

Guidance Note 1: unacceptable circumstances

Overview

This Guidance Note discusses when the Takeovers Panel may make a declaration of unacceptable circumstances under section 657A of the Corporations Act 2001 (Cth) and some of the matters which the Panel will take into account in making such a declaration. In particular it provides guidance on the circumstances the Panel may consider unacceptable. The note however, provides guidance only and each situation will need to be assessed in light of its own facts, matters and circumstances.

If the Panel makes a declaration of unacceptable circumstances it may then decide whether or not to make orders to correct those unacceptable circumstances. The Panel's Guidance Note 4 on Enforcement and Remedies discusses the use and effect of orders and other remedies available to the Panel.

The Panel aims to correct unacceptable circumstances as quickly and cost effectively as possible, and ensure that the outcome of takeover proposals are decided by informed shareholders who have confidence in the integrity of Australia's market for corporate control.

Power to declare unacceptable circumstances

1.1 Subsections 657A(1) to (3) of the Corporations Act 2001 (Cth)¹ (**Corporations Act**) provide:

- “(1) *The Panel may declare circumstances in relation to the affairs of a company to be unacceptable circumstances. Without limiting this, the Panel may declare circumstances to be unacceptable circumstances whether or not the circumstances constitute a contravention of a provision of this Act.*
- (2) *The Panel may only declare circumstances to be unacceptable circumstances if it appears to the Panel that the circumstances:*
- (a) *are unacceptable having regard to the effect of the circumstances on:*
 - (i) *the control, or potential control, of the company or another company; or*
 - (ii) *the acquisition, or proposed acquisition, by a person of a substantial interest in the company or another company; or*
 - (b) *are unacceptable because they constitute, or give rise to, a contravention of this Chapter or of Chapter 6A, 6B or 6C.*

The Panel may only make a declaration under this subsection, or only decline to make a declaration under this subsection, if it considers that doing so is not against the public interest after taking into account any policy considerations that the Panel considers relevant.

- (3) *In exercising its powers under this section, the Panel:*
- (a) *must have regard to:*
 - (i) *the purposes of this Chapter set out in section 602; and*
 - (ii) *the other provisions of this Chapter; and*
 - (iii) *the rules made under section 658C; and*
 - (iv) *the matters specified in regulations made for the purposes of paragraph 195(3)(c) of the Australian Securities and Investments Commission Act 1989; and*
 - (b) *may have regard to any other matters it considers relevant.*

In having regard to the purpose set out in paragraph 602(c) in relation to an acquisition, or proposed acquisition, of a substantial interest in a company, body or scheme, the Panel must take into account the actions of the directors of the company or body or the responsible entity for a scheme (including actions that caused the acquisition or proposed acquisition not to proceed or contributed to it not proceeding).”

1.2 Subparagraphs 657A(3)(a)(iii) and (iv) above direct the Takeovers Panel (**Panel**) to take certain things into account when exercising its powers. However, there are currently no rules made under section 658C, or regulations for the purposes of paragraph 195(3)(c).

¹ In this Guidance Note, statutory references are to the Corporations Act, unless otherwise indicated.

Objectives of Chapter 6

1.3 Section 602 provides:

“The purposes of this Chapter are to ensure that:

- (a) the acquisition of control over:
 - (i) the voting shares in a listed company, or an unlisted company with more than 50 members; or*
 - (ii) the voting shares in a listed body; or*
 - (iii) the voting interests in a listed managed investment scheme,**takes place in an efficient, competitive and informed market; and**
- (b) the holders of the shares or interests, and the directors of the company or body or the responsible entity for the scheme:
 - (i) know the identity of any person who proposes to acquire a substantial interest in the company, body or scheme; and*
 - (ii) have a reasonable time to consider the proposal; and*
 - (iii) are given enough information to enable them to assess the merits of the proposal; and**
- (c) as far as practicable, the holders of the relevant class of voting shares or interests all have a reasonable and equal opportunity to participate in any benefits accruing to the holders through any proposal under which a person would acquire a substantial interest in the company, body or scheme; and*
- (d) an appropriate procedure is followed as a preliminary to compulsory acquisition of voting shares or interests or any other kind of securities under Part 6A.1”.*

1.4 The Panel also looks at the other provisions of Chapter 6. In general, the Panel regards those other provisions as embodying the policies of section 602 in the form of protections (especially prohibitions) or procedures designed to promote those policies.

