



**In the matter of BreakFree Limited 03
[2003] ATP 38**

**In the matter of BreakFree Limited 04
[2003] ATP 39**

Catchwords:

Bidder's statement for scrip takeover bid – allegations of misleading or deceptive statements and omissions – application for orders to restrain dispatch and remedy – application superseded by subsequent events – issues would have warranted further consideration in other circumstances – conclusion of proceedings without completing submission and evidence process

Statement by target to the effect that a defeating condition in a bid would not be satisfied – minimum acceptance condition – announcement that bidder would not proceed with scrip takeover bid prior to dispatch of offers – announcement of alternative cash takeover bid – delay by bidder in making announcement – potential to mislead the market – truth in takeovers policy – reliance on Third Party Statements – unreasonable to rely on statements concerning the results of a shareholder survey – declaration of unacceptable circumstances – decision not to order dispatch of bidder's statement for the scrip takeover bid – content of bidder's statement – decision not to make interim orders restraining dispatch of bidder's statement for the cash takeover bid

*Corporations Act 2001 (Cth), sections 602(a), 657A, 657C, 631, 670A, 670F
ASX Listing Rules, Chapter 3
ASIC Policy Statement 25 'Takeovers: false and misleading statements
ASIC Class Order 00/344
BreakFree 02 [2003] ATP 30, cited*

These are our reasons for:

- **concluding the BreakFree 03 proceeding on 12 November 2003 without finalising the submission process in relation to that proceeding; and**
- **making a declaration of unacceptable circumstances on 24 October 2003 in the BreakFree 04 proceeding in relation to an announcement by S8 Limited on 8 October 2003 that it would not proceed to make offers under a scrip takeover bid for BreakFree Limited that had been announced by S8 Limited on 11 July 2003 and deciding on 12 November 2003 not to make any orders.**

THE PROCEEDINGS

1. These reasons relate to two applications (the **Applications**) to the Takeovers Panel under section 657C of the *Corporations Act 2001* (Cth) (the **Act**)¹ from BreakFree Limited (**BreakFree**). The Applications arise from connected facts and their disposition has become interconnected. We considered that one set of reasons dealing with both Applications would present the relevant issues more clearly than two sets of reasons which would necessarily cross-refer frequently to each other. To facilitate the reading of these reasons, we have included in Annexure C a lexicon of the terms which are defined in these reasons.

¹ In these reasons, statutory references are to the Act, unless otherwise indicated.

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2. On 12 September 2003, BreakFree made an application (the **03 Application**) seeking to restrain the dispatch of a bidder's statement for a scrip takeover proposal announced by S8 Limited (**S8**) in relation to BreakFree because of alleged deficiencies in that document.
3. On 10 October 2003 BreakFree made an application (the **04 Application**) which alleged that S8's announcement of its 'withdrawal' of the Scrip Proposal on 8 October 2003 was unlawful (as it would result in a breach of section 631 in circumstances where the defence in section 670F was not available) and constituted unacceptable circumstances in relation to the affairs of BreakFree. The 04 Application sought orders effectively requiring that S8 proceed with the Scrip Proposal.
4. Details of the background to the Applications, and the declaration and orders sought by them, are set out in [7] to [74].

THE PANEL & PROCESS

5. The President of the Panel appointed Kathleen Farrell (sitting President), Peter Cameron (sitting Deputy President) and Meredith Hellicar as the sitting Panel for each proceeding (the **03 Proceeding** and the **04 Proceeding** respectively, and together, the **Proceedings**) arising from the Applications.
6. We adopted the Panel's published procedural rules, and consented to the parties being legally represented by their commercial lawyers, for the purposes of each Proceeding.

FACTUAL BACKGROUND

The Parties

7. BreakFree has been listed on the Australian Stock Exchange (**ASX**) since 13 September 2002. Its principal activities are the conduct of a specialist holiday business and the holding of management and leasing rights to holiday resorts and other recreational accommodation.
8. S8 is also listed on ASX. It is a competitor of BreakFree, having among its business activities the provision of property management services in the holiday resorts and recreational accommodation market.

The progress of the Scrip Proposal prior to the 03 Application

9. S8 announced on 11 July 2003 that it proposed to make a takeover bid for BreakFree shares, offering 13 S8 shares and 20 S8 options for every 20 BreakFree shares (the **Scrip Proposal**).²

² The Scrip Proposal was actually made by a wholly owned subsidiary of S8, Barondene Pty Ltd (**Barondene**). For the purposes of these reasons, references to S8 include references to Barondene.

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10. S8 set out a number of defeating conditions that would apply to the Scrip Proposal. One of those conditions was a minimum acceptance condition (the **Minimum Acceptance Condition**) that S8 obtain a relevant interest in 50.1% or more of the issued BreakFree shares before the end of the offer period.³
11. A copy of the bidder's statement for the Scrip Proposal (the **Original Scrip Bidder's Statement**) was lodged with ASIC on 19 August.
12. On 20 August, S8 announced to ASX that it would seek approval from its shareholders for the issue of converting preference shares (the **S8 Share Issue**).
13. On 2 September, S8 lodged a replacement for the Original Scrip Bidder's Statement⁴ (the **Replacement Scrip Bidder's Statement**) with ASIC⁵ and released a copy of it through the ASX Company Announcements Platform.
14. On 5 September, S8 applied to the Panel for a review under section 656A of a decision by ASIC not to consent under ASIC Class Order 00/344 (**CO 00/344**) to the early dispatch of the Replacement Scrip Bidder's Statement. The Panel undertook those proceedings as *BreakFree 02* [2003] ATP 30 (**BreakFree 02**).
15. The main issue in *BreakFree 02* was whether it was appropriate for ASIC to withhold consent to early dispatch of the Replacement Scrip Bidder's Statement in circumstances where BreakFree had alleged that it was deficient in a number of material respects.
16. In *BreakFree 02* we affirmed ASIC's decision on the basis that we believed that there was a serious question whether the Replacement Scrip Bidder's Statement was deficient.⁶ However, that proceeding was not an appropriate vehicle for us finally to resolve the issues concerning the alleged deficiencies raised by BreakFree in *BreakFree 02*.

First ASIC modification in relation to section 631

17. In the ordinary course, section 631 would have required S8 to proceed to make offers the same as, or not substantially less favourable to shareholders than, offers under the Scrip Proposal within 2 months after announcing it. However, on 10 September S8 requested, and ASIC (under section 655A) granted, a modification of section 631 which, in effect, allowed S8 until 2 October to comply with the section.⁷

³ This defeating condition was reflected in the various Scrip Bidder's Statements prepared by S8.

⁴ The Replacement Scrip Bidder's Statement consolidated the Original Scrip Bidder's Statement dated 19 August with a supplementary bidder's statement dated 2 September.

⁵ In these reasons, '**Scrip Bidder's Statement**' refers compendiously to a bidder's statement for the Scrip Proposal (as opposed to any particular bidder's statement prepared by S8).

⁶ *BreakFree 02* [2003] ATP 30 at [39] and [40]. We announced our decision in *BreakFree 02* on 10 September. Although our reasons for decision were not published until 26 September, the parties were provided with a draft of those reasons on 11 September.

⁷ See also [47]

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Reasons for Decision – BreakFree 03 and 04

The 03 Application made

18. The 03 Application was received by the Panel on 12 September. In the 03 Application BreakFree sought to restrain S8 from despatching the Replacement Bidder's Statement because of alleged deficiencies in that document.

BreakFree Statements

19. On 12 September, BreakFree sent a letter (the **Letter**) to its shareholders (which was also made available through the ASX Company Announcements Platform). The Letter, among other things, contained the BreakFree Scrip Statements and BreakFree Cash Statement (together, the **BreakFree Statements**) which purported to report the intentions of shareholders in BreakFree who had been surveyed (**Surveyed Shareholders**) by BreakFree's adviser, ABN AMRO Morgans (**AAM**).
20. The **BreakFree Scrip Statements** were:

Survey on Shareholder's Intentions

BreakFree's adviser in these matters [concerning the Scrip Proposal], ABN AMRO Morgans, has undertaken a telephone survey of some of the major individual shareholders [in BreakFree] to ascertain their likely acceptance of the current scrip offer.

*Based on the survey responses, ABN AMRO Morgans has advised the Board that shareholders holding a majority of shares indicated that they **would not accept** the current all scrip offer from S8.*

21. The **BreakFree Cash Statement** was:

*Further, when asked about the possibility of a conversion of the all paper offer to cash the majority of the interviewed shareholders indicated their view that \$1.50 per share was less than fair value and **would not be accepted**.*

Discussions between the parties and undertakings from S8

22. Shortly after we received the 03 Application, we were informed that the parties had agreed to hold discussions on the next business day (being 15 September) concerning the issues raised in the 03 Application.
23. On 13 September, S8 offered to provide undertakings to the Panel under section 201A of the *Australian Securities & Investments Commission Act 2001* (Cth) that it would not dispatch its bidder's statement without first giving us, and the other parties to the 03 Proceeding, at least 48 hours notice. We accepted the undertakings, which were formally provided on 17 September. The form of the undertakings is set out in Annexure A.
24. In light of this, we advised the parties that we would await the results of their discussions before deciding under regulation 20 of the *Australian Securities & Investment Commission Regulations 2001* (Cth) (**Regulation 20**) whether to conduct proceedings in relation to the 03 Application.

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ASIC commences investigations of BreakFree Statements

25. In response to the BreakFree Statements, ASIC obtained details of the Surveyed Shareholders from AAM on 16 September.

