Takeovers Panel

Reasons for Decision Pinnacle VRB Ltd No. 11

In the matter of Pinnacle VRB Ltd No. 11
[2001] ATP 23

Catchwords

Review of Panel decision – efficient market – final orders – costs order - continuing effect to interim orders – mistaken acceptance of bid by broker – acceptances without consent – reversal of acceptance – consent to reversal/withdrawal - withdrawal of acceptance – acceptance by mistake void – public interest – buy in replacement shares – void contracts of acceptance – cancellation of shares issued as consideration – directors' duties – unfair prejudice – jurisdiction – costs

Corporations Act 2001 (Cth), sections 602 (a) and (c), 654A, 657A, D and E

Business Rules of the Securities Clearing House, r 16.5

An application under section 657EA of the Corporations Act by Vanteck (VRB) Technology Corp (Vanteck) for a review of the decision of the Panel in Pinnacle VRB Ltd No.10 to make a declaration of unacceptable circumstances and orders in relation to Vanteck's takeover bid (the Bid) for Pinnacle VRB Limited (Pinnacle). The review Panel has declared that unacceptable circumstances exist and has made orders unwinding the Disputed Acceptances.

THE APPLICATION

1. On 8 October 2001 Vanteck applied to the Panel for a review of the decision of the sitting Panel in Pinnacle VRB Ltd No.10 (the **Review Application**). In Pinnacle No.10 the Panel made a declaration of unacceptable circumstances and orders unwinding certain acceptances of Vanteck's Bid for Pinnacle that had been mistakenly and erroneously made by Credit Suisse First Boston Australia Equities Private Limited (**CSFB**) as broker on behalf of certain of its clients (the **Disputed Acceptances**).

2. In Pinnacle No.10, Mr. David Pethard and Ronay Investments Pty Ltd (**Ronay**) applied under sections 657C, D and E of the Corporations Act for a declaration of unacceptable circumstances, interim orders and final orders from the Panel. The initial application related to a purported acceptance by CSFB on behalf of Ronay, in respect of some of its shares (the **Ronay Shares**) in Pinnacle, of Vanteck's takeover offer on Sunday 23 September 2001.

3. Mr Pethard and Ronay denied that Ronay gave any authorisation or instruction to its broker, CSFB, to initiate acceptance of the Bid and that accordingly, the acceptance was given as a result of a mistake by CSFB. They further alleged that because of the potential effect of Vanteck retaining the Disputed Acceptances could have on control of Pinnacle in the context of the Bid, that unacceptable circumstances arose and therefore the Disputed Acceptances should be unwound.

4. Vanteck also sought orders pursuant to section 657D of the Corporations Act for Mr Pethard and Ronay or CSFB to pay Vanteck's costs in relation to these proceedings.

5. The sitting Panel in this matter is Simon McKeon (sitting President), Kevin McCann (sitting Deputy President) and Chris Photakis.

6. The Review Panel met on 9 October 2001 and decided under Regulation 20 of the ASIC Regulations to conduct proceedings in relation to the Review Application.

INTERIM ORDERS

7. Vanteck sought interim orders pending conclusion of the review in identical terms to the interim orders made by the Pinnacle No.10 Panel on 28 September 2001 (**Interim Orders**). The form of those orders is set out in an Annexure to the Pinnacle No.10 reasons for decision.

8. We noted that, in anticipation of the Review Application, the Pinnacle No.10 Panel, in its final orders, had given continuing effect to its Interim Orders pending our decision in relation to the Review Application. Accordingly, we did not consider it necessary to make any new interim orders to the same effect as those orders.

9. However, as at the date of the Review Application, the Bid was due to close on 12 October 2001, and a general meeting of Pinnacle (which had been convened by Vanteck pursuant to section 249F of the Corporations Act and had previously been scheduled to occur on 1 October 2001) was due to take place on 15 October 2001 (**Pinnacle GM**).

10. We considered that, given the nature of the matters under review in these proceedings, it was unlikely that we would be in a position to reach a decision and have relevant information communicated to Pinnacle shareholders prior to the Pinnacle GM or the closing date for the Bid. Accordingly, we made interim orders requiring Vanteck to extend the closing date for the Bid until Friday, 19 October 2001 and Pinnacle to postpone the date for the Pinnacle GM until Monday, 22 October 2001. (See Annexure 1.)

FACTS

11. The facts set out in Annexure 3 of the Pinnacle No.10 Panel's reasons for decision are not disputed by the parties (with one exception about a relatively non-material time issue which is noted in that Annexure).

12. The events which led to the Disputed Acceptances being made by CSFB are also summarised in paragraphs 12 to 16 of the reasons for decision of the Pinnacle No.10 Panel. We do not propose to repeat them here.

