



**In the matter of Brisbane Broncos Limited (No 4)  
[2002] ATP 04**

**Catchwords:**

*Review of ASIC decision – competing bids – defeating condition – withdrawal of takeover offer if defeating condition triggered – modification to allow for withdrawal without ASIC consent*

*Corporations Act 2001 (Cth), sections 606, 652B and 656A*

**These are our reasons for granting a modification of section 652B of the Corporations Act (Act), in relation to a takeover bid for Brisbane Broncos Ltd (“Broncos”) by Magic Millions League Pty Ltd (“Magic Millions”). The modification allows Magic Millions to withdraw its offers if frustrated in its offer by another person acquiring more than 50% of the voting power in Broncos. This decision is in response to an application by Magic Millions to ASIC for a similar modification.**

**Introduction**

1. The Panel was constituted by Simon McKeon (sitting President), Ian Ramsay (sitting Deputy President) and Carol Buys.
2. This review is under section 656A of the Act. It concerns a decision of ASIC to refuse to grant a modification of section 652B of the Act.

**Summary**

3. The relief we granted would, under certain circumstances, allow Magic Millions to withdraw any unaccepted offers under the revised, full, bid for Broncos that it proposed to the Panel under the Broncos 03 proceedings (Revised Magic Millions Bid).
4. Magic Millions would be allowed to withdraw the offers if another person acquired control over more than 50% of the voting power in Broncos. That would have triggered a defeating condition in the Revised Magic Millions Bid, making the outstanding offers futile. In that event, the relief would allow Broncos shareholders who had accepted the Revised Magic Millions Bid to retrieve their shares as quickly as possible, and allow them the maximum time to consider whether or not they wished to accept a rival bid, if still open.
5. The relief requires Magic Millions to decide, as soon as the defeating condition in its bid is triggered, whether or not it would waive the condition (and pay for the shares accepted) or withdraw the offers (and allow the shareholders to consider their other options).
6. We decided that the relief which Magic Millions had applied for would only operate where another person had gained control over Broncos.

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7. We also decided that the relief would reduce the risk that Broncos shareholders who preferred to sell into the full, higher bid by Magic Millions, might be disadvantaged by accepting that bid.
8. We did not consider that there was a material risk that the circumstances in which the modification would operate would cause us to change our decision, nor that Magic Millions' use of the relief would be materially adverse to Broncos shareholders.
9. Finally, we considered that the relief would facilitate the proposed, Revised Magic Millions Bid for Broncos shares, which we saw as an improved opportunity for Broncos shareholders to consider compared to the original Magic Millions bid.

### Facts

10. This application follows on from the Panel's decision in the Broncos 03 application. The facts of the takeover during, and leading up to this application are set out more fully in the Broncos 03 Panel's reasons for decision.
11. On 29 November 2001 Magic Millions announced a 50% proportional bid for Broncos at 16 cents.
12. On 14 December 2001 BB Sports Pty Limited ("**BB Sports**") a wholly owned subsidiary of (The News Corporation Limited) announced a conditional full bid for Broncos, at 17 cents.
13. On 17 December 2001 Magic Millions announced its proportional bid would not proceed, in light of the BB Sports bid.
14. The announcement by Magic Millions on 17 December 2001 was the subject of the Panel's Broncos 01 & 02 proceedings and the Broncos 03 review proceedings.
15. BB Sports did not proceed with its 17 cent, conditional, full bid (see the Broncos 03 proceedings), but instead lodged a bidder's statement with ASIC for a 50% proportional bid at 17 cents, conditional on (among other things) acquiring a relevant interest in more than 50% of Broncos shares (**Revised BB Bid**).
16. Magic Millions and BB Sports had given undertakings to the Broncos 03 Panel. Magic Millions gave a conditional undertaking to proceed with its 50% 16 cent proportional bid by 12 February 2002 unless BB Sports made offers on terms that offerees would reasonably be expected to prefer over the Magic Millions bid. BB Sports gave an undertaking that it would not make a bid containing certain conditions which were the subject of the Broncos 03 Panel proceedings.
17. Following the lodgment of the Revised BB Bid, Magic Millions applied to the Broncos 03 Panel for advice about, and/or release from, its undertaking. The Broncos 03 Panel did not determine that request.
18. It did not do so because Magic Millions instead put a proposal to the Broncos 03 Panel about a revised bid, the Revised Magic Millions Bid. The final form of that proposal was for a full bid for Broncos at 18 cents per share. The bid would be conditional on no prescribed occurrences during the bid period, and that Magic Millions acquire at least 45% of the voting power in Magic Millions and more voting

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power than BB Sports and its associates. Magic Millions' proposal was originally also conditional on BB Sports giving certain undertakings about extending its bid.

