



Australian Government

Takeovers Panel

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 policy on frustrating action.
2. The examples are illustrative only and nothing in the note binds the Panel in a particular case.
3. A frustrating action is an action by a target, whether taken or proposed, by reason of which:
 - a bid may be withdrawn¹ or lapse
 - a potential bid² is not proceeded with.

¹ Section 652B (with ASIC approval; see ASIC RG 59 *Announcing and withdrawing takeover bids (s653 and s746)*) or s652C. References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

² In this note, a ‘potential bid’ means a genuine potential bid communicated to target directors publicly or privately which is not yet a formal bid under Chapter 6. It includes announcements to which s631 applies but is not limited to these: *MacarthurCook Limited* [2008] ATP 20

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The following actions may be frustrating actions (assuming they breach a bid condition or allow a bid to be withdrawn under s652C³):

1. *Significant issuing or repurchasing of shares (or convertible securities or options)⁴*
 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*
 6. *Entering into joint ventures*
4. 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.
5. As was said in *Bigshop.com.au Limited 01*:
- "...frustrating action must be defined in terms of action which prevents a transaction which would bring about a change of control of the target company in a manner, and at a time, when a decision about control of the company should properly be taken by shareholders, rather than directors (even though the relevant decision may be fully within the directors' area of responsibility when the target is not subject to a takeover)."⁵*
6. Some ASX Listing Rules require shareholder approval for transactions for similar policy reasons.⁶

Overlap with directors' duties

7. The Panel does not enforce directors' duties – that is for a court.
8. Undertaking a frustrating action may give rise to unacceptable circumstances regardless of whether it is consistent with, or a breach

³ In rare circumstances, an action that does not breach a bid condition or allow a bid to be withdrawn under s652C may still be unacceptable: see for example *Babcock & Brown Communities Group* [2008] ATP 25 and *Gondwana Resources Limited* [2014] ATP 9

⁴ A small number of convertible securities may be significant if this could, for example, prevent the tax benefits of 100% ownership. In *Bigshop.com.au Limited 02* [2001] ATP 24 at [45] the Panel said that a small issue of shares under an employee option plan might trigger a defeating condition but not be such a threat to the bid as to be a frustrating action

⁵ [2001] ATP 20 at [33]

⁶ See principally rules 7.1, 7.6 and 7.9, but also rules 10.1, 11.2 and 11.4

of, directors' duties and notwithstanding that there is no express requirement in the law for shareholder approval of frustrating actions.

Unacceptable circumstances

9. 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 or proposed acquisition of a substantial interest. This includes actions that caused or contributed to the acquisition or proposed acquisition not proceeding (that is, frustrating actions). The provision was introduced in 1994 to broaden the test for unacceptable circumstances in s732 (forerunner to s657A):

"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.

Existing paragraph 732(d) appears, at present, to only cover actions by the offeror, and it is desired that this should be widened to include, amongst other things, illegitimate spoiling action by the Board of directors of the target company..."⁷

10. Accordingly, the Panel may declare circumstances to be unacceptable if the actions of the target directors cause an acquisition or proposed acquisition not to proceed or contribute to it not proceeding. Typically, this policy applies to an action that triggers a condition of a bid or a potential bid⁸ or would allow a market bid to be withdrawn.⁹
11. Whether a frustrating action gives rise to unacceptable circumstances will depend on its effect on shareholders and the market in light of ss602(a)¹⁰ and (c)¹¹ and s657A.¹²

⁷ Explanatory Memorandum to the *Corporations Legislation Amendment Bill 1994*, at [344]-[345]

⁸ A bidder may make its bid (or potential bid) subject to any conditions it chooses, with exceptions (see Division 4 of Part 6.4). 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 target what conditions would apply if a bid were made. This will help establish that it was a genuine potential bid and that the target was aware of the condition in issue

⁹ *Freshtel Holdings Limited* [2016] ATP 15 should not be taken to suggest otherwise

¹⁰ Acquisition of control over voting shares takes place in an efficient, competitive and informed market

