



**In the matter of Ausdoc Group Limited
[2002] ATP 09**

Catchwords:

Lock-up devices – quantum of break fee and cost contribution fee – break fee of more than 1% – break fee payable where compulsory acquisition levels (90%) not achieved – exclusivity arrangements – deterring potential rival bidders

Corporations Act 2001 (Cth), sections 602 and 657A(3)

Takeovers Panel Guidance Note 7 – “Lock-up Devices”

These are our reasons for declining to make a declaration of unacceptable circumstances in relation to the Deed of Undertaking entered into by Ausdoc Group Limited (Ausdoc) and ABN AMRO Capital (Belgium) N. V. (ABN AMRO) on 22 May 2002. The decision follows undertakings to the Panel by Ausdoc and ABN AMRO waiving ABN AMRO’s right to the break fee that would be payable under the Deed if there is no bid for Ausdoc higher than the ABN AMRO bid, and ABN AMRO does not reach or waive its 90% minimum acceptance condition. The application in this matter was brought by the Australian Securities and Investments Commission (ASIC).

INTRODUCTION

1. The sitting Panel was comprised of Mr Michael Tilley (sitting President), Professor Ian Ramsay (sitting Deputy President) and Ms Luise Elsing.
2. On 22 May 2002, Ausdoc and ABN AMRO entered into a deed of undertaking (**Deed**). The Deed set out certain lock-up arrangements in relation to a possible takeover bid by ABN AMRO for Ausdoc, including various exclusivity, break fee and cost contribution arrangements.
3. On 14 June 2002, ASIC applied to the Panel pursuant to subsection 657C(2) of the Corporations Act (**Act**) for a declaration of unacceptable circumstances under section 657A of the Act and orders under section 657D of the Act in relation to the Deed.
4. The Panel decided that one aspect of the Deed gave rise to unacceptable circumstances but declined to make any declaration following an offer by each of Ausdoc and ABN AMRO to provide an undertaking to the Panel in relation to the Deed. The Panel was satisfied that the undertakings adequately addressed the Panel’s concerns in relation to the Deed and, therefore, decided to accept those undertakings.

COST CONTRIBUTION AND BREAK FEE ARRANGEMENTS

5. The Deed provides for Ausdoc to pay to ABN AMRO various cost contributions or break fees in different circumstances. The amount is to be determined in accordance with clause 7 and Schedule 3 of the Deed. Most of those fees are no longer able to be triggered because of the passage of time, and the occurrence (or non-occurrence) of

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specified events. The relevant aspects of clause 7 and Schedule 3 of the Deed are set out in **paragraph 16** and **Annexure A**, respectively. The fees may be summarised as follows:

- (a) **No Bid Fee:** A cost contribution fee of up to \$1.5 million would have been payable if ABN AMRO had not announced a takeover offer for Ausdoc on the agreed terms for a reason beyond its control as agreed with Ausdoc (e.g. ABN AMRO's due diligence reveals a material adverse issue);
- (b) **29 May No Recommendation Fee:** A break fee of \$3.5 million would have been payable if by 12:00 noon on 29 May 2002, ABN AMRO had notified Ausdoc of its willingness to make a takeover offer on the agreed terms but the Ausdoc board did not recommend the offer;
- (c) **18 June No Recommendation Fee:** A cost contribution fee of up to \$2.5 million would have been payable if the Ausdoc board had not recommended the offer which ABN AMRO had notified Ausdoc before 12:00 noon on 18 June 2002 that it was willing to make which offer was on the agreed terms;
- (d) **"Don't bid" Fee:** A cost contribution fee of up to \$2.5 million would have been payable if at any time between 12:00 noon on 29 May 2002 and 12:00 noon on 18 June 2002, Ausdoc had notified ABN AMRO that it did not wish ABN AMRO to make a takeover offer for Ausdoc on the agreed terms;
- (e) **Adjustment Agreement Fees:** If ABN AMRO and Ausdoc had been unable to agree the adjustment to the \$2.13 per share price as a result of the break-up strategy in respect of certain parts of Ausdoc's business, and Ausdoc had not required ABN AMRO to make a takeover offer at a price which incorporates ABN AMRO's adjustment amount:
 - (i) a break fee of \$3.5 million would have been payable if ABN AMRO notified Ausdoc of its willingness to make a takeover offer prior to 12:00 noon on 29 May 2002; and
 - (ii) a cost contribution fee of up to \$2.5 million would have been payable if ABN AMRO notified Ausdoc of its willingness to make a takeover offer between 12:00 noon on 29 May 2002 and 12:00 noon on 18 June 2002.
- (f) **Higher Bid Fee:** A break fee of \$3.5 million would have been payable if ABN AMRO, having announced a takeover bid which is recommended by Ausdoc, had not sent offer documents to Ausdoc shareholders due to a higher bid being announced after ABN AMRO's announcement;
- (g) **Adjusted Higher Bid Fee:** If a higher bid is made by any person after ABN AMRO has sent its offer documents and that bidder becomes "entitled" to 10% or more of Ausdoc shares, Ausdoc will have to pay a break fee of \$3.5 million less any profit made by ABN AMRO on the sale of Ausdoc shares into the higher offer;

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- (h) **90% Break Fee:** But for the undertakings by ABN AMRO and Ausdoc as part of these Panel proceedings, a break fee of \$2.5 million would have been payable if there is no higher bid and ABN AMRO's 90% minimum acceptance condition is not satisfied or waived.

