Submission

from

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Date	7 February 2014	Confidential Email
From	Greg Bosmans	
To	**Allan Bulman**, Director, Takeovers Panel	
Email	takeovers@takeovers.gov.au	

Dear Allan

Submission on Consultation Paper – Guidance Note 12 – Frustrating Action

Thank you for the opportunity to comment on the Takeovers Panel's Consultation Paper regarding proposed amendments to Guidance Note 12 – Frustrating Action (***GN12***).

Our comments are as follows.

1 Our understanding is that the proposed amendments are intended to address the situation where a bidder is 'holding open' a triggered bid condition (ie where a bid condition has been triggered, but the bidder has not announced within a 'reasonable' period of time after that occurred whether the bidder will waive or rely on the trigger) and the target subsequently undertakes or announces an action which would amount to a frustrating action (because it will trigger a bid condition, whether the same condition as previously triggered or another condition). In these circumstances, the proposed amendments are intended to reflect that the bidder may not be entitled to expect the Panel to find the frustrating action unacceptable, because while the bidder is 'holding open' the previously triggered condition, it may not be clear whether there is a 'real' bid capable of being frustrated by the subsequent action.

2 We think that the starting point for a consideration of the proposed amendments is the general principle established in *Novus Petroleum Limited 01* that (at 46):

> … so long as the market knows that there is uncertainty, the nature of that uncertainty and the timetable for resolving it, there is no vice in the bidder waiting until the date set under section 630 for its decision whether to waive defeating conditions, before making an announcement as to its attitude to the conditions in its bid. The market is able to trade on the basis of a known uncertainty. The market deals with prices and trades efficiently where a known uncertainty exists, for example with respect to mining exploration companies and their future results of exploration. This does not make a market false or inefficient, provided that it is informed of developments in a timely way.

3 Unless due recognition is given to this principle in the context of the proposed amendments to GN12, the Panel's proposed approach to assessing frustrating action has the potential to undermine it significantly. If a bidder is deprived of protection against frustrating action – a key protection under Panel policy – in circumstances where it is otherwise conducting itself acceptably under the *Novus* principle, that principle loses much of its practical meaning.

4 Of course, the *Novus* principle itself is not without limitation, in that there may be circumstances where the failure of a bidder to make a decision on a triggered condition before the section 630 date will give rise to unacceptable circumstances. In such a case, there would be no inconsistency in the Panel also denying the bidder protection against frustrating action.

5 We also accept that additional policy considerations come into play in the context of assessing a frustrating action. Those additional policy considerations may justify a bidder being deprived of protection against frustrating action in circumstances where it is holding open a triggered bid condition, even where the Panel, applying the *Novus* principle, would not find there to be unacceptable circumstances in relation to the bidder's conduct in doing so.

6 However, we think the Panel should be careful in reaching such a conclusion, and only do so after an appropriate balancing of the competing principles and policy considerations.

7 To reflect the above, and to make the proposed new paragraph 11(f) clearer in its intent, we suggest that it be replaced with the following:

> whether at the time of the frustrating action the bidder is 'holding open' a triggered bid condition (ie, a bid condition has previously been triggered, but the bidder has not disclosed within a reasonable period of time after that occurred whether the bidder will waive or rely on the trigger), so that it may not be clear whether the bid will actually proceed. In assessing what is a 'reasonable' period of time in this context, the Panel will take into account all of the prevailing circumstances (other than the frustrating action itself and the reasons for it), including the nature of the triggered condition, the nature of the trigger, why the bidder has not yet made a decision to waive or rely on the trigger, and the bidder's other conduct in relation to the bid (and the reasons for that conduct), as well as the general principle that a bidder is entitled to wait until the date set under section 630 for its decision whether to waive the trigger (see *Novus Petroleum Limited 01* [2004] ATP 2 at [46])

8 In relation to the proposed new paragraph 11(g), we are not sure what it adds, as it seems merely to reflect an application of the principles already covered by paragraph 11(a) (and footnote 12) and the proposed new paragraph 11(f) (in the form outlined above). An increase in the bid consideration may increase the likelihood of success of the bid and should be taken into account for the purposes of paragraph 11(a). Conversely, such an action by the bidder[1] may result in 'mixed messages' being sent to the market while the triggered bid condition remains open, suggesting that the 'reasonable' period contemplated by the new paragraph 11(f) may have ended at that point or shortly afterwards. That said, there may be other extenuating circumstances that explain why it is reasonable for the bidder both to vary the bid and to reserve its decision on the triggered condition. Even then, however, if a significant period of time has elapsed since the variation, this might preclude the bidder from arguing that the frustrating action gives rise to unacceptable circumstances.

