ANNEXURE A

Submissions

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

Submission

from

Arnold Bloch Leibler

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20 April 2018

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File No.

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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

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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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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

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OF AUSTRALIA

Business Law Section

19 April 2018

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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
Takeovers Panel
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MELBOURNE VIC 3000

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