



**In the matter of Bigshop.com.au Limited
[2001] ATP 20**

Catchwords:

Takeover bid – proposed placement of shares – implementation of placement without shareholder approval – allegation of frustrating action – improper purpose – defeating conditions – bidder’s conditions not unusual – delay in making application – caretaker directors – directors’ conduct – two minimum acceptance conditions may confuse – interim orders – final orders

Corporations Act 2001 (Cth), sections 50AA, 602, 648E and 657E

Pinnacle VRB Ltd (No 5) [2001] ATP 14

Pinnacle VRB Ltd (No 8) [2001] ATP 17, applied

On 27 September 2001, we declined to make a declaration of unacceptable circumstances in response to an application by Fast Scout Ltd dated 13 September 2001. On 27 September we accepted various undertakings from Fast Scout and Bigshop.com.au Ltd and Macquarie Bank Ltd to ensure that Fast Scout’s bid could be put to Bigshop shareholders. We decided that the proposed placement of Bigshop shares to Macquarie and related advisory agreements could not reasonably be said to frustrate the purpose of Fast Scout’s bid.

REASONS FOR DECISION

These are our reasons for our decision not to make a declaration of unacceptable circumstances in relation to a proposed placement of Bigshop shares to Macquarie Bank Ltd.

Background

1. The Panel in this matter is constituted by Brett Heading (sitting President), Meredith Hellicar (sitting Deputy President) and Tro Kortian.
2. Fast Scout Ltd ("Fast Scout") has asserted that a proposal by Bigshop.com.au ("Bigshop") to make a placement of 10 million Bigshop shares to Macquarie Bank Ltd ("Macquarie"), entering into an advisory agreement with Macquarie Technology Investment Banking and the addition of three non-executive directors to the board of Bigshop recommended by Macquarie, would constitute "frustrating action".

Bigshop

3. Bigshop floated in April 2000, issuing 32 million new shares raising \$8 million and listing on the Australian Stock Exchange Ltd (ASX). It had 80 million shares on issue following the float. Of those shares, approximately 36.9 million, or 46% were subject to ASX escrow conditions (which elapse in April 2002).

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4. Like many dot com companies at that time Bigshop proposed to develop an Internet portal site. Shortly after Bigshop's float the technology sector stock market crash came about.
5. Bigshop proceeded to develop its Internet portal to a limited extent. It managed to do that with the expenditure of a very limited proportion of the funds it had raised. The site has not developed to the size or volume initially projected in Bigshop's prospectus. However, Bigshop has managed to conserve the vast majority of its cash in developing its portal site to the current stage. On 25 July 2000 Bigshop announced a conditional contract to merge with another company called Rumble Ltd and Bigshop shares were consequently suspended until 30 November when it announced that the Rumble transaction was not to proceed. At the AGM of Bigshop on 24 November 2000 the founders of the business were removed from the Bigshop board.
6. Bigshop shares always traded below their issue price, which was 25c, and they were trading at about 7.0 cents per share (“cps”) when Fast Scout announced its bid. The NTA of Bigshop shares is about 8.5 cps and the cash on the Bigshop balance sheet is around 8.2 cps.

Fast Scout's Bid

7. On 13 June, Fast Scout announced its intention to make a proportional takeover bid for 51% of the Bigshop shares it did not own, subject to the waivable pre-conditions that ASX approve Fast Scout's application for a waiver to ASX Listing Rules 9.17 and 9.18 to allow holders of shares held in escrow to accept Fast Scout's offer and certain “prescribed occurrences”. Fast Scout's bid, if made, was to be subject to a number of other conditions set out in that announcement. The consideration was to be 7.6 cps.
8. On 28 July ASX refused Fast Scout's application for a waiver of the Listing Rules on the basis that ASX's policy was to consent to the release of escrow shares only where a full takeover bid was made for the target company.
9. On 30 July Fast Scout withdrew that intention to make a pre-conditional offer and announced its further intention to make a bid, on similar terms but subject to the pre-condition that ASX approve a revised form of waiver of the relevant Listing Rules. The consideration was to be 7.8 cps. Fast Scout noted in its announcement that its pre-condition may not be met.
10. On 4 September Fast Scout made an application to ASX seeking consent under Listing Rule 9.17. Fast Scout proposed that the waiver be subject to different conditions. ASX declined the application on 14 September.

The Placement Proposal

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11. On 28 August 2001, Bigshop announced that it had agreed with Macquarie to proceed with a placement of 10 million Bigshop shares at 7.5 cps, to enter an agreement for Macquarie to become Bigshop's financial adviser, and the addition of up to three non-executive directors recommended by Macquarie (the "**Proposal**" and the "**Placement Announcement**").
12. The Placement Announcement stated that the agreement was subject to two conditions:
 - ASX not approving the waivers requested by Fast Scout i.e. the ASX not giving its consent under Listing Rule 9.17 or a waiver of Listing Rule 9.18 to enable the holders of restricted securities in Bigshop to accept an offer by Fast Scout, by 14 September 2001; and
 - the placement not being in breach of Listing Rule 7.9 which prohibits a company issuing securities without the approval of ordinary security holders for three months after it is told in writing that a person is making, or proposes to make, a takeover offer.
13. The Proposal also included the proposed placement of 2 million options to Macquarie but consideration of that is secondary to the other issues.
14. The proposal originally discussed by Bigshop and Macquarie prior to Fast Scout's announcement of 13 June was for a placement of 6.667 million shares. Bigshop's 28 August announcement advised that the proposed size of the placement had been increased to 10 million shares. Macquarie and Bigshop advised that the increase was in response to Fast Scout's acquisition of over 10% of Bigshop in order to ensure that Macquarie would still be perceived by other institutional investors as having the presence of a "Cornerstone" investor.

The Uncertainty Factor

15. Fast Scout alleged that Bigshop's description of the condition relating to ASX approval of the Listing Rule waiver, in its announcement of the placement, was unclear. Fast Scout said that it was unclear whether the fact that ASX had not yet refused or approved Fast Scout's application for consent amounted to ASX "not giving its consent by 14 September 2001". As a result of this ambiguity, Fast Scout said that it was unsure whether Bigshop was entitled to (or required) to proceed with the Proposed Placement in accordance with the Agreement as of 14 September 2001.
16. However, Fast Scout advised that it understood, on the basis of discussions with an employee of Macquarie on 12 September 2001, that Bigshop intended to proceed with the Proposed Placement shortly thereafter, and believed that this would have occurred as early as the morning of 14 September 2001.

