



In the matter of Bigshop.com.au Limited (No. 2)
[2001] ATP 24

Catchwords:

Review of Panel decision – proposed placement of shares – implementation of placement without shareholder approval – allegation of frustrating action – breach of bid’s defeating conditions – bidder’s conditions not unusual – uncertainty in the market – caretaker directors – directors’ conduct – meaning of “control”

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

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

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

On 15 October 2001, we decided that the proposed placement of Bigshop shares to Macquarie and related advisory agreements could be said to be likely to lead to the defeat of Fast Scout’s bid. Therefore, we advised Bigshop that to implement the Proposed Placement without shareholder approval would constitute unacceptable circumstances. We decided not to make a declaration of unacceptable circumstances in response to the application by Fast Scout Ltd dated October 2001 seeking review of an earlier Panel decision (Bigshop 01) not to make a declaration of unacceptable circumstances. On 15 and 25 October we accepted various unsolicited undertakings from Fast Scout to improve its bid and on 17 October made orders to ensure that Fast Scout’s bid could be put to Bigshop shareholders and that Bigshop shareholders could decide the future of their company in the most efficient manner possible.

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 Justice RP Austin (sitting President), Simon Mordant (sitting Deputy President) and Karen Wood.
2. Fast Scout Ltd ("Fast Scout") has asserted that a proposal ("Proposal") by Bigshop.com.au ("Bigshop") would constitute "frustrating action". The proposal, announced on 28 August 2001 had three elements:
 - a. a placement of 10 million Bigshop shares ("Placement") to Macquarie Bank Ltd ("Macquarie");
 - b. entering into an advisory agreement with Macquarie Technology Investment Banking; and

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- c. Macquarie would assist in finding up to three additional non-executive directors to be appointed to the board of Bigshop.
The announcement set out a number of conditions to which the Proposal was subject.
3. On 27 September, the Bigshop 01 Panel decided that the Proposal would not constitute frustrating action, and therefore would not constitute unacceptable circumstances.¹
4. The facts leading up to the application to this Panel (“Review Panel”) are essentially identical to those facing the Bigshop 01 Panel, and we extract the majority of the factual analysis below from the Bigshop 01 reasons for decision.

Bigshop

5. Bigshop floated in April 2000. It issued 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).
6. Bigshop has retained the 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.
7. Bigshop shares have 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

8. 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.

¹ “See *Bigshop.com.au Limited* [2001] ATP 20.”

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9. Fast Scout became a substantial shareholder on 13 June 2001 and increased its shareholding to 10.2% on 30 July, 10.7% on 28 August, 14.8% on 13 September and decreased its holding to 12.6% on 18 September, which was the last notice given by Fast Scout.
10. On 8 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.
11. On 30 July Fast Scout withdrew that intention to make a pre-conditional offer and announced its further intention to make a new 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 revised to 7.8 cps. Fast Scout noted in its announcement that its pre-condition may not be met.
12. ASX Listing Rule 7.9 prohibits a listed entity from issuing shares in the three months after the listed entity is advised of the making, or a person's intention to make, a takeover bid for the listed entity, except with shareholder approval. On 30 August, Fast Scout met with ASX. ASX advised Fast Scout that in its view, the three month period under Listing Rule 7.9 would end on 14 September, three months after Fast Scout's first announcement, and would not restart from Fast Scout's second announcement on 30 July.
13. 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

14. 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 Macquarie assisting in finding up to three additional non-executive directors (the "**Proposal**" and the "**Placement Announcement**").
15. 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.

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16. The Proposal also included the proposed placement of 2 million options to Macquarie but consideration of that is secondary to the other issues.
17. 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. During the Bigshop 01 matter, Bigshop and Macquarie offered to reduce the size of the placement to 6.67 million Bigshop shares. The Bigshop 01 Panel accepted that offer, so the proposal before the Review Panel was for 6.67 million shares.

The Uncertainty Factor

18. 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 ambiguous and constituted unacceptable circumstances. Fast Scout said that Bigshop's announcement was ambiguous as to the status of the Proposal in the event that either:
 - a) ASX had not yet refused or approved Fast Scout's application for consent; or
 - b) Fast Scout waived the condition in its announcement that ASX grant the Listing Rule 9.17 waiver.

