Australian Government
Takeovers Panel

CONSULTATION PAPER

Guidance Note 7 – Deal protection

Why is the Panel consulting?

The current (fourth) issue of Guidance Note 7: Lock-up devices was issued on 11 February 2010.

Following the Panel's decisions in *AusNet Services Limited 01* and *Virtus Health Limited*, the Panel proposes to revise Guidance Note 7 to (among other things) clarify the Guidance Note's application to deal protection devices entered into in respect of non-binding proposals, including to provide guidance on the Panel's approach going forward to 'hard' exclusivity arrangements (**Revised Guidance Note**).

While the Panel also proposes some changes to the content of the current Guidance Note (including to revise the order in which sections are presented and to consolidate existing text), the Panel's intention is that the guidance and principles set out in the current Guidance Note will continue to apply and that the Panel's approach to deal protection devices entered into in respect of binding proposals will remain fundamentally the same following implementation of the Revised Guidance Note.

What is the Panel proposing?

Attached is a draft Revised Guidance Note. The main proposed changes are to:

- Rearticulate the policy bases for the Guidance Note and clarify its scope, including its application to both binding and non-binding proposals.
- Recognise the complexity in and dynamic nature of the target board's role in responding to a control transaction proposal. While deal protection devices are not unacceptable as such, target boards must balance all relevant circumstances, and the Panel expects that target boards will reject deal protection devices that individually or in aggregate have the effect of reducing meaningful competition for control. Having regard to this general proposition, the Panel has formulated some general principles and a (non-exhaustive) list of factors that the Panel will consider in determining whether any deal protection arrangements give rise to unacceptable circumstances.
- Clarify what the Panel considers to be an effective 'fiduciary out' (including examples of potential unacceptable fetters or constraints).
- Provide guidance on the Panel's approach to 'hard' exclusivity arrangements (ie, exclusivity arrangements without an effective 'fiduciary out') entered into in respect of non-binding proposals, including to allow a period of 'hard' exclusivity in certain

circumstances of no more than 4 weeks in which exclusive access to non-public due diligence is provided (with any no-talk to be consistent with this period).

- Clarify the Panel's position on break fees in respect of non-binding proposals.
- Require the disclosure of deal protection arrangements which include a notification obligation entered into in respect of a non-binding proposal, given the direct impact of the notification obligation on a rival bidder, even where such arrangements may not require disclosure under the continuous disclosure provisions.

The draft Revised Guidance Note also:

- Renames the Guidance Note to "Deal protection", so that it is clearer that there is a focus on mechanisms sought by bidders to protect a control transaction. Consequently, the sections previously titled 'Asset lock-up' and 'Lock-up devices with major shareholders' have been removed. It is proposed that these will be addressed in future issues of other guidance notes. The principles described in the removed sections remain relevant and will be considered by the Panel on a case by case basis.
- Reorders some of the sections and text of the current Guidance Note so that there is a more logical flow.

Invitation to comment

The final Revised Guidance Note will be determined by the Panel after taking into account the comments received as part of the consultation process.

Comments are sought generally from the public regarding the Panel's proposed Revised Guidance Note. In particular, submissions are sought on the following questions:

1. Do you agree that the principles in the Revised Guidance Note should generally apply to deal protection arrangements entered into in respect of both binding and non-binding proposals? Please explain.
2. Are the general principles and factors that the Panel will have regards to in considering whether deal protection devices give rise to unacceptable circumstances useful (see paragraphs 8 to 16)? Do you agree with the approach set out? Please explain.
3. Is the guidance on an effective 'fiduciary out' useful (see paragraphs 35 to 38)? Please explain.
4. Do you agree with the Panel's approach to 'hard' exclusivity arrangements agreed in respect of non-binding proposals? Do you consider that a short period of 'hard' exclusivity is not unacceptable in certain limited circumstances (and do you have any comments on the example circumstances described in paragraph 43)? If yes, is the proposed acceptable 'hard' exclusivity period of up to 4 weeks in which exclusive access to non-public due diligence is provided appropriate? Please explain.

5. Do you agree with the Panel's position on break fees in respect of non-binding proposals (see paragraph 49)? Please explain.

6. Do you agree that deal protection arrangements should be disclosed where a notification obligation has been agreed as part of those arrangements in respect of a non-binding proposal (see paragraph 53)? Does this have the potential to cut across the continuous disclosure provisions and the exceptions in Listing Rule 3.1A? Please explain.

7. Do you agree with the other amendments made to the Guidance Note? Please identify any other amendments you think should be made.

Submissions	Comments on the draft Revised Guidance Note are due by **Tuesday, 28 February 2023**. Please send any submissions or consultation enquiries to takeovers@takeovers.gov.au. Please note that your submission will be published unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential. You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to. Please refer to our privacy policy for more information about how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by the Panel.

Wednesday, 14 December 2022

Australian Government

Takeovers Panel

CONSULTATION DRAFT

Guidance Note 7 – Deal protection

Introduction

1. This guidance note has been prepared to assist market participants understand the Panel's approach to deal protection devices sought by bidders. It applies to takeover bids, schemes of arrangement and any other transactions that affect or are likely to affect control or potential control of a company or the acquisition or proposed acquisition of a substantial interest in a company. For convenience, the terms 'bid', 'bidder' and 'target' are used.
2. The principles discussed in this note apply to any deal protection arrangement which has the effect of fettering the actions of a target.[1] Generally, the principles are relevant regardless of whether the arrangement is entered into in respect of a non-binding proposal (during the non-binding bid stage) or a binding proposal (during the binding bid stage).

[1] While this note focusses on deal protection arrangements (as defined in paragraph 4 below), there may be other arrangements which have the effect of fettering the actions of a target which are unacceptable, for example, an asset lock-up agreement that involves an important asset of the target. There may also be arrangements which have the effect of fettering the actions of a bidder or a substantial shareholder that may be unacceptable

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3. The examples are illustrative only and nothing in this note binds the Panel in a particular case.

Definitions

4. In this note the following definitions apply:

Term	Meaning
break fee	a fee payable by a target to a bidder if specified events occur which prevent a bid from proceeding or cause it to fail
deal protection arrangement (or device)	an arrangement that typically imposes restrictions on the actions of the target that encourages or facilitates a control transaction and potentially hinders another actual or potential control transaction *Examples: break fees and exclusivity arrangements (such as no-shop, no-talk and no-due diligence restrictions)*
exclusivity arrangement	an arrangement entered into between a bidder, or potential bidder, and the target which limits the ability of the target from engaging with competing bidders. Commonly in Australia, such arrangements include 'no-shop', 'no-talk' and 'no-due diligence' restrictions
'fiduciary out'	a provision which allows the directors of a target to be relieved of an obligation in an exclusivity arrangement if it is likely that their fiduciary duties require them to do so
matching right	where a bidder or potential bidder is given a right to match or better a superior competing proposal before the target board changes its recommendation or enters into an agreement in relation to that superior competing proposal[2]
no-due diligence	where the target agrees not to provide any third party with due diligence access
no-shop	where the target agrees not to solicit a bid or other competing transaction from any third party

[2] See also footnote 21

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Term	Meaning
no-talk	where the target agrees not to engage or negotiate with any third party making or seeking to make a competing proposal
notification obligation	where the target agrees to notify and provide the bidder with details of any third party approaches received

Policy basis

5. The main policy basis for this note is that deal protection devices may inhibit the acquisition of control over voting shares or interests taking place in an efficient, competitive and informed market (s602(a)).[3]
6. The principle that holders of the relevant class of shares or interests are given enough information to enable them to assess the merits of the proposal (s602(b)(iii)) may also be offended where there has been inadequate disclosure of a deal protection arrangement.
7. In certain circumstances, deal protection devices may also deny holders of the relevant class of voting shares or interests a reasonable and equal opportunity to participate in the benefits of a proposal under which a person may acquire a substantial interest (s602(c)).[4]

Deal protection devices generally

8. The Panel recognises the complexity in and dynamic nature of the target board's role in the M&A process and notes that the target board is required to have regard to and balance all the relevant circumstances.
9. Deal protection devices are not unacceptable as such. The Panel understands that deal protection devices can be used by the target board to secure a proposal.[5] On the other hand, they may also deter rival bidders. The Panel expects target boards to reject deal protection

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[3] Unless otherwise indicated, references are to the *Corporations Act 2001* (Cth)

[4] An example may be when a break fee was paid to a competing bidder who already had a controlling interest in the company, see discussion in *National Can Industries Limited 01* [2003] ATP 35 at [32]

[5] For example, by encouraging or facilitating an offer from a potential bidder, to leverage a higher price from a bidder, to protect against costs (opportunity and expended) that would not be recoverable if the transaction did not complete or by reducing the bidder's risk that the target will not complete the proposal

devices that individually or in aggregate have the effect of reducing meaningful competition for control.[6]

10. Whether any deal protection device gives rise to unacceptable circumstances will depend on its effect or likely effect, having regard to s602 and s657A. The Panel will look at the effect or likely effect of the device on:

    (a) competition involving current or potential bidders, and whether it is significant and

    (b) shareholders and whether they may be substantially coerced into accepting the bid (ie, the tendency to diminish the value of the company if shareholders do not accept).[7]

11. The Panel will also take into account the following (among other things):

    (a) the potential benefits to target shareholders of the arrangements

    (b) the reasons why the target directors are satisfied of the commercial and competitive benefits to shareholders of entering the arrangements

    (c) the context in which the arrangements are agreed, including the target board's view of the target company's value and the extent of the analysis or work undertaken to inform the target board's view of the target company's value[8]

    (d) whether there is anything to prompt the Panel to second guess the target board's decision to enter into the deal protection arrangements and

    (e) the effect of all the arrangements and surrounding circumstances in aggregate.