9 Finally, we think the proposed amendment to footnote 12 goes too far. GN12 is not intended to address unacceptable circumstances in relation to the bidder's actions (or inaction). It is instead focused on the target's conduct, and whether frustrating action is unacceptable. Accordingly, GN12 is not the appropriate place to deal with the unacceptability or otherwise of the bidder's conduct.

10 Indeed, we are not sure any extra words are required in footnote 12 at all, but if it is felt necessary to add something in the context of this particular issue, we think it would be better to say:

> However, if the bid is still conditional as a result of the bidder 'holding open' a triggered bid condition (see (f)), then it still may be reasonable to reach the conclusion that target shareholders have rejected the bid.

11 In relation to the question in paragraph 8 of the Consultation Paper whether a fixed timeframe should be introduced into GN12, after which the frustrating actions policy would no longer apply, we do not

[1] If the proposed new paragraph 11(g) is to be retained, we think that it needs to made clear that not all variations of a bid are relevant. In particular, an extension of the offer period should generally be considered a neutral action by the bidder.

support such a proposal. There are too many permutations in the potential circumstances affecting a particular bid, and too many factors affecting the potential timetable for a particular bid (many of which are outside the bidder's control), for such a prescriptive approach to be appropriate. Instead, we think the circumstances of each bid need to be assessed on their own merits, as is currently the case.

Please contact me if you have any queries in relation to this submission.

Regards

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Submission

from

GRT Lawyers

11 February 2014

Mr Allan Bulman
Director, Takeovers Panel

By email: **takeovers@takeovers.gov.au**

Dear Mr Bulman

Submission in respect of Consultation Paper on GN 12: Frustrating Action

Submission

This Submission is made by GRT Lawyers in respect of the Takeover Panel's (**Panel**) Consultation Paper in respect of GN: 12 (**CP**).

We thank you for the opportunity to review and provide feedback on this paper and to the development of further important policy in this area.

Overview of our position

GRT Lawyers is supportive of further policy development in this area and generally welcomes the suggested additions to the list of factors that the Panel will consider when assessing whether frustrating action gives rise to unacceptable circumstances. Further detailed comments are made below.

We do not however support the introduction of a fixed timeframe after which the frustrating actions policy would no longer apply and have explained our reasons (commencing from page 7) below.

Response to CP6.1.1[1] (new sub-paragraph 11(f) to GN 12)

Support for 6.1.1

GRT Lawyers agree that the addition proposed in paragraph 6.1.1 of the CP should be adopted as policy. We consider that this addition will be an important measure in ensuring:

- that bids are not unnecessarily drawn out (efficiency and competition principles);
- that Bidders are compelled to make timely decisions about their bid whenever possible (efficiency principle and competition principles);
- that shareholders and the market generally, are informed of a Bidder's intention at the earliest opportunity (in the interests of an efficient and informed market); and
- that operations, financing and transactions of Targets and their boards are not unnecessarily fettered for longer than necessary,

  (together the **Key Objectives**).

[1] Refers to paragraph 6.1.1 of the CP.

Further guidance on 'reasonable time'

In addition, we consider that the policy could be strengthened by providing meaningful guidance on what may constitute a 'reasonable time'.

We recognise that this will vary on a case-by-case basis and as against the overall context of the transaction, however consider that it is possible to give some additional guidance in general terms, particularly as different types of bid conditions may have certain features or a particular character.

We make further submissions in respect of potential 'reasonable time' guidance at page 5 below.

