



**In the matter of Orion Telecommunications Ltd  
[2006] ATP 23**

**Catchwords:**

*Association - substantial holding - agreement contributing to need to give substantial holding notice - voting arrangements - common directors - voting power - relevant agreement - acting in concert - declaration of unacceptable circumstances - final orders to divest shares acquired in breach of section 606 and restrict voting rights*

*Corporations Act 2001 (Cth), sections 12(2)(b)(c), 606, 671B, 657D*

*Re Rossfield Group Operations Pty Ltd [1981] Qd R 372 ; 5 ACLR 237*

*Flinders Diamonds Ltd v Tiger International Resources Inc & Ors (2004) 49 ACSR 199*

*Ford, Austin & Ramsay, Ford's Principles of Corporation Law [16.200]*

**These are the Panel's reasons for deciding to make a declaration of unacceptable circumstances and orders in relation to the affairs of Orion Telecommunications Limited.**

## **SUMMARY**

1. These reasons relate to an application (the **Application**) to the Panel from Orion Telecommunications Limited (**Orion**) on 3 July 2006 in relation to the affairs of Orion.
2. The Panel decided that, for the purposes of sections 606 and 671B of the *Corporations Act 2001 (Cth)* (**Act**)<sup>1</sup>, TelEurope Ltd (**TelEurope Ltd**), Mr Lewis and Lewis Securities Ltd (**Lewis Securities**) have, since at least 24 April 2006, been associates in relation to Orion under paragraphs (b) and (c) of section 12(2).
3. The Panel made a declaration of unacceptable circumstances under section 657A and orders under section 657D. The declaration is set out in Annexure A and the orders are set out in Annexure B (**Orders**).

## **THE PANEL & PROCESS**

4. The President of the Panel appointed Robyn Ahern, Denis Byrne (sitting Deputy President) and Byron Koster (sitting President) as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the Application.
5. The Panel adopted the Panel's published procedural rules (**Procedural Rules**) for the purposes of the Proceedings.
6. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.
7. As the Application involved numerous issues of disputed fact, the Panel encouraged parties to consider lodging a statement of agreed (and disputed) facts pursuant to Procedural Rule 5.1. The parties agreed to this process whereby they provided:

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<sup>1</sup> All statutory references in these reasons are to the Act, unless otherwise specified.

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- (a) a submission which identified any facts stated in the Application which that party disputed and specified changes or additions required to provide an accurate statement of facts submitted by that party; and
- (b) sworn statements (declarations, affidavits or statements under Procedural Rule 7.1) by persons with knowledge of the relevant matters to support that party's claims with respect to disputed facts.

## APPLICATION

### Background

8. The following is based on the agreed statement of facts prepared by the parties referred to in paragraph 7, supplemented by findings based on witness statements and submissions by the parties. The evidence and submissions described below in paragraphs 9 to 60 is accepted by the Panel (except where the contrary is indicated). In the case of the disputed issues of fact described in paragraphs 61 to 93, the Panel has set out its findings at paragraph 94.

#### *Orion*

9. Orion was first registered on 11 May 2004. Orion provides non-facility-based telecommunication services to residential and small and medium business customers through its subsidiaries in 4 countries.
10. Orion was admitted to the Official List of the Australian Stock Exchange Limited (**ASX**) on 1 October 2004. Orion was established for the purpose of acquiring a company called NewTel Holdings LLC (**NewTel**).
11. As at 27 June 2006, the directors of Orion were:
  - (a) Amanda Lacaze (executive chairman);
  - (b) Ian Roberts (non-executive director);
  - (c) Valentina Josifovski (non-executive director); and
  - (d) Shane Allan (non-executive director).
12. As at 30 June 2006, Orion had 671 shareholders. The largest shareholders (without adjusting for the association the subject of the Application) as shown in the substantial shareholder notices lodged with ASIC, prior to lodgement of the Application, were:
  - (a) TelEurope Ltd (including persons listed as associates of TelEurope in its initial substantial holding notice dated 6 October 2004 (and which information had not changed in subsequent substantial holdings notices), including Hobart Properties & Securities (controlled by Ian Noel Roberts), Roberts & Partners (controlled by Ian Noel Roberts), Ian Noel Roberts ATF <Roberts Medical Fund> and Mr Christian Roberts (son of Ian Noel Roberts)) (**TelEurope Associates**) (19.97 %)<sup>2</sup>;

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<sup>2</sup> 19.99 % was in fact disclosed by TelEurope in its last substantial holding notice. This was inconsistent with Computershare's trading records, which showed the holding of TelEurope Ltd in Orion as being 19.97 %.

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- (b) Hunter Hall Investment Management Ltd (including its associates including, Hunter Hall International Limited, Mark Fortsmann, Hampshire Assets and Services Pty Ltd and Peter James Hall) (**Hunter Hall**) (19.87 %<sup>3</sup>);
- (c) MMC Asset Management Ltd (including its associates including certain bodies corporate that MMC Asset Management Ltd controls, Evanalex Holdings Pty Ltd, Jamah Metanomski, MMC Investment Company Ltd and HGL and certain bodies corporate that it controls) (**MMC**) (11.09 %); and
- (d) Lewis Securities (including persons listed as associates of Lewis Securities in the substantial holding notice dated 20 June 2006 including Lewis Securities Ltd <Anthony R Lewis>, Fixed Interest Pty Ltd, Interest Investments Pty Ltd, LSL Holdings Pty Ltd and Vimow Pty Ltd) (the **Lewis Associates**) (11.82 %).

#### *TelEurope Ltd*

- 13. TelEurope Ltd was first registered on 1 July 1999. It is an unlisted public company limited by shares. TelEurope Ltd is an investment company which has no employees. Its major asset is its shareholding in Orion. See also paragraphs 34 to 38.
- 14. As at 27 June 2006, the directors of TelEurope Ltd were:
  - (a) Mr Roberts;
  - (b) Anthony Lewis; and
  - (c) Robert Miller.
- 15. John Perry was a director of TelEurope Ltd from 1 July 1999 to 9 June 2006. His position was vacant at the time of these proceedings. As discussed in paragraph 19 below, Messrs Roberts, Lewis and Miller were also directors of Lewis Securities (which was one of the Lewis Associates).
- 16. Mr Roberts's witness statement stated that "*Mr Lewis is a non-executive director and chairman of TelEurope and has no involvement in the day-to-day operations of that company. TelEurope is really an investment vehicle with its sole asset being the shareholding in Orion, and therefore the TelEurope board only meets sporadically.*" This was consistent with the witness statements of Mr Miller and Mr Lewis.
- 17. According to TelEurope Ltd's company report dated 13 July 2006, the largest shareholders of TelEurope Ltd were:
  - (a) Mr Roberts and entities controlled by him (11.92%); and
  - (b) Lewis Securities (7.6%)<sup>4</sup>.

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However, because of the comparative immateriality of these percentages (0.02 %), Parties accepted the lower figure of 19.97 %.

<sup>3</sup> Hunter Hall's shareholding in Orion had increased from 12 months prior, when it held approximately 11% in Orion.

<sup>4</sup> TelEurope Ltd submitted that Lewis Securities held 8.9% of TelEurope Ltd. Mr Lewis's witness statement asserted that the Lewis Associates owned 454,044 TelEurope shares or about 7.61% of the company.

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*Lewis Securities*

18. Lewis Securities was first registered on 8 May 1985. It is an unlisted public company limited by shares. Lewis Securities' principal business is as a dealer and adviser in retail fixed interest securities. It holds an Australian Financial Services Licence No 243288.
19. As at 27 June 2006, the directors of Lewis Securities were:
  - (a) Mr Roberts (non-executive director);
  - (b) Mr Lewis (managing director);
  - (c) Mr Miller (non-executive director); and
  - (d) Mr Elias (non-executive director).
20. As noted in paragraph 14, apart from Mr Elias all of the above were also directors of TelEurope Ltd.
21. As at 27 June 2006, Lewis Securities had:
  - (a) 2 A voting management class shares (both held by Mr Lewis);
  - (b) 55,695 B class shares (of which Mr Lewis and LSL Holdings Pty Ltd, another company within the Lewis Associates, had a combined holding of 99.99 %); and
  - (c) 76,115 C preference class shareholders (of which Mr Lewis held 98.62 %).
22. Lewis Securities is controlled by Mr Lewis, in the sense that he is the Managing Director of Lewis Securities, responsible for the day to day running of the company, and holds (directly and indirectly) the majority of shares (including both A voting shares) in Lewis Securities. Mr Lewis is able to change the board composition of Lewis Securities. Mr Miller and Mr Roberts are non-executive directors who have no involvement in the day-to-day operations of the company. This was supported by the witness statements of Mr Lewis, Mr Elias, Mr Roberts and Mr Miller.
23. Mr Lewis's witness statement stated however that "*...as a matter of convention, I discuss matters of importance with the directors of [Lewis Securities], particularly Nigel Elias and also from time to time with Ian Roberts and Bob Miller. Nigel and I speak virtually every day, and we typically meet face to face once a week.*"
24. This was supported by Mr Elias's (director of Lewis Securities) witness statement "*[f]ormal meetings of the Board of [Lewis Securities] are infrequent however, the individual board members often discuss matters of importance to [Lewis Securities]. On average, I would speak with Mr Lewis by telephone about [Lewis Securities] business once a day, and would meet with him once a week. Whilst Mr Lewis is responsible for the day to day operations of [Lewis Securities], he raises matters of importance to [Lewis Securities] to the attention of fellow board members for discussion.*"
25. The notice of change of interest of substantial holding lodged by Lewis Securities on 20 June 2006 disclosed the following entities as associates of Lewis Securities:
  - (a) Lewis Securities Ltd <Anthony R Lewis A/C>;
  - (b) Fixed Interest Pty Ltd;
  - (c) Interest Investments Pty Ltd;

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- (d) LSL Holdings Pty Ltd; and
- (e) Vimow Pty Ltd.

26. Orion identified that a number of shareholders of Orion had the same shareholding address as the Lewis Associates but were not stated as being associates of Lewis Securities in its substantial holding notice dated 20 June 2006. Mr Lewis’s witness statement stated that “*as a service to its clients, [Lewis Securities]’s business address is used as the registration address for correspondence by approximately 200 investment and superannuation persons and entities*”. The Lewis Associates submitted that all the shareholders identified by Orion as having the same shareholding address as Lewis Securities were “clients” of Lewis Securities except two superannuation fund accounts, holding 48,000 shares in total (0.058%), which were omitted from the substantial holding notice in error. The Panel notes however, that only the shareholdings of the Lewis Associates (as defined) were the subject of this decision. Furthermore, other than information as to their shareholding addresses, no additional evidence was given to the Panel as to whether such shareholders were also associates of Lewis Securities and the Panel made no inquiries about any such association.

#### *Other major shareholders*

27. Orion’s other major shareholders were Hunter Hall and MMC, both of which were unlisted public companies limited by shares.

#### *Share trading history*

28. The following table was submitted by Orion as an annexure to its application. The table depicts the monthly trading history of Orion shares by TelEurope Ltd and the Lewis Associates since Orion listed in October 2004. Orion also submitted a table showing the daily breakdown of acquisitions and disposals by the Lewis Associates.