THE APPLICATION

- 6. ASIC submitted in its application that two aspects of the Deed gave rise to unacceptable circumstances as follows:
 - (a) the size of certain of the cost contribution and break fees provided for in the Deed; and
 - (b) the existence and size of the 90% Break Fee.
- 7. ASIC sought the following orders:
 - (a) that the terms of the Deed be varied such that the break fee payable by Ausdoc to ABN AMRO in the circumstances specified in rows 2, 3 and 4 of the table contained in Schedule 3 and in clause 7.2 of the Deed (see **Annexure A** and **paragraph 16** below, respectively) may not exceed 1% of the equity value of Ausdoc, based on the final ABN AMRO bid price and having regard to any cost contribution fee previously paid by Ausdoc to ABN AMRO;
 - (b) that the terms of the Deed be varied, either:
 - (i) such that the 90% Break Fee is not payable by Ausdoc to ABN AMRO; or alternatively
 - (ii) such that the 90% Break Fee may not exceed 1% of the equity value of Ausdoc, based on the final ABN AMRO bid price and having regard to any cost contribution fee previously paid by Ausdoc to ABN AMRO; and

any other orders that the Panel may deem appropriate in the circumstances (including orders relating to any other aspect of the

- (c) Deed which may give rise to unacceptable circumstances and which has not been specifically addressed in ASIC's application).

BACKGROUND

- 8. The entry into the Deed was preceded by a public tender process for Ausdoc which had been conducted by UBS Warburg on behalf of Ausdoc over a period of approximately 6 months.
- 9. On 19 December 2001, Ausdoc commenced the tender process by announcing that it would seek expressions of interest, to be followed by indicative bids, for the acquisition of each of its businesses or for all of the shares in Ausdoc (**Proposed Sale Announcement**).

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10. Following preliminary due diligence investigations of Ausdoc, ABN AMRO submitted an indicative bid for all of the shares in Ausdoc on 1 February 2002. ABN AMRO was then selected to conduct further due diligence on a non-exclusive basis. ABN AMRO then submitted another indicative bid for Ausdoc on 21 March 2002. In that indicative bid, ABN AMRO stated that it wished to negotiate suitable arrangements in relation to exclusivity, cost contribution and break fees with Ausdoc before proceeding further in the tender process.
11. Discussions ensued between Ausdoc and ABN AMRO in relation to ABN AMRO's indicative bid of 21 March 2002 which resulted in the parties entering into the Deed on 22 May 2002. On that date, Ausdoc announced to Australian Stock Exchange Limited (**ASX**) that it had entered into exclusive negotiations with an unnamed person (ABN AMRO) who was interested in making a cash offer to Ausdoc shareholders for their shares in Ausdoc. The key terms of the Deed were disclosed in that announcement.
12. As at the date of the Deed, Ausdoc had not received any alternative bids or proposals which were comparable to ABN AMRO's indicative bid at that time. Further, Ausdoc did not have an agreement with any other person except a proposal which was being negotiated for the sale of one part of its business.
13. Prior to the execution of the Deed, Ausdoc paid ABN AMRO a cost contribution fee of \$250,000 plus GST in relation to ABN AMRO's preliminary due diligence investigations of Ausdoc (**Preliminary Cost Contribution Fee**). There is no provision in the Deed for any break fee or cost contribution fee payable under the Deed to be adjusted by the amount of the Preliminary Cost Contribution Fee. Ausdoc and ABN AMRO have confirmed to the Panel that the Preliminary Cost Contribution Fee was intended to be in addition to any amount paid to ABN AMRO under the Deed. Similar payments were made to other interested parties who conducted due diligence on Ausdoc.
14. As at 18 June 2002, when the Panel decided to conduct proceedings in accordance with Regulation 20 of the ASIC Regulations, Ausdoc had not paid any amount to ABN AMRO under the Deed. ABN AMRO submitted that in the two-week period following 18 June 2002, the only circumstance in which a break fee would be payable to it under the Deed was if ABN AMRO announced a takeover bid, but did not proceed because a higher bid had been announced by another person. ABN AMRO undertook to the Panel that it would not enforce its rights to receive a break fee in those circumstances for a period of two weeks following 18 June 2002, by which time the Panel expected to have disposed of this matter.
15. After the close of trading on 18 June 2002, Ausdoc and ABN AMRO made a joint announcement to the ASX that ABN AMRO intended to make a recommended cash offer of \$2.15 per share for all of the shares in Ausdoc (**Joint Announcement**).

