



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 25

# Takeovers: false and misleading statements

### Chapter 6 — Takeovers

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

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*From 5 July 2007, this document may be referred to as Regulatory Guide 25 (RG 25) or Policy Statement 25 (PS 25). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 25.1) or their policy statement number (e.g. PS 25.1).*

## What this guide is about

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RG 25.1 This regulatory guide 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.

RG 25.2 This regulatory guide 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 clearly qualify its statement. Merely stating “we presently intend that” is not a clear qualification. 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 RG 25.4–RG 25.45*

**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 RG 25.46–RG 25.66*

**C** *Other misleading statements:* We discuss some other issues: confusing or ambiguous statements; and statements by the bidder or target about acceptances.

*see RG 25.67–RG 25.78*

RG 25.3 Our main focus in this policy is statements made during the offer period. This regulatory statement does not cover issues raised by the bidder’s or target’s statement content requirements: s636 or 638 of the *Corporations Act 2001* (Corporations Act). For example, it does not cover statements about the value of shares in the bidder or target, prospective financial information or the bidder’s intentions for the target, even if the statement is made during the offer period.

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## A Last and final statements

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### Our policy

RG 25.4 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; or
- (b) an application by us or another party to the Takeovers Panel for a declaration of unacceptable circumstances.

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 RG 25.21–RG 25.34.

RG 25.5 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 RG 25.25.

RG 25.6 The market participant may reserve the right to depart from its last and final statement by attaching to it a clear, express qualification. Whatever language the market participant uses, it must clearly convey the message to all holders of securities in the target that it is reserving the right to change its mind.

RG 25.7 Examples in the case of no increase statements are:

- (a) “We do not presently intend to increase our bid price, *although we reserve the right to do so.*”; or
- (b) “We think our offer is full and fair. We do not have any information that would justify an increase in offer price. *But we have not declared the offer final.*”.

RG 25.8 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

RG 25.9 Market participants that make a last and final statement should be held to it, as with a promise. Holders of securities in the target are entitled to expect that market participants will act consistently with their last and final statement. Some market participants have even cited the legal significance of their last and final statement to reinforce it. (Of course, the statement has legal significance regardless of whether the market participant cites it.)

RG 25.10 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)).

RG 25.11 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.

RG 25.12 The market participant makes the last and final statement voluntarily. It should assume the risk for its statement. It can protect itself by a clear qualification.

## Explanations

### **Corporations Act provisions**

RG 25.13 A market participant that departs from a last and final statement may contravene misleading conduct provisions: s670A or 1041H. The market participant may also contravene other provisions, such as s1041E or 1041F.

*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

RG 25.14 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 or target’s statement (including a supplementary statement), an offer document, a notice of variation of takeover offer and a report included in or accompanying these documents.

RG 25.15 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.

RG 25.16 Defences against liability or prosecutions for contraventions of s670A are contained in s670D. Statutory defences corresponding to s670D do not apply to a contravention of s1041H.

### Section 1041H – statements outside a takeover document

RG 25.17 Where the market participant makes a statement outside a “takeover document”, the general misleading conduct provision in s1041H applies. The section applies where a market participant makes a last and final statement in a market announcement, media release, press conference, media interview, telephone conversation with a holder or in comments to a journalist or analyst. Section 1041H has 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.

Section 1041H(2) does not apply where the statement is made in takeover documents because s670A applies: see s1041H(3).

### Authorities

RG 25.18 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 for the risk of its non-fulfilment to be disclosed (see RG 25.36; *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 did not have reasonable grounds for believing that the statement would be fulfilled (see s769C and 670A(2). 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);
- (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 and *Poseidon Ltd v Adelaide Petroleum NL* (1991) 105 ALR 25). “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 at 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”.

RG 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.

### Omissions

RG 25.20 A person must not omit from a bidder's or target's statement (including a supplementary statement) information required under s636 or 638: see s670A(1). A bidder or target that:

- (a) departs from its last and final statement in a bidder's or target's statement (including a supplementary statement); and
- (b) omits 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) or 638(1).

### **Examples of last and final statements**

#### Bidder – no increase statement

RG 25.21 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 "this is our last offer"; the offer will not be "increased", "amended", "revised" or "changed"; or "we do not have any information that would justify an increase in the offer".

RG 25.22 A holder who sells securities in the target:

- (a) on-market; or
- (b) into a market bid,

following a no increase statement will miss the opportunity to participate in any improved consideration. In contrast, where a holder accepts into an off-market bid, they are entitled to improved consideration: see s650B. In the case of a competing bid, where the original bidder made a no increase statement and the holder accepts into the competing bid (particularly an unconditional bid) the holder will miss the opportunity of improved consideration under the original bid.

RG 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 competing bid.<sup>1</sup> Compensation does not adequately address the regulatory concerns in RG 25.10 and RG 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.

RG 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 (“UK City Code”). The UK 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.

