

In the matters of BRISBANE BRONCOS LTD (No. 1) and (No. 2)

These are our reasons for refusing applications made by BB Sports Pty Ltd (“News”) and by ASIC for declarations of unacceptable circumstances and orders in relation to the affairs of Brisbane Broncos Ltd (“Broncos”), because Magic Millions League Pty Ltd (“Magic Millions”) had announced but not made a takeover bid for Broncos and because of the terms of an announcement by News that it would bid for Broncos.

Background

1. The Panel was constituted by Jenny Seabrook (sitting President), Denis Byrne (sitting Deputy President) and Peter Young.
2. This matter concerns two announcements of takeover bids for Broncos, a listed company which operates a rugby league football team. Those announcements appear to have resulted from disputes between rival substantial shareholders in Broncos over control and direction of Broncos. Once made, they took on lives of their own, attracting the general legislative policy that misleading public statements not be made in connection with takeovers (or, indeed, with the securities markets) and the specific requirement in section 631 of the *Corporations Act* that a person who announces a takeover bid must make a bid in accordance with the announcement.
3. On 29 November 2001, Magic Millions announced to ASX that it would make a takeover bid at 16 cents per share for 50% of each shareholder's holding in Broncos. The announcement stated that Magic Millions was associated with Mr John Singleton and that Mr Singleton had relevant interests in 19.58% of Broncos shares. It also mentioned that a subsidiary of The News Corporation Limited had a relevant interest in 44.5% of the shares and that for a number of years the News group had held 40% or more of the Broncos and many of the directors have been associated with the News group. It said that the bid would be conditional as to prescribed occurrences, but that it would not be conditional as to acceptances. It nonetheless described Magic Millions' intention as being to secure a better return for all shareholders.
4. In the months before this announcement was made, Broncos shares had generally traded at 13 or 14 cents, or lower. Since then, they have traded at 16 to 18 cents.
5. On 14 December BB Sports Pty Ltd, a wholly-owned subsidiary of The News Corporation Limited, announced that it would bid for all of the shares in Broncos at 17 cents, subject to prescribed occurrences and a condition (the **cross-condition**, which is discussed below) to the effect that neither ASIC nor Panel action nor any other event should permit Magic Millions to withdraw its bid or to make it other than in accordance with the timing requirements of the Corporations Act. News indicated that, if at the close of its own bid it was unable to proceed to compulsory acquisition, it would consider accepting the Magic Millions bid for any shares it had in excess of a bare majority. On 17 December, News lodged a bidder's statement with ASIC and served a copy on Broncos.

6. Also on 17 December, Magic Millions announced that its bid for Broncos would not proceed, because News had announced its bid for Broncos. It stated that, since the News bid was at a higher price than Magic Millions' bid, News had announced that it did not intend to accept the Magic Millions bid and News's relevant interest in Broncos shares was now 44.91%, it was unlikely that Magic Millions could achieve its primary objective of securing control of Broncos. Not having posted offers pursuant to its announcement, Magic Millions did not withdraw them, and it appears to have taken no other action in relation to the bid, apart from participating in these proceedings.
7. On 18 December, both ASIC and Broncos itself reacted to the possibility that the abandonment of the Magic Millions bid would in turn lead to the collapse of the News bid. Each wrote to News and to Magic Millions, asking them to clarify their positions and intentions, and Broncos made an announcement flagging the risk and obtained a trading halt while it was addressed. News replied to both ASIC and Broncos that it believed that Magic Millions was obliged to continue with its bid and that the condition in the News bid had been triggered, but that it would post its offers in accordance with section 631 and it reserved its position on waiving the condition. Broncos made an announcement conveying this response and the trading halt was lifted.

Applications

8. On 19 December, News applied to the Panel for a declaration that the purported withdrawal of the Magic Millions bid gave rise to unacceptable circumstances in relation to the affairs of Broncos and for orders requiring Magic Millions to bid in accordance with its announcement (**Brisbane Broncos Ltd (No. 1)**).
9. On 24 December, ASIC applied for a declaration that the cross-condition in the News announcement gave rise to unacceptable circumstances and for orders requiring News to waive the condition, or at least to state whether it intended to rely on the condition (**Brisbane Broncos Ltd (No. 2)**).
10. On 28 December 2001, in the context of making submissions on the brief, News made further applications for a declaration and order concerning ASIC's handling of the Magic Millions announcement. Perhaps those applications were not meant seriously: at any rate they were not supported by argument that they were within power or would be an appropriate exercise of the power, if it exists. We decline to conduct proceedings on those further applications.
11. At the same time, News sought to broaden its original application, by seeking a declaration that Magic Millions' failure to proceed had given rise to unacceptable circumstances and an order that its associates not accept the News bid and instead sell the shares they hold to News at cost price, subject to shareholder approval. We deal with this widening below.

