Takeovers Panel

Reasons for Decision Trysoft Corporation Limited

In the matter of Trysoft Corporation Limited
[2003] ATP 26

Catchwords:
Grant of options to managing director - voting arrangements – right of first refusal – failure to disclose to market – notice of revocation - relevant interest – voting power - association – substantial holding – failure to disclose information to Panel in proceedings – exercise of options – shareholder ratification of grant of options – declaration of unacceptable circumstances – undertakings to obtain legal advice

Corporations Act 2001 (Cth), sections 12(2)(b), 606, 606(5), 608(1)(b), 608(1)(c), 608(8), 609(5), 657A, 657A(2)(a), 657A(2)(b), 657C(3), 657D, 671B
ASX Listing Rules 3.1, 10.11, 10.12
ASIC Policy Statement 128 'Collective action by institutional investors'
Brickworks Limited (No.1) [2000] ATP 6, followed
Isis Communications Limited [2002] ATP 10, distinguished

These are the Panel's reasons for deciding to make a declaration of unacceptable circumstances in relation to the affairs of Trysoft Corporation Limited as a result of breaches of sections 606 and 671B of the *Corporations Act 2001* (Cth) by the managing director of, and certain shareholders in, Trysoft. The Panel made orders that agreements giving rise to associations between the relevant parties be terminated with immediate effect, and that options granted to the managing director of Trysoft not be exercised until shareholder ratification of the issue of those options was obtained.

1. These reasons relate to an application (the **Application**) to the Panel from Mr Stephen Ioannides (**Mr Ioannides**) on 10 June 2003 in relation to the affairs of Trysoft Corporation Limited (**Trysoft**).

The Panel & Process

2. The President of the Panel appointed Robyn Pak-Poy (sitting President), Anthony Burgess (sitting Deputy President) and Marian Micalizzi as the sitting Panel for the Application (the **Panel**).

3. The Panel met on 13 June 2003 to consider the Application. The Panel decided to conduct proceedings in relation to the Application and therefore issued a brief under Regulation 20 of the ASIC Regulations on 13 June 2003.

4. On 26 June 2003 (after reviewing submissions and rebuttals from the parties in relation to the Panel's brief), the Panel issued a letter to the parties advising them of the Panel's current views in relation to the Application based on the evidence and submissions that had been provided to it at that stage. It allowed the parties an opportunity to make further submissions as to why those views were, or were not, correct in light of any additional evidence that the parties could provide. Nothing included in the further submissions and rebuttals caused the Panel to change the views expressed in the letter.

5. The Panel advised the parties of its decision to make a declaration of unacceptable circumstances, and final orders, in relation to the affairs of Trysoft on 3 July 2003.

SUMMARY

Unacceptable circumstances

6. The Application related to the circumstances surrounding:

   (a) a heads of agreement (the **Robertson Agreement**) between Mr Douglas Wong (**Mr Wong**), Trysoft, Mr Grahame Robertson (**Mr Robertson**) and TSA ME3 Pty Ltd (**TSA ME3**); and

   (b) a heads of agreement (the **Ioannides Agreement**) between Mr Wong, Trysoft and Mr Ioannides,

   (together the **Agreements**[1]).

7. The Panel decided that:

   (a) Mr Wong acquired a relevant interest in 63.03% of the ordinary voting shares (the **Shares**) of Trysoft on entering into the Agreements;

   (b) Mr Robertson, TSA ME3 and Mr Ioannides (the **Shareholders**) became associates of Mr Wong at the time that the Agreements were executed, and remained so associated at the time that the proceedings were brought before the Panel; and

   (c) the 'notices of revocation' provided by Mr Wong to the Shareholders on 6 November 2002 were, at the most, only partial releases of obligations under the Agreements.

8. The acquisition by Mr Wong of a relevant interest in the Shares the subject of the Agreements resulted in breaches of:

   (a) section 606 of the *Corporations Act 2001* (Cth) (the **Act**) since, among other things, it resulted in his voting power in Trysoft increasing from 0% to 63.03%, with a subsequent reduction to 61.63%; and

   (b) section 671B of the Act since the acquisition of relevant interests by Mr Wong resulted in his acquiring a substantial holding (as defined in the Act) in Trysoft, and in increases in the substantial holdings of each of the Shareholders.

9. The Panel decided that these circumstances constituted unacceptable circumstances in relation to the affairs of Trysoft, and that the Panel should make a declaration to that effect.

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[1] Despite the fact that both of the Agreements (which were executed as deeds) were titled 'Heads of Agreement', it was clear from their terms that it was not necessary for any further agreements to be entered into before the obligations set out in them took effect.

Failure to disclose relevant information

10. Neither the Application, nor any of Mr Ioannides' submissions, referred to the existence of the Ioannides Agreement, or Mr Ioannides' role in executing the Robertson Agreement (see paragraphs 89 and 90). The Panel was of the view that Mr Ioannides must have been aware that these facts could have a material effect on the Panel's decision in relation to the facts the subject of the Application.

11. The Panel expects that parties to proceedings before it will provide it with all of the information that is relevant to the issues in the proceedings, not just the information that a party believes will advance its position. Any failure to do this will be regarded unfavourably by the Panel.

APPLICATION

Background

The company

12. Trysoft is a company listed on the Australian Stock Exchange (**ASX**). At the time of the application, Trysoft had on issue 22,200,000 Shares and 3,536,000 options to acquire Shares (including options issued to Mr Wong as discussed in paragraphs 16 and 22 to 26).

The parties – Interests in Trysoft as at the date of the Application

13. Mr Ioannides held approximately 17.5% of the Shares. In the period between 27 April 2003 and 22 May 2003, Mr Ioannides had disposed of 310,000 Shares. Prior to the sale of these Shares, Mr Ioannides had held 18.91% of the Shares since Trysoft listed on the ASX in June 2000. Mr Ioannides had been a director of Trysoft until he decided not to seek re-election at the Trysoft 2002 annual general meeting (the **2002 AGM**) on 29 November 2002.

14. Mr Robertson personally held approximately 18.91% of the Shares. TSA ME3, a company controlled by Mr Robertson (and of which he is the sole director and secretary), held approximately 25.85% of the Shares. Mr Robertson held a further 2000 Shares on behalf of his children. Therefore, in total, Mr Robertson held relevant interests in approximately 44.78% of the Shares, and had an equivalent voting power[2] in Trysoft. Mr Robertson had been a director of Trysoft until 24 December 2001.

15. Mr Wong was appointed as a director of Trysoft on 24 December 2001, and as its managing director in January 2002. Previously Mr Wong had acted as a consultant to the company. Trysoft entered into a service agreement (the **Service Agreement**) with Douglas Wong Associates (Aust) Pty Ltd (the **Consultant**, a company controlled by Mr Wong) which governed the performance of Mr Wong's duties as managing director and set out the

[2] As determined in accordance with section 610 of the Act.

remuneration to be provided to the Consultant (or its nominee). The Service Agreement was not dated. The Service Agreement did state that it was to commence operation on 3 June 2002, but Trysoft submitted that it believed that the Service Agreement was not executed by Trysoft until 20 September 2002.

16. As part of his remuneration package, Mr Wong had been granted 3,300,000 options (the **Wong Options**) to acquire Shares[3]. If Mr Wong exercised all of the Wong Options, he would have acquired approximately 12.9% of the total expanded issued share capital in Trysoft.

The Robertson Agreement

17. The Application alleged that a 'voting agreement' had been entered into by Mr Wong and Mr Robertson (or their associated entities). Mr Ioannides submitted that he had seen a copy of the voting agreement when he was a director of Trysoft. However, he did not have a copy of the agreement.

