



**In the matter of Pasminco Ltd (Administrators Appointed)  
[2002] ATP 06**

**Catchwords:**

*Review of ASIC decision – company under administration – comparison between deed of company arrangement and scheme of arrangement – exemptions from section 606 for deeds of company arrangement – effect of relief on creditors and shareholders – disclosure of relief – value of listed shell – breadth of power – ASIC policy – precedent value of Panel’s decision*

*Corporations Act 2001 (Cth), sections 606, 611 items 7 and 17 and 655A*

*ASIC v DB Management Pty Ltd [2000] HCA 7*

**These are the reasons of the majority for setting aside a decision by ASIC under section 655A of the Corporations Act not to grant relief from section 606 of the Act in relation to a Deed of Company Arrangement for Pasminco Ltd., and for our decision to grant a conditional exemption under section 656A.**

**APPLICATION**

1. The sitting Panel for this application is Denis Byrne (sitting President), Marian Micalizzi (sitting Deputy-President), and Irene Lee.
2. The review is under section 656A of the Corporations Act (**Act**). It concerns a decision by ASIC under section 655A of the Act to refuse to grant an exemption from compliance with section 606 of the Act. The exemption would allow some of the creditors (**Creditors**, See Annexure 1) of Pasminco Ltd (Administrators appointed) (**Pasminco**) collectively to acquire shares in Pasminco which would otherwise breach the 20% threshold in section 606 of the Act. The original application to ASIC was made on behalf of the Creditors by the administrators of Pasminco, John Spark and Peter McCluskey, both of Ferrier Hodgson (**Administrators**).
3. The Administrators commenced the original application to ASIC on 14 December 2001. After a number of communications and further submissions, ASIC refused the application on 4 February 2002. The Administrators applied to the Panel on 19 February 2002 under section 656A of the Act.

**SUMMARY**

*Decision*

4. We have decided to grant the exemption requested by the Administrators, to provide relief to allow them to proceed with the proposal advised to ASIC in the original application. We have decided to impose conditions on the exemption.

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#### *Position of Pasminco*

5. We do not consider that in the particular circumstances of Pasminco, the takeover provisions are now relevant to it.
6. Pasminco is a company which its directors have placed into administration under Part 5.3A because they considered they *"were unable to form the view that there were reasonable grounds to believe that Pasminco could meet all of its commitments as and when they fall due."*<sup>1</sup>
7. As Pasminco is a company under administration, it is controlled by the Administrators. Because they advise that it would be insolvent without the support of the Creditors, and that it has an excess of liabilities over assets, the Administrators are primarily responsible to the company's creditors, not the shareholders.
8. The Administrators advise the Panel that:
  - a. Pasminco cannot pay its debts<sup>2</sup> as they fall due without the continued financial support of its lenders (which the Directors were unable to obtain, but which the Administrators have);
  - b. It has a material excess of liabilities over assets;
  - c. On liquidation, which is entirely open to the Creditors at present, shareholders would receive no payment;
  - d. They believe that Creditors may reduce their losses to some extent by continuing to trade the assets of Pasminco forward, hopefully out of the current base metal price trough, and that using the listed shell of the company as the vehicle to do this may assist. This will provide existing shareholders with some residual (i.e. very small) interest in Pasminco and may provide some residual value for their investment in Pasminco;
  - e. There is no prospect of its shareholders' equity in the company regaining any value other than under the proposal outlined to the Panel;
  - f. Pasminco's Creditors will not consent to any reconstruction proposal under which Pasminco's current shareholders have a veto.
9. The Panel is faced with a company that, it is advised, has no value for shareholders on a winding up.
10. Control of the company has passed to the creditors through the Administrators. Without its creditors immediately providing further cash to support it, the

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<sup>1</sup> The Directors' announcement to ASX of 19 September 2001.

<sup>2</sup> In general, unless we have specific quotations using different words (such as the announcement of 19 September which used the term "commitments") we have described Pasminco as being "unable to pay its debts".

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Administrators advise that it would have had to cease operating immediately<sup>3</sup>.

11. The Administrators advise that not receiving this further cash contribution (which is essentially equity) would mean immediate liquidation of Pasmenco, no return to shareholders, and possibly a worse return for creditors. The Administrators further advise that *“Creditors would become shareholders of Pasmenco Limited, not because there is any value in the shares, purely for structural reasons as part of a plan to possibly recover more of the money they have lent the Pasmenco group”*<sup>4</sup>.
12. The Creditors are proposing a form of reconstruction which may salvage some, albeit minimal, value for shareholders, while possibly reducing the loss for creditors. The submissions that the Administrators of the company have made are that there are no circumstances where rejecting the proposal would gain shareholders any value greater than they may receive under the proposal that the Administrators have outlined to the Panel.
13. The Administrators advise that they propose to use a Deed of Company Arrangement to carry out the reconstruction which they have outlined to us. However, unlike for schemes of arrangement, there is no statutory exception from the takeovers provisions for acquisitions pursuant to a Deed of Company Arrangement. Therefore, to proceed with this proposal, the Administrators are required to proceed either:
  - a. Under shareholder approval under item 7 of section 611 of the Act;
  - b. Under a scheme of arrangement under Part 5.1 of the Act; or
  - c. Under an exemption from ASIC (or on review, the Panel) under section 655A of the Act.
14. The Administrators advise that all the other alternatives which they and the Creditors are prepared to consider would provide no value to shareholders. Therefore, in the circumstances of this matter, the shareholders are not in a position to make a choice.
15. We say this while recognising that the Administrators are seeking to improve the return for creditors (albeit reducing the amount of loss rather than making any profit) by issuing a very large number of shares to the Creditors which would otherwise be prohibited by the takeovers provisions. We also recognise and accept that the Administrators propose to use the existing spread of shareholders for the Creditors' future benefit. However, the majority of any improvement in the Creditors' position is likely to come from retaining the assets in the hope of improving base metal prices rather than specifically utilising the existing company and shareholder spread.

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<sup>3</sup> In part this was due to the crystallization of foreign exchange contracts upon Pasmenco being placed into administration, which materially changed the position of Pasmenco's ability to pay its debts as they fell due.

<sup>4</sup> Administrators' Rebuttal submissions.

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16. We also recognise that the Directors do not necessarily agree with all of the assessments of the Administrators. However, the Directors chose to put Pasminco into administration, because they were unable to affirm that it would remain solvent, and they passed control of Pasminco to the Administrators and passed the responsibility for these assessments to the Administrators.
17. We do not intend this decision to be a watershed. We do not think that our decision will be tantamount to law reform by setting a precedent that ASIC and future Panels will feel bound to follow. Rather, we expect ASIC and future Panels to decide whether it is appropriate to give exemptions on the basis of the specific facts in individual future cases.

### Parties

18. The parties to this application were:
  - a. the administrators of Pasminco, John Spark and Peter McCluskey, both of Ferrier Hodgson;
  - b. ASIC
  - c. The directors of Pasminco (Mark Rayner, Geoffrey Allen and Andrew Guy) (**the Directors**).
19. The Panel received a number of submissions from interested shareholders of Pasminco<sup>5</sup>. None of these persons became parties to the proceedings. However, the Panel provided copies of their submissions to the parties (after seeking the shareholders' consents). To the best of the Panel's knowledge, the shareholders who made submissions did not have the benefit of seeing the submissions of the other parties, and in general were materially unaware of the terms of the draft proposal outlined to the Panel by the Administrators.
20. The sources of information for these shareholders was a letter from the Administrators on 15 November 2001 advising them that there appeared to be "*no realistic prospect of any funds becoming available for shareholders*" and media reports. In addition, Pasminco continued to make announcements to ASX's Companies Announcement Platform.
21. We have required the Administrators to prepare an information release for shareholders setting out the terms and effect of the relief we have granted and to prepare a similar information release if the terms of the proposal are settled and agreed by Pasminco' creditors. We have required the Administrators to publish the information releases on ASX and to advertise the availability of the releases in national newspapers.

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<sup>5</sup> We also received a brief submission from the Australian Shareholders Association in similar terms to those of shareholders.

**Shareholder Representation**

22. The Panel was aware from the outset that this application was one which set the interests of shareholders in Pasminco against the interests of the creditors of Pasminco. The interests of the Creditors seemed well represented by the Administrators and their representing solicitors. However, the Panel was concerned that the interests of shareholders be appropriately represented. To that end, the first request for information that the Panel put to parties asked whether the interests of Pasminco shareholders could be adequately represented by the parties to the proceedings.
23. The Directors of Pasminco said that they could adequately represent the rights and interests of Pasminco shareholders at this time, despite the Administrators having control and day to day running of Pasminco. However, the Directors noted that they may need additional independent financial advice if they were asked to give a view on the fairness of a final proposal.
24. ASIC also indicated that it had the interests of shareholders of Pasminco as one of its primary concerns in participating in the proceedings.
25. Finally, although the interests of shareholders rank a long way down the priorities of the Administrators given the material excess of liabilities over assets which the Administrators advise is the situation for Pasminco, administrators are particularly required to respect the interests of shareholders where there is any real chance of shareholders' equity retaining value in a company under administration.
26. Given the material role for both the Directors and ASIC in representing the interests of shareholders, and the residual role for the Administrators where there appeared any prospect of value for shareholders' shares, the Panel decided that Pasminco shareholders' interests could and would be adequately and appropriately represented in these proceedings. This is how shareholders would be normally represented in proceedings before the Panel.
27. The Directors and ASIC had also received some outline information from the Administrators about some of the various reconstruction proposals that the Administrators had been considering, and about the current state of Pasminco's financial position. As contributors to the Panel's proceedings, shareholders' submissions would be materially hampered by not having this information<sup>6</sup>. The Panel did not consider it would have been appropriate to require disclosure of that information to Pasminco shareholders generally. This reduced the viability of a role for the shareholders themselves in making submissions to the Panel. It also reinforced the role for ASIC and the Directors as representatives of the Pasminco shareholders.
28. The Panel received suggestions from some shareholders that it should communicate

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<sup>6</sup> The Administrators advised that it would have been costly, impractical, uncommercial, and of no material benefit, for the Administrators to have sought to keep Pasminco's shareholders apprised of the progress of discussions within the Committee of Creditors.

