



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 34

Takeovers: False and misleading statements [PS 25]

March 2002



ASIC

Australian Securities & Investments Commission

[PS 25]

Consultation draft

Takeovers: false and misleading statements

Chapter 6 — Takeovers

Chapter 6B — Rights and liabilities in relation to Chapter 6 and 6A matters

Issued 4/6/1992

Updated 20/3/2002

Important note:

We are seeking comment on the content of this draft update to existing Policy Statement 25, particularly on the questions noted in boxes under the relevant text. We will consider submissions before publishing the final policy. See page 3 for details on how to make submissions.

We will use this draft Policy Statement when responding to statements during takeovers until we issue a final Policy Statement.

What this policy statement is about

[PS 25.1] This Policy Statement addresses the issue of “truth in takeovers”. It is for the guidance of market participants (bidders, targets and substantial holders) making public statements during takeover bids. Our policy considers statements that:

- (a) in our experience are commonly made in the course of takeover bids; and
- (b) may be misleading or deceptive.

[PS 25.2] This consultation draft policy statement amends our original Policy Statement 25 on misleading statements, published in 1992. The aim of this amendment is to update and elaborate on, rather than change the direction of, our policy since its original publication.

[PS 25.3] This Policy Statement covers:

A Last and final statements. These are statements made by market participants that they will or will not do something in the course of the bid. If a market participant intends to reserve the right to depart from its statement on the happening of an event, it must qualify its statement by reference to that event. Otherwise the market participant risks regulatory action by us for contravention of misleading or deceptive conduct provisions or an application by us or another party to the Takeovers Panel for a declaration of unacceptable circumstances.

see [PS 25.6]–[PS 25.43]

B Making, correcting or updating statements. Bidders and targets must make, correct or update material statements during the offer period by preparing a supplementary bidder's or target's statement.

see [PS 25.44]–[PS 25.62]

C Other misleading statements. We discuss some other issues: confusing or ambiguous statements; and statements by the bidder concerning the level of acceptances received.

see [PS 25.63]–[PS 25.69]

[PS 25.4] Our main focus in this policy is statements made during the offer period, rather than issues raised by the bidder's or target's statement content requirements, such as the value of scrip consideration: s636 or 638 of the *Corporations Act 2001* (Corporations Act).

Question 1:

Are there any other issues you think the final policy statement should address?

[PS 25.5] We have updated this Policy Statement so that it reflects:

(a) amendments to the Corporations Act under the *Corporate Law Economic Reform Program Act 1999* and the *Financial Services Reform Act 2001*;

- (b) our current compliance and enforcement options and practice; and
- (c) additional examples of misleading or deceptive statements that we have seen in recent years, including statements by targets and substantial holders as well as bidders.

Your comments

You are invited to comment on this draft policy.

Comments are due by Wednesday 1 May 2002 and should be sent to:

Andrew Fawcett, Principal Lawyer
Regulatory Policy Branch
Australian Securities & Investments Commission
GPO Box 5179AA
Melbourne, Victoria, 3000
Facsimile 03 9280 3372
Email: andrew.fawcett@asic.gov.au.

You can also contact ASIC Infoline on 1300 300 630 for information and assistance.

Contents

What this policy statement is about ... [PS 25.1]

A Last and final statements

- Our policy ... [PS 25.6]
- Underlying principles ... [PS 25.10]
- Explanations ... [PS 25.14]

B Making, correcting or updating statements

- Our policy ... [PS 25.44]
- Underlying principles ... [PS 25.48]
- Explanations ... [PS 25.51]

C Other misleading statements

- Our policy ... [PS 25.63]
- Underlying principles ... [PS 25.67]
- Explanations ... [PS 25.68]

Key terms ... [PS 25.70]

Related information ... [PS 25.71]

A Last and final statements

Our policy

[PS 25.6] A “last and final statement” is a statement made by a market participant that it will or will not do something in the course of the bid. One example is a statement by a bidder that it will not improve the consideration offered under its bid (“no increase statement”): for other examples see [PS 25.22]–[PS 25.34]. A market participant that makes a last and final statement and then seeks to depart from it risks:

- (a) regulatory action by us for contravention of misleading or deceptive conduct provisions, particularly s670A and 1041H (formerly s995); or
- (b) an application by us or another party to the Takeovers Panel for a declaration of unacceptable circumstances.