13. After discovering the mistake, CSFB wrote to all of the CSFB Clients giving them each an opportunity to ratify the acceptance of Vanteck's offer. At the time of writing these reasons, the Review Panel has been informed of only one CSFB Client consenting to ratify their acceptance.

14. After we reached our decision and the Disputed Acceptances had been reversed, we were informed by CSFB that two further Pinnacle shareholders had immediately instructed CSFB to accept the Bid on their behalf.

BRIEF

15. We invited parties to make submissions in relation to the issues of law and policy surrounding the Disputed Acceptances. We informed parties that we had received copies of each of the submissions and evidentiary statements made to the Pinnacle No.10 Panel and that it would be counterproductive merely to repeat or restate arguments or evidence contained in that material. Accordingly, we sought submissions that dealt only with any additional arguments or evidence not contained in the material submitted to the Pinnacle No.10 Panel. Parties were at liberty to bring specific parts of previous submissions to the Review Panel's attention, by either referring to the document or restating the submissions and clearly identifying them as a restatement of an earlier submission.

BASIS FOR DECISION

Overview

16. Since the changes to the Corporations Act introduced in 1994, the Panel's power under section 657A is to declare *circumstances* to be unacceptable. This power must be exercised with regard to the *effect* of the circumstances on the control, or potential control of a company, or on the acquisition, or proposed acquisition, by a person of a substantial interest in a company or because the circumstances give rise to a contravention of the takeovers provisions of the Corporations Act. As the Panel's policy on unacceptable circumstances states:

    "It [unacceptable circumstances] does not depend upon the occurrence of unacceptable conduct or any intention to bring about an objectionable state of affairs. A state of affairs may be unacceptable due to inadvertence, and despite the best of intentions"

17. In this matter, the relevant circumstances arose because CSFB made a mistake by accepting the Bid on behalf of 17 of its clients without their authorisation. There was no suggestion that Vanteck was in any way responsible for this mistake. However, the effect of CSFB's mistake was to transfer 1,754,676 Pinnacle shares (representing approximately 3.11% of the voting power in Pinnacle) to Vanteck and to increase Vanteck's voting power in Pinnacle to approximately 35.38% shortly before the scheduled date of the Pinnacle GM (which had been convened by Vanteck to reconstitute the Pinnacle board).

18. In itself, in these circumstances the transfer of those 3.11% of Pinnacle shares had the potential to have a significant effect on the control of Pinnacle. However, the significance of CSFB's mistake was increased because 682,441 of the shares transferred were held by Ronay (a company associated with Mr Pethard) and Mr Pethard was both a vocal opponent of the Bid and one of the Pinnacle directors that Vanteck was seeking to have removed at the Pinnacle GM.

19. While CSFB was initially responsible for bringing about this state of affairs, immediately it became aware of its mistake, CSFB quickly took appropriate steps with a view to rectifying the problem. It telephoned Vanteck's share registry, ASX Perpetual Registrars Ltd (**ASXPRL**) early on the morning of Monday 24 September 2001 and followed up with a facsimile to ASXPRL that was received at 9.02am on that morning. It also communicated with Vanteck's lawyers, Freehills and sought to have the Disputed Acceptances withdrawn by entering further messages into CHESS pursuant to rule 16.5 of the SCH Business Rules.

20. Vanteck immediately rejected CSFB's request to withdraw the Disputed Acceptances. It also took immediate steps to process the Disputed Acceptances. The Vanteck Board approved the processing of the Disputed Acceptances at approximately 11.15am (AEST) on Monday 24 September 2001 (after ASXPRL, Freehills and Vanteck were aware that CSFB was seeking to withdraw the Disputed Acceptances on the basis they were made in error). Vanteck also sent a message to its Canadian share registry authorising the issue of shares in Vanteck as consideration for the acceptances (**Vanteck Shares**) at approximately 4.02am (AEST) on Thursday 27 September 2001 (after Vanteck was aware that the Pinnacle No.10 application had been made to the Panel on 26 September 2001).

21. In its submissions to the Review Panel, Vanteck submitted that it was reasonable for it to take these steps. Indeed, it contended that "no reasonable director could make a decision different to the one taken by Vanteck directors" in refusing to consent to the withdrawal of the Disputed Acceptances. In support of this submission, Vanteck argued that consenting to the withdrawal would have been:

    (a) in breach of the Corporations Act;

    (b) inconsistent with the duties of Vanteck's directors to act in the best interests of Vanteck; and

    (c) inconsistent with Vanteck's contractual rights.

