



**In the matter of Bigshop.com.au Limited (No. 3)
[2001] ATP 22**

Catchwords:

Takeover bid – disclosure in bidder’s statement – agreement on content of proposed replacement bidder’s statement – breach of section 631 – interim order made by Panel to facilitate dispatch of information to shareholders

Corporations Act 2001 (Cth), sections 602, 657E and 631

ASIC Class Order 00/344

An application under section 657C of the Corporations Act by Fast Scout Limited for interim orders under section 657E of the Corporations Act

STATEMENT OF REASONS FOR DECISION

1. The sitting Panel comprises Mr Brett Heading (sitting President), Ms Meredith Hellicar (sitting Deputy President) and Dr Tro Kortian.
2. On 5 October 2001, Fast Scout Limited (ACN 088 488 724) (*Fast Scout*) applied under section 657C of the Corporations Act 2001 (the *Act*) for interim orders under section 657E of the Act allowing it to dispatch a replacement bidder’s statement to shareholders of Bigshop.com.au Limited (*Bigshop*). The form of the replacement bidder’s statement was consented to by Bigshop (however, Bigshop reserved the right to contest, in its target’s statement, any information with which it did not agree). The application requested the Panel to direct the replacement bidder’s statement to be dispatched on 10 October 2001, and that Fast Scout was not required to dispatch any bidder’s statement prior to that date.
3. The Panel decided to make the interim orders sought, and did so on 5 October 2001.

FACTUAL BACKGROUND

4. This is an application under section 657C of the Act for interim orders under section 657E of the Act.
5. It concerns a proposed takeover bid by Fast Scout for Bigshop. On 30 July 2001, 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 and options held in escrow to accept Fast Scout’s offers and certain “prescribed occurrences”. The consideration was to be 7.8 cps.

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6. On 4 September Fast Scout made an application to ASX seeking a waiver from Listing Rules 9.17 and 9.18. Fast Scout proposed that the waiver be subject to different conditions to those it had proposed in an earlier application on 17 July 2001. ASX declined the application on 14 September.
7. By letter dated 21 September 2001, Bigshop wrote to Fast Scout alleging certain deficiencies in Fast Scout's bidder's statement given to Bigshop on 17 September 2001. A copy of that letter was sent to the Panel executive. Bigshop was concerned that the bidder's statement did not comply with the Act in a number of significant respects.
8. By a process facilitated by the Panel and its executive, the parties reached agreement on the content of Fast Scout's proposed replacement bidder's statement.
9. Bigshop has advised the Panel that it has no objection to Fast Scout's proposal to send out a replacement bidder's statement and has agreed to the proposal as to timing, subject to Bigshop reserving its rights and Fast Scout retaining the risk and potential liabilities in respect of misleading or inaccurate statements in, or breaches of the Act in respect of the bidder's statement.
10. There was one outstanding issue and this is discussed below.

Potential breach of Section 631 of the Act

11. Section 631(1) of the Act provides that if a person publicly proposes to make a takeover bid for securities in a company and does not make an offer for the securities under a takeover bid within 2 months, the person contravenes section 631(1).
12. Fast Scout made its announcement of its intention to make a takeover bid for Bigshop on 30 July 2001. Under section 631, Fast Scout was required to send its offers to Bigshop shareholders by 30 September 2001.

THE APPLICATION

13. Fast Scout applied for interim orders under section 657E of the Act that:
 - Fast Scout dispatch a replacement bidder's statement which is substantially in the form of the draft approved by the Panel on 5 October, to shareholders of Bigshop on Wednesday 10 October 2001.
 - If the directors of Bigshop do not do so voluntarily, that the directors of Bigshop be required to agree in writing, for the purposes of ASIC

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Class Order 00/344, to allow the dispatch of Fast Scout's replacement bidder's statement on 10 October 2001.