Relevant Provisions of the Act

12. The relevant provisions of the *Corporations Act* are as follows:

631(1) If a person publicly proposes to make a takeover bid for securities in a company, either alone or with other persons, the person contravenes this subsection unless they make offers for the securities under a takeover bid within 2 months after the proposal. The terms and conditions of the bid must be the same as or not substantially less favourable than those in the public announcement.

- (2) A person must not publicly propose, either alone or with other persons, to make a takeover bid if:
- (a) the person knows the proposed bid will not be made or is reckless as to whether the proposed bid is made; or
 - (b) ...
- (3) Section 1314 (continuing offences) and subsection 1324(2) (injunctions) do not apply to a failure to make a takeover bid in accordance with subsection (1).

654A(1) The bidder must not dispose of any securities in the bid class during the bid period [i.e. from giving the bidder's statement to the target until the close of the bid].

- (2) Subsection (1) does not apply to a disposal of securities by the bidder if:
- (a) someone else who is not an associate of the bidder makes an offer, or improves the consideration offered, under a takeover bid for securities in the bid class after the bidder's statement is given to the target; and
 - (b) the bidder disposes of the securities after the offer is made or the consideration is improved.

670E(1) A person who:

- (a) enters into a transaction relating to securities in reliance on:
 - (i) a public proposal for a takeover bid; or
 - (ii) an announcement of a market bid; and
 - (b) suffers loss or damage that results from a contravention of section 631 may recover the amount of the loss or damage from:
 - (c) the person who contravened the section; or
 - (d) any person involved in the contravention.
- (2) To determine the amount of compensation payable under subsection (1), deduct the price of the securities at which the transaction was entered into from the price of the securities at which the transaction would have been likely to be entered into if the proposal or announcement had not been made.

670F A person does not commit an offence under subsection 631(1) or (2) and is not liable under section 670E if the person proves that they could not reasonably have been expected to comply with those subsections because:

- (a) at the time of the proposal or announcement, circumstances existed that the person did not know of and could not reasonably have been expected to know of; or
- (b) after the proposal or announcement, a change in circumstances occurred that was not caused, directly or indirectly, by the person.

1325B(1) If a bidder making a takeover bid for a class of securities contravenes section 631 by failing to make the offers within time and ASIC applies for an order under this section, the Court may:

- (a) order the bidder to send, to each holder of securities in that class, an offer to which the bidder's statement relates within a specified time; and
- (b) make any ancillary orders it thinks appropriate ...

Similar provisions have been in effect since 1985 and broadly similar provisions since 1971. These sections were rewritten and simplified by the *Corporate Law Economic Reform Program Act 1999*, generally without substantive change.

Relevant Policy

13. The source of sections 631 and 670F is in a report of the Eggleston Committee:

'Bluffing' offers: It has been suggested to us that the very existence of the provisions requiring notice of intention to make an offer affords a method by which an unscrupulous person may defeat a take-over offer or run up the price by announcing his intention to make an offer without having any such intention. It has been suggested that some form of security might be required as evidence of good faith. We see practical difficulties in making such provision, but we think it should be an offence to make a take-over offer, or to give notice of intention to do so without having any real intention of doing so, or without having any reasonable or probable grounds of expectation of being able to provide the consideration for the offer or proposed offer. It would often (but not always) be difficult to prove the offence, but the existence of such a provision would, we think, discourage the making of irresponsible announcements which could have the effect of creating a false market. In making this recommendation we are not so much concerned with offerors who may find that as a result of a bluffing statement they have been induced to pay more than their first offer. Presumably they will not pay more than the shares are worth to them. We are, however, concerned that a bluffing statement may

be used to defeat a genuine take-over bid, or to create a false market where no take-over bid is in fact contemplated by anyone.¹

14. In 1995 ASIC published Practice Note 59 concerning predecessors of sections 631 and 670F. Relevant passages are:²
 32. An offeror generally assumes the risks of publicly announcing a bid, unless it anticipates those risks by announcing that it intends to make a bid subject to specified conditions.
 36. Section [631] will be infringed, however, if the offeror attempts to avoid having to complete the bid by introducing conditions which are not reasonably capable of satisfaction.
 49. The first element [of the defence in section 670F] is that there must have been either ... a change of circumstance after the public announcement, over which the offeror had no control ... that is, a change of circumstance not caused by the offeror ...
 50. It is normally reasonable to expect an offeror to proceed with an announced bid. This is based on the policy of [sections 631 and 670F]. It is also based on the fact that ... an offeror can choose the time and content of its public announcement and include any conditions it thinks prudent or desirable ...
 51. The second element [of the defence in section 670F] is that, as at the time the bid is abandoned, it must be unreasonable to expect the bidder to proceed with the bid, ... because of the newly changed circumstances.
 54. The first class of case [where it would be unreasonable to expect an offeror to proceed with an announced bid] is where it would be futile to make offers under the bid because enforceable contracts would not result from acceptance of the offers. Examples are where the contracts would be ... subject to unsatisfied defeating conditions.
 61. The third class of case [where it would be unreasonable to expect an offeror to proceed with an announced bid] is where the offeror can no longer get control of the target company: e.g. because it has been clearly overbid. However, the mere public announcement of a rival bid at a higher price will not be sufficient for this purpose.

