Contents

Benefits given on **arm's-length commercial terms** are generally permissible, but will be scrutinised where they appear to **favour key shareholders or directors** during a control proposal.
In ***David Jones Ltd [2014] ATP 10***, the Panel examined alleged collateral benefits and emphasised that arrangements conferring selective value or advantage may breach both **s 623** and directors' **proper purpose** obligations, even if they are dressed as commercial transactions.

B. Defensive Measures

Defence measures are aimed at maximising the price achieved for shareholders.

1. **Long-Term Defence Strategies**:
    - **Amending the constitution** (generally ineffective for ASX-listed entities).
    - **Poison Pills:** Measures designed to make the company less attractive upon hostile takeover (e.g., triggering the loss of a key asset). US-style share rights poison pills are generally considered a breach of directors' duties in Australia.
    - **Tactical share issues:** Issuing shares to a friendly party that will be supportive.
2. **Defence Tactics (Specific Responses) (GN 12)**:
    - **Criticism of the bid/bidder:** Publicly rejecting the bid as "too low" and providing substantive reasons (e.g., superior comparable valuations or future prospects).
    - **Legal action:** Applying to the Takeovers Panel to restrain or challenge the bid (Panel prioritises speedy resolution).
    - **Encourage rival bidders ("White Knights"):** Approaching competitors to initiate a bidding war, seen as the most effective way to drive up the price.
    - **Internal restructure or alternative transactions:** Proposing special dividends, demergers, or joint ventures to demonstrate higher shareholder value than the current bid.

C. Regulatory Constraints on Defence

1. **Frustrating Action (Takeovers Panel Guidance Note 12):** Action taken by directors that triggers a bid condition and is likely to defeat a bid must be put to shareholders for approval. Examples include acquiring or disposing of a major asset, or issuing new shares (e.g., *MacarthurCook*).
2. **Lock-Up Devices (Takeovers Panel Guidance Note 7):** Rules govern contractual arrangements (e.g., break fees, exclusivity, no-shop/no-talk clauses) designed to provide security to the first bidder.

Seminar 5 Bidder and target strategy, Compulsory acquisition, Substantial holding notices, Regulators

Takeover Defence Strategy

Frustrating Action

Under the Frustrating Action Policy, action taken by directors that triggers a bid condition and is likely to defeat a bid must be put to shareholders for approval. Examples include acquiring or disposing of a major asset or issuing new shares (GN 12; MacarthurCook).

- **Takeovers Panel Guidance Note 12**:
    - This guidance note (reissued Dec 2016) departs from the traditional approach of courts regarding director decisions.
    - It states that **shareholders should decide on actions** that:
        - **Interfere with reasonable and equal opportunity** for shareholders to participate in the benefits of a takeover proposal.
        - **Inhibit the acquisition of control** in an efficient, competitive, and informed market.
    - E.g. if the directors are trying to issue new shares, the takeover panel requires shareholder approval. The main objective here is to protect shareholders, even though this is not exactly the black letter of the law.
        - Some critics argue that the panel should not be interfering with directors duties.
- **Examples of Frustrating Action**:
    - Issuing **new shares** or convertible securities.
    - **Acquiring or disposing of a major asset**.
    - **Incurring significant new liabilities** (e.g., new investments).
    - **Declaring a special dividend**.
- **Policy Flexibility**:
    - The Panel's policy allows for flexibility, meaning some actions that appear frustrating might be permissible depending on the circumstances, such as:
        - The **takeover's chance of success** (market price vs. bid price).
        - **How long the bid has been open**.
        - Whether **shareholders have already rejected the bid**.
        - The **nature of the bid condition** (e.g., too restrictive, commercially critical, reasonable for the bidder to rely on).

- Any **legal or commercial imperative** for the frustrating action.
- How the target came to take the action, and if negotiations were advanced.

Case Examples

MacarthurCook Limited [2008] ATP 20	**Facts** In MacarthurCook, the target company's board entered into arrangements that involved issuing new shares and structuring a transaction which would have impacted the prospects of a takeover bid by AMP Limited. The Panel considered whether the board's actions constituted frustrating action. **Key point** The Panel held that the policy on frustrating action could apply to *potential bids*, not only actual takeover bids. The board's share issue that impacted bid conditions was a relevant action. **Holding / Outcome** While the Panel did not necessarily order unwinding in this particular case, MacarthurCook is often cited for the proposition that a target may need to seek shareholder approval for actions that may affect control outcomes when a potential bid is on foot. **Significance for rule statement** Illustrates that even before a formal bid is launched (i.e., a "potential bid"), target actions may be scrutinised for frustrating effect. It emphasises the shareholder-approval safeguard (rather than unilateral board action) when control may shift.
Perilya (2009)	**Facts** CBH Resources Limited had made a takeover bid for Perilya. Meanwhile Perilya entered into a share placement and a call-option over a major asset (Mt Oxide) with another party (Shenzhen Zhongjin Lingnan). The combination of these transactions was alleged to frustrate CBH's bid. **Key point** The Panel accepted that the target's entry into a placement and call option (without sufficient shareholder approval) could amount to a frustrating action because it undermined an alternative bid, impacted shareholder choice and gave less information to shareholders. **Holding / Outcome** However, the Panel declined to conduct full proceedings, as it was not satisfied there was a *reasonable prospect* of a declaration of unacceptable circumstances. The fact that shareholder approval was required for the placement weighed in favour of the board's action. **Significance for rule statement** This case emphasises that the target's business urgency (risk of insolvency) may afford a defence or mitigate a finding of unacceptable circumstances (see GN12 para 21(c) for material adverse financial consequence). Also demonstrates that shareholder approval is a key mitigating factor for controversial target actions.
Transurban Group [2010] ATP 5	A consortium (CP2) proposed to acquire control of Transurban. Transurban announced a 1-for-11 rights issue and acquisition of a toll-road asset (Lane Cove Tunnel). The rights issue was alleged to be a frustrating action because it would dilute the consortium's possible shareholding and impede their proposal. **Key point** The Panel found the consortium's proposals were schemes of arrangement (rather than a takeover bid) and not genuine potential bids for the purposes of GN12. The rights issue did not materially affect control. Therefore, no declaration of unacceptable circumstances. **Holding / Outcome** The Panel declined to proceed with a hearing. It held that because the rights issue was pro rata, open to all shareholders, and did not involve dilution of control beyond what is typical, it did *not* constitute frustrating action. **Significance for rule statement** This case illustrates limits of the frustrating-action doctrine: not every neutral capital raising is prohibited; the target's action must actually impair the ability of shareholders to decide on control, or materially affect control in a way that undermines the takeover policy objectives.

