



**Tuesday, 18 December 2007**

**Takeovers Panel Publishes Revised Guidance Notes:**

- **Guidance Note 8 (Matters Procedures);**
- **Guidance Note 16 (Correction of Takeover Documents);**
- **Guidance Note 17 (Rights Issues);**
- **Guidance Note 19 (Insider Participation in Control Transactions)**

The Takeovers Panel announced today that it has published revised versions of its Guidance Notes 8, 16, 17 and 19.

The Panel advised that, like some other minor reviews of Guidance Notes, it has not published the Guidance Notes in a draft form for comment because it considers that the changes made are not substantive and involve no major change of policy. Rather the changes are part of the Panel's planned process of reviewing the currency and consistency of its Guidance Notes.

While it has not published the revised Guidance Notes as drafts, the Panel advised that it would, as always, be interested to receive comments on them.

The specific changes to the Guidance Notes are shown in marked-up form in the Annexure to this Media Release.

**Guidance Note 8 (Matters Procedures)**

Guidance Note 8 provides guidance on how the Panel conducts its proceedings and the requirements for parties to those proceedings.

Guidance Note 8 has been updated to provide guidance on how the Panel is likely to consider the timing of any application when assessing such issues as whether or not to commence proceedings, make interim orders, make costs orders etc.

In general, the Panel (among other things) weighs up the possible prejudice to each of the parties affected by any action it might take. When an application is made late in a process, the prejudice to one or other party is likely to be greater and the Panel is likely to require more cogent reasons to take that action.

**Guidance Note 16 (Correction of Takeover Documents)**

Guidance Note 16 provides guidance on circumstances that the Panel is likely to declare to be unacceptable in relation to deficiencies in takeovers documents and how the Panel may use corrective statements to remedy unacceptable circumstances. The Panel's primary focus is on the quality and accessibility of the information going to target

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shareholders and the market, and remedying in the most appropriate manner any unacceptable circumstances in relation to that information.

The Guidance Note has been updated to provide guidance on the Panel's approach to disclosures offered to the Panel as bases for it declining to commence proceedings. The Panel notes that such disclosures (if adequate) have the benefit of reaching shareholders earlier than if the Panel is required to conduct proceedings.

#### **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.

The Guidance Note has been updated in relation to the disclosure that a company undertaking a rights issue should give the market to avoid the risk of a declaration of unacceptable circumstances. In particular, the Panel took into account the new "cleansing notice" disclosure regime under section 708AA of the Act.

#### **Guidance Note 19 (Insider Participation in Control Transactions)**

Guidance Note 19 provides guidance on situations where there is involvement or potential involvement by the management, directors or external advisers of a target company with the bidder in a takeover bid or potential bid for the target company.

The reference in the Guidance Note to the decision of the Full Court of the Federal Court in *Australian Pipeline Limited v Alinta Limited* [2007] FCAFC 55 has been removed after the High Court's announcement of the orders it made on 13 December 2007 following the appeal made by the Attorney General of the Commonwealth of Australia.

Copies of the revised Guidance Notes are available on the Panel's website: [Guidance](#).

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#### Guidance Note 8 – Matter Procedures

A new paragraph has been inserted in the “Overview” section of the Guidance Note as follows:

“The Panel is likely to take into account the timing of any application when assessing such issues as whether or not to commence proceedings, make interim orders, make costs orders etc. In general, the Panel (among other things) weighs up the possible prejudice to each of the parties affected by any action it might take. When an application is made late in a process, the prejudice to one or other party is likely to be greater and the Panel requires more cogent reason to take that action.”

And new paragraphs 8.86 to 8.88 have been inserted as follows:

#### “Timing of applications

8.86 Parties should ensure that they do not delay unreasonably making an application. The time periods in takeovers are short. While the Panel endeavours to work quickly and informally, there are limits as to the time within which it can sensibly consider issues put before it and give parties sensible and reasonable time to make submissions on those issues.

8.87 In general, applicants should take it that the shorter a period that is left between the time of an application and the time at which the Panel must make a decision to act, the higher the onus will be on an applicant to demonstrate the harm which may eventuate if the Panel does not take the action sought. Similarly, a higher onus will be on the applicant to convince the Panel that taking the action sought will not cause material harm.

