UNACCEPTABLE CIRCUMSTANCES IN TAKEOVERS

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INTRODUCTION

Takeovers and mergers are an integral part of the operation of equity markets. Both have a profound impact on the interests of shareholders and society in general. A number of reasons have been offered for takeovers. One of the reasons is that takeovers serve a corporate governance function. An active market for corporate control is said to discipline a company's board and officers to run the business so as to maximise the company's value. A detailed discussion on the rationales for takeovers is, however, outside the scope of this paper.

It is worth noting that where the board of the target faces a material conflict of interest in takeovers, it raises the concern because the board of the target may adopt defensive tactics to avoid being ousted. The board of the target should not apply defences that protect management at the expense of shareholders. Due to this reason, takeovers law does not only regulate takeover activities but it also focuses on the aspect of governance to ensure that the board of the target does not abuse its power. This will in turn ensure that the interest of shareholders, especially the minority, in circumstances where the control of a company is likely to change, is protected. This will indirectly protect the integrity of the securities markets with a view to maintaining investor confidence in the capital market. Section 217(5) of the Capital Market Services Act 2007 lays down the foundation of the Malaysian takeovers law. As a general rule, directors are tied up with the fiduciary duties they owe to a company. In addition to the fiduciary duties provided for in the Companies Act 1965, the Malaysian Code on Take-Overs and Mergers 1998 ('the Code') prevents the board of the target company from taking action which would have the effect of frustrating a takeover bid. It prohibits the board of the target from taking such

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actions, whether during the course of an offer or even before the date of the offer if they have reason to believe that a bona fide offer might be imminent, unless they have obtained their shareholders' approval.[1]

This paper seeks to examine in detail the conduct of the board of the target which may amount to frustration of a takeover bid in Malaysia. Further, this paper will examine the various conducts which may constitute unacceptable circumstances in takeovers. In order to shed some light upon the discussion, the Australian experience on frustration and unacceptable circumstances will be referred to. This paper will also discuss the emerging devices in takeovers and mergers deal which are currently gaining popularity in Malaysia and examine on whether such devices will amount to a frustrating action. The discussion thus will focus on deal protection measures which will include lock-up devices and break fees agreement.

THE FOUNDATION OF MALAYSIAN TAKEOVERS LAW

Section 217(5) of the Capital Market and Services Act 2007 requires that the change of control in the company shall take place in an efficient, competitive and informed market and that shareholders have a reasonable and equal opportunity to participate in any benefits available under a takeover offer. This provision resembles s 602(a), (b) and (c) of the Australian Corporations Act 2001 ('the Corporation Act'). The origin of s 602 can be traced to the recommendation made by the Eggleston Committee. In 1967, the Standing Committee of the Attorney General in Australia appointed a law advisory committee on company law chaired by Sir Richard Eggleston. The committee was given a mandate to inquire into and report on the extent of the protection afforded to the investing public.[2] The Eggleston Committee's Second Interim Report identified four principles that came to be known in Australia as the Eggleston principles which have been incorporated into the Australian takeover law.[3] In Australia, there has been some criticism of the Eggleston principles. Tony Greenwood observed that the Eggleston principles 'were the product of application of Sir Richard

1 Section 35 of the Code.
2 Cited in *Ford's Company Law*, (2003), Butterworths: Sydney, (11th Ed) at para 2.1.0105.
3 They are:
(1) that the bidder's identity to be known to the shareholders and directors;
(2) that the shareholders and directors have a reasonable time in which to consider the proposal;

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Eggleston's equity jurisprudence rather than of the economic analysis of law which has since become fashionable'.[4] Greenwood further added that the requirement in the Australian takeover law of an 'efficient, competitive and informed market' was in fact the contribution of Mr Leigh Masel, at the time chairman elect of the Australian National Companies and Securities Commission ('NCSC').[5] 'Efficient, competitive and informed market' means the market must operate efficiently without unnecessary costs, have sufficient access to players and parties should have information.[6] Justin Mannolini, for instance observed that it is difficult to rationalise the Eggleston principles in terms of economic efficiency.[7] He is of the view that the Eggleston principles epitomise the Australian cultural imperative of a 'fair go for all' and represent 'a uniquely Australian attempt to address innovations in takeover practice at the unacceptable end of the creative spectrum'.[8]