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with Pasminco shareholders directly, either by writing a letter to them or by placing press advertisements advising them of the proceedings and seeking submissions from shareholders. The Panel considered these suggestions in light of the representations by the Directors and ASIC, and the administrative difficulty of receiving and considering the potentially thousands of responses that such a process might entail.

29. After considering the responses from the Pasminco Directors, ASIC, and Pasminco shareholders, the Panel decided that the shareholders' interests would be properly represented, and that seeking submissions from shareholders was not needed nor was it likely to be practical.

#### Information sources

30. We have not made detailed examination of Pasminco's current financial position or its prospects. We believe that we are entitled to rely on the assessment of the Administrators on Pasminco's current financial position.
31. Administrators have material obligations under both statutory and common law to maximise the chances of the company continuing in business and seek a better return for the company's creditors and members than would result from an immediate winding up of the company. We consider that we are further entitled to rely on the Administrators' assessment when none of the parties have led material evidence against the Administrators' views on the company's solvency or balance sheet.<sup>7</sup>
32. We assume that the valuations which the Administrators have provided to us as the basis for this decision have been prepared in accordance with the Administrators' statutory and common law obligations. In saying this, we note that the valuations of Pasminco's assets provided by the Administrators in their submissions to the Panel are said to have been prepared on a going concern basis.
33. The Directors have disagreed with aspects of the Administrators' valuation of Pasminco's assets, saying that they were based on "*a valuation of the assets using current or consensus forecast commodity prices and exchange rates (and upon "fire sale" prices tendered for some of the company's assets offered for sale by the Administrators)*"<sup>8</sup>.
34. The Directors advised that, in the absence of further information from the Administrators, they were unable to comment on the Administrators' assessment of the future prospects of Pasminco trading back to both solvency and positive equity value (that is the equity of existing shareholders) and the fairness of the proposal to shareholders, creditors and employees. However, the Directors suggested that the Panel could ensure that the interests of shareholders was safeguarded by requiring that existing shareholders retain 20% of the diluted shares in Pasminco, although they acknowledged that they were "*unable to form an opinion as to whether any specific*

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<sup>7</sup> The Directors advise that they have not been able to prepare alternative proposals or figures to those of the Administrators because while Pasminco is under administration company resources are not generally available to enable them to offer such evidence.

<sup>8</sup> Directors rebuttal submissions.

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*percentage shareholding being retained by existing shareholders is fair and reasonable".<sup>9</sup>*

35. We have accepted the Administrators' advice on the value of Pasminco's assets and Pasminco's prospects as preferable, absent cogent and objective evidence to the contrary. We also consider that it would be unreasonable in terms of time, cost and expertise, for us to embark on a course of seeking detailed submissions on this issue and to come to an informed and expert view on it.

#### PASMINCO

36. Pasminco is made up of the old Electrolytic Zinc Company, with parts of North Broken Hill, it was refloated as a specialist base metals company in about 1988. It took over Savage Resources Ltd in 1999. It is a lead and zinc mining and refining company (incidental silver), with modest operating profit and trading debt. However, it has significant financial obligations to various banks,<sup>10</sup> many of them apparently due to currency, interest rate and base metal, forward and futures contracts which Pasminco entered into as part of a hedging strategy. Pasminco has also suffered from the recent period of very low base metal prices.

37. In September 2001 the Directors announced that they were unable to sign the accounts for the financial year 2000-2001, because they:

*could not form the view that that there were reasonable grounds to believe that Pasminco could meet all of its commitments as and when they fell due*

*(i.e. the definition of insolvency).*

38. The directors advised that they could only form a view that the company could meet all of its commitments as and when they fell due if the company's lenders agreed to longer term credit support, which the Directors could not obtain. At that point, the directors appointed administrators under the voluntary administration provisions in Part 5.3A of the Act.
39. In addition to the issue of solvency, as discussed above, the Administrators have advised the Panel that the Pasminco group has an extremely large excess of liabilities over assets and the group's creditors would receive only a relatively small dividend in cents in the dollar terms on a liquidation<sup>11</sup>. The Administrators provided the Panel and parties with an indicative statement of Pasminco's financial position as at 31 December to assist the Panel's consideration. However, they requested that the Panel not publish the statement in its reasons as they considered it contained commercially confidential information.
40. The appointment of the Administrators was an event of default which triggered the right to crystallize many of the hedging contracts and for the counterparties to seek immediate payment. Pasminco has announced that payment on most of them has in

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<sup>9</sup> Directors submissions on the Panel's brief.

<sup>10</sup> References to Pasminco's Creditors are to these financiers.

<sup>11</sup> Administrators' letter to the Panel 24 April 2002.

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fact been called for by the counterparties.<sup>12</sup>

41. Given Pasminco's current insolvency it is open, under Part 5.3A of the Act, to the Administrators to liquidate Pasminco: sell all the assets, distribute the proceeds to creditors, leaving a shortfall, and dissolve the company with no distribution to shareholders, and to do this without reference to the shareholders. The Panel is advised by the Administrators that this is likely to cause creditors the largest loss.
42. It is also open, under the Act, to the Administrators to transfer the assets of Pasminco to a new company, in which the existing shareholders would have no equity, and continue to trade with financial support from its financial creditors, again without reference to shareholders. However, we make no comment on the practicalities and costs of such an option. In either case, it is agreed by all parties, the shareholders would receive nothing.
43. The Administrators proposed in their submissions to ASIC of 14 December 2001, that a workout under a deed of company arrangement might be preferable to a liquidation. No proposal has been put to the creditors of Pasminco formally, but options have been discussed with the Committee of Creditors. The Administrators have proposed in a number of public statements to ASX to sell some assets, but prices for zinc and zinc assets appear to be at a cyclical low. The Administrators advised that they considered that the Creditors will likely suffer lower losses by continuing to trade the assets of Pasminco forward, hopefully out of the current base metal price trough.
44. On 22 March, the Administrators released to ASX a copy of a further interim report to creditors on the current status of the administration of Pasminco and the future strategy for Pasminco. It contained a useful bringing up to date for those who hadn't had the benefit of the detailed submissions which the Panel had had over the last four weeks. It contained no valuations or projections.

### WORKOUT PROPOSAL

45. No firm or definite proposal has been put to the Panel or the Creditors so far. The Administrators advise that they have not developed any workout proposal in sufficient detail to put before the Panel as the basis for this application, and the Administrators stated in the application of 19 February that the proposal remains one of a number of alternatives they are currently considering, with a committee of creditors. The Panel's decision is based on the outline of the proposal in the Administrators' application.
46. The main terms of the proposal outlined for the Panel are that some debt will be converted into equity and the Creditors will agree to a moratorium on claims (although, again, the terms of such moratorium have not been made available to the Panel). The Administrators advise that the moratorium should allow the company to trade at a profit, and its free cash flow to be used to reduce debt. The suggested proposal will also allow the possibility of Pasminco shares being requoted. The

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<sup>12</sup> Announcement to ASX 15 November 2001: Letter to Shareholders re Company Update.



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Administrators advised on 27 February that the Creditors may perceive there to be an advantage in having a portion of their stake in the Pasminco group in the form of securities potentially tradable on a stock market.

47. The Administrators advise that new shares issued to the Creditors will likely constitute 95 - 99% or more of the shares in Pasminco on a fully diluted basis when Pasminco shares are quoted for trading again.

#### Later issues of shares

48. The Administrators advise that the Creditors are also considering converting as yet undetermined amounts of existing debt into convertible securities. Under the Deed of Company Arrangement those convertible securities would be convertible into new shares in Pasminco, under as yet undefined terms, for a period which the Administrators advise is unlikely to be more than ten years. The terms of the relief granted will allow the Creditors to acquire these shares where conversion of the securities is pursuant to the Deed of Company Arrangement, i.e. conversion is specifically a term of the Deed of Company Arrangement. The amount of debt likely to be converted to this form has not yet been determined. However, the Administrators advise that it is likely to be materially greater than the amount of debt initially converted to equity.
49. The Administrators also advise that the Creditors currently are considering recharacterising the remaining debts owed to the Creditors to remain as debt, but to be convertible, in certain events, and at certain rates (neither yet determined) into new shares in Pasminco. Similarly to the convertible securities which may be created under the Deed of Company Arrangement, where this debt is convertible to shares in Pasminco pursuant to the Deed of Company Arrangement, Creditors will be able to acquire those shares under the terms of the relief. We assume that the timetable for conversion of the debt will be similar to the convertible debt securities.

#### Spread and Requotation

50. The existing shareholders will retain their existing shares, but will be heavily diluted. The Administrators advised that sufficient shares would be issued to the Creditors to ensure that sufficient of the existing shareholders retained shares of a marketable parcel to maintain the "spread" required for listing on ASX.
51. The Administrators advise that the Creditors currently propose to seek reinstatement of quotation of Pasminco shares as soon as practicable, and in any event, during the currency of the convertible securities and convertible debt.

#### PASMINCO'S FUTURE

52. If the company is to continue to trade, it must be solvent, and additional money must be provided to it. The Administrators advise currently only Pasminco's existing creditors will supply the needed credit to Pasminco, and then only on the basis that the Creditors are providing Pasminco with further financial support in order to reduce the overall losses they are likely to make. The amount of debt to be converted

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and the proportion of shares to be issued to the Creditors have not been decided. We have used numbers of \$10 million for the debt conversion and 95% for the dilution factor on the basis that the Administrators have suggested them, but they may be quite different in the eventual plan decided on by the Administrators and Creditors.

53. At no stage have the Administrators suggested that Pasminco might be able to trade through this period of administration such that the existing shareholders' equity will regain value and Pasminco could be returned to the control and ownership of those shareholders. Indeed, the Administrators have expressly rejected this, in submissions to the Panel and to ASIC and in their initial letter to shareholders on 15 November 2001.
54. The Administrators have provided the Panel with no advice on when the suspension of trading of Pasminco shares may be lifted. We consider that it is desirable for the Administrators to advise the shareholders, and the market on this issue as soon as possible. We also think it is very desirable, if they propose to continue down the path outlined to the Panel, for the Administrators to take more consistent steps to keep shareholders and the market apprised of their plans and progress than they have so far.
55. Not the least, shareholders will wish to know whether Pasminco Limited is to be liquidated, or shares traded on any market, to allow them to realise any capital losses on their investments.