22. We deal with these arguments in more detail later in these reasons. However, we consider that the approach taken by Vanteck once it was made aware of CSFB's mistake placed too much weight on technical legal arguments regarding Vanteck's rights and obligations and had insufficient regard to the principles set out in section 602 of the Corporations Act. Where a corporation makes a takeover bid under Chapter 6 of the Corporations Act, not only must it comply with the requirements of Chapter 6 but it must also ensure that its conduct does not contribute to the existence of unacceptable circumstances. In this matter, the Review Panel considers that Vanteck's conduct after it was made aware of CSFB's mistake, including its decision not to consent to reversal of the Disputed Acceptances and the steps taken to expedite processing of those acceptances, did contribute to the continuing existence of unacceptable circumstances.

23. In the circumstances, the Review Panel considers that it was appropriate to make a declaration of unacceptable circumstances and orders requiring Vanteck to consent to the withdrawal of the Disputed Acceptances. In our view, the relevant circumstances as outlined above were not consistent with the acquisition of control over the voting shares taking place in an efficient, competitive and informed market (see section 602(a) of the Corporations Act) and denied the CSFB clients a reasonable and equal opportunity to participate in the benefits provided by the Bid by denying them the choice whether or not to accept the Bid (see section 602(c) of the Corporations Act).

24. As noted above, Vanteck made a number of arguments in support of its submission that no declaration should be made in this matter. We did not accept these arguments. However, we will now deal with these arguments in turn.

Policy of Chapter 6

25. Vanteck submitted that there is nothing in Chapter 6 of the Corporations Act which suggests that Vanteck should not be entitled to enforce its legally binding contracts in relation to the Disputed Acceptances.

26. Vanteck further contended that the Panel's approach to policy issues such as those raised by these proceedings should be consistent and predictable and not *ad hoc* and unpredictable. In this regard, Vanteck submitted that it is not sufficient, on legal or policy grounds, for the Review Panel to base its consideration of the relevant issues on notions of "fairness".

27. In support of these submissions, Vanteck argued that it is important for participants in the Australian securities markets to be able to have confidence that, in the absence of extraordinary circumstances, the Panel will respect legally binding agreements and will give those agreements their full effect and operation. Otherwise, Vanteck submitted the market would be exposed to uncertainty.

28. It is clear that contractual and property rights must be read subject to the Panel's powers to make orders (including remedial orders) under section 657D of the Corporations Act. If the Panel declares circumstances to be unacceptable, it has an explicit power to make an order canceling a contract or directing a person to deal with property if it considers the order to be appropriate to ensure a takeover bid proceeds (as far as possible) in a way it would have proceeded if the circumstances had not occurred. Accordingly, the correct test in making orders affecting contractual rights is not whether there have been "extraordinary circumstances", but whether there have been unacceptable circumstances which make the order appropriate in accordance with section 657D.

29. The Review Panel does not accept Vanteck's submissions on this point and it is satisfied that the orders affecting Vanteck's contractual rights were clearly appropriate. The Disputed Acceptances represented a significant number of shares held by several shareholders, there was clear evidence that the Disputed

Acceptances were mistakenly made by CSFB, the error was notified to Vanteck almost immediately (and before Vanteck had taken any action in reliance on the Disputed Acceptances) and some of those acceptances were for shares held by interests associated with Mr Pethard – a vocal opponent of the Bid and a director of Pinnacle who had recommended Pinnacle shareholders not accept the Bid and had announced his intention not to accept the Bid. It is also relevant to note that if orders were not made requiring Vanteck to consent to the reversal of the Disputed Acceptances, the CSFB Clients would have had their shares sold, by acceptance into the bid, against their intentions.

30. Vanteck suggested that the Panel's decision may encourage a broker to seek to use the process under SCH Business Rule 16.5 to seek to withdraw acceptances made by it where the offeree had merely changed its mind, or in the case of a trust, where the trustee some time after giving the broker its instruction to accept, discovered that the instruction was contrary to the beneficiaries' wishes. CSFB submitted in response that it is unlikely that a broker would attempt to do so because this would breach their dealer's licence and expose them to losing their licence and their reputation in the market. The Review Panel agrees with CSFB's views on this issue.

31. The Review Panel does not consider that its decision to unwind the Disputed Acceptances will create uncertainty in relation to the CHESS System or securities trading generally in Australia. The Disputed Acceptances, the parties agree, were clearly made mistakenly and erroneously by CSFB on behalf of the CSFB Clients and without authorisation. That error was very quickly recognised by CSFB and communicated to Vanteck's registry and then to Vanteck. The transactions were not made in open trading on the stockmarket of the ASX and they were, at all times, processed in accordance with the relevant SCH Business Rules.

32. This is not a situation where the precedent value of the Review Panel's decision should, or will, be extrapolated to situations where a target shareholder merely changes their mind as to whether to accept an offer as Vanteck suggested may be the case. Rather, given the particular circumstances surrounding the Disputed Acceptances, the Panel considers that its decision will more likely provide the market with some certainty as to the behaviour the Panel considers appropriate by market participants in these circumstances.

