Australian Government
Takeovers Panel

Reasons for Decision
Ross Human Directions Ltd
[2010] ATP 8

Catchwords:

no shop, no talk, no due diligence, recommending scheme, voting in favour of scheme, notification obligations, matching rights, decline to make a declaration, break fee, effect on control, efficient, competitive and informed market, interim order, lock-up device, scheme of arrangement, undertaking, "fiduciary" out

Corporations Act 2001 (Cth), sections 411, 602, 606

Rusina Mining NL [2010] FCA 1277, Re Sino Gold Mining Ltd (2009) 74 ACSR 647

Guidance Note 7 – Lock-up devices

Magna Pacific (Holdings) Limited 02 [2007] ATP 03, National Can Industries Limited 01(R) [2003] ATP 40, National Can Industries Limited 01 [2003] ATP 35, St Barbara Mines Limited and Taipan Resources NL [2000] ATP 10

INTRODUCTION

1. The Panel, Guy Alexander (sitting President), Sophie Mitchell and Andrew Sisson, declined to make a declaration of unacceptable circumstances in relation to the affairs of RHD following acceptance of undertakings to amend the SIA. The application concerned the proposed acquisition by Peoplebank of RHD by way of scheme of arrangement announced on 19 July 2010.

2. In these reasons, the following definitions apply:

Confidentiality Deed	the Confidentiality Deed between RHD, Navis Capital Australia Pty Limited and Peoplebank Australia Limited dated 8 December 2009
Corom	Corom Pty Ltd
Peoplebank	Peoplebank Holdings Pty Ltd
RHD	Ross Human Directions Ltd
SIA	the scheme implementation agreement between RHD and Peoplebank in relation to the proposed scheme of arrangement between RHD and its members dated 19 July 2010

FACTS

3. RHD is an ASX listed company (ASX code: RHD). Its board consists of four directors:

   Julia Ross, who owns or controls 44.59%[1] of RHD

   Eileen Joy Doyle, who owns or controls 0.01%[2] of RHD

[1] Based on 2009 Annual Report
[2] Based on 2009 Annual Report

Allan McDonald, who owns or controls 0.62%[3] of RHD and

Tim Trumper, who owns or controls no shares in RHD. [4]

4. RHD undertook a private sale process in which RHD had discussions with a number of potential merger partners. RHD described the process in its submissions. This process was in response to an initial informal approach which was made to RHD by a competitor in late 2007/early 2008. In total, enquiries were made of seven domestic and international parties (excluding the competitor referred to above) and meetings were held with five of those parties. None of these discussions resulted in a formal offer being made and, in each case, the discussions were ultimately discontinued by the end of 2008.

5. In mid-2009, informal discussions again took place between RHD and the competitor referred to above, following an approach from that party. That party was also granted due diligence. These discussions were ultimately discontinued after RHD formed the view that that party was not prepared to make an offer on terms acceptable to RHD.

6. During that time, RHD's financial adviser again contacted those of the seven parties referred to above that were considered to be potentially interested in acquiring RHD. Of those parties, only Peoplebank expressed a desire to engage in discussions with RHD. RHD and Peoplebank entered into the Confidentiality Deed on 8 December 2009 to facilitate more detailed discussions and due diligence.

7. The discussions between RHD and Peoplebank were discontinued in late April 2010 because the parties were, at that time, unable to reach agreement on commercial terms. Discussions were subsequently revived in late May 2010 and continued until 19 July 2010, when the parties entered into the SIA, which provided for Peoplebank to acquire all of the shares in RHD by way of scheme of arrangement for a cash consideration of $0.615 per RHD share.

8. The consideration of $0.615 per RHD share represented a 60% premium to the last closing price of RHD shares before announcement of the scheme on 19 July, a 63% premium to the 3 month VWAP before announcement, and a 71% premium to the 12 month VWAP before announcement.

9. The announcement by RHD of the scheme on 19 July 2010 stated that RHD directors unanimously considered the scheme to be in the best interests of RHD shareholders and that RHD directors recommended that shareholders approve the scheme in the absence of a superior proposal. It also stated that each RHD director intended to vote their RHD shares in favour of the scheme, again in the absence of a superior proposal. The announcement also included a quote from the RHD Chairman that: "*The offer price of A$0.615 cash per share delivers compelling value to RHD shareholders and represents an attractive premium to the recent RHD share price*".

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[3] Based on 2009 Annual Report

[4] Based on Appendix 3X dated 23 September 2009

10. The SIA entered into on 19 July 2010 contains a number of deal protection measures. These include:

    (a) an obligation on RHD to use best endeavours to procure that each RHD director does not withdraw their recommendation in favour of the scheme, and to ensure that each RHD director votes their RHD shares in favour of the scheme

    (b) a no-shop restriction

    (c) a no-talk restriction

    (d) a no-due diligence restriction

    (e) a notification obligation on RHD, and matching rights in favour of Peoplebank and

    (f) a break fee of $500,000 (being less than 1% of total scheme consideration).

11. The relevant provisions (marked up to show the amendments made by RHD and Peoplebank on 9 September 2010 in response to the Panel's concerns) are set out in Annexure C to these reasons.

12. Corom is a substantial holder in RHD, which at 3 September 2010 held 14.94% of the shares in RHD. Corom had been aware that RHD was the subject of a potential control transaction for some time. A meeting had been held on 16 April 2010 between representatives of Corom and representatives of Peoplebank and the financial adviser to RHD to discuss the possibility of Corom granting a pre-bid option over its shares in RHD, should Peoplebank or an associate make a takeover bid for RHD. Corom did not agree to grant any such pre-bid option, but was aware of the potential bid for RHD from that date.

APPLICATION

Declaration sought

13. By application dated 24 August 2010, Corom sought a declaration of unacceptable circumstances. It submitted that unacceptable circumstances arise as a result of:

    (a) the RHD board's statement that the Peoplebank proposal represents "*compelling value*", without the benefit of an expert report or other reasonable basis for making the recommendation and alleged misleading statements by the RHD board in relation to the value of RHD

    (b) the anti-competitive effect of the lock-up and break fee provisions, and notification obligations and matching rights in the SIA

    (c) provisions of the SIA that fetter the ability of RHD directors to carry out their fiduciary duties and

    (d) breaches of s606[5] (because of provisions in the SIA to the effect that RHD will use its best endeavours to procure that each RHD director will recommend the scheme and ensure that each director will vote in favour of the scheme).

