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24 October 2016

Allan Bullman
Director
Takeovers Panel
Level 10, 63 Exhibition Street
Melbourne VIC 3000

Dear Allan

Submission on proposed changes to Guidance Note 12 – Frustrating Action

We refer to the Takeovers Panel's consultation paper dated 14 September 2016. Our responses to the questions raised in the consultation paper are as follows:

1. Is there any need to amend the existing guidance?

The reason given in the Consultation Paper for the changes is that a number of market participants have expressed the view that the GN in its current form does not adequately explain the risk attached to the various considerations making frustrating action unacceptable, and that the position of target directors is said to have become more difficult of late because of the trend for bidders to include a long, complex and restrictive list of bid conditions.

While we agree that the existing guidance could benefit from some amendment to remove considerations which do not advance the frustrating action policy, we did not think that bid conditions are any more long, complex and restrictive now than 10-15 years ago, when it was more common to have conditions such as those requiring the target to give due diligence confirmations or take actions assisting the bidder.

That said, we are in favour of clarifying the Guidance Note in a number of respects described below.

2. Is the revised list of 'considerations when assessing unacceptable circumstances' appropriate (paragraph 12)?

Our view is that the list in paragraph 12 is generally appropriate, although more could still be done to explain the relevance of particular considerations, and the weight which would be given to them. For example, paragraph 12(d) lists as a relevant consideration whether the frustrating action is undertaken by the target in ordinary course of business, without going on to say that, if the action was undertaken in the ordinary course of business, it will generally not be unacceptable. Likewise, paragraph 12(c) lists as a relevant consideration whether there is already a competing proposal. Presumably this is suggesting that if there is already a competing superior proposal, so that the bid is not reasonably likely to be successful, then the frustrating action is not likely to give rise to unacceptable circumstances. But again, this is not clear.

Another concern is with the overlap which is created by having a separate list of 'considerations when assessing unacceptable circumstances' in paragraph 12; and a separate list of 'circumstances

tending against unacceptable circumstances', which itself includes a catch all of circumstances where it is 'otherwise unreasonable' to find unacceptable circumstances. It would seem that this drafting could be condensed into a single list, with an explanation of the relevance of the various factors.

3. "Genuine opportunity"

In our view, if there is no 'genuine opportunity' for target shareholders to dispose of their shares, then the frustrating action policy should not apply, and that this is a desirable policy clarification.

We note that there are different views amongst lawyers as to whether 'no genuine opportunity' should be merely a 'relevant consideration' in deciding whether unacceptable circumstances exist, or whether the guidance should make it clear that, if the bid really does not give shareholders a genuine opportunity to dispose of their shares, then the frustrating action policy does not apply.

Our view is that if there is no genuine opportunity for shareholders to sell their shares, then there is nothing to frustrate, and there is no policy basis for target boards being subjected to an extra layer of restriction, on top of their existing statutory and fiduciary duties, in conducting the business of the company. We also believe that target boards need clear guidance in this situation, and that having no genuine opportunity as just another 'relevant consideration' does not provide this, thereby forcing target boards to take a conservative approach in practice to avoid the risk of a declaration of unacceptable circumstances.

This is explained further below in respect of each of the three categories of bids referred to in paragraphs 20(a), (b) and (c):

(a) Actions which trigger a condition of a bid or potential bid which cannot be implemented because of a condition or structural or other feature

Our view is that, if the bid or potential bid truly cannot be implemented (which requires that there be something more than just strong grounds to believe it won't be successful), then there is no 'genuine potential bid', and an action which triggers a condition of such a 'bid' should be carved out from the definition of 'frustrating action'. Such bids should not come under 'considerations tending against unacceptable circumstances'. If the bid is simply not capable of being implemented (for example, because it is made without a reasonable basis as to funding, or because it is subject to a condition that clearly will not be satisfied) there is nothing to frustrate.

(b) Actions which trigger a condition of a bid, where there are reasonable grounds to expect that the bid will not be successful

Given that there will be uncertainty as to what amounts to reasonable grounds to expect that the bid will not be successful, our view is that an action which triggers a condition of such a bid should not automatically be carved out from the definition of 'frustrating action'. Such an action may be acceptable (i.e. not constitute unacceptable circumstances) if there are reasonable grounds to believe that the bid will not ultimately be successful, but it will depend on all of the relevant circumstances. This seems to be covered by paragraph 12(a) of the revised draft in any event.

(c) Actions which trigger a condition of a bid, or potential bid, which is expressed to be subject to a target board recommendation

Our view is that bids or potential bids which are expressed to be subject to a target board recommendation should not enliven the frustrating action policy at all (i.e. rather than regarding an action which triggers a condition under such a bid or potential bid as a 'frustrating action, but then saying it may not amount to unacceptable circumstances, the action should not constitute a 'frustrating action' in the first place). This has clearly been the position for some time in relation to

potential bids which contemplate a scheme transaction structure (example 3 in paragraph 7 of the existing Guidance Note 12)[1].

Where this issue most often arises is in the common situation where a potential acquirer submits a confidential non-binding indicative offer letter to a company. Almost invariably, the letter will state that the proposal, as well as being indicative and non-binding, is subject to the target board unanimously recommending the offer and to the target board providing due diligence. It will also usually state that the proposal is conditional on the target board entering into a binding implementation agreement containing, amongst other things, exclusivity provisions and a break fee.

In our view, such letters should not enliven the frustrating action policy at all. The opposing view is that a potential acquirer which has submitted such a non-binding indicative offer letter may not have completely ruled out a hostile bid, and until the potential acquirer does so, the target board should be subject to the frustrating action policy restricting its ability to take actions which may trigger conditions of the possible bid.

The reasons for our view include:

- It is relatively easy for a potential acquirer to submit a non-binding indicative offer letter, where the indicative offer is subject to due diligence and a target board recommendation. shareholders. The impact on the target is far greater if that sort of letter enlivens the frustrating action policy.
- The target board should not be bound by the frustrating action policy simply because there is a hypothetical chance that the party making the approach will bid on a hostile basis, particularly when they have said that they will only bid if the target board recommends the bid. In this situation, there is no 'genuine opportunity' at this stage for shareholders to dispose of their shares.
- Often the target board will not know whether the party making the approach is willing or able to make a hostile bid. If the potential acquirer wants the frustrating action policy to apply, it should make it clear in the letter that, while it would like to have a target board recommendation, its willingness to proceed is not dependent on it.
- If the potential bid is subject to the target board recommending the transaction, then the bid cannot be frustrated if the target board decides not to recommend it, but to instead take some other action which may trigger a condition of the potential bid.
- Target boards require clarity in this situation. Making the fact that the bid is expressed to be subject to a target board recommendation a 'relevant consideration' as to whether an action will constitute unacceptable circumstances does not provide that clarity.
- Even without the frustrating action policy applying, in those circumstances the target directors are bound to comply with their statutory and fiduciary duties in determining to take any action which may lead to the possible bid not being made. It is not correct to say, therefore, that there are no other restrictions on the target board in these circumstances.
- It is not clear why a scheme proposal cannot be frustrated, but a non-binding indicative takeover bid proposal which is subject to the target board recommending the bid should attract the frustrating action policy.

[1] Example 2 in paragraph 7 of the existing Guidance Note 12 states that 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.

4. "Otherwise unreasonable" to consider the frustrating action as giving rise to unacceptable circumstances - a desirable policy shift (or clarification)? Are the circumstances in paragraph 21 of GN 12 appropriate?

In relation to sub-paragraph 21(d), we would suggest deleting example 3, as this really seems to be an example of a bid where there is no genuine opportunity for shareholders to dispose of their shares.

