

THE RISE OF SHAREHOLDER INTENTION STATEMENTS - BEWARE THE RISKS

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Legal Briefings - By **Rodd Levy** and **Kam Jamshidi**

The tactical importance of shareholder intention statements has been highlighted in a number of recent control transactions.

SUMMARY

- Shareholder intention statements to support takeover bids and schemes are an effective tool for bidders to secure control of targets.
- Takeovers Panel Guidance Note 23 has helped improve market practice in relation to the use of these statements, following a period of uncertainty and inconsistent practice.
- However, ASIC's views on whether soliciting such statements gives rise to an association or relevant interest that may breach the 20% rule gives rise to the risk of intervention.

For bidders these recent examples have highlighted the use of these statements as a tool in securing control of a target. For target boards, they reiterate the importance of staying close to major shareholders in an effort to avoid unexpected actions that may hamstring defence tactics.

However, the use of such statements is not without risk of regulatory intervention.

BACKGROUND

To recap, a shareholder intention statement is a public statement of the intention of a shareholder in relation to a takeover bid or scheme of arrangement. The statement may be that the shareholder intends to accept or reject a proposal and may be subject to clearly stated qualifications.

The Takeovers Panel Guidance Note 23, released in December 2015, was designed to provide market guidance 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. The guidance note identifies the following circumstances as heightening the risk of unacceptable circumstances:

- a shareholder accepting an offer prior to the stated timing in its intention statement,
- 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%, the absence of a 'no superior proposal' qualification is likely to give rise to unacceptable circumstances, and
- if a shareholder intention statement is subject to no superior proposal 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 proposal has opened.

The Panel also provided guidance on the manner in which a shareholder intention statement should be disclosed to avoid giving rise to unacceptable circumstances.

ASIC VIEWS

ASIC voiced a number of concerns during the Panel's consultation process for the Panel's Guidance Note 23. The concerns have since been reiterated in a number of publications from ASIC, including in ASIC's corporate finance reports for the half year ending 31 December 2015 and again for the half year ending 30 June 2016.

In the 30 June 2016 report, ASIC expressed the need for caution in interactions between a proposed acquirer and target shareholder that evidenced more than a mere "canvassing" of the views of major shareholders.

ASIC's core concern appears to be that securing a shareholder intention statement can result in the formation of a relevant agreement, giving a soliciting entity a relevant interest in the shareholder's shares (potentially contravening the 20% rule in section 606).

RECENT MARKET PRACTICE

In the 12 months to 30 June 2016, we saw 9 bids or schemes involve a positive shareholder intention statement and, in all instances, these bids or schemes were successful.

Over the last few months there have been the following instances where shareholder intention statements have been used in control situations (together with two examples we drill down on further below):

Date	Bidder - Target	Shareholder commitment and interesting features
August 2016	Shanghai Pharma and Primavera's scheme proposal to acquire Vitaco	<p>Shareholder representing 15.3% committed to vote in favour in the absence of a superior proposal and subject to the board of Vitaco continuing to recommend the scheme.</p> <p>The shareholder went on to:</p> <ul style="list-style-type: none"> confirm that it did not currently intend to sell its shares prior to the scheme meeting, but reserved the right to do so if it gets an offer from a third party, subject to notifying the bidders and giving them a chance to match; and commit to no shop and no talk exclusivity arrangements.
August 2016	Almonty Industries Inc. takeover bid for ATC Alloys Ltd	Shareholders representing 11.5% indicated an intention to accept the bid approximately two weeks after pre-bid acceptance agreements were entered into with other shareholders representing 19.3%.
October 2016	Independence Group takeover bid for Winward Resources	Shareholder representing 27.44% made an intention statement to accept the offer in the absence of a superior proposal on the later of 21 days after the offer opens and shareholders holding at least 22.67% of the shares accepting the offer, such that the minimum acceptance condition of 50.1% would be satisfied.
October 2016	Steinhoff's scheme proposal to acquire Fantastic Holdings	Shareholders representing 50.8% gave the Fantastic Board an intention to vote in favour of the scheme at the time the proposal was announced.

