Australian Government
Takeovers Panel

PUBLIC CONSULTATION RESPONSE STATEMENT

Guidance Note 1 – Unacceptable Circumstances

Introduction

On 14 March 2018, the Takeovers Panel released a Consultation Paper seeking public comments in relation to proposed revisions to Guidance Note 1 on Unacceptable Circumstances. The proposed revisions give an example of unacceptable circumstances following a last and final statement in relation to a takeover bid.

Comments on the Consultation Paper were due by 20 April 2018. The Panel received submissions from Arnold Bloch Leibler, ASIC, Herbert Smith Freehills, the Law Council,[1] MinterEllison and Mr Simon Mordant AM (in his personal capacity) (**Annexure A**). The Panel thanks the respondents for their comments. Consistent with the Panel's published policy on responding to submissions, this statement sets out the material comments received by the Panel and the Panel's response.

Attached is a copy of the final Guidance Note 1, in mark-up to show the changes from the draft circulated with the Consultation Paper (**Annexure B**).

Do you agree that there is uncertainty in the market regarding how long a last and final statement will be treated as having ongoing effect following the close of a bid? If so, does the proposed guidance provide greater certainty to the market?

Comments

The majority of respondents submitted that there is uncertainty and that the proposed guidance would provide greater certainty.

The Law Council acknowledged the diversity of views in the market, but on balance submitted that *"if bidders are contemplating or choose to make "no increase" or similar "truth in takeovers" statements, for example as part of their "end game" strategy in a takeover bid, it would greatly assist them in particular and for the market generally to have more specific guidance (such as the proposed guidance) as to the timeframe that bidders may be held to such statements"* (footnotes excluded).

One respondent submitted that the proposed guidance should not impose a meaning on last and final statements that is not consistent with the carefully chosen wording of bidders. It drew a distinction between last and final statements that expressly apply to the current bid or for a prescribed period (where it argued a "wait period" should not apply) and other last and final statements (where it argued a "wait period" should apply).

One respondent disagreed with the proposed guidance and submitted that the Panel's question is premised on a law or existing policy that a last and final statement has ongoing effect and that this is not the case. It submitted that the Panel can determine whether a departure from a last and final statement is unacceptable on a case by case basis having regard to the bidder's statement, bidder's conduct and overall circumstances of the target. It also submitted that there was no clear evidence of confusion or actual instances of departure from last and final statements after bids have closed (to its knowledge) that warranted guidance that in its view re-writes the existing law and policy.

[1] The Corporations Law Committee of the Business Law Section of the Law Council of Australia

Panel response

The Panel considers that there is sufficient uncertainty in the market to justify guidance. The Panel acknowledges that there is a range of views regarding the period before which departure from last and final statements may give rise to unacceptable circumstances. This is representative of uncertainty in the market. The Panel has decided to proceed with its proposed guidance to provide the market with more certainty.

The Panel does not consider it necessary to clarify what constitutes a "clear qualification". This would need to be determined in the circumstances.

What are the possible unintended consequences (if any) of the proposed guidance?

Comments

Two respondents raised concern that the example given in the proposed guidance only relates to last and final statements made by bidders and not other market participants. One respondent also considered *"anomalous"* that the example given applies to "no increase" statements but not other types of last and final statements such as "no extension" and "no waiver" statements.

Two respondents expressed the concern raised above as to whether a statement that applies to the existing bid and not any future bid would be a *"clear qualification"* allowing a bidder to bid again.

ASIC submitted that the proposed guidance recognises a possible ground for unacceptable circumstances that has always existed. Given this view, ASIC considers there is limited likelihood of significant unintended consequences from the Panel's efforts to seek to clarify the timeframe more precisely, provided the timeframe represents a reasonable conclusion as to what an ordinary investor would consider it to be.

One respondent raised a concern that because the example given in the proposed guidance only concerns where a bidder *"makes"* another bid (which is generally accepted as meaning that a bidder making an off-market bid has served a bidder's statement on a target), the proposed guidance would be undermined by the bidder announcing a new bid within the 4 month wait period (which a bidder could do within 2.5 months (or 2 months with the target's consent) after its first bid closes). It submitted that *"makes"* should be amended to *"announce"*. Three other respondents also raised this issue (in response to other questions).

Panel Response

The Panel accepts respondents' comments to change *"makes"* to *"announces"*. The Panel also removed the word "proposes" in relation to a scheme so that a subsequent bid or scheme are on equal footing. See footnote 39 in Annexure B.

No other changes were considered appropriate at this time. The Panel notes that the guidance is intended to be an example from which future Panels, taking a principles based approach, can extrapolate to deal with the circumstances at hand.

Do you agree with the suggested 4 month wait period? Is some other time period more appropriate?

Comments

Three respondents generally considered 4 months to be an appropriate wait period. One respondent had no firm view on the length of the wait period. One respondent did not consider that any wait period is appropriate.

ASIC submitted that 4 months was too short and a period of at least 6 months was more in line with *"what the market would on average consider is a period during which a bidder could be expected to be held to its statement that an offer is final"*. It also submitted that there was statutory support for a 6 month period referring to item 9 of s611[2] and s664AA.

Panel Response

The Panel considers that a 4 month wait period is appropriate.

Should there be an exception for a "material change" or "exceptional circumstance" occurring during the wait period? If so, how should these terms be defined?

Comments

One respondent did not consider that there should be any exceptions, noting that a bidder is free to qualify its statement. It submitted that a general exception would arguably undermine the broader truth in takeovers policy. ASIC expressed a similar view.

One respondent submitted that the only potential exception should be if a third party proposal emerges so that target shareholders are not disadvantaged by not allowing the initial bidder to bid again.

One respondent submitted that there should be an exception for a change in circumstances previously unknown and outside the control of the bidder which has the potential to materially increase the value of the target's shares to the bidder.

The Law Council expressed two different perspectives on this. One that there be no general exception. The other that many market participants and advisers currently understand that there is a "material change in circumstances" exception that applies to last and final statements. It submitted that this view is consistent with the basis of the policy because a departure from a statement where there is a material change is unlikely to offend that underlying policy. It submitted that there is difficulty in defining what constitutes a "material change in circumstances" and suggested that it could be defined as some or all of the 'prescribed occurrences' in s652C or to reflect s670F.

One respondent submitted that, if the proposed guidance is adopted, then extensive exceptions are required so that target shareholders are not prejudiced. At a minimum, it submitted that the wait period should end on the occurrence of most of the matters in s652C.

Panel Response

The Panel does not consider that exceptions are required and is concerned that any general exception may undermine the policy. It does not agree that exceptions based on ss652C or 670F were necessarily helpful or appropriate.

In relation to the alternative view of the Law Council, the Panel does not accept that there is already an exception for a "material change in circumstance". The Panel notes that a bidder is free to include clear qualifications and expects that the guidance will focus bidders' last and final statements.

[2] Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth), and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

Should the proposed guidance be extended to a last and final public statement made or authorised by a bidder in connection with a preliminary approach seeking an agreed control transaction? If so, when would the wait period commence?

Comments

A majority of respondents considered that the guidance should be extended to a last and final public statement made or authorised by a bidder in connection with a preliminary approach and that the wait period should run from the date of the statement.

One respondent considered that the policy should only apply to actual proposals capable of acceptance.

One respondent submitted that the guidance should only be extended if there is evidence of this behaviour occurring.

Panel Response

The Panel considers that it is not necessary to extend the guidance at this time to cover a last and final public statement made or authorised by a bidder in connection with a preliminary approach. The guidance does not exclude the policy from applying in the context of these statements. As noted above, the principle expressed in footnote 39 is intended to be considered by the Panel in other circumstances.

Please identify any amendments you think should be made to the draft revisions.

Comments

In addition to suggested changes to address matters expressed above, other suggested amendments included:

- extending the guidance to "no extension" and "no waiver" statements
- restricting subsequent confidential non-binding approaches during the 4 month period
- applying the guidance to failed or abandoned schemes and
- making clear that if a new bid is made the day after the end of the 4 month period, this will not, of itself, give rise to unacceptable circumstances.

Panel Response

Other than the change to footnote 39 in Annexure B, for the reasons expressed above, the Panel does not consider any further changes to the guidance are appropriate at this time.

11 July 2018

ANNEXURE A

Submissions

- Arnold Bloch Leibler
- ASIC
- Herbert Smith Freehills
- Law Council
- MinterEllison
- Mr Simon Mordant AM (in his personal capacity)

Submission

from

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20 April 2018

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Dear Allan

Consultation Paper - Revisions to Guidance Note 1 on Unacceptable Circumstances - Last and Final Statements

We are grateful for the opportunity to provide comments in response to the Takeovers Panel's Consultation Paper on Last and Final Statements. This letter sets out Arnold Bloch Leibler's comments on the Consultation Paper and our responses to the questions posed by the Panel.

Our view is that guidance from the Panel as to the stand-down period that should apply after a last and final statement is made will be helpful. However, the stand-down period should not apply:

- where the last and final statement clearly only applies to a particular transaction or for a prescribed period; or
- new circumstances arise after the date of the statement that materially increase the value of the target to the bidder.

1. Do you agree that there is uncertainty in the market regarding how long a last and final statement will be treated as having ongoing effect following the close of a bid? If so, does the proposed guidance provide greater certainty to the market?

We agree that there is uncertainty among commentators and practitioners as to how long a bidder will be held to a best and final statement. We agree that the market would be well served by revisions to Guidance Note 1 to clarify this uncertainty. However, we consider that the Guidance Note should not rush to impose a meaning to best and final statements that was not intended or to impose a one-size-fits-all stand down period in all circumstances.

Takeover bidders in Australia are invariably well resourced and well served by sophisticated advisers. The statements bidders make in relation to their bids are crafted with care and attention. This is especially true in relation to best and final

statements/no increase statements. The Panel should not adopt a policy which seeks to apply meanings to best and final statements which is not consistent with the carefully chosen wording of the bidders.

If a no increase statement is clear that it only applies to the current bid/scheme or only for a specified period, then no stand-down should apply beyond the close of the current bid/scheme or end of the period referred to in the statement.

In considering the application of a stand-down period to no increase statements it is important to distinguish between two different categories of no increase statement:

(a) **No increase statements that relate only to the current bid/scheme or for a prescribed period** - eg, "*Its Offer price of $0.145 in cash per Macmahon share is final and will not be increased in any circumstances during the Offer Period*"[1].

