Takeovers Panel

Reasons for Decision
National Can Industries 01(R)

In the matter of National Can Industries Limited 01(R)
[2003] ATP 40

Catchwords:
Break fee – efficient, competitive and informed market - controlling holder – related party – relevant interest – lock-up device – undertaking to Panel – shareholder approval – scheme of arrangement

Takeovers Panel Guidance Note 7 – 'Lock-up Devices'

These are our reasons for our decision not to vary or set aside the decision of the Initial Panel in the matter of National Can Industries 01 the subject of our review.

PRELIMINARY

1. These reasons relate to an application made on 20 October 2003 (**Application**) by Visy Industrial Packaging Holdings Pty Ltd (**VIPH**) under section 657EA of the Corporations Act 2001 (Cth) (**Act**)[1] for review of the decision by the Panel (**Initial Panel**) in *National Can Industries 01* [2003] ATP 35 to accept undertakings provided by National Can Industries Limited (**NCI**) and ESK Holdings Pty Limited (**ESK**) and accordingly not to make an order under section 657A or any orders under section 657D.

2. The Review Panel was constituted by Justice Robert Austin, Mr John King and Ms Alice McCleary.

DECISION OF THE INITIAL PANEL

Summary

3. VIPH, a substantial shareholder in NCI, alleged that unacceptable circumstances arose from an implementation agreement (**First Implementation Agreement**) under which ESK would acquire control of NCI through a scheme of arrangement, from the termination of the First Implementation Agreement and its replacement by an agreement on similar terms (**Second Implementation Agreement**). VIPH sought a declaration of unacceptable circumstances and orders for cancellation of the First Implementation Agreement, repayment of a break fee (**First Break Fee**) paid by NCI under the First Implementation Agreement and cancellation of the agreement to pay a further break fee (**Second Break Fee**) contained in the Second Implementation Agreement. The Initial Panel considered the application of the Panel's Guidance Note on Lock-up Devices (**GN7**) to the arrangements contained in the First Implementation Agreement and the Second Implementation Agreement.

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[1] In these reasons, all references to legislative provisions are to the Act, unless otherwise obvious.

4. On 17 October 2003, the Initial Panel decided not to make the declaration sought or any orders, having been offered the undertakings by ESK and NCI summarised in [5] (**Undertakings**).

5. The undertakings offered by ESK (**ESK Undertakings**) were:

   (a) to increase the consideration offered under the scheme of arrangement by 1.5 cents per NCI share so that the total offer price is $1.565 per NCI share;

   (b) to repay the First Break Fee to NCI if, before the scheme proposal is considered by shareholders, another person announces a bid for NCI with a cash value in excess of $1.565 per NCI share which subsequently leads to a change in control of NCI; and

   (c) not to enforce its right to receive or accept payment from NCI, of the Second Break Fee.

   The undertaking offered by NCI (**NCI Undertaking**) was, subject to ESK's undertaking as set out in (c) above, not to pay all or any part of the Second Break Fee to ESK.

6. The Initial Panel found the agreement to pay the First Break Fee would have been unacceptable because of the circumstances in which it was entered into, despite the immateriality of the amount. However, the Initial Panel found that the Undertakings overcame the adverse effects of the payment of the First Break Fee on competition and efficiency in the market for shares in NCI and generally.

FACTUAL BACKGROUND

7. The facts leading up to the Application are essentially identical to those that faced the Initial Panel. No submissions were made by any party that suggested that we should find any primary fact different from those found by the Initial Panel, although the parties argued that different conclusions should be reached by us. Therefore we adopt those findings of fact. The summary that follows is not intended to indicate that we disagree with the Initial Panel on any of these matters, but rather to facilitate understanding of the discussion of our reasons which follow. A fuller discussion of the relevant factual background is set out in the reasons for decision of the Initial Panel (**Initial Reasons**).

8. ESK is a company 100% owned and controlled by Michael Tyrrell (**MT**), the managing director of NCI. It is associated with Tyrrell family members and companies (**Tyrrell Interests**). The Tyrrell Interests together have, and have had at all relevant times, a controlling interest in NCI.