33. In reaching this decision, the Review Panel is not applying an "ill-defined" or "idiosyncratic" notion of "fairness" as Vanteck alleged. The Review Panel has considered the effect of the relevant circumstances having regard to the principles set out in section 602 of the Corporations Act, the public interest and other matters considered relevant by the Review Panel.

Vanteck's arguments in support of its submissions

34. Vanteck raised the following additional arguments in support of its assertions:

    (a) that the application did not relate to the control or potential control of a company within the meaning of section 657A of the Corporations Act;

(b) that the Disputed Acceptances gave rise to binding contracts which Vanteck should be entitled to rely upon and should not be unwound;

(c) that the orders proposed by the Review Panel would unfairly prejudice Vanteck;

(d) that the orders proposed by the Review Panel would require Vanteck to take action:

(i) in breach of the Corporations Act; and

(ii) contrary to Vanteck's directors' fiduciary duties to the company;

(e) that the law of mistake would not permit the Disputed Acceptances to be unwound;

(f) that the SCH Business Rules provide an adequate remedy via the indemnity given by CSFB to its clients; and

(g) that Australian market practice in these circumstances is that a bidder has discretion whether to consent to reversal or not.

Jurisdiction – section 657A

35. In our opinion, the issues raised by the Review Application related to the control, or potential control, of Pinnacle within the meaning of section 657A of the Corporations Act.

36. As at 16 October, which is the date we considered the parties' submissions, Vanteck had a relevant interest in approximately 49.9% of Pinnacle shares on issue (calculated on the basis Vanteck had a relevant interest in the shares subject to the Disputed Acceptances). In those circumstances the transfer of up to 3% of the voting power in Pinnacle from shareholders, many of whom had not intended to accept the Bid, to Vanteck may have affected control of Pinnacle.

37. We consider that the questions before us in relation to the Disputed Acceptances related to the potential control of Pinnacle. Although whether or not Vanteck achieves a relevant interest in more than 50% of Pinnacle shares is an important threshold in relation to control, in other circumstances a lower or higher threshold interest may be relevant to questions of control (e.g. a 90% acceptance condition which would enable a bidder to proceed to compulsory acquisition).

Section 654A

38. Vanteck asserted that the Review Panel should not make any order unwinding the Disputed Acceptances because to do so would cause Vanteck to breach section 654A of the Corporations Act which prohibits, unless under circumstances not relevant to this matter, a bidder disposing of bid class securities during the bid period. Vanteck submitted that it is inappropriate to find that a failure to breach the law can amount to unacceptable circumstances.

39. The Review Panel does not accept that the policy of section 654A was intended to prevent, or prevail over, the Panel exercising its orders powers under section 657D to remove, or mitigate against, the effect of unacceptable circumstances such as those under consideration here. Requiring Vanteck to consent to the Disputed Acceptances being unwound in the manner requested by CSFB, appears to us to be something quite distinct from the harm against which section 654A is directed being to prevent a bidder offering to acquire securities under a bid and at the same time deliberately dispose of those securities.

40. If the Panel makes a declaration, its powers under section 657D(2) allow it to make any order it thinks appropriate to protect the rights or interests of any person affected and to ensure the bid proceeds as far as possible in a way that it would have proceeded had the circumstances not occurred.[1]

41. Taking that power into account, the Panel may make orders in appropriate circumstances which might result in a breach of another provision of the Corporations Act.

Binding Contracts

42. In addition to its submissions that the Disputed Acceptances made by CSFB created binding contracts between Vanteck and the CSFB Clients that Vanteck should be entitled to rely on, it argued that the proposed orders would deprive Vanteck of property it acquired under binding contracts in good faith.

43. It asserted that a declaration and orders would be inconsistent with Vanteck's contractual rights and would involve the Review Panel forcing Vanteck to make good an error made by a third party. By contrast, CSFB pointed out that acquisitions of shares in takeovers have taken place in a regulatory environment which has, since the early 1980s, included a power (originally vested in the Court and later the Panel) to cancel contracts where unacceptability has arisen. CSFB further submitted that these provisions have not resulted in a lack of confidence in market participants to acquire shares in Australian companies.

44. The Review Panel accepts Vanteck's submissions that the contracts formed by Vanteck with the CSFB Clients were formed in good faith by Vanteck and are legally binding, subject to any order made by the Review Panel. However, as stated in paragraph 22 above, we consider that the appropriate basis upon which we should base our decision is the policy set out in Chapter 6 of the Corporations Act rather than the enforceability of the contracts resulting from the Disputed Acceptances. Once we form the view that the circumstances in which the contracts were formed were unacceptable circumstances, then under section 657A(1) we have the power to declare them to be unacceptable and make orders under section 657D(2).