¹¹ As far as practicable, holders of the relevant class of shares all have a reasonable and equal opportunity to participate in any benefits

¹² See Guidance Note 1 *Unacceptable Circumstances*, in particular at [12]-[16]

Considerations when assessing unacceptable circumstances

12. Factors the Panel will have regard to in considering whether a frustrating action gives rise to unacceptable circumstances include:
- (a) how long the bid has been open and its likelihood of success (if a potential bid, of proceeding)¹³
 - (b) any clearly stated objectives of the bidder and whether the triggered condition is commercially critical to the bid
 - (c) whether there is already a competing proposal¹⁴
 - (d) whether the frustrating action was undertaken by the target in the ordinary course of its business¹⁵
 - (e) how advanced the frustrating action was when the bid was made or communicated
 - (f) in the case of a potential bid - whether the potential bidder has failed to make its bid or formally announce¹⁶ its proposed bid within a reasonable time after becoming aware of the target's intention to undertake the action or type of action¹⁷ and
 - (g) in the case of a bid - whether paragraph 20(a) (bids not genuinely available) or paragraph 21(e) (triggered conditions) applies and is not remedied within a reasonable time upon request of the target.

Considerations tending against unacceptable circumstances

13. The frustrating action policy is not intended to unduly inhibit target companies from carrying on business during a bid period.
14. In general, it will not give rise to unacceptable circumstances under the frustrating action policy if a target:
- (a) does not facilitate a bid

¹³ 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. See also paragraph 20(b)

¹⁴ This may indicate that the bid is unlikely to be successful. See also paragraph 20(b)

¹⁵ A bidder must accept that the target's business will continue normally. Relevant factors include the target's business plans and the size and nature of the transaction

¹⁶ Section 631

¹⁷ *MacarthurCook Limited* [2008] ATP 20 may be an example of circumstances in which advance notification of the target's intention to undertake an action may have assisted. However, advance notification is not a safe harbour and there may be other factors that mean a declaration of unacceptable circumstances is made notwithstanding

- (b) seeks alternatives¹⁸
 - (c) recommends rejection of a bid or
 - (d) offers shareholders a choice.
15. 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,¹⁹ unless control would pass to the bidder if the bid were then to be declared unconditional²⁰*
 2. *Seeking prior shareholder approval or making the frustrating action conditional on shareholder approval²¹*
 3. *Entering an agreement conditional on the bid failing or which contains a cooling-off clause which a new management might exercise*
16. If a target wishes 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 meeting²²
 - (c) how long the target has been considering the proposed action and
 - (d) the benefits to target shareholders of the proposed action.
17. If a bidder wishes to require a target to seek shareholder approval, an additional issue the Panel will consider is whether the bidder agrees not to rely on the triggered condition (and perhaps other conditions²³) should the resolution fail. This may require the bidder to vary or waive the condition(s) so the bid remains a viable option for shareholders.

¹⁸ This might even involve, for example, breaching a 'no talk' condition if the directors did not agree to that condition. Unacceptable circumstances may still arise if the alternative transaction pursued breaches a bid condition, for example, if the condition is commercially critical to the bid. See also paragraph 21(d)

¹⁹ Reasonable time may be affected by the length of the bid period or the status of any bid conditions. See also footnote 31

²⁰ Through acceptances or acceptances under an acceptance facility

²¹ *Pinnacle VRB Ltd 05* [2001] ATP 14 at [50]

²² 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

²³ See *Pinnacle VRB Ltd 08* [2001] ATP 17 at [77] and Appendix 2 to that decision

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18. 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 not be conditional on shareholder approval.
19. In general, a frustrating action is also unlikely to give rise to unacceptable circumstances if:
- (a) the bid or potential bid does not give shareholders a genuine opportunity to dispose of their shares or
 - (b) one of sub-paragraphs 21(a) to 21(e) applies.

These are discussed below.

