Takeovers Panel — Reasons for Decision

In the Matter of Online Advantage Limited

These are our reasons for declining to make a declaration of unacceptable circumstances in relation to the affairs of Online Advantage Limited (Online Advantage) as a result of the acquisition by certain persons of approximately 100 million shares in Online Advantage through crossings which occurred on 3 June 2002. The decision follows undertakings to the Panel by Online Advantage, Shaw Stockbroking Limited and Euroz Securities Limited to give effect to an arrangement whereby shareholders of Online Advantage who acquired their shares prior to 3 June 2002 would have a reasonable and equal opportunity to dispose of their shares. The applications in this matter were brought firstly by McWilliam Nominees Pty Ltd, and then by the Australian Securities and Investments Commission (ASIC).

1. The Panel is constituted by Braddon Jolley (sitting President), Brett Heading and Chris Photakis.

Online Advantage Limited

2. At all relevant times, Online Advantage was a listed company with no operating business and about $6 million net assets, mainly cash. It had 214 million shares on issue, all of them fully paid ordinary shares.

3. In May 2002, 111 million shares (52% of the total) in Online Advantage were held by five shareholders (the ***Vendors***) in the following numbers:

Sharon Baldwin	25,981,680
Janne Petrie	26,111,680
Pamela Chapman	16,702,440
Ian Liddle	26,031,680
Brian Heitner	16,702,440

4. Several much smaller parcels of shares were held by relatives of the Vendors, which we will not discuss separately.

5. The Vendors had received those shares as part of a transaction under which they sold a business to the company. The business did not prosper and was closed down during May 2002. The vendor shares were released from escrow on 25 May. At 31 May, Messrs Liddle and Heitner were directors of Online Advantage, but the other three Vendors were not officers or employees of the company.

6. At 31 May, the other directors of Online Advantage were Scott Altman, who was also company secretary, and Corin Maberly, who was the nominee of Izodia PLC, which then had a 20% holding in Online Advantage. He resigned as a director after that parcel was sold, with effect from 4 or 5 June 2002.

7. The board proposed that the company be wound up voluntarily and estimated that the assets were worth about 3.2 cents per share. At a meeting convened by notice given on 3 May to be held on 5 June 2002, resolutions were to be put to wind up the company and (if the winding-up proposal was defeated) to re-elect as directors Messrs Altman, Heitner and Maberly.

Contact with Shaw and Churchill

8. Other proposals had been considered. In particular, on 24 April 2002, Messrs Altman and Heitner met with Gordon Hart of Shaw Stockbroking to consider a proposal that Online Advantage acquire a company named BDJ Pty Ltd. The Online Advantage board rejected that proposal, but in the course of discussions, Mr Hart learned that the Vendors would shortly be able to sell their shares, that they were keen to realize their shares and that they might be interested in selling them at a price comparable with the distribution on liquidation.

9. On 15 May 2002, Messrs Altman, Heitner and Hart held a further meeting (also attended by Karl Paganin and Trevor Pike, both of Churchill Capital Pty Ltd) to explore the possibility that Shaw would arrange the sale of the Vendors' shares to a number of its clients, supported by a due diligence examination of Online Advantage to be performed by Churchill. In these negotiations, Shaw was principally interested in arranging the sale of the Vendors' shares, Churchill was interested in conducting a due diligence investigation of the company, all parties regarded these proposals as consistent with one another and perhaps as mutually supportive, and Shaw and Churchill co-operated in their dealings with the board.

10. On 22 May, Mr Paganin sent an e-mail to Mr Altman concerning the proposal to conduct due diligence. In that e-mail Mr Paganin said that the sale would require the existing directors to resign in favour of new directors nominated by the new shareholders. Mr Altman replied that the board would only be prepared to recommend to shareholders a full, unconditional, cash bid at not less than 3.1 cents per share. He did not specifically respond to the requirement that directors resign.

11. On 24 May, Mr Paganin sent Mr Altman a further e-mail repeating the proposal for Churchill to conduct due diligence on Online Advantage, to confirm the net asset backing and check for liabilities, to make a recommendation to Shaw whether to proceed with the purchase, and at what price. This e-mail did not repeat the requirement that the board resign, but it did not retract or abandon it. This e-mail was reviewed by Mr Hart and Shaw's in-house counsel before it was sent. Mr Altman replied on the same day that the board's requirements had not been addressed and that he would not facilitate Churchill conducting due diligence. Mr Altman later that day obtained confirmation of his response from Mr Heitner.

