CSP

The Takeovers Panel

Reasons for Decision
Pinnacle VRB Ltd (No. 05)

In the matter of Pinnacle VRB Ltd (No. 05)
[2001] ATP 14

Catchwords

Competing takeover bids – transactions entered into between target and bidder – effect of transactions on rival bid – requirement to obtain shareholder approval for transactions – shareholder ratification – defeating conditions – conduct of target directors – improper purpose – reasonable and equal opportunity to participate in benefits – undertakings to Panel

Corporations Law (Cth), sections 602, 657A, 657D and 659C

City Code on Takeovers and Mergers, r 21.1

ASIC Policy Statement 110

Precision Data Holdings Ltd v Wills *(1992) 10 ACLC 1*

On 21 May 2001 we decided not to make a declaration of unacceptable circumstances or make any orders in relation to the two transactions which Pinnacle VRB Limited had entered into in March and April 2001 for the marketing, sale, manufacture and utilisation of the Vanadium Redox Battery technology by Vanteck (VRB) Technology Corp within Canada, the United States, Central and South America and Int-A-Grid (UK) Ltd within Europe, Russia and the Middle East. At the time that Pinnacle entered into these transactions, Pinnacle was the subject of an off market cash takeover offer by Reliable Power Inc for the ordinary shares in Pinnacle.

These are our reasons for that decision.

REASONS FOR DECISION

1. The sitting Panel in this matter comprises Marian Micalizzi (President), Louise McBride (sitting Deputy President) and Robyn Ahern.

2. These are our reasons for deciding not to make a declaration of unacceptable circumstances or orders in relation to the entry by Pinnacle VRB Limited (***Pinnacle***) into the transactions in March and April 2001 for the marketing, sale, manufacture and utilisation of the Vanadium Redox Battery (***VRB***) technology by Vanteck Technology Corp (***Vanteck***) within Canada, the United States, Central and South America (the ***Vanteck Transaction***) and Int-A-Grid (UK) Ltd (***Int-A-Grid***) within Europe, Russia and the Middle East (the ***Int-A-Grid Transaction***) (together, the ***Transactions***). At the time that Pinnacle entered into the Transactions, Pinnacle was the subject of an off market cash takeover offer by Reliable Power Inc (***Reliable***) for all of the ordinary shares in Pinnacle (the ***Bid***).

Background

3. Pinnacle is a company listed on the Australian Stock Exchange Limited (***ASX***). Some time ago, Pinnacle acquired intellectual property from Unisearch Limited concerning the VRB technology, which involves the storage of electricity for domestic and commercial installations to supply electricity when required, as well as to smooth peaks and troughs in mains power.

4. Pinnacle has licensed a number of other companies to exploit and utilise the VRB technology in certain regions of the world.

5. Pinnacle has the following securities on issue:

   (a) ordinary shares (***Pinnacle Shares***); and

   (b) options to acquire ordinary shares in Pinnacle exercisable at 20 cents on or before 30 January 2002 (***Pinnacle Options***).

6. The Pinnacle Shares and the Pinnacle Options are quoted on the ASX. On 22 January 2001, Reliable Power Inc announced that it would make an off-market cash takeover bid of 55 cents for all of the Pinnacle Shares.

7. Reliable is incorporated in Delaware in the United States. Reliable is not registered as a foreign company under Division 2 of Part 5B.2 of the Law. Reliable's sole shareholder is Mr John Venners. It has 2 directors: Mr Venners and Mr Gregg Renkes.

8. On 5 March 2001, Reliable lodged its bidder's statement with the ASIC and sent a copy to Pinnacle.

9. On Tuesday 20 March 2001, Reliable dispatched its offers to Pinnacle shareholders. The consideration offered under Reliable's Bid was 65 cents for every Pinnacle Share. Reliable's Bid was conditional upon Reliable acquiring a relevant interest in at least 51% of the total number of the issued shares in Pinnacle. There were several other defeating conditions to Reliable's Bid including, inter alia, while the Bid is open:

   (a) no prescribed occurrence taking place in relation to Pinnacle; and

   (b) Pinnacle not entering into any transaction which would result in a material change in Pinnacle's financial position, prospects or business, except in the ordinary course of business.

