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The Takeovers Panel

Reasons for Decision
Pinnacle VRB Ltd (No. 08)

In the matter of Pinnacle VRB Ltd No. 8
[2001] ATP 17

Catchwords

Review of Panel decision – 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 – timing of shareholders meeting to approve transactions – defeating conditions – conduct of target directors – improper purpose – reasonable and equal opportunity to participate in benefits – Eggleston Principles – poison pill – function of Panel – function of Review Panel - undertakings to Panel

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

Miller v Miller (1995) 16 ACSR 73
Precision Data Holdings Ltd v Wills (1992) 173 CLR 167
Winthrop Investments Ltd v Winns Ltd [1975] 2 NSWLR 666
Whitehouse v Carlton Hotel Pty Ltd (1987) 162 CLR 285

These are our reasons for accepting further undertakings from both parties and otherwise dismissing an application by Reliable Power Inc. under section 657EA of the Corporations Law for review of the decision in the matter of Pinnacle VRB Limited (No. 5).

1. The review Panel is constituted by Justice Kim Santow (sitting President), Trevor Rowe (sitting Deputy President) and Denis Byrne.

INTRODUCTION — THE DECISION

2. On 16 June 2001 this Review Panel accepted a binding set of undertakings from the target, Pinnacle VRB Limited (***Pinnacle***). It follows a reciprocal undertaking from the bidder, Reliable Power Inc. (***Reliable***) as to the terms of its waiving certain conditions in Reliable's bid for all the ordinary shares in Pinnacle, based upon Pinnacle's undertaking. But for Pinnacle's undertakings, this Review Panel, taking into account the public interest, would have declared unacceptable circumstances to exist. This was by reason of:

   (a) conduct by Pinnacle's Board in triggering defeating conditions in Reliable's offer by reason of certain asset disposals; and.

   (b) the absence of a proper time-table for an early members' meeting to approve these transactions, augmented by formal ratification should there be sufficient possibility of improper purpose on the part of Pinnacle's directors (on which the Panel made no finding).

3. Pinnacle's members would thereby have been denied "reasonable and equal opportunity to participate in any benefits" accruing from Reliable's bid, in contravention of the Eggleston principles as enacted in the Corporations Law. However, Pinnacle's undertakings to the Pinnacle No. 5 Panel and its further undertakings to this Panel have obviated those circumstances, by assuring the

opportunity for disinterested members of Pinnacle to vote in timely fashion whether or not to approve the transactions. [1]

4. Importantly, this is now undertaken to be done with enhanced disclosure and, in the event that the transactions were, or may have been, for an improper purpose, ratification must also take place with directors and their associates precluded from voting. Directors of Pinnacle are required to state whether or not the transactions may be voidable for an improper purpose recognising that directors thereby assume responsibility to be accurate and not misleading. The "may" recognises that the position may not be clear-cut. It leaves open the possibility of seeking ratification if there be sufficient possibility of improper purpose, for greater caution.

5. Reliable, for its part, undertook to waive the triggered conditions if at the last date for declaring the bid free of those conditions (presently 3 July 2001), the relevant transactions had not proceeded nor been approved (or otherwise would not proceed). That gives some assurance that members will have a proper choice between Reliable's bid versus the transactions going ahead, if Reliable extends its bid beyond the current date (for which we did not require an undertaking).

6. This Panel has completed its review of the decision in Pinnacle VRB Ltd (No 5) (***Pinnacle No. 5***) by:

   (a) (a) accepting these more comprehensive further undertakings in addition to the undertaking not to proceed without members' approval previously given by Pinnacle in the Pinnacle No 5 proceedings; and

   (b) (b) in consequence, declining to make a declaration of unacceptable circumstances or orders in relation to the conduct of Pinnacle and its Board as pertains to Reliable's bid for all the ordinary shares of Pinnacle, so

   (c) (c) otherwise dismissing an application by Reliable under s657EA of the Corporations Law for review of the decision of Pinnacle No. 5, insofar as such application for review sought such declaration and orders.

7. This Review Panel emphasises that in general a transaction or conduct by a target board which has the effect of triggering a bid condition which is likely to lead to the defeat of the bid, must be submitted promptly to the target's members for approval. That follows from the Eggleston Principle referred to in s602(c) of the Corporations Law requiring that holders of the target's shares have a reasonable and equal opportunity to participate in any benefits from the bid proposal.

8. This recognises that, for the target board to seek out an alternative, potentially advantageous transaction and place it properly and promptly before shareholders will often facilitate the efficient, competitive and informed market for control of the target company and increase the benefits accessible to target shareholders. Members are thereby given an informed choice, rather than their board pre-empting that choice.

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[1] "See *Pinnacle VRB Ltd (No. 5) [2001] ATP 14*".

9. As the Pinnacle No. 5 Panel indicated, the principles we have applied to this matter will need to be fleshed out by a process of policy formulation, to deal with cases and circumstances to which the principles apply, but to which they will need to be adapted. In the meantime, and to deal with gaps in the policy when formulated, it will be necessary to ask the Panel's executive for guidance as to the likely response of a future Panel. That guidance cannot bind a future Panel.

Some qualifications

10. However, there are some important qualifications to this principle, reflected in the public interest considerations which the Panel must take into account. The first is that it certainly does not follow that the Panel would be satisfied that the target board may simply act to defeat or delay a takeover offer by entering into transactions of dubious benefit by the simple expedient of putting matters to members. If a target board, in obvious and blatant disregard of its duties, were to take such a course, not only might ASIC[2] resort to the Court to injunct such conduct as being in breach of directors' duties of good faith and proper purpose. The Panel itself, if the circumstances were clear enough, could well declare unacceptable circumstances without being deflected from doing so by the target offering to refer the matter to members.

11. The second qualification is that there could be exceptional circumstances where the Panel may be satisfied that approval of members need not be sought despite an action triggering a bid condition. An example could be a transaction which was clearly for the commercial advantage of the company and so motivated. If it were far advanced at the time the bid was announced and not designed to forestall a future bid, it may be contrary to the interests of target members to require that transaction be submitted for approval, particularly where that course could jeopardise that transaction going ahead at all.

12. Another circumstance in which approval may not be required is where the bid conditions are so far reaching and constraining that they exceed what would be commercially reasonable in the circumstances; this with the result that perfectly legitimate transactions that the board of the target would wish to pursue would thereby trigger the bid conditions in question. It should not be expected that in that event the bidder should be able to interfere with the normal and ordinary course of conduct of the target's business. There may of course be transactions which are in a grey area.

13. Recognition of these qualifications should ensure that the right balance is struck between restraining unfair defensive or condition-triggering manoeuvres on the target's part whilst not interfering unreasonably with the ordinary and proper conduct of the target's business during a bid period.