12. The Panel looks at the substance of the deal protection device over its form.

13. There is no requirement for a target to undertake an auction process prior to entry into any deal protection arrangements.[9] The Panel recognises that there may be many reasons why a target board seeking to encourage, facilitate or procure a control transaction for the benefit of shareholders does not wish to publicly put itself up for sale (for

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[6] See discussion in *GBST Holdings Limited* [2019] ATP 15 at [35]

[7] For example, *Ausdoc Group Limited* [2002] ATP 9 at [44] and *Ballarat Goldfields NL* [2002] ATP 7 at [14]-[16]

[8] For example, it is common for marketplace analysis to be undertaken by the target's financial advisers

[9] For example, *Ross Human Directions Ltd* [2010] ATP 8 at [27] and *AusNet Services Limited 01* [2021] ATP 9 at [46]

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example, because of the impact of such a move on the target's relationships with its suppliers, customers and employees or its value where there is no certainty of a transaction). However, where there has not been any auction process prior to entry into such deal protection arrangements, the Panel will consider what processes and analyses have been undertaken and what advice has been obtained by the target, particularly where there are credible competing bidders, and the safeguards discussed in this note may be of greater importance.[10]

14. The Panel is less likely to second guess the process adopted by the target board prior to entering a deal protection arrangement where the directors' actions have been carefully considered and led to a better outcome for shareholders.[11]

15. There is also no general requirement for a target to provide equal access to information about the target company to rival bidders.[12]

16. Regardless of whether or not a particular deal protection arrangement is unacceptable under the approach set out in this note, other laws may make such arrangements void or unenforceable. This note is not intended to displace the duties of directors that separately exist under corporate law which require directors to (among other things) act in the best interests of the company as a whole. The Panel recognises that this will necessarily require target directors to turn their minds to what is appropriate in the context of the relevant transaction.

Exclusivity arrangements

Exclusivity arrangements generally

17. Exclusivity arrangements restrict the ability of the target to act. The possible effect of one or more restrictions in an exclusivity arrangement, taken together, may be anti-competitive and give rise to unacceptable circumstances.

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[10] *Ross Human Directions Ltd* [2010] ATP 8 at [28] (as referred to in *AusNet Services Limited 01* [2021] ATP 9 at [47])

[11] *GBST Holdings Limited* [2019] ATP 15 at [36] and *Pacific Energy Limited* [2019] ATP 20 at [34]

[12] *Goodman Fielder Limited 02* [2003] ATP 5 at [84] to [96] (as referred to in *GBST Holdings Limited* [2019] ATP 15 at [34], *AusNet Services Limited 01* [2021] ATP 9 at [46] and *Virtus Health Limited* [2022] ATP 5 at [49]). In certain circumstances, target directors should explain why they have not provided equal access to information to potential rival bidders – see *Goodman Fielder Limited 02* [2003] ATP 5 at [96]

18. Exclusivity arrangements may be coupled with notification obligations[13] or matching rights.[14] These may increase the anti-competitive effect.

19. Exclusivity arrangements may have a less anti-competitive effect if coupled with a go-shop provision[15] or market-check provision.[16] Such provisions should allow a reasonable period to 'shop' the target. They should not unreasonably constrain any 'fiduciary out' that might be coupled to the exclusivity arrangements (see further under 'Fiduciary out' below).

20. Exclusivity arrangements are less likely to give rise to unacceptable circumstances if the target has conducted an auction or market testing process before agreeing to it[17] or where the potential transaction has been in the market for a long period.

Types of restrictions

No-shop

21. A no-shop restriction prevents the soliciting of alternatives, usually during a defined period of exclusivity.

22. A simple no-shop restriction generally does not require a 'fiduciary out', being less anti-competitive than a no-talk restriction, although if the wording of the no-shop would restrict the target's ability to respond to an unsolicited proposal or enquiry, the Panel is likely to treat the restriction like a no-talk restriction.

No-talk

23. A no-talk restriction prevents a target negotiating with any potential competing bidder. It might be graduated from the least restrictive form (allowing negotiations if the approach was unsolicited) to the most restrictive form (no negotiations, even if the approach was unsolicited).

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[13] See paragraphs 28 to 31 below

[14] See paragraphs 32 to 34 below

[15] A provision that allows the target a reasonable set time in which it can 'shop' the market after which a no-shop obligation will apply

[16] A provision allowing the target to announce that it will entertain third-party interest for a reasonable set period, after which it proposes to deal with the bidder. Used, for example, in management buy-outs as a way of testing the fairness of the proposal by proving the market for other offers. A 'fiduciary out' should still allow alternative proposals

[17] See also paragraph 13 above

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24. A no-talk restriction is more anti-competitive than a no-shop restriction. Therefore, the safeguards need to be more stringent.

25. In the absence of an effective 'fiduciary out' that is available to target directors in practical terms (see further under 'Fiduciary out' below), a no-talk restriction is likely to give rise to unacceptable circumstances.[18]

No-due diligence

26. A no-due diligence restriction prevents a target providing information to a potential competing bidder as part of due diligence without the consent of the original bidder. Its anti-competitive effect is similar to a no-talk restriction.

27. Safeguards (including 'fiduciary outs') applicable to no-talk restrictions apply similarly to no-due diligence restrictions and like restrictions affecting dealings with potential rival bidders.

Notification obligation and information rights

28. A notification obligation requires the target to disclose details of any potential competing proposal to the original bidder. In combination with other deal protection measures, this may increase the anti-competitive effect.

29. A notification obligation reduces the likelihood that a competing bidder will want to make an approach. It may be subject to a 'fiduciary out' so that details of the competing proposal or the identity of the competing bidder need not be disclosed. Limiting the details required to be disclosed reduces the anti-competitive effect. If it is simply the fact of an approach that is disclosed, there may be little increase in effect.

30. A notification obligation may be coupled with a matching right (discussed below).

31. An information right requires the target to disclose to the original bidder any information about the target that is made available to a competing bidder which has not previously been provided to the original bidder.[19] Like a notification obligation it reduces the likelihood that a competing bidder will want to make an approach. In combination with other deal protection measures, it may increase the anti-competitive effect.[20]

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[18] However, see paragraphs 41 to 45 below

[19] An information right may exist as a standalone obligation or be included as part of a notification obligation

[20] For example, see *Virtus Health Limited* [2022] ATP 5 at [49] where the Panel required a carve out to protect bidder sensitive information in exceptional circumstances

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Matching right

32. A matching right allows the bidder, whose proposal is recommended by the target board, a right to match or better a superior competing proposal before the target board changes its recommendation or enters into an agreement in relation to that superior competing proposal.[21]

33. A matching right cannot be for a duration that removes any practical likelihood that a potential competing bidder will be prepared to put a proposal to the target.[22] The Panel considers that the duration of the matching right should be no more than 5 business days and often shorter, depending on the circumstances.[23]

34. A material extension to a matching period is likely to be unacceptable because of the effect the provision has on the willingness of a potential competing bidder to put forward a proposal.[24]

'Fiduciary out'

35. The effectiveness of any 'fiduciary out' is relevant to the Panel's consideration of whether unacceptable circumstances exist. Generally, a 'fiduciary out' should be available to target directors in practical terms. That is, it should allow target directors to fully exercise their fiduciary duties without unreasonable fetters or constraints.