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[1] Note this expressly does not include a power to direct a person to comply with Chapters 6, 6A, 6B or 6C of the Corporations Act.

Directors' duties

45. Vanteck alleged that the Pinnacle No.10 Panel's orders required Vanteck's directors to take action causing Vanteck to give up its contractual rights contrary to the directors' duties to the company. Vanteck's submissions to the Pinnacle No.10 Panel argued that in the course of the Bid, it was in Vanteck's and its shareholders' best interests to obtain the maximum possible number of acceptances under the Bid.

46. While the directors of Vanteck may be required to act in the best interests of their corporation, if unacceptable circumstances exist, the Panel may make appropriate orders to address those circumstances. As a consequence, as noted in paragraph 22, directors may need to consider whether their actions will contribute to the existence of unacceptable circumstances in determining whether those actions are indeed in the best interests of their company. Accordingly, we do not consider that Vanteck's argument in relation to directors' duties carries much weight in these circumstances. Further, the Panel notes that it was open to Vanteck, especially after the decision of the Pinnacle No.10 Panel was made, to take steps to remove the circumstances declared to be unacceptable by that Panel. However, Vanteck immediately chose to institute an application for review arguing primarily along the same grounds it had in the initial proceedings and without introducing any new material that this Panel might consider relevant. In these circumstances, we consider that Vanteck's actions during and following the Pinnacle No.10 proceedings contributed to the continuation of the unacceptable circumstances.

Unfair Prejudice to Vanteck

47. Under section 657D, the Panel may not make an order that would unfairly prejudice any person. Vanteck submitted that it would not only be prejudicial to it to take away some 3% of Pinnacle's shares from Vanteck, but that it would also be unfair because takeovers rely on momentum and market confidence and can behave irrationally in times of uncertainty.

48. The Review Panel does not consider that any unfair prejudice will flow to Vanteck if the Review Panel orders the Disputed Acceptances to be unwound. This is because:

    (a) CSFB acted expeditiously to inform Vanteck that the Disputed Acceptances had been made in error and requested consent to reverse them. This was before the market would have been aware of the acceptances and before Vanteck commenced processing the Disputed Acceptances;

    (b) It was open to Vanteck to slow or suspend the processing of the Disputed Acceptances once it became aware of the mistake and the dispute – it chose not to do so. We note that Vanteck knew that CSFB had advised of its error before the Vanteck board meeting of 24 September, and knew of Mr Pethard's and Ronay's application to the Panel at the time it decided

to issue shares in Vanteck (**Vanteck Shares**) as consideration for acceptances under the Bid on 26 September 2001;

(c) If Vanteck is required to consent to reversal or withdrawal of the Disputed Acceptances, it will be returned to the situation in existence prior to the erroneous acceptances; and

(d) The CSFB Clients have the option to ratify their acceptance of Vanteck's offer or alternatively, to consider whether they wish to accept the offer for so long as the Bid remains open after the Disputed Acceptances have been unwound.

Law of Mistake

49. Vanteck acknowledged that, in order to determine whether unacceptable circumstances exist, the Panel must be guided by the factors set out in section 657A(3). However, it said that the Pinnacle No. 10 Panel was wrong to conclude that the law of mistake had no relevance to the decision to be made by that Panel. It submitted that the fact that the law would not set aside the contracts formed as a result of the Disputed Acceptances is a policy basis for the Review Panel deciding not to declare unacceptable circumstances.

50. The Review Panel agrees that, in appropriate cases, the Panel should consider the position the law might take in relation to the circumstances before it. In some circumstances, a legal argument may raise policy considerations that are relevant to the Panel's jurisdiction. However, a technical legal argument that does not raise any such policy considerations must be subject to the policy underpinning the Panel's powers as set out in sections 602 and 657A of the Corporations Act.

51. In this case we do not consider Vanteck's argument relating to the law of mistake has merit. In our opinion, the argument had insufficient regard to the factors which the Panel must take into account in the exercise of its powers. We agree with CSFB's submission that, although the Disputed Acceptances occurred as a result of its error, the question to be asked by the Review Panel is whether it is unacceptable for the Disputed Acceptances to stand rather than the applicability of the doctrine of mistake.

SCH Business Rules & Appropriate Remedies

52. The Review Panel notes Vanteck's, CSFB's and ASX Settlement and Transfer Corporation's submissions that the SCH Business Rules provide an indemnity in favour of Vanteck, Ronay and the CSFB Clients for any costs associated with the error by CSFB.[2] Vanteck submitted that this remedy would be adequate to recompense the CSFB Clients for CSFB's mistake. When the potential affect of Vanteck retaining the shares the subject of the Disputed Acceptances on control of Pinnacle is considered, it is difficult to conclude that for Ronay and the CSFB

[2] Rule 16.4.5 of the SCH Business Rules.

