



**In the matter of BreakFree Limited 04(R)
[2003] ATP 42**

Catchwords:

Nature of review – powers of review panel -whether declaration of unacceptable circumstances made “on an application” -statement by target to the effect that a defeating condition in a bid would not be satisfied – minimum acceptance condition – announcement that bidder would not to proceed with scrip takeover bid prior to dispatch of offers – announcement of alternative cash takeover bid – delay by bidder in making announcement– potential to mislead the market – truth in takeovers policy – reliance on Third Party Statements –unreasonable to rely on statements concerning the results of a shareholder survey – declaration of unacceptable circumstances – decision not to order dispatch of bidder’s statement for the scrip takeover bid - content of bidder’s statement

Corporations Act 2001 (Cth), sections 602(a), 657A, 657C, 657D, 657EA, 658A, 658B, Part 9.2

Australian Securities and Investments Commission Act 2001 (Cth) section 192

Australian Securities and Investments Commission Regulations 2001, regs 18, 20, 22

ASIC Policy Statement 25 ‘Takeovers: false and misleading statements

ASIC v National Exchange Pty Limited [2003] FCA 955; 47 ACSR 128

Bondv Australian Broadcasting Tribunal (1988) 84 ALR 646

Hedges v Australasian Conference Association Ltd [2003] NSWSC 1107

R v Australian Broadcasting Tribunal; ex parte Hardiman (1980) 29 ALR 289

Sabag v Health Care Complaints Commission [2001] NSWCA 411

TarsonPty Limited v Holt (1991) 25 ALD 730

Anaconda 18 [2003]ATP 18

PICA [2003] ATP 36

Sirtex [2003] ATP 22

Taipan 06 [2000] ATP 15

These are our reasons for our decision to uphold and vary in part the decision in the matter of BreakFree 04.

PRELIMINARY

1. These reasons relate to an application made on 28 October 2003 (**Review Application**) by S8 Limited (**S8**) for review under section 657EA of the *Corporations Act 2001 (Cth)* (**Act**)¹ of the decision by the Panel (**Initial Panel**) in *BreakFree Limited 04* [2003] ATP 39 to declare that unacceptable circumstances existed in connection with the affairs of BreakFree Limited (**BreakFree**).
2. The Review Panel was David Gonski, Kevin McCann and Robyn Ahern.

¹ In these reasons, statutory references are to the Act, unless it is otherwise obvious.

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INITIAL DECISION

Summary

3. The Initial Panel made a declaration of unacceptable circumstances (**Initial Declaration**). A copy of the Initial Declaration was annexed to the reasons for decision of the Initial Panel (**Initial Reasons**).
4. The Initial Panel found that an efficient competitive and informed market in shares in BreakFree and S8 and generally was prejudiced by the delay by S8 in announcing its response to the BreakFree Announcements (defined at [15]) and by its purported reliance on the BreakFree Announcements as meaning that the shareholders referred to in them would be required not to accept the Scrip Bid when and if it was made.

Factual background

Preliminary matters

5. The facts to which the Review Application relates are essentially identical to those considered by the Initial Panel. As a result of the procedural history of this matter (discussed at [6]), the Initial Panel received additional factual submissions after it had informed the parties of its decision. We also received further factual submissions (these, together with the additional material received by the Initial Panel, are the **Further Evidence**). Further, most submissions to us suggested that we ought to draw different inferences even from undisputed facts. Except where we specifically comment on factual matters, however, we consider that the primary facts were correctly found by the Initial Panel and that the Initial Panel drew the correct inferences from those primary facts. Accordingly, the summary that follows (at [9]-[21]) is intended to facilitate understanding of the discussion of our reasons that follows. A fuller discussion of the factual background is contained in the Initial Reasons.
6. We referred in [5] to the procedural history of this matter and to the additional submissions to which this gave rise. Briefly, that history is:
 - the Initial Panel informed the parties of its decision to find that unacceptable circumstances existed by providing them with a draft media release setting out in some detail the facts found and inferences drawn by the Initial Panel and a summary of its reasons;
 - the parties were invited to, and did, make submissions on the factual accuracy of the media release;
 - after the media release was issued on 27 October 2003 (Media Release TP 106/2003) (the **Media Release**), S8 made the Review Application, as it was required to do by reason of the time limit contained in section 657EA of the Act -- we decided to defer consideration of the Application until the Initial Panel had decided whether it would make any orders under section 657D;

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- the Initial Panel issued a further brief for the purposes of obtaining submissions from the parties on the question of the orders that it might make as a result of the Initial Declaration and submissions were made by the parties; and
 - the Initial Panel decided not to make any orders.
7. Accordingly, in addition to material provided in submissions and rebuttal submissions from the parties in response to the brief issued by us under ASIC regulation 20, we had available to us several sets of submissions made to the Initial Panel which were not available to the Initial Panel when it decided to make the Initial Declaration.
8. It would have facilitated efficient and accurate decision-making had the parties other than ASIC been more forthcoming in setting out fully the relevant facts in their earlier submissions.