FRUSTRATION OF A TAKEOVER BID

As a general rule, the board of the target may defend the company against a takeover. However, they may only do so within their general duties as directors and exercise their power in the best interest of the company. The issue on whether the board can resort to a variety of defences in the face of a takeover have led to debates. In the United States of America ('US'), there has been a vigorous debate since 1980s in relation to hostile takeovers.[9] A leading American business writer, Peter Drucker argued that hostile takeovers are bad for the economy

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3 (3) that the offeror is required to give such information as is necessary to enable shareholders to form a judgment on the merits of the proposal and, in particular, where the offeror offers shares or interest in a corporation, that the kind of information which would ordinarily be provided in the prospectuses be furnished to the offeree shareholders; and
(4) that so far as is practicable, each shareholder should have an equal opportunity to participate in the benefits offered.

4 Greenwood, Tony, *In addition to Justin Mannolini* (2000) 11 AJCL 308 at p 310.

5 *Ibid*.

6 Sheehy, Benedict, *Australia's Eggleston Principles in Takeover Law: Social and Economic Sense?* (2004) 17 AJCL 218 at p 219.

7 Mannolini, Justin, *Convergence or Divergence: Is there a Role for the Eggleston Principles in a Global M & A Environment?* (2002) 24 Sydney Law Review 336 at p 338.

8 *Ibid.*

9 See Tomasic, Roman, et al, (2002), *Corporations Law in Australia,* (2nd Ed), The Federation Press: Sydney.

as they force management into operating with short term horizons in terms of their financial results.[10] Takeover defences became the reaction of target managements that viewed the hostile takeovers as splitting up healthy companies that have been in business for ages and cheating the current shareholders of the real value of their share in the company. Apart from that, the board of the target have a degree of freedom to take action in response to a hostile bid which is designed, in their view, to maximise value for shareholders. This includes actions designed to encourage auctions for shares in the target even if those actions frustrates the hostile bidder's intention.[11]

WHAT ARE FRUSTRATING ACTIONS AND UNACCEPTABLE CIRCUMSTANCES IN MALAYSIA?

The law restricts the actions which target directors can take in response to a takeover bid. As mentioned earlier, directors owe fiduciary duties to the company. In Malaysia, in addition to their fiduciary duties imposed upon them by the Companies Act 1965, directors involved in a takeover are subject to duties imposed by the Code. The Code restricts the ability of the target directors to take measures which may frustrate an offer once a bona fide offer has been received or becomes imminent. This reflects the view that in Malaysia, the outcome of a takeover offer should be left to the shareholders to decide upon.

There are a number of conducts by the board of the target which may give rise to frustrating actions. A frustrating action occurs when an action by the board of the target results in the takeover bid to be withdrawn or lapsed. Those circumstances are spelt out in s 35 of the Code.[12] Section 35 of the Code finds its origin from r 21.1 of the

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10 Drucker PF, *The Hostile Takeover and Its Discontents*, The Frontier of Management at p 694 cited in Roman Tomasic, et al, *Corporations Law in Australia* at p 650.

11 See for example, www.aar.com.au/July/Aug issue 2002.

12 Section 35 provides that except in pursuance of a contract already entered into, the board of the target may not:
(a) issue any authorised but unissued shares of the offeree;
(b) issue or grant options in respect of any unissued shares of the offeree;
(c) create or issue or permit the creation or subscription of any shares of the offeree;
(d) sell, dispose of or acquire or agree to sell, dispose of or to acquire assets of the offeree of a material amount; or
(e) enter into or allow any contracts for or on behalf of the offeree to be entered into otherwise than in the ordinary course of business of the offeree.

English Takeover Code. Looking at s 35, it can be observed that any act by the board of the target may amount to frustration if the end result would amount to diluting the shareholding of the bidder, making it difficult and more expensive for the bidder to obtain control of the target company. The board of the target is also refrained from disposing any assets of a material amount or the 'crown jewel' of the target and from acquiring any assets of a material amount.[13] In these situations, the general approach of the courts has been to look at the purpose of the action taken by the board of the target. It would naturally have been impossible to enumerate all frustrating actions; thus, s 35 is complemented by a general prohibition which prohibits directors from carrying out or arranging any transaction other than in the ordinary course of business of the target company. The board however, is allowed to engage in any action which is required to be carried out by an agreement that was entered into prior to the bid and which is not designed to frustrate the takeover offer or change the activity of the target.[14] Where the action of the board of the target falls under some other obligation, the commission must be informed and a written approval from the commission may be obtained.[15] Similarly, the commission may approve any action by the board of the target which in its view falls under special circumstances.[16] When considering whether any action by the board of the target amounts to frustration of a bid, the commission will consider whether such action is acceptable to the bidder.[17] Thus, although an action by the board of the target does not specifically fall under s 35(1), a bidder may still write to the commission if the act by the board of the target is perceived to be unacceptable.

