



Australian Government

Takeovers Panel

Consultation Paper

GN 12 Frustrating action

10 December 2010

Introduction

1. The Panel invites comments on the draft Guidance Note attached. The time for comments is open until 21 January 2011.
2. Comments or queries can be directed to:

<p>Allan Bulman Director, Takeovers Panel Email: takeovers@takeovers.gov.au</p>

3. Note that it is Panel policy that submissions may be made public unless the respondent requests confidentiality.
4. The Panel will consider all comments and reserves the right to make changes to the draft Guidance Notes in response to comments or otherwise.

Background

5. The revised GN 12:
 - 5.1. clarifies the application of the Panel's frustrating action policy to reflect the decision in *Transurban Group* [2010] ATP 5
 - 5.2. clarifies the 'passage of time' carve-out in example 1 of paragraph 14. The change will capture acceptances through an acceptance facility and
 - 5.3. proposes, in a new paragraph 17, that a target might be able to proceed with a potential frustrating action where a private approach has been received by putting the bidder on notice. The Panel has had regard to the UK 'put-up or shut-up' model, and considers that paragraph 17 of proposed GN 12 may be more appropriate in the Australian regulatory context.
6. Additional minor changes have also been proposed.

Issues

7. While comments are sought generally, particular attention is drawn to whether paragraph 17 should be adopted as policy and whether there are any practical issues the Panel should address.

Attachments

- 1 Revised draft GN 12 Frustrating action

*Attachment 1***Guidance Note 12 – Frustrating action**

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Introduction

1. This guidance note has been prepared to assist market participants understand the Panel’s approach to actions that could frustrate a bid or potential bid. Usually such actions are taken by a target.

Examples of frustrating action:

1. *Significant issuing or repurchasing shares, or issuing convertible securities or options¹*
 2. *Acquiring or disposing of a major asset, including making a takeover bid*
 3. *Undertaking significant liabilities or changing the terms of its debt*
 4. *Declaring a special or abnormally large dividend*
 5. *Significant change to company share plans.*
2. The examples are illustrative only and nothing in the note binds the Panel in a particular case.

¹ A small number of convertible securities may be significant if this could, for example, prevent the tax benefits of 100% ownership. But compare *Bigshop.com.au Ltd (No 2)* [2001] ATP 24 at [45] which considered that a Panel might not regard a small issue of shares under an employee option plan to be unacceptable

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3. The policy basis for this note is that it is shareholders who should decide on actions that may:
 - interfere with the reasonable and equal opportunity of the shareholders to participate in a proposal or
 - inhibit the acquisition of control over their voting shares taking place in an efficient, competitive and informed market.
 4. Some ASX Listing Rules require shareholder approval for transactions for similar policy reasons.²

Frustrating action

5. In this note the following definitions apply:

Term	Meaning
frustrating action	an action by a target, whether taken or proposed, by reason of which: <ul style="list-style-type: none"> • a bid may be withdrawn³ or lapse • a potential bid is not proceeded with
potential bid	a genuine potential bid communicated to target directors publicly or privately which is not yet a formal bid under Chapter 6 ⁴

6. A bidder may make its bid (potential bid) subject to any conditions it chooses, with exceptions.⁵ It must set out the conditions clearly. As this note extends to potential bids, it is incumbent on a potential bidder to make it clear to the

² See principally rules 7.1, 7.6 and 7.9, but also rules 10.1, 11.2 and 11.4

³ Section 652B (with ASIC approval; see RG 59) or s652C. References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

⁴ Includes announcements to which s631 applies but not limited to these: *MacarthurCook Ltd* [2008] ATP 20

⁵ See Division 4 of Part 6.4. For example, a bid must not include a condition dependent on an event within the sole control of the bidder. A bidder could not rely on a condition that offended Part 6.4 to establish unacceptable circumstances

target what conditions would apply if a bid were made.⁶ This will help establish that it was a genuine potential bid and that the target was aware of the condition in issue.

7. An action that triggers a condition is a frustrating action, but whether the action gives rise to unacceptable circumstances will depend on its effect on shareholders and the market in light of ss602(a)⁷ and (c)⁸ and s657A.