What are unacceptable circumstances?

1.5 There is no definition of unacceptable circumstances in the Corporations Act. Instead, the Panel is directed to use section 602, Chapter 6 of the Act and the public interest as reference points to determine when circumstances are unacceptable. Parliament considered that black letter law would be insufficient to deal with all the possible circumstances that might defeat the policy of section 602. Accordingly, it empowered the Panel, as an expert body, to address the issues by considering whether circumstances are unacceptable in terms of those reference points.

1.6 Section 657A provides that the Panel may only declare circumstances to be unacceptable having considered their effect on the control or potential control of a company² or on an acquisition or proposed acquisition of a substantial

² The concept of control of a company is discussed in the Panel decisions in *Grand Hotel Group* [2003] ATP 34, *Kaefer Technologies Ltd* [2004] ATP 8 and *Village Roadshow Ltd (No 2)* [2004] ATP 12.

interest in a company³ or whether they contravene Chapters 6, 6A, 6B or 6C (**Takeovers Chapters**). Typically this requires the Panel to consider both the issue of legal compliance and that of the effect of the relevant circumstances not only on persons affected by transactions which influence control but also on the market, in each case in the light of the policy of section 602 and the protections of Chapter 6. The existence of unacceptable circumstances does not depend on the occurrence of unacceptable conduct or any intention to bring about an objectionable state of affairs.

- 1.7 Conduct may give rise to unacceptable circumstances as well as contravening the Corporations Act. However, if a breach does not give rise to a mischief of a kind relevant to section 602, it may not lead to unacceptable circumstances, particularly where it does not infringe on the protections afforded by the relevant provision.⁴
- 1.8 Conversely, conduct may not contravene Chapter 6 (for example, because it is within an exception in section 611), but may still be regarded by the Panel as bringing about unacceptable circumstances. In these cases, the Panel will consider not only the policies set out in section 602, but also the policy rationale for the relevant exception to determine whether the relevant conduct causes unacceptable circumstances.⁵ This may require consideration of legislative policies other than those of Chapter 6, and the relationship which Parliament has established between those policies and the policies of Chapter 6.⁶
- 1.9 The Panel's power to declare circumstances to be unacceptable is very wide and does not require the Panel to decide that anyone caused the relevant circumstances or carries any blame for them, or that any person's conduct or any particular acquisition of securities, was unacceptable. A state of affairs may be unacceptable due to inadvertence, and despite the best of intentions. It is useful to contrast this with the first formulation of the Panel's powers which required it to determine whether or not specific conduct or acquisitions were unacceptable.
- 1.10 Although circumstances concerning takeover bids account for the majority of matters before the Panel, section 657A applies to unacceptable circumstances in situations that do not involve bids. Examples are rights issues, buybacks and resolutions to approve acquisitions of shares and reductions of capital

³ The concept of acquisition of a substantial interest is discussed in the Panel decisions in *Pinnacle VRB Ltd (No 11)* [2001] ATP 23 and *Anaconda Nickel Ltd (No 16-17)* at [35].

⁴ For example, if a breach of the disclosure obligations in Chapter 6 is remedied by additional or clarificatory information which is included in a supplementary statement, it will cease to constitute unacceptable circumstances: see *Email Limited (No 1)* [2000] ATP 3 at [33]. However, if an erroneous view would be propagated by certain information, and that view would be difficult to correct, then it may give rise to a mischief of a kind that constitutes unacceptable circumstances: see *Email Limited (No 2)* [2000] ATP 4 at [48].

⁵ See for example the discussion in *InvestorInfo Ltd* [2004] ATP 6 of the exemption in section 611 item 10 concerning rights issues and their underwriting and the discussion in *Village Roadshow Ltd (No 2)* [2004] ATP 12 concerning unacceptability and exceptions generally.