ASX Listing Rule 7.9 Waiver

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17. Bigshop announced in the Placement Announcement on 28 August that it had obtained a waiver of Listing Rule 7.9 from ASX to allow it to enter into the Agreement. The Placement was conditional on the transaction not being in breach of Listing Rule 7.9.
18. ASX advised Bigshop and Fast Scout that it considered that the 3 month time limit under Listing Rule 7.9 should be taken to commence from the date of Fast Scout's original announcement of intention to bid, on 13 June 2001, and did not recommence on 30 July 2001 when Fast Scout made its second announcement (although Fast Scout does not accept that view).

Bigshop EGM to Spill Board

19. On 12 September Fast Scout announced it has called a meeting of Bigshop shareholders to remove the current board of directors of Bigshop and replace them with Fast Scout nominees. The meeting is to be held on 26 October 2001.
20. There is some dispute between the parties as to whether Fast Scout has convened the meeting properly within the time period required by section 203D of the Corporations Act, but that is beyond the scope of this decision.

The Application

21. In its Application, Fast Scout made a number of allegations that Bigshop's proposed placement of 10 million Bigshop shares (at 7.5 cps) and 2 million options to subscribe for Bigshop shares (the **Placement**) would give rise to unacceptable circumstances under Chapter 6 of the Corporations Act.
22. Essentially, Fast Scout's allegations were that the issue of Bigshop shares under the placement, and the advisory agreement, would be frustrating action, because it would breach a pre-condition to Fast Scout's proposed bid, and a proposed defeating condition in the bid.
23. Fast Scout applied for:
 - a) a declaration under section 657A of the Act to the effect that the following circumstances (or one or more of the following circumstances) constituted unacceptable circumstances in relation to the affairs of Bigshop:
 - (i) Bigshop's failure to clarify the status of the conditions attached to the conditional contract entered into between Bigshop and Macquarie Bank Limited ("**MBL**"), as announced on 28 August 2001 (the "**Agreement**"), and to make clear the fee structure which applies to the appointment of MBL as financial adviser.
 - (ii) Any requirement under the Agreement that Bigshop proceed with the proposed placement of 10 million ordinary shares and the issue of 2 million options to MBL (the "**Proposed Placement**") while the bids announced by Fast Scout on 30 July 2001 (the "**Bids**") are still on foot, without first seeking shareholder approval for the Placement.

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- (iii) Bigshop's refusal to provide the undertaking proposed by Fast Scout in the letter written by Fast Scout's solicitors dated 12 September 2001, or any suitable alternative undertaking; and
 - b) an interim order under section 657E of the Corporations Law to restrain Bigshop from proceeding with the Proposed Placement prior to the earlier of:
 - (i) the close of (or withdrawal) of the bids announced by Fast Scout on 30 July 2001;
 - (ii) approval of the Proposed Placement by the members of Bigshop in general meeting;
 - (iii) the Panel making final orders in this matter; and
 - (iv) two months from the date that the interim order is made by the Panel.
24. Fast Scout reserved the right to seek final orders, in the event that the Panel made a declaration of unacceptable circumstances in relation to any one or more of the circumstances referred to above.

Interim orders

25. On 14 September, Bigshop provided an undertaking to the Panel that it would not issue shares to Macquarie under the placement agreement until at least 9.00 a.m. Monday 24 September 2001. Bigshop's solicitors advised that Bigshop had not issued any shares to Macquarie under the placement agreement.
26. It appeared to the Panel that given Bigshop's undertaking, and given that it had not issued any shares, it was not necessary for the Panel to make interim orders, at least until immediately prior to 9.00 a.m. 24 September 2001, if at all.
27. The Panel therefore postponed consideration of Fast Scout's request for interim orders until there appears a real and current need to do so.

Proceedings

28. The Panel met on 15 September. It decided to conduct proceedings in relation to the application for unacceptable circumstances. We issued a brief that day under regulation 20. It sought submissions on 18 September and rebuttals on 19 September. That brief was provided to ASIC, Fast Scout, Bigshop and Macquarie. We received submissions and rebuttals from all of the parties. We received a rebuttal dated 21 September 2001 from Bigshop which was Bigshop's response to Fast Scout's rebuttals dated 20 September 2001, but decided that it was not necessary to receive it. We also received some submissions dated 21 September from Macquarie under regulation 24, but decided that it was not necessary to receive them. We invited Macquarie to make a submission addressing certain questions asked by the Panel. We considered that submission by Macquarie dated 24 September 2001 and also another submission by Macquarie made on the same date. We met again on 21 and 24 September and made the present decision.

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FURTHER DEVELOPMENTS

29. During proceedings, a number of developments occurred. We discuss these, and their influence on our decision and reasons below.

a. *Reduction of proposed placement size.*

During proceedings, Macquarie offered to reduce the size of the proposed placement from 10 million shares to 6.667 million shares. The Panel accepted this offer.

This matter has been very difficult to determine. Any reduction in size of placement would, necessarily, reduce any likelihood of the Proposal frustrating the intention and purpose of Fast Scout's bid.

The Panel recognised from the outset of its deliberations that there was a case to be argued that the Proposal, in the uncommon circumstances of this matter, might reduce the prospect of Fast Scout achieving its intentions. The Panel decided that it would not. The reduction made that decision, on balance, a little easier.

b. *Bigshop undertaking re section 648E*

At the request of the Panel, Bigshop gave an undertaking that it would only appoint further directors to the board of Bigshop, under the Proposal, if they gave undertakings that they would refrain from making any recommendation on the section 648E resolution to be put to Bigshop shareholders. The Panel considered that this would further reduce any risk that the Proposal would inhibit Fast Scout's opportunity to put its proposal before the Bigshop shareholders.

c. *Macquarie undertaking re section 648E*

At the request of the Panel, Macquarie gave an undertaking that it would not vote any shares it received under the Proposal on the section 648E resolution. This also reduced any concerns that the Panel had that the Proposal might inhibit Fast Scout's opportunity to put its proposal before the Bigshop shareholders.

d. *Fast Scout undertaking concerning the future period of its bid.*

At the Panel's request, Fast Scout gave an undertaking that it would limit the effect of its bid conditions on the future operations of Bigshop to a reasonable period. It did this by undertaking that, provided the resolutions notified by Fast Scout in the notice of meeting dated 12 September 2001 and the resolution required under section 648E of the Corporations Act have all been voted on by 2 November 2001, Fast Scout will not extend its bid beyond a reasonable period (on the understanding that this permits an offer period of at least three months) unless Fast Scout's bid is unconditional at the time of the extension or the board of Bigshop consents to the extension.

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THE PANEL'S DELIBERATIONS

30. The following set out the Panel's deliberations and reasons on the issues which it considered relevant in its decision.

Would the Proposal reasonably frustrate Fast Scout's Bid?