19. The Broncos 04 Panel sought submissions from the parties to the proceedings in relation to the terms of the Revised Magic Millions Bid. BB Sports was not prepared to give the undertakings as to a bid extension.

### Application

20. ASIC received the application by email at approximately 9:15 am on 31 January 2002. The Application set out the terms of the Revised Magic Millions Bid and sought a modification to section 652B of the Corporations Act to insert a new subsection (2) in s652B in the following terms:

*(2) ASIC's consent to the withdrawal of unaccepted offers under a takeover bid is not required under subsection (1), in circumstances where the voting power of someone who is not the person who made the offers increases to more than 50%.*

21. Section 652B simply provides that ASIC may consent to the withdrawal of unaccepted offers, and allows ASIC to impose conditions on its consent. It is silent on when, and for what reasons, ASIC may grant its consent.
22. Magic Millions sought the modification by 4.00 p.m. on the day it made the application.

### ASIC's Decision and Reasons

23. In the afternoon of 31 January, ASIC advised Magic Millions and the Broncos 04 Panel that it had declined to grant the modification.

#### *Decision prior to circumstances*

24. ASIC noted that it can impose conditions on its consent to the withdrawal of unaccepted offers under section 652B. ASIC said that it commonly exercises its discretion to consent at a time when it is clear to ASIC, and to market participants, that proceeding with a specific bid would be futile, typically because a defeating condition has already been triggered in a conditional bid.
25. ASIC was concerned that the modification, if granted, would require ASIC to decide, in advance, when proceeding with the Revised Magic Millions Bid would be futile. This would also require ASIC to give up in advance, its power to impose conditions on withdrawal that were appropriate to the circumstances at the time Magic Millions would withdraw the offers. ASIC was concerned at being asked to make this decision at the start of the bid when it couldn't know all the facts and circumstances that might be relevant to its decision to consent or not.

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#### *Time*

26. ASIC said that in the time available to it to consider the Application (less than one business day), it could not be satisfied that it could determine and consider all the possible future circumstances in which Magic Millions might seek to rely on the right to withdraw. ASIC also considered that at least in some cases the right to withdraw might be used in way that would be detrimental to Broncos shareholders and the market in general.

#### *Decision overlaps ongoing Panel proceedings*

27. Further, ASIC said that it was aware that the Application touched on matters that were the subject of unresolved Panel proceedings. In those circumstances, ASIC considered it undesirable to exercise its discretion in isolation from issues under consideration in those unresolved proceedings.

#### *Possible detriment to Broncos shareholders*

28. Finally, ASIC was concerned that the purposes of Chapter 6 in section 602(b)(ii), that target shareholders and target directors have a reasonable time to consider a proposal of a person to acquire a substantial interest in Broncos, might be infringed by the grant of the relief sought in the Application. Specifically, ASIC said that it could not be certain that in all cases, acceptors into the Revised Magic Millions Bid would become aware that it was possible, and be in a position to take action, to accept into the BB Sports bid. In those circumstances, ASIC was not satisfied that acceptors into the Revised Magic Millions Bid would have a reasonable time to accept into the BB Sports bid.

## Discussion

29. The issue for us was whether, and on what terms, we should grant a modification of the Act to provide Magic Millions with an assurance in advance, that it would be able to withdraw its offers if BB Sports obtained voting power of over 50% in Broncos.
30. ASIC pointed out that it has a power to consent to withdrawal of offers under a bid. It also states that its published policy (Practice Note 59) and general practice is that it decides only once a situation has already arisen in which it would be futile to require an offeror to persist with a bid. It also pointed out that it must ensure that offerees are not prejudiced by the withdrawal of offers.