(b) **No increase statements which are not clearly limited to the current bid/scheme** - eg, "*Its Offer Price of $1.15 per Spotless Share represents Downer Services' final offer price in the absence of a superior proposal*"[2].

The truth in takeovers policy is, among other things, designed to protect shareholders from deception and coercion by bidders. In particular, where bidders press shareholders to accept their bid with statements about the bidder's intentions only to later resile from those statements.[3] This policy would not be served by imposing a mandatory stand-down to a carefully worded no increase statement which only applies to a current bid or scheme or for a prescribed period. If the statement is clear, then no stand-down should apply beyond the close of the current bid/scheme or end of the prescribed period. Any potential confusion in the minds of unsophisticated shareholders could be easily addressed by an announcement from the target.

In practice, we suspect that imposing such a rule would see the majority of best and final statements formulated to fit into category (b) - and the mandatory stand-down - providing clarity for all participants.

We see no issue with holding bidders to a stand-down period where they make a clear type (a) no increase statement followed by ambiguous statements to shareholders that suggest the no increase statement applies more broadly. Doing so simply reflects that the later statements are in effect type (b) no increase statements.

No increase statements which clearly extend beyond the current bid/scheme or are ambiguous as to their application (ie, (b) above), should be subject to a mandatory stand-down period in the absence of material intervening circumstances.

Our recommended amendments to the Guidance Note are set out in section 6 below.

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[1] ASX announcement dated 2 March 2017 in relation to CIMIC's bid for Macmahon.
[2] ASX announcement dated 3 May 2017 in relation to Downer's bid for Spotless.
[3] *Taipan Resources NL 06* [2000] ATP 15.

2. What are the possible unintended consequences (if any) of the proposed guidance?

As noted in 1 above, we are concerned that the proposed revisions to Guidance Note 1 might be read as applying to best and final statements which are carefully drafted to only relate to the current bid/scheme or for a prescribed time period. The truth in takeovers rule should only enforce the "truth" of the statement made by the bidder. If that "truth" is that the no interest statement only relates to the current bid/scheme then the Panel should enforce only that "truth".

3. Do you agree with the suggested 4 month wait period? Is some other time period more appropriate?

We have no firm views on the appropriate length of the wait period. The period should be long enough to give "teeth" to the no increase statement. An insufficiently long period would reduce the value of a no increase statement and render it an ineffective tool in takeover strategy. Too long a period would prevent future bids to the detriment of shareholders. We do consider that a period around 4 months seems preferable to the 12 month period imposed in the United Kingdom.

4. Should there be an exception for a "material change" or "exceptional circumstance" occurring during the wait period? If so, how should these terms be defined?

Yes. Any stand-down period should be subject to a change in circumstances outside of the control of the bidder which has the potential to materially increase the value of the target companies' shares to the bidder. As mentioned, this should apply only to previously unknown circumstances outside the control of the bidder and only to circumstances which materially increase the value of the target to the bidder. Material should be defined by reference to a material (eg, 10% or more) increase in the earnings contribution or carrying value of the target or a material new strategic benefit of the acquisition.

If there were no such exception, and material new circumstances arose which increased the value of a target, a previously unsuccessful bidder would effectively be blocked from participating in a contest for control of the target within the stand-down period. Take for example a mining company which makes a material new resource discovery 2 months after an unsuccessful offer where the bidder made a general last and final statement. We do not consider that shareholders or the market would expect the previous bidder to be prohibited from increasing their prior offer in these circumstances.

By applying the exception only where the circumstances were previously unknown and outside the control of the bidder it removes the risk of bidders gaming the rule in the knowledge they can trigger the exception.

5. Should the proposed guidance be extended to a last and final public statement made or authorised by a bidder in connection with a preliminary approach seeking an agreed control transaction? If so, when would the wait period commence?

Yes, the stand-down period should apply but only if the last and final statement is contained in a statement made and publicly released by or on behalf of the bidder (subject to the same limitations and exceptions discussed above).

No stand-down should apply if the statement is contained in a confidential and non-binding approach made to the target or its advisers (eg, an indicative, non-binding letter). If that approach is then released or leaked the bidder should not be held to their last and final statement unless they reiterate the statement publicly.

The rationale behind our view is that shareholders are not asked to make any decisions or take any action in relation to a confidential approach. Accordingly, it is not necessary to hold bidders to non-binding statements made confidentially in the course of negotiations. If this rule applied and the statement leaked, it would be open to the target or bidder to clarify to the market that the bidder will not be held to their last and final statement.

Conversely, if a bidder has made a proposal public (even if it is expressed as non-binding or an expression of interest) then shareholders may be asked or expected to pressure the target directors to engage. If a bidder in these circumstances were not held to their public last and final statement shareholders may act under deception or coercion (which the truth in takeovers rule should prevent).

6. Please identify any amendments you think should be made to the draft revisions.

The amendments to proposed footnote 39 that we consider appropriate are in underlined text below:

> *39 See ASIC Regulatory Guide 25, Taipan Resources NL 06 [2000] ATP 15, Summit Resources Limited [2007] ATP 9, Rinker Group Limited 02 [2007] ATP 17, Rinker Group Limited 02R [2007] ATP 19, Ludowici Limited [2012] ATP 3 and Ludowici Limited 01R [2012] ATP 4. For example, unacceptable circumstances are likely to arise if, after <u>publicly</u> making a no increase statement, the bidder (or an associate) makes another bid (or proposes a scheme) within 4 months after the bid closes and offers increased consideration (unless that is contemplated by a clear qualification to the no increase statement <u>or it is clear that the no increase statement relates only to the current bid or only for a prescribed period). Notwithstanding the above, unacceptable circumstances are unlikely to arise where a bidder (or an associate) makes another bid (or proposes a scheme) within 4 months after the first bid closes if during the intervening 4 months there has been a change in circumstances outside of the control of the bidder and not previously known by the bidder which has the potential to materially increase the value of the target's shares to the bidder (which may include a 10% or more increase in the earnings contribution or carrying value of the target or a material new strategic benefit of the acquisition of the target's shares).</u>*

Yours sincerely

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Submission

from

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26 April 2018

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Dear Mr Bulman

Takeovers Panel Consultation Paper – Guidance Note 1 — Unacceptable circumstances

ASIC appreciates the opportunity to provide comments on the Takeovers Panel's proposed revisions to Guidance Note 1—*Unacceptable circumstances* (**GN 1**). This letter sets out ASIC's comments on the questions raised in the Panel's consultation paper.

Response to Consultation Paper questions

1.	***Do you agree that there is uncertainty in the market regarding how long a last and final statement will be treated as having ongoing effect following the close of a bid? If so, does the proposed guidance provide greater certainty to the market?***

1.1. ASIC agrees that the lack of a 'bright line' timeframe has likely resulted in some uncertainty regarding how long a bidder making an unqualified 'truth in takeovers' statement that an offer is final should, in practice, be prevented from returning with a new offer in accordance with the policy in ASIC Regulatory Guide 25 *Takeovers: False and misleading statements* (**RG 25**).

1.2. ASIC notes this uncertainty may not necessarily be limited to questions around whether a higher offer can be made after a no increase statement. Arguably the same issue arises in connection with statements that an offer is 'final' or won't be extended. Statements of this kind may lead readers to the view that the bidder will not immediately return with a new offer on substantially the same terms as the existing offer.

1.3. However ASIC also notes that the proposed guidance in footnote 39 is expressed to be only one example of unacceptable circumstances that may arise from conduct inconsistent with the principles in RG 25.

1.4. In this regard ASIC agrees that the proposed guidance provides some additional clarity to the market around the Panel's views with respect to:

(a) the general timeframe during which last and final statements regarding takeover offers should be considered to have effect; and

(b) the need for those making last and final statements to carefully consider what qualifications should be attached to those statements.

2. What are the possible unintended consequences (if any) of the proposed guidance?

2.1. In ASIC's view it is likely that practitioners and the market have recognised for some time the potential for unacceptable circumstances to arise where a bidder declares its offer final and then returns with a new offer—particularly one that offers higher consideration.

2.2. Conduct of this kind gives rise to the precise concerns that the 'truth in takeovers' policy seeks to address in requiring bidders to be held to 'no increase' and other last and final statements that are not qualified. RG 25 is concerned with the reasonable impression created by a last and final statement as to what the maker of the statement will and will not do and its likely impact on the market.[1] In general, statements that an offer is final indicate that no higher offer will be available from the bidder. They have the potential to entice target holders into selling on market (including into a market bid) or accepting an off-market bid.[2] In the absence of a clear reservation of rights there is no reason to expect the market to distinguish between increasing a current offer and making a new offer at a higher price. Both would reasonably be considered to constitute a departure from, or an act inconsistent with, the statement that an offer is final.

2.3. In this regard the Panel's proposed revisions to GN 1 recognise a possible ground for unacceptable circumstances that, in ASIC's view, has always existed. The effect of the guidance is principally to provide clearer parameters around the general timeframe during which the last and final statement may be considered to apply. Given that there would always have been a timeframe in most cases ASIC considers there is a limited likelihood of significant unintended consequences resulting from the Panel's efforts to seek to clarify this more precisely—provided that the timeframe selected generally represents a reasonable conclusion as to what an ordinary investor or market participant would consider to be a period of exclusion commensurate with an indication that an offer is a final one.

2.4. If the exclusion period is too short then the policy potentially risks entrenching a standard or default that is misaligned with the impression created by the statement—and in turn the making of unqualified last and final statements that may tend to mislead target holders.

3. Do you agree with the suggested 4 month wait period? Is some other time period more appropriate?

3.1. In ASIC's view the period of 4 months is too short and a more appropriate exclusion period would be at least 6 months.

3.2. ASIC notes that the 4 month period is consistent with the statutory 'look-back' period for the minimum bid price rule in s621(3). While this timeframe provides a statutory

[1] See eg RG 25.38.
[2] See RG 25.21—RG 25.23.

pointer as to what might be considered a relevant timeframe for the purposes of extending the equality principle to the pre-bid period,[3] in context it is necessarily one set (at least in part) with a view to ensuring a level of continued relevancy in the pricing of pre-bid acquisitions.

3.3. As noted above, the applicable timeframe in question is one that reflects market expectations around what it means to say that an offer is final—and it is important that this period is not shorter than these expectations. Conversely, a bidder concerned about the length of this period can always qualify their statement.