¹ Paragraph 37 of the Second Interim Report of the Company Law Advisory Committee on *Disclosure of Substantial Shareholdings and Takeover Bids* Commonwealth Government Printing Office, Canberra, 1969. Under section 52 of the *Companies (Acquisition of Shares) Act 1980 and Codes*, as first enacted, a person who failed to bid within 2 months of announcing a bid was deemed to have made the announcement without intending to proceed, perhaps to overcome the difficulty of proof mentioned by the Committee. After *BT Australia v Bell Bros*, failing to bid within 2 months was made a separate offence: see paras 97–105 of the Explanatory Memorandum to the *Companies and Securities Legislation (Miscellaneous Amendments) Bill 1985*.

² These passages are excerpts from the numbered paragraphs, with current section numbers substituted for those in force in 1995.

62. ... It is not part of the policy of [sections 631 and 670F] that an underbidder must give a successful bidder the opportunity to offload the target company. On the contrary, [section 654A] allows one bidder to sell out to a later (normally higher) bidder.

Relevant Cases

15. In *BT Australia Ltd v Bell Bros Pty Ltd* (1981) 27 SASR 557 CLC 40-713 and 40-719, the Supreme Court of South Australia at first instance and on appeal, rejected an attempt by a bidder³ to rely on its own promise not to proceed in accordance with an announcement, holding that a changed circumstance which made it unreasonable to require the bidder to proceed could not be one of the bidder's own making.
16. The Court in *BT Australia v Bell Bros* regarded the argument as tenable that the fact that the target had announced a takeover of its own was such a change in circumstances that it had become unreasonable to require the bidder to proceed. In *NCSC v Industrial Equity Ltd* (1982) 1 ACLC 35, Needham J regarded it as an issue of fact whether the disclosure that the affairs of a target were in a much worse state than the bidder had had reason to believe satisfied what is now paragraph 670F(a). Neither of these issues was decided on the facts.
17. In *Quancorp Pty Ltd v MacDonald* (1997) 15 ACLC 1415 at 1420, Templeman J dealt with the issue whether a bidder could rely on what is now paragraph 670F(b) where, after the announcement of the bid, the target had announced that it would distribute its only asset to its shareholders. His Honour had no difficulty in concluding that the distribution of the asset would constitute a relevant change of circumstances: "it could hardly be contemplated that a person in the [bidder's] position should be obliged to pursue its takeover offer once the company's assets had been dissipated."
18. *ASC v Mt Burgess Mining Co NL & ors* (1995) 13 ACLC 271 concerned an announcement which contravened what is now subsection 631(2). At page 276, Lee J applied to section 631 the provision now in paragraph 602(a) that "the purpose of the Law is to ensure 'that the acquisition of shares in a company takes place in an efficient, competitive and informed market'", citing *Gjergja & Atco Controls Pty Ltd v Cooper & ors* (1986) 4 ACLC 359 at 370 - 371. Consistent with this view of the section, an earlier case on similar facts, also relied on by Lee J, was treated as a breach of the market manipulation provisions of the *Securities Industry (Victoria) Code*: see *NCSC v Monarch Petroleum NL & ors* (1984) 2 ACLC 256.

What is Involved in Section 670F ?

19. None of the cases analyses what is meant by asking whether it is reasonable to expect a bidder to proceed. First, "expect" seems here to mean "require". Secondly, the "reasonable to expect" test involves a balancing of considerations. What are those considerations ?

³ For brevity, we refer to a person who has announced a bid as a "bidder", even if they have not proceeded with the bid or intend not to do so.

