

In the matter of Namakwa Diamond Company NL (No. 1)  
[2001] ATP 8

**Catchwords:**

*Takeover bid made two hours after initial listing of target – association – acting in concert – contravention of section 606 – allegation of market manipulation – efficient, competitive and informed market – insufficient information available to shareholders – equal opportunity to participate in benefits*

*Corporations Law (Cth), sections 606, 995 and 997*

On 27 April 2001, we decided that we had received insufficient evidence supporting the application by Namakwa to commence a detailed inquiry into its allegations of association, breach of section 606, and market manipulation. We advised Namakwa and Majestic that we will keep those issues under review as the bid develops. We have requested Majestic not to waive its minimum acceptance condition in its bid without giving the Panel two business days notice of its intention to do so, with details of the level of acceptances and the identities of the offerees who have accepted for parcels in excess of 5%.

These are our reasons for that decision.

## REASONS FOR DECISION

1. The sitting Panel in this matter comprises Nerolie Withnall (President), Fiona Roche (sitting Deputy President) and Chris Photakis.
2. These are our reasons for declining to make a declaration of unacceptable circumstances in relation to the takeover bid announced by Majestic Resources NL (*Majestic*) on 15 March 2001 for all of the ordinary shares in Namakwa Diamond Company NL (*Namakwa*) (the *Bid*).
3. Namakwa applied on 26 March 2001 (the **Application**) for a declaration of unacceptable circumstances under section 657A and interim orders under section 657E of the Corporations Law<sup>1</sup> restraining the dispatch of Majestic's bidder's statement pending determination of the Application. Namakwa advised that if the Panel made a declaration of unacceptable circumstances it would seek orders requiring Majestic (and its associates) to dispose of or otherwise distribute (in a fair and equitable manner) its Namakwa securities.

## APPLICATION

4. The application arose out of a series of acquisitions of shares and options in Namakwa under a prospectus issued by Namakwa dated 15 December 2000 (**Prospectus**), trading in Namakwa and Majestic shares leading up to and immediately after the initial listing of Namakwa, and the takeover bid by Majestic

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<sup>1</sup> All references to section are to sections of the Corporations law, unless otherwise stated.

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announced on 15 March 2001, approximately two hours after Namakwa commenced trading.

5. The persons whom Namakwa alleged were acting in concert with Majestic were:
  - a. Rumsey Holdings Limited (**Rumsey**);
  - b. Mr Sin Jen Hwang (**Hwang**);
  - c. Equity West Securities Pty Ltd (**Equity West**);
  - d. D.J. Carmichael Pty Ltd (**D.J. Carmichael**); and
  - e. Carmichael First Capital Pty Ltd (**Carmichael First Capital**)

Collectively the **Majestic Parties**.

6. Namakwa alleged in its application that some or all of the Majestic Parties had acted in concert to enable Majestic (and its associates) to acquire a “substantial interest” (as referred to in section 657A) in Namakwa. The effect of the transactions would be that certain of the Majestic Parties breached section 606.
7. Namakwa further alleged that the trading activities of D.J. Carmichael in Majestic shares leading up to the announcement of the Majestic bid and the release of a research report on Majestic by D.J. Carmichael dated 19 February 2001 attributing a value of 61 cents per share fully diluted, may have been in breach of sub-section 997(1).
8. Namakwa sought a full investigation of the trading in Namakwa securities since listing (including, without limitation, trading conducted by D.J. Carmichael and Hartley Poynton).
9. Namakwa alleged that:
  - a. the acquisition of a substantial interest by Majestic in Namakwa did not take place in an efficient, competitive and informed market;
  - b. at the time the bid was announced, there was a lack of information available to shareholders as to Majestic’s existence on the Namakwa register or the extent of its interest. The substantial shareholder notice for Majestic was not lodged until after the bid for Namakwa was announced. The non-disclosure by Majestic was a major omission either knowingly, recklessly or negligently; and
  - c. its shareholders had been deprived of a reasonable and equal opportunity to participate in any benefits which would otherwise accrue to them if Majestic was to have acquired its “substantial interest” in Namakwa by other means (e.g on-market).
10. Namakwa advised that the adequacy of disclosures made in Majestic’s Bidder’s Statement was likely to form the basis of a separate application to the Panel by Namakwa. This later happened.

