

RE ASIC AND WESFI LTD**Corporations and Securities Panel.****Decision handed down 12 October 1999**

Before: N Withnall (President), S Mordant (Deputy President) and A McCleary (Member). **N Withnall (President), S Mordant (Deputy President) and A McCleary (Member):**

Decision

1. The Panel has determined that, in the circumstances of the takeover bid for Wesfi, it is not satisfied that:

- (a) the resolution of the board of Innerhadden Limited to acquire shares in either Bristile or Wesfi to a value of up to \$8 million amounted to a proposal to acquire, or under which a person would acquire, a substantial interest in Wesfi;
- (b) a proposal for CPV to acquire 1.9% of the shares in Wesfi is a proposal to acquire, or under which a person would acquire, a substantial interest in Wesfi.

2. Accordingly, the Panel is not satisfied that unacceptable circumstances have occurred for the purposes of section 733(3) of the Corporations Law. Therefore, having no power to make a declaration as to unacceptable acquisition or conduct, the Panel makes no declaration.

Reasons for decision**Background****Application by the ASIC**

3. The Australian Securities and Investments Commission (ASIC) lodged an application with the Corporations and Securities Panel (Panel) on 9 August 1999, pursuant to section 733(1) of the Corporations Law. It appeared to ASIC that unacceptable circumstances pursuant to section 732 of the Corporations Law had, or may have, occurred in relation to:

- (a) an acquisition and proposed acquisition of shares in Wesfi by CPV; and/or
- (b) the conduct of CPV in relation to shares in Wesfi.

4. In the application, ASIC alleges that:

- (a) the acquisitions and conduct took place in the context of the takeover bid (Blend Bid) for Wesfi by Blend, a wholly owned subsidiary of Bristile.
- (b) CPV, a company closely connected with or an associate of Bristile, acquired 1.9% of the shares in Wesfi on market and sold them into the Blend Bid, and proposes to acquire up to another 7% to 8% of the shares in Wesfi for the same purpose (CPV Purchases).
- (c) the CPV Purchases occurred in the period from 16 April 1999 to 28 June 1999.
- (d) the CPV Purchases are properly characterised as side running. CPV is purchasing shares in the market *alongside* the offeror, Blend, feeding the shares into the Blend Bid. Blend is prohibited by section 667 of the Corporations Law from purchasing shares on market unless it offers a full cash alternative. The side running by CPV thus allows Blend to acquire the shares able to be purchased on market, without having to offer the same opportunity to sell for immediate cash settlement to each of the other shareholders and particularly not to those who have accepted the bid before becoming aware of the CPV Purchases.
- (e) the CPV Purchases were unacceptable because:
 - (i) CPV has just under 20% of the shares in Bristile and a common director, Alan Newman;

- (ii) CPV used nominee companies and a broker different from that usually used by CPV in order to conceal its identity from the market;
- (iii) it was CPV's intention to sell all the Wesfi shares it acquired into Blend's Bid;
- (iv) one purpose of the acquisitions was to assist Blend to meet its commercial objective of securing control of Wesfi;
- (v) another purpose was to prevent the shares from being acquired by friends of Wesfi; and
- (vi) Blend has not offered, nor agreed to offer a cash alternative under the Blend Bid.

Declaration/orders sought

5. ASIC sought a declaration under section 733(3) that unacceptable circumstances occurred in relation to:

- (a) an acquisition or proposed acquisition of shares in Wesfi by CPV; and/or
- (b) the conduct of CPV in relation to shares in Wesfi.

6. ASIC also sought an extension of the 60 day period referred to in sub-section 733(2)(a) of the Corporations Law for a period of a further 30 days.

7. If the Panel made any of the declarations sought, ASIC invited the Panel to make orders under section 734(2) of the Corporations Law as follows:

- (a) make orders that Blend be required to offer an alternative consideration under the Blend Bid to both persons who have accepted it and persons who may accept it during the currency of the offer, equal to the highest consideration paid by CPV for the shares it purchased;
- (b) make orders that, in the alternative to (a), Blend be required to cancel the acceptances by CPV, return the Wesfi shares and require CPV to divest those shares in such manner as the Panel sees fit; and
- (c) make such other order as the Panel thinks necessary or desirable pursuant to sub-section 734(2)(a) of the Corporations Law.