Result of first discussions

26. On 17 September, S8 wrote to us (and the other parties to the 03 Proceeding) setting out its view of the results of its discussions with BreakFree. S8 proposed a number of changes to the Replacement Scrip Bidder's Statement in light of those discussions. S8 also advised that it:
- (a) believed there was only one remaining substantive issue in relation to the Replacement Scrip Bidder's Statement after the proposed changes were incorporated (the **Amended Replacement Scrip Bidder's Statement**); and
 - (b) intended to dispatch the Amended Replacement Scrip Bidder's Statement on 22 September 2003.
27. S8 did not comply with the requirements of items 2 to 5 of section 633 or CO 00/344 in relation to the Amended Replacement Scrip Bidder's Statement at that time, nor did it subsequently do so.⁸
28. We wrote to the parties on 17 September requesting that:
- (a) BreakFree and ASIC advise what issues they believed were still outstanding in relation to the Amended Replacement Scrip Bidder's Statement; and
 - (b) S8 explain the basis on which it expected to be able to dispatch a bidder's statement for the Scrip Proposal on 22 September.⁹

We requested responses by 18 September.

29. On 18 September we received:
- (a) submissions from BreakFree and ASIC that, despite the amendments contained in the Amended Replacement Scrip Bidder's Statement, they considered that there were still a number of deficiencies in the document that should be remedied before it was dispatched; and
 - (b) a response from S8 indicating that it intended to seek to be in a position to dispatch the Amended Replacement Scrip Bidder's Statement under CO 00/344 by 22 September.

⁸ The requirements of these alternative courses are discussed in *BreakFree 02* at [7] to [13].

⁹ For S8 to be able to dispatch the Amended Replacement Scrip Bidder's Statement on 22 September, it needed to comply with the terms of CO 00/344 and obtain the consent of either BreakFree or ASIC to early dispatch. Alternatively, it could have dispatched either the Original Scrip Bidder's Statement or the Replacement Scrip Bidder's Statement on that date.

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Reasons for Decision – BreakFree 03 and 04

30. After considering the responses from BreakFree and ASIC, S8 sent us a further letter indicating that it no longer believed that it would be possible to proceed on the timetable it had proposed, and so advised us that it:
- (a) reaffirmed the undertakings given on 17 September; and
 - (b) regarded itself as being bound by those undertakings as if the notice of dispatch given on 17 September had never been given.

BreakFree 03 - the decision to conduct proceedings and Initial Brief

31. After considering the responses from the parties, on 19 September we advised the parties that we had decided under Regulation 20 to conduct proceedings and issued them with a brief (the **Initial Brief**) in relation to the 03 Application. Parties were asked to provide:
- (a) principal submissions in relation to the issues identified in the Initial Brief concerning the Amended Replacement Scrip Bidder's Statement by 5.00 pm on 23 September; and
 - (b) rebuttal submissions by 5.00 pm on 24 September.

ASIC continues to investigate the BreakFree Statements¹⁰

32. Between 19 and 23 September, ASIC wrote to the Surveyed Shareholders about the BreakFree Statements advising the Surveyed Shareholders, among other things, that:

*it is ASIC's view, as set out in [PS 25], that unqualified statements to the effect that a shareholder "will not accept" a takeover bid at the current price have the effect that the **shareholder who made the statement** may not accept at that price without engaging in misleading or deceptive conduct.*
[emphasis added]

33. ASIC's letter did not say that if the shareholders did not respond they would be taken to have made the statement. In fact, it informed the shareholders that they were under no obligation to respond to ASIC's letter, and that answers would be used to:

*assist ASIC in determining whether the market is fully informed, and whether or not **BreakFree** needs to make a clarifying announcement to the market about the results of the survey*
[emphasis added]

34. ASIC's letter also asked the Surveyed Shareholders whether they were informed by AAM of the manner in which their responses would be used, and whether they qualified their statements.

¹⁰ The text of ASIC letters was only made available to the Panel in responses from ASIC to the Panel's request for comments referred to at [35] although the substance of them was clear from ASIC's submissions to the Panel before its decision was made.

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35. Only 5 of the 12 Surveyed Shareholders responded to ASIC’s letter. We do not have copies of, or detailed information concerning, the responses received from the Surveyed Shareholders, other than submissions from ASIC that informed us that none of the 5 responses resiled from the BreakFree Statements. Those submissions from ASIC were provided to us in response to the opportunity we gave the parties on 22 October to comment on the draft Media Release announcing our decision in the 04 Proceedings(which had also informed the parties of our decision)..

S8 requests postponement of 03 Proceeding

36. On 22 September, we received an oral request from S8 for a delay in the 03 Proceeding in order to allow it to make further changes to the Amended Replacement Scrip Bidder’s Statement.

37. S8’s proposal was confirmed in correspondence from S8’s lawyers (McCullough Robertson) to BreakFree’s lawyers (Phillips Fox) that evening on the basis that:

Although [S8] maintains that the amended consolidated Bidder’s Statement ... is not misleading and does not omit material required by section 636 of the Corporations Act, it nevertheless is conscious of the desirability for such matters to be resolved between the parties, if at all possible. Against that back ground, it has instructed us that it proposes to revisit the amended consolidated Bidder’s Statement in light of your client’s and ASIC’s comments, with a view to redrafting parts of the document.

38. McCullough Robertson suggested that the changes would take at least one week (possibly two) and that BreakFree and S8 approach us jointly to seek postponement of the time for responding to the Initial Brief to allow this proposed process.
39. ASIC confirmed on 23 September that it did not object to the delay.
40. On 23 September, we sought further information from S8 concerning its proposal, and submissions from ASIC and BreakFree (if they wished to make them) in relation to it.
41. Despite objections from BreakFree, on 24 September we advised the parties (among other things):
- (a) that we had decided to postpone the 03 Proceeding to allow S8 until 12 noon on 29 September a final opportunity to prepare a further revised version of the Amended Replacement Scrip Bidder’s Statement (the **Further Amended Replacement Scrip Bidder’s Statement**). The decision was based on the understanding that the revisions to be made by S8 would take into account the issues raised by ASIC and BreakFree, and those raised in the Initial Brief;
 - (b) of the conditions that attached to our decision to postpone the 03 Proceeding. The conditions included requirements for S8 to advise the Panel of the issues that would not be addressed in its amended document. These requirements were subsequently relaxed at the request of S8 in order to allow it the maximum opportunity to address the outstanding issues on the condition that that

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information was provided on 29 September. This relaxation was granted in light of submissions from McCullough Robertson that doing so:

will enable S8 to provide at one time a comprehensive response to all matters before the Panel. S8 is concerned to achieve finality from this process; and

- (c) that it appeared that delay in the Proceeding could mean that S8 might require further relief from ASIC in relation to the time by which it must dispatch the Further Amended Replacement Scrip Bidder's Statement, unless it was able to obtain consent to early dispatch under CO 00/344.

ASIC writes to BreakFree concerning the BreakFree Statements

- 42. On 25 September, ASIC wrote to BreakFree and AAM outlining its concerns in relation to the BreakFree Statements and requesting the provision of certain information. In response, ASIC received, among other things, the information provided to the Panel as mentioned at [75] and [76].

S8 seeks legal advice on BreakFree Scrip Statements

- 43. On 29 September (some 17 days after the BreakFree Statements had been made), S8 sought legal advice in relation to the BreakFree Scrip Statements .

Receipt of the Further Amended Replacement Scrip Bidder's Statement

- 44. On 29 September, S8 provided BreakFree, ASIC and ourselves with a copy of the Further Amended Replacement Scrip Bidder's Statement (and other information that we requested). Later that day, after considering the changes made by S8, we requested BreakFree and ASIC to advise us by 5.00 pm on 1 October whether they considered that there were still issues in relation to the Further Amended Replacement Scrip Bidder's Statement that warranted restraining its dispatch.
- 45. No copy of the Further Amended Replacement Scrip Bidder's Statement was released on the ASX Companies Announcements Platform.

Responses to the Further Amended Replacement Scrip Bidder's Statement

- 46. On 1 October we received detailed submissions from BreakFree and ASIC identifying a number of issues that they considered were still outstanding in relation to the Further Amended Replacement Scrip Bidder's Statement, and which they thought warranted the Panel making an order restraining its dispatch. A number of the remaining issues directly related to matters that were raised in the 03 Application that had not been addressed in the Further Amended Replacement Scrip Bidder's Statement.¹¹ However, there were also some issues raised which either or both:
 - (a) had arisen from changes made by S8 during the 03 Proceeding; and

¹¹ In saying that these issues had not been addressed, we are not indicating that we had formed any view on whether they needed to be addressed (although we had formed the view that they were sufficiently serious questions to warrant our conducting proceedings in relation to them).

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- (b) were new issues which, although they might have existed at the time the 03 Application was made, were not referred to in it.

Second ASIC modification in relation to section 631

47. Following an application from S8 on 30 September, on 2 October ASIC (again under section 655A) granted a further modification which allowed S8 until 23 October to comply with section 631. When informing S8 that it had granted the modification, the relevant representative of ASIC also stated that:

I also take this opportunity to inform you that ASIC is concerned that any further delays with dispatch of the S8's bidder's statement beyond 23 October will significantly undermine the policy of paragraph 631(1)(b) of the Corporations Act 2001. I draw your attention to paragraph [PN 59.72] of Practice Note 59 in that regard. Accordingly, ASIC urges S8 to take all necessary steps to ensure that its bidder's statement is dispatched within the time contemplated by the enclosed instrument of relief.

Dispatch of notice to approve S8 Share Issue

48. On 2 October, S8 settled with ASX the form of a notice for a general meeting at which approval was to be sought from the S8 shareholders in relation to the S8 Share Issue. S8 sent the notice to shareholders on the same date.