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#### BACKGROUND

11. Namakwa and Majestic are listed on Australian Stock Exchange Limited (ASX).
12. Namakwa is an alluvial diamond prospector with tenements in South Africa. It is a spin off of a division of Kimberley Diamond Company NL. On 15 December 2000, it issued a prospectus Majestic advises that from October 2000 to March 2001 it examined various options for acquiring a direct or indirect interest in the Namakwa Diamond Project, including applying for shares under the Prospectus. In December 2000, Majestic approached its corporate adviser, Carmichael First Capital Pty Ltd, a subsidiary of the Perth stockbroker DJ Carmichael Ltd for advice and assistance.
13. Following Majestic's approach to Carmichael First Capital to acquire a stake in Namakwa, DJ Carmichael proposed a sub-underwriting arrangement with Equity West, Namakwa's underwriters to its December prospectus. D.J. Carmichael agreed to participate as a sub-underwriter and to take as of right a "firm" allocation of 10,000,000 Namakwa shares (i.e. the whole of the public offer). DJ Carmichael then entered into a series of sub-sub-underwriting agreements with Majestic between 18 December 2000 and 9 February 2001. The amount to be underwritten by Majestic decreased successively from 10 million Namakwa shares to 6 million.
14. Pursuant to an underwriting agreement between Namakwa and Equity West dated 11 December 2000:
  - a. Equity West agreed to underwrite the Namakwa offer as to an amount of \$5,000,000;
  - b. Equity West was retained to manage the issue under the Prospectus;
  - c. there were no restrictions in the underwriting agreement on how Equity West might allocate shares, and there was no minimum spread requirement; and
  - d. Namakwa was obliged to allot shares (and a corresponding number of attaching options) in accordance with the directions of Equity West.
15. On 26 February 2001 and in accordance with the underwriting agreement, Equity West delivered three (3) applications for 10,000,000 Namakwa shares to Namakwa. The applications, from DJ Carmichael's clients under a "firm" sub-underwriting agreement, were as follows:
  - a. Overnight Nominees Pty Ltd 6,000,000 Shares;
  - b. Rumsey 2,000,000 Shares; and
  - c. Hwang 2,000,000 Shares.
16. Overnight Nominees Pty Ltd (**Overnight**) is a nominee company of D.J. Carmichael.
17. Rumsey is a Hong Kong incorporated company. Mr Charles Mostert (**Mostert**) is a substantial shareholder in Rumsey and is its authorised representative in Australia. Mostert has significant business relationships with Majestic, particularly as representative of Majestic.
18. Hwang is a substantial shareholder of Majestic. Carmichael First Capital states that he is a long standing client of DJ Carmichael who has taken sub-underwriting

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positions in diamond, gold and other resource companies. DJ Carmichael suggests it approached Hwang to invest in the sub-underwriting of the Namakwa shares.

19. On 9 March 2001 and in accordance with the underwriting agreement and the terms of the offer under the Prospectus, the securities were allotted to applicants (including Overnight, Rumsey and Hwang). For each four Namakwa shares, each subscriber also received two options to subscribe for Namakwa shares at \$0.25 (exercisable before 19 September 2001) (**2001 options**), and one option to subscribe for Namakwa shares at \$0.30 on or before 2003 (**2003 options**).
20. Namakwa listed on ASX at 10am (WST) on 15 March 2001. Within approximately 90 minutes of listing, Majestic announced a takeover bid for Namakwa and notified Namakwa of its intention (through Overnight) to convert its 3,000,000 2001 options.
21. Majestic was offering two fully paid Majestic shares (then trading at around \$0.35/sh), plus one \$0.20 partly paid Majestic share for every two Namakwa shares. It asserted that this represented a 41% premium to the \$0.25 issue price of the Namakwa shares. The bid did not extend to either series of options, but did extend to all Namakwa shares on issue at 3 April 2001. The bid was conditional on 50% acceptances.
22. At the time the Majestic bid was announced Namakwa asserts that the market was not aware of Majestic's existence on the Namakwa register or the extent of its interest in the securities registered in the name of Overnight.
23. Majestic lodged a substantial shareholder notice at approximately 3.36pm (WST) on 15 March 2001, after the announcement of the bid for Namakwa. Majestic's disclosed entitlement (excluding the shares held by Rumsey and Hwang, but including shares to be issued following the exercise of Majestic's 2001 options) to voting shares in Namakwa was 19.4%.
24. The weighted average price for a share in Majestic during the 5 days preceding the announcement of the bid was 35.3 cents.