The Placement

31. The first issue which the Panel considered was whether the Proposed Placement was significant enough for Fast Scout reasonably to say that the intention of its bid has been frustrated.
32. The structure of Bigshop's register and Fast Scout's bid lead to some complexity in the numbers to be considered. At the time of the Panel's decision:
- i. Bigshop has 80,000,002 shares on issue.
 - ii. Fast Scout's proposed bid is for 51% of the shares that it does not own.
 - iii. Fast Scout's bid is subject to two minimum acceptance conditions: 25% and 45%.
 - iv. Fast Scout holds 10.073 million Bigshop shares (12.6%).
 - v. Holders of 36.9 million Bigshop shares are restricted, under ASX escrow provisions from accepting Fast Scout's bid.
 - vi. Holders of 33.026 million Bigshop shares are eligible to accept Fast Scout's bid.
 - vii. If **100%** of those eligible shareholders accepted Fast Scout's offer, it would acquire 16.843 million further Bigshop shares, at a cost of \$1.314 million, taking its shareholding to 26.917 million which equals **33.6** percent, undiluted.
 - viii. If the placement of 6.667 million shares¹ to Macquarie proceeds, and the bid extended to those shares, and Macquarie accepted for none of those newly issued shares (or Fast Scout chose not to extend its bid to those shares), Fast Scout's maximum holding would constitute **31.5%** of the 86,667,002 shares then on issue
 - ix. If Macquarie accepted for 51% of those shares, it would cost Fast Scout a further \$265,213 and Fast Scout would have a shareholding of 33.6%.

Frustrating Action

33. We consider that frustrating action must be defined in terms of action which prevents a transaction which would bring about a change of control of the target company in a manner, and at a time, when a decision about control of the company should properly be taken by shareholders, rather than directors

¹ Reduced from 10 million under the revised Proposal following the Macquarie undertaking.

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(even though the relevant decision may be fully within the directors' area of responsibility when the target is not subject to a takeover).

34. The Pinnacle 8 Panel said:

"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."

with the proviso 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.";

and

"a company may be paralysed, or unduly hampered in its everyday business, by unduly intrusive and constraining conditions in a bid."²

Control

35. The definition of "control" is important in the context of this decision. Section 602 of the Corporations Act states, in part, that:

The purposes of this Chapter are to ensure that:

(a) *the acquisition of control over:*

(i) *the voting shares in a listed company...*

takes place in an efficient, competitive and informed market.

36. Section 9 of the Act provides that "control" has the meaning given by section 50AA. Section 50AA(1) provides that an entity controls a second entity if the first entity has the capacity to determine the outcome of decisions about the second entity's financial and operating policies. In determining whether the first entity has this capacity, section 50AA(2) provides that:

- the practical influence the first entity can exert (rather than the rights it can enforce) is the issue to be considered; and
- any practice or pattern of behaviour affecting the second entity's financial or operating policies is to be taken into account (even if it involves a breach of an agreement or a breach of trust).

37. In the alternative, Fast Scout submitted that the alleged frustrating action was an attempt to frustrate Fast Scout's bid to secure "effective control" of Bigshop. For the purposes of Fast Scout's submission, the Panel considered that "effective control" meant something less than "control".

² "Pinnacle VRB Ltd (No 8) [2001] ATP 17 at [7], [11] and [49]."

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38. The Panel did not consider that its bid, as currently configured, Fast Scout would be able to obtain “control” within the meaning of section 50AA. The Panel did not accept Fast Scout’s submission that Fast Scout’s bid would enable it to secure “effective control” of Bigshop.
39. On balance, we do not think that Fast Scout could reasonably say that the proposed placement, in light of the uncommon circumstances of this matter, is sufficient to defeat its intention.
40. However, we say this “on balance”. The Panel thinks that there are good arguments on one hand for requiring the Proposal to be put to shareholders and on the other for saying that Bigshop should not be restricted in this case.

Two Minimum Acceptance Conditions

41. We note in saying this, that Fast Scout has two minimum acceptance conditions in its bid, at 25 and 45 percent. Fast Scout’s bidder’s statement does not adequately explain the purpose or function of two minimum acceptance conditions.
42. The Panel was unable to understand from Fast Scout the intention or purpose of the two minimum acceptance conditions. It appears to us that the only proper construction is that Fast Scout has clearly indicated that it considers that achieving 25% of Bigshop in its bid would be one of its definitions of success. It also appears to us that Fast Scout cannot argue that a percentage relevant interest below 33% would frustrate its bid, as it has clearly indicated that 25% would, in some circumstances be acceptable.
43. It appears that placing two minimum acceptance conditions may be confusing to shareholders. It appears to this Panel that the purpose and operation of those minimum acceptance conditions, the circumstances in which they will be waived and the circumstances in which they will not be waived will need to be carefully and clearly explained in bidder’s statements.

The Advisory Agreement

44. On balance, we think that the elements of the Proposal other than the placement, are not sufficiently material for Fast Scout reasonably to say that the purpose of its bid has been frustrated by entry into those parts of the Proposal. We note, however, that it is within Fast Scout’s right to make its bid subject to conditions which the Proposal would breach, and if those parts of the Proposal proceed, it would be within Fast Scout’s right to decide not to waive the conditions and allow its bid to close unfulfilled.
45. The Panel notes that it is unusual for up to three directors to be appointed in exchange for such a small share placement, however Fast Scout did not raise this as an issue for consideration by the Panel.

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Had Fast Scout been put on adequate notice by Bigshop’s earlier announcements about seeking a cornerstone investor?

46. The second issue which the Panel considered was whether Bigshop’s announcements in relation to its intentions to seek further investors and business opportunities had sufficiently put Fast Scout on notice of its intentions. If that was the case, could Fast Scout, having proceeded in light of the announcement, now reasonably claim that the Proposal was frustrating action. If Bigshop’s intentions had been clearly announced, Fast Scout may have been put on notice of the future direction of Bigshop and may have been taken to have decided to proceed in full knowledge of, and accepting, the proposed direction.
47. We do not consider that the announcement by Bigshop on 29 November 2000 to ASX that Fast Scout should reasonably be considered to have been put on notice of the proposed Macquarie placement. However, we note that the Executive Chairman of Fast Scout acknowledged in a submission that he had been advised in some discussions with Bigshop in April or May of 2001 that Bigshop was by then negotiating with another party concerning an alternate proposal.

