

In the matter of Realestate.com.au Ltd
[2001] ATP 1**Catchwords**

Unacceptable circumstances - public announcement of intention to bid - bidder purported to make less favourable bid - effect of target's failure to correct forecasts - whether announcement of bid came contained effective condition to the making of bid - whether announcement made recklessly - effect of announcement on market for target shares - whether bidder knew or should have known that announced condition could not be fulfilled - whether bidder to be required to make bid - costs

Corporations Law (Cth), sections 602(a) and (b)(iii), 629, 631, 657A, 670E, 670F

Panel Guidance Note 1: "Unacceptable circumstances"

ASIC Practice Note 59: "Announcing and withdrawing takeover bids"

BT Australia Ltd v The Bell Bros Ltd (1981) CLC 40-719

ASC v Mount Burgess Gold Mining Company NL (1995) 13 ACLC 271

These are our reasons for our decision to declare that unacceptable circumstances existed in relation to the affairs of realestate.com.au Ltd (*Realestate*) in connection with the announcement by RP Data Ltd (*RP Data*) on 5 October 2000 of a bid for Realestate, as a result of an application by the Australian Securities and Investments Commission.¹

REASONS FOR DECISION

1. The Panel in this matter is constituted by Jeremy Schultz (sitting President) Marian Micalizzi (sitting Deputy President) and Fiona Roche.
2. ASIC sought the following declaration and orders:
 - 1 A declaration pursuant to section 657A that the withdrawal of the takeover bid announced on 5 October 2000 and its replacement by a further bid announced on 30 October 2000 constituted unacceptable circumstances.
 - 2 An order pursuant to section 657D(2) that RP Data be directed to proceed with its bid announced on 5 October 2000.
 - 3 An order pursuant to section 657D that RP Data offer shareholders of Realestate the terms of the bid announced on 5 October 2000.
 - 4 An order that no further steps be taken in relation to the takeover bid announced on 30 October 2000.
 - 5 Alternatively to paragraphs 1 to 4 an order pursuant to section 657D that RP Data prepare and lodge a new supplementary bidder's statement explaining the details and providing the particulars of the bid that was announced on 5 October but was later withdrawn
 - 6 Such further or other declaration or orders as the Panel considers appropriate.

¹ Statutory references in these reasons are to the Corporations Law.

THE PARTIES

realestate.com.au ltd

3. The following short account of Realestate is extracted from an expert report² dated 18 December 2000 prepared by Grant Thornton:

[Realestate] (formerly known as Netwide Pty Limited) has been an Internet service provider offering technology solutions and design since February 1995. [Realestate's] portal website, www.realestate.com.au, was established in early 1996.

[Realestate] was established to exploit the synergistic benefits of combining Netwide's activities with the activities of Property Seeker Management Pty Limited, a property and client database management software provider to the real estate industry established in 1997.

Since listing, [Realestate] has experienced a sustained period of growth, achieved in both client numbers within the real estate industry and also in terms of consumer traffic to [Realestate's] website.

The number of real estate agents currently listing property is approximately 2,100 which has been achieved through a sustained direct sales effort and strategic alliances with industry groups. The growth in the number of agents has seen the number of active property listings on the site grow to over 85,000.

The growth in content on [Realestate's] website has been matched by growth in consumer traffic. The site now has more than 150,000 unique users each month resulting in more than 6 million page impressions.

Growth in user traffic has been driven by marketing initiatives, in particular by exclusive online distribution alliances with ninemsn and LookSmart.

4. Realestate was floated in December 1999 and raised \$6.5 million under a prospectus. It has set up a web site and marketed its products and services, ahead of earning revenue to cover its expenses. It is common ground that the company is gaining fee-paying clients and public interest for its site, but that it has expended much of its capital in doing so and that its expenses still exceed its revenue from sales. It is less clear when the company will break even, what additional funds it will need to reach that point and where it is to obtain those funds.
5. During mid to late 2000, Realestate actively looked for additional equity capital and business co-operation arrangements from a number of sources, particularly companies whose businesses might mesh with its own.

RP Data Limited

6. One of those companies was RP Data Ltd, another listed company which sells real estate software and listings. RP Data has traded profitably for some years since listing. It remains controlled by the Catelan family who established it.
7. After inconclusive approaches earlier in the year, during September 2000, Realestate invited RP Data to bid for the company. On 13 September Mr Raymond Catelan, managing director of RP Data, wrote to the Chairman of Realestate that:

'We have been requested by Silverstream Associates [financial advisers to Realestate] to express in writing our interest in acquiring a controlling interest or all of the issued shares in realestate.com.au Limited (REA).

² This is the report to be provided by Realestate to its shareholders with the notice of the general meeting held on 25 January 2001 to consider the News Limited proposal.

RP Data Limited and parties associated with it (RPD) confirm that it is willing to make a conditional bid for a controlling interest in or all of the issued shares in REA. The offer would be \$0.10 plus one RP Data Limited share for every two REA shares.

However, prior to making any such bid, RPD would like the exclusive opportunity to review all material contracts and agreements to which REA is a party and other key information relating to REA. '

8. RP Data being a competitor, Realestate did not provide it with the opportunity Mr Catelan requested, until RP Data had committed to a bid.
9. On 3 October 2000 representatives of RP Data, the then Managing Director of Realestate and Mr Duncan of Silverstream met to discuss the proposed bid. Realestate declined to provide confidential information until RP Data had committed to bidding for Realestate and its representatives encouraged RP Data to formalize its bid. Mr Duncan told ASIC:

'I was hopeful of encouraging them to proceed with a takeover bid' and that RP Data had been invited in writing by Realestate to make a formal takeover bid.