[PS 25.7] A market participant departs from a last and final statement if the market participant’s conduct (action or statement) is inconsistent with it. For example a bidder departs from a no increase statement if it improves the consideration under its bid or buys on-market at a price higher than its bid price: see [PS 25.25].

[PS 25.8] The market participant cannot rely on the happening of an event or a change in circumstances to depart from a last and final statement unless:

- (a) it has qualified its statement by specific reference to the event; or
- (b) the event is not reasonably foreseeable.

[PS 25.9] We may write to a market participant at the time it makes a last and final statement to query the statement if it is unqualified, inadequately qualified or confusing. We may require the market participant to qualify the statement in a supplementary statement or market announcement.

Underlying principles

[PS 25.10] Market participants that make a last and final statement should be held to it, as with a promise. Holders are entitled to expect that market participants will act consistently with their last and final statement.

[PS 25.11] Where a bidder makes a last and final statement to press holders to accept its offer, then departs from this statement, the statement may:

- (a) mislead holders—the statement has the tendency to lead holders and the market into error (see *Parkdale Custom Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191); or
- (b) coerce holders into accepting early, so that the holders' opportunity to benefit from the change of control is not reasonable or equal (see s602(c)).

[PS 25.12] In addition, if a market participant makes a last and final statement and departs from it, the following purposes behind Chapter 6 may be undermined:

- (a) that the acquisition of control takes place in an efficient, competitive and informed market (see s602(a))—an informed market maintains market integrity, which promotes the confidence of investors; and
- (b) that holders are given enough information to enable them to assess the merits of the proposal (see s602(b)).

Holders will be misinformed about what the market participant will or will not do in the course of the bid.

[PS 25.13] The market participant should assume the risk of a reasonably foreseeable event that bears on its statement. The market participant makes the last and final statement voluntarily. It can protect itself by a qualification referring to the event.

Explanations

Corporations Act provisions

[PS 25.14] A market participant that departs from a last and final statement may contravene misleading conduct provisions: s670A or 1041H (formerly s995). The market participant may also contravene other provisions, such as s1041E or 1041F (formerly s999 and 1000).

Note: The Takeovers Panel may declare circumstances to be unacceptable whether or not the circumstances constitute a contravention of the Corporations Act: see s657A(1).

Section 670A

[PS 25.15] Section 670A(1) prohibits a bidder or target from giving a takeover document if there is a misleading or deceptive statement in the document. A “takeover document” in s670A includes a bidder’s statement, a target’s statement, an offer document, a notice of variation of takeover offer and a report included in or accompanying these documents.

[PS 25.16] A contravention of s670A may give rise to both civil and criminal liability: see s670A(3) and 670B. A bidder or target commits an offence if it contravenes s670A(1) and the misleading statement or omission is materially adverse from the point of view of the holder: see s670A(3). A contravention of s1041H gives rise to civil liability only.

[PS 25.17] Defences against liability or prosecutions for contravention of s670A are contained in s670D. Statutory defences corresponding to s670D do not apply to a contravention of s1041H.

Section 1041H

[PS 25.18] The general misleading conduct provision in s1041H(2) (formerly s995) does not apply where the statement is made in “takeover documents” because s670A applies: see s1041H(3). But s1041H does have express application to takeover bids. Section 1041H(2)(b)(iii) prohibits a person from engaging in conduct which is or is likely to be misleading or deceptive in:

- (a) the making of a takeover bid; or
- (b) the making of an evaluation of, or of a recommendation in relation to, a bid.

[PS 25.19] The test for what amounts to misleading or deceptive conduct is objective: conduct must be viewed in light of the type of person who is likely to be exposed to that conduct. The question is what the statement conveys to an ordinary investor: see *Annand & Thompson Pty Ltd v TPC* (1979) 25 ALR 91, 102; *Siddons Pty Ltd v Stanley Works Pty Ltd* (1991) 99 ALR 497, 501.