Relevant Considerations

14. What follows are the Review Panel's reasons for the course it took. It will be apparent from those reasons that, whilst the general approach of the Pinnacle No. 5 Panel is affirmed, namely that action having the effect of triggering

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[2] Australian Securities and Investments Commission.

defeating conditions of a takeover offer should generally be submitted first to shareholders for approval, there are important additional requirements affecting that process laid down by the Review Panel and accepted by the parties. Those requirements arise from considerations which underlie a properly articulated policy on actions by a target board which trigger bid conditions and which the facts of this matter brought out. In so doing, we emphasise that these considerations are not intended to be an exhaustive statement, nor to anticipate every contingency that may arise.

15. We set these out below.

(a) There is no point in requiring shareholder approval by the target of transactions or other conduct which would defeat a bid unless members have a clear election between those transactions going ahead and, if still available, the bid;

(b) This requires reasonable assurance (if necessary, by undertakings) that the bidder will waive the relevant defeating conditions if member approval is withheld and reasonable prospect that the bid will still be available unless its extension is obviated by its likely total failure (or closes early because of early success);

(c) Given the Panel cannot ordinarily force an extension of the availability of the bid beyond its expiry date to accommodate the timing of a target's shareholders' meeting to consider whether to approve the relevant transactions or conduct, it is imperative that any shareholders' meeting be held reasonably promptly so as to maximise the chances of the bid being still available; that necessitates a strict timetable for any shareholders' meeting to consider whether to approve the relevant transactions or conduct, both as to date the notices of meeting must be dispatched and the date the meeting must be held;

(d) Unless upon the kind of limited inquiry that the Panel may practicably carry out it is reasonably apparent that a conclusion can be safely reached that the target's board's conduct was or was not for an improper purpose, the Panel should avoid reaching any firm conclusions on that;

(e) Instead, the Panel should place the primary responsibility upon the target's board, who are at risk of prosecution for breach of directors' duties, to provide its members in the notice of meeting with a clear statement as to whether or not the relevant transactions may be voidable on the basis that they were, or may have been, entered into for an improper purpose on the board's part, such as the purpose of defeating a bid where that purpose would be impermissible;

(f) In the event that the transactions may be voidable on this basis, any necessary ratification imposes on the target's board the responsibility of ensuring that the information to ensure the transaction is not voidable is provided to members in a way that is accurate and not misleading;

(g) Where ratification is required as mentioned in paragraph (f), only disinterested members may vote, thus excluding votes by the target's board and their associates;

(h) Some acts of a board are incapable of ratification, particularly in cases of dishonesty and where the board have exceeded their powers. Ratification may be ineffective in a particular case, if the meeting is not adequately informed or if the majority in the general meeting act for the same improper purpose as motivated the directors;[3]

(i) Where the transactions are required to comply with ASX requirements for member approval in relation to disposal of assets to a party not at arm's length (Rule 10 of ASX Business Rules) or Chapter 2E of the Corporations Law precluding related party transactions, without member approval, then those requirements of disclosure and voting exclusion must be strictly complied with;

(j) The disclosure and any requisite independent expert's report needs to compare the benefits accruing to shareholders if the transactions proceed compared to the value of the bid, making clear that, unless the bid condition is waived, the bid will fail if the transactions go ahead, with the result that all acceptances would be void; and

(k) If transactions requiring member approval fail to obtain it, then to avoid any "poison pill" defence, the transactions must terminate (and no like ones proceed) with no consequential liability to the other party to the transactions or any third party.

16. As mentioned below, the Pinnacle No.5 Panel did not lay down these detailed requirements in the form either of orders or undertakings in lieu. For the guidance of future Panels, it is emphasised that these matters and any other relevant considerations need to be addressed, with due recognition that the nature of the Panel's powers will ordinarily not permit reliable conclusions as to complex matters of mixed fact and law such as whether a board has acted with an improper purpose. That said, there will be circumstances where that is sufficiently apparent that the Panel may safely reach a conclusion on this without undue delay.

17. We now turn to the factual circumstances which provide the context for the Review Panel's approach in the present case and to the detailed reasons which explain that approach.[4]

FACTS

18. Pinnacle is the owner of intellectual property in a vanadium redox battery technology which it purchased from the University of New South Wales (the ***VRB technology***), for storing mains electric power and using it to cover peak loads and temporary failures in power supply or quality. So far, only demonstration installations have been made. According to Pinnacle, they already indicate that the

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[3] *Miller v Miller* (1995) 16 ACSR 73 at 89 – 90, and cases there cited.

[4] The facts are more fully described in the Pinnacle No. 5 reasons.

technology has the capacity to balance the load (or protect the supply) to a large building or a small town. All parties agree that large markets might be developed for the technology in developed countries all around the world.

19. Reliable made a cash bid at 65c/share for all of the ordinary shares in Pinnacle. It announced the bid on 22 January 2001 and dispatched its offers on 20 March 2001. The bid was subject to a number of conditions, among them that, before the close of the bid:

    - Pinnacle not enter into (or announce) any material transactions out of the ordinary course of its business;

    - no prescribed occurrence happen in relation to Pinnacle;[5] and

    - Reliable receive acceptances for 50.1% of the fully-paid ordinary shares in Pinnacle.

    (The full text of the conditions is to be found in Reliable's bidder's statement.)

20. Reliable stated in its bidder's statement that a primary objective of the bid was to secure the ability to control the marketing of the VRB technology in North America. The principals of Reliable are experienced in the energy market in the United States.

21. During Reliable's bid, Pinnacle announced two transactions concerning the licensing of the VRB technology: the Vanteck transaction and the Int-A-Grid transaction (collectively ***the transactions***). Each is described later. This Review Panel has no reason to depart from the conclusions of the Pinnacle No. 5 Panel that those transactions or the Vanteck transaction by itself would have led to at least one of two conditions to which Reliable's bid is subject ceasing to be satisfied. It also proceeds on the basis, not conceded by Pinnacle, that unless approved by members, the Vanteck transaction contravenes Rule 10.1 of the ASX Listing Rules, as has been determined already by the ASX.

22. Vanteck (VRB) Technology Corp (***Vanteck***) has subsequently announced a scrip bid for Pinnacle on a 1 for 4 basis, unconditional. As at 12 June 2001, this bid was claimed to be worth 88c/share. There has to date been no indication that the transactions will be abandoned as a result of the Vanteck bid.

Licensing

23. Before Reliable's bid was announced, Pinnacle had granted licences over the technology for Africa (to Federation Resources NL (***Federation***), since assigned to Vanteck) and Sumitomo Electric Industries Limited of Japan (***Sumitomo***). It had also entered into a global collaboration agreement with Sumitomo, which gave Sumitomo rights to sell equipment incorporating the VRB technology into any part of the world, limited to the extent that Pinnacle's active co-operation had to be sought on each occasion.

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[5] i.e. the events listed in section 652C.

24. On 29 March, and 11 April 2001, during Reliable's bid, Pinnacle announced that it had entered into exclusive agreements or arrangements for the marketing of the technology. The Vanteck transaction covers the Americas. The Int-A-Grid transaction covers Europe, Russia and the Middle East. Each has a life of five years. Each provides for Pinnacle to own a proportion of the marketing company[6] and to derive royalties under licences it will grant for VRBs sold by that company. It is common ground that each of these agreements or arrangements and the two taken together have the effect that the material transaction condition in Reliable's bid, the prescribed occurrence condition or both are not satisfied.

