Takeovers Panel

Reasons for Decision
Prudential Investment Company

In the matter of Prudential Investment Company of Australia Limited [2003] ATP 36

Catchwords:
Review of ASIC decision to refuse relief - joint bid - condition of relief that bid be subject to non-waivable condition that majority of shareholders accept bid - later modification granted to exclude shareholders created by share-splitting- further modification refused on ground that market had traded on assumption that the condition was non-waivable and operated on the number of shareholders- abandoned parcels -breadth of ASIC power under section 655A - market knowledge - market integrity – effect on non-waivable conditions imposed as condition of ASIC relief - basis for decision - appropriate relief

Corporations Act 2001 (Cth) - sections 655A, 656A, 661A(1)(b)(ii)
Companies (Acquisition of Shares) Act 1980 section 42
Corporations Law section 701
ASIC Policy Statement 25 'Takeovers: false and misleading statements'
ASIC Policy Statement 142
ASIC Policy Statement 98 (superseded)
NCSC Policy Statement 139
ASIC Media Release [01/295]
ASIC v DB Management Pty Limited [2000] HCA 7, 169 ALR 385, cons
Brierley Investments v Dextran (1990) 3 ACSR 455, cited
Peninsula Gold Pty Limited v ASC (1996)19 ACSR 703, cited
Peninsula Gold Pty Limited v ASC (1996) 21 ACSR 246, cited
Taipan Resources NL (No 6) [2000] ATP 15, 36 ACSR 716, cons

These are our reasons for upholding an application for review of a decision by ASIC to refuse relief in relation to a bid by FEXCO Investments Australia Pty Ltd for all of the shares in Prudential Investment Company of Australia Ltd (PICA).

THE APPLICATION

Background

1. The sitting Panel is Andrew Knox (sitting President), Karen Wood (sitting Deputy President) and Elizabeth Alexander.

The Applicants and the Application

2. FEXCO Investments Australia Pty Ltd (**FIA**), Fexco Money Transfer Limited, FEXCO, Mr Geoff Bell and Mr Peter Jess (together with companies they respectively control, the **Joint Bidders**) made an application to the Panel on 3 October 2003 (**Application**) under section 656A of the Corporations Act 2001

(Cth) (the **Act**).[1] The Application sought review of the decision of ASIC described below.[2]

The Joint Bid

3. On 28 May 2003 FIA announced that it would make a takeover bid on behalf of the Joint Bidders (the **Joint Bid**) for all of the shares in PICA (**Shares**), offering 35 cents cash per Share.

4. At the time of the announcement of the Joint Bid, each of the Joint Bidders had a relevant interest in separate parcels of Shares (the **Pre-Bid Shares**). They made an agreement (the **Disposal Agreement**) between themselves restricting the terms on which they may dispose of their Pre-Bid Shares during the bid period for the Joint Bid.

5. They are also all party to a shareholders' deed under which they will have pre-emptive rights to each other's Pre-Bid Shares if PICA becomes an unlisted company with less than 50 members, and accordingly ceases to be a company to which section 606 applies.

6. Upon entry into these agreements, each of the Joint Bidders acquired a relevant interest in all of the Pre-Bid Shares held by the other Joint Bidders and increased their voting power in PICA to 57.5%. The ASIC relief that was required to allow these acquisitions is discussed below at [20] to [22].

Independent expert's valuation

7. PICA engaged Hindal Securities Pty Ltd (the **Independent Expert**) as an independent expert to assess whether the Joint Bid was fair and reasonable to the PICA shareholders not associated with the Joint Bidders.

8. The Independent Expert concluded in its report dated 23 June 2003 that:

   (a) the fair value of Shares was between 37 cents and 44 cents.

   (b) the Joint Bid was not fair, but that it was reasonable in light of the Joint Bidders' pre-existing stake in PICA.

   At the time, the price offered to PICA shareholders under the Joint Bid was 35 cents per Share.

Glebe Administration Board and London City Equities

9. On 4 July 2003, a shareholder in PICA, Glebe Administration Board, sold approximately 17% of the Shares on market to London City Equities Limited (**LCE**). The Shares were sold for 34 cents each and brought LCE's holding in PICA to approximately 18.5% of the Shares.

10. LCE subsequently acquired a further 0.9% of the Shares through on-market purchases.

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[1] In these reasons, statutory references are to the Act unless otherwise obvious.
[2] See [30] to [34]

11. LCE announced to ASX on 4 July 2003 that:

    (a) in the circumstances, it had no intention of accepting the Joint Bid as it then stood (the offer price under the Joint Bid at that time was 35 cents); and

    (b) it would be approaching the FEXCO Group to propose a rearrangement of PICA's board structure to reflect more sensibly the shareholding ownership and the geographical spread of PICA's business.

12. LCE advised the Joint Bidders of its intention to remain a long term shareholder in PICA.

13. The Joint Bidders submitted that on that basis, they concluded at that time that LCE would not be likely to accept the Joint Bid.

Rival takeover bid by LKM Capital Limited

14. On 15 August 2003 LKM Capital Limited (**LKM**) announced a rival takeover bid (the **LKM Bid**) for all of the Shares. The price initially offered under the LKM Bid was 45 cents cash per Share.

15. An auction for the Shares followed between LKM and FIA. The changing offer prices are included in the chronology set out in [19].

16. In the end, LKM announced on 9 September that it would not increase its offer price above 52 cents per share. At the time, FIA was offering 57 cents per Share under the Joint Bid.

17. The LKM Bid closed on 2 October with acceptances for only 0.44% of the Shares.

Acceptance by LCE

18. On 5 September LCE announced to ASX that it would accept the Joint Bid, in light of the increase in the bid consideration to 57 cents per Share and in the absence of a higher offer. LCE accepted the Joint Bid on 11 September.