Authorities

[PS 25.20] Authorities on s52 of the *Trade Practices Act 1974* provide guidance on why a last and final statement may contravene s670A or 1041H. The reasons why a last and final statement may be misleading include:

- (a) the last and final statement is an unqualified or inadequately qualified statement where relevant circumstances show the need for a qualification to be attached to that statement or the risk of its non-fulfilment to be disclosed (see [PS 25.35]; *Wheeler Grace & Pierucci Pty Ltd v Wright* (1989) ATPR 40-940, 50,251);
- (b) the last and final statement is a representation about a future matter and the market participant had no reasonable grounds for believing that the statement would be fulfilled. Ormiston J held that “if there be an unconditional promise...then it is proper to treat the giving of that promise, at least in the ordinary case, as the making of a representation as to a future matter, being either the doing of an act or the ‘refusing’ to do an act” (see *Futuretronics International Pty Ltd v Gadzhis* [1992] 2 VR 217, 240-1). A statement about any future matter is misleading if the market participant does not have reasonable grounds for making it (see s769C (formerly s765(1)) and 670A(2));
- (c) when the last and final statement was made, the market participant did not have a present intention to fulfil the statement (see *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 55 ALR 25, 31). “[A] statement relating to the future...may represent impliedly that the promisor has a present intention to make good the promise” (see *James v ANZ Banking Group Ltd* (1986) 64 ALR 347, 372 citing *Thompson v Mastertouch TV Services Pty Ltd* (1977) 15 ALR 487); and
- (d) the last and final statement and the departure from the statement together constitute misleading or deceptive conduct. In *Holt v Biroka Pty Ltd* (1988) 13 NSWLR 629, 636, Kearney J adopted the view of Greig and Davis in *The Law of Contract* (1987) that it is a “too restrictive approach to consider the conduct involved as merely the making of the representation or promise”.

Omissions

[PS 25.21] A person must not omit from a takeover document information required under s636: see s670A(1). A bidder or target that:

- (a) departs from its last and final statement; and
- (b) omitted from an original or supplementary bidder’s or target’s statement an adequate qualification of the last and final statement,

may contravene s670A(1). The omitted qualification may be information material to the making of the holder’s decision to accept that must be disclosed under s636(1)(m).

Examples of last and final statements

Bidder – no increase statement

[PS 25.22] Bidders sometimes state that the consideration that they offer will not be improved (“no increase statement”). The bidder may say that its offer is “final”, but our policy on no increase statements may apply where the bidder does not use this language. For example, our policy will be invoked if the bidder says that there is no basis upon which it could justify an increase in the offer. A holder who sells securities in the target:

- (a) on-market;
- (b) into a market bid; or
- (c) into a rival bid (particularly an unconditional bid),

following the statement will miss the opportunity to participate in any improved consideration. This is not the case where a person accepts into an off-market bid, as the holder is entitled to improved consideration: see s650B.

[PS 25.23] A bidder cannot depart from a no increase statement, even if it compensates those who have sold on-market, or accepted into a market bid or rival bid.¹ Compensation does not adequately address the regulatory concerns in [PS 25.11]. A compensation policy would allow a bidder to:

- (a) press holders into accepting early by using a no increase statement; and
- (b) improve the consideration later only if necessary for the bid to succeed.

[PS 25.24] Our view that bidders should be held to no increase statements is consistent with the United Kingdom City Code on Takeovers and Mergers (“City Code”). The City Code provides that other than in “wholly exceptional circumstances”, if the bidder makes an unqualified no increase statement or no extension statement, the bidder is not allowed to subsequently set that statement aside: see Rules 31.5 and 32.2. The Hong Kong and Singapore Codes contain similar provisions.

¹ The Takeovers Panel took the same view in *Re Taipan Resources NL (No 6)* Takeovers Panel (2000) 36 ACSR 716, 720.

[PS 25.25] Where a bidder buys on-market under items 2 or 3 of s611 at a price higher than the offer price, this will constitute a departure from a no increase statement. If a bidder does this it may risk a declaration of unacceptable circumstances or other regulatory action. Item 2 provides an exemption from the main takeover prohibition for an acquisition that results from an on-market transaction during the bid period where the bid is full and unconditional. If a bidder purchases bid class securities for a price higher than the bid consideration, offers under an off-market bid are taken to be increased to the highest price paid outside the bid: see s651A.

Bidder – no extension statement

[PS 25.26] The same principles apply to a statement by a bidder that it will not extend the offer period (“no extension statement”). The bidder may state this in various ways, eg the bidder may say that its offer “goes away” on the last day of the offer period. A person who sells securities early following a no extension statement will miss any opportunity of another higher offer during the extended period. This person will sell or accept earlier than necessary.

Bidder – no waiver statement

[PS 25.27] Bidders sometimes state that they will not waive a defeating condition (“no waiver statement”). A holder may accept into a bid on the basis that they will be bound to sell only if the condition is met. For example, a holder may accept in reliance on a statement by the bidder that it will not waive a 50% minimum acceptance condition in circumstances where the holder wishes to sell its shares to the bidder only if control passes.

