedural requirements similar to Chapter 6. Unlike a members' scheme of arrangement, a trust scheme is not supervised in the same way by the court or ASIC.[9]

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[4] A variation would involve the target issuing units to the acquirer, which may be done after the target is delisted to avoid a breach of s606

[5] If the managed investment scheme is "non-liquid" (s601KA(4)) compulsory redemption would generally not meet Part 5C.6 and would require ASIC relief (s601QA)

[6] Responsible entity of the acquirer would hold the interests: s601FC(2)

[7] Item 7(a). See also ***Village Roadshow Ltd v Boswell Film GmbH*** [2004] VSCA 16

[8] ASIC RG 74.53

[9] In some situations judicial advice is sought as part of a trust scheme

8. The Panel does not hold the view that a managed investment scheme can be taken over only under a bid. However, it does hold the view that trust schemes should be governed by similar policies and protections[10] as in Chapter 6. This is similar to the policy that courts apply when considering section 411(17) in connection with a members' scheme of arrangement.[11] Moreover, as there is no court or ASIC supervision, more direct and prescriptive protections for holders should be provided.

Unacceptable circumstances

Jurisdiction

9. The Panel considers that trust schemes involving listed managed investment schemes come within its powers under Part 6.10 because they affect control of the target[12] and involve acquisitions of substantial interests: s657A(2).

Section 602

10. To reduce the likelihood of a trust scheme giving rise to unacceptable circumstances the following should be considered.

Differential treatment

11. A trust scheme may provide that holders are to be treated differently.[13] If it does, the scheme would be likely to be contrary to s602(c) unless the different treatment was approved by properly informed and constituted meetings of holders (and this may require meetings of sub-groups of holders).

12. Differential treatment may also create a collateral benefit. To address this:

    (a) the acquirer can undertake that neither it nor its associates will acquire interests outside the scheme or, if acquired, it will increase the scheme consideration to match[14] and

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[10] This formulation reflects the relationship between the policies in s602 and the procedures and prohibitions in the remainder of Chapter 6 (except Part 6.10). See also ***Catto v Ampol*** (1989) 7 ACLC 717, per Kirby P at 720

[11] Re ***Archaean Gold NL*** (1997) 15 ACLC 382, ***Catto v Ampol*** (1989) 7 ACLC 717***, Nicron Resources Ltd v Catto*** 10 ACLC 1186, ***Re Ranger Minerals Ltd*** [2002] 20 ACLC 1769

[12] Chapter 6 extends to listed managed investment schemes: s604

[13] Relief by ASIC from s601FC(1)(d) may be necessary

[14] This undertaking should apply at least from the date of the notice of meeting until the scheme is implemented or rejected. Note however, that adjustment of the scheme

(b) the trust scheme should meet the following principles from Chapter 6:

(i) all interests in the relevant class, or the same proportion of each holding, should be acquired and on the same terms (excepting those already held or to be acquired on approved or exempted different terms)[15]

(ii) the 4-month minimum bid price rule[16] and

(iii) no escalators, discriminatory conditions or unapproved collateral benefits.[17]

Disclosure

13. The notice of meeting should meet disclosure standards comparable (as applicable to the trust scheme[18]) to requirements under:

(a) the common law notice of meeting requirements[19]

~~(b) s601GC[20]~~

(b) ~~(c)~~ ss602(a) and 602(b)(i) and (iii)

(c) ~~(d)~~ ss636 and 638[21][20]

(d) ~~(e)~~ s611 item 7[22][21]

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consideration may require the documentation to be amended, limiting how close to the scheme meeting this could occur

[15] ss618(1) and 619

[16] ss621(3), (4) and (5) as modified by ASIC CO 00/2338. The date the scheme notice is sent to holders is treated as "the date of the bid" under s621

