Australian Government

Takeovers Panel

Reasons for Decision
Nitro Software Limited
[2023] ATP 2

Catchwords:

Decline to make a declaration – alternative transaction structures - media canvassing – superior proposal – disclosure – institutional acceptance facility – efficient, competitive and informed market – scheme/bid structure - jurisdiction

Corporations Act 2001 (Cth), sections 12(2), 411, 602, 606, 629(1), 631(1), 659A, 659B

Supreme Court (Corporations) Rules 1999 (NSW), Rule 12.1B

Takeovers Panel Procedural Rules 2020 (Cth), rules 18 and 19

ASIC Regulatory Guide 9: Takeover bids

In the matter of Virtus Health Limited [2022] NSWSC 597; Cromwell Corp Ltd v ARA Real Estate Investors XXI Pte Ltd (2020) 148 ACSR 217; Queensland North Australia Pty Ltd v Takeovers Panel [2015] FCAFC 68; Lionsgate Australia Pty Ltd v Macquarie Private Portfolio Management Ltd (2007) 240 ALR 385; Tower Software Engineering Pty Limited; Pendant Software Pty Limited v Harwood [2006] FCA 717

Virtus Health Limited 02 [2022] ATP 7 at [18]; Nex Metals Explorations Ltd 02 [2021] ATP 16; AusNet Services Limited 01 [2021] ATP 9; Patrick Corporation Limited 03 [2006] ATP 12; National Foods Limited [2005] ATP 8; LV Living Limited [2005] ATP 5; Goodman Fielder 02 [2003] ATP 5

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
NO	NO	YES	NO	NO	NO

INTRODUCTION

1. The Panel, Yasmin Allen (sitting President), James Burchnall and John O'Sullivan, declined to make a declaration of unacceptable circumstances in relation to the affairs of Nitro Software Limited. The application concerned the offer by Alludo to acquire 100% of Nitro by way of a scheme of arrangement or, in the alternative, via an off-market takeover bid and whether Nitro had undertaken a competitive process to secure the best outcome for Nitro shareholders. The Panel was not satisfied that the circumstances were unacceptable.

2. In these reasons, the following definitions apply.

Act	*Corporations Act 2001* (Cth)
AFR	Australian Financial Review
Alludo	Rocket BidCo Pty Limited, a wholly owned subsidiary of Cascade Parent Limited (trading as Alludo), which are both controlled by KKR Americas Fund XII L.P.
Alludo Scheme	has the meaning given in paragraph 5(b)
Alludo Takeover Offer	has the meaning given in paragraph 5(b)

Alludo Transaction	The Alludo Scheme and Alludo Takeover Offer
Employee Equity Incentive Plan	Nitro's employee equity incentive plan dated 29 September 2019
Implementation Deed	has the meaning given in paragraph 6
Nitro	Nitro Software Limited
Potentia	Technology Growth Capital LLC, a special purpose vehicle managed by Potentia Capital Management Pty Ltd
Potentia Takeover Offer	has the meaning given in paragraph 4
Rights	has the meaning given in paragraph 116
Scheme Fails Condition	has the meaning given in paragraph 102
Procedural Rules	*Takeovers Panel Procedural Rules 2020* (Cth)
Transaction Booklet	The explanatory statement in respect of the Alludo Transaction released on 21 December 2022

FACTS

3. Nitro is an ASX listed company (ASX code: NTO).

4. On 28 October 2022, Potentia announced an off-market takeover bid for Nitro at $1.80 cash per share (**Potentia Takeover Offer**).

5. On 31 October 2022, Nitro announced that:

   (a) the Nitro board unanimously rejected the Potentia Takeover Offer and

   (b) it had entered into a process deed with Alludo after receiving a non-binding proposal from Alludo to acquire 100% of Nitro by way of scheme of arrangement at $2.00 cash per share (**Alludo Scheme**) or, in the alternative, via an off-market takeover bid with a 50.1% minimum acceptance condition at $2.00 cash per share (**Alludo Takeover Offer**).

6. On 15 November 2022, Nitro entered into an implementation deed with Alludo to give effect to the Alludo Transaction (**Implementation Deed**).

7. On 8 December 2022, Potentia increased the offer price of the Potentia Takeover Offer to $2.00 per share and announced that access to due diligence materials may allow it to further increase the cash offer price beyond $2.00 per share.

8. On 12 December 2022, Nitro announced that:

   (a) Alludo had increased the offer price of the Alludo Transaction to $2.15 cash per share and

   (b) the Nitro board unanimously rejected the revised Potentia Takeover Offer.

9. On 21 December 2022, Nitro released a transaction booklet in relation to the Alludo Transaction. The announcement included the Nitro board's unanimous recommendation "*that Nitro Shareholders both:*

   (a) ***VOTE IN FAVOUR*** *of the Alludo Scheme at the Alludo Scheme Meeting, in the absence of a Superior Proposal and subject to the Independent Expert continuing to conclude that the scheme is in the best interests of Nitro Shareholders; and*

   (b) ***ACCEPT*** *the Alludo Takeover Offer, in the absence of a Superior Proposal and subject to the Independent Expert continuing to conclude that the offer is fair and reasonable."*

10. On 23 December 2022, Potentia varied the consideration under the Potentia Takeover Offer to include a scrip alternative and disclosed[1] that it would consider increasing the offer price if granted due diligence access.

11. On 28 December 2022, Nitro reaffirmed its determination that the Alludo Transaction was superior to the Potentia Takeover Offer (inclusive of the scrip alternative).

APPLICATION

Declaration sought

12. By application dated 4 January 2023, Potentia sought a declaration that:

   (a) the Alludo Takeover Offer, in conjunction with the Alludo Scheme and the Scheme Fails Condition, gave rise to unacceptable circumstances and

   (b) Nitro's failure to facilitate a full commercial and legal due diligence investigation by Potentia gave rise to unacceptable circumstances.

13. Potentia submitted (among other things) that:

   (a) concurrently seeking acceptances for the Alludo Takeover Offer and votes in favour of the Alludo Scheme was inherently contradictory and confusing for Nitro shareholders

   (b) institutional investors had "*been provided with an Institutional Acceptance Facility that allows them to withdraw their acceptance while the Alludo Takeover Offer remains conditional. That is not available to retail shareholders. They are encouraged to lodge a proxy "ahead" or "in advance" of the scheme meeting and to accept the Alludo Takeover Offer at the same time"* (footnote omitted)

   (c) the scheme/bid structure under the Alludo Transaction was anti-competitive. It was "*likely to discourage opposition to the scheme by encouraging shareholders to believe that defeating the scheme will only delay control passing and delay their receipt of consideration*"

   (d) Nitro denying Potentia due diligence access was contrary to the interests of Nitro shareholders

   (e) the Alludo Takeover Offer was "*a "bluffing bid""*(footnote omitted) and "*[i]ts effect is to prevent competing bidders (such as the Applicant) from making (and*

[1] In its Third Supplementary Bidder's Statement

shareholders from accepting) possibly slightly lower priced but more certain (and less conditional) offers"

(f) certain conditions to the Alludo Transaction,[2] in particular the Scheme Fails Condition, were void under section 629(1)[3] and contrary to section 631(1) and

(g) Nitro may have caused a breach of the prescribed occurrences condition under the Potentia Takeover Offer by issuing restricted share awards and performance rights.