Further development of policy to have broader application

GRT Lawyers also consider that the Panel's background section (in CP para 5) raises concerns which extend beyond the context of 'frustrating action' and that the policy outlined in CP para 6.1.1 may be further developed to strengthen the policy response to regulating unacceptable circumstances more generally. This is best explained through use of an example.

***Example 1**: Bidder makes a conditional bid for all of the outstanding shares of Target, including a condition that Target's debt financing arrangements must not be repayable upon a change of control occurring. Shortly after making the bid, the Bidder conducts due diligence and learns that such a provision does in fact exist, at which time the Bidder becomes aware that the condition cannot be fulfilled. The nature of the condition is such that it is binary in nature (i.e. either the accelerated repayment provision exists or it does not) and such that the fulfilment or otherwise of the condition will not change with the passing of time. The Bidder, despite knowing the status of the condition, fails to inform the Target, its shareholders or the market of its intentions to rely on or waive the condition until it is compelled by statute to do so.*

We consider that in this case, the failure of the Bidder to disclose whether it will rely on, or waive, such a condition, within a *reasonable time* of becoming aware of the status of that condition, ought to constitute unacceptable circumstances arising from the actions of the Bidder (rather than the actions of the Target in undertaking 'frustrating action'). This is because the Bidder ought to know, or be in a position to assess in a timely manner, the impact of the non-fulfilment of the condition and whether it is or may be fatal to its bid.

By failing to compel the Bidder to disclose its intentions at the earliest possible time, the Target may be subject to a bid for longer than necessary and fettered by the frustrating actions policy for longer than necessary. It is our submission that this failure by the Bidder to disclose its intentions at the earliest reasonable time, ought to give rise to unacceptable circumstances.

'Reasonable time' considerations are further discussed commencing at page 5 below.

We consider that this further policy could be adopted by way of amendment to the Panel's Guidance Note 1: Unacceptable Circumstances.

Response to CP6.1.2[2] (new sub-paragraph 11(g) to GN 12)

Support for 6.1.2

GRT Lawyers agree that the addition proposed in paragraph 6.1.2 of the CP should be adopted as policy. We consider that this addition will be an important measure in ensuring the Key Objectives.

Further development of policy to have broader application

We further consider that there may be circumstances where varying the terms of the bid after a bid condition has been triggered, may effectively result in an implied waiver of a triggered condition.

Again, taking Example 1, if a Bidder becomes aware of a provision accelerating debt repayment obligations upon a change of control, meaning one of its bid conditions will never be satisfied, and the Bidder subsequently increases its bid price, it would be reasonable to assume that the Bidder still intends to pursue the bid or at least believes it has the capacity to do so.

If at the time of varying the terms of its bid (by increasing the bid price or otherwise), the Bidder knew that it did not have the desire or capacity to fund the bid consideration *plus* the accelerated debt repayment obligation which arises as a consequence, then the bid variation would not be reasonable or bona fide and ought to constitute unacceptable circumstances.

Any subsequent attempt by the Bidder to rely on the condition and not proceed with the bid would be in bad faith. Accordingly, the failure of a Bidder to clarify its position in relation to triggered conditions in circumstances where it then varies its bid, may in fact give rise to unacceptable circumstances on the part of the Bidder.

A potential policy response (and one we would encourage) would be to require a Bidder, at the time of varying any terms of its bid, to disclose the status of any bid conditions and its intentions to rely on any conditions that may have already been triggered.

When considered from that perspective, whilst we support the addition of the newly proposed paragraph 11(g), we do query the extent to which it will (in its current form) assist a Target in determining whether to take an action that may otherwise run the risk of being considered frustrating action giving rise to unacceptable circumstances. That is, unless there is further guidance as to when a Bidder ought to clarify its intentions (including where it varies a bid), a Target is likely to be no better informed of the intentions or position of the Bidder in relation to pursuing, or its ability to pursue, its bid.

As such, a Target's ability to properly consider relevant factors prior to taking any frustrating action (such as the commercial imperative for the frustrating action, and whether the condition is commercially critical to the Bidder) will continue to be hampered.