Constitution of Panel

8. The Panel was constituted under a direction of Mr Simon McKeon, Acting President of the Corporations and Securities Panel on 9 August 1999. The sitting members who constituted the Panel for the purpose of this inquiry were Mrs Nerolie Withnall (President), Mr Simon Mordant (Deputy President) and Ms Alice McCleary (Member).

Inquiry and brief

9. Pursuant to regulation 20 of the Australian Securities and Investments Commission Regulations 1990 (ASIC Regulations), the Panel decided:

- (a) on 11 August 1999 to hold an inquiry in accordance with sub-regulation 20(a) of the ASIC Regulations into the matters raised in ASIC's application; and
- (b) after considering ASIC's application, to extend the 60 day period referred to in sub-section 733(2)(a) of the Corporations Law for a period of a further 30 days.

10. Pursuant to regulation 22 of the ASIC Regulations, the Panel prepared a brief setting out a general description of the matters to be examined in the inquiry, a summary of the grounds presented in the application for the making of a declaration or an order by the Panel and the issues to be addressed in submissions to the inquiry. The brief was dated and issued by the Panel on 17 August 1999.

11. Pursuant to section 190 of the Australian Securities and Investments Commission Act 1989 (ASIC Act), the Panel made a direction that certain documents forming part of ASIC's application be kept confidential and required the solicitors and counsel for each affected party to give a confidentiality undertaking in respect of such information.

Legal proceedings

12. During the course of the Panel's deliberations, the following legal proceedings were instituted:

CPV v ASIC

13. On 10 August 1999, CPV commenced proceedings for declaratory relief in the Supreme Court of Western Australia and sought to have the action entered in the expedited list.

14. CPV sought declarations (in effect) that:

- (a) the shares acquired by it were not a substantial interest;
- (b) there was no relevant proposal;
- (c) the conduct could not as a matter of law be conduct in connection with the acquisition of any substantial interest; and
- (d) ASIC's application to the Panel dated 9 August 1999 was void and of no effect.

15. The Panel was not a party to the proceedings. The application to have the matter entered in the expedited list came before Steytler J on 12 August 1999 and was dismissed on that day. So far as the Panel is aware, no further steps have been taken in the action since that time.

CPV v ASIC and Bristle and Blend and Wesfi

16. On 23 August 1999, CPV applied to the Administrative Appeals Tribunal for review of ASIC's decision on 9 August 1999 to apply to the Panel. CPV also sought a stay of part or all of ASIC's decision.

17. The Panel was not a party to these proceedings. On 6 September 1999, the application for review of ASIC's decision was dismissed on the basis that the Tribunal had no jurisdiction.

18. CPV appealed to the Federal Court from the decision of the Administrative Appeals Tribunal, and also made an application to stay the decision of the Administrative Appeals Tribunal. The Panel was not a party to these proceedings. The application for a stay was unsuccessful and, so far as the Panel is aware, the appeal has not yet been heard.

CPV v Simon McKeon as the President of the Corporations and Securities Panel and the Corporations and Securities Panel

19. By a further application dated 23 August 1999, CPV applied to the Federal Court to review the decisions of the Panel:

- (a) not to revoke Mr McKeon's direction that Ms McCleary be a sitting member of the Panel for this inquiry; and
- (b) (in effect) refusing to expand the brief in relation to examining a statement in Wesfi's Part B Statement that Shareholders who own more than 53% of Wesfi's shares have stated in writing their intention to reject Bristle's offer (Cullity Interests).

20. Orders were sought that the direction appointing Ms McCleary be revoked and that the terms of the inquiry be expanded so as to include an inquiry into the Cullity Interests. Both Mr McKeon, in his capacity as President of the Corporations and Securities Panel, and the Panel constituted for this inquiry, were parties to these proceedings, and the Panel was heard on the application.

21. It is unnecessary to go into the details of these proceedings, other than to say that the Panel did not accept the contentions of CPV and, in particular, did not accept CPV's contentions that the brief did not allow the Cullity Interests properly to be examined.