#### *Time*

31. We had more time to make our decision than ASIC (which had less than a day) and the benefit of a prior acquaintance with the matter. We also had the benefit of the applicant's willingness to agree to any additional modifications that might be necessary to protect the position of other shareholders in Broncos, if it withdrew.

#### *Circumstances in which Magic Millions could withdraw*

32. The situation in which the variation would operate falls under ASIC's general policy concerning withdrawal of offers. The variation would apply if BB Sports obtained

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acceptances taking its voting power to over 50% of the share in Broncos (and therefore clear control). In that case the minimum acceptance condition in the Revised Magic Millions bid would have been triggered. There is no way that the circumstances which triggered the defeating condition would cease to exist before the bid closed, unless BB Sports withdrew its bid as a result of a prescribed occurrence, which would trigger a similar condition in the Magic Millions bid.

#### *Timing of bids*

33. If Magic Millions' minimum acceptance condition was triggered and not waived, when the Revised Magic Millions Bid closed, all of the contracts resulting from acceptances of that bid would be void, and the offerees who had accepted the Revised Magic Millions Bid would be free to sell elsewhere. At the same time, section 654A would cease to prohibit Magic Millions from disposing of bid class shares. If the Revised BB Bid was still open, offerees who accepted the Revised Magic Millions Bid would be able to accept the BB Sports bid instead, as would Magic Millions itself.
34. It was unlikely that the Revised BB Bid would, at the time the Revised Magic Millions Bid closed, still be open, however. BB Sports had already lodged a bidder's statement, and could post offers at any time from 5 February. On 1 February, when we made our decision, Magic Millions had yet to lodge a bidder's statement and accordingly was unlikely to be in a position to post offers before 15 February at the earliest.
35. If BB Sports and Magic Millions each posted offers at their first opportunity, those offers would have to be open until 6 March and 16 March respectively, unless they were extended. Accordingly, unless extended, the BB Sports bid would close well before the Magic Millions bid. Even if Broncos abridged time for dispatch of the Magic Millions bid, that would reduce BB Sports' timing advantage, but could not eliminate it.
36. It was unlikely that BB Sports would extend its bid voluntarily. It had made it clear from the outset that it wished to obtain 50% of the shares in Broncos, and as few additional shares as possible, and that the timing of the bid relative to the Magic Millions bid was part of its plan to achieve that outcome. It made it clear in the week preceding our decision that its intention in that respect had not changed.

#### *Timing of withdrawal decision – trap for offerees*

37. ASIC's policy under section 652B has generally been to wait to make such a decision until the situation has arisen in which the bid may be withdrawn.
38. BB Sports also submitted that it would be inappropriate to specify in advance a situation in which Magic Millions could withdraw its offers.
39. We do not agree. In the situation contemplated in the modification, the Magic Millions bid would have been frustrated by a defeating condition being triggered. The condition was fundamental, and if Magic Millions did not waive the condition immediately, it would be appropriate to terminate the bid. The offers would be of no value to shareholders who had yet to accept: in fact, they would be a trap. If the bid closed and the offers were withdrawn, the operation of section 650G would be

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brought forward, contracts resulting from acceptances would be promptly annulled and the accepting shareholders could accept the BB Sports bid instead.

#### *Facilitating Broncos shareholders making choices*

40. The modification would make it safer for shareholders to accept the Magic Millions bid, and thus more likely that they would do so. The Magic Millions bid would be an attractive bid, but subject to a condition which might appear to be difficult to satisfy. Any delay in terminating the Magic Millions bid would prejudice shareholders who had accepted that bid, by preventing them switching their acceptances into the BB Sports bid. Any risk of that would be a good reason not to accept it. That would reduce the chance for all Broncos shareholders to receive a higher payment.