⁶ This is an example of another relevant matter to which the Panel may have regard in exercising its powers under section 657A as referred to in paragraph 657A(3)(b).

which involve effects on control or potential control. Alternatively, unacceptable circumstances may arise in the context of an acquisition or proposed acquisition of a substantial interest, or a contravention of a provision of a takeovers chapter, such as a failure to lodge substantial holding notices or to respond to tracing notices in accordance with Chapter 6C.⁷

- 1.11 Schemes of arrangement may also involve the acquisition of substantial interests. The Panel is likely to be the primary forum for resolving disputes in trust schemes. However, as schemes of arrangement for companies are normally regulated by the Courts, the Panel expects that the situations where it would be appropriate for it to be involved in company schemes of arrangements will likely be uncommon.
- 1.12 The Panel examines all the relevant circumstances of a particular matter to determine whether those circumstances are unacceptable. The conclusion of the Panel will depend on the state of the material before the sitting Panel members in the event of an application being made.
- 1.13 Indeed, it is possible for apparently similar facts to give rise to different conclusions. Take the example of a target which has not issued its target's statement in response to a bidder's statement within the allowed period. On its own this would appear to be unacceptable because it would be a contravention of Chapter 6 and it would be contrary to the policies in paragraphs 602(a) and (b)(ii) and (iii). However, if the evidence showed that the target needed additional time to prepare the statement to include some more and better information (for example more recent audited financial results), the Panel might not consider the circumstances to be unacceptable. The Panel might be even less inclined to declare the circumstances to be unacceptable if the target had kept the market informed, and was working to gain the information within that period.

Public Interest

- 1.14 The Panel is required to take the *public interest* into account when considering whether or not to make a declaration of unacceptable circumstances. *Public interest* is a difficult term to define. However, the Panel takes its significance to mean, for the Panel, that the Panel should not merely consider the commercial interests and convenience of the parties and their shareholders directly involved in a dispute before the Panel. Rather, the Panel should consider wider issues such as: what signals its decisions to make, or not make, a declaration of unacceptable circumstances in individual cases, will send to the market and the wider investing community.
- 1.15 If such signals may improve the standards in the market and the future efficiency of the market for control in Australia, consideration of the public interest in sending such signals may add weight to the choice of making, or

⁷ See, for example, *Austar United Communications Limited* [2003] ATP 16, *Grand Hotel Group* [2003] ATP 34, *National Can Industries Limited* [2003] ATP 35 and *Village Roadshow Limited* [2004] ATP 4.

not making, a declaration of unacceptable circumstances. Indeed, in some cases, it may sway an otherwise on-balance decision definitely one way or another.

Types of unacceptable circumstances

Inhibition of efficient, competitive an informed market

- 1.16 The first broad category of unacceptable circumstances is where an efficient, competitive and informed market in the relevant securities is inhibited.⁸ Such circumstances may result from a false market, a deficiency of information, or the premature lockout of rival bids, among other things. Anything which leads to a false market in any securities affected by a bid or transaction may be in this category. Where there is a deficiency of information, the circumstances will often, but not always, also fall into the second category.
- 1.17 Similarly, the Panel considers that an efficient, competitive and informed market requires a person who makes a public statement in connection with a market activity concerning that person's proposed actions or intentions⁹ to adhere to their statement, although there are limits to this principle.¹⁰
- 1.18 Other actions may compromise an efficient market, such as a bidder failing at all times to have a reasonable basis to believe that it will be able to pay the cash component offered in a bid,¹¹ or failing to issue consideration securities,¹² or refusing to reverse transactions which had been entered into in error and were promptly notified.¹³

Other examples

- (i) GN 7 "Lock-Up Devices" – where these devices, such as break fees, no-talk agreements, no-shop agreements and asset lock-ups have an adverse effect on competition in the market.¹⁴
- (ii) GN 13 "Broker Handling Fees" – to the extent that excessive fees can impair a broker's proper duty to advise their clients may cause unacceptable circumstances. However, the Panel recognises that where these fees encourage brokers to bring bids to the attention of clients they can encourage an efficient, competitive and informed market.
- (iii) GN 14 "Financing Arrangements" – in order for the market to be efficient, competitive and informed a bidder must, from the time of announcement of a bid with a cash consideration element until conclusion of the bid, have a reasonable grounds to expect that it will have

⁸ Not wherever such a market is absent, since it is impossible to legislate for a liquid or competitive market. The aim here is to ensure that investors are not misled and competition is not stifled.

