



Law Council
OF AUSTRALIA

Business Law Section

Submission in response to consultation paper on Guidance Note 19

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Introduction

1. On 14 December 2023, the Takeovers Panel (**Takeovers Panel** or **Panel**) published a consultation paper inviting comments on its draft revised 'Guidance Note 19—Insider Participation in Control Transactions (**Revised Guidance Note**). This submission has been prepared by the Corporations Committee of the Business Law Section of the Law Council of Australia (the **Committee**) in response to that consultation paper.
2. Unless otherwise stated, all references to paragraph and footnote numbers in this submission are references to the paragraph and footnote numbers in the Revised Guidance Note.

General comment

3. As noted in the Consultation Paper, when Guidance Note 19 was introduced in 2007, it was in the context of a significant increase in private equity bids at that time (which had been relatively uncommon prior to then). Not only was the Guidance Note in response to this increase in private equity bids, it also sought to address a number of hypothetical scenarios which might arise in the future, and which may have been of concern.
4. For example, in addition to dealing with the position of a director or member of senior management who has an agreement, arrangement or understanding with the bidder or its associates in relation to the bid, the Guidance Note sought to cover a range of other hypothetical scenarios, such as conflicted advisers or former advisers, former directors, etc.
5. This tended to complicate the definitions of 'insider' and 'participating insider', and to complicate the core principles underlying the guidance, namely, that consideration by the target board and/or senior management of a bid or control proposal should occur without influence from the bidder or any competing bidder, and that provision of the target's confidential information should be under the control of the board, rather than any senior management who may have some relationship with the bidder.
6. If the Guidance Note is to be revised, the Committee recommends that the document be simplified as described below, to make the guidance more accessible and useful for market participants.

Response to specific questions

Question 1

Do you agree with the updated definition of insider?

7. The term 'insider' is used in paragraphs 11–14 (obligations on insiders to notify the board if they become aware of an approach made to the company in relation to a control proposal), and in the definition of 'participating insider'. The updated definition of 'insider' is perhaps an improvement, but it could be further substantially simplified to mean "any director or senior manager of the target". On this point:
- The words in paragraph (a) of the definition of 'insider', "who is in a position to influence the target's consideration of the bid", only introduce uncertainty as to the application of the definition;
 - It does not seem necessary to refer to 'advisers' in the definition. Typically, the role of advisers, and their duties in relation to conflicts and information, will be set out in their mandate letters with the target. The Committee's recollection is that advisers were included in the original Guidance Note following one isolated example where an investment bank, who may or may not have had an engagement with the target in relation to certain matters, became a participant in a bidding consortium for the company. However, this would not seem to justify extending the entire guidance to advisers, let alone former advisers; and
 - Paragraph (b) of the definition of 'insider' refers to persons who are outside of the target company, but who may have access to material non-public information concerning the target. This may or may not be under NDA with the target. If the Revised Guidance Note needs to deal with this category of persons at all, it may be best not to characterize them as 'insiders'. The guidance would also need to consider the basis on which that person has the information, and the permitted uses of the information.

Question 2

Do you agree with the updated definition of participating insider?

8. Again, the definition of 'participating insider' could be simplified to mean: 'any director or member of senior management of the target who (a) is themselves the bidder; or (b) who has an agreement, arrangement or understanding with the bidder or its associates in relation to the bid'.
9. Paragraphs 8(a) and 8(b) of the Revised Guidance Note then give a range of examples of such an agreement, arrangement or understanding, while paragraph 10 refers to certain agreements, arrangements or understandings which would not, of themselves, make the director or member of senior management a 'participating insider'.

Question 3

Do you agree with the guidance provided (in paragraphs 11 to 14) in relation to when an insider should notify the board or any relevant sub-committee of the target of any approaches that might lead to a control proposal?

10. Generally yes, if 'insider' is defined as any director or senior manager.
11. Paragraphs 11 to 14 become unworkable though if, as is currently the case, 'insider' is defined to include major shareholders with nominees on the board, or current or former advisers, or former directors and officers. It is not clear why those persons would be receiving an approach addressed to the target, but in any event, the guidance becomes confused if 'insider' is given too broad a meaning here.
12. In the Committee's view, paragraphs 11 to 14 could simply state that any director or senior manager who receives an approach to the target in connection with a control proposal should notify the board immediately of that approach.

Question 4

Do you agree that, if all directors are participating insiders, the target should consider appointing at least one independent director to form an independent board committee?

13. Prior to addressing this question, the Committee notes that paragraph 15 seems to contemplate that there would be an independent board committee (**IBC**), even where none of the directors is a participating insider. If it is non-director senior management who are 'participating insiders', then an IBC is not necessary. In that scenario, it is also worthwhile noting that the non-director senior management who are 'participating insiders' will have duties under their employment arrangements with the target.
14. As to the scenario where all directors are participating insiders, the Committee agrees that the target should consider appointing at least one independent director to form an IBC. However, while this may be desirable, there will obviously be considerable practical difficulties in finding a truly independent director who will be prepared to go on to the board of the target, without any underlying knowledge of the target's business, operations and affairs, for the sole purpose of responding to a takeover bid or scheme of arrangement.
15. The Committee considers that the Revised Guidance Note should acknowledge this (perhaps in a footnote at the end of paragraph 17) as a relevant factor that the Panel will take into account in assessing the effect of a lack of independence and whether or not unacceptable circumstances exist.

Question 5

Is the guidance provided under the heading 'Protocols' useful? Please explain.