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[5] References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

14. Corom submitted that the effect of the circumstances was that:

    (a) control of RHD would not pass in an efficient, competitive and informed market and

    (b) RHD shareholders were being denied access to adequate information to assess the merits of the Peoplebank proposal.

Interim orders sought

15. Corom sought interim orders to the effect that:

    (a) RHD not seek any orders under s411 in relation to the scheme

    (b) Peoplebank and its associates not take any step or action that may result in it acquiring a relevant interest in voting shares in RHD (that it did not have immediately before the SIA was executed) or exercise any control or influence it may have in relation to any RHD shares (other than those it already had)

    (c) Peoplebank, its associates and RHD not enforce the SIA in relation to (i) restrictions on the disposal or voting of RHD shares held by RHD directors or (ii) obligations in relation to recommendations of RHD directors and

    (d) Peoplebank not enforce any of the purported obligations of RHD under specified provisions (if RHD or an RHD director notifies it that to do so would conflict with statutory or fiduciary duties).

16. RHD provided the proposed timetable for the transaction and agreed to give the Panel 2 business days' notice of the first court hearing. It appeared that we could deal with the application before the proposed first court hearing date. We therefore considered it was not necessary to make interim orders.

Final orders sought

17. Corom sought final orders to the effect that:

    (a) the break fee provisions in the SIA be cancelled

    (b) RHD not seek any orders under s411 in relation to the scheme or take any action in furtherance of the scheme for 60 days, and during this period it be free to solicit and respond to expressions of interest for the acquisition of RHD

    (c) if the RHD board reasonably considers that a Competing Proposal that is submitted during that 60 day period is a Superior Proposal then the SIA be terminated

    (d) if the SIA has not been terminated at the end of the 60 day period:

        (i) clauses 7.1, 7.2 and 10.1 to 10.4 be amended to include reasonable and customary "fiduciary" outs

(ii) restrictions on the disposal or voting of RHD shares held by the RHD directors only be effective in respect of that number of RHD shares held by the directors that is equal to 20% of the issued voting shares in RHD (less the number of shares in which Peoplebank and its associates already held a relevant interest immediately before entry into the SIA)

(iii) the "End Date" under the SIA be extended by 60 days and

(iv) no break fee be payable under the terms of the SIA and

(e) either or both of RHD and Peoplebank bear the costs and expenses incurred by Corom in relation to the application.

DISCUSSION

Jurisdiction

18. In its preliminary submission, RHD submitted that the Panel should decline to conduct proceedings because the court has jurisdiction in relation to the scheme following review by ASIC.

19. We disagree. We consider that the Panel has jurisdiction in relation to the application (section 657A). While the Panel generally is reluctant to conduct proceedings in connection with a scheme of arrangement if a court has commenced scrutiny of the scheme,[6] the court is yet to do so here and the Panel has previously conducted proceedings in that situation.[7]

Conduct proceedings?

20. We decline to conduct proceedings on the following issues:

(a) the statement by the RHD Chairman that the Peoplebank proposal represented "compelling value"

(b) whether the SIA fettered the ability of RHD directors to carry out their fiduciary duties and

(c) the alleged breaches of s606.

21. We conduct proceedings in relation to the deal protection measures (see below).

22. On the issue of the statement by the Chairman that the proposal represented "compelling value", we have no reason to believe that this was not a true representation of the Chairman's opinion, and it does not appear wholly unreasonable given that the offer price was at a 60% premium to the pre-announcement price.

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[6] *St Barbara Mines Limited and Taipan Resources NL* [2000] ATP 10 at [32]

[7] *National Can Industries Limited 01* [2003] ATP 35, *National Can Industries Limited 01(R)* [2003] ATP 40 and *Magna Pacific (Holdings) Ltd 02* [2007] ATP 3

23. On the question of whether the SIA fettered the ability of the RHD directors to carry out their fiduciary duties, we consider the fetters in the fiduciary outs in the context of considering the deal protection measures, but it is not the Panel's role to determine claims for breach of fiduciary duty (to the extent that they were put).

24. On the alleged breaches of section 606, under the SIA, it is RHD, not the director shareholders, which is required to use its best endeavours to procure that the RHD directors recommend the scheme and ensure that each director will vote in favour of the scheme. Further, under the SIA, RHD's liability for failing to ensure that the RHD directors voted in favour of the scheme is capped at the amount of the break fee, being $500,000. We therefore do not think that the provisions are sufficient to give Peoplebank a relevant interest in the shares held by the director shareholders, without which there is no breach of section 606.

Deal protection measures

25. As discussed above, the SIA includes a number of deal protection measures, including no-shop, no-talk and no-due diligence restrictions, a notification obligation and matching rights and a break fee. The applicant, Corom, submitted that these provisions were unacceptable because their practical effect was to prevent a competing offer ever being made for RHD. Corom submitted that this was particularly the case in circumstances where the RHD board had not tested the market via a public auction process before entering into those arrangements.

26. Guidance Note 7 makes it clear that deal protection measures such as no-shops, no-talks, notification obligations and matching rights are not per se unacceptable. While those provisions obviously have an anti-competitive element, they can, if subject to certain basic structural requirements, indirectly facilitate competition for control in the sense that, but for those deal protection measures, many bidders will be unwilling to proceed to make a bid. We also note that these types of provisions are commonplace in implementation agreements for schemes of arrangement and takeovers in Australia, and typically do not stop a serious competing bid emerging. However, their effect also needs to be considered taken as a whole.

27. As to the issue that the provisions here were agreed without a public sale process having been undertaken, in our view, there is no requirement that a target company must undertake a public sale process prior to entry into an implementation agreement containing such arrangements. We note that there may be many reasons why a target board seeking to obtain a control transaction for the benefit of shareholders does not wish to publicly put itself up for sale, including the impact of such a move on its relationships with its suppliers, customers and employees.

28. That being said, such deal protection measures need to be subject to certain basic structural requirements to ensure that they do not unreasonably hinder competition for control of the target company. This is even more the case where there has not been any public sale process prior to entry into the implementation agreement. For example:

    - a no-talk restriction and a no-due diligence restriction must be subject to a fiduciary out, allowing the target to respond to a competing proposal which could reasonably be expected to lead to a superior proposal and to grant due diligence if required to do so by the target directors' fiduciary or statutory duties
    - that fiduciary out must then not be subject to fetters or constraints which unreasonably restrict the target's ability to rely on it
    - a matching right cannot be for a duration that removes any practical likelihood that a potential competing bidder will be prepared to put a proposal to the target and
    - a notification obligation cannot require a target to disclose information concerning a competing bidder where that obligation would make it unlikely that any competing bid would be made.