Chronology

19. The following table sets out a chronology of the major events that occurred after the Joint Bid was announced. Various aspects of the items described in the chronology are described in more detail below.

Date	Event	Share price[3]
19 May	ASIC grants Joint Bid Relief	-
20 May	PICA closing share price on the last full trading day on which PICA shares were traded prior to the announcement of the Joint Bid	$0.175

[3] Unless otherwise indicated, the share prices listed in this column represent the highest share prices on offer under the Joint Bid and the LKM Bid respectively at the relevant time.

28 May	Joint Bid announced	$0.35 (JB[4])
12 June	Offers under Joint Bid posted	$0.35 (JB)
23 June	Independent Expert says Joint Bid terms not fair	$0.35 (JB)
4 July	Glebe Administration Board sells 17% of the PICA Shares on market to LCE at $0.34	$0.35 (JB)
4 July	LCE says it will not accept Joint Bid as it then stands	$0.35 (JB)
22 July	Joint Bidders apply for the Aggregation Relief	$0.35 (JB)
30 July	In response to a request from ASIC, FIA indicates that it does not wish to pursue relief substantially the same as the Majority of Shares relief later sought. ASIC did not indicate whether it would be prepared to grant such relief	$0.35 (JB)
1 August	Joint Bid extended to 2 September	$0.35 (JB)
15 August	LKM Bid announced at 45 cents	$0.45 (LKM[5])
25 August	Joint Bid extended to 23 September	$0.45 (LKM)
28 August	ASIC grants Aggregation Relief	$0.45 (LKM)
29 August	Joint Bid increased to 47.5 cents	$0.475 (JB)
2 September	LKM waives conditions other than prescribed occurrences	$0.475 (JB)
3 September	LKM stands in the market at 52 cents	$0.52 (LKM)
5 September	Joint Bid increased to 57 cents	$0.57 (JB)
5 September	LCE says it will accept Joint Bid	$0.57 (JB)
9 September	LKM announces no increase beyond 52 cents	$0.57 (JB)
11 September	LCE accepts Joint Bid	$0.57 (JB)
11 September	FIA applies for Majority of Shares relief	$0.57 (JB)
15 September	Joint Bidders advise PICA shareholders of application to ASIC	$0.57 (JB)
15 September	Joint Bid extended to 3 October	$0.57 (JB)
16 September	ASIC rejects Majority of Shares relief	$0.57 (JB)
25 September	Joint Bid extended to 17 October	$0.57 (JB)
2 October	LKM Bid closes	$0.57 (JB)

[4] 'JB' means that the price in question is the price offered under the Joint Bid.
[5] 'LKM' means that the price in question is the price offered under the LKM Bid.

3 October	Application lodged	$0.57 (JB)
9 October	Joint Bid extended to 31 October	$0.57 (JB)

The ASIC Relief

The ASIC relief to allow the Joint Bid

20. The acquisition of relevant interests in the Pre-Bid Shares by the Joint Bidders under the Disposal Agreement would have contravened section 606, if ASIC had not provided them with an exemption from that section.

21. The ASIC relief (the **Joint Bid Relief**) was given by an instrument issued by ASIC on 19 May 2003 pursuant to a policy which ASIC announced in August 2001, in ASIC Media Release [01/295] (**ASIC Joint Bid Policy**), which states that relief for joint takeover bids will be subject to three conditions, of which one is that:

> *The bid must contain a non-waivable minimum acceptance condition **of 50.1% of target company shareholders who are not associated with the joint bidders**. This is designed to ensure that the bid proceeds only at a price that a majority of the target shareholders consider acceptable, and will stop the joint bidders being able to use a joint bid to take control at a lower than fair price. [emphasis added]*

22. The Joint Bid Relief included a condition to this effect (the **ASIC Acceptances Condition**):

> *Offers under the bid are subject to a defeating condition which will operate where FIA does not receive acceptances in respect of at least 50.1% of PICA shareholders not associated with any of the Joint Bidders as at the commencement of the bid period, and the bidder's statement in respect of the Bid includes a statement to the effect that this condition will not be waived.*

23. The bidder's statement for the Joint Bid described the Joint Bid Relief, including the ASIC Acceptances Condition. The part of the document which set out the terms of the FIA offers, however, contained only the following relevant terms (together the **Bid Acceptances Condition**):

    (a) a defeating condition that at the close of the bid the Joint Bidders have 90% voting power and have received acceptances for 75% of the shares which they offered to acquire (the **90% Condition**); and

    (b) a term that the 90% Condition could only be waived if the bid had been accepted by 50.1% of the non-associated shareholders.

24. The Bid Acceptances Condition as drafted only operated as a constraint on the Joint Bidders' power to waive the 90% Condition. It did not operate as a defeating condition in its own right, which is what the ASIC Acceptance Condition required. So far as we are aware, ASIC took no issue with this. By the time the Majority of Shares Application was made the 90% Condition had been fulfilled (and hence did not need to be waived). As a matter of strict logic,

there was no need to make either the Majority of Shares Application to ASIC or the review Application as the Bid Acceptances Condition did not prevent the completion of the Joint Bid. After representations by the Joint Bidders and by ASIC, we agreed to deal with the Application on its merits, rather than refuse it as unnecessary, in effect on the basis of a concession that the Bid Acceptances Condition had the same effect as if it had complied with the ASIC Acceptance Condition.

25. Both of the subsequent applications made to ASIC by the Joint Bidders which are discussed in this decision related to variations of the Joint Bid Relief. In each case, the application was for ASIC to vary the ASIC Acceptances Condition, on the basis that the Joint Bidders could then make a corresponding variation to the Bid Acceptances Condition in their offers and in the contracts resulting from acceptances.

