Takeovers policy must allow a change of plan

JAMES PHILIPS

A POLICY that changes the meaning of language in a takeover context advances market integrity? Wrong. Market integrity is in conflict with price maximisation for shareholders? Wrong — market integrity should create the conditions for proper price setting.

Yesterday an article was published in these pages ("Bid bluster a risk to market faith") that purported to respond to my piece published on Tuesday. I argued that the Australian Securities and Investments Commission's truth in takeovers policy should not inhibit auctions that maximise price for target shareholders. I also argued that the existence of the policy itself changed market expectations by changing statements of intention into final commitments.

Yesterday's note described my conclusions as "dangerous nonsense", but failed to refute my analysis. The note suggested market integrity and investor confidence were well served by turning statements of intention in a bid context into final positions, and dismissed in passing my emphasis on the objective of price maximisation for target shareholders.

Proper price setting for target shareholders should be the prime objective of a contested takeover bid process. Proper price setting in this context will usually result in price maximisation. Market integrity is a means towards the proper functioning of the market and proper price determination.

Market integrity is entirely consistent with allowing a bidder's statements to have their ordinary meaning. For example, an unqualified statement by a bidder that it does not intend to increase its bid price can be understood as a statement of the bidder's intention without compromising market integrity.

It should not be the job of regulatory policy to distort such a statement to prohibit a subsequent change of intention and price increase. The statement must be true when made, but not acquire a significance or meaning that it would not have but for an overreaching regulatory policy.

In contrast, a statement that on its face irreversibly commits the bidder to a future course of action should be binding.

In the Ludowici proceedings, the Takeovers Panel was correct in not preventing FLSmidth from increasing its bid price because its chief executive had earlier said no when asked if he would consider raising the bid.

The challenge for the panel was to achieve this outcome in light of the truth in takeovers policy, which in this context could metamorphose the chief executive's statement into a promise to not bid more.

Care is needed in formulating public company and market regulation policy. Excessive or ill-considered regulation, layer upon layer, reduces the attractiveness of listed companies as an investment class. Private equity and other "alternative asset classes" are the winners.

In takeovers, it should not be the purpose of regulatory policy to turn a statement of intention into a prohibition on offering shareholders a better price.

The issue is not a choice between market integrity and price maximisation. It is about a policy that purports to change the meaning or significance of statements of intention into something more. Such a policy serves neither market integrity nor target shareholders' interests.

James Philips is a partner and merger and acquisition head at Minter Ellison, Sydney