First Implementation Agreement

9. On 21 July 2003, NCI announced to ASX that (among other things):

   (a) NCI had signed the First Implementation Agreement with ESK pursuant to which ESK proposed to acquire all of the shares in NCI that were not owned by Tyrrell Interests, for a price of $1.40 cash per share (**First Proposal**);

(b) the proposed acquisition would be implemented by way of a scheme of arrangement (**First Scheme**); and

(c) under the First Implementation Agreement, NCI agreed to pay the First Break Fee, an amount of $1 million, which was expressed to be a pre-estimate of the expenses which would be incurred by ESK in relation to the First Proposal.

10. The First Implementation Agreement required NCI to pay the First Break Fee if:

(a) any independent director of NCI withdrew that director's recommendation of the First Proposal and the First Implementation Agreement was terminated by ESK as a result;

(b) any independent director of NCI withdrew that director's recommendation of the First Proposal and the First Proposal was not approved by the scheme meeting; or

(c) ESK terminated the First Implementation Agreement as a consequence of a material breach of it by NCI.

11. The First Implementation Agreement expressly contemplated that the independent directors had the right to change or withdraw their recommendation of the First Proposal if the independent expert concluded that the scheme of arrangement was not in the best interests of minority shareholders or a superior offer for all NCI shares was made and the independent directors (with the advice of senior counsel) decided their fiduciary duties required them to change their recommendation. Despite these express provisions, such a change of recommendation would nonetheless oblige NCI to pay the First Break Fee if ESK terminated the First Implementation Agreement. However, NCI would not be exposed to any further claim for damages.

12. The First Implementation Agreement further provided that part or all of the First Break Fee need not be paid (and is to be repaid, if it has already been paid) if a Court or the Panel determines that the payment is unlawful, involves a breach of directors' duties or constitutes unacceptable circumstances.

13. NCI's independent directors[2] negotiated the First Implementation Agreement with ESK with legal and financial advice. In particular, Deloitte Corporate Finance advised that an offer price within a value range of $1.28 to $1.54 would provide an outcome in the best interests of minority shareholders.

14. When negotiations commenced, it was on the basis that the First Break Fee would be $500,000. NCI's independent directors pressed ESK to increase its offer price from $1.37 to $1.40, and, when ESK agreed to do so, NCI's

[2] In these reasons, for convenience we refer to the NCI directors who were not part of, and were not disclosed to be associated with the Tyrrell Interests as the "independent directors". By doing this, we are not to be taken to be indicating that we make any finding that these directors were or should be regarded as independent for any purposes.

independent directors agreed to increase the First Break Fee to $1 million as part of the negotiated arrangements leading to this increase.

Payment of the First Break Fee

15. NCI paid the First Break Fee to ESK when the independent directors of NCI withdrew their recommendation of the First Proposal on receipt of the independent experts' report from Grant Samuel & Associates Pty Limited (**GS Report**). At the same time, they agreed to recommend a revised scheme of arrangement proposed by ESK (**Revised Scheme**) and agreed that NCI become subject to obligations to pay the Second Break Fee of $100,000[3]. The Revised Scheme was on the same terms as the First Scheme, except that ESK offered $1.55 per NCI share instead of $1.40.

Original application

16. VIPH alleged that unacceptable circumstances arose as a result of NCI's agreement to pay ESK the First Break Fee in the event that any of the independent directors withdrew their support for the First Scheme, NCI's payment of the First Break Fee and NCI's agreement to pay the Second Break Fee.

Decision of Initial Panel

17. The following are extracts from the Initial Panel's reasons for decision which set out the Initial Panel's reasoning:

> *39. 'Although the effect of payment of the First Break Fee on market efficiency was marginal, we consider that the payment of the fee in these circumstances was unacceptable because it affected a proposed acquisition of a substantial interest and resulted from a decision of the Board of NCI which in our view was not appropriate in the circumstances of the ESK proposal. The agreement to pay the First Break Fee was unacceptable because:*
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> *(a) ESK was a related party of the Tyrrell family, who have a controlling interest in NCI;*
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> *(b) the initiative for the ESK proposal lay with ESK, not with NCI, and it does not appear that there was any urgency about the First Proposal from NCI's point of view;*
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> *(c) the independent directors agreed to pay the First Break Fee before they had received the independent experts' report which would be provided to shareholders;*
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> *(d) the payment of the First Break Fee tended to inhibit competition in the market for control of shares in NCI; and*

[3] We note that the sum of the First and Second Break Fee is less than 1% of the bid consideration payable at the increased amount of $1.55 per NCI share.

