

From: s 22
To: s 47F
Cc: [Takeovers Panel Executive](#)
Subject: Shareholder intention statements - first subcommittee meeting [SEC=UNCLASSIFIED]
Date: Wednesday, 11 March 2015 11:47:58 AM
Attachments: [Memo to subcommittee.docx](#)

Dear Panel members

At the November National Panel day the Panel decided to form a sub-committee to consider the issue of shareholder intention statements. We have drafted the attached memo outlining the three (broad) policy options and key issues.

We suggest holding our first meeting in the next two weeks and propose the following agenda for the meeting:

1. Who should we approach to participate in the subcommittee? Should we invite representatives from ASIC?
2. Initial responses to the three options identified in the memo
3. Discussion of key issues
4. Next steps

Please let us know if you are still happy to be on the subcommittee and of your availability in the next two weeks for a meeting of approximately 1 hour.

Kind regards

s 22 | Lawyer | Takeovers Panel

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Australian Government

Takeovers Panel

MEMO

Date: 11 March 2015

To: Subcommittee

From: Panel Executive

SUBJECT: SHAREHOLDER INTENTION STATEMENTS

Threshold issue

1. The threshold issue is whether further market guidance on shareholder intention statements is required or whether ASIC's existing 'truth in takeovers' policy and past Panel cases provide sufficient guidance. See Annexure A (the November Panel Day paper) for background information.

Three policy options

2. If something should be done, the executive sees broadly three options to deal with the issues that arise from shareholder intention statements.

Option one: ASIC revises its 'truth in takeovers' policy

3. ASIC could revise its 'truth in takeovers' policy so that intention statements are not binding on shareholders. This change would need to be ASIC-driven, likely through a public consultation of amendments to ASIC's Regulatory Guide 25.

Option two: Panel provides guidance on shareholder intention statements

4. The Panel could issue guidance on how it views shareholder intention statements and how it will treat the issues arising from them (see Annexure A). One option is to formulate a 'safe harbour' for bidders seeking to procure shareholder intention statements. **Explain – framework so not unacceptable

Option three: seek a mandatory follow-on bid rule

5. ASIC and the Panel could lobby for legislative reform to introduce a mandatory follow-on bid. This could alleviate the issues around association and relevant interests which arise when a bidder seeks shareholder intention statements in support of a proposed bid.

Issues to address

6. Regardless of whether ASIC or the Panel issues further guidance, policy issues and questions to be considered include:
 - a) Should intention statements be dealt with under the false and misleading statements provisions in the Corporations Act or should they be governed by ASIC's truth in takeovers policy or both or neither?
 - b) Should intention statements only be permitted if they are:
 - i. announced or published by the shareholder or
 - ii. published in the bidder's or target's statement with the shareholder's explicit consent to the particular statement?
 - c) Should aggregated intention statements be permitted?
 - d) What information should be disclosed alongside an intention statement? For example, the identity of the shareholder, individual holdings, time frame for acceptance etc.
 - e) Should the Panel suggest a minimum time frame that a shareholder should wait before acting on their stated intention to accept an offer?¹
 - f) When will efforts to obtain intention statements give rise to an association or relevant agreement between the bidder and the shareholder?²
 - g) When will procuring an intention statement result in the bidder acquiring a relevant interest in the shareholder's shares?
 - h) Should shareholders be more specific about what is a 'superior' proposal or offer?³ Should the Panel or ASIC give guidance about what would be seen as a 'superior' proposal?
 - i) When will an intention statement cease to bind a shareholder?⁴
 - j) How should intention statements in the context of a scheme vs a takeover be treated differently?⁵
 - k) Should statements by retail shareholders be treated differently to statements by institutional shareholders or substantial holders? (NB ASIC RG 25 does not extend to retail shareholders with less than 5%)
 - l) Should ASIC or the Panel take the lead in providing guidance to the market?

¹ The Panel has required a shareholder to wait until 21 days after the offer has opened before accepting: *MYOB Limited* [2008] ATP 27 at [52]. See also *Ambassador Oil and Gas Limited 01* [2014] ATP 14 at [76]

² What if the bidder uses a third party (eg, a financial adviser) to conduct its negotiations with shareholders?

³ Eg, can a shareholder sell on-market at a higher price? If scrip in a foreign-listed company is valued at more than a rival offer, is it "superior" notwithstanding potential disadvantages in holding foreign-listed scrip?