Summary of facts

9. BreakFree has been listed on the Australian Stock Exchange (**ASX**) since 13 September 2002. Its principal activities are the conduct of a specialist holiday business and the holding of management and leasing rights to holiday resorts and other recreational accommodation.
10. S8 is also listed on ASX. It is a competitor of BreakFree, having among its business activities the provision of property management services in the holiday resorts and recreational accommodation market.
11. S8 announced on 11 July 2003 that it would make a takeover bid for all the shares in BreakFree in which S8 offered S8 shares as consideration for the BreakFree shares (**Scrip Proposal**).
12. On 19 August, S8 lodged its bidder's statement with ASIC and served copies on ASX and BreakFree. On 2 September, S8 lodged with ASIC a replacement bidder's statement.
13. S8 set out in its replacement bidder's statement a number of defeating conditions that would apply to the Scrip Proposal. Most of these had been foreshadowed in its announcement of 11 July. One (**Minimum Acceptance Condition**) was that S8 obtain a relevant interest in 50.1% or more of the issued shares in BreakFree before the end of the offer period.
14. On 12 September, BreakFree sent a letter to its shareholders which was also made available through the ASX Company Announcements Platform. The letter, among other things, contained the BreakFree Statements (set out at [15]) which purported to report the intentions of shareholders in BreakFree who had been surveyed (**Surveyed Shareholders**) by BreakFree's adviser, ABN AMRO Morgans (**AAM**).

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15. The **BreakFree Statements** were:

Survey on Shareholders' Intentions

BreakFree's adviser in these matters [concerning the Scrip Proposal], ABN AMRO Morgans, has undertaken a telephone survey of some of the major individual shareholders [in BreakFree] to ascertain their likely acceptance of the current scrip offer.

*Based on the survey responses, ABN AMRO Morgans has advised the Board that shareholders holding a majority of shares indicated that they **would not accept** the current all scrip offer from S8.²*

16. Between 19 and 23 September, ASIC wrote to the Surveyed Shareholders about the BreakFree Statements seeking answers that would be used to “assist ASIC in determining whether the market is fully informed, and whether or not BreakFree needs to make a clarifying announcement to the market about the results of the survey”. ASIC’s letter also asked the Surveyed Shareholders whether they were informed by AAM of the manner in which their responses would be used, and whether they qualified their statements.
17. Only 5 of the 12 Surveyed Shareholders responded to ASIC’s letter. We do not have copies of, or detailed information, concerning, the responses received from the Surveyed Shareholders, other than submissions from ASIC that none of the 5 responses it received resiled from the BreakFree Statements.
18. On 25 September, ASIC wrote to BreakFree and AAM outlining its concerns in relation to the BreakFree Statements and requesting the provision of certain information.
19. On 29 September (some 17 days after the BreakFree Statements had been made), S8 sought legal advice in relation to its obligations under section 631 in light of the BreakFree Statements and whether the BreakFree Statements enlivened the defence under section 670F.
20. Having received preliminary legal advice, the chair of S8 telephoned a senior officer of ASIC. They discussed the BreakFree Statements and the consequences in terms of ASIC’s truth in takeovers policy [PS 25] (**PS 25**) of the BreakFree Statements.
21. On 8 October, S8 announced (**S8 Announcement**) that it had withdrawn the Scrip Proposal and that instead it would make a cash off-market takeover bid for BreakFree shares (**Cash Proposal**). The S8 Announcement indicated that S8 was entitled to take this course of action because of the BreakFree Statements which meant that the Minimum Acceptance Condition could not be fulfilled.

² Original emphasis – the emphasised statement is referred to as the **Highlighted Statement**

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Initial Application

22. BreakFree alleged that unacceptable circumstances arose from the S8 Announcement and sought a declaration of unacceptable circumstances and orders (**Initial Application**) that S8:
- (a) not be permitted to withdraw the Scrip Proposal;
 - (b) continue with the Scrip Proposal in accordance with section 631(1);
 - (c) vary the consideration under the Scrip Proposal to increase the value of the scrip consideration offered from \$1.50 to \$1.51, and to provide an alternative cash consideration of \$1.51 per BreakFree share; and
 - (d) address the outstanding issues raised in the supplementary brief by the Panel in the BreakFree 03 proceeding on 6 October 2003.

