



Australian Government
Takeovers Panel

Guidance Note 13 – Broker handling fees

Introduction.....	1
Excessive fees	2
Availability of fees.....	3
Terms	4
Disclosure of the fees.....	4
Remedies.....	5
Publication History	5
Related material	6

Application following the Future of Financial Advice Reforms

Broker handling fees appear to fall under the definition of ‘conflicted remuneration’ and are prohibited under Chapter 7¹ unless an exception applies (see TP16/12).² Market participants considering offering broker handling fees should seek professional advice on whether such fees would be allowed under Chapter 7.

Introduction

1. This guidance note has been prepared to assist market participants understand the Panel’s approach to broker handling fees.³
2. The examples are illustrative only and nothing in the note binds the Panel in a particular case.

¹ See sections 963A, 963E to 963K. Unless otherwise indicated, references are to the *Corporations Act 2001* (Cth)

² See also ASIC Regulatory Guide 246 *Conflicted remuneration*

³ A similar approach may be taken in respect of other fees offered in other types of control transactions

3. Fees not tied to acceptance of a bid (eg, a telemarketing agent) are not the subject of this note.
4. In this note the following definition applies.

Broker handling fees	Fees offered by bidders to brokers who solicit acceptances of a bid from their clients. The broker either stamps the acceptance form or initiates the message in CHES
----------------------	---

Excessive fees

5. If broker handling fees are excessive, they may create incentives for a broker to:
 - pressure shareholders to accept a bid or
 - advise shareholders to accept a bid prematurely.
6. Broker handling fees may facilitate the acquisition of shares in an efficient, competitive and informed market⁴ by encouraging the provisions of information to shareholders. It detracts from an efficient, competitive and informed market if shareholders accept for reasons other than price or their best interests.
7. Excessive broker handling fees may:
 - offend sections 602(a), (b) or (c)⁵
 - offend sections 623 or 621(3)⁶ or
 - give rise to conflicts for the brokers.⁷
8. In considering whether excessive fees give rise to unacceptable circumstances, the Panel considers the following factors:
 - (a) whether the fees exceed reasonable compensation for the time and expense incurred in talking to clients about the bid and processing acceptances. In the absence of other factors, the Panel considers a fee up to 0.75% of the consideration payable to an accepting shareholder, capped at \$750 for a single acceptance, is generally not unacceptable

⁴ Section 602(a)

⁵ Acquisition of shares in an efficient, competitive and informed market: s602(a). Reasonable time or enough information to assess the bid: ss602(b)(ii) and (iii). Equal opportunity to participate in any benefits: s602(c)

⁶ Collateral benefits not allowed: s623. Minimum bid price requirement: s621(3). See also GN 6; *Taipan Resources NL (No. 10)* [2001] ATP 5 at [89]-[90]

⁷ The Corporations Act regulates a broker's dealings with clients: for example, s945A

- (b) whether there is a minimum amount for a single acceptance. In the absence of other factors, the Panel considers that a minimum fee up to \$50 for a single acceptance is generally not unacceptable. A minimum fee may encourage brokers to contact clients with small holdings. Appropriate protections should exist against arrangements such as share splitting which seek to take advantage of any minimum or maximum (see paragraph 12)
- (c) whether the fees are consistent with other types of fees and commissions normally charged by brokers for advisory and transaction-related services. A fee consistent with other types of fees is not likely to create an undue incentive for the broker
- (d) whether different rates of broker handling fees are offered depending on the number of shares in an acceptance (eg, a bidder might offer a higher rate for acceptances of small parcels to encourage targeting of retail shareholders). If a sliding scale is used, the upper and lower ends should come within the guidelines above. Otherwise, sliding scales may create an incentive for brokers to apply more pressure on retail clients, who usually need more protection than institutional clients and
- (e) whether the fees are changed during the bid. In the absence of other factors, the Panel considers that an increase is generally not unacceptable if the fees remain within the guidelines above. If the fees are decreased, this may lead to the same type of pressure as a fee that is available for only a limited time.

