

# THE TAKEOVERS PANEL'S NEW 4 MONTH LOCK OUT RULE

30 July 2018 | Australia

Legal Briefings - By **Andrew Rich and Simon Haddy**

---

The Takeovers Panel has, following a public consultation process, articulated a new policy that, if a bidder makes a statement during a takeover bid to the effect that it will not increase its offer price, the bidder is prevented from announcing a new takeover bid at a higher price for 4 months after the close of its takeover bid. In this article, we discuss the Panel's new policy and some of the areas of remaining uncertainty.

## IN BRIEF

- The “truth-in-takeovers” policy strictly prevents a bidder from increasing or extending its takeover bid once it has declared its bid ‘last and final’.
- The Takeovers Panel has articulated a new policy that, if a bidder says it will not increase its offer price, the bidder cannot return with a new takeover bid at a higher price until 4 months have elapsed after the close of its takeover bid.
- The only circumstances in which departures to this will be tolerated by the Panel are those expressly set out in the bidder’s ‘last and final’ statement.
- While this reform is welcome, there are some areas of uncertainty remaining as to the potential scope of the Panel’s new policy.

## WHAT IS THE PANEL'S NEW POLICY

The Takeovers Panel's new policy position – which Herbert Smith Freehills supports – is that “unacceptable circumstances” are likely to arise if a bidder makes a “no increase” statement during a takeover bid (that is, a statement to the effect that the bidder will not increase its offer consideration), and the bidder announces a new takeover bid (or a scheme of arrangement) at a higher price within 4 months after the bid closes.

The only exception to this so-called “4 month lock out rule” is where the bidder has made a clear qualification to the no increase statement (for example, where a competing proposal is announced by a third party) and the circumstances contemplated by that qualification actually arise.

The background to the Takeovers Panel's new policy position and the public consultation process were set out in our [earlier article](#).

The Takeovers Panel's new policy is set out in a new 7 line footnote in Guidance Note 1.<sup>1</sup>

## WHAT CHANGED DURING THE CONSULTATION PROCESS?

The only change of substance that the Panel made in the final version of its policy from the position articulated in its consultation paper, was to pick up Herbert Smith Freehills' suggestion that the Panel should make it clear that the 4 month lock out period prevents a bidder from even announcing a new bid during the 4 month period.

As originally drafted, bidders could have circumvented the proposed new policy by *announcing* a new bid two and a half months (and possibly as little as 2 months) into the 4 month period so long as they only served their bidder's statement after the expiry of the 4 month period.

Significantly, the Panel expressly declined to accept a general overriding “material change” or “exceptional circumstances” exception to the 4 month lock out rule. The Panel's position is that, if a bidder wishes to avail itself of such an exception, it should include a clear qualification to this effect in its “last and final” statement. Herbert Smith Freehills was supportive of Panel's conclusion in this regard as 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 wished to avoid.

## WHAT ISSUES HAVE BEEN LEFT FOR ANOTHER DAY?

The Panel has left a number of matters for another day – thus creating a degree of uncertainty as to the potential future scope and direction of the policy.

In summary, those matters, include:

- **(no increase and no extension statements)** whether, and the extent to which, the Panel would apply the 4 month lock out rule to:
  - a no extension statement – in other words, the Panel has not made it clear what its position would be if a bidder, who has said that it will not extend its offer period, launches a new bid shortly after the close of its bid; or
  - a no waiver statement – in other words, the Panel has not made it clear what its position would be if a bidder, who has said that it will not waive a particular bid condition, launches a new bid (not containing the condition that the bidder previously said it would not waive) shortly after the close of its bid;
- **(restrictions on delivering NBIOS during the lock-out period)** what the Panel would do if a previous bidder, who had made a no increase statement, delivers a non-binding indicative offer to the target relating to a new bid during the 4 month lock out period.

Herbert Smith Freehills had submitted to the Panel that the policy should not be able to be circumvented by a bidder putting a target in a difficult position by, for example, privately delivering a non-binding indicative offer to the target during the 4 month lock-out period. As this could require the target to publicly disclose the receipt of the indicative offer (for example, if news of the receipt of the proposal leaked into the market or if the target was the subject of another takeover bid at the time);

- **(application of the policy to failed schemes)** whether, and the extent to which, the Panel would apply the 4 month lock out rule in circumstances where the bidder had (unsuccessfully) sought to acquire the target by way of a scheme and where the bidder had made a no increase statement in connection with the scheme.

In this regard, Herbert Smith Freehills had submitted that the Panel should make it clear that the 4 month lock out rule applies equally to schemes of arrangement; and

- **(application of the policy to bear hug announcements)** whether, and the extent to which, the Panel would apply the 4 month lock out rule in circumstances where a prospective bidder makes a no increase statement in a preliminary approach (or “bear hug” announcement). For example, it is unclear whether the Panel would apply the wait period from the date of the statement.

In response to this issue, Herbert Smith Freehills had submitted that, 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.

## COMMENTARY

The Takeovers Panel is to be commended for removing the significant uncertainty from the market as to whether there in fact existed a “wait period” following the making of a no increase statement. Views varied from there being no wait period at all to there being a wait period of 4 or 6 months (or possibly even longer). It was important to market integrity that the Panel articulated a clear, bright line, test - which it has done.

It will be disappointing to some that the Panel did not expressly deal with any of the other points discussed above.

However, it is understandable that the Panel did not want to delay implementing the most critical policy reform (that is, the articulation of the 4 month lock out rule following a no increase statement) whilst a length debate played out.

That said, we hope that consideration will be given to those other points in the near future and that they will not be left to be determined “on the fly” by the Panel in the course of considering actual takeover disputes that are referred to it.

## ENDNOTES

1. Takeovers Panel, Guidance Note 1, “Unacceptable Circumstances”, Sixth Issue, 11 July 2018, at footnote 39.

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



**ANDREW RICH**  
PARTNER, SYDNEY

+61 2 9225 5707  
andrew.rich@hsf.com

---

## LEGAL NOTICE

The contents of this publication, current at the date of publication set out above, are for reference purposes only. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2020

---

**SUBSCRIBE TO STAY UP-TO-DATE WITH LATEST THINKING, BLOGS, EVENTS, AND MORE**

Close