[PS 25.28] A holder who sells on-market following a no waiver statement may be disadvantaged if the bidder subsequently waives the condition. The holder may sell on-market because of their assessment that the condition is unlikely to be fulfilled. If the bidder subsequently waives the condition, the holder may miss the opportunity of:

- (a) a better price for their securities, because the market price may have reflected the view that the condition was unlikely to be fulfilled, so the bid would fail;
- (b) any improved consideration or a rival bid; or

- (c) receiving non-cash consideration where this is offered by the bidder.²

Acceptance statement

[PS 25.29] We have seen statements by substantial holders that they will not accept into the bid, or that they will not accept unless the bidder improves the consideration. The substantial holder may risk regulatory action by us for contravention of s1041H or a declaration of unacceptable circumstances.

[PS 25.30] Other holders may, in reliance on the statement, reject the offer because they judge that if the substantial holder does not accept, control of the target will not pass. If the substantial holder departs from its statement and accepts the offer, control may pass. There are risks in being left as a minority holder where the bidder has effective control, but cannot compulsorily acquire, eg:

- (a) the share price may drop; and
- (b) the bidder may influence dividend policies.

[PS 25.31] We have also seen last and final statements by substantial holders that they will accept into the bid.

[PS 25.32] Other holders may rely on the statement by a substantial holder that it will or will not accept because the substantial holder is a large and reputable institution, as well as because of the size of its holding. Other holders may be influenced by the substantial holder's commercial judgement.

[PS 25.33] Where the bidder or target states that a substantial holder will or will not accept into the bid, we may query the bidder or target and the substantial holder concerning the statement: see [PS 25.40]. We may require that the bidder or target identifies the substantial holder, and gives details of what the substantial holder has told it. We may contact the substantial holder to determine whether the bidder or target had reasonable grounds for its statement.

² The Takeovers Panel decided that a bidder should not be released from a no waiver statement in *Re Taipan Resources NL (No 6)* Takeovers Panel (2000) 36 ACSR 716.

[PS 25.34] We discuss misleading statements about acceptances actually received at [PS 25.65].

Question 2:

Are there any other examples of last and final statements that we should refer to in this Policy Statement?

Qualification of statement

[PS 25.35] A market participant cannot rely on the happening of a reasonably foreseeable event to depart from its statement unless it has qualified its statement by reference to the event. Unless the market participant reserves its right to depart from a statement, it is representing that it will not do so if the event occurs. In *Wheeler Grace & Pierucci Pty Ltd v Wright* (1989) ATPR 40–940 at 50,251, the court found that:

A positive unqualified prediction by a corporation may be misleading conduct...if relevant circumstances show the need for some qualification to be attached to that statement or the possibility of its non-fulfilment to be disclosed...The misleading or deceptive conduct may be found in the failure to qualify the statement or disclose the risk of non-fulfilment...

Reasonably foreseeable events

[PS 25.36] The market participant does not have to qualify its statement by reference to an event that is not reasonably foreseeable.

[PS 25.37] Events that *are* reasonably foreseeable include that:

- (a) a rival bid is made or increased;
- (b) the target declares a dividend;
- (c) the target recommends acceptance of the bid if:
 - (i) the bid consideration is increased;
 - (ii) a condition is waived; or
 - (iii) a certain number of acceptances have been received;
- (d) the bidder:
 - (i) improves the consideration offered;
 - (ii) extends the offer period; or
 - (iii) waives a condition; or
- (e) there are a significant number of late acceptances.

Question 3:

Do you agree that all of the events listed above are reasonably foreseeable?

Question 4:

Are there any other events that should be taken to be reasonably foreseeable for this purpose?

General qualifications

[PS 25.38] A market participant should not make a last and final statement and merely reserve a general right to depart from it. A mere disclaimer may be insufficient to counterbalance the effect of the last and final statement on holders: see *Lezam Pty Ltd v Seabridge Australia Pty Ltd* (1992) 35 FCR 535 and Policy Statement 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)* at [PS 168.100]. The overall impression that the statement conveys may be that the market participant will not depart from it. A general qualification does not give holders sufficient information to assess the risk that the statement will not be fulfilled. This policy is consistent with the view of the UK Takeover Panel that a bidder cannot depart from a no increase statement unless it has “specifically reserved the right to do so in such circumstances”: see City Code Rule 32.2. Qualifications must be clear and unambiguous: [PS 25.63].