In relation to sub-paragraph 21(e), the words "or has varied the terms of the bid, such as increasing the bid price, but has not waived the condition or the breach" have been added to what is in paragraph 11(f) of the existing Guidance Note 12 (although there is a reference to variation of bid terms in footnote 15, which explains what is a reasonable time for the purposes of paragraph 11(f)). This was a change which the Panel proposed in its January 2014 consultation paper (the proposed new paragraph 11(g)), but which the Panel ultimately decided to drop in favour of including footnote 15.

We think that sub-paragraph 21(e) of the revised draft should revert to the wording in paragraph 11 and footnote 15 of the existing guidance. The mere fact that a bidder has varied the terms of the bid, even by increasing the price, should not result in the frustrating action policy ceasing to apply. It would depend on the circumstances, including the nature of the condition. This is already covered in the footnote 15 in the existing guidance.

5. Is further guidance required on when it is unacceptable for a target to seek alternatives (subparagraphs 14(b) and 21(d), example 2)?

We do not think that further guidance is required on this.

6. Other issues

(a) Can an action that does not trigger a condition in a bid or proposed bid still constitute a 'frustrating action' for the purposes of the policy?

While the definition of 'frustrating action' in paragraph 5 of the existing guidance is not expressly limited to actions which would trigger a bid condition, paragraphs 6 and 7 are all about actions which would trigger bid conditions, and the need for a bidder to make it clear what the proposed bid conditions are. This helps the reader understand that, while the definition refers to actions by reason of which a bid or potential bid may be withdrawn, in practice the way this will be determined is by reference to the bid conditions. The conclusion is that there would need to be a very unusual set of circumstances where an action which did not trigger a bid condition or proposed bid condition would constitute a 'frustrating action'.

The revised draft guidance seems to move away from this position. The existing paragraphs 6 and 7 have been removed, and there is now no reference to bid conditions at all until towards the end of page 3, where it states that 'typically, the policy applies to an action that triggers a condition of a bid or a potential bid'. We think this is unhelpful, because market participants reading the guidance don't know until they get to the end of page 3 that, in the vast majority of cases, whether the policy will apply will depend on whether the action breached a bid condition or not. It also seems that by making this change the Panel is trying to reserve to itself greater flexibility to regard an action as a frustrating action, even when the action does not trigger a condition of a bid or potential bid.

While we understand the Panel's desire to preserve flexibility, we think that the existing paragraphs 6 and 7 should be re-instated. Also, if the Panel is trying the widen the scope of actions which may be frustrating actions even if they don't trigger a bid condition, it should say so and should give some examples of what it is concerned about. For example, we assume that actions such as those taken by the target board in *Babcock & Brown Communities Group* [2008] ATP 25 at [29]-[36] and

Gondwana Resources Limited [2014] ATP 9 at [31] are not 'frustrating actions' as defined, even though they may reduce the likelihood of a bid or a potential bid being made in the future.

In relation to market bids, the revised draft should also make it clear that an action which may allow the bid to be withdrawn under section 652C is a frustrating action (like an action which triggers a bid condition of an off-market bid). We understood this to be the intent of footnote 1 of the existing guidance, which is repeated in the revised draft, but this is now unclear following the Panel's decision in *Freshtel Holdings Limited* [2016] ATP 15.

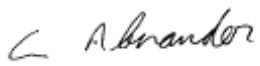
(b) Where the target offers target shareholders a choice

We note that the 3 examples in paragraph 15 of the draft are now located under the heading 'Considerations tending against unacceptable circumstances', whereas in the existing guidance they appear under the heading 'Not unacceptable circumstances'.

In our view, the revised draft should make it clear that an action which has been approved by target shareholders in general meeting, or which is conditional on target shareholder approval, does not amount to unacceptable circumstances under the frustrating action policy. Again, it is not the action which has frustrated the bid, but the fact that the target shareholders in general meeting have voted to approve the action over accepting the bid. We think that this is necessary so that a target board has a clear 'safe harbour' for taking the action.

Please feel free to contact either Guy Alexander or Richard Kriedemann on the numbers below if you have any questions in relation to this submission.

Yours sincerely



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24 October 2016

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Dear Mr Bulman

Takeovers Panel Consultation Paper – Guidance Note 12 *Frustrating Action*

ASIC appreciates the opportunity to provide comments in response to the Takeovers Panel's Consultation Paper regarding the proposed revision of Guidance Note 12 *Frustrating Action* (**GN 12**). ASIC's responses to the Panel's issues for comment at paragraphs 37 to 43 of the Consultation Paper are as follows:

1. Comments are sought on whether the revised list of "considerations when assessing unacceptable circumstances" is appropriate? Are there any other relevant considerations? (see paragraph 12 of revised GN12)

1.1. ASIC considers that it is appropriate that the Panel provides guidance on what it would consider when determining whether a frustrating action would give rise to unacceptable circumstances.

1.2. ASIC has some drafting concerns with the wording of subparagraph (f) of paragraph 12. We suggest the Panel remove the wording at (f) and instead cast the 2 bullet points as separate factors (being new (f) and (g)) along the following lines:

> *(f) in the case of a potential bid—whether the potential bidder has failed to make its bid or formally announce its proposed bid within a reasonable time after becoming aware of the target's intention to undertake the action; or*
>
> *(g) in the case of a bid—whether there is a feature of the bid which means that it is not genuinely available to shareholders, or is otherwise unreasonable for the reasons set out in paragraph 21(e), that has not been remedied within a reasonable time upon request of the target.*

1.3. The primary aim of this revision is to remove the introductory language in current paragraph (f) "whether there has been prior notification, namely". We are concerned this may be understood by the market as suggesting that target boards will always be required to notify bidders of any corporate action they are intending to take in order to avoid a charge of frustrating action.

1.4. In ASIC's view, mere notification to the bidder of a proposed action will not necessarily stop a proposed course of action being frustrating action. Rather, the items in the bullet points in paragraph 12(f) indicate that it is generally the action or inaction of the bidder in circumstances where they are on notice about the proposed frustrating action or should know that a structural aspect of their bid is problematic, is the more relevant factor.

1.5. Moreover, to the extent that paragraph 12(f) refers to an alternative to 'notification' being a declaration by the target that 'it considers it will not be bound by the frustrating action policy', ASIC does not believe that specifying this as an additional option materially assists the policy. While a target may well seek to assert that the policy will not apply to a particular frustrating action in notifying a bidder or proposed bidder of its proposed course of action, it is ultimately for a sitting Panel to determine whether the frustrating action policy applies and the frustrating action is unacceptable. Even in circumstances where the factors in paragraph 12(f) exist, there may nonetheless be other reasons why a frustrating action is unacceptable. In the context where the Panel is setting out a 'balance of factors approach' ASIC is concerned that alluding to the ability of a target to set their own parameters around when the frustrating action applies is unnecessary (and could be seen to be limiting the Panel's discretion).

1.6. Further, to the extent that the new guidance requires that bidders seeking to rely on the frustrating action policy must ensure that their bid is 'genuinely available', ASIC would submit that the policy should equally extend to requiring that the bid is not 'otherwise unreasonable' for the reasons set out in paragraph 21(e) of the proposed guidance. We have added this reference to new paragraph (g) above.

2. Comments are sought on whether the proposal that a frustrating action is unlikely to give rise to unacceptable circumstances if the bid does not give shareholders a genuine opportunity to dispose of their shares, represents a desirable policy shift (or clarification)? (see paragraph 20 of revised GN12). If so, comments are sought on whether the examples of bids which do not provide a genuine opportunity for shareholders to dispose of their shares identified in paragraph 20 of revised GN12 are appropriate? Are there any other examples?