3.4. ASIC believes a period of at least 6 months is more in line with what the market would on average consider is a period during which a bidder could be expected to be held to its statement that an offer is final. ASIC also notes that statutory support for a 6 month period in connection with excluding a person from a takeover-related process can be found in both item 9 of s611 and s664AA. This period is also consistent with the exclusion periods applying under the UK Takeovers Code:

(a) where a person has made a statement that it does not intend to make a takeover offer for a company; [4] and

(b) following the closure of an unconditional offer by a bidder with more than 50% voting power.[5]

3.5. ASIC is also of the view that the exclusion should apply to publicly proposing to make a new bid (or scheme or similar offer), rather than making a bid, within 6 months of the close of an offer. This would ensure that scheme and bid proposals are put on equal footing and that the 6 month period is not, in effect, truncated. ASIC believes this is consistent with the expectations of the market when it is told an offer is final. The market can be expected to react to the announcement of a new offer and will not distinguish that announcement from the making of the offer in assessing whether the action taken by the bidder is inconsistent with the bidder's statement that its previous offer was final.

4. Should there be an exception for a "material change" or "exceptional circumstance" occurring during the wait period? If so, how should these terms be defined?

4.1. ASIC does not consider that the Panel should include reference to an exclusion of this kind in the updated guidance note.

4.2. In ASIC's view any such exclusion would potentially undermine:

(a) the certainty the Panel's proposed revision to GN 1 is seeking to introduce; and

(b) the objective of ensuring that a bidder adequately qualifies its statements to ensure that any last and final statement provides readers with a full and informed understanding of the position of the bidder.

4.3. The most likely material change that might justify a departure is where a non-associated third party announces a rival offer. However in ASIC's view this is a qualification that is, and should ordinarily be, attached to a last and final statement that an offer is final. Allowing it as a general ground to depart from such a statement would

[3] See ASIC Regulatory Guide 9 *Takeover Bids* (**RG 9**) at RG 9.148. Similar reference periods appears in connection with certain requirements relating to collateral benefits given or agreed prior to a bid and compulsory acquisition: see s636(1)(i) and s664D(2).

[4] See The Panel on Takeovers and Mergers (UK), *The Takeover Code* (**UK Code**), rule 2.8.

[5] See UK Code, rule 35.3.

potentially result in this qualification being dropped from these statements and shareholders being less informed as a result.

4.4. In terms of a general 'material change' or 'exceptional circumstance' qualification—in ASIC's view the Panel should avoid, or at the very least be cautious in, seeking to define this in its guidance.

4.5. Firstly, the starting point in any consideration of a last and final statement should be an examination of what ordinary impression was conveyed to target holders by the statement itself.

4.6. Secondly, ASIC expects that in this context, the options for departing from the statement during the exclusion period (on grounds not contained in an express qualification) would be exceptionally limited. ASIC suggests that the limited nature of these circumstances suggests that they do not necessarily warrant specific acknowledgement in the guidance note at this time. Doing so risks the makers of such statements seeking to rely on them as a general fall-back and detracting from the key message that bidders should seriously consider the need for adequate qualifications.

4.7. Finally, any purported departure from a last and final statement on the basis of a material change or exceptional circumstance should not ordinarily be a matter that a bidder determines alone. Before relying on a concept as open to subjective influence as a 'material change' or 'exceptional circumstances' (particularly in the context of the need to consider the particular terms of a last and final statement that—depending on how it is worded—may carry its own implications) ASIC would suggest that a bidder should ordinarily seek the views of ASIC on the proposed departure.[6] This is potentially a further reason why the Panel need not seek to define these circumstances in its guidance note at this stage.

5. Should the proposed guidance be extended to a last and final public statement made or authorised by a bidder in connection with a preliminary approach seeking an agreed control transaction? If so, when would the wait period commence?

5.1. A public last and final statement that places an upper limit on the value of a proposed offer has the same potential to affect the market as one relating to the consideration available under an existing offer.

5.2. ASIC would expect that any exclusion period in relation to such a circumstance ought to be measured from the time the statement was last made.

5.3. However, as noted above, the current guidance in footnote 39 need not necessarily address this expressly. It is framed in the nature of one example only.

6. Please identify any amendments you think should be made to the draft revisions.

6.1. ASIC suggests that footnote 39 should be amended to state that unacceptable circumstances are likely to arise if '*…the bidder (or an associate) publicly proposes another bid (or an alternative transaction such as a scheme that is in the nature of an offer to target holders) within 6 months after the bid closes and …*'

[6] See also UK Code, Rule 2.8 and notes on rule 2.8, at para 2(a)(iv) which allow for departures where there is a material change of circumstances as determined by the UK Panel.

ASIC would be happy to discuss the contents of this submission and any queries the Panel may have regarding the suggestions raised.

Please feel free to contact me at a convenient time if you would like to do so.

Yours sincerely

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Senior Specialist – Mergers & Acquisitions
Corporations
Australian Securities & Investments Commission

Submission

from

Herbert Smith Freehills

HERBERT SMITH FREEHILLS

Takeovers Panel submission: GN 1 consultation paper

18 April 2018

Introduction

Herbert Smith Freehills is pleased to provide this submission in support of the Takeovers Panel's proposed amendment to Guidance Note 1, in relation to the establishment of a time frame before which departure from a no increase statement may give rise to unacceptable circumstances.

We agree that there is uncertainty in the market on this point, and that codification (or at least clarification) would be welcome.

We have provided further comments below on the six specific questions raised by the Panel in its consultation paper dated 14 March 2018.

Please note that the views expressed in this submission do not necessarily represent the views of all Herbert Smith Freehills partners or of our clients.

The general principle underlying our comments is that, in the interests of market integrity and certainty, the Panel's guidance on this point should be as clear and definitive as possible.

1 Do you agree that there is uncertainty in the market regarding how long a last and final statement will be treated as having ongoing effect following the close of a bid? If so, does the proposed guidance provide greater certainty to the market?

We agree that this uncertainty exists.

While there is a reasonable amount of commentary in the market to the effect that such a period exists and that it is 4 months in duration, we would not consider this to be a universally accepted position – and, in any event, we suggest that (absent the adoption of the current reform) there is uncertainty as to whether any such period does in fact exist under the current law.

We consider the initial, and most important, point to be that a period is in fact specified – there needs to be a clear line drawn. Having established this principle, the appropriate duration of the period can be determined. Having said that, we agree that 4 months is indeed an appropriate period.

Accordingly, we agree that the proposed guidance provides the much needed certainty to the market.

2 What are the possible unintended consequences (if any) of the proposed guidance?

One possible unintended consequence we have identified is that the proposed amendment only applies where a bidder or associate "*makes*" another bid (or proposes a scheme).

We suggest that, instead, the drafting should refer to situations where a bidder or associate "*announces*" a bid.

The word “makes” is generally accepted to apply to the act of *serving* a bidder’s statement on the target.[1]

As a bidder’s statement can be served up to 6 weeks after the announcement of a takeover bid (without the target’s consent) or up to 2 months after the announcement of a takeover bid (with the target’s consent)[2], the currently proposed drafting would allow a bidder to announce a new takeover bid, just 2.5 months or even just 2 months (with the target’s consent) after its first bid closes. This cuts right across the policy objective of having a 4 month waiting period.

3 Do you agree with the suggested 4 month wait period? Is some other time period more appropriate?

As per our response to question 1, we agree that 4 months is an appropriate period.

4 Should there be an exception for a “material change” or “exceptional circumstance” occurring during the wait period? If so, how should these terms be defined?

We are of the view that there should not be such an exception to the Panel’s policy. If a bidder wishes to preserve the right to come back within 4 months with a new bid (or scheme) in the event of a “material change” or “exceptional circumstances”, the bidder would, of course, be free to write such an exception into their last and final statement.

Introducing an exception would arguably undermine the broader truth in takeovers doctrine by creating uncertainty as to whether other situations are also covered by a “change in circumstances” exception – this is a position we understand the Panel wishes to avoid.

5 Should the proposed guidance be extended to a last and final public statement made or authorised by a bidder in connection with a preliminary approach seeking an agreed control transaction? If so, when would the wait period commence?

If a bidder makes a “bear hug” style of public statement in connection with a preliminary approach to the effect that it will not increase its proposed offer price, the bidder should be held to this statement and prevented from announcing a new bid (or new scheme) at a higher price for 4 months from the date on which that statement was made.

[1] ASIC Regulatory Guide 5, "Relevant interests and substantial holding notices”, dated November 2013, at [5.293].

[2] See s631(1)(b) and item 6 of s633(1) of the *Corporations Act* 2001 (Cth).

HERBERT SMITH FREEHILLS

6 Please identify any amendments you think should be made to the draft revisions.

6.1 "Making" a bid versus "announcing" a bid

As per our response to question 2, our primary suggested amendment is that the word "makes" should be replaced with "announces".

6.2 Other suggestions

More broadly, we have discussed below some other enhancements we would suggest to the policy. While we see these further enhancements as important, we would not want any debate they generate to delay or impede the adoption of the draft revisions themselves.

(a) **The policy should apply to "no extension" statements**. Such statements are made by bidders with the intention that the market will rely on them, and the making of a fresh bid shortly afterwards would not be consistent with market integrity. In this situation, the policy should prevent the announcement of a new bid during the relevant 4 months, even if that new bid is not on better terms than the old bid.

(b) **The policy should apply to subsequent confidential non-binding approaches**. In our view, the policy should not be able to be circumvented by a bidder (or associate) putting a target in a difficult position by, for example, privately delivering a non-binding indicative offer (or equivalent) to the target during the 4 month lock-out period. This could require the target to publicly disclose the receipt of the indicative offer.

We think this could be achieved by adding a second restricted action, being where a bidder (or associate) during the 4 month period:

> *"privately informs a target that it intends to announce another bid (or propose a scheme) after the end of the 4 month period, under which the consideration will be increased from the consideration offered under the previous bid."*

(c) **Application to schemes.** The Panel should make it clear that these policy considerations apply equally to members' schemes of arrangement and trust schemes. This could be made clear by the inclusion of a statement along the following lines:

> *"These considerations apply equally in the context of schemes of arrangement and trust schemes (collectively **Schemes**). Generally speaking, in the context of a Scheme, the 4 month period will run from the earlier of (a) the date of the scheme meeting at which the proposed transaction is voted down, (b) the date on which the implementation agreement terminates and (c) the date on which the Scheme is otherwise abandoned."*

(d) **After the 4 month period.** The guidance note should make it clear that if a bidder announces a new bid (or proposes a scheme) the day after the end of the 4 month 'lock out' period, this will not, of itself, give rise to unacceptable circumstances.

* * *

We would be very happy to discuss our submission further.

