



Australian Government

Takeovers Panel

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## AMENDMENT OF GN 12

### REWRITE OF GN 6, GN 13 AND GN 15

## PUBLIC CONSULTATION RESPONSE STATEMENT

6 MAY 2011

### Introduction

On 10 December 2010, the Takeovers Panel released a Consultation Paper seeking public comments on amendments to guidance note 12.

The revised GN 12 reflected the decision in *Transurban Group* [2010] ATP 5 and clarified the "passage of time" carve-out in example 1 of paragraph 14. It also proposed a new paragraph to deal with the ability of a target to proceed with a potential frustrating action where a private approach has been received by putting the bidder on notice.

Comments on the Consultation Paper were due by 21 January 2011 and the Panel received 4 submissions in response. The Panel thanks those who made submissions for their comments.

On 23 December 2010, the Panel released a Consultation Paper seeking public comment on the following rewrites of its guidance notes:

- GN 6 (minimum bid price)
- GN 13 (broker handling fees )
- GN 15 (trust scheme mergers)

Comments on the Consultation Paper were due by 4 February 2011 and the Panel received two submissions in response. The Panel thanks those who made submissions for their comments.

Consistent with the Panel's published policy on responding to submissions, this paper sets out the Panel's response to the public consultation process and its conclusions on the main comments received from respondents.

Many of the editorial comments made have been incorporated into the final guidance notes.

Attached are copies of the final guidance notes, in mark up to show the changes from the drafts circulated with the Consultation Paper.

## **Material comments received and Panel's conclusions**

### **GUIDANCE NOTE 12: FRUSTRATING ACTION**

#### **Schemes**

##### *Comment*

One respondent suggested that the guidance note should apply to schemes as well as bids. The reason is that the policy should be based on whether the bidder has ruled out proceeding without a recommendation rather than the legal form of the initial approach.

##### *Response*

It is market practice for schemes to be 'friendly'. Therefore it is simpler, and clearer for the market, to state that the frustrating action policy does not apply to schemes.

#### **"Put up or shut up"**

##### *Comment*

All respondents were in favour of the proposed new paragraph 17 - that a target might be able to proceed with a potential frustrating action, following a private approach, by putting the bidder on notice.

##### *Response*

GN 7 has been amended to include this proposal.

### **GUIDANCE NOTE 6: MINIMUM BID PRICE**

#### **Foreign cash as non-cash consideration**

##### *Comment*

One respondent was in favour of retaining GN 6 and addressing foreign cash as non-cash consideration for takeover purposes. This may have an impact on various provisions, including the minimum bid price rule (s621(3)) and acquisitions outside the bid (eg, on-market acquisitions) (s651A).

## **Schemes**

### *Comment*

One respondent recommended that GN 6 should not apply to schemes of arrangement.

### *Response*

The Panel has decided to continue with GN 6, including a statement about foreign cash (new paragraph 11). Whether the policy behind s621(3) applies to schemes, and if so how it should apply, are open questions. The Panel has decided at this stage not to extend its guidance to schemes.

## **GUIDANCE NOTE 13: BROKER HANDLING FEES**

### **Limits on fees**

#### *Comment*

One respondent saw no reason to increase the minimum and maximum fees.

#### *Response*

The Panel has retained the limits.

## **GUIDANCE NOTE 15: TRUST SCHEME MERGERS**

### **Responsible entity - approval as a related party transaction**

#### *Comment*

One respondent agreed that disclosure and approval is required for a responsible entity of the target (or a related body) giving up management rights over the target only if it is a related party transaction.

#### *Response*

The Panel has retained this as footnote 17.

### **Expert report**

#### *Comment*

One respondent thought that it was useful to reflect the practice of independent experts covering both "best interests" and "fair and reasonable" tests.

#### *Response*

The Panel has retained this as footnote 21.

## **ATTACHED**

Marked up copies, showing changes from consultation version of the GNs to final version, of:

- GN 6 (Minimum bid price)
- GN 12 (Frustrating action)
- GN 13 (Broker handling fees) - no change from the consultation draft
- GN 15 (Trust scheme mergers)