Clients to rely on the indemnity in rule 16.4.5 would provide an adequate remedy.

53. In addition, we note that the remedy which we, and the Pinnacle No.10 Panel, proposed would restore all parties to the position in which they found themselves had the unacceptable circumstances not occurred which is consistent with section 657D(2)(b) of the Corporations Act.

Previous instances of this kind of mistake having been made in Australia

54. CSFB cited in its submissions examples of previous bids in Australia where the bidders had willingly reversed acceptances of a takeover offer where it was clear that the acceptances had been made mistakenly by the broker and the broker acted promptly to notify the error and seek consent to withdrawal of the acceptances. Vanteck's solicitors submitted, in an affidavit supplied by ASXPRL, that such cases are rare and that even where they do occur, the bidder has the right to decide whether to give its consent to reversal. CSFB submitted that the Review Panel should give more weight to the evidence supplied by Computershare Investor Services Pty Ltd in its affidavit accompanying CSFB's submissions. It submitted that the usual practice is for bidders to accede to the request for withdrawal notwithstanding that the accepting shareholder may not have a legal right to withdraw their acceptance.

55. In addition, Vanteck submitted to the Pinnacle No.10 Panel that it would be an appropriate remedy for CSFB to purchase additional Pinnacle shares on-market at its own cost on behalf of the CSFB Clients.

56. We considered all of the parties' submissions carefully. While we acknowledge that under the SCH Business rules Vanteck is not required to give its consent to withdrawal of the Disputed Acceptances, we consider that requiring Vanteck to do so is the appropriate remedy in these circumstances. If CSFB were to buy Pinnacle shares on market to replace the Disputed Acceptance shares this would not redress the shift in voting power in Vanteck's favour resulting from the Disputed Acceptances. In addition, we are satisfied that Vanteck suffers no unfair prejudice if it is required to comply with an order requiring it to consent to reversal. Vanteck had previously informed the Pinnacle No.10 Panel that it is possible for Vanteck to cancel the Vanteck Shares issued as consideration to the CSFB Clients.

DECISION

57. The Review Panel considers that the events leading up to and arising out of the Disputed Acceptances mean that it is in the public interest for us to make a declaration of unacceptable circumstances having regard to the Eggleston Principles underpinning Chapter 6 of the Corporations Act. In particular we considered that it would not be consistent with a competitive, efficient and informed market if Vanteck were allowed to retain the Disputed Acceptances.

58. We also considered it relevant that Vanteck refused to consent to reversal of the Disputed Acceptances after it had been notified very quickly of the error by

CSFB when it was open to Vanteck to resolve the issue now before us, avoid the Pinnacle No.10 proceedings and indeed, these review proceedings.

59. The Review Panel's orders require Vanteck to consent to the Disputed Acceptances being reversed or withdrawn. They have the effect of putting the parties back into the position they would have been in if the unacceptable circumstances had not occurred. The Review Panel's orders are set out in Annexure 2.

Costs

60. The Review Panel sought submissions from parties as to whether it should make any orders as to costs in relation to these review proceedings. Submissions were received on 19 October 2001.

61. We note that the Pinnacle No.10 Panel made no order as to costs in those proceedings. We have decided to order Vanteck to pay the reasonable costs of the other parties in these review proceedings on a party – party basis.

62. The Review Panel considers that, in bringing the Review Application, Vanteck did not raise any arguments or issues of policy that had not been thoroughly considered in the Pinnacle No.10 proceedings. Accordingly, we do not consider that Vanteck advanced any material grounds for review of the Pinnacle No.10 Panel's decision.

63. In addition, we note that at all times since 24 September 2001 when the Disputed Acceptances were notified to it, Vanteck had an opportunity to cooperate with the other parties to reach a commercial solution to the dispute, or to apply to the Panel for consent orders if it believed that was necessary, that would have cost Vanteck little but which would have put the parties back to their original positions. Vanteck chose not to do so but rather chose to argue its position before the Review Panel without having any significant regard for the Eggleston principles but primarily on technical legal grounds.

64. Although CSFB was the party that caused the mistake giving rise to the issues put before us, we do not necessarily consider that this should be the basis upon which the Review Panel makes orders as to costs. In determining who should bear the costs of these proceedings we considered not only the mistake of CSFB which initiated the facts giving rise to these proceedings, but also the subsequent conduct of Vanteck in relation to that mistake and its conduct in relation to these proceedings.

65. While in appropriate cases a Panel might take into account circumstances where a mistake has been caused by a party's negligence, or has caused other parties to incur material costs, these circumstances do not appear in this matter. In relation to the Disputed Acceptances, the Review Panel considers that CSFB promptly admitted its mistake and took all necessary steps to try and remedy the situation.