Decision of Initial Panel

23. On 24 October, the Initial Panel declared that unacceptable circumstances arose in relation to the affairs of BreakFree resulting from the S8 Announcement.
24. The declaration of unacceptable circumstances was made on the basis that it was unreasonable for S8 to rely on the BreakFree Statements as a basis for not proceeding to make offers under the Scrip Proposal after a delay of 26 days between the BreakFree Statements and S8's announcement to withdraw its Scrip Proposal.
25. S8's extended delay in responding to the BreakFree Statements, in the absence of any further announcement by S8, led to the Initial Panel's finding that the market was entitled to infer that S8 would proceed with its Scrip Proposal despite the BreakFree Statements. The facts supporting this inference included S8's failure to disclose to ASIC, the market or the Initial Panel that it was preparing a cash alternative to its scrip bid and features of the BreakFree Statements which meant that it was not a satisfactory basis for a decision in relation to the Scrip Proposal.
26. The Initial Panel considered the application of PS 25 in relation to the BreakFree Statements. The Initial Panel considered that in order for it to be reasonable for market participants to place reliance on statements made by a person about the views and intentions of a third party, the statement must be made with express authority from, or be publicly supported by, the third party in circumstances where it is expressly recognised (or there is a necessary inference) that the third party knows that it will not be able to depart from the statement.
27. The following are extracts from the Initial Panel's reasons for decision which demonstrate the Initial Panel's reasoning:
150. *"[We] consider that S8's action in delaying announcing its decision not to proceed with the Scrip Proposal until it was able to announce an unrelated Cash Proposal had the potential to mislead the market and was contrary to the*

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principle in section 602(a). This consideration by itself would have been sufficient to warrant a declaration of unacceptable circumstances in these circumstances.

151. *However, our views in this regard are reinforced by:*
- (a) the unreasonableness of S8’s purported reliance on the BreakFree Scrip Statements as discussed in [142] to [149];*
 - (b) the lack of any evidence to support the conclusion that S8 was motivated by a belief that the BreakFree Scrip Statements meant that the Minimum Acceptance Condition could never be satisfied and its conduct in proceeding with the Scrip Proposal for a significant period after the BreakFree Statements were made tends to contradict any assertion that S8 did not hold that belief;*
 - (c) the long delay between the making of the BreakFree Scrip Statements and S8’s announcement that it would not proceed with the Scrip Proposal, in light of:*
 - (i) the uninformed state of the market for S8 and BreakFree shares in that extended period; and*
 - (ii) the significant time that had elapsed since the Scrip Proposal was first announced on 11 July, and the fact that S8 had sought (and obtained) extensions from ASIC on two separate occasions of the time for it to comply with its obligations under section 631 in relation to the Scrip Proposal.”*

28. The Initial Panel noted in the Initial Reasons that it had concerns that the BreakFree Statements were inaccurate.³
29. Notwithstanding making a declaration of unacceptable circumstances, the Initial Panel made no orders to remedy the circumstances, citing the impracticability and limited benefit of requiring S8 to proceed with its Scrip Proposal.
30. S8 announced on 20 October that it proposed to dispatch a bidder’s statement to BreakFree shareholders on 24 October in relation to the Cash Proposal. On 23 October, BreakFree requested that the Initial Panel make an interim order restraining the dispatch of the bidder’s statement for the Cash Proposal. ASIC made a similar request at or about the same time.
31. The Initial Panel declined to make the interim order on the basis that it was not satisfied that unacceptable circumstances were likely to result from the dispatch of the bidder’s statement relating to the Cash Proposal while it was still an open question whether, when and in what form offers under the Scrip Proposal must be made.
32. The Initial Panel decided that it was unnecessary to make a finding on submissions from S8 concerning whether the Cash Proposal would be “substantially less favourable” than the Scrip Proposal for the purpose of

³ [2003] ATP 39 at [78]

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determining whether S8 may contravene section 631 (and disregarding section 670F).