20. Section 670E and the secondary materials indicate that part of the policy of section 631 is to prevent losses in false markets resulting from bids being announced but not made. The facts required to be found before section 670F operates indicate that this is to be balanced against the mischief to the bidder resulting from new (or newly disclosed) circumstances and any contribution of the bidder to those circumstances or failure to discover them. It is for the bidder to show that it would be unreasonable to expect it to proceed with its announcement. The reversed onus and the strong expression “would not be reasonable” indicate that the bidder must make out a strong case, both that it would be prejudiced by having to proceed and that it has not voluntarily assumed the risk of that prejudice, by contributing to the triggering event or by failing to inquire into the risk that it would occur.⁴
21. The cases and the fact that even an on-market bid can be withdrawn if a prescribed occurrence happens to the target (section 652C) support this analysis. So do the examples in the Practice Note of situations in which it would be unreasonable to expect a person to bid, because:
- (a) the bid would be of no benefit to offerees;
 - (b) government intervention has destroyed the commercial benefits of an otherwise successful bid;
 - (c) there has been a change in the fundamental nature of the target;
 - (d) there has been a change in the fundamental basis of the target’s attractiveness to the offeror.
22. On whose part must it be not unreasonable to expect a bidder to proceed ? Arguably, section 631 is intended to protect shareholders, not rival bidders, and this is the view taken in Practice Note 59. These facts, unusual though they are, show this view to be too narrow. The policy of the section cannot be limited to pre-existing shareholders, to the exclusion of people who buy after the bid is announced, be they investors or arbitrageurs. Indeed, section 670E gives a remedy to a person who buys shares in reliance on an announcement, but not to a person who holds the same shares in reliance on the same announcement. And, if it protects arbitrageurs, there is no reason to exclude rival bidders.

The Cross-Condition

23. The cross-condition is as follows:

2.6(a) Magic Millions Offer

Between the Announcement Date [14 December 2001] and the end of the Offer Period:

⁴ Although section 670F refers to whether a person can be expected to proceed, it doesn’t actually apply to the power to order a person to make a bid in section 1325B. Instead, it applies only to prosecutions and actions in damages. Evidently, Parliament decided that a defence of this kind was not needed in relation to injunctions and Panel orders, because they are discretionary remedies. We have nonetheless used the test in section 670F as an indication of the legislature’s intention as to when an order should be made to proceed with a bid.

- (i) there is not in effect any preliminary or final decision, order or modification of the Corporations Act by ASIC or the Takeovers Panel;
 - (ii) no action or investigation is instituted or threatened by ASIC or the Takeovers Panel; and
 - (iii) no other event occurs,
- which permits or (in the case of (ii) or (iii) above) may permit,
- (iv) the withdrawal of the Magic Millions Offer [defined by reference to the 29 November announcement]; or
 - (v) the making of the Magic Millions Offer otherwise than in accordance with s631(1) or in accordance with the time periods set out in s633 of the Corporations Act,

as those sections apply prior to any modification or declaration under s655A of the Corporations Act.

24. The cross-condition is a defeating condition. It can be waived down to 7 days before the News bid closes (section 650F). If the condition is triggered (i.e. one of the events happens to which it refers) and it is not waived, section 650G will void all bid contracts at the close of the bid.
25. The cross-condition refers to an act or event which “permits” Magic Millions to withdraw etc. We understand that to mean that the condition is not triggered if Magic Millions simply withdraws its bid, but is still obliged to make the bid. The act or event must either remove the obligation under sections 631 and 633 to bid in accordance with the announcement and the statutory timeframe for a bid (such as a declaration under section 655A), or attract the defence in section 670F (such as a prescribed occurrence).
26. There is no relevant modification of the *Corporations Act* and no relevant action or investigation by ASIC or the Panel has been instituted or is now threatened, unless these proceedings, which were initiated by News and by ASIC, are relevant to the condition. The only other events which were mentioned as possibly permitting the Magic Millions bid to be withdrawn or made other than in accordance with sections 631 and 633 were News’ announcement of its intention to bid and the making of the News bid.

Bidders’ Submissions

27. Magic Millions' position was that it had been overbid by News and that the combined effect of sections 631 and 670F, supported by ASIC policy, was that it was in no way liable for its failure to proceed, because the making of the News bid (a circumstance which was beyond its control and which occurred after its announcement) rendered its bid nugatory. Since the News bid is a full bid and at a higher price, offerees will rationally prefer it to the Magic Millions bid. In these

circumstances, it would not be reasonable to expect Magic Millions to incur the cost of completing documentation and dispatching offers.

28. News submitted that it was fully entitled to rely on the cross-condition if and when its bid closed and an event had occurred which triggered the condition. It had announced its bid in the knowledge that the Magic Millions bid had been announced and that applicable law and policy required Magic Millions to proceed, and it had properly protected itself by the condition from the risk that Magic Millions might be able to abandon or withdraw its bid.
29. If Magic Millions was permitted to withdraw, it is arguable that News was entitled to abandon its bid as futile, because it was subject to a triggered condition. That would mean that, although two bids were announced, neither had to be made, which sits very oddly with the legislative policy.