⁴ Eg, an increase in offer consideration or the emergence of a rival bid

⁵ Need to consider any inconsistencies between the approach of the Panel in relation to bids and the courts in relation to schemes. NB *Re Cellestis Ltd* [2011] VSC 284 at [20], Davies J held that the directors who had made intention statements and entered into call options with the bidder did not form a separate class

ANNEXURE A



Australian Government

Takeovers Panel

November 2014 Panel Day Paper

SUBJECT: SHAREHOLDER INTENTION STATEMENTS

Overview of issues

- What issues arise from statements about shareholders' intentions to accept or reject a takeover offer (or vote in favour or against a scheme)?
- Should the Panel issue a guidance note on shareholder intention statements?

Background

1. In 2014, 45% of takeovers and 86% of schemes were announced accompanied by a statement of shareholders' intentions in response to the proposal. Most of the examples involving takeovers were friendly bids, and the majority of shareholder intention statements were given by directors of the relevant targets.
2. [ASIC RG 25 – Takeovers: false and misleading statements](#), commonly referred to as the “truth in takeovers” policy, notes as an example of a last and final statement, a statement by a substantial holder that the holder will (or will not) accept a bid.⁶ If the shareholder diverges from its statement, ASIC may take enforcement action against the shareholder.
3. Two Panel applications this year have involved statements about shareholders' intentions in relation to takeover bids and exposed some issues.

Why obtain shareholder intention statements?

4. Securing acceptances and creating momentum for a bid can be a drawn-out process as investors wait to see whether the bid will be declared unconditional. One way to counteract shareholder inertia is to obtain intention statements from shareholders (particularly substantial holders) prior to announcing a bid. Some bidders also see it as a way to obtain support for the bid without triggering the 20% threshold.

⁶ ASIC RG 25 at [25.29]

5. It now appears to be market practice for shareholder intention statements to be made by the target or bidder through an ASX announcement or in a target's statement or bidder's statement.

The risk of intention statements misleading the market

6. RG 25 prescribes statements made by a target or bidder about the level of support for a bid to include specific information and shareholding percentages along the lines of: "*X, holding 8% of ordinary shares, has stated that it will not accept at the current price*"; or "*holders of 5.4% of ordinary shares have stated their intention to accept into the bid*".⁷
7. However, in two Panel matters (*Breakfree 04 & 04R*; *Bullabulling*), statements that followed the RG 25 formulation were found to be misleading (for various reasons) and constitute unacceptable circumstances.
8. In *Breakfree 04*, Breakfree sent a letter to its shareholders informing them that its adviser had conducted a telephone survey of some of the major individual shareholders and stated (among other things) that "*shareholders holding a majority of shares indicated that they would not accept the current all scrip offer*".⁸ The bidder then purported to rely on the statement to withdraw its bid, arguing that the statement demonstrated that its minimum acceptance condition would not be satisfied.
9. The Panel discovered that the surveyed shareholders had provided differing responses (including qualifications), they were told that their responses were not binding on them and they were not informed that Breakfree would aggregate their responses with other surveyed shareholders to make the statement in the letter. The Panel concluded that the intention statement should have been "*treated as mere puffery*" and that it was not reasonable for the bidder to rely on it to withdraw its bid.⁹
10. In *Breakfree 04R*, the Review Panel considered it unlikely that the Panel or a court would require the shareholders to act in accordance with the intention statements. It expressed the view that statements made about a third party's intentions would not typically give rise to the same expectations of compliance in relation to last and final statements.¹⁰
11. In *Bullabulling*, Norton, in its bidder's statement, made acceptance statements including: "*Certain Bullabulling shareholders, representing 6.6% of the [sic] Bullabulling's shares on issue, have expressed their intention to accept the offer*".