29. Here, the deal protection measures in the SIA (before amendment) do contain a number of elements which would result in the provisions having an unacceptable effect on competition for control of RHD. These elements, and a number of other aspects of the deal protection measures, are considered below. These issues were ultimately dealt with by the amendments to the SIA offered by RHD and Peoplebank after we indicated that we would declare unacceptable circumstances unless the provisions were changed.

30. The issues that we have with the deal protection measures in the SIA are as follows.

Fetters on the fiduciary out to the no-talk and no-due diligence restrictions

31. The no-talk restriction in clause 10.2 of the SIA (before amendment) provides that, during the Exclusivity Period, RHD must not enter into negotiations or discussions with a third party in relation to a Competing Proposal unless:

> *"the Target Board, acting in good faith and in order to satisfy what the Target Board reasonably considers to be its fiduciary or statutory duties, determines that, where there is a Competing Proposal:*
>
> *(c) the Target Board has received written advice from its external financial advisers to the effect that the Competing Proposal could reasonably be considered to be a Superior Proposal; and*
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> *(d) the Target Board has received written advice from its external legal advisers that failing to respond to that Competing Proposal would be likely to constitute a breach of the Target Board's fiduciary or statutory obligations."*

32. The no-due diligence restriction in clause 10.3 of the SIA (before amendment) provides that, without limiting clause 10.2, during the Exclusivity Period RHD must not make any non-public information available to any third party in connection with that third party formulating or developing a Competing Proposal unless:

> *"(a) the Target Board, acting in good faith and in order to satisfy what the Target Board reasonably considers on the basis of written advice from its external legal advisers to be its fiduciary or statutory duties, determines that the Competing Proposal is or could reasonably be considered to be a Superior Proposal; and*
>
> *(b) if Target proposes to provide any confidential information to a Third Party, before Target provides such information to the Third Party, the Third Party has entered into a written agreement in favour of Target regarding the use and disclosure of the confidential information by the person and that restricts the Third Party's ability to solicit the employees of the Target Group and which includes substantially all of the material terms (including standstill obligations) contained in the Confidentiality Deed."*

33. Clause 10.2 refers to a "Competing Proposal" that "*is or could reasonably be considered to be a Superior Proposal*". A "Competing Proposal" is described in the SIA (before amendment) as "*any expression of interest, proposal, offer, transaction or arrangement*" by or with a third party pursuant to which the third party may acquire a controlling interest in RHD. The SIA then defines a "Superior Proposal" as:

> *"a bona fide Competing Proposal that the Target Board determines, acting in good faith and in order to satisfy what the Target Board considers to be its fiduciary or statutory duties (and after having taken advice from its financial and legal advisers):*
>
> *(a) is capable of being valued and completed, taking into account all aspects of the Competing Proposal, including its conditions precedent; and*
>
> *(b) would, if completed substantially in accordance with its terms, be more favourable to Shareholders (as a whole) than the Scheme, taking into account all the terms and conditions of the Competing Proposal and all aspects of the Scheme."*

34. We consider that there are a number of unacceptable fetters on the fiduciary outs in the no-talk and no-due diligence restrictions in the SIA. These are as follows:

(a) Clauses 10.2(c) and 10.3(a) appear to require the RHD board to determine that there is already a Superior Proposal before responding to a third party approach or granting due diligence. Given the definition of "Superior Proposal", it may not be possible for the RHD board to determine that a Competing Proposal is actually a Superior Proposal until such time as RHD has held discussions with the potential competing bidder and provided due diligence information to it. In our view, RHD should be able to respond to and grant due diligence in respect of a Competing Proposal which the RHD board, acting in good faith, determines is, or may reasonably be expected to lead to, a Superior Proposal.

(b) Clause 10.2(c) requires that the RHD board must have first received written advice from its external financial advisers that the Competing Proposal could reasonably be considered to be a Superior Proposal. We do not object to the clause requiring that RHD obtain advice from its financial advisers on the Competing Proposal (the definition of "Superior Proposal" already requires RHD to do this). However, clause 10.2(c) may be read as putting the final decision on whether the proposal is superior with the financial advisers rather than the RHD board. It is also not clear how the external financial advisers could advise that the Competing Proposal could reasonably be expected to be a Superior Proposal, when the definition of Superior Proposal includes such concepts as the RHD board acting in good faith and in order to satisfy what they considered to be their fiduciary and statutory duties, which are not matters that the financial advisers would be in a position to opine on.[8]

(c) Clause 10.2 requires not only that the RHD board get the advice from its external financial advisers and written advice from its legal advisers that failing to respond would be likely to constitute a breach of the RHD board's fiduciary or statutory obligations, but that the RHD board be acting in good faith and in order to satisfy what the RHD board "reasonably" considers to be its fiduciary or statutory duties. We consider that it is inappropriate to impose an additional "reasonableness" requirement on the RHD board in determining what are its fiduciary and statutory duties, beyond requiring that RHD obtain external legal advice that failing to respond would likely breach those duties. We also considered whether it was appropriate that, in addition to requiring that the RHD board determine in good faith that a Competing Proposal was a Superior Proposal, the RHD board should also be required to get legal advice that failing to respond would likely constitute a breach of duty (i.e. should the "and" at the end of clause 10.2(c) be an "or"). In our view, it would have been preferable if clause 10.2(c) and (d) were expressed as alternatives, but given that the legal advice in (d) should be readily obtainable if the requirements of clause 10.2(c) are met, we do not press the point.

(d) Clause 10.3(b) requires that before a potential competing bidder can obtain due diligence, that party must enter into a confidentiality agreement with RHD not only restricting the disclosure and use of the information and the poaching of RHD employees, but containing "*substantially all of the material terms (including standstill obligations) contained in the Confidentiality Deed*". The Confidentiality Deed has not been publicly disclosed, so it is not possible for a potential competing bidder to determine what other restrictions it would need to sign up to in order to obtain due diligence. This in itself acts as a deterrent on competing bidders coming forward. Further, while a target may well wish to obtain a standstill from a potential competing bidder before providing due diligence, we do not consider it is appropriate that Peoplebank could insist that the third party be subject to the same standstill that Peoplebank agreed to before RHD is able to grant due diligence to that third

[8] We have similar concerns in relation to clause 10.3(a)

party. We do not consider that the requirement in clause 10.3 that RHD impose an equivalent standstill on a third party is necessary to ensure a "level playing field" (as submitted by Peoplebank). For example, it would equally ensure a level playing field if the obligation on Peoplebank was able to be scaled back to match whatever was subsequently agreed with a third party.