Should the Proposal be excused from being Frustrating Action for any reason

48. The Panel considered whether there were any other aspects of the Proposal, and the events leading up to it, that might cause the Panel to excuse the Proposal, if it had decided it was frustrating action.
49. In considering this application, the Panel took note of the decisions of the Panel and Review Panel in Pinnacle VRB Ltd (Nos. 5 & 8), and in particular to the exceptions to the starting principle of Pinnacle 5 & 8, cited in paragraph 34 above.³

The Proposal was “Essentially Completed” when Fast Scout announced its bid

50. The “Essentially Completed” argument says that it is unreasonable to force a company to seek shareholder approval for a proposal if the bidder’s announcement comes when the proposal was essentially complete, perhaps at the expense of considerable of the company’s resources.
51. The Proposal agreement was not binding on 13 June 2001. Indeed, even on the evening of 12 June there were further discussions in progress on conditions, which hadn’t been resolved at the time of Fast Scout’s announcement.
52. The Panel does not accept that this case is a good example of the essentially complete exception. Bigshop and Macquarie themselves withdrew from the Proposal on the announcement. It is too late now to argue that the Proposal

³ “Pinnacle VRB Ltd (No 5) [2001] ATP 14 and Pinnacle VRB Ltd (No 8) [2001] ATP 17.”

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was Essentially Completed on 13 June, that Bigshop and Macquarie stopped the process when the Fast Scout announcement was made, but that the Essentially Complete exception should still apply. The Panel may have had more sympathy for the argument in this case if Bigshop had applied to the Panel earlier for assistance, and if it had applied to ASX for a waiver of Listing Rule 7.9 on the same basis.

53. The Panel considers that it was open to Bigshop to apply to the Panel for a declaration of unacceptable circumstances in that the conditions attached to Fast Scout's bid unreasonably restrained the operations of Bigshop.

Were Fast Scout's conditions Unreasonable in terms of Frustrating Action ?

54. The Panel considers that bidders should, within the confines of the Corporations Act, be entitled to make their bids conditional on the terms which they choose. The Panel does not seek, in its frustrating action considerations, to limit bidder's conditions. However, the Panel will only limit the actions of targets where those actions will cause a breach of conditions to a degree which frustrates the intention of a bidder.
55. In essence, this issue was resolved when we considered whether Bigshop's actions could constitute frustrating action. Fast Scout's conditions included
- No issue of shares by Bigshop
 - Minimum cash holding of \$6.2 million
 - No expenditure commitments of more than \$100,000
 - No liabilities of more than \$250,000
56. The Panel considers that conditions similar to Fast Scout's are not unusual for a person bidding for a cash box. However, it does not consider that the breaches of them constituted by the Proposal reasonably frustrate Fast Scout's intentions in the circumstances of this matter.
57. We were mindful that Fast Scout knew that Bigshop was a cash-box and would be pressured by ASX to comply with ASX Listing Rules and invest its cash.

Prolonged restriction of Bigshop's actions by Fast Scout's conditions

58. The Panel notes that the expenditure commitments and liabilities condition, at least, would unreasonably restrict Bigshop's operations, to the unreasonable detriment of Bigshop's shareholders, if Fast Scout's bid were not prosecuted expeditiously. A follow on of this is that action of Bigshop which caused further breaches of Fast Scout's conditions may not constitute frustrating action if Fast Scout has not prosecuted its bid diligently, or has sought to extend its bid beyond a reasonable time.

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Was there a compelling “Commercial Imperative” for Bigshop to enter the Proposal without waiting for shareholder approval?

59. The Panel does not think either party has made a compelling case for or against this issue. Fast Scout made no compelling arguments that losing the Proposal would be no material harm to Bigshop shareholders, Bigshop made no compelling arguments that losing the Proposal would be a very material harm to Bigshop shareholders i.e. a “once in a lifetime opportunity”.
60. The Panel noted that Bigshop argued that a bank with Macquarie’s standing, resources and expertise would bring benefits to Bigshop as adviser and as a shareholder. The Panel also noted that Bigshop asserted that jeopardizing the Proposal would disadvantage it.
61. However, the Panel was not convinced that Macquarie, although undeniably a desirable cornerstone investor/adviser, is the only investment bank reasonably able to give the Bigshop shareholders the benefits of the Proposal. We therefore did not consider that the Proposal is one that could not be allowed to be put at risk. We do not think that the Proposal falls within this category.
62. The Panel invited Macquarie and Bigshop to give it undertakings that they would not proceed with the Proposal without Bigshop shareholder approval. Macquarie declined to give that undertaking. While there may have been sensible commercial reasons for Macquarie not wishing to extend its exposure to the Bigshop Proposal, the Panel would have preferred that Macquarie, after the extended period of negotiations, had agreed. Even though the Panel concluded that on balance this was not a frustrating action its preference would have been to take the most cautious of approaches and send the Proposal to shareholders if parties had agreed.

Has Bigshop Negated its claims that Fast Scout’s actions harm Bigshop’s shareholders?

63. Bigshop chose not to call a meeting of its shareholders to ratify the Proposal. It had at least three clear triggers to do so; after 13 June, 30 July, or 28 August. The Panel considers that Bigshop had the solution to its current problem within its control during the three months since Fast Scout’s first announcement. Bigshop could have sought approval for the Proposal on both ASX Listing Rule 7.9 and unacceptable circumstances grounds.
64. The Panel considers that this would have been a very sensible course of action by Bigshop and would have obviated the need for these proceedings.

Was Bigshop on notice of the Fast Scout bid so shouldn’t have been proceeding with the Macquarie Proposal?

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65. There is some argument between the parties as to how much notice Fast Scout had given Bigshop of its intention to make a takeover bid for Bigshop, and whether Bigshop should have known, at the time it was intending to enter into the Proposal with Macquarie, of Fast Scout's intention to bid. It is agreed that Fast Scout first approached one or more directors of Bigshop in January 2001 to ask about a possible placement and alignment with Fast Scout. There were further discussions in April and May of 2001. The exact content and timing is in dispute. In particular, there is dispute whether the possibility of a takeover bid, in the event of Bigshop not giving a placement to Fast Scout, was raised during those discussions.
66. We do not think we can answer the question definitively without much more forensic examination of the persons concerned. However, the decision we have made renders it irrelevant.

Has Fast Scout negated its Frustration claim because of its delays since 13 June?

Should the Panel consider that Bigshop has been frozen by Fast Scout bid's conditions since 13 June and that that is an unreasonable harm to Bigshop shareholders?

67. The Panel recognises that the principles concerning frustrating action that we, and Pinnacle 5 and 8 Panels, have applied, will, of necessity, cause targets some degree of hardship in reducing targets' abilities to act quickly in uncertain business times and to seize opportunities as they arise. One of the issues this application caused this Panel to consider is how much potential harm or unfairness should the frustrating action policy cause to Bigshop and its shareholders in order to retain for those shareholders the right to decide on the Fast Scout proposal.
68. The Panel is aware that Bigshop appears to have been restricted in its operations (at least as far as securing new business acquisitions) for three months since 13 June, and requiring shareholder approval will delay that for a further month at least. However, we also note that it was open to Bigshop, regardless of the Macquarie Proposal, to seek shareholder approval of further plans as soon as Fast Scout announced its intention on 13 June, which would have avoided the need for these proceedings.
69. Fast Scout first announced its intention to bid (see Annexure A) on 13 June 2001. That announcement was conditional on ASX granting Fast Scout a waiver from Listing Rule 9. Fast Scout then took until 19 July 2001 to make its application to ASX for the waiver. This appears an excessive period of time.
70. Fast Scout announced its amended intention to bid (see Annexure B) on 30 July. It too was subject to a condition that ASX grant Fast Scout a waiver from Listing Rule 9. Fast Scout did not then make its application to ASX for waiver of the Listing Rule until 4 September. This too seems an excessive period of time.