18. In their initial submissions, each of Trysoft, Mr Wong and Mr Robertson acknowledged that such an agreement had been entered into. The relevant agreement was the Robertson Agreement which, among other things[4]:

    (a) included a recognition of the key aspects of Mr Wong's remuneration package as managing director of Trysoft[5] (clause 3.2), including details of:

        (i) an executive option scheme for Mr Wong (clauses 3.2(b)(i) and (ii), the **Wong Option Scheme**), including a provision to prevent the dilution of Mr Wong's interests (clause 3.2(b)(iii), the **Anti-dilution Provision**). The Wong Option Scheme also included a requirement that Trysoft pay Mr Wong a bonus sufficient to fund the exercise by him of the options granted to him pursuant to the Wong Option Scheme (other than any options granted under the Anti-dilution Provision) (clause 3.5, the **Bonus Provision**); and

        (ii) an executive option scheme for members of the Trysoft management team to be allocated as nominated by Mr Wong (including a provision to prevent the dilution of the value of these options) (clause 3.3, the **Executive Option Scheme**);

    (b) included an agreement by Mr Wong to fully and faithfully serve as managing director of Trysoft for 3 years in consideration for the Robertson Agreement (clause 3.6);

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[3] During the proceedings, both Trysoft and Mr Wong submitted to the Panel that the Wong Options were held directly by Mr Wong. However, in the process of finalising these reasons it was revealed to the Panel that the Wong Options were actually held by the Consultant. These reasons remain drafted on the former basis because that is the basis on which the Panel made its decision at the time. For the Panel's analysis of the impact of this subsequent development on its decision, see paragraphs 109 to 114.

[4] Annexure A sets out in full the relevant terms from the Robertson Agreement.

[5] The complete details of Mr Wong's remuneration package were included in the Service Agreement.

(c) required Mr Robertson and TSA ME3 to support the shareholder resolutions necessary to effect the Wong Option Scheme and the Executive Option Scheme (together the **Option Schemes**) (clause 3.4);

(d) provided that following the approval of certain of the resolutions approving the Executive Option Scheme and the Bonus Provision, for a period of 3 years Mr Wong was to have the power to exercise the voting power attached to the Shares owned by Mr Robertson[6] (clauses 4.2 to 4.4); and

(e) gave Mr Wong a right of first refusal in relation to all of the Shares owned by Mr Robertson[7] (clause 4.6); and

(f) provided that the Robertson Agreement could only be terminated in certain circumstances (clause 11), which included termination:

(i) if, within 6 months of the date of the Robertson Agreement, certain steps contemplated by the Robertson Agreement were not completed; or

(ii) if all parties consented in writing.

19. The Robertson Agreement was executed by each of Mr Wong, Mr Robertson, TSA ME3 and Trysoft.

The Ioannides Agreement

20. During the course of the proceedings, the Panel also became aware of the existence of a second agreement (the Ioannides Agreement) between Mr Wong, Mr Ioannides and Trysoft. Among other things, the Ioannides Agreement[8] (which had been executed by all parties but was undated):

(a) acknowledged the existence of the Robertson Agreement (clause 2.2); and

(b) required Mr Ioannides to support the shareholder resolutions necessary to effect the Option Schemes (clause 2.3).

21. The termination provisions in the Ioannides Agreement (clause 9) were equivalent to those discussed in paragraph 18(f).

Approval of the Wong Option Scheme by Trysoft shareholders

22. Listing Rule 10.11 provides that:

> *Unless one of the exceptions in rule 10.12 applies, an entity must not issue or agree to issue equity securities to any of the following persons without the approval of holders of equity securities.*

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[6] This provision only related to the Shares held by Mr Robertson, and did not include those held by TSA ME3. There was some doubt as to the exact number of shares covered by this provision – clause 4.2 referred to 4,200,000 Shares, while clause 4.3 referred to 4,300,000 Shares. Mr Robertson submitted that the reference to 4,300,000 Shares in clause 4.3 was a mistake.

[7] Again, excluding the Shares held by TSA ME3.

[8] Annexure B sets out in full the relevant terms from the Ioannides Agreement.

10.11.1 A related party…

23. For the purposes of Listing Rule 10.11, the Shares to be issued to Mr Wong pursuant to the Wong Option Scheme were 'equity securities' and Mr Wong, as a director of Trysoft, was a related party of Trysoft. None of the exceptions in Listing Rule 10.12 were argued to apply in relation to the grant of the Wong Options. Consequently, the issue of the Wong Options to Mr Wong under the Wong Option Scheme required the approval of an ordinary resolution of the Trysoft shareholders.

24. A resolution (the **Resolution**) to approve the Wong Option Scheme was put to Trysoft shareholders at the 2002 AGM. However, the Resolution did not relate to all aspects of the Option Schemes, as it did not relate to the Anti-dilution Provision or the Executive Option Scheme.

25. The Resolution was carried by the Trysoft shareholders. The votes cast in relation to the 2002 AGM were as follows:

	Number of votes	**Percentage of votes cast**	**Percentage of total Shares**
Votes in favour	15,593,876	89.08%	70.24%
Votes against	1,862,871[9]	10.64%	8.39%
Abstentions	49,500	0.28%	0.22%
Votes not cast	4,693,753	N/A	21.15%

26. Each of the Shareholders voted at the 2002 AGM in favour of the Resolution. Their votes accounted for 14,141,150, or 90.7%, of the votes cast in favour of the Resolution.

Discussions with ASX in relation to disclosure of the Agreements and the 'notices of revocation'

27. None of the parties to the Agreements disclosed the existence of the Agreements to the market either before or after the 2002 AGM.

28. Trysoft originally proposed to disclose the existence of the Agreements, as well as the voting arrangements contained therein, in the explanatory memorandum that was sent to shareholders in relation to the Resolution. However, on reviewing a draft of the explanatory memorandum ASX advised Trysoft that the existence of the Agreements would prevent Mr Robertson and Mr Ioannides from being able to vote in relation to the Resolution at the 2002 AGM.

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[9] One shareholder in Trysoft, Mr Sean Stark, alleged that his personal votes (some 300,000, or approximately 1.35%, of the total Shares) cast against the Resolution were not included in these figures which were published by Trysoft. Trysoft indicated that this matter was resolved with Mr Stark, but details of the resolution were not requested by the Panel as the inclusion or exclusion of these votes did not affect the Panel's decision.

29. On 24 October 2002, Trysoft advised ASX that Mr Wong had agreed to release the Shareholders from the requirements in the Agreements for them to support the allocation of the Wong Options to Mr Wong under the Resolution[10]. The disclosure of the Agreements that was included in the draft explanatory memorandum was then deleted from the final explanatory memorandum sent to shareholders.

30. Following the correspondence with ASX, Mr Wong issued documents to the Shareholders on 6 November 2002 in relation to the Agreements which he called 'notices of revocation'. The notices stated that:

> *As discussed, I hereby revoke immediately and unconditionally your obligations in the [relevant Agreement], at least insofar as the 2002 annual general meeting is concerned.*

31. Trysoft, Mr Wong and Mr Robertson submitted that they took the view that the notices of revocation effectively terminated the Agreements, and consequently that after they had been given there was no need to make disclosure to Trysoft shareholders in relation to the Agreements.

Application – Declaration and orders

32. The Application alleged that the Robertson Agreement resulted in Mr Wong acquiring a relevant interest in Shares held by Mr Robertson and TSA ME3 such that he:

    (a) acquired in excess of 20% of the voting power in Trysoft in breach of section 606 of the Act; and

    (b) was under an obligation to provide a substantial holding notice in accordance with section 671B of the Act. At the time that the Application was made, Mr Wong had not complied with this obligation.

33. Mr Ioannides submitted that the circumstances referred to in paragraph 32 constituted unacceptable circumstances in relation to the affairs of Trysoft.

34. The orders Mr Ioannides applied for included orders:

    (a) that full and proper disclosure be made in relation to of Mr Wong's voting power in Trysoft;

    (b) for the divestiture of the Shares the acquisition of which caused Mr Wong to breach section 606 of the Act, and restraining the exercise of voting power associated with those shares in the interim;

    (c) terminating the Robertson Agreement; and

    (d) preventing the exercise of the Wong Options.

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[10] This advice was given to ASX before the relevant notices of revocation were dispatched by Mr Wong.