In conclusion, we support the addition, but also consider it will better serve the broader policy objectives underpinning Chapter 6 of the Corporations Act, if the Panel also further develops its broader policy in respect of unacceptable circumstances in GN 1 (and in particular, those that arise from the actions of the Bidder). The use of footnotes in GN 12 and cross-references back to a revised GN 1 could be utilised in GN 12.

We hold this view as we consider frustrating action policy should not be unduly restrictive upon a Target, particularly in circumstances where the Bidder is not doing everything that can reasonably be done, in order to ensure an efficient, competitive and informed market.

[2] Refers to paragraph 6.1.2 of the CP.

Otherwise, a Bidder can effectively option-up the Target through a conditional bid, with all the attendant statutory, regulatory and policy restrictions upon a Target's business, transactions and financing plans, but proceed in a non-transparent and/or tardy manner which can negatively impact a Target's business and reduce competitive pricing tensions. Of course this may be to the tactical advantage of the Bidder – the concern is that such advantage is achieved through inappropriate means and against the Key Objectives.

Response to CP6.2[3] (new footnote 12 to sub-paragraph 11(a) to GN 12)

Support for 6.2

GRT Lawyers agree that the addition proposed in paragraph 6.2 of the CP should be adopted as policy, however propose an amendment.

We consider that the statement could be re-worded to enable the Panel to set out a more definitive policy position in relation to whether it is unacceptable to 'hold open' triggered conditions preventing a conclusion about whether Target shareholders have rejected a bid.

This is particularly the case if the Panel further develops its policy position around what constitutes a *reasonable time* to hold open conditions (as contemplated throughout this Submission).

We request that the Panel give consideration to restating its policy position in terms of holding open triggered conditions to replace new footnote 12 with an amended statement to the effect that:

> *"However, it ~~may be~~ is unacceptable for the bidder to 'hold open' a triggered condition, for more than a reasonable time, preventing a conclusion about whether the target shareholders have rejected the bid (see ~~(f)~~ [insert para references with 'reasonable time' guidance]."*

What constitutes a 'reasonable time'?

We recognise that it is not possible to definitively describe the precise parameters of the *reasonable time* concept. We do however consider that some further guidance as to the types of factors that the Panel will consider in determining whether a reasonable time has passed will greatly assist.

The purpose of giving additional guidance having regard to the features or nature of the conditions is to demonstrate that disclosure decisions need to respond to the particular circumstances surrounding the bid, and should never be arbitrary or withheld for tactical or other improper reasons.

Bid conditions that are binary in nature

In this Submission, we have highlighted an example (Example 1) which deals with a condition of a binary nature; the status of which will not change with the passing of time. In this case, the reasonable time concept could be assessed by considering:

- the point in time when the Bidder discovered the status of the condition;
- a reasonable period of time for the Bidder's board (having regard to its composition/geographical spread) to convene and consider the effect of the condition status, its impact on the Bidder (including the Bidder's desire and capacity to continue with the bid) and any options that the Bidder may have as a consequence. It should be noted that boards are expected to act

[3] Refers to paragraph 6.2 of the CP.

expeditiously during control transactions, so a reasonable time to convene a board meeting in this context is likely to be short;

- If the Bidder's board identifies options that need to be explored before it is able to make a decision on its desire or capacity to proceed with the bid, a reasonable period of time to explore those options. This will need to be considered on a case-by-case basis having regard to (amongst other things) the nature of the relevant condition, the options under consideration and the Bidder's particular circumstances.

If the Bidder requires further time to assess its options to address any concerns it has arising from the non-fulfilment of a condition, we expect that the Bidder ought to be in a position to make a statement as to the likely impacts of the condition on its bid, and any actions it is taking or options it is exploring in order to make a decision regarding whether to rely on, or waive the condition. If it is in such a position, policy in this area ought to encourage or compel such a statement.

In Example 1, this may involve an assessment by the Bidder of its financial capability to repay accelerated debt repayments arising from a change of control upon a successful bid. If the Bidder has no reasonable prospect of obtaining such finance, or no desire to be subject to such additional liability, then we would expect that a Bidder would be in a position to immediately disclose its position, and failing to do so would be contrary to control transactions occurring in an efficient and informed market (as well as to other regulatory requirements such as continuous disclosures).