The Aggregation Relief

26. The first application by the Joint Bidders to modify the ASIC Acceptances Condition was to treat 300 parcels as if they were one parcel (the **Aggregation Relief**). Each of the parcels comprised 50 shares and they were held by a few parties with similar names in various combinations which resulted in a large number of separate holdings. The combinations of joint holdings, similar names and the use of a common address suggested that the holders were associated. 50 shares were worth $8.50 at the market price before the Joint Bid was announced, $17.50 under that bid and $28.50 under the closing price of that bid. At the relevant times, the minimum brokerage charged by Australia's largest discount broker was $19.99.

27. When the Joint Bidders applied for the Aggregation Relief on 22 July, ASIC staff raised with them whether the Joint Bidders wished to apply to ASIC for a variation of the Joint Bid Relief to replace the ASIC Acceptances Condition with a condition which required acceptances for a majority of shares held by non-associates, precisely as now proposed. Staff advised the Joint Bidders that if they sought this modification, it would need to be considered by the Regulatory Policy Group. The Joint Bidders did not apply for the proposed change, because at that stage, particularly in light of LCE's announcement of 4 July, they foresaw greater difficulties acquiring a majority of the shares than satisfying the head-count test.

28. The Aggregation Relief was granted on 26 August. It allowed the 300 parcels to be treated as one, but did not replace the ASIC Acceptances Condition with a "majority of shares" condition.

29. While the Aggregation Relief was not under review in the Proceedings and while we were not given a statement of reasons for that decision, it appears to be capable of being supported on the share-splitting policy described at [44] to [47]. Accordingly, we adopt the Aggregation Relief as an appropriate starting point on which any additional relief should build.

The Majority of Shares Application

30. On 11 September, the same day as LCE accepted the Joint Bid, the Joint Bidders applied to ASIC for relief to replace the ASIC Acceptances Condition with a requirement that the bid be conditional on acceptances for a majority of shares held by people other than the Joint Bidders and their associates (the **Majority of Shares Relief**). Since the bid has been accepted for approximately 83.5% of the shares held by persons other than the Joint Bidders and their associates, a condition in this form would already have been satisfied. In effect, the bid would no longer be subject to the 90% Condition.

31. This application to ASIC was based on a submission that the bid in substance satisfied the objective of the joint bid policy that "the bid proceeds only at a price that a majority of the target shareholders consider acceptable", since it was not at an undervalue, as indicated by the independent expert's report, the independent director's recommendation and FIA's success in outbidding LKM.

32. The Joint Bidders did not base the application to ASIC on a submission that shareholders had not accepted the Joint Bid without consciously rejecting it, or provide to ASIC the evidence as to how many offeree shareholders were unaware of the bid, or had abandoned their holdings, which they have provided to us in the review proceedings.

33. This was surprising and disappointing as presentation by the Joint Bidders and their advisers at this stage of an appropriate case to ASIC for granting the relief sought would seem likely to have resolved the matter then without any need for this Application. In particular, the information which supported the abandoned parcels relief was available to, or readily ascertainable by, them. So was clear proof that the majority of non-associated holders of marketable parcels had accepted the bid. ASIC seems always to have accepted that relief under superseded ASIC Policy Statement 98 (**SPS 98**) would be available, if the necessary evidence was provided. No review application should have been required: the relief should have been sought and given under the analogy of SPS 98 or ASIC Policy Statement 142.

34. ASIC refused the application on 16 September, for reasons which it set out in its reasons for decision. In brief ASIC's reasons were:

    (a) the Joint Bid had been open for over three months while subject to a non-waivable condition: it would be detrimental to an efficient, competitive and informed market to allow that condition to be waived after so long;

    (b) the Joint Bidders had not only allowed this time to elapse without seeking further relief, they had failed to accept the offer of ASIC staff in July to propose substantially the same relief to the Regulatory Policy Group;

    (c) the application for relief to ASIC had failed to provide any analysis as to why they were unable to satisfy the Bid Acceptances Condition, including as to abandoned parcels;

(d) the grant of relief would enable the Joint Bidders to compulsorily acquire shares held by Non-Accepting Shareholders, although those holders had reason to believe that the Bid Acceptances Condition would prevent compulsory acquisition of their shares.

Relief sought by the Application

35. The Application seeks a review under section 656A of ASIC's decision to refuse the Majority of Shares Relief. It seeks that the Panel vary the Joint Bid Relief to replace the ASIC Acceptances Condition (which is a requirement for the Joint Bid to be conditional on being accepted by 50.1% of the non-associated *shareholders*) with a requirement that it be conditional on 50.1% of the *Shares* held by non-associated shareholders being accepted into the Joint Bid.

36. The Application was argued on the bases that the price offered under the Joint Bid had been a fair price, the grant of relief would be beneficial to holders who had accepted the bid, holders who had sold on market had not been disadvantaged and that many of the holders who had not accepted the bid were uncontactable.

DISCUSSION

37. We have decided that the grant of relief is supported by ASIC policy which is relevant to the ASIC Acceptances Condition and the substantive requirements of which are satisfied by evidence provided to us by the Joint Bidders and by PICA itself.

Value premise in ASIC Joint Bid Policy

38. We do not discount the evidence set out in the Application that the Joint Bid was not at an undervalue, as indicated by the final bid price exceeding the valuation range in the independent expert's report, the independent director's recommendation and the Joint Bidders' success in outbidding LKM. However, we agree with the unstated premise of the ASIC Joint Bid Policy that it is preferable, wherever it is practicable, for the assessment whether a bid offers sufficient value to be made by target shareholders themselves. Accordingly, we prefer to base our decision principally on the level of acceptances of the Joint Bid.