#### THE 20% THRESHOLD

56. Pasminco is a company to which section 606 applies, because it is a company listed on ASX. The Administrators advise that none of Pasminco's creditors have material relevant interests in Pasminco shares at present.<sup>13</sup>
57. Under the proposed reconstruction, the Creditors as a group will be issued shares in Pasminco which will have voting power exceeding 20%, as defined in section 610. No one Creditor will acquire shares with more than 20% of the voting power in the company.
58. However, part of the proposal outlined to the Panel is that the Creditors will collectively enter into agreements controlling disposal of the shares for the period of the workout (which is unpredictable at present but may be from one to ten years). These agreements will mean that each Creditor will have relevant interests in the shares of each other Creditor. The Administrators advise that agreements between Creditors regulating disposals of shares will only last until shares in Pasminco recommence quotation on ASX. The Creditors will in any case include each other's shares in their voting power because they will be associated by virtue of being parties to relevant agreements over control of Pasminco and the conduct of its affairs.
59. Accordingly, the currently proposed reconstruction will contravene section 606, unless it falls within an exception to, or exemption from, section 606. Two automatic

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<sup>13</sup> Nominee companies related to banks hold large parcels of Pasminco shares, for unrelated investors.

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statutory exceptions, and one exempting power, are relevant.

(a) **Member Approval Exception -**

Under item 7 of section 611, the members of the company can consent to the acquisition by a resolution in general meeting.

(b) **Scheme of Arrangement Exception -**

Under item 17 of section 611, section 606 does not apply to an acquisition resulting from a scheme of arrangement under Part 5.1.

(c) **Exemption under Section 655A -**

Under section 655A, ASIC can exempt the acquisition<sup>14</sup>.

#### MEMBER APPROVAL EXCEPTION

60. The Creditors could acquire the shares that the outlined proposal suggests if they obtained the approval of a general meeting of Pasminco shareholders (item 7 of section 611). The meeting needs to be properly informed and no votes may be cast in respect of shares held by either the Creditors or their associates.

#### SCHEME OF ARRANGEMENT EXCEPTION

61. The exception to section 606 for schemes of arrangement is available for both members' schemes and creditors' schemes.<sup>15</sup> The policy bases for excepting acquisitions of shares that are made under members' schemes are:
- a. the broad equivalence between the information and acceptance requirements for a takeover bid and those for a scheme of arrangement,
  - b. the supervision of the Court and
  - c. a provision requiring the Court not to approve a scheme (without ASIC consent) if it appears to have been entered into to avoid compliance with Chapter 6 (subsection 411(17)).
62. The broad equivalence ground does not extend to a creditors' scheme, which does not depend on acceptance by shareholders, and for which the information requirements are quite different from those for a members' scheme (and directed to creditors, not shareholders). Court supervision and subsection 411(17) apply to creditors' schemes, however. On that basis, courts may well take notice of the interests of shareholders in a creditors' scheme where they think that appropriate. Affected classes of creditors vote on a creditors' scheme, but members do not vote.
63. The Courts have accepted the proposition that, because of the equivalence of the information and equality of treatment between takeovers under Chapter 6 of the Act and members' schemes of arrangement, the legislature has no preference for a takeover being undertaken by either manner. The Courts do not apply subsection

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<sup>14</sup> This is the basis of these proceedings.

<sup>15</sup> Item 17 of section 611.

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411(17) to prevent schemes merely because the transaction (or parts thereof) could have been carried out by way of a takeover under Chapter 6. Similarly, Courts have not refused to approve the members' parts of schemes which, combined with creditors' schemes do things which could not have been attempted under Chapter 6, even where part of the scheme could have been attempted under Chapter 6.

64. Accordingly, it is open to suggestion that a properly constructed scheme to affect creditors' rights and to issue shares would be accepted by the Court.

### The Pasminco Deed of Company Arrangement

65. We note that the Deed of Company Arrangement has not yet been settled and we have not been provided with any of the material terms or detail that will constitute the final deed. We also note that if the Administrators had proposed to go by way of a scheme of arrangement they would have had to have provided the court with a fully developed proposal and documentation before a court would have convened the first meeting.
66. The version of the proposed reconstruction of Pasminco which has been outlined to the Panel could be put in place by deed of company arrangement or by creditors' scheme of arrangement. The Administrators advise that they propose a deed of company arrangement, because it is cheaper and quicker to put in place. Because creditors do not vote in separate classes in a deed of company arrangement, small classes of creditors are unable to veto the proposal, as they may under a creditors' scheme of arrangement.
67. The Administrators advise that they propose to issue to the Creditors shares in the company which will hold the Pasminco assets, businesses and subsidiaries during the workout. Under the current proposal that company would be the current listed company, Pasminco Ltd. Alternatively, it could be a new company formed specifically for the workout. However, we make no comment on the commercial practicality or cost efficiency of such a proposal.
68. The Administrators advise that they speculate<sup>16</sup> that the Creditors may prefer the equity which they will take up in the holding company to be quoted. On this basis, the Administrators would prefer to use the existing listed company Pasminco Ltd as the holding company and to retain its listing on ASX and quotation of its shares. If the Administrators use the existing company, they will issue only as many shares as would ensure sufficient existing shareholders will remain holding marketable parcels of shares to make up the spread required to retain listing.
69. The Administrators have stated that the Creditors will not be materially advantaged by using the existing shell, compared with transferring the assets to a new company, beyond the savings in arranging quotation of new equity just mentioned.

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<sup>16</sup> The Administrators advised on 4 March that the Creditors desired to *obtain control* of the company in order to “*use whatever value there may be in the listed shell to help them recover the money they have provided to the group*”. On 15 March, the Administrators stated that they were only “*speculating*” as to “*what might be possible advantages to the banks*” in acquiring control of the listed entity.

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70. In particular, they have stated in their rebuttals to the submissions of the Directors of Pasminco, and in a supplementary document<sup>17</sup>, that the Creditors will be no better off in terms of exposure to liability under environmental legislation or exposure to taxation liabilities if the assets of Pasminco were transferred to a proprietary company and the Creditors took shares in the new proprietary company in proportion to their claims. They have advised that *“the tax losses available to the Pasminco group will not be adversely affected by using a private holding company instead of Pasminco Limited.”*<sup>18</sup>
71. The Administrators have advised that Creditors would face only nominally greater exposure to stamp duty if the assets of Pasminco were transferred to a proprietary holding company. We understand this is because most assets and liabilities of the Pasminco group are held in subsidiaries of Pasminco and if the shares of these subsidiaries were transferred together, bringing the assets and liabilities, the net, dutiable, value would be low.

### Deeds of Company Arrangement

72. The following table sets out relevant differences between a scheme and a deed:

	Creditors' Scheme	Deed of Company Arrangement
Approval	Meetings of each class of creditors.	One meeting of all creditors.
Majority	50% by number and 75% by value that vote at the meeting, in each class.	50% majority by number and by value of the creditors voting at the meeting.
Court	Needed to order meetings and approve scheme.	No automatic role, however parties and other interested persons may apply to the court for intervention.
ASIC	Must be given draft scheme and explanatory statement and may address Court.	No role, unless on review of deed. Need not be given drafts.
Members	No role, but may appear as person interested when Court orders meetings and approves scheme. Court may take their interests into consideration.	No role, unless they seek review of deed (for example where there is a prospect of an insolvent company trading out of its insolvency) They are bound by the deed.
Company must	No	Yes (or at risk of insolvency)

<sup>17</sup> Administrators' letter of 15 March, 2002.

<sup>18</sup> Administrators' letter of 15 March, 2002.

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be Insolvent		
Information	Explanatory statement containing all of the information known to the company which is material to a decision whether to approve the scheme and, including copies of statutory accounts and a report as to affairs.	Report by the administrator about the company's business, property, affairs and financial circumstances and a recommendation about what is to be done. The report must be compiled quickly, in about three weeks (section 439A(5)) unless the Court extends the time.
Can be used for reconstruction	Yes	Yes
Reconstruction Provisions	Yes – section 413	No
Acquisitions Excluded from Chapter 6	Yes – item 17 of section 611	No

73. The Court has a wide power to set aside a deed of company arrangement, including on grounds that it is unfair or oppressive to one or more creditors (section 445D). It may also be set aside on the ground that wrong or inadequate information was given to creditors or the administrator before it was adopted, but that power must be exercised with a view to the time limits set by statute to find and provide the necessary information.
74. Shareholders may apply to the Court for orders concerning the administration of a company if they can show that they have standing as “any other interested person” (section 447A(4)). However, there is no specific ground for them to apply on the basis that the deed is oppressive to members.
75. The deed is executed by the company and its administrator. It binds the company, its officers, members and creditors (with a partial exception for secured creditors), and the administrator of the deed, who is usually the administrator of the company. It can be used do a wide range of things, including<sup>19</sup>:
- appropriating company property to pay debts,
  - releasing debt,
  - imposing a moratorium on debt, and
  - operating the company like a receiver-manager.
76. It is clear from the provisions relating to a deed of company arrangement<sup>20</sup> that it is

<sup>19</sup> See generally Schedule 8A of the Corporations Regulations.

<sup>20</sup> See particularly clause 2 of the prescribed provisions in Schedule 8A to the Corporations Regulations.

## Takeovers Panel

### Reasons for Decision - Pasminco Ltd

consistent with them to conduct a long-term workout, like the Adelaide Steamship group (which was not done under a deed of company arrangement as it was implemented prior to the existence of Part 5.3A).

#### Shareholders and a Deed of Company Arrangement

77. Existing shareholders do not vote, or have to be consulted, under the procedure to adopt a deed of company arrangement (or a creditors' scheme of arrangement).
78. If they have interests affected by the deed (and they may not, if the company has a deficiency of assets), they have standing to initiate action applying to the Court to set aside the deed (subsection 445D(2)). However, there is no requirement for Court approval of a Deed of Company Arrangement.
79. A standard provision for incorporation into deeds confers power to sell shares,<sup>21</sup> but there are no provisions which waive acquisitions of shares under a deed from the takeovers provisions. Similarly there are no provisions within Part 5.3A which would allow shares to be compulsorily acquired under a deed.
80. If the company is listed and no waiver is given, their approval to the issue of new shares may be required under Listing Rule 7.1 or other rules. ASX has advised this Panel that it has not received a formal application for any waiver of its Listing Rules by Pasminco concerning the issue of shares proposed under the reconstruction outlined to the Panel, nor has it made any determination as to what its response would be to any application.