It is equally important to note that in order to achieve the objective of the takeovers law and preserve its spirit, the Code also prevents the bidder from imposing any defeating condition in its

13 In determining whether a disposal or acquisition is of a 'material amount' regard will be given to the ratio of the transaction consideration to the market value of the equity shares of the target, the ratio of the relevant assets to the total assets of the target and the ratio of the operating profit attributable to the relevant assets to the operating profit of the target. If any of these relative values are 10% or more, the Securities Commission will consider the amount to be 'material'.

14 Section 35(2) of the Code.

15 Section 35(2) of the Code.

16 *Ibid*.

17 Malaysian Code on Take-Overs and Mergers Practice Note 8.1, s 35(6).

takeover offer, the success of which lies in the sole control of the bidder.[18] It can be observed that based on the foundation of the Malaysian takeover law, the conduct of the board of the target and the bidder may violate the spirit of the law in the following circumstances.[19]

Where an efficient, competitive and informed market in the securities is inhibited

An informed market is one of the primary goals of any takeover regulation. Proper disclosure is a cornerstone of a fair and efficient market, as both depend upon investors' ability to make informed decisions. A false market, a deficiency of information or the premature lock out of rival bids would often lead to unacceptable circumstances. Competition or an auction for control should, however be viewed as desirable on the basis that the highest bidder is assumed to be able to use the target's assets most efficiently.

Where there is misinformation

Where holders do not have the information necessary to make an informed decision or are misled about the transaction, unacceptable circumstances occur. Lack of information and misleading information will harm the holders of securities. Thus, the absence of particular issues relating to disclosure of the identity of parties concerning their interests in a company or any misleading information may result in unacceptable circumstances. This will cover situations relating to the intentions of the bidder concerning the future relations between the target and the current shareholders. It is worth noting that the reuse of reports obtained for a different purpose can also lead to misinformation if it is not clear on who was responsible for the report and to whom the report had intended to advice.

Where reasonable and equal opportunities are inhibited

Where holders of voting shares do not have reasonable and equal opportunities to participate in the benefits accruing to holders of

18 Section 18 of the Code.

19 A similar classification in relation to types of unacceptable circumstances is discussed in *Guidance Note 1: Unacceptable Circumstances*, Takeovers Panel, 4th Issue, 18 April 2008.

shares in the target company, it results in unacceptable circumstances. The holders of the securities should be allowed an adequate time to consider, sell or vote in relation to the takeover bid. Further, the shareholders should get equal value in relation to the price of securities. Relying on this principle, conduct by the directors of a target that frustrates a bid can deprive target shareholders of an opportunity to share in the benefits of that bid. Shareholders of a company may also be deprived of an equal opportunity if securities in a target are acquired by an associate of the target or its directors as part of a defence to a takeover bid.

ACTIONS BY DIRECTORS TO FRUSTRATE A TAKEOVER BID: A PROPER PURPOSE

In addition to the board's duty to exercise powers in the best interests of the company, it is equally important for the board to exercise power for proper purpose. When dealing with the issuance of new shares, it is important to see whether such action will frustrate a takeover bid. In *Hogg v Cramphorn Ltd and others*,[20] the board of the target placed a large block of stock in a trust fund established for the benefit of the company's employees. Despite the fact that the court accepted that the board of the target had no unworthy motives and was acting on an honest belief that the scheme was for the interest of the company, the court found the act to constitute an improper purpose given that the purpose of the placement of the shares was to block potential bidders. In *Howard Smith Ltd v Ampol Petroleum Ltd and others*,[21] where the company issued shares which had the effect of diluting the majority stake held by two of the company's shareholders to remove their majority in an attempt to block a bid for the company by a third party, the court held that the issue was not for a proper purpose. The decisions show that an issue of shares by the directors with the primary purpose of frustrating a bid will be an improper exercise of their powers even if the company requires capital as a secondary purpose.