10. On 29 March 2001, both Pinnacle and Federation Group Limited (***Federation***) announced to ASX that Pinnacle had granted to Vanteck an exclusive licence (subject to some licences previously granted) to commercialize certain technology in the Americas for five years.

11. Federation has a relevant interest in about 50% of the issued shares in Vanteck. Vanteck has a relevant interest in 22% of the issued shares in Pinnacle.

12. Pinnacle's current directors are: Mr John Fraser, Mr John Anderson, Mr Rodney Duncan, Dr. John Hawkins, Mr David Lenigas, Mr David Pethard, Dr. Richard Sharp and Mr Peter Williams. Mr John Fraser, Mr Rodney Duncan and Dr John Hawkins are also directors of Vanteck. Mr John Fraser is also a director of Federation.[1]

13. A further transaction was announced by Pinnacle on 11 April 2001, whereby Pinnacle granted Int-A-Grid (UK) Ltd (***Int-A-Grid***) sole and exclusive rights as Pinnacle's agent to promote, develop and market the VRB technology within Europe, Russia and the Middle East (the ***Int-A-Grid Transaction***). Int-A-Grid is a joint venture vehicle to be owned by Pinnacle and other investors.

The Application

14. On 2 April 2001, Reliable applied for a declaration of unacceptable circumstances and interim and final orders in relation to the Vanteck Transaction.[2]

15. In its Application, Reliable alleged that the Vanteck Transaction:

    (a) breached the conditions mentioned in paragraph 9 above;

    (b) contravened provisions of the Corporations Law and of the ASX Listing Rules concerning related party transactions, transactions in which directors are interested, and transactions involving a significant change to the nature or scale of the company's activities, because it was not approved by shareholders;

    (c) was entered into by the Pinnacle board acting for an improper purpose, namely to defeat the Bid;

    (d) would have required shareholder approval under the London City Code on Takeovers and Mergers; and

    (e) accordingly, gave rise to unacceptable circumstances in relation to the affairs of Pinnacle.

    Reliable also highlighted the Panel's draft policy on Unacceptable Circumstances, alleging that this supported Reliable's argument that the actions of Pinnacle's directors in entering into the Vanteck Transaction gave rise to unacceptable circumstances.

16. Reliable applied for:

    (a) interim orders restraining Pinnacle from giving further effect to the Vanteck Transaction and from entering into or giving effect to other transactions which would materially affect its financial position and prospects;

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[1] Based on the public information available.

[2] The Int-A-Grid Transaction was not announced by Pinnacle until 11 April 2001.

(b) a declaration that the circumstances narrated in the application relate to unacceptable conduct by Pinnacle; and

(c) final orders to set aside the Vanteck Transaction, to reverse anything undertaken to implement the Vanteck Transaction, to clarify the equitable ownership of shares in Pinnacle held by Federation, and for costs.

The Int-A-Grid Transaction

17. Although the Int-A-Grid Transaction was not the subject of Reliable's Application (the transaction was announced after the Application was made), we informed the parties that we had similar concerns in relation to that transaction.

Interim order

18. We sought and obtained from Pinnacle an undertaking that Pinnacle would refrain from taking any further action in implementing the Vanteck Transaction and the Int-A-Grid Transaction, until this matter was resolved.

19. For this reason, we declined to make the interim orders requested by Reliable.

ASX

20. In early April, soon after the Application was made and drawn to the attention of the Australian Stock Exchange Limited (***ASX***), ASX commenced discussions with Pinnacle with the aim of determining whether Listing Rule 10.1 applied to the Vanteck Transaction[3]. ASX's consideration of this issue continued through these proceedings. After we had made a decision in principle that shareholder approval would be required, we were informed that ASX had decided under Listing Rule 10.1 to require Pinnacle to submit the Vanteck Transaction to shareholders for ratification and obtain an independent expert's report for the purpose of that meeting. However, ASX was not a party to these proceedings.

The Law and Policy

21. There is nothing in the Corporations Law (the ***Law***) which specifically stipulates that a company must not enter into a material transaction during the course of a takeover bid for that company. Nor is there anything in the Law which provides that where a company the subject of a takeover bid proposes to enter into a material transaction during the

[3] Listing Rule 10.1 requires an entity to ensure that it does not acquire a substantial asset from or dispose of a substantial asset to a related party without the approval of shareholders, subject to some exceptions. Pinnacle asserted that the Int-A-Grid Transaction did not involve a related party, and we understand that ASX therefore treated it as not caught by Listing Rule 10.1.

course of a bid, it is required to seek shareholder approval prior to entering into that transaction, or at least makes that transaction subject to shareholder ratification.