36. The Panel may consider there to be unacceptable fetters or constraints on a 'fiduciary out' where:

    (a) the decision of the target directors to determine whether or not the 'fiduciary out' can be relied upon is effectively taken out of the target directors' hands[25]

    (b) additional requirements are imposed on how the target board should act beyond requiring the target to obtain:

        (i) legal and/or financial advice that a competing proposal could reasonably be considered to become a superior proposal and

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[21] In the non-binding bid stage, the purpose of the matching right is to allow the original bidder to maintain exclusive due diligence

[22] *Ross Human Directions Ltd* [2010] ATP 8 at [28]

[23] *Ross Human Directions Ltd* [2010] ATP 8 at [53]-[54]

[24] *Ross Human Directions Ltd* [2010] ATP 8 at [53]-[54]

[25] *Ross Human Directions Ltd* [2010] ATP 8 at [34](b)

(ii) legal advice that failing to respond to a competing proposal would likely breach the directors' statutory and fiduciary duties[26]

(c) the requirements to be able to rely upon the 'fiduciary out' are overly restrictive. For example:

(i) where the terms of the exclusivity arrangements **require** a superior proposal before the 'fiduciary out' can be relied upon (rather than to allow the target board to respond to a competing proposal which could "reasonably be expected to lead" to a superior proposal)[27] or

(ii) where the 'fiduciary out' requires the target board to obtain legal advice that failing to respond to a competing proposal **would** be a breach of their statutory or fiduciary duties before it can be relied upon (rather than to allow the target board to respond to a competing proposal which "would be likely" to constitute a breach of those duties)[28] and

(iii) it is specified that the target board can only consider a competing proposal to be a superior proposal if the competing proposal is fully financed.

37. Generally, the Panel is unlikely to second guess the decisions of the target board in exercising their discretion in respect of a 'fiduciary out'[29] on the basis that the target board, properly informed, is in a better position to understand and make an assessment of all of the relevant facts and circumstances to determine what is in the best interests of the target company and shareholders.

38. However, it may give rise to unacceptable circumstances if the target board applies an overly restrictive interpretation to the terms of the exclusivity arrangements and the 'fiduciary out'.[30]

Non-binding bid stage

39. Consistent with the principles that apply generally in this note, the Panel is cognisant of the complexity in and dynamic nature of the

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[26] *Ross Human Directions Ltd* [2010] ATP 8 at [34](c)

[27] *Ross Human Directions Ltd* [2010] ATP 8 at [34](a)

[28] *Magna Pacific Holdings Limited 02* [2007] ATP 03 at [31]-[32]

[29] See, for example, *Queensland Cotton Holdings Limited 02* [2007] ATP at [37], *Babcock & Brown Communities Group Limited 02* [2008] ATP 26 at [10] and [11], *GBST Holdings Limited* [2019] ATP 15 at [36], *Webcentral Group Limited 02R* [2020] ATP 26 at [39] and *Virtus Health Limited 02* [2022] ATP 7 at [16]-[18]

[30] *Queensland Cotton Holdings Limited 02* [2007] ATP at [28]

target board's role in their consideration of a response to a non-binding proposal for the target company.

40. The Panel expects that in exercising its discretion when considering any relevant deal protection arrangements sought by a bidder in connection with a non-binding proposal, target boards will:

    (a) consider the impact on competition (ie, whether any deal protection devices, individually or in the aggregate, have the effect of reducing the likelihood of a competing proposal emerging rather than promoting such competition) and have regards to the s602 principles and the principles set out in this note and

    (b) where possible, seek to negotiate and 'test' (and not accept as a matter of course) the proposed deal protection devices sought by the bidder,

    noting importantly that the target has not received a binding proposal and may not receive a binding proposal from that bidder.

'Hard' exclusivity

41. A period of 'hard' exclusivity (ie, exclusivity arrangements without an effective 'fiduciary out') granted by the target board to a bidder in connection with a non-binding proposal is likely to have an anti-competitive effect. Accordingly, hard exclusivity is likely to give rise to unacceptable circumstances unless there are circumstances that warrant it.

42. The Panel recognises that there may be certain limited circumstances in which the target board considers that it is in the best interests of the target company to grant a short period of hard exclusivity to a bidder in respect of a non-binding proposal.

43. For example, it may not be unacceptable for a target board to grant a limited period of hard exclusivity in circumstances where:

    (a) A major shareholder has made a bid for the target company (or a bidder has the support of a major shareholder) and the target board considers that granting hard exclusivity would incentivise another bidder to enter the process and stimulate competition for the target company.

    (b) The target board has conducted an auction process or a fulsome sounding out of the market and is aware of a potential bidder for the target company and considers that granting hard exclusivity will encourage an offer to be made.

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(c) The target board has granted hard exclusivity to extract a material price increase from an existing bidder.[31]

(d) There is a single bidder for the target company and the board of the target company considers it unlikely that any competing bid at a higher price will emerge, the target board considers that the price offered fairly values the company and the target board considers that granting hard exclusivity to that bidder would potentially enable the proposal to progress to binding status.

44. The longer the period of hard exclusivity, the greater the anti-competitive effect. Without limiting paragraph 41, where hard exclusivity is agreed, it is generally expected that the period in which exclusive access to non-public due diligence is provided would be short and limited to no more than 4 weeks (and any no-talk would be consistent with this period).[32]

45. While the circumstances outlined in the examples above are relevant to the Panel's consideration, they are not determinative of acceptability. In all cases, the Panel will look at the circumstances as a whole and the context in which the arrangement was entered into in considering whether or not a hard exclusivity arrangement is unacceptable.[33]

Examples:

1. *Virtus Health Limited* [2022] ATP 5 – The Panel considered that exclusivity arrangements granted by a target at the non-binding bid stage that included a period of approximately one-month hard exclusivity (in effect), together with a suite of other restrictions including notification and equal information obligations, matching rights and a break fee, when considered as a whole and having regard to the factual matrix of the matter, had an anti-competitive effect and were unacceptable. The Panel was also concerned about the effectiveness of the 'fiduciary out' in circumstances where the original bidder had the prospect to match any counterproposal with a further non-binding proposal.

2. *AusNet Services Limited 01* [2021] ATP 9 – Exclusivity arrangements granted by a target at the non-binding bid stage included hard exclusivity for the entire exclusivity period (a

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[31] In considering whether unacceptable circumstances exist, the Panel will consider (among other things) whether the target board has made enquiries of other existing bidders regarding any further price increases before granting hard exclusivity to ensure that other existing bidders are not prematurely being locked-out of the process. See *AusNet Services Limited 01* [2021] ATP 9 at [51] and *Virtus Health Limited* [2022] ATP 5 at [6]

[32] The 4 weeks includes any extensions of time of hard exclusivity

[33] *AusNet Services Limited 01* [2021] ATP 9 at [67]-[69] and *Virtus Health Limited* [2022] ATP 5 at [26]

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minimum of 8 weeks) coupled with a notification obligation. The Panel considered that the exclusivity arrangements, when taken together, had an anti-competitive effect, the effect of which was exacerbated by the delay in disclosing the material terms of the arrangements. The Panel emphasised that in considering the matter, the individual aspects of the exclusivity arrangements and their disclosure were not considered in isolation. Rather, each aspect was assessed within the surrounding circumstances and the context in which the exclusivity arrangements were granted.

Break fees

The 1% guideline

46. In the absence of other factors, a break fee payable by a target not exceeding 1% of the equity value of the target[34] is generally not unacceptable.[35] There may be facts which make a break fee within the 1% guideline unacceptable - for example if triggers for payment of the fee are not reasonable (from the point of view of coercion).[36] In the absence of other factors, reasonable triggers might include:

    (a) a change of directors' recommendation (but it might be unreasonable for the trigger to be a change of recommendation because of a breach of the implementation agreement by the bidder, or a condition precedent outside the target's control not being satisfied, or an expert opining that the transaction is not fair and reasonable)

    (b) a competing transaction that successfully completes

    (c) a material condition precedent within the target's control not being satisfied

    (d) a material breach within the target's control or

    (e) other events affecting the bid (eg, a major asset of the target is destroyed).