DISCUSSION

Acquisitions and associations pursuant to the Agreements

Relevant interests and associations

35. Putting to the side for a moment the question of whether the notices of revocation from Mr Wong were effective (which is discussed in paragraphs 45 to 50 below), the Panel decided that the Agreements caused:

    (a) Mr Wong to acquire, pursuant to section 608(1)(b) of the Act, relevant interests in the Shares held by the Shareholders due to the voting arrangements contained in the Agreements (see paragraphs 18(c) and (d) and 20(b) above);

    (b) Mr Wong to acquire, pursuant to sections 608(1)(c) and 608(8) of the Act, relevant interests in the Shares held by Mr Robertson due to the right of first refusal (see paragraph 18(e) above) included in the Robertson Agreement;

    (c) the Shareholders to become associates of Mr Wong for the purposes of Chapters 6 to 6C of the Act. In accordance with section 12(2)(b) of the Act:

        (i) the Agreements were relevant agreements within the meaning of section 9 of the Act; and

        (ii) the voting arrangements referred to in paragraphs 18(c) and 20(b) above clearly had the purpose of controlling or influencing the conduct of Trysoft's affairs (in particular, the remuneration to be paid by Trysoft to its managing director); and

    (d) the Shareholders to become associates of Mr Wong for the purposes of Listing Rule 10.11.

Concession by Mr Wong

36. In his initial submissions to the Panel, Mr Wong conceded that the terms of the Agreements had the effect that Mr Robertson (and presumably TSA ME3) and Mr Ioannides became associates of Mr Wong.

37. The Panel reached the same conclusion concerning the associations arising from the Agreements without relying on this concession by Mr Wong. However, the Panel did not accept Mr Wong's submission that the Agreements were revoked before they were acted upon (see paragraphs 45 to 50).

The continuing effect of the Agreements

The intended effect of the Agreements

38. Mr Wong submitted that having the support of the major shareholders in Trysoft was crucial to his decision to accept the position as its managing director. He submitted that he did not intend for the Agreements to be enforced according to their terms, since the fact that the shareholders were

prepared to sign the Agreements provided him with the comfort he required. Mr Wong submitted, and Mr Robertson confirmed, that he had informed Mr Robertson of this shortly after Mr Robertson executed the Robertson Agreement in December 2001. It was not suggested that any such statement was made to Mr Ioannides.

Timing of the execution of the Agreements

39. However, the Panel decided that, despite the submissions to the contrary, the Agreements were intended to have effect in accordance with their terms since:

    (a) the Agreements were, in the end, executed by all parties even though it appeared from the evidence that some of the parties may have executed the Agreements considerably after Mr Robertson executed the Robertson Agreement. In particular:

        (i) Trysoft submitted that it did not execute the Robertson Agreement or the Ioannides Agreement until 11 October 2002; and

        (ii) Mr Robertson's evidence indicated that Mr Wong had also executed the Agreement after Mr Robertson, and without informing him that he had done so[11];

    (b) efforts were clearly made by Mr Wong and Trysoft (of which Mr Wong was at the relevant time the managing director) to complete the formal steps to ensure that the Agreements were legally binding; and

    (c) execution of the Agreements, at least by Trysoft, occurred:

        (i) only 7 weeks before the Resolution was put to shareholders, which was when Mr Wong was likely to wish to rely on the voting arrangements in the Agreements; and

        (ii) 10 months after the date on which Mr Robertson apparently signed the Robertson Agreement and was allegedly informed that he would not be held to the terms of that Agreement.

The relevance of the Service Agreement

40. In relation to paragraph 39, the Panel also noted that the Service Agreement provided for the issue of the options under the Wong Option Scheme, including the Anti-dilution Provision and the Bonus Provision.

41. Clause 4.2 of the Service Agreement originally provided that the commencement of the agreement was conditional on shareholder approval of the Wong Option Scheme within 45 days of the date of the Agreement. However, it appeared from handwritten notations that clause 4.2 was deleted by agreement between the parties on 29 September 2002.

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[11] Mr Robertson submitted that he was not aware that Mr Wong had executed the Robertson Agreement until he was provided with the notice of revocation in relation to it on 6 November 2002.

42. Following the deletion of this clause, Trysoft had a contractual obligation to offer to provide the Wong Option Scheme even if the shareholder approval of that scheme required under Listing Rule 10.11 was not provided. Trysoft could therefore have found itself in a situation where its obligations under the Listing Rules forced it to commit a breach of the Service Agreement (and expose itself to a claim for damages).

43. No evidence was provided to the Panel as to why clause 4.2 was deleted from the Service Agreement. However, the execution of the Agreements (including the voting arrangements described in paragraphs 18(c) and 20(b)) shortly after 20 September 2002 (on 11 October 2002) did provide a solution to this problem. Therefore, it appeared that Trysoft, at least, had an incentive to ensure that the voting arrangements under the Agreements were binding on the Shareholders.

44. Trysoft submitted that the deletion of clause 4.2 was intended simply to extend the time that Trysoft had to obtain the necessary shareholder approvals. The Panel did not agree that this was the effect of the amendment.

Were the 'notices of revocation' effective in accordance with their terms?

45. Despite the above, it was still within the power of the parties to terminate the Agreements to minimise the duration of any breaches of the Act.

46. Mr Wong relied on the 'notices of revocation' delivered to the Shareholders on 6 November 2002 as the basis on which the Agreements had been terminated prior to the 2002 AGM.

47. Clause 11 of the Robertson Agreement and clause 9 of the Ioannides Agreement provided that each of the Agreements could be terminated with the written consent of all parties. However, the notices of revocation were signed only by Mr Wong, not by all parties. In addition, no notice of revocation was even addressed to Trysoft.

48. Mr Wong was the managing director of Trysoft at the time of delivering the notices of revocation. However, he was also a party to each of the Agreements in his individual capacity and there was no indication in the notices of revocation that he was purporting to act in his capacity as an officer of Trysoft in delivering the notices.

49. It would have been possible for the parties (including Trysoft) to accede to the revocation by Mr Wong, even though this did not strictly comply with the requirements in the Agreement. However, no evidence was provided to the Panel that convinced it that that had occurred.

50. In any event, in light of the Panel's interpretation of the terms of the notices of revocation as being more in the nature of a partial release (see paragraphs 54 to 59), it was not crucial to the Panel's decision in these proceedings to determine whether the notices were effective in accordance with their terms.

Alternative basis for terminating the Agreements

51. The Agreements also provided that they were to automatically terminate if, within 6 months of the date of the Agreements, certain events had not occurred[12]. The exact meaning of these clauses (in particular, the question of exactly what steps needed to occur to prevent the clause from operating) was open to debate.

52. However, no party sought to allege, or even raised the possibility, that any particular steps had failed to occur which resulted in the automatic termination of the Agreements on the expiration of any 6 month period[13].

53. Mr Wong and Mr Robertson did submit that the 6 month period may have started earlier than 11 October 2002 (which is when Trysoft submitted that it executed the Agreements). However, no evidence was provided to the Panel that convinced it that the necessary conditions had occurred for these clauses to automatically terminate the Agreements.

The effect of the 'notices of revocation' – Partial release only

54. Paragraph 30 sets out the terms of the notices of revocation provided by Mr Wong. In the Panel's view, the inclusion of the words 'at least insofar as the 2002 annual general meeting is concerned' was intended to, and did, limit the reference to 'obligations in the Heads of Agreement' to the obligations so far as they applied in relation to the 2002 AGM. To the extent that the obligations continued to apply in relation to meetings and transactions other than the 2002 AGM those obligations remained in effect.[14]

55. The fact that Trysoft, a party to both of the Agreements, was not provided with a notice of revocation in relation to either of them also suggested that the notices were intended to operate as releases of some obligations under the Agreements, rather than complete terminations of them.

56. The Robertson Agreement provided for Mr Robertson (and, in relation to clause 3.4, TSA ME3) to be subject to the following obligations that were not related to, or at least were not solely related to, the 2002 AGM:

    (a) the obligation under clause 3.4 to support the shareholder resolutions to effect the Anti-dilution Provision (as set out in clause 3.2(b)(iii) of the

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[12] See clause 11(a) of the Robertson Agreement and clause 9(a) of the Ioannides Agreement.

[13] This issue was expressly raised with parties in the invitation to make further submissions which is described in paragraph 4.