22. Paragraph 657A(3)(a) of the Law requires that, in exercising its powers under section 657A (which entitles the Panel to make a declaration of unacceptable circumstances), the Panel must (amongst other things) have regard to the purposes of Chapter 6 of the Law set out in section 602. Paragraph 602(c) lays down a policy that:

    "as far as practicable, the holders of the relevant class of voting shares or interests all have a reasonable and equal opportunity to participate in any benefits accruing to the holders through any proposal under which a person would acquire a substantial interest in the company …".

    Subsection 657A(3) directs the Panel to look at actions by directors which caused an acquisition or proposed acquisition of a substantial interest in a company not to proceed, or contributed to it not proceeding.

23. In addition to this, the Australian Securities and Investments Commission (***ASIC***) has long made it part of its policy that unacceptable circumstances may arise from frustrating a bid.[4]

24. It is also relevant to note that the London Panel on Takeovers and Mergers requires that during a Bid, a Target seek shareholder approval for the sale or disposal of assets (or the acquisition of assets) of a material amount, or for contracts otherwise than in the ordinary course of business[5]. Paragraph 602(c) of the Law provides a solid basis for a similar rule or policy in Australia.

25. A similar rule or policy is relevant in the Australian context if a material transaction may trigger a defeating condition in a bid, or may otherwise entitle a bidder to withdraw its bid. Without shareholder approval to enter into a transaction which may frustrate a bid, the directors are in effect deciding themselves whether the transaction represents a better opportunity for shareholders than the offer under the bid.

26. Unlike a court, the Panel's function is not to determine the existing rights and obligations of the parties and to enforce them. It is to ascertain the existing rights and obligations of the parties and, where relevant and persuasive considerations of commercial policy require it to do so, to make declarations and orders designed to create new rights and obligations, so as to remove existing unacceptable circumstances or prevent unacceptable circumstances coming into existence[6].

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[4] For example, see ASIC Policy Statement 110 at paragraph 110.48.

[5] See The City Code on Takeovers and Mergers, Rule 21.1.

[6] *Precision Data Holdings Ltd v Wills* (1992) 10 ACLC 1, 6 ACSR 269

27. As mentioned above, in performing this function, the Panel is directed to take into account whether the actions of the directors of a company may deprive shareholders in that company of reasonable and equal access to benefits which would accrue to them under any transaction or proposed transaction under which a person would acquire a substantial interest in the company[7].

28. Subject to legislative and regulatory requirements, while directors of a company may and should conduct the affairs of the company without reference to the shareholders in general meeting, decisions on control of the company should be made by the shareholders. These principles collide, if a transaction which is otherwise within the directors' sphere is capable of defeating a bid. Under the policy of section 602, the right of shareholders to decide on control transactions prevails. If the transaction is made subject to shareholder approval, shareholders are able to decide which of the alternative opportunities they prefer. There is a requirement to obtain ratification of similar transactions in the London City Code on Takeovers and Mergers.[8] The ASX Listing Rules and Chapter 2E and section 611 of the Corporations Law also require shareholder ratification of certain transactions, for diverse reasons.

29. In our view, a transaction entered into after a bid has been announced and before it closes should be conditional on approval by shareholders, if it may cause the bid to fail by causing a defeating condition not to be fulfilled. This policy is based on the matters just mentioned: assuming that the transaction is valid without ratification, it may nonetheless have the effect of depriving shareholders of access to benefits which they might have received under the bid, and their right to determine the outcome of the bid prevails over the directors' right and duty to manage the company.

30. Accordingly, the policy is quite distinct from the directors' fiduciary duties to act in the best interests of the company, from the restrictions placed on their powers by the general law and from the existing statutory and Listing Rules requirements concerning approval of related party and other transactions, although obviously they may coincide in any particular case.

31. We adopted this policy in response to the facts of this matter. The policy needs to be refined to make its application clear in instances where, for instance, the facts involve breaches of conditions which may be unreasonable for a bidder to rely on, transactions which have been entered into or announced before a bid is made, or compelling reasons why shareholder approval should be dispensed with in a particular case.