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[34] The aggregate of the value of all classes of equity securities issued by the target having regard to the value of the bid consideration when announced. In limited cases, it may be appropriate for the 1% guideline to apply to a company's enterprise value, for instance because the target is highly geared

[35] Note, however, that an applicant may be able to establish that the fee is anti-competitive or coercive despite being less than 1%

[36] "Naked no vote" break fees (ie, fees payable by a target to a bidder if the takeover is rejected by the target's shareholders even though there is no competing bid) may fall into this category. See *Ausdoc Group Ltd* [2002] ATP 9 at [43]

47. In considering whether a break fee gives rise to unacceptable circumstances, the Panel is guided by the following (among other things):

    (a) whether the fee was agreed after a public, transparent process designed to elicit proposals[37]

    (b) whether the proposal was solicited by the target

    (c) whether the fee is fixed or capped (either in dollar or percentage terms)

    (d) whether the fee (on a cost per share basis) is less than the premium under the bid[38]

    (e) the cost, effort or risk involved in making the proposal

    (f) whether the fee reimburses actual expenses

    (g) whether another bidder has increased its bid or made a bid and whether the fee was material in determining the price that the competing bidder was prepared to pay. In this case the fee may not be anti-competitive[39] and

    (h) any other relevant factors, such as whether the obligation is limited to a reasonable period.

48. Multiple fees (with a party and its associates in respect of the same or related transactions) are likely to be aggregated for the purpose of the 1% guideline. [40]

Non-binding bid stage / proposals

49. Generally, the Panel does not expect that a target board would agree to a break fee in respect of a non-binding proposal. However, to the extent one is agreed, the Panel expects that the quantum would be substantially lower than for an equivalent binding proposal.

Timing

50. It may be appropriate to delay entry into a break fee agreement, or incorporate a 'fiduciary out', if an event that might trigger payment of the fee is imminent.

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[37] *Ausdoc Group Ltd* [2002] ATP 9

[38] *Ausdoc Group Ltd* [2002] ATP 9 at [35(f)]

[39] See eg, *Pacific Energy Limited* [2019] ATP 20, where a break fee to a second bidder resulted in a significantly higher price for shareholders (see at [33])

[40] *National Can Industries Limited 01* [2003] ATP 35 and *National Can Industries 01R* [2003] ATP 40. Contrast *Ausdoc Group Limited* [2002] ATP 9

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Example: Negotiating a break fee payable if a director changes his or her recommendation shortly before an expert's report on which the recommendation will be based is due, when the directors could have waited, may give rise to unacceptable circumstances. [41]

Disclosure

51. At a minimum, the existence and nature of all material terms[42] of any deal protection arrangement should normally be disclosed by no later than when the relevant control proposal is announced,[43] although it may be necessary to announce it earlier under continuous disclosure provisions applicable to the bidder or target.[44]

52. The failure or delay in disclosing the deal protection mechanism may have an anti-competitive effect[45] and also result in an uninformed market for control of the target.

53. A bidder or target may form the view that deal protection arrangements entered into in respect of a non-binding proposal during the non-binding bid stage does not require disclosure under the continuous disclosure provisions.[46] However, where such arrangements include a notification obligation, the Panel expects there to be disclosure of the material terms of the deal protection arrangements once those arrangements are entered into. The Panel considers that a competing bidder should be aware that information in respect of their competing proposal (which may include confidential information) may be disclosed by the target under a notification obligation.

Remedies

54. The Panel has a wide power to make orders (including remedial orders) if a deal protection device gives rise to unacceptable

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[41] *National Can Industries Limited 01* [2003] ATP 35 at [41] and *National Can Industries Limited 01(R)* [2003] ATP 40 at [37]

[42] Even if the relevant terms of the arrangement are in separate documents: *Normandy Mining Limited (No. 3)* [2001] ATP 30 at [39]

[43] See *AusNet Services Limited 01* [2021] ATP at [65]. However, there may be circumstances in which the full agreement containing the arrangement should be disclosed – see *GBST Holdings Limited* [2019] ATP 15 at [43]-[44]

[44] For a listed disclosing entity, ASX Listing Rule 3.1 applies unless the exception in ASX Listing Rule 3.1A applies. For other disclosing entities, see s675

[45] *AusNet Services Limited 01* [2021] ATP 9 at [60]

[46] ie, because an exception in Listing Rule 3.1A applies

circumstances, including requiring a standstill period,[47] cancelling agreements,[48] or cancelling agreements if an amendment is not made.[49] The Panel's orders (or undertakings[50]) will be designed to remove any anti-competitive or coercive effect.

Publication History

First Issue	7 December 2001
Reformatted	17 September 2003
Second Issue	15 February 2005
Third Issue	13 November 2007
Fourth Issue	11 February 2010
Fifth Issue	[**]

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[47] In *Virtus Health Limited* [2022] ATP 5, the Panel made a standstill order which prevented the target and a potential bidder from entering into (in effect) a scheme implementation agreement for a limited period

[48] In *Ballarat Goldfields NL* [2002] ATP 7, the Panel made orders that the shares which were to constitute the break fee not be issued and no other benefit be provided in substitution

[49] In *AusNet Services Limited 01* [2021] ATP 9, the Panel made orders that a no-talk restriction in a confidentiality deed would be of no force and effect unless the no-talk was amended to include a 'fiduciary out'. Similarly, in *Virtus Health Limited* [2022] ATP 5, the Panel made orders that certain exclusivity arrangements in a process deed would be of no force and effect unless the process deed was amended to ensure there was (among other things) an effective 'fiduciary out'

[50] In *Ausdoc Group Limited* [2002] ATP 9, the Panel accepted undertakings from the fee-taker to waive its right to receive and not to accept the payment of a particular fee and from the fee-payer not to pay that fee

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Guidance Note 7 ~~– Lock-up devices~~ – Deal protection

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Introduction

1. This guidance note has been prepared to assist market participants understand the Panel's approach to ~~lock-up~~deal protection devices

sought by bidders.[1] It applies ~~in control~~to takeover bids, schemes of arrangement and any other transactions~~, including takeovers~~ that affect or are likely to affect control or potential control of a company or the acquisition or proposed acquisition of a substantial interest in a company. For convenience, the terms 'bid', 'bidder' and 'target' are used. ~~The types of lock-up devices addressed might also be referred to as 'deal protection' measures.~~

~~*Examples: asset lock-ups, break fees, no-shop agreements, no-talk agreements*~~

2. The principles discussed in ~~the~~this note ~~are of general application and can be applied~~apply to any deal protection arrangement which has the effect of fettering the actions of a target~~, a bidder or a substantial shareholder~~.[1] Generally, the principles are relevant regardless of whether the arrangement is entered into in respect of a non-binding proposal (during the non-binding bid stage) or a binding proposal (during the binding bid stage).

3. The examples are illustrative only and nothing in ~~the~~this note binds the Panel in a particular case.

~~4. The policy bases for this note are that lock-up devices may:~~

- ~~inhibit the acquisition of control over voting shares taking place in an efficient, competitive and informed market or~~
- ~~deny holders of the relevant class of shares a reasonable and equal opportunity to participate in the benefits of a proposal under which a person may acquire a substantial interest.~~

Definitions

4. ~~5.~~ In this note the following definitions apply:

Term	Meaning
~~asset lock-up~~	~~an arrangement between a bidder and target for the sale, purchase or encumbrance of an asset in~~

~~[1] Considered by the Panel in many matters, for example: *Normandy Mining Limited (No. 3)* [2001] ATP 30, 20 ACLC 471; *Ballarat Goldfields NL* [2002] ATP 7, 41 ACSR 691; *Ausdoc Group Limited* [2002] ATP 9, 42 ACSR 629; *Sirtex Medical Limited* [2003] ATP 22; *National Can Industries Limited* [2003] ATP 35, 48 ACSR 409; *National Can Industries Limited 01R* [2003] ATP 40, 48 ACSR 427; *Axiom Properties Limited 01* [2006] ATP 1; *Wattyl Limited* [2006] ATP 11; *Magna Pacific (Holdings) Limited 02* [2007] ATP 03; *Queensland Cotton Holdings Limited* [2007] ATP 05~~

[1] While this note focusses on deal protection arrangements (as defined in paragraph 4 below), there may be other arrangements which have the effect of fettering the actions of a target which are unacceptable, for example, an asset lock-up agreement that involves an important asset of the target. There may also be arrangements which have the effect of fettering the actions of a bidder or a substantial shareholder that may be unacceptable

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Term	Meaning
	~~exchange for~~ ~~• proposing a bid or other control transaction or~~ ~~• a period of exclusivity or the opportunity to undertake due diligence for a control transaction~~
break fee	~~consideration however~~a fee payable by a target to a bidder if specified events occur which prevent a bid from proceeding or cause it to fail[2]
~~'fiduciary' out~~	~~a provision which allows the directors of a party to be relieved of a lock-up obligation (or aspects of it) if their duties require them to do so~~
~~lock-up~~deal protection arrangement (or device)	an arrangement that typically imposes restrictions on the actions of the target that encourages or facilitates a control transaction[3] and potentially hinders another actual or potential control transaction ~~*Example: 1 By imposing a restriction on actions of the target (or a shareholder), as in a no-shop agreement or no-talk agreement*~~ ~~2. By providing for compensation if the control transaction does not proceed, as in a break fee~~ *Examples: break fees and exclusivity arrangements (such as no-shop, no-talk and no-due diligence restrictions)*