14. Potentia submitted that Nitro's failure to run a competitive process to secure the best outcome for Nitro shareholders, including by taking the actions above (in association with Alludo), was inconsistent with the principles set out in section 602.

15. Potentia also requested that, if unacceptable circumstances were not found, the Panel refer the following questions of law to the Supreme Court of NSW under section 659A:

(a) *"Are Alludo and Nitro associates for the purposes of Chapter 6 and its application to the Alludo Takeover Offer?*

(b) *Is the Scheme Fails Condition, or any other condition of the Alludo Takeover Offer, void under s629?*

(c) *Have any of Nitro, Alludo or Alludo BidCo contravened s631(1)?*

(d) *Is it relevant for the Panel to consider whether a concurrent scheme of arrangement and takeover bid is "an appropriate procedure" under s602(d)?"*

Orders sought

16. Potentia did not seek interim orders. It sought final orders to the effect that:

(a) Nitro and Alludo take all necessary action to effect the withdrawal of the Alludo Takeover Offer and that no similar takeover bid be made by Alludo unless Nitro and Alludo first confirm that the Alludo Scheme will not proceed and no similar scheme will be proposed to occur concurrently with a takeover bid for Nitro

(b) alternatively, that Nitro and Alludo take all necessary action to effect the withdrawal of the Alludo Scheme and that no similar transaction be made by Alludo unless Nitro and Alludo first confirm that the Alludo Takeover Offer will be withdrawn and no similar takeover bid will be proposed to occur concurrently with a scheme to acquire Nitro and

(c) Nitro provide due diligence access to Potentia.

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[2] As set out in section 5.8 of the Transaction Booklet

[3] Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth) and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

DISCUSSION

17. We have considered all the material, but address specifically only that part of the material we consider necessary to explain our reasoning.

Decision to conduct proceedings

18. Alludo and Nitro each made a preliminary submission in response to the application, submitting that we should decline to conduct proceedings.

19. Alludo submitted that Potentia was seeking to disrupt a superior proposal and gain due diligence access and (among other things) that:

    (a) *"There was nothing contradictory or confusing about Nitro shareholders being encouraged to vote in favour of the Alludo Scheme and accept the Alludo Takeover Offer, especially given that the offer price is the same under both."*

    (b) *"The concurrent scheme/bid structure is an established and effective way for target companies to combat a major shareholder who holds a blocking stake and is committed to opposing a control transaction which the target board considers to be in the best interests of shareholders".*

    (c) The use of institutional acceptance facilities is "*well-established and customary practice in takeover bids"*, and the institutional acceptance facility under the Alludo Takeover Offer is market standard.

    (d) The exclusivity provisions in the Implementation Deed provide for a market standard fiduciary exception to the exclusivity provisions and *"[o]n any reasonable assessment, invoking a properly drafted fiduciary exception requires more than a vague statement by a bidder that they **may** increase price if they are granted due diligence access."*

    (e) The meaning of the Scheme Fails Condition is clear. If the Alludo Scheme is not approved at the scheme meeting, or if it is approved at that meeting but not subsequently approved by the Court, then the condition will be satisfied.

    (f) Alludo and Nitro are not associates and any such allegation is *"based purely on speculation"*.

20. It also submitted that no question of law warranted referral.

21. Nitro submitted that we should decline to conduct proceedings submitting (among other things) that:

    (a) *"Given that Potentia Capital has acquired a 19.31% pre-bid stake and has publicly stated that it will vote against any competing scheme and not accept any competing takeover bid in relation to its Nitro Shares, a concurrent Scheme/Takeover Bid is an entirely appropriate and logical transaction structure…"*

    (b) *"Concurrent Scheme/Bid structures are not anti-competitive – rather they enhance a target board's ability to conduct a competitive auction, as they allow a counter-bidder to effectively compete against a pre-bid stake which itself has the impact of stymieing competition."*

(c) Prior to entering the Implementation Deed with Alludo, Nitro had offered Potentia the opportunity to access due diligence subject to signing a non-disclosure agreement with a standstill provision, which Potentia had declined. Further, it is for the target board to decide to whom and on what terms it provides access to due diligence.

(d) The Implementation Deed contains a customary fiduciary carve-out permitting Nitro to engage on a competing proposal (including by providing due diligence) if certain requirements are satisfied. Should it wish to do so, Potentia is "*free to increase its offer to a price above $2.15 (subject to due diligence) and request access to due diligence*" and the "*Nitro Board would assess any such proposal in accordance with the terms of the Implementation Deed and its fiduciary duties*".

(e) The claim that Nitro and Alludo are associates is not substantiated by any credible facts. The terms of the Implementation Deed were negotiated on an arms' length basis and Nitro and Alludo have been independently advised.

22. We considered that several issues raised by Potentia could likely resolve themselves if Potentia increased its bid such that the Nitro board determined Potentia's bid to be the superior proposal.

23. Nevertheless, the application raised issues that warranted investigation, including whether the Nitro board's recommendation that Nitro shareholders both vote in favour of the Alludo Scheme and accept the Alludo Takeover Offer "*at the same time*" could disadvantage retail Nitro shareholders, such as by denying them equal opportunity to participate in benefits arising from a superior proposal.

24. Accordingly, we decided to conduct proceedings.

Concurrent scheme/bid structure

Complexity

25. Potentia submitted that "*[t]he complexity of combining these two structures is such that it is difficult to explain simply*." Potentia also submitted that:

(a) the structure under the Alludo Transaction was "*inherently contradictory and confusing for Nitro Shareholders*"

(b) "*[t]he complexity of running such different transactions concurrently creates problems for regulators, advisers and even the most experienced of investors*"

(c) Alludo was in fact actively seeking the failure of the Alludo Takeover Offer by working with Nitro to achieve the success of the Alludo Scheme, which undermined the ability of the Nitro Board to provide clear advice to Nitro shareholders

(d) issues may arise which would affect the efficiency of the market, including:

(i) the Court's and the Panel's role throughout the transaction, for example "*if Alludo or Nitro is required to lodge and send a supplementary bidder's statement or target's statement, they are required to do so "as soon as practicable" under s647*" but they may need "*to seek the Court's approval first to amend or supplement the Transaction Booklet*"

(ii) the Alludo Scheme and Alludo Takeover Offer are repeatedly described as "simultaneous", which is accurate only in a technical sense

(iii) "*[s]hareholders and others whose interests may be affected will be unclear about whether they should complain to the Panel or the Court if they have an issue with the disclosures in the Transaction Booklet*" and

(iv) a shareholder would not know who is communicating with them - in particular whether the Transaction Booklet is their company's document or the bidder's document, who is responsible for it or who is speaking to them.

