PANEL LIFTS THE VEIL ON AGGREGATED INTENTION STATEMENTS

30 June 2014 | Australia, Brisbane, Melbourne, Perth, Sydney
Legal Briefings – By **Simon Reed**

SUMMARY

- The Panel's decision in Bullabulling Gold provides a framework for the disclosure of aggregate shareholder intentions in a manner the Panel considers is consistent with ASIC's truth in takeovers policy.
- The Panel appears to be saying that a shareholder's intention can only be used in an aggregate shareholder intention statement if they have formally given their consent.
- As the giving of formal consent can attract statutory liability, one might now expect to only see aggregate shareholder intention statements (which relate to the intentions of a significant number of different shareholders) used on rare occasions.

BACKGROUND FACTS

In April 2014, Norton Gold Fields announced an unsolicited off-market takeover bid for Bullabulling Gold. On the same day, Norton released its bidder's statement, which included a statement that '*shareholders representing 6.6% of Bullabulling Shares have already indicated their intention to accept the Offer*' (**Acceptance Statement**).

In its communication with shareholders, Bullabulling included a statement that '*holders of 41.8% of Bullabulling's Shares have indicated that they DO NOT intend to accept the Offer*' (**Rejection Statement**).

Norton filed an application with the Takeovers Panel, submitting that the Rejection Statement had the potential to mislead Bullabulling shareholders.

DECISION

The Panel identified several concerns in relation to the Rejection Statements:

- Bullabulling did not inform all the rejecting shareholders how the statements were to be used,
- Bullabulling did not obtain consents from the rejecting shareholders in accordance with Panel policy or the Corporations Act,
- Bullabulling shareholders were not given sufficient information about how the rejection statements were compiled and the qualifications to which some statements were subject, and
- Bullabulling shareholders were not informed that Bullabulling considered that the rejection statements were no more than statements of the rejecting shareholders' intentions at certain points in time and were not intended to be statements of the rejecting shareholders' future actions.

In relation to the Acceptance Statements, the problems identified by the Panel were:

- neither the Acceptance Statement or Norton's bidder's statement disclosed that one of the accepting shareholders was an associate of the bidder,
- whilst the relevant shareholders consented to the acceptance statements being included in the bidder's statement in accordance with the Corporations Act, the details of this consent was not included in the bidder's statement (including any relevant qualifications), and
- based on the subsequent conduct of one shareholder, it was not apparent that the relevant shareholders understood that their statement would be relied on.

Both parties addressed the Panel's concerns by making supplementary disclosure.

REASONS FOR DECISION

In its reasons, the Panel considered that, in the circumstances, the relevant shareholders were free to act contrary to their stated intention. On that basis, the aggregate shareholder intention statement was not able to be relied on and was therefore inherently misleading and should not have been released.

Further, it appears that the Takeovers Panel and ASIC (who was a party to the proceedings) expect that parties making an aggregate shareholder intention statement in a takeover document will obtain the formal consent of the relevant shareholders to use their intentions in this way.

In the Panel's view, unacceptable circumstances can be avoided by ensuring that the shareholders who provide their intentions are aware of:

- the intended use of their intention statement, and
- the possible implications of making the statements under the truth in takeovers policy (namely that they will be held to those intentions).

In addition, it seems an aggregate shareholder intention statement must (at a minimum) disclose:

- the manner in which the aggregate shareholder intention statement was compiled,
- whether the relevant shareholders have given their consent to the disclosure of the aggregate shareholder intention statement, and
- whether any shareholders qualified their intention statements.

If the above requirements are not met, the statement cannot be relied on (and therefore should not be made).

COMMENTARY

The application by the Panel of the truth in takeovers policy to the Rejection Statement in this matter represents an extension of the truth in takeovers policy. Previously, the policy only applied to acceptance statements from substantial holders. This is something that the Takeovers Panel noted back in 2003 in *Re BreakFree (Nos 3 and 4)*, where the Panel stated:

> “A statement about an aggregate number of shares made up of individual parcels which themselves are not substantial holdings is therefore a different thing to a statement about a parcel which itself is a substantial holding. We are of the view that the statements concerning substantial holders in [the truth in takeovers policy] are intended to apply in the latter case, but not the former."

The Panel’s decision in Bullabulling has a number of consequences, both for shareholders providing their intentions to a bidder or target and the party issuing the aggregate shareholder intention statement.

The Panel indicated that consent should have been obtained by Bullabulling from the rejecting shareholders to the use of their statements to make the aggregate shareholder intention statement that was the Rejection Statement. This is significant because, under the Corporations Act, shareholders who formally consent to the inclusion of a statement in a takeover document take responsibility for that statement. However, it is not immediately clear how responsibility for an aggregate shareholder intention statement might be apportioned amongst individual shareholders who give their consent in respect of their own intentions (unless they and their shareholding level were, for example, publicly identified).

For bidders and targets – the decision increases the level of disclosure required in relation to an aggregate shareholder intention statement. Practically, shareholders may now be less willing to allow their intentions to be disclosed in this way, as it appears that those shareholders may no longer be able to maintain anonymity and may be liable for the statement both under the Corporations Act and the truth in takeovers policy, due to the Panel’s apparent requirement that their formal consent be provided.

As a result of this decision, one might now expect to only see aggregate shareholder intention statements (which relate to the intentions of a significant number of different shareholders) used on rare occasions.

KEY CONTACTS

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

SIMON REED

PARTNER, PERTH

+61 8 9211 7797
Simon.Reed@hsf.com

LEGAL NOTICE