



# PANEL CLARIFIES DISCRETION TO ACCEPT UNDERTAKINGS IN LIEU OF ORDERS

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Legal Briefings - By **Simon Reed** and **Geoff Kerrigan**

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The Takeovers Panel has recently clarified its position in relation to when undertakings in lieu of orders will be accepted.

## SUMMARY

A minor amendment to Guidance Note 4 has been proposed to clarify that the timing of the offer of the undertaking is relevant to the Panel's exercise of discretion to accept it.

## BACKGROUND

Panel proceedings can be resolved by undertakings from the parties in lieu of the Panel making a declaration of unacceptance circumstances and orders.

Undertakings can allow proceedings to be resolved earlier in the Panel process and may be preferable from a communications/investor relations perspective (but noting that the Panel will publicly disclose that it is minded to make a declaration of unacceptable circumstances but for the undertaking if it has communicated its intention to make a declaration to the parties).

## PROPOSED AMENDMENTS TO GUIDANCE NOTE 4: REMEDIES GENERAL (GN 4)

GN 4 currently provides that an undertaking can be offered at any time during a Panel proceeding.

Following feedback from a post matter review, a minor amendment is proposed to GN 4 to further clarify that the timing of the offer to provide an undertaking is relevant to the Panel's exercise of the discretion to accept the undertaking. GN 4 already states that the Panel is 'more receptive' to undertakings offered earlier in the process, making the proposed amendment more of a clarification than reflecting any change in the Panel's position.

## **FURTHER CONSULTATION**

The Panel is also seeking consultation on whether further guidance is needed and whether the current policy of accepting undertakings at 'any stage' of the process provides a disincentive to undertakings being provided earlier in proceedings.

On the second point, there may be legitimate reasons for parties not offering an undertaking until all parties have participated in the proceedings and the Panel has communicated its intention to make a declaration (eg clarifying and narrowing the issues in dispute).

In our experience, the timing of any offer of an undertaking is not overly influenced by the Panel's statements in GN 4 regarding timing but is primarily motivated by having the Panel proceedings resolved as quickly as possible.

The full consultation paper is available from the Panel's website. Comments are due by 14 October 2016.



## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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