2.1. ASIC welcomes the Panel's approach to providing more explicit policy regarding the need for a bidder to have provided target shareholders with a genuine opportunity to dispose of their shares before being able to benefit from the frustrating action policy.

2.2. ASIC considers that this is reflective of the Panel's view, and ASIC's position, in *Austock Group Limited*[1] that "[w]*ithout a bid or a genuine potential bid, there can be no frustrating action.*"[2]

2.3. We consider the examples in paragraph 20 of the proposed guidance note are adequate and provide a good range of factors which may make a bid not a genuine opportunity. We consider also that the Panel should not make an exhaustive list of possible factors and allow sufficient room for any market developments to be addressed.

3. Comments are sought on whether the proposal to identify circumstances in which it would be unreasonable to conclude that a frustrating action is unacceptable represents a desirable policy shift (or clarification)? (see paragraph 21 of revised GN12). If so, comments are sought on whether the circumstances identified in

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[1] [2012] ATP 12
[2] [2012] ATP 12 at [25]

paragraph 21 of revised GN12 are appropriate? Are there any other circumstances?

3.1. ASIC supports the proposal to provide further guidance regarding circumstances where the Panel is unlikely to find unacceptable circumstances.

3.2. ASIC's preference is that the Panel include in paragraph 21, the factor outlined at of paragraph 11(l) of the existing guidance, i.e: "*how advanced the negotiations on the frustrating action were when the bid was made or communicated.*"

3.3. We consider that this is an important circumstance which is not quite captured by new paragraph 21(a). Additionally, the circumstance in paragraph 11(l) supports the factors in paragraph 12 of the proposed guidance note.

4. Comments are sought on whether GN 12 should provide further guidance on when it is unacceptable for a target to seek alternatives? (see subparagraphs 14(b) and 21(d), example 2 of revised GN12)

4.1. ASIC understands that the policy is intended to reflect a position that target boards, who have not entered into an agreement which restricts the target's ability to approach other potential acquirers (e.g. through no-shop clauses), should not be prevented from doing so under the frustrating action policy. ASIC agrees with this position.

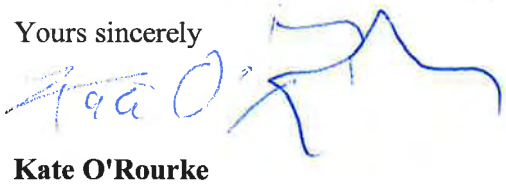
4.2. However, ASIC suggests that the guidance could be clearer in this regard, by including explicit reference in the body of the policy along the lines of existing footnote 22 in GN 12 which states "*This might even involve, for example, breaching a 'no talk' bid condition provided the directors did not agree to that condition*". ASIC suggests this would be clearer than cross-referencing to paragraph 21(d) which discusses an example in a specific context.

5. Comments are sought on whether existing GN 12 already provides adequate certainty and/or latitude for target boards to pursue transactions and should not be amended?

5.1. ASIC considers that the existing Panel policy is effective in providing a basis for requiring that a bidder provide a genuine opportunity for target shareholders to dispose of their shares. However, ASIC considers that clear guidance in relation to this policy is a welcome amendment to the existing guidance as, currently, the policy stems only from the definition of 'potential bid' in the guidance note.[3]

If you wish to discuss any aspects of this letter, please do not hesitate to contact me.

Yours sincerely



Kate O'Rourke
Senior Executive Leader
Corporations
Australian Securities & Investments Commission

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[3] In *Austock Group Limited* [2012] ATP 12, ASIC made submissions based from the existing policy that "*[the bidder's] proposed bid was not a 'genuine potential bid' to which the frustrating action policy should be applied, because it was not funded.*" (at [32])

HERBERT SMITH FREEHILLS

Takeovers Panel submission: GN 12 consultation paper

21 October 2016

1 Summary

Herbert Smith Freehills (**HSF**) is pleased to provide this submission in support of the proposed reforms to the Panel's frustrating action policy.

HSF agrees with the concerns highlighted by the Panel in relation to the current description of the policy, and – other than the points of clarification discussed at section 4 below – agrees that the Panel's proposed reforms are an appropriate way to address these concerns.

The Guidance Note, if amended, would more appropriately balance the interests of bidders and targets (both target boards and target shareholders), and would provide welcome additional clarity and certainty.

2 HSF's general comments on the frustrating action policy

In HSF's view, the ambiguities in the current formulation of the policy mean that it is often perceived as extending too far in practice.

Bidders are arguably gaining undue advantage from the actual or perceived restrictions that the current policy imposes upon target boards. The threat of being found to have engaged in unacceptable frustrating action is significant for target boards in considering what actions they are able to take in both responding to a bid and managing the company through a potentially drawn-out and destabilising bid period.

Target boards are further constrained because obtaining shareholder approval to "bless" frustrating action is unlikely to be a practical solution in most instances. In particular, counter-parties are generally unwilling to agree to a transaction when the target company must seek shareholder approval, effectively giving it an option to withdraw. Additionally, if the transaction involves an issue of equity (subject of course to ASX Listing Rule 7.9 compliance), then it may simply not be commercially feasible to have a conditional transaction in the public domain for an extended period.

This issue has come to the fore due to the combined impact of the frustrating action policy and the tendency for bids to be accompanied by extensive and restrictive conditions, leading to two effects:

- first, by purporting to restrict a wide array of arguably business-as-usual activities of the target, these conditions can leave target boards believing that they are at risk in taking even commercially reasonable and usual actions; and
- secondly, the ambit nature of some bid conditions found in the market means that they will almost inevitably be breached at some point, with or without the involvement of the target. Bidders are not required, until very late in the bid period, to announce whether they will rely on such breaches to cause their bid to lapse – meaning that the bidder has, in effect, a free exit option. It does not strike the right balance that, while shareholders have no certainty that the bid will actually proceed, the target remains bound by the frustrating action policy.

HERBERT SMITH FREEHILLS

3 HSF's general response on the proposed reforms

HSF supports and agrees with the considerations and concerns set out by the Panel in its consultation paper.

Accordingly, with the exception of the points of clarification discussed at section 4 below, HSF supports the proposed revisions to the policy. We consider these revisions to reflect an appropriate re-balancing of the policy, and we consider that the enhanced clarity and certainty embedded in the amendments will provide meaningful additional guidance to target boards, while continuing to restrict illegitimate or unreasonable actions.

4 HSF's response on the specific questions raised by the Panel

We provide the following comments on the specific issues raised by the Panel:

(a) *Comments are sought on whether the revised list of "considerations when assessing unacceptable circumstances" is appropriate? Are there any other relevant considerations? (see paragraph 12 of revised GN12)*

HSF response: we agree with the revised list and do not consider that further matters need to be listed.

(b) *Comments are sought on whether the proposal that a frustrating action is unlikely to give rise to unacceptable circumstances if the bid does not give shareholders a genuine opportunity to dispose of their shares, represents a desirable policy shift (or clarification)? (see paragraph 20 of revised GN12)*

HSF response: We think that it has always been the case since *Pinnacle No 8* that the policy should only apply if the bid provides a genuine and viable opportunity for shareholders to sell their shares, though that fundamental point is not clear in the current drafting of GN12. Therefore, the proposed revisions should be welcomed by the market as a clarification. They would alleviate the concern target boards have, based on the current wording, which is causing difficulties in implementing commercial solutions in this situation.

(c) *If so, comments are sought on whether the examples of bids which do not provide a genuine opportunity for shareholders to dispose of their shares identified in paragraph 20 of revised GN12 are appropriate? Are there any other examples?*

HSF response: we think that the list of proposed examples is generally appropriate, subject to the following comments.

