

REVISED GUIDANCE: TAKEOVERS PANEL WELCOMES REMEDY PROPOSALS

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Legal Briefings - By **Simon Reed** and **Sam Kings**

SUMMARY

- The Takeovers Panel is proposing to make changes to its policy on remedies generally (Guidance Note 4).
- The key focus of the proposed changes is to clarify that the Takeovers Panel welcomes efforts by the parties to resolve any potential unacceptable circumstances (in lieu of a declaration and orders) at any stage of the process.
- The Takeovers Panel has invited comments on the proposed changes by 10 April 2015.

REMEDIES

Guidance Note 4 assists market participants to understand the Takeovers Panel's approach to remedies generally.

As outlined in the Guidance Note, if the Takeovers Panel makes a declaration of unacceptable circumstances, it may make orders to protect rights or interests affected by the unacceptable circumstances or to ensure (as far as possible) that a bid proceeds as if the unacceptable circumstances had not occurred.

The Takeovers Panel may also make interim orders (these operate for up to 2 months and do not require a declaration of unacceptable circumstances to be made first).

CLARIFICATION THAT EFFORTS TO REMEDY POTENTIAL UNACCEPTABLE CIRCUMSTANCES WELCOMED

Parties to a Takeovers Panel proceeding (or a potential proceeding) can offer to remedy any potential unacceptable circumstances (by varying the terms of the deal or offering to provide additional disclosure etc) at any time before a declaration has been made. However, according to the Consultation Paper on Guidance Note 4, feedback received by the Takeovers Panel in a post-matter review indicated that parties may not be aware of this.

To address this, the Takeovers Panel is proposing to revise Guidance Note 4 to clarify that it welcomes offers by the parties to remedy potential unacceptable circumstances at any stage of the proceedings and that an agreed resolution (such as by undertakings) may 'obviate the need for the Panel to make a declaration'.

Comments have also been sought on whether it is appropriate for the Takeovers Panel to decline to make a declaration, even if it is satisfied that unacceptable circumstances exist, if the parties offer to remedy the unacceptable circumstances.

HELPFUL REINFORCEMENT (BUT THE IMPACT MAY BE LIMITED)

The proposed changes to Guidance Note 4 help clarify that parties may offer to remedy potential unacceptable circumstances at any stage of the process and will assist market participants to better understand the Takeovers Panel's approach to remedies. If implemented, the proposed changes would reconfirm the Takeovers Panel's commitment to finding practical, commercial solutions rather than resorting to enforcement action.

However, it will be interesting to see whether the changes reduce the number of Takeovers Panel declarations. Many market participants (and their advisers) are likely already aware that they can offer proposed remedies, and so these changes will only benefit those who were previously unaware that they could pursue this course of action.

Parties to a proceeding (or a potential proceeding) should also carefully consider whether offering a 'compromise position' is likely to facilitate a more favourable outcome. In particular, respondents who are considering offering undertakings to the Panel Executive before proceedings have commenced (with a view to persuading the Takeovers Panel not to commence proceedings), may wish to consider whether, if the proposed undertakings are rejected and proceedings commenced, the suggested compromise will merely constitute a 'floor' for any subsequent orders the Takeovers Panel may consider making.

It is interesting that the Takeovers Panel has also invited comments on whether it is appropriate for it to decline to make a declaration, even if it is satisfied that unacceptable circumstances exist, if the parties offer to remedy the unacceptable circumstances. Historically (and as outlined in Guidance Note 4), the Takeovers Panel's approach has been to accept undertakings that address any potential unacceptable circumstances (on the basis that this serves the public interest) unless it wants to send the market a signal.

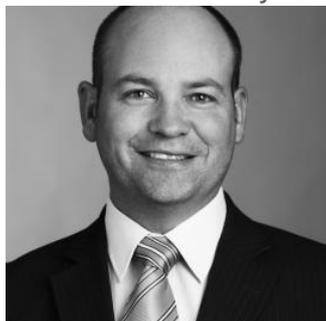
This approach is not objectionable and indeed is consistent with the Takeovers Panel resolving disputes as expeditiously and informally as possible. Any material divergence from this position (noting that the Takeovers Panel can already accept undertakings and still make a declaration of unacceptable circumstances where it considers it appropriate to do so, as it did in *Mildura Co-operative Fruit Company Limited* [2004] ATP 5) should be approached with caution as it would likely dilute one of the key incentives for respondents to offer undertakings in the first place.

NEXT STEPS

The Takeovers Panel has invited comments on the proposed changes by 10 April 2015.

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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