RG 25.25 Where a bidder buys on-market under item 2 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 an application to the Takeovers Panel for 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

RG 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 the opportunity of another higher offer during the extended period. This person will sell or accept earlier than necessary.

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

### Bidder – no waiver statement

RG 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.

RG 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 competing bid; or
- (c) receiving non-cash consideration where this is offered by the bidder.<sup>2</sup>

### Acceptance statement

RG 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 an application by us or another party for a declaration of unacceptable circumstances where the substantial holder departs from such a statement.

RG 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. (Although if the bidder’s voting power in the target increases to more than 50% in the last 7 days of the offer period, the offer period is extended for 14 days after this occurs: s624(2).) The holder may also rely on the acceptance statement in assessing whether it is likely that:

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

- (a) the bidder will meet the compulsory acquisition tests in s661A(1)(b) or 664A(1) or (2); and
- (b) in a scrip bid, whether capital gains tax rollover relief will be available to accepting holders.

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

RG 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.

RG 25.33 Where a bidder or target states that a substantial holder will or will not accept into the bid, we may query both the bidder or target and the substantial holder: see RG 25.42. 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. If the substantial holder made the acceptance statement to the bidder or target and does not accept the offer the substantial holder risks:

- (a) regulatory action by us for contravention of s1041H; or
- (b) an application to the Takeovers Panel for a declaration of unacceptable circumstances.

RG 25.34 For the position of the bidder or target see RG 25.74 and RG 25.75. We discuss misleading statements about acceptances actually received by the bidder at RG 25.71.

### **Qualification of statement**

RG 25.35 A market participant cannot depart from a last and final statement unless it has expressly reserved the right to do so by attaching a qualification. The qualification must be clear and unambiguous. For example, a bidder making a no increase statement may say:

- (a) "We do not presently intend to increase our bid price, *although we reserve the right to do so.*"; or
- (b) "We think our offer is full and fair. We do not have any information that would justify an increase in offer price. *But we have not declared the offer final.*".

RG 25.36 In *Wheeler Grace & Pierucci Pty Ltd v Wright* (1989) ATPR 40–940 at 50,251 the court found that a statement about the future may be misleading without an adequate qualification:

*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...*

### Present intention statement

RG 25.37 It may be useful and natural for a market participant to use “present intention” language in a last and final statement eg in the case of a no increase statement: “we do not presently intend to increase our offer”.

RG 25.38 Without a clear additional statement that the market participant reserves the right to change its mind, present intention language may be insufficient to counterbalance the effect of the last and final statement on holders, including ordinary investors: see *Lezam Pty Ltd v Seabridge Australia Pty Ltd* (1992) 35 FCR 535 and Regulatory Guide 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)* at RG 168.100. The overall impression that the statement conveys, particularly to the ordinary investor, may be that the statement is firm and final. We recognise that some parties, including some wholesale investors, market participants and their advisers, may read a “present intention” statement as a disclaimer. However, market participants making such a statement must have regard to its effect on the entire audience, including retail investors. In considering the overall impression conveyed by a last and final statement, ASIC will be mindful of its function of monitoring and promoting consumer protection: s12A(2) of the *Australian Securities and Investments Commission Act 2001* (ASIC Act).

RG 25.39 The UK Panel treats a statement containing “present intention” language as firm rather than qualified: see UK City Code Rule 32.2.

RG 25.40 In any event, a statement of present intention must be genuine. The market participant must in fact have the relevant intention at the time the statement was made: see RG 25.18(c).

### **Withdrawing a statement**

RG 25.41 If a market participant makes an incorrect last and final statement, it may withdraw, correct or qualify the statement by an

announcement or supplementary statement: see RG 25.46. For example, a representative of a market participant may be drawn into a last and final statement, or fail to qualify it, during a media interview. A market participant may withdraw or qualify its statement only within a short period after the statement was made. If there is any significant opportunity for holders to accept or trade on the basis of the statement, the market participant should not withdraw or qualify it. The market participant must act consistently with the statement. This policy is similar to UK City Code Rule 32.2.

### ***We may query a statement***

RG 25.42 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 adequately qualified; or
- (b) the statement is confusing or ambiguous (see RG 25.67).

This reflects our existing enforcement practice.

RG 25.43 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**

RG 25.44 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 RG 25.46); or
- (b) in the case of a substantial holder, to issue an announcement, containing those qualifications and adequately explaining them.

### **Notice to produce**

RG 25.45 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 ASIC Act s30.

## **B Making, correcting or updating statements**

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### **Our policy**

RG 25.46 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.

RG 25.47 A market participant must correct, clarify or update its statements as soon as practicable.

RG 25.48 If a market participant has made a last and final statement and reserved the right to change its mind, it must immediately update its statement if it does change its mind.

RG 25.49 If there is rumour or speculation in the market concerning a bid, a bidder or target should consider carefully whether it must disclose information concerning the subject of the speculation. The bidder or target should consider its obligations under the takeover information principles in s602(a) and (b)(iii)<sup>3</sup>, the supplementary statement provisions in s643 or 644 and continuous disclosure provisions in s674, 675 and ASX Listing Rules.