Date	TelEurope Ltd			Lewis Associates			Aggregate voting power
	Shares acquired	Total shares	% of issued capital	Shares acquired	Total shares	% of issued capital	
Oct-04	300,000	11,886,172	13.51%	580,000	2,810,000	3.19%	16.70%
Nov-04	500,000	12,386,172	14.80%	-	2,810,000	3.19%	17.99%
Dec-04	1,603,286	13,989,458	15.90%	-	2,810,000	3.19%	19.09%
Jan-05	13,000	14,002,458	15.91%	950,000	3,760,000	4.27%	20.18%
Feb-05	-	14,002,458	15.91%	-	3,760,000	4.27%	20.18%
Mar-05	-	14,002,458	15.91%	(200,000)	3,560,000	4.05%	19.96%
Apr-05	100,000	14,102,458	16.03%	-	3,560,000	4.05%	20.08%
May-05	-	14,102,458	16.03%	436,682	3,996,682	4.54%	20.57%

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Date	TelEurope Ltd			Lewis Associates			Aggregate voting power
	Shares acquired	Total shares	% of issued capital	Shares acquired	Total shares	% of issued capital	
Jun-05	-	14,102,458	16.03%	412,818	4,409,500	5.01%	21.04%
Jul-05	200,000	14,302,458	16.26%	-	4,409,500	5.01%	21.27%
Aug-05	200,000	14,502,458	16.63%	100,000	4,509,500	5.17%	21.80%
Sep-05	-	14,502,458	17.12%	(100,000)	4,409,500	5.20%	22.32%
Oct-05	-	14,502,458	17.12%	-	4,409,500	5.20%	22.32%
Nov-05	-	14,502,458	17.79%	63,800	4,473,300	5.49%	23.28%
Dec-05	89,800	14,592,258	17.96%	188,200	4,661,500	5.74%	23.70%
Jan-06	500,000	15,092,258	18.57%	83,523	4,745,023	5.84%	24.41%
Feb-06	1,137,742	16,230,000	19.97%	95,870	4,840,893	5.96%	25.93%
Mar-06		16,230,000	19.97%	200,000	5,040,893	6.20%	26.17%
Apr-06		16,230,000	19.97%	435,709	5,476,602	6.74%	26.71%
May-06		16,230,000	19.97%	2,505,423	7,982,025	9.82%	29.79%
Jun-06 <sup>5</sup>		16,230,000	19.97%	1,726,976	9,709,001	11.95%	31.92%

29. The Lewis Associates submitted their own table setting out the share trading history in Orion by the Lewis Associates. The Lewis Associates' table is very largely consistent with the Orion tables showing the monthly and daily trading by the Lewis Associates in Orion shares. There were only minor discrepancies between the different versions.<sup>6</sup> The Lewis Associates did not dispute that they had engaged in a number of acquisitions of Orion shares resulting in their shareholding increasing from 5.96 % on 28 February 2006 to 11.95 % on 27 June 2006, an increase of almost 6 % in 4 months.
30. Based on the daily trading chart from Orion, in the period from 23 September 2004 to 06 April 2006 (a 560 day period), the Lewis Associates traded in Orion shares on approximately 44 days (about 8% of days in that period). Of these, on approximately 33 days (about 75% of the days on which they traded) the Lewis Associates made net acquisitions and on 11 days made net disposals. The relevant interests of the Lewis Associates increased from approximately 2.53% to 6.15%.
31. In the period from 7 April 2006 to 23 June 2006 (a 77 day period), the Lewis Associates traded in Orion shares on approximately 23 days (about 30% of days in that period). On all of those days (that is, on 100% of the days on which they traded)

<sup>5</sup> The data provided for the month of June 2006 only includes trading up to and including 27 June 2006.

<sup>6</sup> For example, Lewis Associates submitted that it did barely breach the 5.0% rule in June 2005 but did not exceed 5.10% until January 2006 mainly as a result of share cancellations.

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the Lewis Associates made net acquisitions and on no days made net disposals. The relevant interests of the Lewis Associates increased from approximately 6.15% to 11.95%.

#### *Asset background*

32. Orion's largest subsidiary was Southern Cross Telco Holdings Limited (**Southern Cross**). Southern Cross represents a major component of Orion's business.
33. Southern Cross was established in 1994 (first registered on 7 September 1994). The initial directors of Southern Cross were Jon Grunseth, Victoria Grunseth, Elam Baer and Mr Roberts. Mr Lewis became a director of Southern Cross from 19 December 1994.
34. Mr Lewis ceased to be a director of Southern Cross in late 1998 or early 1999.
35. In June 1999, Davnet Limited (**Davnet**) acquired a majority stake in Southern Cross via a takeover offer. Pursuant to this takeover offer, the Lewis Associates and other entities sold an approximate 9.7 % shareholding in Southern Cross to Davnet at this time.
36. TelEurope Ltd was established in 1999 (first registered on 1 July 1999). At the time of these proceedings, TelEurope Ltd's registered office had been c/o Lewis Securities Ltd at Level 13, 15-19 Bent Street, Sydney, NSW since 5 January 2005.<sup>7</sup> Pursuant to a TelEurope Ltd prospectus dated 30 August 1999, TelEurope Ltd's initial principal investment was in NewTel, a US company with operations in Europe in relation to telecommunication reselling. At the time of its initial investment, TelEurope Ltd owned in excess of 35% of NewTel.
37. The initial directors of TelEurope Ltd were Mr Roberts (chairman), Mr Lewis, Mr Perry and Ms Grunseth. Ms Grunseth ceased to be a director on 4 August 2004, and was replaced by Mr Miller on 20 August 2004. Mr Perry ceased to be a director of TelEurope Ltd on 9 June 2006. Mr Miller, together with Messrs Roberts and Lewis, were, as at the date of the decision in these proceedings, the current directors of TelEurope Ltd. Mr Lewis was also the chairman of TelEurope Ltd.<sup>8</sup>
38. In July 2002, Southern Cross was acquired from Davnet by NewTel, at which time TelEurope Ltd had a minority interest in NewTel. The directors of Southern Cross at that time were Mr Baer, Mr Roberts, Mr Lewis and John Lawrence.
39. In mid-2004, TelEurope Ltd created Orion as a wholly-owned subsidiary and shifted its then approximate 13-15 % interest in NewTel to Orion. NewTel was subsequently restructured in late 2004 resulting in Orion owning 100% of NewTel.
40. TelEurope Ltd's most important asset was its investment in Orion. Since Orion's listing in October 2004, TelEurope Ltd's shareholding in Orion has grown from 13.17 % to 19.97 %.

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<sup>7</sup> Since the Panel made its declaration in these proceedings on 3 August, TelEurope Ltd has changed its registered office

<sup>8</sup> Since the Panel made its declaration in these proceedings on 3 August, Mr Lewis resigned as a director and chairman of TelEurope Ltd.

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41. The substantial holding notice lodged on 20 June 2006 indicated that the Lewis Associates held 11.82 % of the voting power in Orion, however Computershare's trading records up to 27 June 2006 recorded the Lewis Associates' shareholding in Orion at 11.95 % on that date.
42. Accordingly, as at 27 June 2006, TelEurope Ltd's shareholding plus the Lewis Associates' shareholding in Orion was 31.92 %.

#### *Board changes*

43. Between November 2005 and February 2006, the average monthly share price of Orion fell from \$0.29 to \$0.125. On 27 February 2006, Hunter Hall sent a letter to Orion requisitioning an extraordinary general meeting (EGM). The proposed resolutions were:
  - (a) to remove Messrs Miller, Roberts and Skippen (both Miller and Roberts were directors of TelEurope Ltd and Lewis Securities);
  - (b) to appoint Amanda Lacaze and Valentina Josifovski as directors; and
  - (c) to grant Ms Lacaze certain share options at a strike price of \$0.14.
44. Ms Lacaze was identified by Hunter Hall as a prospective executive director of Orion.
45. Hunter Hall withdrew its EGM requisition notice following which, on 3 March 2006, Ms Lacaze and Ms Josifovski were appointed to Orion's Board to replace Messrs Skippen and Miller. (Mr Allan was later appointed to the Board of Orion as a non-executive director on 4 May 2006 following Noel Robertson resigning as chief executive officer and director).

#### *Orion EGM*

46. The Board of Orion convened an EGM, held on 27 April 2006, in relation to the proposed grant of options to Ms Lacaze at a strike price of \$0.125 and increasing the non-executive directors' maximum aggregate remuneration. Mr Lewis held a number of proxies in respect of this meeting (see paragraph 55 below) including a proxy for TelEurope Ltd.
47. Mr Lewis's witness statement stated that "*[Lewis Securities] was not consulted about whether or not it agreed that Messrs Miller and Skippen should be replaced, or whether or not Ms Lacaze and Ms Josifovski should be appointed to the board of Orion. I was disappointed by this because I thought that as a shareholder of Orion, [Lewis Securities] and the other Lewis Associates should have been consulted, particularly about the appointment of Ms Lacaze as Deputy Chairman.*"
48. Mr Roberts's witness statement stated "*I was not however, prepared to agree with the proposed resolution to approve the grant of 3,200,000 options by the company to Amanda Lacaze. I discussed this issue at length with Mr Miller on a number of occasions in March and April of this year. Those conversations were expressly agreed between us to be TelEurope conversations, by which I understood that we did not give any consideration to the position of Lewis Securities and the position of Lewis Securities was not discussed by us.*"
49. The Lewis Associates submitted that following discussions between directors of Lewis Securities, it was decided that the Lewis Associates would oppose the options



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resolution because the proposal to grant options did not require Ms Lacaze to meet any performance hurdles, and they did not consider the granting of the options could be commercially justified by reference to Ms Lacaze's experience and value to Orion. This was also noted in Mr Lewis's witness statement.

50. The minutes of a Board meeting of Orion on 24 April 2006 held in the lead up to the EGM, record Ms Lacaze noting that the voting intention of TelEurope Ltd in its proxy had not been indicated. Ms Lacaze asked Mr Roberts if he could provide an indication on this. Mr Roberts responded that he was attempting to remain separate from this decision. He further advised that the Chairman of TelEurope Ltd (Mr Lewis) had scope to act independently and had sole control of the decision. The Lewis Associates denied any knowledge of this.
51. TelEurope Ltd submitted that Mr Lewis had in fact been given instructions earlier that day at a TelEurope Ltd directors' meeting as to how to vote at the EGM.
52. Mr Roberts's witness statement stated *"It is true that the proxies do not on the face of them contain voting instructions. The reason for this is that I believe the proxy forms, although they are undated, were sent by Mr Lewis to Orion prior to the TelEurope board meeting on 24 April, at which time the directors met and instructions in relation to the share options were explicitly conveyed to Mr Lewis. TelEurope merely wished to ensure that proxy forms were received by Orion prior to 24 April, so that Mr Lewis could then exercise its votes as directed."*
53. The minutes for a TelEurope Ltd board meeting held at 9.00 am on 24 April 2006 stated: *"Orion EGM matter – it was agreed that TelEurope would give its proxy to Tony Lewis with the intention of voting against the options to Ms Lacaze."*
54. Mr Lewis's witness statement stated (in relation to the EGM to grant options to Ms Lacaze) that *"I consulted with two of my fellow [Lewis Securities] directors, Nigel Elias and Ian Roberts in the weeks prior to the 27 April 2006 EGM in order to obtain their direction as to how I should vote [Lewis Securities]'s shares at the EGM. With respect to Nigel Elias, this consultation consisted of several phone and face to face meetings. During the course of these discussions, I told Nigel Elias that I was concerned about Ms Lacaze's background which did not seem to involve holding senior executive positions in small companies... for these reasons I recommended that [Lewis Securities] vote against the options packages."*
55. At the EGM, Mr Lewis was the nominated proxy in respect of a number of shareholders of Orion, including:
  - (a) Fixed interest Pty Ltd;
  - (b) Lewis Securities Ltd <Anthony R Lewis A/C>;
  - (c) Lewis Securities Ltd;
  - (d) LSL Holdings Pty Ltd; and
  - (e) TelEurope Ltd.
56. Orion submitted that this represented 21,744,102 votes in Orion, or 26.76 % of the outstanding shares. Of these votes, 21,639,102 were "open-conditional" such that the relevant shareholders did not provide Mr Lewis with voting instructions and accordingly he was able to vote these shares at his discretion. Mr Lewis submitted that some of the Lewis Securities clients who hold shares in Orion sent their proxy

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forms direct to Computershare without providing him a copy. On this basis he was unsure whether he held proxies for all the entities and individuals identified by Orion. Mr Miller's witness statement noted that he arranged for four minor Orion shareholders who he knew personally to give proxies to Mr Lewis. These four shareholders were identified by Orion in its submissions. Mr Lewis stated that he was not certain whether he in fact held proxies for those shareholders.

