

19 April 2018

Allan Bulman, Director and Bruce Dyer, Counsel
Takeovers Panel
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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.

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.

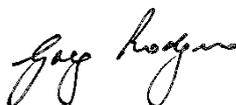
Clarification of application to non-binding indicative proposals

- 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



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