While we agree that, as per item 1 of paragraph 21(c), a takeover bid which is expressed as being conditional on target board recommendation should not attract the frustrating action policy, we acknowledge that it may be difficult in the context of negotiations surrounding a potential bid to form a definitive view that the bid will only proceed if a target board recommendation is obtained. Accordingly, we suggest the inclusion of a footnote to the following effect *"In the context of a potential bid, the Panel will require very strong evidence in order to conclude that a bid will only be subsequently made if such a recommendation is obtained."*

One further example that the Panel could consider is the situation where a bid is made subject to a hair-trigger condition, ie where it is highly likely the condition will be breached. In that event, it seems unreasonable that target should be

constrained by the policy given the bidder is seeking to maintain the ability to withdraw.

(d) *Comments are sought on whether the proposal to identify circumstances in which it would be unreasonable to conclude that a frustrating action is unacceptable represents a desirable policy shift (or clarification)? (see paragraph 21 of revised GN12)*

HSF response: our views are the same as those in relation to paragraph 20. Whether this is a policy shift or just a clarification, we think that it is highly desirable given the practical effect currently imposed on target boards by their concern regarding the current wording of the policy, and the difficulties in implementing commercial solutions that they currently face in this situation.

(e) *If so, comments are sought on whether the circumstances identified in paragraph 21 of revised GN12 are appropriate? Are there any other circumstances?*

HSF response: we think that the list of proposed examples is generally appropriate, subject to the following comments in relation to paragraph 21(e).

First, as a drafting point, the text of paragraph 21(e) and the related text in footnote 29 seem to overlap with each other. We think that sub-paragraph 21(e) should be shortened by the deletion of all text from "or has varied…" onwards. The revised text would then align with the existing form of the guidance note.

Secondly, as a more substantive matter, we suggest that the Panel should revisit the implications of a bid variation in the context of both the implied waiver of historic breaches and the related implications for the frustrating action policy. In our view, where one or more conditions have been breached, and the bidder – having not already waived those breaches – subsequently increases its bid or drops some of the bid's conditions, it would generally be unacceptable and inconsistent for the bidder to subsequently rely on those historic breaches to allow its bid to lapse. Simply put, the increase in the bid price (or dropping of conditions) is inconsistent with the retention of an earlier "exit option". To the extent that *Novus Petroleum* suggests it is okay for abider to simply wait until the date for giving its notice about the status of conditions, we consider that decision goes too far. In such a situation, it would be unacceptable for the bidder to subsequently rely on that breach to allow its bid to lapse – but, as a consequence, the frustrating action policy would continue to apply. We think that will promote more certainty in the market.

The situation may not be as clear-cut in the case of a mechanical variation such as an extension, where the question of the "reasonable time" is likely to remain the relevant area of focus.

(f) *Comments are sought on whether GN12 should provide further guidance on when it is unacceptable for a target so seek alternatives? (see subparagraphs 14(b) and 21(d), example 2 of revised GN12)*

HSF response: in our view, it is arguably not necessary to include paragraph 14(b) at all. Given the express acknowledgement that such an alternative could proceed if shareholder approval is obtained, we think it is implicit that "seeking" such an alternative (as opposed to committing to it or implementing it) does not *per se* constitute unacceptable frustrating action.

Nevertheless, there is no harm in providing some clarity here, including with reference to the fact that some conditions can be breached by the target in seeking alternatives without constituting unacceptable frustrating action.

However, we do not think that the proposed wording and accompanying footnote achieve this. We think that the example and the footnote that are

contained in the current version of the guidance note (at paragraph 16) present a clearer explanation of this point, and that this current wording should be replicated.

(g) *Comments are sought on whether existing GN12 already provides adequate certainty and/or latitude for target boards to pursue transactions and should not be amended?*

HSF response: for the reasons set out above, we do not think the current wording reflects the level of latitude which target boards should have from a policy viewpoint, and we endorse the revised draft as set out in the Panel's consultation paper.

* * *

We would be very happy to discuss our submission further.

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24 October 2016

Mr Allan Bulman

Director, Takeovers Panel
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Our ref: Luke Dawson

Dear Mr Bulman

Submissions in respect of Consultation Paper - GN 12 Frustrating Action

HopgoodGanim Lawyers are pleased to have the opportunity to provide submissions in response to the Takeovers Panel Consultation Paper "GN 12 Frustrating Action".

1. **General comments**

HopgoodGanim Lawyers are of the view generally that the policy development in relation to frustrating action has had the unintended effect of shifting the balance of power too far in favour of a Bidder to the detriment of commercial certainty of a Target.

While HopgoodGanim Lawyers acknowledges that the policy in respect of frustrating action should rightfully focus on the actions and conduct of the Target (and whether such frustrating action ultimately gives rise to unacceptable circumstances), there are at times:

(a) extenuating circumstances or extraneous factors; and

(b) subsequent conduct by a Bidder in respect of a frustrating action,

which should in our submission, nevertheless preclude the Bidder from the benefit of the policy.

The general imbalance of power noted above, coupled with the inability of Target companies to seek advance rulings, has often left the board of directors of Targets in hostile takeovers in an unenviable position of either continuing to operate under the assumption that they are largely unable to act to undertake commercial endeavours or otherwise risking a declaration of unacceptable circumstances should they undertake a relevant commercial transaction (without for example, the certainty of shareholder approval).

Having regard to the above general comments and the submissions noted below, HopgoodGanim Lawyers supports and welcomes the additional guidance and clarity generally provided by the revised Guidance Note 12.

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2. Response to issues

2.1 *[37] Comments are sought on whether the revised list of "considerations when assessing unacceptable circumstances" is appropriate? Are there any other relevant considerations? (see paragraph 12 of revised GN12)*

HopgoodGanim Lawyers supports the revised list of "considerations when assessing unacceptable circumstances" (including the removal of prior considerations which do not advance the "frustrating action" policy).

In respect of the new consideration contained within paragraph 12(f) of the revised Guidance Note 12, our view is that the "second limb" represents a sensible addition to the policy.[1] In our consideration of this aspect of the policy, it is necessary to differentiate between the Target (referring to the Target Shareholders) and the Target Directors.

If the Target Directors form the view that a bid does not constitute a genuine opportunity for Target Shareholders to dispose of their shares and the Target Directors wish to pursue a "frustrating action" then it should rightly be incumbent on the Target Directors to notify the Bidder of this (so as to allow the Bidder the opportunity to rectify the aspect of the bid alleged to be defective, or alternatively challenge the decision of the Target Directors before the Panel). While this may seem counterintuitive to a traditional takeover defence, it supports the underlying policy that Target Shareholders (as opposed to Target Directors) should ultimately determine whether or not a takeover bid succeeds.

If a frustrating action is undertaken by the Target Directors without prior notification to the Bidder (such notification to include the aspect of the bid alleged to be defective such that the bid is not "genuinely available to shareholders" so as to allow the Bidder the opportunity to ventilate the issues before the Panel or otherwise remedy the defective aspect of the bid), the Target Directors are effectively usurping a decision that rightly should be made by the Target Shareholders.[2]

One caveat to the above notification requirement may be the situation in which a bid is fundamentally flawed, such that it is incapable of being remedied (for example, it contains a condition that is incapable of satisfaction), however we are of the view that paragraph 20(a) of the revised Guidance Note 12 satisfactorily addresses this aspect. In any event there is no reason why these concepts should be mutually exclusive (for example, it may be the case in this situation that notification is provided to the Bidder, but the "remedial period" will not be applicable).

2.2 *[38] Comments are sought on whether the proposal that a frustrating action is unlikely to give rise to unacceptable circumstances if the bid does not give shareholders a genuine opportunity to dispose of their shares, represents a desirable policy shift (or clarification)? (see paragraph 20 of revised GN12)*

HopgoodGanim Lawyers supports the policy clarification that a frustrating action is unlikely to give rise to unacceptable circumstances, if the bid does not give shareholders a genuine opportunity to dispose of their shares (subject to our comments in to 2.3 below).