'Realestate had suggested to RP Data that if they wished to continue in these discussions and make inquiries they should formalise their bid, that that was considered to be the appropriate thing to do, and I did encourage the chief executive Ray Catelan that that was the appropriate step ...'.

Mr Catelan 'was going away for a week or so and it seemed that unless they proceeded and made a formal bid before he went away, the thing might lapse for some time. So I encouraged him – I indicated to him that, as had been said in writing to him by the Chairman [of Realestate] I think, that the Board looked forward to receiving a formal bid from the company and encouraged him to think of that.'

In a statement prepared for us, Mr Duncan added:

'RP Data is a direct competitor of Realestate [he gave details] ... Realestate's management were concerned to ensure that RP Data made a genuine bid before disclosing confidential information to RP Data.

It is against this background that I encouraged RP Data's officers to make a bid if they wished to have access to non-public information of Realestate or to do due diligence.'

10. In view of these statements by Mr Duncan that he sought from RP Data a definite commitment to bid, supported as they are by the evidence of Mr Catelan and Mr McColl³ and submissions by the company to us, we infer that, while Realestate was committed to accepting a due diligence condition in the announcement or the bid, RP Data would not have been allowed to do due diligence if, for instance, it had announced only that it was considering a possible bid, or discussing a possible bid with Realestate.

The 5 October Announcement

11. RP Data on 5 October made the announcement at the centre of this matter. It was that two companies associated with RP Data (REA Holdings (No. 1) Pty Ltd and REA Holdings (No. 2) Pty Ltd)⁴ would make a joint bid for Realestate on the following terms:
 - (a) a cash payment by REA Holdings (No 1) Pty Ltd of \$0.10 per share; and
 - (b) for every 2 Realestate shares, REA Holdings (No 2) Pty Ltd would procure the transfer to the Realestate shareholder of 1 ordinary fully paid share in RP Data Limited, from shares previously issued to Catelan family interests;

³ The Business Development Manager of RP Data.

⁴ Here and elsewhere, we refer to all three companies as RP Data, unless there is reason to distinguish.

- (c) Shares in Realestate acquired under the bid would be held jointly by the joint bidders;
 - (d) The offer was subject to the following conditions:
 - (i) that in the sole opinion of the directors of the offerors, between 5 October 2000 and the closing date for the acceptance of the offers under the takeover bid, no material adverse matters arise concerning the structure, business, financial (including assets and liabilities) or trading position of Realestate (or any subsidiary of Realestate) (the *adverse events condition*); and
 - (ii) completion to the absolute satisfaction of the directors of the offerors of due diligence investigations of the structure, business, financial (including assets and liabilities) or trading position of Realestate (or any subsidiary of Realestate) prior to the date of lodgement of the Bidder's Statement or within 30 days from 5 October 2000, whichever first occurs (the *due diligence condition*).
12. In the week after the 5 October announcement atypically large numbers of shares in Realestate were traded on ASX at prices higher than before. The price then drifted lower until 30 November, when the News proposal was announced. See Appendix 2.
13. After the 5 October announcement was made, Realestate and RP Data entered into an agreement allowing RP Data to conduct a limited due diligence investigation into Realestate under satisfactory confidentiality arrangements. The due diligence took place on 17 and 18 October. At this time, RP Data first obtained some details of Realestate's outgoings, sales, cash resources, budgets and cost controls, additional to those released to the market.

The 30 October bid

14. RP Data advised the market on 30 October that it would not bid for Realestate on the terms it had announced on 5 October, but on the following terms:
- (a) REA Holdings (No 2) Pty Ltd will offer one (1) RP Data Limited share for every two (2) Realestate.com.au Limited shares, which will be held jointly by REA Holdings (No 1) Pty Ltd and REA Holdings (No 2) Pty Ltd; and
 - (b) Conditional upon:
 - (i) Acceptance by Realestate.com.au Limited shareholders at an extraordinary general meeting of a restructure proposal which would combine the operations of Realestate with those of RP Data (the *reconstruction condition*); and
 - (ii) No specified occurrences (eg. Insolvency events, further issue of shares or other securities (not including Macquarie Bank's right of conversion under its facility), disposal of major assets of the business, material adverse change to financial position, etc.) (the *specified occurrence condition*).

Also on 30 October, RP Data lodged and served a bidder's statement for that bid.

15. On 30 November, Realestate announced that it had entered into an agreement with News Limited (a company in the News Corporation group). Under that agreement, News would support Realestate financially and by supporting the Realestate brand: Realestate would advertise in the News press, provide preferential access to its site from News websites and issue up to 40% of its shares to News. Shareholder approval of the agreement was given at a general meeting on 25 January 2001.

Differences between the Announcements

16. The terms announced on 30 October differed from the terms announced on 5 October by:
 - (a) the omission of the 10c per share cash element of the bid consideration;
 - (b) the introduction of the reconstruction condition;
 - (c) the omission of the due diligence condition; and
 - (d) the replacement of the adverse events condition with the specified occurrences condition.
17. At the time of the announcement, RP Data shares were trading at 44 cents. On that basis, the bid consideration was then worth 32 cents per Realestate share. Although the new proposal omitted the cash element, RP Data proposed to invest an equivalent amount (\$5 million) in Realestate under the reconstruction proposal.
18. The adverse events condition was subjective, in the sense that its satisfaction depended on an arbitrary decision of the board of RP Data. The specified occurrences condition which replaced it is objective, in the sense that it depends on provable facts. A condition may be objective in this sense, even if it incorporates a materiality threshold.