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Submission

from

Law Council

Law Council
OF AUSTRALIA

Business Law Section

19 April 2018

Allan Bulman, Director and Bruce Dyer, Counsel
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By email: takeovers@takeovers.gov.au

Dear Mr Bulman and Mr Dyer

Submission in response to consultation paper on proposed revisions to Guidance Note 1 – Unacceptable Circumstances

The Corporations Law Committee of the Business Law Section of the Law Council of Australia (**Committee**) welcomes the opportunity to provide this submission to the Takeovers Panel (**Panel**) on the Consultation Paper on Guidance Note 1 – Unacceptable Circumstances (**Guidance Notes**).

Summary

- While acknowledging a diversity in views in the market, the Committee is generally supportive of the revised guidance and considers that it will assist in clarifying market participants' (and advisors') understanding of how "truth in takeovers" applies in practice to "last and final" statements.
- If a "wait period" is to be prescribed, the Committee considers that four months is an appropriate "wait period" to apply to "last and final statements".
- The Committee considers that the market would also benefit from additional clarification from the Panel in its revised guidance on whether the "wait period" also applies to other types of "last and final statements" (such as "no waiver" and "no extension" statements). However, the Committee would understand if the Panel decided to limit its guidance on a "wait period" to "no increase" statements at this stage, and leave other "last and final" statements for separate consultation and guidance at another time.
- The Committee considers that the market would benefit from the Panel also providing some guidance as to the likelihood of unacceptable circumstances where there is a departure from last and final statements after expiry of the "wait period".
- We set out below the Committee's responses to the specific questions posed by the Panel in the consultation paper. Even if the Panel is unable to accommodate the views expressed by the Committee in these specific responses, the Committee overall remains supportive of the revisions proposed by the Panel in its consultation paper.

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1 Do you agree that there is uncertainty in the market regarding how long a last and final statement will be treated as having ongoing effect following the close of a bid? If so, does the proposed guidance provide greater certainty to the market?

1.1 There is a general consensus within the Committee that there is some uncertainty in the market regarding the period of time that a “no increase” statement or “last and final” statement will apply – that is, the period of time after making such a statement that a bidder may be precluded from advancing a new offer or proposal at a higher consideration.

1.2 While many advisors consider that there is a “wait period” of between four to six months following such a statement, the Committee considers that there is no consensus in the market as to the applicable period, and that some market participants take the view that there is no “wait period” at all unless a bidder has clearly stated that it will not return with a higher offer. Such uncertainty is to the detriment of all market participants – including bidders who make such statements, as the failure of target shareholders and others to appreciate (or believe) the effect of such statements may undermine their efficacy.

1.3 Again, while acknowledging a diversity in market views, on balance the Committee considers that if bidders are contemplating or choose to make “no increase” or similar “truth in takeovers” statements,[1] for example as part of their “end game” strategy in a takeover bid, it would greatly assist them in particular and for the market generally to have more specific guidance (such as the proposed guidance) as to the timeframe that bidders may be held to such statements.

1.4 For this reason, on balance the Committee considers that the proposed guidance will provide greater certainty to the market by clearly specifying that such a “wait period” will (typically) apply following a “last and final” statement.

1.5 The Committee also considers that, in addition to the proposed guidance as to the timeframe within which a departure from a “no increase” or similar “truth in takeovers” statement is likely to give rise to unacceptable circumstances, the revised guidance should also specifically clarify the corollary – i.e., that (except where the relevant statement clearly indicates that it relates or is intended to apply to or for a longer period) acting inconsistently with such a statement after the four month “wait period” will not, of itself, give rise to unacceptable circumstances.

2 What are the possible unintended consequences (if any) of the proposed guidance?

2.1 The Committee notes that the guidance only relates to conduct by “bidders” and not other market participants.

2.2 However, the Committee is not advocating for reciprocal fixed "wait periods" for equivalent “truth in takeovers” statements made by other market participants at

[1] Regarding other “truth in takeovers” statements, please see paragraphs 6.2 to 6.5 below regarding the Committee’s submission that the proposed amended footnote 39 should ideally refer not only to “no increase” statements, but also to “no waiver” and “no extension” statements.

this stage. Any suggestions in this regard can be addressed through additional consultation in the future.

2.3 See also the Committee's submissions with respect to clarifying the application of the guidance to non-binding indicative proposals set out in paragraphs 6.6 and 6.7 below.

3 Do you agree with the suggested 4 month wait period? Is some other time period more appropriate?

3.1 The Committee considers that, if a specific "wait period" is to be indicated or prescribed, four months is an appropriate period, subject to the relevant statement not itself expressly stating a shorter or longer time period.

3.2 The Committee notes that a four month period is consistent with that applied under Chapter 6 in respect of, among other things, the prohibition on collateral benefits and disclosure of dealings in target securities.

4 Should there be an exception for a "material change" or "exceptional circumstance" occurring during the wait period? If so, how should these terms be defined?

4.1 The Committee considers that there are two key (and differing) perspectives on this question.

4.2 Firstly, the inclusion of a "material change in circumstances" or similar exception may be appropriate on the basis that this is consistent with how many market participants and advisors currently understand that "truth in takeovers" applies to "last and final" (and similar) statements. This is also consistent with the basis of the policy (being to avoid misleading and deceptive conduct and to promote an informed, efficient and competitive market) because a departure from such a statement where there is a material change is unlikely to offend that underlying policy.

4.3 This approach raises the difficulty of clearly and adequately defining what type of "material changes in circumstances" would justify an early end to the "wait period", for instance:

(a) some or all of the "prescribed occurrences" set out in section 652C of the *Corporations Act 2001* (Cth) could be adopted, though some of these may not be relevant (e.g., a winding up resolution) while others would, if included, have to be subject to appropriate carve-outs or *de minimis* thresholds (e.g., in relation to security issues); and

(b) alternatively, section 670F might provide a more appropriate standard – for example, "a material change in circumstances that the [bidder] could not reasonably have foreseen at the time of making the statement".

4.4 An alternative perspective, however, is that there should be no such general exception, and that if a bidder wishes to make a new or revised offer during the four month "wait period" in certain circumstances, the bidder should specifically note those circumstances in its "last and final" statement.

5 Should the proposed guidance be extended to a last and final public statement made or authorised by a bidder in connection with a preliminary

approach seeking an agreed control transaction? If so, when would the wait period commence?

5.1 The Committee considers that the proposed guidance should also apply to "bear hug" public statements (i.e., statements that the bidder will not increase its proposed offer price) made by bidders seeking to prompt targets to agree to a proposed control transaction. Where bidders make such statements, the Committee considers that the four month "wait period" should apply from the date of the statement – that is, there would likely be unacceptable circumstances if the bidder publicly announced a new proposed bid (or scheme of arrangement) at a higher price during that period.

5.2 The Committee considers that the same regulatory approach, including the application of the four month "wait period", should be applied consistently to "last and final" statements of all types by bidders – regardless of whether they are made during or outside of an announced takeover bid or scheme. This consistency is important in providing greater market certainty as to the effect of such statements.

5.3 However, the Committee considers that the Panel should adopt the four month "wait period" in the case of "no increase" statements (and possibly also "no extension") statements at this stage, and leave consideration of the appropriate policy for other "last and final" statements for another day. The Committee's comments in response to Question 5 should be read in this light.

6 Please identify any amendments you think should be made to the draft revisions.

6.1 In addition to the suggested amendments referred to in paragraphs 1.5 and 5.1 above, the Committee submits that there are two additional clarifications that should be addressed in the proposed guidance.

Application of wait period to other "truth in takeovers" statements

6.2 The Committee submits that in addition to addressing "no increase" statements, Panel guidance should ideally also specifically address:

(a) "no extension" statements – i.e. statements by bidders that they will not extend their offers; and

(b) "no waiver" statements – i.e. statements by bidders that they will not waive defeating conditions that apply to their offers or proposals (e.g. a minimum acceptance condition).

6.3 The Committee's view is that it is consistent with the stated aim of the proposed guidance – i.e., providing greater certainty to market participants – to clarify that the same policy also applies to other "truth in takeovers" statements that are relevantly similar to "no increase" statements.

6.4 In the case of a "no extension" statement, for example, this would mean that unacceptable circumstances would be likely to arise if a bidder that made such a statement made or proposed to make a similar offer within four months of the close of its initial offer.

6.5 That said, the Committee notes that the consultation paper has not focussed on these other "truth in takeovers" statements, and that further consultation may be

appropriate. If the Panel wishes to consult further on those matters, the Committee considers that it would be preferable for the Panel to issue revised guidance in a form that addresses "no increase" statements (i.e., a form consistent with the proposed guidance) rather than to delay issuing any revised guidance at all.

Clarification of application to non-binding indicative proposals

6.6 The Committee notes that the proposed revised footnote 39 refers to a bidder "making" another bid or "proposing" a scheme. The concept of "making" a bid is a technical one and means the act of serving a bidder's statement on the target (see *ASIC Regulatory Guide 5 – Relevant interests and substantial holding notices* at [5.293]). In a hostile deal, this can happen up to 6 weeks after the announcement of a takeover (or up to 2 months after the announcement in the case of a friendly deal) (see s631(1)(b) and item 6 of s633(1) of the *Corporations Act 2001* (Cth)). This means that, if the policy is to hang off the "making" of a bid (rather than the announcement of a bid), the four month "wait period" is really only a two-and-a-half month "wait period". This would appear to undermine the intent of the policy.

6.7 The Committee submits that this language should be clarified so that it refers to a bidder "making" another bid or "publicly proposing" another bid or scheme – so as to avoid any suggestion that the policy can be circumvented, or the four month period truncated, by the bidder proposing (e.g., through publicly proposing a bid or announcing a non-binding indicative offer or similar) a new takeover bid within the four month "wait period".

The Committee would be pleased to discuss this submission if that would be helpful.

Please contact Shannon Finch, Chair of the Corporations Committee at Shannon.finch@au.kwm.com on 02 9296 2497, or Sandy Mak at sandy.mak@corrs.com.au on 02 9210 6171 in the first instance, if you require further information or clarification.

Yours sincerely

Greg Rodgers
Deputy Chair
Business Law Section

Submission

from

MinterEllison

MinterEllison

20 April 2018

BY EMAIL

Allan Bulman, Director and Bruce Dyer, Counsel
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Dear Sirs

Submission in response to consultation paper on proposed revisions to Guidance Note 1 – Unacceptable Circumstances

We refer to the Takeovers Panel's Consultation Paper dated 14 March 2018 inviting submissions on proposed revisions to Guidance Note 1 – Unacceptable Circumstances. MinterEllison thanks the Takeovers Panel for the opportunity to make this submission.

