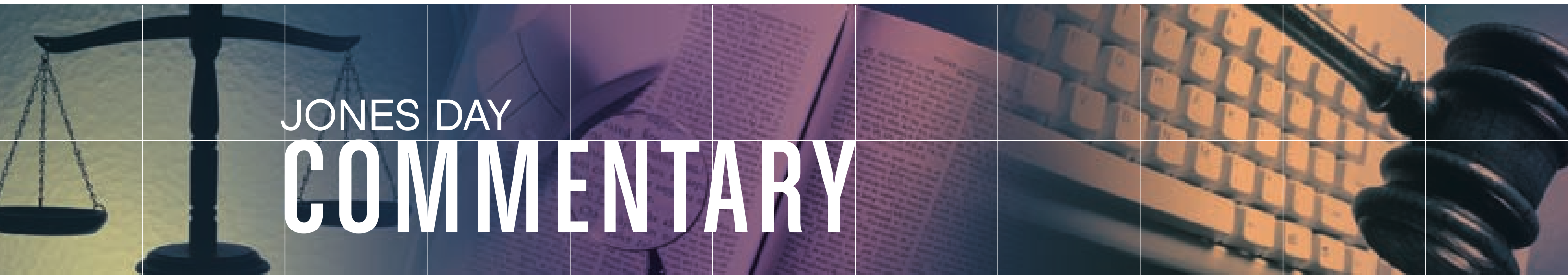
JANUARY 2007



THE USE OF DEAL PROTECTION DEVICES IN AUSTRALIA: RECENT TRENDS AND A COMPARATIVE ANALYSIS WITH THE US AND UK

The current high levels of global public M&A activity (including in Australia) have again brought into focus the deal protection devices used by bidders in "friendly" transactions to recover some of their transaction costs if they are subsequently outbid by a rival, and to ensure that the target board focuses exclusively on their offer and does not solicit rival bids.

This *Commentary* examines Australian developments in the use of break fees and exclusivity or "lock-out" agreements—the forms of deal protection prevalent in the Australian M&A market—and, where relevant, compares the Australian experience with that in the US and UK.

BACKGROUND

What Is a Break Fee? A "break fee" is a fee that is usually payable by the target to the bidder if a specified event occurs—normally outside the control of the bidder—which prevents the transaction from proceeding to completion (*e.g.*, if the bidder's offer fails as a result of the target company board recommending a third-party bidder's offer). In some merger transactions, the break fee is mutual.[1]

The rationale for a bidder seeking a break fee is relatively straightforward: A break fee represents compensation for the time and costs incurred and the resources expended by the bidder in pursuing and negotiating a transaction with the target. From a target board's perspective, an agreement to pay a break fee is often justified on the basis that it is the cost of securing a firm offer from the bidder for its shareholders to consider and is usually payable only in the event that a higher third-party offer is made.

Break fees, which originated in the United States, have quickly become an established feature of deal protection in public M&A transactions in Australia. They have often attracted controversy and debate in Australia within the legal and financial community. Much of that debate has focused on the potential for break fees to dissuade competing offers from third parties and to put pressure on target shareholders to accept a bid without the opportunity to consider any competing offers. It is fair to say that while opinion on the relative merits of break fees among commentators remains divided, break fees are now an established part of the M&A landscape in Australia and have been employed to great effect by both targets and bidders in recent Australian M&A transactions.[2]

What Is an Exclusivity Agreement? An exclusivity or "lock-out" agreement is an agreement between a target and a bidder whereby the target agrees, for a defined period of time, that it will not solicit or engage in discussions with any other bidder. As in the US, the two most common forms of exclusivity agreements are often referred to in Australia as "no-shop" and "no-talk" agreements.

A no-shop agreement is a type of exclusivity agreement where the target agrees not to solicit any third-party bids during the exclusivity period. With a no-talk agreement, the target agrees not to engage or negotiate with anyone other than the bidder during the exclusivity period.

