



## **BREAKFREE LIMITED - TAKEOVERS PANEL'S REASONS FOR DECISION**

**These are the Takeovers Panel's reasons for concluding proceedings in relation to the affairs of BreakFree Limited (BreakFree) following the termination by BreakFree of certain transactions the subject of the proceedings.**

1. These reasons relate to the proceedings (the **Proceedings**) before the Takeovers Panel arising from an application (the **Application**) made by S8 Limited (**S8**) on 11 July 2003 in relation to the affairs of BreakFree for a declaration of unacceptable circumstances under section 657A of the *Corporations Act 2001* (Cth) (the **Act**) as well as final orders.
2. The parties (**Parties**) to the Proceedings were BreakFree, S8 and the Australian Securities & Investments Commission (**ASIC**).

### **The Panel**

3. The President of the Panel appointed Kathleen Farrell (sitting President), Peter Cameron (sitting Deputy President) and Meredith Hellicar as the sitting Panel (the **Panel**) for the Proceedings.

## **SUMMARY**

### **Allegations concerning the Franchising Transactions**

#### *The Franchising Transactions*

4. S8 alleged that BreakFree's entry into certain sale and franchise transactions (the **Franchising Transactions**) amounted to unacceptable circumstances because they could frustrate S8's announced takeover bid for BreakFree (**S8 Bid**)<sup>1</sup>.
5. The Franchising Transactions involved the sale by BreakFree of the management rights (**Management Rights**) to four of the holiday properties under its management. Each of the sales was subject to a condition precedent that the purchasers (the **Franchisees**) enter into a franchise agreement (together the **Franchise Agreements**) with BreakFree in relation to the Management Rights so that the relevant properties would continue to be operated under a BreakFree franchise.
6. After considering a number of submissions from the Parties, the Panel decided that the following aspects of the Franchising Transactions required further investigation before the Proceedings could be determined:
  - (a) BreakFree's intention to include a right in the Franchise Agreements (which were still being negotiated during the Proceedings) which could result in the Management Rights being alienated by BreakFree without it retaining the benefit of the Franchise Agreements if the S8 Bid succeeded. In this regard, the Panel notes that the chairman of BreakFree had submitted that the value of the

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<sup>1</sup> Paragraph 24 discusses the S8 Bid in more detail.

## Takeovers Panel

### Reasons for Decision – BreakFree Limited

Franchise Agreements was a factor in determining the sale price for the Management Rights; and

- (b) the question of whether the Franchising Transactions were entered into in the ordinary course of BreakFree's business, and were arms length transactions.

7. The Panel requested that the Parties provide it with further additional information in relation to these aspects.

#### *The resolution of the Proceedings*

8. Whilst indicating that it could, and would (if necessary), provide the additional information requested by the Panel, BreakFree responded by making a proposal which it believed would remove the need for further investigation of the matters identified by the Panel. BreakFree's proposal (which was provided voluntarily) was that it would provide undertakings to the Panel to use its best endeavours to terminate the Franchising Transactions within a timeframe set by the Panel. BreakFree indicated that it had proposed this resolution for the commercial reasons set out in paragraphs 39 to 41.
9. The Panel decided that if the Franchising Transactions were terminated there would be no need for it to conduct any further investigation, or to obtain any further information from the Parties. Therefore, the Panel accepted the undertakings volunteered by BreakFree.
10. As contemplated by the undertakings, BreakFree terminated the Franchising Transactions (without any liability to, or obligation of, BreakFree arising as a result of those terminations) on 12 August 2003.

#### **Other allegations in the Proceedings**

11. The Panel decided that if there were any misleading aspects of BreakFree's announcements in relation to the properties under its management, they were resolved by BreakFree's announcement to the Australian Stock Exchange (ASX) on 18 July 2003.
12. The Panel declined to conduct proceedings in relation to the allegations made by S8 concerning the acquisition of certain shares in BreakFree.

#### **Conclusion of the Proceedings**

13. In concluding the Proceedings on 14 August 2003, the Panel stressed the need for transactions which are entered into in the context of a takeover bid to comply with the letter and spirit of relevant Panel policies and to be fully and promptly disclosed to the market.