35. After considering our concerns, Peoplebank and RHD offered to amend the fiduciary outs in clauses 10.2 and 10.3 of the SIA to provide that RHD and its representatives may undertake any action that would otherwise be prohibited by clause 10.2 or 10.3 in relation to a Competing Proposal where:

- the Target Board determines that the Competing Proposal is, or may reasonably be expected to lead to, a Superior Proposal and
- the Target Board, acting in good faith and after having taken advice from its legal advisers, determines that not undertaking that act would be likely to involve a breach of the fiduciary or statutory duties owed by any RHD director.

36. We consider that the amendments proposed address our concerns in relation to the fiduciary outs to the no-talk and no-due diligence restrictions.

37. There were a number of other submissions which Corom made in relation to the no-talk and no-due diligence restrictions which we do not think are material. One of these is Corom's submission that the no-talk and no-due diligence (and no-shop) restrictions continued for an unreasonably long period. Under the SIA, those provisions continue for the "Exclusivity Period", which is defined as the period commencing on the date of the SIA and ending on the first of the date of termination of the SIA, the effective date for the scheme and the "End Date" (which is 31 December 2010 or such later date as agreed between the parties in writing). The effect of this is that, absent some further agreement between the parties, the no-shop, no-talk and no-due diligence restrictions continue for a maximum period of approximately five and a half months. We do not consider that this is unreasonably long in the context of a scheme. There are a number of Court decisions on schemes where the Court determined that a six or seven month exclusivity period was not unreasonably long.[9] The timetable for the scheme allows time for a competing bidder to emerge (and, in any event, RHD and Peoplebank decided to extend the timetable).

No-shop which may operate as a no-talk

38. Guidance Note 7 states that while a no-shop restriction does not normally need to be subject to a fiduciary out like a no-talk, it will need to be if the no-shop provision goes beyond obliging the target not to shop the company and restricts the target responding to an unsolicited competing proposal (i.e. if it operates as a de-facto no-talk restriction).

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[9] See, for example, the decisions of Lindgren J in *Re Sino Gold Mining Ltd* (2009) 74 ACSR 647 at [23] and Barker J in *Rusina Mining NL* [2010] FCA 1277

39. Clause 10.1 of the SIA (the no-shop restriction) states that, during the Exclusivity Period, RHD must not directly or indirectly "*solicit, invite, facilitate, encourage or initiate any Competing Proposal*". We are concerned that the term "facilitate" in reference to a Competing Proposal in clause 10.1 may be interpreted as preventing RHD responding to an unsolicited Competing Proposal, or from granting due diligence in respect of such an unsolicited proposal. The issue here is that clause 10.1, unlike clauses 10.2 and 10.3, is not subject to a fiduciary out.

40. After considering our concerns, Peoplebank and RHD offered to amend clause 10.1 of the SIA to delete the prohibition on "facilitating" a Competing Proposal.

No exception where the independent expert does not conclude that the scheme is in the best interests of shareholders

41. Under clause 7.1(b) of the SIA, RHD is obliged to use its best endeavours to procure that the RHD board and each of the RHD directors recommends that shareholders vote in favour of the scheme in the absence of a superior proposal, and that RHD directors do not withdraw that recommendation. Under clause 7.2(b), RHD is obliged to use its best endeavours to ensure that each RHD director who holds or controls shares votes them in favour of the scheme.

42. The obligation in each of clauses 7.1(b) and 7.2(b) is subject to an exception where the RHD board determines that a Competing Proposal constitutes a Superior Proposal and a majority of the board no longer considers the scheme to be in the best interests of shareholders. However, there is no exception for the situation where, after the SIA is entered into, the independent expert does not conclude that the scheme is in the best interests of shareholders.

43. Similarly, clauses 11.2(a)(i) and (iii) of the SIA require RHD to pay the $500,000 break fee in circumstances where any RHD director changes or withdraws their recommendation in favour of the scheme, or fails to vote in favour of the scheme, but there is no exception for where that change of recommendation or voting intention is due to the independent expert not concluding that the scheme is in the best interests of RHD shareholders.

44. We think, consistently with the reasoning by the Panel in *National Can 01(R)*[10] and GN 7,[11] that if the directors cannot wait for the conclusion of an independent expert, an obligation to recommend the scheme and to pay a break fee if the RHD directors withdraw their recommendation, should be expressed to be subject to an exception allowing a change where the independent expert subsequently does not conclude that the scheme is in the best interests of shareholders. Following *National Can 01(R)*, the standard market practice has been for such provisions to be subject to such an exception. Peoplebank and RHD were invited by the Panel to point to any other examples of implementation agreements for schemes in the past 2 years where a change of recommendation trigger in a break fee has not been subject to such an exception, which they were unable to do.

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[10] *National Can Industries Limited 01(R)* [2003] ATP 40 at [27]

[11] Guidance Note 7 at para [12]

45. Here, RHD stated that its directors did seek such an exception; however, Peoplebank would not agree. RHD submitted that its board "*was sufficiently confident in its assessment of the Scheme proposal in the circumstances of the market value ascribed to RHD shares to not press that matter*". RHD and Peoplebank also submitted that, since the SIA was entered into, the draft independent expert's report had been prepared, and the conclusion was to the effect that the scheme was "*not fair, but reasonable and is in the best interests of RHD shareholders*". They submitted, therefore, that, unless there was a later change to that conclusion, the point was moot.

46. We take the view, consistent with *National Can 01(R)* and GN 7, that the obligation to use best endeavours to ensure that RHD directors recommend and vote in favour of the scheme, and the obligation to pay the break fee where an RHD director changes their recommendation or fails to vote in favour, should be subject to an independent expert exception. This is so, even though the draft report concluded that the scheme was in the best interests of shareholders, as the expert may change that recommendation in the future and we want to ensure a precedent isn't created for future control transactions.