As a result of this ambiguity, Fast Scout said, that it, and the market, were unsure whether Bigshop was entitled to (or required) to proceed with the Proposed Placement in accordance with the Agreement as of 14 September 2001.

19. Fast Scout advised that the only reason it knew that Bigshop intended to proceed with the Proposed Placement on 14 September, was on the basis of discussions with an employee of Macquarie on 12 September 2001.
20. In the event, ASX did refuse Fast Scout's application on 14 September 2001, so, by the time the issue was before us it was of historical significance, which might warrant censure but required no remedial action.

ASX Listing Rule 7.9 Waiver

21. 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.

Bigshop EGM to Spill Board

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22. 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 was to be held on 26 October 2001. Fast Scout offered further undertakings concerning these resolutions which influenced the orders we decided to make.

The Application

23. In its Review Application, Fast Scout asserted that Bigshop's amended proposed placement of 6.67 million Bigshop shares (at 7.5 cps) (the **Placement**) would give rise to unacceptable circumstances under Chapter 6 of the Corporations Act.
24. 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.
25. Fast Scout requested the Review Panel to:

*“set aside the Decision and substitute a new decision making a declaration under section 657A of the Act to the effect that the following circumstances (or one or more of the following circumstances) constitute unacceptable circumstances in relation to the affairs of Bigshop.com.au Ltd ("**Bigshop**"):*

- (a) *Bigshop's failure to*
- (i) *make clear in its announcement of 28 August 2001 the effect of the conditions attached to the conditional contract (the "**Agreement**") entered into between Bigshop and Macquarie Bank Limited ("**MBL**") and its understanding as to the operation of Listing Rule 7.9 with respect to the proposed placement of 10 million ordinary shares and the issue of 2 million options to MBL (the "**Proposed Placement**");*
 - (ii) *make clear to the market that, despite Listing Rule 7.9, Bigshop would seek to proceed with the Proposed Placement on or shortly after 14 September 2001, without shareholder approval, even if the bids announced by Fast Scout on 30 July 2001 (the "**Bids**") were still on foot.*
 - (iii) *make clear the fee structure which applies to the appointment of MBL as financial adviser.*
- (b) *Bigshop entering into the Agreement and thereby:*
- (i) *agreeing, in response to the bids announced by Fast Scout on 13 June 2001, to increase the number of shares to be issued to MBL from 6.667 million shares to 10 million shares; and*

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- (ii) *agreeing to accept obligations which could require the issue of shares and options to MBL, without shareholder approval, while the Bids were still on foot.*
 - (c) *Bigshop's refusal to provide the undertaking proposed in the letter from Fast Scout's solicitors dated 12 September 2001, or any suitable alternative undertaking (other than the undertakings since provided to the Sitting Panel).*
 - (d) *Bigshop's refusal to make application for a waiver from Listing Rule 9.18 to permit holders of restricted securities to accept Fast Scout's bid in response to the facsimile of ASX to Gilbert & Tobin and Fast Scout dated 14 September 2001.*
26. Fast Scout reserved the right to seek final orders, in the event that the Review Panel made a declaration of unacceptable circumstances in relation to any one or more of the circumstances referred to above.

Proceedings

27. The Review Panel met on 8 October. It decided to conduct proceedings in relation to the application for unacceptable circumstances. We issued a brief under regulation 20 on 10 October. It sought submissions on 11 October and rebuttals on 12 October. The time frames were short, but the parties had had the benefit of their preparations under Bigshop 01, they had had the application for a week, and we had prepared them by a number of preparatory process letters.
28. We met again on 14, 15 and 17 October and made the present decision.

FURTHER DEVELOPMENTS

29. Like the proceedings in Bigshop 01, a number of circumstances changed during proceedings. We discuss these, and their influence on our decision and reasons below.
30. One change was that during the proceedings, Fast Scout actually did dispatch its offers (following a further application to the Bigshop 01 Panel to facilitate). This gave the Review Panel comfort that Fast Scout's bid had, at least, eventuated.
31. The primary change was that in its submissions in response to the brief, Fast Scout offered a series of undertakings that would materially improve the terms of its offer. Those undertakings were conditional on Macquarie agreeing, or the Panel ordering, that no placement would take place prior to Fast Scout's proposed resolution to replace the Bigshop board. We set out those offered undertakings below.