THE AUSTRALIAN EXPERIENCE

In Australia, the Takeovers Panel ('the panel') is empowered by s 657A of the Australian Corporations Act 2001 to declare

20 [1966] 3 All ER 420 (Ch D).
21 [1974] AC 821 (PC).

circumstances to be unacceptable. It is worth noting that s 657A was proposed in view of s 659AA which was designed to make the panel to be the main forum for resolving disputes about a takeover bid. Frustration of the bid may give rise to unacceptable circumstances if the particular circumstances offend against the principle set out in ss 602 and 657A of the Corporations Act 2001, even if it is otherwise legal or required for the proper performance of the directors' duties.[22] In such a case, the panel may prevent the target from proceeding with the frustrating action, unless it has first been approved at a general meeting of target shareholders, or the target has taken some action to avoid the action from being unacceptable.[23]

In formulating its approach, the panel has sought not to be prescriptive. Rather, it seeks to provide the market with guidance as to relevant consideration the panel will take into account when assessing whether triggering action by the target gives rise to actual or potential unacceptable circumstances.[24] Section 602 sets out the foundation and purposes of Chapter 6 which relates to takeovers. The panel's power to declare circumstances to be unacceptable is also very wide and does not require it to decide that anyone had caused the relevant circumstances or carries any blame for them.[25] A state of affairs may be unacceptable due to inadvertence, despite the best of intentions.[26]

What are unacceptable circumstances?

There is no definition for unacceptable circumstances in the Australian Corporations Act 2001. Whether the action gives rise to

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22 *Frustrating Action Guidance Note: Draft for Public Comment*, Takeovers Panel, 31 May 2002 at p 1. It is worth noting that in 2001, the panel came up with a new rule in relation to conduct by the board which may have a significant effect on the conduct of a target's business once a bid is announced. See also Armson, Emma, *The Frustrating Action Policy: Shifting Power in A Takeover Context*, (2003) Company and Securities Law Journal, Vol 21 at p 487; Ian Ramsay et al, *Corporate Governance and Anti-Takeover Devices: Evidence from Australia* (2000), Corporate Governance: An International Review, Vol 8, Issue 3 at pp 227–243.

23 *Ibid*.

24 *Ibid*.

25 *Guidance Note 1: Unacceptable Circumstances*, Australian Government, Takeovers Panel.

26 *Ibid*.

unacceptable circumstances will depend on its effect on shareholders and the market in the light of s 602(a), (b) and (c) and s 657A. Section 602(a) requires that acquisition of control shall take place in an efficient, competitive and informed market. Section 602(b) on the other hand incorporates the Eggleston principles with minor modifications to include holders of 'interests' and not just shareholders.[27] Section 602(c) also incorporates the Eggleston principles which requires that the holders of the voting shares should receive reasonable and equal opportunity to participate in any benefits following a takeover offer. Section 602(d) is an additional principle added to s 602 which requires the compliance with an appropriate procedure as a preliminary to compulsory acquisition. Further, when making a declaration of unacceptable circumstances, s 657A(2) requires the panel to consider whether making the declaration is not against the public interests after taking into account any policy considerations that the panel considers relevant. To summarise, the panel's role in declaring circumstances unacceptable applies to a situation where the spirit of Chapter 6 is breached.

It is worth noting that the panel may declare the circumstances to be unacceptable whether or not the circumstances constitute a contravention of a provision of the Act.[28] Section 657A requires the panel to consider the effect of the circumstances and whether the effect appears to the panel to be unacceptable having regard to the control or potential control of a company,[29] or having regard to the acquisition or proposed acquisition of a substantial interest in a company.[30]

Examples of unacceptable circumstances in Australia

In 2002, the Takeovers Panel issued a Guidance Note to explain the possible circumstances which amount to unacceptable circumstances.

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27 Section 602(b) reads 'the holders of the shares or interests, and the directors of the company or body or the responsible entity for the scheme:
 (i) know the identity of any person who proposes to acquire a substantial interests in the company, body or scheme; and
 (ii) have a reasonable time to consider the proposal; and
 (iii) are given enough information to enable them to assess the merits of the proposal. ...'