(e) the obligation to pay the fee was not triggered by rejection of the ESK proposal by shareholders, but by a decision of any one of the independent directors to withdraw their initial recommendation of the proposal. This trigger would tend to fetter the ability of the directors to carry out their duties.

40. In these circumstances, we consider that it was not necessary to agree to the fee to attract MT's attention to NCI, and away from other possible targets. While the Tyrrell Interests retained their controlling shareholding, it was unlikely that MT would lose interest in NCI. Since MT could wait, but was unlikely to lose interest, he was likely to decide whether and when to bid for NCI on the basis of personal and family considerations, rather than being persuaded by the board and their agreement to pay the First Break Fee.

49. Although GN7 does not specifically address the facts of this case it is repeatedly expressed to be non-exhaustive. The two bases of GN7 are that fees should not inhibit competition and that they should be objectively reasonable. In the circumstances, it was unsafe to assume that the terms under which the fee was to be paid were reasonable.

50. We dealt with these issues by obtaining undertakings from ESK:

(a) to increase the consideration payable under the Second Scheme to give effect to the ESK proposal by 1.5 cents/share. This is the amount by which the payment of the First Break Fee depleted the assets of NCI on a per share basis. This undertaking ensures that shareholders are not adversely affected by the payment of the First Break Fee, if they approve the Second Scheme. In our experience, where a sale transaction is being considered, the proposed sellers (here, the shareholders in NCI) would prefer to receive an increased price for their assets (the shares in NCI) rather than to see an asset underlying the subject of the sale (NCI's cash resources) restored or enhanced. To proceed in the alternative way, by enhancing or restoring the underlying asset, means that any increased value will not be available to the sellers unless the sale does not proceed and, then only indirectly; and

(b) to repay the First Break Fee if a rival bid is announced before the Second Scheme meeting and is eventually successful. This ensures that if a rival bid succeeds, NCI's assets will not have been depleted by the payment of the First Break Fee, overcoming any adverse effect of the fee on that rival bid. We consider that in this way, the effect of payment of the First Break Fee on the possibility (albeit remote) of a competing bid will be neutralised – a rival bidder knows that if it makes a counter-proposal, the assets of NCI will be replenished to the extent of the depletion effected by payment of the First Break Fee.

56. We also accepted an undertaking from ESK that it would not accept payment from NCI of the Second Break Fee and an undertaking from NCI that it would not pay all or any part of the Second Break Fee. To pay a second fee because the first was paid prematurely only underlines the fact that the directors should not have agreed to pay the First Break Fee until they knew at least as much as they did

when they agreed to pay the Second Break Fee. The duplication reinforces our finding as to the deficiencies of the process.

58. We wish to emphasise that the Panel felt free to find the agreement to pay the fee unacceptable because of the circumstances in which it was entered into irrespective of immateriality of the amount and in requiring the payment of a break fee to depend on a shareholder vote. The Undertakings have overcome the adverse effects of the payment of the First Break Fee on competition and efficiency in the market for shares in NCI and generally.....'

REVIEW APPLICATION

Break fees

18. VIPH sought in the Application an order either:

    (a) setting aside the decision and substituting a new decision to impose orders so that:

        (i) ESK was required to repay the First Break Fee immediately; and

        (ii) ESK would only receive payment of the First Break Fee if NCI shareholders who were not associated with the Tyrrell Interests approved the payment of the First Break Fee (by way of ordinary resolution); or

    (b) setting aside the decision and substituting a new decision to impose appropriate orders that will remedy the unacceptable circumstances which were found to exist by the Initial Panel.

19. The Application asserted that the Undertakings did not remedy the effects caused by the payment of the First Break Fee as described by the Initial Panel. Specifically, it asserted that the Undertakings permitted unacceptable circumstances to continue by not allowing the non-associated shareholders of NCI to vote to consider whether the First Break Fee should have been paid.

DEALING WITH THE APPLICATION

20. We were appointed on 22 October 2003 and on 24 October 2003 decided, under Regulation 20 of the ASIC Regulations, to conduct proceedings in relation to the Application (**Proceedings**). We adopted the Panel's published procedural rules for the purposes of the Proceedings. We consented to the parties being legally represented by their commercial lawyers in the Proceedings.