“Undertakings concerning meeting

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.....

Fast Scout is prepared to undertake as follows to the Panel, provided no shares or options are issued to Macquarie without Fast Scout's agreement:

- a) *If the resolutions to remove the current directors of Bigshop are **defeated** at the meeting on 26 October 2001 (the "**26 October 2001 Meeting**"), Fast Scout will immediately announce that it will not waive any breach of its bid conditions, and will seek ASIC's consent under section 652B to withdraw its offers.*
- b) *If the resolutions to remove the current directors of Bigshop are **passed** at the 26 October Meeting, Fast Scout will immediately:*
 - (i) *give notice to free its bid from all conditions except the conditions in clause 5.1 (a) (prescribed occurrences), (b) (prescribed occurrences prior to bid period), (c) (minimum cash holding), (d) (minimum liabilities), (f) (material adverse change to assets), (g) (material adverse change to financial position) and (i) (25% minimum acceptance);*
 - (ii) *announce that it will not seek to rely on any of its bid conditions with respect to breaches resulting from Bigshop entering into the Agreement; and*
 - (iii) *increase the consideration offered from 7.8 cents per share to 9 cents per share.*

Undertakings concerning restricted shares

.....

Fast Scout is prepared to undertake to the Panel that:

- f) *provided no shares or options are issued to Macquarie without Fast Scout's agreement; and*
- g) *no waiver is granted by ASX prior to the close of Fast Scout's offer,*

Fast Scout will, subject to ASIC providing any necessary relief, vary the proportion of each shareholders' shares to which Fast Scout's offer applies from 51% to 65%.

THE REVIEW PANEL'S DELIBERATIONS

32. The following set out the Review 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

33. 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

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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. An example could be a transaction which was clearly for the commercial advantage of the company and so motivated. If it were far advanced at the time the bid was announced and not designed to forestall a future bid, it may be contrary to the interests of target members to require that transaction be submitted for approval, particularly where that course could jeopardize that transaction going ahead at all."; and

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

34. The first issue which the Review Panel considered was whether the Proposed Placement would have the effect of triggering a bid condition which is likely to lead to the defeat of the bid.
35. The Review Panel accepted Fast Scout's assertion that the proposed placement to Macquarie and arrangements to add up to three directors would be likely to lead to the defeat of the bid, and therefore unreasonably reduce the prospect of it achieving effective control of Bigshop under its bid.
36. Like the Bigshop 01 Panel, the Review Panel considered that it should apply a materiality test in considering whether the Proposed Placement could constitute unacceptable circumstances. On balance, we came down on the side of the placement being likely to lead to defeat of the bid if it went ahead. In the absence of shareholder approval, implementation of the Proposed Placement would be frustrating action.

Control

37. In considering the materiality test as to whether the Proposed Placement could constitute frustrating action we considered that it was reasonably open to Fast Scout to assert that it could achieve its stated objective of "effective control" of Bigshop, under its partial takeover bid for Bigshop, if it acquired at least 25%.
38. On that basis, a placement of 6.67 million Bigshop shares could make it more difficult for Fast Scout to achieve control of Bigshop and therefore could constitute frustrating action.

Additional Information

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

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39. Fast Scout asserted that the Review Panel should seek a range of information on previous voting patterns, current voting intentions, shares held by current and former directors and their associates, and to confirm aspects on oath. The Review Panel does not consider that, in this matter, these would have been relevant facts to the decision. We decided not to seek that sort of information. We considered that it would require the Review Panel to enter into speculation into the support for various future resolutions which we considered unnecessary.