25. In addition to these transactions, Pinnacle disclosed to us that it proposed to grant licences for several installations in the United States. These are fairly small installations on less than fully commercial terms, intended as demonstration systems and to facilitate regulatory approval of the VRB technology in the United States (the ***EPRI transactions***). Only one of these has been made public: a commercial scale installation for the San Diego Gas and Power (the ***San Diego transaction***).

26. At all relevant times, Federation has held 51% of the issued shares in Vanteck. Since early February 2001, Federation has controlled 22.5% of the voting shares in Pinnacle, which it acquired under a takeover bid for Pinnacle in late 2000 and by exercise of options acquired under that bid: see Pinnacle No. 3. Of that holding, Federation has transferred 19.9% to Vanteck.

First Application

27. Reliable applied to the Pinnacle No. 5 Panel on 31 March 2001, for a declaration that unacceptable circumstances existed in relation to Pinnacle because of the transactions and orders setting aside the two transactions. On 4 May 2001, the Pinnacle No. 5 Panel decided that, given that the transactions would likely lead to the failure of the bid, the policy of paragraph 602(c) (that holders of bid class shares have reasonable and equal opportunities to participate in benefits accruing to bid class shareholders from, *inter alia*, a bid) required that they not proceed without the approval of the Pinnacle shareholders.

28. At that point in the Panel's proceedings, Pinnacle undertook not to proceed with the transactions before the completion of Panel proceedings, or approval by a general meeting of Pinnacle. As a result of the undertaking and in reliance upon it, the Pinnacle No. 5 Panel did not make a declaration of unacceptable circumstances or an order preventing completion of the transactions. Instead, they stayed their proceedings with a view to monitoring the process and dismissing the application without a declaration or orders after the meeting had been held, if it was satisfactory.

29. When the review application was foreshadowed, the Pinnacle No. 5 Panel required the undertaking to be varied so that Pinnacle undertook not to proceed with the transactions, with a view to the undertaking being withdrawn once the transactions had been approved by a general meeting of Pinnacle, to the

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[6] Pinnacle will hold 25% of the shares in Int-a-Grid and 19.99% of the shares in Vanteck. The commercial effects on the Vanteck transaction of Vanteck's bid for Pinnacle, should that bid succeed, have not been worked out.

satisfaction of the Pinnacle No. 5 Panel. They also allowed the undertaking to be varied to enable Pinnacle to proceed with the EPRI transactions and Int-A-Grid to negotiate contracts with other parties. Otherwise, they dismissed the Pinnacle No. 5 application, to leave the ground clear for this review.

30. The undertaking having been given in the context of compliance with ASX Listing Rule 10.1, the Pinnacle No. 5 Panel did not specify a time frame or voting exclusions. It decided not to require an independent expert's report: subject to ASX's requirements, the directors could assume the responsibility of advising the members. Nearly a month later, that meeting has not yet been convened.

ASX Listing Rule 10.1

31. On 7 May, 2001, after the Pinnacle No. 5 initial decision, Australian Stock Exchange Ltd (***ASX***) required Pinnacle to submit the Vanteck transaction to shareholders for approval under Listing Rule 10.1 (related party transactions). Chapter 10 of the Rules requires the company to provide an independent expert's report and to exclude from voting the related party and its associates (relevantly, Vanteck, Federation and their respective directors).

32. Pinnacle proposes to hold one meeting to satisfy ASX's requirements and Chapter 2E of the Corporations Law (also on related party transactions) in relation to the Vanteck transaction, as well as its undertaking to the Pinnacle No. 5 Panel. On the information presently before the Review Panel, and without expressing a concluded view, the Int-A-Grid transaction by itself appears not to be a related party transaction under the ASX Listing Rules or so regarded by the ASX, nor within Chapter 2E. Under the undertaking given to the Pinnacle No. 5 Panel however, Pinnacle will also seek approval of the Int-A-Grid transaction.

Review Application

33. On 23 May 2001, Reliable applied to us to set aside the decision in Pinnacle No. 5 and substitute a declaration that unacceptable circumstances existed in relation to the affairs of Pinnacle because of the transactions and to make orders setting aside the two transactions. Reliable says that it is entitled to that relief, because the transactions were vitiated by improper purpose and/or lack of good faith on the part of Pinnacle's directors in that the transactions were intended to defeat its bid. It also sought reconsideration of the Pinnacle No. 5 Panel's decision to permit the EPRI transactions to proceed.

Function of the Panel

34. The relevant functions of the Panel are conferred on it by sections 657A and 657D of the Corporations Law. They are the power to declare that unacceptable circumstances exist in relation to a company and the power to make any orders it thinks appropriate to protect the interests of persons affected by those circumstances and to ensure that a bid proceeds as far as possible as if the circumstances had not occurred. Whether unacceptable circumstances exist is to be judged by reference to six principles set out in section 602, to the public interest and to other matters considered relevant by the Panel.

35. The most relevant principle for present purposes is set out in paragraph 602(c):

"The purposes of this Chapter are to ensure that … holders of the relevant class of voting shares … all have a reasonable and equal opportunity to participate in any benefits accruing to the holders through any transaction under which a person would acquire a substantial interest in the company ..."

Unacceptable circumstances may arise under this principle because of the "actions of the directors of the [target] company … including actions that caused [the bid] not to proceed or contributed to it not proceeding".[7]

36. Unacceptable circumstances may exist in relation to a company, even if the Corporations Law has not been breached.[8] Moreover, the orders the Panel can make do not include orders requiring a person to comply with Chapter 6.[9] These provisions enable the Panel to provide quick remedies during a bid, directed principally to the matters enumerated in subsection 657D(2), leaving wider or other legal issues to be sorted out after the bid. If need be, the Panel can apply to the Court to have its orders enforced.

"To create a new set of rights and obligations"

37. In *Precision Data v Wills*,[10] the High Court held that corresponding previous provisions adequately differentiated the functions of the Panel from those of the courts, as is essential for the Panel's constitutional validity. The function of the courts is to determine what rights and liabilities exist and to enforce them. The function of the Panel, by contrast, is to find out the existing state of affairs (including existing rights and liabilities). Then, where it considers it appropriate, to make orders within the powers given to it by the law changing that state of affairs thus creating a new set of rights and obligations rather than purporting to enforce existing ones. Significantly, the Panel has only those powers conferred on it by the statute: no common law, equitable, or other jurisdiction.