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[7] Subsection 657A(3) of the Law.

[8] See also proposed paragraph 614(1)(c) in the Corporate Law Economic Reform Bill 1998, imposing restrictions on a company subject to a mandatory bid.

Companies should not be paralysed simply due to the existence of a takeover bid. On these facts, however, we do not need to enter into most of those refinements.

Application of Policy

32. Applying the policy set out above, we decided that Pinnacle's shareholders should decide if the Transactions should proceed, unless there were compelling reasons why shareholder approval should not be required in this particular case. In making this decision, we took into account that the Transactions would trigger a defeating condition in Reliable's Bid (potentially removing the Bid from Pinnacle's shareholders), they were material to Pinnacle, and they were entered into while Pinnacle was subject to Reliable's Bid.

The issues

33. With this background in mind, we identified the issues to be examined in these proceedings as follows:

    (a) whether the entry into the Transactions may have the effect of depriving any or all shareholders in Pinnacle of reasonable and equal opportunities to participate in benefits which might accrue to them under Reliable's Bid;

    (b) whether it would be in the public interest to make a declaration of unacceptable circumstances in relation to the Transactions;

    (c) whether entry into the Transactions without ratification by shareholders in Pinnacle would defeat the policy of paragraph 602(c) of the Corporations Law;

    (d) whether, if shareholders are not given the opportunity to ratify the Transactions, the Panel should make orders requiring them to be given that opportunity;

    (e) whether the Panel should make orders cancelling either or both the Transactions or restraining Pinnacle from giving effect to the Transactions, unless they are ratified;

    (f) whether the Panel should cancel the Transactions, regardless of any proposal to seek shareholder ratification.

34. In this matter, we were therefore concerned to decide whether, after Reliable's Bid was announced and before it closed, the Transactions should not have been entered into at all, or should have only been entered into with shareholder approval or if they were, made subject to shareholder approval.

Request for Information

35. To assist us, we asked Pinnacle to provide certain information about :

    (a) Any commercial imperative driving Pinnacle's entry into the Transactions, without making the Transactions subject to shareholder approval, notwithstanding that the Bid was on foot;

    (b) The commercial life of the intellectual property which is the subject of the Transactions, the proportion of Pinnacle's assets that the technology represents, and the proportion of the potential market for that technology that is covered by each of the Transactions;

    (c) Whether Pinnacle was aware of any alternative potential licensees;

    (d) The terms of the each of the Transactions; and

    (e) Whether Pinnacle, Vanteck or Int-A-Grid intended to take any action pursuant to the Transactions during the Bid, and whether it would cause unfair prejudice to make an interim order preventing them from doing so.

36. At the same time, we also invited Pinnacle, Reliable and ASIC to make submissions in relation to:

    (a) The need for shareholder approval for, or ratification of, the Transactions, bearing in mind that they were entered into during the Bid;

    (b) Whether unacceptable circumstances occurred because Pinnacle did not obtain shareholder approval prior to entering into the Transactions or did not make the Transactions subject to shareholder approval, and whether any such unacceptable circumstances could be overcome by ratification of the Transactions, or in any other way;

    (c) Whether it would be contrary to the public interest for the Panel to make or decline to make a declaration that unacceptable circumstances existed in relation to the affairs of Pinnacle if the Panel found that unacceptable circumstances had occurred;

    (d) Whether any advantages to Pinnacle in entering into the Transactions outweigh the possible effect of the Transactions on the Bid, from a shareholder's point of view; and

    (e) Whether it would unfairly prejudice Pinnacle or any other person to make any or all of the interim and final orders proposed in the

application, and, in particular, order Pinnacle to now put the Transactions to shareholders for ratification.

37. Pinnacle had told us that its directors sought legal advice on what shareholder approvals, if any, they needed to obtain for the Transactions. The directors were advised that, based on certain assumptions as to fact, neither Chapter 2E nor the Listing Rules required the Transactions to be ratified by shareholders. While the directors appear not to have received written advice about the effect of the Transactions on the defeating conditions in Reliable's Bid, we have been assured by Pinnacle's solicitors that, prior to entering into the Transactions, the directors sought and received oral advice on that issue and on its effect on their obligations. With this in mind, the directors nonetheless decided that it would be in the best interests of Pinnacle to enter into the Transactions. None of that advice concerned the policy we have set out above. Except to note that ASX later disagreed with part of that advice concerning the application of the Listing Rules (or at least the facts on which it was based) on the Vanteck Transaction, we make no comments in relation to that advice.