8.88 However, the Panel is also aware that if it merely adopted the policy above, an applicant may be discouraged from pursuing alternatives to Panel proceedings in order to avoid appearing to have delayed unreasonably if those alternatives fail and an application is subsequently made. Additionally, there could be an incentive for other parties to delay negotiations with a potential applicant, which could resolve some or all issues in dispute, in order to make the applicant appear to have delayed unreasonably if an application is subsequently made. Therefore, the Panel will normally seek to assess all relevant circumstances relating the applicant’s timing of its application when faced with such issues. See also Guidance Note 5 paras 5.9 – 5.13 and Guidance Note 16 paras 16.48 – 16.50.”

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#### Guidance Note 16 – Correction of Takeovers Documents

A new paragraph has been inserted in the “Overview” section of the Guidance Note as follows:

*“This Guidance Note (with such adaptation as appropriate) applies also to disclosures offered to the Panel as bases for it declining to commence proceedings. The Panel notes that such disclosures (if adequate) have the benefit of reaching shareholders earlier than if the Panel is required to conduct proceedings.”*

Paragraph 16.22 has been amended as follows:

“16.22 Once it has commenced proceedings, the Panel will generally require a corrective statement to make a standard set of statements that advise recipients that the statement:

- (a) is a corrective statement;
- (b) corrects false, misleading, confusing or inadequate information in the earlier document;
- (c) identifies the issue or information which required correction; and
- (d) was made at the request of the Takeovers Panel; ~~and.~~
- ~~(e) was made to correct what would otherwise have been unacceptable circumstances.”~~

## Guidance Note 17 - Rights Issues

A new footnote has been inserted in paragraph 15 as follows:

*“15. A rights issue which is brought before the Panel will be liable to a higher level of scrutiny by the Panel and carry an increased risk of a declaration of unacceptable circumstances if:*

- (a) it results, or is likely to result, in no readily discernible benefit to the company;*
- (b) the company has no compelling need for funds; and*
- (c) it leads to an effect on control of the company.<sup>4</sup>*

*<sup>4</sup> However, as discussed at paragraph 67, the Panel is likely to expect fuller disclosure in relation to a rights issue that may have a material effect on control than one which may only slightly increase the voting power of an existing controller.”*

Paragraphs 57 to 67 have been amended as follows:

### *“Disclosure*

*57. The Panel considers that a company raising capital by way of a rights issue must be conscious of the increased importance of disclosure in circumstances where shareholders are considering not merely the desirability of making a further investment in the company, but also the control implications of the rights issue and whether to take steps to protect against the dilution of their existing holding.<sup>2</sup>*

*~~5758. Therefore, a rights issue ~~which is~~ undertaken without full and meaningful disclosure of the consequences of any potential effect on control will carry a heightened risk of a declaration of unacceptable circumstances. ~~Without this information, shareholders are unable to make an informed decision whether to invest under the rights issue with a clear understanding of the issuer’s business, financial performance, plans and prospects and the effect of the issue on their investment.~~~~*

*59. Rights issue disclosure may be made in a variety of forms under Part 6D.2:*

- (a) a full prospectus (with or without a profile statement) under sections 709(1) and (2);*
- (b) a “transaction specific” prospectus under section 713,*
- (c) an Offer Information Statement under section 709(4), or*
- (d) a “cleansing notice” under section 708AA.*

*60. Exceptionally, a rights issue may also be made without disclosure as required under Part 6D.2, if it meets the requirements of section 708 (ie, is a small scale offering, an offering to professional investors, etc).*

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<sup>2</sup> While the disclosure being discussed here concerns control effects, it is important to bear in mind that shareholders also need an understanding of the issuer’s business, financial performance, plans and prospects whether from disclosure in relation to the rights issue under Part 6D.2 of the Corporations Act or from the issuers' previous continuous disclosure documents.

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~~61. It is normally ASIC's role to consider whether or not a prospectus provides sufficient disclosure as to the rights and values attached to securities being offered under that prospectus. However, applications to the Panel concerning rights issues have frequently asserted that one or more of the grounds for making a declaration of unacceptable circumstances is that the prospectus has not made adequate disclosure as to the rights and interests attaching to the securities offered under the rights issue prospectus.~~ The Panel considers it appropriate to take into account the legislative intention for the disclosure required, the type of document used, and the adequacy of disclosure in respect of the control effects of the rights issue ~~prospectus~~ in considering whether unacceptable circumstances exist.