[14] Trysoft also provided the Panel with drafts of the notices of revocation. The draft notices used exactly the same phrase for terminating the agreements as the final notices, but added that: 'Naturally, I [Mr Wong] reserve any rights I have in relation to any subsequent meetings of Trysoft Corporation Limited.' The Panel was of the view that this was arguably further evidence that the final notices were intended to reserve Mr Wong's rights under the Agreements, other than in relation to the 2002 AGM. Trysoft submitted that an equally sustainable interpretation was that the deletion of those words provided evidence that Mr Wong's intention was for the notices to terminate the Agreements in full. However, in light of the other evidence, the Panel did not accept that argument.

Robertson Agreement) and the Executive Option Scheme. Resolutions to this effect were not put to shareholders at the 2002 AGM, and the obligation was not limited only to any vote that might take place at the 2002 AGM. In this regard, it is noted that a letter from the company secretary of Trysoft, Mr McCartney, to Ms Grundy of ASX on 24 October 2002 specifically recognised that the Anti-dilution Provisions were to be re-negotiated 'for future reference to the shareholders'[15]. If these resolutions had been put to shareholders at a subsequent meeting, Mr Robertson and TSA ME3 would have been required to support the resolutions despite the notice of revocation;

(b) the obligation under clauses 4.2 to 4.4 for Mr Robertson to transfer to Mr Wong voting power in respect of approximately 19% of the Shares following the passage of certain shareholder resolutions. As no evidence was provided to the Panel that the Executive Option Scheme had been approved by shareholders prior to the Application being made, it appeared that this obligation may not yet have become operative; and

(c) the obligation under clause 4.6 for Mr Robertson to provide Mr Wong with a right of first refusal in relation to Mr Robertson's Shares.

57. In addition, if the Resolution had been defeated at the 2002 AGM, and was subsequently put to a later meeting of shareholders, Mr Robertson and TSA ME3 would have obliged them to support those resolutions.

58. Clause 2.3 of the Ioannides Agreement essentially had the same ongoing operation in relation to voting at meetings other than the 2002 AGM as clause 3.4 of the Robertson Agreement (see paragraphs 56(a) and 57).

59. On the basis of this analysis, the Panel decided that the Agreements were not terminated by the notices of revocation on 6 November 2002. Even if the notices of revocation were effective in accordance with their terms, the Panel was of the view that at the most the 'revocations' were only partial releases of a limited set of obligations. Despite the notices, the Agreements remained effective in the respects outlined in paragraphs 56 to 58, and this was sufficient to cause:

(a) Mr Wong to retain the relevant interest in the Shares of the Shareholders that he had first acquired upon execution of the Agreements; and

(b) the Shareholders to continue to be associates of Mr Wong, as they had been since the execution of the Agreements.

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[15] No evidence was provided to the Panel concerning the current status of the shareholder resolutions concerning the Anti-Dilution Provisions or the Executive Option Scheme. However, under the Service Agreement Trysoft had an obligation to provide the Anti-dilution Provision even though no evidence was provided that the necessary shareholder approval had been obtained (see paragraphs 40 to 44).

Consequences of the existence of the Agreements – Breaches of the Act

60. The Panel decided that the Agreements gave rise to the breaches of the Act (and possibly the Listing Rules) discussed in paragraphs 61 to 74, which were still continuing during the Panel proceedings.

Breaches of section 606 of the Act

61. At a minimum, Mr Wong acquired a relevant interest under sections 608(1)(c) and 608(8) of the Act in the Shares held by Mr Robertson that were subject to the right of first refusal in clause 4.6 of the Robertson Agreement (which amounted to approximately 19% of the Shares).

62. In addition, the voting arrangements in clause 3.4 of the Robertson Agreement and clause 2.3 of the Ioannides Agreement caused Mr Wong to have a relevant interest (under section 608(1)(b) of the Act) in the Shares held by the Shareholders.

63. At the time that the Agreements were executed, Mr Wong had a relevant interest in approximately 63.03% of the Shares in Trysoft[16], as well as equivalent voting power. With the sale of Shares by Mr Ioannides in April and May 2003[17], the Shares in which Mr Wong had a relevant interest, and his voting power in Trysoft, fell to approximately 61.63%.

64. Among other things, section 606 of the Act prohibits a person from acquiring a relevant interest in issued voting shares in a company if:

    (a) the company is a listed company (which Trysoft is);

    (b) the person (here Mr Wong) acquiring the interest does so through a transaction in relation to securities entered into by the person; and

    (c) the transaction results in the person's voting power in the company increasing:

        (i) from 20% or below to more than 20%; or

        (ii) from a starting point that is above 20% and below 90%.

65. As the entry into the Agreements by the parties resulted in Mr Wong's voting power in Trysoft increasing from 0% to approximately 63.03% (with a subsequent fall to approximately 61.63%), Mr Wong had breached section 606 of the Act unless he could establish a defence to that breach.

66. The existence of the Agreements also caused the Shareholders to be associates of Mr Wong pursuant to section 12(2)(b) of the Act for the purposes of Chapters 6 to 6C of the Act[18]. As Mr Wong acquired a relevant interest in all of

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[16] For details of the Shares held by each of these parties, see paragraphs 13 and 14. The 63.03% figure is based on Mr Ioannides' ownership of approximately 18.91% of the Shares on 11 October 2002, prior to the sale by him of 310,000 Shares in April and May 2003.

[17] See paragraph 13.

[18] See paragraphs 35(c) and 59(b).

the Shares subject to the Agreements, the entry into the Agreements also resulted in increases in the voting power of his associates (being the Shareholders) to above the 20% threshold in breach of section 606 of the Act.

Defences to a breach of section 606 of the Act

67. Mr Wong and Mr Robertson submitted that the increases in voting power resulting from the Agreements should not be regarded as giving rise to a breach of section 606 for the following reasons:

    (a) the exception in relation to proxy holders in section 609(5) applied in relation to the breach as the Agreements only applied to one meeting, and no valuable consideration was provided[19].

        The Panel decided that this exception did not apply because:

        (i) the voting arrangements in clauses 3.4 and 4.2 to 4.4 of the Robertson Agreement, and in clause 2.3 of the Ioannides Agreement, were not limited to any one meeting (see paragraphs 56(a), 57 and 58);

        (ii) the voting arrangements were not drafted in the form of appointing Mr Wong as proxy in relation to the exercise of the relevant votes;

        (iii) the Robertson Agreement expressly stated in clause 3.6 that Mr Wong gave consideration (that is, the performance of his role as managing director of Trysoft) for the rights obtained under the Robertson Agreement; and

        (iv) a right of first refusal was also granted to Mr Wong in relation to Mr Robertson's Shares under the Robertson Agreement, and so that Agreement had a wider effect than simply affecting the casting of votes attached to the Shares.

    (b) the parties were not aware that the Agreements would result in a breach of section 606. In particular, Mr Wong submitted that his legal advisers at the time did not inform him of the implications under the Act of entering into the Agreements.

        However, the defence set out in section 606(5) of the Act makes it clear that when considering whether the defence of mistake is available, a person's ignorance of, or mistake concerning, a matter of law is to be disregarded; and

    (c) in substance, the Robertson Agreement was intended to achieve a situation analogous to one where institutional investors form what would otherwise be associations in order to vote on specific resolutions. Essentially, Mr Wong and Mr Robertson proposed that they should be allowed to rely on relief provided to institutional investors in such

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[19] Mr Wong and Mr Robertson only referred to this defence so far as it related to the Robertson Agreement. However, the Panel's decision applied equally to the potential for the exception to apply in relation to the Ioannides Agreement.

circumstances by ASIC under Policy Statement 128 'Collective action by institutional investors' (and the related Class Order).

The Panel accepted submissions from ASIC on this point that the parties to the Agreements were not within the class of investors to which that Policy Statement applies (that is, they were not institutional investors) and that the requirements of the relevant class order relief had not been complied with in any event.

Breach of Part 6C.1

68. Mr Wong's voting power of approximately 61.63% in Trysoft at the time of the Application amounted to a substantial holding in Trysoft for the purposes of section 671B of the Act. As discussed in paragraph 63, Mr Wong's original voting power on entry into the Agreements was even higher, at approximately 63.03%.