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~~[2] Generally, this is because the target shareholders decline the offer or fail to approve the merger, or the target receives a superior proposal from a rival bidder. These events will typically be outside the control of the bidder, but not necessarily of the target or its shareholders. See also paragraph 12~~

~~[3] Including shareholder approved transactions under item 7 of s611~~

Term	Meaning
exclusivity arrangement	an arrangement entered into between a bidder, or potential bidder, and the target which limits the ability of the target from engaging with competing bidders. Commonly in Australia, such arrangements include 'no-shop', 'no-talk' and 'no-due diligence' restrictions
'fiduciary out'	a provision which allows the directors of a target to be relieved of an obligation in an exclusivity arrangement if it is likely that their fiduciary duties require them to do so
matching right	where a bidder or potential bidder is given a right to match or better a superior competing proposal before the target board changes its recommendation or enters into an agreement in relation to that superior competing proposal[2]
no-due diligence	where the target agrees not to provide any third party with due diligence access
no-shop	where the target agrees not to solicit a bid or other competing transaction from any third party
no-talk	where the target agrees not to engage or negotiate with any third party making or seeking to make a competing proposal
notification obligation	where the target agrees to notify and provide the bidder with details of any third party approaches received

5.

~~Devices~~Policy basis

6. The main policy basis for this note is that deal protection devices may inhibit the acquisition of control over voting shares or interests taking place in an efficient, competitive and informed market (s602(a)).[3]

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[2] See also footnote 21

[3] Unless otherwise indicated, references are to the *Corporations Act 2001* (Cth)

7. The principle that holders of the relevant class of shares or interests are given enough information to enable them to assess the merits of the proposal (s602(b)(iii)) may also be offended where there has been inadequate disclosure of a deal protection arrangement.

8. In certain circumstances, deal protection devices may also deny holders of the relevant class of voting shares or interests a reasonable and equal opportunity to participate in the benefits of a proposal under which a person may acquire a substantial interest (s602(c)).[4]

Deal protection devices generally

9. The Panel recognises the complexity in and dynamic nature of the target board's role in the M&A process and notes that the target board is required to have regard to and balance all the relevant circumstances.

10. ~~6. Lock-up~~Deal protection devices are not unacceptable as such. ~~They may help secure a proposal[4] by protecting against costs (opportunity and expended) that would not be recoverable if the transaction did not complete. They may reduce the bidder's risk that~~ The Panel understands that deal protection devices can be used by the target ~~will not complete the~~board to secure a proposal. ~~However~~[5] On the other hand, they may also deter rival bidders. The Panel expects target boards to reject deal protection devices that individually or in aggregate have the effect of reducing meaningful competition for control.[6]

11. ~~7.~~ Whether any ~~lock-up~~deal protection device gives rise to unacceptable circumstances will depend on its effect or likely effect, having regard to s602 and s657A.[5] The Panel will look at the effect or likely effect of the device on:

    (a) competition involving current or potential bidders, and whether it is significant and

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[4] An example may be when a break fee was paid to a competing bidder who already had a controlling interest in the company, see discussion in *National Can Industries Limited 01* [2003] ATP 35 at [32]

~~[4] For example, by inducing the first bidder to bid or a subsequent bidder to compete~~

[5] For example, by encouraging or facilitating an offer from a potential bidder, to leverage a higher price from a bidder, to protect against costs (opportunity and expended) that would not be recoverable if the transaction did not complete or by reducing the bidder's risk that the target will not complete the proposal

[6] See discussion in *GBST Holdings Limited* [2019] ATP 15 at [35]

~~[5] Unless otherwise indicated, references are to the *Corporations Act 2001* (Cth)~~

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(b) shareholders and whether they may be substantially coerced into accepting the bid (ie, the tendency to diminish the value of the company if shareholders do not accept).[6]7

12. The Panel will also take into account the following (among other things):

(a) the potential benefits to target shareholders of the arrangements

(b) the reasons why the target directors are satisfied of the commercial and competitive benefits to shareholders of entering the arrangements

(c) the context in which the arrangements are agreed, including the target board's view of the target company's value and the extent of the analysis or work undertaken to inform the target board's view of the target company's value[8]

(d) whether there is anything to prompt the Panel to second guess the target board's decision to enter into the deal protection arrangements and

(e) the effect of all the arrangements and surrounding circumstances in aggregate.

13. ~~8.~~ The Panel looks at the substance of the ~~lock-up~~deal protection device over its form.

14. There is no requirement for a target to undertake an auction process prior to entry into any deal protection arrangements.[9] The Panel recognises that there may be many reasons why a target board seeking to encourage, facilitate or procure a control transaction for the benefit of shareholders does not wish to publicly put itself up for sale (for example, because of the impact of such a move on the target's relationships with its suppliers, customers and employees or its value where there is no certainty of a transaction). However, where there has not been any auction process prior to entry into such deal protection arrangements, the Panel will consider what processes and analyses have been undertaken and what advice has been obtained by the target,

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[6]7 For example, *Ausdoc Group Limited* [2002] ATP 9 at [44] and *Ballarat Goldfields NL* [~~2001~~2002] ATP 7 at [14]-[16]

[8] For example, it is common for marketplace analysis to be undertaken by the target's financial advisers

[9] For example, *Ross Human Directions Ltd* [2010] ATP 8 at [27] and *AusNet Services Limited 01* [2021] ATP 9 at [46]

particularly where there are credible competing bidders, and the safeguards discussed in this note may be of greater importance.[10]

15. The Panel is less likely to second guess the process adopted by the target board prior to entering a deal protection arrangement where the directors' actions have been carefully considered and led to a better outcome for shareholders.[11]

16. There is also no general requirement for a target to provide equal access to information about the target company to rival bidders.[12]

17. Regardless of whether or not a particular deal protection arrangement is unacceptable under the approach set out in this note, other laws may make such arrangements void or unenforceable. This note is not intended to displace the duties of directors that separately exist under corporate law which require directors to (among other things) act in the best interests of the company as a whole. The Panel recognises that this will necessarily require target directors to turn their minds to what is appropriate in the context of the relevant transaction.

Exclusivity arrangements

Exclusivity arrangements generally

18. Exclusivity arrangements restrict the ability of the target to act. The possible effect of one or more restrictions in an exclusivity arrangement, taken together, may be anti-competitive and give rise to unacceptable circumstances.

19. Exclusivity arrangements may be coupled with notification obligations[13] or matching rights.[14] These may increase the anti-competitive effect.

20. Exclusivity arrangements may have a less anti-competitive effect if coupled with a go-shop provision[15] or market-check provision.[16] Such

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[10] *Ross Human Directions Ltd* [2010] ATP 8 at [28] (as referred to in *AusNet Services Limited 01* [2021] ATP 9 at [47])

[11] *GBST Holdings Limited* [2019] ATP 15 at [36] and *Pacific Energy Limited* [2019] ATP 20 at [34]

[12] *Goodman Fielder Limited 02* [2003] ATP 5 at [84] to [96] (as referred to in *GBST Holdings Limited* [2019] ATP 15 at [34], *AusNet Services Limited 01* [2021] ATP 9 at [46] and *Virtus Health Limited* [2022] ATP 5 at [49]). In certain circumstances, target directors should explain why they have not provided equal access to information to potential rival bidders – see *Goodman Fielder Limited 02* [2003] ATP 5 at [96]

[13] See paragraphs 28 to 31 below

[14] See paragraphs 32 to 34 below

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provisions should allow a reasonable period to 'shop' the target. They should not unreasonably constrain any 'fiduciary out' that might be coupled to the exclusivity arrangements (see further under 'Fiduciary out' below).

21. Exclusivity arrangements are less likely to give rise to unacceptable circumstances if the target has conducted an auction or market testing process before agreeing to it[17] or where the potential transaction has been in the market for a long period.

Types of restrictions

No-shop

22. A no-shop restriction prevents the soliciting of alternatives, usually during a defined period of exclusivity.

23. A simple no-shop restriction generally does not require a 'fiduciary out', being less anti-competitive than a no-talk restriction, although if the wording of the no-shop would restrict the target's ability to respond to an unsolicited proposal or enquiry, the Panel is likely to treat the restriction like a no-talk restriction.