38. In the course of its reasoning, the High Court gave this characterisation of Panel proceedings, under the predecessor provisions:

"In applying for a declaration under s.733, the Commission is not seeking the vindication of any right or obligation; a declaration, when made, does not resolve an actual or potential controversy as to existing rights. Nor does the Panel, in granting or refusing a declaration, make its decision solely by reference to the application of the law to past events or conduct. Although the function entrusted to the Panel is that of making a declaration about past events or conduct, the function is one in which the Panel is bound to take account of the considerations of commercial policy mentioned in s.731. "(T)he desirability of ensuring that the acquisition of shares in companies takes place in an efficient, competitive and informed market", and "any other matters the Panel considers relevant" in arriving at the conclusion that it is in the public interest to make a declaration, as well as to apply the provisions of ss.732 and 733 to the facts which it finds. Furthermore, the object of the inquiry undertaken by the Panel and of the declaration which it makes under s.733 is to

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[7] Subsection 657A(3).

[8] Subsection 657A(1).

[9] Subsection 657D(2).

[10] *Precision Data Holdings Ltd v Wills* (1992) 173 CLR 167

enable the Panel to make one or more of the orders set out in s.734. In other words, the object of the Panel's inquiry and determination is to create a new set of rights and obligations, that is, rights and obligations arising from such orders as the Panel may make in a particular case, being rights and obligations which did not exist antecedently and independently of the making of the orders. It follows from what has already been said that, in creating that new set of rights and obligations, considerations of policy, including commercial policy, as well as factors not specified by the legislature yet deemed relevant by the Panel, on which it may form a subjective judgment, must inevitably play a prominent part."[11]

Function of a Review Panel

39. The functions of a review Panel are implicit in section 657EA, which empowers a review Panel to vary a decision under review or to set it aside and substitute a different decision.[12] That plainly implies that the review Panel must make a decision on the merits. That in turn implies that the review is a *de novo* review: not an appeal, but a fresh look at the facts and the policy, not limited by the facts found, or the policy applied, at first instance. However, in line with the Panel's published policy on Reviewing Decisions, a Review Panel will be slow to fail to follow any established policy that has been developed by the Panel.

40. A review Panel is given no power to remit a matter to the Panel at first instance. Instead, it is given power to make any declaration and any order which might have been made by the Panel at first instance. Accordingly, the review Panel takes over the functions of the Panel at first instance, as regards the matters covered by the application for review. The overall nature of the proceedings and of the Panel's functions is, of course, the same.

Whether Unacceptable Circumstances now exist

41. In the light of these considerations, on 12 June 2001, we issued a brief under regulation 20 of the ASIC Regulations. We have considered the evidence submitted to the Pinnacle No. 5 Panel, additional material given to us and the submissions of the parties, old and new. We have also had the benefit of a face to face conference (with additional persons also participating by telephone). That conference, which took place on 16 June 2001, led to the further undertakings and our decision.

42. Provided Pinnacle complies with the undertaking it has already given to the Pinnacle No. 5 Panel and also with the further undertaking now given on 16 June and set out in Appendix 1, this Review Panel would be satisfied that unacceptable circumstances do not now exist.

43. It will be apparent that the contemplated further undertaking laid down by the Review Panel sets clear parameters, as to process, content and timing, for the member approvals required as a prerequisite to these transactions going ahead. It does so in circumstances where Reliable has now given the reciprocal undertaking

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[11] *Precision Data v Wills* at page 191

[12] Subsection 657EA(4).

set out in Appendix 2, as to waiver of the bid conditions triggered by the transactions.

44. The result is that members will likely have a clear choice between these transactions and Reliable's bid. If Reliable's bid fails, members then can consider the transactions in that light. If Reliable's bid succeeds, sufficiently for Reliable not to need to extend, then members will know that Reliable is likely to vote against the transactions, though the Panel would expect Reliable to confirm its position in that event, so the market is properly informed.

The Effect on the Bid

45. If the Vanteck and Int-A-Grid transactions proceed with approval, and Reliable's bid is still open, it is to be expected that Reliable will allow the bid to close with its conditions unsatisfied and unwaived. Section 650G will then operate to void all acceptances under the bid. In view of the effect of the transactions on Pinnacle, the intentions Reliable has disclosed and the conditions it included in its bid, this appears to us to be a reasonable position for Reliable to take.

46. If the bid fails because the transactions proceed, shareholders will not be able to sell their shares to Reliable under the bid. They will be entirely precluded from receiving benefits which might otherwise be available to them as holders of bid class securities who accepted the bid (subject to necessary acceptances and to no other prescribed occurrences or major transactions taking place). No opportunity is clearly less than a reasonable opportunity. Were the transactions to proceed without proper reference to Pinnacle's shareholders, unacceptable circumstances would exist in relation to Pinnacle, because its shareholders would have been denied a reasonable opportunity to sell their shares under the bid. By "proper reference", we mean a reference which conforms to the law, including any necessary ratification if the transactions were, or might have been, entered into for an improper purpose. It must also comply with ASX requirements, including as to disclosure and voting, and must not be unreasonably delayed so Reliable's bid is no longer available. Pinnacle's undertakings cover these matters.

47. On the evidence available to us, it is not clear whether the EPRI transactions in their combined effect, would lead to either of Reliable's conditions ceasing to be satisfied. On one view, they are not out of the ordinary course of Pinnacle's business, as they are consistent with the direction of that business, as described at its most recent annual general meeting, and none of them relates to an installation much larger than existing demonstration plants, which have followed a trend of increasing size. The San Diego transaction was announced before Reliable's bid, so is allowed by the material changes condition. If it were relevant, the case that these transactions were entered into or accelerated for improper purposes is not at all convincing, on the material presently before us.

48. To remove any room for concern on this point, Pinnacle's undertaking has been extended to ensure that, of the four EPRI transactions only the San Diego transaction may be entered into or become the subject of binding legal relations before 30 September 2001. This strikes a balance between not constraining the target's ordinary business and taking account of the possible, albeit arguable, effect on the bid.

Shareholder Approval Available

49. The shareholders in Pinnacle can, however, by a disinterested, properly informed majority vote agree to the transactions proceeding, notwithstanding that the effect is to defeat Reliable's bid:

    (a) Since the interests adversely affected are those of the shareholders, it is appropriate that the power to control them be exercised by the shareholders, but not shareholders with an interest in the transactions.

    (b) It would not be satisfactory to prevent the transactions from proceeding, without the option of obtaining shareholder approval, because that could prevent directors of a target company from pursuing advantageous commercial transactions, including alternatives to the bid. Judgements about the commercial merits of proposed company transactions of this sort are best made by the affected shareholders in these circumstances.

    (c) There are a number of parallels for this procedure in the Corporations Law, takeovers regulation overseas (see Appendix 3) and in the ASX Listing Rules: item 7 of section 611 of the Law which allows shareholders to waive the right to a bid, by a properly informed and constituted meeting, and Listing Rule 10.1 are prime examples.

    (d) On the facts of this matter, there is the additional consideration that if a majority of the shareholders prefer the transactions to proceed than to accept the bid, the bid will anyway fail, as the necessary acceptances will not be obtained, the consequence being clearly apparent.