⁹ See *Novus Petroleum Ltd (No 2)* [2004] ATP 9; *BreakFree Ltd 04R* [2003] ATP 42 and *Prudential Investment Company of Australia Ltd.*[2003] ATP 36, 49 ACSR 147.

¹⁰ Some of those limits were discussed in *Prudential Investment Company Of Australia Ltd* (where the statement was really ASIC speaking through a bid condition) and *BreakFree Ltd 04R* (where the statement was an unauthorised assessment by one person of the proposed behaviour of others).

¹¹ As discussed in GN 14.

¹² See *Colonial First State Property Trusts (No. 3)* [2002] ATP 17.

¹³ As in *Pinnacle VRB Ltd (No 11)* [2001] ATP 23.

¹⁴ See also the Panel decisions in *Normandy Mining Ltd (No 3)* [2001] ATP 30, 20 ACLC 471; *Ballarat Goldfields NL* [2002] ATP 7, 41 ACSR 691; *Ausdoc Group Ltd* [2002] ATP 9, 42 ACSR 629; and *National Can Industries Ltd 01R* [2003] ATP 40, 48 ACSR 427.

sufficient funding arrangements in place to satisfy full acceptance of its offers when the bid becomes unconditional.¹⁵

- (iv) GN 15 “Listed Trust and Managed Investment Scheme Mergers” – transactions which are within section 657A(2) but which are not otherwise directly regulated by the Corporations Act should be conducted according to the policies and protections of Chapter 6 to ensure an efficient, competitive and informed market.
- (v) Uncertainty concerning the effect of conditions of a bid,¹⁶ or whether a bid would be made and its terms¹⁷ would make the market inefficient and uninformed.
- (vi) Failure to correct inaccurate media reports so allowing the market to trade on an ill-informed basis may compromise the existence of an efficient, competitive and informed market.¹⁸

Misinformation

- 1.19 A second category of unacceptable circumstances is where holders do not have the *information* necessary to make an informed decision or are misled about the relevant transaction. The decision could be whether to accept a bid or whether to approve a transaction. The Panel treats misinformation or false information being given to the market the in the same way as a shortage of information, because the effects are likely to be similar and may be just as harmful.
- 1.20 Any failure to provide information reasonably expected by the market and relied on to make decisions about a bid, such as notices under the ASX Listing Rules or sections 643, 644 or 630,¹⁹ may cause unacceptable circumstances.
- 1.21 Particular issues relate to disclosure of the identity of parties concerning their interests in a company. These can arise in the context of disclosure in transaction documents (such as bidders’ statements, prospectuses or notices of meeting) or in compliance with the substantial holding notice and tracing provisions in Chapter 6C.²⁰

Other Examples

- (i) Where a bid is made for shares in a company organised on co-operative principles, the intentions of the bidder concerning the future relations between target and the current shareholders as suppliers to, or customers of, the target may be so critical as to require them to be formed and disclosed.²¹
- (ii) The re-use of reports obtained for a different purpose can lead to misinformation if it is not clear who was responsible for the report and who the report is intended to advise.²²

¹⁵ See also *Taipan Resources NL (No 3)* [2000] ATP 17, 37 ACSR 173; *Pinnacle VRB Ltd (No 6)* [2001] ATP 11, 38 ACSR 564, 19 ACLC 1249; *Taipan Resources NL (No 10)* [2001] ATP 5; *Taipan Resources NL (No 11)* [2001] ATP 16; *Goodman Fielder Ltd* [2003] ATP 1, 44 ACSR 254.

¹⁶ See *Brisbane Broncos Ltd (No 3)* [2002] ATP 2; *SA Liquor Distributors* [2002] ATP 22, 47 ACSR 249.

¹⁷ See *Realestate.com.au Ltd* [2001] ATP 1, 37 ACSR 218, 19 ACLC 618; *Cobra Resources Ltd* [2003] ATP 23, 45 ACSR 487.

¹⁸ *Novus Petroleum Ltd (No 2)* [2004] ATP 9

¹⁹ Supplementary bidder’s statements, supplementary target’s statements, notices regarding satisfaction of defeating conditions and substantial holders’ notices.

²⁰ See *Austar United Communications Ltd* [2003] ATP 16, 45 ACSR 456; *National Can Industries Ltd 01* [2003] ATP 35, 48 ACSR 409, *Grand Hotel Group* [2003] ATP 34 and *Village Roadshow Ltd* [2004] ATP 4, 22 ACLC 578.