28 Section 657A(1) of the Corporations Act 2001.

29 Section 657A(2)(a)(i) of the Corporations Act 2001.

30 Section 657A(2)(a)(ii) of the Corporations Act 2001.

The circumstances include the issuing of new shares or repurchasing shares, if significant in the context of the target's issued capital and the structure of the bid and the issuing of securities convertible into bid class securities or options over bid class securities. It also includes the acquisition or disposition of a major asset of the target. Obviously, these actions will dilute the shareholding of the bidder, making it difficult for the bidder to acquire control in the target and causing the target to lose its crown jewel or attractiveness. Further, unacceptable circumstances occur where the target undertakes significant liabilities (eg guaranteeing parent company debt) or declares a special or abnormally large dividend. The same occurs where the company changes its share plan.[31] The board of the target will not give rise to unacceptable circumstances by undertaking a triggering action that is part of the ordinary course of its business or by carrying out agreements which were entered into or announced before the bid was made known to the company.

EMERGING DEVICES GIVING RISE TO UNACCEPTABLE CIRCUMSTANCES

Presently, there are new devices that have been introduced into a merger and takeover deal which are known as 'deal protection' measures.[32] The protection measures include lock-up devices and break fees. It is important to examine whether the usage of these devices will amount to unacceptable circumstances. In Australia, Guidance Note 7 provides guidance when dealing with key deal protection measures which include break fees, asset lock-ups, no-talk agreements and no-shop agreements.[33] The panel states that it does not regard lock-up devices to be prima facie unacceptable. However, they may be unacceptable if they prevent the acquisition of control taking place in an efficient, competitive and informed market or if they result in shareholders not having reasonable and equal opportunity to participate in the benefits resulting from the proposed bid.

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31 *Frustrating Action Guidance Note: Draft for Public Comment*, Takeovers Panel, 31 May 2002 at p 8.

32 The latest incidence reported in Malaysia on lock-up devices concerns Hong Leong Bank and EonCap proposed takeover.

33 *Guidance Note 7: Lock-up devices*, Australia Government, Takeovers Panel.

Lock-up devices

A lock-up is an arrangement or transaction by which the target corporation gives one proposed acquirer a competitive advantage over other bidders or prospective bidders.[34] Usually, a potential bidder will include in a confidentiality agreement certain clauses designed to limit the potential for competing bids to emerge. These clauses reduce the bidder's risk that the target will not complete the control transaction.[35] They may help secure a proposal by protecting against opportunity and expended costs that would not be recoverable if the transaction becomes unsuccessful.[36] However, these protection measures may deter rival bidders as it would discourage a target from seeking or accepting alternative bids, resulting in less auction occurring in takeover activities. Whether any lock-up device gives rise to unacceptable circumstances in Australia will depend on its effect or likely effect.[37] Lock-up devices may amount to frustration if it offends ss 602 and 657A. The panel in Australia requires immediate disclosure of the existence and nature of any lock-up device. Apart from disclosure made to the stock exchange, the existence and nature of the break fee should also be disclosed in the bidder's statement or the offer document and the target's statement. It is worth noting, however that in the US, lock-up devices are used widely and play a major role in the US acquisition deal.

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34 See *Note: Lock-up options: Toward a State Law Standard*, 96 Harv Law Review 1068.

35 Consultation Paper, *Rewrite of: GN 7 Lock-up devices, GN 12 Frustrating action, GN 14 Funding arrangements and GN 17 Rights Issues*, Australia Government, Takeovers Panel, 13 May 2009 at p 6.

36 *Guidance Note 7, Lock-up devices*, Australia Government, Takeovers Panel at p 3.

37 Guidance Note 7 on lock-up arrangement applies to any control transaction.The relevant factors which the panel may consider include:

(a) the stage the transaction had reached when the device was negotiated;

(b) whether other interests had been canvassed;

(c) the bargaining power of each party;

(d) the size and complexity of the transaction;

(e) the likely (opportunity and expended) costs involved; and

(f) ancillary provisions in the agreement.

