

**In the matter of Pinnacle VRB Ltd (No. 04)  
[2001] ATP 7**

**Catchwords**

*Takeover bid – content of bidder’s statement – inadequate disclosure regarding funding – unknown financier – identity of bidder – sufficient information to assess merits of proposal – failure to register as foreign company – order that takeover bid be stopped – order that offers and contracts under bid be cancelled*

*Corporations Law (Cth), sections 602, 631 and 636*

*ASIC Practice Note 37*

**On 9 April 2001, we stopped the takeover bid made by Reliable Power Inc on 20 March 2001 for all of the ordinary shares in Pinnacle VRB Limited, and ordered that the offers and contracts under the bid be cancelled, that Reliable notify the Australian Stock Exchange and shareholders of Pinnacle VRB Limited that the bid has been stopped, and prohibiting Reliable Power Inc from acquiring a further interest in shares in Pinnacle VRB Limited as a result of offers made or acceptances received under the bid.**

**These are our reasons for that decision.**

### **REASONS FOR DECISION**

1. The sitting Panel in this matter comprises Marian Micalizzi (President), Louise McBride (sitting Deputy President) and Robyn Ahern.
2. These are our reasons for deciding to stop the takeover bid made by Reliable Power Inc (*Reliable*) on 20 March 2001 for all of the ordinary shares in Pinnacle VRB Limited (*Pinnacle*) (the *Bid*). We ordered that the offers and contracts under the Bid be cancelled, that Reliable notify the Australian Stock Exchange (*ASX*) and shareholders of Pinnacle that the Bid has been stopped, and prohibiting Reliable from acquiring a further interest in Pinnacle shares as a result of offers made or acceptances received under the Bid.

#### **Legislative Framework**

3. Subsection 636(1) of the Corporations Law (the *Law*) requires that a bidder’s statement include certain information. This includes information in relation to who will provide any cash consideration offered under a bid and the arrangements under which the cash will be provided (paragraph 636(1)(f)), and information that is material to offerees in making the decision whether to accept an offer under the Bid (paragraph 636(1)(m)).

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4. These specific requirements are supplemented by section 602, which sets out the purposes of the takeovers provisions of the Law. These purposes include that offerees know the identity of any person who proposes to acquire a substantial interest in the company (paragraph 602(b)(i)) and that offerees are given enough information to enable them to assess the merits of the proposal (paragraph 602(b)(iii)).
5. Interpreting these legislative requirements, the Australian Securities and Investments Commission (*ASIC*) has published Practice Note 37, which relates to financing arrangements for takeovers. This Practice Note states that disclosure requirements in the Law are there to ensure the bidder gives sufficient information to establish whether it is able to pay for the shares it is offering to buy. It states that a bidder must disclose the ultimate source of borrowings, including the names of persons who are credit providers (including those who are providing the funds indirectly), any back to back funding arrangements or guarantees, the proportion of funding to be provided by each credit provider and the essential provisions of funding arrangements.
6. The Law also prohibits a person from publicly proposing to make a takeover bid if the person knows the proposed bid will not be made or is reckless as to whether the proposed bid is made or 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 (refer to section 631(2)). A bidder would therefore be prohibited from making a bid if it could not reasonably have believed that it would be able to pay for acceptances received under its bid.
7. Again, section 602 supplements this specific section. Paragraph 602(a) states that the purposes of the Chapter are to ensure that “the acquisition of control over the voting shares in a listed company ... takes place in an efficient, competitive and informed market”. This provision therefore indicates that there is a policy intention that bids do not take place in a false market.

### Background

8. Pinnacle is a company listed on the ASX. Some time ago, Pinnacle acquired intellectual property from Unisearch Limited concerning a technology using vanadium redox batteries (*VRB*) to store electricity for domestic and commercial installations to supply electricity when required, as well as to smooth peaks and troughs in mains power.
9. Pinnacle has licensed a number of other companies to exploit and utilise *VRB* technology in certain regions of the world.
10. Pinnacle had the following securities on issue:
  - (a) ordinary shares (*Pinnacle Shares*);