Reasons for the Differences – the Financial Position of Realestate

19. In a letter of 30 October to ASIC giving its reasons for deciding not to bid on the terms announced on 5 October, RP Data stated that it had relied on the following representations, and that they were all untrue:
 - (a) Realestate had drawn down only approximately \$500,000 from the Macquarie facility;
 - (b) There had been a significant upsurge in new customers signed up over the previous 10 weeks;
 - (c) Realestate was still operating on its own funds (presumably those raised from the public offering);
 - (d) Realestate had sufficient cash resources (non-borrowed funds) to trade through until January 2001, when it would become cash positive.⁵
20. Raymond Catelan and Ross McColl, the managing director and business development manager of RP Data Ltd, gave a different explanation of the decision in ASIC's examination. They said that their change of intention was a result of learning during the due diligence on 17 and 18 October that Realestate:
 - (a) was still consuming cash at a rate of about \$500,000 per month;
 - (b) was unlikely to be cash flow positive before March 2001 (instead of January 2001);
 - (c) had limited discretionary control over its expenses;
 - (d) had creditors of \$1.5 million, many of them over 60 days old, and debtors of less than \$300,000; and
 - (e) had drawn down the Macquarie facility for running costs, not, as RP Data had assumed, to repay pre-existing bank debt.

Realestate does not agree with the figures in paragraphs (a) and (d).

21. There is considerable difference between Realestate and RP Data about the information

⁵ This expression is used throughout to mean to make a profit for the relevant month on an accruals basis, disregarding non-cash expenses.

provided by Realestate to RP Data before the 5 October announcement concerning the financial position and prospects of Realestate. This is reflected in submissions to us and in transcripts of examinations by ASIC of officers of the two companies.

Cash Usage

22. In cash usage statements provided to Australian Stock Exchange Ltd (ASX) after each quarter, Realestate summarized its cash flows. The following figures are extracted from statements lodged on 31 July 2000 for the quarter to 30 June, and on 31 October 2000, for the quarter to 30 September:⁶

	June quarter	September quarter
Negative operating cashflow	1,219,000	1,600,000
Revenue on Sales	783,000	712,000
Advertising and marketing	533,000	197,000
Staff costs	321,000	1,001,000
Consultants and Contractors	(no amount)	340,000
Equity Investment	678,000	nil
Investment in physical assets	118,000	nil
Proceeds of Borrowings	nil	500,000
Cash at end of Quarter	1,971,000	871,000

While the company had \$871,000 cash at the end of the September quarter, \$500,000 had been drawn down on 8 September under the Macquarie facility mentioned shortly. In effect, only \$371,000 was from the money raised under the prospectus.

23. In the announcement of its June quarter cash usage statement on 31 July Realestate stated that:

'In addition to its statement of cash flows, the company is continuing to generate a growing revenue from its business operations, increasing to \$783,000 in the June quarter – almost doubling those of the previous quarter. ...

With revenue on the rise, realestate.com.au's cash position is considered more than adequate to meet the company's needs during its development phase. Cash usage for the quarter was \$2,015,000 including the New Zealand transaction. Given recent operational streamlining and encouraging revenue projections, the Directors have budgeted to be in a cash flow positive position by January 2001.'

24. On 3 August, in an announcement made in response to a query from ASX on Realestate's cash reserves, in response to the 31 July cash usage statement, Realestate announced that it had 'cash to fund its activities for 1.6 quarters' and that:

'A budget has been adopted by the board of directors which incorporates conservative revenue growth with responsible cost control. This budget provides that the company becomes cash positive in January 2001 and is not reliant on any further injection of funds.'

It also mentioned that staff costs had been reduced by over 50% by redundancy and attrition.

⁶ All financial data on Realestate are on a consolidated basis.

25. On 29 August, Realestate announced that Macquarie Bank had agreed to provide a working capital debt facility of \$2 million, four weeks after it had said its budget did not rely on any injection of funds, and it commented that:
- 'The availability of the additional funds from Macquarie will enable the Company to explore to the fullest the various alliance arrangements currently under exploration.'*
26. In the announcement on 31 October of its September quarter cash usage statement, Realestate advised that:
- 'Cash usage for the quarter was \$1.6 million. This usage rate is still regarded as high by the Directors but is \$415,000 less than the June quarter⁷. The Directors are continuing to review monthly expenditures and are currently considering strategies to further reduce expenditure and improve operational procedures.*
- In August 2000, [Realestate] accepted a \$2 million loan facility with Macquarie Bank. The first tranche of \$500,000 was drawn down during the quarter. The facility has been the subject of a previous announcement to the market.*
- The Directors are constantly monitoring the cash position and are confident that if an alliance development and restructuring cannot be achieved in the necessary time frame, appropriate action can be taken to ensure that the company will not trade to the point where it is unable to pay its debts as and when they fall due.'*
27. In a response to an ASX query on that announcement, Realestate said on 3 November that:
- 'The Company does not intend to maintain the present level of cash expenditure. The Board has instructed that operational expenditure be further reduced and will make a further announcement to the market when a revised plan has been finalised.'*
- 'The actual revenues and expenses [for the September quarter] have varied from the budget implemented by the Board for the current financial year. The actual revenues were 80% of budgeted revenues. Actual expenses were 9% higher than budgeted expenses.'*
- 'On 10 October a report was presented to the board highlighting the anticipated cash position of the Company and commenting on performance to budget. On instruction from the Board additional analysis was undertaken to ensure Directors were fully informed before making any announcement to the market and before completing the Directors Statement in the Annual Report. The work was completed in line with the preparation of the 4C [cash usage statement]. Directors were advised on 30 October and the 4C issued to the market on 31 October.'*
28. In the Directors' Report in its Annual Report for the financial year to 30 June 2000, signed on 23 October, the directors of Realestate said that:
- '... the cash reserves raised through the Initial Public Offering have been exhausted. Macquarie Bank have provided a working capital debt facility of \$2 million and the company is now seeking additional funding and market consolidation through alliance partnerships.'*
- In note 24 to the accounts, they said that the company 'is dependent on its associate Macquarie Bank Ltd for working capital funding'.*
29. Accordingly RP Data were substantially correct in their conclusion that at mid-October Realestate had all but exhausted the funds it raised in the public offering and they were entirely correct in inferring that before it became cash positive it would need funds in addition to those raised in the public offering. Given that by mid-October it was foreseeable that the second drawdown would shortly be needed, their error over the date of that drawdown is not material. Whilst we have worked from historic figures and to that extent

⁷ CSP Note: The cash usage statement for the June quarter gave \$2,015,000 as the total of operating and investment cash flows.

we have had the benefit of hindsight, RP Data had access to current financial information from their due diligence investigation in mid-October, from which similar conclusions about Realestate's financial performance until at least the end of October could already be drawn.