## THE ISSUES IN THE PROCEEDINGS

### Allegations in relation to which the Panel conducted proceedings

14. The Panel decided to conduct proceedings in relation to two allegations of unacceptable circumstances made in the Application. The alleged unacceptable circumstances were:
- (a) certain statements made by the directors of BreakFree to the market on 1 and 8 July 2003 concerning the number of properties under BreakFree's management, which S8 alleged were misleading when made against the background of an anticipated takeover offer by S8; and
  - (b) the sale by BreakFree (as part of the Franchising Transactions) of the Management Rights (which S8 described as four of BreakFree's key assets) in circumstances where the directors of BreakFree should reasonably have anticipated the S8 Bid and should have known that the sales could frustrate that bid. In the course of the Proceedings, S8 argued that the entry into the Franchising Transactions as a whole (that is, including the franchise back arrangements) constituted unacceptable circumstances because they could frustrate the S8 Bid.

### Final Orders

15. The final orders sought by S8 in relation to the matters set out in paragraph 14 consequent on a declaration of unacceptable circumstances included:
- (a) that copies of the documentation supporting the Franchising Transactions be disclosed in the Proceedings and that further details of those transactions be provided to the market;
  - (b) that the Franchising Transactions be rescinded; and
  - (c) that from 11 July 2003 until the conclusion of the S8 Bid, BreakFree be restrained from entering into any arrangements similar to the Franchising Transactions without first obtaining shareholder approval.

### Allegations in relation to which the Panel declined to conduct proceedings

16. The Panel declined to conduct proceedings in relation to a third allegation by S8 that shares in BreakFree had been acquired in circumstances where the acquirer, AKS Investments Pty Ltd (a company controlled by the managing director of BreakFree, Mr Anthony Smith), knew of confidential information which would have had a material effect on the BreakFree share price. The Panel did not consider that the Application provided sufficient evidence to establish a nexus between the actions in question and the principles set out in section 602 of the Act. The Panel advised S8 that if it wished to pursue these allegations further it should refer the matter to ASIC.

## Takeovers Panel

### Reasons for Decision – BreakFree Limited

## BACKGROUND

17. The following is a brief description of the facts underlying the Application, which has been taken from the Application and the submissions from the Parties.

### BreakFree and S8

18. BreakFree became listed on the ASX on 13 September 2002. Its principal activities are the conduct of a specialist holiday business<sup>2</sup> and the holding of management and leasing rights to holiday resorts and other recreational accommodation, primarily in South East Queensland.

19. S8 is a competitor of BreakFree and is also listed on ASX. Among its primary activities is the provision of property management services in the holiday resort and recreational accommodation market.

### Pre-bid discussions

20. From mid-March 2003 until early July 2003, a series of discussions took place between S8 and BreakFree concerning the possibility of implementing an alliance between, or merger of, the two companies. The negotiations broke down in early July 2003.

### Announcements by BreakFree

21. On 1 July 2003, BreakFree announced to the market that it had that day completed the purchase of the management letting rights for two named resorts, both due for completion by 2004. According to the announcement, this brought the total number of properties under BreakFree management to 31.

22. On 8 July 2003, BreakFree announced its plans for a new franchising model to be rolled out Australia wide, commencing with the implementation of the Franchising Transactions (as described in paragraph 5). That release noted that there were currently 26 properties operating under the BreakFree brand, and that the company expected to double that number to 52 by 30 June 2004 as it brought new franchisees on line. The release also stated:

*On settlement of these franchises the total number of resorts operating under the BreakFree Resort brand will be 22 company operated and 4 franchised properties. In addition the company has contracts to buy the management rights to a further 5 properties which are due to complete at various times over the next 2 years.*

23. BreakFree submitted to the Panel that it had been developing a franchising model for its business since November 2002.

### S8's takeover bid for BreakFree

24. Following the breakdown in discussions with BreakFree, S8, through its wholly owned subsidiary, Barondene Pty Ltd (**Barondene**), acquired a substantial holding in BreakFree. Its first substantial shareholding notice was lodged with the ASX on

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<sup>2</sup> In particular, providing holiday activities and themed events for end of year school leavers and sporting groups.

## Takeovers Panel

### Reasons for Decision – BreakFree Limited

8 July 2003. On 11 July 2003, Barondene announced the S8 Bid, which is an off-market takeover bid to acquire all of the voting shares in BreakFree.