69. As discussed above, the Agreements also resulted in the Shareholders being associates of Mr Wong. Therefore, as a result of Mr Wong's acquisition of relevant interests the voting power of each of the Shareholders had increased to approximately 63.03% from starting points of approximately 44% (for Mr Robertson and TSA ME3) and 18.9% (for Mr Ioannides), and subsequently fell to 61.63%. Both before and after this change each of these parties had a substantial holding in Trysoft for the purposes of section 671B of the Act.

70. Consequently, Mr Wong and each of the Shareholders was subject to an obligation under section 671B to give a substantial holding notice in relation to the change in their holdings upon the execution of the Agreements. An obligation to give a further notice arose when Mr Ioannides sold 310,000 Shares in April and May 2003.

71. None of those parties had given any such notices[20].

Possible breaches of the Listing Rules – Referral to ASX

72. The Panel also considered that Trysoft's failure to make any disclosure to the market of the terms of the Service Agreement may have resulted in a breach of Listing Rule 3.1. In addition, the fact that the Shareholders voted in favour of the Resolution despite being associates of Mr Wong appeared to be a breach of Listing Rule 10.11.

73. As discussed in paragraph 31, Trysoft submitted that it did not consider that such breaches occurred because the notices of revocation terminated the Agreements.

74. However, given the Panel's views in relation to the effect of the notices of revocation it drew these matter to the attention of the ASX.

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[20] Mr Ioannides did provide a substantial holding notice to ASX on 16 June 2003, but that notice only related to the decrease in his voting power from 18.9% to 17.5% as a result of the sale by him of Shares held directly by him in May 2003.

The relevance of the Panel's decision in *Isis Communications Limited*

75. Mr Wong and Mr Robertson submitted that the Panel's decision in *Isis Communications Limited*[21] (the **Isis Proceedings**) supported their position that no unacceptable circumstances had occurred. The Isis Proceedings concerned a situation that was, in some ways, similar to that created by the Agreements. In the Isis Proceedings, despite expressing concerns in relation to the matters in question, the Panel determined that unacceptable circumstances had not occurred.

76. The Isis Proceedings concerned an agreement (the **Isis Agreement**) to sell approximately 19.9% of the shares (the **Sale Shares**) in Isis Communications Limited (**Isis**) from Radly Corporation Pty Ltd (Receivers and Managers Appointed) (**Radly**) to MGB Equity Growth Pty Ltd (as trustee of the MGB Equity Growth Unit Trust) and Investec Australia Ltd (together **MI**). In addition to the Sale Shares, Radly owned a further 23% of the shares in Isis.

77. As well as the sale provisions, the Isis Agreement contained other provisions (clauses 6.3, 6.6 and 6.7) which, it was argued, affected the manner in which Radly exercised the voting power attached to all of its shares in Isis (that is, the full 43%, not just the Sale Shares).

78. In paragraph 66 of its reasons, the Panel in Isis (the **Isis Panel**) indicated that it 'had some real concerns' that the relevant provisions in the Isis Agreement resulted in a contravention of the Act. However, despite its concerns, the Isis Panel did not support a conclusion that unacceptable circumstances had arisen, in particular taking into account:

> *MGB-Investec's assertions that any offensive parts of the [Isis] Agreement were inadvertent and unintended; the fact of MGB-Investec quickly and voluntarily deleting the relevant clauses when the issues were formally brought to its attention; and the evidence presented that MGB-Investec had been operating on the basis that the Receivers had been free to deal with the remaining 23%.*[22]

79. The Isis Panel was also of the view that the clauses in question had little chance of having any practical effect[23]. However, the Isis Panel put the market on notice that a different result may occur in different circumstances, saying that:

> *under other circumstances another Panel may well take a similar clause to support a positive inference of an association and unacceptable circumstances.*[24]

80. The Isis Panel emphasised that:

> *The Panel's position has consistently been that the existence of unacceptable circumstances is an issue to be determined in light of, in addition to the particular facts of*

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[21] [2002] ATP 10.
[22] *Isis Communications Limited* [2002] ATP 10, paragraph 67.
[23] Ibid, paragraphs 68 and 70.
[24] Ibid, paragraph 72.

the case before it, policy, public interest, and market and shareholder interests, rather than by black letter law interpretation.[25]

81. The Panel decided that the circumstances in consideration in these proceedings were quite different to those in the Isis Proceedings for the following reasons:

(a) *Rectification* – In the Isis Proceedings the parties quickly and voluntarily deleted the offending provisions from the Isis Agreement. Conversely, in the case of the Agreements, upon discovering the issues arising from them the parties did not delete the offending provisions in full. Instead, Mr Wong served notices of revocation which operated only as partial releases of limited obligations.

(b) *Focus of the Agreements* – The sole purpose of MI was to buy the Sale Shares from Radly. The relevant principals did not intend the Isis Agreement to give MI any control over any other shares in Isis held by Radly. In contrast, a primary purpose and effect of each of the Agreements was to create the voting arrangements for the purpose of influencing the conduct of the affairs of Trysoft. As discussed in paragraph 81(c), the offending provisions cannot be regarded as technical breaches of the law which did not have practical consequences.

(c) *Actual application* – The Isis Panel noted that the clauses in question were unlikely to have any practical effect because of the short and distinct period in which they could operate. This cannot be said of the Agreements, which were in effect for at least 8 months before the Application was made. Within that 8 month period, Trysoft held the 2002 AGM at which shareholders approved the Resolution. The notices of revocation delivered by Mr Wong may have released the Shareholders from their direct obligations under the Agreements to vote in favour of the Resolution at the 2002 AGM. However, the Panel considered that the Shareholders were nevertheless associates of Mr Wong at the time that they cast their votes in favour of the Resolution. Therefore, it cannot be said that the objectionable aspects of the Agreements had no actual effect.

(d) *Operating on the basis of the arrangements* – The Isis Panel found that MI and Radly's receivers were operating on the basis that the receivers were free to deal with the remaining 23%. That did not appear to be the case in these proceedings. Mr Wong referred to the need for him to be satisfied that he had the support of the major shareholders in Trysoft. The arrangements in the Agreements clearly provided that support. In addition, as discussed in paragraphs 40 to 44, Trysoft also appeared to have a strong incentive to ensure that the Resolution was passed so that it would not breach its obligations under the Service Agreement.

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[25] Ibid, paragraph 74.

82. Consequently the Panel decided that the decision in the Isis Proceedings was able to be distinguished from the circumstances in the proceedings relating to Trysoft.

MISCELLANEOUS ISSUES

Mr Ioannides' complaints in relation to the Resolution

83. In the Application and his submissions, Mr Ioannides' asserted that he did not realise that the Resolution may not have been in the best interests of Trysoft until after the 2002 AGM. Mr Ioannides submitted that he would not have voted in support of the Resolution if he had had the understanding of its implications that he had acquired at the time of making the Application.

84. The Panel did not consider these assertions to be relevant in reaching its decision in these proceedings.

85. At the time of the 2002 AGM, Mr Ioannides was an executive director of Trysoft, and was party to the discussions at board level to approve Mr Wong's remuneration package. Mr Ioannides was under an obligation at that time to properly inform himself concerning Mr Wong's remuneration package so that he could properly perform his fiduciary duties as a director of Trysoft.

86. During the proceedings, the Panel also accepted, under regulation 24 of the *Australian Securities & Investments Commission Regulations 2001* (Cth), submissions from a shareholder in Trysoft, Mr Sean Stark. The submissions from Mr Stark provided clear evidence that Mr Stark had raised with Mr Ioannides and the other directors of Trysoft his concerns in relation to the remuneration package proposed for Mr Wong, including that part that was the subject of the Resolution.

87. It was also clear from the evidence that Mr Ioannides was aware of the Robertson Agreement prior to the 2002 AGM since:

    (a) he attested the affixation of Trysoft's company seal to the Robertson Agreement, which Trysoft indicated was executed by it on 11 October 2002; and

    (b) the Ioannides Agreement, which Mr Ioannides signed in his personal capacity (again, according to Trysoft, on 11 October 2002), expressly recognised the existence of the Robertson Agreement (and certain of the terms in it).

88. In any event, the Panel's view was that the existence of the Robertson Agreement had no bearing on the manner in which Mr Ioannides cast his votes at the 2002 AGM.