### ALLOTMENTS, EXERCISING, SALES

25. There is material contention between the parties as to the communications, instructions and agreements reached between Namakwa, DJ Carmichael, Equity West and others as to how the underwriting was progressing and who would emerge as shareholders in Namakwa. There is disagreement as to whether Namakwa was happy about various allotments. We do not think it would be possible to determine the definitive course of arrangements and agreements.
26. Namakwa states that on receiving only three applications from Equity West, it telephoned Equity West who confirmed that the applications were arranged by D.J. Carmichael. Namakwa also alleges that Mr. Max Fowles (chairman of D.J. Carmichael) advised Namakwa, inter alia, that Equity West had placed no restriction on D.J. Carmichael with respect to the placement of the "firm" securities.
27. DJ Carmichael asserts that Rumsey approached it to sub-sub-underwrite the Namakwa issue, and that because of its previous relationship with Hwang it was DJ Carmichael which approached Hwang to subscribe for Namakwa shares.

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28. Under the prospectus and by exercise of options, Majestic, Rumsey and Hwang subscribed for the following shares:

	Firm Under-writing of Prospectus	Rights Issue Under-writing	% of 43.5 M	Shares Sold on 15 and 16 March	Exercise of 2001 Options	Total	% of 51 M
Majestic	6,000,000		13.8%		3,000,000	9,000,000	17.6%
Rumsey	2,335,283	3,999,997	14.6%	1,899,000	2,999,999	7,436,279	13.9%
Hwang	2,046,000		4.6%	350,000	500,000	2,150,000	4.2%
		<u>Total</u>	<u>33.0%</u>			<u>Total</u>	<u>35.7%</u>

Notes:

- (a) The numbers of shares taken by Rumsey and Hwang under the prospectus include bonus shares.
  - (b) The number 43,466,223 shares is given on page 5 of the prospectus as the total number of shares on issue after completion of the offer. The number 50,966,222 shares is the same number, increased by the number of shares to be issued on exercise of the options mentioned above.
  - (c) Majestic stated in its 15 March bid announcement to ASX, and in its subsequent substantial shareholding notice, that it had acquired a relevant interest in 6 million (13.8%) Namakwa shares and that it intended to exercise 3 million options to take its relevant interest to 19.4%. This implies that 46.4 million shares are on issue. This would have been true after shares had been issued to Majestic on the exercise of its options and before shares had been issued to Rumsey or Hwang on the exercise of their options.
  - (d) It is somewhat unclear how many 2001 options have been exercised. The 2003 options are out of the money.
29. Rumsey acquired a further 3,999,997 shares, 2 million 2001 options and 1 million 2003 options by negotiation with Namakwa under the rights issue underwriting.
  30. Majestic stated in its bidder's statement that it sold, on 15 March for 6.9 cents per option, the 1.5 million Namakwa 2003 options it acquired under the prospectus. Rumsey also sold its 2003 options on the advice of DJ Carmichael.
  31. On 15 March 2001, Majestic (through Overnight) lodged a notice of exercise of 3,000,000 2001 options.  
On 16 March 2001, Hwang and Rumsey lodged notices of exercise of 1,000,000 and 500,000 2001 options respectively.  
On 19 March 2001, Rumsey lodged a notice of exercise of 2,499,999 2001 options.
  32. Rumsey notified Namakwa on 20 March (i.e. after lodging notices of exercise of 2,999,999 options) of a holding of 4,600,997 shares, explained as 'application and allotment of ord. shares less sales'. This includes the 500,000 options exercised on 16 March.

