

13 April 2007

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Dear Mr Morris

## **Insider Participation in Control Transactions – Issues Paper & Guidance Note**

The Australian Institute of Company Directors (AICD) appreciates the opportunity to comment on the Issues Paper and Draft Guidance Note regarding insider participation in control transactions. Thank you for the extension of time to lodge our submission.

AICD is the principal professional body representing directors in Australia and has over 21,000 individual members. Our members are directors of a wide range of corporations: publicly-listed companies, private companies, not-for-profit organisations, and government and semi-government bodies.

### **General Comments**

AICD welcomes the work which the Takeover Panel has undertaken in relation to the important and topical issues arising out of insider participation in control transactions.

We have made comments below on three areas raised in the Issues Paper: participating insiders, addressing potential conflicts of interest and provision of information to potential rival bidders. A common thread to our views is that prescriptive rules are not appropriate in the context of control transactions.

As a general point on the Guidance Note, we are concerned that there is an appropriate balance between allowing scope for the operation of the law in this area, yet at the same time ensuring that readers of the Guidance Note are both reminded of that law and offered appropriate guidelines on complying with it. Accordingly, there should be a clear statement upfront in the Guidance Note of the obligations arising under common law and statute for directors and senior management of a target company. To the extent there is

any level of prescription or detail in the Guidance Note, that prescription should be described as 'best practice' to retain the necessary flexibility for particular circumstances. To either state or imply that a failure to strictly follow protocols set out in the Guidance Note will result in a declaration of unacceptable circumstances would be counter-productive and could result in the type of "tick the box" formulaic compliance which encourages compliance in form and not in substance.

## **Specific Comments**

### ***Participating Insiders***

AICD considers that the definition of 'participating insider' is too broad. The definition should be narrowed to cover only those persons who are able to affect the relevant control transaction, as opposed to all directors and senior management. The underlying principle should be that directors and senior management are not considered to be participating insiders, and thus subject to the Guidance Note, unless it is absolutely necessary. Directors and senior management are the persons best placed to know the business of the company. They are more likely to have the skills and experience that should be brought to bear on the process for the benefit of the target and its shareholders. To unnecessarily limit their involvement in a control transaction is likely to be detrimental to the shareholders and the company overall.

The proposed definition of 'participating insider' will also catch all insiders who receive a benefit from the transaction. This is too wide considering that, in many control transactions, the insiders will receive some benefit even though that insider is not actively participating in bringing about the control transaction, e.g. a director may have options that are acquired as part of the transaction. To be a 'participating insider', the insider should go beyond merely obtaining a benefit from the transaction and should have some *active participation* in the transaction. Benefits that are obtained by an insider purely as a result of the relevant control transaction taking place should be distinguished from circumstances where the benefit arises because of their active participation in ensuring that the transaction is completed.

### ***Addressing Potential Conflicts of Interests***

The protocols set out by the Panel in relation to managing potential conflicts of interests of participating insiders must also not be prescriptive. The protocols applied in each case should be appropriate to the particular circumstances. Accordingly, the Guidance Note needs to state that the protocols are 'guiding principles' rather than rules per se.

The purpose of the protocols appears to be to regulate the information that is disclosed to a bidder. In relation to directors, the protocols seem to reinforce the general fiduciary duty that they have to act in the best interests of the company despite their own personal interests. Ideally such protocols would put a framework in place to ensure that directors

understand and comply with their general fiduciary obligations. By way of background and information, we attach a copy of an article authored by Colin Galbraith in the April 2007 AICD Company Director journal which seeks to clarify those obligations in the context of corporate control transactions.

We do not support the suggestion that the Independent Board Committee may require that a target representative be present at meetings between participating insiders and bidders because it could potentially hinder the ability of the insiders and bidders to freely progress the transaction. The impact of such a requirement is unlikely to be in the best interests of shareholders and the company.

### **Provision of Information to Potential Rival Bidders**

The Panel's approach is appropriate in relation to the provision of information to potential rival bidders. We support the principle that there should be equality of access to information. We agree that it is useful for there to be guidance supporting the principle that there should not be an information disadvantage for potential bidders. However, prescriptive rules are not appropriate. Different levels of disclosure may be appropriate in different circumstances and should be dealt with on a case by case basis. In fact, issues might arise under the insider information and tipping provision of section 1043A(2) of the Corporations Act if information is given to the bidders and not to the relevant company's shareholders.

### **Guidance Note**

As noted above, AICD considers that any guidance in the Guidance Note should be clearly understood to be in addition to, and not instead of, the position under general law. Therefore, the Guidance Note should state upfront that the directors and senior management of a target company have certain fiduciary obligations arising under common law and statute and that those obligations must be complied with. This approach will ensure that primary attention is focused on those duties, rather than the procedures in the Guidance Note.

Please contact Gabrielle Upton on (02) 8248 6635 should you have any queries in relation to our submission.

Yours faithfully

Ralph Evans  
**Chief Executive Officer**