    (e) While a company may be paralysed, or unduly hampered in its everyday business, by unduly intrusive and constraining conditions in a bid, these conditions are not of that character and have not been invoked unreasonably: see paragraph (f).

    (f) Moreover, the Vanteck transaction required shareholder approval anyway under Listing Rule 10.1. In addition, potentially being not at arm's length and otherwise potentially contravening Chapter 2E of the Corporations Law (related party benefits), the bid apart, approval will in any event be sought.

50. Accordingly, while the transactions could lead to unacceptable circumstances if they proceeded without the approval of a general meeting, we are satisfied that they will not lead to unacceptable circumstances, if they only proceed after being approved by a timely, properly informed and constituted meeting. What that requires, we consider in more detail below.

The Nature of the Decision to be Made

51. Reliable and Pinnacle united in urging us to deal with this matter simply by applying the law on directors' duties, or a policy which approximated to that branch of the law.[13] It was submitted by Reliable to be an improper use of the

[13] There was some confusion over this issue, however, as Pinnacle also appears to substantially agree with us that our processes and powers are not adapted to this sort of inquiry, and both parties submitted that we should apply the law as a matter of policy.

directors' powers to enter into the transactions (or even bring them forward) for the purpose of causing Reliable's bid to fail. If the directors would not have entered into the transactions (when they did) without that purpose, the transactions could be set aside solely on that ground. Until a Court exercises this discretion, however, the transactions are merely voidable (*Winthrop v Winns*;[14] *Whitehouse v Carlton Hotel Pty Ltd (1987) 162 CLR 285*).[15]

52. This submission mistakes the nature of these proceedings and of the Panel's function, which we have discussed above. As a Panel, our functions are limited to applying the updated, enacted Eggleston principles set out in section 602 as essential elements in a wider public interest discretion. We are not empowered to enforce compliance with the law or to set aside contracts on equitable grounds or for non-compliance with Chapter 2D or 2E of the Corporations Law. We do not have the powers which a court of law has to perform any of those functions (including for example, the powers to order discovery between parties and to punish for contempt, like a court); parties and witnesses do not have the protections which they would have in court proceedings.

53. The nature of the problem is illustrated by the diverse submissions we received on the facts. Reliable submitted that we should infer from the circumstances of the transactions and from the different explanations given by Pinnacle concerning them that they had been entered into in order to defeat the bid. This is a very serious finding, and Reliable's evidence (which was mainly circumstantial) is insufficient to sustain it. There is, as Pinnacle points out, no direct evidence of this purpose, and a certain amount of evidence pointing to the directors having acted for quite different purposes.

54. To resolve this conflict, we would need to deploy limited powers to conduct an extensive investigation into several persons' states of mind, which could last for weeks and require the deployment of skilled counsel to examine and to represent parties and their witnesses. In general, this sort of process should be avoided by a Panel whose function is to see to it that takeovers (generally fast-moving transactions) are conducted fairly and openly, and which has been given powers and processes adapted to that limited function. In a gross case of apparent breach of duty by directors, ASIC is still able to resort to a court, whose processes are more suitable for such a determination than a Panel. The Panel, if its necessarily limited enquiries were to lead to a reasonable apprehension of that, could refer the matter to ASIC with a request that it invoke the Court's processes. The Review Panel is not of that view in the present case. But that should not be taken as a conclusion beyond that limited finding.

55. The commercial community is seeking in the Panel, not for a second-rate court, but for a first-rate commercial Panel. It should not therefore fall between two stools and attempt to replicate court processes, thereby unduly delaying fast-moving transactions and the bid itself.

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[14] *Winthrop Investments Ltd v Winns Ltd* [1975] 2 NSWLR 666

[15] The Vanteck transaction may actually be void, until ratified, because of the interaction of ASX Listing Rule 10.1 and Pinnacle's constitution.

56. And to what end would we conduct this inquiry ? Our decision can only be based on the existence, prevention, removal and remediation of unacceptable circumstances which impact on Reliable's bid. Legal consequences of people's behaviour can obviously be circumstances. But even assuming such consequences can be established fairly and reliably, they are only relevant insofar as they impact on the bid by creating unacceptable circumstances, or bear upon the public interest. Moreover, as Pinnacle's undertakings[16] demonstrate, the mode of remediation can, albeit not completely, cater for the *possibility* of a particular legal consequence, namely possible improper purpose. If it be wrongly denied, this is at risk of subsequent ASIC prosecution for false or misleading statements and for breach of directors' duties. There is the alternative, available in cases of doubt, of seeking ratification for any such breach, provided its possibility is fully and properly disclosed. The undertakings cater for this. If there is no likelihood of improper purpose, then ratification is unnecessary.

57. Whether these transactions led to unacceptable circumstances depends on their effects on the outcome of the bid but also on the other commercial interests of Pinnacle and its shareholders. With one exception, discussed in the next section, those effects do not depend on the state of mind of the Board in entering into the transactions. Accordingly, subject to the same exception, the Pinnacle Board's state of mind was irrelevant to our consideration of the existence of unacceptable circumstances.

58. If we were clearly satisfied that an act of Pinnacle's Board had been intended to defeat the bid, we might conclude that there was an improper purpose and also be more confident in concluding that the act would in fact tend to defeat the bid. On these facts, we do not have to speculate: it is quite clear that these transactions are capable of defeating the bid, if they stand. We make no conclusion, one way or the other, as to improper purpose.

59. The directors' purpose in entering into the transactions will become moot if there are inadequate acceptances to satisfy the minimum acceptance condition. If, on the other hand, there are adequate acceptances, Reliable can waive its conditions and use the votes attached to the shares it acquires under the bid to vote against the resolutions, which will ensure their defeat.

60. Everything we need to do and everything we are entitled to do, we can do without inquiring further into the director's purposes beyond the necessarily limited enquiries so far made.

Limited Relevance of Proper Purpose

61. That is not to say that we can take no account of proper purpose. If we are satisfied that unacceptable circumstances exist under the Eggleston principles, the making of a declaration is nonetheless a discretionary remedy. In the exercise of that discretion, we must consider whether making (or failing to make) a declaration would be contrary to the public interest. If we were satisfied that

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[16] Or orders which we could have made in lieu.

unacceptable circumstances existed, or that they did not, that finding would be relevant to the exercise of this discretion.

62. We note that the Pinnacle No. 5 Panel based its decision not to make a declaration in part on not having been satisfied on the evidence before it that the Pinnacle Board had acted for an improper purpose, though their enquiries were necessarily limited. That would have been a relevant consideration for the Pinnacle 5 Panel and for us, had either Panel decided that unacceptable circumstances existed. Since we and they found that unacceptable circumstances do not now exist and will not exist if the right procedures are adopted as laid down in the Pinnacle undertakings, we do not find it necessary to go further into that issue.

63. In addition, whether the directors were actuated by an improper purpose is relevant to the validity of the transaction with which we are dealing and to the means necessary to validate it, if it is invalid. If it would be unacceptable for a bid to be derailed by a transaction entered into by the target board, it would be still more unacceptable for a bid to be derailed by an illusory transaction, being one voidable for improper purpose. It follows that we have a proper concern with ensuring that any element of improper purpose which may affect the transaction is dealt with in the procedure for approval of the transaction.