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RELEVANT PROVISIONS OF THE DEED

Cost Contribution and Break Fees

16. Clause 7 and Schedule 3 of the Deed set out the obligation of Ausdoc to pay ABN AMRO a cost contribution or break fee in certain circumstances. Schedule 3 to the Deed is reproduced in Annexure A. The relevant aspects of clause 7 are set out below.
- “7.2 If at any time during the Extended Period [i.e. after 12.00 noon on 29 May 2002 and until 12.00 noon on 18 June 2002], [ABN AMRO] notifies Ausdoc of its intention to make a Takeover Bid [i.e. an off-market bid under Chapter 6 of the Act] that complied with clauses 3.1(1) to (3) inclusive, but the Ausdoc Board for any reason does not recommend the Takeover Bid, then Ausdoc must immediately pay to [ABN AMRO] its Actual Costs [i.e. reasonable professional costs and disbursements of ABN AMRO’s external advisors charged to ABN AMRO, and costs of airfares and travel and accommodation incurred by representatives of ABN AMRO and its advisers, in relation to ABN AMRO’s due diligence on Ausdoc...for which...ABN AMRO provides copy invoices and proof of payment to Ausdoc] as well as its Internal Costs up to an aggregate maximum amount of \$2.5 million [i.e. the 18 June No Recommendation Fee].
- 7.6 At any time during the Extended Period Ausdoc may notify [ABN AMRO] that it does not wish [ABN AMRO] to make a Takeover Bid that complies with clauses 3.1(1) to (3) inclusive and in those circumstances Ausdoc must immediately pay to [ABN AMRO] its Actual Costs and its Internal Costs as calculated in accordance with clause 7.2 up to an aggregate maximum of \$2.5 million [i.e. the “Don’t bid” Fee].”
17. In addition, clause 7.7 of the Deed provides that ABN AMRO may recover a cost contribution or break fee from Ausdoc only once. ABN AMRO confirmed in its submissions that no break fee or cost contribution amount specified in the Deed was to be aggregated with another in determining the amount payable to ABN AMRO.

Exclusivity

18. The Panel also considered the exclusivity arrangements contained in the Deed and invited parties to make submissions on those arrangements. The exclusivity arrangements in the Deed prevented Ausdoc from encouraging, soliciting or inviting bids in relation to Ausdoc until 18 June 2002, or where ABN AMRO made a takeover bid for Ausdoc (as it has done), until the end of ABN AMRO's bid period. Further, Ausdoc is not permitted to respond to any unsolicited offer, statement of intention or expression of interest in relation to the sale of Ausdoc during the same period unless failing to respond would constitute a breach of the directors’ fiduciary or statutory obligations or would otherwise be unlawful. If Ausdoc does respond to a rival offer, it is required immediately to disclose to ABN AMRO the details of that rival offer (**Disclosure Obligation**).

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19. The exclusivity arrangements, including the Disclosure Obligation, are subject to a fiduciary carve out where complying with them would constitute a breach of the directors' fiduciary or statutory obligations or would otherwise be unlawful.
20. The Panel was particularly interested in receiving submissions in relation to the Disclosure Obligation, and the length of the exclusivity period (i.e. the fact that it extended into ABN AMRO's bid period).

SUBMISSIONS

21. The parties made the following submissions.

ASIC

Quantum of cost contribution and break fees

22. ASIC submitted that:

- (a) the break fee of \$3.5 million which is payable in the circumstances specified in rows 3 and 4 of Schedule 3 to the Deed (see Annexure A) (**\$3.5M Break Fee**); and
- (b) the cost contribution fee of up to \$2.5 million which is payable where ABN AMRO notifies Ausdoc of its intention to make a takeover bid on the specified terms and conditions between 12.00 noon 29 May 2002 and 12.00 noon 18 June 2002, and Ausdoc directors do not recommend the bid (**\$2.5M Cost Contribution Fee**),

give rise to unacceptable circumstances because their size may discourage rival bidders, thereby impeding competition for the control of Ausdoc and preventing the acquisition of control of Ausdoc from taking place in an efficient, competitive and informed market.

23. ASIC submitted that the Preliminary Cost Contribution Fee should be added to the break fees and cost contribution fees payable under the Deed for the purposes of determining whether their quantum is reasonable. On that basis, ASIC submitted that the \$3.5M Break Fee and the \$2.5M Cost Contribution Fee (each when aggregated with the Preliminary Cost Contribution Fee) constituted approximately 2% and 1.48% of the equity value of Ausdoc, respectively¹ which exceeded the 1% guideline set out in the Panel's Guidance Note on Lock-up Devices².
24. ASIC further submitted in relation to quantum:

¹ ASIC's application was made prior to the announcement of ABN AMRO's intention to make a recommended bid for Ausdoc at \$2.15 per share which amounts to a total bid consideration of \$187.6 million. There is little difference between the equity value of Ausdoc based on ABN AMRO's total bid consideration and the value estimated by ASIC at the time of its application.

² Paragraph 14 of the Panel's Guidance Note on Lock-up Devices (<http://www.takeovers.gov.au/Content/guidance/lockupdevices.asp>).