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71. If the impact of this passing time had been solely on Fast Scout, the Panel would not be concerned. However, the delays incurred by Fast Scout, such as the delays in making both applications to ASX, materially lengthened the period of restriction within which the board of Bigshop was required to operate.
72. The Panel considers that Fast Scout should have made materially more preparations for its waiver application before announcing its intention to bid. The Panel is not convinced by Fast Scout's explanations as to the delays.

Was the delay in making Fast Scout's application to the Panel unreasonable?

73. The Panel considers that Bigshop's announcement of 28 August, where it said "*The ASX has provided a waiver from Listing Rule 7.9 to BigShop to permit it to enter into that conditional contract.*" should have reasonably put Fast Scout on notice that the Proposal was imminently pending, and should have put Fast Scout on enquiry as to the nature of the waiver granted. Alternatively, on 30 August 2001 the ASX advised Fast Scout that the three month restriction period for Bigshop making a placement commenced from Fast Scout's bid of 13 June 2001. From there, the Panel considers that Fast Scout should have made its application more expeditiously. We think it somewhat disingenuous for Fast Scout to assert in its submissions to the Panel that it assumed that the Proposal would not take place until 3 months after the date of Fast Scout's second announced intention to bid.
74. On that basis, the Panel considers that the delay by Fast Scout in making its application to the Panel contributed to the Panel's decision not to grant its application.
75. If a bidder wishes to invoke the protection of the principles concerning frustrating action that we, and Pinnacle 5 and 8 Panels, have applied, it must first of all protect its own position by ensuring that it prosecutes its bid as diligently as possible. Otherwise the harm which the target suffers from not being able to initiate various actions may outweigh the harm caused by possibly frustrating action.

Is further delay to mid/late October unreasonable?

76. Given the factors above, the Panel considers that further delaying the Proposal until after Bigshop has convened a meeting for Bigshop shareholders to consider the Proposal is not appropriate.

Fast Scout may currently only acquire 33% under this bid

77. The Panel considered this issue in terms of the stated intention of Fast Scout to gain control of Bigshop. Fast Scout has mentioned 51%, 45% and 25% as

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possible goals for it in this bid. The goals of 51% and 45% have been prevented by Fast Scout's choice of a partial bid for only 51% of shares and its interaction with ASX's policy on releasing escrow shares for acceptance into takeover offers. The goal of 25% is still within Fast Scout's capability, with, or without the Proposal. Therefore we think there is further evidence that the Proposal should not be considered frustrating action.

78. When considering the issue, the Panel noted that the maximum percentage attainable (diluted and undiluted)
- is more than the Australian 20% threshold
 - is more than the UK 30% threshold
79. Fast Scout asserted that the Panel should consider that the shares which Fast Scout may acquire may constitute a controlling block if Fast Scout was supported by other shareholders in Bigshop. Fast Scout also asserted that Macquarie would vote the shares issued to it in conformity with the current board of Bigshop and therefore the Panel should declare that the placement would tilt the balance against Fast Scout. The Panel considers that both these assertions are matters of speculation which it should not enter into in this matter.

OTHER ISSUES

80. There was a range of other issues raised by both parties in the applications. In general we did not think that they were central to our decision. For completeness, we list them here and give brief notes as to why they were not central to its considerations.

a. Proper/Improper Purpose.

The Panel's primary concern in considering frustrating action is the effect of the action, not the purpose for which it was entered. There may be cases where the intention to frustrate a bid is clear, in which case the Panel may take that as one of the factors in its consideration. However, in this case, there was no clear evidence.

The Panel notes that Bigshop and Macquarie agreed to increase the June proposed placement of 6.667 million shares to 10 million shares in the 28 August announcement. In certain circumstances such a change may lead to an inference of an intention to frustrate the rival proposal.

b. Condition/Pre-condition.

There was discussion in submissions as to whether the requirements in Fast Scout's announcements were pre-conditions to it making a bid, or announced conditions of its bid and whether that made any difference to the degree of importance Bigshop should give to Fast Scout's announcement. We did not think this had a bearing on the Panel's decision.

Takeovers Panel

Reasons for Decision – Bigshop.com.au Limited 01

c. Sole Control Condition.

There was an assertion that the fact that making application to ASX for a Listing Rule waiver was within Fast Scout's control and that Fast Scout's announcement breached section 629. This has been addressed in previous Panel decisions. The Panel considers that similar arguments could be raised against most approval conditions, such as FIRB and that there has to be an implied undertaking from the bidder to prosecute such applications and failure to do so would constitute unacceptable circumstances. In passing, the Panel notes that section 629 applies only to a bid as made, not to an announcement of an intention to make a bid. Nevertheless the Panel considers the principle applies.

Takeovers Panel

Reasons for Decision – Bigshop.com.au Limited 01

d. Proposal in the Best Interests of Bigshop shareholders.

The parties sought, in some of their submissions, to assert that the Panel should consider whether or not the Proposal was in the best interests of the Bigshop shareholders, and to base its decision in part on such an assessment. The Panel considers that if the Proposal constituted frustrating action then the Proposal would be required to be approved by Bigshop shareholders and they would make that decision. In the uncommon circumstances of this bid, the Panel has determined that the Proposal does not constitute frustrating action. Therefore it is for the directors of Bigshop to decide whether it is in the best interests of Bigshop. The Panel did not need to consider or decide the issue in this matter.

e. Fast Scout “offer” to make placement.

Fast Scout asserted that it had offered to take a placement from Bigshop and therefore there was no reason for Bigshop to make a placement to Macquarie. Further, Fast Scout asserted, Bigshop’s choice to make the placement to Macquarie in the face of Fast Scout’s offer was evidence of Bigshop’s intention to frustrate Fast Scout’s bid.

The Panel drew no adverse inference from Bigshop’s rejection of Fast Scout’s offer to take the placement in these circumstances, because a bare placement would not bring with it the other benefits that Bigshop identified in Macquarie’s Cornerstone investment. Therefore it bore little relevance to the Proposal or to the Panel’s decision.

f. Above/Below NTA issues.