[PS 25.39] A market participant may seek to qualify its statement by saying that it is expressing a present intention only. Using the language of intention may be insufficient to convey to holders that the market participant is reserving the right to change its mind. In any event, the market participant should explain what would cause it to change its mind. This is information that holders require to assess the merits of the bid.

Question 5:

Are there any practical situations where it would be unreasonable to expect a market participant to qualify its statement by reference to events that may cause it to depart from the statement, rather than to merely reserve the right to depart from it?

We may query a statement

[PS 25.40] We may query a market participant that makes a last and final statement at the time of the statement where:

- (a) the statement is not qualified;
- (b) there is no adequate disclosure of the risk that the statement will not be fulfilled; or
- (c) the statement is confusing or ambiguous (see [PS 25.63]).

This reflects our existing enforcement practice.

[PS 25.41] We may:

- (a) tell the market participant what we consider the statement means;
- (b) ask the market participant what it meant by the statement;
- (c) if necessary, require the market participant to clarify its statement; or
- (d) warn the market participant that it will be held to its statement.

Add qualification

[PS 25.42] If the market participant intended the statement to be qualified, we may require it:

- (a) in the case of a bidder or target, to issue a supplementary bidder's or target's statement (see [PS 25.44]); or
- (b) in the case of a substantial holder, to issue an announcement, containing those qualifications and adequately explaining them.

Notice to produce

[PS 25.43] In conjunction with our query, we may give a notice to produce books for the purpose of determining whether documents support the last and final statement: see s30 of the *Australian Securities and Investments Commission Act 2001*.

Question 6:

Are there any other circumstances where we should query a last and final statement?

B Making, correcting or updating statements

Our policy

[PS 25.44] If a bidder or target:

- (a) makes a statement during the offer period concerning a matter material to a holder's decision whether to accept, including a last and final statement;
- (b) updates a statement to reflect a development material to a holder's decision to accept; or
- (c) corrects or clarifies a misleading or deceptive statement or omission in the bidder's or target's statement, including any supplementary bidder's or target's statement;

it must do so by preparing, lodging and sending a supplementary bidder's or target's statement under s643 or 644.

[PS 25.45] A market participant must correct, clarify or update its statements as soon as practicable.

[PS 25.46] Even if a market participant is not responsible for misleading or confusing statements in the market (including media reports), it should clarify or correct statements where it has access to reliable information.³ For example, if there has been media comment that the target is in discussions with a possible rival bidder, the target should confirm or deny that comment.

[PS 25.47] A target that has stated it is in discussions with a possible rival bidder must:

- (a) update the market about material developments in the discussions; and
- (b) if there is no reasonable prospect of a rival bid, warn holders not to rely on the possibility of a rival bid not less than 7 days before the end of the offer period.

Holdings are unlikely to accept into the existing bid while a higher bid may emerge.

³ This is consistent with the Takeovers Panel's guidance in *Substantial unacceptability* (May 2001), paragraph 1.31.

Underlying principles

[PS 25.48] The bidder and target must keep the market informed and give current material information necessary to enable holders to assess the merits of the bid: see s602(a) and (b)(iii).

[PS 25.49] A statement may become misleading or deceptive if it continues to be published when the facts or grounds on which it was based have substantially changed.⁴

[PS 25.50] The bidder and target should use the supplementary bidder's and target's statement provisions because those provisions:

- (a) promote orderly flows of information to the market; and
- (b) underline the status of the information as an official release of the bidder or target in a regulated environment, to which liability may attach.

Explanations

[PS 25.51] The supplementary bidder's or target's statement provisions were introduced by the *Corporate Law Economic Reform Program Act 1999*.

[PS 25.52] The bidder or target must prepare a supplementary statement to address:

- (a) a misleading or deceptive statement in the bidder's or target's statement;
- (b) an omission from the bidder's or target's statement of information required by s636 or 638; or
- (c) a new circumstance that would have been required by s636 or 638 to be included in the bidder's or target's statement that is material from the point of view of a holder: s643 or 644.

[PS 25.53] Section 636 includes a requirement that the bidder's statement discloses all information known to the bidder material to the making of the decision by a holder whether to accept the offer:

⁴ The Explanatory Memorandum to the *Corporate Law Economic Reform Program Bill 1998* stated that "a number of provisions of the current law effectively require the bidder or target to provide supplementary information including...the risk that the failure to update renders a continuing representation misleading or deceptive (current s995)". See also Policy Statement 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)* at [PS 168.96].

s636(1)(m). A similar requirement applies to the target's statement: s638(1) and (1A).