ASIC's Submissions

30. ASIC stood by the policy of paras 59.61 - 64 and the application of that policy to allow Magic Millions to discontinue its bid. ASIC argued that the policy of paragraph 59.54 of the Practice Note was not applicable to the cross-condition, because that condition would enable News to make illusory offers.
31. ASIC criticised paragraph 2.6(a)(iii) of the cross-condition, which would be triggered by any event which permits, or may permit, Magic Millions to abandon its bid. Since the announcement of the News bid itself permitted Magic Millions to abandon its bid (or the actual making of the News bid will in due course permit Magic Millions to abandon its bid), ASIC said the condition rendered the News bid illusory. This may lead to a false (or speculative) market in Broncos shares and to News having an option whether to bid and whether to retain shares for which it receives acceptances. It submitted that each of these consequences was unacceptable.
32. ASIC also criticised paragraphs 2.6(a)(i) and (ii), which refer to acts of ASIC and the Panel which permit Magic Millions to abandon its bid. ASIC said that it was unacceptable, as contrary to public policy, that the condition may be triggered by the performance by ASIC or the Panel of their statutory functions of ensuring compliance with Chapter 6 and their exercise of discretions which that Chapter requires them to exercise.

News Bid Superior

33. If News bids in accordance with its announcement, that bid will be directly comparable with the Magic Millions bid and superior in every way in which they differ, except for the cross-condition: it will apply to all shares (not just half), it is at a higher price and (apart from the cross-condition) each bid will be conditional only on the non-occurrence of the standard prescribed occurrences. Were it not for the cross-condition, there would be no respect in which the Magic Millions bid was superior to the News bid.
34. It does not detract from the superiority of the News bid that, unlike the News bid, the Magic Millions bid is a partial bid, which may be convenient to shareholders

who prefer to retain an exposure to Broncos, for financial or sentimental reasons. Although News offers to acquire all of the shares in Broncos it does not already hold, the News bid can be accepted for only part of a shareholding, so a shareholder can sell some of their shares and retain the rest.

35. Nor is it affected by the fact that some shareholders may be opposed to News controlling Broncos, for financial or sentimental reasons. News is within 6% of majority control of Broncos, without News' acceptance Magic Millions cannot secure control of Broncos (or even parity with News) and (assuming that Magic Millions retains 20% and there is no higher bid) News may acquire up to another 35% of the shares under its bid.

Whether Magic Millions must bid

36. Because of News' reliance on the announcement, however, it is reasonable to expect Magic Millions to bid in accordance with its announcement. In the face of a register already dominated by News and although it plainly sought influence or control over Broncos, Magic Millions expressly stated that its bid would not be subject to a minimum acceptance condition. In so doing, it plainly accepted the risk that it would purchase a small or large number of shares, without obtaining control. News' decision to bid crystallises that risk, but it must have been foreseen.
37. The matters mentioned by Magic Millions in its announcement of 17 December do not affect this conclusion:
- (a) the increase in News' relevant interest in Broncos shares was trifling;
 - (b) if News had stated that it would not accept Magic Millions' bid, that fact would have been irrelevant, as Magic Millions' announced intention to bid was not in any way conditional on News' acceptance. What News actually said about accepting the bid was quite different: it said that if it did not reach the compulsory acquisition threshold, it might accept the Magic Millions bid for shares in excess of 50.1%;
 - (c) News' announcement of its competing bid is relevant to most shareholders, because on financial criteria, the News bid is clearly preferable to the Magic Millions bid. This does not apply to News itself, and we presently discuss its reliance on the Magic Millions bid.
38. This conclusion does not disturb ASIC's general policy that a later, superior bid, if directly comparable and actually made, generally makes obsolete any previous announcement of a bid. That policy refers to the bidder no longer being able to get control⁵ i.e. it is premised on the bid having been designed to secure control. But we have already found that Magic Millions' announcement was not premised on securing control.

Reliance by News

⁵ PN 59.61.

39. News put it to us that it had been entitled to rely, and had in fact relied, on Magic Millions making its bid in accordance with its announcement. It did not develop its commercial reasons for doing so, but some of them are apparent from its published statements. On 14 December News announced that it was contemplating disposing of shares in excess of the 50.1% it needs to control Broncos, if it was unable to compulsorily acquire all of the shares in Broncos.
40. News has already served a bidder's statement, but Magic Millions has not. In the ordinary course, each bid must be made not less than 14 days after the relevant bidder's statement is served and must remain open for another month. Section 654A would prevent either bidder from disposing of shares in Broncos during its bid, unless and until someone else made a bid for Broncos.
41. Accordingly, if News retains its timing advantage and if Magic Millions bids for Broncos without an abridgement of time from ASIC or Broncos itself (under ASIC's class order) Magic Millions' bid will open after News' bid opens and close after News' bid closes. Section 654A would not prevent News selling shares once Magic Millions has made offers under its bid. A sale while its own bid was still open might give rise to market concerns. Once its bid has closed, however, News will be free to dispose of excess shares by accepting the Magic Millions bid. By doing so, News will reduce its carrying cost of the controlling parcel. It will incur a loss of 1 cent per share (5.9%) on the shares it sells, but the loss on selling into the market in the absence of the Magic Millions bid might be much greater.
42. On this analysis, News seems really to have relied on the Magic Millions bid being made as announced. By selling surplus shares into the Magic Millions bid, News proposes to shift onto Magic Millions part of the cost of acquiring control of Broncos, but none of the benefits. In effect, News has successfully ambushed Magic Millions.
43. Plainly, these circumstances are adverse to Magic Millions. The circumstances did not change adversely to Magic Millions when News announced its bid, however: by the terms of its announcement, Magic Millions left itself exposed to much the same outcome, even if News ignored its bid.