#### Disclosure of control effects

~~59~~62. It is important that the reasons behind the choice and roles of any supporting shareholders, underwriters and sub-underwriters be disclosed to shareholders. If the possible control scenarios can be and are properly disclosed, including the identities of those who may end up owning any shortfall, and the future shareholding pattern of the issuer is frankly discussed, shareholders will be able to make informed decisions on participating, or not participating, in the rights issue and the potential control consequences. Such information would be expected to be found in a full prospectus or cleansing notice because of the specific requirements in the Act. The Panel thinks it is likely that such information would be required in a transaction specific prospectus. Because an Offer Information Statement is used for small capital raisings, there may be limited control implications. But that may not be so for a company with low capitalisation, and therefore the circumstances may suggest that such information should be disclosed.<sup>3</sup>

~~60~~63. In addition, the intentions for the company of persons who may obtain control of it as a result of the rights issue should also be disclosed, to the extent that the information is able to be ascertained by the company ~~(this. This information should be feasible for the company to obtain in relation to underwriters and sub-underwriters but not necessarily in relation to major shareholders whose voting power may increase simply by taking up their entitlement in a non-underwritten offer while other shareholders do not).~~

~~61~~64. If the company proposes to institute a dispersion strategy to sell any shortfall of rights, it should include a discussion ~~in the~~ as part of its disclosure ~~document~~ of the potential effects on control of the company which its proposed dispersion strategy might cause.

#### **Prospectus**

~~62~~65. ~~The Panel considers that a company raising capital by way of a rights issue must be conscious of the increased importance of disclosure in circumstances where shareholders are considering not merely the desirability of making a further investment in the company, but also whether to take steps to protect against the dilution of their existing holding. As such,~~ If a rights issue is undertaken without a ~~lodged disclosure~~ document under Part 6D.2, it is highly likely to face increased scrutiny of the disclosure made to shareholders. ~~In such cases the onus is likely to fall onto the company to assure the Panel positively that adequate~~

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<sup>3</sup> In the matter of Anaconda 02-05 [2003] ATP 04, [70], [72].

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~~disclosure has been made. It is likely, also, that the onus will be on the company to rebut assertions that there has been inadequate disclosure. The Panel is advised that it would only be in very unusual circumstances that an exception in section 708 would apply to permit a company to offer a rights issue without a lodged disclosure document.~~

6366. ~~The Panel does not see its role as being a primary regulator of the disclosure content of prospectuses. Therefore the Panel considers that while it may~~ While in any application the Panel will advise what aspects of a rights issue ~~offer document it finds deficient, it is undesirable and infeasible for it to provide extensive or~~ disclosure it finds unacceptable, it will not provide detailed guidance to a company as to what will constitute complete disclosure ~~once. This is because it is not~~ the Panel ~~has found that's~~ role to be a primary regulator of the disclosure ~~document for the~~ content of rights ~~issue is deficient. issues.~~ Further, a Panel decision about ~~a disclosure document~~ documentation used for making the rights issue in respect of any item of disclosure other than those raised in the application or reasons.

#### ~~Extent~~ Disclosure of the extent of the control effect

6467. ~~The size and significance of the effect, or likely effect, of the rights issue on the control of the company may also be a relevant consideration in assessing whether or not a rights issue (and any related arrangements or circumstances) gives rise to unacceptable circumstances. While any rights issue which affects control (and which, therefore, must rely on the exemptions in items 10 and 13 of section 611) is within the scope of this Guidance Note, rights issues which~~ Rights issues which may cause effective control to pass to a shareholder, or an underwriter, will receive ~~more~~ closer scrutiny than those which only slightly increase the voting power of an existing controller. For example, the Panel ~~considers that it is likely to be more in the public interest to make a declaration of unacceptable circumstances~~ would expect fuller disclosure in relation to a rights issue which may increase a person's voting power from 10% to 40%, than in relation to ~~otherwise similar circumstances in relation to~~ a rights issue which ~~increases~~ may increase a person's voting power from 51% to 55%."

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#### Guidance Note 19 – Insider Participation in Control Transactions

Paragraph 5 has been amended as follows:

- “5. The Panel expects that all relevant parties will comply with their legal, fiduciary and statutory duties (and seek advice on these as required), but its primary concern is to determine whether unacceptable circumstances exist in the context of a takeover bid, not to determine whether there has been a breach of directors' or employees' duties or other obligations under the law. The Panel does not regard it as being its role to determine and enforce such duties and obligations.*