26. Potentia submitted that "*[t]he above complexities arise from forcing a takeover bid and a scheme proposal into the one document. That is not what the Corporations Act contemplates, and it is not what the market is familiar with.*" It submitted that the complexity of the Alludo Transaction scheme/bid structure was unnecessary.

27. Alludo submitted that "*it is accepted that the scheme/bid structure is a more complex transaction structure than a stand-alone scheme or a stand-alone takeover offer. However, an increase in complexity is not necessarily problematic where clear and effective disclosure is provided to shareholders*".

28. Alludo submitted that a single integrated booklet was preferable so that shareholders had access to all the information in relation to the Alludo Takeover Offer and the Alludo Scheme. Moreover, it submitted that "*Nitro shareholders have had the benefit of more rigorous regulatory oversight of the disclosure than is the case in a conventional takeover offer, with both ASIC and the Court having considered and impliedly or expressly approved the disclosure included in the Transaction Booklet.*"

29. Nitro submitted that "*there is no legal or policy requirement which precludes parties from undertaking such transactions or which otherwise legislates that parties must adopt the "simplest" or least "complex" transaction structure possible (as Potentia has sought to put forward to the Panel).*"

30. ASIC submitted that "*[t]he Act does not expressly prohibit a bidder and target agreeing to conduct a scheme of arrangement and takeover bid at the same time or in circumstances where one is conditional on the other, provided that all relevant obligations are met…*".

31. ASIC also submitted that, while dual or multiple structure control transactions may give rise to regulatory risks not present in singular control transactions, it was cognisant of these risks. It submitted that "*[g]iven that dual or multiple structure control transactions are a relatively untested and new emergence comparative to takeover bids and schemes of arrangement, ASIC closely considers such structures in line with its regulatory role on a case-by-case basis*".

32. ASIC also submitted that "*a number of the risks the subject of submissions in this matter do not solely exist in relation to dual or multiple structure control transactions.*"

33. ASIC also submitted that:

(a) while a combined transaction booklet may necessarily be lengthier and more complex than a disclosure document with respect to a singular transaction, "*there is some merit in reducing the duplication of information*"

(b) "*it does not necessarily always follow that a supplementary bidder's or target's statement will be submitted to the Court for approval prior to being lodged or distributed in accordance with Chapter 6 or that doing so would cause unacceptable circumstances*" and

(c) many of the issues identified by Potentia in the context of a concurrent scheme/bid structure would "*similarly exist where a target is subject to a takeover bid and a scheme of arrangement from different, competing bidders*".

34. We agree with ASIC's submissions.

35. In the context of a concurrent scheme/bid structure, the Panel has jurisdiction to order further disclosure in relation to the takeover bid should the lack of disclosure give rise to unacceptable circumstances. While supplementary disclosure might be difficult to manage, and parties may consider that they need to return to Court, we consider we would have jurisdiction to make appropriate orders requiring disclosure in relation to the takeover bid that would not conflict with the Court's jurisdiction.[4]

36. In any event, we agree with ASIC's submission that a supplementary bidder's or target's statement would not necessarily be submitted to the Court for approval prior to being lodged or distributed. We also agree with ASIC that Potentia's submissions on this issue "*fail to address whether or why the delay occasioned by the requirement for Court approval would cause the bidder or target to fail the criteria of 'as soon as practicable'*" under section 647.

37. In the context of a scheme/bid structure the decision whether to submit supplementary disclosure in relation to the bid to the Court is one for the target or the bidder to make (as the case may be). Given no supplementary disclosure was required during these proceedings, this issue did not arise and we did not need to consider it further.

38. We agree that it is desirable to have all the information relating to a transaction (such as the concurrent scheme/bid structure under the Alludo Transaction) in a single document, rather than separate documents, subject to the qualifications ASIC identified.

39. We are not satisfied, in this case, that the complexities have had adverse commercial consequences which affected the efficiency of the market contrary to section 602. They did not in our view give rise to unacceptable circumstances, in fact we consider that, to the extent the scheme/bid structure under the Alludo Transaction introduced more complexity compared to a stand-alone transaction, in this case it enhanced the Nitro board's ability to conduct a competitive auction and procure a higher offer at $2.15.

40. In terms of judicial consideration, Justice Black in the Supreme Court of New South Wales, in relation to an earlier scheme/bid structure proposing a single integrated transaction booklet, noted the risk that collateral challenges to the information

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[4] See *Tower Software Engineering Pty Limited; Pendant Software Pty Limited v Harwood* [2006] FCA 717 at [36] to [46]

provided as to a takeover bid or associated transactions may complicate the process of approval of the scheme. He said "*[i]t seems to me that scheme proponents and their advisers, and possibly ASIC, may be well advised to give further thought to the desirability of this approach*."[5]

41. Potentia reviewed previous decisions in relation to scheme/bid approvals and submitted that the review supported the conclusion that there has not been any considered judicial analysis as to whether the scheme/bid structure is permissible, and that the main concerns raised in Potentia's application have not been squarely put to a Court for consideration.

42. Alludo submitted that Justice Black did not have any questions of Nitro on these issues at the first Court hearing when being taken through the Transaction Booklet, and Potentia did not raise them. Nitro made a similar submission.

43. ASIC submitted that, while Justice Black indicated that an application to the Panel in relation to the disclosure in a bidder's or target's statement may complicate the Court's process of approving a scheme, he did not go so far as to say that it would not be possible for the Court to approve it.

44. We agree with ASIC's submission.

45. In short, we are not prepared to say that a scheme/bid structure, whether employing a single disclosure document or not, is unacceptable due to complexity.

Competitiveness

46. Potentia submitted that the concurrent scheme/bid structure under the Alludo Transaction was anti-competitive.

47. Potentia submitted that it created significant practical problems and obstacles for any competing bidder, especially when the scheme company sought concurrent proxies/votes for the scheme and acceptances for the takeover. Potentia submitted "*[s]chemes are rarely voted down and most retail shareholders will follow the Board's recommendation without realising the choice they have in respect of their own shares if a higher takeover bid is made. This makes it harder for a competing bidder to compete. It is not a level playing field*."