Determination — Unacceptable Circumstances

If the Panel finds that the action **frustrated** a genuine bid or potential bid **without shareholder approval**, it can declare **unacceptable circumstances**.
Key factors considered (GN 12 [12]):

- Was the bid genuine and commercially viable?
- Was the target's action within the ordinary course of business?
- Did the target seek shareholder approval or offer shareholders a choice?
- Was the action necessary (e.g. to avoid insolvency)?
- How advanced was the bid when the target acted?

Consequences / Remedies (s 657D)

If the Panel declares unacceptable circumstances, it can make **broad remedial orders**, including:

- **Preventing the action or transaction from proceeding**;
- **Requiring the target to seek shareholder approval** for the action;

- **Unwinding** a transaction already entered into; or
- **Reinstating bid conditions or extending bid timelines**.

(GN 12 [22]; Corporations Act s 657D)

Bidder Strategy During the Bid

Bidders employ various strategies to encourage shareholders to accept their offer and achieve their desired level of control.

- **Creating Momentum and Encouraging Acceptances**:
  - Sophisticated shareholders may not accept a conditional bid quickly. Bidders can create momentum by:
    - **Improving the terms of the bid**, such as by **increasing the price**.
    - **Freeing the bid from conditions** – making an 'unconditional bid' – removes friction between the bid and the payment being received.
    - **Declaring the bid "final" or the offer price "best and final"** (though this must be absolutely final due to the "Truth in Takeovers" policy).
    - **Speeding up payment** (e.g., reducing the payment time from one month to seven days).
- **Shareholder Communications**:
  - Bidders may **negotiate with key shareholders**, send **mail-outs**, and make **announcements**.
  - **Truth in Takeovers policy** (ASIC Regulatory Guide 25) aims to prevent **misleading statements** and ensure **market integrity**. This policy has been applied in cases like *Rinker Group*, *Qantas Airways*, and *Ludowici*.
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Case Examples

Case	Facts / Background	Issue	Regulatory / Panel Finding	Outcome / Principle	Key Takeaway for Bidder Strategy
Rinker Group Ltd (2007)	CEMEX (Mexican company) made a hostile takeover bid for Rinker. CEMEX made a **"last and final statement"** declaring its offer was **final and would not be increased**. Shortly after, Rinker declared a **dividend**. CEMEX did **not lower its offer price** to account for the dividend, effectively **increasing the bid's value**.	Whether CEMEX's conduct breached the **Truth in Takeovers policy** (RG 25) by indirectly increasing its bid after making a "final" statement.	ASIC held that the **"last and final" statement** created a **binding market expectation** under RG 25. Even though the increase was indirect, it breached the policy. ASIC intervened and required **arbitration procedures** to compensate shareholders who **sold in reliance** on the final statement.	Once a bidder makes a **"last and final"** statement, it must strictly adhere to it — any change in value or terms (even indirectly, e.g. not adjusting for a dividend) may breach the policy.	A bidder should **reserve flexibility** in wording (e.g. "no intention to increase but reserves the right if circumstances change"). Otherwise, they are legally bound to the statement and risk compensation orders.
Qantas Airways Ltd (2007)	A private equity consortium (Airline Partners Australia) made a **takeover bid for Qantas** at $5.45 per share. They declared it their **"last and final offer"**, stating they'd waive the **90% minimum acceptance condition** if they reached **70%**. They reached only ~46%, partly due to time zone issues and late hedge fund acceptances.	Whether the bidder could lawfully **extend or waive conditions** after declaring the bid final; whether shareholders were misled about timing and finality.	The **bid closed** without reaching the threshold. ASIC and the Panel found **no breach** — the finality statement was honoured; late acceptances were properly excluded. However, the case exposed **practical timing risks** when final statements are made early.	Once a "final" statement is made, the bidder **cannot change or extend** conditions after the closing date without breaching RG 25.	Bidders should avoid premature "final" declarations — it limits flexibility and can doom an otherwise viable offer. Timing and communication precision are critical.
Ludowici Ltd (2012)	Danish company **FLSmidth** made a bid for Ludowici and its CEO told media that the **bid price would not be increased**. Shortly after, a **competing bidder (Weir Group)** offered more. FLSmidth then **increased its bid by 10%**.	Whether this breached the **Truth in Takeovers policy** by going back on a "final" public statement.	The **Takeovers Panel** found that FLSmidth's conduct **breached RG 25**. Shareholders had relied on the "final" statement and sold shares prematurely. The Panel ordered	A "last and final" statement is **binding** — bidders cannot later raise their offer unless they clearly reserve the right to do so.	Bidders must **avoid absolute language** in media or ASX announcements ("final", "best and last") unless they intend to be bound. ASIC treats these statements as market representations with legal consequences.