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- (b) options to acquire ordinary shares in Pinnacle exercisable at 20 cents on or before 30 January 2002 (*Pinnacle Options*); and
  - (c) options to acquire ordinary shares in Pinnacle exercisable at 30 cents on or before 4 August 2002 (*Unlisted Options*).
11. The Pinnacle Shares and the Pinnacle Options are quoted on the ASX. On 22 January 2001, Reliable Power Inc announced that it would make an off-market cash takeover bid of 55 cents for all of the issued ordinary shares in Pinnacle.
  12. Reliable is incorporated in Delaware in the United States. Reliable is not registered as a foreign company under Division 2 of Part 5B.2 of the Law. Reliable's sole shareholder is Mr John Venners. It has 2 directors: Mr Venners and Mr Gregg Renkes.
  13. On 5 March 2001, Reliable lodged its bidder's statement with the ASIC and sent a copy to Pinnacle.
  14. The consideration offered to Pinnacle shareholders in Reliable's Bid was 65 cents for every issued ordinary share in Pinnacle. Reliable's Bid was conditional upon Reliable acquiring a relevant interest in at least 51% of the total number of the issued shares in Pinnacle. There were several other defeating conditions to Reliable's Bid.
  15. On 9 March 2001, Pinnacle, through its solicitors, Minter Ellison, requested that Reliable provide further information in its bidder's statement (the *9 March Letter*). That request was directed to Reliable's lawyers, NM Taylor Lawyers, and related to information in respect of Reliable and its owners and associates, the financing arrangements for Reliable's Bid, and consents obtained by Reliable in relation to statements made in its bidder's statement. The 9 March Letter also requested that Reliable cease to take further action in Australia in relation to its Bid unless it registers under Division 2 of Part 5B.2 of the Law, and referred to a number of minor amendments required to the bidder's statement.
  16. On 13 March 2001, NM Taylor Lawyers responded to the 9 March Letter, agreeing to make the minor amendments to its bidder's statement, but otherwise denying that the further information requested was required in the bidder's statement (the *13 March Letter*). In the 13 March Letter, NM Taylor Lawyers also stated that the fact that Reliable is a foreign person under the Law was a matter which could be raised in Pinnacle's Target's Statement.
  17. At about that time ASIC communicated with NM Taylor Lawyers, who sent a draft supplementary bidder's statement to ASIC for its approval on 20 March 2001.

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18. On 20 March 2001, Reliable dispatched its offers with the bidder's statement and a supplementary bidder's statement to Pinnacle shareholders (jointly referred to as the *Bidder's Statement*).

19. Paragraph 4.2 of the Bidder's Statement stated that:

*"The maximum amount payable under the Offer to all shareholders will be approximately A\$39.91 million (the **Maximum Amount**) if all Pinnacle Options are exercised and Reliable Power acquires all of the Pinnacle shares. Funds to satisfy the maximum Amount and amounts necessary to cover stamp duty and other transaction costs associated with the Offer will be provided to Reliable Power from the facilities described below.*

*New West Capital LLC (**New West**) has agreed to provide sufficient funds to Reliable Power by way of equity subscription and loans to enable Reliable Power to meet its obligations under the Offer (together with the expenses incurred by Reliable Power in relation to the Offer) (the **Funding Obligation**).*

*New West will source funds to meet the Funding Obligation from a combination of:*

- (a) immediately available cash resources of New West;*
- (b) drawdowns under New West bank facilities; and*
- (c) investments by New West clients."*

It went on to give some of New West's background and track record in financing venture capital transactions, and ended:

*"New West has not set aside any funds at the date of this Statement to fund its funding obligation."*

20. Paragraph 4 of the supplementary sent to Pinnacle shareholders added the following paragraph 4.2 of the Bidder's Statement:

*\* There is a written undertaking from New West to provide the necessary funds to Reliable Power;*

*\* The obligation of New West to provide the necessary funds to reliable Power is unconditional, except that the bid must be successful in accordance with the terms and conditions set out in the Bidder's Statement;*

*\* New West is obliged to provide the funds as and when required by Reliable Power to comply with its obligations under the Bidder's Statement;*

*\* Reliable Power has not been advised, and it believes that New West has yet to make a decision, of what combination of funding sources New West will use in complying with its obligations to Reliable Power;*

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*\* The combination of the three funding sources of New West as set out in Section 4.2 of the Bidder's Statement is a matter entirely for New West."*

21. Prior to Reliable's Bid, Pinnacle was the subject of a takeover bid by Federation Group Limited (*Federation*). As a result of that takeover bid, Federation acquired 10.6% of the Pinnacle Shares then on issue. Subsequent to the close of Federation's bid at the end of December 2000, Federation exercised a number of options which it had acquired under its bid for Pinnacle, with the result that Federation's voting power in Pinnacle increased to approximately 21%, of which 19.9% has been, or is being, transferred to Vanteck.

#### The Application

22. On 15 March 2001, Pinnacle applied to the Panel under section 657C of the Corporations Law (the *Law*) for a declaration of unacceptable circumstances and orders in relation to Reliable's Bid (the *Application*).
23. In the Application, Pinnacle alleged that Reliable Bidder's Statement was deficient in that it contained insufficient information about the funding for the Bid.
24. Pinnacle claimed that such information was material to Pinnacle shareholders in making a decision to accept or reject Reliable's offer and that Reliable's failure to provide this information in its Bidder's Statement constituted unacceptable circumstances and otherwise failed to satisfy Reliable's disclosure obligations under section 636(1) of the Corporations Law.
25. In addition to a declaration of unacceptable circumstances, Pinnacle sought an order requiring Reliable to amend the Bidder's Statement by including further material information relating to the matters raised above. Pinnacle also requested that, if the Panel made an order requiring Reliable to provide additional information, the Panel also make orders:
  - (a) requiring Reliable to provide the Panel with evidence (satisfactory to the Panel) of Reliable's ability to pay the consideration offered under its Bid;
  - (b) prohibiting Reliable from proceeding with its Bid until it provides sufficient evidence of its ability to pay the consideration it is offering under its Bid;
  - (c) requiring Reliable to include in its Bidder's Statement, information relating to:
    - (i) the ultimate source of the funds, including who the ultimate lenders or investors are and how they are committed to advance the funds in the event that Reliable's Bid is successful;