48. Potentia also submitted the concurrent scheme/bid structure under the Alludo Transaction was:

    (a) "*misleadingly presented as one transaction to persuade Nitro Shareholders it will succeed regardless of Potentia's objection to the Alludo Scheme*"[6]

    (b) "*encouraging shareholders to believe that defeating the scheme will only delay control passing and delay their receipt of consideration*" and

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[5] *In the matter of Virtus Health Limited [2022] NSWSC 597* at [25]

[6] The alleged misrepresentation of the Alludo Transaction elements as one "simultaneous" transaction was submitted to matter because it "*encouraged an assumption of a foregone conclusion that 50.1% acceptance would be achieved and determine the outcome*."

(c) *"in effect being used to "punish" existing major shareholders and bidders who take a pre-bid stake."*

49. Alludo submitted that "*[t]he scheme/bid structure Nitro proposed ameliorates the chilling effect on competition for control of Nitro that Potentia intended to achieve through its pre-bid stake and "truth in takeovers" declaration. This outcome should be encouraged by the Panel, not stymied (as Potentia would have it do)*".

50. Nitro submitted that "*[t]he ability for third party bidders to bring forward a proposal for a change of control of Nitro, notwithstanding an underbidder holding a material pre-bid stake, has been enabled by the scheme/bid structure and has allowed the Nitro Board to conduct a competitive auction which has resulted in an increase in consideration to shareholders from A$1.58 per share to A$2.15 per share (a 36% increase).*"

51. Nitro also submitted that the Nitro share price had been trading above the Alludo Takeover Offer consideration "*in anticipation of a potential higher offer for Nitro*" which demonstrated that the market did "*not view the Alludo Transaction to be anti-competitive as Potentia has submitted*."

52. We are not persuaded that the Alludo Transaction is anti-competitive. The Nitro board, it seems, carefully considered the proposed transaction, took advice, and ensured that the usual fiduciary provisions enabling an auction process to develop existed in the Implementation Deed. It also appears that Nitro had undertaken an auction process prior to entering into the Implementation Deed with Alludo (see below at 85) and that it remains open to Potentia to increase the consideration under the Potentia Takeover Offer in order to be considered by the Nitro board as a superior proposal and be granted due diligence access.

53. In fact, in our view, the availability of the scheme/bid structure in this case was pro-competitive as it likely enabled a competitive auction for the benefit of Nitro shareholders notwithstanding Potentia's pre-bid stake.

54. On that basis we are reluctant to second guess the board and interfere with the Alludo Transaction.

55. Potentia submitted that the scheme/bid structure of the Alludo Transaction was contrary to section 602(d). It submitted that it was not an "*appropriate procedure*" as a preliminary to compulsory acquisition because Alludo was effectively using the Alludo Scheme as the preliminary procedure. This, it submitted, was to discourage opposition to the Alludo Scheme and so obtain a lower threshold for "*compulsory acquisition*". Opposition was discouraged because the existence of the Alludo Takeover Offer meant that control was likely to pass regardless of whether the Alludo Scheme was approved. If we understand it, Potentia is saying that the voting level of a scheme, being lower than the 90% acceptance level for compulsory acquisition, makes having the preceding scheme unacceptable. We do not agree.

Validity

56. Potentia submitted that "*the implications of such structures have not previously been properly raised before the Panel. Nor have those implications, to the extent they fall within the*

Panel's jurisdiction, been relevant for courts to consider at the first or second court hearings for previous transactions".

57. Nitro submitted that "*Potentia's fundamental argument is that the Panel should draw the inference that even though the Courts have repeatedly and consistently found that concurrent schemes/bids are legitimate transaction structures, it is possible that all of the presiding judges did not actually turn their minds to the legality of the structure. This claim is plainly absurd.*"

58. We note that, having regard to previous examples of concurrent scheme/bid structures such as Prime Infrastructure (2010), Healthscope Limited (2019), Huon Aquaculture Limited (2019) and Virtus Health Limited (2022), there has been no comprehensive consideration or analysis of the scheme/bid structure by the Courts. However, this does not mean that such structures are problematic or unacceptable.

59. ASIC submitted that the Act does not expressly prohibit a bidder and target agreeing to conduct a scheme of arrangement and takeover bid at the same time or in circumstances where one is conditional on the other, provided that all relevant obligations are met. We agree. While it may be advisable in the future for further guidance to be provided by ASIC or the Courts in relation to these transactions, we do not consider in this case that the concurrent scheme/bid structure is unacceptable.

Section 659B

60. Potentia's application did not raise as an issue the application of section 659B to the Alludo Transaction. However, in submissions it did raise this.

61. Section 659B concerns delaying the commencement of Court proceedings until after the end of a bid period. In summary, only identified persons may commence Court proceedings in relation to a takeover bid, or proposed takeover bid, before the end of the bid period.[7] Those persons include ASIC and government authorities. If proceedings have already been commenced the Court may stay them.[8] The expression "*court proceedings in relation to a takeover bid or proposed takeover bid*" is defined.[9] Relevantly it includes:

    (a) "*an action taken or to be taken as part of, or for the purposes of, the bid or the target's response to the bid*"[10] and

    (b) "*any proceedings before a court in relation to a document prepared or to be prepared, or a notice given or to be given, under [Chapter 6]*".[11]

62. Potentia submitted that section 659B applied to Nitro's application to the Court in respect of the Alludo Transaction under section 411(1). This was because at the time the section 411 proceedings were commenced, there was both a takeover bid (Potentia's) and a proposed takeover bid (Alludo's). It submitted that section 659B

[7] Section 659B(1)
[8] Section 659B(2)
[9] Section 659B(4)
[10] Section 659B(4)(a)(i)
[11] Section 659B(4)(a)(ii)

was engaged because the Alludo Transaction was put forward to the Court in a single document, and accordingly:

(a) is an action taken as part of, or for the purposes of Nitro's response to the Potentia Takeover Offer (subsection 659B(4)(a)(i)) or

(b) *"as they sought approval for the Transaction Booklet which, as well as being a scheme explanatory statement, is stated to be a bidder's statement and a target's statement prepared under Chapter 6 for the Alludo Takeover Offer"* (subsection 659B(4)(a)(ii)).

63. Potentia submitted that Nitro had failed to notify the Court ""*immediately on suspecting or becoming aware" that s659B applies*" in accordance with Rule 12.1B of the Supreme Court (Corporations) Rules 1999 (NSW). Accordingly, it submitted, Nitro's failure gave rise to unacceptable circumstances because it deprived the Court of an opportunity to address section 602 principles when deciding whether to stay the section 411 proceedings, and thus "*many of the issues raised in Potentia's Application*."