As such, we would expect that a 'reasonable time' to disclose a Bidder's intentions or position, in the context of bid conditions which are binary in nature, is likely to be relatively short, or at the very least, closely tied to follow-on actions within the Bidder's control, which the Bidder ought to expedite.

Bid conditions that have a reasonably foreseeable outcome

It is not uncommon for bids to contain conditions to the effect that the Target is or is not subject to particular types of contractual provisions. It is also often the case that these provisions typically have a market standard approach.

Using our Example 1, (a condition that a Target's debt must not be repayable upon a change of control occurring), it is common and indeed market practice for significant debt financing arrangements to include repayment acceleration provisions of that nature. As such, a Bidder ought to have foreseen or expected that the condition was likely to be triggered and factored this into their decision making or transaction planning prior to making a bid.

Where the likelihood or expectation that a bid condition will be triggered is such that it ought to have been within a Bidder's contemplation, a reasonable period of time is likely to be shorter than for other types of bid conditions where the outcome is subject to a higher degree of uncertainty.

The underlying premise is that a Bidder ought not to be 'blind-sided' by a revelation that a market standard contractual provision is present which then leads to a drawn out decision making process on the part of the Bidder as to whether to rely on or waiver the condition.

Reasonable time – generally

In terms of what constitutes a *reasonable time* for a Bidder to disclose its intentions in relation to other types of bid conditions which are non-binary in nature (and may change with the passing of time), we consider that guidance of a more general nature may assist in relation to the *reasonable time* concept.

For example, a statement to the effect that, if at any time during a bid period a Bidder becomes aware of

the status of a condition which does, or is likely to, materially affect the Bidder's desire or capacity to pursue the bid, the Bidder is expected to expedite any corporate action required to reach a definitive decision as soon as possible to enable it to disclose its intentions in relation to such a condition at the earliest possible time. This may include holding board meetings, signing off on market announcements, or exploring options to enable the bid to proceed. The Panel expects Bidder's to do all such things and keep the market informed within the shortest possible timeframe.

Early disclosure of a Bidder's intention to rely on a triggered condition is less compelling in circumstances where the status of a condition could change over time. For example, a condition may be triggered at an early point in time during the bid period, but may be capable of rectification prior to the point in time where the Bidder is compelled by statute to make a declaration regarding the status of conditions. In these circumstances, it may be reasonable for a Bidder to withhold disclosure for a longer period of time.

Response to proposed fixed timeframe for frustrating actions policy

GRT Lawyers do not support the introduction of a fixed timeframe after which the frustrating actions policy will no longer apply for the following key reasons:

- the frustrating actions policy serves an important purpose and ensures that Bidders can proceed with some certainty as to status quo. Introduction of a fixed timeframe would effectively permit the use of frustrating actions as a defensive tactic by simply delaying the frustrating action until the expiration of the timetable;
- from a policy perspective, there is no reason to arbitrarily divide a bid period into a period where the Bidder receives this protection, and a period where it does not. There are legitimate reasons why some bid periods are prolonged (including where third party or statutory approval processes are required) and longer bid periods should not be subject to greater risk arising from a policy response;
- the introduction of a fixed timeframe may be viewed as effectively (in a practical sense) modifying section 630 of the Corporations Act, which sets out the statutory requirements for a Bidder to give notice on the status of defeating conditions in the period between 14 days and 7 days of the end of the offer period;
- if this proposed measure is to address the concern around unnecessarily prolonging bids and forcing Targets to the Bidder's negotiating table, we consider that this concern can be adequately addressed in other ways, including:
  - by adopting the proposed additions in CP para 6.1.1, 6.1.2 and 6.2 (subject to our comments in this Submission);
  - further clarity of the types of bid conditions that can't be held open; and
  - further policy guidance on what constitutes a 'reasonable timeframe' for a Bidder to declare the status of, and its intentions in relation to, its conditions.