21. A review under section 657EA is a *de novo* reconsideration by us of the matters before the Initial Panel, on the merits, and on the facts as they stand at the date we make our decision. We may re-examine all of the facts and issues and may, as we consider appropriate, vary or set aside the decision of the Initial Panel and substitute our own decision. We may in effect affirm the decision of the Initial Panel by doing neither of those things. Thus, we may declare under section 657A that there are unacceptable circumstances and make orders under

section 657D as a consequence, when no declaration or orders were made by the Initial Panel.[4]

22. On 28 October 2003, we issued a brief to all parties who had taken part in *National Can Industries 01* and on 29 October 2003, the Initial Panel provided parties with its draft reasons for its decision.

23. Each of the parties made submissions in response to the brief. However, we also considered the submissions and evidence in *National Can Industries 01* and the draft reasons for the decision in that matter. Submissions were received from:

ASIC	generally supporting the Initial Panel's decision, however suggesting that the Undertakings should be adjusted so that the First Break Fee should be repaid by ESK to NCI in the event that shareholders do not approve the scheme of arrangement. ASIC suggested that otherwise unreasonable pressure is placed on shareholders of NCI to approve the scheme of arrangement.
NCI & ESK	supporting the Undertakings accepted by the Initial Panel, however, submitting that we should differ from the Initial Panel's conclusion that NCI's agreement to pay, and subsequent payment of, the First Break Fee gave rise to unacceptable circumstances in relation to the affairs of NCI.
VIPH	seeking replacement of the Undertakings accepted by the Initial Panel with the orders suggested by VIPH and set out in [18].

DECISION

24. We decided not to vary or set aside the decision of the Initial Panel. We also decided not to seek changes to the Undertakings.

25. We took into account the various findings and observations that we make on specific issues raised in the proceeding as set out in [26] to [41]. In particular, we also took into account that:

    (a) ESK is part of the Tyrrell Interests, which together have, and have had and been known by the market to have, a controlling shareholding in NCI;

    (b) the acquisition proposal was initiated by ESK;

    (c) the effect of the First Proposal and the Second Proposal was to take NCI private under ESK's control.

26. In those circumstances, the agreement of ESK and the directors of NCI to pay the First Break Fee would have been unacceptable in the absence of the Undertakings, to the extent that the First Break Fee:

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[4] Guidance Note 2 – Reviewing Decisions; see also *Email Limited No.2* [2000] ATP 4 at [4]

(a) was payable in circumstances other than rejection of the acquisition proposal by shareholders; and

(b) in particular, could become payable upon withdrawal of the recommendation of the acquisition proposal by any independent[5] director, without reference to shareholders.

27. We consider that ESK (a company controlled by the managing director of NCI and an associate of NCI's controlling shareholder) placed the independent directors in an invidious position by requiring that, before they had received the views of the independent expert and knew that they could recommend the scheme to members:

(a) they make a positive recommendation; and

(b) NCI agree to pay a break fee which might become payable in the circumstances described in [26].

28. While appearing to allow the independent directors to fulfil their fiduciary duties to NCI, the First Implementation Agreement provided a real disincentive to them doing so – if conduct by the directors of a target, rather than that of its shareholders or a rival bidder, is to be the trigger for payment of a break fee, the relevant agreement should allow the directors to respond to changes in the circumstances without triggering a right in the other party to receive (or take action to require the payment of) the break fee if the directors do as their fiduciary duties require.

29. The position in which the independent directors of NCI were placed, and their acceding to ESK's request in agreeing to the triggers for payment of the First Break Fee which we describe in [10], affected the whole of the First Proposal and the Revised Proposal, making them inappropriate as a whole. But for the Undertakings, we agree with the Initial Panel that there would have been unacceptable circumstances.

30. Like the Initial Panel, we consider that the unacceptability created by the First Implementation Agreement, the payment of the First Break Fee and the Second Implementation Agreement was sufficiently addressed by the Undertakings so that no declaration of unacceptable circumstances or orders should be made. In forming this conclusion, we took into account:

(a) the potential unfairness to ESK of requiring repayment of the First Break Fee after it had increased its offer by 1.5 cents per NCI share on the basis that the fee would not be repayable except in accordance with the Undertakings;

(b) that in our opinion it would have been appropriate for a break fee to have been payable on rejection of the First Scheme or the Revised Scheme by shareholders provided those schemes were recommended to shareholders by the independent directors; and

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[5] See our discussion on the use of this term in footnote 2.

(c) that the amount of the First Break Fee did not appear to us either to adversely affect the efficiency or competitiveness of the market for NCI shares or generally or to place unreasonable pressure on NCI shareholders to approve the Revised Scheme.