22. CPV's application was dismissed by Carr J on 13 September: CPV v McKeon [1999] FCA 1272.

**Corporations and Securities Panel v Blend and
Bristile and Wesfi and CPV and ASIC**

23. On 27 August 1999, the Panel applied to the Supreme Court of Western Australia for an extension of time in which to make any declaration. The reason for the application was that, in the light of various matters, including:

- (a) difficulties in the distribution of the ASIC application to the affected parties;
- (b) matters raised by the parties in relation to the confidentiality of their submissions and the time taken to resolve those matters; and
- (c) the need to comply with the times prescribed in the ASIC Regulations,

the Panel formed the view that it could not complete its task unless an extension of time was obtained. Bristile, Blend and CPV initially opposed the application. On 3 September 1999, Miller J granted an extension of time until 28 September 1999, with liberty to the Panel to apply. A further extension of time was later granted, with the consent of ASIC and all the affected parties, until 12 October 1999.

**CPV v Nerolie Withnall and Simon Mordant (in their
capacity as the Corporations and Securities Panel)**

24. On 27 August 1999, Bristile and ASIC developed a settlement proposal which involved Blend, Bristile and CPV giving undertakings which would resolve some aspects of ASIC's regulatory concerns. Wesfi indicated that it opposed this settlement proposal.

25. As the Panel's inquiry was at an early stage, the Panel was unable to form a view as to whether the proposed undertakings were appropriate. Accordingly, on 2 September 1999, the Panel decided not to accept the proposed undertakings.

26. The Panel decided to hold a conference, pursuant to regulation 35 of the ASIC Regulations.

27. On 13 September 1999, CPV and Bristile and Blend made a further application to the Federal Court, seeking to review:

- (a) the decision of the Panel to refuse to accept the undertakings by CPV, Bristile and Blend;
- (b) various decisions of the Panel in relation to its conference including that Wesfi be entitled to attend and participate;
- (c) various proposed directions of the Panel in relation to the conference itself; and
- (d) the timing of the conference.

28. CPV also sought a stay of the Panel's inquiry until its application had been considered.

29. The Panel was a party to these proceedings and was heard on the applications. The application for a stay was dismissed. No further steps have been taken in the application since that time.

Corporations and Securities Panel v Bristile and Blend and ASIC and CPV and Wesfi

30. At the Panel's conference on 16 September 1999 (see paragraph 45), Blend and Bristile produced some documents over which legal professional privilege was asserted.

31. Accordingly, on 20 September 1999, with the consent of ASIC and the affected parties, the Panel referred questions of law to the Supreme Court of Western Australia pursuant to section 196 of the ASIC Act. In essence, the reference concerned whether legal professional privilege applied in relation to the production and use of documents produced to the Panel under a summons or notice to produce documents. The reference came before Miller J on 22 September 1999, who answered the reference, holding that legal professional privilege did not apply: *Corporations and Securities Panel v Bristile Investments Pty Ltd and Ors* [1999] WASC 183.

32. On 23 September Bristile and Blend lodged a notice of appeal from the decision of Miller J and applied for a stay. The Panel gave an undertaking not to use, rely upon or disclose to any parties to the inquiry the material in respect of which legal professional privilege had been asserted, until the determination of the appeal. In giving its undertaking, however, the Panel also expressly stated that, in the absence of a stay, it did not consider that the reference to the Supreme Court remained pending for the purposes of s 196 of the ASIC Act, and that it could, if it saw fit to do so, make a decision in relation to the inquiry without regard to the material in dispute.

33. On 4 October 1999, the appeal from the decision of Miller J came before the Full Court of the Supreme Court of Western Australia, which reserved its decision.

34. Subsequent to the hearing of the Full Court appeal, the Panel came to the decision set out in paragraphs 1 and 2. In the circumstances, there is no purpose to be served in inspecting, relying upon and distributing the material in respect of which privilege has been asserted, with the consequential delays in the Panel concluding its inquiry.

History of the application

35. ASIC lodged its application with the Panel on 9 August 1999. Pursuant to section 733(4) of the Corporations Law, the Panel was required to make its declaration within 30 days after the day on which the application was made or any period as the court otherwise ordered. Two extensions of time were granted to the Panel by Miller J. Accordingly, the date for the making of the Panel's declaration was extended up to and including 12 October 1999.

Expressions of interest

36. The Panel called for expressions for interest from non-parties through advertisements placed in local and national newspapers on 16 August 1999, with the due date being 19 August 1999. No expressions of interest were received by that date.