57. At the EGM held on 27 April 2006, the resolution to approve the grant of options to Ms Lacaze was defeated. However, the resolution to increase non-executive director remuneration was passed.
58. Mr Rabinovitz's (group portfolio manager for Hunter Hall) witness statement attached a fax from Mr Lewis (in his capacity as Chairman of TelEurope Ltd) dated 4 May 2006. The fax was sent under cover sheet of Lewis Securities. The fax stated "*now that the [Orion] EGM has occurred it may be worthwhile for the three major investors in [Orion] to meet and discuss matters of mutual interest*". It goes on to refer to "MMC, Hunter Hall and TelEurope". The fax further stated that "*we noted your disappointment when Ms Lacaze's options were not passed at the EGM. TelEurope was considering voting for the options until (A) Ian Roberts was voted off as Chairman at last Monday's board meeting and (B) [Orion] decided to repay the TelEurope loan. TelEurope had always been uneasy about the "low hurdle" options.*" Mr Lewis emailed Mr Rabinovitz on 22 May noting he had not had a response to the fax. The email was signed off "Tony Lewis, Lewis Securities Ltd". On 29 May Mr Rabinovitz emailed Mr Lewis and noted "*we are unsure as to what can be gained from a meeting with you. Why not send us a detailed agenda of what you wish to discuss, and we will get back to you*". On 6 June Mr Lewis emailed Mr Rabinovitz stating "*all of TelEurope, Lewis Securities Ltd, Hunter Hall and MMC own a lot of [Orion] shares. We would like to understand your aims and exit strategy. Bob Miller and I both live in Sydney and would like to meet with you and discuss the above.*"

#### *TelEurope Ltd requisition*

59. On 19 June 2006, Orion received a notice of requisition for an EGM from TelEurope Ltd pursuant to section 249D to put the following resolutions to shareholders:
- (a) that Ms Lacaze, Ms Josifovski and Mr Allan be removed from office as directors of Orion; and
  - (b) that Messrs Miller (a director of TelEurope Ltd and Lewis Securities and former director of Orion) and Skippen (a former director of Orion) be re-appointed to the Board as directors of Orion.
60. This requisition for an EGM was provided to Orion under the cover of a Lewis Securities facsimile cover sheet. It was signed by Mr Lewis and Mr Miller.
61. The Lewis Associates submitted that they were not informed of TelEurope Ltd's EGM requisition until after it was lodged with Orion.
62. The Lewis Associates further submitted that during the period 19 June to 22 June 2006, the directors of Lewis Securities (particularly Mr Elias and Mr Lewis) discussed the proposed resolutions and the meeting planned for 22 June 2006 referred to below and that during the course of these discussions Mr Elias and Mr Lewis expressed

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concerns about the performance of Ms Lacaze, and Orion, since Ms Lacaze became the Executive Chairman. They submitted that Mr Elias told Mr Lewis that if matters could not be resolved, and the EGM proceeded, he would be likely to recommend that Lewis Securities vote in favour of the resolution to replace Ms Lacaze, Ms Josifovski and Mr Allan.

63. Mr Elias's witness statement stated *"I was not told about any proposal by TelEurope to requisition an EGM of Orion to vote on a resolution to have Ms Lacaze, Josifovski and Mr Allan removed as directors of Orion, before that requisition was apparently lodged with Orion...I had, however, been told by Mr Lewis in or around late May/early June 2006 that TelEurope was not happy with Ms Lacaze's performance as a director of Orion"*.
64. Mr Lewis's witness statement stated that *"[t]he decision by TelEurope to requisition an EGM for Orion to consider a resolution to remove Ms Lacaze, Ms Josifovski and Mr Allan from the board of Orion and replace them with Mr Miller and Mr Skippen, was made during the course of a TelEurope board meeting on 19 June 2006. I did not discuss or consult with Lewis Securities about this proposal prior to 19 June 2006 – this was distinctly a TelEurope initiative. In particular, I did not discuss this TelEurope proposal with Nigel Elias before the TelEurope board decided on 19 June 2006 to requisition an EGM and my discussion with Mr Roberts and Mr Miller on this proposal up to the time the board decision was taken was in their capacity as directors of TelEurope."*
65. Mr Roberts's witness statement further stated that *"I have been asked what discussions (if any) took place between TelEurope and the Lewis Associates in relation to the proposed resolutions to remove Ms Lacaze, Ms Josifovski and Mr Allen [sic] and to reappoint Messrs Miller and Skippen. I was not party to any discussions on the part of TelEurope with the Lewis Associates in relation to the resolution. I had been directed by Ms Lacaze, given I was still a director of Orion, to refrain from discussing the board politics of Orion with TelEurope, the Lewis Associates or any Orion shareholders, and I therefore did not do so...Having said this it is certainly the case that there were discussions between myself, Mr Miller and Mr Lewis in his capacity as a director of TelEurope in relation to the proposed resolutions."*
66. Mr Roberts's witness statement further stated in relation to the use of a Lewis Securities fax cover, *"I am not personally aware of whether this is in fact the case, as Mr Lewis did not discuss it with me. It had been my belief and intention that the requisition would be sent to Orion from TelEurope, and solely from TelEurope. It is true that I did ask Mr Lewis, in his capacity as chairman of TelEurope, to seek legal advice in relation to the Notice of Requisition to ensure that it was appropriate and correct."*
67. TelEurope Ltd agreed to withdraw its EGM requisition notice subject to Ms Lacaze and Mr Allan (on behalf of Orion) meeting with Messrs Lewis and Miller (on behalf of TelEurope Ltd) on 22 June 2006.
68. Mr Lewis's witness statement stated *"[a]s a result of the discussion between Mr Miller and Ms Lacaze, TelEurope agreed on a "without prejudice" basis that the requisition for an EGM would be withdrawn and that a "without prejudice" meeting would be held on 22 June 2006 to discuss TelEurope's concerns, including TelEurope's dissatisfaction with, in particular, Ms Lacaze's performance."*
69. Mr Lewis's witness statement stated *"I told Mr Elias that TelEurope had lodged the requisition because TelEurope were not satisfied with the performance of Orion since their [Lacaze and Josifovski's] appointment... I also told Mr Elias about TelEurope's decision to*

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*withdraw the requisition and the agreement to have a “without prejudice” meeting on 22 June 2006 with Ms Lacaze and Mr Allan.”*

70. Mr Elias’s witness statement stated “*[f]rom [Lewis Securities]’s perspective, I thought that removing Ms Lacaze from the board would be a sensible development because I did not believe that Ms Lacaze has performed to the required standard in her role as Executive Chairman.”*
71. Mr Miller’s witness statement stated that “*I had some discussions with Mr Lewis in relation to the proposed resolutions put at the meeting on 22 June 2006.... I remember in my discussions with Mr Lewis that we were concerned with the lack of information being provided by Orion to TelEurope as a substantial shareholder, and in what we considered to be the failure by Ms Lacaze to properly consult and inform us of the direction of Orion.”*
72. At that 22 June 2006 meeting TelEurope Ltd sought a number of undertakings from Orion, namely:
  - (a) that the Board of Orion not undertake any capital raising via a placement or otherwise that would have the effect of diluting the shareholding of TelEurope Ltd;
  - (b) that at least one additional TelEurope Ltd nominee (e.g. Mr Miller) be appointed to the Board of Orion to replace one of the current non-executive directors;
  - (c) that the Board of Orion commits to providing more frequent briefings to TelEurope Ltd in respect of Orion’s affairs; and
  - (d) that the Board of Orion provide TelEurope Ltd with a statement of current policy on dividend and capital management. The Lewis Associates also submitted that an undertaking was sought to reinstate a share buy-back plan.
73. Messrs Lewis and Miller attended the meeting on 22 June 2006 with Orion as representatives of TelEurope Ltd.
  - (a) Orion and Hunter Hall submitted that Mr Lewis indicated to Ms Lacaze and Mr Allan at the meeting that Lewis Securities would support the resolutions proposed by TelEurope Ltd to secure the interests of TelEurope Ltd, and that accordingly TelEurope Ltd and Lewis Securities believed that they had enough votes to ensure that the resolutions would be passed.
  - (b) TelEurope Ltd agreed with this assertion but stated that the resolutions proposed by TelEurope Ltd were resolutions “to secure the interests of TelEurope Ltd”. TelEurope Ltd further stated that Mr Lewis’s statement was made without any prior consultation of the other TelEurope Ltd directors (that is, Mr Roberts).
  - (c) The Lewis Associates submitted however, that Mr Lewis indicated to Ms Lacaze and Mr Allan that Lewis Securities would “probably” support the TelEurope Ltd but denied that a statement was made to the effect that “they had enough votes to ensure that the resolutions would be passed”.
74. Mr Allan’s witness statement stated “*[o]n 22 June 2006, Ms Lacaze and I attended a meeting with Bob Miller and Tony Lewis ... At this meeting, Bob Miller stated that he was representing TelEurope Ltd. I do not specifically recall Tony Lewis stating who he was*

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representing. However, I understood Tony Lewis to be representing Lewis Securities as he gave me a 'Lewis Securities Ltd' business card."<sup>9</sup>

75. Ms Lacaze's witness statement stated "I attended the 22 June Meeting with the understanding that both Tony Lewis and Bob Miller represented both TelEurope Ltd and Lewis Securities. Bob Miller opened the discussion by stating that the discussion we were about to have related to TelEurope Ltd."
76. Mr Miller's witness statement stated "I recall in considerable detail the meeting I had with Mr Lewis, Ms Lacaze and Mr Allan on 22 June 2006 ... At the outset, I believe that both myself and Mr Lewis made it clear that it was a TelEurope meeting, and that Mr Lewis was attending in his capacity as chairman of TelEurope, not on behalf of Lewis Securities. A discussion then occurred as to the best strategy for running Orion for the benefit of shareholders. I stated my view, with which Mr Lewis agreed, that we believe that Orion could not continue to successfully conduct business as a reseller given the increased vigilance of Telstra in the market place ...".
77. Mr Miller's further witness statement also stated that "...I specifically said at the start of the meeting that both myself and Mr Lewis were representing TelEurope and not Lewis Securities, and that it was a TelEurope meeting."
78. Mr Lewis's further witness statement stated "I recall that during the meeting, both Mr Miller and myself, stated words to the effect that: we are here representing TelEurope, and want to discuss the reasons why TelEurope requisitioned an EGM of Orion."