Share Trades

12. On 30 or 31 May, Mr Peter Diamond, of Euroz Securities, asked Mr Hart whether he could purchase some shares in Online Advantage on behalf of clients of Euroz. This contact later led to Euroz obtaining the opportunity to sell some of the Vendors' shares to its clients.

13. On 27 May Ms Nicole McWilliam bought the Izodia parcel, at 3.0 cents per share. During the following days Mr Bruce McWilliam (on behalf of McWilliam Nominees Pty Ltd) discussed with Mr Altman (as a director of Online Advantage) the terms of a bid which Mr McWilliam proposed that McWilliam Nominees would make for remaining shares in Online Advantage. On 30 May Mr McWilliam met with Messrs Altman, Heitner and Liddle. Mr McWilliam agreed to offer the terms he announced the following day, but it does not appear that the board agreed to recommend the bid.

14. Apart from the purchase of the Izodia parcel by McWilliam Nominees, between 22 and 31 May the main buyer of Online Advantage shares at 3.0 cents and lower was Rivkin Discount Stockbroking. Its main client appears to have been Rivkin Investments Pty Limited, which on 31 May purchased 10 million shares from Mr Heitner and on 4 June announced a substantial holding of 9.12%. There were a few sales at higher prices, mainly between 3 and 4 cents, and even as high as 5 cents.

15. On the morning of 31 May, Mr Heitner sold 10 million shares in Online Advantage through Salomon Smith Barney at 3.0 cents each: they were acquired by Rivkin Stockbroking, apparently on behalf of Rivkin Investments. After that sale, the Vendors (with certain of their relatives) still had 101 million shares in Online Advantage to sell, making up 47% of the issued shares in that company.

16. On 31 May 2002, after Mr Heitner sold those 10 million shares, he agreed with Mr Hart to obtain mandates from the Vendors for Shaw to sell the Vendors' remaining shares in Online Advantage at 3.1 cents per share, no later than 10.00 am AEST on 3 June 2002. In accordance with that agreement, Mr Heitner obtained the Vendors' mandates and provided them to Mr Hart during Friday 31 May.

17. After the close of trading on Friday 31 May, McWilliam Nominees announced that it would bid for 65% of each parcel of shares in Online Advantage which it did not already own, at 3.0 cents cash per share, subject to certain conditions. In that announcement, McWilliam Nominees said that its offer "presents a more attractive alternative to shareholders than the liquidation of the company which is presently proposed to be considered at the forthcoming general meeting on June 5".

18. The duration of the mandates was extended briefly, because trading in Online Advantage shares was suspended from 10.00 am to 11.00 am on 3 June as a consequence of the takeover announcement by McWilliam Nominees the previous trading day. Mandates were provided for a small number of additional shares held by relatives of Vendors.

19. The Vendors' 101 million remaining shares were sold in two crossings at 11.01 am AEST on Monday 3 June 2002. 68 million of the shares were sold to about 64 clients of Shaw and 32 million were sold to about 35 clients of Euroz. On average, each purchaser acquired about 0.5% of the voting shares in Online Advantage. Other than the brokers' nominee companies, no one person and no corporate group acquired legal title to more than 5% of the voting shares in Online Advantage as a result of the sale.

Expectations of the Purchasers

20. Shaw client advisers spoke to a large number of clients on 31 May and 3 June to find buyers for the Vendors' shares. Shaw states that it selected clients "on the basis of their interest in small cap companies, their respective trading history and their interest in small trading speculative positions" and that, of 9 Shaw client advisers who spoke with clients about the Online Advantage sale:
    (a) each adviser (with one exception, who gave no advice) told the clients to whom he spoke of the cash backing of Online Advantage shares which would limit the downside in the event of a future winding up of the company;
    (b) most of them also mentioned the Rivkin investment, the McWilliam announcement, or both;
    (c) some of them informed their clients that Shaw had a mandate to sell "a line of stock" and that other Shaw clients would be purchasing some shares, without providing further details; and
    (d) only one had mentioned the proposed winding up to his clients.