Information provided

38. In response to our request for information, Pinnacle explained to us that it had a commercial imperative to enter into the Transactions as a matter of urgency, in order to ensure its prime asset, the VRB technology, was able to be developed, marketed and sold as quickly as possible and with the maximum returns for Pinnacle, and that the opportunity was not lost to other persons.

39. Most of Pinnacle's submissions and evidence in relation to this issue were provided to us (and, in most instances, also to the other parties in this matter) on a confidential basis, and we will therefore not publish that information here.

40. Pinnacle's submissions largely related to two issues:

    (a) the risk of other parties commencing marketing and promotion of the VRB technology in the territories covered by the Vanteck and Int-A-Grid Transactions; and

    (b) the risk of missing a number of commercially material deadlines to demonstrate the potential and functionality of the VRB technology.

41. We considered Pinnacle's arguments and evidence in relation to these commercial imperatives carefully alongside the submissions and rebuttals we received from Reliable. We also held a conference with the parties to explore these issues further.

42. In assessing the submissions and evidence presented to us, we focussed on the critical question whether Pinnacle was facing such significant time constraints in entering into the Transactions and whether the cost to Pinnacle of delay were such that the Pinnacle Board was justified in:

    (a) entering into the Transactions at all, or

    (b) without making them subject to shareholder ratification,

    while Reliable's Bid was on foot.

Should the Transactions have been entered into at all?

43. At the conference with the parties, we asked numerous questions to help us obtain a better understanding of the background to Pinnacle's assertion that commercially, it was imperative that the Transactions be entered into as quickly as possible, despite the Bid. In particular, we were interested to obtain information about the time period and extent to which Pinnacle had been in discussions and negotiations for the Transactions, the commercial reasons behind Pinnacle's assertion that the commercialization of the VRB technology was under threat, and the reasons why Pinnacle would be disadvantaged, commercially, if it were to seek shareholder ratification of the Transaction now.

44. Although we had some concerns in relation to Pinnacle's assertions about the time pressures Pinnacle was facing, and the need to enter into the Transactions as a matter of urgency (which we detail further below), we were satisfied that Pinnacle had a strategy in place as far back as October 2000 (well before Reliable's Bid was announced) to commercialise the VRB technology and that the board considered that there was significant commercial pressure on it to implement that strategy quickly. We were also satisfied that the Transactions were integral to the implementation of the strategy. On balance, the evidence we were provided with did not convince us that the Pinnacle board had entered into the Transactions to defeat the Bid.

Should shareholder ratification have been sought?

45. In considering whether Pinnacle should have sought shareholder approval prior to entering into the Transactions, or made the Transactions subject to shareholder approval, we considered that the test is an objective one, based on commercial considerations rather than a subjective test based on proper purposes. We were not interested in determining whether the Board of Pinnacle had in any way failed to perform their fiduciary duties or whether a meeting should be held as a precaution against such failure. Rather, we were concerned that Pinnacle's shareholders should make this decision. Without shareholder involvement, the effect of the Transactions is that they may remove from the shareholders the decision on the outcome of the Bid.

46. The factor to weigh against that potential effect on the Bid is the harm to Pinnacle (if any) from deferring the Transactions until the Bid was over, or from making them subject to ratification.

47. We understand that both Transactions were integral to the strategy put in place by the Pinnacle board late in 2000, in that they facilitate the marketing and sale of the VRB technology in two important geographical markets. Pinnacle also submitted that, for commercial reasons, it was critical that the technology be put through testing in order to prove the technology as quickly as possible. While we accepted Pinnacle's evidence in this regard, we were not convinced that Pinnacle had compelling reasons why it could not seek shareholder approval prior to entering into the Transactions, or at least make them subject to subsequent shareholder ratification.

48. Following the conference, we informed the parties that the written and oral submissions received from the parties had not adequately explained why shareholder ratification of the Transactions was not or should not be sought. We were not convinced that shareholder ratification would be so harmful to Pinnacle and the Transactions as to outweigh the need for ratification.