REVIEW APPLICATION

33. S8 sought in the Review Application that we:
- (a) set aside the Initial Decision and order that each party bear their own costs in relation to these proceedings;
 - (b) make a declaration of unacceptable circumstances applicable to BreakFree in relation to the BreakFree Statements;
 - (c) make no substantive orders arising from the Initial Decision either interim or final, pending a decision on the Review Application; and
 - (d) relieve S8 from any undertakings made or given by it to the Initial Panel in relation to the proceedings leading to the Initial Decision.
34. The Application asserted that the Initial Decision was wrong:
- (a) in interpreting PS 25 in the way in which it did;
 - (b) in concluding that S8's reliance on the BreakFree Statements was unreasonable;
 - (c) in refusing to make a declaration of unacceptable circumstances against BreakFree in respect of the BreakFree Statements;
 - (d) in making the Initial Declaration; and
 - (e) because the process undertaken by the Initial Panel in issuing the Media Release was flawed, so that any impartial observer of the process would have a reasonable apprehension of bias on the part of the Initial Panel.

NATURE OF APPLICATION

35. As the Review Panel in *National Can Industries 01(R)* [2003] ATP 40 observed (at [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, affirm, vary or set aside the decision of the Initial Panel and substitute our own decision...Thus, we may declare...that there are unacceptable circumstances and make orders...when no declaration or orders were made by the Initial Panel."

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DEALING WITH THE APPLICATION

36. We were appointed on 28 October 2003 and on 3 November 2003 decided, under Regulation 20 of the ASIC Regulations, to conduct proceedings in relation to the Application. We adopted the Panel's published procedural rules for the purposes of the proceedings. On 19 November 2003, we issued a brief to all parties who had taken part in *BreakFree 04* and on 5 December 2003, the Initial Panel provided parties with its draft of the Initial Reasons.
37. Each of the parties made submissions in response to the brief. However, we also considered the submissions and evidence in *BreakFree 04* and the draft reasons for the decision in that matter. Submissions were received from:

- BreakFree: generally supporting the reasons and findings of the Initial Panel, except in relation to the Initial Panel's:
- (i) comments regarding the BreakFree Statements at [75] to [78] of the Initial Reasons;
 - (ii) observation that it was unnecessary to make a finding as to whether the Cash Proposal would be "substantially less favourable" than the Scrip Proposal; and
 - (iii) decision not to make the orders sought by BreakFree.
- S8: disagreeing with the Initial Panel's decision, and seeking the orders suggested by S8 as set out in [33].
- ASIC: supporting the Initial Panel's decision, however, submitting that we should differ from the Initial Panel's decision and make a declaration of unacceptable circumstances against BreakFree in relation to the making of the BreakFree Statements.

DECISION OF REVIEW PANEL

Complaint of Bias

38. We did not pursue the complaint summarised above (at [34(e)]) alleging a reasonable apprehension of bias on the part of the Initial Panel as our proceedings are a full reconsideration of the matter on the merits.

Jurisdictional Question

39. In its submissions, BreakFree argued that it was not competent for a review panel to make a declaration of unacceptable circumstances in connection with the BreakFree Statements. BreakFree submitted that:
- (a) a review panel can have no greater power when exercising its authority under section 657EA than the initial panel;

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- (b) an initial panel's authority is limited by subsection 657C(1) which provides:
- "The Panel may make a declaration under section 657A, or an order under section 657D or 657E, only on an application made under this section."*⁴; and
- (c) the application before the Initial Panel was that of BreakFree which complained of the purported withdrawal of the Scrip Proposal by S8 and did not complain about the BreakFree Statements.
40. The Review Panel accepts the first limb of BreakFree's submission. A review panel's powers in conducting a review are contained in subsection 657EA(4), which provides:
- "After conducting a review under this section, the Panel may:*
- (a) vary the decision reviewed; or*
 - (b) set aside the decision reviewed; or*
 - (c) set aside the decision reviewed and substitute a new decision.*

In conducting the review, the Panel has the same powers to make a declaration under section 657A, or an order under section 657D or 657E, as it has when it is considering an application under section 657C."

41. It follows from the last sentence in subsection 657EA(4) that the limitation on an initial panel when dealing with the initial application imposed by subsection 657C(1) applies with equal force to a panel conducting a review of the decision by the initial panel and does so by reference to the initial application (rather than by reference to the application for review).

42. The remaining questions relate to the meaning of the expression "only on an application" and their effect on panel proceedings.

43. Subsection 657C(1) means that the Panel is not able to act on its own motion to commence proceedings before it to investigate circumstances that it may believe to be potentially unacceptable. It may only exercise its powers under the Act where an application under subsection 657C(1) has been made.