#### Statements regarding voting

79. Mr Lewis's witness statement stated "[t]here was a discussion about the resolution proposed by TelEurope. Regarding the question of how [Lewis Securities] might vote on any such resolution I indicated that I thought [Lewis Securities] would probably support the proposal by TelEurope. To the best of my recollection, I said words to the following effect:  

*If we are unable to resolve our differences, TelEurope will lodge a new EGM and seek to have a vote on the resolution. In that event I think that [Lewis Securities] will probably vote in support of the resolution.*
80. Ms Lacaze's witness statement stated in relation to the 22 June meeting "Tony Lewis then stated words to the effect that Lewis Securities has been buying shares in Orion to protect the interests of TelEurope Ltd. I then said words to the effect: "so Lewis Securities has been buying shares in Orion to secure the interests of TelEurope?" Tony Lewis then answered: "yes". I then sought further confirmation of this by saying words to the following effect: "Really Lewis Securities has been buying Orion shares to protect the interests of TelEurope?". Before Tony Lewis could answer, Bob Miller stated words to the following effect: "no he is mistaken: it's to protect the interests of Lewis Securities. Lewis Securities has been buying shares in Orion to secure the interests of Lewis Securities."
81. Mr Lewis denied saying words to the effect that Lewis Securities had been buying shares in Orion to protect the interests of TelEurope Ltd. Mr Lewis's further witness statement stated "[o]ther than indicating that Lewis Securities would probably vote in support of any resolution ... the only other reference I made to Lewis Securities was that I

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<sup>9</sup> In relation to this Mr Miller's further witness statement noted that there is no TelEurope business card and that would have been the reason why Mr Lewis gave Mr Allan a Lewis Securities business card.

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*said words to the effect that: Lewis Securities has purchased another 90,000 shares since the last significant shareholders notice."*

82. Mr Miller did not recall whether the statements alleged by Ms Lacaze (paragraph 80) were made.
83. Ms Lacaze's witness statement further stated *"Tony Lewis also stated that he wanted TelEurope Ltd to control the Orion Board so that it could change the strategic direction of Orion. Tony Lewis then stated that he wanted to discuss the position of Lewis Securities. Tony Lewis stated that Lewis Securities was likely to support the resolutions proposed by TelEurope Ltd ..."*
84. These statements were denied by Mr Lewis. Mr Miller did not recall whether these statements were made. In relation to the alleged statement that Mr Lewis *"wanted TelEurope Ltd to control the Orion Board so that it could change the strategic direction of Orion"*, Mr Miller's further witness statement asserted *"What I do recall is that Mr Lewis said words to the effect that he wanted TelEurope to have equal representation on the Orion Board."*
85. Mr Allan's witness statement stated that *"On two separate occasions during the 22 June Meeting, Tony Lewis said words to the following effect: "if the meeting is requisitioned, you can rest assured that I will use my Lewis Securities shares to vote in the interests of TelEurope". On the second occasion when Tony Lewis made the statement referred to above ... Bob Miller said to Tony Lewis words to the following effect: "no Tony, you cannot say that". Tony Lewis then responded to this by saying words to the following effect: "if the meeting is requisitioned, I will be voting my Lewis Securities shares to secure the interests of Lewis Securities.""*
86. Mr Lewis denied saying that he would use his Lewis Securities shares to vote in the interests of TelEurope.
87. Mr Miller's further witness statement stated that he did not recall the precise words used by Mr Lewis but he believed they were words to the effect that Lewis Securities would 'probably' support the resolutions proposed by TelEurope Ltd. It further stated *"It is true that I did correct Mr Lewis and I believe that, following this correction, he did make it clear that he would vote his Lewis Securities shares only to secure the interests of Lewis Securities. From this sequence of events, I believe it should have been clear to Mr Allan and to Ms Lacaze that the interests of Lewis Securities and TelEurope were separate and distinct, and that Mr Lewis' comment was a throwaway line and had not been previously discussed with the other directors of TelEurope."*

#### Direction of Orion

88. Mr Lewis's witness statement stated *"I told Ms Lacaze and Mr Allan, that TelEurope wants Orion's Australian operations to be put in a run-off mode, that is, significantly reduce operating expenses (especially staff costs) and reinstate at 20 cents Orion's previous buy back offer which had been suspended in December 2005. Ms Lacaze stated that the [sic] TelEurope's vision was not the correct way to run a telephone company, she wanted Orion to focus on reducing the churn of customers and that once Orion had a loyal customer basis to focus on selling other products to those customers. Ms Lacaze stated that she thought that Orion's marketing strategy prior to her appointment was all wrong, and made criticisms about Orion's previous management."*

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89. Mr Miller's witness statement stated *"A discussion then occurred as to the best strategy for running Orion for the benefit of shareholders. I stated my view, with which Mr Lewis agreed, that we believed that Orion could not continue to successfully conduct business as a reseller, given the increased vigilance of Telstra in the market place, and that Orion should be put into a "runoff" model. The purpose of a "runoff" model would be to minimise expenditure, slow down the "churn" rate of existing customers and become cash positive. Mr Roberts, in his statement, has set out in some detail his belief as to the benefits of adopting a "run off" model and how that would improve the share price of Orion. I agree with his observations, and they were the general thrust of my statements in the meeting with Ms Lacaze and Mr Allen [sic]. On the other hand, Ms Lacaze stated that she believed that it was appropriate for the company to continue its usual trading and marketing activities. I responded by saying that I believed that if it did so, then the expenditure would never be properly recovered. We asked if there was any evidence showing that her financial plan for Orion would result in commercial benefits for the company. I stated that if we were provided with a convincing and reasonable financial plan, we might reconsider our position. We were not provided with such documentation and have not since the meeting."*
90. Ms Lacaze's witness statement stated *"Tony Lewis then expressed concern about the strategic outlook of Orion. He stated that he considered that Telstra was making the telecommunications environment difficult for competitors in Australia because of its wholesale pricing approach. Tony Lewis stated that, if TelEurope got control of Orion, it would withdraw from Australian operations and put the company in "run-down" mode. Tony Lewis also stated that he did not want Hunter Hall or MMC as significant minority shareholders, and that he would offer to buy them out at 20 cents per share, as already approved in the buy back scheme."*
91. Mr Allan's witness statement stated *"Tony Lewis and Bob Miller then discussed what TelEurope Ltd intended to do strategically if it obtained control of Orion: they stated that they intended to place the company in run down mode and make redundant 50 members of its Australian work force out of a total workforce of 70 people, and also to offer to buy-back Hunter Hall's shares at 20 cents per share, and propose a further buy-back at the next AGM of Orion."*
92. Mr Allan's witness statement further stated *"Tony Lewis appeared surprised that Ms Lacaze and I did not agree that Telstra's wholesale pricing policy had a 'make or break' impact on Orion's business, and he also appeared surprised about the growth opportunities for Orion mentioned by Ms Lacaze and myself, such as voice-over IP, DSL and other internet products. Tony Lewis gave the impression that he had not thought of the opportunities presented by such technology for Orion... It was then agreed by all that we would all go away and have further discussions and meet again on 30 June 2006 when Orion would respond to the undertakings sought by TelEurope Ltd."*
93. On 30 June 2006, Ms Lacaze and Mr Allan attended a further meeting with Messrs Lewis and Miller (TelEurope Ltd asserted that Mr Miller only attended by phone and Mr Miller stated that this was only for 5 minutes) where they responded to the undertakings requested by TelEurope Ltd. TelEurope Ltd asserted that at this meeting, Ms Lacaze and Mr Allan indicated that no such undertakings would be provided.
94. As noted in the preceding paragraphs (72 to 92) there was conflicting evidence as to the detail of what occurred during the meeting held on 22 June. The Panel did not

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find it necessary to resolve all disputed matters to make its decision. To the extent that the Panel did find it necessary to resolve these matters, the Panel's findings were as follows:

- (a) Mr Miller indicated at the start of the meeting that he and Mr Lewis were representing TelEurope Ltd.
- (b) Mr Lewis made statements during the meeting, that were made (and understood to be made) in his capacity as directing mind and will of Lewis Securities, to the effect that:
  - (i) Lewis Securities had purchased another 90,000 shares since its last substantial shareholder notice; and
  - (ii) if unable to resolve its differences with Orion, TelEurope Ltd would lodge a new requisition for an EGM, and in that event he thought that Lewis Securities would probably vote in support of the resolution,
- (c) Mr Miller corrected Mr Lewis when he made a statement in relation to Lewis Securities using its shareholding in Orion to support the initiatives of TelEurope Ltd.

#### Declaration and orders sought in the Application

95. Orion sought a declaration of unacceptable circumstances by virtue of TelEurope Ltd and the Lewis Associates:
  - (a) entering into a relevant agreement, or acting, or proposing to act, in concert in relation to the affairs of Orion in respect of certain acquisitions of Orion shares made by them in breach of section 606; and
  - (b) failing to provide substantial holding information required by section 671B to Orion and ASX.
96. Orion sought various orders primarily directed at restricting the voting rights of Orion shares held by TelEurope Ltd and the Lewis Associates (and each of their associates), with such voting rights being restored at a rate of 3% every 6 months (that is, the rate permitted under the "creep" exception<sup>10</sup>). Orion also sought orders restricting the further acquisition or disposal of Orion shares by TelEurope Ltd and the Lewis Associates.

## DISCUSSION

### *Common Directors*

97. The Panel accepted, as submitted by TelEurope Ltd, that the mere fact of the common directorships between TelEurope Ltd and Lewis Securities in these proceedings did not, of itself, make them associates. The Panel considered, however, that in deciding whether it should find or infer any understanding or common purpose between the two companies it was relevant to take account of the composition and practice of the two boards.

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<sup>10</sup> The exception set out in item 9 of section 611 of the Act.