Concluding Remarks

The Panel's current guidance on frustrating action is a valuable tool to ensure that corporate actions of the Target during a bid period are appropriate having regard to the underlying policy objectives of Chapter 6 of the Corporations Act. As such, GN12 has as its main focus, guidance for a Target of a generally restrictive nature.

We consider that unless there is also meaningful guidance as to the actions of the Bidder in relation to bid conditions, including actions that may trigger the conditions, the status of conditions and the Bidder's resultant intentions ; frustrating actions policy may be unnecessarily restrictive or difficult for Targets to navigate. Our submission encourages the development of policy in this area from this other perspective to ensure a holistic, balanced, fair and practical approach at such a critical time during an entity's life.

We would welcome the opportunity to discuss our views further.

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Submission

from

Herbert Smith Freehills

HERBERT SMITH FREEHILLS

Guidance Note 12: Frustrating Action

1 Summary

In response to the Takeovers Panel (**the Panel**) invitation for comments on the following issues in relation to Guidance Note 12 Frustrating Action:

(1) *Comments are sought on whether sub-paragraphs 11(f) and 11(g) (and the consequent amendment to footnote 12) should be adopted as policy and whether there are any practical issues the Panel should address.*

We suggest that sub-paragraphs 11(f) and 11 (g) should be adopted by the Panel, with clarifications to the wording of the sub-paragraphs and an additional footnote. We are of the view that footnote 12 is appropriate for the Panel to adopt.

(2) *The Panel considered whether it should introduce a fixed timeframe (e.g. 90 days or 120 days) after which the frustrating actions policy would no longer apply, either in addition to or as an alternative to this proposal. Comments are sought as to whether a fixed timeframe would be adopted and, if so, whether it is preferable in addition to or as an alternative to the proposed revisions.*

We do not suggest that the Panel implement a fixed timeframe.

In addition, we propose an amendment to the examples in sub-paragraph 11(j) to address the issue of refinancing distressed companies.

We have set out further detail below.

Please note that the views expressed in this submission do not necessarily represent the views of all Herbert Smith partners or of our clients.

2 Sub-paragraphs 11(f) and 11(g)

The Panel has sought comments on whether sub-paragraphs 11(f) and 11(g) should be adopted as policy in the Panel's Guidance Note 12.

2.1 Sub-paragraph 11(f)

We suggest that sub-paragraph 11(f) be adopted, however it should be clarified by including the word 'previously', to read (our amendments appear in mark-up text for ease of review):

(f) whether a condition has previously been triggered and the bidder has not disclosed whether it will rely on it or waive it within a reasonable time

This would make it clearer that the Panel, through 11(f), intends to address a situation in which the target has previously breached a condition, and then an unrelated and later act allegedly constitutes a frustrating action. This is to avoid confusion where 11(f) might otherwise be thought to relate to the particular condition alleged to have been frustrated by the later act.

2.2 Sub-paragraph 11(g)

Similarly, our view is that 11(g) be adopted by the Panel, but that the wording of the sub-paragraph would benefit from amendment, to read (our amendments appear in mark-up text for ease of review):

> *(g) whether a condition has previously been triggered, and the bidder has subsequently ~~varied~~ improved the terms of the bid, such as increasing the bid price, but has not waived the condition (or waived the particular breach of the condition)*

We suggest that the phrase 'improved the terms of the bid', rather than 'varied the terms of the bid' better reflects what we understand to be the Panel's objective to address a situation in which it is implicit that a bid will proceed despite the breach of condition, since a bidder has improved the terms of the bid, after becoming aware of the breach of condition. For example, a simple extension of the offer period is a variation of the terms of the bid – but an extension should not, of itself, be determinative.

2.3 Footnote added to sub-paragraphs 11(f) and 11(g)

In addition, we propose the following footnote be included in sub-paragraphs 11(f) and 11(g):

> *By sub-paragraphs 11(f) and 11(g), the Panel is not saying that in all cases in order to have the benefit of frustrating actions policy, the bidder must necessarily declare its intentions in relation to the waiver of all previous conditions breached, but whether it does so in relation to one or more conditions is a factor which may be relevant for the Panel to consider.*

We consider that the addition of a footnote to these sub-paragraphs is important to avoid the perception that the Panel will always require that a bidder 'clear the decks' and reveal its response to all conditions breached, regardless of materiality, before being able to apply to the Panel to address a frustrating action. Instead, similarly to sub-paragraphs 11(a) – (e), this is one of a number of relevant factors the Panel may take into account.