37. On 7 September 1999, the Panel became aware that Mr Gavin Bunning desired to be involved in the inquiry as an affected party. Accordingly, the Panel gave Mr Gavin Bunning, through senior legal counsel, the opportunity to make oral submissions as to why he should be treated as an affected party on 14 September 1999. The Panel considered Mr Bunning's oral submissions and then decided that he was not entitled to be present at the Panel's inquiry as of right pursuant to regulation 36(a). The Panel considered that it had a discretion under section

189(2) of the ASIC Act to make a direction that Mr Bunning be entitled to be present at the conference, but decided to exercise its discretion by not making such a direction.

38. On 13 September 1999, the Panel received a written request from Mr Robert Catto that he be allowed to make a short written submission to the Panel's inquiry. On 20 September 1999, the Panel decided that it would be inappropriate to consider Mr Catto's written submission.

Submissions

39. Written submissions were received from ASIC, CPV and Wesfi on 25 August 1999. Bristile and Blend (together Bristile/Blend) were granted an extension of time to lodge their submission to ensure procedural fairness and a written submission was received from them on 30 August 1999.

40. Submissions in rebuttal were received from ASIC, Bristile/Blend, CPV and Wesfi on 7 September 1999.

41. Final submissions were received from ASIC, Bristile/Blend, CPV and Wesfi on 5 October 1999.

Directions hearing

42. The Panel held a directions hearing on 9 September 1999 to settle various procedural issues relating to a proposed conference under regulation 35 of the ASIC Regulations.

43. At the directions hearing, affected parties were invited to make submissions on the following matters:

- (a) the matters which the Panel should include in its statement under sub-regulation 38(1) of the ASIC Regulations;
- (b) the availability of various witnesses to give evidence at the proposed conference;
- (c) the provision of documents to the Panel in connection with its inquiry, including the timing of delivery of such documents; and
- (d) the procedural guidelines that would determine the way in which the Panel's conference would be conducted.

44. Instructing solicitors and counsel for each affected party appeared at the Panel's directions hearing and made submissions on the above matters. After considering the submissions of the various parties, the Panel then made decisions in relation to the above matters and circulated the Procedural Guidelines, a Statement of Facts and a Statement of Issues pursuant to sub-regulation 38(1).

Conference

45. The Panel decided to hold a conference to allow the affected parties to make submissions to the Panel, to hear evidence from various witnesses and, subject to obtaining leave from the Panel, to allow counsel for each affected party to cross examine those witnesses. Each of the parties was represented by counsel.

46. The conference was held from 14 to 16 September 1999 and 24 September 1999. Because of the previous concerns with confidentiality, the conference was held in private.

Facts

47. The Panel finds the following to be the relevant facts.

- (a) On 31 March 1999, Blend lodged a Part A statement with ASIC for registration in relation to the Blend Bid.
- (b) On 1 April 1999, Bristile made an announcement to ASX of its intention to make a takeover offer for all of the fully paid ordinary shares in Wesfi through its wholly owned subsidiary, Blend.
- (c) The Part A statement was deemed registered at 5pm on 1 April 1999.
- (d) On 14 April 1999, the board of directors of Innerhadden Limited (Innerhadden) resolved that management be authorised to invest up to \$8 million dollars in either Bristile or Wesfi, whichever offered the better entry point.
- (e) Between 16 April 1999 and 28 June 1999, CPV purchased on market 1,158,990 ordinary shares in Wesfi, at prices ranging from \$1.38 to \$1.46 totalling approximately 1.9% of Wesfi.
- (f) Offers were dispatched to Wesfi shareholders on 30 April 1999.
- (g) The offer period under the Blend Bid was originally expressed to close at 5pm on 28 May 1999, but was subsequently extended.
- (h) At the commencement of the Blend Bid, the relevant shareholding interests in Wesfi were:
 - Blend 23%
 - Interests associated with Mr Cullity 39.4%
 - Holdings of other Directors 4.2%
- (i) Under the takeover offers as despatched to Wesfi shareholders, Blend offered 1 Bristile share plus 10 cents cash for each Wesfi share. On 26 May 1999, Blend increased the consideration to 1 Bristile share plus 25 cents cash for each Wesfi share.
- (j) On 26 May 1999, Blend announced to the ASX pursuant to section 663(3) of the Corporations Law that the takeover offer had become unconditional.
- (k) In its Part B statement dated 14 May 1999, Wesfi stated that Shareholders who own more than 53% of Wesfi's shares have stated in writing their intention to reject Bristile's offer. During the course of the bid, only one of these shareholders (representing approximately 0.8% of Wesfi's share capital) sold into the Blend Bid, after the consideration under the bid increased and the offers were declared unconditional.
- (l) CPV did accept the Blend Bid in relation to the Wesfi shares which it had purchased on market.
- (m) Blend could not have acquired Wesfi shares for a wholly cash consideration during the course of the bid without affording Wesfi shareholders who had accepted Blend's share and cash offer the opportunity to receive cash only in substitution for the consideration provided under the bid.
- (n) On 3 September 1999, Bristile announced that it would unconditionally stand in the market for Wesfi shares at \$1.46 per share until close of trading on 21 September 1999. At the time of that announcement, the last sale price of Wesfi shares on the Australian Stock Exchange was in excess of \$1.46. No shares were acquired by Bristile pursuant to that announcement.
- (o) Offers under the Blend Bid closed at close of business on 30 September 1999.
- (p) At the conclusion of the Blend Bid, the shareholding interests in Wesfi were
 - Blend 38.74%
 - Interests associated with Mr Cullity 39.43%
 - Interests of other directors 4.2%
- (q) CPV is the largest single shareholder in Bristile.
- (r) Blend is a wholly owned subsidiary of Bristile. Blend's principal activity is to hold shares in Wesfi acquired under the takeover offers.
- (s) CPV is a wholly owned subsidiary of Innerhadden. The business and affairs of CPV are conducted by Innerhadden.
- (t) The business and affairs of Innerhadden and CPV are managed by Futuris Corporation Limited (Futuris).