⁷ ASIC RG 25 at [25.74]

⁸ *Breakfree Limited 04* [2003] ATP 39 at [19] – [21]

⁹ *Breakfree Limited 04* [2003] ATP 39 at [137] and [144]

¹⁰ *Breakfree Limited 04R* [2003] ATP 42 at [66]

12. Two weeks later, Bullabulling released a shareholder letter to ASX with rejection statements including: *“holders of 41.8% of Bullabulling Gold’s shares have indicated that they do not intend to accept the Offer at the current price”*.
13. The Panel discovered that the rejection statements were compiled from statements given by 101 shareholders (most responding to a HotCopper post) who had given differently worded statements and whose percentage shareholdings had not been verified by Bullabulling.
14. The Panel considered that the rejection statements were misleading as they did not accurately reflect the shareholders’ intentions.¹¹ Nor did the letter give sufficient information about how the rejection statements were compiled, the qualifications to which some rejection statements were subject and the fact that consents were not obtained from the shareholders to aggregate and publish the statements.
15. The Panel also considered the acceptance statements made by Norton were misleading because Norton had not disclosed whether those shareholders consented to the statements and Norton was associated with one of the shareholders and therefore already had voting power in that associate’s shareholding.¹²
16. As the two matters demonstrate, making intention statements in reliance on informal telephone surveys or responses to internet forum posts is fraught.
17. This raises the question of whether intention statements should only be permitted if they are made directly by the shareholder or, as *Bullabulling* found, if they are published with the shareholder’s explicit consent to the publication of the statement. This could avoid the problems that arose in the two matters.
18. Perhaps aggregated intention statements should only be permitted to be aggregated where each statement is identical and shareholders have been informed of the intended aggregation. Perhaps also, specific information about the shareholders should be included with the aggregated statement (eg, names of shareholders and size of individual holdings).

Application of RG 25 to intention statements by substantial shareholders

19. RG 25 states in effect that substantial shareholders may be held to statements as to whether they will accept a bid. The policy basis as to why this proposition is limited to substantial shareholders is unclear.

¹¹ Some rejecting shareholders had, in fact, accepted the bid

¹² The Panel accepted an undertaking offered by Norton, which dealt with the Panel’s concerns notwithstanding that the statements were not part of the application

20. An alternative policy might be state that shareholder will be bound by such statements only if their identity had been disclosed and/or they consented to be named.

Questions of association and obtaining a relevant interest

21. Bidders appear to view intention statements as a way of not breaching the 20% threshold while still gathering support for a bid.
22. In [MYOB Limited](#), the Panel drew an inference that there was an understanding between Manhattan and investors holding approximately 34% of MYOB who had indicated they would accept Manhattan's offer for MYOB as soon as it opened. It concluded that the understanding went "*beyond mere support for a bid*".¹³ The Panel felt that the intention statements gave Manhattan "*a measure of control*" and that the investors had committed themselves to accepting the bid.¹⁴
23. The Panel concluded that the understanding amounted to a relevant agreement with the investors, and Manhattan acquired a relevant interest in the MYOB shares held by the investors. However, the Panel stated that "*we should not be taken to be saying that a shareholder cannot make a statement that attracts the truth in takeovers policy without giving rise to a relevant interest.*"¹⁵
24. In [Ambassador 01](#), in announcing its bid, Drillsearch also announced that two substantial holders and Ambassador's three directors, collectively holding approximately 25% of Ambassador, had made statements that they intended to accept Drillsearch's offer within 14 days from the opening of the offer, in the absence of a superior offer.
25. Four days after Drillsearch's offer opened it increased its offer and declared it unconditional. The two substantial shareholders and two of the directors immediately accepted Drillsearch's offer.
26. The Panel concluded that Drillsearch's involvement in obtaining the intention statements made them associates of the directors and one of the 'substantial shareholders'.¹⁶ Drillsearch therefore acquired voting power in their shares.¹⁷ The Panel did not explore whether the intention statements gave Drillsearch a relevant interest in the shares.
27. Both cases demonstrate the fine line that bidders walk when attempting to procure support for their bids.

¹³ *MYOB Limited* [2008] ATP 27 at [30]

¹⁴ *MYOB Limited* [2008] ATP 27 at [32] – [33]

¹⁵ *MYOB Limited* [2008] ATP 27 at [31]

¹⁶ The shares of the 'substantial shareholder' were held by his wife, who left all the arrangements to him

¹⁷ *Ambassador Oil and Gas Limited 01* [2014] ATP 14 at [59] – [66]

28. It would be useful for the Panel to consider giving guidance on what will constitute unacceptable circumstances when a bidder seeks intention statements.
29. It would be useful also for any guidance to address what intention statements actually mean as the usual language used is ambiguous (as discussed below).

What constitutes a ‘superior’ offer or proposal?