Assessment of Acceptance Requirement in the ASIC Joint Bid Policy

39. The ASIC Joint Bid Policy is not unreasonable in requiring joint bidders to give up relevant interests in one another's shares which they acquire under an agreement to make a joint bid, unless their bid is approved by non-associated shareholders. It would be unsatisfactory for acquisitions which would otherwise be prohibited by section 606 to be exempt because a token bid was made by the acquiring party. In effect the level of acceptances is a proxy for approval by shareholders at a general meeting under the exception in section 611 item 7.

40. However, it is less satisfactory to measure that approval by the number of acceptances, without adjustment for abandoned holdings and manipulation, rather than by the number of shares to which those acceptances relate. Requirements based on numbers of acceptances have caused recurring problems over the years, leading to numerous applications to the Commission for relief and, finally and quite recently, to amendments to the legislation.

Problems with Counting Acceptances

41. Section 42 of the *Companies (Acquisition of Shares) Act 1980 and Codes* and section 701 of the *Corporations Law* formerly applied a similar test as a precondition to compulsory acquisition after a bid. If the bidder was entitled to over 10% of the shares in the bid class when it posted its offers, the bidder needed three-quarters of the non-associated shareholders to accept the bid or (under the *Corporations Law*) otherwise dispose of their shares. This head-count test gave rise to two sorts of difficulty both of which are also relevant to the Application.

Abandoned Parcels

42. First, a bid could fail to reach the threshold for compulsory acquisition because a large number of shareholders failed to respond to the bid because they were unaware of it, for reasons such as moving house without leaving a forwarding address. An excessive number of uncontactable shareholders could make compulsory acquisition under this test impossible, even where the bid was accepted by over three-quarters of those shareholders who were aware of it.

43. Commission policy on abandoned holdings involved relief to apply the provisions without regard to shareholdings which appeared, after suitable inquiries, to have been abandoned. It was set out in NCSC Policy Statement 139 and SPS 98, which is discussed below at [48] to [50].

Share-Splitting

44. Secondly, the head-count test was open to manipulation. By artificially increasing the number of shareholdings, a person could obtain the power to determine whether there were enough acceptances for a bid to enable compulsory acquisition. This power could be abused in various ways, such as by bidders who tried to eliminate this requirement as a practical matter or by shareholders seeking a premium for facilitating compulsory acquisition. This abuse was addressed by modifications to apply the provisions without regard to shareholdings which appeared to have been created to manipulate the test.

45. ASIC policy on share-splitting affecting section 701 was not set out in a formal policy statement. There was, however, a policy which was set out in a media release[6] and in reasons for decision[7] applied in several decisions which were upheld in the Administrative Appeals Tribunal and in the courts.[8]

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[6] Quoted from in *Peninsula Gold Pty Ltd v ASC* (1996) 21 ACSR 246 at 247 - 248.
[7] See *Peninsula Gold Pty Ltd v Australian Securities Commission* (1996) 19 ACSR 703 at [4] and [18].
[8] See *Brierley v Dextran Pty Ltd* (1990) 3 ACSR 455 and the *Peninsula Gold* cases cited above.

46. In Policy Statement 142, concerning the requirement under paragraph 411(4)(a)(ii)(B) for 75% majority approval of schemes of arrangement, ASIC states:

> *142.61 ASIC has made public statements on its views on share splitting devices in the context of takeovers. ASIC considers that similar devices employed by proponents or opponents of a scheme would likewise be objectionable.*
>
> *142.62 ASIC would generally advise a Court that it would have no objection to orders sought under, say s1319 or another provision, which ensured that a corporate action or decision was not determined by shareholders who lacked even a minimum economic interest, as shareholders, in the corporate future of the company. ASIC would generally advise the Court that in its view, in a modern listed company, a reasonable proxy for a minimum economic interest is a marketable parcel of shares.*[9]

47. Like compulsory acquisition under the former provisions, a joint bid should succeed only if it receives clear majority support.[10] The outcome should not be affected by the artifice of splitting one parcel into many. Where this happens, the proportion of parcels for which the bid is accepted is not a fair test whether it is acceptable to the majority of people who hold the shares, and an adjustment of the number of shareholders to notionally consolidate split parcels may make the ratio of the number of acceptances to the number of parcels a better indication of shareholder sentiment.

Superseded Policy Statement 98

48. As it developed, the Application was in effect based on SPS 98, which was issued in 1995, replacing NCSC Policy Statement 139, and withdrawn in 2000, after the difficulties with which it dealt were thought to have been resolved by the repeal of former section 701 of the Corporations Law. SPS 98 articulated the Commission's policy as follows:

> *11. The policy behind the ASC's modification is to discount untraceable shareholders when calculating the three-quarters test is based on the fact that most of these shareholders have not received offers. Therefore they have not considered the fairness or otherwise of the terms being offered. Currently, all such shareholders are treated as if they had rejected the offer.*
>
> *12. However, it is unreasonable to suppose that all shareholders who have not received offers would have rejected them. The fact that they failed to give the company their current address suggests that they have no strong attachment to their shares, and would not be strongly opposed to an offer which satisfied most other shareholders. Modification of s701 as outlined in paras 18 and 19 in fact produces the same result as if the untraceable shareholders accepted or rejected the offer in the same proportion as the traceable shareholders.*

49. SPS 98 went on to say that:

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[9] See also *ASIC Media Release 03-169 MIM Holdings and Xstrata* 29 May 2003, concerning suggestions that shares had been split with a view to affecting the outcome of a scheme meeting.

[10] Which is not to beg the question whether the majority should be measured by holders or by shares.

20. … when assessing an application, the ASC will take into account various matters including the following:

(a) the methods and diligence used by the offeror to trace those shareholders who have not received offers because they are no longer at their registered addresses. Those methods include advertising in appropriate newspapers (see para 23 and 25);

(b) the proportion of shares and shareholders outstanding;

(c) the number of holders of odd lots. A high proportion of such holders will usually count in favour of the applicant;

(d) the proportion of shareholders who have expressed dissent about the takeover offer to the ASC, the offeror or the target and the proportion of shares they hold; and

(e) the number of shares to which the offeror was entitled prior to the takeover offer.