S8 talks to ASIC about the BreakFree Scrip Statements

49. On 2 October, the Chairperson of S8 telephoned a senior officer of ASIC to discuss the view ASIC would take if S8 did not proceed with the Scrip Proposal but instead proceeded with an alternative proposal. The submissions from both S8 and ASIC about this discussion lead us to find that the ASIC officer:
- (a) did not give S8 any decision as to the acceptability to ASIC of S8's proposal not to proceed with the Scrip Proposal or S8's intention to rely on the BreakFree Scrip Statements, and that S8 understood this to be the case;
 - (b) indicated that, in general, ASIC would expect target shareholders to comply with statements attributable to them and would, if necessary, take action to enforce this; and
 - (c) indicated that if S8 wished to proceed with any alternative proposal it would need to ensure that it was capable of acceptance by a BreakFree shareholder who previously made one of the statements on which the BreakFree Scrip Statements was alleged to be based. The officer drew S8's attention to the BreakFree Cash Statement in the context of any cash alternative.
50. S8 submitted that the ASIC officer had further indicated that:
- (a) in principle, the defence in section 670F:

is available where a bidder does not proceed with an announced bid because the target has made statement [sic] to the effect that a current offer is not capable of success; and

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- (b) ASIC would generally seek to confirm whether statements made by a target concerning the intentions of target shareholders accurately reflect the position of the shareholders.

This was neither confirmed nor denied to us by ASIC.¹²

Need to amend the 03 Application

51. On 3 October we advised the parties that, before we could resolve all of the issues that had been raised in submissions in the 03 Proceeding (but not in the 03 Application), it would be necessary for BreakFree either to request our consent to amend the 03 Application or to make a new application. We did this because the Act only allows the Panel to make a declaration of unacceptable circumstances under section 657A, or an order under section 657D or 657E, “on an application made under” section 657C.
52. At the same time, we encouraged the parties to have discussions to see whether any of the outstanding issues could be resolved between themselves so that the 03 Proceedings could be confined to the matters which were still in issue between the parties. We asked the parties to advise us by 12.00 noon on the next business day (6 October) how they wished to proceed with the 03 Proceeding.
53. On 6 October, S8 and ASIC advised us that they proposed to hold discussions on 8 October in an attempt to resolve some or all of the outstanding issues in relation to the Further Amended Replacement Scrip Bidder’s Statement. BreakFree advised that although it was prepared to meet with S8 and negotiate further, it had no real level of confidence that the discussions would not simply result in further delays without resolving the outstanding issues. BreakFree also sought our consent to amend the Application to include all of the issues identified in submissions on 1 October.¹³

The Supplementary Brief

54. In light of the correspondence from the parties, on 6 October we:
- (a) consented to the amendment of the 03 Application so that it also applied to the additional issues and the Further Amended Replacement Scrip Bidder’s Statement; and
 - (b) provided the parties with a supplementary brief (the **Supplementary Brief**) under Regulation 20 which identified the issues concerning the Further Amended Replacement Scrip Bidder’s Statement on which we required submissions. Those submissions were requested by 3.00 pm on 9 October, with rebuttals due by 10 October.

¹² However, in this regard see the discussion of ASIC’s requests for information in relation to the BreakFree Statements as discussed at [32].

¹³ See [46]

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55. S8 subsequently requested a revision to the timing in light of the meetings scheduled for 8 October. However, on 7 October we advised the parties (among other things) that we had already taken this issue into account,¹⁴ and that if they could not resolve the outstanding issues within a short timeframe, then we would resolve them. In this regard, we informed the parties that we were conscious that;
- (a) by that time, there had already been a long delay in the dispatch of a Scrip Bidder's Statement, which section 631 originally had required to be provided to BreakFree shareholders on or before 11 September; and
 - (b) there were still issues outstanding in relation to the Further Amended Replacement Scrip Bidder's Statement that had been identified in the 03 Application (as amended).
56. In the event, the Further Amended Replacement Scrip Bidder's Statement did not achieve the 'finality' that S8 sought. This was, in part, due to the fact that the document did not address at least two key issues that S8 had been aware of from the time that it received a copy of the 03 Application on 12 September.

Legal advice received by S8 on BreakFree Statements

57. The legal advice requested by S8 on 29 September, which had been given in a preliminary way on 2 October, was provided in final form on 8 October 2003 and sought to rely in part on S8's discussions with ASIC on 2 October.¹⁵

The announcement by S8 on 8 October concerning the Scrip Proposal and the Cash Proposal

58. On 8 October (26 days after the BreakFree Statements were made), S8 announced (the **S8 Announcement**) that it would not proceed to make offers under the Scrip Proposal. At that time no Scrip Bidder's Statement had been sent to BreakFree shareholders and no offers had been made for BreakFree shares under the Scrip Proposal.
59. In the same announcement, S8 also announced an off-market takeover bid (the **Cash Proposal**) for BreakFree shares under which it would offer BreakFree shareholders \$1.51 cash for each of their BreakFree shares.
60. S8 had sought and obtained an ASX trading halt in anticipation of making the S8 Announcement.

Financing for the Cash Proposal

61. S8 advised us in submissions that before announcing the Cash Proposal S8 spoke with 18 of its top 20 shareholders (who together held in excess of 70% of S8's shares) and all of these shareholders expressed support for the proposed S8 Share Issue.

¹⁴ In fact, for that reason we had already allowed an additional half day over the standard 2 business day response time for submissions. We had also advised the parties in the Supplementary Brief that we would consider a request for an extension if that was appropriate in light of the result of the discussions.

¹⁵ See [43]

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62. Section 4 of the Cash Bidder's Statement¹⁶ indicates that the consideration payable by S8 under the Cash Proposal is to be funded from two sources, being funds subscribed to S8 under the S8 Share Issue (which was now underwritten) and funds drawn down by S8 under a loan facility. It is clear that these funding arrangements were put in place before the S8 Announcement was made.
63. Sections 4.3 and 4.4 of the Cash Bidder's Statement make it clear that:
- (a) the underwriting arrangements (the **Underwriting Arrangements**) with Grange Securities Limited in relation to the share issue; and
 - (b) the loan facility (the **Loan Facility**) with National Australia Bank Limited,
- were only finalised on 8 October. S8 submitted that those arrangements were finalised during the trading halt referred to in [60].

Our response to the S8 Announcement

64. Shortly after being advised of the S8 Announcement, we informed the parties that submissions in response to the Supplementary Brief would no longer be due on 9 October.
65. On 9 October¹⁷ we advised the parties that, on the assumption that S8 proceeded in accordance with the S8 Announcement, we were of the view that there would be little point in continuing the 03 Proceeding in relation to the Further Amended Replacement Scrip Bidder's Statement since that document related to the then 'withdrawn' Scrip Proposal. As it appeared that no Scrip Bidder's Statement would ever be sent to the BreakFree shareholders, the substance of the 03 Proceeding (being an application to restrain despatch of the Scrip Bidder's Statement) may have disappeared. We noted that if there were any issues concerning the bidder's statement for the Cash Proposal, they should be the subject of a new application.
66. However, we recognised that any proposed action by ASIC or BreakFree in relation to the S8 Announcement might alter our views concerning the Proceeding. Although we expressed no view in that regard, we asked ASIC and BreakFree to provide us with submissions on this by 12 noon on 10 October so that we could consider the conclusion of the 03 Proceeding in light of that response.
67. BreakFree made the 04 Application on 10 October.

THE APPLICATIONS

The 03 Proceeding

68. The 03 Application alleged that unacceptable circumstances existed because the Replacement Scrip Bidder's Statement:

¹⁶ The Cash Bidder's Statement was lodged with ASIC, and a copy was provided to BreakFree and ASX, on 10 October.

¹⁷ Which was before the S8 Announcement was the subject of an application to us.

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- (a) contained misleading or deceptive statements; or
- (b) omitted material required by section 636,

in contravention of section 670A. A number of the issues contained in the Application had been previously raised by BreakFree in *BreakFree 02*.

69. On the basis of those allegations, the 03 Application sought:

- (a) interim and final orders restraining the dispatch of the Replacement Scrip Bidder's Statement prior to the resolution of the Proceeding; and
- (b) final orders requiring amendments to the Replacement Scrip Bidder's Statement to correct the alleged deficiencies.

The 04 Proceeding

70. The 04 Application alleged that the purported withdrawal of the Scrip Proposal on 8 October 2003 was unlawful (as it would result in a breach of section 631 in circumstances where the defence in section 670F was not available) and constituted unacceptable circumstances.

71. If a declaration of unacceptable circumstances was made, BreakFree sought final orders that S8:

- (a) not be permitted to withdraw the Scrip Proposal;
- (b) continue with the Scrip Proposal in accordance with section 631(1);
- (c) vary the consideration under the Scrip Proposal to increase the value of the scrip consideration offered from \$1.50¹⁸ to \$1.51, and to provide an alternative cash consideration of \$1.51, per ordinary BreakFree share; and
- (d) address the outstanding issues raised in the supplementary brief issued by us in the 03 Proceeding on 6 October 2003.

72. On 23 October, BreakFree also requested that we make interim orders to restrain the dispatch of the Cash Bidder's Statement. ASIC made a similar request at or about the same time.¹⁹

73. As a consequence of the way in which these events occurred, we proceeded to decide the 04 Proceeding while suspending the 03 Proceeding.

74. If the result of the 04 Proceeding had been that:

- (a) we determined that S8's decision not to proceed with the Scrip Proposal constituted unacceptable circumstances; and

¹⁸ The minimum consideration that S8 could offer under its bid in accordance with section 621.

¹⁹ See [169] to [172]

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(b) S8 in effect was required to proceed with the Scrip Proposal,

then it may have been necessary for the outstanding issues in the 03 Proceeding to be determined, including the provision of further submissions about the content of the Further Replacement Scrip Bidder's Statements which had been suspended on 9 October. Consequently, we decided that the 03 Proceeding should not be concluded until the 04 Proceeding had been resolved.

