Australian Government

Takeovers Panel

REWRITE OF GN 1 ON UNACCEPTABLE CIRCUMSTANCES

DRAFT GN ON RECOMMENDATIONS AND UNDERVALUE STATEMENTS

PUBLIC CONSULTATION RESPONSE STATEMENT

20 SEPTEMBER 2010

Introduction

On 20 April 2010, the Takeovers Panel released a Consultation Paper seeking public comments on:

- a rewrite of GN 1 (Unacceptable Circumstances), which also added guidance in relation to reverse takeovers and
- a draft GN on Recommendations and Undervalue Statements.

Comments on the Consultation Paper were due by 21 May 2010. The Panel received four substantive submissions in response to the rewrite of GN 1 and two substantive submissions in response to the draft Undervalue GN. The Panel thanks those who made submissions.

Consistent with the Panel's published policy on responding to submissions, this paper sets out the Panel's response to the public consultation process and its conclusions on the main comments received from respondents.

Main comments received and Panel's conclusions

GN 1: UNACCEPTABLE CIRCUMSTANCES

Should other examples be included in GN 1?

Comment

The Consultation Paper asked whether further examples were necessary. One submission suggested that some of the examples in paragraph 18 should be clarified.

Response

The Panel has clarified the examples.

Should reverse takeovers be the subject of a separate guidance note?

Comment

Example 8 of paragraph 31(b) of GN provided guidance in relation to reverse takeovers. The Consultation Paper asked whether further guidance was necessary. Two respondents thought that the Panel should issue separate guidance on reverse takeovers. One of them submitted that this would assist to "*dispel the confusion and uncertainty which we believe has been brought about by the Panel's decision in Gloucester Coal Limited 01R*".[1]

Response

Gloucester Coal 01, [2] and its review in *Gloucester Coal and 01R,* is the only occasion on which the Panel has considered whether the effect of a reverse takeover is unacceptable. It is appropriate to note in GN 1 that there may be circumstances in which a reverse takeover may be unacceptable either because it disenfranchises shareholders or "locks-up" the bidder and adversely affects competition. In future, if further applications raising reverse takeover issues are considered, the Panel may reconsider providing more guidance in a separate guidance note.

When is a reverse takeover unacceptable?

Comment

One respondent submitted that a reverse takeover may also be unacceptable if there was a material effect on control of the bidder, and *"the 20% threshold is a useful guide for determining when bidder shareholder approval may be necessary"*.

Response

While the Panel agreed that a reverse takeover may be unacceptable when there was a material effect on control of the bidder, and has amended example 8 of paragraph 31(b),[3] it considered that unacceptability was fact-specific and it was not prepared to state categorically the 20% threshold.

Comment

One respondent submitted that the Panel should clarify *"that the mere fact of an acquisition being a reverse takeover does not on its own result in the need for bidder shareholder approval or a no superior proposal condition"* and submitted that a reverse takeover should be defined as *"a transaction orchestrated by the target under which, at least, the target or persons who control it acquire control of the bidder"*.

Response

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[1] [2009] ATP 9
[2] [2009] ATP 6
[3] See now paragraph 32(b)

The Panel was not prepared to limit the example at this time. As noted, a reverse takeover is fact-specific and may be unacceptable because of its effect irrespective of who orchestrated it.

DRAFT GUIDANCE NOTE: RECOMMENDATIONS AND UNDERVALUE STATEMENTS

Should the Panel issue a guidance note?

Comment

One respondent submitted that guidance was not necessary, and the Panel should not second-guess directors. The assessment of value was subjective, it submitted, and the Panel should not apply an objective test which puts it in the shoes of the directors.

Response

The Panel considered that guidance would be useful to the market. It did not think it was second-guessing directors on valuation issues to question an undervalue statement that may be incomplete or provide insufficient information to allow target shareholders to assess the merits of the proposal.

Basis for an undervalue statement

Comment

One respondent submitted that the requirement to set out the basis for an undervalue statement in a target's statement was an unjustified extension of the requirement under the Act to give reasons for a recommendation. One respondent supported the Panel requiring the basis of an undervalue statement.

Response

The Panel has replaced the expression *"basis"* with *"reasons"* in the guidance note.

Undervalue statements prior to target's statement

Comment

One respondent submitted that target directors should provide the reasons for making an undervalue statement at the same time as making the undervalue statement and queried the Panel's approach in paragraph 8(b) of the draft guidance note, which permitted target directors to make a recommendation that included an undervalue statement together with a statement that *"the basis for the recommendation will be disclosed later"*.

Response

Requiring the reasons in all cases at the same time as an undervalue statement may unnecessarily limit the ability of target directors to provide useful information to shareholders. The guidance note continues to state that, if more work is needed to finalise the analysis underlying an undervalue statement, the reasons for the recommendation can be disclosed later, but the Panel amended paragraph 8(b) to make it clear that:

- directors should bear in mind that the market will assume that the reasons are soundly-based and reasonable and
- later disclosure can only be adopted if it is consistent with continuous disclosure obligations.

Recommendations for reasons other than value

Comment

One respondent submitted that a recommendation for qualitative reasons should only be made in unusual circumstances, and where *"directors recommend that a bid be rejected for reasons other than value, it is important that:*

- *the recommendation be soundly based and*
- *target shareholders and the market are told expressly that the directors have not determined whether the bid is at a premium or discount to the fair value of target shares."*

Response

The Panel has amended paragraph 12 of the guidance note to make it clear that recommending a bid be rejected for qualitative reasons may be possible only in unusual circumstances and that target directors *"should bear in mind that the market is likely to assume in this situation that there has been no quantification of a premium or discount to the bid."*