64. Nitro submitted that the section 411 proceeding "*is not a proceeding in which a dispute about a takeover bid has arisen or will arise. It is not about whether a "takeover bid should be disrupted or allowed to proceed*""[12]. Nitro also referred to the principle that "*Courts will interpret any provision affecting their jurisdiction in such a way as to have the minimum effect on it*"[13].

65. Alludo submitted that "*[i]f Potentia's analysis is accepted, the result would be that while a target company is subject to a takeover offer, it could never put a scheme of arrangement to its shareholders, regardless of whether the bidder under the scheme is the same bidder making the takeover offer*".

66. ASIC submitted that the object of section 659B was to make the Panel the main forum for resolving disputes about a takeover bid until the bid period has ended, noting that scheme proceedings are usually not forums for resolving takeover bid disputes. ASIC further submitted that it was "*not aware of any matter alleging scheme of arrangement proceedings are a form of tactical litigation under s659B, but observes in any event that the direct application of s659B is a matter for the Court*."

67. We agree with the submissions of ASIC, Alludo and Nitro. The purpose of section 659B is to prevent tactical litigation in relation to a takeover bid, whereas a target obtaining Court approval for a scheme is a legitimate separate exercise.

68. In any event, we consider that the applicability of section 659B is a matter for the Court to determine, not the Panel. Therefore, we consider that the issues raised by Potentia relating to section 659B do not give rise to unacceptable circumstances.

Nitro board's recommendation

69. As noted in paragraph 9 above, the Nitro board had unanimously recommended that shareholders both vote in favour of the Alludo Scheme and accept the Alludo

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[12] *Lionsgate Australia Pty Ltd v Macquarie Private Portfolio Management Ltd* (2007) 240 ALR 385 at [21], quoted with approval in *Cromwell Corp Ltd v ARA Real Estate Investors XXI Pte Ltd* (2020) 148 ACSR 217 at [63])
[13] *Lionsgate Australia Pty Ltd v Macquarie Private Portfolio Management Ltd* (2007) 240 ALR 385 at [27], quoted with approval in *Cromwell Corp Ltd v ARA Real Estate Investors XXI Pte Ltd* (2020) 148 ACSR 217 at [64])

Takeover Offer (each in the absence of a superior proposal and subject to the independent expert continuing to conclude that the offer was fair and reasonable). In the Chairman's letter the heading says, in capitals, "*VOTE IN FAVOUR OF THE ALLUDO SCHEME AND, AT THE SAME TIME, ACCEPT THE ALLUDO TAKEOVER OFFER*".

70. Potentia submitted that:

    (a) pre-scheme acceptance of the Alludo Takeover Offer carried material risks and no benefit for individual shareholders and

    (b) the scheme/bid structure under the Alludo Transaction had "*undermined the ability of the Nitro Board to provide clear advice and an appropriate recommendation to its retail shareholders.*"

71. We were concerned that the Nitro board's recommendation to accept the Alludo Takeover Offer "*at the same time*" as voting in favour of the Alludo Scheme (that is, earlier than the closing date of the Alludo Takeover Offer and before knowing the outcome of the Alludo Scheme) could disadvantage Nitro shareholders, including by denying them the opportunity to participate in benefits arising from a subsequent superior proposal. We asked Nitro to explain why the Nitro board had decided to make this recommendation.

72. In response, Nitro submitted that the Nitro board "*considers the recommendation to be in the best interests of its shareholders*" given that*:*

    (a) it "*maximises completion certainty of the Alludo Transaction which offers an extra A$0.15 per share compared with the Potentia Takeover Offer*" in circumstances where Potentia had confirmed that it would vote all the Nitro shares that it controlled[14] against the Alludo Scheme and that it would not accept any of those Nitro shares into any competing takeover proposal (including the Alludo Takeover Offer)

    (b) it "*likely accelerates the satisfaction of key conditions and therefore the timing to completion of the Alludo Transaction*" and

    (c) starting the acceptance process after the scheme meeting "*exposes the transaction to unnecessary timetable risk which could trigger the non-fulfilment of other conditions*"[15].

73. Nitro also submitted that "*[t]he recommendation is based on the Nitro's Board's good faith assessment of what it considers to be in the best interests of Nitro Shareholders, after having taken external advice and having regard to several factors, including the terms, conditions and risks associated with each of the rival bids*".

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[14] Potentia had voting power in 19.31% of all Nitro shares as at the date of the Transaction Booklet

[15] Nitro included the "No Target Material Adverse Change" condition under the Implementation Deed, which it said was a relevant consideration "*[h]aving regard to the current economic climate… and the fact that that [sic] Nitro is still in a "cash-burn" phase of its lifecycle*"

74. Lastly, Nitro submitted that "*it is not a matter for any external party, including the Panel, to second guess the Nitro Board's considered judgement in this regard, which has been exercised in good faith and in accordance with its statutory and fiduciary duties*".

75. In rebuttals, Potentia submitted that acceptance of the Alludo Takeover Bid before the scheme meeting would disadvantage shareholders who wanted to receive the proceeds as soon as possible because they could otherwise sell on market at a higher price or they risked missing out on a higher price if Alludo was out-bid by Potentia or anyone else and they were not free to accept that. It submitted that "*[t]o the extent there is a conventional equivalent, we submit "take no action" advice would be usual until there is greater certainty*".

76. The decision of a company's board to recommend that shareholders accept a takeover involves the exercise of business and commercial judgement. We accept that. However, we asked parties whether, having regard to the prominence of the Nitro board's recommendation in the Transaction Booklet, the risks of accepting the Alludo Takeover Offer at the same time as voting in favour of the Alludo Scheme had been sufficiently disclosed to Nitro shareholders.

77. Nitro submitted that "*[a]ll risks that the Nitro Board considers to be material in relation to the Alludo Scheme and the Alludo Takeover Offer have been carefully considered by the Nitro Board, undergone an extensive verification exercise and have been clearly disclosed in the Transaction Booklet… in a manner which Nitro, ASIC and the Court have deemed to be clear, concise and effective*".

78. Both ASIC and Alludo pointed to the number of places in the Transaction Booklet where the risks of accepting the Alludo Takeover Offer were addressed. The first relevant disclosure was in the Chairman's letter, where it was said "*Nitro Shareholders may give up their rights to sell their Nitro Shares on ASX or otherwise deal with their Nitro Shares (including to accept an offer from a competing bidder) from the time they accept the Alludo Takeover Offer*."

79. Nitro and Alludo also pointed to the other relevant disclosure contained in the Transaction Booklet.

80. Alludo also submitted that "*[t]his is not a case of Nitro shareholders being encouraged to accept the Alludo Takeover Offer "immediately". The deadline for proxies to be submitted in relation to the Alludo Scheme is 6 weeks after the date of the Transaction Booklet. This provides an ample opportunity for Nitro shareholders to carefully consider whether the Alludo Transaction is in their best interests having regard to professional advice, and to make a fully informed decision whether to follow the recommendation of the Nitro board in light of the clearly disclosed consequences of doing so*."