66. We consider that an order of costs against a party may be appropriate where that party has applied for review of a decision but has been unable to adduce

new evidence or arguments or otherwise to demonstrate that there are issues which the Panel has found difficult to resolve. The Review Panel's orders (see Annexure 3) require Vanteck to pay only those costs that were actually, necessarily, properly and reasonably incurred by the other parties in these review proceedings. While the Review Panel notes that Vanteck may have certain claims against CSFB under the SCH Business Rules in relation to the Disputed Acceptances, the Review Panel would not consider it appropriate for Vanteck to seek to recover any of these costs as part of any such claim.

Simon McKeon
President of the Sitting Review Panel
Decision dated 16 October 2001
Reasons published 07 November 2001.

takeovers PANEL
CORPORATIONS ACT SECTION 657E
Interim order

Pinnacle VRB Limited
Application by Vanteck (vrb) Technology cORP

Vanteck (VRB) Technology Corp (**Vanteck**) has made an application under section 657EA of the Corporations Act for review by the Takeovers Panel (the **Review Panel**) of a decision under section 657A of the Corporations Act to declare that unacceptable circumstances exist in relation to the application by Ronay Investments Pty Ltd (**Ronay**) and Mr David Pethard dated 26 September 2001. The circumstances declared to be unacceptable circumstances relate to acceptances of the takeover offers (the **Bid**) made by Vanteck for Pinnacle VRB Limited (**Pinnacle**) which were made erroneously and mistakenly by Credit Suisse First Boston Australia Equities Private Limited (**CSFB**) on behalf of Ronay and other clients of CSFB on Saturday, 22 September 2001 and Sunday, 23 September 2001 (the **Acceptances**) and Vanteck's refusal to consent to withdrawal or reversal of the Acceptances.

The Bid is currently due to close on Friday, 12 October 2001 and a general meeting of Pinnacle's shareholders (the **Pinnacle EGM**) originally scheduled for Monday 1 October 2001 is now scheduled to take place on Monday, 15 October 2001.

PURSUANT TO SECTION 657E OF THE CORPORATIONS ACT, THE REVIEW PANEL ORDERS AS SOON AS PRACTICABLE AFTER THE DATE OF THIS ORDER:

1. Vanteck extend the offer period in relation to the Bid in accordance with the Corporations Act to close on a date not earlier than Friday, 19 October 2001; and

2. Pinnacle postpone the Pinnacle EGM to a date not earlier than Monday 22 October 2001.

Dated: 11 October 2001

Signed:

SIMON MCKEON

TAKEOVERS PANEL
CORPORATIONS ACT SECTION 657d
orderS

Pinnacle VRB Limited
Application by ronay investments pty ltd and mr david pethard

The Takeovers Panel (the **Panel**) has declared under section 657A of the Corporations Act that unacceptable circumstances exist in relation to the application by Ronay Investments Pty Ltd (**Ronay**) and Mr David Pethard dated 26 September 2001. The circumstances (the **Relevant Circumstances**) declared to be unacceptable circumstances relate to acceptances of the takeover offers (the **Bid**) made by Vanteck (VRB) Technology Corp (**Vanteck**) for Pinnacle VRB Limited (**Pinnacle**) which were made erroneously and mistakenly by Credit Suisse First Boston Australia Equities Private Limited (**CSFB**) on behalf of Ronay and other clients of CSFB on Saturday, 22 September 2001 and Sunday, 23 September 2001 (the **Acceptances**) and Vanteck's refusal to consent to withdrawal or reversal of the Acceptances.

PURSUANT TO SECTION 657D OF THE CORPORATIONS ACT, THE PANEL ORDERS THAT:

1. CSFB as soon as practicable sends a Valid Takeover Acceptance Removal Request message in accordance with the SCH Business Rules on behalf of the CSFB Clients;

2. Vanteck consents to, and authorises, the withdrawal or reversal of the Acceptances and instructs ASX Perpetual Registrars Limited to send a Valid Message in accordance with the SCH Business Rules as soon as practicable and in any event within one business day of CSFB making the Valid Takeover Acceptance Removal Request on behalf of Vanteck authorising the release of the fully paid ordinary shares in Pinnacle referred to in the schedule to this order (the **Relevant Securities**) to the parties named in respect of the Relevant Securities in the schedule (the **CSFB Clients**);

3. Vanteck and ASX Perpetual Registrars Limited not take any action to complete any transfer of the Relevant Securities to Vanteck;

4. Pinnacle not register any transfer or transmission of the Relevant Securities to Vanteck;

5. The securities clearing house (as defined in the Corporations Act) takes any action necessary to reverse or withdraw the Acceptances in respect of the Relevant Securities in accordance with the procedures set out in the SCH Business Rules;