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- (ii) the security given for the funds, including details of all back to back arrangements and guarantees in relation to the funds;
  - (iii) the proportion of funding to be provided by each ultimate lender;
  - (iv) whether there are any restrictions on the availability of the funds;
  - (v) the time periods in which the funds will be available at each level;
  - (vi) any persons other than Mr John Venners and Mr Gregg Renkes who control Reliable;
  - (vii) any person it is proposed Reliable will transfer voting power in Pinnacle to following the Bid, and full details in relation to the proposed transaction;
  - (viii) the facts surrounding, and the outcome of the market manipulation case which was brought against Mr John Venners in the United States;
  - (ix) any convictions or ongoing or pending proceedings (if any) against Mr John Venners or Mr Gregg Renkes;
  - (x) the limited liability status of the shareholders of Reliable Power;
  - (xi) the implications (for Pinnacle shareholders who accept Reliable's offer) of the fact that Reliable is a foreign person.
- (d) to the extent that Reliable refers to statements made by, or attributable to, others in its Bidder's Statement, requiring Reliable to obtain the necessary consents for quoting these statements, and requiring Reliable to verify in its Bidder's Statement that those statements were made by, or are attributable to, others.
26. Pinnacle also claimed that, by virtue of having made a bid for Pinnacle, Reliable was carrying on business in Australia, and therefore ought to have registered as a foreign company under Division 2 of Part 5B.2 of the Law. Pinnacle sought an order from the Panel requiring Reliable to cease taking further action in Australia in relation to the Bid until it lodged an application for registration under Division 2 of Part 5B.2 of the Law.
27. Pinnacle also applied for an order that Reliable pay the costs incurred by Pinnacle in bringing these proceedings. The Panel has recently received further submissions on this issue and is still considering this aspect of Pinnacle's application.
28. Pinnacle also applied for interim orders to restrain the dispatch of Reliable's Bidder's Statement. This Panel was not appointed until 20

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March 2001. This was too late for this Panel to be in a position to make a decision on interim orders before the Bidder's Statement was dispatched on that date. At that stage, however, there were no immediately apparent deficiencies in the Bidder's Statement that could not be remedied by a supplementary bidder's statement, in accordance with the Panel's policy on Restraining the Dispatch of Documents. Subsequently, we found that Reliable had not made appropriate funding arrangements to ensure it could pay for all the acceptances it might receive under its Bid, amounting to unacceptable circumstances and justifying an order stopping Reliable's Bid.

#### The issues

29. In the course of these proceedings, we considered the following issues:
- (a) Whether Reliable had sufficient funding arrangements in place to ensure that it could pay the consideration offered to Pinnacle shareholders under the Bid and, if not, whether a lack of sufficient funding arrangements detracted from an efficient, competitive and informed market in Pinnacle Shares (refer to section 602(a));
  - (b) Whether, in announcing its Bid on 22 January 2001, Reliable had been reckless as to whether it would be able to perform its obligations relating to its Bid for Pinnacle if a substantial proportion of the offers under the Bid were accepted (refer to section 631(2)(b));
  - (c) Whether there were deficiencies in the information provided to Pinnacle's shareholders in relation to Reliable's Bid (including the original and supplementary bidder's statements) and whether any such deficiencies mean that:
    - (i) Reliable's proposed acquisition of control over Pinnacle's shares could not take place in an efficient, competitive and informed market (refer to section 602(a));
    - (ii) Pinnacle shareholders did not know the identities of all of the persons who proposed to acquire substantial interests in Pinnacle (refer to section 602(b)(i)); or
    - (iii) Pinnacle shareholders did not have enough information to enable them to make an informed decision about the merits of Reliable's Bid (refer to section 602(b)(iii)).
  - (d) Whether unacceptable circumstances existed because Reliable, as a foreign company, had not registered under Division 2 of Part 5B.2 of the Law.
30. These issues are dealt with in turn, below.

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#### Unacceptable circumstances and funding arrangements

31. We consider that, in accordance with the principle that acquisitions of control over the voting shares in a listed company should take place in an efficient, competitive and informed market, a bidder should have sufficient funding arrangements in place to ensure that the consideration offered under the bid can be provided. For funding arrangements to be sufficient, the bidder must have firm arrangements for access to enough funds to pay for all the acceptances which it may receive under its Bid, whether directly or through firm arrangements with persons who have those funds.
32. Reliable submitted that subsection 631(2) (recklessness as to ability to pay for acceptances) and paragraph 636(1)(f) (disclosure of funding arrangements) cover the ground. On this basis, Reliable submitted that the Panel should not find that unacceptable circumstances existed because the bidder's statement disclosed funding arrangements which the Panel regarded as inadequate. We do not accept this submission. Under sections 602 and 657A, we are obliged to consider whether circumstances are unacceptable because they militate against an efficient, competitive and informed market in shares of a target, whether the law has been breached or not.
33. An announcement of a bid may materially affect trading in shares in the target for weeks or months, so that a substantial number of the shares change hands at prices which reflect the announced bid price. It is critical that the bid not be illusory, in the sense that the bidder is in fact able to pay for scrip when and if the conditions of the bid are satisfied.

