

## Key Points

- The Takeovers Panel has published a rewrite of Guidance Note 12 on Frustrating Action
- The revised guidance provides clarity of when a frustrating action will or will not be unacceptable, giving greater certainty to target boards

## Background

The Panel's frustrating action policy in GN 12 sets out when the actions of target directors in contributing to a bid being withdrawn, lapsing or not proceeding (that is, "frustrating actions") may be unacceptable. The policy was first published in 2003 and has evolved through a number of iterations since.

The starting policy position in GN 12 is that it is target shareholders, rather than target boards, that should determine whether a bid succeeds or fails. While that position is consistent with takeovers principles, not all frustrating actions will be unacceptable and the policy should not unduly restrain targets from carrying on with business or pursuing alternative transactions during a bid period.

The Panel received feedback that there was a concern that the previous guidance may have had that effect on targets because:

- While providing a list of considerations the Panel had regard to, the policy did not adequately articulate the weight a sitting Panel would give to the considerations in a given case, creating uncertainty for target boards.
- There are circumstances in which a bid is structurally flawed or highly unlikely to succeed, however the frustrating action policy was not clearly disapplied in those circumstances.
- The increased complexity of bid conditions meant that (i) targets could be hampered in their day-to-day operations during a bid period and (ii) bidders were effectively given an option over whether to proceed with the bid whilst the frustrating action policy continued to apply.

The Panel has now published a revised GN 12 which seeks to address these concerns and provide greater clarity of when the actions of a target during a bid period may be unacceptable. In our view, the clarification provided in GN 12 appropriately re-balances the policy between bidders and targets.

## Overview of Revised Guidance Note 12

### Threshold Test: Does the Bid Provide a Genuine Opportunity for Target Shareholders to Sell Their Shares?

The revised guidance imports a threshold test that a bid must provide target shareholders with a genuine opportunity to dispose of their shares for the policy to apply.

If no genuine opportunity is available, a target will generally be free to get on with business as usual and pursue other actions without the risk of the Panel finding unacceptable circumstances under the frustrating action policy.

A bid will not provide a "genuine opportunity" if:

- The bid has a condition or structural or other feature which makes it incapable of being implemented or completed.
- There are reasonable grounds to conclude that the bid will not be successful.
- The bid is dependent on a target board recommendation which is not forthcoming (and the bidder has not reserved the right to bid without the recommendation).

This aspect of the policy recognises that targets should not be tied up when a bid cannot be implemented or is unlikely to be successful. That may have been the position adopted by sitting Panels (*Austock*, *Pinnacle 08*), but was less clear in the guidance note. Critics argued that this could have resulted in target directors shying away from alternative (and value-accretive) transactions in fear of a declaration of unacceptable circumstances.

The three limbs of "no genuine opportunity" import stringent tests and target boards should be cautious not to rely on them too hastily to disapply the frustrating action policy. A target will also generally be expected to provide the bidder with a reasonable opportunity to remedy the issue before proceeding with an alternative transaction that might constitute a frustrating action.

### Set of Circumstances in Which a Frustrating Action Is Unlikely to Be Unacceptable

The revised guidance specifies a set of circumstances in which a frustrating action is unlikely to give rise to unacceptable circumstances (even if the bid provides a genuine opportunity for target shareholders to dispose of their shares).

The circumstances are where:

- The frustrating action is announced before the bid or potential bid.
- There is a legal imperative for the frustrating action.
- The frustrating action is required to avoid a materially adverse financial consequence.
- It is unreasonable for the bidder to rely on the triggered condition (to claim an unacceptable frustrating action).
- A bidder unreasonably holds open a bid condition.

These circumstances existed only as factors the Panel would have regard to in the superseded guidance. We welcome the Panel stating a more definitive position that unacceptable circumstances are unlikely to arise in these limited circumstances.

## Considerations the Panel Will Have Regard to When Assessing Unacceptable Circumstances

In line with previous guidance, GN 12 contains a suite of considerations the Panel will have regard to when assessing whether a frustrating action may or may not be unacceptable. The Panel will need to turn to these considerations where the frustrating action does not fall within one of the “safe harbours” described above.

These considerations largely adopt the considerations from the previous guidance and include matters such as how long the bid has been open and its likelihood of success, whether the triggered condition is commercially critical to the bid and whether the action was undertaken in the ordinary course of business.

The Panel has dropped certain considerations from the previous guidance which it considers no longer advances the policy (for example, whether the frustrating action may have a materially positive impact on the target’s business).

### Put Up or Shut Up Rule – Notification to Bidder

An important aspect of GN 12 is the “put up or shut up” type rule. This “rule”, introduced by the Panel in previous iterations of the frustrating action policy and confirmed in the rewrite, says that in the context of a potential bid, the Panel will consider whether a bidder has failed to formally announce its bid after the target has given notice of its intention to undertake an alternative action. In effect, this gives some scope for targets to require a bidder to either announce its bid or forego the benefit of the frustrating action policy.