Genuine opportunity

20. In considering frustrating action, the Panel considers that a bid or potential bid will not give shareholders a genuine opportunity to dispose of their shares if:
- (a) it is not genuinely available to them because, due to a condition or structural or other feature, it cannot be implemented or completed²⁴

Examples:

 1. *A bid made without funding*²⁵
 2. *A bid which has a condition incapable of satisfaction. For example, a condition which requires a third party to give an approval or consent and the third party has ruled out giving its approval or consent*
 - (b) there are reasonable grounds to conclude that it will not be successful. The Panel will require very strong probative material to reach this conclusion. Factors that may be relevant include:
 - where the bid has been open for a long time and has had few acceptances (recognising that a bid may be open because of the need to meet a regulatory condition, and that shareholders may hold off accepting a bid if it is conditional and the final close date is not known)

²⁴ The Panel would ordinarily expect a target to provide the bidder with a reasonable opportunity to address the issue prior to undertaking the frustrating action. See also paragraph 12(g)

²⁵ See *Austock Group Limited* [2012] ATP 12 at [42] where the Panel considered that Mariner's bid for Austock was not frustrated "because Mariner's proposed bid was not capable of being implemented, because it had not been properly funded"

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- where the bid is opposed by key shareholders²⁶ and
- where there is a superior competing bid

or

- (c) it is dependent on target directors recommending it.

Examples:

1. The bidder has indicated that it would only proceed if the bid is recommended by the target directors²⁷
2. A scheme of arrangement²⁸

Otherwise unlikely to be unacceptable

21. Notwithstanding that a bid or potential bid provides a genuine opportunity for shareholders to dispose of their shares, a frustrating action is unlikely to give rise to unacceptable circumstances where:

- (a) the frustrating action is announced before the bid or potential bid
- (b) there is a legal imperative for the frustrating action

Example: Action to comply with a court order, legislative requirement or government directive regarding a licence

- (c) the frustrating action is required to avoid a materially adverse financial consequence, such as insolvency²⁹
- (d) it is unreasonable for the bidder to rely on the triggered condition before the Panel to claim unacceptable frustrating action³⁰

Examples:

1. A condition that is overly restrictive or invoked unreasonably
2. A condition restricting the target from seeking competing proposals where the target has not agreed to any such restriction

²⁶ The Panel will consider whether a shareholder intention statement is made: see Guidance Note 23 *Shareholder intention statements* and ASIC RG 25 *Takeovers: False and Misleading Statements* at [RG25.29]-[RG25.34]

²⁷ This example would not extend to the situation where the bidder has expressly reserved the right to bid without a recommendation and has clearly indicated its proposed bid conditions (see paragraph 12(b) and footnote 8)

²⁸ *Transurban Group* [2010] ATP 5. However, if the potential bidder included an alternative that was a genuine potential bid, which did not require board support, actions by the target may still give rise to unacceptable circumstances

²⁹ See *Perilya Limited 02* [2009] ATP 1

³⁰ The bidder is free to choose the bid conditions but an action breaching a bid condition may not give rise to unacceptable circumstances. The Panel will place weight on whether the bidder has clearly stated its objectives and the relevant condition is therefore critical to the bid

3. *A condition that requires the target to enter into material transactions outside its business plan*

or

- (e) a bid condition has been triggered and the bidder has not within a reasonable time³¹ disclosed whether it will rely on or waive the breach.

Example: A condition which requires the target to confirm or give the bidder information and the target has reasonably refused to do so³²

Remedies

- 22. The Panel has wide powers to make orders,³³ 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.
- 23. 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
Third issue	6 May 2011
Fourth issue	18 July 2014
Fifth issue	1 December 2016

Related material

GN 7 Lock-up devices

³¹ What is a reasonable time will depend on the prevailing circumstances, including which condition has been triggered, whether the bidder has varied the terms of its bid since the triggering of the condition, whether it is still acceptable to wait until the time for giving notice of the status of conditions (see *Novus Petroleum Limited 01* [2004] ATP 2) and whether the target has requested the bidder to disclose its position (see paragraph 12(g))

³² In such a case, it may be unacceptable for a target to undertake a frustrating action until a reasonable time after it has sent its target's statement to the bidder

³³ Section 657D