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98. It was accepted by all parties that Mr Lewis controlled Lewis Securities, could determine the composition of its board, and had been delegated authority to run Lewis Securities on a day to day basis. It followed that Mr Lewis should be regarded as the “directing mind and will” of Lewis Securities, such that Mr Lewis’s knowledge and purposes are attributed to Lewis Securities (see Ford, Austin & Ramsay, *Ford's Principles of Corporation Law* [16.200]). This means that whatever was communicated to Mr Lewis, even in his capacity as a TelEurope Ltd director, should also be taken to be known to Lewis Securities.
99. The fact that, from 9 June 2006, all directors of TelEurope Ltd were also directors of Lewis Securities is also relevant. In *Re Rossfield Group Operations Pty Ltd* [1981] Qd R 372 ; 5 ACLR 237 Connolly J said:
- “There may well be situations in which it would not be right to impute to one company the knowledge which one or more of its directors happen to have by reason of his or their dealings with or position on the board of another company. That is not this case. Whether the theory to be applied be the organic theory or that of principal and agent, the result must in my judgment be the same. Both AMH and the respondent have identical boards and knowledge of the affairs of AMH is an essential function of each board. I hold therefore the information was within the knowledge of the respondent offeror.”
100. Although the boards of TelEurope Ltd and Lewis Securities were not identical, the fact that Mr Lewis was Lewis Securities’ directing mind and will reduced the significance of Mr Elias’s membership of the board of Lewis Securities. It follows that, where knowledge of a matter is an essential function of each board, the *Rossfield* principle might well be thought to apply. Even apart from that principle, the Panel found it difficult to see how, if something was in fact known to *all* members of the TelEurope Ltd board (albeit in their capacity as Lewis Securities directors), it could sensibly have been said not to be known to TelEurope Ltd itself.
101. The fact that the same knowledge or intentions with respect to a particular matter can be imputed to two companies does not, of itself, make them associates with respect to that matter. However the Panel considered that common knowledge or intentions may, in some cases, go some way toward establishing an “understanding” constituting a relevant agreement within section 12(2)(b) or a common purpose amounting to acting in concert within section 12(2)(c).
102. Accordingly, the Panel did not accept Orion’s submission that the common directorships of TelEurope Ltd and Lewis Securities created an inference of association. However, the Panel did accept that such common directorships may, in appropriate circumstances, be a factor which, in combination with other probative material, supports an inference of association.

#### *Recent acquisitions of shares in Orion*

103. The Panel did not consider that the material provided to it regarding the acquisitions of Orion shares referred to in paragraphs 28 and 30 and 31 (**Acquisitions**), by itself,

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supported a finding or inference that there was a relevant agreement, or acting in concert, between TelEurope Ltd and Lewis Securities with respect to the Acquisitions. However, the Panel considered that the Acquisitions were relevant in determining whether an inference of association was justified by other matters.

104. The Panel noted that the trading in Orion shares in the period leading up to April 2006, despite the steady accumulation of Orion shares over the period, appeared consistent with the submissions of the Lewis Associates that Lewis Securities was a trader of shares rather than a strategic investor. However, the trading pattern of the Lewis Associates, and in particular Lewis Securities, appeared to change from early April 2006 and significantly so in the period around the 27 April 2006 EGM and the period leading up to the 22 and 30 June 2006 meetings.
105. From early April 2006, the Lewis Associates made no net disposals on any of the days on which they traded. From March 2006, the pace of accumulation of Orion shares by the Lewis Associates appeared to accelerate considerably. The Panel thought that this appeared to be inconsistent with the submissions of Lewis Securities that it was a trader. It also appeared significant to the Panel that the acceleration of the accumulation of Orion shares by the Lewis Associates correlated with the TelEurope Associates approaching the 20% takeovers threshold in its holding of Orion shares and ceasing its acquisition of Orion shares.
106. Mr Lewis indicted in his witness statement that: *“The reason for [Lewis Securities]’s acquisition of shares in Orion is first and foremost, because I believe that based on my research and experience in the stock market Orion shares are significantly undervalued.”* The witness statement went on to provide reasons why Mr Lewis held that belief. However Mr Lewis also acknowledged that: *“Purchasing a significant shareholding in Orion provided [Lewis Securities] with a side benefit, being that it could expect greater consultation by the board of Orion and that it would have increased voting power at any shareholders meeting.”* The Panel noted that this “side benefit” would be of limited value, given the conflict that had developed with Hunter Hall and MMC, unless Lewis Securities could also count on the TelEurope Associates’ support.
107. While sequential buying of shares by two entities is not of itself evidence of an association, in the circumstances before the Panel, where there was other probative material indicating an association (as discussed in paragraphs 109 to 111 below), what appeared to be concerted buying activity may be taken to support an inference of an “understanding” constituting a relevant agreement within section 12(2)(b) or a common purpose amounting to acting in concert within section 12(2)(c). Moreover, the timing of the acceleration of the acquisitions, and the “side benefit” acknowledged by Mr Lewis, were both consistent with the inferences drawn below.
108. The Panel also noted that, if TelEurope Ltd and Lewis Securities became associates, the Acquisitions appeared to involve a contravention of section 606(1) of the Act (in addition to any contravention of section 606(1) that might have resulted from a relevant agreement between them giving control over the voting or disposal of shares). Given this, and all of the other commonalities and links described in the factual background above, the Panel considered that Lewis Securities and TelEurope Ltd should have taken particular care to ensure that they did not become associates

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and that the separation of the two entities and their actions was clearly demonstrated.

#### *Discussions re Orion*

109. The Panel considered that the submissions and sworn statements provided by TelEurope Ltd and Lewis Securities, when set against the issues raised in the Application, justified an inference that TelEurope Ltd, Mr Lewis and Lewis Securities:

- (a) acted in concert, and proposed to act in concert, through the use of their combined voting power (if necessary), with the common purpose of securing undertakings relating to the conduct of Orion's affairs from Orion at a meeting on 22 June 2006; and
- (b) prior to the meeting on 22 June 2006, had an understanding constituting a relevant agreement, that they would use their combined voting power (if necessary) for the purpose of influencing the composition of Orion's board and the conduct of Orion's affairs.

Accordingly the Panel inferred that TelEurope Ltd, Mr Lewis and Lewis Securities were associates under both paragraphs (b) and (c) of section 12(2) of the Act.

110. The Panel considered that the inference described in paragraph 109 was supported by the following:

- (a) It was clear from the evidence provided to the Panel by TelEurope Ltd and Lewis Securities that, sometime before TelEurope Ltd gave its requisition on 19 June 2006, each of TelEurope Ltd and Lewis Securities and all the directors of both companies had developed concerns about the performance of Ms Lacaze.
- (b) It had not been suggested that there was any divergence between the interests of TelEurope Ltd and Lewis Securities in relation to the matters addressed by TelEurope Ltd's requisition of 19 June 2006 and the matters discussed at the meeting on 22 June 2006. To the contrary, the statements of Mr Lewis and Mr Elias indicated that the interests and objectives of Lewis Securities were aligned with those of TelEurope Ltd. The Panel accepted the submissions of TelEurope Ltd and Lewis Securities that each of them had different business purposes and may have had some reasons for investing in Orion which differed from those of the other. However it had not been suggested that those differences resulted in any material difference in their views or objectives with respect to the issues under consideration in relation to Orion from 19 to 22 June 2006. Nor did any differences mean that TelEurope Ltd and Lewis Securities were not acting in concert.
- (c) Given that Mr Lewis was the directing mind and will of Lewis Securities and that he did not indicate any divergence between the interests of TelEurope Ltd and Lewis Securities with respect to the matters under discussion between 19 to 22 June 2006, the Panel considered that the TelEurope Ltd directors must have realised that the views expressed by Mr Lewis at that time would also represent the views of Lewis Securities and that Lewis Securities would support its approach. This understanding may not have been

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detailed in express words. It did not need to be, because the dual roles of Mr Lewis, as both an active participant in the discussions of TelEurope Ltd and the directing mind and will of Lewis Securities, meant that an understanding was practically unavoidable. Mr Lewis could not prevent his left hand knowing what his right hand was doing. Even with the best of intentions, he could not maintain an impervious Chinese wall through the middle of his brain.

- (d) TelEurope Ltd's action in sending the requisition on 19 June 2006 provided evidence of the understanding between TelEurope Ltd and Lewis Securities. The TelEurope Ltd Board minutes for its meeting on 19 June 2006 stated that "*TelEurope now views three of four directors of Orion to be representing Hunter Hall and MMC who own around 30% of Orion shares.*" It was not credible that TelEurope Ltd would requisition a meeting to replace these directors without being able to count on support from Lewis Securities to allow it to match the combined voting power of Hunter Hall and MMC. TelEurope Ltd provided no evidence that it consulted any other shareholders in Orion, or that it had any indication of support for its proposals from any other Orion shareholders. Arguably, in these circumstances, if there had not been an understanding between TelEurope Ltd and Lewis Securities, Mr Lewis's duties as a director of TelEurope Ltd may have obliged him to advise the TelEurope Ltd board (given that Mr Lewis was the controlling mind and will of Lewis Securities and there could be no breach of confidence given that the other directors were all also directors of Lewis Securities) of anything that would lead Lewis Securities to vote against the resolutions. Mr Lewis indicated in his statement that the requisition was "distinctly a TelEurope Ltd initiative" and he did not discuss or consult with Lewis Securities about this proposal prior to 19 June. However, as the directing mind and will of Lewis Securities, Mr Lewis had no need to discuss or consult with anyone. The Panel did not accept that Mr Lewis could actively participate in this initiative, given that it depended on Lewis Securities' support to have a reasonable prospect of success, without doing so in his capacity as directing mind and will of Lewis Securities as well.
- (e) The Panel's conclusion that Mr Lewis, in participating in TelEurope Ltd's requisition and its aftermath, was doing so as the directing mind and will of Lewis Securities, as well as in his capacity as chairman of TelEurope Ltd, was supported by other circumstantial evidence including:
- (i) TelEurope Ltd's requisition being sent by Mr Lewis under cover of a Lewis Securities fax cover sheet. This was likely to convey to Orion that the requisition had the support of Lewis Securities. Even if that was not intended, it illustrated the problems for Mr Lewis in attempting to act purely in his TelEurope Ltd capacity and his failure to address them in any realistic manner.
  - (ii) Mr Lewis's attendance, as a representative of TelEurope Ltd, at the meetings with Orion on 22 June 2006 and 30 June 2006. Once again, this was likely to convey to Orion that TelEurope Ltd had the support of Lewis Securities. If TelEurope Ltd and Lewis Securities had not intended to convey and take advantage of that impression, one might have expected them to ensure that Mr Lewis played no part in the events.

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- (iii) Mr Lewis's statement, at the meeting on 22 June 2006, (on his account of the events) that Lewis Securities had purchased another 90,000 shares since its last significant shareholder notice, and his statement to the effect that:

*If we are unable to resolve our differences, TelEurope will lodge a new EGM and seek to have a vote on the resolution. In that event I think that Lewis Securities will probably vote in support of the resolution.*

In making these statements, at the very least, Mr Lewis must have been acting in his capacity as directing mind and will of Lewis Securities.

- (iv) Mr Miller's correction of Mr Lewis at the meeting on 22 June 2006, which (on Mr Miller's account of the events) led to Mr Lewis making it clear that he would vote his Lewis Securities shares only to secure the interests of Lewis Securities. This evidence suggests that, even if Mr Lewis's comment was no more than a throwaway line, it sufficiently exceeded his role on behalf of TelEurope Ltd, in the eyes of Mr Miller, to require correction.

