

**In the matter of Alpha Healthcare Limited**  
**[2001] ATP 13**

**Catchwords:**

*Takeover bid – pre-bid agreements between bidder and creditors/shareholders – acquisition of shares and debt – equal opportunity to participate in benefits – contravention section 606 – relevant interest – whether agreements coercive – agreement to bid – value of debt – effect of purchase of debt on control – repayment of debt – collateral benefit – early dispatch of bidder’s statement – delay in making application to Panel*

*Corporations Law (Cth), sections 602, 606, 608(8), 623 and 633*

*SSG Investments v Australian National Industries Ltd (1999) FCR 564, cited*

**These are the reasons for our decision not to make a declaration of unacceptable circumstances on the application by Alpha Healthcare Limited under section 657C of the Corporations Law dated 3 May 2001 for a declaration of unacceptable circumstances and orders in relation to a takeover bid by Ramsay Centauri Pty Limited.**

**INTRODUCTION**

1. This is a statement of the reasons for our decision in relation to the application by Alpha Healthcare Limited (*Alpha*) dated 3 May 2001 for a declaration of unacceptable circumstances under section 657A of the Corporations Law (the *Law*) and orders under section 657D of the Law in relation to a takeover bid by Ramsay Centauri Pty Limited (*Ramsay*) for Alpha.<sup>1</sup> Our decision was announced on 21 May 2001.
2. The Panel in this matter was constituted by Maxine Rich (sitting President), Jeremy Schultz (sitting Deputy President) and Jennifer Seabrook.

**BACKGROUND TO APPLICATION**

3. The following summary of the facts is based on Alpha’s application, its annual report for 1999-2000, the Pre-Bid Agreement, announcements to ASX and submissions made by parties and others to the Panel.

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<sup>1</sup> Statutory references are to provisions of the Corporations Law. Findings of fact are based on submissions and other materials provided by the parties and ASX announcements.

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### Reasons for Decision – Alpha Healthcare Limited

- (a) Alpha is a public company listed on Australian Stock Exchange Limited (*ASX*). Its business is to operate private hospitals. It has on issue 43,610,260 fully paid ordinary shares and 2,080,000 options to subscribe for shares. It has recently begun to trade profitably again, but has large borrowings.
- (b) Ramsay Health Care Limited (*RHC*) is also a public company listed on the ASX. It also operates private hospitals. Ramsay is a wholly owned subsidiary of RHC.
- (c) Sun Healthcare Group Australia Pty Limited receiver appointed (*Sun Healthcare*) and SHG Holdings Pty Limited receiver appointed (*SHG Holdings*) are subsidiaries of Sun Healthcare Inc, which went into Chapter 11 bankruptcy protection on 14 October 1999.
- (d) In January 2000, SHG Holdings appointed Lazard Freres in New York who, in turn, mandated Caliburn Partnership (*Caliburn*) to sell the Australian assets of Sun Healthcare and SHG Holdings. A receiver and manager was appointed to each of SHG Holdings and Sun Healthcare on 20 September 2000 (generally, we will refer to the receivers as *Sun*).
- (e) At all relevant times up to 1 May 2001, Sun Healthcare and its subsidiaries held approximately 37.5% of Alpha's voting shares. SHG Holdings and Sun Healthcare were owed \$24.7 million by Alpha and its subsidiaries.
- (f) Alpha and its subsidiaries also owed \$36 million to the ANZ Bank and \$7 million to the James Hardie Group (*Hardie*). Hardie also held 4.1 million shares (9.4%) in Alpha.
- (g) On 9 April 2001, a Pre-Bid Agreement was entered into between Ramsay, RHC and Sun. The Pre-Bid Agreement was annexed to a substantial shareholding notice given by Ramsay to Alpha and the ASX on 11 April 2001.
- (h) Under the Pre-Bid Agreement Ramsay agreed to purchase from Sun 8,678,400 ordinary shares in Alpha (the *Initial Shares*), representing 19.9% of the issued capital of Alpha, and the debt mentioned above (leaving the *Remaining Shares*, approximately 7,670,000 shares, 17.6% of the voting shares in Alpha).

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### Reasons for Decision – Alpha Healthcare Limited

- (i) At about the same time, Ramsay agreed with Hardie to purchase its Alpha debt (the *Hardie Agreement*).
  - (j) Each agreement was conditional on Ramsay bidding for Alpha. Neither Sun nor Hardie undertook or agreed to accept Ramsay's bid. Details of the agreements are set out below.
  - (k) On 12 April 2001, Ramsay served on Alpha a bidder's statement for the bid, in the terms set out in the Sun and Hardie debt agreements. On 26 April 2001, Ramsay dispatched offers under the bid to all Alpha shareholders and notified Alpha that offers had been dispatched and were due to close on 28 May.
  - (l) On 1 May 2001 Sun accepted the bid for the Remaining Shares.<sup>2</sup> Late on 1 May, Ramsay declared the bid unconditional. The declaration was announced to the market on 2 May.
4. Alpha applied for:
- (a) a declaration of unacceptable circumstances pursuant to section 657A of the Law:
    - (i) in relation to the bid by Ramsay for all the shares in Alpha;
    - (ii) in relation to the affairs of Ramsay and/or RHC; and
    - (iii) in relation to the affairs of Alpha; and
  - (b) an order pursuant to section 657D of the Law:
    - (i) that Ramsay withdraw the bid; and
    - (ii) restoring each of Ramsay, RHC, SHG Holdings and Sun Healthcare to the respective positions they were in immediately prior to their entry into the Pre-Bid Agreement dated 9 April 2001 with respect to the property the subject of the Pre-Bid Agreement.