²¹ *Mildura Co-operative Fruit Company Ltd* [2004] ATP 5, see also *SA Liquor Distributors Ltd* [2002] ATP 22, 47 ACSR 249..

²² *Great Mines Ltd* [2004] ATP 1, 22 ACLC 261; *Novus Petroleum Ltd* [2004] ATP 2, 22 ACLC 436.

- (iii) The failure to provide the qualifications of the person who prepared, and the basis for comparison used, in making a comparison between a bid price and “comparable” transactions may make those comparisons misleading.²³
- (iv) Circumstances in which a party possesses and uses “inside” information, may (leaving aside the issue of whether the use of that information amounts to a breach of the insider trading provisions) give rise to unacceptable circumstances.²⁴

1.22 In all cases, the Panel will be concerned to ensure that information provided is adequate, and with sufficient time for the relevant people to make a proper decision.²⁵

Reasonable and equal opportunities

1.23 A third category of unacceptable circumstances is where holders of voting shares or units do not have *reasonable* and *equal opportunities* to take part in *benefits* accruing to holders of shares or units in connection with a transaction effecting control.

1.24 *Reasonable* means that holders have adequate time to consider, sell, vote etc, and are not exposed to pressure tactics or maximum acceptance conditions (in bids) or uncommercial pricing.²⁶ *Equality* means equal value, not identical dealing. The *opportunity* is often to participate directly, by selling their shares or units in a bid or buy-back or taking up shares in a rights offer, but it can also be an opportunity to participate indirectly, by voting on a transaction.²⁷ The *benefits* can be given directly or in collateral transactions,²⁸ and need not take the straightforward form of a price for shares.²⁹ Conversely, this principle does not require that all transactions provide a premium to the existing market or be equally attractive to all shareholders.³⁰

Other Examples

- (i) GN 12 “Frustrating Action” – conduct by the directors of a target that frustrates a bid can deprive target shareholders of an opportunity to share in the benefits of that bid.³¹
- (ii) GN 13 “Brokers Handling Fees” – brokers’ handling fees may involve an impermissible collateral benefit where the broker shares the fee with its client.

²³ *Goodman Fielder Ltd (No 2)* [2003] ATP 5, 48 ACSR 353.

²⁴ National Companies and Securities Commission Policy Statement 105 “Discretions vested in the Commission” at [15], [18]-[22].

²⁵ See for example GN 16 at [16.10] and *Data & Commerce Ltd.*[2004] ATP 7.

²⁶ For example, pricing may be a concern in a rights issue: this and other related issues are considered in *InvestorInfo Ltd* [2004] ATP 6 at [38] and also see *Data & Commerce Ltd* [2004] ATP 7.

²⁷ See, for example, section 611 item 7: some aspects of this issue were considered in *PowerTel Ltd (No 1)* [2003] ATP 25.

²⁸ For instance the price of the other parcel of shares in *Sagasco Amadeus Pty Ltd v Magellan Petroleum Australia Ltd* [1993] 177 CLR 508, or by acquiring another asset for an overvalue (see *Alpha Healthcare* [2001] ATP 13, 39 ACSR 238; *PowerTel Ltd (No 3)* [2003] ATP 28.

²⁹ For example in *Re Pivot Nutrition Pty Ltd* [1997] ATP 1, 15 ACLC 369, concerning the takeover bid by Pivot for Gibson’s, shareholders of Gibson’s were in the first instance denied a full price for their shares because the Pivot obtained the transfer of a key supply arrangement from Gibson’s to another subsidiary of Pivot. This deflated the Gibson’s share price and so Pivot was able to make a significantly lower offer than it might otherwise have had to if Gibson’s had retained the valuable supply contract.

³⁰ See *PowerTel Ltd (No 2)* [2003] ATP 27.

³¹ See also *Pinnacle VRB Ltd (No 8)* [2001] ATP 17, 39 ACSR 55, 19 ACLC 1252; *Bigshop.com.au Ltd (No 2)* [2001] ATP 24; *Normandy Mining Ltd (No 6)* [2001] ATP 32.