64. It also follows that if an improper purpose of the Pinnacle Board had been relatively obvious, or at least relatively likely, ratification would have been essential, if we had not set the transaction aside as itself constituting unacceptable circumstances irrespective of the possibility of ratification. We would have done this if we had been convinced that the Pinnacle directors had acted merely to preserve their own positions, or that the transactions had no obvious commercial merit. We were not able to come any conclusions as to this.

Purpose as Relevant to Ratification ?

65. In *Winthrop v Winns* the Court of Appeal held that a resolution was ineffective to cure a decision made for an improper purpose, because the notice of meeting did not disclose the improper purpose. We have considered whether to inquire further into the Board's purposes in entering into these transactions with a view to ensuring that a resolution in favour of the transactions will be effective, if it is passed. We have decided not to do so, instead firmly placing the onus on Pinnacle in that regard.

66. The notice of meeting in *Winthrop v Winns* sought to conceal that part of the effect of the resolution was to cure the invalidity of the directors' act, whereas here we require that the interaction of the resolution, the transactions and the bid be made clear with full disclosure.

67. The Pinnacle directors, who are responsible for framing the notice of the meeting, are also best placed to know whether the transactions are open to attack as having been entered into for an improper purpose. They are at risk of penalty if they are in breach of their directors' duties, without proper ratification.

68. Moreover, if the resolution of the Pinnacle general meeting is ineffective, section 659C of the Corporations Law will not prevent the Vanteck and Int-A-Grid transactions being set aside in the general equitable jurisdiction of the Supreme

Court, after the bid has closed, although remedies under the Corporations Law may not be available.

Notice of Meeting to deal with possible Improper Purpose

69. The Pinnacle Board has already stated to the Pinnacle No.5 Panel, to this Panel, to ASIC, to ASX and to Reliable that the transactions were not entered into for proper purpose. We think it desirable that they repeat this statement to the Pinnacle shareholders. Accordingly, we require the Board to state in the notice of meeting, in relation to each transaction, whether or not it may be invalid because it was entered into for an improper purpose and whether the relevant resolution is intended to cure that possible invalidity. If the notice states that either resolution is intended to remedy possible invalidity for that reason, none of the directors nor their associates may vote on the resolution. If either transaction is in fact affected by improper purpose and the directors state that the relevant resolution is not intended to cure that defect, that transaction is likely to remain liable to be set aside, despite approval. The directors moreover are personally at risk.

70. We considered whether to require the notice to state that the resolutions were intended to cure invalidity resulting from improper purpose, and the directors and their associates to abstain from voting, unless Pinnacle provided senior counsel's opinion that the resolutions were not in fact affected by improper purposes or bad faith. It is more consistent with our functions to leave the responsibility for determining this to the Pinnacle directors and their advisers. They will be aware of the serious consequences either of breach, or of misleading shareholders.

71. By consent, we took into account as going to the defeating conditions and to potential unacceptable circumstances, a proposed share issue to directors of Pinnacle. That has been dealt with in both Pinnacle's and Reliable's undertakings.

Timing of Meeting

72. The Pinnacle No. 5 Panel did not lay down time parameters or other specific requirements for the approval Pinnacle was required to obtain in general meeting, although prior to these proceedings it had intended to keep its proceedings open to monitor the process, and it also relied on the timing process of the ASX requirements. In Minorco's bid for Consolidated Gold Fields, the London City Panel required the defensive actions there taken by the target (litigating anti-trust issues of the bid in the United States) to go to members with reasonable promptness, and extended the bid timetable accordingly: see its ruling and reasons of 9 May 1989.

73. Since the Pinnacle No. 5 Panel obtained these undertakings in May, for what Pinnacle and the independent expert contend were reasons related to the expert's need to understand the complexities of the transaction, the meeting has not been convened. This review Panel considers that this drift, explicable as it may be, cannot be allowed to continue. We therefore asked Pinnacle what its current timetable for the meeting was and have accepted Pinnacle's timetable in the undertakings we received. The meeting is to be held by 3 August 2001, extendable to 10 August 2001, depending on whether or not ASIC shortens its time to

consider the notice of meeting from 14 days to 7 days. Reliable's bid will need to be extended if it is still to be available after the date of the meeting. Reliable has made it clear that it is making no commitment, one way or the other, at this point, as to any extension of its bid beyond its present closing date of 10 July 2001. Alternatively, if the level of acceptances of Reliable's bid is sufficient, it could close on the present last day (10 July 2001)[17] and vote its holding against the approval.

Exclusion of Interested Shareholders

74. Irrespective of the proper purpose issue, it would not be appropriate for a resolution to approve these transactions to be carried by the votes of shareholders who might be motivated by interests other than as shareholders. It is however clear that since Vanteck and Federation have interests in the Vanteck transaction, neither of those companies nor their associates should vote on approval of that transaction or any associated transaction. This does not pre-empt any other preclusion the ASX may impose or indeed that the need, if there be a need, that ratification would impose.

No Poison Pill

75. Clearly, if the transactions do not receive approval, there should be no residue of them to act as a poison pill; that is, in the form of any liability (for damages or otherwise) to the other party to the transactions (or a third party) by reason of the transaction not proceeding. Indeed, it would be improper for matters requiring shareholder approval to go to members with such a consequence, as they then would be voting with the threat of damages to the company if they failed to approve. The undertakings deal with that (see paragraph (a)(ii) in Pinnacle's undertakings). If necessary, the other parties to the transactions should now give a release or waiver in the event approval conforming to the undertakings is not forthcoming.

Orders or Undertakings

76. For the above reasons, our conclusion was that Pinnacle should seek approval of the transactions at a general meeting. Our requirements for that meeting are set out in Pinnacle's undertakings, in Appendix 1. Absent the undertakings given to the Pinnacle No.5 Panel and the further undertakings given to this Panel, we would have concluded that unacceptable circumstances existed, and would have made orders to the same effect.

77. To ensure that Reliable's bid remains a viable option for Pinnacle shareholders, while it is open, without exposing Reliable to undue risk, we obtained from Reliable an undertaking that if the transactions did not proceed and if no other events happened which would cause those conditions not to be satisfied, it would waive the relevant conditions.

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[17] This could be extended by subsection 624(2) to as late as 24 July, if Reliable receives acceptances to take its voting power to over 50% during the last week of the bid.

Final Matters

78. We gave leave for Pinnacle and Reliable to be represented by their commercial solicitors. We thank all parties for their submissions and presence at the conference. There having been no declaration, there will be no order for costs.