### The Pre-Bid Agreement

5. Under the Pre-Bid Agreement, Ramsay agreed with Sun to purchase from Sun all of the Alpha debt owed to Sun for \$6,133,333, a substantial

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<sup>2</sup> This acceptance was made within 3 business days: 26 April was a Thursday.

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- discount to its face value of \$24.7 million.<sup>3</sup> It also agreed to purchase 19.9% of the voting shares in Alpha, part of the 37.5% parcel held by Sun, for 40 cents per share. Completion of the Agreement was subject to two conditions.
6. The first of these conditions was that Ramsay make a full bid for all of the voting shares in Alpha within 25 days<sup>4</sup> at 40 cents cash per share. The bid might be conditional only on prescribed occurrences<sup>5</sup> and on Ramsay receiving enough acceptances that it had relevant interests in 29.2% of the shares on issue on the date the bid was announced. It had to provide for accepting offerees to be paid within 5 days of acceptance or the date the bid became unconditional, whichever was the later.
  7. It was a part of this condition that the bid become unconditional within 30 days.<sup>6</sup> Sun could compel Ramsay to waive the prescribed occurrence condition if it accepted for all of the Remaining Shares within 3 business days after being notified that the bid had been made. The bid was made on these terms and within this time frame.
  8. The second condition to which completion of the Pre-Bid Agreement was subject was that either:
    - (a) Sun Healthcare accepted Ramsay's bid for the Remaining Shares within 3 days of receiving notice that offers had been posted; or
    - (b) 30 days after the bid was made, no prescribed occurrence had taken place, or Ramsay had waived any prescribed occurrence which had taken place.<sup>7</sup>
  9. In the event, Sun Healthcare accepted the bid on 1 May and Ramsay waived the defeating conditions on the same day. Settlement took place on 8 May 2001.

### The Hardie Agreement

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<sup>3</sup> This debt consisted of a loan from Sun Healthcare to Alpha of \$7.3 million and a project facility of \$17.4 from SHG to Westmead Private Hospital Pty Ltd for the construction of the Westmead Private Hospital, repayable out of the cash flow from that hospital, subordinated to a \$36 million loan from the ANZ Bank.

<sup>4</sup> i.e. by 4 May.

<sup>5</sup> i.e. on none of the events listed in subsections 652C(1) and (2) occurring.

<sup>6</sup> i.e. by 9 May.

<sup>7</sup> Although the expression "prescribed occurrence" is usually applied to a bid, this waiver would appear to apply only to the Pre-Bid Agreement, not to the bid.

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10. Representatives of Ramsay met with representatives of Hardie on 6 April 2001. Ramsay informed Hardie that it was contemplating making a takeover offer for Alpha and that it was close to reaching agreement with Sun to acquire 19.9% of Alpha at 40 cents per share and all of the Alpha debt owed to Sun at a significant discount to book value, and that it wished to discuss Hardie's interest in selling its 4,100,000 shares (9.4%) and its remaining Alpha debt<sup>8</sup>.
11. On 9 April 2001 Hardie and Ramsay entered the Hardie Agreement. Ramsay agreed to purchase from Hardie a convertible note issued by Alpha due for payment in August 2002. Ramsay also agreed to acquire a loan of \$1.9 million owed by Alpha to Hardie, however, prior to settlement of the agreement Alpha repaid the loan in full and repaid part of the convertible note. Under an earlier agreement between Alpha and Hardie the value of the convertible note had been reduced to \$2.4 million. Under the agreement with Ramsay, Hardie agreed to accept \$2 million as full payment.
12. Ramsay had explained that it was commercially undesirable for it to make the takeover offer while Alpha still owed debts to Hardie. Hardie submitted that it was interested in selling its Alpha debt and was prepared to take a discount to the value that it had agreed with Alpha in order to ensure repayment of the debt at a certain and soon date. Hardie advised the Panel that it had been negotiating with Alpha to pay off all of the Hardie debt but that the time and amount of repayment was still uncertain.
13. It is clear from correspondence between Alpha's finance director and the Panel that Alpha had given material priority to repaying the Hardie debt, because the Hardie debt was "secured by a first ranking charge over all our assets (except Westmead Private Hospital) and this charge makes it difficult for us to establish effective banking arrangements". However, even with this priority, by the time Ramsay approached Hardie, Alpha had not been able to secure the cash to settle a date with Hardie for repaying the Hardie debt. Clearly Alpha was therefore not in a position to buy-back or repay any other debt at the same time (such as the Sun debt).
14. Hardie was also keen to ensure that the takeover bid proceeded to give it an opportunity to dispose of its Alpha shares at a price it was prepared to

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<sup>8</sup> The Hardie debts consisted of a \$4 million convertible note issued by Alpha in August 1997 and a \$1.9 million loan. The Note was interest-free and due for repayment in August 2002. Hardie had agreed with Alpha to accept a 9 percent compound discount on any early repayments made in relation to the convertible notes. This, and partial early repayment, gave a current repayment value of \$2.4 million.

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accept. The Hardie agreement was conditional on Ramsay bidding for Alpha, on the same terms as the Pre-Bid Agreement with Sun. Unlike Sun, Hardie was not able to compel Ramsay to waive the prescribed occurrence condition. Ramsay agreed with Hardie to set the minimum acceptance condition at 29.2%, so that Hardie could satisfy the condition by accepting the Ramsay bid for its shares.