#### *Voting at EGM*

111. The fact that TelEurope Ltd and Lewis Securities voted in the same way at the general meeting of Orion on 27 April 2006 would not, of itself, give rise to association if that was merely due to a concurrence of views about the merits of the respective resolutions. In this case, however, there was evidence to suggest that TelEurope Ltd's and Lewis Securities' voting resulted either from an understanding between them or some broader common purpose:
- (a) It was common ground that some weeks before the meeting Hunter Hall gave an EGM requisition notice which, although subsequently withdrawn, led to Mr Miller (a director of TelEurope Ltd and Lewis Securities) and Mr Skippen deciding to step down from the Orion Board and the appointment of Ms Lacaze and Ms Josifovski to replace them. It follows that TelEurope Ltd and Lewis Securities had a common cause for grievance for some weeks before the meeting.
  - (b) The evidence submitted by TelEurope Ltd and Lewis Securities established that there were discussions before the meeting between Mr Lewis, Mr Roberts and Mr Miller concerning a proposed resolution to approve the grant of options to Ms Lacaze.
  - (c) Mr Lewis was given proxies to vote at the meeting on behalf of TelEurope Ltd, Lewis Securities and several small shareholders (including four known to Mr Miller). Mr Lewis indicated in his statement that he had discussed how Lewis Securities should vote with the directors of Lewis Securities and had separately discussed how to vote with the directors of TelEurope Ltd. For the reasons given above in paragraphs 97 to 102 and 109, the Panel considered that an understanding was unavoidable as a result of these discussions.
  - (d) Following the meeting, Mr Lewis sent the fax described in paragraph 57 in his capacity as Chairman of TelEurope Ltd under a Lewis Securities cover sheet.

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112. The evidence described in paragraph 111 might not, of itself, have justified inferring an ongoing association. However, in the light of the factors discussed in paragraphs 102 and 103, and the Panel's finding of association above in paragraph 109, the Panel considered that it should infer that the association between TelEurope Ltd, Mr Lewis and Lewis Securities arose, at the latest, when the board of TelEurope Ltd appointed Mr Lewis as its proxy on 24 April 2006. This is because the association which the Panel found to exist appeared to have arisen, in large part, due to dissatisfaction with Ms Lacaze and a common purpose to change the board of Orion. The evidence described in paragraph 111 suggested that this could be traced back to the appointment of Ms Lacaze and that, even before 27 April 2006, Lewis Securities and TelEurope Ltd had already begun to act collectively in response, and without proper regard to the need to avoid becoming associates. Clear evidence of this was provided by TelEurope Ltd's appointment of Mr Lewis as a proxy on 24 April 2006. Accordingly, the Panel considered that, from 24 April 2006, Lewis Securities, Mr Lewis and TelEurope Ltd had an understanding constituting a relevant agreement for the purpose of influencing the composition of Orion's board and the conduct of Orion's affairs, and were proposing to act in concert in relation to Orion's affairs.

#### *Other matters*

113. The Panel did not consider that the other material presented to the Panel concerning relationships involving the assets of Orion (see paragraphs 32 to 39), and other arrangements between Orion, TelEurope Ltd and Lewis Securities raised in the Application, supported an inference of association. Accordingly the Panel did not find it necessary to resolve any of the disputed issues of fact with respect to those matters. The Panel did, however, take account of the undisputed facts concerning these matters as relevant background for its decision.

## DECISION

114. The Panel considered that, for the purposes of sections 606 and 671B of the Act, TelEurope Ltd, Mr Lewis and Lewis Securities had, since 24 April 2006, been associates in relation to Orion under paragraphs (b) and (c) of section 12(2) of the Act as a result of:

- (a) acting in concert with respect to the operations of, and the composition of the board of, Orion; and
- (b) having formed an understanding that they would use their combined voting power (if necessary) for the purpose of influencing the composition of Orion's board and the conduct of Orion's affairs.

115. The Panel considered, as a result, that there had been contraventions of Part 6C.1 of the Act due to the failure of each of TelEurope Ltd and Lewis Securities to disclose their association and the relevant interests of the other.

116. The Panel considered further that the acquisitions of Orion shares by the Lewis Associates from the time the association arose until present (**Lewis Acquisitions**) resulted in a contravention of section 606(1) of the Act. On any view the Lewis

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Acquisitions exceeded what is permitted by item 9 of section 611 (3% creep),<sup>11</sup> and none of the other exceptions in section 611 appeared to be applicable.

117. The Panel noted that one might feel some sympathy for TelEurope Ltd and Lewis Securities on the basis that, had they decided to become associates at the end of 2004, when their combined voting power was less than 20%, they would have been free to combine their voting power and the 3% creep would have permitted most of the acquisitions since. However, their failure to advise the market of their association meant that the increase in their voting power had not occurred in a properly informed market. That was particularly the case given that their combined holding approached a level at which it may well confer de facto control. Had the market been fully informed, the Panel considered on the basis of its experience that it was likely other shareholders in Orion would have made different decisions as to whether they would increase or reduce their holdings and as to how they voted at meetings of Orion since then.
118. The Panel considered that the circumstances constituted by the association of TelEurope Ltd and the Lewis Associates and the Lewis Acquisitions (**Circumstances**) were unacceptable because they constituted, or gave rise to, a contravention of section 671B and 606(1) of the Act.
119. The Panel considered also that the Lewis Acquisitions (amounting to more than 5% of Orion) constituted a substantial interest and the Circumstances were unacceptable having regard to their effect on the acquisition by the Lewis Associates of a substantial interest in Orion, and the effect on the potential control of Orion, as described in paragraph 117.
120. The Panel, having taken into account the matters set out in section 657A(3) (and in particular the fact that the Lewis Acquisitions did not take place in an efficient, competitive and informed market in accordance with section 602(a)), considered that it was not against the public interest to make a declaration of unacceptable circumstances. The Panel therefore made the declaration set out in Annexure A.

#### Orders

121. The Panel invited submissions from parties (being those persons to whom the Panel considered a proposed order would relate) in relation to the orders sought by Orion in the Application. As part of those submissions, Orion requested that the Panel make further orders (not stated in its original Application). Accordingly, the Panel gave parties a further opportunity to provide submissions in relation to those further orders.

#### *Discussion re orders*

122. Orion requested various orders in relation to the “Unacceptable Shares” defined in the Application to be “*shares acquired after the combined voting power of TelEurope Ltd*

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<sup>11</sup> According to Orion (schedule 3 to its Panel application), as at 24 April, Lewis Associates held 6.66% (5,409,102 shares). The Lewis Associates’ submissions did not appear to be inconsistent with this. Accordingly to the Lewis Associates, as at 30 June, the Lewis Associates held 12.06% (9,799,001 shares). It follows that the Lewis Associates’ voting power increased by 5.4% in less than 3 months.

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and the Lewis Associates was 20% of the shares in Orion and prior to the granting of orders by the Panel” (**Unacceptable Shares**).

#### *Divestment orders*

123. In its submissions regarding orders, Orion sought, primarily, orders that the Lewis Associates divest the Unacceptable Shares, and be restrained from voting those shares between the date of the order and divestment (**Proposed Divestment Order**).

#### *Creep acquisitions*

124. Orion submitted that the Panel should order that the Lewis Associates and TelEurope Ltd may only acquire more Orion shares under the creep rule<sup>12</sup>, without taking advantage of shares sold as part of the Proposed Divestment Order (**Proposed Creep Order**).

#### *Voting restrictions*

125. As an alternative to the Proposed Divestment Order, Orion requested that the Panel order that TelEurope and the Lewis Associates be restricted from voting the Unacceptable Shares at general meetings of Orion other than the number determined on the basis of:
- (a) an additional 3% of Orion shares on issue on each six month anniversary of TelEurope Associates and the Lewis Associates complying with their obligations to file complying substantial holding notices; and
  - (b) less any Orion shares acquired by TelEurope or the Lewis Associates after TelEurope Associates and the Lewis Associates comply with their obligations to file complying substantial holding notices,
- (the **Proposed Voting Restriction Order**).
126. Orion proposed the Proposed Voting Restriction Order as an alternative to the Proposed Divestment Order. Orion submitted that, such an order would be appropriate as it would not involve divestiture nor would it affect the economic interests of TelEurope Ltd or the Lewis Associates.

#### *Disposal order*

127. Further to the Proposed Voting Restriction Order, Orion sought an order that TelEurope and the Lewis Associates be restrained from disposing of any Unacceptable Shares except for disposals:
- (a) of up to the number of shares that can be voted as permitted under the Proposed Voting Restriction Order;
  - (b) made on-market in accordance with the ordinary course of trading to a person who is not an associate of either of them;
  - (c) made pursuant to a takeover offer or scheme of arrangement in respect of all of the Orion shares; or
  - (d) which have the consent of the Panel,

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<sup>12</sup> The Creep Rule being the exception set out in item 9 of section 611 of the Act.



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(the **Disposal Order**).

*Disclosure*

128. Finally, Orion requested that Lewis Securities and TelEurope Ltd be ordered to disclose their association in a substantial holding notice (**Disclosure Order**).

**Decision on Orders**

*Divestment Order*

129. The Panel considered the submissions of the parties in relation to the Proposed Divestment Order. The Panel did not consider that it should make an order requiring divestment of all of the Unacceptable Shares as that would involve divestment of shares which were acquired at a time in respect of which the Panel had not found association between TelEurope Ltd and the Lewis Associates existed (namely, prior to 24 April 2006).

130. The Panel noted the decision in *Flinders Diamonds Ltd v Tiger International Resources Inc & Ors*(2004) 49 ACSR 199 where the Full Court of the Supreme Court of South Australia set aside the Trial Judge's order for divestment of all of the defendants' shares in Flinders Diamonds Ltd, and ordered that the defendants be simply restrained from giving effect to an arrangement or understanding whereby they had power to exercise or control the exercise of a right to vote attached to the shares of the other.

131. The Trial Judge in *Flinders Diamonds* made the divestment orders because "*the defendants had acquired a relevant interest in breach of s 606 of the Corporations Act, that they had done so covertly and had failed to make disclosure of the true position.*" The Full Court found that the order went beyond what was reasonably necessary to remedy the contravention.

132. The Full Court held:

*"At the time the proceedings were instituted the arrangement, although made, had not been implemented. No-one had obtained any interest in shares to which they were not entitled other than by way of an interest deemed to exist by virtue of the Corporations Act. No-one had been wrongly deprived of any shares to which they were lawfully entitled. No person's rights had been adversely affected. Orders were made early in the course of the proceedings to prevent the general meeting of shareholders from taking place, and such orders have ensured that the status quo has remained throughout proceedings."*

133. Accordingly, the order made at first instance was punitive in nature rather than remedial.

134. The Full Court also held:

*"Shareholders in a company are entitled to seek to change the composition of the board of directors of that company. In this case, the defendants were exercising their legitimate right to seek to change the board of Flinders. Their fault lay in the fact that they went about the exercise of that right in a manner rendered unlawful by the Corporations Act because of their understanding or agreement as to voting. While it involved some element of secrecy, it was not, in itself, dishonest or deceitful. It did not result in any transfer of property or rights to which the defendants were not entitled. It was not unlawful for Mr Barry to convene a*

## Takeovers Panel

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*meeting of shareholders to seek to have the existing board replaced. The illegal conduct was entering into the arrangement or understanding in contravention of Chapter 6 to exercise voting rights in a particular way at the meeting. The attempt to remove the incumbent directors other than by way of agreement or understanding as to voting was not in itself unlawful.”*