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

40. The Review 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.
41. In considering this application, the Review Panel took note of the decisions of the Panel and Review Panel in Pinnacle VRB Ltd (Nos. 5 & 8).³

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

42. The Review Panel agrees with the Bigshop 01 Panel when it said that bidders should, within the confines of the Corporations Act, be entitled to make their bids conditional on the terms which they choose. The Review Panel does not seek, in its frustrating action considerations, to limit bidder's conditions, subject of course to the Corporations Act. The Review Panel also agrees with the Bigshop 01 Panel in saying that 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.
43. 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
44. The Review Panel considers that Fast Scout's conditions are not unusual for a person bidding for a target whose primary asset is cash. The Panel considered that, on balance, Fast Scout would be reasonably entitled to rely on its defeating conditions if the Proposed Placement went ahead.
45. The Review Panel does not, however, endorse any view that any breach of a bid's defeating conditions necessarily would constitute frustrating action. For example, an issue of a relatively small number of shares, say under an employee option plan, may well breach a condition of a bid, but not constitute such a threat to the success of a bid for control to warrant the bidder describing it as frustrating action. In such circumstances, the bidder may be

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

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entitled to allow its bid to close (though the reasonableness of doing so will depend on all the circumstances), but might not get support from the Panel to prevent the issue of the shares or require the issue to be put to shareholders.

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

46. The Review Panel does not think either Bigshop or Macquarie made a compelling case that there was any commercial imperative for the Proposal. 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”.

Bigshop has had it within its power to call a meeting of shareholders to approve the proposed placement.

47. The Review Panel agrees with the Bigshop 01 Panel that Bigshop appears to have been in a position since 13 June 2001 to convene a meeting of Bigshop shareholders to ratify the elements of the Proposal (which substantially haven't changed since 13 June) and has chosen not to do so. This was a material fact in our considerations. Given that the proposal was under communication for some time, Bigshop had at least four clear triggers to do so; after 13 June, 30 July, or 28 August, and when asked by the Bigshop 01 Panel.
48. The Review Panel agrees with the Bigshop 01 Panel that this would have been a sensible course of action by Bigshop and would have obviated the need for these proceedings.

Delays by Fast Scout

49. The Review Panel considers that the delay by Fast Scout in putting its bid before Bigshop shareholders has been unacceptable. The threat of a takeover bid causes targets some degree of hardship in reducing their abilities to act quickly in uncertain business times and to seize opportunities as they arise.
50. The Review Panel considers that Fast Scout should have made far better preparations for its applications for Listing Rule waivers from ASX and should have been far more advanced before it made any announcement to the market concerning its bid.
51. It is irresponsible for persons to make announcements to the market which will have significant effects on the price of their own shares and those of other listed entities without having made adequate preparations. Once it made its announcements Fast Scout appears still to have delayed unacceptably in preparing and making its applications to ASX in the first and second cases. The Review Panel does not accept the reasons given by Fast Scout as being any reasonable basis for the delay in prosecuting these important applications.

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

52. Fast Scout requested the Review 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 Review Panel agrees with the Bigshop 01 Panel in saying 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 Review Panel does not consider that the current matter constitutes such exceptional circumstances.

Uncertainty in Bigshop's 28 August Announcement

53. The announcement by Bigshop on 28 August was unclear as to the status of the Proposal if ASX had not yet determined whether or not to grant the waiver by 14 September. Although a small point, that was undesirable, and could have led to undesirable uncertainty in the market for Bigshop shares. In the event, ASX did make the decision on 14 September. The Review Panel considers that Bigshop, and other listed entities in future, should frame their conditions and announcements more carefully, to avoid this type of uncertainty.
54. In addition, and of more material concern, Bigshop did not provide any timely update after 14 September as to the ongoing status of the Proposal. Given the material uncertainties surrounding the applications to the Panel and the contest between Bigshop and Fast Scout it would have been far more desirable for Bigshop to have given regular notice to its shareholders and the market concerning the ongoing status of the Proposal as different circumstances emerged.

Caretaker Directors

55. The Review Panel agrees with the views of the Bigshop 01 Panel on the issue of whether Bigshop directors should have considered themselves to be in caretaker director mode. The arguments put forward by Fast Scout were not persuasive to the Review Panel under the current circumstances.

ORDERS

56. The Review Panel provided parties with its draft decision and orders on 15 October. The decision was that the Macquarie Proposal should not go ahead without Bigshop shareholder approval while the Fast Scout bid is still viable.
57. The Review Panel received submissions from all parties and advised parties on 17 October of its decision as to the orders it proposed to make. Fast Scout was concerned that the Panel, while originally contemplating a declaration of

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unacceptable circumstances, had decided that it should rather make interim orders and suspend its proceedings until after the relevant meetings. Fast Scout requested an opportunity to make further submissions. On 19 October the Panel agreed, and listed the issues on which Fast Scout was invited to make further submissions.