30. Usually, a shareholder will specify an intention to accept an offer (or vote in favour of a scheme) “in the absence of a superior offer/proposal”. This raises questions about what constitutes a ‘superior’ offer/proposal and whether it is a subjective assessment made by each shareholder or objectively assessed.
31. For example, in *Ambassador 01*, some shareholders argued that foreign-listed scrip was less attractive than ASX-listed scrip even though the foreign listed scrip was valued higher. Is a cash offer ‘superior’ to a scrip offer? What about a highly conditional bid? These are questions which a guidance note could canvass in order to assist shareholders to understand their obligations and market participants to assess and rely on intention statements.

Specifying time frames in intention statements

32. Some intention statements specify a time frame within which a shareholder will accept the bid. In *Ambassador 01*, the Panel said that the “*purpose of specifying a time period and the qualification must be to wait in the hope that a superior proposal emerges*”.¹⁸ Because the Ambassador shareholders and directors accepted the offer earlier than the 14 days referred to in the intention statements, the Panel considered that they had acted contrary to their intention statements.
33. In *MYOB* and *Ambassador*, the Panel suggested that a waiting period of at least 21 days after the offer opened was appropriate before shareholders acted on their stated intention to accept an offer.¹⁹ Formal guidance or policy on this issue may provide greater certainty for the market in the same way as the Panel’s 1% break-fee guidance has done.

When does an intention statement cease to bind a shareholder?

34. One of the biggest unanswered questions about intention statements is: when will an intention statement (whether or not it is qualified) cease to bind a shareholder?
35. For example, if a bidder increases its offer in order to lift acceptances, does that constitute a change in circumstances which allows the shareholder to reconsider his or her position? Does the emergence of a rival bid mean that all bets are

¹⁸ *Ambassador Oil and Gas Limited* [2014] ATP 14 at [72]

¹⁹ See *MYOB Limited* [2008] ATP 27 at [52] and *Ambassador Oil and Gas Limited 01* [2014] ATP 14 at [76]

off?²⁰ Can the shareholder still accept the first bid? Should the shareholder be compelled to accept a higher bid or sell their shares on-market?

Use of intention statements in a scheme versus a takeover

36. For schemes of arrangement, in the case *Re Cellestis Ltd*, Davies J held that the directors who had made intention statements and entered into call options with the bidder did not form a separate class.²¹
37. It would be useful for any guidance to take into account differences in the scheme and takeover processes. **s 45**

Contrasting the UK and US position

38. In the US, statements of intention are not treated as binding commitments. Instead, targets, bidders and shareholders make decisions knowing there is some uncertainty about how parties may respond to different developments.
39. The UK Takeovers Code allows a bidder to procure an 'irrevocable commitment or a letter of intent' from the target's shareholders to accept a bid or vote in favour of a scheme.
40. Irrevocable commitments are treated as conferring an interest in securities on the bidder. However, a bidder can obtain irrevocable commitments which would take it above the 30% threshold without triggering the mandatory bid rule as long as such acquisitions fall within certain permitted categories, most notably where the takeover has been recommended by the target's board.²²
41. The commitment must be publicly disclosed along with details about the shareholder's identity, shareholding size and circumstances in which the commitment will cease to be binding.²³ If the shareholder in question is unable (or no longer intends) to comply, the shareholder must promptly announce an update of its position.²⁴

Use of intention statements in recent takeovers

42. We have compiled a table setting out examples of some recent intention statements (see **Attachment A**). There is a fairly standard form of words used

²⁰ A higher rival bid emerged in *Ambassador 01*, but the issue of whether all bets were off in relation to the intention statements was not raised in submissions

²¹ [2011] VSC 284 at [20]

²² UK Takeovers Code, Rule 5.2 and Rule 9

²³ UK Takeovers Code, Rule 2.11

²⁴ UK Takeovers Code, Rule 2.11. It is unclear how this rule operates to allow a shareholder to revoke its "irrevocable" commitment simply by updating the market that it no longer intends to comply with its commitment

and it is common for the intention statement to be included with the initial ASX announcement of the control transaction.

43. Nineteen of the 22 schemes announced this year were accompanied by intention statements while 14 of 28 off-market takeovers announced were accompanied by intention statements.
44. Of the intention statements given in relation to schemes, all of them had a 'superior proposal/offer' qualifier. Twelve of the 14 intention statements given in relation to takeovers were similarly qualified.²⁵
45. Only 4 intention statements specified a time frame "within" which the shareholder would accept the offer. In 3 cases the time frame was 14 days, in the other example, it was 14 business days.