…

23. In order to draw the proposed application to the attention of shareholders who may not have received offers in the post, the ASC requires the offeror to advertise its intentions [to apply for a modification] in newspapers likely to be read by the non-accepting shareholders …

24. the offeror must demonstrate in its application that it has used reasonable diligence in attempting to locate untraceable shareholders. It should provide details of the steps it has taken and should retain documentary evidence of the response or lack of response to its inquiries. This evidence can then be produced if requested by the ASC.

25. Reasonable diligence may include the offeror searching the following records in the state or territory where the untraceable shareholders were last known to be located:

(a) telephone directories;

(b) electoral rolls;

(c) Registry of Births Deaths and Marriages;

(d) brokers indemnities and share registries associated with the target where appropriate, particularly for details of dispatch of dividend cheques; and

(e) ASC records, particularly for offerees that are bodies corporate.

50. ASIC's policy on abandoned parcels and share splitting was both vindicated and superseded when the *Corporate Law Economic Reform Program Act 1999* commenced, replacing the head-count test with the test in new subparagraph 661A(1)(b)(ii) that acceptances be received for 75% of the shares for which offers under the bid are made. At about the time the ASIC Joint Bid Policy was announced, SPS 98 was withdrawn as superseded, although the difficulties of the head-count test linger under the ASIC Joint Bid Policy.

Former ASIC Policies Relevant

51. While it was open to ASIC to base its condition in the Joint Bid Policy on the **number of non-associated shareholders** who accepted the bid, considerations

of legislative policy and practicality would have supported a test based on the **number of shares for which non-associated holders accepted the bid**. Because of the well-known difficulties of head-count tests, we think it essential that the ASIC Joint Bid Policy allow for the head-count test to be adjusted as necessary under the share-splitting and abandoned parcels policies.

52. ASIC seems to have accepted at all stages of this matter that the head-count test might need to be adjusted. In submissions, ASIC stated that it would be prepared to give additional relief under SPS 98 in the present matter, if the requirements of that policy were satisfied. We should stress again that the Joint Bidders did not provide ASIC with any evidence of abandonment, or submissions that the relief should be based on abandonment.

53. Accordingly, we now consider the evidence provided to us by the Joint Bidders and by PICA itself under the criteria of SPS 98.

Application of SPS 98

Acceptance figures

54. When the Joint Bid commenced, 700 shareholders held 42.49% of the Shares which the Joint Bidders did not control. 300 of those shareholders are treated as holding one parcel between them by virtue of the Aggregation Relief. That one parcel is 0.06% of the shares on issue.

55. 188 shareholders have accepted the Joint Bid for 35.49% of the Shares in PICA. These Shares constitute 83.5% of the Shares which were originally subject to the Joint Bid. As a result of their pre-bid stake in PICA and acceptances of the Joint Bid, the Joint Bidders currently have a relevant interest in just over 93% of the Shares.

56. Shareholders have accepted the Joint Bid for 86 out of 134 marketable parcels which the Joint Bidders and their associates did not previously hold. Of 213 holders who have not accepted the bid (**Non-Accepting Shareholders**),[11] only 48 hold marketable parcels.[12]

57. Concerning the Non-Accepting Shareholders:

    (a) PICA provided witness statements that:

        (i) its share registry had advised it of at least 244 shareholders who had not presented one or more dividend cheques;

        (ii) it had attempted to make contact with those shareholders between 15 and 30 September, and some of them had made contact with it. As a number of the shareholders are former employees of PICA, enquiries

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[11] One of them the holder of the notional parcel created by the Aggregation Relief, which is also counted as a marketable parcel.

[12] Since SPS 98 was issued, the notion of an odd lot has been replaced in the ASX Business Rules by the notion of a non-marketable parcel, which is a parcel valued at less than $500. At the final price under the Joint Bid, 878 Shares are required to make up a marketable parcel.

were also made of current PICA employees in an attempt to ascertain new contact details. Those details were then used in an attempt to contact the relevant Non-Accepting Shareholders;

(iii) as a result of those contacts, PICA:

(A) spoke with 76 shareholders by phone. About 20% of these holders told PICA they were not interested in the bid, particularly those holding only 200 shares or less. None said they would reject the bid;

(B) sent mail (which was not returned) to another 60 shareholders, for whom it did not have telephone numbers;

(C) could not make contact with another 108 shareholders, because the contact details it had were incorrect when checked and it could not locate them using the telephone directory. Dividend cheques sent to 49 of these shareholders had been returned because they were not known at the latest addresses they had provided to PICA; and

(b) PICA's register shows that 143 of the Non-Accepting Shareholders hold 200 shares each or less. 200 shares are worth $114 at the closing bid price, and were worth $34 at the market price before the bid commenced.

58. The Joint Bidders also provided us with a witness statement from a holder of 1.7% of the Shares that it had accepted the Joint Bid, but had later withdrawn its acceptance "as a matter of prudence", because it held the relevant shares as trustee and was not confident of its power to accept the bid.

Findings on these figures

59. Failure to bank dividend cheques, returned mail and failed attempts to contact holders are good indicia that many of these shareholdings have been abandoned. The small size and low value of these parcels support the inference that many of them have been abandoned.