47. To address our concerns, Peoplebank and RHD offered to amend clauses 7.1(b) and 7.2(b) to allow a change of recommendation and voting intention where

> "*the Independent Expert concludes in the Independent Expert's Report (either initially or in any updated report) that the Scheme is not in the best interests of Shareholders.*"

48. Peoplebank and RHD also offered to amend the break fee trigger in clause 11.2(a)(i) so that the break fee is not payable where the independent expert concludes in its report (either initially or in any updated report) that the scheme is not in the best interests of shareholders (except where the independent expert reaches that conclusion as a result of a Competing Proposal having been announced or made public).[12]

49. The amendments offered by Peoplebank and RHD address our concerns in relation to these issues.[13]

Terms of the notification obligation and matching rights

50. Clause 10.4 of the SIA contains a notification obligation and matching rights with the following features:

    (a) before the RHD directors can change their recommendation and recommend a Competing Proposal, RHD is required to give Peoplebank 5 clear business days notice of the proposed change

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[12] RHD and Peoplebank also volunteered to amend clause 11.2(a)(iii)

[13] RHD and Peoplebank also agreed to amend the SIA to address our concern that clause 11 could be triggered by a change of recommendation after termination of the SIA (because of the operation of clause 12.5(a))

(b) that notice must include:

(i) all material terms of the Competing Proposal

(ii) any "*information provided to any person associated with the Competing Proposal not previously provided to*" Peoplebank and

(iii) the identity of the competing bidder (except that if the competing bidder refuses consent to their name being divulged, RHD may withhold the information to the extent necessary to satisfy what the RHD board reasonably considers on the basis of legal advice to be its fiduciary or statutory duties)

(c) during that 5 clear business day period, Peoplebank can put forward a matching proposal, in which event RHD and Peoplebank must use their best endeavours to agree amendments to the SIA to reflect that matching proposal and RHD must use its best endeavours to ensure that the RHD directors maintain their recommendation of the Peoplebank proposal

(d) any "material modification" to the Competing Proposal (including any modification relating to the price or value of the Competing Proposal) is taken to make the proposal a new Competing Proposal, re-starting the 5 clear business day process above and

(e) the notification obligation and matching rights are subject to a fiduciary out in clause 10.4(f). It states that:

"*(f) Notwithstanding anything in clause 10.4, each obligation of the Target under this clause 10.4 does not apply to the extent that the Target Board, acting in good faith and in order to satisfy what the Target Board reasonably considers to be its fiduciary or statutory duties after having received written advice from its external legal advisors, determines that complying with such obligation would be likely to constitute a breach of the Target Board's fiduciary or statutory duties.*"

51. We are concerned with a number of aspects of the notification obligations and matching rights, namely:

(a) The notification obligations in clause 10.4(b) require RHD to provide Peoplebank with "*any information provided to any person associated with the Competing Proposal that has not been disclosed previously to Peoplebank*", rather than restricting the obligation to material confidential information concerning RHD's operations. This broad obligation could require, for example, RHD to provide Peoplebank with information concerning the pricing of the Competing Proposal.

(b) A competing bidder would be, in effect, required to keep its offer open for 5 clear business days. We consider that this, when combined with the matching rights, is a real disincentive for the competing bidder putting forward a proposal.

(c) The fact that the 5 clear business day period refreshes for any modification relating to the price or value of the Competing Proposal, regardless of whether it is material or not.

(d) The fact that, like the no-talk and no-due diligence restrictions, the terms of the "fiduciary" out in clauses 10.4(b) and 10.4(f) are subject to requirements which make it difficult for RHD to rely on the fiduciary out. We consider that the fiduciary outs should operate if the board, acting in good faith and in order to satisfy what it considers to be its fiduciary or statutory duties (having taken advice from its external legal advisers) determines that complying with obligations in clause 10.4 would be likely to constitute a breach of their fiduciary or statutory duties.

52. RHD and Peoplebank offered to amend the SIA to deal with the issues referred to in paragraphs (a), (c) and (d) above. We are satisfied that the amendments made resolve those issues.

53. On the question of the duration of the matching rights in clause 10.4(b) (referred to in paragraph 51(b) above), we understand that when matching rights started to become more prevalent in implementation agreements in Australia a few years ago, the period of the matching right was generally no more than 3 days. This period has grown in more recent transactions to 5 business days and even longer periods. While we are reluctant to set an arbitrary time limit, we consider that any material extension of these periods is likely to be unacceptable, because of the effect that the provision has on the willingness of a third party to put forward a competing proposal.

54. Here, we are, after some deliberation, prepared to accept the 5 clear business day period. One of the reasons for this is that Peoplebank's major shareholders are based offshore and, it was submitted, the 5 clear business day period is necessary to allow Peoplebank to respond to the competing proposal. We note that RHD and Peoplebank in any event reduced the period to 3 clear business days on any "refresh" of the matching right, although we did not require this.

Break fee as sole liability for breach

55. One issue which we did consider in determining the anti-competitive effect of the various deal protection measures, including the no-shop, no-talk and no-due diligence restrictions, is that under the SIA, RHD's sole liability for breach of the agreement is for payment of the break fee of $500,000. We clarified with the parties that this was the intention of clause 11.1(d) of the SIA, and Peoplebank and RHD agreed to make certain amendments to the drafting to put this beyond doubt.

DECISION

56. After considering the submissions and rebuttals, we were minded to make a declaration of unacceptable circumstances unless the SIA was amended to address our concerns. RHD and Peoplebank offered undertakings to do so (see Annexure A and Annexure B), which we accepted.

57. Given the undertakings, we decline to make a declaration and are satisfied that it is not against the public interest to do so. We have had regard to the matters in s657A(3).

Orders

58. Corom made a number of submissions in response to our orders brief, some of which (as submitted by RHD) sought to re-submit substantive matters we have already determined. However two submissions should be addressed:

    (a) Corom submitted that additional orders should be made that the scheme be withdrawn and not re-presented until a reasonable time set by the Panel has passed. Peoplebank submitted that there was no justification for additional extensive delay. We note that the indicative timetable for the scheme has been revised so that the first court hearing to obtain orders to convene the scheme meeting will not be until at least 24 September. In our view, there is plenty of time for an interested third party (including Corom) to put forward a Competing Proposal and

    (b) Corom submitted that RHD should be ordered to obtain a replacement expert report. We could, of course, only do this if we made a declaration. In our view, noting the requirements of ASIC RG 111, it is not necessary for us to make such an order.

59. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

Guy Alexander
President of the sitting Panel
Decision dated 8 September 2010
Reasons published 17 September 2010

Australian Government
Takeovers Panel

Annexure A

Australian Securities and Investments Commission Act 2001 (Cth)
Section 201A
Undertaking

Pursuant to section 201A of the *Australian Securities and Investments Commission Act* 2001 (Cth), Ross Human Directions Ltd ACN 003 758 709 (**RHD**) undertakes to the Takeovers Panel (**Panel**), in connection with the proposed draft declaration and draft orders by the Panel dated 6 September 2010 (**6 September Documents**) in relation to the proposed acquisition of RHD by Peoplebank Holdings Pty Ltd ACN 127 554 410 (**Peoplebank**), that it will:

1. within 2 business days after the date of this undertaking, amend, in a form approved by the Panel, the scheme implementation agreement between RHD and Peoplebank dated 19 July 2010 to address the matters identified by the Panel in the 6 September Documents;
2. release the amended scheme implementation agreement to ASX, together with a summary of the changes, as soon as practicable after it is executed; and
3. confirm in writing to the Panel when it has satisfied its obligations under this undertaking.

