

COMPANY AND SECURITIES LAW JOURNAL

Volume 22, Number 7

October 2004

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ARTICLES

Developments in break fees – *Damian Reichel and Bruce Dyer*

In December 2001 the Takeovers Panel finalised *Guidance Note 7: Lock Up Devices*, which indicated when the Panel may find a lock up device (including a break fee) to be unacceptable. Since then, break fee agreements, usually associated with exclusivity arrangements (such as “no-shop” and “no-talk” clauses) have become reasonably common in takeover bids and schemes of arrangement, and there have been a number of decisions by the Takeovers Panel addressing issues raised by such devices in particular circumstances. This article examines how the Panel’s guidance has been applied in the cases it has considered to date. It also considers the use of break fees in transactions which do not attract the Panel’s jurisdiction but which have an effect similar to a change of control transaction – in particular, the sale of a company’s main undertaking, which requires shareholder approval under the Listing Rules of Australian Stock Exchange Limited (ASX). It is submitted that it is appropriate for break fees in such transactions to be subject to restrictions similar to those in break fees in takeover bids and schemes of arrangement. 439

Generic and specific approaches to the liability and duties of directors on government boards and authorities – *Marco Bini*

Governments establish entities outside traditional Departmental structures with specific governance arrangements to perform particular activities on behalf of government. Many of these entities are managed by a governing board, similar to private sector corporations. The relationship with a Minister however, introduces a factor which may change the dynamics of the governing board, and the duties and liabilities of directors who sit on such boards.

This article examines the legal framework relating to duties and responsibilities of directors of government boards in three Australian jurisdictions, and contrasts a generic legislative approach with a more specific approach. The role and potential for liability of directors and Ministers arising from board decisions under the regimes is discussed. 460

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ISSN 0729-2775

Typeset by Lawbook Co., Pyrmont, NSW
Printed by Ligare Pty Ltd, Riverwood, NSW