60. This information satisfies us that most holders of significant parcels favour the bid and that the principal reason why the Bid Acceptance Condition (after the Aggregation Relief) has not been satisfied is that a large number of Non-Accepting Shareholders are not aware of the bid. In the context that 188 holders have accepted, another 213 holders have not, and receipt by FIA of another 14 acceptances would satisfy the condition envisaged by the ASIC Acceptances Condition:

(a) between 49 and 108 of the Non-Accepting Shareholders have probably not received the Bidder's Statement, because they do not receive mail sent to their addresses in the company's register;

(b) the inference that at least 49 of the holders do not receive their mail from the company is particularly strong, as dividend cheques for those 49 were returned;

(c) the number of holders of marketable parcels who have accepted the bid (86) is significantly greater than the number of holders of marketable parcels who have not accepted the bid (48);

(d) the value of most of the parcels held by Non-Accepting Shareholders is so small as to give them little incentive to maintain their details on PICA's register or to accept the bid;

(e) about 15 of the Non-Accepting Shareholders have heard of the bid, but are not interested in accepting it.

Some of the numbers above are imprecise, but the margins are ample to cover any likely error in concluding that the number of accepting shareholders exceeds by a clear margin the maximum number who can have consciously rejected the bid on its merits.

61. These figures support a strong inference that more shareholders accepted the bid than can have knowingly rejected it. There are several ways of estimating how many holders were unaware of the bid. The surest is to start from the 49 holders for whom there are two strong indications that contact with them had been lost: their dividend cheques were returned and PICA failed to make contact with them. Once these 49 are excluded, the largest number of holders who can possibly have knowingly rejected the bid is 164, which is less than the 188 who accepted. It follows that ASIC's objective in imposing the ASIC Acceptances Condition has already been achieved, and that condition now serves no useful purpose.

62. In our view, each of these matters supports relief taken separately, and taken together they are conclusive, even though the Joint Bidders have not taken every step that would have been required had the matter proceeded strictly under SPS 98. In light of the evidence we have reviewed, we see no reason for the cost and delay of newspaper advertisements in this case.

Market Integrity Principle

63. ASIC argued, however, that the Joint Bid has proceeded too long on the basis that it is subject to a non-waivable condition which gives effect to the ASIC Acceptances Condition for that basis to be changed now. This argument is based on market integrity, i.e. on the policy that acquisitions of shares take place in an efficient, competitive and informed market. It is closely akin to the 'truth in takeovers' policy in ASIC Policy Statement 25. ASIC stated in its rebuttal submissions to the Panel on 14 October that:

> *ASIC considers that to amend the "rules of the game" towards the end of the bid period to suit the bidder would have the effect of eroding the confidence of the market and producing market uncertainty. This is likely to negatively impact the market's confidence in relation to future bids. Engendering uncertainty and a lack of confidence in the market as a result of very late, significant changes to fundamental defeating conditions should, in ASIC's view be avoided at all costs.*

64. We endorse the 'truth in takeovers' policy and we agree that it supports long-term confidence in the market. However, we do not support ASIC's attempt to apply that policy to the Bid Acceptances Condition so as to prevent any variation of that condition or the grant of the present relief.

65. The Joint Bidders did not renounce their right to apply to ASIC for relief from the application of the joint bid policy, by limiting their power to waive the Bid Acceptances Condition, or in any other way. Indeed, the Joint Bidders did apply for further relief. When they applied for the Aggregation Relief, ASIC was bound to grant the additional relief if the relevant policy required, which in the event it did. The breadth of ASIC's powers under section 655A was confirmed by the High Court in *ASIC v DB Management*[13] and the market knows that ASIC's power to modify Chapter 6 permeates every aspect of every takeover. The grant of the Aggregation Relief made it crystal clear to the market, at least as from 28 August, that the Bid Acceptances Condition was not immutable if ASIC had good policy reasons to allow a change to it.

66. ASIC was right to say that it would be prepared to apply SPS 98 to the facts of the present matter, even at the late stage at which the review application was brought. As far as we can tell, the grant of the Aggregation Relief was also justified. But the availability of this relief squarely refutes ASIC's contention that the grant of relief would:

> "*[engender] uncertainty and a lack of confidence in the market as a result of very late, significant changes to fundamental defeating conditions [which] should, in ASIC's view be avoided at all costs.*"

67. Whether any particular decision under section 655A would engender uncertainty and undermine the integrity of the market is, of course, a relevant consideration whenever ASIC exercises its discretion whether to grant a modification. In the particular circumstances of this matter, however, the grant of relief did not engender uncertainty or adversely affect market integrity.

68. Although the Bid Acceptances Condition was recognised as onerous, the market has never had any basis for assuming that it could not be satisfied. Even without Majority of Shares relief, the necessary handful of acceptances could have been received, depending on the acts of people other than the Joint Bidders.

69. If the Aggregation Relief had not been granted, and the offer had been accepted for the 300 parcels which were notionally treated as one under that declaration, as well as by the people who had in fact accepted the offer, the condition may have been satisfied. Whether satisfaction of the condition in that way would have given rise to unacceptable circumstances is an issue which this Application does not raise.

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[13] [2000] HCA 7; 169 ALR 385

70. The level of acceptances strongly suggests that most shareholders have assumed that the bid has a reasonable prospect of success. The Joint Bid has been accepted for 83.5% of the shares to which it related. It is even more telling that LKM's rival bid closed on 2 October with only 0.44% acceptances, although it was then conditional only as to prescribed occurrences and had been at 52 cents since 3 September. That is, the market applied a discount of less than 10% for the risk that the Joint Bid would fail.

Non-Renounceable Conditions

71. ASIC's argument assumes that all non-waivable defeating conditions are alike from the market integrity point of view. In our view, there is a critical difference between, on the one hand, a statement of the bidder's own intentions and, on the other hand, a condition which is said to be non-waivable, at ASIC's insistence and pursuant to ASIC policy.[14]

72. Where a bidder freely chooses to make a condition non-waivable, or to emphasize that the bid will not be declared free of a particular condition, it is generally sending a message to the market that its intentions are in the relevant respect inflexible. Such a condition resembles the last and final statements discussed in ASIC's truth in takeovers policy. An example from *Taipan (No. 6)* [15] is discussed at [75] to [79].