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- (a) ABN AMRO's bid for Ausdoc (a company which ASIC noted is on the S&P/ASX 200 index) for approximately \$187 million is not a "low value bid" for the purposes of paragraph 15 of the Panel's Guidance Note on Lock-up Devices³;
- (b) No exceptional circumstances exist in this case which would justify the Panel calculating the various cost contribution and break fees payable to ABN AMRO by reference to Ausdoc's enterprise value, rather than its equity value, the possibility of which is contemplated in paragraph 15 of the Panel's Guidance Note on Lock-up Devices. ASIC submitted that exceptional circumstances will only exist for these purposes if the target is highly geared which, ASIC submitted was not the case with Ausdoc which has a debt to equity ratio of less than 1:1;
- (c) Although Ausdoc has been "on the market" since 19 December 2001, this is not conclusive evidence that there are no potential rival bidders for Ausdoc and that the break fee will therefore not have the effect of impeding competition for the acquisition of control of Ausdoc;
- (d) The reasonableness of a bidder's costs should be assessed by reference to the costs which would be incurred by a typical and reasonable bidder in prosecuting the transaction, and not by reference to the particular characteristics of the actual bidder (including whether the actual bidder is a financial buyer as opposed to a trade buyer⁴); and
- (e) In considering the benefits that the ABN AMRO bid may bring to Ausdoc shareholders, the Panel should have regard to the fact that Ausdoc shares traded in a range between \$2.01 and \$2.09 during the period between 27 December 2001 and the date of the Joint Announcement.

90% Break Fee

25. ASIC submitted that the 90% Break Fee gave rise to unacceptable circumstances because it placed unacceptable pressure on Ausdoc shareholders to accept the ABN AMRO bid even if, absent the break fee, they did not consider it to be in their best interests. ASIC stated that the 90% Break Fee could be distinguished from other forms of break fees payable where a bid does not succeed due to a higher rival bid because the existing shareholders of Ausdoc bear the cost of the break fee rather than the successful rival bidder. ASIC submitted that a break fee payable in these circumstances is unacceptable regardless of the quantum of the break fee (except where it is a *de minimis* amount).

³ Paragraph 15 of the Panel's Guidance Note on Lock-up Devices recognises that in a low value bid, costs of the bidder may reasonably exceed 1%.

⁴ The essential difference between a financial buyer and a trade buyer is that a financial buyer is one who acquires a business in an industry in which it is not currently involved and, therefore, is unlikely to have pre-existing knowledge of, or expertise in, the relevant industry.

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Exclusivity

26. ASIC submitted that the Disclosure Obligation may deter a potential rival bidder from proposing or prosecuting a bid for Ausdoc, thereby impeding competition in the market for shares in Ausdoc. ASIC noted in support of its submission that paragraph 30 of the Guidance Note on Lock-up Devices states that procedural requirements may increase the anti-competitive effects of a no-talk agreement if they oblige the target to provide details of any discussions regarding an alternative proposal to the original bidder.

Ausdoc

Quantum of cost contribution and break fees

27. Ausdoc submitted that the cost contribution and break fees in the Deed are reasonable and do not have the effect of impeding competition for control of Ausdoc. It made, inter alia, the following submissions in relation to the quantum of the cost contribution and break fees:
- (a) The Preliminary Cost Contribution Fee should not be added to the break fees and cost contribution fees for the purposes of determining whether or not those fees are excessive. The Preliminary Cost Contribution Fee was a payment to ABN AMRO for certain actual third party costs that it incurred in performing preliminary due diligence on Ausdoc and is not a “break fee” within the meaning of paragraphs 10 to 13 of the Panel’s Guidance Note on Lock-up Devices i.e. contingent on the progress or outcome of a bid. If the Preliminary Cost Contribution Fee is not added, the maximum break fee payable under the Deed is 1.86% of the equity value and 1.1% of the enterprise value of Ausdoc;
 - (b) It is relevant to the question of whether the quantum of the cost contribution and break fees is reasonable that ABN AMRO is a financial buyer rather than a trade buyer;
 - (c) The quantum of the cost contribution and break fees must be viewed in the light of the special value to Ausdoc shareholders delivered by the ABN AMRO bid. The bid price of \$2.15 per share represents:
 - (i) a 32% premium to the one month volume weighted average price of \$1.63 per share for Ausdoc shares to the close of trading on 19 December 2001 (the day prior to the commencement of the sale process);
 - (ii) a 41% premium to the three month volume weighted average price of \$1.53 per share for Ausdoc shares to the close of trading on 19 December 2001;
 - (iii) a 46% premium to the volume weighted average price of Ausdoc shares from 1 January 2001 to 19 December 2001 of \$1.47;

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- (d) In considering whether the Deed may have the effect of deterring potential rival bidders, the Panel should have regard to the fact that Ausdoc had conducted a six month tender process prior to entering into the Deed;
- (e) As at the date the Deed was entered into, no other takeover bids for Ausdoc were forthcoming and ABN AMRO had made it clear to Ausdoc that it would not bid for Ausdoc unless the Deed was entered into; and
- (f) The Ausdoc board had no ability to negotiate the terms of the Deed as ABN AMRO had presented those terms to Ausdoc on a “take it or leave it” basis.

90% Break Fee

28. Ausdoc made the following submissions in relation to the 90% Break Fee:

- (a) The 90% Break Fee is not likely to have an unacceptably coercive effect on Ausdoc shareholders when they consider whether or not to accept ABN AMRO's bid. Ausdoc noted that at the time it entered into the Deed, the directors of Ausdoc controlled approximately 20% of the shares in Ausdoc and they did not regard the fee as being unacceptably coercive;
- (b) ABN AMRO would not have proceeded further in the sale process if Ausdoc had not agreed to the 90% Break Fee. As such, the 90% Break Fee is a clear example of an option fee to secure a corporate opportunity referred to in paragraph 21 of the Guidance Note on Lock-up Devices;
- (c) Having regard to paragraphs 20 and 21 of the Guidance Note (which are summarised in **paragraph 45** below), the question before the Panel is solely whether the quantum of the 90% Break Fee is so high as to materially influence shareholders' decisions. It is not whether a break fee payable where a bid is rejected by shareholders in the absence of a rival bid is unacceptable as a matter of principle as alleged by ASIC; and
- (d) In the circumstances, the quantum of the 90% Break Fee is not unacceptably high.