Asset lock-up

An asset lock-up involves the grant of an option to a potential bidder to buy a major asset of the target company. This arrangement will make the target company unattractive to the bidder. If an asset lock-up inhibits the principle of an efficient, competitive and informed market, it is likely to be unacceptable.[38]

Break fees or inducement fees

A break fee or an inducement fee may be viewed as an option fee paid to secure a proposal for a target to consider. The inducement fee arrangements may sometimes be reciprocal. The terms of the inducement fee will specify the circumstances in which the fee will be payable. Most commonly, the inducement fee will be payable by the target company in the context of a competing bid. It will be a matter for negotiation whether an announcement of the competing proposal is sufficient to trigger payment of the break fee, such as a change in the target board's recommendation or a breach of a non-solicitation obligation. It is worth noting that the target's shareholders may be critical of a break fee which is payable by the target company if an offer fails in the absence of a competing proposal or any breach of undertaking by the directors of the target company. Break fee agreements have traditionally been entered into immediately prior to the takeover being agreed and announced. However, break fees are now entered into at an earlier stage in the process to compensate a thwarted bidder for its wasted costs if it does not get to the offer stage. A conventional announcement stage break fee will be payable if the potential bidder does not announce an offer because the target board refuses to recommend it or decides to recommend a third party offer. The revised Guidance Note 7

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38 *Guidance Note 7, Lock-up devices*, Australia Government, the Takeovers Panel provides that in considering whether an asset lock-up gives rise to unacceptable circumstances, the panel may consider the following:
(a) the commercial reason for it;
(b) the size or strategic value of the asset involved;
(c) whether the agreement was negotiated on an arms-length basis;
(d) the safeguards in place;
(e) whether the agreement was at a fair price;
(f) its effect on the amount of, or distribution of benefits to, shareholders in the target in connection with the takeover; and
(g) the timing of entry into the agreement and the lengths of the lock-up.

provides that break fees be capped at the equivalent to 1% of the equity value of a deal. It is also worth noting that before entering into a break fee agreement, the board of the target may need to obtain an independent valuation advice. Generally, in considering whether a frustrating action gives rise to unacceptable circumstances, the panel will take into consideration certain considerations surrounding the bid and those surrounding the frustrating actions.[39]

CONCLUSION

The Malaysian takeovers and mergers law are found in policies which focus on an efficient, competitive and informed market. The law also confers the right upon shareholders to have a reasonable and equal opportunity to participate in any benefits which may accrue under the takeover. Therefore, the board of the target cannot simply act to defeat or delay a takeover bid. Thus, it is very important for the law to preserve a balance between the duty of directors to carry out transactions in the interests of the company on the one hand and the right of shareholders not to have the bid unnecessarily frustrated. In Australia, the panel can declare circumstances unacceptable where the transaction during the course of a takeover would be one which is designed primarily to frustrate a takeover bid or contravene the spirit of takeovers law. The Malaysian law on the other hand, identifies

39 Considerations surrounding the bid will include:

(a) how long the bid has been open and its likelihood of success;

(b) any clearly stated objectives of the bidder and whether the condition is commercially critical to the bid;

(c) whether it is 'unreasonable' for the bidder to rely on the condition before the panel;

(d) whether the bidder can waive the condition; and

(e) the market price compared to the bid price.

On the other hand, considerations surrounding the frustrating actions, among others, include:

(a) whether there is a competing proposal already;

(b) whether the frustrating action was undertaken by the target in the ordinary course of its business;

(c) whether the frustrating action materially affects the financial or business position of the target; and

(d) how advanced the negotiations on the frustrating action were when the bid was made or communicated.

the transactions that cannot be carried out without the shareholders' approval once the takeover bid becomes imminent or during the bid period. Despite the different approaches adopted in Malaysia and in Australia, it is observed that both approaches would bring the same outcome. It will allow a balance between the ability of directors to pursue transactions to maximise the interests of the company and the right of the shareholders to be able to consider the takeover bid. Since Malaysia applies a restrictive approach, ie by laying down the list of actions which the board of the target should refrain from doing, it is worth noting that any action by the board of the target which goes beyond the list may amount to frustration and circumstances unacceptable to the bidder where the spirit of the law is violated. It is also worth noting that in Malaysia, the commission has the power under s 217(5) of the Capital Market Services Act 2007 which allows it to act more quickly to intervene any act which may give rise to a frustrating action following its role of administering, monitoring compliance and enforcing the rule contained in the Code and the spirit of the takeover law.

When dealing with competing bids, which especially involves a hostile bid, the target directors' action will generally be acceptable where they effectively give shareholders the choice between competing proposals. As regard to the emerging device in takeovers, it must be noted that the deal protection measures should not frustrate the bid. In relation to break fee agreements, they should be permitted only where they are designed to maximise shareholders' wealth but not otherwise. Policy makers should adopt shareholders' welfare enhancement as the criterion for developing the applicable rules in this area.