## DISCUSSION AND DECISIONS

### The alleged misleading statements by BreakFree

#### *The submissions from S8*

25. S8 submitted that the announcements by BreakFree on 1 and 8 July 2003 were misleading in that:
- (a) the 1 July announcement suggested that there were 31 properties which would, in the near future, be under BreakFree management. The announcement indicated that completion of the acquisition of two of the properties may not occur until the end of 2003. However, it was implicit in the 8 July announcement that there were another three properties for which the contracts to acquire the management rights had not been completed. There was therefore an inconsistency between the two announcements; and
  - (b) the 1 July announcement did not make any reference to the fact that at the time of making the announcement the Franchising Transactions must have been well advanced.
26. As mentioned in paragraph 14(a), S8 alleged that these misleading statements amounted to unacceptable circumstances.

#### *The Panel's decision*

27. The Panel decided that if there were any misleading aspects of BreakFree's announcements in relation to the properties under its management, those aspects were clarified by the following paragraph of BreakFree's ASX announcement of 18 July 2003 (in relation to its proposed transaction with Sunland Group Limited):

*BreakFree is Australia's largest holiday and management rights letting group with 26 BreakFree resort properties from Port Douglas to Coffs Harbour operating under the BreakFree brand. BreakFree has contracts to buy the management rights of a further five properties in the next two years and plans to double the number of resorts operating under the BreakFree brand to 52 by June 2004 via new franchised resorts.*

### Alleged frustrating action

28. As discussed in paragraph 14(b), S8 alleged that BreakFree's entry into the Franchising Transactions constituted frustrating action which amounted to unacceptable circumstances.
29. The Panel has issued a Frustrating Actions Guidance Note (the **Guidance Note**) concerning actions taken by a company the subject of a takeover bid which are likely to have a material effect on the objective of the bid. In such circumstances a bidder may be able to allow its offer to lapse (by relying on a defeating condition in the offer which is triggered by the action) or to decide not to proceed with a genuine potential offer that has been conveyed to the target but not the market generally, meaning that target shareholders are deprived of an offer for their shares. The question is whether the circumstances in which the 'frustrating action' takes place are properly to be characterised as unacceptable circumstances.

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### Reasons for Decision – BreakFree Limited

30. The Panel looked at two distinct aspects of the Franchising Transactions to determine whether they amounted to frustrating action, being:
- (a) whether the entry into the Franchising Transactions was enough, of itself, to constitute frustrating action; and
  - (b) whether the terms of the Franchising Transactions caused transactions that otherwise were not objectionable to become frustrating actions that constituted unacceptable circumstances.
31. Each of these questions is considered below.

#### **Alleged frustrating action – Entry into the Franchising Transactions**

##### *The submissions from S8*

32. S8 alleged that the Franchising Transactions could trigger defeating conditions in its bid, and therefore amounted to unacceptable circumstances, since the entry into those transactions constituted frustrating action within the meaning of the Guidance Note, or within an acceptable extension of it.

##### *The Panel's decision*

33. The S8 Bid was announced on 11 July 2003, three days after the Franchising Transactions had been publicly announced by BreakFree.
34. The evidence before the Panel established that S8 had made BreakFree aware that it wanted to make a takeover bid for BreakFree on 26 June 2003. However:
- (a) S8 had not made BreakFree aware of the conditions that would attach to its bid, other than a minimum acceptance condition which was not relevant in the Proceedings; and
  - (b) BreakFree had made S8 aware of its intention to implement a franchising system by at least 26 June 2003 (although this strategy was not announced to the market generally until 8 July 2003), and S8 had not indicated to BreakFree that it objected to the system, or that implementing it would trigger any of the conditions in the proposed S8 Bid. In fact, BreakFree submitted that the managing director of S8, Mr Chris Scott, had indicated that S8 was developing its own franchise model. This was not denied by S8.
35. On the basis of the above, the Panel was of the view that entry into the Franchising Transactions did not, of itself, fall within the scope of the Guidance Note.