Continuing Losses

30. Realestate prepared a budget which indicated that the company would become cash positive in early 2001 (the *due diligence budget*). Parts of this budget dealing with cash flow were shown to RP Data on 17 and 18 October. The due diligence budget forecast a sharp increase in the level of sales revenue on the introduction of new products: increases of up to 28% from one month to the next are predicted for months after November 2000, the latest month for which any actual data have been provided to us.
31. Management financial reports given to the board of Realestate for its meeting a few days later on 27 October, however, forecast that the company would make a loss in each month of the financial year 2001, on the basis of revenue increases much more in line with actual increases during calendar 2000. Wherever we have comparable figures,⁸ the actual losses, as shown in unaudited management accounts, are materially higher than in the forecasts shown to the Board and materially higher again than in the due diligence budget. The Board on 3 November disclosed that the results for the September quarter were materially below budget.
32. According to Realestate's management accounts, Realestate lost \$1.33 million in the quarter ending on 30 September 2000⁹ and over \$400,000 in each of September and October,¹⁰ with a corresponding reduction in net assets.
33. According to the budget provided to the Realestate board for its meeting on 27 October, the company will draw down \$1.8 million of the Macquarie facility and will have just over \$300,000 cash in hand at 2 March. Even on that budget, the company failed to meet its forecasts on 31 July and 3 August that its cash position at 30 June was adequate to fund its development phase, that it would be cash positive by January 2001 and that it was not reliant on any further injection of funds. On the contrary, it was apparent by mid-October that the company would not be cash positive before March 2001 and that it required a substantial further injection of funds – in the event not less than \$1.5 million.
34. This shortfall is material, not only because of its magnitude, but because the losses may continue beyond March. The company's expenses did not trend down in July, August, September and October 2000. On the most recent figures for its sales receipts, while they trended up over calendar 2000, at the present rate of progress sales revenue will not overtake the present level of expenses for some months yet. PKF observed in their report that, even after Realestate first becomes cash positive, 'in subsequent months there are certain periods where the cash flow will be negative'.
35. Realestate submitted that this deterioration was not material: the cash position was only

⁸ With one exception: the due diligence budget overstates the actual loss in July 2000. A handwritten note suggests that this is due to a mistake in accruing redundancy expenses.

⁹ In two reports (Grant Thornton *Independent Expert Report Proposed Issue of Shares to News Limited* 18 December 2000 and PKF Corporate Advisers Pty Ltd *Independent Expert's Report Realestate.com.au Limited Proposed Transaction with Macquarie Bank Limited* 25 October 2000) the loss for the September quarter is given as \$1.57 million. This appears to be overstated by \$241,000, mainly because a provision made in financial 2000 for redundancy payments which fell due and were paid in July 2000 was not reversed.

¹⁰ About \$84,000 in each month may be non-cash items.

\$200,000 worse than under the budget mentioned above and that breakeven had receded by only two months. In view of the circumstances and financial information we have mentioned, we reject that submission.¹¹

36. RP Data's assessment that Realestate was continuing to lose money and that the losses would continue for some time to come was substantially correct. While we have based our conclusions on historic figures, Mr McColl had access to current information in the course of the due diligence investigation.
37. The availability of the Macquarie facility allowed Realestate to continue to trade, in spite of these losses, but at the cost of a substantial dilution of the other shareholders' interests in the company if Macquarie's loan is converted to shares and other shareholders do not invest any more. If the loan was fully drawn and fully converted, the dilution would be 16%.¹²

Reliance on the Forecasts

38. Realestate submitted that no reasonable person in RP Data's position at 5 October would have relied on the 3 August forecast. We disagree. A listed company's announcements to the market are made for use in decisions in trading in the company's securities. They are continuing representations, on which people can rely until they are stale, updated or withdrawn. The forecast was not stale – it covered the period under discussion.
39. Although they rebuffed them, RP Data's questions on 3 October made it clear to Realestate's representatives that RP Data was aware of the forecasts. RP Data was entitled to rely on the forecasts, unless they were withdrawn, and they were not withdrawn. Indeed, Realestate's representatives repeatedly referred RP Data to the cash usage statement for the June quarter, which is in the same ASX announcement as the forecasts that 'realestate.com.au's cash position is considered more than adequate to meet the company's needs during its development phase ... the Directors have budgeted to be in a cash flow positive position by January 2001'.
40. With the benefit of hindsight, the announcement of the Macquarie facility was a public indication of the deterioration in Realestate's position. RP Data were told on 3 October of the first drawdown on the facility, which was not announced to the market until 31 October. However, Realestate's public announcement of the facility stressed that it would enable Realestate to explore alliance arrangements and Realestate declined to tell RP Data how the funds drawn down had been applied.
41. In these circumstances, we are unable to accept that RP Data should have been aware that the forecast was not to be relied upon.
42. RP Data was in error in saying that more than \$500,000 of the Macquarie facility had been drawn down at mid-October. In fact, \$500,000 was drawn down on 8 September and another \$500,000 on 10 November. In these circumstances, that error is not substantial.

