HERBERT SMITH FREEHILLS

TAKEOVERS PANEL PUBLISHES GUIDANCE NOTE ON SHAREHOLDER INTENTION STATEMENTS

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Legal Briefings – By **Simon Reed, Geoff Kerrigan**

The Takeovers Panel has recently published a new guidance note on statements of intention made by shareholders in the context of a takeover bid or scheme of arrangement.

SUMMARY

- The Panel has recently finalised a new guidance notice (Guidance Note 23 – Shareholder Intention Statements) (**GN 23**) on statements made by shareholders regarding their intended actions in the context of takeovers and schemes.
- GN 23 addresses the Panel's concern that shareholder intention statements may be inappropriately used as a lock-up device, or expressed in a manner which is unclear or overstates the shareholder's actual intentions.
- GN 23 provides target board and shareholders with guidance on the steps which should be taken to minimise the risk that the disclosure of shareholder intention statements gives rise to unacceptable circumstances.
- However, GN 23 does not contain any specific guidance on whether a shareholder intention statement evidences an association or relevant interest between the shareholder providing the statement and the bidder more generally - meaning that this remains an area of continued exposure for bidders and target shareholders.

OVERVIEW

A shareholder intention statement is any statement regarding the intention of a shareholder in the context of a control transaction, such as:

"*HoldCo, a holder of 15%, intends to accept the offer by Bidder in the absence of a superior proposal.*"

"*HoldCo, a holder of 15%, intends to vote in favour of the scheme of arrangement in the absence of a superior proposal.*"

Such statements are often used by both bidders and targets in their communications with shareholders (both in standalone ASX announcements and formal takeover documents).

GN 23 is intended to address the Panel's concern that such statements may have the effect of precluding the opportunity for competing proposals or may be expressed in ways that may be misleading, or at least confusing.

Following a consultation process (in response to which Herbert Smith Freehills and a number of other organisations made submissions), the Panel has published the final version of GN 23. The final version of GN 23 does not materially differ from the consultation draft, other than some variations firming up the Panel's position on issues relating to the timing of acceptances and disclosure.

The requirements of the final version of GN 23, as well as summary of the key amendments from the consultation draft, are summarised below.

POTENTIAL FOR SHAREHOLDER INTENTION STATEMENTS TO BE MISLEADING

GN 23 notes that there is a risk that a statement of shareholder intention will be misleading, or at least confusing, if it is expressed in terms that are unclear in meaning (such as a statement of 'present' intention), subject to qualifications which are ambiguous or published without detailed information regarding the relevant shareholding.

TERMS OF SHAREHOLDER INTENTION STATEMENTS

The Panel is guided by the following when assessing whether the terms of a shareholder intention statement gives rise to unacceptable circumstances:

- if a shareholder states an intention to accept after a certain date, whether that

shareholder has accepted the offer prior to that date,

- if a shareholder provides an intention statement before the offer period opens and the aggregate voting power of that shareholder and the bidder exceeds 20%, whether the intention statement is subject to no superior offer emerging – the Panel has said that, in such circumstances, the absence of a 'no superior offer' qualification is likely to give rise to unacceptable circumstances, and

- if a shareholder intention statement is subject to no superior offer emerging, whether the shareholder has allowed a reasonable time to pass for a superior offer to emerge, which the Panel will generally consider to be 21 days after the offer has opened.

In relation to the third bullet point, in response to consultation, the Panel clarified that a reasonable period for allowing a superior offer to emerge would generally be 21 days (although a shorter timeframe may be reasonable if the shareholder intention statement is made after offers have opened, or where the statement is made following a variation in the bid).

Bidders should consider communicating this requirement to any shareholders who provide a statement of intention subject to no superior offer emerging, to mitigate the risk of unacceptable circumstances arising inadvertently through early acceptance of the bid by the relevant shareholder.

DISCLOSURE OF SHAREHOLDER DETAILS

The Panel also stated that it will be guided by the following when assessing whether the manner in which a shareholder intention statement is disclosed gives rise to unacceptable circumstances:

- whether the identity of the shareholder to whom the statement is attributed has been disclosed,

- whether the details of the holding in number and percentage terms have been disclosed,

- if the shareholder intention statement has been published in a bidder’s statement or target’s statement, whether the relevant shareholder has consented to the inclusion of the statement (the Panel also considers the same principles apply outside formal takeover documents (e.g. ASX announcements) and will look more closely at statements made in that context if the consent of the relevant shareholder has not been obtained), and

- if, in the context of an aggregate shareholder intention statement (i.e. holders of a total of X% of ordinary shares have stated their intention to accept into the bid), whether the

individual holdings of each shareholder have been separately identified in the statement and whether each of those shareholders has provided consent.

In response to consultation, the Panel removed a materiality qualifier in relation to the second and fourth bullet points above, meaning that a bidder or target disclosing a statement of shareholder intentions (either for an individual shareholder or in aggregate) should ensure that all of the above points are satisfied in relation to each relevant shareholder, regardless of the size of that shareholder's shareholding.

We expect that the Panel's expectation that bidders and targets will identify and obtain individual consents from each shareholder whose shareholding is included as part of an aggregate intention statement will lead to a decline in the use of aggregated intention statements. This may have been the intended regulatory outcome.

ASSOCIATION AND RELEVANT INTEREST IMPLICATIONS

The consultation paper also sought comment on whether additional guidance was needed on if a shareholder intention statement evidences an association between the relevant shareholder and the bidder in all cases (i.e. even if the requirements outlined above are satisfied).

Divergent views were expressed in submissions on whether such a statement gives rise to a relevant interest or association between the relevant shareholder and the bidder more generally, and consequently the extent to which clarification was required. Ultimately, the Panel elected not to provide specific guidance on this point (although it did give more prominence to its concern that such statements may have the effect of precluding the opportunity for a completing proposal) in the final version of the guidance note.

Therefore, this remains an area of some uncertainty (particularly given the differing views provided) and thus potential exposure for bidders, targets and target shareholders.

This article was written by Simon Reed, Partner and Geoff Kerrigan, Solicitor, Perth.

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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