04 PROCEEDING -THE BREAKFREE STATEMENTS

Analysis of the information which was the basis for the BreakFree Statements

75. In the course of the 04 Proceeding, we received information concerning the Survey, and its results. The information was provided in relation to the making of the BreakFree Statements and ASIC's regulatory response.
76. The information which we received included the telephone script used by AAM in conducting the Survey and a summary prepared by AAM of the responses it received. This revealed that:
- (a) the Surveyed Shareholders were told that their responses to the Survey were not binding on them in any way;
 - (b) the Surveyed Shareholders were not told that their responses would be combined with those received from other shareholders to make a statement concerning the combined intention of shareholders holding a majority of the shares in BreakFree;
 - (c) the Surveyed Shareholders were told that their responses to the Survey would 'assist the BreakFree directors in assessing the level of support for the S8 bid in its current form';
 - (d) the responses from the Surveyed Shareholders were quite diverse, and a number of shareholders attached their own qualifications to them. The qualifications were not referred to in the BreakFree Statements;
 - (e) the Survey results did not appear to support the BreakFree Scrip Statements - certain Surveyed Shareholders, although expressing concern about receiving S8 shares, indicated that they would speak to BreakFree before selling their shares; and
 - (f) the Surveyed Shareholders were not asked for their views concerning a possible cash offer by S8 and, although some shareholders did comment on that issue, the BreakFree Cash Statement was not borne out by the Survey results.

On the basis of the statement quoted in paragraph (c), it would have been reasonable for the Surveyed Shareholders to expect that their statements would only be used by BreakFree for internal purposes.

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Reasons for Decision – BreakFree 03 and 04

77. BreakFree submitted that information such as shareholders' intentions which is provided in a telephone survey is not binding on the respondent shareholders and can change with the ordinary passage of time and in the ordinary course. However, BreakFree did not qualify the BreakFree Scrip Statements to that effect nor did BreakFree refer in them to any qualifications made by the shareholders themselves.
78. We were concerned that the BreakFree Statements were misleading.
79. S8 submitted that we should make a declaration of unacceptable circumstances in relation to the making of the BreakFree Statements. The BreakFree Statements are part of the same matrix of unacceptable circumstances as S8's announcement. However, the unacceptability or otherwise of the BreakFree Statements was not within the scope of the 04 Application and so we did not make the additional declaration requested by S8 or include the BreakFree Scrip Statements in the declaration that we did make. To the extent that the market may have been misled by the BreakFree Statements, we consider that it will have been corrected by the content of the media release 113/2003 of 12 November 2003 which indicated the deficiencies in BreakFree's basis for making the BreakFree Statements.

S8's knowledge of the deficiencies

80. S8 submitted to us that it was aware of the BreakFree Statements from the time that they were made on 12 September and that from then until 8 October:
 - (a) S8 was at all times moving to be in a position to dispatch the Scrip Bidder's Statement; and
 - (b) S8 was hopeful that the BreakFree Scrip Statements would be amended and that its Scrip Bid would proceed.
81. ASIC advised us and the other parties during the Proceedings (on 15 October) that it had concluded that BreakFree did not need to make a clarifying announcement in relation to the parts of the Letter concerning the Survey. No submissions were made by any party that suggested that ASIC had informed anyone of its decision in that regard prior to 15 October. In particular, no submissions were made that S8 had been aware of the details of the manner in which the Survey was conducted, the details of ASIC's enquiries or the responses it received in relation to those enquiries or ASIC's decision, before making the S8 Announcement.
82. We do not believe that S8 was aware (and we have received no evidence or submissions that it was aware), at the critical times leading up to its announcement on 8 October, of the evidence concerning the deficiencies in the BreakFree Statements discussed in [75] and [76] or the enquiries made by ASIC described in [25], [32], [42], and [49]. Consequently, we did not rely on that evidence in deciding to make the declaration of unacceptable circumstances in the 04 Proceedings.

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Reasons for Decision – BreakFree 03 and 04

04 PROCEEDING - THE POTENTIAL TO MISLEAD

The state of information in the market

83. We are of the view that, from 11 July until the BreakFree Scrip Statements were made on 12 September, in light of the information available to it the market would have expected that S8 would proceed with the Scrip Proposal. Important to this conclusion are:
- (a) the announcement of the Scrip Proposal by S8 on 11 July;
 - (b) the preparation and lodgment with ASIC of the Original Scrip Bidder's Statement and the Replacement Scrip Bidder's Statement (both of which were available from the ASX website and by search through ASIC);
 - (c) the institution and prosecution of Panel proceedings by S8, particularly, *BreakFree 02* where S8 sought consent to the early dispatch of the Scrip Bidder's Statement;
 - (d) the media releases by S8 and BreakFree and their respective discussions with the media,²⁰ during that period; and
 - (e) S8's responses to the 03 Proceeding, as reflected in our media releases concerning the 03 Proceeding.
84. By making no public reference to the BreakFree Scrip Statements between 12 September and 8 October, S8 allowed the market to continue to expect that S8 would proceed with the Scrip Proposal despite the BreakFree Scrip Statements and notwithstanding that it was actually preparing to announce the Cash Proposal for at least some of that period.
85. The fact that 26 days elapsed from the making of the BreakFree Statements until S8 announced that offers would not be made under the Scrip Proposal gave market participants a long time to adopt trading and investment positions in S8 and BreakFree (or retain positions adopted after 11 July) based on the assumption that offers under the Scrip Proposal would be made - many of those positions would be less suitable in the context of the Cash Proposal. Although any bid made on the basis of the Scrip Proposal would have been subject to the Minimum Acceptance Condition, for the reasons discussed at [142] to [149] it would not have been reasonable for market participants to assume that that condition would not be satisfied on the basis of the BreakFree Scrip Statements.²¹

²⁰ Some of these were considered in *BreakFree 02* at [44] to [52].

²¹ We note that S8 sought ASIC's views concerning the applicability of ASIC's policy from ASIC. This indicates to us that S8 itself had at least some doubt as to whether PS 25 was applicable in this situation. Of course, the market was not aware of the conversations between ASIC and S8 on 2 October: see [49].

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Reasons for Decision – BreakFree 03 and 04

The finalisation of the funding for the Cash Proposal

86. In our brief in the 04 Proceeding, we asked S8 to explain the reasons for its delay in announcing that it would not proceed to make offers under the Scrip Proposal.
87. The Cash Proposal was also announced on 8 October. The matters discussed at [48] and [61] to [63] suggest that the Cash Proposal could not have been announced before that date. We therefore specifically asked S8 to explain the extent to which the delay between the making of the BreakFree Statements on 12 September and the S8's Announcement on 8 October was to allow S8 to finalise arrangements preparatory to announcing the Cash Proposal.
88. S8 submitted that, among other things:
- (a) it had been genuinely attempting to resolve the issues under consideration in the 03 Proceeding;
 - (b) there was no requirement in the Act that it take any action that it wished to take in response to the BreakFree Statements (in particular to rely on the Minimum Acceptance Condition), or to make any statement concerning its intentions in relation to the BreakFree Statements, within any specified time;
 - (c) it was entitled to consider its position in a 'reasonable fashion'; and
 - (d) it was reasonable for it to allow ASIC some time to complete the enquiries that are referred to in [82].
89. S8 acknowledged that the Loan Facility and Underwriting Arrangements had only been entered into on 8 October and submitted that:
- Until that time the underwriting and bank debt were not final and the decision had [sic - not] been taken by S8 until that day to make the Cash Bid.*
90. S8 also submitted that these arrangements were finalised during the trading halt requested by S8 on 8 October (as referred to in paragraph 60).
91. However, S8 did not deny that the need to finalise the funding for the Cash Proposal before that proposal could be announced was a major reason (or the reason) for the delay in S8's announcement concerning the Scrip Proposal.

S8's actions during the intervening period

92. In addition, S8's submissions demonstrated that:
- (a) it was aware of the BreakFree Statements for 26 days before it made its announcement on 8 October;
 - (b) it did not seek legal advice in relation to the impact of the BreakFree Scrip Statements until 29 September (17 days after the BreakFree Statements were

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made) and did not, in fact, receive the consequent advice in final form until 8 October (a further 9 days later);²²

- (c) S8 had applied for relief from ASIC in relation to section 631 as discussed at [47];
- (d) the advice received was based on S8 having itself had ‘in principle’ discussions with ASIC in relation to the BreakFree Scrip Statements on 2 October 2003 (20 days after the BreakFree Scrip Statements were made);
- (e) it had canvassed the views of some of its shareholders in relation to the S8 Share Issue; and
- (f) S8 entered into the Underwriting Arrangements and the Loan Facility (which were to support S8’s ability to fund the Cash Proposal) on 8 October (26 days after the BreakFree Statements were made), which was the same day as it announced that it would not proceed with the Scrip Proposal.

93. No reasonable explanation was provided as to why, if it believed that the BreakFree Statements had the effect for which it contended, S8 sought the additional relief in relation to section 631 referred to in [92] 18 days after the BreakFree Scrip Statements were made without first deciding whether to proceed with the Scrip Proposal. It only sought legal advice in relation to the impact of the statements one day before applying for this relief, and had not spoken to ASIC about the BreakFree Scrip Statements at that point. If there had been a material concern about the impact of the BreakFree Scrip Statements, we consider that further action would have been taken in this regard before applying for further ASIC relief.

Inferences drawn by us

94. On the basis of the evidence before us (including the matters discussed in [86] to [92]), we inferred that:

- (a) S8 was not, in fact, motivated to act as it did on 8 October by the impact that the BreakFree Scrip Statements may have had on the likelihood that the Minimum Acceptance Condition under the Scrip Proposal would be fulfilled, and thus for the Scrip Proposal to succeed or fail. If it had been so concerned about the impact of the BreakFree Statements, we are of the view that S8 would have:
 - (i) sought advice from its lawyers, and from ASIC, much sooner than it did;²³ and
 - (ii) announced whether or not it would be proceeding to make offers under the Scrip Proposal much sooner than 8 October, 26 days after the BreakFree Statements were made;

²² See the discussion at [43] concerning the provision of the advice in stages.