#### Did Reliable have sufficient funding arrangements in place?

34. The basis for our concern in relation to Reliable's funding arrangements was that, if Reliable did not have appropriate funding arrangements in place, then the Bid may have led to a false market, because Reliable may have been unable to complete the Bid.
35. In our brief to parties dated 22 March 2001 we requested that, pursuant to Regulation 22(b), Reliable provide information in relation to:
  - (a) the arrangements that Reliable had in place in respect of the funding for the consideration it was offering to Pinnacle shareholders under its Bid, including:
    - (i) whether New West intended to fund Reliable's Bid with its own cash, borrowings, funds raised from investors, or some other source of funding;
    - (ii) whether Reliable had entered into any security arrangements in relation to the funds, and the details of any such arrangements;



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- (iii) the terms of Reliable’s funding arrangement with New West, including the details of any conditions and restrictions attached to the arrangement;
  - (b) who else, other than Mr John Venners or Mr Gregg Renkes, had an interest in Reliable and whether that interest arose as a result of:
    - (i) a security interest in Reliable or over Pinnacle shares;
    - (ii) an equity or investment interest in Reliable; or
    - (iii) some other interest .
- 36. In response to the Panel’s request dated 22 March 2001, Reliable informed us that:
  - (a) New West had written to Reliable on 15 January 2001, stating that it was committed to providing the funds necessary for the Bid. We were provided with a copy of this letter. It was a brief letter, stating that approximately US\$20 million was required to acquire 100% of Pinnacle based on the Bid price, and that New West confirmed that it had agreed to provide Reliable with the necessary funding to acquire a majority interest in Pinnacle, assuming that the Bid conditions were met.;
  - (b) New West wrote to Reliable again, on 16 March 2001. Again, we were provided with a copy of this letter, which stated that New West reconfirmed its commitment to fund the Bid and that it had the resources necessary to meet the commitment “based on its cash and other holdings”;
  - (c) New West had not told Reliable how the funding would be provided (note that section 4.2 of the Bidder’s Statement said that New West would source the funds from a combination of cash resources, drawdowns under bank facilities and investments by New West clients; and the supplementary statement said that New West had not decided what combination of funding sources to use, and that the list provided in section 4.2 of the Bidder’s Statement was entirely a matter for New West).
  - (d) Reliable had not entered into any security arrangements in relation to the funding to be provided by New West (note that the Bidder’s Statement said that New West had agreed to provide the funds by way of equity subscription and loans); and
  - (e) That no person other than John Venners and Gregg Renkes had an equity, security, investment or other interest in Reliable.
- 37. Following receipt of this information, we wrote to Reliable on 28 March 2001, noting that the terms on which New West would provide funds to Reliable had not been concluded, and that these terms may be relevant to the decisions of Pinnacle shareholders whether to accept Reliable’s offer. In that letter, we asked for further information in relation to New

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West, including how it would provide funds to Reliable for the purpose of funding the Bid.

38. On 30 March 2001, we again wrote to Reliable, expressing our concern that, irrespective of New West's ability to source funding for the purposes of Reliable's Bid, there were no firm arrangements by which New West would provide funds to Reliable.
39. In that letter, we noted that this lack of firm arrangements raised the question of what the terms of such an arrangement might be, including whether New West would have a relevant interest, a security interest, or both, in shares for which Reliable receives acceptances under its Bid for Pinnacle. We also alerted Reliable that we were minded to make a declaration of unacceptable circumstances under section 657A of the Law on the basis that the lack of firm funding arrangements between New West and Reliable created uncertainty in relation to whether there has been an efficient, competitive and informed market in Pinnacle shares and whether shareholders had the information they required to assess the merits of the offer.
40. Before Reliable formally responded to our 28 and 30 March requests, it had become clear that the only funding arrangements that Reliable had with New West were 2 letters which confirmed that New West had agreed to provide Reliable with the funding to acquire a majority interest in Pinnacle on an unconditional basis, provided that the Bid conditions were met.
41. On 3 April 2001, Reliable provided us with a copy of a written agreement between Reliable and New West dated 2 April 2001 relating to the funding for Reliable's Bid (the *Funding Agreement*).
42. It was clear from the Funding Agreement that Reliable had "firmed-up" its arrangements with New West. The Funding Agreement established that:
  - (a) New West would provide the necessary funds by way of an unsecured short term standby facility, which would expire 60 days after the close of the Bid;
  - (b) This short term facility would be replaced by way of equity participation by a number of co-investors, to be procured by New West and/or Reliable;
  - (c) If Reliable's Bid was successful, Reliable would be listed (most likely by merging with and becoming the subsidiary of a public shell company (as yet unidentified) incorporated in the US (the *US Company*))
  - (d) Equity participation would be achieved via subscription to the US Company through a private information memorandum;