6. Any contracts between Vanteck and the CSFB Clients arising as a result of the Acceptances are cancelled;

7. Vanteck not take any further steps to issue, or to complete the issue of, any ordinary shares in Vanteck (**Vanteck Shares**) as consideration for the Relevant Securities under the Bid;

8. Vanteck takes all action necessary to cancel the Vanteck Shares issued to the CSFB Clients and take no further steps to issue, or to complete the issue of, the Vanteck Shares;

9. The CSFB Clients not deal, in any way, with any of the Vanteck Shares that may have been issued as consideration for the Relevant Securities under the Bid or with any interest in any of those Vanteck Shares and not exercise any voting rights or other rights attached to the Vanteck Shares;

10. The CSFB Clients do all things reasonably required of them in order for Vanteck to cancel the Vanteck Shares that may have been issued as consideration for the Relevant Securities under the Bid; and

11. CSFB as soon as practicable notify the CSFB Clients of these orders and inform them of their right to attend and vote at the adjourned general meeting of Pinnacle to be held on Monday 22 October 2001 or to appoint a proxy or representative to attend and vote on their behalf.

Dated: 17 October 2001

Signed:

SIMON MCKEON

Schedule

SHAREHOLDER	**NUMBER OF RELEVANT SECURITIES**
Mrs Donna Margaret Luxton 62 Peel Street Redland Bay Qld 4165	11,000
Mr Edward Albert French & Mrs Lynne Shirley French PO Box 39 (Roys Road) Palmwoods Qld 4555	4,376
Mr Philip Ang 1122 Malvern Road Malvern Vic 3144	29,167
Mr Gavin Bust 6 Atheldene Drive Glen Waverley Vic 3150	1

Eastcoast Air & Electric Pty Ltd (Eastcoast Super Fund A/c) C/- S Pollard & M Bonnici PO Box 2020 Taren Point NSW 2229	30,000
Lazar Mayer Pty Ltd C/- H Jolson Room 1711 Owen Dixon Chambers West 205 William Street Melbourne Vic 3000	12,000
Mr Warren Sherry Neill 15 Vincent Court Campbelltown SA 5074	620
Mrs Mary Murray 22 Katrina Avenue Mona Vale NSW 2103	3,445
Mitpan Investments Pty Ltd 5 Paddys Lane Park Orchards Vic 3114	795,696
Ronay Investments Pty Ltd Unit 22 33 Queens Road Melbourne Vic 3004	682,441
Mr Benito Randazzo & Mrs Mary Fandazzo 56 Summerhill Road Reservoir Vic 3073	180
Mr Brian John Bugeja & Mrs Judyanny Elizabeth Bugeja 7 Thornton Close Hallam Vic 3803	10,000
Amecoy Pty Ltd 24 Packenham Street Mount Lawley WA 6050	90,000
Ms Jan Berg 24 Packenham Street Mount Lawley WA 6050	35,000
Mr Kurt Smyth & Mrs Beverley Smyth (Eighth Amacorp Pty Ltd SSF T A/C) 13 Market Street Essendon Vic 3040	9,000

Mr Ken Sturrock & Mrs Helen Sturrock (K&H Sturrock Superannuation A/C) C/- Cavendish Superannuation PO Box 7803 Cloisters Square WA 6850	36,750

TAKEOVERS PANEL
CORPORATIONS ACT SECTION 657d
orderS

Pinnacle VRB Limited
Application by ronay investments pty ltd and mr david pethard

The Takeovers Panel (the **Panel**) has declared under section 657A of the Corporations Act the circumstances in relation to the application by Ronay Investments Pty Ltd (**Ronay**) and Mr David Pethard dated 26 September 2001 to be unacceptable. The circumstances relate to acceptances of the takeover offers (the **Bid**) made by Vanteck (VRB) Technology Corp (**Vanteck**) for Pinnacle VRB Limited (**Pinnacle**) which were made erroneously and mistakenly by Credit Suisse First Boston Australia Equities Private Limited (**CSFB**) on behalf of Ronay and other clients of CSFB on Saturday, 22 September 2001 and Sunday, 23 September 2001 (the **Acceptances**) and Vanteck's refusal to consent to withdrawal or reversal of the Acceptances.

Pursuant to section 657D of the Corporations Act, the Panel orders that:

1. Vanteck pay the legal costs of the parties to the proceedings in the matter of Pinnacle No.11 on a party-party basis using the Federal Court scale; and

2. Vanteck pay the non-legal costs of the parties to the proceedings in the matter of Pinnacle No.11 reasonably incurred by those parties.

Dated: 7 November 2001

Signed:

SIMON McKEON