## ISSUES

15. The Panel considered that the main issues for its consideration were:
- (a) Did SHG Holdings and Sun Healthcare bind themselves, legally or economically, to accept into the bid for the Remaining Shares in breach of section 606 or the policy of paragraph 602(a) of the Law?
  - (b) Was the price paid for the debt by Ramsay under the Pre-Bid Agreement referable only to its fair market value? Was that price related to the amount offered for Sun Healthcare's shares in Alpha? The issue of concern was whether a lower price per share was offered because of a higher than market price being paid for the debt and, if so, whether under paragraph 602(d) of the Law the non-Sun shareholders were receiving an equal benefit to Sun Healthcare.
  - (c) Did effective control of Alpha pass with control of Alpha's debt? Was there any basis, to ensure an efficient competitive and informed market for the control of Alpha, for the Panel to consider requiring the debt only to pass with control of a majority of Alpha shares independent of the ownership of the debt (i.e. requiring that the debt be sold or assigned to the person who had made the highest bid for all of the shares in Alpha)?

We will consider these issues in the following sections.

### **Contravention of Section 606**

16. The first issue is whether the Pre-Bid Agreement, the Hardie Agreement or some related transaction contravened section 606 (the 20% acquisition rule), because Ramsay acquired the Remaining Shares from Sun Healthcare, or the Hardie parcel from Hardie, at the times of the relevant agreements.

#### *Direct Acquisition*

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17. We are assured, and we accept, that under the Pre-Bid Agreement and the Hardie Agreement neither Sun Healthcare nor Hardie agreed to sell their shares to Ramsay, other than the 19.9% parcel sold under the Pre-Bid Agreement. Neither the Pre-Bid Agreement nor the Hardie Agreement in terms requires Sun Healthcare or Hardie to accept the bid. Nor do they in any way give control over the voting or disposal of the other Alpha shares they then held. Nothing in the agreements' terms supports the implication of a term that Sun Healthcare or Hardie would accept the bid or retain their shares or deal with their shares (or refrain from dealing with them) in any particular way. We are advised that both Sun Healthcare and Hardie received clear advice from their legal advisers that to do so would have contravened the Law.
18. Mr Levy of Wentworth Associates provided a statement (which is quoted below) concerning (amongst other things) the receiver's attitude to the Pre-Bid Agreement after it was entered into and before the receiver accepted the Ramsay bid. Mr Levy's evidence makes it clear that the receiver regarded the Pre-Bid Agreement as effectively linking the Remaining Shares to the initial 19.9% parcel, in that it created an opportunity for the receiver to overcome the uncertainty over disposing of the shares and the debt, by accepting the bid for the Remaining Shares. Mr Levy does not suggest, however, that the receiver regarded the Pre-Bid Agreement as creating a legal or moral obligation to accept the bid.

#### *Deemed Acquisition*

19. Alpha raised a technical argument that the Pre-Bid Agreement contravened section 606. The argument was stated in the following terms. By committing to make a takeover bid, Ramsay effectively gave Sun a put option to sell it the Remaining Shares. Accordingly, Ramsay was deemed under subsection 608(8) of the Law already to have the relevant interest in 37.5% of the voting shares in Alpha which Ramsay would have had once the put option was exercised. Accordingly, Ramsay already acquired a relevant interest in the Remaining Shares by giving the commitment under the Pre-Bid Agreement. This acquisition was said to contravene section 606.
20. In our view, this argument expressly treats a bidder and an offeree under a bid in the same way as the writer and holder of a put option, on the basis that the offeree has the power to accept an offer which the bidder cannot withdraw without ASIC approval. While there are similarities, the nature and source of the offeree's right is different from that of an option holder. Options arise from contract. An offeree has no contractual right

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against a bidder to have the offer held open. It only has an expectation that ASIC will not allow the bidder to withdraw its offers.

21. Alpha's argument would have some attraction if it was confined to Sun Healthcare's rights under the Pre-Bid Agreement. Those rights were contractual in nature, only one shareholder possessed them, they existed before the bid was made and they arose from a transaction in relation to securities. However, it cannot be confined in this way. The rights conferred on Sun Healthcare by the Pre-Bid Agreement did not give rise directly to the alleged option: Sun Healthcare could only compel Ramsay to buy the Remaining Shares by first compelling it (if Ramsay could be compelled<sup>9</sup>) to make an offer to all shareholders.
22. Accordingly, to apply Alpha's argument, we need to consider the Ramsay bid under which the alleged option arises. Under Alpha's argument, whenever a person made offers under a full bid they would acquire relevant interests in all of the shares in the bid class. Since the bidder would acquire those interests by making offers, not from offerees accepting the offers, the exception in item 1 of section 611 for acquisitions resulting from acceptances would not apply. It would follow on Alpha's argument that section 606 forbids some or all takeover offers. That conclusion cannot be accepted.

#### *Commercial Commitment*

23. Alpha argued that by entering the Pre-Bid Agreement Sun Healthcare committed itself to accepting Ramsay's offer, in a commercial sense, even if not legally. By breaking up its strategic parcel and putting itself in a position where the value of the Remaining Shares was imperilled unless it quickly accepted Ramsay's offer, Sun Healthcare left itself with little alternative but to accept Ramsay's offer for the Remaining Shares. The effect on the market of this decision was much the same as if Sun Healthcare had agreed to sell Ramsay the Remaining Shares outright, and the Panel should declare unacceptable the state of affairs to which it led, even if Ramsay and Sun Healthcare had not otherwise contravened section 606. Sun, it was said, wished to sell the shares and debt as a bundle and, by providing it with the means of doing so, Ramsay defeated a competitive market in shares in Alpha.

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<sup>9</sup> Ramsay promised to make a takeover announcement. Once it made this announcement, Ramsay was compelled by subsection 631(1) to make a bid. Until then, however, Sun had no power to specifically enforce the bid (or any right to damages).