21. Mr Diamond of Euroz Securities stated in evidence that before offering the shares to clients he had researched public information about Online Advantage, he was aware of the cash backing and of the proposal to wind up the company, and he relied on Mr Paganin's recommendation and judgement, without querying the proposal to wind up the company. He specifically denied having mentioned the proposed winding up to clients.

22. We infer that most of the purchasers of the shares on 3 June did not expect that Online Advantage would be wound up, had not been advised by Shaw or Euroz that it might be wound up, and would have been surprised and disappointed to learn that the company had gone into liquidation two days after they bought the shares. In our view, a reasonable investor, if they had thought about it, would have expected it to seek suitable investment opportunities and to have a board committed to doing so.

(a) The Panel accepts the consistent evidence of Messrs Donohue, Jesser, Hart, Diamond, Paganin and O'Connor that on 3 June their view had been that shares in Online Advantage were worth buying at 3.1 cents each, although the present value of the cash backing was 3.1 cents, that the reason was that there was a potential for an increase in price or value if Online Advantage acquired a suitable business, and the cash backing reduced the downside risk, and that any information or advice the advisers gave their clients was based on this view.

(b) There would be no appreciation in price from the acquisition of a business by Online Advantage, if the winding-up went ahead or if the board remained committed to returning the company's funds to shareholders. Accordingly, we infer that most or all of the advisers and purchasers involved in the 3 June crossings did not expect the company to be wound up and that those of them who knew about those issues expected that the winding-up would not proceed and that new directors would be appointed who would seek to acquire a suitable business.

(c) The Panel does not infer that all purchasers were told that there was a proposal to wind up the company (or whether and how that proposal would be defeated), or that the incumbent board were committed to returning the company's funds to shareholders (or whether and how the board were to be replaced).

The 4 June Board Meeting

23. At 10.45 am AEST on 3 June 2002, a telephone call was held between Messrs Hart, Heitner and Paganin, at which they discussed a meeting of the board of Online Advantage to be held at 2.30pm on 4 June 2002. Mr Hart described the call in detail. Messrs Paganin and Heitner agreed that such a discussion took place, and did not deny that such a call took place. We accept Mr Hart's evidence on this point. Mr Heitner said that he intended to resign from the board, once his shares were sold, and that he expected Mr Liddle also to resign. Mr Hart suggested Mr Paganin as one possible replacement director, and Mr Paganin suggested Patrick O'Connor (another executive of Churchill) as another replacement director. We infer that Mr Heitner acquiesced in these suggestions.

24. The board meeting was held at 2.30 p.m. AEST on 4 June 2002 and attended by Messrs Altman, Heitner and Liddle. At that meeting, Messrs Paganin and O'Connor were appointed directors of Online Advantage (Mr Altman abstaining) and Mr Liddle tendered his resignation as a director to Mr Altman.

25. Mr Heitner did not provide his resignation as a director on 4 June. In evidence, he stated that he withheld it until 5 June, because it was not yet clear on 4 June that Mr Maberly's resignation had become effective, and he was concerned that Messrs Altman and Maberly might take control of the board. Mr Altman's evidence on this point is similar.

26. We infer that in the telephone call at 10.45 am on 3 June Messrs Hart and Paganin required, and Mr Heitner agreed, that he would co-operate to transfer board control to nominees of Churchill and Shaw, and his resignation was timed and intended to facilitate that outcome. We infer this from the timing of the telephone call, from Mr Heitner's willingness to appoint Messrs Paganin and O'Connor without finding out anything about their suitability and from the care he took to ensure that Messrs Paganin and O'Connor would control the board. Messrs Hart and Heitner deny that it was a condition of the sale of the Vendors' shares going ahead that Mr Heitner agree to facilitate the replacement of the board.

27. We do not find that Mr Liddle was party to this agreement, or that Mr Heitner had his prior authority to make it. Mr Heitner knew, however, that Mr Liddle was keen to resign from the board, once he had sold his shares.

28. We infer that Mr Hart's intention was to avoid surprising and disappointing Shaw's clients who had agreed to invest in Online Advantage, by buying them shares in a company which would be placed in liquidation two days later. According to Shaw's own submission, of 9 Shaw client advisers who spoke with clients about the Online Advantage sale, only one had mentioned the proposed winding up to his clients. In our view, Mr Hart was seeking some assurance that the Board would be changed to one committed to preventing Online Advantage from being wound up.