Exclusivity

- 29. Ausdoc submitted that the extension of the exclusivity period into ABN AMRO's bid period was justified given the tender process which Ausdoc had conducted, and the special value which ABN AMRO's bid represents to Ausdoc shareholders. Ausdoc stated that paragraphs 28 and 29 of the Guidance Note support this submission.
- 30. In relation to the Disclosure Obligation, Ausdoc noted that similar clauses have appeared in merger implementation agreements in relation to schemes of arrangement which have been approved by courts in support for its contention that the obligation is not unacceptable. While conceding that the Disclosure Obligation may have some influence on rival bidders, Ausdoc submitted that the obligation

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should not be viewed in isolation, but in the context of ABN AMRO's "take it or leave it" proposal following an extensive sale process, which proposal had the potential to offer Ausdoc shareholders special value.

ABN AMRO

31. ABN AMRO made submissions in relation to the quantum of the cost contribution and break fees, the 90% Break Fee and the exclusivity arrangements which were, on the whole, consistent with those of Ausdoc.
32. In addition, ABN AMRO submitted that the costs of its due diligence investigations of Ausdoc to date were close to \$3.5 million and that it expected its total costs at the end of the process to be materially higher.
33. ABN AMRO also elaborated on the distinction between a financial buyer and a trade buyer as follows:
 - (a) As a financial buyer, ABN AMRO had no reason to take part in the tender process in order to protect its own position in any of the relevant industries or to obtain or enhance a competitive position in those industries. Therefore, ABN AMRO could only be encouraged to take part in the tender process if the deal as a whole (including its right to recover costs) could be made attractive to it;
 - (b) Further, ABN AMRO incurs opportunity costs in excess of those which would be incurred by a trade buyer (although, it has submitted that no component of the cost contribution and break fees was attributable to ABN AMRO's opportunity costs);
 - (c) ABN AMRO, as a financial buyer, must fund the entire enterprise value of Ausdoc, not only its equity value. As such, the reasonableness of the break fees should be assessed by reference to Ausdoc's enterprise value rather than its equity value.
34. ABN AMRO further submitted that the Panel should have regard to the desirability of encouraging the development of a private equity market in Australia. It said the Panel should consider the potential adverse consequences to that development if the Panel does not take into account the particular circumstances of private equity market participants in undertaking takeovers when the Panel looks at break fee arrangements to which a private equity market participant is a party.

DISCUSSION

Quantum of the cost contribution and break fees

35. We agree with ASIC that a break fee in excess of 1% of the equity value of a target is prima facie excessive. In this case, however, on balance we conclude that the \$3.5M Break Fee is not anti-competitive or unreasonable, having regard to the following circumstances:

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- (a) The break fee arrangements set out in the Deed were agreed at the end of a long public tender process which had been conducted by Ausdoc in an attempt to find a buyer for all or a part of Ausdoc, and were not so high as to be anti-competitive in the event another bidder emerges;
 - (b) At the time the Deed was entered into, Ausdoc had not received any alternative bids or proposals comparable to the ABN AMRO offer at that time;
 - (c) As a result of undergoing the tender process, Ausdoc reasonably apprehended (although it was by no means certain) that other potential bidders for the whole of Ausdoc were not likely to emerge at the time the Deed was entered into;
 - (d) Ausdoc submitted that it believed, and we had no reason to doubt, that ABN AMRO would not have proceeded with the tender process unless Ausdoc agreed to enter into the Deed with the possibility that Ausdoc would end up with no potential bidders at the end of its tender process;
 - (e) The cost of preparing and prosecuting a bid for Ausdoc would be high for any bidder when compared to the size of Ausdoc because its businesses are relatively complex, they are conducted by a number of distinct entities and are geographically spread out (see further **paragraph 36**);
 - (f) The price at which ABN AMRO has agreed to bid for Ausdoc represents a premium to market prices at which Ausdoc shares traded prior to the Proposed Sale Announcement. The premium is many times larger than the break fee on a cost per share basis (see further **paragraph 37**); and
 - (g) We do not accept that the special circumstances of this bidder justify a higher break fee which might be anti-competitive in effect (see further **paragraph 40**)
36. From the evidence, it appears that the \$3.5M Break Fee was a reasonable pre-estimate of ABN AMRO's actual outgoings in conducting due diligence and conducting a takeover offer for Ausdoc, with a reasonable allowance for internal costs, but no allowance for opportunity costs. We do not think that the amount spent by ABN AMRO on due diligence and its offer is excessive, given that the Ausdoc business is relatively complex for a company of its size and extends over both Australia and New Zealand.
37. The price at which ABN AMRO has agreed to bid for Ausdoc is high, compared with the prices at which Ausdoc shares have traded last year prior to the Proposed Sale Announcement. The amount by which the bid price exceeds pre-announcement market prices (over 50c per share) is much greater than the amount of the break fee (about 4c per share). The procedure which Ausdoc has adopted is likely to have achieved a fuller price for the shares than is likely to have been achieved without some such measures. The fee was a reasonable part of that procedure. In that

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context, the effect of the break fee in restraining further price increases, while real, is marginal and not objectionable.

