

In the matter of Pinnacle VRB Ltd (No. 6) [2001] ATP 11

Catchwords:

Review of Panel decision – 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 – costs order made

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

ASIC Practice Note 37

On 1 May 2001, following a review of the decision made by the Corporations and Securities Panel in relation to Pinnacle VRB Limited No. 4, we decided to allow Reliable Power Inc to proceed with its off market takeover offer for the ordinary shares in Pinnacle VRB Limited, subject to Reliable providing further disclosure of its funding arrangements to the shareholders of Pinnacle. At the same time, we also affirmed the declaration of unacceptable circumstances made by the Panel in Pinnacle No. 4.

These are our reasons for that decision.

REASONS FOR DECISION

1. The sitting Panel in this matter comprises Karen Wood (President), Brett Heading (sitting Deputy President) and Alice McCleary.

The application for review

2. This was an application made by Reliable under section 657EA of the Corporations Law (the *Law*) for a review of the Panel’s decision and orders in Pinnacle VRB Limited No. 4 (*Pinnacle 4*). The sitting Panel in Pinnacle 4 decided 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*). The Panel in Pinnacle 4 made a declaration of unacceptable circumstances and ordered that the offers and contracts under the Bid be cancelled, that Reliable notify the Australian Stock Exchange Limited (*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.
3. Reliable’s application for review alleged that the Pinnacle 4 Panel had:
 - (a) applied a policy that was inconsistent with section 602 of the Law, case law and ASIC Practice Note 37, and was outside the legislative framework;

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- (b) incorrectly formed its own view on the ability of Reliable to meet its obligations rather than letting the market determine Reliable's ability to pay from the information provided to it by Reliable in its Bidder's Statement and Pinnacle in its Target's Statement.
 - (c) refused to accept the evidence presented to it that New West has more than sufficient financial resources to meet its obligations to Reliable.
4. These are our reasons for deciding to affirm the declaration of unacceptable circumstances made in relation to the Bid, and to revoke the orders made by the Pinnacle 4 Panel, enabling Reliable's Bid to proceed.

Policy to be applied

5. We agree with the policy applied by the Pinnacle 4 Panel. In accordance with the principle in section 602(a) of the Law, we decided that bidders need to have sufficient funding arrangements in place to ensure that they are able to pay the consideration offered under a bid, so that the acquisition of control over the voting shares in a listed company takes place in an efficient, competitive and informed market.

Application of policy

6. We were aware that the Pinnacle 4 Panel had made a considerable effort to assist Reliable in establishing that its funding arrangements were adequate.
7. In the course of the Pinnacle 4 proceedings, Reliable had provided evidence in relation to its funding arrangements to the Pinnacle 4 Panel, including the following:
- (a) A funding agreement between Reliable and New West dated 2 April 2001, which evidences that New West has a commitment to provide Reliable with funds to pay for acceptances received under the Bid (the *New West Funding Agreement*); and
 - (b) A letter from Raymond James and Associates (*Raymond James*) dated 6 April 2001 evidencing that New West has negotiable securities with a market value of US\$16 million on deposit with Raymond James which are available for immediate draw down if so requested by New West.
8. Subsequent to the Pinnacle 4 proceedings, Reliable submitted as evidence a letter from Mr Tom Wiens, CEO of New West, dated 13 April 2001 indicating that he was in the process of transferring additional securities into the Raymond James account. We have not received any confirmation that this transfer has, in fact, occurred.
9. We told Reliable that we accepted that the New West Funding Agreement constitutes, prima facie, adequate arrangements between

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Reliable and New West, in the event that New West has sufficient cash to deliver on its obligations. However, we also told Reliable that we agreed with the Pinnacle 4 Panel that the arrangements described by Reliable and its associates for New West to acquire the cash to deliver on its obligations to Reliable were not adequate to ensure Reliable could pay the consideration offered under its Bid.

10. Acknowledging that, as a foreign bidder, Reliable may have been having some difficulty in accommodating the objectives and requirements of section 602 and 636(1)(f), on 27 April 2001, we gave Reliable a further, and final, opportunity to satisfy those objectives and requirements.
11. In response to this, Reliable provided us with the following:
 - (a) A statement from Mr Tom Wiens, CEO of New West, that, on behalf of New West, Mr Wiens controls the securities on deposit with Raymond James and that they are “not pledged for other current or future obligations or liabilities of New West or other persons or entities and, to the best of [Mr Wien’s] knowledge, will remain within the control of New West until after the period set out in the [New West Funding Agreement]”;
 - (b) A funding agreement between Reliable and US Global LLC (*US Global*) dated 27 April 2001 which evidences that US Global has a commitment to subscribe for US\$4 million worth of Preferred Stock of Reliable (the *US Global Funding Agreement*);
 - (c) A letter from Fleet Bank dated 4 April 2001 evidencing that US Global has funds in excess of US\$8.5 million in accounts with Fleet Bank.
 - (d) A statement from Mr John Parell, President and CEO of US Global, and Mr Neil Bhambhani, Executive Vice President of US Global, that US Global has current cash reserves and liquid securities in excess of US\$4 million, that US Global controls the cash reserves held in the Fleet Bank account under the name of US Global, that US\$4 million of US Global’s current reserves have been set aside to meet the obligations of US Global under the US Global Funding Agreement, that the funds are not intended for, or pledged for, other current or future contingent obligations or liabilities of US Global or to other persons or entities and that, to the best of their knowledge, the funds will remain within the control of US Global until the expiration of the US Global Agreement.
12. We accepted that the sum of US\$20 million would be adequate to meet Reliable’s obligations under the Bid, based on Reliable’s offer of 65 cents for each ordinary share in Pinnacle. Pinnacle has just under 55 million ordinary shares on issue.¹

