



**Australian Government**  
**Takeovers Panel**

## Guidance Note 7 – Lock-up devices

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### Introduction

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1. This guidance note has been prepared to assist market participants understand the Panel’s approach to lock-up devices.<sup>1</sup> It applies in control transactions, including takeovers. 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 note are of general application and can be applied to any arrangement which has the effect of fettering the actions of a target, a bidder or a substantial shareholder.

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<sup>1</sup> 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

3. The examples are illustrative only and nothing in the 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.
5. In this note the following definitions apply:

<b>Term</b>	<b>Meaning</b>
asset lock-up	an arrangement between a bidder and target for the sale, purchase or encumbrance of an asset in exchange for <ul style="list-style-type: none"><li>• proposing a bid or other control transaction or</li><li>• a period of exclusivity or the opportunity to undertake due diligence for a control transaction</li></ul>
break fee	consideration however payable by a target if specified events occur which prevent a bid from proceeding or cause it to fail <sup>2</sup>
'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 device	an arrangement that encourages or facilitates a control transaction <sup>3</sup> 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*

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<sup>2</sup> 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

## Devices generally

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6. Lock-up devices are not unacceptable as such. They may help secure a proposal<sup>4</sup> 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 target will not complete the proposal. However, they may also deter rival bidders.
7. Whether any lock-up device gives rise to unacceptable circumstances will depend on its effect or likely effect, having regard to s602 and s657A.<sup>5</sup> 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).<sup>6</sup>
8. The Panel looks at the substance of the lock-up device over its form.

## Break fees

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### The 1% guideline

9. In the absence of other factors, a break fee not exceeding 1% of the equity value of the target<sup>7</sup> is generally not unacceptable.<sup>8</sup> 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).<sup>9</sup> In the absence of other factors, reasonable triggers might include:

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<sup>3</sup> Including shareholder approved transactions under item 7 of s611

<sup>4</sup> For example, by inducing the first bidder to bid or a subsequent bidder to compete

<sup>5</sup> Unless otherwise indicated, references are to the *Corporations Act 2001* (Cth)

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

<sup>7</sup> 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

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

<sup>9</sup> "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]

- 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)
  - a competing transaction that successfully completes
  - a material condition precedent within the target's control not being satisfied
  - a material breach within the target's control or
  - other events affecting the bid (eg, a major asset of the target is destroyed).
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<sup>10</sup>
  - (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<sup>11</sup>
  - (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.<sup>12</sup> In this case the fee may not be anti-competitive
  - (h) any other relevant factors, such as whether the obligation is limited to a reasonable period.

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<sup>10</sup> *Ausdoc Group Ltd* [2002] ATP 9

<sup>11</sup> *Ausdoc Group Ltd* [2002] ATP 9 at [35(f)]

<sup>12</sup> 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

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.<sup>13</sup>

### **Timing**

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.*<sup>14</sup>

### **Restriction agreements**

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#### **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<sup>15</sup> or matching rights.<sup>16</sup> 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.
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

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<sup>13</sup> *National Can Industries 01 and 01R. Contrast Ausdoc Group Limited [2002] ATP 9*

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

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

<sup>16</sup> A provision that allows the bidder to match the third party deal proposed to the target

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,<sup>17</sup> go-shop provision<sup>18</sup> or market-check provision.<sup>19</sup> 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).
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

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<sup>17</sup> 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

<sup>18</sup> A provision that allows the target (or shareholder) a reasonable set time in which it can 'shop' the market

<sup>19</sup> 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

- (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.<sup>20</sup> 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.
- 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**

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- 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")

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<sup>20</sup> Compare the restraint on disposing of shares in *PowerTel Limited 01* [2003] ATP 25

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.<sup>21</sup>
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**

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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 itself. This note applies, with necessary adaptation, to such agreements.<sup>22</sup>
34. Primarily the Panel is interested in agreements that may undermine s606. The Panel will consider the anti-competitive effect<sup>23</sup> 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.<sup>24</sup>

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<sup>21</sup> See GN 12. See also *Perilya Ltd 02* [2009] ATP 1 at [22]-[33]

<sup>22</sup> 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

<sup>23</sup> Coercion is not a factor in lock-up agreements with a major shareholder

<sup>24</sup> *Alpha Healthcare Limited* [2001] ATP 13 at [23]-[24]



## Disclosure

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35. The existence and nature<sup>25</sup> of any lock-up device should normally be disclosed no later than when the relevant control proposal is announced, although it may be necessary to announce it earlier under continuous disclosure provisions applicable to the bidder or target.<sup>26</sup>

## Remedies

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36. The Panel has a wide power to make orders (including remedial orders) if a lock-up device gives rise to unacceptable circumstances, including cancelling agreements.<sup>27</sup> The Panel's orders (or undertakings<sup>28</sup>) will be designed to remove any anti-competitive or coercive effect.

## Publication History

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## Related material

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GN 12 Frustrating action

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<sup>25</sup> Including all the relevant terms, even if they are in separate documents: *Normandy Mining Limited (No. 3)* [2001] ATP 30 at [39]

<sup>26</sup> 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

<sup>27</sup> 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

<sup>28</sup> 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