Overall, we conclude that, based on recent market practice, Guidance Note 23 has been effective in clarifying certain aspects regarding permitted use of shareholder intention statements. The statements provided are more consistent following the guidance and the disclosure available to shareholders is more precise.

GULF ALUMINA

The Panel's Guidance Note got a workout early on in the year, with the Gulf Alumina Panel application in January 2016 resulting in a declaration of unacceptable circumstances.

In that case, shareholders representing 71% of the ordinary shares in Gulf had expressed "a current intention not to accept the Offer" and later a majority of these shareholders stated that they would not accept any improved offer from the bidder other than a "substantially improved offer".

While the Panel did not need to determine the matter, ASIC was supportive of allowing the reference to a current intention, given the statement went on to clearly specify that the intention was not binding and could be subsequently changed.

Separately, the Panel agreed with ASIC's view that it was unclear as to what was meant by a "substantially improved offer", but thought that this issue could be dealt with separately should an improved offer materialise that was not accepted by the shareholders.

UNITY MINING

ASIC is clearly monitoring developments in this space and in May 2016 took steps to intervene in respect of certain intention statements made by a substantial shareholder of Unity Mining.

Unity agreed to a scheme proposal from Diversified Minerals in December 2015 for total cash payments of 2.9 cents a share. Diversified Minerals and its associates held a relevant interest in 13.66% of all Unity shares. In February 2016, Brahman Pure Alpha acquired a substantial holding in Unity of 18.7%.

In a rare example of shareholder activism involving an Australian company, on 18 March 2016, Brahman orally informed the company that it intended to vote against the scheme. Unity published the intention statement on the ASX. Brahman simultaneously requisitioned a shareholders' meeting to replace two existing directors.

On 4 April 2016, Unity received an improved offer from Diversified Mining of 3.2 cents a share. Soon after, Unity received a letter from Brahman that it intended to vote in favour of the scheme if Diversified Mining further increased its offer to 3.3 cents a share, subject to no superior proposal emerging. The next day Diversified Mining agreed with Unity to increase the offer to 3.3 cents.

ASIC intervened in the matter, raising concerns regarding the link between the making of the Brahman statement of intention on 12 April and the improved offer from Diversified Mining on 13 April. ASIC required Unity to issue a supplementary scheme booklet which included ASIC's concerns.

ASIC reserved its position regarding whether it would challenge in court the votes cast by Brahman at the scheme meeting. In exchange, Unity agreed to 'tag' those votes so that they could, if the court considered it appropriate, be excluded in the event that the scheme resolution was not approved by the requisite majorities (absent the tagged votes). The scheme was ultimately approved by the requisite majorities even if the 'tagged' votes had been excluded, so the court did not have to consider whether it was appropriate to exclude the votes.

In its half-yearly corporate finance report, ASIC described the Unity Mining situation and expressed concern that the circumstances evinced an overall agreement or understanding between Diversified Mining and Brahman that was sufficient for Diversified Mining to have obtained a relevant interest in Brahman's 18.7% in breach of the 20% rule (noting the bidder's 13.66% interest). ASIC raised this concern notwithstanding that the communications by the acquirer and substantial shareholder were addressed to the scheme company rather than each other.

CONCLUSION

It would appear that greater certainty has been achieved with respect to the detail covered off in the Panel's Guidance Note on shareholder intention statements. However, what appears to be emerging is a risk of intervention by ASIC at a more fundamental level in respect of whether these statements give rise to a relevant interest for those who solicit such statements.

On ASIC's reasoning, bidders that are actively involved in securing the intention statements should expect a heightened level of scrutiny, particularly where the intention statements are coupled with other pre-bid support mechanisms (such as pre-bid call options or acceptance/voting agreements).

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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