There was discussion in submissions about the fact that the proposed placement would be at a price below Bigshop’s NTA. The Panel considers this was not a relevant consideration, especially when both Fast Scout’s proposed bids were also below Bigshop’s NTA.

g. Macquarie as an “Associate” of Bigshop.

Fast Scout asserted that the Panel should consider Macquarie to be an associate of Bigshop. It provided no material evidence to support its assertion. In the absence of even circumstantial evidence the Panel did not consider it could reasonably take such assertions into account.

h. ASX Waiver Condition as Lock-Up Device.

Fast Scout asserted that because ASX’s policy on granting waivers to Listing Rules strongly favours applications where the listed entity supports the application, companies with escrow shares effectively have a lock-up device contrary to the Panel’s policy on such devices. The Panel does not accept this assertion.

Takeovers Panel

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i. Bigshop directors obligation to make application to ASX for Fast Scout's waiver.

Fast Scout requested the Panel to order Bigshop to make an application to ASX for waiver of Listing Rule 9.18, and asserted that it would constitute unacceptable circumstances for Bigshop not to do so. The Panel considers that it would require unusual circumstances for it to require a board of a public company to do an action that the board stated it believed was not in the best interests of the company, or indeed was against the best interests of the company. The Panel does not consider that the current matter constitutes such exceptional circumstances.

j. Caretaker directors.

Fast Scout asserted that as Fast Scout had convened a meeting to remove the incumbent directors the board of Bigshop should treat itself as caretakers. We accepted the submissions of ASIC that this rule had been applied only once in a decided case in *Australia Paringa Mining and Exploration Co plc v North Flinders Mines Limited* (1988) 14 ACLR 587, and that the circumstances of that case are materially removed from the current matter.

In ASIC's view, it was fundamental to the court's decision in *Paringa Mining* that Paringa held 49.5% of the shares in North Flinders and was in a position, from a practical point of view, to control the decisions at any meeting of North Flinders' shareholders.

The Panel accepted ASIC's view that, given the early stage in the development of the Australian common law on the caretaker director doctrine, the Panel should be reluctant to accept a proposition that the caretaker doctrine applies in a case where a 12.592% shareholder requisitions an EGM. To accept such a proposition would risk undue restriction on directors well before shareholders had considered the offer. Such a development would be an unwelcome development in Australian takeovers.

DECISION

81. In view of the unusual circumstances this has been a very difficult decision. We believe that it may have been decided more easily if parties had from the start provided the analysis of the commercial imperatives and control issues that were elicited by the Panel in later requests for submissions.
82. On balance, and in the particular circumstances of this matter, we do not think that the amended Proposal (including the placement of 6.667 million shares, and the commitment of a fee of \$150,000 p.a., and the appointment of three directors to the board of Bigshop) constitutes action which could reasonably be considered to frustrate the intentions of Fast Scout in seeking control, or effective control, of Bigshop.

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83. However, having said that, we also consider that the Proposal came very close to being frustrating action. We also repeat our comment that it was open to Bigshop to resolve this matter several months ago by taking it to shareholders.
84. We also wish to repeat our concern at the time it has taken Fast Scout to pursue its bid. The ASX Listing Rules prevent a company from issuing or agreeing to issue shares, without the approval of existing shareholders, for three months after it is told in writing that a person is making, or proposes to make, a takeover bid for securities in it. The practical effect of this is to give a bidder an automatic three month period within which to implement its bid, without being frustrated by an issue of shares other than an issue approved by shareholders. In the Panel's view, there was every reason for Fast Scout to have had its bid well under way before the expiry of that three month period on 13 September.
85. We think that our decision will provide some limited assistance to other Panels in future, but, because of its circumstances, which are most unlikely to arise again, there are unlikely to be many future matters for which it will be a direct precedent.
86. We thank all the parties for the spirit in which their undertakings were given.

Brett Heading

President of the Sitting Panel

Decision dated 27 September 2001

Reasons published 3 October 2001

Takeovers Panel

Reasons for Decision – Bigshop.com.au Limited 01

Annexure A

Fast Scout Limited Intention to Make Cash T/O Bid for 51%

Document date: Wed 13 Jun 2001

Released time: Wed 13 Jun 2001 15:00:54

Document No: 197378

Document part: A

Market Flag: Y

Classification: Intention to Make Takeover Bid

BIGSHOP.COM.AU LIMITED

2001-06-13 ASX-SIGNAL-G

HOMEX - Perth

Subject to the conditions referred to below, Fast Scout Limited ("Fast Scout") intends to make an off-market bid to acquire 51% of the issued fully paid ordinary shares of BIGSHOP.com.au Limited ("BIGSHOP") that it does not already own (the "Bid Shares"), for a cash consideration of 7.6 cents per share (the "Share Bid"). The proposed bid is for 51% of each shareholder's fully paid ordinary shares.

Fast Scout also proposes to make off-market bids (together, the "Option Bids") for the following options to subscribe for fully paid ordinary shares in BIGSHOP:

* A bid for all of the options exercisable at 25c each on or before 30 May 2005, for a cash consideration of 0.25 of a cent per option; and

* A bid for all of the options exercisable at 25c each on or before 13 April 2005, for a cash consideration of 0.25 of a cent per option,

(together, the "Bid Options").

Fast Scout currently has a relevant interest in 5,053,655 (being approximately 6.32%) of the fully paid ordinary shares in BIGSHOP. Fast Scout does not currently own any options to subscribe for shares in BIGSHOP.

Fast Scout will not proceed with the takeover bids referred to above unless the following conditions precedent are satisfied (or waived by Fast Scout in its absolute discretion):

* Australian Stock Exchange Limited ("ASX") gives its consent under Listing Rule 9.17 to enable the holders of the Bid Shares and the Bid Options which are restricted securities to accept an offer under the Share Bid, conditional only upon Fast Scout and the holder of the restricted securities agreeing in writing, consistent with Listing Rule 9.18.3, that the certificates will be returned to the bank or recognised trustee, for each of the restricted securities that is not bought by Fast Scout under the Share Bid.

Fast Scout understands that approximately 36,900,000 of the Bid Shares and all of the Bid Options are currently classified by ASX as "restricted securities". Fast Scout intends to make an application to ASX very shortly to seek this consent. ASX's Listing Rules state that ASX will not give consent unless (amongst other things) the offers under a takeover bid are for all of the ordinary securities. Since this is a proportional bid, there is no assurance that ASX will give its consent.

Takeovers Panel

Reasons for Decision – Bigshop.com.au Limited 01

* None of the events referred to in section 652C(1) of the Corporations Law (formerly known as "prescribed occurrences") occur in relation to BIGSHOP or any subsidiary of BIGSHOP prior to the date on which Fast Scout lodges a copy of its bidder's statement and offer document with the Australian Securities and Investments Commission. These events include, without limitation, any issue or agreement to issue new shares in BIGSHOP beyond its existing issued capital of 80,000,002 fully paid ordinary shares (excluding any shares issued as a result of an exercise of any of the existing options to subscribe for shares in BIGSHOP).