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24. We agree with this submission to the extent that Sun's entry into the Pre-Bid Agreement effectively concluded the auction of Sun's interest in Alpha. By entering into the Pre-Bid Agreement Sun secured the power to render both the bid and the Pre-Bid Agreement itself unconditional. This was critical, because of Sun's (i.e. its receiver's) need to sell the whole of its investment in Alpha, debt and shares. But Sun could only exercise that power by accepting the bid for the Remaining Shares and it would prejudice its position by not accepting the bid. While Sun Healthcare retained the power to accept a rival bid for the Remaining Shares, the rival bid would have to be attractive enough to make up for any prejudice to Sun's position under the Pre-Bid Agreement.

#### *The Sale Process*

25. The issue is whether entry into the Pre-Bid Agreement harmed the competitive auction process for Alpha in an unacceptable way given that:
- (a) Sun Healthcare's shareholding in Alpha (if it was acquired by one person) was likely to carry with it effective control of Alpha; and
  - (b) Sun Healthcare was under no obligation to the market or to other shareholders in Alpha to take any risks to secure a higher price.
26. It is our view that the Pre-Bid Agreement cannot be separated from the series of events which preceded that agreement. The Alpha shares and debt had effectively been on the market for over a year. Alpha stated that it had been "acutely aware that the question of future ownership of Sun's parcel would be widely known to the market". Sun advised that Caliburn had approached likely buyers in this country and overseas, including other companies operating hospitals and had received three indicative offers, but no firm proposal. The receiver commenced a similar process of contacting a number of potentially interested parties. One of those companies was Network Healthcare Holdings Ltd (*Netcare*), a South African company which operates private hospitals in South Africa. Alpha also had extensive discussions with Sun concerning the sale of the debt and equity.
27. On 5 March 2001 Sun sent Confidentiality Agreements to those interested parties which it had identified over the previous months. Alpha was consulted in settling those Confidentiality Agreements. Ramsay and Netcare were two interested parties who entered into Confidentiality Agreements with Sun. Following extensive e-mail communications during March, representatives of Netcare met with Sun on 2 and 4 April 2001, but it appeared to Sun that those negotiations were not productive of

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a firm offer. On 6 April 2001 Ramsay met again with Sun and proposed the essential terms of the Pre-Bid Agreement. On 9 April 2001 Sun entered into the Pre-Bid Agreement with Ramsay.

28. This process constituted a better test of the market for the Alpha shares than happens in many takeovers which are notionally more open to a competing bid.
29. Even in the absence of the previous process, had Ramsay announced a full, unconditional, cash bid and bought all of Sun's shares on market immediately under item 2 of section 611, one could have queried the wisdom of accepting so soon, but not about the fairness. The effect on other shareholders of the entry into and the performance of the Pre-Bid Agreement was similar.

#### *Secured Lender*

30. Chapter 6 poses difficulties for secured lenders, because it allows them to take and enforce security over parcels of shares exceeding 20%, but prevents the lender from selling such a parcel entire, unless the buyer obtains shareholder approval or buys the shares under a bid. The receiver had not only a strategic parcel of shares to sell, but also debts of approximately equal value. Selling some of these assets could weaken its bargaining power for the sale of the rest, unless it ensured a minimum price for the parts which equaled the value of the bundle.
31. The Pre-Bid Agreement was a solution to these difficulties, as it gave Sun reasonable confidence of being able to sell the whole of its investment in Alpha in a short period, at known prices, without participating in a breach of section 606 by agreeing to sell the whole of the bundle to Ramsay in advance. We can speculate on other mechanisms which might have allowed more of an auction while the takeover bid was open, and we comment on that issue. However, this issue is not whether this is the best possible mechanism for testing the market, but whether entry into the Pre-Bid Agreement in the context in which it occurred, prevented Sun Healthcare's shares being sold in a competitive market for control of Alpha. In our view, it did not.
32. The Pre-Bid Agreement may have led to unacceptable circumstances, if Sun had received a benefit in the form of an inflated price for the Alpha debt, which may have induced it to sell the shares cheaper than it might otherwise have done. We discuss this issue below.

#### *The Rejection of the Netcare Offer*

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33. Alpha said that the Panel should infer from Sun's and SHG's refusal to accept an offer by financiers for Netcare for shares in Alpha at a price of \$0.45 and for the Alpha debt at the same price agreed with Ramsay, that Ramsay and Sun had already entered into a binding agreement in relation to the Remaining Shares. The Panel sought submissions on whether there was any evidence to suggest that the differences in terms offered by Netcare were sufficient for a reasonable person to discount the higher price per share offered.
34. On 4 April 2000, Netcare offered Sun much the same total price to Sun for the two parcels of debt and the two parcels of equity as Ramsay offered on 6 April 2001. There appears to have been some misunderstanding as to the apportionment of the total amount offered as between the different parcels of debt and equity. As late as the afternoon of 30 April, Netcare and Sun did not agree what had been the terms of Netcare's offer for Sun's investment in Alpha.
35. Sun accepted Ramsay's proposal on 9 April. Sun accepted the Ramsay proposal in part on the basis of the higher amount offered by Ramsay for the Remaining Shares under the proposed takeover. Sun decided that the price offered by Netcare for the shares was too low.<sup>10</sup> Sun also says that it discounted the value of Netcare's offer because of the risks it was subject to i.e. South African Reserve Bank (*SARB*) and Foreign Investment Review Board (*FIRB*) approval.
36. On 30 April 2001, after Sun had entered into the Pre-Bid Agreement and offers had been posted under the bid, Netcare offered to acquire the debt from Sun for \$100,000 more than Ramsay and to acquire the shares at 45 cents. It is interesting to note, in terms of the issue of whether the Pre-Bid Agreement had unacceptably damaged the market for control/auction of Alpha, that even at this stage, notwithstanding the public announcement of the Pre-Bid Agreement some weeks earlier, Netcare considered that bidding for control of Alpha was still open.
37. This offer was fleshed out in a written offer put to the receiver by Netcare's financial advisers on 1 May. Netcare would have bought 6,498,000 of the Remaining Shares outright (14.9% of the total shares in Alpha) and the rest of the Remaining Shares (a further 3.4%) for the same price, but subject to FIRB approval. Netcare would also have made a full

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<sup>10</sup> As mentioned below, although the Sun receiver was concerned to preserve the strategic value of the bundle of Alpha shares and debt, he was also concerned to obtain appropriate prices for the different components, for which the receiver accounted to different lenders.