49. Shortly after this, we were informed that the Pinnacle board had decided that it would convene a general meeting of the shareholders of Pinnacle to seek ratification of the Transactions[9].

Declaration of unacceptable circumstances?

50. Our decision that shareholder approval should be sought for certain transactions entered into during the course of a takeover bid is not a pre-existing requirement of the general law, the Corporations Law, the Listing Rules or Panel policy. Rather, it is a policy which has not previously been stated in Australia. That policy, having been formulated in response to an existing state of affairs, is effectively being imposed retrospectively[10]. Accordingly, we preferred to avoid making a declaration of unacceptable circumstances, unless it was necessary as a foundation for orders, or unless it was justified by bad faith in the conduct of the directors.

51. Had it been necessary for us to order Pinnacle to seek ratification of the Transactions (or not to proceed with them without ratification) we would have declared that unacceptable circumstances existed in relation

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[9] We also understand that, at that general meeting, Pinnacle intends to put a number of additional resolutions to shareholders, including a proposed share issue to certain existing share and option holders under an Entitlement Offer from November 1999 and a proposed share issue to directors.

[10] We make no apology for this: decisions under Part 6.10 of the Law must occasionally impose new policy retrospectively. The Panel will now develop a policy statement in relation to this issue to provide some guidance for target directors in the future.

to the affairs of Pinnacle.[11] The board of Pinnacle, however, decided to put the Transactions to a resolution without any necessity for us to order them to do so.

52. We were also prepared to declare that the Transactions had given rise to unacceptable circumstances if we found that the Pinnacle board had acted for an improper purpose in entering into the Transactions; ie: in order to defeat the Bid. While the evidence provided to us by both parties did not present a totally consistent story, on balance, we were not satisfied that this was the purpose of entering into these Transactions.

53. For those reasons, we decided that we would stay the proceedings until after the general meeting of Pinnacle's shareholders has been held, without any declaration or order, but in reliance on Pinnacle's undertaking not to put the Transactions into effect before the close of the proceedings.

54. We were conscious that we had, to that date, relied largely on representations made by Pinnacle in its submissions and at the conference. We therefore told the parties that if we became aware of information which was contrary to those representations in a material respect, we would reconsider our position.

55. We also informed the parties that, if shareholder ratification is sought, we would not require Pinnacle to obtain an independent experts report for the purposes of the general meeting. We considered that the Pinnacle board, together with the external advisers which it has already engaged, would be capable of providing the advice that shareholders need. We also considered the possibility of delay in obtaining an independent expert's report and the resultant prejudice to Pinnacle. However, we did not take any view in relation to whether the Transactions were fair or reasonable. In addition, we made it clear to the parties that we did not wish to make any comment in relation to whether such a report may appropriately be required under the ASX Listing Rules.

56. ASX subsequently decided that Listing Rule 10.1 required Pinnacle to take the Vanteck Transaction to shareholders and obtain an independent expert's report for the purpose of that meeting. It may be some weeks before Pinnacle is able to obtain an independent expert's report and it is therefore likely that the shareholder meeting will not occur until late June 2001. With this in mind, we decided it would be in the public interest to conclude this matter sooner, rather than wait for the conclusion of the meeting.

57. Pinnacle had insisted to us in its submissions and at the conference, that it had a strong commercial imperative to enter into the Transactions as a

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[11] The Panel can only make orders if it has first made a declaration of unacceptable circumstances.

matter of urgency, despite the fact that the Bid was on foot. In order to verify these submissions, we sent 2 staff members from the Panel Executive to Pinnacle's offices to inspect board minutes and other documentation relating to the commercial imperatives to proceed with the Transactions during the 4-6 months leading up to the Bid.

58. Pinnacle's board papers and other correspondence confirmed the director's assertions that the Pinnacle board had in place a strategy that it was pursuing to commercialise the VRB technology[12]. We understand that this strategy is set out in Pinnacle's business plan, which was discussed in some depth at the Conference. Some documents also confirmed that, Pinnacle's management and advisors believed that, commercially, Pinnacle was facing pressures and time constraints which meant that it needed to implement that strategy quickly.