Exclusivity agreements play a key role in deal protection for bidders, as they provide bidders with some comfort that the target will not run a simultaneous negotiating process with a third-party bidder using the bidder's offer as a starting point to kick off an auction. They are a common and useful form of deal protection for bidders, whether used alone or in conjunction with break fees and other deal protection devices. There are few recommended transactions in Australia where the bidder has not secured some form of no-shop or no-talk agreement from the target as part of, or prior to, making the offer.

LEGAL ISSUES

Break fees and exclusivity agreements raise certain legal issues from an Australian legal perspective that ought to be borne in mind by both target boards and bidders in implementing cross-border transactions. These are discussed below.

Contractual Validity. In Australia, the validity and enforceability of break fees and exclusivity agreements have never been directly challenged before the courts. This contrasts with the UK[3] and the US,[4] where the courts have directly ruled on and upheld the validity and enforceability of exclusivity and break fee agreements. In the absence of direct judicial authority on the subject, and based on UK and US reasoning, the general Australian view is that, provided the standard common-law elements for a contract are present, an exclusivity or break fee agreement will be a valid and enforceable contract. However, it should be noted that in Australia, as in the UK, a contractual provision that requires a party to make a payment to the other on breach of the contract (which is not a genuine pre-estimate of the loss likely to be suffered by the other party) is unenforceable as a penalty. Therefore, care needs to be taken to ensure that the amount of the break fee is a genuine pre-estimate of the bidder's loss. In considering the quantum of break fees, the issue of contractual penalties is one that is sometimes overshadowed by the focus on the guideline financial caps set by the Australian takeovers regulator (see below). However, if the break fee is structured so that the trigger for its payment is not a breach of contract by the target, then the likelihood of the break fee being considered a penalty is significantly reduced.

Directors' Duties. As is the case in the US and the UK, in agreeing to pay a break fee or to grant a bidder exclusivity, Australian directors have a duty to act in good faith in the best interests of the company and not to fetter their discretion to act in the future. In seeking to discharge these duties, it is helpful if target directors can point to some evidence to show that agreeing to pay the break fee or to grant exclusivity to the bidder was in the best interests of the company. For example, it would be helpful to be able to show that the agreement to pay the fee or grant exclusivity was required in order to secure a firm offer from the bidder (*i.e.*, had it not been for the agreement to pay the break fee or to grant the bidder exclusivity, the bidder would not have made an offer).

In the US, the "enhanced scrutiny" standard enunciated by the court in *Unocal* applies to deal protection measures, including break fees and exclusivity agreements. The target board will need to show that in agreeing to pay a break fee or to grant exclusivity to a bidder, it has reasonable grounds to believe that a danger to corporate policy and effectiveness exists and such agreement is reasonable in relation to the threat posed. If the *Unocal* test is satisfied, then directors will be able to rely on the "business judgment rule", under which it would be presumed that in agreeing to pay the break fee or to grant the bidder exclusivity, they have acted in good faith in the best interests of the company. There is no equivalent to the *Unocal* test in Australia; instead, a decision by target directors to employ deal protection devices will be judged in accordance with their directors' duties.[5]

Target directors sometimes seek to make the agreement to pay a break fee itself subject to their fiduciary duties. This has the merit for the target directors of making the obligation to pay the fee subject to the directors' determination of what is in the best interests of the company at the relevant time. However, a counter-argument is that by making break fees subject to a fiduciary carve-out, directors are seeking to avoid "pressure-testing" the break fee to ensure that it is in the best interests of the company. In any event, from a bidder's perspective, a fiduciary carve-out represents a significant qualification to the target's agreement to pay a break fee. The Australian Takeovers Panel (see below) has taken the view that such fiduciary carve-outs are not required and in fact "would be so uncertain for the bidder as hardly worth having."[6] However, it should be noted that the stated views of the Australian Takeovers Panel (see below) are not statements of law, and a court could come to a different view. Indeed, there is some limited Australian judicial comment to suggest that such a carve-out should be included in break fee agreements.[7] In practice, most of the break fees currently seen in Australian transactions are not subject to fiduciary carve-outs.