[1] Refer to the second bullet point of paragraph 12(f) – "in the case of a bid, whether before undertaking an action the target notified the bidder that it intends to undertake the action, or that it considers it will not be bound by the frustrating action policy, if the bidder does not remedy, within a reasonable time, a feature of its bid which makes the bid not genuinely available to shareholders.

[2] Refer for example to *Re Pinnacle VRB Ltd 9 (No 5)* [2001] ATP 14 at [25] and *Re Coopers Brewery Ltd (No 3R)* [2005] 23 at [51].

As noted above, HopgoodGanim Lawyers are of the view generally that the policy in relation to frustrating action has had the unintended effect of shifting the balance of power too far in favour of a Bidder (to the detriment of the Target).

Where a genuine opportunity to dispose of shares does not exist, the underlying policy enshrined in sections 602(a), 602(c) and 657A(3) of the Corporations Act (that decisions about ownership and control of a company are made by its shareholders, and not the directors) will not be offended and the Target should be free to pursue value accretive transactions (which could otherwise constitute frustrating actions in the context of a genuine bid).

2.3 ***[39] If so, comments are sought on whether the examples of bids which do not provide a genuine opportunity for shareholders to dispose of their shares identified in paragraph 20 of revised GN12 are appropriate? Are there any other examples?***

The examples provided in paragraph 20(a) and (c) are considered appropriate.

The example provided in paragraph 20(b) is also considered appropriate, however HopgoodGanim Lawyers would urge a cautious approach to any pre-determination that a bid will not be successful (which in any event, appears to be contemplated by the careful drafting of the sub-paragraph).

As noted above, the policy underlying the doctrine of "frustrating action" is that decisions about ownership and control of a company are made by its shareholders, and not the directors. However, an unsatisfactory result could potentially follow where a Target acquires shareholder intention statements (which are often sought early during the bid process having regard to the practicalities in obtaining sufficient levels of support and the number of shareholder intention statements to be gathered in by the Target) from shareholders (**Intending Shareholders**) sufficient to prima facie indicate that the bid will not be successful, in circumstances where ultimately shareholder approval would be a more appropriate mechanism.

For example, it may be the case that while Intending Shareholders do not support the relevant bid, if the relevant frustrating action (**Alternative Action**) were to be put to a vote for the purposes of shareholder approval (which importantly, would necessitate appropriate disclosure by way of the relevant meeting materials), that those same Intending Shareholders would similarly not support the Alternative Action. While the qualification of the Panel requiring "very strong evidence" to reach such a conclusion is welcome, such evidence would need to be viewed in light of all relevant circumstances.

2.4 ***[40] Comments are sought on whether the proposal to identify circumstances in which it would be unreasonable to conclude that a frustrating action is unacceptable represents a desirable policy shift (or clarification)? (see paragraph 21 of revised GN12)***

HopgoodGanim Lawyers supports the policy clarification in paragraph 21 of revised Guidance Note 12, specifically, the "expansion" of the concept provided by sub-paragraph 21(e).[3]

Often a Bidder will include numerous defeating conditions as part of its bid and many Targets will at some point face an assertion from the Bidder that their actions have constituted a breach of a condition. In our experience, such an assertion is unlikely to be

[3] We note that while footnote 15 of existing Guidance Note 12 contemplates the scenario of a varied bid in the context of "what is a reasonable time", it appears that the inclusion of this consideration of the bidder's actions (i.e. in varying the terms of the bid) in the body of the guidance note represents an expansion of the concept from prior guidance.

accompanied by a determination (one way or the other) by the Bidder as to whether or not the relevant condition will be relied upon or waived. The previous Guidance Note 12 dealt appropriately with this situation in recognising that a determination should only be required "within a reasonable time" so as not to unduly prejudice an "innocent" Bidder in forcing an immediate reaction/determination in respect of a breach of a condition.

The revised Guidance Note 12 expands this concept to contemplate not only the lapse of time, but also other bid variations that may be made by a Bidder (i.e. a price increase) that are still not accompanied by a decision as to whether or not the Bidder will rely upon the alleged breached condition and in effect provide the Bidder with a "free option" as to whether or not to proceed with the bid (for example, a price increase is an easier decision for the directors of a Bidder where they retain the option to pull the bid should the prevailing economic conditions decline).

Unless there are exceptional extenuating circumstances, at the point of a bid variation (especially a price increase, given the high degree of analysis that is often associated with such a decision), the ability of a Bidder to rely upon a previous frustrating action of the Target before the Panel should be extinguished.[4]

For completes, we note that it may be desirable from a policy perspective to differentiate between variations to the terms of a bid which are not of themselves determinative as to the Bidder's decision to continue with the bid. For example, as noted above, an increase in the bid price (or improving the terms of the bid generally) should be determinative as to the Bidder's position, whereas a short extension of an offer period (for example, to allow the Bidder additional time to consider the implications of the relevant frustrating action) are in our view likely less determinative as to the state of mind of the Bidder.

2.5 ***[41] If so, comments are sought on whether the circumstances identified in paragraph 21 of revised GN12 are appropriate? Are there any other circumstances?***

As noted above, HopgoodGanim Lawyers supports the policy clarification and examples identified in paragraph 21 of revised GN12.

2.6 ***[42] Comments are sought on whether GN12 should provide further guidance on when it is unacceptable for a target so seek alternatives? (see subparagraphs 14(b) and 21(d), example 2 of revised GN12) and [43] Comments are sought on whether existing GN12 already provides adequate certainty and/or latitude for target boards to pursue transactions and should not be amended?***

The revised GN12 (with relevant omissions from the prior version) provides adequate certainty and latitude for a Target board to pursue transactions. In addition, there are numerous decisions of the Panel on this topic which already provide additional guidance.[5] Accordingly, in our view, additional guidance is not required in respect of either of these aspects of the Guidance Note.

Again, thank you for the opportunity to provide submissions in relation to the Takeover Panel's Consultation Paper "GN 12 Frustrating Action".

[4] Although beyond the scope of this submission, while the relevant frustrating action undertaken by the Target will not constitute unacceptable circumstances, the Panel may wish to consider whether in fact the actions of the Bidder in these circumstances should themselves be considered unacceptable. Although we note the comments made by the Panel at [46] in *Novus Petroleum Limited 01* [2004] ATP 2, we consider the situation of a bid variation (especially a price increase) is inherently distinguishable, and at that point in time it should be incumbent on the Bidder to resolve the uncertainty that exists or risk a declaration of unacceptable circumstances itself.

[5] Refer to *Re Pinnacle VRB Ltd (No 8)* [2001] 17, *Re Macarthur Cook Ltd* [2008] ATP 20, *Re Perilya (No 2)* [2009] ATP 1 and *Re Austock Group Ltd* [2012] ATP 12.

If you would like to discuss any aspects of the above, please do not hesitate to contact us.

Yours faithfully

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24 October 2016

Dear Allan,

Submission on proposed changes to Guidance Note 12 – 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) on 14 September 2016 in relation to the revision of Guidance Note 12 on Frustrating Action.

The Committee's responses are as follows:

1. Is there any need to amend the existing guidance?

The reason given in the Consultation Paper for the changes is that a number of market participants have expressed the view that the GN in its current form does not adequately explain the risk attached to the various considerations making frustrating action unacceptable, and that the position of target directors is said to have become more difficult of late because of the trend for bidders to include a long, complex and restrictive list of bid conditions.