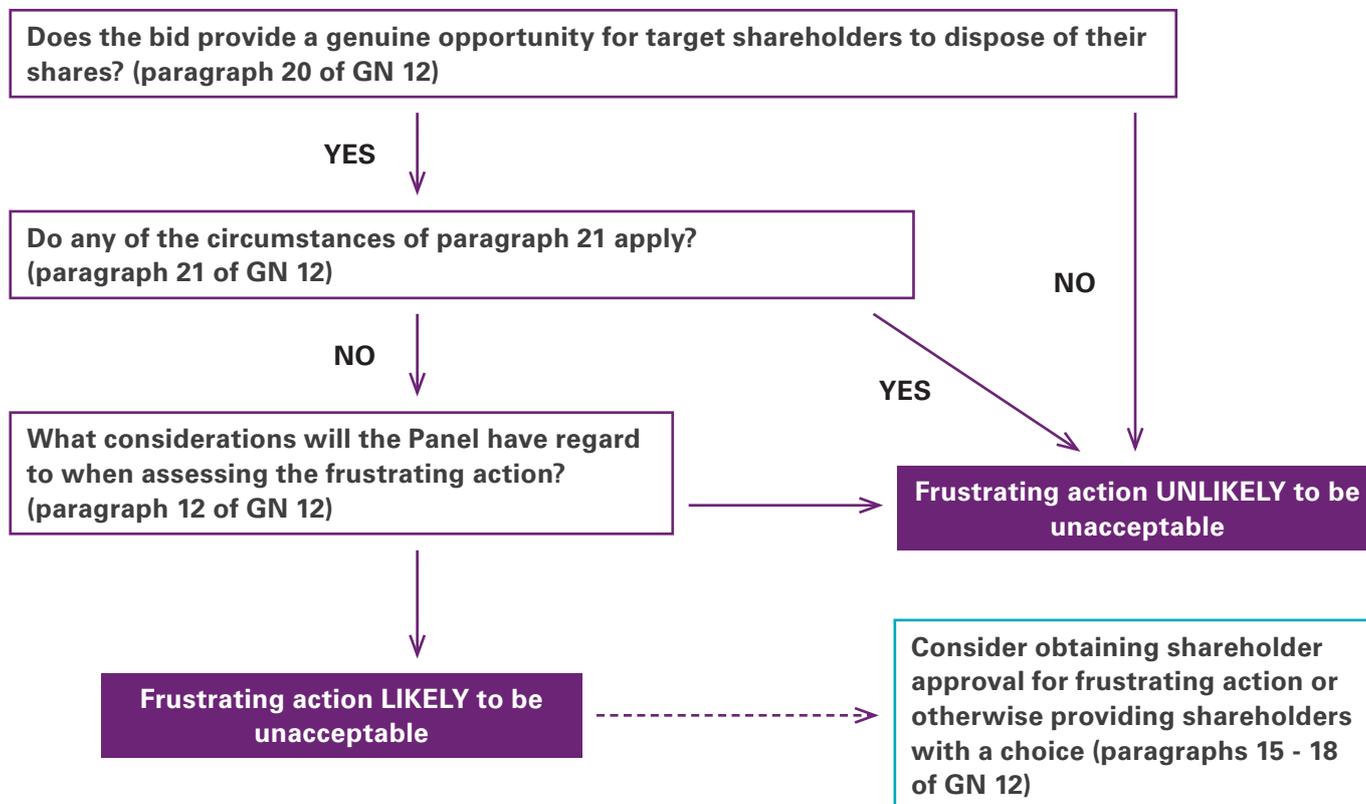
As the frustrating action policy applies to potential bids, this ensures that targets are not unduly and potentially indefinitely tied up if the bidder is not genuine.

A similar notice regime applies where a bid is not “genuinely available”, or where a bidder is unreasonably holding open a triggered condition – meaning the Panel would be less likely to consider a frustrating action to be unacceptable where the target has reasonably (but unsuccessfully) engaged with the bidder to address the issues with its bid before undertaking the frustrating action.

Importantly, a target cannot proceed with a proposed frustrating action until a reasonable time after requesting the bidder to formally announce the bid, or address the issues with the bid (as the case may be). This will allow the bidder the opportunity to either announce the bid or address the issues with its bid, or alternatively, consider taking proceedings in the Takeovers Panel to prevent the target proceeding with the proposed action.

### Navigating Guidance Note 12

While the revised GN 12 provides welcome clarity of the Panel’s approach to frustrating actions, whether or not a frustrating action is unacceptable is a complex issue and will depend on all of the circumstances. As a starting point the following flow chart may assist targets to navigate the policy when faced with a decision whether to undertake a frustrating action.



To discuss potential implications of the Panel’s revised frustrating action policy, please contact us.

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