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- (e) If the necessary equity funds were not raised, New West's short term funding would be converted into equity in the US Company;
  - (f) In consideration for the funding facility, Reliable would provide warrants in the US company to New West (the number of warrants to be issued would depend on the amount of equity assumed by the co-investors).
43. Because New West is a private and foreign company, we had no means of obtaining evidence ourselves to be sufficiently assured that New West had access to the funds required for the Bid.
  44. At the same time as we received the Funding Agreement, we were also informed that Reliable expected to be able to provide a letter from Compass Bank in the United States, indicating that New West had the funds available to meet its obligation to Reliable. We told Reliable that we wanted evidence that New West had sufficient funding arrangements in place to meet its obligation to Reliable, and not simply an acknowledgement that New West had the financial standing to meet a funding obligation. NM Taylor Lawyers indicated to us that they were expecting a letter from Compass Bank stating that New West had the funds available and that Compass Bank would lend New West the funds if needed. We were told that this letter was in the process of being issued by Compass Bank but, due to time zone differences, that we wouldn't receive it until Wednesday 4 April 2001.
  45. The promised letter from Compass Bank was accordingly integral to our consideration of this matter, as it provided a means of confirming that New West had the funds available for the Bid.
  46. At this stage of the proceedings, we believed that, at least until the Funding Agreement was put into place on 2 April 2001, Reliable had not made sufficient funding arrangements with New West. While Reliable's directors may, themselves, have believed that New West would meet its commitment to provide the funds, the terms on which the funds would be provided had not been decided, not even whether it would be equity or a loan. This lack of definite arrangements justified some doubt as to whether the funds would be provided, as well as to the terms on which they would be provided.
  47. The scope for such doubt raised the possibility of disruption to the efficient, competitive and informed market in Pinnacle Shares. This possibility seemed real. Since early March 2001, Pinnacle Shares had traded between 47c and 57c. Prior to this, since September 2000, Pinnacle Shares traded predominantly below 40c. This suggested that the market price for Pinnacle Shares was supported by Reliable's Bid.
  48. Further, in our view, the fact that New West, as financier to the Bid, was a foreign, private company, little known in Australia, added to the uncertainty as to whether Reliable would be able to pay the

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consideration offered under the Bid. At no stage in the proceedings were we provided with a copy of the accounts of either company. Nor were we provided with anything other than brief 1 page letters broadly referring to the financial standing of Mr Venners and New West. We were unsuccessful in our attempts to find some more information about New West using our own resources. In contrast, we were quickly able to establish that Compass Bank is a well known bank in the United States. Without sufficient evidence of New West's funding capabilities, Pinnacle shareholders and the market would not know whether they could rely on New West meeting its obligation to Reliable under the Funding Agreement.

#### **Declaration of unacceptable circumstances and interim orders**

49. We did not receive the promised letter from Compass Bank on 4 April 2001. Rather, we were told that we would receive it on 6 April 2001.
50. By this stage, we had evidence that Reliable did not have sufficient arrangements in place to ensure that Reliable would have funding to pay the consideration offered to shareholders under the Bid. Reliable had entered into the Funding Agreement with New West on 2 April 2001, which clarified the terms on which New West would lend money to Reliable, and, perhaps also more concrete evidence of a commitment to provide funds to Reliable. However, by 4 April 2001, despite our repeated requests, we had insufficient evidence that New West was able to meet its commitment to Reliable.
51. We therefore decided to make a declaration of unacceptable circumstances under section 657C of the Law, because:
  - (a) Reliable had not made sufficient arrangements to ensure that Reliable would have funding to pay the consideration offered to shareholders under the Bid, with the result that:
    - (i) the insufficient funding arrangements detracted from an efficient, competitive and informed market in shares in Pinnacle; and
    - (ii) Pinnacle shareholders did not have enough information to enable them to assess the merits of Reliable's offer.
  - (b) Reliable's disclosure of its funding arrangements did not comply with paragraph 636(1)(f) of the Law.
52. A copy of the declaration is attached as Annexure A to these reasons.
53. Since on 4 April 2001 we still expected to receive a letter indicating that New West had funding arrangements in place to meet its obligation to Reliable, we decided that we would not be justified in stopping the Bid at that stage.

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54. Rather, we made interim orders preventing Reliable from dealing with any Pinnacle Shares for which Reliable had received acceptances under the Bid. The aim of these interim orders was to protect Pinnacle shareholders who had accepted Reliable's offer by ensuring that nothing could be done with their Pinnacle Shares until we had evidence that New West had sufficient funding arrangements in place to meet its obligation to Reliable.
55. A copy of the interim orders is attached as Annexure B to these reasons.
56. At the time that we made these orders, we also told NM Taylor Lawyers that Reliable had until the morning of Friday 6 April 2001 to provide the promised letter from Compass Bank, and that if the letter was not forthcoming, then we would stop the Bid.
57. On Friday 6 April 2001, we did not receive the promised letter from Compass Bank. Instead, we were told that Mr Tom Wiens (a director of New West) would provide evidence that New West had sufficient funds available to meet its obligation to Reliable by the morning of Saturday 7 April 2001. We were also told that we would receive a letter from Compass Bank at the same time.
58. On Saturday 7 April 2001, the Panel was provided with the following:
  - (a) A letter from Mr Harold Goldback, Vice President of Corporate Banking at the Denver-Cherry Creek office of Compass Bank. In this letter, it was acknowledged that New West had agreed to provide the funding for Reliable to acquire Pinnacle, and that the total amount required was approximately US\$18 million. The letter also stated:

*“Tom Wiens has been a valued customer of Compass Bank (formerly known as FirsTier Bank) for a number of years and we are confident that he has the readily available resources to fulfill his obligations with respect to this proposed transaction.”*
  - (b) A letter from Mr Jimmac Lofton, Branch Manager/Vice President, Investments of Raymond James & Associates Inc, which we understand is a large US stock broking firm. That letter stated that New West had negotiable securities with a current market value of approximately US\$16 million with Raymond James and Associates, which were available for immediate drawdown.
  - (c) Extracts from a Form S-4 lodged by Compass Bancshares Inc dated 13 October 2000 with the Securities Exchange Commission showing that 6.8 million shares were to be issued to the shareholders of the FirsTier Corporation in return for acquiring their shares in FirsTier Corporation, and that Mr Joel Wiens and Mr Timothy Wiens were the beneficial owners of common stock in Compass Bancshares Inc. We were told by Reliable that shares in Compass Bancshares Inc had a current market value of approximately US\$21.

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- (d) A letter from Mr John Parell, President and CEO of US Global LLC to Mr John Venners of Reliable which stated that US Global was very interested in investing in the technology of Pinnacle, assuming the conditions of the Bid were met, and acknowledged that Reliable had a funding commitment from New West. This letter also advised that US Global were prepared to supplement New West if the opportunity presented itself. Attached to this letter was a bank statement from Fleet Bank verifying that US Global LLC has a balance in excess of US\$8.5 million.
59. The Compass Bank letter related to the financial standing of Mr Tom Wiens and not New West. It did not provide evidence that New West had arranged a facility with Compass Bank to fund the Bid, or even that New West had some other way of accessing the funds to meet its obligation to Reliable.
60. The Raymond James & Associates letter provided evidence that New West had US\$16 million in securities which were available for immediate drawdown if so required by New West. However, if Reliable received 100% acceptances under its Bid, it would need approximately US\$18 million to pay the consideration offered under the Bid. In addition, we had no way of knowing whether New West had other alternative uses for these funds which would take priority over New West's obligation to lend the funds to Reliable.
61. The Form S-4 extracts showed that some members of the Wiens family (not including Mr Tom Wiens) held common stock in Compass Bancshares Inc. in October 2000, as a result of the sale by them of FirsTier Bank to Compass Bank. We had no way of knowing whether these members of the Wiens family still held this stock or whether they could liquidate the stock, or, if they could liquidate the stock, whether they would be prepared to provide the funds to New West. We also had no evidence that this stock could be liquidated by New West.
62. The letter from US Global LLC provided evidence of a non-binding commitment from a proposed equity participant. This letter did not provide any additional evidence that funds had been made available for Reliable to pay the consideration offered under its Bid.
63. None of these documents either on their own, or when read together, provided evidence that New West had access to sufficient funds for the purpose of meeting its commitment to provide funds to Reliable to pay for acceptances under the Bid. Nor did they show that someone else had access to sufficient funds and had committed to providing them to Reliable for the purpose of funding its Bid.

### Final orders

64. We had invited Reliable several times to provide evidence that it had sufficient funding arrangements in place, and had allowed Reliable more

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than adequate time to provide this evidence. While Reliable was able to produce evidence of a commitment by New West to provide the funds to Reliable, Reliable did not demonstrate to our satisfaction that, through New West (or any other party), it had sufficient funding arrangements in place for the purpose of funding its Bid.

65. For this reason, we made orders:
  - (a) Cancelling all offers made to shareholders of Pinnacle and all contracts made with Pinnacle shareholders under the Bid;
  - (b) Requiring Reliable to notify the ASX and Pinnacle shareholders that the offers and contracts made under the Bid have been cancelled and to return all acceptances received in respect of the Bid; and
  - (c) Prohibiting Reliable from acquiring a further interest in Pinnacle shares as a result of offers made or acceptances received under the Bid.
66. A copy of those orders is attached as Annexure C to these reasons.

#### **Was Reliable reckless in announcing its Bid?**

67. Section 631(2) prohibits a person from publicly proposing to make a takeover bid if the person knows the proposed bid will not be made or is reckless as to whether the proposed bid is made or 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.
68. Although Pinnacle did not raise this directly in its Application, in its submissions, Pinnacle alleged that Reliable had been reckless in making its Bid in that it did so without first ensuring it would be able to perform its obligations relating to the Bid if it received acceptances for a substantial proportion of the offers made.
69. We made no finding in relation to whether, at the time that Reliable publicly announced its intention to make a takeover bid for Pinnacle, Reliable was reckless as to whether it would be able to perform its obligations relating to the takeover Bid if it received acceptances for a substantial proportion of the offers under the Bid. We note that Reliable made arrangements to fund the bid and that Mr Venners stated that he was confident those arrangements were adequate. In our view, the more significant issue raised by the Application was whether Reliable's lack of sufficient funding arrangements detracted from an efficient, competitive and informed market in Pinnacle shares.