²³ In this regard, see also our comments in [93]

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Reasons for Decision – BreakFree 03 and 04

- (b) S8 refrained from advising the market that it did not propose to proceed to make offers under the Scrip Proposal until it was in a position to announce the Cash Proposal because the real motivation for the S8 Announcement was S8's desire to substitute the Cash Proposal for the Scrip Proposal;
 - (c) Even if S8 had formed the view that proceeding with the Scrip Proposal was hopeless, there was no acceptable reason for it to wait until it could announce the Cash Proposal before informing the market that it would not proceed with the Scrip Proposal. S8 did not provide such a reason to us.
95. In light of these inferences and the evidence on which they are based, we thought that there was reason to doubt that S8 was motivated by any belief that the existence of the BreakFree Scrip Statements meant that the Minimum Acceptance Condition would never be satisfied, and that the Scrip Proposal was doomed to fail. This inference was also arguably supported by S8's submission (as referred to in [80(b)]) that it was hopeful that the BreakFree Statements would be amended which indicates that S8 at least contemplated that the BreakFree Scrip Statements might not be correct or, even if they were accurate, that the Surveyed Shareholders might change their minds. As discussed at [81], we did not receive any submissions that ASIC advised S8 of any conclusions that it had formed in relation to the BreakFree Statements until 15 October (which, of course, was after S8 had made its announcement concerning the Scrip Proposal).
96. Even if S8 was motivated by a belief that the BreakFree Statements meant that the Minimum Acceptance Condition would be triggered and that the Scrip Proposal would fail, we consider that the period which it allowed to elapse after the BreakFree Statements were made before purporting to rely on this circumstance to withdraw the Scrip Proposal resulted in unacceptable circumstances in the market for BreakFree and S8 shares.
97. Had S8 reacted in a more timely way to the BreakFree Statements, we may have drawn different inferences and conclusions.

Different from triggered condition situation

98. S8's actions facilitated the creation, and continuation, of circumstances in which the market for S8 and BreakFree shares traded on an uninformed basis for a significant period and on the incorrect assumption that offers would be made under the Scrip Proposal. That situation is quite different from one in which:
- (a) offers under a takeover bid have been made;
 - (b) it has subsequently become clear to the bidder and the market that a defeating condition in the bid has been triggered, or will not be capable of being fulfilled; and
 - (c) the bidder has not announced whether it will rely on the relevant defeating condition.

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99. In such circumstances, the market can take into account the uncertainty surrounding whether the bidder will rely on the defeating condition.
100. However, as discussed at [85] and [142] to [149], in these circumstances there was no reason for the market reasonably to expect that the Minimum Acceptance Condition would be triggered when offers under the Scrip Proposal were made. The BreakFree Scrip Statements simply did not justify such an expectation.

Terms not substantially less favourable

101. S8 submitted that substituting the Cash Proposal for the Scrip Proposal would not lead to a contravention by it of section 631 because, if and when the time arose to assess whether S8 had complied with section 631, it would be entitled to rely on the defence in section 670F which applies where a person:

proves that they could not reasonably have been expected to comply with [subsections 631(1) and 631(2)] because...after the [takeover] proposal or announcement, a change in circumstances occurred that was not caused, directly or indirectly, by the person.

102. In essence, S8 submitted that it was not reasonable to expect it to proceed with the Scrip Proposal because:
- (a) the BreakFree Scrip Statements indicated that the Minimum Acceptance Condition would not be fulfilled; and
 - (b) the truth in takeovers policy set out in ASIC Policy Statement 25 'Takeovers: false and misleading statements' (PS 25) would require the Surveyed Shareholders interviewed in the AAM survey (the **Survey**) to act in accordance with the BreakFree Scrip Statements.
103. S8 further submitted that making offers under the Cash Proposal could result in S8 actually complying with its obligations under section 631. Essentially it argued that the terms and conditions of the Cash Proposal were not substantially less favourable, when considered as a whole, than those of the Scrip Proposal.
104. However, that was not the basis on which S8 announced to the market that it would not be proceeding with the Scrip Proposal. Rather, S8 stated that it:

was entitled to withdraw its scrip bid as a consequence of BreakFree's statement on 12 September 2003 that shareholders holding a majority of shares would not accept the scrip bid.

105. The announcement of the Cash Proposal in these circumstances does not overcome our concerns regarding the quality of the information in the market concerning the Scrip Proposal in the period between 12 September and 8 October as described in [83] to [85]. It is therefore unnecessary in this decision to make a finding on the submissions from S8 concerning whether the Cash Proposal would be 'substantially less favourable' than the Scrip Proposal for the purpose of determining whether S8 may contravene section 631 (and disregarding section 670F).

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106. The critical factor for us was S8 allowing the market for S8 and BreakFree shares to continue to trade for a substantial period in reliance on the impression generated by S8 that it would make offers under the Scrip Proposal, when for at least part of that period S8 had effectively abandoned that proposal.

Conclusions regarding the potential to mislead

107. S8's actions by proceeding in this manner in these circumstances had the potential to mislead the market, and the concomitant potential for loss or damage as a consequence, which cause us to consider that the circumstances were unacceptable. For the same reasons, the circumstances were also inimical to an efficient, competitive and informed market in shares in BreakFree, in S8 and generally.

04 PROCEEDING - THIRD PARTY STATEMENTS

108. For S8 to be able to rely on the defence in section 670F, it was necessary for it to be reasonable for it to rely on the BreakFree Scrip Statements as meaning that the Minimum Acceptance Condition could never be satisfied.
109. For the reasons set out in [142] to [149] we do not believe that it would have been reasonable for S8 to rely on that being the case.

ASIC's truth in takeovers policy

General position

110. We consider that, in general, ASIC's truth in takeovers policy is an important and appropriate policy to apply in the context of takeovers in Australia.
111. Requiring persons to act in accordance with statements that they have made to the market concerning their intentions in the context of a takeover bid under Chapter 6 promotes the principle set out in section 602(a) that one of the purposes of Chapter 6 is to ensure that:

the acquisition of control over... the voting shares in a listed company... takes place in an efficient, competitive and informed market

112. Clearly, the market will be better informed if it is able to rely on people acting, or being required to act, in accordance with their public statements of their own intentions. Of course, as is noted in PS 25, it is possible for a person to make a public statement but still retain flexibility in relation to the subject matter of the statement if the statement is appropriately qualified.²⁴

Repetition of statements of third parties

113. In general, if a statement about a person's views or intentions is made by that person, it can be relied on by the market. Where that happens, there is no question that the

²⁴ See [PS 25.2A], [PS 25.6], [PS 25.7] and [PS 25.35].

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person making the statement ‘owns’ the statement, and therefore should be bound to comply with it.

114. However, the application of the principles in PS 25 is more complicated when public statements (a **Third Party Statement**) are made by a person (the **Declarant**, here BreakFree) about the views and intentions of a third party or third parties (the **Third Party**, here the Surveyed Shareholders).
115. Third Party Statements are dealt with in [PS 25.33] and [PS 25.75] in the context of statements concerning whether a shareholder will, or will not, accept a takeover bid.
116. [PS 25.33] states that:

*Where a bidder or target states that a substantial holder will or will not accept into the bid, we may query both the bidder or target and the substantial holder: see [PS 25.42]. We may require that the bidder or target identifies the substantial holder, and gives details of what the substantial holder told it. We may contact the substantial holder. **If the substantial holder made the acceptance statement to the bidder or target and does not accept the offer the substantial holder risks:***

- (a) *regulatory action by us for contravention of section 1041H; or*
- (b) *an application to the Takeovers Panel for a declaration of unacceptable circumstances.*

[emphasis added]

117. The wording that we have emphasised shows that ASIC’s policy is that a substantial holder may only be held to a public statement made on its behalf (that is, a Third Party Statement) if the substantial holder made a statement to the Declarant which supports the Third Party Statement. Different considerations may apply if the Third Party is itself a ‘disclosing entity’ (within the meaning of the Act).
118. We believe that it is implicit in [PS 25.33] that a substantial holder can only be taken to have ‘made’ the acceptance statement if it is accurately reflected in the subsequent Third Party Statement. Accuracy in this context must necessarily imply that the Third Party Statement included all relevant qualifications made by the substantial holder, or which were implicit in its statement (for example, qualifications may be implicit from the context in, and basis on, which the statement was made). We agree that if a substantial holder can be said to have ‘made’ an acceptance statement in that sense, then the holder should be held to the statement that it made and therefore ‘owns’.
119. [PS 25.75] focuses on action being taken against the Declarant of an incorrect Third Party Statement (rather than against the substantial shareholder (Third Party) who may have been misquoted), stating that:

Where the bidder or target misstates what a substantial holder has said about whether the substantial holder will or will not accept the offer, it risks regulatory action by us for contravention of misleading or deceptive conduct provisions or an application by us or another party to the Takeovers Panel for a declaration of unacceptable circumstances.

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120. [PS 25.50] does state that:

If a statement made to the media by a market participant is misreported (for example, reported without a qualification) the market participant must immediately qualify it in a supplementary statement, or in the case of a substantial holder, an announcement.

121. However, [PS 25.50] talks about misquotation by the media of a market participant²⁵ and [PS 25.33] and [PS 25.75] deal with unauthorised attribution of a statement to a market participant. Neither paragraph appears to purport to require shareholders who are neither bidders nor substantial holders to correct baseless statements attributed to them.

Do the statements in PS 25 apply in these circumstances?

122. Third Party Statements are not otherwise expressly covered in PS 25, or in any other public document published by ASIC that was brought to our attention in these Proceedings.

123. The view that we express at [128] to [140] on Third Party Statements is thus not contrary to ASIC's published policy – as can be seen from [115] to [121] we are now considering a set of facts which falls outside that policy.