- (u) Alan Newman is a director of each of CPV, Bristle and Innerhadden. Mr Newman is the managing director of Futuris.
- (v) Mr Newman was closely involved in the strategy and implementation of the Blend Bid.
- (w) Mr Newman was involved in the purchases of Wesfi shares on behalf of CPV.

Issues

48. For the purposes of the Panel's conference and pursuant to regulation 38 of the ASIC Regulations, the Panel identified the following issues (as stated in its Statement of Issues) for its determination:

- (a) Was there at any time a proposal or proposals that CPV acquire shares in Wesfi and if so what was that proposal or what were those proposals.
- (b) Whether the relevant Wesfi shares actually acquired (comprising approximately 1.7% of Wesfi's capital) and/or those proposed to be acquired (the approximate 9-10% that \$8 m would buy) constitute a substantial interest in the circumstances.
- (c) Whether the shareholders and directors of Wesfi knew the identity of the person proposing to acquire a substantial interest.
- (d) Whether the shareholders and directors of Wesfi were supplied with enough information for them to assess the merits of the proposal under which CPV would acquire a substantial interest in Wesfi.
- (e) Whether the shareholders of Wesfi did or did not have reasonable and equal opportunity to participate in any benefits accruing to the shareholders of Wesfi who sold their shares on market to CPV or in connection with the proposal for CPV to acquire a substantial interest in Wesfi.
- (f) Whether, if unacceptable circumstances are found to have occurred, it is in the public interest for the Panel to make a declaration of unacceptable acquisition or conduct under section 733.
- (g) If it is in the public interest to make such a declaration, what orders the Panel should make.

The Corporations Law

Section 733(3)

49. "Where, on an application under sub- section (1), the Panel is satisfied:

- (a) that unacceptable circumstances have occurred:
 - (i) in relation to an acquisition of shares in the company; or
 - (ii) as a result of conduct engaged in by a person in relation to shares in, or the affairs of, the company; and
- (b) having regard to the matters referred to in section 731 and any other matters the Panel considers relevant, that it is in the public interest to do so;

the Panel may by writing declare the acquisition to have been an unacceptable acquisition, or the conduct to have been unacceptable conduct, as the case may be."

Section 732(1)

50. So far as is relevant to the Panel's inquiry, section 732(1) of the Law Corporations Law provides that unacceptable circumstances shall be taken to have occurred if, and only if:

- “(a) the shareholders and directors of a company did not know the identity of a person who proposed to acquire a substantial interest in the company; or
- (b) ... ; or

- (c) the shareholders and directors of a company were not supplied with enough information for them to assess the merits of a proposal under which a person would acquire substantial interest in the company; or
- (d) the shareholders of a company did not all have reasonable and equal opportunities to participate in any benefits, or to become entitled to participate in any benefits, accruing, whether directly or indirectly and whether immediately or in the future, to any shareholder or to any associate of a shareholder, in connection with the acquisition, or proposed acquisition, by any person of a substantial interest in the company; ...”