73. Where a bidder makes it clear that a condition was included at ASIC's insistence, the market will generally appreciate that the relevant ASIC policy speaks through the condition, which is only as inflexible as the policy. Where it is also clear that there is relevant policy which may lead to the requirement for the condition being relaxed, the market should appreciate (and, in our view, does appreciate) that the condition may be varied or waived, with ASIC's approval.

74. The real nature of such a term would be better disclosed if the bidder stated that it could declare its bid free of that condition, but only with ASIC's approval. In other words, the position on this category of "non-waivable" conditions should be akin to that applying to withdrawal of bids under section 652B.

Parallel with Taipan 6

75. ASIC contended that the present matter was covered by a previous Panel decision in *Taipan (No. 6),* [16] in which ASIC made it a condition of relief it granted Troy Resources NL from section 631 that:

> *The offers under the Takeover Bid:*
>
> *(a)* …
>
> *(b)* *include the following defeating condition:*

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[14] Putting aside consideration of the condition imposed on bids by subsection 625(3) of the Act.
[15] [2000] ATP 15; 36 ACSR 716
[16] [2000] ATP 15; 36 ACSR 716

> *"The Court dismissing, or St Barbara discontinuing, St Barbara's application (Supreme Court Matter COR 197 of 2000) to approve the Share Scheme and Option Scheme pursuant to s.411(4) of the Corporations Law."; and*

(c) provide to the effect that the defeating condition set out in paragraph (b) above cannot be waived by the Bidder.

76. Paragraph (c) of this condition was required by ASIC and acquiesced in by Troy. ASIC required the defeating condition to be non-waivable:

> *as Troy had engaged in conduct indicating an intention not to waive the condition (whether as a precondition or a defeating condition) in any circumstances.*[17]

77. The ASIC decision was intended to ensure that the terms of Troy's bid were consistent with public statements by Troy that its intention was that its bid would remain subject to the pre-condition. There were a number of such statements. In particular, Troy had announced to ASX that:

> *Troy has previously advised the solicitors for Taipan that it intends to maintain as a pre-condition to any Troy bid, that the proposed Taipan St Barbara merger does not proceed and shareholders do not approve the merger proposal.*

78. The sitting Panel upheld the refusal of ASIC to allow this condition to be waived, saying at [24] to [28]:

> *24. For a bidder to press shareholders to make decisions on its bid with statements about its intentions and later to resile from those statements risks deceiving and coercing shareholders.*
>
> *25. The mischief is that the bidder's course of conduct as a whole may induce offerees and other persons in the market to make decisions based on an apprehension of material facts which the bidder's own conduct later falsifies. When a bidder states an intention, but means to reserve the right to change its mind, it needs to avoid the risk of deceiving offerees by making it clear that they should not rely on its stated intentions, for instance by being quite explicit that it is stating only its present intention.*
>
> *26. Palliatives such as offering accepting offerees an opportunity to withdraw their acceptances and offering compensation to other persons affected do not make coercive or deceptive conduct acceptable. Bidders should conduct themselves in ways which do not call for these remedies. It is entirely proper of ASIC to refuse relief to support conduct which is so wrong that the applicant must offer compensation to those affected by it.*
>
> *27. Accordingly, we accept that ASIC's published policies include a general principle, which we regard as sound, that where a bidder makes a statement about its intention in relation to the conduct of a bid, shareholders and market participants can reasonably expect the bidder to act consistently with that stated intention.*
>
> *28. This principle is not an absolute rule that the bidder must act out its stated intentions mechanically. What it is reasonable to expect depends also on the degree*

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[17] [2000] ATP 15 at [11]

> *of precision of its statement, the presence or absence of clear qualifications to the statement, on the acts of other persons, on new circumstances, on later statements of the bidder itself and on how far it is reasonable to expect stated intentions to be pursued.*

79. We entirely agree with this decision. However, it has no relevance to this matter, which does not concern a statement of intention on the part of the Joint Bidders, but a condition which was expressly stated by them to be non-waivable because ASIC required it to be so, for reasons of general policy and not (for instance) to hold the Joint Bidders to previous public statements. Nothing in the facts before us suggests that the Joint Bidders' conduct has been coercive or deceptive in effect or intention, or that it would have been reasonable of shareholders to assume that the Joint Bidders would not obtain relief from the requirement, if policy permitted.

Whether Change of Position by Offerees

80. If offerees had changed their positions in reasonable reliance on the Bid Acceptances Condition being immutable, it would support the inference that market integrity requires that the condition stand. ASIC point out that the Bid Acceptances Condition was identified in the bidder's statement, the target's statement, the independent expert's report and several news reports. It was also highlighted in the bidder's statement for the LKM bid.

81. The Joint Bidders submit that shareholders who sold into the market during the bid took the risk that the bid would improve. That begs the question, which is whether they had reason to act on the basis that the bid would fail. If those shareholders were misled into believing that the bid was doomed to fail, they did not make an informed decision whether to accept, sell or hold.

82. Despite the publicity concerning the Bid Acceptances Condition, it would not have been reasonable for offerees to rely on the condition being immutable, for the reasons given above. The relevance of SPS 98 is well-known, and was mentioned in media reports on the bid, despite the policy having been mothballed.

83. The instance of most concern is the Glebe Administration Board, which on 4 July sold 17% of the shares in PICA on market at 34 cents per share. The price the Board received was, however, only one cent below the then bid price of 35 cents and nearly double the pre-bid price of 17.5 cents. However, the Board sold its shares before LKM made its bid or the price under the Joint Bid was increased, on the same day as LCE announced that it would not accept the Joint Bid as it then stood, and when the level of acceptances was between 1.5% and 2.5%.[18] That was too early to gauge whether further relief from ASIC would determine whether the Bid Acceptances Condition would be satisfied, or whether (for instance) the Joint Bidders would receive an acceptance for the split parcels.