124. In addition, we note that all of the discussion in PS 25 that potentially applies to Third Party Statements relates to statements made concerning the views of a 'substantial holder'. We understand that term to refer to a person who has a 'substantial holding' (as that term is defined in section 9). Substantial shareholders have attracted obligations to provide notices about their holdings and are likely to be people of commerce and substance, who have reasonable access to legal advice, so that it would be reasonable to expect a substantial shareholder to publicly correct a misstatement by a Declarant about their intentions once they become aware of the statement. If they do not do that, depending on the circumstances, it may be reasonable to hold them to statements of a Declarant under the Truth in Takeovers Policy. However, that is not the case that we were dealing with here.

125. The BreakFree Statements did not indicate what percentage (if any) of the shares the subject of the Survey were part of a substantial holding.²⁶ Consequently, there was no reason to expect that the paragraphs in PS 25 discussed at [115] to [121] even applied to most of the Surveyed Shareholders.

126. We believe that the intention behind the references to substantial holders in PS 25 is to pick up the technical definition of 'substantial holding' in the Act. A statement about an aggregate number of shares made up of individual parcels which

²⁵ The term 'market participant' is defined in PS 25 to be 'a bidder, target or substantial holder and its advisers'. Except where quoting PS 25, in these reasons that term is used in the wider sense of meaning persons who are involved in the market to acquire shares in companies.

²⁶ In the event, only 2 of the 12 Surveyed Shareholders actually had substantial holdings in BreakFree. However that was not a necessary, or relevant, factor to consider here, especially since the market was not aware of that fact at the relevant times.

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Reasons for Decision – BreakFree 03 and 04

themselves are not substantial holdings is therefore a different thing to a statement about a parcel which itself is a substantial holding. We are of the view that the statements concerning substantial holders in PS 25 are intended to apply in the latter case, but not the former.

127. However, even though we do not consider that PS 25 applies to the BreakFree Statements so far as the position of the Surveyed Shareholders is concerned,²⁷ there is still the question whether the S8 Announcement would be unacceptable circumstances under section 657A.

Our views in relation to Third Party Statements

128. Although a Declarant will place itself at jeopardy of enforcement action if it makes a Third Party Statement that is not accurate, we consider that unless certain criteria are met it is not reasonable for market participants to rely on the Third Party complying with such a statement or for Third Parties to be held to them.

129. In order for it to be reasonable for market participants to rely on a Third Party Statement, we consider that the statement must be expressly made with authority from, or be publicly supported by, the Third Party in circumstances where it is expressly recognised (or there is a necessary inference) that the Third Party knows that it will not be able to depart from the statement.

130. Market participants will reasonably be entitled to expect a Third Party to comply with a Third Party Statement if either:

- (a) the Third Party publicly endorses the statement; or
- (b) the Declarant states that the Third Party has consented to its comments being used in the manner proposed by the Declarant. A Declarant will only be entitled to make such a statement if it has:
 - (i) informed the Third Party of the manner in which the Declarant proposes to use the Third Party's comments;
 - (ii) made the Third Party aware of the consequences under PS 25 of authorising the Declarant's proposed use of its comments; and
 - (iii) obtained the Third Party's consent to the use of its comments in light of paragraphs 130(b)(i) and (ii).

131. It may also be reasonable to expect a Third Party to comply with a Third Party Statement if:

- (a) there is such an obviously close relationship between the Third Party and the Declarant that it is reasonable to expect that the Declarant would clearly, as a matter of course, have authority to make a statement of the relevant kind on behalf of the Third Party without requiring any specific authority for doing so.

²⁷ As opposed to BreakFree's position under PS 25.

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Reasons for Decision – BreakFree 03 and 04

For example, a statement by a holding company about the views and intentions of a wholly-owned subsidiary would be likely to satisfy this test. However, the test is unlikely to be satisfied in relation to parties whose relationship appears to be at arm's length or who otherwise appear to be independent from each other; and

- (c) the relationship between the Declarant and the Third Party is clear from the context or the statement.

132. In general, it is only in the circumstances described in [130] or [131] that it is reasonable for market participants to rely on a Third Party Statement.²⁸

Unsupported, and insufficiently supported, statements

133. Where:

- (a) the Declarant does not advise the market that it has authority to make a Third Party Statement (on the bases referred to in [130]);
- (b) the Third Party Statement is not publicly endorsed by the Third Party; and
- (c) authority for the Declarant to make the statement is not necessarily inferred in accordance with [131]),

the market should, and we believe does, reasonably accord a Third Party Statement little weight.

134. For this reason the making of a Third Party Statement by a Declarant is undesirable unless it is expressly made with the authority of named Third Parties (obtained in accordance with [130(b)]).²⁹ Absent such express authorisation, while the Declarant has an obligation not to mislead or deceive the market (and may be subject to the actions described in [139] if it does not meet the relevant standards), the Third Party is usually not to be taken to be bound by the Third Party Statement. In such circumstances the Declarant's conduct in making the Third Party Statement is an example of precisely the mischief that PS 25 seeks to repress.

135. A Third Party Statement will be particularly unconvincing where any one or more of the following apply:

- (a) the Third Parties are not named and the Third Party Statement does not state that it has been made with authority;

²⁸ That is not to say that it is not appropriate for ASIC to investigate Third Party Statements that do not meet those criteria to determine whether they are actually supported by statements from the relevant Third Party. If it is discovered that the Declarant had authority for making such a statement, the market can be informed of the relevant authority and then accord appropriate weight to the statement. In addition, Declarants making Third Party Statements without authority can be required to correct its statement accordingly.

²⁹ Even if authority would be inferred in accordance [131], it is preferable if the Declarant states the basis on which it has authority to make the Third Party Statement.

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Reasons for Decision – BreakFree 03 and 04

- (b) the statement attempts to convey the views of a disparate group (some of the members of which may not even have a substantial holdings in the target, and so may fall outside the terms of [PS 25.33] and [PS 25.75]); and
- (c) the views of the individuals within the group to whom the statement relates might reasonably be expected to change over time, especially if those views may change without reference to other members of the group.

136. All of these factors are present in the common case where a statement is made based on a survey of a broad body of shareholders as to their views and intentions. In light of the market's knowledge of the manner in which such surveys are conducted, in general a Third Party Statement based on responses to such a survey should be, and we believe is, accorded little weight, especially in forming any expectations about the future actions of those shareholders.
137. If there is a reason why a Third Party Statement based on such a survey should be accorded more weight in particular circumstances, then it is the Declarant's responsibility to ensure that the market is aware of the pertinent facts. Otherwise these statements should be, and, we believe, are, treated as mere puffery.

Responsibility of the Declarant

138. If a Declarant wishes to include commercially significant information in a Third Party Statement, it should be careful to ensure that the statement is firmly based on, and is an accurate and complete reflection of, the position of the Third Party. In all cases the Declarant should clearly indicate the basis on which it is making the Third Party Statement on behalf of the relevant Third Party as set out in [130] and [131], and have information available to support this.
139. If a Declarant does not state the basis of its authority to make the Third Party statement, or cannot support its claim to that authority, the statement may be misleading and expose the Declarant itself to a declaration of unacceptable circumstances or other criminal or civil action in the courts.
140. In essence, the Declarant is the person who is responsible for, and liable on, the Third Party Statement and not the Third Party, unless the Third Party has endorsed the statement or authorized its making in the ways set out in [130] and [131]. This is consistent with ASIC's view in [PS 25.75].
141. It would not be sound policy to hold a Third Party to compliance with a statement which it had not authorized. This would unfairly deprive shareholders of the choice which Chapter 6 attempts to secure for them and give targets a meretricious defence based on conduct which is not only misleading and deceptive, but tends to make the market inefficient and uninformed.

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Reasons for Decision – BreakFree 03 and 04

Was it reasonable to rely on the BreakFree Scrip Statements?

142. The BreakFree Statements were clearly Third Party Statements. They also purported to express the views of a disparate group of an unknown number of unnamed shareholders as a single, global, unqualified intention.
143. The BreakFree Statements did not indicate that BreakFree had any authority from the Surveyed Shareholders to make the statements that it did using their responses. Indeed, the evidence was to the contrary.
144. It was not reasonable for anyone (including S8) to rely on the BreakFree Scrip Statements as a basis for concluding that the Minimum Acceptance Condition could never be fulfilled for the four reasons described below.
145. First, the BreakFree Statements were of the kind described in [135] and [136], and no statement of the kind referred to in [137] was made. Thus they could not reasonably be relied on as showing an immutable intention by the Surveyed Shareholders which would be a basis for requiring the Third Party to comply with the Statement. There was no reason why S8, and the market generally, would not have been aware of those problems at all relevant times. In such circumstances S8's purported reliance on those statements was not reasonable.
146. S8 submitted that its conversations with ASIC concerning ASIC's views in relation to the BreakFree Statements are relevant in this regard. However:
- (a) both ASIC and S8 indicated that, in their conversations, ASIC did not express any final view concerning the BreakFree Scrip Statements;
 - (b) S8 indicated that ASIC informed it that the defence in section 670F would only be available if:

*a bidder elects not to proceed with an announced **because** a target has made a statement to the effect that a current offer is not capable of success.*
[emphasis added]
- As discussed in paragraphs 85, 94 and 95, we are of the view that S8 did not act as it did 'because' it was concerned that the BreakFree Scrip Statements meant that the Minimum Acceptance Condition could never be fulfilled;
- (c) ASIC's views in relation to the BreakFree Statements were not conclusive (although they might have been a relevant factor) of what could, or did, constitute unacceptable circumstances for the purposes of section 657A: that is a matter to be determined by the Panel; and
 - (d) ASIC did not provide S8 with any information obtained from BreakFree or the Surveyed Shareholders about the shareholders' intentions, or any of the conclusions that ASIC had formed based on the information it received.

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For these reasons, S8's conversations with ASIC did not alter the nature of the BreakFree Statements in such a way as to make it reasonable for S8 to suppose that the Surveyed Shareholders would be required to act in accordance with the BreakFree Scrip Statements.