Conclusion

46. ASIC RG 25 is not comprehensive, particularly as it applies to shareholder intention statements. The increasing use of intention statements and the two Panel applications this year indicate that the issues discussed in this paper may benefit from Panel guidance.
47. We recommend forming a sub-committee to consider the issues in greater detail with a view to drafting policy. Further thought should be given to whether ASIC or the Takeovers Panel is the most appropriate body for disseminating the policy.

²⁵ One of the unqualified intention statements was made by Norton Golds in relation to its offer for Bullabulling, which the Panel considered in *Bullabulling Gold Limited* [2014] ATP 8

Attachment A – examples of shareholder intention statements in recent takeovers and schemes

Target	Bidder	Takeover or scheme	Publisher	Time frame	Wording
Noni B	Alceon Group	Takeover	Target – ASX announcement	None	Each of the Directors who owns or controls shares in Noni B has confirmed that they intend to accept the Offer in respect of any shares in Noni B that they own or control in the absence of a superior proposal. The Directors collectively have a relevant interest in approximately 42% of Noni B's ordinary shares
Blackthorn Resources	Intrepid Mines	Scheme	Target – ASX announcement	N/A	Each director of Blackthorn intends to vote all Blackthorn shares they control in favour of the Merger
Oakton	Dimension Data	Scheme	Target – ASX announcement	N/A	Each Board member, including the Executive Chairman and CEO, who represent 11.3% of the total shares outstanding, intend to unanimously recommend and vote all Oakton shares held by them in favour of the Scheme [subject to there being no superior proposal and an independent expert opining that the scheme is in the best interests of shareholders]
Calliden Group	Steadfast Group	Scheme	N/A	N/A	None
Iron Ore Holdings	BC Iron	Takeover	Target – ASX announcement	14 business days	IOH major shareholder, Australian Capital Equity Pty Ltd, intends to accept the Offer within 14 business days of the Offer opening, in the absence of a superior proposal IOH has been advised by its major shareholder, ACE, that it intends to accept the Offer in respect of all IOH shares held or controlled by it (approximately 52.7% of all IOH shares on issues) within 14 business

Target	Bidder	Takeover or scheme	Publisher	Time frame	Wording
					days of the Offer opening, in the absence of a superior proposal. ACE has confirmed to IOH that it consents to its statement of intention being published on its behalf, a copy of which is attached to this announcement
Roc Oil Company	Fosun International	Takeover	Target – ASX announcement & BS/TS	None	<p>All of the ROC directors have advised their intention to accept Fosun’s offer with respect to the ROC shares they own or control, in the absence of a superior proposal</p> <p>ROC’s largest shareholder, Allan Gray [with a declared Relevant Interest of around 20%], has stated that it is supportive of the Offer, in the absence of a Superior Proposal or a higher market price</p>
Nido Petroleum	BCP Energy International	Takeover	Target – ASX announcement	None	<p>Each Nido Director who has a Relevant Interest in Nido shares has advised Nido’s Board that they intend to accept the Offer in respect of their Nido shares in the absence of a Superior Proposal</p> <p>The major shareholder of Nido, Petroleum International Investment Corporation, which owns 19.66% of Nido, has executed a conditional share sale agreement with BCPE to sell its entire holding to BCPE at the price of the Offer</p>
Cape Alumina	MetroCoal	Takeover	Target - TS	None	[The Non-Associated Directors] intend to accept the MetroCoal Offer for the Shares they hold or control
Wotif.com Holdings	Expedia Group	Scheme	Target – ASX announcement	N/A	Subject to an independent expert determining that the Scheme is in the best interests of Wotif Group shareholders, the directors of Wotif Group (who, including Mr Graeme Wood, collectively represent approximately 20.2% of fully diluted shares outstanding) unanimously recommend and intend to vote shares in their control in favour of the proposed Scheme,

Target	Bidder	Takeover or scheme	Publisher	Time frame	Wording
					<p>in the absence of a superior proposal</p> <p>Further, Mr Andrew Brice and his associated entities (who collectively represent approximately 15.5% of fully-diluted shares outstanding) intend to vote shares in their control in favour of the proposed scheme, in the absence of a superior proposal and subject to an independent expert determining that the Scheme is in the best interests of Wotif Group shareholders</p> <p>The two founders of Wotif Group, Mr Graeme Wood and Mr Andrew Brice have both entered into separate option agreements with Expedia, that enable Expedia, subject to conditions, to acquire up to 19.9% of the outstanding shares of Wotif Group</p>