Creditors

43. RP Data state that their due diligence investigation revealed that at mid-October, Realestate had creditors of \$1.5 million, many of them over 60 days old, and debtors of only \$300,000, many of them also over 60 days old. We are not satisfied that RP Data were misled on this

¹¹ The slippage in the date at which Realestate becomes cash positive is, however, less important in itself than for its effect on Realestate's accumulated losses and future prospects.

¹² PKF Report, pages 1 and 3: Macquarie would receive 9,852,217 new shares on an existing capital of 48,013,702 shares.

issue. On the one hand, in Realestate's management accounts, on 16 October the appropriate figures were \$864,000 and \$466,000 respectively. On the other hand, even if the creditors were as high as they believe, RP Data should have been alerted to the possible level of creditors by Realestate's preliminary final report for the financial year to 30 June 2000 issued on 13 September which showed accounts payable of \$1.9 million and receivables of \$502,000.

Sales

44. We are not satisfied that RP Data discovered that sales had not increased to the level they had been led to believe. Realestate's statement that sales had increased was not substantiated by production to RP Data of contracts, but our best information is that there had been an increase in sales during the September quarter and that RP Data did not press the issue.

RP Data's Contribution

45. Although Realestate's failure to correct or withdraw its forecasts contributed to the error under which RP Data made the 5 October announcement, RP Data was also partly the victim of its own negligence.
46. There is in the transcripts of examination provided by ASIC abundant evidence that on 5 October RP Data was aware of circumstances which should have alerted it to a real risk that Realestate was trading on borrowed money and continuing to consume cash. RP Data knew of the existence of the Macquarie facility and that part of it had been drawn down. It had been announced as a working capital facility. RP Data's inquiries about the use to which the Macquarie funds had been put and about economy measures were rebuffed. His dealings with Realestate left Mr Catelan the impression that Realestate's cost control was inadequate.
47. In the face of these ominous signs, RP Data's representatives consoled themselves with rationalisations that the drawdown of the Macquarie facility must have been used to repay a loan from the National Australia Bank and that Realestate must have control over its expenses, at least in the sense that there would be a large discretionary component, which it could reduce at need.
48. There is no suggestion that Realestate encouraged RP Data in these rationalisations, that there was any evidence for them, or that RP Data made any other inquiries about the basis for them. The preliminary final statement indicates that on 30 June Realestate had only \$2000 in borrowings, which should have indicated to RP Data that the National Australia Bank debt had in fact been repaid.

Relevant Provisions

49. We mention the following provisions in our discussion of these facts:

Subsection 629(1) Offers under an off-market bid must not be subject to a defeating condition if the fulfilment of the condition depends on:

- (a) the bidder's, or an associate's, opinion, belief or state of mind; or
- (b) the happening of an event that is within the sole control of, or is a direct result of action by, any of the following:
- (c) the bidder (acting alone or together with an associate or associates); or
- (d) an associate (acting alone or together with the bidder or another associate or associates of the bidder).

A purported condition of this kind is void.

Subsection 631(1) If a person publicly proposes to make a takeover bid for securities in a company, either alone or with other persons, the person contravenes this subsection unless

they make offers for the securities under a takeover bid within 2 months after the proposal. The terms and conditions of the bid must be the same as or not substantially less favourable than those in the public proposal.

Subsection 631(2) A person must not publicly propose, either alone or with other persons, to make a takeover bid if:

- (a) the person knows that the proposed bid will not be made, or is reckless as to whether the proposed bid is made; or
- (b) the person is reckless as to whether they will be able to perform their obligations relating to the takeover bid if a substantial proportion of the offers under the bid are accepted.

Subsection 631(3) Section 1314 (continuing offences) and subsection 1342(2) (injunctions) do not apply in relation to a failure to make a takeover bid in accordance with a public proposal under subsection (1).

Subsection 657A(1) The Panel may declare circumstances in relation to the affairs of a company to be unacceptable circumstances. Without limiting this, the Panel may declare circumstances to be unacceptable circumstances whether or not the circumstances constitute a contravention of a provision of this Law.

Subsection 657A(2) The Panel may only declare circumstances to be unacceptable circumstances if it appears to the Panel that the circumstances:

- (a) are unacceptable having regard to the effect of the circumstances on:
 - (i) the control, or potential control, of the company or another company; or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in the company or another company; or
- (b) are unacceptable because they constitute, or give rise to, a contravention of a provision of this Chapter or of Chapter 6A, 6B or 6C.

The Panel may only make a declaration under this subsection, or only decline to make a declaration under this subsection, if it considers that doing so is not against the public interest after taking into account any policy considerations that the Panel considers relevant.

Subsection 657A(3) In exercising its powers under this section, the Panel:

- (a) must have regard to:
 - (i) the purposes of this Chapter set out in section 602; and
 - (ii) the other provisions of this Chapter; and
 - (iii) the rules made under section 658C; and
 - (iv) the matters specified in regulations made for the purposes of paragraph 195(3)(c) of the Australian Securities and Investments Commission Act 1989.
- (b) may have regard to any other matters it considers relevant.

In having regard to the purpose set out in paragraph 602(1)(c) in relation to an acquisition, or proposed acquisition, of a substantial interest in a company, body or scheme, the Panel must take into account the actions of the directors of the company or body or the responsible entity for a scheme (including actions that caused the acquisition or proposed acquisition not to proceed or contributed to it not proceeding).

Subsection 670E(1) A person who:

- (c) enters into a transaction relating to securities in reliance on:

- (i) a public proposal for a takeover bid; or
 - (ii) an announcement of a market bid; and
- (d) suffers loss or damage that results from a contravention of section 631: may recover the amount of the loss or damage from:
- (e) the person who contravened the section; or
 - (f) any person involved in the contravention.