29. Mr Hart did not explain his motivation for taking part in discussions concerning the composition of the board of a company whose shares he was selling. However, he did make it clear that his perception was that the shares were of greater value if the company was to continue as a going concern than if it was to be wound up. For that to happen, the resolutions to wind up the company needed to be defeated and the board needed to be replaced.

30. The board of Online Advantage appointed Mr Brian Currie as a director on 27 June 2002, and appointed Mr Paganin chairman and a secretary of the company on 9 July 2002.

The 5 June General Meeting

31. At 10.00 a.m. on 5 June 2002 a meeting was held between Mr Altman, Mr Paganin and Online Advantage's legal advisers. There was significant uncertainty in the minds of the directors and the company's legal advisers as to the ongoing validity of many of the proxies lodged, given that a substantial number of the shares covered by those proxies had been traded on 3 June. It was agreed at this meeting by the company and its legal advisers that the significant uncertainty surrounding who would be entitled to vote on a winding up resolution would be ameliorated by the Vendor shareholders attending in person, and that this would allow the preference of the purchasers of the Vendors' shares to be taken into account.

32. The recommendation made to the company by its legal advisers to adjourn the meeting was proposed in order to enable the company to gather all of the relevant facts and achieve a level of certainty in relation to who would be entitled to vote on as significant resolution as a proposal to wind up the company, in light of the significant uncertainty surrounding the issue. That would also allow the Vendors to take into account, if they wished, the preferences of the purchasers of their shares. All directors present accepted this advice.

33. At 11.00 a.m. AEST on 5 June 2002, a general meeting of Online Advantage was held to vote on resolutions to:

    (a) place the company in members' voluntary winding-up (2 special resolutions and 2 ordinary resolutions);

    (b) re-elect Messrs Altman, Heitner and Maberly as directors (3 ordinary resolutions, to be put if the resolutions to wind up failed).

34. Each of the Vendors had lodged a proxy in relation to the shares they held, directing the Chairman of the meeting to vote in favour of each resolution. Only Mr Heitner attended in person at 11.00am. At the time of the meeting, the company was uncertain as to the validity of these proxies. Proxies lodged by other shareholders in favour of the resolutions to wind up the company amounted to 15.2 million or 7.1% of the shares in Online Advantage. Eight shareholders, with a total of 19.9 million, or 9.3% of the shares, had lodged proxies opposed to winding up.

35. It was expected that based on McWilliam Nominees' announcement of its bid, Ms McWilliam's 20% parcel would be voted against the resolutions to wind up the company. Accordingly, prior to the commencement of the general meeting, it seemed likely that the special resolutions would fail. When Mr McWilliam announced at the meeting that he intended to vote the McWilliam parcel in favour of the resolutions for winding up the company, however, taking the other proxies into account, it appeared that the necessary majorities would be secured.

36. At the general meeting on 5 June, Messrs Paganin and Heitner learned that the resolutions to wind up Online Advantage were likely to pass. Their own evidence and that of the other Vendors strongly implied that none of Messrs Paganin, Hart and Heitner had expected the resolution to wind up the company to pass, whether because they were unaware that all of the Vendors had lodged proxies in support of the resolution, because they did not appreciate that the proxies would be effective on 5 June, because they expected Ms McWilliam to vote against the resolution, or for some other reason.

37. A resolution was put to adjourn the meeting. Ms McWilliam voted against the proposed adjournment. The resolution was lost. Mr Altman, who was the Chairman of the meeting, nonetheless adjourned the meeting until 2.30pm on the same day, on legal advice that he had power to do so. Senior Counsel later

advised that it was by no means clear that the Chairman had that power and recommended that a validating order be obtained.

38. Mr Hart was not present during the morning, but joined Messrs Paganin and Heitner during the recess. During the recess, one or other of Messrs Paganin, Heitner and Hart spoke by telephone to each of Mss Baldwin, Chapman and Petrie and Mr Liddle and persuaded them to attend the meeting when it resumed at 2.30pm, for the purpose of voting for a further adjournment of the meeting. They did attend (although Mr Heitner did not), and they voted in favour of a resolution to adjourn the meeting until 9 July 2002. That resolution was passed, and Hely J later validated it under subsection 1322(4) of the *Corporations Act*. The company advises us that Hely J commented that Mr Altman had acted in good faith in adjourning the meeting.