81. ASIC submitted that, while it did not seek to make submissions on the Nitro board's recommendation with regards to the Alludo Transaction, it noted that "*the Transaction Booklet indicates to Nitro shareholders that there are risks associated with accepting the Alludo Takeover Offer (including that they will be precluded from accepting an offer from a competing bidder) and draws shareholders' attention to the existence of the Potentia Takeover Offer*".

82. We considered that the disclosure of the risks associated with accepting the Alludo Takeover Offer (including that Nitro shareholders will be precluded from accepting an offer from a competing bidder) sufficiently addressed our concerns that the Nitro board's recommendation could disadvantage Nitro shareholders.

Due diligence access

83. Potentia submitted that "*[c]ommencing from 30 August 2022, Potentia Capital has made repeated attempts to obtain access to Nitro so that it may conduct a commercial and legal due diligence investigation of Nitro. However, that access has repeatedly been denied by Nitro*".

84. Potentia submitted "*for Nitro to deny Potentia Capital due diligence access is contrary to the interests of Nitro Shareholders*".

85. Nitro submitted that "*Potentia's summary of Nitro's attempt to engage with it in order to provide access to due diligence information is deliberately ambiguous and requires clarification*" and submitted (among other things) that:

    (a) after rejecting Potentia's non-binding offer at $1.58 per share in August 2022, "*the Nitro Board instructed UBS Securities Australia Limited to undertake a process in respect of Nitro to see whether a party could put forward a proposal that could ultimately be recommended by the Nitro Board*"

    (b) various parties expressed an interest in acquiring Nitro (including Alludo) as part of the auction process and, prior to receiving access to Nitro's confidential information, agreed to a standstill provision which restricted their ability to acquire securities in Nitro for 12 months

    (c) on 13 October 2022, Nitro had indicated to Potentia that it would be prepared to grant Potentia access to confidential information on the condition that Potentia agree to a confidentiality deed (including the 12-month standstill restriction)

    (d) on 14 October 2022, Potentia rejected Nitro's offer and, on the same day, "*Nitro offered Potentia a compromise on the standstill which included an exception by allowing Potentia to make a takeover bid after three months for Nitro provided that it contained a non-waivable 50.1% minimum acceptance condition*", which was also rejected by Potentia.

86. Potentia's response to the fact that it rejected Nitro's offers was, it submitted, that "*[a] standstill obligation has a much more onerous impact on a major shareholder as compared to a non-shareholder*" and that the standstill "*discriminated against Potentia as a pre-existing major shareholder who had already risked significant funds*".

87. We do not accept Potentia's submissions. There is a long line of Panel cases starting with *Goodman Fielder 02*[16], stating that there is no general requirement that a target company must provide equal access to information about the target company to rival bidders. Access to due diligence is a valuable tool that a target board has to create a

[16] [2003] ATP 5 at [87]

competitive auction. Recently, in *Virtus Health Limited 02*[17], the Panel reiterated that "*the Panel on a number of occasions has recognised that it is for the target board to decide to whom and on what terms it provides access to due diligence.*"

88. Importantly here, Potentia had been provided with an opportunity the same as other potential bidders (arguably in fact on better terms) to access Nitro's confidential information. That Potentia found the terms unacceptable is of course a matter for it. There is nothing in the process outlined to us that gives rise to unacceptable circumstances.

89. Potentia submitted that "*Potentia has made numerous public statements that if it is afforded due diligence access it will assess whether it can then match or exceed $2.15*", adding that "*[t]he last time Potentia matched Alludo's price with a binding offer that was clearly superior in its minimal conditionality, Potentia was still refused due diligence. Why would it not assume, barring the Panel's intervention, that Nitro will do the same again?*".

90. Nitro submitted that "*[t]he Nitro Board's fiduciary obligations to shareholders are very clear, well understood and clearly catered for in the Implementation Deed. There is nothing stopping Potentia (or any rival other bidder) from submitting a Superior Proposal and the Nitro Board granting access to due diligence and, subject to Alludo exercising its matching right, changing its recommendation.*"

91. We have no reason to doubt, on the material before us, that the Nitro board is acting in good faith in the interests of Nitro shareholders. We note that Potentia has not put forward a superior proposal, merely the prospect of one. This avenue remains available to Potentia so giving it the opportunity to achieve the desired outcome of accessing Nitro's confidential information. We consider that the decision whether or not to grant due diligence access to Potentia, and on which terms, is at the discretion of the Nitro board, acting in good faith and in accordance with its statutory and fiduciary duties to ensure the best outcome for shareholders.

92. In our view this does not give rise to unacceptable circumstances.

Institutional acceptance facility

93. Potentia submitted that institutional investors "*have here been provided with an Institutional Acceptance Facility that allows them to withdraw their acceptance while the Alludo Takeover Offer remains conditional. That is not available to retail shareholders. They are encouraged to lodge a proxy "ahead" or "in advance" of the scheme meeting and to accept the Alludo Takeover Offer at the same time*" (footnotes omitted).

94. This issue gave us pause.

95. In the usual takeover situation an institutional acceptance facility does not offend the principle of equal opportunity if, as ASIC Regulatory Guide 9 states at [9.606]: "*[a]ppropriately constituted, a facility of this kind may not offend the equality principle in s602(c), provided that smaller holders retain an equal and reasonable opportunity to accept the bid and facility participants do not receive a discriminatory benefit in using the facility.*" In their submissions, ASIC reiterated their guidance and noted the policy underlying

[17] [2022] ATP 7 at [18]

acceptance facilities in relation to institutional investors, which aims at addressing the fact that "*institutional investors may be prevented from accepting a conditional bid, or a bid achieving less than a certain level of acceptances, because of restrictions in their investment mandates*".

96. Here shareholders were recommended to accept the Alludo Takeover Bid early. Therefore, we asked whether retail shareholders might be disadvantaged compared to institutional shareholders because of the availability of the institutional acceptance facility.

97. Nitro submitted that "*[i]nstitutional acceptance facilities are standard and customary mechanisms used in takeover bids.*" It also submitted that "*[n]either ASIC nor the Panel have previously expressed the view that institutional acceptance facilities should not be established in the circumstances where there are two rival bids – this would be a material deviation from both ASIC's and the Panel's widely accepted position*".