RHD understands that Peoplebank has or will provide an undertaking in respect of itself to the Panel on the same terms as this undertaking.

Signed for and on behalf of Ross Human
Directions Ltd ACN 003 758 709 by

_____

Marko Komadina
Partner
Gilbert + Tobin

Dated 7 September 2010

Australian Government
Takeovers Panel

Annexure B

Australian Securities and Investments Commission Act 2001 (Cth)
Section 201A
Undertaking

Pursuant to section 201A of the *Australian Securities and Investments Commission Act* 2001 (Cth), Peoplebank Holdings Pty Ltd ACN 127 554 410 (**Peoplebank**) undertakes to the Takeovers Panel (**Panel**), in connection with the proposed draft declaration and draft orders by the Panel dated 6 September 2010 (**6 September Documents**) in relation to the proposed acquisition of RHD by Peoplebank, that it will:

1. within 2 business days after the date of this undertaking, amend, in a form approved by the Panel, the scheme implementation agreement between RHD and Peoplebank dated 19 July 2010 to address the matters identified by the Panel in the 6 September Documents;
2. release the amended scheme implementation agreement to ASX, together with a summary of the changes, as soon as practicable after it is executed; and
3. confirm in writing to the Panel when it has satisfied its obligations under this undertaking.

Peoplebank understands that RHD has or will provide an undertaking in respect of itself to the Panel on the same terms as this undertaking.

Signed for and on behalf of Peoplebank Holdings Pty Ltd
ACN 127 554 410 by

_____

Peter Shaw
Partner
Maddocks

Dated 7 September 2010

Annexure C

7 Target Board Recommendations and Intentions

7.1 Target Board recommendation

(a) The Target Public Announcement must state that the Target Board unanimously considers the Scheme to be in the best interests of Shareholders and recommends that Shareholders approve the Scheme, in the absence of a Superior Proposal.

(b) Target must use its best endeavours to procure that the Target Board and each of the Target Directors:

(i) does not withdraw the statements and recommendations set out in the public announcement issued in accordance with clause 8.1;

(ii) in the Scheme Booklet states that the Target Board unanimously considers the Scheme to be in the best interests of Shareholders and recommends that Shareholders approve the Scheme Resolution, in the absence of a Superior Proposal, and does not withdraw those statements or recommendations once made; and

(iii) does not make any public statement to the effect, or take any other action that suggests, that the Scheme is no longer so considered or recommended,

unless either ~~the requirements in both clause 7.1(b)(iv) and clause 7.1(b)(v) below are satisfied~~:

(iv) the Independent Expert concludes in the Independent Expert's Report (either initially or in any updated report) that the Scheme is not in the best interests of Shareholders; or

~~(iv)~~(v) ~~the~~ the Target receives a Competing Proposal and a majority of the Target Board determines that ~~a~~ the Competing Proposal constitutes a Superior Proposal~~;~~ and any Target Director, after considering the matter in good faith, no longer considers the Scheme to be in the best interests of Shareholders.

~~(v) a majority of the Target Board, after considering the matter in good faith and after consulting in good faith with Bidder in relation to its proposed change of statement and recommendation, no longer considers the Scheme to be in the best interests of Shareholders.~~

7.2 Target Director intentions

(a) The public announcement to be issued by Target immediately after execution of this agreement in accordance with clause 8.1, and the Scheme Booklet despatched to Shareholders, must state that each Target Director who holds Shares, or who has control over voting rights attaching to Shares, intends to vote in favour of the Scheme, and/or procure that the Shares the voting rights of which the Target Director has control over are voted in favour of the Scheme, in the absence of a Superior Proposal.

(b) Target must use its best endeavours to ensure that each Target Director who holds Shares, or who has control over voting rights attaching to Shares:

(i) will vote in favour of the Scheme Resolution, or procure that the Shares the voting rights of which the Target Director has control over are voted in favour of the Scheme Resolution; and

(ii) does not change that voting intention,

unless ~~the requirements in both clause 7.2(b)(iii) and clause 7.2(b)(iv) below are satisfied~~either:

(iii) the Independent Expert concludes in the Independent Expert's Report (either initially or in any updated report) that the Scheme is not in the best interests of Shareholders; or

(~~iii~~)(iv) ~~the~~Target receives a Competing Proposal and a majority of the Target Board determines that ~~a~~ the Competing Proposal constitutes a Superior Proposal~~;~~ and any Target Director, after considering the matter in good faith, no longer considers the Scheme to be in the best interests of Shareholders.

~~(iv)~~(v) ~~a majority of the Target Board, after considering the matter in good faith and after consulting in good faith with Bidder in relation to its proposed change of statement and recommendation, no longer considers the Scheme to be in the best interests of Target Shareholders.~~

~~**7.3 Exception for Consultation**~~

~~Notwithstanding anything in clause 7.1(b)(v) or clause 7.2 but subject to Target complying with its obligations under clause 10.4, the obligations on the Target to consult with the Bidder do not apply to the extent that the Target Board, acting in good faith and in order to satisfy what the Target Board reasonably considers to be its fiduciary or statutory duties, after having received written advice from its external legal advisers, determines that any such consultation would be likely to constitute a breach of the Target Board's fiduciary or statutory duties.~~

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10 Exclusivity

10.1 No shop restriction

During the Exclusivity Period, Target must not, and must ensure that each of its Representatives do not, except with the prior written consent of Bidder, directly or indirectly solicit, invite, ~~facilitate,~~ encourage or initiate any Competing Proposal or any enquiries, negotiations or discussions with any Third Party in relation to, or that may reasonably be expected to lead to, a Competing Proposal, or communicate any intention to do any of those things.