38. We have assessed the amount of the \$3.5M Break Fee (about 1.87% of the equity value of Ausdoc as measured by the bid price) against the benchmark of 1% of the value of the bid set out in the Panel's Guidance Note on Lock-Up Devices. For these purposes, we did not consider that the fee should be aggregated with the Preliminary Cost Contribution Fee, or that the Preliminary Cost Contribution Fee was a device to achieve a higher break fee. The Guidance Note states that where there are multiple break fee arrangements in place, the Panel will generally aggregate them for the purposes of the 1% guideline. The Preliminary Cost Contribution Fee was not, however, in the nature of a break fee (that is, a fee which is payable by the target if certain specified events occur which have the effect of preventing the offer from proceeding or causing it to fail⁵). Rather, it was a payment made to ABN AMRO in consideration for its participation in Ausdoc's sale process.
39. The 1% guideline is expressed to be subject to the requirements of particular cases, with the ultimate criterion being whether any particular fee is reasonable in amount or anti-competitive in effect. The Guidance Note expressly accepts that a higher percentage will be acceptable where the amount of the bid is relatively low, without specifying what is meant by low. In these circumstances, we think that a higher percentage than 1% of the equity value of Ausdoc is reasonable in amount and unlikely to be anti-competitive in effect.
40. ABN AMRO and Ausdoc made much of the fact that ABN AMRO was a "financial buyer" as opposed to a "trade buyer" in submitting that the size of the break fee should be measured by reference to the overall enterprise value of Ausdoc rather than its equity value. We do not believe that financial buyers can automatically justify a right to negotiate higher break fees because they are financial buyers. Likewise, we do not accept that financial buyers should be able to base their break fees on the ungeared value of a target because their obligations to finance the equity and debt of the target are different. This is because we do not believe their obligations are in fact any different from any other prospective bidder.
41. Similarly, we were not convinced that our decision would have any material impact on the development of a private equity market in Australia, or that we should have regard to any such potential impact in making our decision. While we welcome the development of a private equity market in Australia, we do not consider that this should extend to allowing private equity market participants special concessions when reviewing lock-up agreements to which they are a party.
42. At the time of our deliberations, the \$2.5M Cost Contribution Fee was no longer able to be triggered as ABN AMRO had notified Ausdoc of its intention to make a takeover bid and the Ausdoc board had decided to recommend that bid. Therefore,

⁵ Paragraphs 11 and 12 of the Guidance Note on Lock-up Devices describe other types of payments which are in the nature of break fees.

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we did not need to decide whether the \$2.5M Cost Contribution Fee was unacceptable.

90% Break Fee

43. We consider the 90% Break Fee to be unacceptable. We agree with ASIC's submission that the fee may have the effect of coercing Ausdoc shareholders to accept ABN AMRO's bid even where, absent the break fee, they do not consider it to be in their best interests. We also agree with ASIC that this form of break fee is to be distinguished from other forms of break fees payable where the bid does not succeed due to a higher rival bid because the existing shareholders of the target, rather than the successful rival bidder, bear the cost of the break fee.
44. In assessing the potential for the 90% Break Fee to influence the decision of Ausdoc shareholders, we had regard to the fact that they had been informed on 6 May 2002 that the profit after tax for the year ended 30 June 2002 was expected to be \$6 million.⁶ The 90% Break Fee represents approximately 42% of this expected profit figure, which is a substantial proportion. Moreover, Ausdoc shareholders will not be paid a dividend this year. When viewed in this light, the 90% Break Fee has the potential to materially influence shareholders' decisions as to whether or not they accept ABN AMRO's bid in the absence of any higher bid.
45. Paragraph 20 of the Guidance Note states that a break fee is likely to be unacceptable where its size puts pressure on shareholders to accept a bid. Paragraph 21 goes on to state that this may be of particular concern if a break fee is payable where a bid is rejected by shareholders in the absence of a rival bid. While that paragraph notes that the Panel is not totally opposed to a break fee being payable in these circumstances, it also states that the level of the fee should not be so high as to materially influence shareholders' decisions. In Ausdoc's circumstances, we consider that any break fee which is payable in same circumstances as the 90% Break Fee may have a coercive effect on Ausdoc shareholders unless it is a *de minimis* amount.
46. In our view, it is clear from paragraphs 20 and 21 of the Guidance Note that break fees which are payable in the circumstances of the 90% Break Fee are likely to attract greater scrutiny by the Panel than other types of break fees. This is because, in such cases, target shareholders will not have an alternative bid which is capable of acceptance, and it will be the current shareholders, rather than a rival bidder, who will bear the cost of the break fee.
47. On 24 June 2002, the Panel advised the parties of the substance of its decision in this matter. It also sought proposals from the parties which might obviate the need for the Panel to make a declaration of unacceptable circumstances in relation to the 90% Break Fee. Between 25 and 28 June 2002, the Panel received proposals and further submissions from the parties which resulted in Ausdoc and ABN AMRO providing undertakings to the Panel on 28 June 2002 to the effect that Ausdoc would not pay the 90% Break Fee (or any benefit in substitution thereof) to ABN AMRO, and that

⁶ Ausdoc's Interim Report for the 9 months ended 31 March 2002 as announced to ASX on 6 May 2002.