[17] ss622, 623, 627, 628 and 651A. Benefits include those given to the responsible entity of the target or a related body in exchange for giving up management rights over the target. Benefits would require disclosure, and perhaps also approval ~~(eg,~~ if a related party transaction~~) but see~~ or listing rule requirement applied. See also s253E. The date the scheme notice is sent to holders is treated as the start of the "offer period" under s623. The "offer period" is treated as ending immediately after the meeting. As for s629, see paragraph 29(b)

[18] The standards are not a Procrustean bed (ie one size fits all)

[19] All information needed to fully and fairly to inform holders of the nature of the proposed resolutions and enable them to judge for themselves whether to attend the meeting and vote for or against the proposed resolutions: see ***Bulfin's Limited v Bebarfald*** (1938) 38 SR (NSW) 423 at 440; ***Fraser v NRMA Holdings Limited*** (1995) 55 FCR 452 at 466

~~[20] For example, if there is to be a special resolution to amend the constitution~~

[21][20] All the information known to bidder (target) which holders of bid class securities and their professional advisers would reasonably require to make an informed decision whether to accept the bid

(e) ~~(f)~~ s411(3)[23][22] and

(f) ~~(g)~~ if securities or managed investment products are offered, Part 6D.2 or Part 7.9.[24][23]

14. The standards involve overlap and, of course, information need not (and should not) be repeated to satisfy each.

15. The standards would normally require the scheme notice to include:

(a) a statement of the effect of the scheme on the responsible entity of the target, its related bodies and their directors, if different to holders in general

(b) the voting intentions of the responsible entity of the target, its related bodies and their directors

(c) from each of the directors of the responsible entity for the target, either:

(i) a recommendation as to how holders should vote, giving the reasons or

(ii) the reasons why a recommendation is not made

(d) any voting exclusions

(e) any collateral transactions or benefits proposed or already provided and

(f) a statement of whether (and how) the scheme would not comply with Chapter 6 (were it a bid on similar terms).[25][24]

16. As well, there should be proper disclosure of:

(a) securities being retained by the acquiring entity, its related bodies and their nominees

(b) any differential treatment of holders in the scheme

(c) how and why the classes have been constituted

(d) the reasons for the voting exclusions (if any) and

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[22][21] All the information (not already disclosed) known to the acquirer and the target that holders of units in the target trust and their professional advisers would reasonably require to make an informed assessment whether to vote in favour of the scheme

[23][22] The effect of the proposal, the interests of the directors and the effect of the proposal on those interests and any information which is material to a decision whether to agree to the proposal which is within the knowledge of the directors and has not already been disclosed to the members. It must also include the information in Schedule 8 to the Corporations Regulations

[24][23] See ss636(1)(g) and (ga), Class Order 01/1543, ASIC RG 60 at [60.7-60.8]

[25][24] ***Ranger Minerals*** at [45] (scheme of arrangement); ***Nicron*** at 235 (reduction of capital)

(e) the approvals required to implement the scheme.

17. Disclosures made on behalf of the acquirer should be clearly identified as such and state that the acquirer consents to those statements being included in the form and context in which they appear.

18. If missing, corrective or updating information is required, it should be given to ASX by supplementary notice with a copy to ASIC as if ss643 and 644 applied.~~26~~25

Independent expert

19. The scheme notice should also contain a report by an independent expert.

20. Although an expert's report is only required in a bid (scheme) if the acquirer and the target have a shared director or the acquirer has over 30% voting power in the target (in a class), ~~27~~26 the requirement in all cases for a trust scheme is supported by practice, the absence of judicial or ASIC scrutiny, and the fact that every trust scheme is recommended by the responsible entity of the target even though it has an interest because its management rights are affected.

21. The report should state:

(a) whether, in the expert's opinion, the terms of the trust scheme are fair and reasonable for the holders of the target other than the acquirer and its associates~~28~~27

(b) the expert's reasons for forming that opinion (taking into account acquisitions by the acquirer and its associates in the past 4 months) and

(c) the particulars required by s648A(3).

Voting

22. A trust scheme generally requires a special resolution under s601GC to amend the constitution. No holders are excluded from voting by s601GC.