14. The sitting Panel met on Friday 5 October 2001. It decided to conduct proceedings in relation to the application for interim orders. We issued a brief that day under regulation 20.
15. No written submissions were received in response to this brief. Fast Scout amended its application later on 5 October.
16. In its amended application, Fast Scout submitted that:
 - The terms of proposed interim order (i) be amended to provide that Fast Scout dispatch a replacement bidder's statement which is substantially in the form of the draft approved by the Panel, without objection from Bigshop, to be sent to shareholders of Bigshop on Wednesday 10 October 2001 (and that Fast Scout not dispatch any bidder's statement prior to that date).
 - That Fast Scout's application otherwise be adjourned until 11 October 2001 unless Fast Scout makes application prior to that date to renew its application.
17. Fast Scout submitted that the interim orders were necessary to ensure that:
 - Fast Scout is not exposed to any argument that it may be liable under section 631 of the Act as a result of Fast Scout's willingness to seek a negotiated solution; and
 - Bigshop shareholders are not prejudiced by unnecessary delay in receiving Fast Scout's offer.

DECISION

18. The Panel made its decision on Friday 5 October 2001.
19. The Panel is intended to resolve disputes in a speedy commercial manner, with expert understanding of the facts and context. The Panel has preferred, where possible, to have parties consent or give undertakings rather than have the Panel make declarations and orders. With this aim in mind, the Panel sought to have the parties reach agreement amongst themselves as to the form of disclosure in the bidder's statement and the timetable for dispatch. The Panel facilitated this process where necessary, in order to assure itself that:
 - Fast Scout's bidder's statement is dispatched to Bigshop shareholders in a sufficiently timely manner; and

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- Bigshop shareholders are given enough information to enable them to assess the merits of the proposed takeover (as required by section 602(b)(iii) of the Act).
20. Fast Scout announced its bid on 30 July 2001, and lodged its bidder's statement with the ASIC on 17 September 2001, the last day it could do so without prospectively breaching section 631. Section 631 of the Act required that Fast Scout dispatch its bidder's statement to Bigshop shareholders by 30 September 2001.
 21. Fast Scout asserts that it had its bidder's statement prepared and ready for printing and dispatch within the time required by section 631. Fast Scout went on to assert that delays for negotiations with Bigshop as to an acceptable level of disclosure, and attendant problems relating to printing, contributed to it being unable to make this deadline. The Panel accepted these assertions in part, and considered that, as Fast Scout delayed dispatch of its offer in order to accommodate amendments requested by Bigshop and to avoid another adversarial action before the Panel, it would be somewhat disingenuous for Bigshop to assert that the Panel should take adverse measures against Fast Scout for being in breach of section 631 of the Act.
 22. However, as it stressed in its decision in Bigshop 01, the Panel was concerned that Fast Scout had created a large part of this problem itself, by allowing a large part of the two month period allowed under section 631 of the Act to elapse before it applied to the ASX for a waiver from Listing Rule 9.18. To that extent, Bigshop's concerns were well justified.
 23. Fast Scout sought to address the concerns of Bigshop in the 21 September letter by making additional disclosure. This additional disclosure was satisfactory to Bigshop, save in certain areas which Bigshop has informed the Panel it will deal with in its target's statement. The Panel also required additional disclosure and clarification from Fast Scout, which Fast Scout made to the satisfaction of the Panel.
 24. Given the delay already, and the possibility of achieving agreement on the additional information to be disclosed, the Panel decided that allowing the parties time to resolve the issue was desirable, even though it meant that the bidder's statement was to be dispatched 10 days later than required under section 631 of the Act. In order to facilitate the timely dispatch of the bidder's statement, the Panel made interim orders that Fast Scout dispatch on 10 October 2001. The Panel considers that this was more efficient than requiring Bigshop to commence contested proceedings before the Panel concerning the content of Fast Scout's bidder's statement.

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25. The orders had the effect of preventing further delay by Fast Scout constituting an ongoing breach of section 631 of the Act.
26. Bigshop agreed, for the purposes of ASIC Class Order 00/344, to allow the dispatch of Fast Scout's replacement bidder's statement on 10 October 2001.
27. The Panel made the following interim orders:
 - Fast Scout dispatch a replacement bidder's statement (which was substantially in the form of the draft provided to the Panel on 5 October 2001) to shareholders of Bigshop.com.au Limited not earlier than Wednesday 10 October 2001; and
 - Fast Scout was not required to dispatch any bidder's statement prior to Wednesday 10 October 2001.
28. The Panel adjourned the application until Thursday 11 October 2001.
29. The Panel commends the parties for the quick and cooperative manner in which they resolved this issue.

Brett Heading

President of the Sitting Panel

Decision dated 5 October 2001

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