Mr Ioannides' failure to disclose the existence of the Ioannides Agreement

89. The Panel notes that neither the Application by Mr Ioannides, nor any of his submissions or rebuttals, referred to the existence of the Ioannides Agreement or the facts referred to in paragraph 87. That information only came to the

Panel's attention as a result of the submissions from Trysoft and Mr Wong and Mr Robertson.

90. Although these omissions did not affect the views formed by the Panel, the Panel was of the view that the information was clearly relevant to the proceedings and should have been drawn to the Panel's attention in the Application by Mr Ioannides. The Panel considered that the omission of this information was inappropriate.

TIMING CONSIDERATIONS

The date of the Agreements

91. Neither of the Agreements was dated.

92. Mr Robertson submitted that he signed the Robertson Agreement in December 2001. Mr Wong submitted that he signed that Agreement at about the same time, although it seems clear that he signed it after Mr Robertson, and not in his presence[26]. In any event, it is not clear what document may have been signed by Mr Robertson and Mr Wong at this time, since:

    (a) the cover of the Robertson Agreement indicated that copyright attached to the document in 2002; and

    (b) recital B of the Robertson Agreement refers to the past event of Mr Wong being appointed as managing director of Trysoft in January 2002.

93. On the other hand, Trysoft indicated that, although both of the Agreements were undated, the minutes of meeting of Trysoft's directors on 11 October 2002 confirmed that Trysoft's company seal was affixed on that date.

94. It therefore appeared to the Panel that at least one party executed the Agreements as late as 11 October 2002. In the absence of conclusive evidence to the contrary, the Panel adopted that date as the date of the Agreements.

Was the Application made out of time?

95. The Application was made on 10 June 2003. In substance, it sought a declaration from the Panel in relation to matters arising from the Agreements, which appeared to have been entered into on 11 October 2002.

96. Under section 657C(3) of the Act, an application for a declaration of unacceptable circumstances can only be made within 2 months after the relevant circumstances have occurred, or a longer period determined by the Panel.

97. As the Panel noted in *Brickworks Limited (No. 1)*[27]:

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[26] See paragraph 39(a)(ii).
[27] [2000] ATP 6, paragraph 30.

A circumstance is distinct from the act or event which brings it into existence: circumstances are the relatively persistent background against which acts and events occur.

98. In these proceedings, the Panel considered that the relevant circumstances for the purposes of section 657C(3) of the Act were:

    (a) the continued existence of the Agreements, the acquisitions of relevant interests under them and the associations existing pursuant to them, which had resulted in a breach of section 606 that had not been remedied[28]; and

    (b) the continuing failure by Mr Wong and the Shareholders to comply with their obligations under section 671B of the Act[29].

99. These circumstances were still continuing as at the date of the Application, and so the Panel concluded that it had jurisdiction to hear the Application without the need to exercise its power under section 657C(3) to extend the period for making the Application.

DECISION

Declaration

100. On 3 June 2003, the Panel determined that it should make a declaration of unacceptable circumstances under section 657A in relation to the affairs of Trysoft.

101. In particular, the Panel decided that a declaration of unacceptable circumstances was warranted[30] in relation to:

    (a) the breaches of sections 606 and 671B of the Act referred to in paragraphs 61 to 71 (in accordance with section 657A(2)(b) of the Act); and

    (b) the unacceptable effect that the undisclosed arrangements involving the major shareholders in Trysoft had, and might in the future have, on the control of Trysoft (in accordance with section 657A(2)(a) of the Act).

Orders

The Panel's orders

102. On 3 July 2003, the Panel made orders[31] which:

    (a) terminated both of the Agreements in full, with immediate effect; and

    (b) prevented the exercise of the Wong Options[32] unless and until their exercise had been ratified at a meeting of Trysoft shareholders convened

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[28] See paragraphs 61 to 67 for a discussion of the breaches of section 606.
[29] See paragraphs 68 to 71 for a discussion of the breaches of section 671B.
[30] A copy of the declaration made by the Panel on 3 July 2003 is set out in Annexure C.
[31] A copy of the Panel's orders is set out in Annexure D.

after the date of the Panel's orders, and in relation to which votes cast by associates of Mr Wong were disregarded[33].

Further approval of the grant of the Wong Options

103. As discussed above, the grant of the Wong Options to Mr Wong required shareholder approval under Listing Rule 10.11. When that shareholder approval was obtained at the 2002 AGM, the votes cast by the Shareholders in favour of the Resolution accounted for approximately 90.7% of the votes cast in favour of the Resolution[34].

104. If those votes had been disregarded as required by Listing Rule 10.11, the Resolution would have been defeated[35]. For this reason, the Panel determined that it was appropriate for it to order that the Wong Options could not be exercised unless and until the grant of those options has been ratified by the Trysoft shareholders .

105. Trysoft submitted to the Panel that 21.1% of the Shares were not voted at the 2002 AGM in relation to the Resolution, and it was possible that some of those votes may have been cast if Trysoft shareholders had been aware that the Shareholders were to be excluded from voting in relation to the Resolution.

106. The Panel accepted that this was possible, but was of the view that it was not possible to know whether such votes would have been cast in favour of, or against, the Resolution. Therefore, the Panel considered that this was a further reason for the Panel to order that shareholder ratification be obtained before the Wong Options were exercised.

107. The Panel's decision in these proceedings should not be taken to indicate that if, after excluding the votes of the Shareholders, the Resolution would have been carried anyway, the Panel would not have required shareholder ratification of the grant of the Wong Options.

108. If that had been the case, the Panel would still have considered requiring shareholder ratification due to:

    (a) the fact that Trysoft shareholders were unaware of material information (that is, the associations created by the Agreements) at the time of the 2002 AGM. Knowledge of this information may have affected the way in which shareholders cast their votes; and

    (b) the large number of Shares which were not voted at the 2002 AGM. In particular, if Trysoft shareholders had been aware that the largest

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[32] None of the Wong Options had been exercised prior to the conclusion of the Panel proceedings.
[33] Other than votes cast by such persons as proxy for a person who is entitled to vote where the vote is cast in accordance with directions on the proxy form.
[34] Of the 15,593,876 votes cast in favour of the Resolution, 9,941,150 votes were cast by Mr Robertson and TSA ME3, and 4,200,000 votes were cast by Mr Ioannides.
[35] This would have been the result, regardless of whether the votes cast by Mr Stark (see footnote 9) were included in the figures published by Trysoft.

shareholders in Trysoft (being the owners of over 60% of its Shares) were excluded from voting on the Resolution, they may have been more inclined to cast the votes attached to their Shares.

Subsequent advice that Wong Options held by the Consultant

109. During the course of the proceedings both Mr Wong and Trysoft had submitted to the Panel that the Wong Options were held directly by Mr Wong, a situation which was consistent with the terms of the Service Agreement and the Robertson Agreement. These reasons were drafted on this basis.

110. However, as part of the process of finalising these reasons, it was revealed to the Panel on 12 September 2003 that, in fact, the Wong Options had been issued to, and were still held by, the Consultant as opposed to Mr Wong himself.

111. Mr Wong was, and remains, the sole director and secretary of the Consultant, and conceded that he controlled the Consultant. Consequently:

    (a) the Consultant is a related party of Trysoft within the meaning of the Listing Rules (being an entity controlled by a director of Trysoft which is not also controlled by Trysoft); and

    (b) Listing Rule 10.11 applies to the Consultant in the same way that it would apply to Mr Wong, in particular so that any votes cast by an associate of the Consultant in relation to the Resolution should have been disregarded (unless the votes were cast by such the person as proxy for a person who was entitled to vote and the vote was cast in accordance with directions on the proxy form).

112. The Panel was of the view that the Shareholders were as much associates of the Consultant for the purposes of Listing Rule 10.11 in relation to the Resolution as they would have been associates of Mr Wong had the Wong Options been granted directly to him (as was originally thought to be the case). This view was supported by the evidence presented to the Panel[36] which made it clear that Mr Wong, Trysoft and the Shareholders regarded the Wong Options as belonging to Mr Wong, regardless of whether they were legally held by the Consultant.

113. Therefore, the Panel was of the view that despite this new information the intention of the orders made by the Panel on 3 July 2003 in relation to the Wong Options remained correct. However, in order to ensure that the orders achieved their intended effect, the Panel considered it prudent to vary the orders to reflect this development. A copy of the variation order made by the Panel is set out in Annexure F.