[PS 25.54] The bidder or target may choose to disclose information in a supplementary statement where it is not obliged to do so: see Note 3 to s643.

[PS 25.55] The bidder must send its supplementary statement to the target and vice versa: see s647. The bidder or target must also send the supplementary statement:

- (a) if the bid class securities are quoted—to the operator of the prescribed financial market on which they are quoted; or
- (b) if the bid class securities are not quoted—to all holders who have not yet accepted the offer.

[PS 25.56] If a listed bidder or target sends a supplementary statement to the operator of the relevant financial market, this will satisfy a continuous disclosure requirement to notify the financial market of the information contained in the supplementary statement: see s674 and ASX Listing Rule 3.1. But an announcement to the financial market complying with the continuous disclosure requirement may not comply with s643 or 644 because the announcement will not:

- (a) state at the beginning that it is a supplementary statement—s645(1)(a); and
- (b) be lodged with us and sent to the bidder or target—s647.

[PS 25.57] The misleading statement prohibition in s670A applies to information contained in a supplementary statement. If a supplementary statement is lodged with us, for the purposes of the application of Chapter 6, the bidder's statement or target's statement is taken to be the original statement together with the supplementary statement: s646. The bidder or target may commit an offence if a misleading or deceptive statement or omission in the supplementary statement is materially adverse to holders: see s670A(3). The defences in s670D are available.

[PS 25.58] The bidder or target must lodge a supplementary statement to remedy a misleading statement or omission in a previous supplementary statement. This is because the bidder or target must correct a bidder's or target's statement, deemed to include any supplementary statement: s646.

Orderly flows of information

[PS 25.59] In *Re Pinnacle VRB* (No 9 & 9B) (2001) 40 ACSR 56, 63, the Takeovers Panel agreed with our submissions that the appropriate vehicle for the bidder or target to disseminate information during a takeover bid is the original or supplementary bidder's or target's statement. Information communicated by ad hoc or piecemeal correspondence risks misleading or confusing holders.

[PS 25.60] Problems of emotive language and inaccuracy that make a statement misleading or confusing may be more likely to appear in communications less formal than a supplementary statement under s643(c) or 644(c).⁵ Supplementary statements should disclose the basis of a statement, assumptions and qualifications. Statements contained in supplementary bidder's or target's statements are more likely to be subject to a process for verifying the facts.

[PS 25.61] The full text of the statement should be available from our database or the operator of the relevant financial market.

Counteracting statement

[PS 25.62] To counteract a misleading or confusing statement sent to holders during the offer period, it may be appropriate to send the supplementary statement to holders. In some circumstances a bidder or target that does not send a supplementary statement to holders may risk a declaration of unacceptable circumstances: see Interim Policy Statement 159 *Takeovers: Discretionary powers* at [PS 159.39]. The bidder or target should give its correction or clarification sufficient prominence in a supplementary statement to counteract the misleading or confusing statement.

⁵ Similarly, ASX Guidance Note 8 "Continuous Disclosure" states: "The information contained in a market release or announcement should be factual and relevant and expressed in an objective manner. The use of emotive language or intemperate language should be avoided."—para 32.

C Other misleading statements

Our policy

Ambiguity or confusion

[PS 25.63] If a market participant makes a statement that is ambiguous, and one or more of the reasonably possible meanings is misleading, it risks:

- (a) regulatory action by us for contravention of s670A or 1041H; or
- (b) an application by us or other parties to the Takeovers Panel.

[PS 25.64] A market participant may risk a declaration of unacceptable circumstances if its statement is confusing, or creates uncertainty for holders or the market, even if it is unclear whether the statement is misleading or deceptive under s670A(1)(h) or 1041H.

Bidder – acceptances

[PS 25.65] The bidder may risk regulatory action by us for a contravention of s670A or 1041H or a declaration of unacceptable circumstances where it makes misleading statements concerning acceptances that it has received. The statement will be misleading unless the claimed acceptances may be verified as actually received. The level of acceptances is often critical to holders: see [PS 25.30]–[PS 25.32], which discusses statements by the bidder or target that a substantial holder intends to accept or does not intend to accept.