31. We state for completeness that several of the aspects of the facts and arguments in the Proceedings potentially raise issues relevant to determining whether the directors had fulfilled their fiduciary duties and to whether NCI had complied with the provisions of Chapter 2E concerning the giving of benefits to related parties. However, our concern has been with the acceptability or otherwise of the effect of the arrangements discussed in the Proceedings, bearing in mind the matters to which we are directed by sections 657A(2) and (3). We make no comment on any other laws that might be relevant to the decisions of the NCI directors and the conduct of the parties.

Competitive or coercive effect of the fee

32. VIPH submitted that if the Revised Proposal fails, the First Break Fee would adversely affect the competitiveness of the market for shares in NCI by reducing the value of NCI by the amount of the break fee, as NCI's assets will have depleted by the amount of the First Break Fee. ASIC submitted that the First Break Fee placed the NCI shareholders under unreasonable pressure to approve the Revised Scheme.

33. We consider that a 1% fee is usually not materially anti-competitive and does not place unreasonable pressure on shareholders. This is the basis for the choice of the 1% guideline in GN7. Further, we query whether a sunk cost is anti-competitive if shareholders reject the scheme and agree with the Initial Panel's statement[6] that:

'In these circumstances, we do not entirely reject the notion that a fee should be payable if and when a proposal the directors endorsed was rejected by shareholders. As GN7 puts it, such a fee may be an appropriate price to secure an opportunity broadly in the nature of an option.[7]'

34. We also note the fact that the controlling shareholder of the Tyrrell Interests was known by the market to exist at all relevant times and this controlling interest is anti-competitive in itself. This meant that the marginal effect of the First Break Fee on competition for control was less than may be in another case.

35. VIPH cited *Ausdoc Group Ltd*[8] in support of its submission that the First Break Fee had the potential to influence materially the shareholders' decisions as to whether to approve the scheme. In *Ausdoc* the Panel compared a fee to the after tax profits of the company finding that the fee represented 42% of Ausdoc's expected profit for the relevant year. The Panel in *Ausdoc* took the fee / profit ratio into account in considering the coercive effect of the fee, as it would

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[6] [2003] ATP 35 at [42]
[7] GN7 at para 7.21
[8] [2002] ATP 9; 42 ACSR 629

largely 'wipe out' a year's profit. This fee was payable if a 90% minimum acceptance condition was not fulfilled and was, in effect, an addition to an "ordinary" break fee.

36. In this case, the First Break Fee is equivalent to 11.5% of NCI's net profit for the 2003 financial year. We do not consider that the concern expressed in *Ausdoc* applies to a break fee with a 12% effect on net profit. We also note that the "ordinary" break fee in *Ausdoc* was approximately 1% of the enterprise value, but the discussion in *Ausdoc* comparing a fee to reported profits was in the context of a consideration of a further fee – that fee was quite different from a fee payable if members do not approve a scheme of arrangement.

NCI directors' duty to act promptly

37. NCI submitted that the independent directors of NCI had a legal duty to act in the best interests of shareholders by assessing the First Proposal in a timely manner. We agree that the independent directors did have this duty. However, what is required to act with timeliness needs to be considered against the background of all the facts. We consider that time was on the side of the independent directors. Accordingly in this regard we agree with the Initial Panel's statement:[9]

'It seems to us that the independent directors could also afford to wait. Nothing about the financial or business position of NCI appears to require the bid to be made sooner, rather than later. In this situation, the independent directors did not need to rush into a decision and thus had time to obtain the independent experts recommendation with respect to the valuation of the company.'

Market practice concerning independent experts' reports

38. NCI submitted that it is not standard industry practice to obtain a view from an independent expert before agreeing to recommend an offer, further they state that it may have jeopardised the independence of the expert. NCI submitted that not all target directors seek a preliminary valuation from an independent expert before agreeing to recommend an offer and further the directors obtained a report from Deloitte Corporate Finance.

39. We consider that it is consistent with an expert remaining independent to put to them a worked out proposal and ask for a draft report on that basis and then for the proposal to be adjusted by the proponents if the report is adverse. To do this does not make the independent expert a part of the proponents' teams and so prejudice its independent status.[10] This is so provided the expert is not asked to change its view (other than by considering a revised proposal) and copies of each report are provided to shareholders, pursuant to statutory obligation, or the necessary exemption from this requirement is obtained from ASIC.