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[36] In particular, the fact that the parties originally submitted that the Wong Options had been granted directly to Mr Wong, and the fact that the Robertson Agreement was drafted on that basis (see paragraph 18(a)).

114. Prior to the Panel making the variation order, the Panel enquired whether any of the Wong Options had been exercised after the Panel proceedings. The Panel was informed that all of the Wong Options remained unexercised at that time.

Ability of Mr Robertson and Mr Ioannides to vote on a further resolution

115. No evidence was provided to the Panel that the Shareholders were associates of Mr Wong or the Consultant other than as a result of the existence of the Agreements.

116. Given that:

    (a) the Panel's orders resulted in the termination of the Agreements with immediate effect; and

    (b) each of the relevant parties gave undertakings to the Panel to obtain legal advice concerning when parties will be associates for the purposes of Chapters 6 and 6C of the Act[37],

    the Panel considered that it was not necessary at this stage for it to prevent the Shareholders from voting in relation to any shareholder ratification of the grant of the Wong Options. The question of whether any of the Shareholders again become associates of Mr Wong or the Consultant, and therefore ineligible to vote, will be determined according to the facts at the time of the shareholder meeting.

Undertakings

117. In addition to making the orders referred to above, the Panel accepted undertakings from Mr Wong, Mr Robertson and Mr Ioannides that each of them would obtain advice from their legal advisers concerning the operation of the association concept within the parameters of Chapters 6 and 6C of the Act, and the situations in which agreements such as the Agreements can give rise to a breach of those Chapters.

118. Each of those parties undertook to procure that their legal advisers provide a certificate to the Panel by 31 July 2002 to confirm that such advice had been obtained. A copy of the form of the undertakings is set out in Annexures E. The Panel has received the certificates required pursuant to the undertakings.

119. The parties were also advised that that the Panel was prepared to accept undertakings from them in lieu of the Panel making the orders referred to in paragraph 102.

120. The Panel thanks Trysoft for offering to provide undertakings that would have dispensed with the need to make those orders. However, as the other parties to the Agreements did not agree to voluntarily provide the necessary complementary undertakings, it was necessary for the Panel to make the orders set out in Annexure D.

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[37] See paragraphs 117 to 120.

Legal representation and costs

121. The Panel consented to the parties being legally represented by commercial lawyers.

122. The Panel did not receive any application for an award of costs, and made no order for costs.

Robyn Pak-Poy
President of the Sitting Panel
Decision dated 3 July 2003
Reasons published 23 September 2003

Annexure A – Extracts from the Robertson Agreement

The following relevant clauses have been extracted from the Robertson Agreement:

3. WONG AS MANAGING DIRECTOR

3.1 Robertson, TSA ME3 and TCL [Trysoft] hereby acknowledge that Wong has provided consulting services to TCL since November 2001 and was appointed managing director of TCL in January 2002.

*3.2 Subject to any shareholder and regulatory approvals, TCL hereby confirms its engagement of Wong as managing director of TCL for an initial period of 3 years effective from his appointment on 23 January 2002 ('**Period**') on the following terms and conditions:*

…

(b) TCL will establish an executive share scheme on the following terms and conditions:

(i) Wong shall have options to purchase a total 1,000,000 shares in TCL at 15c per share exercisable at any time within the Period in recognition of Wong's commencement as managing director in January 2002.

(ii) Wong shall have further options to purchase up to a further 2,300,000 shares in TCL at 15c per share exercisable within the Period as follows:

(A) if closure of the ASP Division of TCL is completed (the first hurdle) 1,000,000 shares subject to such options may be acquired at any time thereafter (but prior to the expiration of the Period);

(B) if a strategic acquisition is completed by TCL (the second hurdle) the balance of the shares subject to the options may be acquired at any time thereafter (but prior to the expiration of the Period);

(iii) Wong shall (subject to 3.3) be granted additional options to acquire further shares in TCL sufficient to prevent dilution of Wong's interests (to the extent acquired by the exercise of options under clause 3.2(b)(i) or (ii)) by further allotment of shares (on the basis that the price payable for shares upon exercise of the options shall be at the average price at which such further allotments occur) and the further options under this paragraph (iii) shall be exercisable at any time within 3 years from the date of such allotments.

3.3 Separately, and subject to any shareholder and other regulatory approvals, in order to ensure that Wong has the support of a competent management team and chairman of directors, TCL will establish executive option schemes and procure the issue of such number of shares as in [stet] nominated by Wong. The executive option scheme will be established so that, as far as possible, the number of options issued will be adjusted or further options will be issued, on further share issues to avoid a dilution of such options.

3.4 Robertson and TSA ME3 agree to support the shareholder resolutions necessary to effect the executive share scheme contemplated by clause 3.2(b) and the executive option scheme contemplated by clauses 3.3 and 3.5 of these Heads of Agreement.

3.5 Subject to any shareholder and other regulatory approvals, TCL shall pay to Wong such bonuses as may be necessary to fund acquisition by Wong of all shares which are acquired by Wong upon exercise of an option referred to in clause 3.2(b)(i) or (ii) (but not

3.2(b)(iii)) which amounts shall be payable after exercise by Wong of the relevant option and on or before the time for payment of the relevant price per share.

3.6 In consideration of the obligations of TCL, Robertson and TSA ME3, Wong hereby undertakes to fully and faithfully serve as managing director of TCL for the Period.

4. ROBERTSON'S VOTING CONTROL

4.1 The parties acknowledge that Robertson has effective voting control of TCL.

4.2 Robertson undertakes to appoint Wong as his representative to attend and vote in Wong's absolute discretion at all meetings of TCL in respect of 4,200,000 shares that Robertson holds in TCL.

4.3 Robertson hereby appoints Wong as Robertson's representative and in Robertson's name and on Robertson's behalf to execute any proxy form and do and perform any or all other acts, matters or things reasonably necessary or expedient to appoint Wong as Robertson's proxy to attend and vote in Wong's absolute discretion at all meetings of TCL in respect of 4,300,000 shares that Robertson holds in TCL.

4.4 The parties (including Robertson) acknowledge that this representation shall be for a period of 3 years, commencing immediately after the resolutions contemplated by clauses 3.3 and 3.5 of these Heads of Agreement have been passed at a general meeting of TCL, and shall diminish in proportion to any shares Wong receives as an element of his executive share scheme contemplated by clause 3.2(b) of these Heads of Agreement.

4.5 In the event of any reconstruction (including any consolidation, subdivision, split, reduction, buy-back or return) of the issued capital of TCL, the number of shares subject to clauses 4.2, 4.3 and 4.4 of these Heads of Agreement will be adjusted (as appropriate) to the extent necessary to ensure the parties are in the same position that they would have been in had these Heads of Agreement originally applied to the issued capital of TCL following such reconstruction.

4.6 In consideration of Wong entering into these Heads of Agreement, Robertson undertakes to inform Wong immediately of any intention that Robertson forms to sell any of the shares which Robertson holds in TCL. In respect of such shares, Wong or his nominee shall have a first right of refusal to purchase the shares for a price equal to the proposed purchase price of the shares.

…

11. TERMINATION

These Heads of Agreement will only terminate:

(a) if, within 6 months of the date of these Heads of Agreement, each of the steps contemplated by clauses 3 and 4 of these Heads of Agreement have not been completed;

…

(c) if all the parties consent in writing to its termination…

Annexure B – Extracts from the Ioannides Agreement

The following relevant clauses have been extracted from the Ioannides Agreement:

2. WONG AS MANAGING DIRECTOR

2.1 Ioannides and TCL [Trysoft] acknowledge that Wong has provided consulting services to TCL since November 2001 and was appointed managing director of TCL in January 2002.

2.2 TCL and Ioannides hereby acknowledge that a separate heads of agreement has been entered into between Wong, TCL and Robertson in respect of an executive share scheme (for Wong) and an executive option scheme (to ensure that Wong has the support of a competent management team and chairman of directors).

2.3 Ioannides hereby agrees to support the shareholder resolutions necessary to effect the executive share scheme (for Wong) and an executive option scheme (to ensure that Wong has the support of a competent management team and chairman of directors).