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- bid for Alpha on the terms required by the Pre-Bid Agreement, enabling Sun Healthcare to sell the residue of the Remaining Shares (and the Initial Shares, if the Ramsay bid had fallen through). That bid would have been subject to approvals being obtained from FIRB and SARB. If Netcare was unable to buy the residue, it would have indemnified Sun Healthcare for the difference between the price at which Sun Healthcare sold the residue and 45 cents.
38. Sun refused this offer and accepted the Ramsay bid. On 30 April, Sun's advisers told Netcare's financial adviser that he was "wasting his time" in pressing the Netcare offer in conference, because the offer was uncertain and the receiver did not "want to risk losing Ramsay on the 19.9%" and "the balance of SHG Holdings' (sic) shareholding in Ramsay is effectively linked to the 19.9% already acquired by Ramsay".<sup>11</sup>
39. Alpha and Netcare suggested that Sun's decision to refuse Netcare's higher offer was uncommercial, unless it had already agreed to accept Ramsay's bid. Netcare went so far as to say "Sun could not conceivably be worse off by accepting Netcare's offer as opposed to accepting the Ramsay bid".
40. Sun, however, submitted that the decision was a reasonable response to the situation. When the Netcare offer was made, he was already committed to the Pre-Bid Agreement. Because of SARB and FIRB requirements, Netcare could not acquire the 3.4% residue of the Remaining Shares soon, and might not be able to acquire them before Ramsay's bid closed or at all. The top-up clause would have covered him against this risk. If, however, he accepted the Netcare offer, he would fail to accept the Ramsay offer within three business days and would put at risk completion of the Pre-Bid Agreement in the event that a prescribed occurrence occurred in relation to Alpha, and Ramsay did not waive that condition. Netcare did not indemnify him against this risk.
41. Acceptance of Netcare's offer could also have left Sun holding the debts owed by Alpha<sup>12</sup> and could have been subject to extensive delays in completion and settlement<sup>13</sup>. Although the assets were on the market for a year when the negotiations reached their peak, Netcare left its offer too late. We accept this analysis.

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<sup>11</sup> Paragraphs 22 and 24 of a statement by Geoffrey Levy of Wentworth Associates Pty Ltd, submitted by Netcare.

<sup>12</sup> Although it is unclear from the submissions it is likely that the offer to buy the debt was also subject to SARB approval.

<sup>13</sup> Payment for the debt under Netcare's offer was only due within 90 days.

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#### *Whether Agreement Coercive*

42. Netcare also submitted that Sun’s rejection of its offer showed either that Sun had already committed to accept the Ramsay bid (which we have already rejected) or that the Pre-Bid Agreement was coercive. We reject this submission. The Sun receiver entered into the Pre-Bid Agreement to ensure that he could sell the whole of Sun’s investment in Alpha at prices acceptable to him, without contravening section 606. To call the agreement coercive is to confuse his problem before he entered the agreement with the requirements of the solution he adopted.<sup>14</sup>
43. The receiver was open to suggestions as to how the transaction could be achieved. Like Ramsay, Netcare declined to buy the shares without the debt, but it came up with no better means of doing so. In the end neither Alpha nor Netcare really opposed the principle that Sun should be able to sell its shares and debt in transactions which enabled Sun to be sure, within the confines of the Law, of disposing of all parcels of debt and equity in close proximity. The argument was about certainty, timing and price.

#### **Value of Debt Issues**

44. Ramsay agreed to acquire debt from both Sun and Hardie. On the face of it, the discounts on the debts appear most significant and worthy of concern to Alpha shareholders. However, as Alpha, Hardie and Ramsay explained in some detail (which we will not repeat in full in these reasons) the discounts have some very legitimate commercial underpinnings for their calculation. Those include the interest rates payable by Alpha on them, their dates of repayment, their subordination (in some cases) to other creditors, and their specific recourse limitations (again, in some cases). It would be incorrect and misleading simply to compare the face value of the debts to the sums Ramsay agreed to pay for them. Alpha’s financial adviser said “The ratio of purchase price to face value in this instance is not relevant because the terms are significantly different from loan to loan.”

#### *Sun Healthcare and SHG Holdings Loan*

45. Under the Pre-Bid Agreement Sun agreed to sell to Ramsay debts owing by Alpha for \$6.133 million, a heavy discount to face value. Those debts comprised a loan from Sun Healthcare due July 2001 with a face value of

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<sup>14</sup> Indeed, elsewhere Netcare submitted that “it is reasonable for the Panel to infer that the Pre-Bid Agreement was substantially crafted to meet the key financial objectives of Sun”. We agree.

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\$7.3 million, for a purchase price of \$5 million; and a subordinated loan from SHG secured over Westmead Private Hospital, due 2010, with a face value of \$17.4 million, for a purchase price of \$1.133 million.