#### **Alleged frustrating action – The terms of the Franchising Transactions**

##### *The terms of the Franchising Transactions that emerged during the Proceedings*

36. However, during the Proceedings the following additional matters emerged:
- (a) the Franchise Agreements (which were still being negotiated during the Proceedings) were to include a provision (the **S8 Termination Right**) which would allow the Franchisee to terminate the Franchise Agreement (but not the relevant sale agreement for the Management Rights) if S8 (or any of its controlled entities) or the managing director of S8 (or any of his associates) was appointed as a director of BreakFree or acquired, or otherwise had a relevant interest in, more than 50% of the issued share capital in BreakFree. The intention to include the S8 Termination Right in the Franchise Agreements was

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### Reasons for Decision – BreakFree Limited

only announced to the market on 21 July 2003, 13 days after the Franchising Transactions were announced;

- (b) prior to entering into the Franchising Transactions, BreakFree was aware that the general objective of the S8 Bid was to merge the businesses of the two companies to create 'market leadership'. The Panel understood this to be a reference to S8's desire to maximise the number of properties whose management rights were under the combined BreakFree/S8 umbrella (whether the rights were owned or franchised). The potential for the Franchising Transactions to result in the sale of the Management Rights by BreakFree in circumstances where the Franchise Agreements were not retained by BreakFree (although only if the S8 Bid succeeded, at least to some extent) was clearly contrary to this objective;
- (c) the chairman of BreakFree submitted to the Panel that the price at which the Management Rights were being sold had been determined taking into account the value of the 'franchise back' arrangements with the Franchisees;
- (d) two of the Franchisees were, or were companies associated with:
  - (i) the brother-in-law and sister-in-law of the managing director of BreakFree. On 17 July 2003, BreakFree advised the Panel (though not the market) that it intended to seek shareholder approval for this transaction; and
  - (ii) an executive of BreakFree, who had been a director of one of BreakFree's predecessor companies, Sports Break Travel Pty Ltd;
- (e) the third Franchisee had entered into its Franchising Transaction with BreakFree on terms which included the grant of a right of first refusal over its shares in BreakFree to a company controlled by the managing director of BreakFree. BreakFree and the Franchisee terminated this aspect of the Franchising Transaction on 18 July 2003, but overall the transaction had been negotiated on the basis that this right would be included in it;
- (f) the Management Rights for one of the resorts were being sold at a loss when compared to the written down value of the rights. Although BreakFree submitted that the Management Rights for the other three properties were being sold for a profit, the overall profit on the sale of all four of the Management Rights was marginal, and was being made in circumstances where no clear evidence was provided to the Panel of any attempt by BreakFree to value the Management Rights, or to maximise their sale price. The Panel was not informed of the basis on which BreakFree had determined the relevant written down values used to calculate the profit or loss on the sale of the Management Rights; and
- (g) BreakFree made no enquiries in relation to the ability of the Franchisees to finance their significant obligations under the Franchising Transactions.

#### *Further investigation in relation to the Franchising Transactions*

37. On the basis of the evidence before it, the Panel decided that there were aspects of the Franchising Transactions that required further investigation before the Proceedings could be determined. In particular, the Panel was of the view that the following matters required further investigation and consideration:

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### Reasons for Decision – BreakFree Limited

- (a) the intention to include the S8 Termination Right in the Franchise Agreements in a way which, if the S8 Bid succeeded, would allow the Management Rights to be alienated by BreakFree without it retaining the benefit of the Franchise Agreements. On that basis, the S8 Termination Right would operate so as to have a potential adverse effect on BreakFree, but only if the S8 Bid succeeded; and
- (b) the question of whether the Franchising Transactions were entered into in the ordinary course of BreakFree's business, and were truly arms length transactions.

38. The Panel requested further information from the Parties in relation to these matters on 6 August 2003. At that stage, the Panel had not decided whether the circumstances as then known to it constituted unacceptable circumstances.

#### *Resolution proposed by BreakFree*

- 39. Whilst indicating that it could, and would (if necessary), provide the additional information requested by the Panel, BreakFree responded by making a proposal which it believed would remove the need for further investigation of the matters identified by the Panel.
- 40. Essentially, BreakFree's proposal (which was provided voluntarily) was that it would provide undertakings to the Panel to use its best endeavours to terminate the Franchising Transactions within a timeframe set by the Panel.
- 41. BreakFree advised the Panel that it was not seeking to resile or derogate from the submissions that it had previously made to the Panel. Rather, it was proposing the resolution because of the additional time, costs and resources that would be required if the Proceedings were to continue, particularly in order to provide the additional information requested by the Panel. BreakFree was also concerned about the fact that the Panel's request for further information could result in the provision of confidential information (in particular, intellectual property and trade secrets relating to BreakFree's franchising model) of BreakFree to S8 (which is a competitor of BreakFree).