23. If the trust scheme is a transfer scheme, an ordinary resolution under s611 item 7 is also required. Acquirers and their associates are excluded by item 7 from voting in favour of the resolution (they may vote against it).~~29~~28 ASIC RG 74 expounds the principle that the vote

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~~26~~25 ***Cleary v Australian Co-operative Foods Ltd*** (1999) 32 ACSR 701

~~27~~26 s640; Schedule 8 clause 8303

~~28~~27 It is also not uncommon for the expert to opine on whether the transaction is in the best interests of holders

~~29~~28 On the meaning of the voting restriction, see ***Village Roadshow*** at [15]-[18]

should be only by those holders who will not gain from the transaction (other than as ordinary members) and who are not acting in concert with those who will.[3029] This would capture vendors.

24. If other statutory or ASX Listing Rule approvals are required, voting exclusions may apply.

25. In a members' scheme of arrangement, for example, only members whose interests are affected by the scheme in the same way vote together. The Panel would expect the holders voting on a trust scheme to be constituted into appropriate classes with appropriate voting exclusions.

26. The trust scheme should be subject to a condition that it will only be approved if the resolution is passed disregarding any votes cast in favour[3130] by:

    (a) the acquirer and its associates

    (b) the responsible entity of the target and its associates (other than related fund managers)[3231]

    (c) any person excluded from voting under another statutory or listing rule approval requirement (these units should only be voted against the resolution if permitted by the statute or listing rules) and

    (d) any person who should be treated differently under the trust scheme from the general body of holders (agreement to the trust scheme by such person needs to be obtained separately).

27. Interests voted but disregarded, and interests of related fund managers voted, should be separately recorded so their impact on the result can be assessed.

28. Votes may be cast in favour[3332] in respect of interests held subject to fiduciary or statutory duties owed to 'independent' persons (eg, a responsible entity, a superannuation fund trustee or a life insurance company) even though the holder may be an associate of the acquirer.

[3029] ASIC RG 74.51

[3130] Eg, ss256C(2)(a) and 257D(1)(a). See ***Re Tiger Investment Company Ltd*** (1999) 33 ACSR 438, ***Village Roadshow***

[3231] Section 253E provides that the responsible entity and its associates cannot vote (other than on a resolution for the removal of the RE) if they have an interest other than as a member. The purpose of the provision is to remove the potential for a conflict of interest arising: see ***Southern Wine Corporation Pty Ltd (in liq) v Perera*** (2006) 33 WAR 174. This has been extended to include voting of units even though the effect is to disenfranchise other schemes that are members: ***Everest Capital Ltd (as trustee of the EBI Income Fund) v Trust Company Ltd and Others*** (2010) 77 ACSR 371, particularly at [114]

[3332] unless a specific prohibition applies

The Panel expects the holder to comply with s601FC(3) or s52(2) of the ***Superannuation Industry (Supervision) Act 1993***.

Defeating conditions

29. Trust schemes should:

    (a) if applicable, include a condition along the lines of s625(3) and

    (b) not include a condition that would, in a bid, contravene ss627 or 629.

Enforceability

30. Any undertakings given in relation to a trust scheme to meet the policies and protections of Chapter 6 or Part 5.1 must be capable of direct enforcement by holders (eg, as in a deed poll in their favour).[~~34~~33]

Withdrawal and right not to proceed

31. Applying the policy of s631, the Panel expects that, if a person announces a trust scheme, the person will proceed and be able to meet their obligations under it.

32. However, it may not give rise to unacceptable circumstances to withdraw from a trust scheme after it is announced, if the withdrawal:

    (a) is timely (and announced in a timely way) and

    (b) is based on a prescribed occurrence[~~35~~34] or a condition included when the trust scheme was first announced.

Remedies

33. The Panel has a wide power to make orders (including remedial orders) if a trust scheme gives rise to unacceptable circumstances, including cancelling agreements.

Publication History

First Issue	7 April 2004
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[~~34~~33] ***Archaean Gold***

[~~35~~34] ss652C(1) and (2)