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33. On 15 and 16 March, 2001, Rumsey sold through HP JDV Ltd (**Hartley Poynton**) both Namakwa shares and Namakwa 2001 options which it had acquired under its agreement with DJ Carmichael. DJ Carmichael acquired the majority of the shares sold by Rumsey on 15 March but none on 16 March. Rumsey also sold Namakwa shares through Hartley Poynton on 16 March.

	Date	Time ESST	Number	Price
Shares	15/03/01	13.40 & 14.45	999,000	\$0.285 & \$0.26
	16/03/01	11.48 & 14.52	480,000	\$0.29 & \$0.30
(DJ Carmichael)	16/03/01		420,000	\$0.277
2003 Options	15/03/01	14.38	480,621	6-7 cents
	16/03/01	11.48 & 14.52	750,000	5-6 cents

34. Hwang sold 350,000 Namakwa shares on 15 and 16 March through DJ Carmichael at \$0.28 to \$0.31.

#### *The Bonus Shares and Options*

35. DJ Carmichael was entitled to receive 731,283 Namakwa shares, and 365,642 2003 options and 2% of the sub-underwritten amount as its fee for sub-underwriting 10 million Namakwa shares. It passed on these securities as follows :

	Shares Taken	Bonus Shares	Free 2003 Options
Majestic	6 million	Nil	Nil
Rumsey	2 million	335,283	314,452
Hwang	2 million	46,000	51,190

36. DJ Carmichael provided no explanation for this allocation of the sub-underwriting securities.

#### **ACTING IN CONCERT**

37. In its submissions Namakwa highlighted the following issues:
- (a) Majestic, Rumsey and Hwang all took up shares in the float through DJ Carmichael, and they took up all of DJ Carmichael's firm allotment of 10 million Namakwa shares (which was all of Namakwa's public offer).
  - (b) Hwang is a substantial shareholder of Majestic.
  - (c) Carmichael First Capital was mandated and is acting as the corporate adviser to Majestic in its bid for Namakwa.

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- (d) D.J. Carmichael was the sub-underwriter/firm placee to the Namakwa public offer and arranged for the applications to be made in the names of Overnight, Rumsey and Hwang.
- (e) Majestic, Rumsey and Hwang all exercised their 2001 options within a few days of the bid announcement.
- (f) Rumsey and Hwang accounted for 53% of the selling of Namakwa shares on 15 and 16 March, 2001.
- (g) Mostert has significant business relationships with Majestic, particularly as representative of Majestic. Mostert is a substantial shareholder in Rumsey and is its authorised representative in Australia..

### POTENTIAL BREACHES OF THE LAW AND UNACCEPTABLE CIRCUMSTANCES

38. Section 606 prohibits a person from acquiring a relevant interest in the issued voting shares in a company if, because of the transaction, that person or someone else's voting power in a company increases from:
- a. 20% or below to more than 20%; or
  - b. a starting point that is above 20% and below 90%.
39. If Majestic, Rumsey and Hwang are associates, each of the acquisitions resulting from applications made by these persons under the Prospectus increased Majestic's interest in Namakwa to more than 20% in breach of section 606 (and the option conversions further increased Majestic's interest in Namakwa).
40. Sub-section 995(2) provides that a person cannot, in or in connection with:
- a. any dealing in securities; or
  - b. without limiting the generality of paragraph (a):
    - (i) the allotment or issue of securities;
    - (ii) a notice published in relation to securities;
    - (iii) the making of, or the making of an evaluation of, or of a recommendation in relation to, offers under a takeover bid; or
    - (iv) the carrying on of any negotiations, the making of any arrangements or the doing of any other act preparatory to or in any other way related to any matter referred to in sub-paragraph (i), (ii) or (iii),
- engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
41. Namakwa alleged that the conduct of the Majestic Parties and in particular, the conduct of Equity West, D.J. Carmichael and Carmichael First Capital in assisting Majestic to acquire a "substantial interest" under the Prospectus may be misleading and deceptive.
42. Sub-section 997(1) provides that a person shall not enter into or carry out, either directly or indirectly, two or more transactions in securities of a body corporate,

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being transactions that have, or are likely to have, the effect of increasing the price of securities of the body corporate on the stock market, with the intention to induce other persons to buy or subscribe for securities of the body corporate or of a related body corporate.