44. The effect of the relevant originating process in determining the scope of an administrative decision maker's proceedings has been considered in several cases concerning different administrative tribunals.⁵

⁴ emphasis added

⁵ For example, the former Australian Broadcasting Tribunal: *R v Australian Broadcasting Tribunal; ex parte Hardiman* (1980) 29 ALR 289 and *Bond v Australian Broadcasting Tribunal (No. 2)* (1988) 84 ALR 646 (inquiries may follow wherever the evidence before it may lead, provided that it is related to the possible exercise of one of its powers); the Victorian Travel Agents Licensing Authority: *Tarson Pty Ltd v Holt* (1991) 25 ALD 730 (inquiry was one in which one party would present a case in support and the other will present his case in answer and the decision maker is confined to the

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45. These cases demonstrate that:
- (a) the effect of the content of the originating process on the role and authority of a decision-making body has to be considered in the context of the entire legislative regime applying to that body - the fact that some originating process is required and that the body cannot act of its own motion is not determinative of the question whether the body can inquire beyond the bounds set by the originating process;
 - (b) attempting to attach labels such as "adjudicatory", "investigative", "adversarial" and "inquisitorial" merely seeks to reach a conclusion without considering all the statutory context - further, the same body may have several functions within one inquiry and so categorisation may be not only illusory but also impossible;⁶ and
 - (c) decisions relating to other decision-making bodies are likely to be helpful only as illustrating the application of general principles and are unlikely to provide determinative guidance in relation to a particular decision-making body.
46. The legislation governing the Panel's proceedings allows the Panel to determine what is the appropriate form for an application,⁷ and once such an application is received by it, places on the Panel the responsibility for defining the scope of the inquiry through the process of deciding whether it wishes to conduct proceedings⁸ and then setting the terms of the investigation to be conducted in those proceedings through the preparation,⁹ and distribution to the parties,¹⁰ of a brief. Further, the power to obtain evidence in Panel proceedings is given to the Panel through the issue of summonses under ASIC Act section 192.
47. It is not necessary or desirable for us to determine all the limits that follow from section 657C(1). However, we consider that the Panel is entirely justified in considering all the factual matters and other issues that are raised by the application and all facts and issues that are logically connected with those factual matters and other issues.
48. In this case, the Initial Application specifically mentioned and relied on several occasions on, the BreakFree Statements. Quite clearly, the BreakFree Statements were an essential part of the factual matrix raised by the Initial Application (the S8 Announcement itself relied on the BreakFree Statements). The Panel must be

material placed before it by them); New South Wales Health Care Complaints Commission: *Sabag v Health Care Complaints Commission* [2001] NSW CA 411 (in hearings to consider revoking a professional license on specific grounds, the precise case that the current license-holder is to answer must be apparent from the "pleadings").

⁶ *Hedges v Australasian Conference Association Ltd* [2003] NSWSC 1107 at [124]

⁷ ASIC reg 19

⁸ ASIC reg 20(a)

⁹ ASIC reg 20(b)

¹⁰ ASIC reg 22

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able to include in its inquiry the contribution to the acceptability or otherwise of all elements of the factual matrix on which the application depends.

49. In this matter, the Initial Panel was empowered to enquire into the acceptability of the BreakFree Statements because the correctness of, and the circumstances surrounding the making of, the BreakFree Statements were logically connected with the matters and issues raised in the Initial Application.
50. Accordingly, we consider that the Initial Application was apt to allow the Initial Panel to consider whether the BreakFree Statements were themselves unacceptable or were part of a set of circumstances that were as a whole unacceptable. We are, therefore, able to consider the same issues in our review of the Initial Decision.

Correctness of BreakFree Statements

51. The evidence before the Initial Panel concerning the accuracy of the BreakFree Statements led it to conclude that it had concerns as to the accuracy of those statements. That evidence showed that the responses actually given by Surveyed Shareholders to the questions actually asked by AAM may not have justified the making of the statements concerning them contained in the BreakFree Statements.
52. The Further Evidence enables us to form the view that the BreakFree Statements were inaccurate and were misleading or deceptive or likely to mislead or deceive. The Further Evidence confirmed the deficiencies identified by the Initial Panel so that what was a concern for the Initial Panel is now sufficiently established to satisfy us.
53. In relation to whether as well as being inaccurate, the BreakFree Statements were also misleading or deceptive or likely to mislead or deceive, we consider that the approach of Finkelstein J. in *ASIC v National Exchange Pty Ltd*¹¹ is appropriate, especially as it concerns statements made in the context of stock market traded securities. These confirm that it is appropriate to proceed in a case such as this on the assumption that the persons who become aware of the BreakFree Statements "include the educated as well as the uneducated, the thinking as well as the unthinking, the credulous as well as the cautious" and that "given their likely diversity, it is reasonable to act on the basis that many ... will not weigh each word of the [BreakFree Statements] as an educated or analytical mind might do. Nor will they necessarily subject the [BreakFree Statements] to close scrutiny".¹²
54. In light of those observations, we consider that the BreakFree Statements were misleading or deceptive or likely to mislead or deceive. The evidence before us