Takeovers Panel

Reasons for Decision - [Ausdoc Group Limited]

ABN AMRO would waive all rights in respect of that fee. The undertakings by Ausdoc and ABN AMRO are set out in **Annexures B** and **C** respectively.

48. We considered that the undertakings by Ausdoc and ABN AMRO effectively removed the tendency for coercion which we found to be unacceptable. We, therefore, accepted the undertakings and declined to make a declaration of unacceptable circumstances in relation to the 90% Break Fee.

Exclusivity

49. We were initially concerned about the length of the exclusivity period. However, we are satisfied that the exclusivity period is reasonable given the fiduciary carve-out, and in light of the advantages offered to Ausdoc shareholders by Ausdoc having entered into the Deed, and the tender process which had been undertaken by Ausdoc.
50. In relation to the Disclosure Obligation, we considered whether, by restricting competition, it would prevent the acquisition of control over the shares in Ausdoc taking place in an efficient, competitive and informed market.
51. Our conclusion is that, since ABN AMRO has announced a bid, the fiduciary carve-out from the Disclosure Obligation is sufficient to prevent it fettering competition and thereby giving rise to unacceptable circumstances.
52. The Disclosure Obligation requires Ausdoc to advise the identity of the rival bidder, the details of the proposal put to it by the rival and the fact of having responded. However it need not disclose additional details, such as the subsequent course of negotiations, or due diligence information subsequently provided by a prospective merger partner.
53. Further, Ausdoc is free from the obligation to notify those details, once ABN AMRO announces a bid, on two conditions. The first is that the rival proposal is to make an off-market offer under Chapter 6. The other is that it would be a breach of the Ausdoc directors' duty to disclose the rival proposal to ABN AMRO.
54. Since ABN AMRO has announced a bid, Ausdoc can respond to a proposal put by a prospective rival off-market bidder, and do so without disclosing that fact and the details of the rival proposal to ABN AMRO, if it meets a double directors' duties test. The test is that in the reasonable opinion of the directors of Ausdoc (after having taken legal and other advice):
- (a) it would be a breach of directors' duties to fail to respond to a rival proposal;
and
 - (b) it would be a breach of directors' duties to disclose the existence and subject of the rival proposal and the fact of having responded to ABN AMRO.

Takeovers Panel

Reasons for Decision - [Ausdoc Group Limited]

55. Generally, the basis for judging that it would be a breach of duty to fail to respond to a rival proposal will be that to fail to do so may prevent a better outcome for the present shareholders i.e. the rival is prepared to offer more than ABN AMRO. The basis for judging that it would be a breach to disclose the rival proposal must be similar i.e. that disclosure might prevent a better outcome, because there is a real and apprehended risk that the rival, although prepared to offer more than ABN AMRO, would decline to proceed with its proposal on the basis that its approach would be disclosed to ABN AMRO. On this basis, we do not consider that the Disclosure Obligation is likely to deter any bona fide offers because the Ausdoc directors would not be required to disclose an offer, if making disclosure reasonably risked the rival not approaching Ausdoc with its proposal. Therefore, we consider that the Disclosure Obligation is not unacceptable.

DECISION

56. Other than in relation to the 90% Break Fee, we decided that the Deed did not give rise to unacceptable circumstances in relation to the affairs of Ausdoc. However, we decline to make a declaration of unacceptable circumstances as Ausdoc and ABN AMRO have provided undertakings to the Panel to the effect that Ausdoc will not pay the 90% Break Fee (or any benefit in substitution thereof) to ABN AMRO, and that ABN AMRO will waive all of its rights in relation to the 90% Break Fee.
57. We consented to the parties being represented by their commercial solicitors.
58. There having been no declaration of unacceptable circumstances, we make no order for costs.

President of the sitting Panel

In the matter of Ausdoc Group Ltd

Michael Tilley

15 December 2004

Takeovers Panel

Reasons for Decision - [Ausdoc Group Limited]

Annexure A

Schedule 3 to the Deed

(Our names for the fees are added in square brackets)

Event	Suitor Receives Actual Costs Up to maximum of \$1.5 million	Suitor Receives Break Fee of \$ 2.5 million	Suitor Receives Break Fee of \$3.5 million	Cost Contribution and/or Break Fees to be Set Off Against any Profit on the Sale of Shares into a Higher Bid
<p>[No Bid Fee]</p> <p>Suitor does not announce a Takeover Bid because:</p> <p>(i) it is refused FIRB or other regulatory approval</p> <p>(ii) it becomes aware of material adverse issue ¹</p> <p>(iii) a Key Property Requirement is not met</p> <p>(iv) the Key Person Requirement is not met ²</p>	Yes	No	No	No

¹ 'Material adverse issue' is information:

- (a) of which Suitor is not presently aware about the Ausdoc Group, but excluding the operation performance and net assets of the DXE Business and the GoMail Business, which involves a reduction in the net assets of the Ausdoc Group of not less than \$5 million or a reduction in EBITA of the Ausdoc Group of not less than \$750,000 per annum in comparison to the forecast net assets and EBITA for 2002 as disclosed by Ausdoc to Suitor in the first stage due diligence enquires (save that if Ausdoc discloses to Suitor on or before 18 June 2002 revised forecast net assets and EBITA for the 2002 financial year the comparison will then be against those revised forecast amounts); or
- (b) which is disclosed to Suitor or of which it otherwise becomes aware that is likely to have the effect that as at 30 June 2002 the net debt of the Ausdoc Group (including an allowance for the net cost of acquiring the outstanding Options and the costs of the sale process for the Ausdoc Group or any of its Subsidiaries or business units) will exceed A\$84.1 million, adjusted for the Combined Sale and Closure.

Takeovers Panel

Reasons for Decision - [Ausdoc Group Limited]

Suitor is deemed to be presently aware of information that was contained in the Ausdoc data room or otherwise made available in writing by Ausdoc to Suitor prior to 21 March, 2002.

² **'Key Person Requirement'** means a small number of key people identified by Suitor to Ausdoc (and which will include at least one person to undertake head office functions for Ausdoc) agree to remain with Ausdoc for at least two years after the offer period of Suitor's Takeover Bid closes.

Event	Suitor Receives Actual Costs Up to maximum of \$1.5 million	Suitor Receives Break Fee of \$2.5 millions	Suitor Receives Break Fee of \$3.5 million	Costs Contribution and/or Break Fees to be Set Off Against any Profit on the Sale of Shares into a Higher Bid
<p>[Adjustment Agreement Fee]</p> <p>The circumstances described in clause 9.2(2)</p>	No	No	Yes	No
<p>[Higher Bid Fee]</p> <p>Suitor, having publicly announced a Takeover Bid recommended by the Ausdoc Board, in compliance with law and this Deed does not send Bidder Offer Documents to Ausdoc's shareholders due to a higher bid being announced by any person after Suitor announces Suitor's Takeover Bid</p>	No	No	Yes	No
<p>[Adjusted Higher Bid Fee]</p> <p>Suitor sends Bidder Offer Documents to Ausdoc's shareholders but a higher bid is then made by any person and that bidder is or becomes entitled to 10% or more of the Shares</p>	No	No	Yes	Yes

Takeovers Panel

Reasons for Decision - [Ausdoc Group Limited]

[90% Break Fee]	No	Yes	No	No
<p>Suitor sends Bidder Offer Documents to Ausdoc’s shareholders and no higher bid is made but the 90% defeating condition is not satisfied or waived and Suitor’s Takeover Bid does not succeed (without illegality on the part of Suitor and so long as Suitor has used it's reasonable endeavours to satisfy the defeating conditions set out in paragraphs (b) and (c) of Schedule 1)</p>				



Annexure B

Undertaking to the Takeovers Panel in connection with a decision of the Takeovers Panel by AUSDOC Group Limited ACN 005 482 913

AUSDOC Group Limited ACN 005 482 913 (“AUSDOC”) undertakes to the Takeovers Panel pursuant to section 201A(1) of the Australian Securities and Investments Commission Act 2001 that, subject to ABN AMRO Capital (Belgium) NV (“ABN AMRO”) giving the undertakings in terms (or substantially in the terms) forwarded to AUSDOC or its advisers on 27 June 2002, AUSDOC will not, directly or indirectly, pay the break fee of \$2.5 million provided for in row 5 of the table set out in Schedule 3 of the Deed of Undertaking dated 22 May, 2002 between ABN AMRO and AUSDOC or any other amount or benefit in lieu thereof to ABN AMRO or any other person.

Dated: 28 June 2002

Signed on behalf of AUSDOC Group Limited:

A. Freer - Managing Director

Takeovers Panel

Reasons for Decision - [Ausdoc Group Limited]

Annexure C

Undertakings to the Takeovers Panel in connection with the decision of the Takeovers Panel by ABN AMRO Capital (Belgium) N.V.

1. UNDERTAKING

1.1 ABN AMRO Capital (Belgium) N.V. ("**ABN AMRO**") undertakes to the Takeovers Panel pursuant to section 201A(1) of the Australian Securities and Investments Commission Act 2001 and separately to AUSDOC Group Limited ("**AUSDOC**"):

(a) to waive its rights under the Deed of Undertaking between AUSDOC and ABN AMRO dated 22 May 2002 ("**Deed of Undertaking**") to receive payment, or enforce its contractual right to recover, from AUSDOC the \$2.5 million break fee provided for in Row 5 the table set out in Schedule 3 of the Deed of Undertaking ("**90% Break Fee**"); and

(b) not to receive the 90% Break Fee or seek to recover from AUSDOC any damages, payment or other compensation in lieu of the 90% Break Fee as a result of or in substitution for ABN AMRO having waived its rights under the Deed of Undertaking to the 90% Break Fee.

Dated: 27 June 2002

Signed on behalf of ABN AMRO Capital (Belgium) N.V.:

Bart Sonck, Director