#### INTERIM ORDER

43. The Panel decided not to make an interim order restraining the dispatch of the Majestic bidder's statement. We considered that even if the allegations in Namakwa's application were substantiated, it was not in the interests of Namakwa shareholders to restrain Majestic's bid. We were satisfied that the Panel would have adequate powers to make any appropriate remedial orders if Namakwa's allegations were proven.

#### PANEL'S FINDINGS

##### *Market Manipulation of Namakwa Shares*

44. On 15 and 16 March 2001, Rumsey and Hwang sold large amounts of the Namakwa shares and 2001 options that they had subscribed for as clients of DJ Carmichael. Namakwa asserts that this was done to drive down the price of Namakwa shares, making Majestic's offer appear more attractive to the other Namakwa shareholders.
45. In particular Namakwa points to a sell order placed by Hwang through DJ Carmichael early on 15 March, 2001, for an "undisclosed" number of Namakwa shares at \$0.28, three hours prior to Namakwa being listed (the sell order was for 4-500,000 shares). Hwang subsequently removed the "undisclosed" sell order prior to the opening of trading in Namakwa shares. Namakwa contended that this was an irrational strategy, signaling a large volume of shares to sell, for any person seeking to maximise their return on Namakwa shares. Hwang was sent a copy of the application but he made no submissions to the Panel on this or other matters.
46. Namakwa also points to the fact of Rumsey and Hwang electing to sell Namakwa shares at less than \$0.30 and converting 2001 options for \$0.25 when it would appear to have been clearly more profitable to sell the options on-market for 5-6 cents and keep the shares. Namakwa invited the Panel to make adverse inferences on this issue as to Rumsey and Hwang's motives and strategy. The Panel was offered no countervailing explanation by Rumsey or Hwang for what appears to be a value losing strategy.
47. However, this behaviour is also consistent with Rumsey and Hwang being stag investors. They had just paid \$0.25 for a Namakwa share and half a 2001 option and a quarter of a 2003 option. They sold the Namakwa shares for between \$0.26 and \$0.30, and the 2003 options for 5-6 cents. When the 2001 options are included at a market price of 5-6 cents, they made approximately 7.5 cents profit per Namakwa share subscribed for (approximately 30% on their investments). It is also possible to speculate that the announcement of the Majestic bid caused Rumsey and Hwang to reassess their strategies.
48. In the absence of other evidence supporting market manipulation or acting in concert with Majestic the Panel considers that it ought to accept that there is a plausible explanation of their trading patterns i.e. that they were merely taking stag profits from an IPO while retaining some equity upside with the 2003 options, as many investors do.



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49. There is no evidence to the Panel that any selling of Namakwa shares by Rumsey or Hwang on 15 and 16 March has materially depressed the share price of Namakwa since. The volume of selling by Rumsey does not appear to the Panel to be more than normal on the first day of an IPO. Since the sales to DJ Carmichael early in the afternoon of 15 March at \$0.26, Namakwa shares have traded in the region of \$0.29. Namakwa asserts that the selling has permanently depressed the price. We cannot see evidence of this.
50. We have been given no evidence of any continued selling with the aim of depressing the price of Namakwa shares.
51. We do not see any likelihood of definitively determining the question. Nor do we see there is any benefit to Namakwa shareholders or the market in attempting to do so.