Subject to the above conditions precedent, a formal bidder's statement and offer will be served on BIGSHOP and dispatched to shareholders and option-holders as soon as possible. No brokerage or stamp duty will be payable by accepting shareholders or option-holders.

The Share Bid will be subject to the following conditions and to the provisions of BIGSHOP's constitution:

* At the end of the bid period, Fast Scout has a relevant interest in not less than 45% of the issued fully paid ordinary shares of BIGSHOP (including those shares in which it already has relevant interest at the date of this announcement).

* At the end of the bid period, Fast Scout has a relevant interest in not less than 25% of the issued fully paid ordinary shares of BIGSHOP (including those shares in which it already has relevant interest at the date of this announcement).

* BIGSHOP's cash (being cash at call or in the form of deposits or bills with a maturity date of no longer than 6 months) being not less than \$6.1 million at any time during the bid period.

* BIGSHOP's current and non-current liabilities (whether actual or contingent, and whether or not provided for in BIGSHOP's financial statements) being not more than \$250,000 at any time during the bid period.

* BIGSHOP not having any expenditure commitments (actual or contingent) including, without limitation, commitments in relation to current or former directors of BIGSHOP, of more than \$100,000 in aggregate at any time during the bid period.

* No material change in the composition or value of BIGSHOP's assets.

* No material adverse change in BIGSHOP's financial position.

* Fast Scout receiving acceptances for not less than 90% of each class of options under the Option Bids.

* None of the events referred to in section 652C(1) of the Corporations Law (formerly known as "prescribed occurrences") occur in relation to BIGSHOP or any subsidiary of BIGSHOP.

Each of the Option Bids will be subject to the same conditions as the Share Bid.

Further information:

Mr Farooq Khan
EXECUTIVE CHAIRMAN
Fast Scout Limited

Takeovers Panel
Reasons for Decision – Bigshop.com.au Limited 01

Annexure B

FSL`s Cash Takeover Bid for BIGSHOP.com.au Ltd - As Amended

Document date: Mon 30 Jul 2001
Document No: 199566
Market Flag: N

Released time: Tue 31 Jul 2001 09:09:18
Document part: A
Classification: Intention to Make Takeover Bid

BIGSHOP.COM.AU LIMITED

2001-07-30 ASX-SIGNAL-G

HOMEX - Perth

ASX MARKET RELEASE

Subject to the conditions referred to below, Fast Scout Limited ("Fast Scout") intends to make an off-market bid to acquire 51% of the issued fully paid ordinary shares of BIGSHOP that it does not already own (the "Bid Shares"), for a cash consideration of 7.80 cents per share (the "Share Bid"). The proposed bid is for 51% of each shareholders' fully paid ordinary shares.

The Company also proposes to make off-market bids (together, the "Option Bids") for the following options to subscribe for fully paid ordinary shares in BIGSHOP:

- (i) A bid for all of the 10,000,000 (Executive(1)) options exercisable at 25c each on or before 30 May 2005, for a cash consideration of 0.25 of a cent per option; and
- (ii) A bid for all of the 1,090,000 (Incentive(2)) options exercisable at 25c each on or before 13 April 2005, for a cash consideration of 0.25 of a cent per option, (together, the "Bid Options").

CURRENT RELEVANT INTEREST IN BIGSHOP

Fast Scout currently has a relevant interest in approximately 8,272,256 fully paid ordinary shares in BIGSHOP (being approximately 10.34% of the issued capital of BIGSHOP). Fast Scout does not currently own any Bid Options to subscribe for shares in BIGSHOP.

PRE-CONDITIONS TO THE PROPOSED BID

This proposed bid is subject to certain pre-conditions. That is, Fast Scout will not proceed with the Share Bid and Option Bids unless each of the following conditions precedent are satisfied (or waived by Fast Scout in its absolute discretion):

- (i) Australian Stock Exchange Limited ("ASX") gives its consent under Listing Rule 9.17 to enable the holders of the Bid Shares which are restricted securities to accept an offer under the Share Bid, conditional upon:

- (a) Such holders of restricted Bid Shares being entitled to lodge acceptances under the Share Bid only if holders of at least half of the unrestricted Bid Shares have lodged acceptances under the Share Bid; and

Takeovers Panel
Reasons for Decision – Bigshop.com.au Limited 01

(b) Fast Scout and the holders of restricted Bid Shares agreeing in writing, consistent with Listing Rule 9.18.3, that the certificates will be returned to the bank or recognised trustee, for each of the restricted Bid Shares that is not bought by Fast Scout under the Share Bid;

(ii) ASX gives its consent under Listing Rule 9.17 to enable the holder of the Bid Options which are restricted securities to accept an offer under the Option Bid, conditional upon:

(a) Pre-condition (i)(a) above in relation to holders of restricted Bid Shares being satisfied and

(b) Fast Scout and the holders of restricted Bid Options agreeing in writing, consistent with Listing Rule 9.18.3, that the certificates will be returned to the bank or recognised trustee, for each of the Bid Options that is not bought by Fast Scout under the Options Bid.

(iii) None of the events referred to in section 652C(1) of the Corporations Act (formerly known as "prescribed occurrences") occur in relation to BIGSHOP or any subsidiary of BIGSHOP prior to the date on which Fast Scout lodges a copy of its bidder's statement and offer document with the Australian Securities and Investments Commission ("ASIC"). These events include, without limitation, my issue or agreement to issue new shares in BIGSHOP beyond its existing issued capital of 80,000,002 fully paid ordinary shares (excluding any shares issued as a result of an exercise of any of the existing options to subscribe for shares in BIGSHOP).

Fast Scout understands that 36,900,000 of the Bid Shares (out of a total of 80,000,002 total issued fully paid ordinary shares) and all of the Bid Options are currently classified by ASX as restricted securities.

Fast Scout intends to make an application to the ASX to seek consent for waiver of Listing Rule 9.17 in the above circumstances. ASX's Listing Rule 9.18 state that ASX will not give consent unless (amongst other things) the offers under a takeover bid are for all of the ordinary securities. Since this is a proportional bid, there is no assurance that ASX will give its consent.

CONDITIONS OF THE PROPOSED BID

The Share Bid will be subject to the following conditions and to the provisions of BIGSHOP's constitution:

(i) Shareholders of BIGSHOP give all necessary approvals required under the BIGSHOP Constitution with respect to the proposed bid.

