

# TRUTH IN TAKEOVERS - LATEST ASIC COMMENTS

05 September 2018 | Australia  
Legal Briefings - By **Rodd Levy**

ASIC’s focus on truth in takeovers, already high, is increasing, as evidenced by its latest corporate finance report.

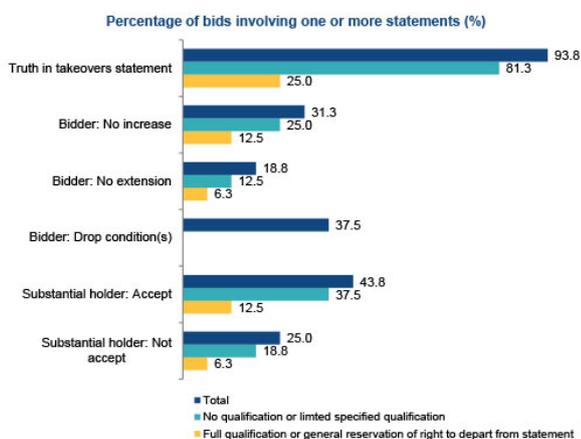
## ASIC’S FOCUS ON TRUTH IN TAKEOVERS

The latest ASIC corporate finance report for the six months to June 2018 gives some insights into ASIC’s attitude to recent issues concerning the truth in takeovers policy.

ASIC says that over the six month period it has intervened on “numerous” statements made by market participants.

## FREQUENCY OF STATEMENTS

ASIC says that truth in takeover statements have become “commonplace” with statements by bidders and target shareholders the most frequent. This is demonstrated in the following table that ASIC included in its report.



This table shows that the vast majority of takeover bids include one or more truth in takeover statements and that, in almost three out of four takeovers, statements are made by substantial shareholders that they will or will not accept the bid.

## **ASIC'S TIPS FOR MAKING TRUTH IN TAKEOVERS STATEMENTS**

Given that truth in takeover statements have the potential to influence the market significantly, ASIC's report offers the following tips for making truth in takeover statements:

- Remind any authorised spokesperson of the risk of making unqualified statements.
- Monitor media reporting daily throughout the transaction.
- If a target shareholder will not be bound under ASIC Regulatory Guide 25 (that is, the person holds less than 5%), ensure this is clear in any statement published. Seek clarification if necessary.
- Ensure any consents for third-party statements cover the form and context of the statement's use.
- If a third-party statement is uncertain or unclear, do not publish it merely because the person has provided consent to do so.
- Do not refer in aggregate to non-uniform intention statements or qualifications that are different.
- Present qualifications to statements clearly and with equal prominence to the statement.
- Exercise caution when inviting shareholders to make intention statements in circumstances that may imply there is a relevant agreement regarding voting or acceptance that may breach the 20% rule in section 606.

## **CLARIFICATIONS REQUIRED**

ASIC's report gives two examples where ASIC sought clarifications.

In the first, a newspaper article cited comments made by a CEO of an acquirer under a proposed scheme of arrangement. The article quoted the CEO as saying the acquirer "will not move the offer price" without any qualification. After a query from ASIC, the acquirer issued a clarification that it reserved its right to increase the offer.

In the second example, a bidder announced shareholder intention statements for over 20% of the target's shares. While checking whether the bidder had exceeded the takeover threshold, ASIC discovered that the bidder's announcement failed to disclose that the shareholders reserved their rights to depart from the statements. ASIC required immediate clarification.

## UNACCEPTABLE CIRCUMSTANCES

During the six month period, ASIC also applied to the Takeovers Panel for a declaration of unacceptable circumstances concerning Finders Resources Limited, where a major shareholder and two of the target's directors departed from earlier statements that they did not intend to accept the bid by Eastern Field Developments Limited.

This matter has been the subject of other articles published by HSF<sup>1</sup> and the decision is currently subject to judicial review. But, it shows the willingness of ASIC to hold to account the makers of statements.

## POLICY REVIEW ANNOUNCED

ASIC has flagged that it will be reviewing the policy set out in RG 25. The policy was published in 2002 and ASIC states that the review will consider how RG 25 could be updated to provide greater certainty to the market about the application and enforceability of the truth in takeovers policy.

We will await the policy review with interest.

## ENDNOTES

1. Paul Branston and George Durbridge, [‘The Takeovers Panel finds a reason to enforce shareholder non-acceptance statement in Finders matter’](#), 31 May 2018; Paul Branston and George Durbridge, [‘Finders keepers? The long-running Finders Resources takeover saga continues’](#), 30 July 2018.

## 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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