While we agree that the existing guidance could benefit from some amendment to remove considerations which do not advance the frustrating action policy, the Committee did not think that bid conditions are any more long, complex and restrictive now than 10-15 years ago, when it was more common to have conditions such as those requiring the target to give due diligence confirmations or take actions assisting the bidder.

That said, we are in favour of clarifying the Guidance Note in a number of respects described below.

2. Is the revised list of 'considerations when assessing unacceptable circumstances' appropriate (paragraph 12)?

The Committee's view is that the list in paragraph 12 is generally appropriate, although more could still be done to explain the relevance of particular considerations, and the weight which would be given to them. For example, paragraph 12(d) lists as a relevant consideration whether the frustrating action is undertaken by the target in ordinary course of business, without going on to say that, if the action was undertaken in the ordinary course of business, it will generally not be unacceptable. Likewise, paragraph 12(c) lists as a relevant consideration whether there is already a competing proposal. Presumably this is suggesting that if there is already a competing superior proposal, so that the bid is not reasonably likely to be successful, then the frustrating action is not likely to give rise to unacceptable circumstances. But again, this is not clear.

Another concern is with the overlap which is created by having a separate list of 'considerations when assessing unacceptable circumstances' in paragraph 12; and a separate list of 'circumstances tending against unacceptable circumstances', which itself includes a catch all of circumstances where it is 'otherwise unreasonable' to find unacceptable circumstances. It would seem that this drafting could be condensed into a single list, with an explanation of the relevance of the various factors.

3. "Genuine opportunity"

There are different views within the Committee as to whether 'no genuine opportunity' should be merely a 'relevant consideration' in deciding whether unacceptable circumstances exist, or whether the guidance should make it clear that, if the bid really does not give shareholders a genuine opportunity to dispose of their shares, then the frustrating action policy does not apply.

Those that say it should only be a 'relevant consideration' argue that there is rarely a clear binary distinction between a bid or potential bid which gives a genuine opportunity to shareholders to sell their shares, and one that does not, and that more often it will require an assessment of all relevant circumstances, and balancing of competing principles and policy objectives (they offer an illustration of this in paragraph (a) below). Proponents of this view are also concerned the existence of a “safe harbour” may encourage some target boards to conclude a potential bid does not give rise to a “genuine opportunity” when that is not appropriate and, as a result, undertake action that denies their shareholders their right to decide the outcome of the bid.

Those that say the frustrating action policy should not apply at all say that there are clear circumstances where there is no genuine opportunity for shareholders to sell their shares, and if that is the case, then there is nothing to frustrate, and there is no policy basis for target boards being subjected to an extra layer of restriction, on top of their existing statutory and fiduciary duties, in conducting the business of the company. It is also argued that target boards need clear guidance in this situation, and that having no genuine opportunity as just another 'relevant consideration' does not provide this, thereby forcing target boards to take a

conservative approach in practice to avoid the risk of a declaration of unacceptable circumstances.

Set out below are some of the different views in respect of each of the three categories of bids referred to in paragraphs 20(a), (b) and (c):

(a) Actions which trigger a condition of a bid or potential bid which cannot be implemented because of a condition or structural or other feature

One view within the Committee is that, if the bid or potential bid truly cannot be implemented (which requires that there be something more than just strong grounds to believe it won't be successful), then there is no 'genuine potential bid', and an action which triggers a condition of such a 'bid' should be carved out from the definition of 'frustrating action'. Such bids should not come under 'considerations tending against unacceptable circumstances'. If the bid is simply not capable of being implemented (for example, because it is made without a reasonable basis as to funding, or because it is subject to a condition that clearly will not be satisfied) there is nothing to frustrate.

The opposing view is that a bid should not always be regarded as one that “cannot be implemented or completed” simply because, at a particular time, it includes a condition requiring the target to take some action which it is not required to take, and which the target has declined to fulfil. For example, a bidder that has not had the opportunity to conduct due diligence on a target may wish to retain the benefit of a bid condition requiring the target to provide certain confirmations at least until after it has had a reasonable opportunity to review the target’s statement even if the target has already made it clear it will not provide confirmations satisfying the terms of its condition. During this period there remains the possibility that the target may change its position or that the bidder may waive the condition once the target has prepared its target’s statement. Proponents of this view argue that, in these circumstances, it is very likely the bid will remain a genuine bid whose outcome should be decided on its merits by shareholders rather than target directors even though it is subject to a condition that is strictly incapable of satisfaction.

(b) Actions which trigger a condition of a bid, where there are reasonable grounds to expect that the bid will not be successful

Given that there will be uncertainty as to what amounts to reasonable grounds to expect that the bid will not be successful, the general view within the Committee is that an action which triggers a condition of such a bid should not automatically be carved out from the definition of 'frustrating action'. Such an action may be acceptable (i.e. not constitute unacceptable circumstances) if there are reasonable grounds to believe that the bid will not ultimately be successful, but it will depend on all of the relevant circumstances. This seems to be covered by paragraph 12(a) of the revised draft in any event.

(c) Actions which trigger a condition of a bid, or potential bid, which is expressed to be subject to a target board recommendation

One view within the Committee is that bids or potential bids which are expressed to be subject to a target board recommendation should not enliven the frustrating action policy at all (i.e. rather than regarding an action which triggers a condition under such a bid or potential bid as a 'frustrating action', but then saying it may not amount to unacceptable circumstances, the action should not constitute a 'frustrating action' in the first place). This has clearly been the position for some time in relation to potential bids which contemplate a scheme transaction structure (example 3 in paragraph 7 of the existing Guidance Note 12)[1].

Where this issue most often arises is in the common situation where a potential acquirer submits a confidential non-binding indicative offer letter to a company. Almost invariably, the letter will state that the proposal, as well as being indicative and non-binding, is subject to the target board unanimously recommending the offer and to the target board providing due diligence. It will also usually state that the proposal is conditional on the target board entering into a binding implementation agreement containing, amongst other things, exclusivity provisions and a break fee.

The proponents of this view argue that such letters should not enliven the frustrating action policy. The arguments put forward by those who support this view include:

- It is relatively easy for a potential acquirer to submit a non-binding indicative offer letter, where the indicative offer is subject to due diligence and a target board recommendation. The impact on the target is far greater if that sort of letter enlivens the frustrating action policy.
- The target board should not be bound by the frustrating action policy simply because there is a hypothetical chance that the party making the approach will bid on a hostile basis, particularly when they have said that they will only bid if the target board recommends the bid. In this situation, there is no 'genuine opportunity' at this stage for shareholders to dispose of their shares.
- Often the target board will not know whether the party making the approach is willing or able to make a hostile bid. If the potential acquirer wants the frustrating action policy to apply, it should make it clear in the letter that, while it would like to have a target board recommendation, its willingness to proceed is not dependent on it.
- If the potential bid is subject to the target board recommending the transaction, then the bid cannot be frustrated if the target board decides not to recommend it, but to instead take some other action which may trigger a condition of the potential bid.

[1] Example 2 in paragraph 7 of the existing Guidance Note 12 states that 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.

- Target boards require clarity in this situation. Making the fact that the bid is expressed to be subject to a target board recommendation a 'relevant consideration' as to whether an action will constitute unacceptable circumstances does not provide that clarity.
- Even without the frustrating action policy applying, in those circumstances the target directors are bound to comply with their statutory and fiduciary duties in determining to take any action which may lead to the possible bid not being made. It is not correct to say, therefore, that there are no other restrictions on the target board in these circumstances.
- It is not clear why a scheme proposal cannot be frustrated, but a non-binding indicative takeover bid proposal which is subject to the target board recommending the bid should attract the frustrating action policy.