39. Mr Altman states in an affidavit to the Federal Court that he told the meeting that the adjournment was "to enable matters concerning the current shareholdings in the company and the prospects of the McWilliam bid proceeding to become clearer and more settled as further information came to hand". The company in submissions to us gave a similar explanation.

40. Each of Ms Baldwin, Ms Chapman, Ms Petrie and Mr Liddle said that they had not previously agreed to attend the meeting or vote, that they had not been asked to do so until the first adjournment, that they were under no compulsion to attend and that their motive for doing so was to allow the purchasers to vote on whether to wind up Online Advantage.

41. The co-operation between the Vendors, on the one hand, and Messrs Hart and Paganin, on the other hand, to secure the second adjournment of the 5 June meeting constituted an association for the purposes of section 12 of the *Corporations Act*. It was a relevant agreement to act in concert by co-operating to achieve a quite explicit common goal in relation to one of the affairs of Online Advantage, namely to adjourn the meeting instead of allowing it to vote on the resolution to wind up the company. They no doubt had diverse motives for wanting to achieve that goal, but that does not affect the analysis.

42. We infer that the concern about the outcome of the meeting which was shown by Mr Heitner (who had sold his shares and retired from the board) and Mr Hart (who had merely sold the shares) arose from previous arrangements or obligations flowing from the 3 June crossing, as neither of them had any direct stake in the future of the company.

Proxies for the Resumed Meeting

43. Among the persons who lodged proxies for the resumed meeting on 9 July, 20 are identifiable from statements provided by Shaw and by Euroz as being among the buyers on 3 June. Of those, 19 held 59,000,000 shares, or 28% of the voting shares in Online Advantage. Those 19 all lodged proxies directing their votes to be cast

against each resolution to wind up the company and all but 2 (who abstained) of the 19 also directed their votes be cast against the election of the directors. One of the 19 was Zero Nominees (Euroz' nominee company), which held shares beneficially owned by 12 clients. Accordingly, the uniform proxies represent the views of 30 of the purchasers. Each of these shareholders had acquired their shares on 3 June, so it would be normally expected that they would have voted against the winding-up, but not consistently against reappointment of all existing directors.

44. Of the shareholders who acquired their shares before 3 June, 8 shareholders holding 9.3% also voted against the resolution to wind up the company and 59.8 million shares being 28% of the issued capital lodged proxies and directed that their votes be cast in favour of winding up. The majority of them also voted for the re-appointment of each director. This includes 42.9 million shares held by McWilliam Nominees and 15.1 million shares held by Rivkin Investments. We note that the McWilliam announcement of 31 May may have influenced some shareholders to vote against winding up.

45. The Panel infers that the owners (or beneficial owners, in the case of the shares held by Zero Nominees) of 28% of the shares in Online Advantage agreed with the Churchill parties over the business to be transacted at the adjourned meeting on 9 July. It is probable that there had been some consultation over the form of the proxies. We base this inference on the number and uniformity of these proxies, the differences between these and the other proxies, the fact that they were contrary to the board's recommendation, the existence of various connections between most of the shareholders who gave those proxies and one or another of Shaw, Euroz and Churchill, and the fact that Zero Nominees obtained similar instructions from all of the beneficial owners of the shares it held.

46. In addition to the proxies, there are close business ties between Churchill Capital, Churchill Resources, Fopar and Messrs Paganin and O'Connor (the Churchill parties). Fopar and Churchill are controlled by two brothers, there was direct evidence of some co-operation in the purchase between those companies and all of them lodged uniform proxies against all seven resolutions at the adjourned meeting. Their holdings are in aggregate 11% of the shares in Online Advantage.

47. We infer from these circumstances that the shareholders who gave the proxies had agreed with the Churchill parties to co-operate concerning the composition of the board or the conduct of the affairs of Online Advantage, as distinct from merely seeing it as being to their advantage as shareholders that all seven resolutions fail. This agreement constitutes an association which had the effect that the Churchill parties had voting power of 28%, which they acquired in connection with the acquisition of 3 June, because it was designed to give effect to the expectation of Shaw, Euroz and the purchasers that the company would not be wound up. While the Panel does not propose to draw any positive inference

that any of the other purchasers under the 3 June and 16 July crossings are associated, it does not assume that they are not.