The issue of fiduciary carve-outs is more significant for exclusivity agreements (particularly no-talk agreements) than in the case of break fees because of the duty of directors not to fetter their discretion to act in the future. However, this duty does not prevent directors from contracting to exercise their powers in the future in a particular way (*e.g.*, by agreeing not to talk to any rival bidders), provided that in deciding to make the contract, they give it proper consideration and do so in good faith in the best interests of the company. In the UK and the US, there is case law that suggests that in a competitive takeover situation, the directors of a target company are under an obligation to secure the best price for the target company shareholders.[8] The practical corollary of this is that target directors need to retain the ability to respond to a higher offer, irrespective of any exclusivity restrictions. This has led to target directors in the UK and the US seeking fiduciary carve-outs in no-talk agreements (or so-called window-shop provisions). Although there is no direct Australian legal authority that requires the target directors in a competitive takeover situation to seek out the best price for shareholders, in practice, target directors are mindful of their directors' duties and also seek to retain the ability to respond to an unsolicited superior offer. In addition, there is some Australian judicial commentary that suggests that exclusivity agreements ought to be subject to a fiduciary carve-out.[9] In any event, the Australian Takeovers Panel requires no-talk agreements to be subject to fiduciary carve-outs (see below).

Financial Assistance. Both Australian[10] and English[11] law prohibit the unlawful giving of financial assistance by a target company to any person for the purpose of acquiring its shares. It is sometimes argued that the payment of a break fee by the target company could be construed as financial assistance given by it to the bidder for the purposes of the acquisition of its shares.

Under Australian and English law, there are two broadly similar counter-arguments, although the financial assistance prohibition in the UK legislation is slightly different from that in Australia. The first argument is that the agreement to pay a break fee is not actually "assistance" but an inducement to the bidder to acquire the target's shares, which is recognised under both Australian and English law as being different from financial assistance.[12] The second argument is that even if the break fee can be characterised as financial assistance, provided (under Australian law) it does not materially prejudice the target's ability to pay its creditors or the interests of its shareholders or (under English law) fall within any of the prohibited heads of financial assistance (*e.g.,* loans, gifts, indemnities) and reduce the net assets of the company to a material extent, then it is lawful. In the UK, legal practitioners generally interpret "material" as being no more than 1 percent of a company's net asset value. "Material prejudice" is not defined in the Australian legislation. However, there is some legislative guidance to suggest that it would depend on the circumstances of the particular company and not on an arbitrary percentage guideline.[13] There is also a third counter-argument, which is now doubtful under English law, that since the break fee is payable only in circumstances where there is no acquisition of the target's shares by the bidder, the statutory prohibition does not apply.[14]

Regulatory Issues. In Australia, break fees and exclusivity agreements are not expressly regulated by legislation or the Australian Securities and Investments Commission, but rather by the Australian Takeovers Panel ("Australian Panel"). The Australian Panel is a statutory body established to make sure that takeovers take place in a competitive, informed and efficient environment. The Australian Panel has wide powers, including the power to declare circumstances in relation to a takeover, or to the control of an Australian company, to be unacceptable. The Australian Panel also has the power to make orders to protect the rights of persons—especially target company shareholders—during a takeover bid and to ensure that any bid proceeds (as far as possible) in the way it would have proceeded if the unacceptable circumstances had not occurred. In the context of break fees and exclusivity agreements, the Australian Panel has the power to declare them to be unenforceable.

In assessing whether a deal protection device (including a break fee or exclusivity agreement) is unacceptable in relation to a takeover or control transaction, the Australian Panel focuses on two things relating to the device:

- **The competitive element.** The device must not have a significant anticompetitive effect on existing or potential rival bidders.
- **The efficient element.** The device must not have a significant coercive effect on target shareholders, making them unlikely to consider other alternatives (including taking no action) on their merits.