Please note that the views expressed in this submission do not represent the views of MinterEllison's clients.

1. Do you agree that there is uncertainty in the market regarding how long a last and final statement will be treated as having ongoing effect following the close of a bid? If so, does the proposed guidance provide greater certainty to the market?

This question is based on the premise that the law or existing policy in fact currently imposes a specific time period on how long a last and final statement will be treated as having ongoing effect following the close of a bid, and that this time period may in some way be misunderstood by the market. That is not the case and never has been.

Neither the Corporations Act (see sections 670A, 1041H, 1041E and 1041) nor ASIC's 'truth in takeovers' policy as set out in ASIC Regulatory Guide 25 have ever imposed a specific time period on how long a last and final statement will be treated as having ongoing effect following the close of a bid.

For the reasons set out below, we submit that there is no uncertainty in the market regarding how long a last and final statement will be treated as having ongoing effect following the close of a bid and that, therefore, the proposed guidance is unnecessary. Indeed, we submit that the proposed guidance would be contrary to the best interests of target shareholders**.**

The current position (supported by ASIC's 'truth in takeovers' policy) is that if a bidder makes a last and final statement and then acts contrary to their statement, it is open for the target, any target shareholder or ASIC to make an application to the Panel, following which the Panel can assess whether what the bidder has said and done amounts to unacceptable circumstances.

In our view, how long a last and final statement will be treated as having ongoing effect following the close of a bid should continue to be decided on a case-by-case basis, having regard to the nature of the bidder's statement, the bidder's conduct more generally, and the overall

circumstances of the target including what may have occurred in the target's business since the end of the offer period.

ASIC Regulatory Guide 25 states quite clearly and correctly at RG 25.13 that:

> "*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*." (emphasis added)

ASIC's guidance uses the word "may" rather than a more definitive expression such as "does" or "will" because the question as to whether a bidder who departs from a last and final statement has contravened misleading conduct provisions depends on the nature of their statement and of their conduct.

As properly explained by ASIC at 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…*" (emphasis added)

By imposing a mandatory 4 month wait period on all bidders who have made a last and final statement, the Panel would be extending the law and policy quite considerably from where it currently stands. In our view, there is no policy or legislative basis for this.

The test would no longer be the objective, flexible test described by ASIC as being based on how the conduct would be viewed by those target shareholders who are exposed to the conduct, but rather would become a rigid, inflexible "one size fits all" test based on the mere fact that a last and final statement has been made (regardless of how target shareholders who are exposed to the statement may have responded to it in the circumstances and the actual terms of the statement).

Such a prescriptive and artificial test has the real prospect of hurting rather than protecting the parties it is intended to protect, namely target shareholders. By automatically 'taking out' a bidder for 4 months, there is the real potential to dampen a post-bid contest for control of a target, to the detriment of target shareholders.

For example, assume that, in the weeks immediately following the close of a takeover bid where a last and final statement has been made by the bidder, the target board announces a material balance sheet transaction such as the sale of its main undertaking, a re-domicile proposal or other restructure, all of which would be subject to shareholder approval. If a target board announces this within the proposed mandatory 4 month wait period, why should a bidder whose offer has recently closed not be allowed to make a new bid before target shareholders vote on a material transaction proposed by their board? Surely target shareholders should also have the opportunity to consider a bid that gives them an alternative and potentially superior outcome to what the target board is now proposing, despite that bid being announced within 4 months of the close of the first bid.

Similarly, if someone else makes a takeover bid for the target within the proposed mandatory 4 month wait period, surely it would be in target shareholders' best interests to allow the bidder whose bid has recently closed to be able to participate in an auction for control of the target, even if that bidder had made a last and final statement.

These examples illustrate our submission that the current objective test has the flexibility to readily accommodate these types of circumstances. In contrast, the proposed new guidance unnecessarily complicates and confuses matters, to the potential detriment of target shareholders. Whilst exceptions could be drafted (see Question 4 below), those exceptions and their application or non-application potentially introduces further complexity and uncertainty.

In addition, for the law and policy to be altered in such a material way as the proposed guidance is contemplating, there must be clear evidence not only of current confusion in the market (which we say is absent), but also of actual instances where bidders have made last and final statements and have then departed from those statements by making a new bid shortly after the close of their original bid.

We are not aware of any examples in the Australian market of a bidder making a last and final statement and then making a new bid within a short time of their first bid closing.

So, the proposed guidance seeks to address a problem that simply does not exist in practice (if it does exist in some theoretical way, it does not have any material adverse impact on the market for control).

We consider that the lack of examples of a bidder making a last and final statement and then making a new bid within a short time of their first bid closing evidences two clear propositions:

- first – the current objective, flexible test works satisfactorily;
- second – bidders, and the market generally, have a clear understanding of the regulatory consequences of making a last and final statement. If there was no such clear understanding, we would presumably have seen numerous examples of bidders making new bids within 4 months of the close of their first bid.

In our view, bidders' use of last and final statements is not what is causing the most uncertainty in the market. Rather, where there has clearly been a lot of confusion and deliberate 'gaming' of the system is where major shareholders have made public statements criticising an offer price, but have deliberately stopped short of making an unequivocal, unqualified statement to which ASIC's 'truth in takeovers' policy would apply, and they have then accepted the offer at the original offer price. There is more damage to the efficiency of the market for control from that practice by major shareholders than from any last and final statements recently made by bidders.

If so, does the proposed guidance provide greater certainty to the market?

There is a material difference between, on the one hand, making an existing legal and policy position that has been long accepted by the market more certain by including it in written guidance, and on the other hand, re-writing the existing law and policy in order to impose certainty.

First, the proposed guidance does not make an existing legal and policy position that has been long accepted by the market more certain. This is because the market has never accepted that there is an existing legal and policy position that bidders who make a last and final statement should be subject to a specific mandatory wait period. Rather, the position that has been long accepted by the market is that how long a last and final statement will be treated as having ongoing effect following the close of a bid depends on the nature of the statement and of the conduct, and on all the relevant circumstances.

Second, imposing a mandatory 4 month wait period is re-writing the existing law and policy in order to impose certainty – in a context where we submit there is no market based evidence of a need for certainty. In our view, it is not necessary or appropriate for the Panel to make such a material change. If any such change of this nature is to be made (despite our submission that no such change is required), the appropriate process for introducing that change is legislative change by Parliament to amend the Corporations Act.

2. What are the possible unintended consequences (if any) of the proposed guidance?

We consider that there would be at least the following three unintended and undesirable consequences if the proposed guidance was adopted:

(a) The proposed guidance will create uncertainty as to how a last and final statement should be qualified in order to not attract the application of the wait period

Bidders should be entitled to make a last and final statement that is capable of applying to the existing bid and not any future bid.

The draft guidance states that a last and final statement that is subject to a 'clear qualification' should not prevent a bidder from bidding again (to the extent of that qualification).

However, this does not give bidders sufficient comfort that they can make a last and final statement that applies to the existing bid and not any future bid because there will never be

certainty as to what type of qualification would be 'clear' enough for the lockout period to not apply.

Bidders who make a last and final statement may consider that they have included a clear qualification or have otherwise clearly limited it to the current bid and not any future bid, whereas target shareholders may interpret the bidder's statement (and any qualification) in a different way.

Even if the proposed guidance was to give examples of what should be considered to be a 'clear qualification', this would not solve the problem. This is because, as described by ASIC at RG 25.19, the proper test is what the statement conveys to an ordinary investor. It is not possible for the proposed guidance to provide a bidder with certainty as to how an ordinary investor would interpret a last and final statement (or any qualification).

This is a particularly concerning problem because a number of the recent 'no increase' statements that have been complained of by commentators who are pressing for the introduction of a mandatory wait period in fact contained qualifications that were readily understood by the market.

For example, the following statement was made by CIMIC Group Limited in its off-market takeover bid for Macmahon Holdings Limited stated:

> "*The Offer Price is final[1], and cannot be increased during the Offer Period, in the absence of a competing proposal*."
>
> *Footnote 1: The Offer Price is final, and cannot be increased during the Offer Period, in the absence of a competing proposal*

In our view, the above statement is clearly qualified in two ways. First, it is qualified in respect of a competing proposal emerging. Second, it only applies in respect of the existing offer period, and therefore should not have any application to any future bid.

We understand that certain Macmahon shareholders and market participants recognised the qualifying wording to CIMIC's last and final statement, accepted that it was limited to the current offer period, and understood that this meant that it was open to CIMIC to bid again in the future.

That understanding is evidenced by a broker report on Macmahon Holdings Limited dated 5 April 2017 by Hartleys which stated:

> "*Will CIM.asx return?*
> *CIM.asx stated clearly that "its Offer price of $0.145 in cash per Macmahon share is final and will not be increased in any circumstances during the Offer Period". **The "offer period" (which is clearly defined) has now expired, and we believe that CIM.asx, if it chose to, could return with a higher price.** We note that the Bidder Statement was clear that "subject to the Corporations Act, CGI or CIMIC may purchase Macmahon Shares otherwise than under the Offer, such as in open market or privately negotiated purchases after the end of the Offer Period". We don't know whether CIM.asx will return, we just highlight it seems possible."* (emphasis added)

If a mandatory 4 month wait period was to apply, would it have applied to the CIMIC statement in the form set out above? If the answer to that question is 'yes' then that wait period would actually operate contrary to the market's clear understanding of the effect of CIMIC's statement (as evidenced by the Hartley's commentary).

This example shows that, no matter how the proposed guidance is framed in terms of qualifications, the problem of uncertainty will inevitably arise. Therefore the proposed guidance would simply replace perceived uncertainty in the market regarding how long a last and final statement will be treated as having ongoing effect following the close of a bid, with new uncertainty as to whether a qualification will be sufficient to not attract the application of the wait period.

(b) The proposed guidance will create an uneven playing field between bidders and other market participants

The proposed guidance would create an uneven playing field, as a bidder who makes a last and final statement would be subject to a 4 month wait period, whereas a major shareholder or target

who makes a 'truth in takeovers' statement would not be subject to any mandatory wait period before acting contrary to their 'truth in takeovers' statement.

In particular, the bidder would not be permitted in that 4 month period to respond to changing or unforeseen new circumstances, such as a former blocking stake being sold, the target board pursuing a material transaction requiring shareholder approval or the emergence of a competing proposal. This can only be seen as harming, not helping target shareholders.