The 16 July Crossing

48. On 16 July, 19.9% of the shares in Online Advantage held by McWilliam Nominees were sold by Euroz to a large number of buyers at 3.1 cents per share. There is some overlap between these buyers and those on 3 June, but no one person (other than Zero Nominees) acquired legal title to over 5% of the voting shares in Online Advantage as the combined result of the two purchases.

49. We infer that buyers under the July crossing purchased the shares on the expectation that Online Advantage would not be wound up, and that it had a board committed to seeking investment opportunities. By the time of the July crossing, it was public knowledge that the board had been changed and that the 5 June meeting had been adjourned.

50. Before Euroz sold these shares, Mr McWilliam, on behalf of McWilliam Nominees, provided to Euroz a written undertaking that it would withdraw the application it had made to the Panel. At the request of Euroz' solicitors, McWilliam added to the withdrawal an explanation that McWilliam Nominees did not believe that the evidence would support its application.

51. When we asked Mr Diamond of Euroz to explain why Euroz had sought and obtained an undertaking from McWilliam before selling its shares, he said that he had not wanted the sale of the McWilliam parcel to involve Euroz and its clients in further proceedings. To us, this implied that provision of a satisfactory undertaking had been a precondition of the sale. Mr McWilliam said that the sale and the undertaking had been interdependent. We infer that it was a condition of the sale that McWilliam provide the undertaking.

52. On the same day, McWilliam Nominees wrote to the Panel, advising that it withdrew its application for a declaration and orders in relation to Online Advantage. It did not mention its undertaking to Euroz, but said it did not believe that an association could be shown between the purchasers on 3 June. The Panel replied that it would treat the notice of withdrawal as an application for leave to withdraw. After taking legal advice, the Panel refused leave to withdraw.

Principles to be Applied

53. The policy of Chapter 6, as set out in section 602, includes that the holders of shares in a company should know the identity of a person who proposes to acquire a substantial interest in the company, have a reasonable time to consider that proposal, be given enough information to enable them to assess the merits of that proposal and have reasonable and equal opportunities to participate in benefits accruing to shareholders under that proposal. For one person (or group

of people) to purchase a controlling interest in a company from another person or group, without giving other shareholders an opportunity to take part in the transaction (by being allowed to sell on the same terms, by having the opportunity to veto the sale etc) contravenes all of these principles.

54. In general, it does not offend against the policy of section 602 for people to buy and vote shares in a company, even if by doing so they change the policies of the company and frustrate the intentions of previous directors and shareholders, provided they do not do so in ways which contravene section 606 or otherwise represent combinations to purchase a block of over 20% of the votes, directly or indirectly.

55. Nor is it offensive for like-minded shareholders to vote the same way (including to replace a board), if each of them votes in that way because they see it as in their interest as a shareholder to vote in that way, and they do not vote together because they have entered into an understanding, affecting 20% or more of the votes, to exercise joint control over the company. After all, resolutions are put to a vote just so that shareholders can resolve disputed questions by majority, according to their perception of their respective interests.

56. Despite these principles, in our view, it is unacceptable for one person (or a group acting together) to acquire control of a company by buying from another group an influential block of shares (which might be less than 20% of the votes) and having that group deliver them control of the board, by appointing a majority of directors to fill casual vacancies, without the minority participating by being made offers to acquire their shares on the same terms or having the opportunity to consent to the transaction. The support of the board can magnify the influence which a modest block of shares can exercise in an open register, and that influence can in turn entrench the board. The overall effect could amount to the purchase of control from some only of the shareholders in the company, contrary to the policy of section 602.

Findings and Decision

57. Applying the principles set out above to the facts we have found regarding Online Advantage leads to the following conclusions.

58. We are not satisfied that section 606 of the Corporations Act had been contravened. Nevertheless, we are concerned that unacceptable circumstances have occurred because of the way in which board and voting control of Online Advantage changed hands.

59. By connected dealings with the exiting shareholders and directors (relevantly the same people), Churchill and companies and individuals closely connected with it acquired both an influential block of shares and majority control of the board. At the same time, parcels which could previously have outvoted the Churchill combination were dissipated among numerous shareholders, strengthening the

relative power of the Churchill parties. The sale of the McWilliam parcel on 16 July removed the only comparable parcel. The first sale led to many of the shares being held by people who were inclined to support the new board, and it is likely the second sale had a similar effect.