#### No Exception from Section 606 for a Deed of Company Arrangement

81. There is no exception from section 606 for an acquisition of shares under a deed of company arrangement. This is in contrast to item 17 of section 611 in relation to schemes of arrangement, although a deed of company arrangement is in many respects similar to a simplified creditors' scheme of arrangement.
82. There is no published explanation for the difference, except for some subsequent reflections of the Legal Committee of the Companies and Securities Advisory Committee in its review of the voluntary administration provisions: Report on Corporate Voluntary Administration, June 1998. While these are helpful, they are of no authority in interpreting Part 5.3A, since they were not available to Parliament when it enacted the Part.
83. It is possible that it was not expected that deeds of company arrangement would be used as extensively as they have been for ambitious reconstructions, and relatively large companies, where takeovers issues most frequently arise. For instance, in Part 5.3A there are no provisions for mergers and asset transfers, corresponding with section 413. Nonetheless, creditors' schemes of arrangement have been largely replaced by deeds of company arrangement.

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<sup>21</sup> See clause 2(zc) of the prescribed provisions in Schedule 8A to the Corporations Regulations. However, there is little if any explanatory material to explain how Parliament intended this power to be used or what the provision's scope is. In addition, it seems to be in conflict with section 437F which prohibits share transfers without the court's approval.

## Takeovers Panel

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84. We reject the argument that members would have no continuing interest in a company subject to a deed, because a company should not be under administration, unless it was actually (or at risk of being) insolvent. For one thing, it is expressly part of the policy of Part 5.3A to maximise the return to company members.<sup>22</sup> A company which is currently unable to pay its bills as they fall due, may yet trade through its current difficulties and reach solvency and be returned to the control and ownership of its members, while still having protected the interests of its creditors during the insolvent period.
85. Under paragraph 444G(b), a deed binds members of the company. This subordinates members' rights in a reconstruction under the deed. It may have been intended to override section 606, but it does not have that effect, because section 606 does not operate by giving rights to members, but by directly prohibiting certain acquisitions. Nonetheless, it is clear support for the agreed position that the interests of members are subordinated to greater or lesser degrees (usually greater) to the interests of creditors in an administration.
86. The interaction of Part 5.3A and Chapter 6 may be resolved by administrators seeking to use the existing pathways through section 606 e.g. shareholder approval, or applying to ASIC to resolve under its the power to decide whether or not to exempt acquisitions of shares proposed under Deeds of Company Arrangement.

#### Should there be an Exception ?

87. The question of extending the exception from section 606 for schemes of arrangement to deeds of company arrangement was raised by CASAC in its 1998 review. Submissions to CASAC suggested that the exemption should be extended, to save expense in complying with Chapter 6, on the analogy of creditors' schemes and because creditors are the only stakeholders in a company in administration.
88. CASAC rejected these submissions, relevantly because shareholders may still have some equity in a company which has a surplus of assets over liabilities but which is under administration because it cannot pay its debts day to day, and because ASIC can give exemptions where justified.

#### EXEMPTION UNDER SECTION 655A

89. That brings us to the third possible way to reconstruct Pasminco under a deed without breaching section 606, which is for ASIC, under section 655A, to exempt the Creditors from section 606, in relation to the acquisition under the deed. ASIC having declined to give this relief, we have been asked to review its decision and give the relief instead.
90. Section 655A confers on ASIC power to exempt from any or all of the provisions of Chapter 6, or to declare that they apply as if modified or varied, in a particular case or a class of cases.

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<sup>22</sup> Paragraph 435A(b).



## Takeovers Panel

### Reasons for Decision - Pasminco Ltd

91. While this is a power with significant effects, it is used (and intended to be used) to overcome situations where the legislation, written for the broad class of cases, appears to have an unintended effect in specific circumstances
92. The width and legitimacy of the power were confirmed by the High Court in *ASIC v DB Management Pty. Ltd. & Ors.* [2000] HCA7 when it said "There is no warrant for giving the words of s 730<sup>23</sup> a meaning other than their literal meaning. The wide discretionary power which they confer, which operates in the context of legislation regulating acquisition of property, and conferring, subject to certain safeguards, rights of compulsory acquisition, cannot be limited in the manner determined by the majority in the Full Court."

### No Relevant Policy

93. ASIC has not published any policy which relates specifically to this situation.
94. In general, where ASIC has a published policy on how a power will be exercised, a review body should take that policy into account and apply it, or distinguish it or reject it, with due regard for ASIC's expertise and experience, and any process leading up to the adoption of the policy.
95. The lack of specific policy means only that the issue hasn't often arisen before, and that only the most general policy guidance is available. It is not a bar to dealing with the application nor is it any indication that this decision should be taken as a policy base for any proposition wider than the specific facts of this case. Any decision will to some degree set a precedent to which people will look in the future: a refusal as much as a grant of relief. However we do not suggest that we have considered the wider policy issues of Part 5.3A's relationship with the takeovers provisions sufficiently for this to be a basis for automatic future exemptions.

### Whether Law Reform

96. ASIC submitted that the Administrators have not established that there any particular circumstances which distinguish the current application and administration from any future cases. It also submitted that the legislature had shown a clear intention in not providing an exception from section 606 similar to item 17. ASIC submitted that in the absence of any clear characteristics that the Panel has been able to identify in the Pasminco application that distinguish it from future applications, the Panel's decision is tantamount to law reform. We think this is too strongly put. We do not think that the secondary materials that are available suggest that this is the case. Rather, we think it is more likely that there was not a sufficient case for an automatic exception, and that the interaction of Chapter 6 and Part 5.3A was left for ASIC to deal with under its modification power, when and if it arose.
97. Similarly, given that we do not intend this decision to be a watershed, we do not think that our decision will be tantamount to law reform by setting a precedent that

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<sup>23</sup> Section 730 was the immediate predecessor to the current section 655A. It was changed under the *Corporate Law Economic Reform Program Act 1999*.

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### Reasons for Decision - Pasminco Ltd

ASIC and future Panels will feel bound to follow. Rather, we expect ASIC and future Panels to decide whether it is appropriate to give exemptions on the basis of the specific facts in individual future cases.

#### Shareholder Veto Anomalous

98. We consider that it is inappropriate to require the issue of the shares under the outlined proposal to be subject to the approval of existing Pasminco shareholders for the following reasons:
- (a) The fact of the Creditors allowing existing shareholders to retain an interest is not a benefit which is given as consideration for the Pasminco shareholders giving anything up (and therefore requiring to be considered for fairness), but is a windfall to shareholders resulting from a device or arrangement which the Creditors have chosen for the Creditors' own convenience and to reduce their losses.
  - (b) It is anomalous and perhaps also unreasonable that the reconstruction, involving about \$3 billion of creditors' money, should be subject to a veto by shareholders with essentially no value at stake;
  - (c) It is anomalous that Chapter 6 should apply to acquisitions of shares by the Creditors, after they have legitimately taken control of Pasminco. Chapter 6 is designed to prevent people getting control of companies by coercion, or rushed, uninformed or selective dealing. The law has placed Pasminco under the control of the Creditors by means which neither contravened nor avoided Chapter 6.
  - (d) A vote under item 7 of section 611 is in effect dispensation by the non-associated shareholders from making a bid. However, as there is essentially no value left in the equity of Pasminco, making a bid would not address the issues of sharing in the benefits which a takeover is designed to preserve.
  - (e) It is anomalous that the existing shareholders should be able to veto one particular restructuring of Pasminco, when their shares are essentially worthless, all of the company's assets and powers are at the disposal of the Administrators, who are essentially answerable only to the company's creditors, and they have no interest which the Administrators are obliged to preserve or respect.
99. The Administrators advise that conducting the outlined reconstruction by a creditors' scheme of arrangement would cost an extra \$200,000 above the cost of progressing the administration solely under Part 5.3A of the Act. Seeking shareholder approval under item 7 of section 611 of the Act would cost an additional \$150,000.

**Counter Arguments**

*Shareholder misunderstanding*

100. Most of the shareholders who have written to us have been under a number of false impressions, in large part that is due to the Administrators not having sought publicly to explain the proposal which has been outlined to the Panel. No doubt the Administrators would say that their letter of 15 November 2001 set out clearly to existing shareholders of Pasminco that there was no prospect of any return of value to the existing shareholders and that that was the end of shareholders' interests in Pasminco.
101. The misunderstandings appeared to include:
  - a. that there is a prospect of Pasminco returning to solvency and positive value to its existing shareholders; and
  - b. that the Administrators' proposal involves it canceling existing shares leaving existing shareholders with nothing.
102. We hope that these reasons will clarify to those shareholders that the Administrators affirm (and we have had no evidence to the contrary) that there is no prospect of current equity in Pasminco returning to value, and that existing shareholders' shares are not being cancelled.

*Returning Pasminco to shareholders once/if it returns to solvency*

103. Notwithstanding those misunderstandings, some shareholders feel that it is unreasonable and unfair for the Creditors to retain the company and trade it back to solvency, without returning it to the shareholders, when the debts are paid off.
104. They accept that the Creditors are entitled to sell the assets, and that the shareholders would then get nothing. But if, like a receiver, the Creditors take the profits for a time instead, and trade the company back to solvency, they believe that the Creditors should then give it back to the shareholders.
105. That analysis works for a company which has a cash flow problem, but a positive balance sheet. And a company with cash flow may find the time to mend its balance sheet. But there was no value left in the equity in Pasminco by the time the company became insolvent (without the support of the Creditors), with a deficiency of assets.
106. Pasminco will only be able to trade back to solvency, if the Creditors advance more money in a position where it is a very material risk to do so. If they do, they will be venturing risk capital, in effect providing equity capital in a company whose equity value has now been reduced to nil.
107. Given the essentially zero value of the current equity in Pasminco, the ratio of ownership of the Creditors and the existing Pasminco shareholders that is proposed under the proposal outlined to this Panel is not unreasonable. In essence, any continued value for existing shareholders is a bonus which they could not have

expected.

*Fair Proportion ?*

108. Several shareholders put a similar proposition to that which the Directors had put to us i.e. that relief should be granted, on condition that some maximum be placed on the proportion of shares to be issued to the creditors. While the shareholders suggested limits ranging from 75% to 95%, none of them was able to suggest a criterion for deciding what proportion would be fair.
109. We do not find this a persuasive argument. If the shares retained some value, that value could be reflected in a limit on the proportion of shares which could be taken by Creditors under reconstruction. The shares retaining no value, there is no basis for setting any such limit.