Major shareholders and targets who make 'truth in takeovers' statements would remain subject to the existing objective, flexible regime under which if they make a truth in takeovers statement and then act contrary to it, this **may** constitute unacceptable circumstances depending on the nature of their statement and of their conduct, and on all of the relevant circumstances at the time. A bidder, on the other hand, would be subject to a rigid, inflexible 'one size fits all' rule that it must wait 4 months before being allowed to make a new bid for the target.

It would be unreasonable to impose a 4 month wait period on some market participants (here, bidders) and not others.

(c) The proposed guidance does not cover all types of last and final statements

The proposed guidance seems to only apply to 'no increase' statements made by bidders, but would not apply to other types of 'last and final statements' such as no extension statements and no waiver statements. This seems anomalous.

But extending the proposed guidance to all types of 'last and final statements' such as no extension statements and no waiver statements may not be a simple proposition.

For example, it is unclear how a 4 month wait period would operate in respect to a 'no waiver' statement – would the bidder be permitted to bid again within 4 months provided that the same condition is included and not waived for at least 4 months, or would the bidder be prohibited from bidding again at all for 4 months?

3. Do you agree with the suggested 4 month wait period? Is some other time period more appropriate?

For the reasons set out above, we do not agree with the suggested 4 month wait period.

As a corollary, we submit that there is no other mandatory wait period that is appropriate.

In some instances a time period shorter than 4 months will be appropriate, and in other cases a time period longer than 4 months will be appropriate. It all depends on the nature of the bidder's last and final statement, their conduct more generally and the overall circumstances of the target following the close of the bid.

It should be left to the Panel to decide (in response to an application by an aggrieved market participant or ASIC), based on all the relevant facts at the time, whether what the bidder has said and done amounts to unacceptable circumstances.

4. Should there be an exception for a "material change" or "exceptional circumstance" occurring during the wait period? If so, how should these terms be defined?

Yes, if the proposed guidance is adopted, then extensive exceptions would be required.

If extensive exceptions did not exist, then target shareholders would be prejudiced as the 4 month wait period would create a period of time during which the target could pursue an alternative control transaction (or other transaction that has a material impact on its balance sheet or share capital, such as a material asset sale, recapitalisation or buy-back) that would not be subject to any potential competition from the former bidder. This would inhibit the competition for control of target to the detriment of target shareholders.

At a minimum, the wait period must end on the occurrence of most of the matters in section 652C – if such matters are important enough to allow a bidder to withdraw a bid (i.e. the law acknowledges that they are very important), then those matters are equally sufficiently material for the bidder to be released from the wait period.

5. Should the proposed guidance be extended to a last and final public statement made or authorised by a bidder in connection with a preliminary approach seeking an agreed control transaction? If so, when would the wait period commence?

Only if there is clear evidence that this type of behaviour has been occurring often enough for the market to have been impacted by it. We are not aware of any such instances.

As there is little evidence of such behaviour occurring, the current position should continue to apply. That is, if a bidder makes a last and final statement in connection with a preliminary approach seeking an agreed control transaction and then acts contrary to their statement, it is open for the target, any target shareholder or ASIC to make an application to the Panel, following which the Panel can assess whether what the bidder has said and done amounts to unacceptable circumstances.

6. Please identify any amendments you think should be made to the draft revisions.

The proposed first sentence of footnote 39 should be retained. The proposed second sentence of footnote 39 should be deleted in its entirety.

Yours faithfully
MinterEllison

Michael Gajic
Partner

Alberto Colla
Partner

Bart Oude-Vrielink
Partner

Ron Forster
Partner

Submission

from

Mr Simon Mordant AM

Submission from Simon Mordant AM, Executive Co-Chairman, Luminis Partners

I am writing in a personal capacity in response to the draft revised GN and the specific questions you have raised.

Q1-Yes I believe there is uncertainty in the market regarding how long a last and final statement will have ongoing effect following the close of the bid.

Q2-I do not see any unintended consequences resulting from the proposed changes.

Q3-as a first change I think 4 months is a sensible period between closure of one bid or lapsed scheme and any announcement of intention to make a new proposal –please note I suggest the 4 month period is to any announcement of intention as opposed to the actual bid date

Q4-the only potential exception should be if a third party proposal emerges so that shareholders are not disadvantaged but not allowing the original bidder to go again.

Q5-Is this referring to a bear hug where no actual proposal is in front of shareholders that is capable of acceptance-if that is the scenario I wouldn't extend the guidance to that

Q6-n/a

ANNEXURE B

Guidance Note 1 – Mark up from the draft in the Consultation Paper

Australian Government

Takeovers Panel

Guidance Note 1 – Unacceptable Circumstances

Background

1. This guidance note has been prepared to assist market participants understand the Panel's approach to making a declaration of unacceptable circumstances.[1]
2. The examples are illustrative only and nothing in the note binds the Panel in a particular case.
3. If the Panel makes a declaration of unacceptable circumstances it has the power to make orders.[2]
4. The Panel aims to correct unacceptable circumstances as quickly and as cost-effectively as possible. It seeks to ensure that control transactions

[1] Section 657A of the *Corporations Act 2001* (Cth). References are to the *Corporations Act* unless otherwise indicated

[2] Section 657D. See GN 4 (Remedies General) for a discussion on the use and effect of orders and other remedies available to the Panel

are decided by informed security holders who have confidence in the integrity of Australia's market for corporate control.

History

5. Section 60 of the Companies (Acquisitions of Shares) Act 1980[3] allowed the National Companies and Securities Commission to declare conduct, or an acquisition of shares, unacceptable. The section was seen to confer an anti-avoidance power:

> *The Commission's exercise of discretionary powers will thus provide a mechanism whereby reasonable commercial transactions will be unencumbered but any belief that what is not illegal (or cannot be demonstrated to the Courts to be illegal) is acceptable will be precluded. The existence of such discretionary powers, and the principles upon which they are to be applied, may be seen as imposing an obligation of propriety on those who use the facilities of the market place and their advisers. The obligation is a responsibility that no person should fear or seek to avoid.*[4]

6. With the introduction of the Corporations Law the power to declare conduct or an acquisition unacceptable[5] was given to the Corporations and Securities Panel under s733 in the following terms:

> *Where, on an application under subsection (1), the Panel is satisfied:*
>
> *(a) that unacceptable circumstances have occurred:*
>
> *(i) in relation to an acquisition of shares in the company; or*
>
> *(ii) as a result of conduct engaged in by a person in relation to shares in, or the affairs of, the company; and*
>
> *(b) having regard to the matters referred to in section 731 and any other matters the Panel considers relevant, that it is in the public interest to do so;*
>
> *the Panel may by writing declare the acquisition to have been an unacceptable acquisition, or the conduct to have been unacceptable conduct, as the case may be.*[6]

---

[3] And State Codes

[4] NCSC Policy Statement 105, Issue 3 (1 October 1986), para 7

[5] The expression 'unacceptable circumstances' was defined in s732, essentially in terms of the Eggleston principles. A declaration could be made after having regard to, among other things, the matters in section 731

[6] Section 733(3) of the Corporations Law

7. Whereas previously orders had been made by the courts, they were now made by the CSP.[7] Only the Australian Securities Commission could bring matters before the CSP.

8. From 13 March 2000, section 733 became section 657A in the following terms:

> *The Panel may only declare circumstances to be unacceptable circumstances if it appears to the Panel that the circumstances:*
>
> *(a) are unacceptable having regard to the effect of the circumstances on:*
>
> *(i) the control, or potential control, of the company or another company; or*
>
> *(ii) the acquisition, or proposed acquisition, by person of a substantial interest in the company or another company; or*
>
> *(b) are unacceptable because they constitute, or give rise to, a contravention of a provision of this Chapter or of Chapter 6A, 6B or 6C.*
>
> *The Panel may only make a declaration under this subsection, or only decline to make a declaration under this subsection, if it considers that doing so is not against the public interest after taking into account any policy considerations that the Panel considers relevant.*[8]

9. In addition, the persons who could bring matters before the Panel was broadened so that a bidder, target, ASIC or any other person whose interests were affected could apply for a declaration[9] and the Panel became the primary forum for resolving takeover disputes during the bid period.[10]

10. In 2001, the CSP became the Takeovers Panel.

11. In 2007, s657A (see Appendix A for detailed terms) was broadened further by:

    (a) extending subsection (2)(a) to clearly cover past and potential future effect, likely effect, control or potential control and

---

[7] Section 734 of the Corporations Law

[8] *Corporate Law Economic Reform Program Act 1999* (Cth) introduced s657A to the Corporations Law. See s657A(2)

[9] Section 657C(2)

[10] Section 659AA

(b) the introduction of an additional test: that the circumstances are otherwise unacceptable having regard to the purposes of chapter 6 set out in s602.[11]

Power to declare unacceptable circumstances

12. Section 657A (**Appendix A**) empowers the Panel to make a declaration of unacceptable circumstances. The section requires the Panel to consider:
    (a) the effect of the circumstances and
    (b) whether the effect appears to the Panel to be unacceptable:
        (i) having regard to control or potential control of a company[12]
        (ii) having regard to the acquisition or proposed acquisition of a substantial interest in a company
        (iii) having regard to the section 602 principles or
        (iv) because of a contravention of Chapters 6-6C.
13. In *Glencore (No 1)*, the Federal Court said of s657A before its amendment in 2007:[13]

> *It is therefore necessary, before the Panel considers whether it **appears** that particular circumstances are unacceptable, having regard to the effect of the circumstances, to make a determination as to the effect of those circumstances. It is only unacceptability of the effect that must appear to the Panel and the Panel must make a finding as to that effect before it considers whether that effect is unacceptable. In a sense, it is a precondition of the making of a declaration that the Panel make a finding as to the effect, on control, or acquisition as, referred to in s657A(2), that the relevant circumstances had….* (original emphasis)

14. Before making a declaration the Panel is also required to consider:
    (a) the purposes of Chapter 6 set out in s602[14]
    (b) the other provisions of Chapter 6[15]

---

[11] Sections 657A(2)(a) and (b), introduced by s4 of the *Corporations Amendment (Takeovers) Act 2007* (Cth), effective 13 May 2007

[12] Extends to listed bodies (s603) and managed investment schemes (s604)

[13] *Glencore International AG & Anor v Takeovers Panel & Ors* [2005] FCA 1290, per Emmett J at [39]

[14] In considering s602(c), the Panel must take into account the actions of directors: s657A(3)

[15] An example of a declaration based on circumstances "*at odds with basic principles and policies underlying takeovers regulation in Australia and Chapter 6*" is *Consolidated Minerals Ltd 03R* [2007] ATP 28 (see para [23]). Generally, these provisions give effect to the purposes set out in section 602

(c) any rules, or matters specified in the regulations[16]

(d) whether making a declaration is not against the public interest[17] (generally meaning issues beyond the commercial interests and convenience of the parties to such things as the signal the decision may send the market and the wider investing community) and

(e) any policy considerations it considers relevant.[18]

15. The Panel may also consider any other matters it considers relevant.[19]

16. Before making a declaration the Panel must give parties, persons to whom the declaration relates and ASIC an opportunity to make submissions.