46. The concern of the Panel was whether there had been a transfer of value paid for the Alpha shares into the purchase price of the debt. If so there would have been an unequal benefit received by Sun Healthcare for the Alpha shares. Accordingly, we were concerned to check that the debt had not been sold at an overvalue. There were a number of scenarios for looking at what the value transfer might have been. The scenario which would have the greatest effect on the price paid by Ramsay for Alpha shares was if the debt was in fact valueless, and the amount paid for the debt was applied to the Initial Shares. In that case, Sun Healthcare would have in effect sold 8,678,400 shares to Ramsay for \$9,604,693, or \$1.11 each. If the whole of the price of the debt owned by Sun Healthcare and SHG is applied to the whole of Sun Healthcare's holding of Alpha shares, Sun Healthcare would have in effect sold 16,353,768 shares to Ramsay for \$12,674,840, or 77.5 cents each<sup>15</sup>.
47. The receiver put to the Panel that in fact the opposite had occurred, that in accepting a very high level of discount for the Westmead debt, it had effectively left more money on the table for Ramsay to offer all of the shareholders of Alpha in its takeover bid. That argument has some merit when seen in light of the terms of an early Netcare proposal to Sun that included a materially lower discount of the debt and a correspondingly lower equity component.
48. We retained KPMG Corporate Finance Pty Ltd to advise us on this issue. Sun gave KPMG access to a valuation it had recently obtained of one of Alpha's principal assets, which secured the larger of the debts, incorporating cash flow and revenue projections. On the basis of these figures, public figures and comparable sales of hospitals and non-investment grade zero coupon debts, KPMG advised us that the price Ramsay paid for the debt was not excessive. Because Sun regarded the valuation as commercially sensitive, we did not disclose to Ramsay, Netcare or Alpha either the valuation or those parts of KPMG's report, which depended directly on it.
49. We were further assured that the price paid for the debt was not materially out of line with fair value by the fact that Netcare offered a very

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<sup>15</sup> Although this illustrative calculation could not be applied in practice, because the Sun companies had different creditors and their assets could not be lumped together this way.

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similar amount in its rebid in early May. Alpha itself effectively agreed with this view when its financial adviser put to the Panel (in another context) that because “two independent parties (Ramsay and Netcare) having agreed with the Receiver a value for the debt, it would be reasonable for the Panel to require the debt to pass at that determined value to the party who achieved control of Alpha”.

50. Accordingly, we are not satisfied that Ramsay in effect paid Sun more than 40 cents per share, by paying more for the Alpha debt than it was worth.

#### *Hardie Debt*

51. As mentioned above, Ramsay also purchased debt from Hardie, which was a substantial shareholder in Alpha. Performance of the Hardie debt agreement was conditional on Ramsay’s bid becoming unconditional by 9 May. We asked parties for submissions on the face value of the Hardie debt, the effective amount paid, the ratio of purchase price and face value and how it compared to the debt Ramsay purchased from Sun and SHG Holdings.
52. Hardie explained that it was willing to accept a further discount of \$400,000 on its debt as it was still uncertain when and whether Alpha would be able to repay the debt. Alpha had been attempting for some time to arrange the funding to repay the Hardie debt, at the attractive rate that Alpha had negotiated with Hardie, but was yet unable to advise Hardie that it had the funds or when they would be available to complete the transaction. Clearly, Alpha, which had known of the desire of the Sun Healthcare Group to realise its Australian assets, and the desire of the receiver to liquidate them as soon as possible, had placed priority on paying back the Hardie debt, and had been having problems doing so.
53. Further, the Ramsay offer meant early repayment of the debt, which was also of value to Hardie.
54. Hardie stated that there was no agreement in relation to the Alpha shares it owned, although it was reassured that the minimum acceptance condition was sufficient to allow it to accept for its shares and satisfy the minimum acceptance condition in the Pre-Bid Agreement.
55. The discount appeared reasonable and similar in range to the discount granted by the receiver on the Sun loan.

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### Reasons for Decision – Alpha Healthcare Limited

#### *Section 623*

56. A related issue raised by Alpha was whether Ramsay had provided benefits to Sun because of:
- (a) the guarantee provided by RHC under clause 9 of the Pre-Bid Agreement; or
  - (b) the fact of Ramsay's purchase of the debt from Sun and SHG Holdings under the Pre-Bid Agreement.
57. It was argued that these were intended and likely to induce Sun Healthcare to accept the offer by Ramsay and were not offered to the other Alpha shareholders, in breach of section 623 (collateral benefits), and in contravention of the policy of paragraph 602(c) (the equal opportunity principle).
58. Alternatively, Alpha alleged that the value of these benefits should have been added to the 40 cents per share, which Ramsay stated it had paid to Sun Healthcare under the Pre-Bid Agreement for the Initial Shares. Alpha alleged that the value of these benefits would show that Ramsay had breached the equal treatment provisions of subsection 621(3) and the equal opportunity principle of paragraph 602(c).
59. Accordingly, the Panel asked the parties to make submissions on whether any of the following were benefits as alleged by Alpha, and if so were they prohibited by section 623:
- (a) the guarantee provided by RHC under clause 9 of the Pre-Bid Agreement;
  - (b) the fact of Ramsay's purchase of the debt from Sun and SHG Holdings under the Pre-Bid Agreement; or
  - (c) the terms of Ramsay's purchase of the debt from Sun and SHG Holdings under the Pre-Bid Agreement (this issue is dealt with above).
60. RHC guaranteed Ramsay's performance of its obligations under the Pre-Bid Agreement. This is not an additional benefit over and above the price, timing and conditions of that agreement: it merely assures Sun that the agreement will be performed according to its terms. Similarly, section 621 draws no distinction between benefits actually received and benefits merely promised.

