



Australian Government
Takeovers Panel

Guidance Note 7 – Deal protection

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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

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 <i>Examples: break fees and exclusivity arrangements (such as no-shop, no-talk and no-due diligence restrictions)</i>
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

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

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 into 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 value⁸
 - (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

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]

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 into 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.

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]. See also Guidance Note 19: Insider Participation in Control Transactions at [26(f)]

18. Exclusivity arrangements may be coupled with notification obligations¹³ 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 provision¹⁵ 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 it¹⁷ or where the potential transaction has been in the market for a reasonable 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).

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

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 may reduce 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 may reduce 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

¹⁸ However, see paragraphs 42 to 47 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

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' hands²⁵
 - (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

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 duties²⁶ or
 - (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
 - (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 the target board considers "would be likely" to constitute a breach of those duties)²⁸ or
 - (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 or if the competing proposal is a particular type of transaction (for example, a 'control transaction' involving the acquisition of 100% or more than 50% of the shares in the target).
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

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 3 at [28] and [31]-[32]

²⁹ See, for example, *Queensland Cotton Holdings Limited* [2007] ATP 5 at [36], *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* [2007] ATP 5 at [28]

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 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 arrangements³¹ 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 aggregate, have the effect of reducing the likelihood of a competing proposal emerging rather than promoting such competition, or have the effect of reducing the ability of the target board to engage with a competing proposal) 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.
41. The principles set out in paragraphs 35 to 38 above apply generally in relation to a 'fiduciary out' at the non-binding bid stage. In addition, the Panel expects that any 'fiduciary out' at the non-binding bid stage would give the target board scope to consider the likelihood that any matching proposal made by the original bidder is likely to lead to a binding proposal at that price.

'Hard' exclusivity

42. The Panel expects that where a target board decides to grant due diligence access to a potential bidder, the default position would be for such access to be granted on a non-exclusive basis. In some circumstances, the target board may determine that it is necessary to grant exclusivity arrangements with an effective 'fiduciary out' (and potentially a short period of 'hard' exclusivity) in order to facilitate a potential proposal.
43. 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-

³¹ In addition, in relation to break fees see paragraph 51 and in relation to disclosure see paragraph 55

competitive effect. Accordingly, hard exclusivity is likely to give rise to unacceptable circumstances unless there are circumstances that warrant it.

44. 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.
45. 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 be required for 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.
 - (c) The target board has granted hard exclusivity to extract a material price increase from an existing bidder.³²
 - (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.
46. The longer the period of hard exclusivity, the greater the anti-competitive effect. Without limiting paragraph 42, where hard exclusivity is agreed, it is generally expected that the period of 'hard exclusivity' would be short and limited to no more than 4 weeks.³³
47. 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

³² 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 [70]

³³ The 4 weeks includes any extensions of time of hard exclusivity

context in which the arrangement was entered into in considering whether or not a hard exclusivity arrangement is unacceptable.³⁴

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 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

48. In the absence of other factors, a break fee payable by a target not exceeding 1% of the equity value of the target³⁵ is generally not unacceptable.³⁶ There may be facts which make a break fee within the

³⁴ *AusNet Services Limited 01* [2021] ATP 9 at [67]-[69] and *Virtus Health Limited* [2022] ATP 5 at [26]

³⁵ 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

³⁶ Note, however, that an applicant may be able to establish that the fee is anti-competitive or coercive despite being less than 1%

1% guideline unacceptable - for example if triggers for payment of the fee are not reasonable (from the point of view of coercion).³⁷ 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 opinion 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.
49. 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 proposals³⁸
 - (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 bid³⁹
 - (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-competitive⁴⁰ and

³⁷ "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]

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

³⁹ *Ausdoc Group Ltd* [2002] ATP 9 at [35(f)]

⁴⁰ 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])

- (h) any other relevant factors, such as whether the obligation is limited to a reasonable period.
50. 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.⁴¹

Non-binding bid stage / proposals

51. 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. In considering whether a break fee in respect of a non-binding proposal gives rise to unacceptable circumstances, the Panel will have regard to the factors set out in paragraph 49 above (among other things).

Timing

52. 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.*⁴²

Disclosure

53. At a minimum, the existence and nature of all material terms⁴³ of any deal protection arrangement should normally be disclosed by no later than when the relevant control proposal is announced,⁴⁴ although it may be necessary to announce it earlier under continuous disclosure provisions applicable to the bidder or target.⁴⁵

⁴¹ *National Can Industries Limited 01* [2003] ATP 35 and *National Can Industries 01R* [2003] ATP 40. Contrast *Ausdoc Group Limited* [2002] ATP 9

⁴² *National Can Industries Limited 01* [2003] ATP 35 at [41] and *National Can Industries Limited 01R* [2003] ATP 40 at [37]

⁴³ Even if the relevant terms of the arrangement are in separate documents: *Normandy Mining Limited 03* [2001] ATP 30 at [39]

⁴⁴ 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]

⁴⁵ 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

54. The failure or delay in disclosing the deal protection mechanism may have an anti-competitive effect⁴⁶ and also result in an uninformed market for control of the target.
55. 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.⁴⁷ However, in certain circumstances the failure to disclose the material terms of the deal protection arrangements once those arrangements are entered into may give rise to unacceptable circumstances, including in either of the following circumstances:
- (a) the arrangements include a notification obligation which requires notification of the identity of a competing bidder or the terms of its competing proposal⁴⁸
 - (b) the target board has agreed (under a 'process deed' or similar document) to recommend a transaction if the bidder puts a binding proposal on the terms of its indicative proposal (or if a material fee would be payable by the target if the target board fails to recommend a binding proposal on the same or better terms than the indicative proposal).

Remedies

56. The Panel has a wide power to make orders (including remedial orders) if a deal protection device gives rise to unacceptable circumstances, including requiring a standstill period,⁴⁹ cancelling agreements,⁵⁰ or cancelling agreements if an amendment is not made.⁵¹

⁴⁶ *AusNet Services Limited 01* [2021] ATP 9 at [60]

⁴⁷ ie, because an exception in ASX Listing Rule 3.1A applies

⁴⁸ The Panel considers that a competing bidder should be aware if information in respect of their identity or their competing proposal (which may include confidential information) may be disclosed by the target under a notification obligation

⁴⁹ 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

⁵⁰ 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

⁵¹ 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'

The Panel's orders (or undertakings⁵²) 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	8 August 2023

Related material

GN 19: Insider Participation in Control Transactions

⁵² 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