The opposing view is that a potential acquirer which has submitted such a non-binding indicative offer letter may not have completely ruled out a hostile bid, and until the potential acquirer does so, the target board should be subject to the frustrating action policy restricting its ability to take actions which may trigger conditions of the possible bid. The arguments put forward by those who support this view include:

- If a bidder has not completely ruled out a hostile bid, an approach in these terms will normally involve a “genuine potential bid” that should initially attract the frustrating action policy in the normal way.
- If the frustrating action policy were not to apply in these circumstances, a bidder would have no meaningful remedy if the target board were to undertake what would otherwise be frustrating action. But this action may nevertheless be sufficient to preclude the bidder proceeding with the hostile bid it has foreshadowed.
- Imposing restrictions on the target in these circumstances should not be unduly burdensome. If the target ultimately declines to recommend the bid, the bidder will need to clarify whether it is prepared to waive its requirement and proceed with a hostile bid if it wishes the frustrating action policy to continue to apply. If it does not do so, the restrictions will only have applied for a relatively short period. And if it does, it is clearly appropriate they should have applied and should continue to do so.

4. "Otherwise unreasonable" to consider the frustrating action as giving rise to unacceptable circumstances - a desirable policy shift (or clarification)? Are the circumstances in paragraph 21 of GN 12 appropriate?

In relation to sub-paragraph 21(d), the Committee would suggest deleting example 3, as this really seems to be an example of a bid where there is no genuine opportunity for shareholders to dispose of their shares.

In relation to sub-paragraph 21(e), the words "or has varied the terms of the bid, such as increasing the bid price, but has not waived the condition or the breach" have been added to what is in paragraph 11(f) of the existing Guidance Note 12 (although there is a reference to variation of bid terms in footnote 15, which

explains what is a reasonable time for the purposes of paragraph 11(f)). This was a change which the Panel proposed in its January 2014 consultation paper (the proposed new paragraph 11(g)), but which the Panel ultimately decided to drop in favour of including footnote 15.

We think that sub-paragraph 21(e) of the revised draft should revert to the wording in paragraph 11 and footnote 15 of the existing guidance. The mere fact that a bidder has varied the terms of the bid, even by increasing the price, should not result in the frustrating action policy ceasing to apply. It would depend on the circumstances, including the nature of the condition. This is already covered in the footnote 15 in the existing guidance.

5. Is further guidance required on when it is unacceptable for a target to seek alternatives (subparagraphs 14(b) and 21(d), example 2)?

The Committee did not think that further guidance was required on this.

7. Other issues

(a) Can an action that does not trigger a condition in a bid or proposed bid still constitute a 'frustrating action' for the purposes of the policy?

While the definition of 'frustrating action' in paragraph 5 of the existing guidance is not expressly limited to actions which would trigger a bid condition, paragraphs 6 and 7 are all about actions which would trigger bid conditions, and the need for a bidder to make it clear what the proposed bid conditions are. This helps the reader understand that, while the definition refers to actions by reason of which a bid or potential bid may be withdrawn, in practice the way this will be determined is by reference to the bid conditions. The conclusion is that there would need to be a very unusual set of circumstances where an action which did not trigger a bid condition or proposed bid condition would constitute a 'frustrating action'.

The revised draft guidance seems to move away from this position. The existing paragraphs 6 and 7 have been removed, and there is now no reference to bid conditions at all until towards the end of page 3, where it states that 'typically, the policy applies to an action that triggers a condition of a bid or a potential bid'. We think this is unhelpful, because market participants reading the guidance don't know until they get to the end of page 3 that, in the vast majority of cases, whether the policy will apply will depend on whether the action breached a bid condition or not. It also seems that by making this change the Panel is trying to reserve to itself greater flexibility to regard an action as a frustrating action, even when the action does not trigger a condition of a bid or potential bid.

While we understand the Panel's desire to preserve flexibility, we think that the existing paragraphs 6 and 7 should be re-instated. Also, if the Panel is trying to widen the scope of actions which may be frustrating actions even if they don't trigger a bid condition, it should say so and should give some examples of what it is concerned about. For example, we assume that actions such as those taken by the target board in *Babcock & Brown Communities Group* [2008] ATP 25 at [29]-[36] and *Gondwana Resources Limited* [2014] ATP 9 at [31] are not 'frustrating

actions' as defined, even though they may reduce the likelihood of a bid or a potential bid being made in the future.[2]

In relation to market bids, the revised draft should also make it clear that an action which may allow the bid to be withdrawn under section 652C is a frustrating action (like an action which triggers a bid condition of an off-market bid). We understood this to be the intent of footnote 1 of the existing guidance, which is repeated in the revised draft, but this is now unclear following the Panel's decision in *Freshtel Holdings Limited* [2016] ATP 15.

(b) Where the target offers target shareholders a choice

We note that the 3 examples in paragraph 15 of the draft are now located under the heading 'Considerations tending against unacceptable circumstances', whereas in the existing guidance they appear under the heading 'Not unacceptable circumstances'.

In our view, the revised draft should make it clear that an action which has been approved by target shareholders in general meeting, or which is conditional on target shareholder approval, does not amount to unacceptable circumstances under the frustrating action policy. Again, it is not the action which has frustrated the bid, but the fact that the target shareholders in general meeting have voted to approve the action over accepting the bid. We think that this is necessary so that a target board has a clear 'safe harbour' for taking the action.

The Committee would be pleased to discuss this submission if that is helpful. Please contact the Chair of the Committee, Rebecca Maslen-Stannage, on 02 9225 5500 if you would like to do so.

Yours sincerely,

Teresa Dyson, Chair
Business Law Section

[2] One member of the Committee was of the view that, given ASIC's current position that bid consideration should not be reduced for the value of franking credits attached to a dividend paid by the target, the payment of a significant unheralded non-ordinary course franked dividend by the target, without the consent of the bidder, should be regarded as being a frustrating action, even in an unconditional off-market bid or in an on-market bid (i.e. so no bid condition is being triggered). The view of other members of the Committee however is that this would effectively amount to law reform, in that it adds to the events in section 652C entitling a bidder to withdraw an on-market bid. On either view, it would seem desirable to have clarity on whether or not payment of such a dividend is a frustrating action.

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24 October 2016

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By email: takeovers@takeovers.gov.au

Dear Allan,

Guidance Note 12: Frustrating Action

Macquarie Capital welcomes the opportunity to comment on the issues raised in the Consultation Paper (the **CP**) issued by the Takeovers Panel (the **Panel**) on 14 September 2016 in relation to a revised draft of Guidance Note 12: Frustrating Action (**GN 12**).

Genuine opportunity

1. In our view, the most significant proposed changes to GN 12 are those dealing with the principle stated in paragraph 21 of the CP that "the Panel's frustrating action policy ... will only apply if the bid proposal represents a genuine opportunity for target shareholders to dispose to dispose of their shares".

2. We agree the frustrating policy should only apply where there is a genuine potential bid. However, we have several concerns in relation to these changes:
    - Rather than providing clearer guidance on this topic, we fear the draft GN may contribute to greater confusion and uncertainty in this area.
    - We believe there is a material risk the draft GN may encourage some targets to engage in frustrating action and deny shareholders the right to decide the outcome of a bona fide offer when that would not be consistent with s602(c) or s657A.
    - We question whether the policy rationale for these changes has been properly established.