## Corporations & Securities Panel

### Reasons for Decision – Alpha Healthcare Limited

61. In being able to sell the debt, Sun received a benefit which other shareholders did not. But Sun was not in the same position as other shareholders: it had made large loans to Alpha; subordinated, unsecured and due for repayment in over 10 years time. These terms might have been uncommercial, except that Sun Healthcare was the major shareholder in Alpha when it made the loans. For Sun to remain as lender after Sun Healthcare sold its shares would be disadvantageous to Sun (which could not oversee repayment) and to Alpha and all of its shareholders (because Sun would have less reason to avoid enforcement action).
62. On the face of it, Sun Healthcare received this benefit as a creditor, not as a shareholder. It might be different, if Ramsay had paid more for the debt than it was worth, but we have decided that it did not.
63. Ramsay told both Sun Healthcare and Hardie that it was not prepared to buy their shares in Alpha, unless it could also buy their Alpha debt. Given that Alpha was in default on the Hardie debt and the Sun Healthcare debt, Ramsay obviously needed some comfort before investing in the shares that these debts would not be enforced. The fact that Ramsay was able to buy the debt was probably on the whole advantageous to shareholders other than Sun Healthcare and Hardie.

### Effect of Purchase of Debt on Control

64. It was put to the Panel that the bundling of the debt and equity by Sun meant that Ramsay acquired effective control of Alpha by buying that bundle from Sun. It was argued that this harmed the efficient competitive and informed market for control of Alpha. The Panel sought submissions on this subject including:
  - (a) when Sun Healthcare and SHG Holdings were placed into receivership,
  - (b) whether Alpha had effectively and publicly been a takeover target since that date,
  - (c) whether that period was sufficient to assume that the market for control of Alpha had had a reasonable opportunity to operate efficiently, and
  - (d) whether ownership of the debt conferred a relevant measure of control over Alpha.

## Corporations & Securities Panel

### Reasons for Decision – Alpha Healthcare Limited

65. Our review above of the process by which the receiver sought buyers for Sun's investment in Alpha satisfies us that the market for control of Alpha had been extensively tested over a long period, ending when Ramsay and Sun entered into the Pre-Bid Agreement. Control of Alpha was tested in an efficient and competitive market.
66. In the circumstances, we do not think that Ramsay acquired control of Alpha by purchasing the Sun and Hardie debt. Alpha had agreed with Sun and Hardie on repayment schedules for the current debts, which it had announced to the market. The Westmead Private Hospital debt was subordinated to ANZ's loan and was not due to be repaid until after 2010.

### Disclosure Issues

67. Alpha raised a range of disclosure issues in its application. Generally these seemed minor to the Panel. The Panel welcomed the fact that Ramsay had offered, in a fax from its lawyers dated 2 May, 2001, to issue a supplementary bidder's statement to address the issues raised by Alpha (without necessarily agreeing that they were necessary).
68. The Panel strongly recommended that it would be most sensible if the parties resolved those issues between themselves before the date that submissions were due, obviating the need for them to make, and the Panel to consider, submissions on those disclosure issues.
69. The Panel noted that it would appear sensible to delay printing and posting of any supplementary bidder's statement until the resolution of the Panel proceedings, in case the Panel required further information to be given to Alpha shareholders<sup>16</sup>.
70. The Panel invited brief submissions on the following issues concerning disclosure in Ramsay's bidder's statement, in the event that the parties could not reach resolution on them:
  - (a) the disclosure of the condition applying to the Pre-Bid Agreement completing, in Section 2, paragraphs 7.1 (a) & (b) of the bidder's statement ;  
*the paragraphs describing the Pre-Bid Agreement in the bidder's*

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<sup>16</sup> The Panel advised the parties that in some previous cases the Panel has determined that giving a supplementary bidder's statement to the Stock Exchange has not been adequate to redress information deficiencies and had required that a copy of a supplementary bidder's statement be sent to all offerees. However, the Panel advised that it would not want to inhibit the earliest disclosure of information by giving announcements to the Stock Exchange.

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### Reasons for Decision – Alpha Healthcare Limited

*statement did not state that the completion of buying both the debts was conditional upon satisfaction of the requirements referred to in clause 5 of the Pre-Bid Agreement;*

- (b) the definition of “Pre-Bid Agreement” in Section 3 Paragraph 1; *the definition of Pre-Bid Agreement indicated that the Pre-Bid Agreement was an annexure to the bidder's statement, which was not the case. Rather, the bidder's statement gave a summary of the terms of the Pre-Bid Agreement ;*
  - (c) the application of Section 2 Paragraphs 4(b) (i) & (ii) only to Shares rather than Remaining Shares; *under the description of the share acquisition in the Pre-Bid Agreement it was potentially unclear whether the relevant “valid acceptance” referred to in those paragraphs was only in respect of the Remaining Shares;*
  - (d) the date currently due for debt repayment; *the due date for payment of the Sun Healthcare and SHG Holdings debts was not stated in the bidder's statement;*
  - (e) the actual provider within the Ramsay group of finance to Ramsay (compare Section 2, Paragraphs 1.2 and 3.2); *the complete linkages within the Ramsay group for providing the cash to the bidding vehicle was unclear, although the source and adequacy of the funds was not; and*
  - (f) the statement concerning the adjustment to Alpha's net tangible asset backing to calculate the premium claimed in Paragraph 1 of “Why you should accept Ramsay Centauri's Offer”; *Ramsay had suggested a NTA value for Alpha shares and said that this was adjusted for an implied discount. It was unclear what the discount was and why it was applied.*
71. The parties resolved these disclosure issues and Ramsay produced a supplementary bidder's statement which Alpha agreed to include in the mailing of its target's statement. The Panel commends the parties and their advisers on the resolution of these issues.