From: s 22
To: s 47F
Cc: [Takeovers Panel Executive](#)
Subject: Shareholder intention statements - meeting to discuss submissions [SEC=UNCLASSIFIED]
Date: Friday, 16 October 2015 1:39:04 PM
Attachments: [150831 Submission from Allens.pdf](#)
[150831 Submission from Norton Rose Fulbright \(31 August 2015\).PDF](#)
[150901 Submission from Baker McKenzie.pdf](#)
[150901 Submission from Gilbert Tobin.pdf](#)
[150901 Submission from HSF.pdf](#)
[150901 Submission from Law Council.pdf](#)
[150917 Submission from ASIC.pdf](#)
[Table of submissions.docx](#)
[150714 JFA Submission from John Fast.mht](#)

Dear subcommittee

Attached are the submissions received in response to the CP, together with a table summarising them. The key issue is whether we say anything in the GN about relevant interest, and if so what.

Please advise available times for a meeting next week to discuss. We will seek to find the best fit, with a view to completing a paper to be put forward to the National Panel Day on 12 November.

A possible agenda for the discussion is:

1. Response to each of the issues raised in the CP
2. Adopting a position on relevant interest
3. Recommendation to the Panel Day

Thanks.

Regards,

s 22

Counsel | Takeovers Panel

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	Issue	GN para	Law Council	HSF	NRF	G+T	B&M	J Fast	Allens	ASIC
1	Whether the statement <i>"The Panel does not encourage or discourage shareholder intention statements"</i> is helpful	4	Inadequate – reformulate: Not unacceptable as such	Inadequate – reformulate: not unacceptable	Discourage >20%	More helpful to state the place of statements in the regime	Lean towards encouraging	Should actively discourage – only present intention. Perhaps ok if stated as not binding	Inadequate – reformulate: not unacceptable unless issues	Discourage
2	Whether a time frame should be specified, and if so what time frame	10(a)	Useful to specify 21 days	No fixed time	No need if <20%. If >20%, at least 21 days. No time after offer opens	Varies according to circumstances, but if before offer wait 21 days after offer opens. After offer open, no specifying time (unless extended because of support – 7 days)	Before offer – 21 days. After – 7 or 14 days.	No.	More specific - 21 days, allow reasonable time for superior proposal.	No. May lead to formulaic approach. Should wait maximum time

	Issue	GN para	Law Council	HSF	NRF	G+T	B&M	J Fast	Allens	ASIC
3	Whether, in disclosing details of the holding, it is necessary for the shareholder's holding to be material before it is disclosed	8(c), 11(b)	Not necessary to define 'material'	Only for sub holdings (>5%)	No materiality test	Consider low threshold – 1%	No, include all	Not specify what amounts to materiality – but require party to state why relevant	Disclose each identity and holding	Not necessary to define 'material' If disclosure is desirable, then must be material
4	Whether, in disclosing aggregate holdings, it is necessary to disclose the identity and holdings of all the shareholders whose holdings are aggregated	11(d)	Yes	No, for directors to aggregate and take responsibility	Yes	Only for holders holding above 1%	Yes	Yes – per s671B(3)	Yes	Yes

	Issue	GN para	Law Council	HSF	NRF	G+T	B&M	J Fast	Allens	ASIC
5	Whether consent to the making of a statement is always required, and if not, in what circumstances it should not be required (see paragraphs	11(c) &(d)	Generally required, except if reporting on statements already public	Matter for bidder or target to decide	Yes, unless released on ASX by maker	No if repeating public information	Yes	Yes	Yes	Yes
6	Is the guidance clear and helpful for smaller companies?		No additional guidance needed	No additional guidance needed	No additional guidance needed	No additional guidance needed	No additional guidance needed	No additional guidance needed	No additional guidance needed	No additional guidance needed
7	Is guidance needed on whether shareholder intention statements give rise to relevant interests or associations		Beneficial to add something	No. Specific guidance would be difficult.	No, if limited to <20%. Yes if >20% allowed	Yes	Yes	No additional guidance needed	Real issue – need ASIC CO	Yes. ASIC will work with Panel

	Issue	GN para	Law Council	HSF	NRF	G+T	B&M	J Fast	Allens	ASIC
8	Other comments		1. Amend para 10(b) to add 'before announcement' 2. Amend para 10(e) to add 'or does not accept the superior proposal'		1. Intention Statements push the boundaries of permissible conduct (20% limit) too far. Not permit them >20% 2. Solicitation creates association, maybe relevant interest	Strongly support guidance			1. Para 5 – limit to only <u>public</u> statements 2. Para 10(e) – should accept superior proposal	

From: s 47F
Sent: Tuesday, 14 July 2015 3:44 PM
To: Takeovers
Subject: Draft Guidance Note - Shareholder Intention Statements

Dear Allan,

I am writing in connection with the invitation for comments concerning the above Draft Guidance Note.