#### *The Panel's decision*

- 42. The Panel decided that if the Franchising Transactions were terminated there would be no need for it to conduct any further investigation in relation to the issues before it in the Proceedings, or to obtain any further information from the Parties (including the information requested by it on 6 August 2003). Therefore, the Panel accepted the undertakings volunteered by BreakFree on 12 August 2003. A copy of the undertakings is included as Annexure A.
- 43. As contemplated by the undertakings, BreakFree terminated the Franchising Transactions (without any liability to, or obligation of, BreakFree arising as a result of those terminations) on 12 August 2003. Later that day BreakFree provided the Panel with the evidence that the Panel had requested to confirm the termination of the Franchising Transactions.



## MISCELLANEOUS ISSUES

### Would the Franchising Transactions have actually frustrated the S8 Bid?

44. On 25 July 2003, the Panel requested that S8 advise it as to whether S8 would allow the S8 Bid to lapse if the Panel decided not to restrain completion of the Franchising Transactions in any way. S8 responded by submitting that this was something that it would need to consider and evaluate if the Panel proceeded in that way.
45. The Panel had requested a response from S8 to a more detailed question in this regard in its letter of 6 August 2003. However, because of the resolution proposed by BreakFree the Panel did not obtain a response from S8 to this question, and did not consider whether the answer to that question might impact on its consideration of the applicability of the Guidance Note.

### Use of the Panel for due diligence purposes

46. Both ASIC and BreakFree submitted to the Panel that S8 was using the Proceedings to conduct a level of due diligence in relation to BreakFree's business that it would not otherwise be able to undertake in the context of a hostile takeover bid. The Panel was conscious of this concern. However, in light of the information that was presented to it, the Panel was satisfied that there were genuine issues that required consideration in relation to the Franchising Transactions.
47. Therefore, the Panel originally put in place arrangements to attempt to ensure that BreakFree was not required to disclose confidential information, except to the extent that it was relevant to the issues in the Proceedings. As the Proceedings developed, the Panel's view was that certain relevant information did need to be provided to both the Panel and the Parties.

### Undertakings during the Proceedings concerning disclosure and maintenance of the status quo

48. The Panel notes that on 18 July 2003 BreakFree separately offered, and the Panel accepted, undertakings from it to:
  - (a) make additional disclosure to the market in relation to the Franchising Transactions; and
  - (b) maintain the status quo in relation to its circumstances until the earliest of certain events occurred, one being the conclusion of the Proceedings.
49. The undertakings to make additional disclosure concerning the Franchising Transactions were provided voluntarily by BreakFree in the course of the Proceedings. The undertakings concerning the maintenance of the status quo were provided in response to a request from the Panel.
50. The additional information was disclosed to the market by way of an ASX announcement on 21 July 2003. The undertakings in relation to the maintenance of the status quo expired with the conclusion of the Proceedings.
51. A copy of the undertakings is included as Annexure B.

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### Reasons for Decision – BreakFree Limited

## PROCESS AND CONCLUSION

### The Panel process

52. The Panel met on 14 July 2003 to consider the Application and decided to conduct proceedings in relation to the certain aspects of the Application but not others (see paragraphs 14 and 16). A brief was issued to the Parties under Regulation 20 of the ASIC Regulations on 15 July 2003.
53. On 25 July 2003 (after reviewing the submissions and rebuttals from the Parties in relation to the Panel's brief), the Panel issued a letter to the Parties requesting further information in relation to the issues arising in the Proceedings. The Panel also requested that certain franchisees associated with BreakFree provide information in relation to some of those issues.
54. After receiving and reviewing that additional information, the Panel issued a request for further additional information to the Parties on 6 August 2003. On 7 August 2003 BreakFree proposed to the Panel and the Parties that the proceedings be resolved on the basis set out in paragraphs 39 to 41.
55. The Panel accepted the undertakings offered by BreakFree on 12 August 2003. Later that day, BreakFree provided the Panel with evidence that it had complied with the undertakings. However, BreakFree advised the Panel that it wished to advise it of further matters before the Panel made its final decision in relation to the Proceedings. This information was provided late on 13 August 2003.

### Conclusion of the Proceedings

56. In light of:
  - (a) the performance by BreakFree of the undertakings it gave to the Panel on 12 August 2003; and
  - (b) the Panel's conclusions in relation to S8's allegations regarding BreakFree's ASX announcements of 1 and 8 July 2003,the Proceedings were concluded by the Panel on 14 August 2003.