58. Fast Scout responded on 19 October. Its primary concern was that the Panel not postpone the Bigshop EGM from 26 October until after the Proportional Bid Resolution meeting. Fast Scout also noted that its original undertaking was expressed in terms of the meeting being held on 26 October. Fast Scout later remade its undertaking in essentially similar terms to those previously offered. Fast Scout also indicated to us that the improved terms of its offer would not be available to Bigshop shareholders if the Proposed Placement were to proceed.
59. The Review Panel offered Bigshop and Macquarie the opportunity to make submissions in response to Fast Scout's 19 October submissions and received them on 23 October. The Review Panel met again on 24 October and decided that the further submissions from parties did not materially alter the information before it or the decision that should flow from that information.
60. In response to the submissions it received the Panel resolved to make the orders which are annexed to these reasons.
61. The intention of these orders is to ensure, as far as possible, that the shareholders of Bigshop make informed decisions on the two alternatives for the future of their company in the most efficient and clear way possible.
62. The effect of these orders, and our reasons for making them are as follows:

Order 1

*Bigshop.com.au Limited (**Bigshop**) postpone the Extraordinary General Meeting (EGM) currently due to be held on 26 October 2001, until after the EGM which is currently due to be held on 2 November 2001;*

63. The Panel considered that the three issues relating to control of Bigshop i.e. Fast Scout's takeover, the replacement of the Bigshop board (the "Spill Resolution") and the Macquarie Proposal, had become inextricably linked, not least of all because of the improved terms of the takeover that were offered in Fast Scout's undertakings. There are a number of possible permutations and combinations of the passage of those relevant resolutions which we endeavour to address and explain below.
64. Because the takeover is most central to control of Bigshop, and various other things flow from whether the takeover proceeds, we considered that Bigshop's shareholders should know the result of the Proportional Bid Resolution first.

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Consequently we ordered that the other meeting be postponed until after meeting to put the resolution under section 648E⁴ had been decided. Fast Scout and its associates may not vote on that resolution (section 648D(1)(b)).

65. If the Proportional Bid Resolution is lost, Fast Scout's bid will not proceed and the Macquarie Proposal would not then constitute frustrating action. Bigshop directors should then act according to what they, as the board of the company, consider is in the best interests of Bigshop. The Review Panel would not object to the Macquarie Proposal then proceeding if the board of Bigshop consider that to be in the best interests of Bigshop. The Review Panel would not consider it to constitute unacceptable circumstances for the Bigshop board to proceed with the Macquarie Proposal prior to the meeting to consider the Spill Resolution⁵.
66. However, if the Proportional Bid Resolution is passed the Macquarie Proposal would still be restrained without shareholder approval. Under Fast Scout's original undertaking to the Review Panel on 11 October, Fast Scout undertook that if the Spill Resolution failed, Fast Scout undertook to the Panel to withdraw its bid (subject to ASIC's consent to allow Fast Scout to withdraw its bid). However, Fast Scout's later undertaking did not include this provision.
67. Weighing up these matters, the Panel decided that there was no need for it to order a resolution of Bigshop shareholders to vote on the Macquarie Proposal.

Order 2

Bigshop prepare and send to Bigshop shareholders, as soon as possible, supplementary information, for the purposes of both meetings, concerning the new circumstances which Bigshop shareholders face and the undertakings provided by Fast Scout in its submissions to the Panel dated 11 October 2001.

68. Given that it appears highly likely that the Bigshop shareholders will never actually vote on the Macquarie Proposal, the Proportional Bid Resolution and the Spill Resolution will become de facto votes on the Macquarie Proposal. Therefore we required the Bigshop board to prepare and send supplementary information to Bigshop shareholders for the purposes of both the Proportional Bid Resolution and Spill Resolution meetings to provide them with information on the Macquarie Proposal, the revised terms of the bid proposed

⁴ Bigshop, like many other companies, has provisions in its constitution which require approval from shareholders not associated with the bidder for a proportional takeover to proceed. Section 648E requires the directors of the target company to ensure that such a resolution ("Proportional Bid Resolution") is voted on by the target company shareholders (otherwise the approval is deemed to have been given).