¹¹ [2003] FCA 955; 47 ACSR 128 esp at [12]-[17]

¹² *ASIC v National Exchange* at [12]

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establishes that the Highlighted Statement was not an accurate reflection of the responses of the Surveyed Shareholders to the survey conducted by AAM and gave a misleading impression of the certainty of the intentions of the Surveyed Shareholders which was not justified by those responses. It is of concern that the Surveyed Shareholders do not appear to have been accurately informed of the use to which their responses were to be put by AAM and BreakFree, in particular that the BreakFree would use those responses in a public statement.

55. We reached that conclusion notwithstanding BreakFree's submissions that:
- the BreakFree Statements included language which might have conveyed to the reader that the information was concerning a transitory intention of the shareholders and not a fixed purpose -- in particular, the use of the word "likely"; and
 - even if the BreakFree Statements were deficient, BreakFree did not cause that deficiency; it relied on its adviser, AAM, to conduct the survey and accurately to report its results to BreakFree.

56. In relation to the first submission, we note and adopt Finkelstein J's observations in *National Exchange* concerning the possibility that strictly accurate statements can nonetheless be misleading or deceptive:

*" This brings me immediately to the question whether an offer which is factually true in every respect may still be misleading. The answer must plainly be in the affirmative. The most obvious case is where what is stated is a half-truth: that is, where the statement is removed from its context and the non-disclosure of the context renders the statement misleading. It is also true where the statement is ambiguous in the sense that it has more than one meaning, one of which is deceptive. A statement may also be literally true yet be framed in such as setting as to mislead or deceive. The ultimate impression created by the statement must be considered and its effect gauged."*¹³

57. In this case, the context is especially important. There is first the context in the document itself: the relevant statement is highlighted by BreakFree by presenting it in bold type, the words relied on by BreakFree are presented in ordinary type; the Highlighted Statement is definite and unambiguous, the exculpatory words are low key and disappear into the background of the sentence in which they appear. Then there is the context of the publication of the BreakFree Statements: they form part of a document which is both a letter by a listed company to its shareholders and a release by a listed company to the stock market. Statements made in such documents should be presumed to be intended to be acted on and, given the serious consequences of their being

¹³ ibid at [13], citations omitted

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deficient, to be accurate both in their strict terms and also in the impressions that they convey.

58. BreakFree's second submission misunderstands the role and function of the Panel when exercising its authority under section 657A. The Panel must determine whether it considers that unacceptable circumstances exist in relation to the affairs of a company. The Panel does not need to attribute the responsibility for the circumstances to anyone.
59. The Panel, after reviewing the relevant facts, established that the BreakFree Statements were made and were incorrect, misleading and deceptive. Who brought that state of affairs into existence is not important at this stage of the inquiry. That BreakFree relied on an intermediary is also not relevant to the determination of this issue.

S8's justification for its conduct

60. The principal bases on which S8 sought to justify its conduct in making the S8 Announcement was that:
 - (a) S8 was required to assume that the BreakFree Statements were accurate;
 - (b) S8 was entitled to assume that the Surveyed Shareholders would be required by PS 25 to act consistently with the BreakFree Statements;
 - (c) S8 was entitled to defer acting until ASIC had conducted inquiries into those statements; and
 - (d) the S8 Announcement was made promptly once that period for ASIC to investigate had expired.
61. S8's submissions depended on PS 25. Accordingly, the Panel's assessment of those submissions also requires an assessment of PS 25.

Observations on PS 25

62. PS 25 has been raised in several Panel matters.¹⁴ In general, the Panel has agreed in those decisions with both the underlying policy in PS 25 and the application of it to the facts being considered by the Panel in that case. In some cases (for example, *Sirtex* at [29]), the Panel noted submissions by parties concerning the restrictions that PS 25 had imposed, or would impose, on them without suggesting that those submissions were incorrect.
63. In *PICA*, the Panel considered that, in the context of conditions expressed by a bidder to be "non-waivable" as a result of a requirement of ASIC's policy (as expressed in an ASIC Media Release and in a modification granted by ASIC under section 655A), ASIC was still entitled to modify the Act in a manner

¹⁴ *Taipan 06* [2000] ATP 15, *Anaconda 18* [2003] ATP 18, *Sirtex* [2003] ATP 22, and *PICA* [2003] ATP 36

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which would have effectively constituted a waiver of that condition. The *PICA* Panel considered that PS 25 did not apply so as to fetter ASIC's discretions and that the market understood that all statements of this kind which expressed ASIC policy were subject to ASIC being convinced on good policy grounds to grant further modifications of the Act.