60. The overall effect is that the Churchill parties have secured a degree of control over Online Advantage, by purchasing shares and acquiring control of the board from some of the shareholders. No offer was made to acquire the remainder of the shares, nor was the consent of the other holders obtained to the changes.

Conclusion

61. For these reasons, we were prepared to make a declaration that unacceptable circumstances existed in relation to the affairs on Online Advantage, resulting from the sales of 3 June and 16 July, and the board meeting of 4 June.

62. However, the Panel has not made a declaration of unacceptable circumstances in this instance because Online Advantage, Churchill, Shaw and Euroz have offered, and the Panel has accepted, undertakings under section 201A of the *Australian Securities and Investments Commission Act 2001* which have the effect of allowing minority shareholders an opportunity to sell their shares on the same terms as the Vendors and McWilliam Nominees. In brief, those undertakings are that:

    (a) Online Advantage will offer to buy back the shares of those shareholders who acquired their shares before 3 June and continue to hold those shares at the time the buy back offer is made and accepted (***Relevant Shareholders***) at 3.1 cents, conditional on obtaining either an ASIC exemption or shareholder approval under section 257D (which approval will be sought at the next annual general meeting); and

    (b) If neither approval nor an exemption can be obtained, Shaw and Euroz will underwrite the sale of the shares for which the buy-back offers were accepted, half each at 3.1 cents, to non-associated parties none of whom would acquire over 5%.

63. Online Advantage has provided an undertaking to the Panel to disclose in the share buy-back offers and in the notice of meeting for the next AGM to be sent to shareholders all benefits given, or which have been agreed to be given, by Online Advantage to related parties of the company and entities which are related to, or otherwise connected with, any director of the company. In this regard, the Panel notes that Online Advantage and Churchill have entered into an agreement pursuant to which Churchill will provide all of the management, and other services, to Online Advantage. On that basis, Online Advantage and the Panel have agreed that it would be appropriate to provide shareholders of Online Advantage with information on those arrangements. Therefore, Online

Advantage and Churchill have agreed that Online Advantage will set out, in the share buy-back offers and in the notice of meeting for the AGM:

a. all payments made to Churchill and related entities and to its or their employees by Online Advantage;
b. all contracts or agreements entered into between Online Advantage and Churchill or Churchill related entities and its or their employees;
c. all Online Advantage payments to, or contracts or agreements with, Churchill, its related entities or its or their employees that are reasonably firmly proposed to be made or entered into; and
d. the reasons for those payments, contracts and agreements, and the person who authorised them.

64. Online Advantage has also undertaken to provide in the notice for the next AGM, similar information for each director who stands for election (at the next annual general meeting all of the board will stand for re-election). Online Advantage has also undertaken to provide in that notice, advice of the top 20 shareholders in Online Advantage and the relationships and connections which shareholders would reasonably expect to know in assessing the ownership of the company.

65. Shaw and Euroz advise the Panel that they believe that their agreement to underwrite this sale is a reasonable commercial resolution of the matter, but stress that this in no way implies any wrongdoing on their part.

66. Buyback offers in these terms and in compliance with the share buyback provisions will extend to the minority the same benefits as were received by the Vendors and by McWilliam Nominees, and adequate information and time.

67. The Panel is of the view that the undertaking it has received from Online Advantage, Shaw Stockbroking and Euroz Securities adequately address the Panel's concerns in relation to the 3 June Crossing, as they provide an arrangement whereby the persons who acquired shares in Online Advantage prior to 3 June and who remain shareholders of Online Advantage at the time the buy back offer is made and accepted who no longer wish to be shareholders of Online Advantage have a reasonable and equal opportunity to dispose of their shareholding at the same price as offered to the shareholders who sold their shares in the 3 June Crossings and a further crossing of 19.9% of the shares in Online Advantage which occurred on 16 July 2002.

68. We consented to the parties being represented by their commercial solicitors.

69. There having been no declaration of unacceptable circumstances, we make no order for costs.

President of the Sitting Panel
In the matter of Online Advantage Limited.
Braddon Jolley
10 September 2002