ACCEPTABILITY OF NAKED BREAK FEES IN AUSTRALIAN SCHEMES OF ARRANGEMENTS

Date: 25 May 2026

Australia Capital Markets Alert

By: Andrew Gaffney

Break fees are a well-established feature of the Australian mergers and acquisitions (M&A) landscape involving an entity which is subject to Chapter 6 of the *Corporations Act 2001* (Cth) (including in takeovers and schemes of arrangement). However, the "*naked*" break fee continues to generate regulatory scrutiny and judicial attention.

The table below outlines the key features of break fees generally and naked break fees (sometimes also referred to as a "bare break fees" or "naked no-vote break fees"):

	Break Fee	**Naked Break Fee**
What is it?	An amount payable by the *target* to the bidder in specified circumstances where a transaction does not complete.	An amount payable by the target to the bidder where *target* shareholder approval of the transaction is not obtained.
What triggers it?	Break fees commonly arise in schemes of arrangement or takeovers where specified events occur which prevent the transaction from proceeding, such as the following: ▪ A *target's* director changing their recommendation to shareholders on how to vote; ▪ A condition within the target's control not being satisfied; ▪ A breach of the transaction documents by the *target*; or ▪ Entry by the target into a competing transaction.	Where the target's shareholders vote against the proposed transaction—even where there is no competing bid or breach attributable to the target.
Takeovers Panel's guidance[1]	Break fees which do not exceed 1% of the target's value, in the absence of other factors, generally do not constitute "*unacceptable circumstances.*"	A naked break fee is one of the Takeovers Panel's examples of other factors which may render a break fee that is within the 1% threshold "unacceptable."

©2005-2026 K&L Gates LLP. All Rights Reserved.

	Break Fee	Naked Break Fee
	In its assessment, the Takeovers Panel may be guided by whether: ▪ The fee was agreed to after a public and transparent process; ▪ The proposal was solicited by the target; ▪ The fee is fixed or capped; and ▪ The fee is less than the premium offered under the bid.	This is because a naked break fee may have a coercive effect on the target shareholders by imposing a financial burden on the target and, indirectly, on its shareholders in exercising their right to vote.

The firm recently acted for Ausmincon Holdings Limited on a merger by way of a court approved scheme of arrangement with AFRY AB in the Federal Court of Australia, under which AFRY AB acquired 100% of the issued share capital in Ausmincon Holdings Limited. This deal featured a naked break fee which was expressly considered by Justice Jonathan Beach in *Re Ausmincon Holdings Limited* [2026] FCA 280.

Justice Beach found that the naked break fee *did not* constitute unacceptable circumstances, but rather *"the price of buying the opportunity"* to put the AFRY AB offer to the Ausmincon Holdings Limited shareholders. In coming to this decision, Justice Beach considered the following:

- Circumstances where the bidder's preference was a traditional M&A transaction which would involve customary warranties and other deal protection arrangements;
- The market soundings leading up to the negotiation of the scheme implementation agreement;
- The quantum of the naked break fee being approximately 1% of the scheme consideration;
- The naked break fee being a reasonable estimate of the actual costs to be incurred by the bidder;
- The target's financial position which could facilitate payment of the naked break fee;
- The premium of the bid compared to the independent fairness report; and
- The likelihood of support from the target's shareholders.

This decision highlights that despite being unusual, naked break fees are not automatically unacceptable. However, as naked break fees carry a much higher regulatory risk than conventional break fees, they should be approached with caution and carefully considered before being implemented.

FOOTNOTES

[1] See Takeovers Panel Guidance Note 7: Deal Protection (Issue 5).

©2005-2026 K&L Gates LLP. All Rights Reserved.

KEY CONTACTS



ANDREW GAFFNEY
PARTNER

MELBOURNE
+61.3.9640.4329
ANDREW.GAFFNEY@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.