135. In *Flinders Diamonds* the Full Court was concerned with the power of a court to make orders, including remedial orders, under section 1325A. The Panel’s power to make orders under section 657D is framed in somewhat different terms. However, the court’s decision in *Flinders Diamonds* is relevant to the Panel’s consideration because the Panel’s power, like that under section 1325D, is clearly remedial rather than punitive.
136. The Panel noted Orion’s submission that a relevant agreement between Lewis Securities and TelEurope Ltd resulted in each acquiring a relevant interest in all of the Orion shares held by the other.
137. However, the Panel considered that any divestment order should only apply to Orion shares acquired by the Lewis Associates or TelEurope Ltd after the time in respect of which the Panel found that the relevant association definitely existed (namely, from 24 April 2006) and in respect of the subsequent acquisitions which breached section 606 (**Post 24 April Shares**).
138. The Panel considered that it was appropriate to order divestment of the Post 24 April Shares in the terms of Orders (1) to (7) (**Divestment Order**) because the shares were acquired in breach of section 606 and at a time when the market was not aware that TelEurope Ltd and the Lewis Associates were associates and were:
  - (a) acting in concert, and proposing to act in concert, with each other in relation to Orion’s affairs ; and
  - (b) proposing to enter into and having a relevant agreement for the purpose of influencing the composition of Orion’s board and the conduct of Orion’s affairs.
139. The Panel considered that the above order was appropriate to protect the rights or interests of persons affected by the circumstances, in accordance with section 657D(2)(a). In the Panel’s view, the particular rights or interests that were affected by the undisclosed association between the Lewis Associates and the TelEurope Associates were the rights and interests of Orion’s shareholders (other than the Lewis Associates and the TelEurope Associates). Such rights and interest were affected as there was a change in the degree of actual or de facto control which TelEurope Ltd and the Lewis Associates were able to exert over Orion without an offer in equal terms being made to all shareholders in accordance with Chapter 6 or compliance with another exception in section 611. As a result, the acquisition of control over voting shares in Orion did not take place in an efficient competitive and informed market and the purposes of section 602 were not upheld. The Panel considered that, subject to engaging in a balancing of those rights and interests against any unfair prejudice that may arise for the Lewis Associates and the TelEurope Associates (see paragraph 160), it needed to make orders that were appropriate to protect those interests.

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140. The Panel noted, that the facts it found differed in significant respects from those in *Flinders Diamonds*. On the Panel’s findings, the Lewis Associates acquired the Post 24 April Shares in the market at a time when the market was not aware that TelEurope Ltd and the Lewis Associates were associates under section 12(2)(b) and/or (c). Furthermore, the shares were actively acquired in breach of section 606 of the Act. This situation is unlike the simpler “coming together” of associates in *Flinders Diamonds*, where the relevant parties did not engage in further acquisitions of shares in pursuit of their joint objectives. In addition, the Panel found in this case that the Lewis Associates and TelEurope Associates did seek to exercise the power of their combined holding (in that as a united bloc, they sought to influence the decisions of the Tower management) and that they actually did exercise the power in voting down the resolution approving options to Orion’s chief executive.
141. The Panel accepted the submissions of the Lewis Associates that the preferable method of arranging divestiture of the relevant shares was to place the shares with an investment bank. However, ASIC requested that it not be restricted to appointing an investment bank. Consequently, the Panel made an investment bank merely one of the alternatives for ASIC to consider when appointing an agent to sell the Post 24 April Shares.

#### *Voting Restriction Order*

142. The Panel also considered whether to make a voting restriction order in respect of the “remainder” of the Unacceptable Shares (namely, those acquired from the time at which TelEurope Ltd and the Lewis Associates acquired a combined holding of 20% and 24 April 2006). The rights and interests of other Orion shareholders have been affected by their voting power and influence over Orion being diminished/overshadowed by the combined voting power resulting from the association between TelEurope Ltd and the Lewis Associates. The Panel considered that, subject to engaging in a balancing of those rights and interests against any unfair prejudice that may arise for the Lewis Associates and the TelEurope Associates (see paragraph 160), it needed to make orders that were appropriate to protect those interests.
143. Accordingly, the Panel considered that it was appropriate to make an order restricting the voting rights of those shares, in the terms of Orders (8) and (9) (**Voting Restriction Order**) to apply unless and until TelEurope Ltd and the Lewis Associates provide persuasive evidence to the Panel that they have dissolved, fully and permanently, the association which the Panel found existed from at least 24 April 2006. Evidence provided to the Panel, as part of submissions on orders, only demonstrated that the parties had taken steps to make it more difficult to prove that the association was continuing. The Panel considered that, in the absence of probative evidence that the association had ended, voting restrictions were necessary to ensure that the interests of other Orion shareholders were adequately protected.
144. The Panel considered that orders imposing voting restrictions would also protect the interests of market participants. By forming an association from at least 24 April 2006, TelEurope Associates and the Lewis Associates all acquired voting power over more than 20% of the voting shares in Orion and increased their voting power by more than 1% a number of times. The Corporations Act does not permit persons to

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increase their voting power in listed entities to such an extent without disclosure to the market under the substantial holding notice provisions. TelEurope Ltd and the Lewis Associates failed to make such disclosure.

145. This failure to advise the market of their association meant the aggregation of, and subsequent increase in, their voting power beyond the 20% threshold did not occur in a properly informed market. Accordingly, the Panel found that the interests of persons affected by the unacceptable circumstances would only be appropriately addressed by an order restricting the voting rights of TelEurope Ltd and the Lewis Associates to a combined shareholding of 20%.
146. The Panel noted that there would inevitably be some arbitrariness in applying the Voting Restriction Order to the combined shareholding of the Lewis Associates and TelEurope Ltd given that their individual holdings in Orion shares have varied over the time since their combined holding increased beyond 20% and since the time from which, at least, the Panel found they had become associates. Given their association arose out of the joint conduct of both parties, the Panel considered that the appropriate way to allocate the Voting Restriction Order between their individual shareholdings, was to apply the restriction in the proportion that their individual shareholding bore to their combined shareholding as at 24 April 2006 (i.e. 25% the Lewis Associates and 75% TelEurope Ltd), which would also be the proportions of their holding following implementation of the Divestment Order.
147. The reduction of the parties combined voting rights (post application of the Divestment Order) to 20% produced an overall voting restriction of approximately 6.7%. This was applied to the Lewis Associates, 1.7% (representing 25% of 6.7%) and to TelEurope Ltd, 5% (representing 75% of 6.7%).

#### *Voting Restriction Order – run-off and exception*

148. The percentage voting power of the shares to which the Voting Restriction Order applies will reduce by 3% every six months on the six months anniversary of the Voting Restriction Order, until there are no shares to which the Voting Restriction Order applies. The reduction will apply proportionately to the holdings of TelEurope Associates and the Lewis Associates i.e. 2.25% for TelEurope Associates and 0.75% for the Lewis Associates each six months anniversary of the Voting Restriction Order. The Voting Restriction Order only applies prior to a final cut-off date of 24 October 2007 (eighteen months after 24 April 2006).
149. Voting is permitted of Orion shares acquired by the parties under a takeover bid or scheme of arrangement since such shares would need to be acquired in a manner consistent with Chapter 6.

#### *Acquisition Restriction Order and Disposal Order*

150. Consistent with the Panel's decision to impose the Divestment Order and the Voting Restriction Order, the Panel made Orders (14) and (15) (**Acquisition Restriction Order**). The Acquisition Restriction Order prohibits TelEurope Associates (and their associates) and Lewis Securities (and their associates) from acquiring further Orion shares if following such acquisition their voting power would exceed the number of shares they would be permitted to vote under the Voting Restriction Orders.

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151. Further to the Voting Restriction Order and the Acquisition Restriction Order, the Panel made Order (10) restricting disposal by TelEurope Ltd and Lewis Securities (and each of their associates) to each other and their associates. This was necessary to ensure that the Voting Restriction Order was not avoided by transferring shares to other associates who could then vote them as directed by TelEurope Ltd or the Lewis Associates.

#### *Disclosure Order*

152. The Panel decided not to make an order requiring the Lewis Associates and TelEurope Ltd to lodge amended substantial holder notices reflecting the association the Panel found to exist from 24 April 2006. The Panel considered that a substantial holding notice in circumstances where TelEurope Ltd and the Lewis Associates assert they have dissolved the association between them would be confusing to the market. The Panel considered that its decision and orders will provide an explanation of the current state of ownership and voting power over Orion shares.

#### *Creep order*

153. The Panel decided to make Orders (12) and (13) (**Creep Order**) to prevent any acquisitions by TelEurope Ltd or the Lewis Associates which they might seek to make in reliance on:

- (a) item 9 of section 611;
- (b) the fact that their voting power was increased by the association which the Panel found existed from 24 April 2006; and
- (c) the fact that their voting power will decline because of the Panel's orders and the dissolution of the association.

154. This order ensures that TelEurope Ltd and the Lewis Associates cannot rely on the increased voting power resulting from the unacceptable circumstances of their association to gain increased "creep" capacity. The Creep Order applies until 24 October 2007.

#### *Orders*

155. The Panel considered that the Orders were appropriate to protect the rights or interests of persons affected by the unacceptable circumstances identified by the Panel, in accordance with section 657D(2)(a). Those rights and interests are outlined in paragraphs 139, 142 and 144) (the **Rights and Interests**).

156. The Panel noted that in making any decision on orders it must weigh the object of protecting the Rights and Interests against the prejudice to any person that would flow from the making of its orders, in order to determine whether that prejudice would be unfair. Accordingly, in assessing each of the orders above, the Panel considered whether any prejudice to the Lewis Associates and the TelEurope Associates was unfair, having regard to the extent of protection of the Rights and Interests of persons that would be afforded by the proposed orders.

157. In relation to the Proposed Divestment Order;

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- (a) the Lewis Associates submitted that they would suffer unfair prejudice as the “overhang” caused by the sale of the relevant shares would depress the price of Orion shares and cause loss to the Lewis Associates. The Lewis Associates also submitted that they would not realise “proper value” for their shares in such circumstances; and
  - (b) TelEurope Ltd submitted that it would be unfairly prejudicial as it would be more in the nature of a punitive order than a remedial one. Furthermore, TelEurope also noted that a sale of a large stake of Orion shares would be likely to de-value Orion shares, resulting in financial loss to TelEurope.
158. In relation to the Proposed Voting Restriction Order the Lewis Associates and TelEurope both submitted that it was unfairly prejudicial as it was based on an assumption that the association between the TelEurope Associates and the Lewis Associates continued (which, in each of their views, was no longer the case).
159. Orion submitted that any such prejudice, if it arose, would not be unfair because:
- (a) in relation to the Proposed Divestment Order:
    - (i) the TelEurope Associates and the Lewis Associates would each receive a sum of money for the sale of the relevant Orion shares in the ordinary course of trading;
    - (ii) Lewis Securities, as a securities trader, would be unlikely to be unfairly prejudiced because of the nature of its business (in buying and selling securities as opposed to long-term investment); and
  - (b) in relation to the Proposed Voting Restriction Order, the orders permit the TelEurope Associates and the Lewis Associates to increase their voting power in a manner equivalent to the 3% creep provisions.
160. The Panel noted the submissions of the Lewis Associates and TelEurope Ltd concerning the prejudice they would suffer if the orders were made, including the submissions of the Lewis Associates as to prejudice resulting from the Proposed Divestment Order. As was noted in *AMP Shopping Centre Trust 02* [2003] ATP 24 at [54]-[55], the Panel cannot make an order if it is satisfied that the order would *unfairly* prejudice a person, but mere prejudice of itself is not enough.
161. In balancing the Rights and Interests against the submissions in relation to unfair prejudice, the Panel noted in particular that:
- (a) the terms of the Divestment Order were drafted to minimize harm to TelEurope Ltd and the Lewis Associates by minimizing the price effect of the sales on the market price of Orion shares;
  - (b) any depression of the market price of Orion shares would likely be temporary, and neither TelEurope Ltd nor the Lewis Associates had indicated to the Panel any need to dispose of Orion shares in the near future;
  - (c) the Divestment Order (ultimately made by the Panel) did not go so far as to require divestment of all of the Unacceptable Shares (as contemplated by the Proposed Divestment Order);

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- (d) neither TelEurope nor the Lewis Associates had provided the Panel with evidence to establish that the association (which the Panel found to have existed between TelEurope and the Lewis Associates) had been terminated; and
- (e) divestiture appeared to the Panel to be the appropriate order to remedy most directly, the effects of the acquisition of the Post 24 April Shares.