147. Secondly, at the time that the Survey was conducted and the BreakFree Scrip Statements were made, the Scrip Bidder's Statement had not been finalised and neither that document, nor the offers under the Scrip Proposal, had actually been sent to BreakFree shareholders for their consideration.³⁰ It was clearly possible that the Surveyed Shareholders could change their views in relation to the Scrip Proposal once they received and considered the final documentation for the Scrip Proposal.
148. Thirdly, the Surveyed Shareholders may have changed their views as the Scrip Proposal proceeded, and, in particular, as levels of acceptances of the proposal were advised to the market.
149. Fourthly, there was no basis for any expectation that the Surveyed Shareholders would not subsequently sell some or all of their shares for cash on market to purchasers who might accept the Scrip Proposal.

DECISION TO MAKE THE DECLARATION

150. As discussed in [107], we consider that S8's action in delaying announcing its decision not to proceed with the Scrip Proposal until it was able to announce an unrelated Cash Proposal had the potential to mislead the market and was contrary to the principle in section 602(a). This consideration by itself would have been sufficient to warrant a declaration of unacceptable circumstances in these circumstances.
151. However, our views in this regard are reinforced by:
 - (a) the unreasonableness of S8's purported reliance on the BreakFree Scrip Statements as discussed in [142] to [149];
 - (b) the lack of any independent evidence that we consider to have probative value to support the conclusion that S8 was motivated by a belief that the BreakFree Scrip Statements meant that the Minimum Acceptance Condition could never be satisfied and its conduct in proceeding with the Scrip Proposal for a significant period after the BreakFree Statements were made tends to contradict any assertion that S8 did hold that belief;
 - (c) the long delay between the making of the BreakFree Scrip Statements and S8's announcement that it would not proceed with the Scrip Proposal, in light of:

³⁰ Although the Original Scrip Bidder's Statement and Replacement Scrip Bidder's Statement were available for download from the ASX website from 19 August and 2 September respectively, those documents were the subject of the 03 Proceeding from 12 September until their conclusion on 12 November.

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Reasons for Decision – BreakFree 03 and 04

- (i) the uninformed state of the market for S8 and BreakFree shares in that extended period; and
- (ii) the significant time that had elapsed since the Scrip Proposal was first announced on 11 July, and the fact that S8 had sought (and obtained) extensions from ASIC on two separate occasions of the time for it to comply with its obligations under section 631 in relation to the Scrip Proposal.

152. Our views in this regard remain the same regardless of whether section 631 would be contravened if S8 proceeded in accordance with its announcement of 8 October.

153. Consequently, on 24 October we declared that the announcement by S8 on 8 October 2003 that it would not proceed to make offers under the Scrip Proposal constituted unacceptable circumstances in relation to the affairs of BreakFree (the **Declaration**). The form of the declaration is set out in Annexure B.

ORDERS CONSEQUENT ON THE DECLARATION

154. S8 notified us that it would apply for a review of the decision to make the Declaration under section 657EA. The application was made on 28 October. In those circumstances, we considered it appropriate to postpone a final decision in relation to orders based on the declaration pending the resolution of the review proceeding.

155. On 3 November, the review panel in the BreakFree 04R proceedings advised that it had decided to conduct proceedings in relation to S8's application, but that it had suspended those proceedings pending our final decision on whether to make orders (and, if so, what orders) in the 04 Proceeding.

Orders to dispatch offers under the Scrip Bidder's Statement

156. Despite the request from BreakFree, we decided not to order S8 to dispatch the Scrip Bidder's Statement.

157. At the time that we made the Declaration, the issues set out in the Supplementary Brief remained unresolved. We had not received complete submissions and rebuttals from all of the parties in relation to a single version of the Scrip Bidder's Statement (although we did receive various submissions from S8, BreakFree and ASIC over the course of the Proceeding).

158. The issues identified in the Supplementary Brief covered a wide range of alleged deficiencies (the **Alleged Deficiencies**) concerning the Further Amended Replacement Scrip Bidder's Statement. Among other things, they related to:

- (a) the share prices, market capitalisation and dividend figures used;
- (b) the stated forecasts and expectations;
- (c) the manner in which the units managed and marketed by S8 were dealt with;

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Reasons for Decision – BreakFree 03 and 04

- (d) the appropriateness (or otherwise) of certain properties being listed as properties managed by S8;
 - (e) the implications of the S8 Share Issue on the document; and
 - (f) the need for the document to be updated in light of new events.
159. As the process of receiving evidence and submissions in the Proceeding was suspended before completion we did not form any concluded views about the Alleged Deficiencies.
160. However, on the basis of the submissions received, we considered that issues had been raised that would have warranted our further consideration had it not been for S8's decision not to proceed with the Scrip Proposal.
161. A number of the Alleged Deficiencies were of a nature that, if they were found to be justified, they would have required significant remedial amendments. Those amendments would not have been able to be achieved by simply deleting the impugned text.
162. In considering whether it was appropriate to order S8 to proceed with the Scrip Proposal, we took into account our concerns regarding whether it was possible to ensure the reliability and accuracy of any document that we could order S8 to dispatch in relation to the Scrip Proposal because:
- (a) the Alleged Deficiencies in the Scrip Bidder's Statement that would need to be addressed before that document could be sent to BreakFree shareholders;
 - (b) the most recent version of the Scrip Bidder's Statement was over 6 weeks old and it was reasonable to expect that significant updating of that document would be required before it could be dispatched; and
 - (c) the market had been aware for 5 weeks that S8 intended not to make offers under the Scrip Proposal, and would instead be proceeding with the Cash Proposal.³¹
163. The unacceptable circumstance that any orders that we made would need to remedy was the potential for S8's actions to mislead the market. In these circumstances, we did not believe that there was any sensible remedial order that we could make in that regard. Although ordering S8 to proceed to make offers under the Scrip Proposal would have resulted in the expectations of the market prior to the 8 October announcement being fulfilled, that was not practicable because we were not satisfied that:

³¹ The Cash Bidder's Statement, and offers under the Cash Proposal, were also sent to BreakFree shareholders in the period between our announcement that we had made a declaration of unacceptable circumstances (27 October 2003) and the date on which we announced our decision in relation to orders in the Proceedings (12 November 2003). As discussed in [168] to [172], we declined a request from BreakFree and ASIC on 23 October to restrain the dispatch of those documents.

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Reasons for Decision – BreakFree 03 and 04

- (a) the Further Amended Replacement Scrip Bidder’s Statement was in a form that we should require to be dispatched; or
- (b) even if the 03 Proceedings were continued, we could frame orders which would address the Alleged Deficiencies (if they were found to be warranted) either:
 - (i) in a timely manner; or
 - (ii) without requiring active participation from S8 in updating and (where necessary) correcting the Further Amended Replacement Scrip Bidder’s Statement.

This was particularly the case in light of:

- (iii) S8’s expressed intention not to proceed with the Scrip Proposal or to issue a Scrip Bidder’s Statement;³² and
- (iv) the fact that despite 4 drafts of the Scrip Bidder’s Statement having already been prepared by S8, there were still a number of significant outstanding issues to be addressed (some of which were identified as far back as BreakFree’s submissions in *BreakFree 02*).

164. Ordering the dispatch of the Scrip Bidder’s Statement in such circumstances would have had the potential to mislead the market further (rather than addressing the potential for the circumstances for the subject of our declaration to be misleading).

165. In the end, we were of the view that it would be contrary to the principle set out in section 602(a) (that the acquisition of control over voting shares in a listed body take place in an efficient, competitive and informed market) for us to require that a Scrip Bidder’s Statement be dispatched in circumstances where there was a real basis for concern that it may be deficient.³³ In all of the circumstances, we felt that the circumstances gave us a reasonable basis for holding such a concern.

166. Consequently, on 12 November we decided not order S8 to proceed with the Scrip Proposal.

The effect of the Declaration itself

167. However, that is not to say that we thought that nothing should be done in relation to the relevant circumstances. To the contrary, we consider that it was important to indicate to the market our disapprobation of these circumstances. However, this was achieved through making the declaration of unacceptable circumstances, which is itself an important means of regulating market conduct in the future.

³² The S8 Announcement stated that S8 would not be proceeding to make offers under the Scrip Proposal, but would instead proceed with the Cash Proposal. On 10 November, S8 confirmed to us that that remained its intention.

³³ This was, in fact, what BreakFree was arguing at the same time in the 03 Proceeding.

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Reasons for Decision – BreakFree 03 and 04

04 Proceeding - interim orders

168. S8 announced on 20 October that it proposed to dispatch the Cash Bidder's Statement and offers under the Cash Proposal to BreakFree shareholders on 24 October 2003.
169. On 23 October BreakFree and ASIC requested that we make an interim order to restrain the dispatch of the Cash Bidder's Statement and offers until the 04 Proceedings, and any review of the decision in the 04 Proceedings, had been finally resolved.
170. Our decision in the 04 Proceedings relates to the S8 Announcement to the extent that it states that S8 was not to proceed with the Scrip Proposal. On the basis of the information provided to us, we were not satisfied that unacceptable circumstances were likely to result from the dispatch of the Cash Bidder's Statement and offers while it was still an open question whether, when and in what form offers under the Scrip Proposal must be made.
171. For reasons mentioned in [74], it did not appear that the Scrip Proposal and the Cash Proposal needed to be considered at the same time, and in the same way, in these circumstances.
172. On that basis, we also declined to make the interim order requested by BreakFree and ASIC.

