

GUIDANCE NOTE 5: RESTRAINING DISPATCH OF DOCUMENTS

Overview

Parties may seek amendments to takeover documents (generally, a bidder's statement) on the ground that its disclosure is defective or that there are structural or procedural defects in the bid.

The party seeking amendment may seek to restrain dispatch of the document to shareholders by applying to the Panel.

There is a balance between the parties negotiating amendments themselves and the time the Panel needs to assess any issues remaining after negotiation.

The Panel's approach is guided by:

- that the document should be complete and not misleading and that the Panel wishes to raise the quality of disclosure;
- the balance of convenience in relation to restraint of dispatch, balancing the harm likely to arise from the various alternative courses. The Panel needs to be satisfied that there is a significant risk that the document will be misleading in a material respect and that further subsequent disclosure to be a sufficient remedy;
- the Panel prefers issues to be settled by negotiation rather than by Panel decisions and considers favourably a party's behaviour where they have made an honest and active attempt to resolve issues by negotiation.

The Panel suggests a procedure under which:

- the party seeking amendments notifies the Panel executive in advance of the identities of the party and the general nature of the issues;
- the executive is briefed in writing during the negotiations;
- applications to restrain dispatch are made at least five days before the first day on which the document can be dispatched;
- negotiations continue even after the application is made; and
- announcements about the issues are evenhanded.

Specific guidance is provided as to the matters which should be canvassed in an application for restraint of dispatch of a document.

What this Guidance Note is about

- 5.1 In this Guidance Note the Takeovers Panel (**Panel**) discusses applications seeking orders to restrain the dispatch of bidders' statements. Where relevant, the approach set out here in relation to those documents will be applied in similar cases, such as restraining dispatch of targets' statements.

Why applications are made

- 5.2 A target company often seeks amendments of a bidder's statement during the period between the date that the statement is served on the target and the date that the statement and offer are posted to target shareholders. A bidder must post its bidder's statement and offers to offerees within 14 to 28 days after the statement is served on the target. The most frequent ground on which the target seeks to restrain dispatch is that the disclosure in the statement is defective, but structural and procedural defects in the bid may also be raised.

Approach

The prejudice of short notice

- 5.3 Bidders and targets can and should resolve as many issues as possible before the statement is posted. If issues remain unresolved after negotiations between the parties, the target may refer them to the Panel. It is important to note that the longer the parties take to negotiate, the less time there is for the Panel to consider the remaining issues before the bidder is entitled to post the statement. An application for interim relief at short notice prejudices the ability of the Panel to consider fully the issues before it must make a decision whether to restrain dispatch. Therefore it may prejudice the applicant. In some situations there may be valid reasons why a party has delayed making an application, and the Panel will take these into account. However, in general, the shorter the time available between the application and the need for a decision, the higher the threshold of alleged harm that the applicant must demonstrate.

Policy considerations

- 5.4 The Panel's approach is guided by a number of considerations. First, a bidder's statement and offer should be complete and not misleading when posted. A major objective of the Panel is to raise the quality of disclosure in takeover documents. Bidders who attempt to make the minimum possible disclosure risk having their disclosure declared by the Panel to be unacceptable. The test for information is not what the bidder's board prefers to disclose, but what offerees and their advisers would reasonably expect to be told in order for all shareholders to make informed investment decisions.

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On the other hand, targets should be reasonable in the information which they claim is material to their shareholders' decision.¹

- 5.5 Second, the Panel will determine where the balance of convenience lies in relation to restraint of dispatch. This will involve assessing the harm that would be suffered by the bidder if dispatch of its bidder's statement is held up, and the harm that might arise if the bidder were allowed to dispatch. Dispatch of a bidder's statement will usually only be held up where the Panel is satisfied that the statement contains defects which may not be adequately remedied by a supplementary bidder's statement (with any necessary extension of the closing date of the bid) or correction in the target's statement. Therefore, any application seeking restraint of dispatch will need to show clear and serious issues relating to the adequacy of the bidder's statement and not merely omissions from it.² The Panel will seek to balance the harm likely from the alternative courses. Generally before restraining dispatch the Panel would have to be satisfied that there is a significant risk that the bidder's statement will be misleading in a material respect, or that a material omission is unlikely to be remedied by the provision of a supplementary bidder's statement.
- 5.6 However, if a document is delayed, the short time that the Panel normally takes to consider matters means that the hardship likely to be suffered by a bidder from restraining the dispatch of its bidder's statement is not likely to be great. In addition, parties have an incentive to cooperate while negotiations are ongoing before documents are dispatched, and bidders must have an incentive to prepare high quality documents initially. On the other hand, if a supplementary bidder's statement is found to be necessary after the bidder's statement is dispatched, it will often be necessary to require the bid to be extended and/or to allow accepting offerees to withdraw acceptances.
- 5.7 Third, it is generally preferable for these issues to be settled by negotiation between the parties, rather than by the Panel. Accordingly, the Panel, in its proceedings, will seek as much as possible to prevent bidders or targets being prejudiced as a result of ongoing genuine negotiations concerning the content of bidders' statements. For example, if an application is made, but negotiations appear to be continuing, the Panel may decide to conduct proceedings but delay the issue of a brief until the parties have reached the point where negotiation will not lead to resolution of the disputes.³

¹ Also refer generally to Guidance Note 16 "Correction of Takeover Documents", especially [16.9]-[16.10].