No-talk

24. A no-talk restriction prevents a target negotiating with any potential competing bidder. It might be graduated from the least restrictive form (allowing negotiations if the approach was unsolicited) to the most restrictive form (no negotiations, even if the approach was unsolicited).

25. A no-talk restriction is more anti-competitive than a no-shop restriction. Therefore, the safeguards need to be more stringent.

26. In the absence of an effective 'fiduciary out' that is available to target directors in practical terms (see further under 'Fiduciary out' below), a no-talk restriction is likely to give rise to unacceptable circumstances.[18]

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[15] A provision that allows the target a reasonable set time in which it can 'shop' the market after which a no-shop obligation will apply

[16] A provision allowing the target to announce that it will entertain third-party interest for a reasonable set period, after which it proposes to deal with the bidder. Used, for example, in management buy-outs as a way of testing the fairness of the proposal by proving the market for other offers. A 'fiduciary out' should still allow alternative proposals

[17] See also paragraph 13 above

[18] However, see paragraphs 41 to 45 below

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No-due diligence

27. A no-due diligence restriction prevents a target providing information to a potential competing bidder as part of due diligence without the consent of the original bidder. Its anti-competitive effect is similar to a no-talk restriction.

28. Safeguards (including 'fiduciary outs') applicable to no-talk restrictions apply similarly to no-due diligence restrictions and like restrictions affecting dealings with potential rival bidders.

Notification obligation and information rights

29. A notification obligation requires the target to disclose details of any potential competing proposal to the original bidder. In combination with other deal protection measures, this may increase the anti-competitive effect.

30. A notification obligation reduces the likelihood that a competing bidder will want to make an approach. It may be subject to a 'fiduciary out' so that details of the competing proposal or the identity of the competing bidder need not be disclosed. Limiting the details required to be disclosed reduces the anti-competitive effect. If it is simply the fact of an approach that is disclosed, there may be little increase in effect.

31. A notification obligation may be coupled with a matching right (discussed below).

32. An information right requires the target to disclose to the original bidder any information about the target that is made available to a competing bidder which has not previously been provided to the original bidder.[19] Like a notification obligation it reduces the likelihood that a competing bidder will want to make an approach. In combination with other deal protection measures, it may increase the anti-competitive effect.[20]

Matching right

33. A matching right allows the bidder, whose proposal is recommended by the target board, a right to match or better a superior competing

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[19] An information right may exist as a standalone obligation or be included as part of a notification obligation

[20] For example, see *Virtus Health Limited* [2022] ATP 5 at [49] where the Panel required a carve out to protect bidder sensitive information in exceptional circumstances

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proposal before the target board changes its recommendation or enters into an agreement in relation to that superior competing proposal.[21]

34. A matching right cannot be for a duration that removes any practical likelihood that a potential competing bidder will be prepared to put a proposal to the target.[22] The Panel considers that the duration of the matching right should be no more than 5 business days and often shorter, depending on the circumstances.[23]

35. A material extension to a matching period is likely to be unacceptable because of the effect the provision has on the willingness of a potential competing bidder to put forward a proposal.[24]

'Fiduciary out'

36. The effectiveness of any 'fiduciary out' is relevant to the Panel's consideration of whether unacceptable circumstances exist. Generally, a 'fiduciary out' should be available to target directors in practical terms. That is, it should allow target directors to fully exercise their fiduciary duties without unreasonable fetters or constraints.

37. The Panel may consider there to be unacceptable fetters or constraints on a 'fiduciary out' where:

    (a) the decision of the target directors to determine whether or not the 'fiduciary out' can be relied upon is effectively taken out of the target directors' hands[25]

    (b) additional requirements are imposed on how the target board should act beyond requiring the target to obtain:

        (i) legal and/or financial advice that a competing proposal could reasonably be considered to become a superior proposal and

        (ii) legal advice that failing to respond to a competing proposal would likely breach the directors' statutory and fiduciary duties[26]

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[21] In the non-binding bid stage, the purpose of the matching right is to allow the original bidder to maintain exclusive due diligence

[22] *Ross Human Directions Ltd* [2010] ATP 8 at [28]

[23] *Ross Human Directions Ltd* [2010] ATP 8 at [53]-[54]

[24] *Ross Human Directions Ltd* [2010] ATP 8 at [53]-[54]

[25] *Ross Human Directions Ltd* [2010] ATP 8 at [34](b)

[26] *Ross Human Directions Ltd* [2010] ATP 8 at [34](c)

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(c) the requirements to be able to rely upon the 'fiduciary out' are overly restrictive. For example:

(i) where the terms of the exclusivity arrangements **require** a superior proposal before the 'fiduciary out' can be relied upon (rather than to allow the target board to respond to a competing proposal which could "reasonably be expected to lead" to a superior proposal)[27] or

(ii) where the 'fiduciary out' requires the target board to obtain legal advice that failing to respond to a competing proposal **would** be a breach of their statutory or fiduciary duties before it can be relied upon (rather than to allow the target board to respond to a competing proposal which "would be likely" to constitute a breach of those duties)[28] and

(iii) it is specified that the target board can only consider a competing proposal to be a superior proposal if the competing proposal is fully financed.

38. Generally, the Panel is unlikely to second guess the decisions of the target board in exercising their discretion in respect of a 'fiduciary out'[29] on the basis that the target board, properly informed, is in a better position to understand and make an assessment of all of the relevant facts and circumstances to determine what is in the best interests of the target company and shareholders.

39. However, it may give rise to unacceptable circumstances if the target board applies an overly restrictive interpretation to the terms of the exclusivity arrangements and the 'fiduciary out'.[30]

Non-binding bid stage

40. Consistent with the principles that apply generally in this note, the Panel is cognisant of the complexity in and dynamic nature of the target board's role in their consideration of a response to a non-binding proposal for the target company.

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[27] *Ross Human Directions Ltd* [2010] ATP 8 at [34](a)

[28] *Magna Pacific Holdings Limited 02* [2007] ATP 03 at [31]-[32]

[29] See, for example, *Queensland Cotton Holdings Limited 02* [2007] ATP at [37], *Babcock & Brown Communities Group Limited 02* [2008] ATP 26 at [10] and [11], *GBST Holdings Limited* [2019] ATP 15 at [36], *Webcentral Group Limited 02R* [2020] ATP 26 at [39] and *Virtus Health Limited 02* [2022] ATP 7 at [16]-[18]

[30] *Queensland Cotton Holdings Limited 02* [2007] ATP at [28]

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41. The Panel expects that in exercising its discretion when considering any relevant deal protection arrangements sought by a bidder in connection with a non-binding proposal, target boards will:

    (a) consider the impact on competition (ie, whether any deal protection devices, individually or in the aggregate, have the effect of reducing the likelihood of a competing proposal emerging rather than promoting such competition) and have regards to the s602 principles and the principles set out in this note and

    (b) where possible, seek to negotiate and 'test' (and not accept as a matter of course) the proposed deal protection devices sought by the bidder,

    noting importantly that the target has not received a binding proposal and may not receive a binding proposal from that bidder.

'Hard' exclusivity

42. A period of 'hard' exclusivity (ie, exclusivity arrangements without an effective 'fiduciary out') granted by the target board to a bidder in connection with a non-binding proposal is likely to have an anti-competitive effect. Accordingly, hard exclusivity is likely to give rise to unacceptable circumstances unless there are circumstances that warrant it.

43. The Panel recognises that there may be certain limited circumstances in which the target board considers that it is in the best interests of the target company to grant a short period of hard exclusivity to a bidder in respect of a non-binding proposal.

44. For example, it may not be unacceptable for a target board to grant a limited period of hard exclusivity in circumstances where:

    (a) A major shareholder has made a bid for the target company (or a bidder has the support of a major shareholder) and the target board considers that granting hard exclusivity would incentivise another bidder to enter the process and stimulate competition for the target company.

    (b) The target board has conducted an auction process or a fulsome sounding out of the market and is aware of a potential bidder for the target company and considers that granting hard exclusivity will encourage an offer to be made.

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(c) The target board has granted hard exclusivity to extract a material price increase from an existing bidder.[31]

(d) There is a single bidder for the target company and the board of the target company considers it unlikely that any competing bid at a higher price will emerge, the target board considers that the price offered fairly values the company and the target board considers that granting hard exclusivity to that bidder would potentially enable the proposal to progress to binding status.