DISPOSITION OF THE 03 PROCEEDING

Combination of the Proceedings

173. We considered that the resolution of the outstanding issues in the 03 Proceeding and the final decision on orders in the 04 Proceeding were fundamentally inter-dependent. Consequently we considered both matters at the same time, and the reasoning set out in [157] to [165] formed the basis for our decisions on both matters.
174. We decide to conclude the 03 Proceeding (without finalising the submission process and without making any declaration or orders) on the basis that:
- (a) the issues outstanding in the 03 Proceeding had been overtaken by the 04 Proceeding and in particular our decision not to require S8 to proceed with the Scrip Proposal; and
 - (b) as no offers were to be made under the Scrip Proposal, no useful purpose would be served by resolving the outstanding issues concerning alleged deficiencies in a document that was not to be sent to BreakFree shareholders. In light of the concerns expressed in [157] to [165] we did not believe that, even if the submission and evidence process in the 03 Proceeding was pursued to its conclusion, we would ever be in a position to order a Scrip Bidder's Statement to be dispatched.

Takeovers Panel

Reasons for Decision – BreakFree 03 and 04

175. BreakFree argued that the availability of the original Scrip Bidder’s Statement and Replacement Scrip Bidder’s Statement on the ASX website meant that the alleged deficiencies in those documents gave rise to issues in relation to:
- (a) to the continuous disclosure requirements in the ASX Listing Rules and Chapter 6CA; and
 - (b) S8’s compliance with the rules relating to fundraising in Chapter 6D in the context of the proposed S8 Share Issue.

However, it is not within the Panel’s jurisdiction to remedy contravention of these requirements generally, but only to the extent that non-observance of them results in issues that are within our jurisdiction. Where we are asked to make a declaration of unacceptable circumstances, that means that the circumstances must be of the kind described in section 657A(2). Here the various versions of the Scrip Bidder’s Statement did not give rise to such issues because any problems arose in the market for S8 shares, not the BreakFree shares that were the subject of the Scrip Proposal, and are the subject of the Cash Proposal.³⁴

No other orders

176. As we did not make a declaration of unacceptable circumstances in the 03 Proceeding, we did not make any orders (including any orders for costs).
177. We decided that no cost orders should be made in the 04 Proceeding.

Kathleen Farrell
President of the Sitting Panel
Decision dated 12 November 2003³⁵
Reasons published 19 February 2004

³⁴ In this regard though, we note that the availability of these documents also needs to be viewed in light of the qualifying material that is in existence in the market, which includes releases in which BreakFree has advised the market of its concerns and our comments in relation to the documents in *BreakFree 02* and during the Proceedings.

³⁵ A draft of these reasons was provided to the parties for their comment, and use in the BreakFree 04R review proceeding, on 5 December 2003.

Takeovers Panel

Reasons for Decision – BreakFree 03 and 04

Annexure A – Undertakings provided by S8

BreakFree 03 - Undertaking to the Takeovers Panel by S8 Limited

Pursuant to section 201A of the *Australian Securities & Investment Commissions Act 2001* (Cth), S8 Limited (**S8**) undertakes to the Takeovers Panel that S8 will not dispatch any bidder's statement or offers relating to its takeover bid for BreakFree Limited (**BreakFree**) to any BreakFree shareholders unless and until:

- (a) S8 has provided the Panel and each of the parties to the BreakFree 03 proceedings with at least 48 hours prior written notice of the time at which it proposes to dispatch the bidder's statement and offers; and
- (b) the period of prior notice of dispatch given by S8 under paragraph (a) has expired.

For and on behalf of S8 Limited

Date: 17 September 2003

Takeovers Panel

Reasons for Decision – BreakFree 03 and 04

Annexure B – Declaration of Unacceptable Circumstances

Corporations Act

Section 657A

Declaration of Unacceptable Circumstances

In the matter of BreakFree Limited 04

WHEREAS

- A. On 11 July 2003 S8 Limited (**S8**) announced a takeover bid (the **Scrip Proposal**) for BreakFree Limited (**BreakFree**) in which S8 offered shares in S8 as consideration for BreakFree shares.
- B. The bidders' statement for the Scrip Proposal was, and is, the subject of the BreakFree 03 proceedings before the Panel. Resolution of the issues in those proceedings had been postponed pending the resolution of the BreakFree 04 proceedings.
- C. On 12 September 2003, BreakFree provided a letter to its shareholders, which was also posted through the ASX Company Announcements Platform, in which, among other things, it stated that:

Survey on Shareholder's Intentions

BreakFree's adviser in these matters [concerning the Scrip Proposal], ABN AMRO Morgans, has undertaken a telephone survey of some of the major individual shareholders [in BreakFree] to ascertain their likely acceptance of the current scrip offer.

Based on the survey responses, ABN AMRO Morgans has advised the Board that shareholders holding a majority of shares indicated that they would not accept the current all scrip offer from S8.

These statements are referred to as the '**BreakFree Scrip Statements**'.

- D. 26 days after the BreakFree Scrip Statements were made (that is, on 8 October 2003), S8 announced that it would not be proceeding to make offers under the Scrip Proposal. S8 indicated that it was entitled to take this course of action because of the BreakFree Scrip Statements which meant that one of the defeating conditions (that is, the condition requiring acceptance of the Scrip Proposal for a minimum of 50.1% of the BreakFree shares) in the Scrip Proposal could not be fulfilled.
- E. As at the date of this declaration, no offers have been made by S8 under the Scrip Proposal.

Under section 657A of the Corporations Act, the Takeovers Panel declares that the circumstances described in recital D constitute unacceptable circumstances in relation to the affairs of BreakFree.

Kathleen Farrell

President of the Sitting Panel

Dated 24 October 2003

Takeovers Panel

Reasons for Decision – BreakFree 03 and 04

Annexure C – Lexicon of terms defined in these reasons

<i>Term</i>	Definition	Where defined
<i>03 Application</i>	Application under section 657C made by BreakFree on 12 September 2003	2
<i>04 Application</i>	Application under section 657C made by BreakFree on 10 October 2003	3
<i>03 Proceeding</i>	The proceeding arising from the 03 Application	5
<i>04 Proceeding</i>	The proceeding arising from the 04 Application	5
<i>AAM</i>	ABN AMRO Morgans	18
<i>Alleged Deficiencies</i>	The deficiencies concerning the Further Amended Replacement Scrip Bidder's Statement	148
<i>Amended Replacement Scrip Bidder's Statement</i>	The Replacement Scrip Bidder's Statement amended in the manner set out in S8's letter to of 17 September	25(a)
<i>Applications</i>	03 Application and 04 Application	1
<i>Barondene</i>	Barondene Pty Limited, the bidder under the Scrip Proposal and the Cash Proposal, a wholly-owned subsidiary of S8	Fn 2
<i>BreakFree</i>	BreakFree Limited	1
<i>Break Free 02</i>	The proceeding in BreakFree 02 [2003] ATP 30 (or where applicable the reasons in that proceeding)	13
<i>BreakFree Cash Statement</i>	The statement in the Letter quoted at [20]	20
<i>BreakFree Scrip Statements</i>	The statements in the Letter quoted at [19]	19
<i>BreakFree Statements</i>	The BreakFree Scrip Statements and the BreakFree Cash Statement	18
<i>Cash Proposal</i>	S8's proposed off market takeover bid for shares in BreakFree announced on 8 October 2003 offering a cash consideration.	52
<i>CO 00/344</i>	ASIC Class Order 00/344	13
<i>Declarant</i>	The person who issues a Third Party Statement	105
<i>Declaration</i>	The declaration of unacceptable circumstances made on 24 October 2003 in the 04 Proceeding	143
<i>Further Amended Replacement Scrip</i>	The proposed Scrip Bidder's Statement to be prepared by S8 to amend the Amended Scrip	36(a)

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Reasons for Decision – BreakFree 03 and 04

<i>Bidder's Statement</i>	Bidder's Statement	
<i>Initial Brief</i>	The Brief issued under Regulation 20 in the 03 Proceeding on 19 September	29
<i>Letter</i>	The letter from BreakFree to its shareholders sent on 12 September and containing the BreakFree Statements	18
<i>Loan Facility</i>	S8's loan facility with National Australia Bank	56(b)
<i>Minimum Acceptance Condition</i>	A defeating condition announced for the Scrip Proposal that S8 obtain a relevant interest in 50.1% or more of the issued BreakFree shares before the end of the offer period	10
<i>Original Scrip Bidder's Statement</i>	The bidder's statement for the Scrip Proposal lodged by S8 on 19 August	11
<i>PS 25</i>	ASIC Policy Statement 25 'Takeovers: false and misleading statements'	92(b)
<i>Proceedings</i>	The 03 Proceedings and the 04 Proceedings	5
<i>Regulation 20</i>	<i>Australian Securities and Investments Commission Regulations 2001 (Cth), regulation 20</i>	23
<i>Replacement Scrip Bidder's Statement</i>	The bidder's statement for the Scrip Proposal lodged on 2 September and consolidating the Original Scrip Bidder's Statement with a supplementary bidder's statement lodged on 2 September	13
<i>S8</i>	S8 Limited (and Barondene)	2 and fn 2
<i>S8 Announcement</i>	The announcement by S8 on 8 October that it would not proceed to make offers under the Scrip Proposal and that it would make offers under the Cash Proposal	51
<i>S8 Share Issue</i>	The proposed issue by S8 of converting preference shares	12
<i>Scrip Bidder's Statement</i>	A bidder's statement for the Scrip Proposal	Fn 5
<i>Scrip Proposal</i>	S8's proposed off market takeover bid for shares in BreakFree announced on 11 July 2003 offering a scrip consideration.	9
<i>Supplementary Brief</i>	The Brief issued under Regulation 20 in the 03 Proceeding on 6 October	47(b)
<i>Survey</i>	The survey of the Surveyed Shareholders by AAM	92(b)

Takeovers Panel

Reasons for Decision - BreakFree 03 and 04

<i>Third Party</i>	The person whose views or intentions are conveyed by a Third Party Statement	105
<i>Third Party Statement</i>	A public statement by a person concerning the views or intentions of another person	105
<i>Surveyed Shareholders</i>	Shareholders in BreakFree who were surveyed by AAM	18
<i>Underwriting Arrangements</i>	The underwriting arrangements of S8 with Grange Securities Limited in relation to the S8 Share Issue	56(a)