Unacceptable Circumstances

- (iii) If the effects of a share buy-back are unreasonable, they may lead to unacceptable circumstances. In determining whether a buy-back is unreasonable, the Panel will consider the effect on the control of the company, or another company, and the provisions of section 602, in particular, whether the shareholders have been given sufficient information and afforded a reasonable and equal opportunity to participate in any benefits.³²
- (iv) Shareholders of a company may be deprived of an equal opportunity if securities in a target are acquired by an associate of the target or its directors as part of a defence to a takeover bid, and the associate subsequently obtains a benefit from the target company, such as an interest in the assets of the target or a material trading arrangement with the target.³³
- (v) If a rights issue (particularly if it is underwritten) does not afford genuine accessibility to the benefits of the rights issue to all shareholders, then shareholders may not have a reasonable opportunity to share in the benefits.³⁴

Compulsory acquisition

- 1.25 A fourth category of unacceptable circumstances is where appropriate procedures are not followed leading up to compulsory acquisition of securities under Part 6A.1.
- 1.26 Part 6A.1 relates to compulsory acquisition of bid class securities in the aftermath of a bid under Chapter 6.³⁵ An example would be a bid which satisfied the preconditions to compulsory acquisition in subsection 661A(1) only because of acquisitions which did not reflect an arms-length approval of the bid terms.

Contraventions of the Corporations Act

- 1.27 Unacceptable circumstances may arise from a contravention of a provision of the Takeovers Chapters. This is not the same as whether someone has committed a criminal offence, as there may be unacceptable circumstances despite the people involved having intended to comply with the legislation and having defences available to them.
- 1.28 Not every contravention of every provision of the takeover chapters will give rise to unacceptable circumstances. It is inappropriate to catalogue contraventions which will (or will not) have that effect. However, it is usually the case that a contravention of the central prohibition in section 606 will be unacceptable,³⁶ although there may even be cases where an honest and accidental contravention of this provision will not be unacceptable, if it has not had any relevant adverse effect.³⁷ For example, it is likely that a contravention of a provision mentioned in section 612 will be unacceptable, because it tends to lead to an uninformed market or unequal access to the benefits offered under a bid.

³² *Village Roadshow Ltd (No 2)* [2004] ATP 12; Australian Securities and Investments Commission Policy Statement 110 "Share buy-backs" at [110.48]-[110.49].

³³ National Companies and Securities Commission Policy Statement 105 "Discretions vested in the Commission" at [32].

³⁴ See *InvestorInfo Ltd* [2004] ATP 6 and *Data & Commerce Ltd* [2004] ATP 7.

³⁵ It also relates to securities which are convertible into bid class securities, but the bidder cannot compulsorily acquire those under Part 6A.1.

³⁶ For example, *Taipan Resources NL (No 9)* [2001] ATP 4, 38 ACSR 111; *Anaconda Nickel Ltd (No 18)* [2003] ATP 18; *Anaconda Nickel Ltd (No 19)* [2003] ATP 20; *Trysoft Corporation Ltd* [2003] ATP 26.

³⁷ As in *ISIS Communications Ltd* [2002] ATP 10.

1. 29 A breach of a general disclosure provision, such as paragraph 636(1)(g) or (m) or subsection 638(1), will usually give rise to unacceptable circumstances. Material breach of a specific disclosure provision will also be generally unacceptable. The distinction between the two types of provisions is that the general disclosure provisions look to the overall adequacy of shareholders' information, but the specific provisions refer to subsets of that overall information requirement. A breach of the general provision, by definition, says that shareholders do not have the information that they reasonably require for their decision, and therefore the breach must be unacceptable. However, a deficiency of one or more specified items, which are subsets of the overall information requirement may not affect the total information adequacy unless the specific deficiency was material in the particular circumstances.
- 1.30 Minor failures to comply with timing provisions may be unacceptable, particularly if other persons may change their positions in reliance on compliance with those provisions: examples are waiver of conditions and extensions of conditional bids (subsections 630(3), 650C(2) and 650F(1)). Similarly, a failure to obtain and disclose required consents to use or refer to statements by others (see sections 636(3) and 638(5)), although technical, is likely to be unacceptable because it affects the liability provisions of the Corporations Act in relation to bidders' and targets' statements.³⁸

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³⁸ See *Mildura Co-operative Fruit Company Ltd* [2004] ATP 5.