The Australian Panel considers that a break fee should not, in general, exceed 1 percent of the equity value of the target company (measured by reference to the bid consideration) as at the date on which the offer is announced. The Australian Panel's starting position is that a break fee that does not exceed the 1 percent guideline is unlikely to be either anticompetitive or coercive. Accordingly, in order to find that a break fee within the 1 percent guideline is unacceptable, the Australian Panel will need to be satisfied that the fee arrangement is actually anticompetitive or coercive, because of its amount, structure or effect. Conversely, if the amount of a break fee is more than the 1 percent guideline, in order to find that the break fee is not unacceptable, the Australian Panel must be satisfied that the arrangement is neither anticompetitive nor coercive based on the relevant facts. The Australian Takeovers Panel takes a more flexible view of the 1 percent limit than the Takeovers Panel in the UK. In the Australian Panel's view, size alone is not determinative, and other terms may render an agreement coercive or anticompetitive. For example, the Australian Panel has found that a break fee of 1.87 percent of the bid value was acceptable[15] and has also stated its willingness to accept, in some limited cases, that it may be appropriate for the 1 percent guideline to apply to enterprise value rather than equity value.[16] In terms of the coercive element of break fees, the Australian Panel considers that triggers can have a coercive effect on sellers/shareholders because they affect the circumstances in which the break fee is payable. However, in the Australian Panel's view, when payment of the fee is triggered because of a more attractive counter-bid, there is unlikely to be any coercive effect on sellers/shareholders, as the success of the competing proposal has commercially supplanted the proposal that had been supported by the break fee agreement.[17]

The UK Takeovers Panel requires a target company to consult with it at the earliest opportunity if a break fee is proposed and for the target and its financial adviser to confirm to it in writing that, amongst other things, they believe the fee to be in the best interests of the target company's shareholders.[18] There is no capacity within the Australian regulatory context for consultation, and targets are not subject to any requirement to confirm to regulators that a break fee is in the best interests of the company. Similarly, there is no requirement in the Australian Stock Exchange Listing Rules for shareholder approval to be sought for a break fee in excess of 1 percent of the equity value of the listed company (as is the case in the UK under the Listing Rules of the UK Listing Authority).[19]

Courts in the US have taken a less prescriptive approach than regulators in Australia and the UK on the quantum of break fees, with the result that break fees in the US tend to represent a significantly higher percentage of the target's equity value than in Australia and the UK. The US courts have tended to focus on the reasonableness of the size of the fee in the context of the transaction, whether it is used in conjunction with other defensive tactics, and all the circumstances surrounding the agreement to pay the fee.[20]

The Australian Panel requires no-talk obligations (but not no-shop obligations) to be subject to a fiduciary carve-out. The rationale for this is that no-talk agreements are inherently more anticompetitive than no-shop agreements, therefore requiring more stringent safeguards.[21] The practical effect—if not the legal rationale—of the Australian Panel's position is not dissimilar to the outcome following the decision of the US courts in the case of *OmniCare Inc v. NCS Healthcare, Inc*, 818 A.2d 914 (Del. 2003), where the Supreme Court of Delaware ruled that an exclusivity clause in a merger agreement was unenforceable on the basis that it did not contain a fiduciary carve-out that would enable the board to terminate the agreement and accept a superior proposal and therefore prevented the NCS board from discharging its fiduciary duties.[22]

As is the case in other jurisdictions, Australian bidders have increasingly sought to limit the breadth of fiduciary carve-out provisions by introducing some objective criteria by which to assess the actions of the target directors. A bidder has a legitimate interest in ensuring that target directors rely on a fiduciary carve-out to an exclusivity agreement only in genuine circumstances and that it is not used as an excuse to walk away from an agreed deal when other pressures emerge. This is reflected by Australian bidders imposing requirements that before the fiduciary carve-out is relied upon:

- The target directors first receive advice from outside counsel (in Australia, there are some provisions requiring the target to provide the bidder with a copy of the opinion) that not responding to the superior proposal would be a breach of their fiduciary duties.
- The target directors notify the bidder of any unsolicited approach, including the identity of the third party.
- The target directors give the bidder a short time period (usually two business days) in which to match the counter-proposal.[23]

Other practical examples of mechanisms by which bidders seek to ensure that fiduciary outs are exercised only in genuine circumstances include defining what constitutes a "superior proposal". In one recent Australian agreed takeover transaction, the bidder included in the definition of a "superior proposal" a requirement that the target board make a determination in good faith after consultation with its advisers that the offer was reasonably capable of being completed, taking into account all aspects of such competing proposal.[24] Although the Australian Panel recognises that it may be appropriate for bidders to request features to be included in fiduciary carve-out requirements to ensure that no-talk agreements achieve their commercial objectives, it requires that "these features should not be excessively restrictive." The Panel has not provided any explicit guidance on what would constitute an "excessively restrictive" limitation.