### Legal representation and costs

57. The Panel consented to the Parties being represented by their commercial solicitors.
58. The Panel did not receive any application for an award of costs, and made no order for costs.

**Kathleen Farrell**  
**President of the Sitting Panel**  
**27 August 2003**

## Takeovers Panel

### Reasons for Decision – BreakFree Limited

## Annexure A – Undertakings provided by BreakFree to resolve the Proceedings

### Undertaking

**By: BreakFree Limited (BreakFree)**

**To: The Takeovers Panel (Panel)**

BreakFree gives these undertakings to the Panel pursuant to section 201A of the *Australian Securities & Investments Commission Act 2001* (Cth).

1. BreakFree undertakes to use its best endeavours to negotiate (and to cause its subsidiaries (including BreakFree Resorts (NSW) Pty Ltd and BreakFree Resorts Pty Ltd) to negotiate) by 5.00pm on Tuesday 12 August 2003, the termination of all rights, interests and obligations arising from the Franchising Transactions announced by BreakFree on 8 July 2003, including the termination of the MRSAs and the associated Sales of the Manager's Units, without any liability to, or obligation of, BreakFree (including any liability to make a payment) arising as a result of the termination.
2. All terminations effected as contemplated by paragraph 1 will comply with the requirements set out in that paragraph and will be effected through the execution of written termination agreements (the **Termination Agreements**) signed by all parties to the relevant original agreements.
3. BreakFree undertakes to provide the Panel with:
  - (i) certified copies of all of the executed Termination Agreements (to the extent that such agreements have been executed); and
  - (ii) confirmation from an authorised officer of BreakFree either that:
    - (A) all documentation supporting all of the Franchising Transactions has been terminated in accordance with the requirements in paragraph 1; or
    - (B) BreakFree has been unable to effect a termination of all rights, interests and obligations arising from the Franchising Transactions as contemplated by paragraph 1,by 5.00pm on Tuesday 12 August 2003.
4. BreakFree acknowledges that if either:
  - (i) all of the documentation supporting the Franchising Transactions has not been terminated in accordance with the requirements of paragraph 1 (regardless of whether BreakFree has complied with its undertaking to use 'its best endeavours' to effect such a termination); or
  - (ii) BreakFree has not complied with the applicable requirements of paragraph 3,by 5.00pm on Tuesday 12 August 2003, the Panel will re-start its consideration of the proceedings before it relating to BreakFree, and will consider how best to conclude

## Takeovers Panel

### Reasons for Decision – BreakFree Limited

those proceedings. In such circumstances, the Panel's consideration of the issues in the proceedings will not be limited in any way by the provision by BreakFree of these undertakings.

5. In these undertakings the following terms have the following meanings:

**Franchisees** means:

- Leo and Michelle Hanrahan and Braigh Holdings Pty Ltd in respect of the Mediterranean resort;
- Glenn Daryl Joseph, Lorraine Lee Joseph, Gary Keith Joseph, Kaye Maree Joseph, Taskstone Pty Ltd and Lodgemark Pty Ltd in respect of the Paradise Centre resort; and
- (Bryan) Luke Jamieson, Kym Amelia Jamieson and Oz-Sumo Pty Ltd in relation to the Beaches and Crest resorts.

**Franchising Transactions** means the transactions announced by BreakFree on 8 July 2003 and all documentation relevant to, or necessary to give effect to, those transactions, including the Letter of Offer to Franchise by Taskstone Pty Ltd and Lodgemark Pty Ltd in relation to the Paradise Centre and the Letter of Offer to Franchise by Leo and Michelle Hanrahan in relation to the Mediterranean Resort.

**MRSAs** means the management rights sale agreements with the Franchisees as announced to ASX by BreakFree on 8 July 2003, including:

- (a) two contracts with Oz-Sumo Pty Ltd for the sale of management rights;
- (b) the contract for Management Rights Business Sale with Taskstone Pty Ltd as trustee and Lodgemark Pty Ltd as trustee;
- (c) in relation to the Hanrahans, the share sale agreement pursuant to which they are to buy all of the shares in Braigh Holdings Pty Ltd which owns the management rights to the Mediterranean Resort; and
- (d) any guarantees given by the Franchisees in relation to the contracts referred to in paragraphs (a) to (c).