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[18] See the chronology in [19], and substantial holder notice lodged by the Joint Bidders on 25 June 2003.

Compulsory Acquisition

84. ASIC also contended that it was inappropriate to grant relief, because one of its effects would be to facilitate compulsory acquisition, in circumstances where a large number of shareholders had not accepted the bid and had reason to believe that their shares could not be compulsorily acquired. The relief does not facilitate compulsory acquisition, however, except by enabling the Joint Bidders to acquire the shares for which they have received acceptances, which are the great majority of the shares they offered to acquire. It is those acceptances which would entitle the bidders to compulsorily acquire the outstanding shares.

85. Non-Accepting Shareholders had only a weak basis for concluding that their shares could not be compulsorily acquired. Even if ASIC had not granted relief under SPS 98, if only another 14 of them had accepted the bid, they would have satisfied the Bid Acceptance Condition, and the Joint Bidders could have acquired the outstanding shares regardless.

86. There is nothing unfair about holders losing the comfort that their holdings are immune from compulsory acquisition, unless they have been misled into suffering loss or damage, by acting in reliance on that comfort.[19] We are not aware of any basis to infer that any of those holders would have in any way altered (or in fact altered) their positions to their detriment in reliance on supposed immunity from compulsory acquisition. For reasons we have discussed above, it would not have been reasonable of them to assume they had such immunity.

Delay in Seeking Relief

87. Another of ASIC's reasons for refusing relief was that the Joint Bidders had not only allowed three months to elapse without seeking Majority of Shares relief from ASIC, they had also failed to accept the offer of ASIC staff in July to propose similar relief to the Regulatory Policy Group. Between July and the application for the Majority of Shares relief in September, however, the bid price had been increased from 35 cents to 57 cents, leading to acceptances from holders who had in July declared their opposition to the bid and reinforcing both the utility of the Majority of Shares relief and the policy case for granting it.

DECISION

88. The Application can be supported on the basis that the Bid Acceptances Condition would have been satisfied if it had been based on acceptances for a majority of shares, which may have been the preferable way to express it. In substance, the ASIC Joint Bid Policy has been fulfilled, insofar as acceptances (in particular in light of the auction with LKM) and the Independent Expert's Report support the inference that the bid is fully priced.

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[19] Compare *Brierley v Dextran* at 464 to 466.

89. It can also be supported on the basis of the logic of SPS 98 (even if its procedures have not been followed precisely). The evidence concerning abandoned shareholdings supports an inference that, once the Aggregation Relief is taken into account, more than half of the non-associated shareholders who are aware of the bid have accepted it, as have a substantial majority of the holders of marketable parcels.

90. The market integrity principle is not offended by the grant of relief. The application of that policy to the Bid Acceptances Condition would be based purely on the ASIC Acceptance Condition, not on any statement of independent intention on the part of the applicant. That condition always was, as it was seen by the market to be, one which could be amended or omitted, should policy require. There is no evidence that any shareholder acted to their detriment in reliance on the condition being immutable.

91. If any ground supports relief, it makes little difference whether relief takes the form of allowing the bidder to replace the existing Bid Acceptances Condition with a condition which is already satisfied or directly allows the bidder to waive the existing condition. As PICA put it in submissions, the result would be the same whichever method is chosen, so why quibble?

Variation of Joint Bid Relief

92. In the circumstances, we think it appropriate to allow the Joint Bidders to declare their bid unconditional. With immediate effect, we will vary the Joint Bid Relief to omit the ASIC Acceptances Condition. This will enable the Joint Bidders to waive the 90% Condition, which is the only defeating condition not yet waived. The variation will have no effect on any rights people may have in damages under section 670A or 1041H, because of the Joint Bidders' conduct in relation to the Bid Acceptances Condition. A copy of the instrument is attached as Annexure A.

Some concluding remarks

93. There is another issue upon which we wish to comment before leaving this matter, namely the drafting of the Bid Acceptances Condition in the bidder's statement for the Joint Bid, which did not fulfil the ASIC Acceptances Condition.

94. When ASIC gave the Aggregation Relief, it must have become aware of the Joint Bidders' failure to comply with the ASIC Acceptances Condition, but it appears not to have required the Joint Bidders to bring the terms of the Joint Bid into conformity with either the original or the amended relief.

95. As mentioned in paragraph 24, in effect both the Joint Bidders and ASIC approached the matter on the basis of a concession that the Bid Acceptances Condition had the same effect as if it complied with the ASIC Acceptances Condition. It is unsatisfactory that the bid failed to give effect to a critical condition of ASIC relief, and that the Panel has had to deal with compliance with a provision which is important to the market in shares in PICA on the basis that the bidder's statement contained provisions that properly gave effect

to the ASIC Acceptances Condition, despite the clear evidence to the contrary contained in the bidder's statement.

Andrew Knox
President of the Sitting Panel
Decision dated 20 October 2003
Reasons published 1 March 2004

ANNEXURE A - AMENDING DECLARATION

TAKEOVERS PANEL

CORPORATIONS ACT 2001

SECTION 656A

DECLARATION

PURSUANT to section 656A of the Corporations Act 2001, the Takeovers Panel varies the instrument mentioned in the schedule, by omitting clause 1 of Schedule C of that instrument.

SCHEDULE

Exemption dated 28 August 2003 in relation to acquisitions of shares in Prudential Investment Company of Australia Limited by FEXCO Investments Australia Pty Ltd, FEXCO (Ireland company no. 83934), FEXCO Money Transfer Ltd, P&B Jess Investments Pty Ltd and Twelfth Vilmar Pty Ltd.

Dated 20 October 2003

Signed by Andrew Knox
President of the Sitting Panel