10.2 No talk restriction

(a) Subject to clause 10.2(b), d~~D~~uring the Exclusivity Period, Target must not, and must ensure that each of its Representatives do not, except with the prior written consent of Bidder, enter into, continue or participate in negotiations or discussions with, or enter into any agreement, arrangement or understanding with, any Third Party in relation to, or that may reasonably be expected to lead to, a Competing Proposal, even if:

(~~a~~)(i) the Competing Proposal was not directly or indirectly solicited, invited, facilitated, encouraged or initiated by Target or any of its Representatives; or

(~~b~~)(ii) the Competing Proposal has been publicly announced.~~,~~

(b) ~~unless~~Target and its Representatives may undertake any action that would otherwise be prohibited by clause 10.2(a) in relation to a Competing Proposal where:

(i) the Target Board determines that the Competing Proposal is, or may reasonably be expected to lead to, a Superior Proposal; and

(ii) the Target Board, acting in good faith and after having taken advice from its legal advisers, determines that not undertaking that act would be likely to involve a breach of the~~and in order to satisfy what the Target Board reasonably considers to be its~~ fiduciary or statutory duties owed by any Target Director.~~, determines that, where there is a Competing Proposal:~~

~~(c) the Target Board has received written advice from its external financial advisers to the effect that the Competing Proposal could reasonably be considered to be a Superior Proposal; and~~

~~(d) the Target Board has received written advice from its external legal advisers that failing to respond to that Competing Proposal would be likely to constitute a breach of the Target Board's fiduciary or statutory obligations.~~

10.3 No due diligence

(a) Subject to clause 10.3(b) and ~~W~~without limiting the general nature of clause 10.2, during the Exclusivity Period, Target must not, and must ensure that each of its Representatives do not, except with the prior written consent of Bidder, make available to any Third Party or permit any such Third Party to receive any non-public information relating to any member of the Target Group in connection with such Third Party formulating, developing or finalising, or assisting in the formulation, development or finalisation of, a Competing Proposal~~, unless, in respect of a Competing Proposal that has not been directly or indirectly solicited, invited, facilitated, encouraged or initiated in breach of this clause or clauses 10.1 or 10.2~~.:

(b) Target and its Representatives may undertake any action that would otherwise be prohibited by clause 10.3(a) in relation to a Competing Proposal where:

(i) the Target Board determines that the Competing Proposal is, or may reasonably be expected to lead to, a Superior Proposal; and

(ii) the Target Board, acting in good faith and after having taken advice from its legal advisers, determines that not undertaking that act would be likely to involve a breach of the fiduciary or statutory duties owed by any Target Director.

~~(a) the Target Board, acting in good faith and in order to satisfy what the Target Board reasonably considers on the basis of written advice from its external legal advisers to be its fiduciary or statutory duties, determines that the Competing Proposal is or could reasonably be considered to be a Superior Proposal; and~~

~~(b) if Target proposes to provide any confidential information to a Third Party, before Target provides such information to the Third Party, the Third Party has entered into a written agreement in favour of Target regarding the use and disclosure of the confidential information by the person and that restricts the Third Party's ability to solicit the employees of the Target Group and which includes substantially all of the material terms (including standstill obligations) contained in the Confidentiality Deed.~~

10.4 Notification by Target

(a) During the Exclusivity Period, Target must promptly notify Bidder if:

(i) it is approached by any Third Party to take any action of a kind referred to in clause 10.2; or

(ii) it proposes to take any action of a kind that is set out in clause 10.3.

(b) If Target receives a Competing Proposal, and as a result the Target Board or any Target Director proposes to publicly change or withdraw its statement that it considers the Scheme to be in the best interests of Target Shareholders and/or its recommendation that Target Shareholders vote in favour of the Scheme (or in the case of any Target Director, that Target Director changes his or her voting intention from that contemplated in clause 7.2)(a)), Target must give Bidder five clear Business Days prior notice (such notice to be in writing) of such proposed change or withdrawal and provide to Bidder all material terms of the applicable Competing Proposal, including details of the proposed price or implied value (including details of the consideration if not simply cash), conditions, timing and break fee (if any) together with copies of any material confidential information concerning the Target Group's operations provided to any person associated with the Competing Proposal not previously provided to Bidder. Target must ask the person who has made

the applicable Competing Proposal (the ***Competing Party***) for their consent to their name and other identifying details which may identify the Competing Party (***Identifying Details***) being provided by Target to Bidder on a confidential basis. If consent is refused, Target may only withhold the Identifying Details from Bidder if the Target Board, acting in good faith and after having taken advice from its legal advisers, determines that failing to do so would be likely to involve a breach of the fiduciary or statutory duties owed by any Target Director~~to the extent necessary to satisfy what the Target Board reasonably considers on the basis of written advice from its external legal advisers to be its fiduciary or statutory duties~~. If information is withheld pursuant to this clause 10.4(b), Target must immediately notify Bidder. Any information provided pursuant to this clause 10.4(b) will be provided subject to the terms of the Confidentiality Deed.

(c) During the period of five clear Business Days referred to in clause 10.4(b), Bidder will have the right to offer to amend the terms of the Scheme (a ***Bidder Counterproposal***) so that the terms of the Scheme (as amended) would provide an equivalent or superior outcome for the Shareholders than the applicable Competing Proposal.

(d) Target must procure that the Target Board considers any such Bidder Counterproposal and if the Target Board, acting in good faith, determines that:

(i) the Bidder Counterproposal would provide an equivalent or superior outcome for the Shareholders than the applicable Competing Proposal; and

(ii) the other terms and conditions of the Bidder Counterproposal taken as a whole are not less favourable than those in the applicable Competing Proposal,

then Target and Bidder must use their best endeavours to agree the amendments to the Transaction Documents that are reasonably necessary to reflect the Bidder Counterproposal (including amendments to the Scheme Consideration that are reasonably necessary to reflect the Bidder Counterproposal), and to enter into one or more appropriate amended agreements to give effect to those amendments and to implement the Bidder Counterproposal, in each case as soon as reasonably practicable, and Target must use its best endeavours to procure that each of the Target Directors continues to recommend the Bidder's Counterproposal to its shareholders and not the applicable Competing Proposal.

(e) Any material modification to any Competing Proposal (which will include any material modification relating to the price or value of any Competing Proposal) will be taken to make that proposal a new Competing Proposal in respect of which Target must comply with its obligations under this clause 10.4 except that any reference to "five clear Business Days" in this clause 10.4 would in that event be taken to be a reference to "three clear Business Days".

(f) Notwithstanding anything in clause 10.4, each obligation of the Target under this clause 10.4 does not apply to the extent that the Target Board, acting in good faith and after having taken advice from its legal advisers~~and in order to satisfy what the Target Board reasonably considers to be its fiduciary or statutory duties after having received written advice from its external legal advisors~~, determines that complying with such obligation would be likely to ~~constitute~~ involve a breach of the ~~Target Board's~~ fiduciary or statutory duties owed by any Target Director.

