

TAKEOVERS PANEL FINALISES CHANGES TO FRUSTRATING ACTION POLICY, PROVIDING HELPFUL GUIDANCE TO TARGET BOARDS

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Legal Briefings - By **Simon Haddy**

The Takeovers Panel has recently published a re-write of its Guidance Note on frustrating action. We explore the background to these changes and examine the finalised reforms.

IN BRIEF

- The Takeovers Panel has recently finalised the amendments to its frustrating action policy.
- Herbert Smith Freehills provided a submission, and a number of items of public commentary, in favour of the proposed changes.
- The finalised changes provide better clarity for the market.

INTRODUCTION

Earlier this month, the Takeovers Panel [released](#) the final form of its updated Guidance Note on “frustrating action”.

In its [formal submission](#) and in its opinions pieces,¹ Herbert Smith Freehills expressed support for the proposed amendments, which were aimed at providing further guidance to target boards by reducing the ambiguity as to what instances of frustrating action might be “unacceptable” – hence allowing them to respond to a bid, and conduct the affairs of the target company during the bid, on a surer footing.

The final form of the amendments adopts most of the changes proposed in the consultation paper, and hence represents a welcome development which provides further clarity to target boards and establishes a more appropriate balance between bidders and targets (and target shareholders) in hostile takeovers.

BACKGROUND TO AMENDMENTS

The Panel’s policy on frustrating action – which is designed to ensure that target shareholders, rather than target boards, have the final say on whether a takeover bid succeeds – can have a significant impact on target companies during a hostile takeover bid. Its effect is that, in general, material transactions and initiatives – no matter how attractive or value-accretive – cannot be implemented by the target company, without express approval from shareholders in general meeting, as, typically, they would breach a condition of the bid.

Commentators – Herbert Smith Freehills included – have argued that the policy potentially extends too far, and that bidders may be gaining excessive advantage from the actual or perceived restrictions that the policy imposes upon target boards. They argue that the threat of being found to have engaged in unacceptable frustrating action is excessively limiting the actions that target boards are able to take in both responding to a bid and managing the company through a potentially drawn-out and destabilising bid period. Our earlier article provides more detail both on these issues and on the Panel’s draft amendments.²

THE FINALISED REFORMS

On the whole, the Panel has adopted the changes proposed in its consultation draft, together with various minor clarifications suggested during the consultation process. Accordingly, the amendments further emphasise:

- that the policy will only have teeth where a bid provides a “genuine opportunity” for shareholders to dispose of their shares. In other words, if there is lack of funding certainty, the bid is demonstrably ‘dead in the water’, or the bid expressly depends on a target recommendation which is not forthcoming, then the policy will not restrict the target board; and
- that the policy won’t apply where it would be “otherwise unreasonable” to do so. These situations include common-sense situations such as actions to alleviate financial distress and compliance with legal requirements. They also include non-compliance with overly

restrictive conditions, conditions that are invoked unreasonably, and the situation where a bid condition has been breached and the bidder has not confirmed within a reasonable time whether it will rely on or waive the breach.

The guidance note emphasises these principles and frames them in a more definitive manner. This will provide comfort to target boards as to where their actions are likely to be unacceptable.

COMMENTARY

In Herbert Smith Freehills' view, the amendments are a welcome evolution of the frustrating action policy, which provide further clarity to target boards, and should dissuade bidders from imposing opportunistic and excessive conditions upon targets.

ENDNOTES

1. See [Takeovers Panel's proposed changes to frustrating actions policy provide helpful guidance to target boards](#) and Simon Haddy, '[Frustrating binds must be torn from the targets of takeovers](#)', The Australian, 25 July 2013.
2. [Takeovers Panel's proposed changes to frustrating actions policy provide helpful guidance to target boards](#).

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