Power to Require a Person to Bid – Whether s.1325B a Code

44. News has sought an order requiring Magic Millions to proceed with the bid it announced. Accordingly, we have considered whether we have the power to make such an order.
45. Section 1325B provides for the only way in which a person can be compelled to proceed with a bid, despite the Panel's general remit to give orders about the conduct of bids. Factors supporting this reading are:
 - (a) the court's general jurisdiction power under section 1324 is not available in relation to section 631;
 - (b) section 1325B severely limits the circumstances in which a person can be ordered to bid, including providing that only ASIC can seek the order; and

(c) section 659B allows ASIC to approach the Court during a bid.

46. The exclusion of section 1324 is not new. Where a bidder contravened previous section 746 of the Corporations Law, the Court could not order the bidder to dispatch offers under the general injunctions power in section 1324. It had a restricted power in section 738 to order a bidder to dispatch offers:

(a) on the application of ASIC;

(b) if the bidder had served a Part A statement; and

(c) if the bidder had subsequently acquired shares in the bid class under what is now item 2 in section 611 (the access to market exception).

The position under the *Companies (Acquisition of Shares) Act 1980 and Codes* was similar.

47. Section 1325B, which replaces previous section 738, gives standing only to ASIC and may require a bidder's statement to have been served, but it does not require that the bidder has acquired shares under item 2. There are anomalies in section 1325B, however, which mean that it would be unwise to read too much into it. In particular, while the section does not require a bidder's statement to have been served, the remedy appears to depend on the existence of a bidder's statement: previous section 738 expressly depended on a Part A statement having been lodged and served. In addition, on the view that it provides the only way of ordering a person to bid, it is anomalous that section 1325B gives neither the Panel nor private parties standing. In general, ASIC no longer has a monopoly of access to civil remedies.

48. The view is open that although ASIC was empowered to approach the Court for an order to bid, by-passing the Panel, other parties were intended to be able to seek comparable orders from the Panel, which the Panel could enforce in Court under section 657G. That would explain why the Panel and private parties do not have standing under section 1325B.⁶

Power to Require a Person to Bid - Order to Comply

49. We have also considered whether such an order would be beyond power, because of the phrase "including a remedial order but not an order directing a person to comply with a requirement of Chapter 6, 6A, 6B or 6C" in subsection 657D(2), where the Panel's power to make orders is conferred. Arguably, an order that Magic Millions dispatch offers in accordance with its announcement of 29 November would be an order that it comply with a requirement of Chapter 6, specifically a requirement of section 631(1).

50. The definition of a remedial order in section 9 includes an order directing a person to comply with a requirement of Chapter 6, 6A, 6B or 6C. Under section 1325A, the

⁶ Even on that reading, section 659B may prevent private parties from applying to the Court to enforce a Panel order, however, depending on its interaction with section 657G.

Court has power to make any remedial order, including an order to comply. The exclusion from subsection 657D(2) of that particular power was presumably to avoid conferring judicial power of the Commonwealth on the Panel, which is not a court and cannot exercise judicial power.

51. Plainly, we cannot simply order Magic Millions “comply with subsection 631(1)”. But the Panel’s jurisdiction and its effectiveness are very limited, if it cannot order a person to follow a particular course of conduct, because that course is one of the possible ways of complying with a requirement of Chapter 6.
52. While it was in the end unnecessary to resolve this issue, we do not think that Parliament intended such a restrictive reading. On the one hand, while a bid is on foot, disputes over compliance with Chapter 6 must generally be brought to the Panel, a contravention of that Chapter may enliven its jurisdiction⁷ and one of the objectives it must pursue is to ensure that a takeover bid or proposed takeover bid proceeds as it would have proceeded in the absence of unacceptable circumstances.⁸ On the other hand, in *Precision Data Holdings Ltd v Wills*⁹ the High Court pointed out that a whether a power is judicial or not depends on how it is to be exercised, as well as on its content, and that the Panel’s powers were not judicial, because they were to be exercised with a view to policy considerations, as well as the rights and obligations of the parties at law.