Disclosure. In Australia, break fees and exclusivity agreements are required to be announced together with the relevant takeover proposal when the proposal is required to be announced under the continuous disclosure provisions of the Australian Stock Exchange Listing Rules and the Corporations Act.[25] The Australian Panel has indicated that the announcement should:

- Be made in a way that will bring the information to the attention of shareholders generally—so if the bidder or the target is listed, to the relevant home exchange (and if both are listed, to both of them).
- Include all the relevant terms of the arrangements—even if they are embodied in separate documents.

In addition, the bidder's statement and the target's statement (or any other relevant document, such as an explanatory statement for a scheme of arrangement) should fully disclose the terms of the lock-up device again.

The regulatory emphasis on break fees and exclusivity agreements in Australia as articulated by the Australian Panel reflects the underlying philosophy of takeovers regulation in Australia that, where possible, target shareholders ought to have the final say in whether or not a bid is successful. To this end, competitive tension in takeovers is encouraged so that target shareholders can choose the best bid and target directors are prevented from taking defensive action without reference to their shareholders. This contrasts with the US position, where although the courts have acknowledged that target shareholders ought to have a say in the outcome of a bid for their shares, they have also recognised the legitimacy of the target's directors taking defensive measures in certain circumstances to thwart unwelcome bids.

Common Themes for Legally Prudent Break Fees. There are several common criteria which a legally prudent bidder and target would seek to satisfy in crafting an Australian break fee.

These are:

- **Good faith.** The agreement to pay the break fee must be a genuine decision taken in good faith in what the target directors believe to be the best interests of the company. In this regard, it is helpful if the target directors can show that the break fee was a genuine inducement for the bidder to commit to making an offer.
- **Quantum.** The size of the fee should not be so large as to deter counter-bidders. Also, the size of the fee should not be such that if it were paid by the target, it would materially diminish the target's net assets. In Australia and the UK, the regulators have prescribed 1 percent of the equity value of the target as a guideline, while in the US the courts have tended to set the reasonable limit at significantly higher percentages of the target's equity value.
- **Triggers.** The circumstances in which the fees are paid should not be coercive for the target or its shareholders (*e.g.*, it should not be triggered solely by the shareholders voting against the bidder's proposal in circumstances where there is no higher alternative offer).
- **Disclosure.** The bidder and the target are required to disclose the existence and details of the fee as soon as practicable after entering into the agreement.
- **Reimbursement.** The break fee should be a genuine reimbursement of the bidder's costs rather than compensation for lost prospective profits or any form of penalty.

RECENT TRENDS AND OVERVIEW

In common with the US and UK, break fees and exclusivity agreements are established deal protection mechanisms used by bidders in Australia. Break fees and exclusivity agreements continue to evolve and to play a major role in Australian recommended takeovers and merger transactions.

In Australia, many of the developments in relation to exclusivity agreements have centred on the exercise of fiduciary carve-outs by target directors and the bidder's ability to make sure that the exercise of a fiduciary carve-out is genuine. In this regard, there seems to be a trend for bidders to employ more US-style restrictions on the ability of target directors to exercise their fiduciary carve-outs in order to respond to unsolicited superior bids.[26]