[PS 25.66] Misleading statements by the bidder concerning acceptances of its offer include where:

- (a) the bidder overstates the level of acceptances, or its voting power in the target (see *Scott v HS Lawrence & Sons Pty Ltd* (1982) 6 ACLR 579); or
- (b) the bidder states it has received acceptances from “numerous institutions” where, say, only two institutions with relatively small holdings have accepted; or

- (c) the bidder states that an institution has accepted where it in fact held the securities as nominee for others (see *Re Weedmans Ltd* [1974] Qd R 377 and [PS 25.32]).

Question 7:

Are there any other examples of statements commonly made during takeover bids by market participants that we should refer to in this Policy Statement?

Underlying principles

[PS 25.67] Market participants must not make statements that mislead or confuse holders: see s602(a) and (b), 670A, and 1041H.

Explanations

Ambiguity or confusion

[PS 25.68] There are conflicting authorities on whether a confusing or ambiguous statement is misleading or deceptive. It has been suggested that “causing mere confusion or uncertainty...is not necessarily co-extensive with misleading or deceptive conduct”: see *Equity Access Pty Ltd v Westpac Banking Corp* (1990) ATPR 40-994, 50,950.

[PS 25.69] A market participant that makes a confusing statement may risk a declaration of unacceptable circumstances whether or not the statement breaches s670A or 1041H. The Takeovers Panel has criticised statements as having “the potential, if not to mislead, then at least to confuse, shareholders”: see *Re Pinnacle VRB* (No 9 & 9B) (2001) 40 ACSR 56, 63.

Key terms

[PS 25.70] In this Policy Statement, a reference to:

“City Code” means the United Kingdom City Code on Takeovers and Mergers;

“Corporations Act” means the *Corporations Act 2001*;

“last and final statement” means a statement by a market participant that it will, or will not, do something in the course of a bid;

“market participant” means a bidder, target or substantial holder and its advisers;

“no extension statement” means a last and final statement that the bidder will not extend the offer period;

“no increase statement” means a last and final statement that the bidder will not improve the consideration offered;

“no waiver statement” means a last and final statement that the bidder will not free an off-market bid from a defeating condition; and

“s670A” (for example) means section 670A of the Corporations Act.

Related information

[PS 25.71]

Headnotes

Extending bid, improving consideration, last and final statements, misleading or deceptive conduct, supplementary statements, takeover bid, unacceptable circumstances, waiving conditions

Policy statements and practice notes

Interim Policy Statement 159 *Takeovers: Discretionary powers*
[IPS 159]

Policy Statement 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)* [PS 168]

Draft Policy Statement 170 *Prospective financial information*
[PS 170]

Legislation

Corporations Act s636, 643, 644, 670A, 670B, 670D 1041E, 1041F, 1041H

Trade Practices Act 1974 s52

Australian Securities and Investments Commission Act 2001
s12DA, 30

Cases

Annand & Thompson Pty Ltd v TPC (1979) 25 ALR 91

CALA Plc/Miller 1999 Plc UK Takeovers Panel (1999/8)

Equity Access Pty Ltd v Westpac Banking Corp (1990) ATPR 40-994

Futuretronics International Pty Ltd v Gadzhis [1992] 2 VR 217, 241

Global Sportsman Pty Ltd v Mirror Newspapers Ltd (1984) 55 ALR 25

Holt v Biroka Pty Ltd (1988) 13 NSWLR 629

James v ANZ Banking Group Ltd (1986) 64 ALR 347

Lezam Pty Ltd v Seabridge Australia Pty Ltd (1992) 35 FCR 535

Parkdale Custom Build Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191

Pinnacle VRB Ltd (Re) (No 9 & 9B) (2001) 40 ACSR 56 (Takeovers Panel)

Scott v HS Lawrence & Sons Pty Ltd (1982) 6 ACLR 579

Siddons Pty Ltd v Stanley Works Pty Ltd (1991) 99 ALR 497

Taipan Resources NL (Re) (No 6) (2000) 36 ACSR 716 (Takeovers Panel)

Thompson v Mastertouch TV Services Pty Ltd (1977) 15 ALR 487

Weedmans Ltd (Re) [1974] Qd R 377

Wheeler Grace & Pierucci Pty Ltd v Wright (1989) ATPR 40-940

Media and information releases

[MR 99/145] Extensions of bids and truth in takeovers, 16 May 1999

[MR 01/440] ASIC issues guidance on forecasts, 12 December 2001

Information sheets

[INFO 1407] Takeovers – information for shareholders