#### **Were there deficiencies in Reliable's disclosure to Pinnacle shareholders?**

70. This matter originally appeared to be based predominantly on questions of the adequacy of Reliable's disclosure. During the proceedings,

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however, it became clear to us that the more pressing question raised by this application was the adequacy of the funding arrangements made by the bidder. The questions we put to parties turned quickly from questions focussing on disclosure to questions aimed at determining what arrangements Reliable had made to ensure it had the funds to pay the consideration offered under its Bid.

71. For this reason, we did not focus on the allegations of inadequate disclosure raised in Pinnacle's application. We note that Reliable agreed to provide any additional disclosures required by the Panel. In that context, we make the following comments.
72. In addition to the provisions requiring disclosure of funding, we considered the adequacy of disclosure in relation to the funding arrangements in the light of ASIC Practice Note 37.

#### *Short-term loan from New West*

73. Paragraph 636(1)(f) of the Law requires that, where cash consideration is offered under a bid, the bidder's statement must include details of:
  - (i) the cash amounts held by the bidder for payment of the consideration;
  - (ii) the identity of any other person who is to provide, directly or indirectly, cash consideration from that person's own funds;
  - (iii) any arrangements under which cash will be provided by a person referred to in subparagraph (ii).
74. Once the Funding Agreement had been entered into, this paragraph would have required Reliable to disclose that New West had agreed to provide the entire funds for the Bid by way of a short term loan.

#### *Intention to inject equity into Reliable post-Bid*

75. Sub-section 636(1)(m) of the Law also requires that a bidder's statement include details of any other information that is material to offerees in making the decision whether or not to accept an offer under a bid. Such information must, however, be known to the bidder.
76. This sub-section would have required Reliable to disclose that it was intended that, following close of the Bid, Reliable would be listed or merged with another entity and that equity would then be sought from other investors in order that New West's short term funding facility could be paid back.
77. The new funding arrangements between Reliable and New West made it clear that Reliable and New West intended to procure equity investments in Reliable (or a company which Reliable merges with) soon after the Bid concluded, for the purpose of providing the funds for Reliable's interest in Pinnacle. Alternatively, New West would provide



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the equity itself. This information would have been relevant to shareholders who were considering keeping their shares in Pinnacle, because an equity injection into Reliable may have affected who ultimately controlled Pinnacle. For this reason, it would be relevant to Pinnacle's shareholders. This information would also be required because subparagraph 602(b)(i) of the Law requires that Pinnacle's shareholders are given enough information about the identity of persons who propose to acquire a substantial interest in Pinnacle.

#### *Foreign bidder and financier*

78. Pinnacle submitted that the fact that Reliable was a limited liability company and was not registered under Division 2 of Part 5B.2 of the Law should be disclosed in its Bidder's Statement as this information would be material to a shareholder deciding whether or not to accept Reliable's Bid.
79. ASIC strongly submitted that, where both a bidder and its financier are foreign and unknown companies in Australia, greater levels of disclosure are required, particularly in relation to the resources of the financier. We agree with ASIC's contention. Even if Reliable had disclosed that it had sufficient arrangements with New West for New West to fund the Bid, the fact that New West is a private company and is little known in Australia means that shareholders should also be given clear evidence that New West had the ability to meet this commitment to Reliable.
80. If we were to order that Reliable provide supplementary disclosure to Pinnacle's shareholders, we would then consider whether to require a statement to this effect in the supplementary document. We did not make such an order, and therefore we simply note that it is relevant to shareholders that a bidder is a foreign company not registered as a foreign company (and therefore it may be more difficult to pursue any claim which may arise against a bidder). We also note that both of these facts could have been drawn to the attention of shareholders by Pinnacle in its Target's Statement.

#### *Conditional funding agreement*

81. Pinnacle submitted that it was unclear from Reliable's Bidder's Statement whether Reliable's funding arrangements with New West were conditional on the Bid conditions being met. The supplementary part of Reliable's Bidder's Statement stated that New West's obligation to provide funds was conditional on the Bid being successful according to its conditions, which is ambiguous as to whether the conditions could be waived by Reliable.
82. In our view, this statement did not identify to shareholders that New West would only provide funds to Reliable for the Bid, if all of the Bid conditions were met. In the event that we had to consider Reliable's

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disclosure obligations more closely in relation to this matter, we would have required that Reliable clarify this in its Bidder's Statement.