GFK Santow
President of the Sitting Panel
Decision dated 18 June 2001
Reasons published 22 June 2001

Appendix 1 - Pinnacle's Undertakings of 16 June

Pinnacle VRB Ltd , hereby undertakes, pursuant to section 201A of the Australian Securities and Investments Commission Law, that:

(a) (i) the Vanteck and Int-A-Grid transactions (or any like ones) will only proceed, if and only if they have been approved by resolution of a meeting of Pinnacle shareholders which satisfies the requirements below;

(ii) in the event that the transactions do not meet with such approval, there will be no liability on the part of Pinnacle to the other party to the transactions or any third party;

(b) the meeting of Pinnacle shareholders will be convened by 5 July and held by 3 August (or such later dates as the Panel may allow — see footnote below);[18]

(c) the resolution including disclosure and voting exclusion to approve either transaction will comply with ASX requirements (including provision of an independent expert's report) and those of Chapter 2E of the Corporations Law and any other requirements of the Corporations Law including as to proper disclosure in a way that is not misleading;

(d) shares held by persons involved in either transaction and their respective associates will not be voted on the resolution in respect of that transaction provided that a person is not precluded from voting in that resolution by reason only of being an associate of Pinnacle unless so precluded by ASX;

(e) if ratification under (g) is sought, shares held by any persons with such interest in the ratification as would preclude their votes being taken into account such as the directors of Pinnacle and their associates will not be voted on that resolution;

(f) the notice of meeting will set out plainly and prominently that one effect of approving either transaction will be that Reliable's bid will (unless waived by Reliable) close with a condition unsatisfied, and that all acceptances will, in that case, be void;

(g) the notice of meeting will state, in relation to each transaction, whether or not that transaction may be voidable on the basis that it was or may have been entered into for an improper purpose. If it states that the transaction

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[18] It needs to be convened and held as quickly as is consistent with the preparation needed, to enhance the prospect that Reliable's bid will remain as an alternative. This timing will allow a week to finalise the notice of meeting, a week to obtain clearance of the notice from ASX and the 28 days notice required by section 249HA. If ASIC requires the full fortnight allowed by section 218, we are prepared to vary the decision to allow until 12 July to convene the meeting and 10 August to hold it. [This note is part of the undertaking.]

may be voidable for that reason, it will state that the resolution to approve that transaction is intended to cure that possible invalidity by ratification, mention this exclusion required by paragraph (e) and the reason for it, and provide any other information necessary to ensure the transaction is not voidable;

(h) the notice of meeting will also compare the benefits accruing to shareholders if the transactions proceed with the value of Reliable's bid, doing so in conformity with ASX requirements;

(i) The independent expert will also provide an opinion on the fairness and reasonableness of the issue of shares to directors of Pinnacle which are to be voted on by the proposed meeting (Reliable will pay the costs of that extra advice).

(j) The Carve-Out transactions (as defined in the Panel's brief in relation the Pinnacle 8), other than the San Diego Gas and Electricity transaction announced by Pinnacle during 2000, will not be entered into or become the subject of binding legal relations before 30 September 2001.

Appendix 2 –Reliable's Undertaking of 16 June 2001

A. Notwithstanding Pinnacle's entry into the Transactions and the San Diego transaction, and the issue of shares to directors as contemplated in the notice of meeting, Reliable will waive conditions 2.6(f)(ii) and 2.6(j)(vi) of its offers[19] and give all necessary notices under sections 630 and 650F, if at the last date for declaring Reliable's offers free from the defeating conditions:

(a) Pinnacle has not proceeded to give effect to the Transactions and no event other than entry into the Transactions has happened which would cause either of those conditions not to be fulfilled; and

(b) One of the following has happened:

(i) Pinnacle's entry into the Transactions has not been ratified by Pinnacle shareholders in accordance with the requirements of Part 10 of the ASX Listing Rules, any requirements imposed by ASX under the Listing Rules, the requirements of Chapter 2E of the Corporations Law, any applicable laws and any requirements imposed by the Panel, with the consequence (as provided in the existing undertaking dated 21 May 2001) that Pinnacle is precluded from proceeding with the Transactions and on the basis that Pinnacle is not legally committed to proceed with them;

(ii) Pinnacle is permanently restrained from giving effect to the Transactions;

(iii) Pinnacle:

1. has no legally binding commitment to enter into or complete the Transactions or any like transactions other than the San Diego transaction or any such commitment has ceased; and

2. undertakes to the Panel not to enter into or complete the Transactions or any like transactions before the end of September 2001 other than the San Diego transaction; and

(c) the number of shares issued to directors is no more than 1.66% of Pinnacle's issued capital;

(d) the issue of those shares is approved by shareholders at the meeting; and

(e) the independent expert states in the report provided to shareholders with the notice of meeting that the issue is fair and reasonable, having regard to commercial practice.

Reliable will pay to Pinnacle the additional cost of having the expert provide the statement mentioned in condition (e).

B. For the purposes of this undertaking, the following expressions have the meaning set out opposite them:

(a) Transactions: the Vanteck and Int-A-Grid Transactions.

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[19] CSP Note: these are the conditions mentioned in paragraph 19 of our reasons.

(b) San Diego transaction: the contract for installation of a VRB in San Diego announced by Pinnacle in 2000

Appendix 3 - Parallel Provisions Overseas

We set out below extracts from takeovers codes in several other countries, corresponding with the principle applied in this matter.

London City Code

RULE 21. RESTRICTIONS ON FRUSTRATING ACTION

21.1 WHEN SHAREHOLDERS' CONSENT IS REQUIRED

During the course of an offer, or even before the date of the offer if the board of the offeree company has reason to believe that a bona fide offer might be imminent, the board must not, except in pursuance of a contract entered into earlier, without the approval of the shareholders in general meeting:—

(a) issue any authorised but unissued shares;

(b) issue or grant options in respect of any unissued shares;

(c) create or issue, or permit the creation or issue of, any securities carrying rights of conversion into or subscription for shares;

(d) sell, dispose of or acquire, or agree to sell, dispose of or acquire, assets of a material amount; or

(e) enter into contracts otherwise than in the ordinary course of business.

The notice convening such a meeting of shareholders must include information about the offer or anticipated offer.

Where it is felt that an obligation or other special circumstance exists, although a formal contract has not been entered into, the Panel must be consulted and its consent to proceed without a shareholders' meeting obtained.

NOTES ON RULE 21.1

1. Consent by the offeror.

Where the Rule would otherwise apply, it will nonetheless normally be waived by the Panel if this is acceptable to the offeror.

2. "Material amount"

For the purpose of determining whether a disposal or acquisition is of "a material amount" the Panel will, in general, have regard to the following:—

(a) the aggregate value of the consideration to be received or given compared with the aggregate market value of all the equity shares of the offeree company; and, where appropriate:

(b) the value of the assets to be disposed of or acquired compared with the assets of the offeree company; and

(c) the operating profit (ie profit before tax and interest and excluding exceptional items) attributable to the assets to be disposed of or acquired compared with that of the offeree company.

For these purposes:

"assets" will normally mean total assets less current liabilities (other than short-term indebtedness); and

"equity" will be interpreted by reference to Note 3 on Rule 14.1.