45. The longer the period of hard exclusivity, the greater the anti-competitive effect. Without limiting paragraph 41, where hard exclusivity is agreed, it is generally expected that the period in which exclusive access to non-public due diligence is provided would be short and limited to no more than 4 weeks (and any no-talk would be consistent with this period).[32]

46. While the circumstances outlined in the examples above are relevant to the Panel's consideration, they are not determinative of acceptability. In all cases, the Panel will look at the circumstances as a whole and the context in which the arrangement was entered into in considering whether or not a hard exclusivity arrangement is unacceptable.[33]

Examples:

1. *Virtus Health Limited* [2022] ATP 5 – The Panel considered that exclusivity arrangements granted by a target at the non-binding bid stage that included a period of approximately one-month hard exclusivity (in effect), together with a suite of other restrictions including notification and equal information obligations, matching rights and a break fee, when considered as a whole and having regard to the factual matrix of the matter, had an anti-competitive effect and were unacceptable. The Panel was also concerned about the effectiveness of the 'fiduciary out' in circumstances where the original bidder had the prospect to match any counterproposal with a further non-binding proposal.

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[31] In considering whether unacceptable circumstances exist, the Panel will consider (among other things) whether the target board has made enquiries of other existing bidders regarding any further price increases before granting hard exclusivity to ensure that other existing bidders are not prematurely being locked-out of the process. See *AusNet Services Limited 01* [2021] ATP 9 at [51] and *Virtus Health Limited* [2022] ATP 5 at [6]

[32] The 4 weeks includes any extensions of time of hard exclusivity

[33] *AusNet Services Limited 01* [2021] ATP 9 at [67]-[69] and *Virtus Health Limited* [2022] ATP 5 at [26]

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2. *AusNet Services Limited 01* [2021] ATP 9 – Exclusivity arrangements granted by a target at the non-binding bid stage included hard exclusivity for the entire exclusivity period (a minimum of 8 weeks) coupled with a notification obligation. The Panel considered that the exclusivity arrangements, when taken together, had an anti-competitive effect, the effect of which was exacerbated by the delay in disclosing the material terms of the arrangements. The Panel emphasised that in considering the matter, the individual aspects of the exclusivity arrangements and their disclosure were not considered in isolation. Rather, each aspect was assessed within the surrounding circumstances and the context in which the exclusivity arrangements were granted.

Break fees

The 1% guideline

47. ~~9.~~ In the absence of other factors, a break fee payable by a target not exceeding 1% of the equity value of the target[~~7~~34] is generally not unacceptable.[~~8~~35] There may be facts which make a break fee within the 1% guideline unacceptable - for example if triggers for payment of the fee are not reasonable (from the point of view of coercion).[~~9~~36] In the absence of other factors, reasonable triggers might include:

(a) ~~•~~ a change of directors' recommendation (but it might be unreasonable for the trigger to be a change of recommendation because of a breach of the implementation agreement by the bidder, or a condition precedent outside the target's control not being satisfied, or an expert opining that the transaction is not fair and reasonable)

(b) ~~•~~ a competing transaction that successfully completes

(c) ~~•~~ a material condition precedent within the target's control not being satisfied

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~~7~~ 34 The aggregate of the value of all classes of equity securities issued by the target having regard to the value of the bid consideration when announced. In limited cases, it may be appropriate for the 1% guideline to apply to a company's enterprise value, for instance because the target is highly geared

~~8 *National Can Industries 01(R)* [2003] ATP 40 at [33].~~ 35 Note, however, that an applicant may be able to establish that the fee is anti-competitive or coercive despite being less than 1%

~~9~~ 36 "Naked no vote" break fees (ie, fees payable by a target to a bidder if the takeover is rejected by the target's shareholders even though there is no competing bid) may fall into this category. See *Ausdoc Group Ltd* [2002] ATP 9 at [43]

(d) ~~•~~ a material breach within the target's control or

(e) ~~•~~ other events affecting the bid (eg, a major asset of the target is destroyed).

48. ~~10.~~ In considering whether a break fee gives rise to unacceptable circumstances, the Panel is guided by the following (among other things):

(a) whether the fee was agreed after a public, transparent process designed to elicit proposals~~10~~[37]

(b) whether the proposal was solicited by the target

(c) whether the fee is fixed or capped (either in dollar or percentage terms)

(d) whether the fee (on a cost per share basis) is less than the premium under the bid~~11~~[38]

(e) the cost, effort or risk involved in making the proposal

(f) whether the fee reimburses actual expenses

(g) whether another bidder has increased its bid or made a bid and whether the fee was material in determining the price that the competing bidder was prepared to pay.~~12~~ In this case the fee may not be anti-competitive[39] and

(h) any other relevant factors, such as whether the obligation is limited to a reasonable period.

49. ~~11.~~ Multiple fees (with a party and its associates in respect of the same or related transactions) are likely to be aggregated for the purpose of the 1% guideline.~~13~~ [40]

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~~10~~ [37] *Ausdoc Group Ltd* [2002] ATP 9

~~11~~ [38] *Ausdoc Group Ltd* [2002] ATP 9 at [35(f)]

~~12 In *Normandy Mining Limited (No. 3)* [2001] ATP 30, the break fee was more than 1% of equity value, which might have been excessive because of the large size of the bid, but for a counter-bid~~

[39] See eg, *Pacific Energy Limited* [2019] ATP 20, where a break fee to a second bidder resulted in a significantly higher price for shareholders (see at [33])

~~13 *National Can Industries 01 and 01R.* Contrast *Ausdoc Group Limited [2002] ATP 9*~~

[40] *National Can Industries Limited 01* [2003] ATP 35 and *National Can Industries 01R* [2003] ATP 40. Contrast *Ausdoc Group Limited* [2002] ATP 9

Non-binding bid stage / proposals

50. Generally, the Panel does not expect that a target board would agree to a break fee in respect of a non-binding proposal. However, to the extent one is agreed, the Panel expects that the quantum would be substantially lower than for an equivalent binding proposal.

Timing

51. ~~12.~~ It may be appropriate to delay entry into a break fee agreement, or incorporate a 'fiduciary~~'~~ out', if an event that might trigger payment of the fee is imminent.

Example: Negotiating a break fee payable if a director changes his or her recommendation shortly before an expert's report on which the recommendation will be based is due, when the directors could have waited, may give rise to unacceptable circumstances.[~~14~~ 41]

~~Restriction agreements~~

~~Agreements~~

~~13. Restriction agreements restrict the ability of the target (or shareholder) to act. The possible effect of one or more restrictions in a restriction agreement may be anti-competitive and give rise to unacceptable circumstances.~~

~~14. Restriction agreements may be coupled with notification obligations[15] or matching rights.[16] These may increase the anti-competitive effect.~~

~~15. A notification obligation reduces the likelihood that a competing bidder will want to make an approach, and may even act as a restriction agreement in its own right. It must be limited and reasonable in the circumstances. It may be subject to a 'fiduciary' out so that details of the competing proposal need not be passed on. Limiting the disclosure reduces the anti-competitive effect. If it is simply the fact of an approach that is passed on, there may be little increase in effect.~~

~~14 *National Can Industries Limited 01* [2003] ATP 35 at [41] and *National Can Industries Limited 01(R)* [2003] ATP 40 at [37]~~

41 *National Can Industries Limited 01* [2003] ATP 35 at [41] and *National Can Industries Limited 01(R)* [2003] ATP 40 at [37]

~~15 A provision that requires the target (shareholder) to disclose details of any potential competing proposal to the original bidder~~

~~16 A provision that allows the bidder to match the third party deal proposed to the target~~

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16. ~~Notification may also be coupled with a matching right. A matching right will be less anti-competitive if the competing bidder has a reasonable opportunity after the original bidder has matched its bid to increase its offer. A matching right will be more anti-competitive if the matching right includes an obligation to provide the original bidder with details of negotiations with the subsequent potential bidder.~~

17. ~~Restriction agreements may have a less anti-competitive effect if coupled with a window-shop provision,[17] go-shop provision[18] or market-check provision.[19] Such provisions should allow a reasonable period to 'shop' the target. They should not unreasonably constrain any 'fiduciary' out that might be coupled to a particular restriction.~~

18. ~~In considering whether unacceptable circumstances arise, the Panel also considers the potential benefits to target shareholders of the agreement and the reasons why target directors are satisfied of the commercial and competitive benefits to shareholders of entering the agreement.~~

~~Types of restrictions~~

~~*No-Shop restriction*~~

19. ~~A no-shop restriction prevents the soliciting of alternatives, usually during a defined period of exclusivity. The longer the period the more anti-competitive is the effect of the restriction. Normally the period would not extend into the bid period but it may do so if justifiable having regard to the advantages the agreement offers target shareholders.~~