#### **Did unacceptable circumstances exist because Reliable was not registered under Division 2 of Part 5B.2 of the Law?**

83. Pinnacle submitted that the fact that Reliable had not registered as a foreign company gave rise to unacceptable circumstances. Assuming (without deciding) that Reliable was required to register as a foreign company to carry out a takeover bid in Australia, we do not think that its failure to comply with that obligation alone gave rise to unacceptable circumstances. It does not directly detract from any of the policies of section 602. If it is relevant to any of the matters we have to consider, it is a factor exacerbating the impact on the market of Reliable's failure to enter into or disclose adequate financing arrangements.

## CONCLUSION

84. Reliable was able to demonstrate that New West had committed to provide funds to pay for acceptances but, after several extensions of time, not that New West (or any other party) had access to sufficient funds for that purpose. Accordingly, we stopped Reliable's Bid for Pinnacle.

**Marian Micalizzi**  
**President of the Sitting Panel**  
**Decision dated 9 April 2001**  
**Reasons published 14 May 2001**

## Corporations & Securities Panel

### Reasons for Decision – Pinnacle VRB Ltd (No. 04)

Annexure A

#### Corporations Law Section 657A Declaration

Whereas:

- A. Reliable Power Inc (*Reliable*) made offers to acquire all of the issued shares in Pinnacle VRB Limited (*Pinnacle*) on 20 March 2001;
- B. In a bidder's statement accompanying those offers, Reliable represented that New West Capital LLC (*New West*) had agreed to provide sufficient funds to Reliable by way of equity subscription and loans to enable Reliable to meet its obligations under the offer;
- C. Reliable had not, in fact, made sufficient arrangements to ensure that Reliable would have funding to pay the consideration offered to shareholders under the bid;
- D. Reliable's failure to put in place sufficient funding arrangements to ensure it was able to pay the consideration offered under the bid:
  - (i) Detracted from an efficient, competitive and informed market in shares in Pinnacle; and
  - (ii) Had the effect that Pinnacle shareholders did not have enough information to enable them to assess the merits of Reliable's offer.
- E. Reliable's disclosure of its funding arrangements did not comply with paragraph 636(1)(f) of the Corporations Law;

under section 657A of the Corporations Law, the Corporations and Securities Panel declares that the circumstances set out in recitals A to D are unacceptable circumstances in relation to the affairs of Pinnacle.

4 April 2001

Marian Micalizzi  
President

**Corporations & Securities Panel**

**Reasons for Decision – Pinnacle VRB Ltd (No. 04)**

Annexure B

Corporations and Securities Panel

CORPORATIONS LAW

Section 657E

Interim Order

Pursuant to section 657E of the Corporations Law, the Corporations and Securities Panel hereby orders that, for a period of 2 months from the date of this order:

- (a) Reliable Power Inc (*Reliable*) does not exercise any voting or other rights attached to shares in Pinnacle VRB Limited (*Pinnacle*) for which Reliable has received or does receive acceptances under Reliable's off-market takeover bid for Pinnacle (*Relevant Pinnacle Shares*);
- (b) Reliable does not sell, transfer, dispose of, charge or in any other way deal with any Relevant Pinnacle Shares or interests in Relevant Pinnacle Shares;
- (c) Any exercise of the voting or other rights attached to the Relevant Pinnacle Shares be disregarded;
- (d) Pinnacle does not make any payment of any amount due now or during the currency of this order in respect of the Relevant Pinnacle Shares

Dated 4 April 2001

Marian Micalizzi

President

## Corporations & Securities Panel

### Reasons for Decision – Pinnacle VRB Ltd (No. 04)

Annexure C

#### Corporations and Securities Panel

#### CORPORATIONS LAW

#### Section 657D

#### Order

Pursuant to section 657D of the Corporations Law, the Corporations and Securities Panel hereby makes the following orders in relation to the off market takeover offer for all of the ordinary shares in Pinnacle VRB Limited (*Pinnacle*) dated 20 March 2001 by Reliable Power Inc (*Reliable*) (the *Bid*):

- (e) That all offers made to Pinnacle shareholders under the Bid are cancelled;
- (f) That all contracts made between Reliable and Pinnacle shareholders under the Bid are cancelled; and
- (g) That Reliable:
  - (i) notifies the Australian Stock Exchange by 5.00pm EST Tuesday 10 April 2001 and notifies Pinnacle shareholders by letter to be posted no later than 5.00pm EST Wednesday 11 April 2001 that all offers made by Reliable to Pinnacle shareholders and all contracts made between Reliable and Pinnacle shareholders under the Bid have been cancelled;
  - (ii) returns to each person who has accepted an offer under the Bid any documents that the person sent Reliable with the acceptance of the Bid by posting them by 5.00pm EST Wednesday 18 April 2001;
  - (iii) gives any electronic notice required by the SCH Business Rules to complete the cancellation of the offers and contracts under the Bid by 5.00pm EST Wednesday 18 April 2001; and
  - (iv) acquires no further interest in shares in Pinnacle as a result of offers made or acceptances received under the Bid.

**Corporations & Securities Panel**

**Reasons for Decision – Pinnacle VRB Ltd (No. 04)**

The interim orders made by the Panel in relation to this matter dated 4 April 2001 will expire at 5.00pm EST Wednesday 18 April 2001.

Dated 9 April 2001

Marian Micalizzi

President