16. Generally yes. The Committee agrees with the Panel's non-prescriptive approach in paragraph 20, noting that each situation will be different and will warrant an assessment of all the relevant facts and circumstances.
17. It might also be useful in this section to restate the core principles which should inform the drafting of the protocols, namely:
 - that consideration by the target board and/or senior management of a bid or control proposal should occur without influence, or the appearance of influence, from a bidder, which requires that participating insiders be excluded from the process; and
 - that provision of the target's confidential information should be under the control of the target board (or IBC where there are director participating insiders), rather than any directors or senior management who may have some relationship with the bidder.
18. Although the Committee notes that the protocols set out in paragraph 20 are examples only and are not intended to be prescriptive, the Committee considers that the example, in paragraph 26(c) of requiring participating insiders to be advised that they must not provide any "corporate information" (which has an inclusive definition in footnote 26) to "anyone" (defined in footnote 27 as "any employee, customer or supplier of the target") "without the express approval of the IBC and following entry into an appropriate confidentiality agreement" is too generally stated.
19. For example, if a key employee or officer is a participating insider it should generally be the case that they should continue to be able to provide corporate information to customers or suppliers in the ordinary course of business.
20. The Panel may wish to consider amending footnote 27 to limit the scope of the example provided in paragraph 20(c) (for example, it could amend footnote 27 to read "Which may include (depending on the circumstances), employees, customers or suppliers of the target". Alternatively, the Panel may consider including a new footnote at the end of paragraph 20(c), which states:

"The Panel is not to be taken as suggesting that the mere fact that an officer or employee is a participating insider means that they cannot freely continue to fulfill their duties to the target in the ordinary course of business."

Question 6

Is the list of factors that may give rise to unacceptable circumstances useful? Please explain.

21. While the factors listed are marginally helpful, they are only a small sub-set of the factors that may be relevant for the Panel in determining whether the consideration by the target board and senior management of a bid or control proposal has been free of influence from a bidder, and whether the provision of the target's confidential information has affected in some way an effective competition for control of the target.
22. The Committee is concerned that, by listing just those factors in paragraph 26, it might be argued in the future that the list of relevant factors for a sitting Panel should be determined by reference in some way to this list in paragraph 26. The Committee therefore queries the utility of including this list.
23. If paragraph 26 is to be retained, the Committee consider that paragraph 26(g) of the Revised Guidance Note is too broadly stated insofar as it extends to a participating insider "coming to an understanding with a potential bidder without first providing sufficient information to the IBC or the board for it to consider the transaction".
24. It may well be the case (and indeed is often the case) that a potential bidder will only be prepared to propose a transaction to a target if the bidder had come to some form of understanding (even if not formal or legally binding) with one or more participating insiders in the first place. In such circumstances, it may be impractical or even impossible for a participating insider to provide information to the IBC or the board about a potential transaction prior to reaching the understanding.
25. The Committee considers that the Panel should limit the ambit of paragraph 26(g) by replacing the words after "coming to an understanding" with "entering an agreement or arrangement" (noting, of course, that the matters set out in paragraph 26 are non-prescriptive examples of what may constitute unacceptable circumstances and that the Panel will ultimately turn to the particular facts of a case when making an assessment).

Question 7

Do you agree with the other amendments made to the Guidance Note? Please identify any other amendments you think should be made.

26. As stated above, the Committee believes that the Guidance Note could be substantially simplified through the amendments referred to above.

27. The Committee also recommends that the Panel consider making the following minor edits to the Revised Guidance Note:

- **Paragraph 20(a)**—for clarity, add “with whom they are involved” to the end of this paragraph;
- **Paragraph 20(b)(ii)**—add “or standing aside” after “notwithstanding such resignation”; and
- **Paragraph 24(e)**—add “or section 636(1)(a)” after “section 602”—relevantly, section 636(1)(a) of the *Corporations Act 2001* (Cth) requires the bidder in a takeover to disclose the identity of the bidder.

Annexure A: About the Business Law Section of the Law Council of Australia

The Business Law Section was established in August 1980 by the Law Council of Australia with jurisdiction in all matters pertaining to business law. It is governed by a set of by-laws adopted by the Law Council and the members of the Section. The Business Law Section conducts itself as a section of the Law Council of Australia Limited.

The Business Law Section provides a forum through which lawyers and others interested in law affecting business can discuss current issues, debate and contribute to the process of law reform in Australia, as well as enhance their professional skills.

The Law Council of Australia Limited itself is a representative body with its members being:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Operating as a section of the Law Council, the Business Law Section is often called upon to make or assist in making submissions for the Law Council in areas of business law applicable on a national basis.

Currently the Business Law Section has approximately 900 members and also 15 specialist committees and working groups:

- Competition & Consumer Law Committee
- Construction & Infrastructure Law Committee
- Corporations Committee
- Customs & International Transactions Committee
- Digital Commerce Committee
- Financial Services Committee
- Foreign Corrupt Practices Working Group

- Foreign Investment Committee
- Insolvency & Reconstruction Law Committee
- Intellectual Property Committee
- Media & Communications Committee
- Privacy Law Committee
- SME Business Law Committee
- Taxation Law Committee
- Technology in Mergers & Acquisitions Working Group

As different or newer areas of business law develop, the Business Law Section evolves to meet the needs or objectives of its members in emerging areas by establishing new working groups or committees, depending on how it may better achieve its objectives.

The Section has an Executive Committee of 11 members drawn from different states and territories and fields of practice. The Executive Committees meet quarterly to set objectives, policy and priorities for the Section.

Current members of the Executive are:

- Mr Philip Argy, Chairman
- Professor Pamela Hanrahan, Deputy Chair
- Mr Adrian Varrasso, Treasurer
- Mr Greg Rodgers
- Mr John Keeves
- Ms Rachel Webber
- Ms Caroline Coops
- Dr Elizabeth Boros
- Ms Shannon Finch
- Mr Clint Harding
- Mr Peter Leech

The Section's administration team serves the Section nationally and is based in the Law Council's offices in Canberra.