98. Alludo submitted that "*[i]t is a reality of all takeovers that retail shareholders who accept the offer will have less flexibility with respect to withdrawal rights than is afforded to institutional investors who lodge acceptance instructions under an institutional acceptance facility. This asymmetry is accepted on the basis that institutional acceptance facilities can be an effective tool in enabling retail shareholders to realise the benefits of a takeover offer notwithstanding the practical constraints imposed by the mandates of institutional investors*".

99. Alludo further submitted that "*the asymmetrical position outlined above will always exist regardless of whether the concurrent scheme/bid structure is utilised*".

100. In *Patrick Corporation Limited 03*[18], it was submitted that the institutional acceptance facility contravened the "equality of opportunity" principle in section 602(c) because it was not available to all Patrick shareholders. The Panel concluded that the availability of the facility did not breach the equality of opportunity principle in section 602.

101. On balance, we are satisfied in this case that the disadvantage to retail shareholders does not rise to the level of unacceptable circumstances, having regard to the following matters:

    (a) the risks of early acceptance were prominently disclosed in the Transaction Booklet (including in the Chairman's letter, which retail investors were most likely to read when considering the Alludo Transaction)

    (b) the Nitro share price has traded consistently at levels above the value of the consideration under the Alludo Scheme or the Alludo Takeover Offer ($2.15), providing shareholders an opportunity to realise their investment by selling on market instead

    (c) while the market price for Nitro shares might suggest that the market considers there is the possibility of a higher offer being made, Potentia has to date only

[18] [2006] ATP 12 at [40]

issued inconclusive statements regarding the prospect of making a higher offer and

(d) while the scrip alternative under the Potentia Takeover Offer may be attractive to certain shareholders, the cash consideration at $2.00 is inferior to the consideration under the Alludo Scheme or the Alludo Takeover Offer (at $2.15) and below the levels at which the Nitro share price had been traded since the release of the Transaction Booklet.

The Scheme Fails Condition

102. Under the Implementation Deed, a condition of the Alludo Takeover Offer is that either the Alludo Scheme is not approved at the scheme meeting by the requisite majority of Nitro shareholders or, following the approval of the Alludo Scheme by the requisite majority of Nitro shareholders, the Court does not approve the Alludo Scheme in accordance with section 411(4)(b) (**Scheme Fails Condition**).

103. Potentia submitted that Nitro and Alludo were associates "*due to the Scheme/Bid structure and provisions in the Implementation Deed.*" It further submitted that "*even if the Implementation Deed and Scheme/Bid structure did not initially make Nitro and Alludo associates in respect of the Alludo Takeover Offer, they have subsequently become associated through acting in concert*".

104. Accordingly, Potentia submitted, the Scheme Fails Condition was void under section 629 because its fulfilment depended on events within the sole control of, or that were a direct result of action by, Alludo or Nitro, acting together as associates, as illustrated by the two following scenarios:

(a) Alludo and Nitro could agree to terminate the Implementation Deed before the second Court hearing, despite approval of the Alludo Scheme by the requisite majority of Nitro shareholders, and as a consequence, given the Alludo Scheme was conditional on the Implementation Deed not being terminated, the Scheme Fails Condition would be fulfilled.

(b) Nitro "*with the agreement or acquiescence of Alludo*" could ensure that the Scheme Fails Condition would never be fulfilled by not applying to the Court to convene the scheme meeting.

105. Potentia further submitted that Nitro and Alludo might agree to terminate the Implementation Deed in circumstances where Nitro would "*find that the proxies indicate the Alludo Scheme will be voted down and that the 50.1% acceptance condition of the Alludo Takeover Offer is unlikely to be satisfied*".

106. Alludo submitted that "*[t]he submissions put by Potentia in relation to the "commercial relevance" of the Scheme Fails Condition are speculative at best…*" and that "*...the proposition that Nitro and Alludo would conspire to manufacture an outcome that deprives Nitro shareholders of the benefits of the Alludo Takeover Offer is fanciful.*"

107. It also submitted that "*[a]n extension of the association concept to the Implementation Deed between Nitro and Alludo would have wide ranging implications for public M&A in Australia.*"

108. Nitro submitted that it and Alludo were not associates. It submitted that the Implementation Deed contained "*customary provisions for a transaction of the size and nature of the Alludo Transaction*" and had been negotiated on an arm's length basis in the usual manner. It submitted that the provisions did not result in Alludo exerting, or being able to exert, pervasive control or influence over the affairs of Nitro. Lastly, it submitted that "*speculation around whether the Alludo Scheme will be approved or not cannot possibly result in Nitro and Alludo acting in concert in relation to the affairs of Nitro*".

109. Section 629 prohibits off-market bids being subject to defeating conditions if the fulfilment of the condition depends on (among other things) the happening of an event that is within the sole control of the bidder or its associate. It renders void any such conditions.

110. A person may be an associate of another person if (among other things) they have entered into a relevant agreement for the purpose of controlling or influencing the composition of the company's board or conduct of its affairs (section 12(2)(b)) or if they are acting or proposing to act in concert in relation to the company's affairs (section 12(2)(c)).

111. While it is arguable that certain clauses of the Implementation Deed could come within the broad wording of the provisions of section 12(2)(b) and (c), the Panel has previously stated that "*[p]aragraphs 12(2)(b) and (c) should not be read unduly widely, as many agreements relate to the conduct of a company's affairs, which should not ordinarily be treated as within the policy of the association provisions, and which have never been held to be associations*".[19]

112. The Panel has also previously held that an agreement could technically fall within the broad wording in section 12(2)(b) and (c), but without contravening the policy of the association provisions, particularly the fundamental policy concern of the accumulation and exercise of voting power. [20]

113. In this matter, no submissions were made that the Implementation Deed concerned the accumulation or exercise of voting power, and we were not convinced that the Implementation Deed otherwise offended the principles in section 602.

114. Accordingly, we are not satisfied that the Implementation Deed gave rise to an association. Even if a technical association had been found to exist between Nitro and Alludo, we consider that the circumstances whereby Alludo and Nitro would act together as associates, to control the fulfilment of the Scheme Fails Condition or otherwise, were too hypothetical to be relevant for the purposes of considering whether there were unacceptable circumstances because of the operation of section 629.[21]

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[19] *National Foods Limited* [2005] ATP 8 at [58]
[20] *LV Living Limited* [2005] ATP 5 at [77]
[21] Potentia also submitted that "*other conditions may similarly be void under s629(1), due to association between Nitro and Alludo*". We also consider that the scenarios submitted by Potentia in relation to these conditions were speculative and not unacceptable

Issue of Rights under the Employee Equity Incentive Plan

115. On 11 November 2022, the Potentia Takeover Offer opened.

116. On 14 November 2022, Nitro issued restricted share awards and performance rights under its employee equity incentive plan (**Rights**).