Subsection 670E(2) To determine the amount of compensation payable under subsection (1), deduct the price of the securities at which the transaction was entered into from the price of the securities at which the transaction would have been likely to be entered into if the proposal or announcement had not been made.

Section 670F A person does not commit an offence under subsection 631(1) or (2), and is not liable under section 670E for a contravention of those subsections if the person proves that they could not reasonably have been expected to comply with those subsections because:

- (a) at the time of the proposal or announcement, circumstances existed that the person did not know of and could not reasonably have been expected to know of; or
- (b) after the proposal or announcement, a change in circumstances occurred that was not caused, directly or indirectly, by the person.

Unacceptable Circumstances

50. In its draft policy on unacceptable circumstances, the Panel has discussed the section 657A power in terms which cover this matter:

'There is no definition of unacceptable circumstances in the Law. Instead, the Panel is directed to use section 602 and Chapter 6 of the Law as reference points to determine when circumstances are unacceptable. The legislature considered that black letter law would be insufficient to define all the possible circumstances that might defeat the policy of section 602. Accordingly, it empowered the Panel, as an expert body, to address new issues by declaring circumstances unacceptable.

Whether circumstances are unacceptable depends on their effect on persons affected by transactions which influence control and on the market, in the light of the policy of section 602. It does not depend on the occurrence of unacceptable conduct or any intention to bring about an objectionable state of affairs. A state of affairs may be unacceptable due to inadvertence, and despite the best of intentions.

Conduct may give rise to unacceptable circumstances as well as breaching the Law. Not all unacceptable circumstances will constitute breaches of the Law, however, and if a breach does not give rise to a mischief of a kind relevant to section 602, it may not lead to unacceptable circumstances.

...

A second category of unacceptable circumstances is where, even if holders have opportunities to share in the benefits, they do not have the information necessary to make an informed decision or are misled about the relevant transaction. The decision could be whether to sell into a bid or whether to approve a transaction. A shortage of information may be just as harmful as a misinformation. A breach of a general disclosure provision¹³ will usually give rise to unacceptable circumstances. Material breach of a specific disclosure provision will also be generally unacceptable. Any failure to provide information reasonably expected by the market and relied on to make decisions about a bid, such as notices under the Listing Rules or section 643, 644, 650F or 671B, may be unacceptable.'

¹³ Such as paragraph 636(1)(g) or (m).

51. The policy and operation of what is now section 631 are discussed in *BT Australia Ltd v The Bell Bros Ltd and others* (1981) CLC 40-719, *Australian Securities Commission v Mount Burgess Gold Mining Company NL and others* (1995) 13 ACLC 271, and ASIC Practice Note 59: Announcing and Withdrawing Takeover Bids.

Unacceptable Circumstances – Subsection 631(1)

52. ASIC submitted that unacceptable circumstances arose because RP Data contravened subsection 631(1) of the Corporations Law, in particular that:
- (a) both conditions in the 5 October announcement (the adverse events condition and the due diligence condition) should be disregarded, under section 629;
 - (b) RP Data should not have included the reconstruction condition or the adverse events condition in the 30 October bid; and
 - (c) the consideration under the 30 October bid should include the 10c per share cash element announced on 5 October.
53. For reasons we now set out, we decline to find that subsection 631(1) was contravened, to declare the circumstances unacceptable on this ground or to order RP Data to bid on the terms announced on 5 October or to alter the terms of the 30 October bid to align them with those of the 5 October announcement.
54. Under section 629, where an offer under a bid is subject to a condition which depends on the opinion of the bidder or an associate, that condition is void. ASIC would apply that section to the 5 October announcement, as follows:
- (a) both conditions were void under section 629, because they depended on the opinions of the directors of RP Data;
 - (b) because they are void, they must be disregarded for the purposes of section 631;
 - (c) if the conditions are disregarded, the terms of the 30 October bid are materially less favourable than the terms announced on 5 October;
 - (d) in evaluating the bid, informed observers of the market would have disregarded the conditions for these reasons.
55. We are unable to accept the first step in this argument, on which the rest depends. Section 629 applies in terms to a condition in a takeover offer sent under section 633, not to an announcement that a person will make a bid. We are not satisfied that section 629 extends to an announcement of a takeover, the more so as subsection 631(2) prevents a person reserving an option not to bid when they make a takeover announcement.
56. Between 5 October and 30 October RP Data learned of matters which meant that the adverse events and due diligence conditions would not have been met, even if they had depended on non-compliance being material, rather than on the opinion of the directors. Those conditions being triggered, RP Data was under no obligation to waive them: had they been conditions of offers under a complying bid, it could simply have waited for section 650G to avoid the offers and bid contracts.
57. It follows that the defence in section 670F applies to RP Data's failure to bid in accordance with the announcement. Already existing circumstances, of which RP Data was not aware, having made proper inquiries and been rebuffed, meant that a bid in accordance with the announcement would close with a condition unsatisfied.¹⁴ Similarly, on these facts we decline to declare that unacceptable circumstances resulted from RP Data's failure to bid

¹⁴ ASIC Practice Note 59.54.

in accordance with the announcement.

58. Unless RP Data was obliged to bid in accordance with its announcement of 5 October, section 631 does not limit the terms on which RP Data could bid for Realestate. Accordingly, we reject ASIC's remaining propositions.
59. For completeness, we now consider ASIC's application for orders requiring RP Data to abandon its 30 October bid and to bid on the terms announced on 5 October.