**Court consideration of shareholders' interests**

110. ASIC believe that in Pasminco's situation a creditors' scheme of arrangement would have procedural advantages for shareholders over a deed of company arrangement. Those advantages would not consist of an opportunity to vote (shareholders do not vote on a creditors' scheme) or in access to information (the proposal and explanatory document would be released to ASX, whether the reconstruction proceeded by deed or by scheme).
111. ASIC suggests that under a scheme, the Court would be required to take note of the interests of shareholders when considering the documentation of the scheme, the terms of the scheme, and in deciding whether or not to confirm the scheme. In addition, ASIC suggests that proceeding by a scheme would afford the possibility of either the shareholders or ASIC intervening in Court to oppose approval of the scheme. For the reasons we set out in this decision, it seems unreasonable to suggest that the Court would regard the suggested reconstruction as oppressive of shareholders, whether it was conducted by deed or by scheme.

**Rights of shareholders**

112. The Directors and ASIC also submit that, although the equity value of Pasminco shares may now be nil<sup>24</sup>, until Pasminco is dissolved, rights are still attached to the shares. This is plainly correct. ASIC and the Directors further submit that these rights may potentially carry some continuing financial value. Given this possibility, they believe that the reconstruction should be implemented under one of the mechanisms open under the Corporations Act, each of which provides for adequate regard to the potential interests of shareholders. For example, the reconstruction could proceed by way of a creditors' scheme of arrangement. Alternatively, they say, shareholders should be given information and allowed to make their own decision whether and on what terms those rights will be overridden, rather than having that decision made for them by the Administrators, the Creditors or the Panel.

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<sup>24</sup> Although they do not concede that that is the case.

## Takeovers Panel

### Reasons for Decision - Pasminco Ltd

113. ASIC and Directors acknowledge that the Administrators have clear rights to deal with the assets of Pasminco as they see best for creditors under Part 5.3A. However, they say, the Administrators have chosen a path, which is blocked by the takeovers provisions, i.e. that path is not available to them as of right, that path involves overriding the rights of shareholders. If the Administrators want to go by this particular path in favour of others, such as by scheme of arrangement, which have no takeovers block, for the benefit of the Creditors (even if only by reducing the Creditors' losses), they should deal with the existing shareholders of Pasminco rather than asking ASIC or the Panel to override those rights. They argue that there are many other situations where a particular right has no intrinsic value to its holder, but a prospective acquirer of that right must deal with the holder in order to gain access to that right.
114. This is not an argument that the existing Pasminco shareholders have a right to veto the reconstruction per se, merely a right to expect the Administrators will deal with the existing shareholders if the Administrators wish to proceed with this particular alternative. If the Administrators wish to gain some benefits for the Creditors under this proposal, the shareholders should have some right to share in the value that the particular path will bring to Creditors.
115. However, we have not accepted these arguments. Because of the financial position of Pasminco, the Creditors are assured of losses, and control of the company has passed to the Administrators, we should allow the Administrators full use of every asset of Pasminco in order to reduce those losses. This is even to the point of using the listed shell of Pasminco and the existence of the current spread of shareholdings in Pasminco as an asset of the company, without any requirement to consult or consider the interests of the existing shareholders of Pasminco.
116. We are unable to accept the notion that the shareholders retain valuable rights as the owners of the listed shell of Pasminco. The "listed shell of Pasminco" is just the company Pasminco Limited, to which the Administrators have been appointed. We have already mentioned the shareholders' rights in relation to that company. The company's listed status is a contractual relation between the company and ASX. It is not a separate entity or item of property, which must be notionally hived off and dealt with separately. It is simply a circumstance affording certain obligations and opportunities to the Administrators: opportunities which they are bound to use primarily for the benefit of the creditors.

### **BENEFITS TO CREDITORS**

117. We are advised by the Administrators that they do not know the exact nature or value of the benefits that Creditors will gain by proceeding with the proposal outlined to the Panel. However they advised that they have legal and other advice<sup>25</sup> as to the following:
- a. there are no tax losses within the Pasminco group which are likely to be more accessible to the Creditors if any equity issued to the Creditors is in the listed

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<sup>25</sup> Administrators' rebuttal submissions.

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entity (Pasminco Ltd.) rather than a new holding company to which the assets and subsidiaries of Pasminco had been transferred<sup>26</sup>;

- b. there are no added tax, environmental or other liabilities that the Creditors would be exposed to if they were issued equity in a new holding company compared to equity in the current Pasminco Ltd.; and
- c. there would be only nominal/insignificant stamp duty liabilities in proceeding with a new holding entity.

118. The Administrators advise<sup>27</sup> that the following may also be possible advantages:

- a. Equity holdings by creditors in a listed entity may in the medium to long term be more easily transferable than holding in an unlisted entity; and
- b. Certain creditors may be able to record their equity holding at a higher value if the shares are listed.

119. It remains possible however that, having regard to the additional compliance costs which would be involved and the fact that a percentage of the equity would need to be left with the Pasminco Shareholders, the Creditors may ultimately decide that they do not wish to maintain a listed company.<sup>28</sup>

## DISCLOSURE

120. We consider that it is desirable that the Administrators provide shareholders and the market with adequate information both on the relief provided and on the proposal approved by creditors, as quickly as possible.

### *Content*

121. We have decided to require the Administrators to make two disclosures to the Pasminco shareholders and the market. They should contain an adequate description of the following:

- a. The relief granted (within two business days of the date of the instrument of relief):
  - i. the effect of the Panel's decision i.e. to allow the Administrators to issue more than 20% (and in fact likely to be 95-99%) of shares in Pasminco to creditors in a debt for equity swap without requiring the Administrators to seek shareholder approval;
  - ii. that the existing shareholders' shares will, while being heavily diluted by the proposed new issue, not be cancelled as a result of the Panel's decision;

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<sup>26</sup> Administrators' further submissions of 15 March 2002.

<sup>27</sup> Administrators' further submissions of 15 March 2002.

<sup>28</sup> Administrators' further submissions of 15 March 2002.

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- iii. the conditions attached to the Panel's decision; and
  - iv. information about the possible timeframe for future events, such as the second creditors' meeting.
- b. the proposal (when the Administrators have a firm proposal that is to be put to creditors):
- i. a brief summary of the details of the proposal, directed to the direct effect of the proposal on the shareholders;
  - ii. information on the future of Pasminco to assist shareholders realise any capital losses on their investment, in particularly for taxation purposes;
  - iii. a description of the proposal explaining that Pasminco's assets will be operated and realised in the first instance in the interests of creditors;
  - iv. a discussion of any potential value the Administrators see in the shares for shareholders;
  - v. a repeat explanation that whilst existing shareholders' shares are being heavily diluted, they are not being cancelled; and
  - vi. details of arrangements between the creditors regarding the disposal of (or restrictions upon disposal of) the equity issued under the restructure.

122. We do not consider that these are onerous disclosure requirements, nor that they would require material work by the Administrators. We consider that they should be capable of being contained in a short, simple document.

#### *Delivery*

123. We will not require the Administrators to give a copy of any communications to every shareholder of Pasminco. However, the Administrators must provide a copy to each shareholder who requests a copy. The publications made by the Administrators must advise shareholders of their right to request a copy of the disclosure document (at no charge) with a procedure for making the request.

124. The delivery methods will be:

- 1. publication to ASX; and, immediately after; and
- 2. publication (suitable for downloading) on Pasminco's website.

125. Pasminco must also, as soon as practicable afterwards, cause a notice to be published in at least one national Australian newspaper and in one major State based newspaper per State (e.g. The Age in Victoria, The Courier Mail in Queensland) setting out a brief summary of the notice, announcing the publication of the above notice to ASX and on Pasminco's website, and advising how persons may request (at no charge) a copy of the notice.

## Takeovers Panel

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#### *Process*

126. The Panel provided the disclosure requirements to the parties for comment, and received no objections.

#### **Ongoing Supervision**

127. The Administrators have requested that the Panel provide the relief immediately. ASIC and the Directors have suggested that the Panel hold its decision until the form of the proposal is finalised. We have no wish to have any ongoing supervision of the administration, that is properly the domain of ASIC and the Administrators. However, we wish to ensure that the circumstances of the proposal that is eventually agreed by creditors is not materially different from the proposal outlined to the Panel by the Administrators and is the basis for this decision.
128. Therefore, we advised the Administrators that we would grant the relief requested, subject to the conditions below. However, we will not review the final proposal to be put to creditors. It will be incumbent on the Administrators to ensure that the final proposal is not materially different to the proposal outlined to the Panel under this application, i.e. falls within the relief granted.

#### **DECISION**

129. We have decided, by majority, to grant the application by the Administrators. These are the reasons of the majority.
130. We consider that control of Pasminco has passed to the Administrators to deal with on behalf of the Creditors, and that it is no longer appropriate for the takeovers provisions to apply to the issue of shares under the reconstruction outlined to this Panel.
131. We accept the Administrators' submissions that no equity value remains in the shares held by the existing Pasminco shareholders. We consider that on that basis, and in the circumstances before us, the Administrators of Pasminco should be able to use the existing listed company entity, and its existing shareholder spread as an asset to reduce the losses to creditors.
132. We consider that the added value that the existing Pasminco shareholders might receive is entirely in the nature of a windfall. As a windfall, there is no need for the existing shareholders to consider or assess whether the value being given is fair, reasonable or acceptable.
133. This decision is easier for us given that in many of the other ways of reconstruction, that all parties agree are open to the Administrators, shareholders would receive no value at all.
134. The Administrators stated in their submission of 27 February that neither the Administrators nor the Creditors will support a method of restructuring Pasminco which gives its shareholders a veto. The Administrators advise that one of the alternative reconstructions would be chosen instead which would leave existing



## **Takeovers Panel**

### **Reasons for Decision - Pasminco Ltd**

Pasminco shareholders with no interest in the future company.

135. The Directors of Pasminco made submissions suggesting that there are reconstruction outcomes which might allow existing shareholders of Pasminco holding material minority levels of ownership in the reconstructed Pasminco. In their rebuttal submissions, the Administrators again reiterated their view that there is no prospect of existing shareholders of Pasminco owning more than a residual percentage of the company in any reconstruction.
136. In making this decision, we accept that the Administrators and the Creditors appear to be likely to benefit from this relief (by reducing their losses), and shareholders will get no more than “residual” value for the use of the existing listed company and their presence on the register.