RG 25.50 If a statement made to the media by a market participant is misreported (for example reported without a qualification) the market participant must immediately clarify it in a supplementary statement, or in the case of a substantial holder, an announcement.

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<sup>3</sup> The Takeovers Panel stated: "A person who has access to reliable information may be required to correct rumours or other misinformation in the market, whether or not they bear any responsibility for the publication of that misinformation."—Guidance Note *Unacceptable Circumstances* (14 May 2001) para 1.31, see also para 1.12.

RG 25.51 A target that has stated it is in discussions with a possible competing bidder must:

- (a) update the market about material developments in the discussions; and
- (b) in any event, update the market about the status of those discussions not more than 14 days and not less than 7 days before the end of the offer period. (This equates with the requirement to give notice of the status of a defeating condition: s630(1)).

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

## Underlying principles

RG 25.52 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 the takeover information principles in s602(a) and (b)(iii), supplementary bidder's or target's statement provisions in s643 or 644 and continuous disclosure requirements in s674, 675 and ASX Listing Rules.

RG 25.53 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.<sup>4</sup>

RG 25.54 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.

## Explanations

RG 25.55 The supplementary bidder's and target's statement provisions were introduced by the *Corporate Law Economic Reform Program Act 1999*.

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<sup>4</sup> 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 [now s1041H])". See also Regulatory Guide 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)* at RG 168.96.

RG 25.56 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.

RG 25.57 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: s636(1)(m). A similar requirement applies to the target's statement: s638(1) and (1A).

RG 25.58 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.

RG 25.59 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.

RG 25.60 If a listed bidder or target immediately 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, 675 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.

RG 25.61 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.

RG 25.62 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***

RG 25.63 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.

RG 25.64 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).<sup>5</sup> Statements contained in a supplementary bidder's or target's statement are more likely to be subject to a process for verifying the facts.

RG 25.65 The full text of the statement should be available from our database or the operator of the relevant financial market.

### ***Counteracting statement***

RG 25.66 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 an application by us or another party to the Takeovers Panel for a declaration of unacceptable circumstances: see Regulatory Guide 159 *Takeovers: Discretionary powers* at RG 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.

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<sup>5</sup> 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 or intemperate language should be avoided."—para 32.

## C Other misleading statements

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### Our policy

#### ***Ambiguity or confusion***

RG 25.67 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.

RG 25.68 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.

RG 25.69 A statement that is literally true may be misleading if it is placed out of context or is inadequately explained.

RG 25.70 We will assess a statement in a takeover document in the context of relevant statements made outside such a document. Statements made inside and outside a takeover document interact. An example is where a bidder makes a no increase statement in a bidder's statement and a representative of the bidder is more equivocal in statements to the media. This may mislead or confuse holders and the market. 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.

#### ***Acceptances***

RG 25.71 If a bidder makes misleading statements concerning acceptances that it has received, it may risk regulatory action by us for a contravention of s670A or 1041H or an application by us or another party to the Takeovers Panel for a declaration of unacceptable circumstances. 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 RG 25.30, which discusses statements by a substantial holder that it will or will not accept.

RG 25.72 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).

RG 25.73 A statement by the bidder about the level of acceptances that it has received must be in specific, percentage terms. For example, a statement by the bidder that “the bid has been well received by the institutions” or that “it is close to satisfying its minimum acceptance condition” may mislead or confuse holders and the market.

RG 25.74 Similarly, a statement by a bidder or target that a substantial holder said it will or will not accept the offer should be in specific, percentage terms: eg “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”.

RG 25.75 Where the bidder or target misstates what a substantial holder has said about whether the substantial holder will or will not accept the offer, it 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. For the substantial holder’s position see RG 25.29.

## Underlying principles

RG 25.76 Market participants must not make statements that mislead or confuse holders: see s602(a) and (b), 670A, and 1041H.

## Explanations

### ***Ambiguity or confusion***

RG 25.77 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.

RG 25.78 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

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RG 25.79 In this guide, a reference to:

“ASIC Act” means the *Australian Securities and Investments Commission Act 2001*;

“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;

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

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

## Related information

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RG 25.80

### Headnotes

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

### Regulatory guides

RG 159 *Takeovers: Discretionary powers*

RG 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)*

RG 170 *Prospective financial information*

### Legislation

Corporations Act s624, 636, 638, 643, 644, 670A, 670B, 670D, 674, 675, 1041E, 1041F, 1041H

*Trade Practices Act 1974* s52

ASIC Act 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)

*Poseidon Ltd v Adelaide Petroleum NL* (1991) 105 ALR 25

*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**

*ASIC updates “truth in takeovers” policy*, August 2002

[IR 02/6] *ASIC calls for comment on “truth in takeovers”*, 23 March 2002

[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**

*Takeovers – information for shareholders*