What are unacceptable circumstances?

17. There is no definition of unacceptable circumstances.[20] Based on the wording of section 657A, the Panel's ability to make a declaration of unacceptable circumstances is broad.[21]

18. The power extends beyond takeover bids to other control transactions.

Examples:

1. *rights issues and equity placements*
2. *buy-backs and other reductions of capital*
3. *resolutions to approve acquisitions of shares*
4. *compulsory acquisition*

16 There are currently no rules made under section 658C or regulations for the purposes of paragraph 195(3)(c)

17 Section 657A(2) – which also requires the Panel to consider whether not making a declaration is not against the public interest

18 Sections 657A(2) and (3)(a)

19 Section 657A(3)(b). See also *Glencore International AG v Takeovers Panel* [2006] FCA 274 at [35]

20 Section 732 of the Corporations Law was, in effect, a definition

21 For example, *Austar United Communications Limited* [2003] ATP 16, *Grand Hotel Group* [2003] ATP 34, *National Can Industries Limited* [2003] ATP 35, *Village Roadshow Limited* [2004] ATP 4. In *Pinnacle VRB Ltd (No 10)* [2001] ATP 21 and 21a (upheld on review: *Pinnacle VRB Ltd (No 11)* [2001] ATP 23) the Panel reversed an acceptance made in error. See also *Golden West Resources Ltd 03 and 04* [2008] ATP 1 at [40]. In *Midwest Corporation Ltd 02* [2008] ATP 15, the Panel declared an acquisition unacceptable in the contest for control of Midwest (a takeover by SinoSteel) because of failure to comply with the *Foreign Acquisitions and Takeovers Act 1975* (Cth)

5. *schemes of arrangement*[22]

6. *reverse takeovers.*

19. Parliament has twice suggested that a broad interpretation is intended.

20. In 1998, when s657A was proposed, Parliament said:

> *The Panel's jurisdiction to make a declaration of unacceptable circumstances will not depend upon the existence of a general offer to shareholders under a takeover bid. Instead, its discretion will extend to circumstances involving an acquisition of a substantial interest in, or control of, a company (proposed paragraph 657A(2)(a)). In making a declaration of unacceptable circumstances, the Panel must have regard to the spirit of the takeover rules in section 602 in deciding whether the circumstances are unreasonable and whether it is in the public interest to make the declaration (proposed subsection 657A(2)).*[23]

21. A broad interpretation allows the Panel to fulfil the role envisaged by s659AA as the main forum for resolving disputes about a takeover bid.[24]

22. In 2007, Parliament said of the new s657A(2)(b):

> *A new paragraph 657A(2)(b) is inserted in the Act to give the Panel jurisdiction to declare circumstances unacceptable having regard to the purposes of Chapter 6 of the Act set out in section 602. This is a significant change, designed to ensure the Panel can address circumstances which impair those purposes, without having to also establish either a contravention of the Act or an effect on control or potential control of a company or on the acquisition or proposed acquisition of a substantial interest in a company. The intention is to give the Panel a wider power to give effect to the spirit of the Act. The purpose of the words in brackets in the new paragraph is to ensure that the Panel can make a declaration of unacceptable circumstances in relation to the affairs of one company, being the company referred to in subsection 657A(1), where the effect of the unacceptable circumstances relates to or is primarily manifest on another company or the securities of either company.*[25]

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[22] The Panel normally leaves schemes to the regulation of the court seized of it. But see *Citect Corporation Ltd* [2006] ATP 6 at [33]

[23] *Corporate Law Economic Reform Program Bill 1998*, Explanatory Memorandum, para 7.9. The section took effect on 13 March 2000

[24] *Corporate Law Economic Reform Program Bill 1998*, First Reading by Mr Hockey, Hansard 3/12/1998, page 996: "*To address concerns with the current dispute resolution mechanisms for takeovers, the existing Companies and Securities Panel will be reconstituted to become the primary forum for resolving takeover matters. The panel will retain its existing jurisdiction to enforce compliance with the spirit of the law….*"

[25] *Corporations Amendment (Takeovers) Bill* 2007, Explanatory Memorandum, para 3.8

23. In *Alinta*, which concerned in part whether s606 had been contravened, it was said in the High Court:[26]

> *… The declaration is a statement of the Panel's conclusion that, having regard to the circumstances created by the contravention and to the public interest, it considers something needs to be done about those circumstances. They are "unacceptable" in the sense that they cannot remain as they are and that they require consideration to be given to the orders that may be made under s 657D….*

24. The existence of unacceptable circumstances does not depend on conduct or intention. Typically the Panel considers the effect of the circumstances on persons and the market in the light of the principles in s602.

25. Unacceptable circumstances may arise whether or not there is also a breach.[27]

Examples involving possible unacceptable circumstances:

1. *contravention of section 606*[28]

2. *contravention of a provision mentioned in section 612*

3. *contravention of ss636(1) or 638(1) - disclosure*

4. *contravention of a timing provision (even minor) if persons may have changed their position in reliance on compliance with the provision*[29]

5. *contravention of ss636(3) or 638(5) – consent.*[30]

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[26] *Attorney-General of the Commonwealth v Alinta Limited & Ors* [2008] FCA 2, per Crennan and Kiefel JJ at [169]

[27] *InvestorInfo Ltd* [2004] ATP 6 (s611 item 10 - rights issue underwriting), *Email Limited (No 1)* [2000] ATP 3 (disclosure breach remedied by supplementary statement). Unacceptable circumstances may exist because of a contravention of Chapter 6: *Attorney-General (Cth) v Alinta Limited* [2008] HCA 2

[28] For example, *Taipan Resources NL (No 9)* [2001] ATP 4, 38 ACSR 111*; Anaconda Nickel Ltd (No 18)* [2003] ATP 18; *Anaconda Nickel Ltd (No 19)* [2003] ATP 20*; Trysoft Corporation Ltd [2003] ATP 26.* An honest and accidental contravention of s606 may not be unacceptable if it has not had any relevant adverse effect: *ISIS Communications Ltd* [2002] ATP 10

[29] Sections 630(3), 650C(2) and 650F(1)

[30] *Mildura Co-operative Fruit Company Ltd* [2004] ATP 5

Section 602

26. In 1969 the Eggleston Committee[31] said:

> *We agree with the general principle that if a natural person or corporation wishes to acquire control of a company by making a general offer to acquire all the shares, or a proportion sufficient to enable him to exercise voting control, limitations should be placed on his freedom of action so far as is necessary to ensure:*
>
> *(i) that his identity is known to the shareholders and directors;*
>
> *(ii) that the shareholders and directors have a reasonable time in which to consider the proposal;*
>
> *(iii) that the offeror is required to give such information as is necessary to enable the shareholders to form a judgment on the merits of the proposal and, in particular, where the offeror offers shares or interests in a corporation, that the kind of information which would ordinarily be provided in a prospectus is furnished to the offeree shareholders;*
>
> *(iv) that so far as is practicable, each shareholder should have an equal opportunity to participate in the benefits offered.*

27. These 'Eggleston principles' were incorporated into the law.[32]

28. In the Corporations Law they applied in the following way when the ASC was exercising its modification power (section 731[33]):

> *In exercising any of its powers … the Commission shall take account of the desirability of ensuring that the acquisition of shares in companies takes place in an efficient, competitive and informed market and, without limiting the generality of the foregoing, shall have regard to the need to ensure:*
>
> *(a) that the shareholders and directors of a company know the identity of any person who proposes to acquire a substantial interest in the company;*

---

[31] Company Law Advisory Committee to the Standing Committee of Attorneys-General, chaired by RM Eggleston, and directed "*To enquire into and report on the extent of the protection afforded to the investing public by the existing provisions of the Uniform Companies Acts and to recommend what additional provisions (if any) are reasonably necessary to increase that protection.*" See 2nd Interim Report, para 16

[32] Section 60 of the Companies (Acquisition of Shares) Act, then s732 of the Corporations Law, which was extended to buy-backs and capital reductions in the mid 1990s, now in s602 of the Corporations Act

[33] Previously s59 of the Companies (Acquisition of Shares) Act

(b) that the shareholders and directors of a company have a reasonable time in which to consider any proposal under which a person would acquire a substantial interest in the company;

(c) that the shareholders and directors of a company are supplied with sufficient information to enable them to assess the merits of any proposal under which a person would acquire a substantial interest in the company; and

(d) that, as far as practicable, all shareholders of a company have equal opportunities to participate in any benefits accruing to shareholders under any proposal under which a person would acquire a substantial interest in the company;….

29. Section 732 set out when unacceptable circumstances was taken to have occurred, by reference to the 'Eggleston principles'.[34] The CSP was directed to have regard to the matters in s731 when considering whether to make a declaration.[35]

30. In 2000, the 'efficient competitive and informed market' principle (see now s602(a)) was established as one of the principles in s602 alongside the 'Eggleston principles' (see now ss602(b) and (c)).

31. Also in 2000 an additional principle was added to s602 - the 'compulsory acquisition' principle (see s602(d)).[36]

32. Section 602 sets out the purposes of chapter 6. There is overlap between some of the principles. They are to ensure that:

    (a) the acquisition of control over voting shares takes place in an efficient, competitive and informed market.