The Panel concluded that it was not satisfied, having regard to the circumstances and the Panel's findings, that any prejudice caused by the orders to the Lewis Associates or the TelEurope Associates was unfair.

162. The Panel made no order for costs.

**Byron Koster**  
**President of the Sitting Panel**  
**Decision dated 31 August 2006**  
**Reasons published 10 October 2006**



## Annexure A

### Corporations Act Section 657A

### Declaration of Unacceptable Circumstances

#### In the matter of Orion Telecommunications Limited

#### WHEREAS

1. The Takeovers Panel (**Panel**) has received an application from Orion Telecommunications Limited (**Orion**) in relation to the affairs of Orion.
2. As at 24 April 2006 TelEurope Ltd had a relevant interest in 19.9% of Orion shares, and Lewis Securities Ltd, together with the associates listed in its substantial holder notice dated 20 June 2006, (**Lewis Associates**) had relevant interests in 6.66% of Orion shares. In all substantial holder notices given to Orion by each of TelEurope Ltd and the Lewis Associates after 24 April 2006:
  - (a) the Lewis Associates have not disclosed TelEurope Ltd as an associate (nor vice versa); and
  - (b) the Lewis Associates have not included Orion shares in which TelEurope Ltd had a relevant interest as part of their substantial holding (nor vice versa).
3. Between 24 April 2006 and 30 June 2006, the Lewis Associates acquired approximately 5.4% of Orion shares.
4. On the basis of the evidence presented in the proceedings, the Panel finds that by 24 April 2006, TelEurope Ltd, Mr Lewis and Lewis Securities Ltd had formed an understanding that they would use their combined voting power (if necessary) for the purpose of influencing the composition of Orion's board and the conduct of Orion's affairs.
5. The Panel also finds that in furtherance of the understanding referred to in recital 4, TelEurope Ltd, Mr Lewis and Lewis Securities Ltd acted in concert with respect to the operations of, and the composition of the board of, Orion.
6. As a result of the matters described in recitals 4 and 5, TelEurope Ltd, Mr Lewis and Lewis Securities Ltd have been associates in relation to Orion under paragraphs (b) and (c) of section 12(2) of the Corporations Act since at least 24 April 2006 and accordingly:
  - (a) the failure of each of TelEurope Ltd and Lewis Securities Ltd to disclose their association and the relevant interests of the other in their substantial holding notices, as described in recital 2 above, constitutes or gives rise to a contravention of section 671B of the Corporations Act; and
  - (b) the acquisitions of Orion shares described in recital 3 above constitute or give rise to a contravention of section 606(1) of the Corporations Act.



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The Panel considers that it would not be against the public interest to make a declaration of unacceptable circumstances.

Under section 657A of the Corporations Act, the Takeovers Panel declares that the circumstances relating to:

- (a) the understanding between TelEurope Ltd, Mr Lewis and Lewis Securities Ltd (as discussed in recital 4);
- (b) TelEurope Ltd, Mr Lewis and Lewis Securities Ltd acting in concert (as discussed in recital 5);
- (c) the failure of each of TelEurope Ltd and Lewis Securities Ltd to disclose their association and the relevant interests of the other in their substantial holding notices (as discussed in recital 2); and
- (d) the acquisitions of Orion shares by the Lewis Associates (as discussed in recital 3),

constitute unacceptable circumstances in relation to the affairs of Orion.

**Byron Koster**

**President of the Sitting Panel**

Dated 3 August 2006



## **Annexure B**

### **Corporations Act Section 657D Final Orders**

#### **In the matter of Orion Telecommunications Limited**

Pursuant to section 657D of the Corporations Act 2001 (**Act**) and pursuant to a declaration of unacceptable circumstances made by the Panel on 3 August 2006, the Takeovers Panel **HEREBY ORDERS**:

#### **Divestment order**

1. that the legal title to and beneficial ownership of the ordinary shares in Orion Telecommunications Ltd (**Orion**) listed in Schedule 1 (the **Sale Shares**) be vested in the Australian Securities and Investments Commission (**ASIC**) by the transfer of the Sale Shares from the holders to ASIC for ASIC to:
  - (a) sell the Sale Shares; and
  - (b) subject to any requirement arising under a Tax Law, account to the persons who, immediately before the making of this order, were the registered holders of the relevant Sale Shares for the proceeds of sale, net of the costs, fees and expenses of the sale and any costs, fees and expenses incurred by ASIC, or which ASIC reasonably incurs, or estimates it will incur, in complying with these orders (even where those costs, fees or expenses are incurred in relation to any earlier unsuccessful attempt to sell the Sale Shares). If ASIC considers there to be a reasonable doubt as to whether a requirement has arisen under a Tax Law, ASIC is not required to so account for that proportion of the proceeds relating to the apparent requirement until it has determined whether a requirement has, in fact, arisen;
2. that ASIC retain an investment bank or licensed stock broker (**Appointed Seller**) which:
  - (a) ASIC considers to be appropriately licensed to conduct the sale; and
  - (b) provides to ASIC a statutory declaration that, having made proper inquiries, the Appointed Seller is not aware of any interest, past, present, or prospective which could conflict with the proper performance of the Appointed Seller's functions in relation to the disposal of the Sale Shares;
3. that ASIC will instruct the Appointed Seller:
  - (a) to seek to maximise the sale price of the Sale Shares;
  - (b) that none of the Parties may buy any of the Sale Shares;
  - (c) that it obtain from any prospective purchaser of Sale Shares a statutory declaration or statement in accordance with rule 7.1(c) of the Panel's Rules for Proceedings that it is not associated with any of the Parties;

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4. without limiting ASIC's ability to seek further orders, that ASIC seek further orders from the Panel if the Appointed Seller is unable to dispose of the whole parcel within 6 weeks from the date of engagement of the Appointed Seller, without, in its reasonable opinion acting as expert, unduly depressing the market price of Orion ordinary shares;
5. that each person who immediately before the making of this order, was a legal or beneficial owner of Sale Shares must not sell, transfer, mortgage or otherwise deal with the Sale Shares (except to give effect to the vesting or sale), or exercise the votes attached to the Sale Shares, until the vesting is completed by registration of a transfer or transmission of the Sale Shares (Transfer);
6. that Orion not register any transfer or transmission of the Sale Shares which is in breach of the order in (5) (except to give effect to the vesting) or pay any dividend on the Sale Shares, until Transfer;
7. that each Party and ASIC have the liberty to apply for further orders in relation to the matters covered by orders (1), (2), (3), (4), (5) and (6);

#### Voting restriction orders

8. that the Lewis Associates (and any of their associates, other than the TelEurope Associates) must not exercise any voting rights at general meetings of Orion prior to 24 October 2007 in respect of more than the total of:
  - (a) 5% of Orion shares on issue;
  - (b) an additional 0.75% of Orion shares on issue on each 6 month anniversary of the date of these orders; and
  - (c) any Orion shares acquired by the Lewis Associates (and any of their associates, other than the TelEurope Associates) under a takeover bid or scheme of arrangement.
9. that the TelEurope Associates (and any of their associates, other than the Lewis Associates) must not exercise any voting rights at general meetings of Orion prior to 24 October 2007 in respect of more than the total of:
  - (a) 15% of Orion shares on issue;
  - (b) an additional 2.25% of Orion shares on issue on each 6 month anniversary of the date of these orders; and
  - (c) any Orion shares acquired by the TelEurope Associates (and any of their associates, other than the Lewis Associates) under a takeover bid or scheme of arrangement;
10. that, until 24 October 2007, Lewis Securities and TelEurope (and each of their associates) be restricted from disposing of any Orion shares to each other or to a person who is an associate of any of the Lewis Associates or the TelEurope Associates, or a person with whom any of the Lewis Associates or the TelEurope Associates have a relevant agreement with respect to shares in, or control of Orion;
11. that each Party and ASIC have the liberty to apply for further orders in relation to the matters covered by orders (8), (9) and (10);

## Takeovers Panel

### Reasons for Decision – Orion Telecommunications Limited

#### Creep order

12. that, until 24 October 2007, the Lewis Associates (and each of their associates, other than the TelEurope Associates) must not acquire a relevant interest in Orion shares if that would not have been permitted under section 606 of the Act if the voting power of the Lewis Associates in Orion at all times prior to Transfer was less than 19%;
13. that, until 24 October 2007, the TelEurope Associates (and each of their associates, other than the Lewis Associates) must not acquire a relevant interest in Orion shares if that would not have been permitted under section 606 of the Act if the voting power of the TelEurope Associates in Orion at all times prior to Transfer was less than 20%;

#### Acquisition restriction order

14. that the Lewis Associates (and each of their associates) must not acquire a relevant interest in any further Orion shares if, following such acquisition, the Lewis Associates would have voting power (excluding any shares held by the TelEurope Associates) in more shares than the number they are permitted to vote under Order (8); and
15. that TelEurope Associates (and each of their associates) must not acquire a relevant interest in any further Orion shares if, following such acquisition, the TelEurope Associates would have voting power (excluding any shares held by the Lewis Associates) in more shares than the number they are permitted to vote under Order (9).

#### Schedule 1 - the Sale Shares

- (A) 3,322,399 held by Lewis Securities Ltd; and
- (B) 832,098 shares held by Fixed Interest Pty Ltd.

#### Schedule 2 - Glossary

**associate** has the meaning given to that term by sections 12, 15 and 16 of the Act with the modification that in sub-paragraph 12(2)(a)(ii) the expression “a body corporate” is replaced by the expression “an entity” and “entity” has the meaning given in section 64A;

**Lewis Associates** means:

- Lewis Securities;
- Anthony Richard Lewis;
- Lewis Securities Ltd <Anthony R Lewis A/C>;
- Fixed Interest Pty Ltd;
- Interest Investments Pty Ltd;
- LSL Holdings Pty Ltd; and
- Vimow Pty Ltd.

**Lewis Securities** means Lewis Securities Ltd.

**Orion** means Orion Telecommunications Limited.

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**Party** means each of the Lewis Associates and TelEurope Associates.

**Tax Law** means the *Income Tax Assessment Act 1936 (Cth)*, the *Income Tax Assessment Act 1997 (Cth)* or any other law of the Commonwealth relating to taxation law.

**TelEurope** means TelEurope Ltd.

- TelEurope Associates means:
- TelEurope;
- Hobart Properties and Securities Pty Limited;
- Roberts & Partners;
- Ian Noel Roberts;
- Ian Noel Roberts ATF <Roberts Medical Fund>; and
- Mr Christian Roberts.

**Byron Koster**

**President of the sitting Panel**

Dated 31 August 2006