3. The principal reasons for the first two of these concerns are as follows:
    - ***Safe harbour vs. a relevant consideration*** - In the current version of GN 12, "genuine opportunity" is identified as one of a number of considerations that guide the Panel in determining whether frustrating action gives rise to unacceptable circumstances. In our view, this appropriately reflects the need to weigh up a number of competing considerations in deciding whether target directors should be allowed to frustrate an outstanding bid without shareholder approval. It also recognises there is rarely a clear binary distinction between an offer that is genuinely available to shareholders and one that is not. More

often the difference will be a question of degree requiring an assessment of all relevant circumstances and the balancing of competing principles and policy considerations. In contrast, the draft GN effectively proposes the frustrating action policy should simply not apply in the circumstances identified in paragraph 20 as if these were straightforward bright-line tests. In our view, there is a risk this may encourage some targets to jump too hastily to the conclusion they fall within this "safe harbour". And, for the reasons outlined below, we believe this may inappropriately deprive shareholders of their right to decide the outcome of what is, in truth, a genuine bid.

- ***Bid proposals not genuinely available due to "a condition or structural or other feature"*** :
    i. In our view, a bid should not always be regarded as one that "cannot be implemented or completed" simply because, at a particular time, it includes a condition the target has declined to fulfil. For example, a bidder that has not had the opportunity to conduct due diligence on a target may wish to retain the benefit of a condition requiring the target to provide certain confirmations at least until after it has had a reasonable opportunity to review the target's statement even if the target has previously made it clear it will not provide confirmations satisfying the terms of its condition. And, during this period, it is very likely the bid will remain a genuine bid whose outcome should be decided on its merits by shareholders rather than target directors even though it may be subject to a condition that is strictly incapable of satisfaction.
    ii. We are also concerned the distinction between a condition "that requires the target's directors to confirm confidential information" (which is sufficient to disapply the policy) and "a situation where it is not onerous or harmful for the target to give the information or confirmation requested" (which is not) is likely to give rise to considerable uncertainty. Accordingly, we caution against the adoption of a change that may lead targets to believe they will have free rein to engage in frustrating action if they decline to satisfy conditions of this sort.
    iii. In our opinion, one way of addressing these concerns would be to expand footnote 24 to make it clear it will ordinarily be unacceptable for a target to undertake frustrating action in reliance on sub-paragraph 20(a)2 of the draft GN before it has sent its target's statement to the bidder and the bidder has had a reasonable time to consider it.
- ***"There are reasonable grounds to expect that the bid will not be successful"***:
    i. It is unclear whether the use of the phrase "reasonable grounds to expect" in the draft GN is intended to signify anything different from the phrase "it is reasonable to conclude" currently used inn footnote 12 of GN 12. If not, we believe it would be preferable to retain the current form of words in order to make it clear the test remains wholly objective.
    ii. We also believe it would be useful to add some commentary to the second and third bullet points in paragraph 20(b) of the draft GN to clarify how they may operate. For example, opposition by key shareholders may not be fatal to the success of a bid unless the bid has a non-waivable minimum acceptance condition and, even then, it may not be determinative if the opposition is only expressed in relation to the current offer price and the bid has not been declared final.

- ***The bid proposal "is dependent on target directors recommending it"*** – Our only concern with this limb of paragraph 20 of the draft GN is that we do not believe it should permit a target to frustrate a potential bid simply because it has initially been expressed in terms that require a target recommendation. In these circumstances, in contrast to a proposed scheme of arrangement, there will usually be a very real possibility the bidder may ultimately decide to proceed without the required recommendation. Accordingly, the target should not be free to engage in frustrating action unless the bidder has confirmed it will not waive the requirement. This could be done by requiring the target to afford the bidder an opportunity to waive the condition in a manner similar to footnote 23.[1]
- ***A "bid condition has been triggered and the bidder has not ... waived the condition or the breach***":
    i. In our view, sub-paragraph 21(e) of the draft GN should be moved into paragraph 20 since it too is concerned with the question whether a bid is genuinely available to shareholders.
    ii. However, we do not believe frustrating action will always be "unlikely to give rise to unacceptable circumstances" simply because a bidder has "varied the terms of [its] bid, such as increasing the bid price, but has not waived [a] condition [that has been triggered]". We therefore believe it would be preferable to retain the formulation currently used in paragraph 11(f) of GN 12 and its associated footnote.
    iii. We note several submissions in response to the Panel's 2014 Consultation Paper on frustrating action highlighted the need to balance competing principles and policy considerations in relation to this issue. In our view, the need for this balancing exercise reinforces our earlier observation that "genuine opportunity" should remain a "relevant consideration" and not become a stand-alone "safe harbour" under the policy.

4. In assessing these changes, we note the CP does not provide a very clear or convincing rationale for any change to the Panel's policy in relation to "genuine opportunity". While paragraph 8 of the CP says GN 12 currently makes it difficult to predict whether a target can undertake a particular transaction, we question whether this difficulty has often been as a result of uncertainty as to whether a bid or potential bid is genuine. And, even if it were otherwise, we do not believe the draft GN should seek to provide targets with false certainty when that may not be consistent with relevant policy considerations.[2]

Restructuring of the Guidance Note

5. Leaving aside "genuine opportunity", we have no objection to the restructuring of the draft GN so the considerations which make unacceptable circumstances unlikely to arise are consolidated under one heading.[3]

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[1] We also believe footnote 23 should be conformed to the statement in paragraph 27 of the CP, which states "a target would be ***required*** to afford the bidder a reasonable opportunity to waive the offending condition".

[2] Is there any evidence of the "trend" referred to in paragraph 10 of the CP or in support of the suggestion that the position of target directors has become more difficult of late because of bid conditions requiring the target to take actions to assist the bidder?

[3] In general, we accept frustrating action is unlikely to give rise to unacceptable circumstances in the circumstances set out in paragraph 21 of the draft GN. However, we note Example 1 of sub-paragraph 21(d) no longer has the note currently attached to the corresponding Example in sub-paragraph 11(c) of GN 12., which suggests an overly restrictive condition is one that results in a target being "paralysed, or unduly hampered in its everyday business". Since there may be a wide

6. However, one consequence of this change is that some considerations are referred to in both paragraph 12 (as general considerations) and in paragraphs 13-21. This is not inherently problematic, but the revised structure of the draft GN does highlight all the relevant considerations can be grouped into four broad categories:
    - ***Is there a genuine potential bid?*** - See sub-paragraphs 12(a), (c) and (f), paragraph 20 and sub-paragraph 21(e).
    - ***Are target shareholders being offered a choice?*** - See sub-paragraph 14(d) and paragraphs 15-18.
    - ***Does the relevant bid condition impose unreasonable restrictions on the target?*** - See sub-paragraphs 12(b) and (d), paragraph 13 and sub-paragraphs 14(a)-(c) and 21(d).
    - ***Are there other reasons why it is not unacceptable for the target to engage in frustrating action?*** - See sub-paragraphs 21(a)-(c).

7. In our view, it might be helpful to reorganise paragraph 12 of the draft GN to reflect these groupings.

Other comments

8. Our only other comments on the draft GN are:
    - Following the recent decision in *Freshtel Holdings Limited* [2016] ATP 15, we believe it would be desirable to clarify how the policy may apply to actions that do not trigger a bid condition but may allow a market bid to be withdrawn under s652C. The definition of "frustrating action" in paragraph 3 of the draft GN suggests it includes action of this sort, but the *Freshtel Holdings* decision suggests the contrary (and paragraph 10 of the draft GN may be taken to reinforce this). Accordingly, further guidance on this topic would be useful.
    - While paragraph 17 of the draft GN is in essentially the same terms as sub-paragraph 15(e) of GN 12, we believe it would be desirable to clarify that a bidder is only required to provide a waiver to the extent the target's actions in seeking shareholder approval might otherwise have triggered a condition. In other words, the waiver should not be required to extend to any other frustrating action undertaken by the target

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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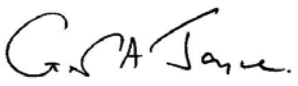

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range of views as to how restrictive bid conditions may be, we believe a note along these lines would provide helpful colour to guide targets and bidders.