    Examples involving possible unacceptable circumstances:

    1. information deficiency[37]

    2. a false market in securities the subject of a bid

    3. the lockout of rival bids[38]

---

[34] Section 732 did not include reference to an 'efficient, competitive and informed' market

[35] Section 733(3)(b) of the Corporations Law. The CSP also had to have regard to any other matters it considered relevant and the public interest

[36] *Corporate Law Economic Reform Program Act 1999* (Cth), effective 13 March 2000

[37] Also a failure to correct inaccurate media reports may affect the existence of an efficient, competitive and informed market

[38] GN 7 (Lock-up devices). *Consolidated Minerals 03* [2007] ATP 25 (review decided on a different basis), *Normandy Mining Ltd (No 3)* [2001] ATP 30, *Ballarat Goldfields NL* [2002] ATP 7, *Ausdoc Group Ltd* [2002] ATP 9, *National Can Industries Ltd 01R* [2003] ATP 40

4. *departure from (or acting inconsistently with) a 'truth in takeovers' statement*[39]

5. *failure to have (and maintain) a reasonable basis to believe you will be able to pay the cash component offered in a bid*[40]

6. *failure to issue consideration securities*[41]

7. *the refusal to reverse transactions entered in error and promptly notified*[42]

8. *excessive broker handling fees*[43]

9. *uncertainty concerning the effect of conditions of a bid*[44]

10. *uncertainty about whether a bid will be made and its terms*[45]

11. *an agreement taking a person's interest over 20% that restrains disposal of shares in reliance on section 609(7) and the restraint is not lifted should the 'acquirer' announce a takeover or scheme before shareholder approval or an ASIC exemption has been obtained*

12. *excessive break fees.*

(b) the holders of shares and the directors:

(i) know the identity of a person who proposes to acquire a substantial interest

(ii) have a reasonable time to consider the proposal and

(iii) are given enough information to enable them to assess the merits of the proposal

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[39] See ASIC Regulatory Guide 25, *Taipan Resources NL 06* [2000] ATP 15, *Summit Resources Limited* [2007] ATP 9, *Rinker Group Limited 02* [2007] ATP 17, *Rinker Group Limited 02R* [2007] ATP 19, *Ludowici Limited* [2012] ATP 3 and *Ludowici Limited 01R* [2012] ATP 4. For example, unacceptable circumstances are likely to arise if, after making a no increase statement, the bidder (or an associate) ~~makes~~ announces another bid (or ~~proposes~~ a scheme) within 4 months after the bid closes and offers increased consideration (unless that is contemplated by a clear qualification to the no increase statement)

[40] GN 14 (Funding Arrangements). See also *Taipan Resources NL (No 3)* [2000] ATP 17, *Pinnacle VRB Ltd (No 6)* [2001] ATP 11, *Taipan Resources NL (No 10)* [2001] ATP 5, *Taipan Resources NL (No 11)* [2001] ATP 16, *Goodman Fielder Ltd* [2003] ATP 1

[41] *Colonial First State Property Trusts (No. 3)* [2002] ATP 17

[42] *Pinnacle VRB Ltd (No 11)* [2001] ATP 23

[43] GN 13 (Broker Handling Fees). Excessive fees may impair a broker's duty when advising clients, creating unacceptable circumstances

[44] *Brisbane Broncos Ltd (No 3)* [2002] ATP 2, *SA Liquor Distributors* [2002] ATP 22

[45] *Realestate.com.au Ltd* [2001] ATP 1, *Cobra Resources Ltd* [2003] ATP 23

Examples involving possible unacceptable circumstances:

1. *failure to provide information under ASX Listing Rules or ss643, 644 or 630*

2. *failure to comply with substantial holding notices and tracing notices under Chapter 6C*[46]

3. *failure to disclose the intentions of the bidder concerning future relations between the target and the current shareholders of a co-operative*[47]

4. *using reports for a different purpose than intended*[48]

5. *failure to provide the qualifications of the person who prepared a report*

6. *failure to disclose the basis of comparison between a bid price and "comparable" transactions*[49]

7. *use of "inside" information (which may also breach the insider trading provisions)*[50]

8. *a change of control, or a material effect on control by an issue of shares as consideration for a bid, that either disenfranchises shareholders or does not meet the policy of chapter 6 (even if strictly it satisfies item 4 of section 611 - acquisitions that result from acceptance of a bid).*[51]

(c) as far as practicable, the holders of shares in the relevant class all have a reasonable and equal opportunity[52] to participate in any

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[46] See *Austar United Communications Ltd* [2003] ATP 16, *National Can Industries Ltd 01* [2003] ATP 35, *Grand Hotel Group* [2003] ATP 34 and *Village Roadshow Ltd* [2004] ATP 4

[47] *Mildura Co-operative Fruit Company Ltd* [2004] ATP 5. See also *SA Liquor Distributors Ltd* [2002] ATP 22, 47 ACSR 249

[48] *Great Mines Ltd* [2004] ATP 1, *Novus Petroleum Ltd* [2004] ATP 2

[49] *Goodman Fielder Ltd (No 2)* [2003] ATP 5

[50] National Companies and Securities Commission, Policy Statement 105 "*Discretions vested in the Commission*" at [15], [18]-[22]

[51] *Gloucester Coal 01* [2009] ATP 6; *Gloucester Coal 01R* [2009] ATP 9. A reverse takeover may also offend the principles in ss602(a) and (c). It may 'lock up' the bidder and adversely affect competition. The Panel takes into account whether the transaction is subject to the approval of bidder shareholders (relief from s629 can be sought from ASIC if necessary) and/or is subject to a condition that allows a superior proposal to be considered by those shareholders. A 'superior proposal' condition, however, if it depends on the opinion of, or an event controlled by, the bidder or an associate is void (s629) so should be drafted in objective terms

[52] Reasonable opportunity means that holders have adequate time to consider a proposal and respond to it and are not exposed to pressure tactics. Equal opportunity means equal value, not identical dealing. Opportunity may be direct (eg, selling shares) or indirect (eg, voting on

benefits[53] accruing to holders through any proposal under which a person would acquire a substantial interest. This does not require that all transactions provide a premium to the existing market or be equally attractive to all shareholders.[54]

Examples involving possible unacceptable circumstances:

1. *maximum acceptance conditions*

2. *uncommercial pricing of a rights issue[55]*

3. *deflating the price for shares that are the subject of the bid[56]*

4. *frustrating a bid[57]*

5. *brokers sharing broker handling fees with clients[58]*

6. *unreasonable effects of a share buy-back[59]*

7. *a target's associate acquiring the target's shares as a defence to a bid, then obtaining a benefit such as a material trading arrangement with the target or an interest in the target's assets[60]*

---

a transaction under s611 item 7: some aspects of this were considered in *PowerTel Ltd (No 1)* [2003] ATP 25)

[53] Benefits may be given directly or in collateral transactions. For example, *Sagasco Amadeus Pty Ltd v Magellan Petroleum Australia Ltd* [1993] 177 CLR 508 (price of another parcel of shares), *Alpha Healthcare* [2001] ATP 13, *PowerTel Ltd (No 3)* [2003] ATP 28 (acquiring another asset for an overvalue), *Re Pivot Nutrition Pty Ltd* [1997] ATP 1 (transfer of a key supply arrangement from Gibson's to another subsidiary of Pivot, which deflated Gibson's share price and Pivot was able to make a significantly lower offer), *Citect Corporation Limited* [2006] ATP 6 (unconditional share acquisition before bid conditions changed), *Becker Group Ltd* [2007] ATP 13 (asset sale to selling shareholders and voting to approve that sale)

[54] See *PowerTel Ltd (No 2)* [2003] ATP 27

[55] For example, pricing may be a concern in a rights issue: this and other related issues are considered in *InvestorInfo Ltd* [2004] ATP 6 at [38]. See also *Data & Commerce Ltd* [2004] ATP 7. See also GN 17 (Rights issues)

[56] Pivot's bid for Gibson: Fn 53

[57] See also *Pinnacle VRB Ltd (No 8)* [2001] ATP 17, *Bigshop.com.au Ltd (No 2)* [2001] ATP 24, *Normandy Mining Ltd (No 6)* [2001] ATP 32. See also GN 12 (Frustrating action)

[58] Possible collateral benefit. See GN 13 (Broker Handling Fees)

[59] *Village Roadshow Ltd (No 2)* [2004] ATP 12; Australian Securities and Investments Commission Policy Statement 110 (Share buy-backs) at [110.48 - 110.49]

[60] National Companies and Securities Commission Policy Statement 105 (Discretions vested in the Commission) at [32]

8. *a rights issue not affording genuine accessibility to its benefits to all shareholders*[61]

9. *a collateral benefit.*[62]

(d) an appropriate procedure is followed as a preliminary to compulsory acquisition.

Example involving possible unacceptable circumstances:

1. *a bid which satisfies the preconditions to compulsory acquisition only because of acquisitions which did not reflect an arms-length approval of the bid terms.*

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Related material

GN 15 Listed Trust and Managed Investment Scheme Mergers

[61] See *InvestorInfo Ltd* [2004] ATP 6, *Data & Commerce Ltd* [2004] ATP 7. See also GN 17 (Rights issues)

[62] *Becker Group Ltd* [2007] ATP 13

Appendix A: Section 657A(1)-(3)

"(1) The Panel may declare circumstances in relation to the affairs of a company to be unacceptable circumstances. Without limiting this, the Panel may declare circumstances to be unacceptable circumstances whether or not the circumstances constitute a contravention of a provision of this Act.

(2) The Panel may only declare circumstances to be unacceptable circumstances if it appears to the Panel that the circumstances:

(a) are unacceptable having regard to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:

(i) the control, or potential control, of the company or another company; or

(ii) the acquisition, or proposed acquisition, by a person of a substantial interest in the company or another company; or

(b) are otherwise unacceptable (whether in relation to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have in relation to the company or another company or in relation to securities of the company or another company) having regard to the purposes of this Chapter set out in section 602; or

(c) are unacceptable because they:

(i) constituted, constitute, will constitute or are likely to constitute a contravention of a provision of this Chapter or of Chapter 6A, 6B or 6C; or

(ii) gave or give rise to, or will or are likely to give rise to, a contravention of a provision of this Chapter or of Chapter 6A, 6B or 6C.

The Panel may only make a declaration under this subsection, or only decline to make a declaration under this subsection, if it considers that doing so is not against the public interest after taking into account any policy considerations that the Panel considers relevant.

(3) In exercising its powers under this section, the Panel:

(a) must have regard to:

(i) the purposes of this Chapter set out in section 602; and

(ii) the other provisions of this Chapter; and

(iii) the rules made under section 658C; and

(iv) the matters specified in regulations made for the purposes of paragraph 195(3)(c) of the ASIC Act; and

(b) may have regard to any other matters it considers relevant.

In having regard to the purpose set out in paragraph 602(c) in relation to an acquisition, or proposed acquisition, of a substantial interest in a company, body or scheme, the Panel must take into account the actions of the directors of the company or body or the responsible entity for a scheme (including actions that caused the acquisition or proposed acquisition not to proceed or contributed to it not proceeding).