### **Conditions**

137. The relief will be conditional on any acquisitions under the relief being specifically authorised or required under the Deed of Company Arrangement approved by the creditors of Pasminco. (See the text of the instrument at Annexure 3)
138. The exemption will be conditional on the Administrators providing the information to shareholders that is set out in paragraph 120 above.

### **Decision is case specific**

139. The grounds of this decision are specific to the facts, and we do not propose to set out a general policy as to when relief from Chapter 6 should be given to facilitate a reconstruction by deed of company arrangement.

### **Process**

140. The Panel has no power to make costs orders in applications under section 656A . The Panel consented to the commercial solicitors of the parties representing their clients in this matter.
141. The Panel invited parties, on a number of occasions through the process, to advise whether they considered there were issues which should be resolved in a conference. Although parties indicated at different times that a conference might be beneficial to resolve an issue, the issues either lost relevance as the matter progressed, or were adequately resolved by other means.

**Denis Byrne**

**President of the Sitting Panel**

**Decision dated 22 April 2002**

**Reasons published 26 April 2002**



**IN THE MATTER OF PASMINCO LTD. (ADMINISTRATORS APPOINTED)**

**DISSENTING DECISION**

**SUMMARY**

1. These are the reasons why I, Marian Micalizzi, as a member of the Pasmenco sitting Panel, would not grant the relief applied for by the Administrators. I consider that the Administrators have not demonstrated that the benefits of granting the relief would outweigh the actual and perceived detriment to the shareholders of Pasmenco and the Australian equity market.
2. I base my view primarily on the following reasons:
  - a. there are routes available to the Administrators (representing the Creditors) to deal with the assets of Pasmenco<sup>29</sup>, including the alternative of proceeding by way of a scheme of arrangement, which need no intervention from the Panel. Without good regulatory reasons to alter the provisions of the law they should follow those routes;
  - b. the benefit suggested to be gained by the Creditors is very uncertain, and at the highest suggested to the Panel, it appears too small to warrant the relief;
  - c. the cost to the Administrators and Creditors of refusing the relief appears too small (some \$200,000) to warrant granting relief of such marginal benefit;
  - d. the harm to the perception of fairness by investors in the Australian equities market is potentially high;
  - e. if the Creditors believe they will gain a benefit from using the listed shell and the spread of shareholdings (even if only by reducing their losses), they should deal with the shareholders or their representatives over what is a fair and reasonable division of the benefit they will gain from using the listed shell. Otherwise, they should use one of the existing routes available to conduct the reconstruction of Pasmenco; and
  - f. refusing the relief would not adversely affect the Administrators' dealings with the assets of Pasmenco in favour of the Creditors.

**APPLICATION**

3. The details of the application, and the facts surrounding it and Pasmenco are well set out in the majority decision. I do not propose to repeat them. I use the terms

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<sup>29</sup> One of the central issues in this application is whether the listed shell (the corporate entity) and the "spread" of shareholdings (or shareholders) constitute assets of Pasmenco or whether they are owned by the shareholders. For the purposes of these reasons, as explained below, I have treated the listed shell and the spread as separate to those assets of Pasmenco over which the Creditors or Administrators properly have claim under the administration.

## Takeovers Panel

### Reasons for Dissenting Decision - Pasminco Ltd

Pasminco, Administrators, Creditors and Directors as they are used in the majority reasons.

#### WHAT THE APPLICATION IS ABOUT

4. The application, and the related decision, before the Panel is not about what the Creditors can do with the assets of Pasminco.
5. The application is about the Creditors seeking to use the listed shell<sup>30</sup> of Pasminco and the “spread<sup>31</sup>” of shareholders/shareholdings in Pasminco, together with the assets of Pasminco, and whether the shareholders should share in any benefits that the Creditors derive from using the listed shell and the spread. It is about the Creditors asking the Panel to decide that the shareholders’ position has no value and asking the Panel to remove the commercial leverage that the shareholders may retain in the reconstruction.
6. The application is about what positive market, efficiency, regulatory and fairness reasons are there for the Panel to intervene given there are other satisfactory routes available to the Administrators and the Creditors to achieve the objectives they have for gaining value from the assets of Pasminco.
7. The application is about the desire of the Creditors to gain a benefit (even if only reducing their losses) by using the shareholding spread and the listed shell of Pasminco. I consider that these are assets of the shareholders and that they are not assets that the Creditors have a right to access. If the Creditors want to use them they should deal with the shareholders, or the Directors as the shareholders’ representatives, for fair and reasonable division of the benefit. If the Creditors do not want to deal with the shareholders or their representatives they should not seek to use those assets for their own benefit.
8. This application is also about the Administrators seeking novel relief to extend the scope of an administration further than the legislature has so far determined.
9. It is not about a veto right for shareholders over the Creditors’ use of Pasminco assets.

#### COMMON GROUND

10. There are many aspects of the application over which there is no difference of view within the Panel. The first and most important is that it is agreed that the Creditors have control over Pasminco’s assets because:
  - a. the Directors of Pasminco placed it under administration;
  - b. the Creditors had pre-existing security over various assets of Pasminco;

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<sup>30</sup> “Listed shell” refers to both the corporate entity, Pasminco Ltd., and the fact that it is currently on the official list of ASX, albeit its shares are currently suspended from quotation, contrasted to any assets owned by that entity.

<sup>31</sup> “Spread” refers to the requirement in ASX Listing Rule 1.1 Condition 7 that a listed entity must have at least 500 holders each having a parcel of ordinary shares with a value of at least \$2000.

## Takeovers Panel

### Reasons for Dissenting Decision - Pasminco Ltd

- c. the Administrators advise that Pasminco is now insolvent (without the support of the Creditors)<sup>32</sup>; and
  - d. the Creditors have access to the assets of Pasminco in order to minimise their losses.
11. Similarly we agree that the shareholders have always been exposed to getting nothing of value for their Pasminco shares, under this or any alternative proposals.
  12. Further, we agree that under any go forward proposal, the Creditors would be providing forbearance to Pasminco, and taking risk. If the company trades out of its current insolvency, then there should be a major shift in value from Pasminco shareholders to the Creditors in recognition of the forbearance and risk taking by the Creditors.

### DISCLOSURE REQUIREMENTS

13. While I disagree with the decision of the majority, if such a decision is to be made, I agree with the disclosure requirements in the majority decision. I also agree with the majority decision on ongoing supervision.

### RIGHTS OF, AND BENEFITS TO, CREDITORS

#### THE LISTED SHELL AND SHAREHOLDING SPREAD

14. It is agreed that because of Pasminco being placed into administration, and the Administrators believing it would be insolvent without the support of the Creditors, the Creditors have the right to deal with all of the assets of Pasminco and, if they choose, to place the company into liquidation.
15. On one argument, it might be asserted that as the Creditors have the right to deal with all of the assets and to place the company into liquidation if they choose, they also have the right to destroy the listed shell, and any value it has. The argument then runs that therefore they also have the right to take and use whatever value is in the listed shell and the spread. However, the initial facts of the argument are no basis for the conclusion.
16. Another line of argument asserting that the Creditors have the right to use whatever value there is in the existence of the listed shell and the spread of shareholdings, is that the corporate entity and the spread of shareholdings are assets of the company. However, in my view, they should properly be seen as "assets" of the shareholders of the company, not of the company. Therefore, the Creditors do not have automatic right to use them as assets under the administration.

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<sup>32</sup> Administrators' letter to ASIC 24 January 2002.

## Takeovers Panel

### Reasons for Dissenting Decision - Pasminco Ltd

#### WHAT EFFECT WOULD REFUSING THE APPLICATION HAVE ON THE CREDITORS

17. The application does not clearly set out what effect refusing the application would have on the Creditors. The Administrators have not advised that they have made any such assessment.
18. The Administrators have asserted that they can do everything to maximise the Creditors' returns (for example, in terms of asset distribution, utilization of tax benefits) using other corporate vehicles as alternatives. Therefore, they say, there is no commercial imperative (so presumably no significant cost) to structure the administration either way. Their submissions appear to characterize the alternatives as being very easy to achieve i.e. with no significant cost over using the existing listed shell and spread of shareholdings. Their assertions as to this ease have not been fully tested.
19. Refusing the application would not adversely affect any treatment of the assets of Pasminco by the Administrators under a Deed of Company Arrangement. Creditors can do all they want with the assets simply by proceeding with a Deed of Company Arrangement and dealing with the assets and leaving the shell of Pasminco in situ, or liquidating it. This application is only about the Creditors using the listed shell and the spread of shareholders.
20. The Creditors want both the benefits of a Deed of Company Arrangement, which rolls all the creditors into one class, and the benefits of a scheme of arrangement, which will allow it to use the listed shell and spread of shareholdings and pass through Chapter 6, without the downside (restrictions) of either of the regimes.

#### DISPROPORTIONATE EFFECT ON CREDITORS AND ON SHAREHOLDERS

21. The benefits to Creditors of granting the relief appear to be small<sup>33</sup>, especially compared to the losses that the Administrators tell us that the Creditors are potentially facing. However, given the very marked diminution in value of shares in Pasminco, the listed shell and the spread make up a very large proportion of their remaining value, if any. It would be inappropriate to impose such a proportionately material further decrease in value on the shareholders for such a proportionately immaterial benefit to the Creditors.

#### SCHEME OF ARRANGEMENT EXCEPTION

22. If the Creditors decide that using the listed shell and its spread is of value to them they can proceed a number of other ways, for example, by way of a scheme of arrangement.
23. The Administrators say that going by way of a scheme of arrangement would cost an extra \$200,000 i.e. about 0.006% of the Creditors' debts.

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<sup>33</sup> At least the Administrators have been unable to tell us that the benefits would be large or small. If the benefits were large, then there would be an even stronger case for the Panel not imposing its view in a case where the potential value being gained by one party is large.

## **Takeovers Panel**

### **Reasons for Dissenting Decision - Pasminco Ltd**

24. If the court decided that the interests of other creditors were so different that they form a different class and should vote separately, a scheme may expose the largest creditors to having to offer those other creditors a deal which they will accept.
25. A scheme of arrangement also exposes the Creditors to the court's overall assessment as to whether or not it is appropriate to approve the scheme.
26. However a scheme, if approved by the court, gives the Administrators absolute certainty over the legality and enforceability of their proposals.