#### *Debt Repayment Schedule*

72. The Panel considered that the future performance and value of Alpha might be materially affected by the financing of its debt. Therefore, in the event of Ramsay not acquiring 100% ownership of Alpha, information on Ramsay's intentions in relation to seeking repayment of the debts of

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### Reasons for Decision – Alpha Healthcare Limited

Alpha which it had purchased was material to the decision of any Alpha shareholder whether or not to accept Ramsay's offer.

73. Ramsay's lawyers asserted, in a letter dated 2 May 2001, that neither Ramsay nor RHC had yet formed a view as to its intentions in relation to seeking repayment of those debts, and may or may not be in a position to do so following the close of the Offer period.
74. The Panel asked for a list and description of internal discussions, plans, proposals and alternative courses that the directors of Ramsay and RHC had or had formulated in relation to the financing or repayment of the Alpha debt, and a similar list of documents given to the Ramsay or RHC boards, or its financiers<sup>17</sup>.
75. Ramsay advised that it had not formed any intentions on repayment of debts because:
  - (a) Alpha had indicated that it would repay all but the Westmead debt by July 2001; and
  - (b) the long term nature of the Westmead debt meant that Ramsay had formed no current intentions for it.
76. We accepted these submissions.

#### **Other issues**

##### *Early Dispatch*

77. Alpha alleged that some Alpha shareholders received Ramsay's offer documents sent to Alpha shareholders less than 14 days after the bidder's statement was sent to Alpha contravening item 6 of sub-section 633(1). The Panel asked whether this occurred, and whether it caused any harm.
78. Alpha said that the Bidder's Statement was served on Alpha on Thursday, 12 April 2001. The earliest time at which Ramsay was entitled to give the Bidder's Statement and offers to shareholders was the fourteenth day after Ramsay gave its bidder's statement to Alpha, namely, Thursday, 26 April 2001 (item 6 of section 633(1) of the Law).

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<sup>17</sup>The Panel specifically did not require Ramsay or RHC to provide the documents at that stage, but it did require an accurate description of them, their content, date, author, recipients and purpose.

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### Reasons for Decision – Alpha Healthcare Limited

79. Alpha was concerned that the Bidder's Statement and the Offers had been received through the mail by at least two shareholders as early as mid-morning on Thursday, 26 April. This would seem to suggest that the Bidder's Statement and Offers were posted prior to Thursday, 26 April 2001.
80. Ramsay cited *SSG Investments v Australian National Industries Ltd* (1999) FCR 564 for the proposition that offer documents may be sent one day before the 14-28 day period referred to in item 6 of subsection 633(1). Ramsay asserted that it had done this and that its offer documents were then received in the normal post on the first day of the 14-28 day period.
81. The Panel accepted this.

#### *ASX Statement Implied Early Agreement on Remaining Shares*

82. Ramsay released a statement to the Stock Exchange on 30 April that the Pre-Bid Agreement was *scheduled* to settle on or before Thursday, 3 May 2001. Alpha alleged that this indicated that Ramsay and Sun or SHG Holdings had reached agreement on the sale of the Remaining Shares other than under the bid, and that Ramsay had therefore breached section 606.
83. The Panel accepted Ramsay's submissions that this was a misreading by Alpha of the terms of the Pre-Bid Agreement. Ramsay said that it had concluded that it was likely to complete the Pre-Bid Agreement on 3 May 2001, on the basis that Sun had not accepted for the Remaining Shares before that time. If Ramsay had expected an acceptance for the Remaining Shares it would have announced a settlement date of 8 May 2001 as provided for in the Pre-Bid Agreement.

#### *Delay in Alpha's Application?*

84. The Panel was concerned at the lapse of time between 3 May 2001 when Alpha applied to the Panel and 11 April, 2001 (when Alpha should reasonably have become aware of the Pre-Bid Agreement). The Panel noted the imperatives placed on it by the legislation to conclude its matters as quickly as possible and to reduce tactical litigation. The Panel asked whether it should discount any submissions by Alpha due to the time lapse.
85. Alpha responded that it only became aware of a number of the issues raised in its application as a result of, what Alpha perceived to be, the Receiver's inexplicable conduct in refusing to deal with Netcare in relation

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### Reasons for Decision – Alpha Healthcare Limited

to its offer and subsequently rejecting it. It was this conduct (which Alpha submitted was brought about by the Pre-Bid Agreement and the alleged inducements which lay within it) and its actual effect on the market for Alpha shares, in terms of inhibiting competition, which warranted Alpha making an application to the Panel.

86. The Panel decided it should not discount Alpha's submissions on this basis.

#### *Time Periods in Bid Due to Application*

87. The Panel was concerned that Alpha's target's statement was due to be sent to Alpha shareholders soon after the application. The Panel's strong preference was to reduce the number of supplementary documents given to shareholders to the minimum possible, and to include the outcome of the Panel proceedings in the supplementary target's statement. With that in mind the Panel suggested Alpha seek an extension of time from ASIC for dispatch of its target's statement and that Ramsay should assure ASIC that it would extend its bid to accommodate this. The Panel required parties to advise it immediately if they were not prepared to facilitate this.
88. Alpha, Ramsay and ASIC co-operated in this issue. The Panel thanks them and their advisers for a very sensible outcome.
89. We thank the parties (and Hardie, which was not a party) for helpful submissions. We consented to all parties being represented by their solicitors. There will be no declaration or orders.

**Maxine Rich**  
**President of the Sitting Panel**  
**Decision dated 22 May 2001**  
**Reasons published 27 July 2001**