The figures to be used for these calculations must be:

(a) for market value of the shares of the offeree company, the aggregate market value of all the equity shares of the company at the close of business either:

(i) on the last day immediately preceding the start of the offer period; or

(ii) if there is no offer period, on the last day immediately preceding the announcement of the transaction; and

(b) for assets and profits, the figures shown in the latest published audited consolidated accounts or, where appropriate, interim or preliminary statements.

Subject to Note 4, the Panel will normally consider relative values of 10% or more as being of a material amount, although relative values lower than 10% may be considered material if the asset is of particular significance.

If several transactions relevant to this Rule, but not individually material, occur or are intended, the Panel will aggregate such transactions to determine whether the requirements of this Rule are applicable to any of them.

The Panel should be consulted in advance where there may be any doubt as to the application of the above.

3. Interim dividends

The declaration and payment of an interim dividend by the offeree company, otherwise than in the normal course, during an offer period may in certain circumstances be contrary to General Principle 7 and this Rule in that it could effectively frustrate an offer. Offeree companies and their advisers must, therefore, consult the Panel in advance.

4. The Competition Commission and the European Commission

When an offer is referred to the Competition Commission or the European Commission initiates proceedings, the offer period ends in accordance with Rule 12.1. The Panel will, however, normally consider that General Principle 7 and Rule 21.1 apply during the competition reference period, but on a more flexible basis. For example, issues of shares, which do not increase the equity share capital or the share capital carrying voting rights

as at the end of the offer period by, in aggregate, more than 15%, would normally not be restricted; and for the purpose of Note 2, a 15% rather than a 10% test would normally be applied.

5. When there is no need to post

The Panel may allow an offeror not to proceed with its offer if, at any time during the offer period prior to the posting of the offer document, the offeree company:—

(a) passes a resolution in general meeting as envisaged by this Rule; or

(b) announces a transaction which would require such a resolution but for the fact that it is pursuant to a contract entered into earlier or that the Panel has ruled that an obligation or other special circumstance exists.

6. Service contracts

The Panel will regard amending or entering into a service contract with, or creating or varying the terms of employment of, a director as entering into a contract "otherwise than in the ordinary course of business" for the purpose of this Rule if the new or amended contract or terms constitute an abnormal increase in the emoluments or a significant improvement in the terms of service.

This will not prevent any such increase or improvement which results from a genuine promotion or new appointment but the Panel must be consulted in advance in such cases.

7. Established share option schemes

Where the offeree company proposes to grant options over shares, the timing and level of which are in accordance with its normal practice under an established share option scheme, the Panel will normally give its consent.

8. Pension schemes

This Rule may apply to proposals affecting the offeree company's pension scheme arrangements, such as proposals involving the application of a pension fund surplus, a material increase in the financial commitment of the offeree company in respect of its pension scheme or a change to the constitution of the pension scheme. The Panel must be consulted in advance in relation to such proposals.

9. Redemption or purchase by an offeree company of its own securities

37.3 REDEMPTION OR PURCHASE OF SECURITIES BY THE OFFEREE COMPANY

(a) Shareholders' approval

During the course of an offer, or even before the date of the offer if the board of the offeree company has reason to believe that a bona fide offer might be imminent, no redemption or purchase by the offeree company of its own shares may, except in pursuance of a contract entered into earlier, be effected without the approval of the

shareholders at a general meeting. The notice convening the meeting must include information about the offer or anticipated offer. Where it is felt that an obligation or other special circumstance exists, although a formal contract has not been entered into, the Panel must be consulted and its consent to proceed without a shareholders' meeting obtained (Notes 1 and 5 on Rule 21.1 may be relevant).

(b) Public disclosure

For the purpose of Rule 8, dealings in relevant securities include the redemption or purchase of, or taking or exercising an option over, any of its own relevant securities by the offeree company. The total amount of securities of the relevant class remaining in issue following the redemption or purchase must also be disclosed.

(c) Disclosure in the offeree board circular

The offeree board circular advising shareholders on an offer must state the amount of relevant securities of the offeree company which the offeree company has redeemed or purchased during the period commencing 12 months prior to the offer period and ending with the latest practicable date prior to the posting of the document, and the details of any such redemptions and purchases including dates and prices.

New Zealand Takeovers Code

38. **Defensive tactics restricted**

1. If a code company has received a takeover notice or has reason to believe that a bona fide offer is imminent, the directors of the company must not take or permit any action, in relation to the affairs of the code company, that could effectively result in—
    a. an offer being frustrated; or
    b. the holders of equity securities of the code company being denied an opportunity to decide on the merits of an offer.
2. Subclause (1) does not prevent the directors of a code company taking steps to encourage competing bona fide offers from other persons.
3. Subclause (1) is subject to rule 39.

39. **When action permitted**

The directors of a code company may take or permit the kind of action referred to in rule 38(1) if—

a. the action has been approved by an ordinary resolution of the code company; or

b. the action is taken or permitted under a contractual obligation entered into by the code company, or in the implementation of proposals approved by the directors of the code company, and the obligations were entered into, or the proposals were approved, before the code company received the takeover notice or became aware that the offer was imminent; or

c. if paragraphs (a) and (b) do not apply, the action is taken or permitted for reasons unrelated to the offer with the prior approval of the Panel.

40. **Notice of meeting**

The notice of meeting containing the proposed resolution for the approval of the action referred to in rule 39(a) must contain, or be accompanied by,—

a. full particulars of the proposed action; and

b. the reasons for it; and

c. a statement explaining the significance of the resolution under this code.

Hong Kong Code on Takeovers and Mergers

Rule 4 No frustrating action

Once a bona-fide offer has been communicated to the board of an offeree company or the board of an offeree company has reason to believe that a bona-fide offer may be imminent, no action which could effectively result in an offer being frustrated, or in the shareholders of the offeree company being denied an opportunity to decide on the merits of an offer, shall be taken by the board of the offeree company in relation to the affairs of the company without the approval of the shareholders in the offeree company in general meeting. In particular, the offeree company's board must not, without such approval, do or agree to do the following –

(a) issue any shares;

(b) create, issue or grant, or permit the creation, issue or grant of, any convertible securities, options or warrants in respect of shares of the offeree company;

(c) sell, dispose of or acquire assets of material amount;

(d) enter into contracts, including service contracts, otherwise than in the ordinary course of business;

(e) cause the offeree company or any subsidiary or associated company to purchase or redeem any shares in the offeree company or provide financial assistance for any such purchase.

Where the offeree company is under a prior contractual obligation to take any such action, or where there are other special circumstances, the Executive must be consulted at the earliest opportunity. In appropriate circumstances, the Executive may grant a waiver from the general requirement to obtain shareholders' approval.

Notes to Rule 4:

1. Consent by the offeror

   The requirement of a shareholders' meeting may be waived by the Executive if the offeror agrees.

3. **Directors' votes**

The Executive should be consulted on whether directors' shareholdings should be voted at the shareholders' meeting, where an actual or potential conflict of interests exists.