² Note that an omission may render the content of the document misleading, see *Mildura Co-operative Fruit Company Limited* [2004] ATP 5; *BreakFree Ltd 04(R)* [2003] ATP 42; *ASIC v National Exchange Pty Ltd* [2004] FCAFC 90.

³ See, for example, *Alpha Healthcare Limited* [2001] ATP 13, 39 ACSR 238; *BreakFree Ltd 02* [2003] ATP 30 and *SSH Medical Limited* [2003] ATP 32.

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- 5.8 The Panel will regard it as a factor in a party's favour that they have demonstrated good faith and made an active attempt to resolve issues in the negotiation process. Parties will help demonstrate their good faith by responses in the correspondence between parties that:
- (a) are prompt;
 - (b) contain fuller rather than minimal information and explanation;
 - (c) seek reasonable compromise rather than taking technical points; and
 - (d) seek to address the actual issues raised by the other party.

Procedures

- 5.9 The following suggested procedures are a compromise between cutting off negotiations between parties before they can resolve the issues and allowing them to run on and leave insufficient time for a Panel to consider properly an application for interim relief.
- 5.10 First, a party which believes that it may make an application to the Panel at short notice should advise the Panel Executive (**Executive**) well in advance (during the first week after service of the bidder's statement) of the identity of the parties and the general nature of the matter. Parties should consult the Executive on the practical and logistical aspects of an application at the same time. This advice will be treated as confidential, but will allow the Executive to ascertain the availability of Panel members in advance of an application being made.
- 5.11 Second, any party to discussions of this kind may brief the Executive on the issues and progress of negotiations over the content of the bidder's statement. This should be done in writing, and should be copied to the other parties to the negotiations. This can usually be done by copying to the Executive correspondence passing between the parties. The parties may also discuss the issues in the matter with the Executive. The Executive will normally give information provided in this way to sitting members, as soon as an application is made and a sitting Panel is appointed. Information provided this way will be confidential under section 127 of the Australian Securities and Investments Commission Act 2001 (Cth), but should be expected to be identified to the other parties to an application if one is made. Views expressed by the Executive do not bind the Panel.
- 5.12 Third, an application to restrain dispatch of a bidder's statement should normally be made not less than 5 (five) calendar days before the first day on which the offer documents could be posted, having regard to the requirements of section 633 of the Corporations Act 2001 (Cth) and any other restraints on the bidder. A target which leaves it later than this to apply runs a real risk that a sitting Panel will not be able to satisfy itself in time that dispatch should be restrained. On the other hand, if a bidder prints offer

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documents although it has been given five days notice of an application, a sitting Panel may form the view that the bidder has voluntarily assumed the risk that its printing costs will be lost.

- 5.13 Fourth, parties should not abandon negotiations over the content of the bidder's statement just because an application has been made. The sitting Panel will generally consent to the parties withdrawing from the proceedings, if the issues have been resolved by arm's-length negotiation.⁴
- 5.14 Fifth, any stock exchange and media announcements about such an application to the Panel (its making, substance and withdrawal) should be scrupulously neutral about the merits of each party's position, so that the announcements do not themselves become a bar to a settlement. Wherever relevant, an announcement should state that negotiations are continuing, or that the withdrawal was negotiated. The Panel's general approach, as set out in its Procedural Rules, is that announcements concerning ongoing applications should only be made where required for an informed market.

Content

- 5.15 Applicants should ensure that, in addition to the matters required by the Takeovers Panel Rules for Proceedings (especially Rule 2.1), an application for restraint of dispatch of documents sets out clearly:
- (a) the specific deficiencies in the document, identifying each deficiency as either an omission or a misstatement and explaining why it is deficient;
 - (b) the harm done by dispatching the document in its current form;
 - (c) the harm likely to be suffered by the bidder if it is restrained;
 - (d) the attempts by the applicant to resolve the issues with the bidder;
 - (e) why a supplementary document would be an inadequate remedy;
 - (f) the time the applicant considers would be needed to resolve the issue; and
 - (g) any other information needed to consider the application.

Publication History

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⁴ See Rule 14 of the Takeovers Panel Rules for Proceedings for the requirement for Panel consent to withdraw and the discussion of withdrawal in *SSH Medical*.