3 Amendment to footnote 12

We do not have any comments on the addition of footnote 12 in the Guidance Note.

However, the Panel should make it clear whether or not it is not intending to depart from its statements in *Re Novus Petroleum Limited No 1* [2004] ATP 2 at [38] to [46] which are to the effect "there is no vice in the bidder waiting until the date set under section 630 for its decision whether to waive defeating conditions" which have previously been breached.

It would be helpful for the Panel to clarify its position in this regard in footnote 12. If the Panel was intending to departing from the above mentioned statements, we suggest that it would be appropriate to have further consultation on this issue.

4 Fixed timeframe

The Panel have sought comments on whether a fixed timeframe should be introduced after which the frustrating actions policy would no longer apply. We are of the view that such a timeline would not be appropriate to include as part of the Panel's policy. In many circumstances the length of a bid is not within the control of the bidder, as regulatory

approval or the resolution of a competing proposal can extend the timeframe of a bid, and has been a key cause of delay in some high profile matters. In addition, a number of recent 'long' bids have ultimately been successful, indicating that a fixed timeline would be a challenging and unnecessary addition to the Panel's Guidance Note 12.

5 Addressing distressed company refinancing

In addition to the specific issues the Panel has sought comment on, we propose the inclusion of a further example in sub-paragraph 11(j):

> *4. An urgent or commercially prudent need for refinancing.*

We suggest this example makes it clear that in circumstances where it is necessary for a target to undergo refinancing, a bidder will not be able to require such a refinancing to be subject to shareholder approval by arguing that the refinancing is frustrating conduct.

Submission

from

Law Council of Australia

Law Council
OF AUSTRALIA
Business Law Section

Mr Allan Bulman
Director, Takeovers Panel
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17 February 2014

Dear Mr Bulman

Response to Consultation Paper on Frustrating Action

This is a submission by the Corporations Committee of the Business Law Section of the Law Council of Australia (the **Committee**) in response to the Consultation Paper issued by the Takeovers Panel (the **Panel**) in early January this year on revisions to Guidance Note 12 on Frustrating Action.

The Committee makes the following submissions:

1. The Committee agrees with the Panel that the factors set out in the proposed new sub-paragraphs 11(f) and 11(g) of the revised Guidance Note 12 are matters that the Panel should consider when determining whether a frustrating action is unacceptable. However, the Committee considers that the Panel should make clear in Guidance Note 12 that the outcome in any given matter will depend on the circumstances involved. This is an area that requires the Panel to exercise its discretion on what is appropriate on a case by case basis.

2. The Committee does not consider that there is any utility in specifying a fixed timeframe after which the frustrating actions policy would no longer apply in all cases. As flagged above, what is reasonable and appropriate will depend on the control transaction and is a matter for the Panel's discretion on a case by case basis.

3. Notwithstanding the comments in paragraph 2, the Committee considers that the Panel should expressly reserve its right to make an order specifying a fixed timeframe after which the frustrating actions policy would no longer apply to a target the subject of a control transaction in response to a Panel application by the target seeking an order that the bidder 'comes clean' on a triggered bid condition to ensure an 'informed market' is maintained. The Committee believes that this will serve to put bidders on notice that, should the circumstances so require, the Panel may be prepared to make a finding that a bidder not 'coming clean' on a triggered bid condition is unacceptable and impose orders specifying a fixed timeframe.

The Committee would be pleased to discuss any aspect of this submission. Please contact the chair of the Committee, Bruce Cowley on (07) 3119 6213, if you would like do so.