#### *Market Manipulation of Majestic Shares*

52. Namakwa alleged that the price of Majestic shares was manipulated upward in the few days leading up to the Namakwa listing and the Majestic bid in order falsely to make the Majestic offer appear more attractive.
53. There was a price and volume surge in Majestic's shares prior to 15 March. However, there are potentially other explanations, including a positive broker's report by an analyst in DJ Carmichael valuing Majestic at \$0.61, a positive report from the broker Hartley Poynton, and an announcement on 8 March of a 123 carat diamond being found in a Majestic tenement. DJ Carmichael assert that the analyst who wrote the report was not aware of the underwriting nor the takeover proposal.
54. The Panel notes the increase in price and volume of Majestic shares in the two trading days leading up to the diamond announcement, the lack of further disclosure concerning the announcement, and that the price and volume subsided within a fortnight.
55. The pattern of trading in Majestic shares is not compelling evidence to us of manipulative practice. Namakwa was unable to offer substantial evidence for its assertion.

#### *Section 606 Breach*

56. If aggregated, Majestic, Rumsey and Hwang's holdings in Namakwa would come to 34% of Namakwa<sup>2</sup>. That would constitute effective control of many companies. Both Carmichael First Capital and Majestic assert that the changes in the sub-sub-underwriting arrangements reflect their consciousness of avoiding Majestic breaching the 20% threshold. They further deny any association or acting in concert with Rumsey and Hwang.
57. The evidence to suggest that either or both of Rumsey and Hwang were associates of Majestic is weak and inferential at best. Those inferences might be drawn from:
  - a. their selling patterns;
  - b. their linkages to Majestic; and

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<sup>2</sup> Assuming 50,966,222 Namakwa shares after the exercise of the Majestic, Rumsey and Hwang options.

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c. the actions of DJ Carmichael.

However, those inferences have not been proven, and the actions of DJ Carmichael do not make Rumsey and Hwang associates of Majestic.

58. Indeed, an alternative explanation, rather than Rumsey and Hwang being associates of Majestic and acting in concert with Majestic and Carmichael First Capital, might be that they were selected as typically stag investors whose presence would not be inimical to Majestic's proposed takeover. However, the Panel would have had to have concluded that Majestic and DJ Carmichael were acting in concert, and there is also only inferential evidence for this, and an association between Majestic and DJ Carmichael may not have implied a breach of section 606.
59. We note that if Majestic waives its 50% minimum acceptance condition it could acquire Rumsey and Hwang's shares under the bid, even if no other offerees accepted. We think that such a scenario would tip our view materially towards believing that two or more of Majestic, Rumsey and Hwang had joined together to seek to gain control of Namakwa in breach of the Law and the policy of section 602. It was with that in mind that we requested Majestic not to waive its minimum acceptance condition without consulting the Panel.
60. We considered that the arrangements we put in place, and our preparedness to take further action in the event of circumstances which concern us, adequately safeguard the interests and rights of the other shareholders of Namakwa without the requirement for further inquiries.
61. In mid May 2001, Majestic advised the Panel that it was considering waiving its minimum condition and varying the terms of its bid. We required Majestic to advise us of the proposed terms before the Panel would consent to the minimum acceptance condition being waived. Majestic later advised us that it had decided not to vary the terms of its offer. The bid is due to close on 28 May, 2001, and the minimum acceptance condition will likely not be met.
62. We contacted the directors of Rumsey to seek advice about the controllers of Rumsey, and the beneficial ownership of the Namakwa shares held by Rumsey. We were advised that the directors are Mr Robin Radcliffe and Mr Andrew Ross, and that Mr Robin Radcliffe is the sole shareholder of Rumsey. We then sought advice from Rumsey as to the beneficial ownership of the Namakwa shares acquired by Rumsey. While we were in the process of making these enquiries about beneficial ownership, Rumsey sold the large majority of its shares. The public announcement concerning this sale stated that they had been placed with parties who did not intend to accept Majestic's bid.

#### *An Inquiry*

63. Any evidence for an association between the parties, if it existed, would be unlikely to be found in writing, we do not think that cross examination would necessarily be likely to unearth it, and there is a plausible explanation for Rumsey and Hwang's acquisitions and selling pattern.
64. Given that the shares Rumsey and Hwang sold went to parties other than Majestic, any harm to the auction process in relation to the takeover of Namakwa, if there were harm, appears to have been mitigated.