51. This Panel recognises that the rationale behind section 732 of the Corporations Law rests on the Eggleston Principles. The purpose of the Eggleston Principles is to ensure that the acquisition of shares in companies takes place in an efficient, competitive and informed market.

Materials considered

52. The Panel considered the evidence, documents and materials before it, as follows:

- (a) the ASIC application in relation to Wesfi Limited, together with a letter from ASIC dated 17 August 1999, requesting that the Panel make such orders as it thought necessary or desirable;
- (b) Panel Documents Volumes 1 and 2 which accompanied the ASIC application referred to above;
- (c) the Panel's brief dated 17 August 1999;
- (d) the submissions of ASIC, Bristile/Blend, CPV and Wesfi;
- (e) the submissions in rebuttal of ASIC, Bristile/Blend, CPV and Wesfi;
- (f) the oral submissions of counsel for ASIC, Bristile/Blend, CPV and Wesfi at the Panel's directions hearing on 9 September 1999;
- (g) the Panel's Statement of Facts and Statement of Issues and the Procedural Guidelines circulated on or about 9 September 1999;
- (h) the documents produced to the Panel in answer to the Panel's direction to produce documents served on the following persons:
 - (i) ASIC;
 - (ii) Bristile/Blend;
 - (iii) CPV; and
 - (iv) Wesfi;
- (i) the documents produced to the Panel in answer to witness summonses issued on the following persons:
 - (i) the Proper Officer of Hartley Poynton Limited;
 - (ii) the Proper Officer of Saw James Capel Limited;
 - (iii) the Proper Officer of Innerhadden Limited;
 - (iv) Alan Leslie Newman;
 - (v) Don Smith;
 - (vi) David Norman Gilham;
 - (vii) Robert George Bunning;
 - (viii) Gavin Law Bunning;
 - (ix) Richard Simpson;
 - (x) Ian Charles Kuba;
 - (xi) Andrew Lovett Frazer;
 - (xii) Lawrence John Clark; and
 - (xiii) Denis Michael Cullity;
- (j) the opening addresses given by counsel for ASIC, Bristile/Blend, CPV and Wesfi at the conference convened by the Panel on 14 September 1999, and the submissions made by counsel from time to time during the conference;
- (k) the evidence given by the following witnesses over the course of the Panel's conference from 14-16 September and 24 September 1999:

- (i) Lawrence John Clark;
 - (ii) Don Smith;
 - (iii) Gavin Law Bunning;
 - (iv) Andre Theron Morkel;
 - (v) Bruno Giovanni Camarri;
 - (vi) Andrew Lovett Frazer;
 - (vii) Richard Simpson;
 - (viii) Robert George Bunning;
 - (ix) Ian Charles Kuba;
 - (x) David Norman Gilham;
 - (xi) Denis Michael Cullity;
 - (xii) Alan Leslie Newman; and
 - (xiii) Paul Owen Depiazzi; and
- (l) the final submissions of ASIC, Bristile/ Blend, CPV and Wesfi.

Reasons for decision

Issues for determination

53. Unacceptable circumstances is defined exhaustively in section 732 of the Corporations Law.

54. The Panel considers that section 732 (so far as it concerns this Panel) requires the determination of two key threshold issues. The first is whether or not CPV acquired a substantial interest in Wesfi. The second is whether there was a proposal to acquire, or under which a person would acquire, a substantial interest in Wesfi.

Proposal

55. In *Re Australian Securities Commission v John Fairfax Holdings Ltd* (1997) 15 ACLC 1,457 at 1,470; (1997) 25 ACSR 441 at 455, the Panel constituted for the purpose of the Fairfax inquiry (Fairfax Panel) considered that the general principle set out in the Eggleston Principles relates to the making of a general offer to acquire all the shares, or a proportion sufficient to enable the exercise of voting control. The Panel considers this *general offer* is what is meant by *proposal* in sections 731 and 732.

56. With respect to the Fairfax Panel, this Panel is inclined to agree with the final submissions of Wesfi and ASIC to the effect that *proposal* in the sense used in section 732 is *not* confined to a general offer. The Panel considers that any purchases and proposed purchases by CPV *could* amount to a proposal, even though CPV was not making a general offer under a takeover bid.