117. In its application, Potentia submitted that it had *"been unable to conclude based on publicly available information (including the Transaction Booklet) and the Employee Equity Incentive Plan document dated 29 September 2019 (which is the basis for the issuing of the Restricted Share Awards) whether or not the Restricted Share Awards or Performance Rights are "options"."*

118. Potentia contended that, if the Rights were in fact options, Nitro had breached the "No Prescribed Occurrences" condition of the Potentia Takeover Offer[22] which states:

> *"During the Bid Period, none of the following Prescribed Occurrences occur:*
>
> *… (iv) Nitro or a subsidiary of Nitro issues shares or grants an option over its shares, or agrees to make such an issue or grant such an option…"*

119. We asked Nitro whether the Rights should be characterised as securities or options for the purposes of determining whether their issue constituted a "Prescribed Occurrence" for the purposes of the Potentia Takeover Offer.

120. In response, Nitro submitted that *"the Rights are "securities" as defined in section 761A of the Corporations Act on the basis that they give the holder a legal right to receive Nitro Shares if the prescribed vesting conditions are satisfied or waived. The holder of the Rights does not have the "option" to receive Nitro Shares. The issuance of the Rights (being "securities") is therefore not a prescribed occurrence event under the Potentia Takeover Offer."* Nitro confirmed that the Rights were currently unvested and that upon their conversion into ordinary Nitro shares, would represent 0.37%of the fully diluted share capital of Nitro. Nitro also submitted that "*Nitro was contractually bound to award the Rights to the participating employees prior to the announcement of the Potentia Takeover Offer (and therefore prior to the entry into the Implementation Deed).*"

121. Potentia challenged Nitro's claim that they were not "options", concluding that based on its interpretation of the Employee Equity Incentive Plan, "*the issue of the [Rights] breached the prescribed occurrence condition of the Potentia Takeover Offer*".

122. It therefore appeared from the submissions that both Nitro and Potentia had now formed a view as to the status of the Rights and whether or not the "No Prescribed Occurrences" condition of the Potentia Takeover Offer had been triggered by the issue of the Rights. So, while we had some concerns around the opaqueness of the Rights disclosure, both Potentia and Nitro can make the appropriate disclosure to shareholders on this matter. Also, we query whether this is a material disclosure issue.

123. Accordingly, we do not take this matter further.

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[22] As set out in section 10.3(b)(iv) of Potentia's original bidder's statement

Other matters

Media canvassing

124. On 16 January 2023, an article was published in the Australian Financial Review (**AFR**), titled '*Panel forms for Nitro Software case, submissions fly*'. The article identified the members of the sitting Panel and disclosed information that had not been disclosed in the Panel's media release in relation to the matter.[23]

125. The Panel Executive was concerned that the contents of this article may have been received in contravention of the confidentiality obligation and media canvassing restriction in the Procedural Rules[24] and made initial enquiries of each of the parties (excluding ASIC) with regards to the article in the AFR, reminding them, for the second time[25], of the media canvassing prohibition and asking them to confirm that neither they nor related bodies corporate, nor any of their directors, officers, employees, agents, contractors, service providers, advisers, nor any other person acting on their behalf, had any communications with the media regarding the article.

126. In effect each party gave the confirmation requested, with Potentia noting that its media adviser had received a call from one of the journalists responsible for the article, but no information had been given by the media adviser to the journalist. We considered the submissions from the parties and remained concerned about what appeared prima facie to be a blatant breach of the Procedural Rules. Accordingly, we directed the parties (excluding ASIC) to provide statements (each in the form of a statutory declaration) from every party representative in possession of confidential information stating (among other things) whether that person used or disclosed any confidential information and, if so, the details of such disclosure. The Panel executive also issued a media release advising the market that the matter was being investigated.[26]

127. Other than the admission by Potentia's media adviser referred to above, all the statutory declarations were in essentially standard form, denying having used or disclosed (including disclosing to any journalists) any confidential information other than as permitted under the Procedural Rules and stating, to the best of their knowledge, that the declarant was not aware of any other person who did so.

128. This process was a costly one for the parties, which we recognise. However, the media canvassing prohibition is important for several reasons and must be taken seriously by all parties to Panel proceedings, who undertake to comply with the Procedural Rules in their Notice to Become a Party.

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[23] See TP23/02

[24] See rules 18 and 19 of the Procedural Rules

[25] An email was sent by Potentia's media adviser to all parties, ASIC and the Panel Executive noting "*[w]e've hit the media*" on the day the Panel's media release was released to the ASX. Alludo and Nitro both submitted that this evidenced a breach of the media canvassing restriction by Potentia. While it was unclear to us whether there had been a breach of the media canvassing restriction at that stage, all parties were reminded of their obligations under the Procedural Rules.

[26] See TP23/04

129. The prohibition was put in place because the Panel considered that matters were more likely to be resolved quickly if parties refrained from canvassing their arguments in the media, and that it would receive more open and less polarised submissions if parties were not responding to media reports or worrying about how their submissions might be presented in the media. The rationale for the prohibition remains.

130. There appears to be a growing prevalence of apparent contraventions of the confidentiality and publicity restrictions[27]. We also have seen instances of leaks to the media in relation to potential transactions that have not been announced. The Panel considers that this type of conduct is damaging to all parties and to the reputation of our market. The Panel is concerned to see the conduct eliminated. While we are unable to form a conclusion as to who breached the prohibition on this occasion, we are satisfied that it was appropriate to put all parties (other than ASIC) through this exercise. We put the market on notice that steps will be taken where there is a breach.

Extension of time

131. Potentia requested an extension of time to make an application under section 657C(3)(b) to include any of the circumstances in the application for which that was required. Given we have decided not to make a declaration of unacceptable circumstances, we consider it is not necessary to give an extension of time.[28]

DECISION

132. For the reasons above, we declined to make a declaration of unacceptable circumstances. We consider that it is not against the public interest to decline to make a declaration and we had regard to the matters in section 657A(3). We are of the view it is not necessary to refer to the Court any question of law under section 659A.

133. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

Yasmin Allen
President of the sitting Panel
Decision dated 23 January 2023
Reasons given to parties 31 January 2023
Reasons published 2 February 2023

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[27] See, for example, *AusNet Services Limited 01* [2021] ATP 9 at [70]-[73] and *Nex Metals Explorations Ltd 02* [2021] ATP 16 at [131]-[132]

[28] Noting that if we had decided to make a declaration of unacceptable circumstances, depending on those circumstances it may not have been necessary to give an extension of time. See *Queensland North Australia Pty Ltd v Takeovers Panel* [2015] FCAFC 68 at [75]

Advisers

Party	Advisers
Potentia	Johnson Winter Slattery
Nitro	Allens
Alludo	Gilbert + Tobin