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65. The Panel has been given no evidence that Majestic, Rumsey or Hwang have been acting together to exercise control over Namakwa.
66. Therefore there appears little benefit to be gained, for the shareholders of Namakwa or for the market in general, in a major inquiry, given the current body of evidence.

#### *DJ Carmichael*

67. As the evidence in this matter accumulated, the Panel formed material concerns as to whether DJ Carmichael had been acting in concert with Majestic, and about the efficiency, honesty and fairness of the actions of DJ Carmichael in this matter.
- A subsidiary of DJ Carmichael, Carmichael First Capital, advised Majestic on aspects of the takeover bid which Majestic was considering, amongst other strategies for gaining an interest in Namakwa, at the same time as it proposed that DJ Carmichael act as sub-underwriter for Namakwa's IPO;
  - on Majestic's account, DJ Carmichael became a sub-underwriter to Namakwa's issue to secure shares for Majestic, despite the separation claimed to exist between Carmichael First Capital and DJ Carmichael;
  - on DJ Carmichael's account, in early December, 2000, Majestic told Carmichael First Capital that Majestic was interested in the forthcoming Namakwa float and suggested that DJ Carmichael might underwrite or sub-underwrite the float. At that stage, Carmichael First Capital provided advice to Majestic on strategies leading up to any takeover bid for Namakwa. Majestic advised it may be interested in making a bid for Namakwa. Carmichael First Capital proposed to DJ Carmichael that DJ Carmichael sub-underwrite the public offer of the Namakwa float, on the basis that Majestic was prepared to sub-sub-underwrite DJ Carmichael's risk,
  - DJ Carmichael failed to disclose this conflict to either Namakwa or Equity West;
  - DJ Carmichael published an investment report on Majestic without disclosing the role of Carmichael First Capital advising Majestic on its acquisition of Namakwa;
  - DJ Carmichael applied to Namakwa to subscribe for Namakwa shares under the prospectus in the name of its nominee company when it should have known that the identity of Majestic as the real major subscriber would be of material interest to Namakwa (which was the ultimate entity for whom DJ Carmichael had entered the sub-underwriting agreement);
68. In addition, it appears highly unlikely to us that DJ Carmichael allotted all its firm allocation to three persons, including Majestic, in the manner that it did, and with the various reorganizations of allocations and bonus shares, unmindful of the possibility of Carmichael First Capital's client Majestic lining Namakwa up as a bid target.
69. The Panel considers that these facts show a position of conflict of interest which the senior management of the firm should not have allowed the firm to place itself into. At the very least it should have been disclosed to all relevant parties, including Namakwa.

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#### **CONCLUSION**

70. We do not see that there is a material likelihood of resolving all the conflicting claims in this matter. If the price of Namakwa shares was deliberately forced down by Majestic, Rumsey or Hwang, that effect appears to have no continued effect.
71. We are not satisfied that it would currently be in the public interest, or in the interest of Namakwa shareholders, for the Panel to commence a detailed inquiry.
72. We do not currently have enough evidence to make a declaration of unacceptable circumstances in relation to the actions of Majestic, Rumsey, Hwang, or DJ Carmichael.
73. However, we are aware that frequently, associations and unacceptable circumstances of the type alleged by Namakwa will be carefully designed to provide little evidence of their existence and to be capable of seemingly plausible explanation. In the same way that the evidence currently before us, or reasonably available to us, does not allow us to affirm that it was the case, it does not allow us to rule out that possibility in this instance. Therefore we decided to suspend proceedings to keep these issues under review as the bid developed. We will review our findings should Majestic wish to waive its 50% minimum acceptance condition. We will similarly review our findings if the pattern of acceptances, particularly in relation to the impugned shares, makes us believe that there has been the concerted action alleged by Namakwa.
74. At this stage we do not intend to make any orders for costs. We consented to all parties being represented by their commercial solicitors in these proceedings.

**Nerolie Withnall**  
**President of the Sitting Panel**  
**Decision dated 27 April 2001**  
**Reasons published 28 May 2001**