In response to the questions posed in the Consultation Paper that accompanied the Draft Guidance Note I would submit as follows:

Encouragement

Contrary to the proposed formulation, I am strongly of the view that the Panel should actively discourage shareholder intention statements and should consider them as unacceptable, except where they are strongly qualified by the party seeking to include them. My reasons are as follows:

1. A statement of intention is nothing more than that - an intention held at a point in time. It is almost never binding or contractually enforceable and always subject to change. And insofar as it represents a view held by a shareholder at a particular point in time, it should not be permitted to be used to influence or sway others into acting in a particular manner - and yet that is precisely the very reason why those statements may be sought to be included by a party.
2. The situation is different with respect to the intentions of directors of a company who may also hold shares and who may be making recommendations to their shareholders. In that instance, the intentions of directors are very relevant in terms of signalling to shareholders that the directors are personally aligned with and supportive (or not) of the recommendations made by them (or some of them) to their shareholders.
3. Rather than achieving an efficient, competitive and informed market these shareholder intention statements, if left unqualified, could have a diametrically opposite effect by creating the impression that other shareholders have committed to a particular course of action, when all that has in fact occurred is that some shareholders have signalled a (non-binding) intention to act in a particular manner. The mistaken belief as to how these shareholders may act can propel others to do likewise - potentially to their detriment - by causing shareholders to be dissuaded from acting on a proposal that with hindsight might have been to their advantage or alternatively, by depriving shareholders the opportunity to perhaps being able to achieve a superior financial outcome through events that may emerge subsequently.
4. My concerns would be largely allayed if shareholder intention statements were, in addition to the other matters addressed by the draft Guidance Note, required to be accompanied by a prominently displayed detailed explanation about the

effect of a statement of intention - specifically that they are not binding and can change at any time until they are given legal effect

Timing

Overall, I feel that no time frame should be specified. The Guidance Note stands on its own and affords maximum flexibility to examine the conduct of parties against the background of all of the facts. In some cases the Panel may consider 21 days as appropriate while in other cases a different period may be more sensible in all the circumstances.

Disclosure

I am a little concerned about the discussion surrounding materiality. In particular:

1. Materiality will differ according to circumstances. In my view, there is a danger in stipulating specific thresholds of materiality by reference to fixed percentages.
2. Sometimes a small shareholding can be material, if it is the shareholding that effectively passes control or alternatively blocks it from occurring
3. Control in the case of very large corporations can be effected with significantly less than 50% shareholding
4. Certain shareholders may be more prominent and attract greater attention than others - and the actions of the former may influence the actions of other shareholders that follow them, irrespective of the actual level of shareholding that they may hold.
5. At the same time, erroneous impressions can be created by referencing the intentions of shareholders that may be small or insignificant in the overall context of a proposed transaction - and it is important that the market be kept fully informed.

For the foregoing reasons, I believe a better formulation may be to require parties that choose to release shareholder intention statements to include a detailed commentary outlining the relevance of the disclosure and stating why it should be viewed by the market and shareholders as material to the proposal under consideration. In adopting such a formulation, there is then an opportunity for the Panel and other stakeholders to consider if the disclosure is intended to create an uninformed market or to mislead stakeholders in some particular way.

On the question of aggregated holdings, I believe it is important for the market to be informed as to the identity of all of the parties whose interests have been aggregated - adopting a beneficial ownership test as per S671B3. The market should be informed if these aggregated holdings are all of related parties or represent the interests of a broader range of other shareholders.

Consents

Consents should always be required as the need for these will go a long way towards ensuring that the disclosures proposed to be made do not overstate the situation

Impact on smaller companies

I do not believe that further guidance is required at this stage

Guidance on relevant interests and associations

I believe the current law and guidance notes are sufficient

ance.

s 47F