The Specified Occurrences Condition in the 30 October bid

60. The specified occurrences condition in RP Data's 30 October bid is not objectionable. It broadly corresponds with the adverse events condition in its 5 October announcement, omitting the objectionable discretionary element. The 30 October condition is inoffensive in itself, and the market was on notice that RP Data intended to impose some such condition. We are unable to accept ASIC's submission that the market would have disregarded the conditions in the 5 October announcement, in reliance on section 629.

The other terms of the 30 October bid

61. The other main changes between the 5 October terms and the 30 October terms are omission of the 10c cash element from the bid and the inclusion of the reconstruction condition. Each change made the terms of the bid substantially less favourable. Given the information which RP Data learned in the due diligence, we are not satisfied that these changes were necessarily unreasonable, from the point of view of a Realestate shareholder.
62. If (as we are inclined to think) RP Data has contravened subsection 631(2), persons who bought shares in Realestate and suffered loss as a result of that contravention may have actions for compensation under section 670E. In view of these rights, of the fact that the reconstruction proposal will to some extent support the value of RP Data shares and of the substantial contribution of Realestate itself to the circumstances, it would impose unfair detriment on RP Data to require it to omit the reconstruction condition from the 30 October terms or to reinstate the 10c cash element.
63. RP Data undertook to us not to dispatch offers under its 30 October bidder's statement until these proceedings were over. The completion of the News proposal would excuse it from bidding under section 670F, as the specified occurrences condition in its bid would be triggered.

Unacceptable Circumstances - Reckless Announcement

64. We have, however, concluded that unacceptable circumstances resulted from the making of the 5 October announcement, whether because in making it RP Data contravened subsection 631(2)¹⁵ or because the circumstances defeated the policy of that subsection and led to a false market in shares in Realestate. We have made a declaration to that effect – see Appendix 1.

Provisions and Policy

65. Subsection 631(2) provides that 'A person must not publicly propose ... to make a takeover bid if ... the person is reckless as to whether the proposed bid is made'. It is subject to the defence in section 670F.
66. The policy of this section is similar to that of General Principle 3 of the *London City Code on Takeovers and Mergers*:

¹⁵ Compare *Australian Securities Commission v Mount Burgess Gold Mining Company NL and others* (1995) 13 ACLC 271 at 275.

'An offeror should only announce an offer after the most careful and responsible consideration. Such an announcement should be made only when the offeror has every reason to believe that it can and will be able to continue to implement the offer: responsibility in this connection also rests on the financial adviser to the offeror.'

Rules 2.1 and 2.2 of the *City Code* emphasize that an announcement should be made only when the bidder has advised the target of a firm and unconditional intention to bid, the bidder has triggered the mandatory bid rule or there is evidence of, or a risk of, information about the bid leaking out.

67. Paragraph 631(2)(a) depends on the person who makes the announcement being reckless as to whether a proposed bid is made. The term 'reckless' has been the subject of several different tests applied by the courts in different areas. On one of them, a person is reckless as to a fact only if they are aware of it or wilfully close their eyes to it (the *subjective test*). On another, a person is reckless as to a fact if they do not responsibly assess the likelihood that the fact exists (the *objective test*).
68. We do not need to resolve the issue for present purposes, but we doubt that the subjective test of recklessness is the right test to apply. The section is subject to the defence in section 670F that the person who made the announcement could not reasonably have been expected to comply with subsection 631(2), because of circumstances which the person did not know and could not reasonably have been expected to know. That defence cannot be sensibly applied to an offence, one element of which is actual knowledge of the relevant fact.
69. For present purposes, it does not matter which test we apply. RP Data was plainly aware of a real possibility that it would not make the bid it announced on 5 October. The terms of the announcement themselves make that clear, particularly the retention of total discretion over satisfaction of the due diligence condition which was not controlled by reference to a material discrepancy from existing financial statements or other published information. We would not, however, have declared unacceptable the circumstances resulting from this announcement, if the announcement had not also been irresponsible.
70. In general, it is preferable that no announcement of a takeover bid is made until the bidder has made a firm and unconditional decision to proceed. It is sometimes necessary to make an announcement before that stage is reached, for instance to avoid a speculative market. In such a case, the announcement should not overstate the likelihood that the bid will be made. In a case such as the present, the bidder can announce, for instance, that it is discussing a possible takeover bid with the target. If it is necessary to mention a particular condition, the bidder should provide enough detail or a sufficiently strong caution that readers do not overestimate the likelihood of the bid being made.

Application to these facts

71. Unacceptable circumstances arose from the 5 October announcement, because it led to a misinformed and speculative market for Realestate shares. By setting out the terms of the bid, although subject to due diligence, the announcement implied that the result of the due diligence could reasonably be expected to be satisfactory and the bid would proceed as announced. In consequence, the market traded for 3 weeks on information that RP Data would bid for Realestate which was not to be relied upon i.e. there was a false market in Realestate shares. The extent of the disturbance can be seen in Appendix 2.
72. The making of the 5 October announcement detracted from an informed market in Realestate shares and shareholders in Realestate did not have the information they reasonably needed to make informed decisions about a proposed change of control of Realestate, contrary to the policy of paragraphs 602(a) and (b)(iii). A false market is also capable of denying

shareholders reasonable and equal opportunities to participate in the benefits accruing from the bid, contrary to the policy of paragraph 602(c).

73. Accordingly, the making of the announcement affected in an unacceptable way the proposed acquisition of a substantial interest in Realestate by RP Data. Alternatively, the making of the announcement constituted or gave rise to a contravention of a provision of Chapter 6, namely subsection 631(2).
74. In our view, it is not adverse to the public interest to make this declaration. The declaration will tend to support considered and credible announcements in takeovers matters and to discourage announcements which cannot be relied on. By so doing, it will help support the credibility and efficiency of the Australian securities markets.