64. Like the Initial Panel, we consider that PS 25 is a soundly-based policy. It properly requires those who make definitive statements to the market as to their intentions to adhere to those intentions by reminding these market actors that an apparently definitive statement of intention will cause market disruption if it is not fulfilled.
65. However, we consider that PS 25 must be understood within its purposes and context. We note that:
 - (a) PS 25, is one of the Policy Statements concerning ASIC's enforcement discretions and not the exercise of its statutory discretionary powers (such as that under section 655A). Accordingly, whether ASIC has a discretion in any particular case depends on whether or not there would be a contravention of the Act (in this case, particularly, section 1041H) which would be enforced by a court or unacceptable circumstances which would be declared and remedied by the Panel.
 - (b) Because it depends on the availability of an enforcement remedy, the policy in PS 25 must apply to a public statement from the moment of its making – ASIC investigation may or may not occur, depending on ASIC's resource allocations and enforcement priorities and ASIC investigation may or may not lead to specific enforcement by ASIC. In any event, the market has to know whether a public statement can be "relied on" immediately, and regardless of ASIC's investigation and enforcement conduct.
 - (c) Although all public statements must be accurate and not misleading or deceptive, that does not mean that every public statement may be "relied on". We place that term in quotations to indicate that it has a special meaning – that a person's conduct after the making of the statement will be restricted by reason of the statement, so that others may rely on that person's conduct being consistent with the statement. A public statement may not be "relied on" against a person, even if it is inaccurate and misleading or deceptive, unless that person should be taken to have induced or condoned the making of the statement.
 - (d) While ASIC needs to make its own assessment whether a statement may be "relied on" against a person, whether a market statement would be misleading or deceptive for the purposes of section 1041H is a question of law, not administrative discretion. Similarly whether circumstances are unacceptable is a matter for the decision by the Panel, not ASIC.

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Application of principles to the BreakFree Statements

66. We do not think that statements like the BreakFree Statements, which purport to report the proposed conduct of others – especially if they are unidentified and unidentifiable, even if misleading and deceptive, typically give rise to the same or similar expectations of compliance that supports the policy of PS 25 in relation to "final statements".
67. We consider that the Initial Panel's guidance on "Third Party Statements" both to be consistent with the terms of PS 25, for the reasons set out in the Initial Panel's decision, and to conform with our understanding of market expectations.
68. In this case, a further relevant consideration is what conduct a Surveyed Shareholder could reasonably have been expected to take when the BreakFree Statements were made if that Surveyed Shareholder had said that it had not made up its mind in relation to the Scrip Proposal. That Surveyed Shareholder, although aware that its statement was not sufficiently definitive to enable BreakFree accurately to make the BreakFree Statements was entitled to assume that other Surveyed Shareholders had made such statements. Accordingly, it would not be clear to any Surveyed Shareholder that the BreakFree Statements were inaccurate.
69. Like the Initial Panel, we consider that none of the Surveyed Shareholders has been shown to have contributed to unacceptable circumstances by their conduct or inaction. In those circumstances, we do not consider that there would be any likelihood of a court or the Panel requiring a Surveyed Shareholder to act only in accordance with the statement of intention set out in the BreakFree Statements.
70. We are dealing only with the question of whether the Surveyed Shareholders' conduct was restricted by reason of the BreakFree Statements. We note that other parties (for example, BreakFree, its directors and AAM and its directors) might incur liabilities by reason of their involvement in the making of the BreakFree Statements.

S8's conduct

71. We consider that, even if the conduct of the Surveyed Shareholders would have been restricted in the matter set out in the BreakFree Statements, S8's delay in informing the market in any meaningful way concerning its reaction to the likely triggering of one of the conditions to the Scrip Proposal, combined with its conduct during that period (which was consistent with a determination to proceed with the Scrip Proposal) together meant that unacceptable circumstances had arisen in relation to the affairs of BreakFree.
72. We agree with the Initial Panel that this delay meant that the S8 Announcement was inappropriate and contributed to unacceptable circumstances existing.