Unfairness and Public Policy

53. We do not think that ordering Magic Millions to bid would inflict unfair prejudice on Magic Millions, or be contrary to the public interest, given that it was entitled to rely on paragraphs 54 and 62 of Practice Note 59, and ability to rely on the Practice Note is conducive to business confidence and consistency of outcomes. Those paragraphs set out ASIC’s proposed responses to certain situations in which section 631 was arguably breached, based in part on ASIC’s interpretation of sections 631 and 670F and certain imagined situations. The Practice Note is over six years old and does not contemplate conditions such as the cross-condition. While ASIC’s views are valuable in themselves and as guidance to its actions, they cannot effectively cut down a provision of the Act, particularly one which is of general policy importance and gives rise to private rights of action.
54. A breach of section 631 might lead to enforcement action by ASIC under section 1325B, to which the Practice Note might be relevant, unless ASIC decided that the facts had not been anticipated in the Practice Note. But it could also lead to an action in damages by a private party, to which ASIC’s view of the law and policy position would be essentially irrelevant. Indeed, that is where our decision in this matter leaves Magic Millions. The Practice Note is only one of the factors which a person should consider before making an announcement, and not the most fundamental: first and last, they should ask whether they will contravene subsection 631(1).

⁷ Paragraph 657A(2)(b).

⁸ Paragraph 657D(2)(b).

⁹ (1991) 173 CLR 167 at 189.

Whether to Order Magic Millions to Bid

55. In what follows, we have assumed that we do have jurisdiction to order either Magic Millions or News to dispatch offers in accordance with its announcement, even if no bidder's statement has been served. Whether either bidder has served a bidder's statement is a factor going to the practicability of exercising that jurisdiction. Under the legislative policy it may also be relevant to whether an order should be made.
56. There are difficulties with ordering Magic Millions to make a bid, or even to accept surplus shares from News. Magic Millions has not lodged a bidder's statement, and it would be extraordinary and perhaps impracticable to require it to compile and sign one. But without a bid, it cannot acquire more than 20% of the shares, and it already has at least 15%.
57. We have decided not to order Magic Millions to make a bid, because a bid is not needed to protect the interests of any of the Broncos shareholders. If price is the only criterion, shareholders other than News are unlikely to be interested in selling to Magic Millions: indeed, they would be more likely to be misled than assisted by receiving a bid from Magic Millions.¹⁰
58. For its part, News has an alternative remedy in damages. Findings that subsection 631(1) requires Magic Millions to bid and that an order should be made to protect News' interests would also support an award of damages under section 670E. News retains the benefit of the amended cross-condition, which will operate if an event permits Magic Millions to withdraw i.e. removes the obligation to bid under subsection 631(1) and with it the right to damages under section 670E.
59. We did not order Magic Millions not to accept the News bid. There are obvious policy reservations and implementation pitfalls in making such an order, and News' application to restrain Magic Millions from accepting was not worked out in detail to allow us to resolve those issues. News should not be adversely affected by receiving an acceptance from Magic Millions: if News has a remedy in damages under section 670E, that remedy will apply to any loss incurred on an acceptance from Magic Millions.

Unacceptability of the Cross-Condition

60. Section 670F relevantly requires that a bidder neither caused triggering factors nor (if they already existed) should have known of them. In that context, whether a bidder can rely on a condition being triggered depends on whether the triggering event is such that it would not be reasonable to hold the bidder to its bid. It is not enough that section 650G would have applied (had the bid already been made), because an event has occurred which would have triggered a defeating condition, if the event is commercially unimportant or if the condition is of the self-serving kind discussed below. And a bidder cannot rely on a condition being triggered by the bidder's own

¹⁰ Some shareholders may prefer the Magic Millions bid for reasons other than price, such as an attachment to the Brisbane Broncos rugby league football team, or because they expect Magic Millions to exert influence to make Broncos profitable. We do not think we can adequately cater for these motives.

conduct, by a foreseeable train of events caused by its acts (other than discretionary responses of third parties) or by regulatory intervention concerning its conduct.¹¹