**Sales of the Managers' Units** means the sales of managers' units associated with the MRSAs, including:

- (a) two contracts for the sale of land to Oz-Sumo Pty Ltd;
- (b) the contract for the sale of lots in a Community Title Scheme to Leo and Michelle Hanrahan;
- (c) two contracts for the sale of residential units to Glenn Daryl Joseph, Lorraine Lee Joseph, Gary Keith Joseph and Kaye Maree Joseph; and
- (d) any guarantees given by the Franchisees in relation to the contracts referred to in paragraphs (a) to (c).

**Takeovers Panel**

**Reasons for Decision – BreakFree Limited**

This undertaking is dated 11 August 2003

Executed by **BreakFree Limited** (ACN 100 072 704) by being signed by:

**Anthony Kevin Smith**

**Maurice Frawley**

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Signature of Director

Signature of \*Director/\*Company  
Secretary

**Anthony Kevin Smith**

**Maurice Frawley**

.....

.....

Print full name

Print full name

*\*Delete whichever is not applicable*

## Takeovers Panel

### Reasons for Decision – BreakFree Limited

## Annexure B – Undertakings provided by BreakFree during the Proceedings

### Undertaking to the Takeovers Panel in relation to the affairs of BreakFree Limited

BreakFree Limited undertakes to the Takeovers Panel as follows pursuant to section 201A of the *Australian Securities & Investment Commissions Act 2001* (Cth):

- (a) BreakFree will, within 1 business day of providing this undertaking to the Panel, issue an announcement to the market providing further details in relation to the sale of the properties referred to in its announcement of 8 July 2003. The further announcement will contain the details referred to in paragraph 2 of the letter from Phillips Fox to the Panel on 15 July 2003<sup>3</sup>.
- (b) Excluding entering into contracts to give effect to the transactions announced by it on 8 July 2003 in circumstances where those contracts comply with paragraph (c) of this undertaking, Break Free undertakes not to breach any of the defeating conditions set out in S8's takeover announcement of 11 July 2003 by dealings in any interest in any real property or rights in relation thereto unless:
  - (i) the proposed action is subject to, or has received, shareholder approval; or
  - (ii) prior to the time at which the relevant action is taken by BreakFree, one or more of the following has occurred:
    - (A) BreakFree has given the Panel at least 2 business days' prior notice of the actions that it proposes to take;
    - (B) the Panel has resolved the proceedings which are the subject of its brief dated 15 July 2003; or
    - (C) S8's bid for BreakFree Limited has either been withdrawn or expired.
- (c) BreakFree undertakes that each contract entered into to give effect to the transactions announced by it on 8 July 2003 will contain the following clause:

*If the Takeovers Panel or the ASIC determine that this document should be cancelled or otherwise terminated, then this document will be deemed to have been rescinded ab initio as if it had never been entered into and no party will have any liability to the other under this document.*
- (d) BreakFree undertakes not to waive its rights under any clause of the type referred to in paragraph (c) of this undertaking.
- (e) In relation to the 4 resorts to be converted to franchisee managed resorts as announced on 8 July 2003, BreakFree undertakes not to complete the transactions to

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<sup>3</sup> The details referred to in paragraph 2 of the letter from Phillips Fox to the Panel on 15 July 2003 were:

- the names of the 4 resorts to be converted;
- the total consideration payable for the management rights to those 4 resorts and whether that consideration was cash or scrip;
- the key conditions precedent;
- any unusual terms or conditions; and
- the expected impact on BreakFree's 2004 forecast earnings.

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### **Reasons for Decision – BreakFree Limited**

convert those resorts from BreakFree managed resorts to franchise managed resorts until the earliest of the following has occurred:

- (i) one month has passed from the date on which this undertaking was given;
  - (ii) BreakFree has given the Panel at least 2 business days' prior notice of the its intention to complete the transaction;
  - (iii) the Panel has resolved the proceedings which are the subject of its brief dated 15 July 2003; or
  - (iv) S8's bid for BreakFree Limited has either been withdrawn or expired.
- (f) In relation to the announcement made by BreakFree to the ASX on 18 July 2003 in relation to the joint venture with Sunland Group Limited, BreakFree undertakes that the transactions referred to in the announcement will be subject to approval by BreakFree shareholders, and will not be completed unless and until such shareholder approval of the transactions has been obtained.

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**For and on behalf of BreakFree Limited**

**Date: 18 July 2003**