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[9] [2003] ATP 35 at [41]

[10] See the discussion by the Initial Panel - [2003] ATP 35 at [44], set out in footnote 11.

40. Further, this issue is only relevant because of the decision of the independent directors to agree to ESK's requirement to have a change of the recommendation of any independent director as a trigger for payment of the First Break Fee. The submissions by NCI and ESK on this point (like their respective submissions concerning other aspects of the issues relating to the Break Fees) criticise the Initial Panel's decision by taking one item in the bundle of items that the Initial Panel said were unacceptable in combination and asserting that the particular item is not inappropriate in itself and hence not unacceptable.

41. This basis for challenge ignores that the Initial Panel's view (and our view as well) depends on the effect of each of these items on all of the others in the totality of the circumstances of this matter[11]. We agree with the Initial Panel's statement in this regard and specifically, the following statements in the Initial Panel's reasons:

> *43. '….No recommendation should have been agreed to at a stage before the independent directors had received all the information they foresaw as being relevant to whether that recommendation should stand. The agreement itself reflects that the independent expert's report would be relevant to that decision. If the obligation to pay the fee were triggered, it would most likely be because there had been a defect in the process leading up to the recommendation, and it was most unlikely to be because a better bid had emerged. If ESK's attention had been likely to stray to other prospective targets, this may have been a risk that the directors were justified in incurring a fee to minimise. However, ESK was as much a captive bidder as NCI was a captive target.*
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> *44. In their submissions ESK and NCI highlighted the need to maintain the independence of the independent expert, Grant Samuel, indicating that it would have been inappropriate for Grant Samuel to report on the First Proposal and the terms of the First Implementation Agreement, prior to finalisation of the First Proposal. In our view it would have been normal and proper practice for the independent directors to have:*
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> *(a) provided in the First Implementation Agreement that the First Break Fee would not be payable in the event of an adverse independent expert's report. This would have reduced the pressure on Grant Samuel and strengthened its position as an independent expert; or*
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> *(b) waited until they had the first draft of the independent expert report on the valuation of the company without compromising the independence of Grant Samuel. The position of NCI in this case is different from that of the experts*

[11] We note that the various submissions received did not show any clear market practice applicable to situations like those of this matter bearing in mind all the relevant factors (what the relationship between target and "bidder" may be, whether there should be a break fee, what its quantum would be, what would trigger its payment , etc). To a certain extent, this decision indicates to the market, potential bidders and target directors how the Panel applies the approach set out in GN 7 where an existing controller seeks to take a company private under its ownership.

in Phosphate Co-operative Co. of Australia Ltd v Shears & Anor (No.3)[1] and ANZ Nominees Pty Ltd v Wormald International Ltd[1] where the experts were part of the "team" and had clearly rewritten parts of their report at the request of the company. It would also not appear to be contrary to ASIC's policy as explained in ASIC Practice Note 42 – Independence of experts' reports, although we acknowledge that care would need to be taken to ensure that this manner of proceeding did not prejudice the independence of the expert.'

42. In all the circumstances of the present case ESK and the independent directors of NCI should have seen that a break fee should only have been payable where a scheme recommended by the directors was rejected by the shareholders.

Other issues

Procedural fairness

43. In the Application, VIPH also asserted that there had been breaches of the Panel's Rules of Proceedings, which when combined with other factors, meant that it had been denied procedural fairness and suffered material prejudice as a consequence. We considered that once consent to the Application had been granted under section 657EA(2) and we made our decision to conduct the Proceedings, this ceased to be relevant as the Proceedings would provide VIPH with a full opportunity to be heard and with all other relevant aspects of procedural fairness.

Scope of Application and Proceedings

44. In its Application, VIPH did not seek review of the Initial Panel's decision with respect to the modification provided by ASIC or disclosure of the various associations and relevant interests in shares in NCI held by the Tyrrell Interests. It did however make submissions in relation to these issues. We considered VIPH's submissions in this regard, however noted that these issues were not within the scope of the Application (which was the basis on which VIPH applied for consent under section 657EA(2), the President gave consent and we agreed to conduct the Proceedings). Hence, we concluded that they should not be the subject of these Proceedings.

RP Austin
President of the Sitting Panel
Decision dated 17 November 2003
Reasons published 5 December 2003