In general, the quantum of break fees in Australia has stayed within the 1 percent guideline, but there have been a few examples of smaller takeover offers, where break fees have exceeded the guideline.[27] On larger transactions, which tend to attract greater public scrutiny, the break fees have stayed within the 1 percent guideline. It will be interesting to see whether the Australian Panel will be willing to reassess its 1 percent guideline as deal sizes increase and the use of break fees becomes more ubiquitous. It is also interesting to note that in Australia the focus on the reasonableness of the size of the break fee seems to be the size of the fee relative to the equity value of the target rather than the size of the fee relative to the target's available or forecast profits. The Australian Panel recently ruled that a break fee which was greater in size than the target's entire forecast profit for the next financial year was not unacceptable.[28] This seems to mirror developments in the UK, where the UK Listing Authority Listing Rules have now been amended so that only break fees in excess of 1 percent of the target's equity value require shareholder approval, whereas previously, break fees equal to, or more than, 25 percent of a target's profits for the last three financial years required shareholder approval under the UKLA Listing Rules.[29]

A recent development in the UK has been the use of break fees not only as a mechanism for costs reimbursement but also to gain a commercial advantage in competitive bid situations. For example, under the terms of the McCarthy & Stone break fee, the bidder (Mars Bidco), in addition to the break fee, required that McCarthy & Stone agree not to pay a break fee to any other party. This prompted complaints by a rival bidder (Broomco, a company backed by a consortium including Bank of Scotland) that the target company was effectively killing off an auction. However, the break fee was not declared invalid and, as it turns out, did not deter a rival bidder (Mother Bidco) from making a higher bid. It will be interesting to see if the sort of restrictive provision requested by Mars Bidco will be used by bidders in Australia and, if so, how the Australian Panel will react. While on its face the extra restriction in the Mars Bidco bid might appear anticompetitive, the fact that a higher counter-bid emerged would seem to refute that argument. In fact, the Australian Panel cites as an example of a break fee that is demonstrably not anticompetitive a situation where "another current bidder has increased its bid, or a new bid has been proposed since the break fee was announced."[30]

Looking into the future, it seems inevitable that bidders and their financial and legal advisers will continue to look for more innovative ways to employ break fees and exclusivity agreements to their advantage in takeover situations.[31] It will be interesting to see how Australian law and regulators will respond to these innovations. So far, no one has challenged the enforceability and legality of a break fee in an Australian court. However, given that Australian takeover participants have shown an increased willingness to challenge decisions of the Australian Panel in court,[32] it remains to be seen whether that will continue to be the case.

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NOTES

1. See, for example, the break fee payable in the UK/US merger of BP and Amoco and the recently announced break fee payable in the Australian merger of Suncorp-Metway and Promina.
2. For example, in August 2005 GasNet Australia Group ("GasNet"), an Australian gas transmission and distribution company, agreed to pay a break fee of AUD$4.2 million to Colonial First State Global Asset Management ("Colonial") if Colonial's bid (which was valued at AUD$420 million and recommended by GasNet's board) did not succeed in certain specified circumstances. At the time the break fee was agreed by GasNet, it was already the subject of a hostile AUD$372 million takeover offer by Australian Pipeline Trust ("APT") and Babcock & Brown Infrastructure. Just over a week later, APT announced a sole bid for GasNet at an increased cash price of AUD$452 million, which GasNet's board later recommended. In the UK, McCarthy & Stone Plc recently had to pay a break fee of GBP 10 million to Mars Bidco Limited (a bid vehicle owned by Permira Advisers LLP and Barclays Capital PIA), in accordance with its obligations under its implementation agreement with Mars Bidco, when it changed its recommendation of the Mars Bidco offer, priced at GBP 10.30 per share, in favour of a higher offer from Mother Bidco (a bid vehicle backed by Bank of Scotland and West Coast Partners) priced at GBP 10.75 per share.
3. *Walford v Miles* [1992] 2 AC 128; *Radiant Shipping Company Limited v Sea Containers Limited* [1995] CLC 976; and *ABN AMRO Private Equity Limited v Forward Technology Industries plc* (unreported, High Court Chancery Division, 24 October 2000).
4. For example, see *Brakan v. Amsted Industries Incorporated*, 567 A.2d 1279 (1989) (Del. Supr.); *Beebe v. Pacific Realty Trust*, 578 F. Supp. 1128 (1984) (US Distr. Crt, Oregon); *Brazen v. Bell Atlantic Corporation*, 695 A.2d 43 (1997) (Del. Supr.).
5. It should also be noted that the "business judgment rule" in Australia is much narrower in scope than that in the United States, as it applies only to the duty of directors to act with care and diligence.
6. Australian Takeovers Panel Guidance Note 7, para. 7.26.
7. See *Re Arthur Yates & Co Limited* (2001) 36 ACSR 758. This decision, however, preceded the common use of break fees in Australia.
8. *Heron International Ltd v Lord Grade* [1983] BCLC 244; *Revlon, Inc v. MacAndrews & Forbes Holdings, Inc*, 506 A.2d 173 (Del. 1986).
9. See footnote 6 above.
10. Section 260A of the Corporations Act.
11. Section 151 of the Companies Act 1985.
12. *Tallglen Pty Limited v Opus Communications Pty Ltd* (1998) 28 ACSR 610 at 620-621; *Barclays Bank plc v British & Commonwealth Holdings plc* [1996] 1 BCLC 1.
13. The Explanatory Memorandum to the Company Law Review Bill 1997, which introduced the current Australian legislation, states (in para. 12.77) that material prejudice will be a question of fact depending on the circumstances of each case and that it will not be possible to determine material prejudice by reference to arbitrary rules "such as the percentage impact the transaction will have on the company's profit".
14. *Chaston v SWP Group PLC* [2003] BCC 140. The judgment in this case supports the view that there can be unlawful financial assistance even where the acquisition does not take place, as the legislation applied to a proposal to acquire shares as well as an acquisition of shares.
15. AUSDOC Group Ltd [2002] ATP 9. The break fee in this transaction of 1.87 percent of equity value was not regarded as unacceptable because of, amongst other things, the previous public tender process carried out by the target and the high cost of preparing and carrying out the bid.