…

9. TERMINATION

These Heads of Agreement will only terminate:

(a) if, within 6 months of the date of these Heads of Agreement, the resolutions contemplated by clause 2.3 of these Heads of Agreement have not been passed;

…

(c) if all the parties consent in writing to its termination…

Annexure C – Declaration of unacceptable circumstances

Corporations Act
Section 657A
Declaration

WHEREAS

A. Mr Douglas Wong, Trysoft Corporation Limited (**Trysoft**), Mr Grahame Robertson and TSA ME3 Pty Ltd (**TSA ME3**) entered into a heads of agreement (the **Robertson Agreement**) dated on or about 11 October 2002.

B. Among other things, the Robertson Agreement contained provisions:

   (a) requiring Mr Robertson and TSA ME3, as shareholders in Trysoft, to support the shareholder resolutions necessary to effect certain option schemes to be implemented by Trysoft (part of the implementation of these schemes resulted in the granting of options (the **Wong Options**) to Mr Wong);

   (b) providing, in certain circumstances, for Mr Wong to have the power to exercise the voting power (as defined in the *Corporations Act 2001* (Cth) (the **Act**)) attached to approximately 19% of the shares in Trysoft that are held by Mr Robertson; and

   (c) providing Mr Wong with a right of first refusal in relation to all of the shares Mr Robertson holds in Trysoft (but not including the shares in Trysoft held by TSA ME3 Pty Ltd).

C. Mr Wong, Trysoft and Mr Stephen Ioannides entered into a heads of agreement (the **Ioannides Agreement**) dated on or about 11 October 2002.

D. Among other things, the Ioannides Agreement required Mr Ioannides, as a shareholder in Trysoft, to support the shareholder resolutions necessary to implement the option schemes referred to in paragraph (a) of recital B of this Declaration.

E. A partial, but not full, release of the obligations of Mr Robertson and TSA ME3 under the Robertson Agreement, and Mr Ioannides under the Ioannides Agreement, was purported to be given on 6 November 2003.

F. The Panel has determined that the entry into the Robertson Agreement and the Ioannides Agreement (together the **Agreements**) resulted in Mr Wong acquiring a relevant interest in shares in Trysoft and increases in the voting power of each of Mr Wong, Mr Robertson, TSA ME3 and Mr Ioannides in breach of section 606 of the Act. That breach has not been remedied.

G. The Panel has also determined that the entry into the Agreements resulted in each of Mr Wong, Mr Robertson, TSA ME3 and Mr Ioannides being under an obligation under section 671B of the Act to give a substantial holding notice in

accordance with the requirements of that section. Each of those parties failed, and continues to fail, to comply with this obligation.

Under section 657A of the Corporations Act, the Panel declares that the circumstances relating to:

(a) the entry into, and continuing existence of, the Agreements (as discussed in recitals A to F); and

(b) the failure by each of Mr Wong, Mr Robertson, TSA ME3 and Mr Ioannides to comply with their obligations under section 671B of the Act (as discussed in recital G),

constitute unacceptable circumstances in relation to the affairs of Trysoft.

Robyn Pak-Poy
President of the Sitting Panel
Decision dated 3 July 2003
Published 23 September 2003

Annexure D – Final orders

Corporations Act
Section 657D
Final Orders

In the matter of Trysoft Corporation Limited

Pursuant to section 657D of the Corporations Act 2001 and pursuant to a declaration of unacceptable circumstances made by the President of the Sitting Panel on 3 July 2003, the Takeovers Panel HEREBY ORDERS:

(a) that the heads of agreement executed on or about 11 October 2002 between Mr Douglas Wong, Trysoft Corporation Limited (**Trysoft**), Mr Grahame Robertson and TSA ME3 Pty Ltd is terminated in full, such termination to take effect immediately;

(b) that the heads of agreement executed on or about 11 October 2002 between Mr Douglas Wong, Trysoft Corporation Limited (**Trysoft**) and Mr Stephen Ioannides is terminated in full, such termination to take effect immediately;

(c) that the options (the **Options**) granted to Mr Wong by Trysoft pursuant to:

  (i) a Services Agreement dated on or about 20 September 2002 between Trysoft and Mr Wong; and

  (ii) a resolution passed at the 2002 Trysoft annual general meeting on 29 November 2002 approving the grant of the options to Mr Wong,

  must not be exercised unless and until the grant of the Options has been ratified at a meeting of the shareholders of Trysoft convened after the date of this order and in relation to which votes cast by associates of Mr Wong have been disregarded (other than votes cast by such persons as proxy for a person who is entitled to vote where the vote is cast in accordance with directions on the proxy form);

(d) that Trysoft must not issue any shares following any exercise of options by Mr Wong unless and until ratification of the grant of the Options complying with requirements set out in paragraph (c) has been complied with.

Dated 3 July 2003

Robyn Pak-Poy

President of the Sitting Panel

Annexure E – Form of undertakings provided to the Panel

[*Name of person providing the undertaking*] undertakes to the Takeovers Panel pursuant to section 201A of the *Australian Securities & Investment Commissions Act 2001* (Cth) that, prior to 5.00 pm (AEST) on 31 July 2003, **[*Name of person providing the undertaking*]** will procure his legal advisers, **[*Name of relevant legal advisers*]**, to provide a certificate to the Takeovers Panel confirming that those advisers have:

(a) provided **[*Name of person providing the undertaking*]** with advice concerning the circumstances in which:

  (i) parties will be associates for the purposes of Chapters 6 and 6C of the *Corporations Act 2001* (Cth) (the **Act**); and

  (ii) arrangements with similar effect to the **[*describe the Agreements to which the person providing the undertaking is a party*]** can lead to persons being in breach of Chapters 6 and 6C of the Act, in particular in relation to shareholder resolutions of the kind referred to in paragraph (c) of the orders to be made by the Takeovers Panel pursuant to a declaration of unacceptable circumstances in relation to the affairs of Trysoft Corporation Limited to be dated on or about 3 July 2003; and

(b) discussed the advice referred to in paragraph (a) with **[*Name of person providing the undertaking*]** and formed the view that **[*Name of person providing the undertaking*]** understood that advice.

[*Additional paragraph provided by Mr Robertson only:* *Mr Robertson represents and undertakes to the Takeovers Panel that he is providing this undertaking in both his personal capacity and on behalf of TSA ME3 Pty Ltd in his capacity as the sole director and secretary of that company.*]

_____

[*Name of person providing the undertaking*]

Date: 3 July 2003

Annexure F – Variation of orders

Corporations Act
Section 657D
Variation of Orders

In the matter of Trysoft Corporation Limited

Pursuant to:

(a) section 657D(3) of the *Corporations Act 2001* (Cth); and

(b) a declaration of unacceptable circumstances in relation to the affairs of Trysoft Corporation Limited (**Trysoft**) made by the President of the Sitting Panel on 3 July 2003,

the Takeovers Panel HEREBY ORDERS that the orders (the **Orders**) made by the President of the Sitting Panel on 3 July 2003 in relation to Trysoft be varied in accordance with the following:

(c) replace paragraph (c) of the Orders with the following:

> *(c) that the options (the **Options**) granted by Trysoft pursuant to:*
>
> *(i) a Services Agreement dated on or about 20 September 2002 between Trysoft and Douglas Wong Associates (Aust) Pty Ltd (**DWAA**); and*
>
> *(ii) a resolution passed at the 2002 Trysoft annual general meeting on 29 November 2002 approving the grant of the options to DWAA or its nominee,*
>
> *must not be exercised unless and until the grant of the Options has been ratified at a meeting of the shareholders of Trysoft convened after the date of this order and in relation to which votes cast by associates of Mr Douglas Wong and DWAA have been disregarded (other than votes cast by such persons as proxy for a person who is entitled to vote where the vote is cast in accordance with directions on the proxy form);*

(d) replace paragraph (d) of the Orders with the following:

> *(d) that Trysoft must not issue any shares following the exercise of any Options unless and until ratification of the grant of the Options complying with requirements set out in paragraph (c) has been obtained.*

Dated 22 September 2003

Anthony Burgess
Deputy President of the Sitting Panel