#### *Closing phases*

41. If BB Sports obtained 50% voting power in the last week of its bid, its bid would be extended for 14 days by section 624. However, shareholders couldn't rely on that extension occurring. For one thing, section 624 might not apply, because BB Sports could obtain 50% voting power before the last week of its bid. For another, even if section 624 did apply, on the original timing of the bids shareholders would have a very short time to accept the BB Sports bid after the Magic Millions bid closed and before the extended closing time of the BB Sports bid.
42. If, however, Magic Millions withdrew its offers promptly on learning that BB Sports had obtained voting power in excess of 50%, accepting shareholders and Magic Millions itself would have at least a week to accept the BB Sports bid. They would need to be told of the changed situation without delay. If the modification gave Magic Millions a simple choice between waiving its condition (and therefore paying shareholders), and abandoning its bid forthwith on learning that BB Sports had obtained voting power of more than 50%, Magic Millions would not be able to exploit or prolong the situation.

#### *Prejudice to BB Sports?*

43. We do not think it would be unfairly prejudicial to BB Sports to allow Magic Millions to withdraw its offers before BB Sports' revised bid closes. When BB Sports announced each of its bids, it accepted the risk that all shareholders would accept its offers (for all, or later 50%, of their shares). BB Sports knew that Magic Millions had announced its intention to bid for Broncos, and minimised part of its funding risk by lodging and serving its bidder's statement before Magic Millions, so that BB Sports' offers would close before Magic Millions' offers.
44. Section 654A would prevent Magic Millions from accepting the BB Sports offer until after Magic Millions' offers closed, by which time the BB Sports bid would be closed. However, BB Sports would be able to accept the Magic Millions bid for any shares that it didn't want, in the period for which Magic Millions' bid would still be open after BB Sports could close its bid.
45. However, BB Sports would be exposed to changes in Magic Millions' timetable by acts of Magic Millions, ASIC or of Broncos itself, and BB Sports knew that it could

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not protect itself from all changes in the Magic Millions bid timetable by inserting conditions in its bid.

46. It was not unfair to BB Sports to overcome the first mover timing advantage it had over Magic Millions. There is nothing in the law or explanatory material which suggests that these policies are not for the protection of rival bidders as well as other shareholders. BB Sports itself argued this in earlier proceedings concerning Broncos.
47. We do not see any policy or intention in the legislation to require an unsuccessful bidder, even a slow one like Magic Millions, to allow a timing advantage to be used to force an unsuccessful bidder to underwrite a successful one. It would detract markedly and systematically from a competitive market.

### **Decision**

48. We decided to grant the modification (see Annexure A). We did so primarily to facilitate a materially better offer to Broncos shareholders.
49. In the modification, we increased the opportunities for Broncos shareholders to indicate their preference for the higher, full bid by Magic Millions, by reducing the risk that in doing so they might miss out on the lesser percentage BB Sports bid. We tried to reduce this risk in other ways as well: by seeking expedited dispatch for Magic Millions, which Broncos Directors agreed to; and by seeking undertakings from both bidders to reduce the risk for Broncos shareholders, which BB Sports declined to do.
50. We consider that the terms of the modification address the circumstances which might arise if and when it was to be relied on.

**Simon McKeon**

**President of the Sitting Panel**

**Decision dated 5 February 2002**

**Reasons published 09 April 2002**

TAKEOVERS PANEL

CORPORATIONS ACT 2001

SECTIONS 655A AND 656A

DECLARATION

Whereas:

- A. Magic Millions League Pty Ltd (Magic Millions) applied on 31 January 2002 to the Australian Securities and Investments Commission (ASIC) for a declaration modifying or varying the effect of section 652B of the *Corporations Act 2001* (the Act) in relation to a proposed takeover bid for shares in Brisbane Broncos Ltd (Broncos);
- B. ASIC decided to refuse to make that declaration on 31 January 2002;
- C. On 31 January 2002, pursuant to section 656A of the Act, Magic Millions applied to the Takeovers Panel to review that refusal;
- D. Magic Millions has undertaken under section 201A of the *Australian Investments and Securities Commission Act 2001* to make a bid (the Millions bid) for all of the shares in Broncos (whether or not an acceptance must relate to all the shares for which the offeree may accept an offer under the bid), at 18 cents per share, subject to defeating conditions relating to acceptances and to prescribed occurrences and also to this declaration remaining in force, and the Panel has accepted that undertaking; and
- E. On 22 January 2002, BB Sports Pty Ltd announced that it will make a bid for 50% of the shares in Broncos, at 17 cents per share, subject to defeating conditions relating to acceptances and to prescribed occurrences.