⁵ The Review Panel does not intend this to be a statement expressing any opinion beyond what it says on its face, i.e. it is concerned only with this Panel's view on unacceptable circumstances.

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under Fast Scout's undertakings, and the new significance of the two resolutions. Bigshop had undertaken to do so in its submission of 16 October in response to the Review Panel's draft decision and orders.

69. We considered that the Bigshop directors are the proper persons to prepare that information for their shareholders and to determine the earliest date on which the Proportional Bid Resolution meeting could be held. There is nothing to prevent Fast Scout sending additional material to Bigshop shareholders in support of its proposals.

Order 3

Bigshop include (with the consent of Macquarie Bank Ltd) in the supplementary information, a clear statement of the continuing viability of the proposed placement to Macquarie, and associated arrangements referred to in Bigshop's announcement of 28 August 2001, in the event that the section 648E of the Act resolution is rejected at the EGM due on 2 November 2001;

70. We considered that the Bigshop shareholders should be given adequate information as to whether the Macquarie Proposal was still available as an alternative for the future of their company (which is how it has been so far portrayed by both sides) when they considered whether or not to approve the Proportional Bid Resolution and the Spill Resolution. It would be unacceptable for Bigshop shareholders to reject those and not to have the Macquarie Proposal still available to Bigshop, unless that had been made abundantly clear to Bigshop shareholders prior to the votes.

Order 4

Bigshop also supply to its shareholders all necessary and appropriate information regarding withdrawal or replacement of any proxies for either of the EGMs, in the light of the new information.

71. The Review Panel was concerned that Bigshop shareholders who had already lodged proxy forms in relation to their shares should be provided with advice on withdrawing and lodging new proxies in light of the new implications of the Proportional Bid Resolution and the Spill Resolution.

Order 5

The two EGMs referred to above be held no later than 16 November 2001.

72. The Review Panel is concerned that the events described above have already delayed resolution of the Fast Scout bid and the Macquarie Proposal for an excessively long time. The Review Panel therefore ordered that the process be completed before 16 November 2001.

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Order 6

Fast Scout takes all steps reasonably necessary to prosecute its bid if the resolution under section 648E is passed at the EGM due on 2 November 2001, and the resolutions proposed for the EGM currently scheduled to be held on 26 October 2001, are passed.

73. The Review Panel was concerned that Bigshop shareholders may be induced to support the Proportional Bid Resolution and the Spill Resolutions in order to have the opportunity to participate in the benefits offered under the Fast Scout bid, as modified under the undertaking given to the Review Panel. If this may be the case, then Fast Scout should be formally required to proceed with the bid and the improved benefits with all due haste. It would be unacceptable for Bigshop to be subject to a longer period of uncertainty, or for the Bigshop shareholders not to be able to participate in the benefits offered in Fast Scout's undertaking, through any delay or failure to act by Fast Scout.

Order 7

Fast Scout not extend its bid to be open for a period of more than three months in total unless Fast Scout's bid is unconditional at the time of the extension or the board of Bigshop consents to the extension.

74. Fast Scout gave the Bigshop 01 Panel an undertaking that it would not extend its bid, in a conditional form, to the harm of Bigshop. That undertaking was conditional on the Proportional Bid Resolution and Spill Resolutions being held by 2 November. If the meetings may be postponed because of the Panel's orders, it is appropriate to require Fast Scout to extend that undertaking correspondingly.

Remaining Uncertainty for Bigshop shareholders

75. The decision before Bigshop shareholders at the Proportional Bid Resolution meeting will still be subject to some uncertainties, which we consider less than desirable but acceptable in order to place the proposals before them within reasonable time. The uncertainties primarily relate to the undertakings given by Fast Scout.

Withdrawal of the bid:

76. In its initial undertaking to the Review Panel of 11 October, Fast Scout undertook to seek ASIC's consent to withdraw its bid in the event of the Spill Resolution not proceeding. At the time that Fast Scout gave that undertaking to the Panel ASIC had given Fast Scout no indication as to whether it would consent in such circumstances because Fast Scout had not approached ASIC for its views on the issue. See paragraph 51 above for our views on persons making statements or announcements which might affect the market without having made adequate preparations to deliver on those announcements.