Examples

1. An action triggering a condition not commercially critical to the bid is unlikely to give rise to unacceptable circumstances.

2. An action that triggers a 'condition' in a potential bid may not give rise to unacceptable circumstances if the bidder indicated that it would proceed only if the bid was recommended and the directors have rejected the approach.

3. A proposed scheme, requiring target board support, cannot be frustrated if the target board does not support it.⁹

8. Section 657A(3) requires the Panel to take into account the actions of directors when considering the purposes in s602(c) in relation to the acquisition of a substantial interest. This includes actions that caused or contributed to the acquisition not proceeding. The provision was introduced in 1994:

*"The purpose of this provision is to ensure that the scope of unacceptable circumstances includes cases where the directors of a target company by their action, including such action which caused or contributed to the acquisition not proceeding, did not give shareholders of the company all reasonable and equal opportunities to participate in any benefits accruing to the company."*¹⁰

⁶ Includes any pre-conditions to the bid set out in a potential bid

⁷ Acquisition of control over voting shares takes place in an efficient, competitive and informed market

⁸ As far as practicable, holders of the relevant class of shares all have a reasonable and equal opportunity to participate in any benefits

⁹ [Transurban Group \[2010\] ATP 5. However, if the potential bidder included an alternative that was a genuine potential bid, actions by the target may still give rise to unacceptable circumstances](#)

¹⁰ Explanatory Memorandum to the *Corporations Legislation Amendment Bill 1994*, para [344]

Overlap with directors' duties

9. The Panel creates new rights and obligations.¹¹ It does not enforce directors' duties – that is for a court.
10. Undertaking a frustrating action may give rise to unacceptable circumstances regardless of whether it is consistent with, or a breach of, directors' duties. It is not to the point that there is no express requirement in the law for shareholder approval of frustrating action.

Unacceptable circumstances

11. In considering whether frustrating action gives rise to unacceptable circumstances, the Panel is guided by the following.

Considerations surrounding the bid

- (a) how long the bid has been open and its likelihood of success (if a potential bid, of proceeding)¹²
- (b) any clearly stated objectives of the bidder and whether the condition is commercially critical to the bid
- (c) whether it is 'unreasonable' for a bidder to rely on the condition before the Panel¹³

Examples:

1. A condition that is overly restrictive or is invoked unreasonably¹⁴
2. A condition that requires the target's co-operation such as recommending the bid or allowing due diligence

¹¹ *Precision Data Holdings Ltd v Wills* (1992) 173 CLR 167; *AG (Cth) v Alinta Ltd* [2008] HCA 2

¹² That is, for a bid whether, having regard to the level and rate of acceptances, it is reasonable to conclude that target shareholders have rejected the bid. It may not be reasonable to conclude this if the bid is still conditional and the final bid close date is not known

¹³ The bidder is free to choose the bid conditions but the frustrating action may not give rise to unacceptable circumstances. One example may be where the condition is not commercially critical to the bid

¹⁴ *Pinnacle VRB Ltd (No 8)* [2001] ATP 17 at [49(e)]

3. A condition restricting target directors from seeking competing proposals where they have not entered a no-talk agreement

4. A condition that the target enters a material transaction that is outside its business plans

- (d) whether the bidder can waive the condition
- (e) the market price compared to the bid price

Considerations surrounding the frustrating action

- (f) whether there is a competing proposal already
- (g) whether the frustrating action was undertaken by the target in the ordinary course of its business. A bidder must accept that the target's normal business will continue normally¹⁵
- (h) whether there is a legal or commercial imperative for the frustrating action

Examples

1. Action to comply with a court order, legislative requirement or government directive regarding its licence

2. Action to avoid a materially adverse or to achieve a materially favourable financial consequence

3. A transaction announced before the bid

- (i) whether the frustrating action materially affects the financial or business position of the target¹⁶
- (j) the process the target undertook in considering whether to take the action, for instance -
 - the impact the acquisition may have on regulatory approval for the transaction (eg, ACCC approval)
 - the "chilling effect" that the frustrating action has on any potential auction
- (k) how advanced the negotiations on the frustrating action were when the bid was made or communicated.