(ii) At the end of the bid period, Fast Scout has a relevant interest in not less than 45% of the issued fully paid ordinary shares of BIGSHOP (including those shares in which it already has relevant interest at the date of this announcement).

(iii) At the end of the bid period, Fast Scout has a relevant interest in not less than 25% of the issued fully paid ordinary shares of BIGSHOP (including those shares in which it already has relevant interest at the date of this announcement).

Takeovers Panel

Reasons for Decision – Bigshop.com.au Limited 01

- (iii) BIGSHOP's cash (being cash at call or in the form of deposits or bills with a maturity date of no longer than 6 months) being not less than \$6.2 million at any time during the bid period.
- (iv) BIGSHOP's current and non-current liabilities (whether actual or contingent, and whether or not provided for in BIGSHOP's financial statements) being not more than \$250,000 at any time during the bid period.
- (v) BIGSHOP not having any expenditure commitments (actual or contingent) including, without limitation, commitments in relation to current or former directors of BIGSHOP, of more than \$100,000 in aggregate at any time during the bid period.
- (vi) No material change in the composition or value of BIGSHOP's assets.
- (vii) No material adverse change in BIGSHOP's financial position.
- (viii) Fast Scout receiving acceptances for not less than 90% of each class of options under the Option Bids.
- (ix) None of the events referred to in section 652C(1) of the Corporations Act (formerly known as "prescribed occurrences") occur in relation to BIGSHOP or any subsidiary of BIGSHOP.

Each of the Option Bids will be subject to the same conditions as the Share Bid.

No brokerage or stamp duty will be payable by accepting shareholders or option holders.

Further information:

Mr Farooq Khan Ph: 08 9214 9700
EXECUTIVE CHAIRMAN email:fkhan@fastscout.com
Fast Scout Limited

Takeovers Panel
Reasons for Decision – Bigshop.com.au Limited 01
Annexure C

Proposed Placement to Macquarie Bank Limited

Document date: Tue 28 Aug 2001 **Released time:** Tue 28 Aug 2001 18:10:57

Document No: 200923 **Document part:** A

Market Flag: Y

Classification: Placement

BIGSHOP.COM.AU LIMITED

2001-08-28 ASX-SIGNAL-G

HOMEX - Perth

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The Board are pleased to announce a proposed share placement to Macquarie Bank Limited (MBL) of 10 million ordinary shares to raise A\$750,000 and the issue of 2 million options exercisable at \$0.15 per option. As part of the proposed placement, the Macquarie Technology Investment Banking (MTIB) division of MBL will be appointed as Bigshop's financial advisor, the Board will be strengthened with the addition of several new directors and a number of value added initiatives will be pursued.

These arrangements are subject to a number of conditions, including the Australian Stock Exchange (ASX) rejecting the waivers requested by Fast Scout as a pre-condition of its intention to make a proportional takeover bid announced on 30 July 2001. If these conditions, more fully explained in the attachment to this Announcement, are not satisfied by 14 September 2001, the placement to MBL, its appointment as financial advisor and the initiatives it has identified, will not proceed.

The Company has been in discussion with MBL for some time and was finalising a placement to MBL immediately before Fast Scout announce its conditional intention to make an offer on 13 June 2001. The directors consider the arrangements with MBL are in the best interest of shareholders for reasons set out in the announcement of 20 June 2001 including:

* it adds a reputable institutional investor to Bigshop's share register. Smaller listed companies such as Bigshop do not typically attract institutional investors;

* it provides new capital of \$750,000 to the Company;

* it allows Bigshop to expand its Board; and

* MTIB is a well respected and competent technology advisor which has identified a number of initiatives that the directors consider will add value to Bigshop. In addition, it will accelerate the strategic review of Bigshop being undertaken by Directors.

More details on the proposal are set out below:

Takeovers Panel
Reasons for Decision – Bigshop.com.au Limited 01

1. PLACEMENT TO MACQUARIE BANK LIMITED

The placement to MBL, through MTIB, is at 7.5 cents per share to raise \$750,000. As part of the placement, MBL will also be issued options over 2 million shares exercisable at \$0.15 per share within 5 years of the date of the placement. MBL will hold approximately 13% of the issued share capital following the placement (and exercise of all options) and will provide a key institutional shareholder for the Company. BigShop and MBL have entered into a conditional contract to carry out the placement, subject to the conditions described below. The ASX has provided a waiver from Listing Rule 7.9 to BigShop to permit it to enter into that conditional contract.

2. APPOINTMENT OF MTIB AS FINANCIAL ADVISOR

MTIB will be appointed as financial advisor to the Company to identify and assess new business opportunities, strategic alliances and the operational focus that is complimentary to the existing ecommerce business of Bigshop. MTIB provides advisory services to technology companies to assist with a range of matters including fundraising, divestment, mergers and acquisitions, strategic alliances, joint ventures and other traditional investment banking services. MBL's Investment Banking Group, of which MTIB is a part, has offices in Australia, Asia and United States.

Notwithstanding MTIB has not yet been appointed as the financial advisor to the Company, MTIB and Bigshop have identified a number of initial potentially valuable initiatives.

3. NEW BOARD

To expand the Board and ensure it has a requisite skills to best add value for shareholders, MTIB has agreed to assist Bigshop to identify up to three non-executive directors with suitable business and IT skills. As part of the placement, Bigshop has agreed with MTIB that it will obtain its approval, not to be unreasonably withheld, to the appointment of those three directors. If the placement to MBL proceeds it is anticipated those directors will be identified, appointed and announced at the time of the placement to MBL.

ANNEXURE A: FURTHER DESCRIPTIONS OF THE CONDITIONS

As set out in this announcement, the proposed arrangement and placement to MBL is subject to the following conditions having been satisfied by 14 September 2001:

- (a) ASX not giving its consent under Listing Rule 9.17 or a waiver of Listing Rule 9.18 to enable the holders of restricted securities in the Company to accept an offer by Fast Scout Limited (Fast Scout) on the terms disclosed in Fast Scout's announcement of 30 July 2001. (In this regard, the Company notes that Listing

Takeovers Panel

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Rule 9.18 states that ASX will not give consent under Listing Rule 9.17 unless (amongst other things) the offers under a takeover bid are for all of the ordinary securities. Since Fast Scout has only announced a proportional bid, there is no assurance that ASX will give such consent or waiver. Fast Scout has already applied for a similar waiver from the ASX in respect of its earlier bid announcement of 13 June 2001. That application was rejected by the ASX); and

- (b) the proposed transaction not being in breach of the Company's obligations under Listing Rule 7.9 and shareholder approval of the proposed transaction not being required under that Listing Rule. (Rule 7.9 prohibits a listed company from issuing securities without the approval of ordinary shareholders for 3 months after being told in writing that a person is making or proposes to make a takeover for securities in the listed company).