Yours faithfully

John Keeves
Chairman, Business Law Section

Submission

from

Macquarie Capital (Australia) Limited

Frustrating Action

Macquarie strongly supports the policy basis for GN 12 "that it is shareholders who should decide on actions that may:

- interfere with the reasonable and equal opportunity of shareholders to participate in the proposal; or
- inhibit the acquisition of control over their voting shares taking place in an efficient, competitive and informed market."

As a consequence, we are concerned the three proposed additional qualifications to the frustrating action policy could increase the likelihood a target may engage in frustrating action and deny shareholders the right to decide the outcome of a bid. It is not clear to us that the policy basis for this proposed shift in the balance of power between shareholders and target directors has properly been established.

Two of the proposed changes are particularly problematic:

- In our view, the words to be inserted in footnote 12 do not add anything to the frustrating action policy beyond what is contemplated by proposed new sub-paragraph 11(f). But they do go significantly beyond the scope of the Guidance Note to suggest the holding open of a triggered condition may, in and of itself, give rise to unacceptable circumstances – a position which is difficult to reconcile with the decision in *Novus Petroleum Limited 02* [2004] ATP 9. In our view, sub-paragraph 11(a) and footnote 12 are satisfactory as they stand.
- We believe the policy basis of proposed new sub-paragraph 11(g) is far from clear. If a bidder increases their bid price, that would normally be taken as a sign their bid is still a genuine bid that should not be frustrated by the target's directors without shareholder approval. It may be questionable whether a bidder should seek to "have its cake and eat it too" by increasing its offer while retaining the benefit of a triggered condition, but we do not believe that should in any way affect the application of the frustrating action policy. While the threat of having its bid frustrated might operate *in terrorem* to discourage a bidder from holding on to the benefit of a triggered condition, two wrongs still do not make a right.

If the Panel is concerned about bidders retaining the benefit of triggered conditions, we believe it would be far preferable to deal with this in a stand-alone guidance note, which might usefully also deal with "hair-trigger" conditions and related topics.

We are less troubled by proposed new sub-paragraph 11(f), although we believe it will be difficult for market participants to know what it might mean without some additional elucidation. In our view, the mere fact a bidder retains its rights under a triggered condition does not necessarily mean the frustrating action policy should cease to apply. The real issue should be whether the bid is still a genuine bid whose outcome should be decided on its merits by shareholders rather than target directors. And we do not believe a bid automatically ceases to be "genuine" simply because a bid condition has been triggered. Consequently, the fact a bidder retains the benefit of a triggered condition should not automatically give target directors the freedom to frustrate the bid without shareholder approval.[2]

For similar reasons, we do not consider the frustrating action policy should only apply for a fixed timeframe (such as 90 or 120 days). We are aware some commentators have questioned the way the policy applies in long drawn-out bids – with APA's bid for Hasting Diversified Utilities Fund and the Dulux bid for Alesco often being cited as examples. However, both those bids ultimately succeeded despite vigorous defensive responses by the targets. If the frustrating action policy had ceased to apply early in either bid, it is quite possible target shareholders may have been denied the choices they ultimately decided to

[2] There may be scope for the GN to include some additional commentary on whether a bid or potential bid is "genuine" for these purposes. For example, the *bona fides* of a bidder or its capacity to finance a proposed bid may be relevant considerations, particularly in relation to potential bids.

take. In our view, this would not have been appropriate. For various reasons, the long duration of these bids was never an indication they had been rejected by target shareholders. Rather, the market understood each was a genuine bid with a genuine prospect of success throughout its long life.[3]

This submission has been prepared by Macquarie Capital (Australia) Limited and does not necessarily reflect the view of other members of the Macquarie Group.

If you have any questions in relation to this submission, please do not hesitate to contact Michael Hoyle on (03) 9635 9148.

Yours faithfully
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[3] Moreover, we do not support the suggestion made by the Corporations Committee of the Business Law Section of the Law Council of Australia that the Panel "should expressly reserve its right to make an order specifying a fixed timeframe after which the frustrating actions (sic) policy would no longer apply to a target subject to a control transaction". Given the Panel would need to make a declaration before it enlivened its power to make such an order, we suspect the circumstances when such an order would be possible would be very limited even if it were otherwise appropriate.