



**CHARTERED SECRETARIES
AUSTRALIA**

Leaders in governance

5 April 2007

Ms Judy Yeung, Mr Nigel Morris and Mr Bruce Dyer
Takeovers Panel
Level 47, 80 Collins Street
Melbourne VIC 3000

By email to: judy.yeung@takeovers.gov.au; nigel.morris@takeovers.gov.au; and
bruce.dyer@takeovers.gov.au

Dear Ms Yeung, Mr Morris and Mr Dyer

**Draft Guidance Note on Insider Participation
in Control Transactions**

CSA is the peak professional body delivering accredited education and the most practical and authoritative training and information on governance, as well as thought leadership in the field. We are an independent, widely-respected influencer of governance thinking and behaviour in Australia and represent over 8,000 governance professionals working in public and private companies. Our members are all involved in governance, corporate administration and compliance with the *Corporations Act* (the Act) and we have drawn on their experience in the formulation of our submission.

Concepts outlined in Draft Guidance Note

CSA believes that the Takeovers Panel (the Panel) has set out a number of protocols in its Draft Guidance Note (the Note) that enhance the understanding of conflicts of interest and insider participation in control transactions.

CSA notes it would be difficult to oppose the concepts as set out in the Note and thanks the Panel for its considered articulation of these concepts. However, CSA will not deal in this submission with any of the protocols set out in the Note, for the reasons set out below.

Panel's jurisdiction

CSA is concerned that the Panel is utilising a Guidance Note to increase its jurisdiction in the matters of adjudicating on insider participation.

CSA is aware that the Panel noted in both the Note and the Issues Paper that there is considerable overlap of the issues which are discussed in the Note with directors' and employees' duties, employment law and the duties and terms of engagement of advisers. CSA is also aware that the Panel noted that the guidance applies to these issues where they affect the principles set out in s 602 of the *Corporations Act*, including the maintenance of an efficient, competitive and informed market for a company's securities where the company is subject to a takeover bid, and that the Panel does not seek to determine whether there has been a breach of directors' or employees' duties or other aspects of law.

Notwithstanding this, CSA is of the view that once the protocols as set out in the Note are issued in a final Guidance Note, they have the effect of legal pronouncement on these issues. The publication of a Guidance Note, which seeks to 'put flesh' on s 602, in effect extends it without legislative amendment.

As a result, this extends the responsibilities of the Panel without there having been due and proper consultation on whether the role of the Panel should be so extended. While CSA can see the merit of the issues covered by the Note being dealt with by the Panel, given that its processes and procedures are more informal than those of the courts or ASIC, any such extension of the role and responsibilities of the Panel should be the subject of formal consultation and legislative amendment, not by the informal and/or inadvertent means of a Guidance Note.

Furthermore, the Note provides for the Panel to be involved in a takeover process at an earlier stage than is currently provided for, and as such the Note also opens the possibility of unhappy bidders using it as a tool to slow down the takeover process, seeking rulings from the Panel on issues dealt with under the *Corporations Act* outside of Chapter 6. This too goes to the heart of the jurisdictional issue, which we believe has not been properly canvassed.

Possible conflict with the government's proposed reform of insider trading laws

The Note sets out definitions of 'participating insiders'. CSA would like to point to the current consultation paper issued by the Department of Treasury on insider trading, which is seeking comment by early June 2007, as well as the current legislation defining what constitutes insider trading.

CSA is concerned that the matters dealt with in the Note may conflict with the issues raised in the consultation process as initiated by the government, thus putting the Panel in conflict with other regulatory bodies, such as ASIC and ASX, that have jurisdiction in such matters. In light of the government's strategy to minimise regulation, such potential conflict goes against the reform process. CSA recommends that the Panel ensure that its deliberations are consistent with the outcomes of the current consultation process by the federal Department of Treasury.

CSA recommendations

While CSA can see the merit of the issues covered by the Note being dealt with by the Panel, given that its processes and procedures are more informal than those of the courts or ASIC, CSA strongly believes that there should be a formal consultation process as to whether an extension of the jurisdiction of the Takeovers Panel is appropriate. Such a formal consultation process could well provide for greater powers to be extended to the Panel, but would do so in an appropriate manner, as jurisdictional change via legislative amendment plays an important role in ensuring an appropriate regulatory outcome.

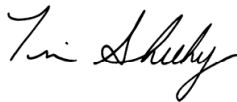
CSA notes that, in the Issues Paper accompanying the Note, the Panel advises it will consider whether it is appropriate to issue a Guidance Note based on the Draft Guidance Note in light of the submissions received.

CSA firmly recommends that the issues dealt with in the Guidance Note should be deferred at this time pending a review of the role of the Panel in such matters.

CSA also recommends that the Panel ensure that any deliberations are consistent with the outcomes of the current consultation process by the federal Department of Treasury on the law relating to insider trading.

In preparing this submission, CSA has drawn on the expertise of its national Corporate and Legal Issues Committee. We would welcome the opportunity to meet with the Panel to discuss any of our views in greater detail.

Yours sincerely

A handwritten signature in black ink, appearing to read "Tim Sheehy". The signature is written in a cursive, flowing style.

Tim Sheehy
CHIEF EXECUTIVE