16. Australian Takeovers Panel Guidance Note 7, para. 7.22.
17. Australian Takeovers Panel Guidance Note 7, para. 7.25.
18. City Code on Takeovers and Mergers Rule 21.2.
19. UKLA Listing Rule 10.2.7.
20. *Paramount Communications, Inc v. QVC Network Inc*, 637 A.2d 34 (1993) at 45.
21. The Australian Panel generally does not require a no-shop agreement to be constrained by a fiduciary exception, because it considers a no-shop agreement materially less anticompetitive than a no-talk agreement.
22. Note that it is not clear to what extent (if any) the court was influenced by the fact that the bidder had obtained voting agreements from the target's two major stockholders, who controlled 65 percent of the vote.
23. In Australia, the pre-bid agreement between Colonial First State Global Asset Management and GasNet Australia Group contained such a provision.
24. See footnote 23 above.
25. Listing Rule 3.1 of the Australian Stock Exchange Listing Rules and Chapter 6CA of the Corporations Act require a listed company to make immediate disclosure of any information concerning it of which it becomes aware that a reasonable person would expect to have a material effect on the price or value of its securities, subject to carve-outs, such as confidential information which a reasonable person would not expect to be disclosed and which relates to an incomplete proposal or negotiations.
26. See the example cited in footnote 21 above.
27. For example, the break fee in SingTel Optus' takeover bid for Alphawest in July 2005 was 1.4 percent of Alphawest's equity value; in Chiquita's bid for East African Coffee Plantations, the break fee was 1.6 percent of East African's equity value.
28. Wattyl Limited [2006] ATP 11.
29. UKLA Listing Rule 10.2.4.
30. Australian Takeovers Panel Guidance Note 7, para. 7.20(a).
31. The UK example of the Mars Bidco/McCarthy & Stone break fee where McCarthy & Stone agreed not to give any other bidder a break fee and the Australian instance of the Colonial/GasNet exclusivity agreement where GasNet agreed to give Colonial a two-business-day time period to match any rival bidder's offer and not to announce any rival approach (subject to its obligations under the law) during this period seem to bear this out.
32. In 2005, Glencore AG successfully challenged a decision of the Australian Panel in the Federal Court. However, recent legislation introduced by the Commonwealth government is seeking to limit the ability of claimants to pursue litigation arising out of decisions of the Panel.