57. The Corporations Law should be interpreted according to the object and purpose underlying the Corporations Law: section 109H of the Corporations Law. To adopt the narrow construction of proposal as suggested by the Fairfax Panel would, in our respectful view, frustrate the very purpose and object underlying section 732(1) of the Corporations Law.

58. That purpose or object is to discourage any activity which would undermine the Eggleston Principles. Accordingly, the Panel considers that proposal should not be equated with a general offer and should instead, be interpreted in accordance with its ordinary and natural meaning.

59. The Macquarie Dictionary definition of proposal includes:

- "1 the act of proposing for acceptance, adoption, or performance;
- 2 a plan or scheme proposed."

60. The Macquarie Dictionary definition of propose includes:

- “1 to put forward (a matter, subject, case, etc) for consideration, acceptance, or action ...
2 to put forward or suggest as something to be done ...”

61. ASIC Practice Note 59, Announcing and Withdrawing Takeover Bids, paragraph 21 says:

“... the word proposed allows something less than a fixed and settled intention which is not likely to be changed (*Commerce Commission v Fletcher Challenge Ltd* (1989) 2 NZLR 554 at 606, 607; *Hooker Rex P/L v SA Land Commission* (1976) 14 SASR 63 at 68-70 and *Ex parte Christensen* [1984] 1 QdR 382 at 387). The idea must have gone past the mere discussion stage. It must involve something more than a mere inward thought, or a tentative, vague and unsettled notion. However, the thinking or discussion of the idea need not yet have resolved all relevant matters, including matters of detail. The plan can also be tentative (eg, a final decision has not yet been made whether or not it will proceed) or contingent (eg, on obtaining the necessary finance).”

62. The Panel is inclined to accept ASIC's views as referred to in paragraph 61.

63. A key issue for determination by this Panel is whether the resolution passed at an Innerhadden board meeting that management be authorised to invest up to \$8 million in either Bristle Ltd or Wesfi Ltd, whichever offered the better entry point is to be characterised as a proposal for the acquisition of a substantial interest in Wesfi.

64. The Panel is not satisfied that the resolution, taken on its own, amounted to a proposal to acquire shares in Wesfi to the value of \$8 million. The resolution authorised management to acquire shares in Wesfi. The resolution placed a limit of \$8 million on the money that could be spent to acquire shares in Wesfi but did not represent an intention to purchase shares to the value of \$8 million in Wesfi. The Panel is not satisfied that there was a sufficiently firm intention to purchase shares in Wesfi to the value of \$8 million to amount to a proposal to do so.

65. Subsequent to the resolution CPV did acquire shares in Wesfi. The share acquisitions were made pursuant to and under the authority of the Innerhadden board resolution. The inevitable inference is that the shares that were actually acquired were acquired pursuant to a proposal to acquire those shares.

Substantial interest

66. Substantial interest is not defined in the Corporations Law.

67. In *Brierley Investments Limited v Australian Securities Commission* (1997) 15 ACLC 1,341; (1997) 78 FCR 255 Emmett J said at ACLC 1,348; FCR 262:

“If the expression used in the statement of the Eggleston principles was significant interest rather than substantial interest, it would be very easy to conclude that, in the particular circumstances of a specified company, the smallest proportion of issued shares could constitute a significant interest, having regard to the numbers of shares held by other shareholders. Nevertheless, while substantial is susceptible of ambiguity and is calculated to conceal a lack of precision, it may signify a shareholding interest which is real or of substance, as distinct from ephemeral or nominal (per Deane J in *Tilmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) ATPR ¶40-138 at 18,500; (1979) 42 FLR 331 at 348), a shareholding interest of a material nature or of real worth or value (*Macquarie Dictionary [Macquarie University, Sydney, 1981]*) or a shareholding interest which is of real significance or is important (*Shorter Oxford Dictionary*, Oxford University Press, Oxford, 1993). A very small proportion of the issued share capital of a company might be material or significant in particular circumstances. Whether such circumstances had been made out in a particular case would ultimately be a matter for the Panel.”