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73. We also consider that it was another contributing circumstance to the existence of unacceptable circumstances that the S8 Announcement incorrectly sought to base S8's decision not to proceed with the Scrip Proposal on the application of PS 25, and the policy embodied in it, to the BreakFree Statements.
74. We do not consider that S8 was entitled to wait any period for ASIC to investigate the BreakFree Statements or, accordingly, to delay more than a relatively short period of time before responding to the BreakFree Statements. S8 was not required to respond definitively or conclusively to the BreakFree Statements promptly after their making. It would have been sufficient for S8 to indicate to the market that it regarded the BreakFree Statements as indicating that it was almost certain that the Scrip Proposal, as currently formulated, would not become unconditional if offers were made pursuant to it and that, in light of this, S8 was seeking legal advice as to whether sections 631 and 670F would require it to make offers as a result of its announcement of 11 July 2003 and that it was otherwise **reviewing its alternatives in relation to making a takeover** bid for BreakFree. This would have allowed the market to trade on the basis of a known uncertainty.
75. The course of conduct that S8 chose to follow, of making no public statement directly concerning the BreakFree Statements and of otherwise conducting itself in a manner consistent with pursuing the Scrip Proposal notwithstanding the BreakFree Statements for almost four weeks meant that, even if it would have been acceptable to make the S8 Announcement promptly following the making of the BreakFree Statements, unacceptable circumstances arose from the delay.

Conclusion – New Declaration but no Orders

76. For these reasons, we varied the Initial Declaration so that the BreakFree Statements are included among circumstances declared by the Panel to be unacceptable (Varied Declaration). The Varied Declaration is set out in the annexure to these reasons.
77. Having made the Varied Declaration, we issued a Media Release on 22 December 2003 (TP 03/123) informing the market of the making of the Varied Declaration and requesting that anyone, other than the Parties, who believed that they were adversely affected by the circumstances declared to be unacceptable, to make submissions about the adverse effects suffered and the orders, on or before 24 December 2003.
78. Our concern in this regard related particularly to the possibility referred to in the Initial Reasons¹⁵ that market positions might have been adopted or retained, to the detriment of market participants, by reason of either or both the BreakFree Statements and the delay between the making of the BreakFree

¹⁵ at [85]

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Statements and the issue of the S8 Announcement. As no submissions were received, and as we otherwise agreed with the analysis relating to orders of the Initial Panel,¹⁶ no orders were made under section 657D.

Legal representation

79. We consented to the parties being legally represented by their commercial lawyers in the Proceedings.

David Gonski
President of the Sitting Panel
Decision dated 24 December 2003
Reasons published 05 April 2004

¹⁶ Initial Reasons at [154]-[166]

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ANNEXURE

Corporations Act Section 657A

Variation of Declaration of Unacceptable Circumstances

In the matter of BreakFree Limited 04(R)

Pursuant to section 657A of the Corporations Act, the Takeovers Panel hereby varies the declaration of unacceptable circumstances made on 24 October 2003 in relation to the affairs of BreakFree Ltd to read as follows:

WHEREAS

- A. On 11 July 2003 S8 Limited (**S8**) announced a takeover bid (the **Scrip Bid**) for BreakFree Limited (**BreakFree**) in which S8 offered shares in S8 as consideration for BreakFree shares.
- B. The bidder's statement for the Scrip Bid was the subject of the BreakFree 03 proceedings before the Panel. Resolution of the issues in those proceedings was postponed pending the resolution of the BreakFree 04 proceedings.
- C. On 12 September 2003, BreakFree provided a letter to its shareholders, which was also posted through the ASX Company Announcements Platform, in which, among other things, it stated that:

Survey on Shareholder's Intentions

BreakFree's adviser in these matters [concerning the Scrip Bid], ABN AMRO Morgans, has undertaken a telephone survey of some of the major individual shareholders [in BreakFree] to ascertain their likely acceptance of the current scrip offer.

Based on the survey responses, ABN AMRO Morgans has advised the Board that shareholders holding a majority of shares indicated that they would not accept the current all scrip offer from S8.

These statements are referred to as the '**BreakFree Statements**'.

- D. The Panel was provided with copies of the script used in the conversations with each of the shareholders surveyed by ABN AMRO Morgans as well as the results of the surveys. The Panel considered that, in light of this information, the BreakFree Statements were misleading or tended to mislead.
- E. 26 days after the BreakFree Statements were made (that is, on 8 October 2003), S8 announced that it would not be proceeding to make offers under the Scrip Bid. S8 indicated that it was entitled to take this course of action because of the BreakFree Statements which meant that one of the defeating conditions (that is, the condition requiring acceptance of the Scrip Bid for a minimum of 50.1% of the BreakFree shares) in the Scrip Bid could not be fulfilled.

Under section 657A of the Corporations Act, the Takeovers Panel declares that the circumstances described in recitals C, D and E constitute unacceptable circumstances in relation to the affairs of BreakFree.

David Gonski
President of the Sitting Panel
Dated 18 December 2003