10.5 Normal provision of information

Nothing in this clause 10 prevents a party from:

(a) providing information to its Representatives;

(b) providing information to any Governmental Agency;

(c) providing information to its auditors, Advisers, customers, joint venturers and suppliers acting in that capacity in the ordinary course of business;

(d) providing information required to be provided by law, including without limitation to satisfy its obligations of disclosure in accordance with the ASX Listing Rules, or any Governmental Agency; or

(e) making presentations to brokers, portfolio investors, analysts and other third parties in the ordinary course of business.

10.6 Acknowledgement

Bidder has required Target to agree to the obligations set out in this clause 10 in consideration of it proceeding with the Scheme and incurring significant costs in doing so. In the absence of obtaining these obligations from Target, Bidder would not have entered into this agreement.

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11 Break Fee

11.1 Payment of costs

(a) Target and Bidder believe that the Scheme will provide benefits to Target, Bidder and their respective shareholders, and acknowledge that if they enter into this agreement and the Scheme is subsequently not implemented, Bidder will incur significant costs.

(b) In the circumstances referred to in clause 11.1(a):

(i) Bidder has requested that provision be made for the payment referred to in clause 11.2, without which the Bidder would not have entered into this agreement; and

(ii) the Target Board believes that it is appropriate for Target to agree to the payment referred to in clause 11.2 in order to secure Bidder's participation.

(c) Target acknowledges that the Break Fee represents a reasonable amount to compensate Bidder for the following:

(i) advisory costs (including costs of Advisers);

(ii) costs of management and directors' time;

(iii) out of pocket expenses; and

(iv) reasonable opportunity costs in pursuing the Scheme or not pursuing other alternative transactions or strategic initiatives.

(d) Notwithstanding anything to the contrary in this agreement, ~~if Target is liable to and makes full payment to Bidder pursuant to~~other than the Target's liability to pay the Break Fee to Bidder in the circumstances referred to in clause 11.2, Target has no ~~further~~ liability for or in respect of any matter under this agreement including, without limitation, for or in respect of any breach of this agreement or any breach of a representation or warranty in this agreement.

11.2 Break Fee

(a) Subject to clauses 11.2(b) and 11.2(c), Target must pay Bidder the Break Fee in accordance with clause 11.4(a), without withholding or set off, if:

(i) during the Exclusivity Period, any Target Director or the Target Board fails to state that they consider the Scheme to be in the best interests of Shareholders or fails to recommend that Shareholders approve the Scheme, or publicly changes (including by attaching qualifications to) or withdraws (including by abstaining) that statement or recommendation ~~or if Target terminates this agreement in accordance with clause 12.3(a)~~, other than in circumstances where the Independent Expert concludes in the Independent Expert's Report (either initially or in any updated report) that the Scheme is not in the best interests of Shareholders (except in

circumstances where the Independent Expert reaches that conclusion as a result of a Competing Proposal having been announced or made public);

(ii) a Competing Proposal is announced or made during the Exclusivity Period and is publicly recommended, promoted or otherwise endorsed by the Target Board or by any of the Target Directors;

(iii) any Target Director who holds Shares or who has control over voting rights attaching to Shares (**Director Shares**) votes any Director Share against (or procures that any Director Share is voted against) the Scheme at the Scheme Meeting, or abstains from voting or otherwise fails to vote any Director Share at the Scheme Meeting, other than where any circumstance specified in any of clauses 7.1(b)(iv), 7.1(b)(v), 7.2(b)(iii) or 7.2(b)(iv) has arisen;

(iv) a Competing Proposal is announced or made during the Exclusivity Period and is completed at any time prior to the first anniversary of the date of this agreement and, as a result, a Third Party acquires a Relevant Interest and/or economic interest in at least 50% of the Shares;

(v) Bidder terminates this agreement in accordance with clause 12.2(a);

(vi) if Bidder terminates this agreement in accordance with clause 3.5 and that termination relates to:

(A) material unremedied breach of a Target Warranty (or a material breach of a Target Warranty that cannot be remedied) and the effect of that breach would result in a Material Adverse Change or cause a reasonable person in the position of the Bidder to not proceed with the Scheme on the terms and subject to the conditions of this agreement; or

(B) the happening of a Prescribed Occurrence which was not consented to by Bidder or has not been waived by Bidder under clause 3.2; or

(vii) a dividend other than the Permitted Dividend is declared, announced or paid during the Exclusivity Period.

(b) Despite any other term of this agreement, Target will not be required to pay the Break Fee more than once.

(c) Despite any other term of this agreement, the Break Fee will not be payable to Bidder if the Scheme becomes Effective notwithstanding the occurrence of any event in clause 11.2(a) (in which case the Break Fee, if already paid, must be refunded by the Bidder).

11.3 Compliance with law

If a court or the Takeovers Panel determines that any part of the Break Fee:

(a) constitutes or would, if performed, constitute:

(i) a breach of the fiduciary or statutory duties of the Target Board; or

(ii) unacceptable circumstances within the meaning of the Corporations Act; or

(b) is unenforceable or would, if paid, be unlawful for any reason,

and all rights of appeal or review in respect of that determination have expired or been exhausted, then Target will not be obliged to pay such part of the Break Fee and, if such fee has already been paid, then Bidder must within five Business Days after receiving written demand from Target refund that part of the Break Fee to Target.

11.4 Time for payment

(a) Target must pay the Break Fee, if it is payable pursuant to clause 11.2, within five Business Days after receiving a written notice from bidder setting out the relevant circumstances and requiring payment of the Break Fee.

(b) If Target fails to pay the Break Fee when due, it will also be required to pay simple interest on the Break Fee from the due date for payment until that amount is paid in full at the rate of BBSW plus 300 basis points, calculated daily.

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12 Termination

...

12.3 Termination by Target

(a) Subject to the proviso, Target (***terminating party***) may terminate this agreement at any time before 8am on the Second Court Date by notice in writing to Bidder if:

(i) the Independent Expert concludes in the Independent Expert's Report (either initially or in any updated report) that the Scheme is not in the best interests of Shareholders; or

~~(a)~~(ii) Target publicly recommends a Superior Proposal.

(b) Subject to the proviso, Target (***terminating party***) may terminate this agreement at any time before 8am on the Second Court Date by notice in writing to Bidder if:

(i) Bidder is in material breach of any material clause of this agreement which cannot be remedied or has not been remedied by the earlier of:

(A) within 5 Business Days of receiving notice from Target to remedy that breach; and

(B) midnight at the end of the day before the Second Court Date; or

(ii) Bidder breaches a warranty given by it in clause 9.1.

...