Responsibility

75. The immediate cause of the false market was that RP Data recklessly announced an unsustainable bid and used the due diligence condition as a safeguard, instead of reasonably analysing the public information and such data as it had obtained in discussions with Realestate before announcing a bid and that the announcement it did make was not appropriately qualified.
76. We acknowledge that the announcement made it quite clear that the bid was subject to satisfactory due diligence and that RP Data was reasonably dissatisfied with the result of the due diligence investigation. This is not enough: market participants were entitled to rely on RP Data to have acted responsibly by reasonably satisfying itself about the financial affairs of Realestate before making any announcement, at least as far as the publicly available information allowed. Given that an announcement in these terms was not justified, although Realestate was pressing for it to be made, had any announcement been required at 5 October, RP Data should have said, for instance, that it was discussing a possible bid with Realestate.
77. Realestate contributed to this state of affairs by encouraging RP Data to announce a bid, when it should reasonably have known that its financial position had deteriorated considerably from the position disclosed to RP Data and the market. The amount of the discrepancy is substantial and Realestate should have anticipated that it would be material to a decision by RP Data whether, for instance, to include the cash component in its announced terms.

Conclusions

1. To return to ASIC's application:

1. *We have declared the circumstances surrounding the proposed bid unacceptable.*
2. *We decline to order RP Data to proceed with its bid announced on 5 October 2000.*
3. *We decline to order RP Data to offer shareholders of Realestate the terms of the bid announced on 5 October 2000.*
4. *We decline to order that no further steps be taken in relation to the takeover bid announced on 30 October 2000. Had the News proposal not been approved, we think that the bid should have been made.*
5. *We make no order, but if the bid had proceeded RP Data should have lodged a supplementary bidder's statement explaining better why it did not bid on the terms it announced on 5 October.*
6. *We make no other declarations or orders.*

78. We thank the parties for their submissions. In particular, ASIC helped a great deal by providing transcripts of examinations of officers of both companies.
79. Realestate provided a considerable quantity of accounting data, this matter took much longer than it should have done, in part because Realestate did not prepare financial information which we requested, when we first asked for it. We received that information piecemeal and very late in the process. In future, a Panel in need of financial information about a party

should consider requiring that party to provide a report by an external accountant setting out that information.

80. We have made no order for costs. Parties may make submissions about costs orders, in addition to the costs submissions they have previously made. Since the Panel has no taxing facilities, any claim for costs should set out and justify the amount which the party claims.

Jeremy Schultz
Sitting President
5 February 2001

APPENDIX 1

CORPORATIONS AND SECURITIES PANEL

Corporations Law Section 657A

Declaration

Whereas:

- A. REA Holdings (No. 1) Pty Limited and REA Holdings (No. 2) Pty Limited (*the bidders*) on 5 October 2000 announced to Australian Stock Exchange Limited (*ASX*) that they would jointly make a takeover bid for all of the ordinary shares in realestate.com.au Limited (*Realestate*) on terms specified in that announcement;
- B. That announcement was expressed to be conditional on completion to the absolute satisfaction of the directors of the bidders of due diligence investigations of specified affairs of Realestate;
- C. The result of that investigation was not satisfactory, and was not at any relevant time likely to be satisfactory;
- D. The bidders announced to *ASX* on 30 October 2000 that they would not bid for Realestate on the terms announced on 5 October, but on terms which were materially different;
- E. The announcement of 5 October gave rise to a false or speculative market in shares in Realestate (*the false market*), because it implied that there was a reasonable prospect of the bid proceeding on the terms of the announcement made on 5 October;
- F. The false market persisted until the bidders' announcement on 30 October,

pursuant to section 657A of the Corporations Law, the Corporations and Securities Panel declares that the false market was an unacceptable circumstance in relation to the affairs of Realestate, having regard to its effect on the proposed acquisition by the bidders of a substantial interest in Realestate.

Dated: 24 January 2000

.....
Jeremy Schultz, President of the sitting Panel

APPENDIX 2

Closing Prices and Volume for Realestate shares on ASX 2 October – 8 December 2000

DATE	PRICE	VOLUME
2 October 2000	22	46815
3 October 2000	22	20000
4 October 2000	23	64200
5 October 2000	24	121551
6 October 2000	26	488550
9 October 2000	26.5	242676
10 October 2000	24	62100
11 October 2000	26	4150
12 October 2000	20	151826
13 October 2000	23	57800
16 October 2000	21	1775
7 October 2000	20.5	88040
18 October 2000	21	30140
19 October 2000	23	154500
20 October 2000	23	15760
23 October 2000	20.5	50000
24 October 2000	20.5	17000
25 October 2000	21	35062
26 October 2000	21	8500
27 October 2000	20.5	51688
30 October 2000	20.5	164337
31 October 2000	20	50615
1 November 2000	17	115412
2 November 2000	17.5	91888
3 November 2000	18	52623
6 November 2000	18	85220
7 November 2000	17	12500
8 November 2000	16.5	87000
9 November 2000	19	86500
10 November 2000	16.9	105615
13 November 2000	17.5	26000
14 November 2000	18	44895
15 November 2000	19	232330
16 November 2000	21	108342
17 November 2000	22	105300
20 November 2000	21	15500
20 November 2000	21	15500
21 November 2000	21	97385
22 November 2000	19	25000
23 November 2000	20	86690
24 November 2000	22	153839
27 November 2000	24	372460
28 November 2000	26	209900
29 November 2000	26.5	262150

Reasons for Decision - Realestate.com.au Ltd**[2001] ATP 1**

30 November 2000	28.5	2428593
1 December 2000	25	229500
4 December 2000	20	242273
5 December 2000	23	147727
6 December 2000	22.5	60000
7 December 2000	20	163000
8 December 2000	2.05	59870