59. However, the documents did not entirely confirm the representations made by Pinnacle in its submissions and at the conference in that they did not indicate that there was such urgency or that the commercial imperative was so great as to warrant Pinnacle entering into the Transactions without shareholder approval or without making the Transactions subject to shareholder ratification. In addition, the documents did not evidence any board discussions in relation to the fact that, in entering into the Transactions, the board may risk the Bid not proceeding.

60. While we did not consider it satisfactory that the documents reviewed by the Executive did not entirely confirm Pinnacle's submissions, the discrepancies were not significant enough to change our initial view that Pinnacle did not enter into the transactions in order to defeat the Bid. If anything, the discrepancies further convinced us that shareholder ratification must be sought.

61. Both parties provided a considerable number of additional submissions late in the course of these proceedings. These submissions included evidence of correspondence between a third party (who was not involved in these proceedings) and each of Reliable and Pinnacle. Both parties submitted extracts of their correspondence with this third party as evidence relevant to determining whether the commercial imperative asserted by Pinnacle did, in fact, exist. We were not persuaded or influenced by the evidence provided by either party in this regard, particularly as it was fragmentary and we were unable to test its veracity.

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[12] Although we have not seen a formal business plan, Pinnacle informed us that that the broad nature of this strategy was discussed at Pinnacle's Annual General Meeting in November 2000. In addition, Pinnacle's public announcements also indicate that such a strategy was in place before Reliable's Bid was announced (see, for instance, ASX Announcements made by Pinnacle on 7 September 2000 and 12 January 2001).

Permission to continue with certain projects

62. Pinnacle also asked that we confirm that Pinnacle would not be acting in contravention of its 20 April 2001 undertaking by granting specific project rights to Vanteck, Int-A-Grid and others in relation to specific projects on a case by case basis. Pinnacle provided us (on a confidential basis) with a list of 4 specific projects involving Vanteck, which related to the Electric Power Research Institute evaluation program in the USA.

63. Once we were satisfied that these individual projects were small enough not to be considered material transactions capable of triggering a defeating condition in Reliable's Bid, we told Pinnacle that, to the extent that the granting of licences in relation to these 4 specific projects would be in breach of Pinnacle's undertaking to the Panel on 20 April 2001, we consented to Pinnacle varying the undertaking so as to enable it to grant those licences.

64. Reliable submitted that, in granting this consent, we had failed to provide Reliable with an opportunity to express its concerns in relation to Pinnacle's request. We disagree. During the latter part of the conference we held with the parties on 27 April 2001, the Pinnacle directors discussed these projects and their concerns that they be progressed as a matter of urgency. At no stage during the course of the conference did Reliable express any objection or concerns in relation to those submissions. Nor did Reliable raise any issue in relation to those submissions at the conclusion of the conference, after we expressly asked Reliable's representatives if there were any comments they wanted to make or any other issues or matters which it wanted to raise. In addition, in a letter we wrote to parties on 1 May 2001, we made it clear that we were considering whether, if we made a declaration and orders requiring Pinnacle to seek shareholder ratification, such orders should contain a carve-out to enable Pinnacle to proceed with these projects. We did not receive any submissions or objections from Reliable in relation to that proposal.

65. After receiving submissions from Pinnacle and rebuttals from Reliable, we also consented to Pinnacle varying its undertaking to enable Int-A-Grid to proceed with negotiations of terms and contracts in relation to a project in Europe, on the basis that all parties to these negotiations are made aware that the Int-A-Grid Transaction will only proceed if Pinnacle's shareholders first approve it.

Undertaking

66. In order to ensure that Pinnacle would not implement the Transactions prior to obtaining shareholder ratification, we sought and obtained from Pinnacle a further amendment to its undertaking. This amended undertaking now stipulates that Pinnacle will not implement the Transactions on the understanding that we will consent to the

withdrawal of the undertaking after Pinnacle's shareholders have validly ratified the Transactions.

Costs

67. Reliable sought an order for its costs. We make no order. We have the power to make a costs order only where we have made a declaration of unacceptable circumstances.[13]

Marian Micalizzi & Louise McBride
Sitting President & Sitting Deputy President of the Sitting Panel
Decision dated 25 May 2001
Reasons published 4 June 2001

[13] Subsections 657D(1) and (2). The Panel will discuss this limitation with the Government.