61. These events reveal that paragraph 59.54 of ASIC's Practice Note may be too widely expressed. That paragraph says that a bidder may abandon a bid if it announced that the bid would be made subject to a defeating condition and the condition is triggered. In general, that is true, but the policy interprets the law and does not substitute for it, and there are certain conditions and certain triggering events on which a bidder cannot rely to abandon a bid which it has announced.
62. It would be tricky or deceptive to include some such conditions in an announcement which will attract subsection 631(1). For instance, it is plainly not acceptable to include a condition which:
 - (a) purports to make it optional whether to bid: "I will bid, if I want to";
 - (b) purports to prevent ASIC from requiring the bid to be made in accordance with Chapter 6: "I will bid on my terms, or not at all"; or
 - (c) has already been triggered or otherwise cannot be fulfilled (such as that the Sun rise in the West).
63. ASIC invited us to express a general opinion as to the acceptability of a condition in a superior bid, to the effect that an inferior bid proceed. We do not think that is necessary, as these circumstances are exceptional and unlikely to recur. A bidder can protect itself against this sort of ambush, by a condition that it obtain 50.1% acceptances or that no rival bid be made which in the reasonable opinion of the bidder is superior to its own.
64. The cross-condition serves an intelligible commercial purpose in relation to the completion of News' bid and is not of the grossly evasive kind just mentioned. Nonetheless, it is capable of being triggered by:
 - (a) the making of the News announcement itself, if that was an event which had the effect of permitting Magic Millions to withdraw its bid, because it had been overbid;
 - (b) the dispatch of offers under News' bid, on the same basis; or
 - (c) the bringing of News' application in Broncos No.1, if that enlivened a discretion to permit Magic Millions to withdraw its bid.
65. It also restricts the freedom of ASIC and the Panel to discharge their statutory responsibilities, by attaching extraneous consequences to their acts. We accept ASIC's submission that this appears to be contrary to public policy.¹² In this respect,

¹¹ ASIC Practice Note 59.56, *BT Australia v Bell Bros*. It may also contravene subsection 631(2): *Re Realestate.com.au Ltd* at para 56; or the principle of contract law that a person who is bound by a contract may not rely on their own act or default to trigger a condition in the contract, discussed in *Meehan v Jones* (1982) CLR 571 at 589 - 591.

¹² This does not imply any conclusion about conditions relating to requirements of the *Trade Practices Act*, the *Foreign Acquisitions and Takeovers Act* etc, on which see paragraphs 41 - 44 of the Practice Note. A conditional offer

News had relied on a previous Panel decision,¹³ which to them appeared to accept that a defeating condition could be triggered by decisions of ASIC or the Panel. That issue had not been raised in the previous matter, for which reasons had not then been published.

66. Accordingly, we advised News that the cross-condition was not acceptable in its original form, but that we would accept a substitute condition which was not in any respect more onerous than the cross-condition, was not self-defeating and did not interfere with ASIC's and the Panel's functions. In view of News' reliance on the previous Panel decision and having regard to the particular circumstances, we allowed part of the replacement condition to relate to decisions of ASIC and the Panel. Another Panel in other circumstances may not accept a condition which cuts across ASIC's or the Panel's functions in this way.

Decision

67. On the Broncos No. 1 application, in our view, Magic Millions is required to dispatch offers in accordance with its announcement. If it does not do so by 29 January and we are then aware of no other relevant circumstances, we are prepared to declare that unacceptable circumstances exist in relation to the affairs of Broncos for that reason. News may apply for such a declaration after 29 January, but must then address whether there have been relevant changes in circumstances.
68. We decline to make a declaration that unacceptable circumstances have resulted from the facts that Magic Millions has not yet dispatched offers and appears to be minded not to do so. Magic Millions has not yet contravened subsection 631(1). Since we have decided not to order it to dispatch offers, on the basis that News has an alternative remedy in damages and other shareholders would not benefit from receiving an offer, there would be little point in making a declaration.
69. On the Broncos No. 2 application, our decision is that News must dispatch offers in accordance with its announcement, and vary the cross-condition to the form agreed with News, which is as follows:

Between the Announcement Date and the end of the Offer Period no event occurs which permits or may permit

- (i) the withdrawal of the Magic Millions Offer; or
- (ii) the making of the Magic Millions Offer otherwise than in accordance with s631(1) of the Corporations Act or in accordance with the time periods set out in s633 of the Corporations Act, as those sections apply prior to any modification or declaration under s655A of the Corporations Act.

is often an accepted way of complying with those Acts, which Acts may forbid the relevant takeover or affect its commercial substance. In general, Chapter 6 requires an announced bid to proceed, but in a manner consistent with that Chapter. An exception would be a condition that an exemption be granted which was critical to the bidder being able to make the bid at all, such as under Policy Statement 71 (the downstream acquisition policy). It is better to obtain the exemption before making the announcement, but that isn't always practicable.

¹³ *Normandy Mining Ltd (No. 4)*, published on 11 January 2002.

This clause does not apply to an act of BB Sports, or where the event is a decision, order or modification of ASIC or the Takeovers Panel, except a decision relating to the time periods in s631(1) or s633 of the Corporations Act.

On 3 January News announced to ASX that it would be proceeding with offers varied to this effect, and released a supplementary bidder's statement.

70. We thank the parties for their submissions, which were helpful and were lodged on time at a difficult time of year. We consent to each party being represented by their solicitors. There having been no declaration of unacceptable circumstances, there will be no order for costs.

Jennifer Seabrook

Sitting President in the matter of Brisbane Broncos No.1 and No.2

15 January 2002