20. ~~While a simple no-shop restriction does not prevent the target (or shareholder) dealing with unsolicited approaches (and therefore if it is limited and reasonable may not require a 'fiduciary' out), it is sometimes coupled with a notification obligation. This increases the anti-competitive effect (which may be reduced by limiting the information required to be passed on).~~

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[17] ~~A provision that the target cannot actively solicit offers, but can consider unsolicited offers, give the potential offeror information and accept the offer if necessary to avoid a breach of fiduciary duty~~

[18] ~~A provision that allows the target (or shareholder) a reasonable set time in which it can 'shop' the market~~

[19] ~~A provision allowing the target to announce that it will entertain third party interest for a reasonable set period, after which it proposes to deal with the bidder. Used, for example, in management buy-outs as a way of testing the fairness of the proposal by proving the market for other offers. A 'fiduciary' out should still allow alternative proposals~~

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21. ~~Whereas a limited and reasonable no-shop restriction generally does not require a 'fiduciary' out, being less anti-competitive than a no-talk restriction, the Panel is likely to treat it like a no-talk restriction if, for example:~~

    (a) ~~the wording does not clearly permit the target to respond to an alternative proposal or enquiry or~~

    (b) ~~it is coupled with a notification obligation to inform the original bidder of subsequent approaches that is too extensive (eg, requires all the details of the negotiations and does not have a 'fiduciary' out).~~

~~No-due-diligence restriction~~

22. ~~A no-due-diligence restriction prevents a target passing information to a potential competing bidder as part of due diligence without the consent of the original bidder. Its anti-competitive effect is similar to a no-talk restriction.~~

23. ~~It might also incorporate a notification obligation, which may increase the anti-competitive effect.~~

24. ~~Safeguards (including 'fiduciary' outs) applicable to no-talk restrictions apply similarly to no-due-diligence restrictions and like restrictions affecting dealings with potential rival bidders.~~

~~No-talk restriction~~

25. ~~A no-talk restriction prevents a target negotiating with any potential competing bidder. It might be graduated from the least restrictive form (allowing negotiations if the approach was unsolicited) to the most restrictive form (no negotiations, even if the approach was unsolicited).~~

26. ~~A no-talk restriction is more anti-competitive than a no-shop restriction. Therefore the safeguards need to be more stringent.~~

27. ~~In the absence of an effective 'fiduciary' out, a no-talk restriction is likely to give rise to unacceptable circumstances. Even with a 'fiduciary' out, the period of restraint must be limited and reasonable.[20] However, generally a no-talk restriction subject to a 'fiduciary' out will have little practical effect following announcement of the bid, even if the restraint extends into that period.~~

28. ~~A no-talk restriction (with a 'fiduciary' out) is less likely to give rise to unacceptable circumstances if the target has conducted an effective auction process before agreeing to it.~~

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[20] ~~Compare the restraint on disposing of shares in *PowerTel Limited 01* [2003] ATP 25~~

29. ~~No-talk restrictions are sometimes coupled with a notification obligation in respect of potential competing proposals. This may increase the anti-competitive effect.~~

~~Asset lock-up~~

30. ~~In the context of a control transaction, an asset lock-up agreement that involves an important asset of the target (usually the "crown jewel") can make the target less attractive as an acquisition candidate or investment for shareholders. Accordingly, it may be both anti-competitive and coercive.~~

31. ~~This note applies to lock-ups in the context of an existing or anticipated bid. If the lock-up was entered into after the target received notice of a bid or proposed bid, it may also constitute frustrating action.[21]~~

32. ~~In considering whether an asset lock-up agreement gives rise to unacceptable circumstances, the Panel is guided by the following (among other things):~~

    (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 is at a fair price. This includes whether any expert advice or sufficient evidence was obtained by the target on the appropriateness of any fixed price, or price formula, in the agreement~~

    (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 length of the lock-up.~~

~~Lock-up devices with major shareholders~~

33. ~~A bidder may seek to enter into a lock-up device with a major shareholder of the target in addition (or as an alternative) to the target~~

[21] ~~See GN 12. See also *Perilya Ltd 02* [2009] ATP 1 at [22] [33]~~

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~~itself. This note applies, with necessary adaptation, to such agreements.[22]~~

~~34. Primarily the Panel is interested in agreements that may undermine s606. The Panel will consider the anti-competitive effect[23] of any agreement that may relate to shares above the 20% threshold (in the shareholder's hands or when combined with shares already held by the bidder) otherwise than as contemplated in s611.[24]~~

Disclosure

52. ~~35. The~~At a minimum, the existence and nature[~~25~~] of all material terms[42] of any ~~lock-up device~~deal protection arrangement should normally be disclosed by no later than when the relevant control proposal is announced,[43] although it may be necessary to announce it earlier under continuous disclosure provisions applicable to the bidder or target.[~~26~~44]

53. The failure or delay in disclosing the deal protection mechanism may have an anti-competitive effect[45] and also result in an uninformed market for control of the target.

54. A bidder or target may form the view that deal protection arrangements entered into in respect of a non-binding proposal during the non-binding bid stage does not require disclosure under the continuous disclosure provisions.[46] However, where such arrangements include a notification obligation, the Panel expects there to be disclosure of the material terms of the deal protection arrangements once those arrangements are entered into. The Panel

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~~22 For example, the 1% cap will be calculated on the value of the shares held by the shareholder rather than the target's market capitalisation~~

~~23 Coercion is not a factor in lock-up agreements with a major shareholder~~

~~24 *Alpha Healthcare Limited* [2001] ATP 13 at [23]-[24]~~

~~25~~42 ~~Including all~~Even if the relevant terms~~, even if they~~ of the arrangement are in separate documents: *Normandy Mining Limited (No. 3)* [2001] ATP 30 at [39]

43 See *AusNet Services Limited 01* [2021] ATP at [65]. However, there may be circumstances in which the full agreement containing the arrangement should be disclosed – see *GBST Holdings Limited* [2019] ATP 15 at [43]-[44]

~~26~~44 For a listed disclosing entity, ASX Listing Rule 3.1 applies unless the exception in ASX Listing Rule 3.1A applies. For other disclosing entities, see s675~~. An example is *AMP Shopping Centre Trust 01* [2003] ATP 21 (a decision on pre-emptive rights). On review, see *AMP Shopping Centre Trust 02* [2003] ATP 24~~

45 *AusNet Services Limited 01* [2021] ATP 9 at [60]

46 ie, because an exception in Listing Rule 3.1A applies

considers that a competing bidder should be aware that information in respect of their competing proposal (which may include confidential information) may be disclosed by the target under a notification obligation.

Remedies

55. ~~36.~~ The Panel has a wide power to make orders (including remedial orders) if a ~~lock-up~~deal protection device gives rise to unacceptable circumstances, including requiring a standstill period,[47] cancelling agreements,[48] or cancelling agreements if an amendment is not made.[27][49] The Panel's orders (or undertakings[28][50]) will be designed to remove any anti-competitive or coercive effect.

Publication History

First Issue	7 December 2001
Reformatted	17 September 2003
Second Issue	15 February 2005
Third Issue	13 November 2007
Fourth ~~issue:~~Issue	11 February 2010

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[47] In *Virtus Health Limited* [2022] ATP 5, the Panel made a standstill order which prevented the target and a potential bidder from entering into (in effect) a scheme implementation agreement for a limited period

[48] In *Ballarat Goldfields NL* [2002] ATP 7, the Panel made orders that the shares which were to constitute the break fee not be issued and no other benefit be provided in substitution

~~[27] In *Ballarat Goldfields NL* [2002] ATP 7 the Panel ordered that the shares which were to constitute the break fee not be issued and no other benefit be provided in substitution~~[49] In *AusNet Services Limited 01* [2021] ATP 9, the Panel made orders that a no-talk restriction in a confidentiality deed would be of no force and effect unless the no-talk was amended to include a 'fiduciary out'. Similarly, in *Virtus Health Limited* [2022] ATP 5, the Panel made orders that certain exclusivity arrangements in a process deed would be of no force and effect unless the process deed was amended to ensure there was (among other things) an effective 'fiduciary out'

~~[28]~~ [50] In *Ausdoc Group Limited* [2002] ATP 9, the Panel accepted undertakings from the fee-taker to waive its right to receive and not to accept the payment of a particular fee and from the fee-payer not to pay that fee

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~~Related material~~

~~GN 12 Frustrating action~~

Fifth Issue [**]

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