Availability of fees

- 9. If broker handling fees are available for only a limited time, they may create incentives for a broker to advise shareholders to accept prematurely. It detracts from the policy of allowing shareholders a reasonable time to consider the merits of the bid if, by accepting early, they may lose the opportunity of considering another bid.⁸
- 10. In considering the time that broker handling fees are available, the Panel will normally take the following factors into account:
 - (a) once the fee is offered, it should generally be available for the balance of the bid period (including extensions unless this has been expressly excluded). The Panel does not seek to limit when the bidder may first offer a broker handling fee
 - (b) in special circumstances, the broker handling fee may cease before the end of the offer period

⁸ *Normandy Mining Limited (No 5)* [2001] ATP 29 at [22]

Example: if the bid period has been long and ample notice has been given of the bidder's intention to withdraw the fee

- (c) once withdrawn, the fee should not be reinstated, even on different terms.

Terms

- 11. To reduce concerns about collateral benefits or equal opportunity, the offer of a broker handling fee should expressly:
 - (a) not apply to acceptances by the broker or its associates and
 - (b) include a term that, by lodging an acceptance for which a fee is claimed, the broker represents that:
 - (i) neither it nor its associate is the accepting shareholder and
 - (ii) the fee will not be passed on or shared directly or indirectly with the accepting shareholder.
- 12. To reduce concerns about share splitting, a bidder may expressly reserve the right to aggregate acceptances for the purpose of determining the broker handling fee payable to a broker if it reasonably believes a person has structured holdings to take advantage of the fee.
- 13. Broker handling fee offers should generally not be subject to a minimum aggregate level of acceptances before a broker is eligible to receive any handling fees. Such a requirement may result in brokers imposing unacceptable pressure on clients once the broker is close to attaining the minimum level.

Disclosure of the fees

- 14. Under the Corporations Act, brokers must disclose to their clients benefits they will receive in connection with advice they give.
- 15. The Panel expects that meaningful disclosure regarding the fees will be made at the time the broker recommends acceptance (or rejection) to the client. Blanket disclosure about the possibility of receiving benefits generally would not satisfy this.
- 16. As well, the fees and terms should be disclosed in the bidder's statement (or supplementary bidder's statement if applicable). It may be appropriate also to announce the fees and terms to the market.

Unacceptable circumstances

17. The Panel will consider a broker handling fee offer as a whole (ie, all aspects of it, not aspects in isolation) when determining whether it gives rise to unacceptable circumstances.

Remedies

18. The Panel has a wide power to make orders (including remedial orders), or accept undertakings,⁹ if a broker handling fee gives rise to unacceptable circumstances. Remedies will be designed to:
- (a) protect the rights or interests of any person or group affected by the circumstances, including target shareholders and actual or potential rival bidders and
 - (b) ensure that the takeover proceeds (as far as possible) as it would have if the circumstances had not occurred.
19. Remedies may include:
- (a) giving shareholders who accepted after the broker handling fee offer was made the right to withdraw their acceptances
 - (b) canceling contracts resulting from acceptances after the broker handling fee offer was made
 - (c) restraining payment by the bidder of the broker handling fee and
 - (d) varying the terms of the broker handling fee offer.
20. While some of the issues raised in this note may be resolved by splitting the fee with, or passing it on to, the client, this may offend sections 623 or 602(c).¹⁰

Publication History

First issue:	3 June 2003
Second issue:	6 May 2011
Third issue:	9 March 2016

⁹ For example, *AurionGold Ltd* [2002] ATP 13. In *Ausdoc Group Limited* [2002] ATP 9 the Panel accepted undertakings that a break fee would not be claimed or paid

¹⁰ Similarly, if the broker or its associate is the accepting shareholder

Related material

GN 21 Collateral benefits