### **DEEDS OF COMPANY ARRANGEMENT**

27. The Administrators say Pt 5.3A is very close to Pt 5.1 and that they could do under Part 5.1 almost all the things they want to do under Part 5.3A. However, there is no equivalent for Deeds of Company Arrangement, of the exception in section 611 item 17 for schemes of arrangement. The Administrators have argued that this is an oversight in the drafting of the legislation and that the Panel should assume that the legislature intended Deeds of Company Arrangement under Part 5.3A to have the same takeovers relief as Schemes of Arrangement approved by a court. There is no evidence for this assertion.

### **NO EXCEPTION FROM SECTION 606 FOR A DEED OF COMPANY ARRANGEMENT**

28. Currently section 606 prevents the Creditors from acquiring more than 20% of Pasminco and maintaining the relevant agreements that they say they need to manage the administration efficiently. The Administrators make an analogy with item 17 of section 611, despite the fact that this item applies only where a court has overseen the process of the scheme of arrangement and has approved the scheme. Flowing from the statutory restriction on the Creditors' acquisition of shares, the shareholders are entitled to assume that persons may not acquire control over the company (rather than its assets, which are not the subject of the takeovers chapters) other than through various gateways in section 611.

### **PASMINCO - VALUATION ISSUES**

#### **"SPECIAL" VALUE OF LISTED SHELL AND SPREAD**

29. The value that the shareholders have is largely a negative or blocking one, i.e. they currently stand in the way of the Creditors using the listed shell. Either the Creditors cannot access the listed shell, or they must go by way of a scheme of arrangement, or the Creditors must deal with the shareholders or their representatives, i.e. the Directors.
30. The Directors might then recommend to the Panel<sup>34</sup> that the relief (as part of the deal) is in the interests of shareholders and the Panel should approve it. If the Creditors choose to go by way of a scheme of arrangement, they run the risk of a court deciding that further note should be taken of shareholders' interests in the process of

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<sup>34</sup> Directors' submissions 1 March 2002.

## Takeovers Panel

### Reasons for Dissenting Decision - Pasminco Ltd

approving a creditors' scheme of arrangement. Again, if the Creditors chose, they could propose a sharing of benefits which would allow the Directors to advise the court that the scheme appeared to be fair to shareholders.

31. No-one has determined what the value of the listed shell and the spread is, to the Creditors or to anyone else. The Administrators have been unable to provide the Panel with any detail. On the one hand they say that there is no value in the shares because the liabilities materially outweigh the assets, but on the other hand the Administrators have spent a large amount of time and money progressing this application.
32. The Administrators say that the value to them of the listed shell and the spread is minimal, because they can do almost anything they want by alternatives involving a new holding company<sup>35</sup>. However, as noted above the Administrators' assertions on the ease of so doing have not been tested.

### DIRECTORS' ASSESSMENT

33. The Administrators say that there is no equity value left in Pasminco. The Directors say they do not have enough information to agree with that or rebut it, or give a view on what a fair value to shareholders is, but they suggest that shareholders being left with 1% of the equity value in the reconstructed company is not fair.<sup>36</sup>
34. The Directors have said that they do not think that the current proposal is fair, or at least have seen no evidence that it is fair.<sup>37</sup>

### VALUE OF LISTED SHELL TO CREDITORS

35. The Administrators have asserted that they do not know what the value of using the listed shell and the spread of shareholdings is to the Creditors. This makes it difficult for the Panel to assess whether or not it is a material benefit which shareholders should decide the disposal of.
36. If the Administrators wished to transfer assets out of the Pasminco group to another vehicle, which is one of the alternatives which the Administrators have advised the Panel would be an effective alternative, they would need to do so on the basis of fair value. In the circumstances they would most likely need to seek independent valuation advice. Further it is possible that such transfers may involve differential "leakage" of distributions or value to different groups of creditors, which may reduce the ease of the alternative. However, the Administrators have made no submissions on this issue.
37. The issue is further clouded by the Administrators' advice that there is doubt as to whether the relief which is the subject of this application will be needed for the final proposal actually put to the creditors.

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<sup>35</sup> Administrators' rebuttal submissions 4 March 2002.

<sup>36</sup> Directors' submissions 1 March 2002.

<sup>37</sup> Directors' submissions 1 March 2002.

## Takeovers Panel

### Reasons for Dissenting Decision - Pasminco Ltd

#### GENERAL VALUATION ISSUES

38. The valuation issues in this matter have been hard, both in terms of the assets of the Pasminco group (and resulting shareholders' equity) and in terms of assessing the "special" value to the Creditors and to the Pasminco shareholders of the use of the listed entity and the spread of shareholdings. It may well be that the valuations provided to the Panel are all reasonable and soundly based, in which case one leg of the Administrators' argument is made out. However, the proof or failure of that leg of the Administrators' argument is not highly relevant to my decision.
39. My decision is concerned with fairness, and appropriateness of using assets (the listed shell and the spread) which do not appear to be within the Administrators' powers. I remain concerned that not enough work appears to have been done to enable the Panel to ground its decision firmly on solid evidence.

#### FAIR VALUE

40. An important issue in the argument about the value of Pasminco's assets, on which it is arguable that the Panel has not received a sufficient answer, is whether the valuations provided to the Panel asserting that there is no equity value left for shareholders are fair value assessments and whether they properly take into account the prospects and related risks of those assets.
41. The Panel's majority reasons assume that the valuations which the Administrators have provided it as the basis for this decision have been prepared in accordance with the Administrators' statutory and common law obligations. The majority reasons note that the valuations of Pasminco's assets provided by the Administrators in their submissions of 24 January 2002 are said to have been prepared on a going concern basis. This statement may not give the Panel sufficient assurance that the values used are "fair value".
42. Base metal prices are at an historical low. The Panel has not been told how much increase in base metal prices would be required to change asset values sufficiently that there is some prospective value in shares in Pasminco<sup>38</sup>. It would appear less than optimal to accept the Administrators' assertions of no value without an analysis, or at least advice, from the Administrators, and preferably from a person expert in the area, on this issue.
43. In particular, the Directors note that the Administrators' estimate, as at 31 December 2001 as to Pasminco's net asset deficiency (which was provided to the Panel and parties in this matter in an indicative statement of financial position, to assist the Panel in its decision), is based upon a valuation of the assets using current or consensus forecast commodity prices and exchange rates (and upon "fire" sale prices tendered for some of the Company's assets offered for sale by the Administrators).<sup>39</sup>

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<sup>38</sup> In their rebuttal submissions of 04 March 2002, the Directors stated "The Directors believe this underpins the future value that creditors place in the company and is the basis for the Directors belief that you can impute, at least, an interest for the existing shareholders in the future operation of the Company that should be protected."

<sup>39</sup> Directors' rebuttal submissions 4 March 2002.



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44. On widely accepted valuation principles, a valuer would take those issues into account in assessing “fair value”, and it would have been desirable to have been able to establish what the Administrators have done in relation to these valuation issues before the Panel accepted the Administrators’ assertions that there is no value for shareholders, now or ever.

#### INFORMATION

45. The application lacked preciseness as to the form of the proposal for the Deed of Company Arrangement and the Administrators’ advice about various issues, such as the value of the listed shell and the spread to Creditors. Another worrying feature has been the reduction in certainty and quality of information as the Panel sought clarification from the Administrators. The culmination was the Administrators’ advice on 15 March that they were “only able to speculate” on what might be the advantages to the Creditors of retaining and using the listed shell and the spread of shareholdings i.e. the crux of the whole application.

#### THE ONGOING EFFECT OF THE PROPOSED RELIEF

46. As set out in the majority decision, the Administrators advise that the Creditors are also considering converting as yet undetermined amounts of existing debt into convertible securities. Under the Deed of Company Arrangement those convertible securities would be convertible into new shares in Pasminco, under as yet undefined terms, for a period which the Administrators advise is unlikely to be more than ten years. The amount of debt likely to be converted to this form has not yet been determined. However, the Administrators advise that it is likely to be materially greater than the amount of debt initially converted to equity.
47. The majority decision sets out that the Administrators also advise that the Creditors currently are considering recharacterising the remaining debts owed to the Creditors to remain as debt, but to be convertible, in certain events, and at certain rates (neither yet determined) into new shares in Pasminco. Similarly, Creditors will be able to acquire those shares under the terms of the relief provided in the majority decision.
48. The Administrators have not been able to quantify the amount of debt, the price at which new shares would be issued, the time or the basis. The Administrators advise that the issue of new shares to Creditors is likely to continue after Re quotation of Pasminco shares on ASX.
49. Because of the size of the debt concerned, the relief would allow the Creditors to acquire an essentially unlimited number of new shares. Further, the relief would apply even after Pasminco had conducted a number of public equity raisings and the Creditors had been diluted materially below their initial reconstruction holdings.
50. It is inappropriate to allow such relief, which is essentially exemption from the takeovers provisions, to a group of creditors in a listed public company. If the Creditors wish to convert debt into equity in such large and indeterminate amounts then they should settle those arrangements before they choose to bring Pasminco back to the public listed equity market.

## **Takeovers Panel**

### **Reasons for Dissenting Decision - Pasminco Ltd**

51. It is inappropriate to allow the Creditors the benefits of the relief and allow them to trade Pasminco shares as a publicly listed company. The Creditors should be required to choose when they want to take the company back to public listing and then treat it in all ways as other listed public companies are treated.
52. Disclosure to investors and the market of the possibility of the Creditors converting the debt would alleviate some problems, but would be inadequate. It has been suggested that the disclosure could be by statements in any requotation announcement, and in every annual report of Pasminco while the convertible securities and debt were outstanding.
53. The unlimited time which the relief grants for such acquisitions of shares by the Creditors is also inappropriate. Both ASIC and ASX have preferences for maximum periods for such convertible securities of between two and five years.

### **THE PANEL'S ROLE**

54. The Directors and ASIC say that it is not the Panel's role to be deciding whether Pasminco shares, or the shareholders' position has any value. They say that that decision is for the shareholders or for the court depending on how the Administrators choose to implement the reconstruction. If the shareholders are in a position of power it is their (or their representatives', in this case the Directors) power to decide whether they will agree to allow the Creditors to use those assets (i.e. the listed shell and the spread), and what share of the benefit they wish for giving that agreement. If the shareholders choose to make unreasonable demands, they risk the Creditors transferring the assets to other vehicles, liquidating Pasminco, and leaving the shareholders with absolutely no value at all. However, the Directors say that that decision is the shareholders' not the Panel's. I agree.