Conditions:

Takeovers Panel

Reasons for Decision – Bigshop.com.au Ltd 02

77. The Fast Scout bid will still be subject to a large number of defeating conditions which may or may not be met.

Improve the Proportion:

78. Fast Scout's undertaking⁶ to improve the proportion of Bigshop shareholders' shares which it will offer to acquire for 9 cents per share, from 51% to 65%, is conditional on ASIC's consent, of which Fast Scout had no advice or views from ASIC when it offered the undertaking to the Review Panel, and is conditional on Bigshop shares currently held in escrow not being able to be accepted into the Fast Scout bid⁷.
79. Fast Scout has now also undertaken to the Review Panel to seek ASIC's in principle views on the necessary modification of the Corporations Act, as soon as possible and to provide them to the Bigshop shareholders as soon as possible. Fast Scout has advised the Review Panel that ASIC has advised that it will not be in a position to comment until Fast Scout has provided a detailed application and ASIC has had an opportunity to consider any comments from third parties.
80. The Review Panel will expect Fast Scout to advise Bigshop shareholders whether or not, and under what circumstances, it would continue to seek, and accept a waiver of ASX Listing Rule 9.17. This will only become necessary if the bid proceeds, the Proportional Bid Resolution and the Spill Resolutions having been passed. In such a case it appears that the granting of such a waiver will be fully within Fast Scout's control.

DECISION

81. On balance, and on the evidence and circumstances before us, we think that implementation of the amended Proposal (including the placement of 6.667 million shares, and the commitment of a fee of \$150,000 p.a., and the assistance of Macquarie to find up to three additional directors for the board of Bigshop) would constitute circumstances which the Review Panel should declare to be unacceptable circumstances if it is implemented without shareholder approval, while Fast Scout's bid is viable.

Robert Austin
President of the Sitting Panel
Decision dated 17 October 2001
Reasons published 2 November 2001

⁶ Made in both the initial and final undertaking.

⁷ The Review Panel understands that the escrow shares could be accepted into the bid if ASX grants a waiver to Listing Rule 9.17 or Fast Scout's bid is extended until May 2002 when the shares come out of escrow.

TAKEOVERS PANEL
CORPORATIONS ACT SECTION 657E
INTERIM ORDERS

Bigshop.com.au limited
Application by fast scout limited

On 17 October 2001, the Takeovers Panel (the **Panel**) decided to make interim orders under section 657E of the Corporations Act (the **Act**) in relation to an application dated 2 October 2001 by Fast Scout Limited (ACN 088 488 724) (**Fast Scout**) under section 657EA of the Act.

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

1. Bigshop.com.au Limited (**Bigshop**) postpone the Extraordinary General Meeting (**EGM**) currently due to be held on 26 October 2001, until after the EGM which is currently due to be held on 2 November 2001;
2. Bigshop prepare and send to Bigshop shareholders, as soon as possible, supplementary information, for the purposes of both meetings, concerning the new circumstances which Bigshop shareholders face and the undertakings provided by Fast Scout in its submissions to the Panel dated 11 October 2001;
3. Bigshop include (with the consent of Macquarie Bank Ltd) in the supplementary information, a clear statement of the continuing viability of the proposed placement to Macquarie, and associated arrangements referred to in Bigshop's announcement of 28 August 2001, in the event that the section 648E of the Act resolution is rejected at the EGM due on 2 November 2001;
4. Bigshop also supply to its shareholders all necessary and appropriate information regarding withdrawal or replacement of any proxies for either of the EGMs, in the light of the new information;
5. the two EGMs referred to above be held no later than 16 November 2001;
6. Fast Scout takes all steps reasonably necessary to prosecute its bid if the resolution under section 648E is passed at the EGM due on 2 November 2001, and the resolutions proposed for the EGM currently scheduled to be held on 26 October 2001, are passed; and
7. Fast Scout not extend its bid to be open for a period of more than three months in total 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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Subject to section 657E(2) of the Act, these orders will have effect for two months from today.

Dated: 17 October 2001

Signed:

Robert Austin

President