68. In *Elders IXL Ltd v National Companies and Securities Commission* (1986) 4 ACLC 457; [1987] VR 1 Marks J, in rejecting a submission that section 60 of the Companies (Acquisition of Shares) Code, a predecessor of section 733, applied to certain acquisitions of shares and certain conduct, concluded that the parcel of shares in question was not a substantial interest within the meaning of those parts of section 60 which correspond with section 732(1). Marks J said (at ACLC 477-478; VR 17-18):

“It is unnecessary to give definitive meaning to the expression substantial interest in the sub-section. At the very least, in my opinion, it must be understood in the context of the takeover code. It may well be that its meaning cannot be defined by reference to a stated percentage or a minimum percentage, but that the question as to what is or is not a substantial interest for the purpose of the sub-section is to be determined according to the circumstances of a particular case. But its meaning in a particular case must attach to a step in the direction of takeover or change in corporate control. It is not to be considered in a vacuum as relating solely to size. The size must have relationship to a threat or potential threat to the stability of corporation control.”

69. In *Brierley Investments Ltd v Australian Securities Commission* Emmett J said that he would be disposed to accept the statement of Marks J as correct.

70. Whether a shareholding interest is a substantial interest is a question of fact and degree which must be determined according to the circumstances of the particular case. The meaning of substantial interest must be viewed in the context of the provisions of the Corporations Law relating to the acquisition of shares. Whether a particular shareholding interest is a substantial interest for the purposes of section 732(1) of the Corporations Law must be viewed in the context of the circumstances in which the shareholding interest is, or is to be, acquired. In the Panel's view, a small number of shares could, in certain circumstances, constitute a substantial interest for these purposes.

71. A key issue for determination by the Panel is whether the 1.9% of Wesfi that was acquired by CPV, amounts to a substantial interest in the circumstances of this case.

72. The Panel notes that because of the 30 day extension referred to in sub-section 733(2)(a) (see paragraph 9(b)), the Panel only had jurisdiction to make orders (if any) in relation to those of the CPV share acquisitions that occurred during the period 12 May 1999 to 28 June 1999 (inclusive). Such percentage equals approximately 1.7% of Wesfi's share capital.

73. At the commencement of the Blend Bid the relevant shareholding interests in Wesfi were:

- Blend 23%
- Interests associated with Mr Cullity 39.4%
- Holdings of other Directors 4.2%

74. Shareholders holding approximately 53% of the shares in Wesfi had stated in writing that they did not intend to accept the Blend Bid. During the course of the bid only one of those shareholders (representing approximately 0.8% of Wesfi's share capital) sold into the bid, after the consideration under the bid had increased and after the offers were declared unconditional.

75. At the conclusion of the Blend Bid the relevant shareholding interests in Wesfi were:

- Blend 38.74%
- Interests associated with Mr Cullity 39.43%
- Interests of other directors 4.2%

76. For a shareholding interest to constitute a substantial interest it is not necessary that the acquisition of those shares should effect a change in corporate control. However, the interest must be significant in the context of corporate control. The Panel is not satisfied that in the circumstances of this bid a proposal for CPV to acquire 1.9% of the shares in Wesfi is a proposal to acquire, or under which a person would acquire, a substantial interest in Wesfi.

Conclusions on section 732(1)

77. Having found that there has been no acquisition of a substantial interest nor any proposal to acquire a substantial interest, the Panel finds that unacceptable circumstances have not occurred within the meaning of sub-sections 732(1)(a), (c) or (d).

Conclusions on section 733(3)

78. Accordingly, the Panel is not satisfied that unacceptable circumstances have occurred for the purpose of sub-section 733(3) of the Corporations Law. Having no power to make a declaration as to unacceptable acquisition or conduct, the Panel makes no declaration.

79. The Panel received extensive submissions regarding whether it should be satisfied that it is in the public interest to declare the CPV acquisition of shares in Wesfi to have been an unacceptable acquisition. In the view of this Panel, where:

- (a) a third party acquires a substantial interest in a company which is subject to a takeover bid; and
- (b) there is a common director between the third party and the bidder,

there will be a heavy onus on a party to persuade the Panel that it would not be in the public interest to declare the acquisition to have been an unacceptable acquisition. That onus would be heavier where the common director was closely involved in the bid strategy and in the share acquisition by the third party.

80. As the Panel is not satisfied that unacceptable circumstances, as defined in Corporations Law section 732(1), have occurred, it is neither required nor authorised to consider whether it is in the public interest that the Panel should declare the acquisition to have been an unacceptable acquisition in this case.

81. However, the decision of this Panel should not be taken as an indication that it would not have been in the public interest to declare the CPV acquisition of Wesfi shares to have been an unacceptable acquisition, had the acquisition been of a substantial interest.