Pursuant to section 655A and 656A of the Act, the Panel hereby declares that Chapter 6 of the Act will apply in relation to the Millions bid as if section 652B of the Act were modified or varied to read as follows:

- “(1) Subject to this section, unaccepted offers under a takeover bid (including the takeover bid referred to in paragraph (2)(a)) may be withdrawn with the written consent of ASIC. ASIC may consent subject to conditions.
- (2) If:
- (a) Magic Millions League Pty Ltd publicly proposes to make a takeover bid for shares in Brisbane Broncos Ltd in accordance with an undertaking accepted by the Takeovers Panel under section 201A of the *Australian Investments and Securities Commission Act 2001*; and
  - (b) before or during the offer period of that bid, the voting power of BB Sports Pty Ltd (or some other person other than Magic Millions League Pty Limited or an associate of Magic Millions League Pty Limited) in relation to Brisbane Broncos Ltd, as disclosed in substantial holding notices given to ASX, disregarding any shares for which Magic Millions League Pty Ltd or an associate has accepted an offer under a bid made by another person becomes greater than 50%,

Magic Millions League Pty Ltd must as soon as practicable do one of the following:



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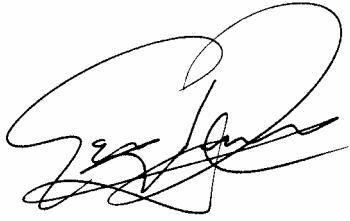
### Broncos 04 - Instrument

- (c) waive all of the defeating conditions to which the bid is subject other than any condition relating to the non occurrence of any of the events listed in section 652C of this Act;
- (d) if offers have been made under the bid, withdraw the offers under the bid by notice in writing to Brisbane Broncos Ltd;
- (e) if offers have not been made under the bid, give Brisbane Broncos Ltd notice in writing that those offers will not be made.

Copies of a notice under paragraph (d) or (e) must be given to the Takeovers Panel, to ASIC and to ASX (for release on the Companies Announcements Platform).

- (3) If, pursuant to paragraph (2)(d), Magic Millions League Pty Limited withdraws its offers under the bid, it must as soon as practicable:
  - (a) send a message to that effect pursuant to Rule 16.8 of the SCH Business Rules, as if the offers had lapsed because of a defeating condition;
  - (b) announce that it has withdrawn its offers in advertisements published in daily newspapers circulating in Brisbane and throughout Australia; and
  - (c) write to each person who has accepted an offer under the bid, stating that it has withdrawn its offers and returning any documents of title given to it in connection with the acceptance.
- (4) If, pursuant to paragraph (2)(d), Magic Millions League Pty Ltd withdraws its offers under the bid, in each letter to an accepting offeree, announcement to ASX and newspaper advertisement notifying that withdrawal, it must also:
  - (a) state that all contracts which have arisen from acceptances of Magic Millions League Pty Ltd's offers are void by virtue of section 650G of this Act; and
  - (b) set out the action that each person who has accepted the bid by Magic Millions League Pty Ltd may take if they wish to accept an offer under the bid made for Brisbane Broncos Ltd by BB Sports Pty Ltd.
- (5) If, pursuant to paragraph (2)(c), Magic Millions League Pty Limited waives any of the defeating conditions to which its offers are subject, in addition to complying with section 650F of this Act, as soon as practicable, Magic Millions League Pty Ltd must announce to ASX and in advertisements published in daily newspapers circulating in Brisbane and throughout Australia that it has waived the condition or conditions.
- (6) If, pursuant to paragraph (2)(e), Magic Millions League Pty Limited gives Brisbane Broncos Ltd notice that offers will not be made, subsection 631(1) of this Act will cease to apply in relation to the announcement by Magic Millions League Pty Ltd referred to in paragraph (2)(a)."

Dated 5 February 2002

A handwritten signature in black ink, appearing to read 'George Durbridge', written over a faint, illegible background.

Signed by George Durbridge, at the direction of  
Simon McKeon, President