¹ Based on Pinnacle’s ASX releases.

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13. In light of this information, additional to that provided to the Panel in Pinnacle 4, we therefore decided that we were now satisfied with the evidence provided by Reliable in relation to its funding arrangements for the purpose of paying the consideration it is offering under its Bid.

Declaration of unacceptable circumstances

14. We agreed with the Pinnacle 4 Panel that, at the time Reliable dispatched its offers to Pinnacle's shareholders, Reliable did not have adequate funding arrangements in place to ensure that it could pay for all acceptances received under its Bid. We also considered that Reliable's funding arrangements remained inadequate until the US Global Funding Agreement was entered into. On this basis, we affirmed the declaration of unacceptable circumstances made by the Pinnacle 4 Panel dated 4 April 2001.

Disclosure

15. We also told Reliable that we did not consider that the disclosure in Reliable's bidder's statement and supplementary bidder's statement met the aims and requirements of paragraph 636(1)(f) of the Law. In our view, the disclosure was not sufficient to enable offerees to reasonably determine the capacity of Reliable to meet its obligations under the Bid. In addition, the Panel in Pinnacle 4 had mentioned several additional disclosures it thought desirable.
16. We were aware, however, that early in the Pinnacle 4 proceedings, Reliable had agreed to provide any additional disclosures required by the Panel. We told Reliable that, subject to Reliable providing additional disclosure to Pinnacle's shareholders, we would allow Reliable's Bid to proceed.
17. We therefore invited Reliable to provide a supplementary Bidder's Statement to us for approval, disclosing information in relation to the following:
 - (a) A description of the arrangements that are in place between Reliable and any person who, directly or indirectly, is to provide cash from their own funds to meet Reliable's obligations under its Bid, including:
 - (i) the identity of any such person;
 - (ii) the quantum to be provided by that person or persons;
 - (iii) the current location or source of those funds (for example, whether the funds are currently held by a financial institution or broker); and
 - (iv) the conditional nature of any such arrangements.
 - (b) Any future equity investments which may affect the future ownership and control of Pinnacle;

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- (c) The reasons why the supplementary disclosure is required, including a reference to the final orders made by the Pinnacle 4 Panel; and
 - (d) The fact that Reliable is a foreign company which is not registered under Division 5B.2 of the Law, and the effect this may have on any shareholders wishing to pursue a claim which might arise against Reliable.
18. For the purposes of disclosure in the supplementary bidder's statement, we also required that Reliable obtain confirmation from Raymond James of the current market value of securities referred to in the Raymond James letter dated 6 April 2001. This was provided.

Orders

19. Once we were satisfied that Reliable's draft further supplementary bidder's statement contained the necessary additional disclosure, we revoked the interim and final orders made by the Pinnacle No. 4 Panel, enabling Reliable's Bid to proceed.
20. We also ordered that Reliable pay the party and party costs of the parties to the proceedings in Pinnacle 4, using the Federal Court scale. We made this order on the basis of Reliable's delay in producing satisfactory evidence in relation to its funding arrangements in the Pinnacle 4 proceedings. Despite the considerable effort made by the Pinnacle 4 Panel to assist Reliable in this regard, Reliable hindered an efficient conclusion of that matter by failing to produce this evidence. In contrast, Reliable were able to quickly and efficiently respond to our request for further evidence in these proceedings.
21. A copy of those orders is attached as Annexure A to these reasons.

Karen Wood

President of the Sitting Panel

Decision dated 4 May 2001

Reasons published 22 May 2001

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ANNEXURE 1

Corporations and Securities Panel

Corporations Law

Section 657D

Order

Pursuant to section 657D of the Corporations Law, the Corporations and Securities Panel hereby:

- (a) revokes the interim orders dated 4 April 2001 and the orders dated 9 April 2001 (as amended by orders dated 11 April 2001 and interim orders dated 17 April 2001 and 1 May 2000) 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*); and
- (b) orders that Reliable pay the party-party costs of the parties to the proceedings in Pinnacle No. 4, using the Federal Court scale.

Dated 4 May 2001

Karen Wood
President