### **PRECEDENT - WHETHER LAW REFORM**

55. ASIC has asserted that the Panel should be cautious of creating a precedent which may not be easily distinguished. The Administrators have provided no basis for distinguishing Pasminco from any future case of administrators of a company under administration seeking an exemption from Chapter 6. The Panel's majority reasons similarly do not distinguish this from any future cases and provide no guidance to ASIC as to which future Deed of Company Arrangement applications would or would not be reversed by the Panel. In the absence of such analysis, it is reasonable to have a concern that future administrators, and ASIC, will take the decision to be de facto law reform.
56. The decision in this application is one which may have effects beyond its bounds. The appropriate course of action should be decided in that context rather than solely on the Pasminco Creditors' preferences.

### **THERE IS NO IMPERATIVE TO GRANT THE RELIEF**

57. The proposed relief does not promote the Eggleston principles. The risk of material harm to the public and legislative view of Panel, and risks to the perception of public

## Takeovers Panel

### Reasons for Dissenting Decision - Pasminco Ltd

investors about the fairness and equity of Australia's markets, weigh more towards refusing the relief.

58. The Creditors can achieve all their objectives concerning the assets of Pasminco without the relief by following any of a number of different routes which utilize the existing law and processes. The Panel is being asked to make a significant decision on the basis of the Creditors' balance of convenience, not because the relief is needed.
59. There appears to be no regulatory benefit which outweighs the harm which may be caused to the shareholders' position, and there appears no persuasive reason for altering the legislative arrangements in place. Where there is a feasible and realistic route in place for achieving the Creditors' commercial aims, the Panel should place the onus on the Creditors to show why their preference should prevail over the shareholders' interests.

### DECISION

60. I do not support the Administrators' application. In saying that, I acknowledge that for Pasminco as an entity to have any future, the Creditors must show material forbearance as creditors. I also acknowledge that the Administrators legally have full control over Pasminco's assets (excluding the listed shell and spread, which I have previously indicated to be controlled by the shareholders, not the Administrators), primarily for the benefit of the Creditors. However, refusing the relief would not restrict the ways that the Administrators can deal with the assets of Pasminco for the benefit of the Creditors.
61. While the Administrators assure the Panel that there is no prospect of Pasminco shareholders gaining "equity" value from their shares, that is a different concept from the value, albeit small, and albeit a "blocking" value, that the shareholders have in the listed shell and the spread of shareholdings.
62. I accept the Administrators advice that if the relief is not granted there is an increased risk that the Administrators may choose another route in the reconstruction and Pasminco shareholders may receive no benefit out of the reconstruction. However, allowing the relief allows them "residual" benefit only. There appears little downside for shareholders between nothing and this residual. Allowing the relief appears to give away the shareholders' only asset i.e. the value of the listed shell and the spread.
63. However, a number of feasible routes currently exist that the Administrators can take to achieve the aims of the Creditors. In the absence of good reasons to interfere in the balance of rights between shareholders and Creditors, the Panel should not so interfere, and the Creditors should follow one of the routes currently open to them. Alternatively, it is open to the Creditors to seek to persuade the shareholders, or their representatives, that the proposal offered is fair and reasonable as between the interests of shareholders and the Creditors.
64. In summary, I do not share the decision of the majority in the Pasminco decision for the following reasons:

## Takeovers Panel

### Reasons for Dissenting Decision - Pasminco Ltd

- a. there are routes available to the Administrators (representing the Creditors) to deal with the assets of Pasminco, including the alternative of proceeding by way of a scheme of arrangement, which need no intervention from the Panel. Without good regulatory reasons to alter the provisions of the law they should follow those routes.
- b. the benefit suggested to be gained by the Creditors is very uncertain, and at the highest suggested to the Panel it appears too small to warrant the relief
- c. the cost to the Administrators and Creditors of refusing the relief appears too small (some \$200,000) to warrant granting relief of marginal benefit
- d. the harm to the perception of fairness by investors in the Australian equities market is potentially high
- e. if the Creditors believe they will gain a benefit from using the listed shell and the spread of shareholdings (even if only by reducing their losses), they should deal with the shareholders or their representatives over what is a fair and reasonable division of the benefit they will gain from using the shell, otherwise, they should use one of the existing routes available to conduct the reconstruction of Pasminco
- f. this does not appear to be a sensible case for the Panel making a conclusion on value rather than the shareholders
- g. refusing the relief would not adversely affect the Administrators' dealings with the assets of Pasminco in favour of the Creditors
- h. the Panel has received poor information in the application, perhaps, insufficient to make a fully informed decision
- i. the terms of the proposal have been so indeterminate, and on their face appear to have varied so much during the proceedings that it is unreasonable to expect the Panel to make a decision until the Administrators have a firm proposal to put to the Panel
- j. the Directors of Pasminco, the shareholders' representatives, have said that they are unable to give advice about the fair value of a reconstructed Pasminco that shareholders might expect<sup>40</sup>. However, the current proposal is several times less favorable to shareholders than the proposal that the Directors considered to be fair. The Directors have said that they do not think the proposal is an equitable compromise between the parties (in other words "fair to shareholders")<sup>41</sup>
- k. the application is the first in relation to allowing Deeds of Company Arrangement to override the takeovers provisions. Neither the Administrators

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<sup>40</sup> Directors' submissions 1 March 2002.

<sup>41</sup> Directors' submissions 1 March 2002.

## **Takeovers Panel**

### **Reasons for Dissenting Decision - Pasminco Ltd**

submissions nor the majority's decision provide a basis for distinguishing that decision from future Deed of Company Arrangements. <sup>42</sup>

- l. there appears no basis in the Eggleston principles for granting the relief.
- m. the relief, especially as it applies to the convertible securities and debt advised by the Administrators, would materially affect the control of Pasminco for some period into the future. This is not appropriate for a listed company in Australia's public equity market. The relief sought makes no allowance for the position of future investors who have bought in on a presumption that the takeover provisions apply to Australian listed companies.
- n. the Administrators have not given any evidence of any harm which declining the relief, as it relates to the convertible securities and debt, would cause the Creditors

**Marian Micalizzi**  
**Deputy President of the Sitting Panel**  
**Decision dated 22 April 2002**  
**Reasons published 26 April 2002**

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<sup>42</sup> A similar view on the application is put by ASIC in its submissions 1 March 2002.

**Principal Financier Creditors of the Pasminco Group**

The following are the creditors of Pasminco who were listed in the application by the Administrators as being Pasminco's principal financiers, persons who would be materially affected by the Panel's decision, who would be issued shares under the restructure of Pasminco that the Administrators are contemplating, and on whose ultimate behalf the application was made.

ANZ  
Level 7  
287 Collins Street  
Melbourne Victoria 3000

Citibank  
Level 15, 120 Collins Street  
Melbourne Victoria 3000

Deutsche Bank  
Level 18, 255 George Street  
Sydney NSW 2000

Commonwealth Bank of Australia  
Level 15  
385 Bourke Street  
Melbourne Victoria 3000

National Australia Bank  
Level 23  
500 Bourke Street  
Melbourne Victoria 3000

Westpac Institutional Bank  
Level 9, 255 Elizabeth Street  
Sydney NSW 2000

**TAKEOVERS PANEL  
CORPORATIONS ACT 2001  
SECTION 655A  
EXEMPTION**

WHEREAS:

- A. On 19 September 2001 the directors of Pasminco Limited (Pasminco) appointed voluntary administrators (the Administrators) under section 436A of the Corporations Act 2001 (the Act);
- B. On 14 December 2001, Pasminco applied to ASIC under section 655A of the Act for an exemption in relation to acquisitions of shares by creditors of Pasminco pursuant to a proposed deed of company arrangement (the original application);
- C. On 4 February 2002, ASIC refused that application;
- D. On 19 February 2002, Pasminco applied to the Takeovers Panel under section 656A of the Act for review of ASIC's decision,

PURSUANT to section 655A of the Act, the Panel HEREBY EXEMPTS each creditor bound by a deed which is materially consistent with the original application (together with subsequent correspondence until ASIC refused the application) from compliance with section 606 of the Act in relation to acquisitions of shares in Pasminco pursuant to that deed, ON CONDITION THAT Pasminco causes to be published the following notices:

- (a) within two business days of the date of this instrument, an adequate description of the relief granted, including:
  - the effect of the Panel's decision i.e. to allow the Administrators to issue more than 20% (and in fact likely to be 95-99%) of shares in Pasminco to creditors in a debt for equity swap without requiring the Administrators to seek shareholder approval;
  - that the existing shareholders' shares will, while being heavily diluted by the proposed new issue, not be cancelled as a result of the Panel's decision;
  - the conditions attached to the Panel's decision; and
  - information about the possible timeframe for future events, such as the second creditors' meeting.
- (b) when the Administrators have a firm proposal that is to be put to creditors, an adequate description of the proposal, including:
  - a brief summary of the details of the proposal, directed to the direct effect of the proposal on the shareholders;

## Takeovers Panel

### Reasons for Decision - Pasminco Ltd Annexures

- information on the future of Pasminco to assist shareholders realise any capital losses on their investment, in particular for taxation purposes;
- a description of the proposal explaining that Pasminco's assets will be operated and realised in the first instance in the interests of creditors;
- a discussion of any potential value the Administrators see in the shares for shareholders;
- an explanation that whilst existing shareholders' shares are being heavily diluted, they are not being cancelled; and
- details of arrangements between the creditors regarding the disposal of (or restrictions upon disposal of) the equity issued under the restructure.

Each notice must be published by:

1. announcement to ASX; and as soon as practicable afterwards
2. publication (suitable for downloading) on Pasminco's website.

Each notice must advise how persons may request (at no charge) a copy of the notice.

Pasminco must also, as soon as practicable afterwards, cause a notice to be published in at least one national Australian newspaper and in one major State based newspaper per State (e.g. The Age in Victoria, The Courier Mail in Queensland) setting out a brief summary of the notice, announcing the publication of the above notice to ASX and on Pasminco's website, and advising how persons may request (at no charge) a copy of the notice.