¹⁵ Relevant factors include the target's business plans and the size and nature of the transaction

¹⁶ It must be reasonable for the bidder to regard the impact as adverse

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12. The following are some examples of actions that may give rise to unacceptable circumstances:
- (a) issuing new shares (or convertible securities), or repurchasing shares, if significant in the context of the target's issued capital or the bid
 - (b) acquiring a major asset, including by making a takeover bid, or disposing of one
 - (c) undertaking significant liabilities or materially changing the terms of its debt (where the takeover would not have given rise to these changes)
 - (d) declaring a special or abnormally large dividend
 - (e) significantly changing company share plans or
 - (f) entering into joint ventures.

Not unacceptable circumstances

13. If a frustrating action creates for shareholders a choice between the proposals, the frustrating action will not generally give rise to unacceptable circumstances.
14. The Panel generally does not consider it an answer to unacceptable circumstances that, for example, a transaction may be lost because of the time involved in calling a general meeting. Relevant factors include the value of the transaction to the target and why it could n^ot be conditional on shareholder approval. However, the Panel recognises that shareholders may be given a choice in different ways, as suits the particular transaction dynamics.

Examples:

1. Directors announcing that they will enter into an agreement after a specified, reasonable time,¹⁷ unless control would pass ~~has by then passed~~ to the bidder if the bid were then to be declared unconditional¹⁸
2. Seeking prior shareholder approval or making the frustrating action conditional on shareholder approval¹⁹
3. Entering an agreement conditional on the bid failing or which contains a cooling-off clause which a new management might exercise

¹⁷ Reasonable time may be affected by the length of the bid period or the status of any bid conditions

¹⁸ This could include acceptances or acceptances through an acceptance facility

¹⁹ *Pinnacle VRB Ltd (No 5)* [2001] ATP 14 at [50]

15. If a target offers to seek shareholder approval, time is needed to prepare adequate information for shareholders to decide between the competing proposals and to hold the meeting. The Panel will consider issues such as:
- (a) what is a reasonable time to prepare the notice of meeting
 - (b) whether the bidder is willing to extend its bid to allow the holding of the meeting²⁰
 - (c) how long the target has been considering the proposed action
 - (d) the benefits to target shareholders of the proposed action and
 - (e) whether the bidder agrees not to rely on the defeating condition should the resolution fail. This may require the bidder to vary or waive the condition.
16. In general it will not give rise to unacceptable circumstances for a target:
- not to facilitate a bid
 - to seek alternatives (without frustrating the bid)²¹ or
 - to recommend rejection of a bid (if the directors consider this in the best interests of shareholders).²²
17. One of the factors that the Panel will take into account in deciding whether unacceptable circumstances exist is whether, before undertaking a corporate action, the target notified²³ the potential bidder that it intends to take the action if the potential bidder does not make its bid or formally announce its proposed bid²⁴ within a reasonable time.²⁵

²⁰ Conversely it may point to unacceptable circumstances that the bidder is prepared to extend its bid yet the target is not prepared to seek shareholder approval

²¹ This might even involve, for example, breaching a 'no talk' bid condition provided the directors did not agree to that condition

²² The bid may nevertheless be subject to such conditions

²³ The parties should consider disclosure issues

²⁴ This is not a safe harbour and there may be other factors that mean a declaration of unacceptable circumstances is made notwithstanding. *MacarthurCook Limited* [2008] ATP 20 may be an example of circumstances in which such a notification may have assisted

²⁵ Normally 2 weeks, but will depend on the circumstances

Remedies

~~17.~~18. The Panel has wide powers to make orders,²⁶ including to:

- (a) prevent an action or transaction from proceeding
- (b) require the target to seek shareholder approval of the action or transaction and
- (c) unwind an action or transaction.

~~18.~~19. The Panel may override directors' decisions even if they were made consistently with directors' duties.

Publication History

First Issue	16 June 2003
Reformatted	16 September 2003
Second issue	11 February 2010
<u>Third issue</u>	<u>[insert date]</u>

Related material

GN 7 Lock-up devices

²⁶ Section 657D