Takeovers Panel

Reasons for Decision
Village Roadshow Limited

In the matter of Village Roadshow Limited
[2004] ATP 4

Catchwords:
Association - class of securities - efficient market – orders – interim orders – preference shares - shareholder approval – tracing notices - tracing relevant interests - scheme of arrangement – share buy-back

Corporations Act 2001 (Cth), sections 12(2), 602, 257D, 672A, 672B
ASX Listing Rules, 3.1
Online Advantage [2002] ATP 14
Wine Pros [2002] ATP 18
Flinders Diamonds Limited v Tiger International Resources Inc [2003] SASC 182
ASIC v Merkin Investments Ltd; re Bligh Ventures Ltd [2001] VSC 211
Re North Broken Hill Holdings Ltd (1986) 10 ACLR 270
Australian Securities Commission v Bank Leumi Le-Israel (Switzerland) and Others (1996) 21 ACSR 474
Brunswick NL v Blossomtree Pty Ltd (1992) 10 ACSR 542
Australian Securities & Investments Commission v Terra Industries Inc [1999] FCA 525
Village Roadshow Limited v Boswell Film GmbH [2003] VSC 440, 22 ACLC 203
Village Roadshow Limited v Boswell Film GmbH [2004] VSCA 16
Re The News Corporation Ltd and Others [1987] 70 ALR 419
Mendes v Commissioner for Probate (1967) 122 CLR 152

These are our reasons for deciding to make a declaration of unacceptable circumstances in relation to the affairs of Village Roadshow Limited (VRL) following the failure by various nominee holders of ordinary shares in VRL to respond fully and adequately to:

- **notices sent to them under section 672A(1)(b) of the *Corporations Act 2001* (Cth)[1] (in breach of section 672B); and**
- **requests for information sent to them by us.**

We made interim orders restricting the disposal of specified ordinary shares in VRL and final orders requiring specified ordinary shares to be vested with ASIC and sold by an independent stockbroker nominated by ASIC.

THE PROCEEDING

1. These reasons relate to an application (the **Application**) to us from Village Roadshow Limited **(VRL)** under section 657C of the Act, received on 23 January 2004, in relation to the affairs of VRL. To facilitate the reading of these reasons, we have included in Annexure E a lexicon of the terms which are defined in these reasons.

THE PANEL & PROCESS

2. Michael Tilley (sitting President), Andrew Lumsden (sitting Deputy President) and Denis Byrne were the sitting Panel (the **Panel**) for the proceeding conducted by us on the Application (the **Proceeding**).

[1] In these reasons, statutory references are to the Act, unless otherwise indicated.

3. We adopted the Panel's published procedural rules for the purposes of the Proceedings.

APPLICATION

Factual background – chronology of events leading up to the Application

The parties and others affected

4. VRL, Australian Securities and Investments Commission (**ASIC**) and Boswell (as defined in [19]) provided notices of appearance to us and as such were the formal parties to the Proceeding. However, for the purposes of these reasons each of Boswell, Schroders, Swissfirst, 001Invest and Mr Stefan Hamm (**Hamm**) will be collectively referred to as the Shareholder Parties (the **Shareholder Parties**).

5. Annexure A sets out the number of shares in VRL owned by the Shareholder Parties and how those shares are held through nominees.

6. VRL is listed on Australian Stock Exchange Limited (**ASX**) and has two classes of shares on issue, ordinary shares (**Ordinary Shares**) and A class preference shares (**Preference Shares**).

VRL scheme meetings – Preference Share buy-back

7. On 26 September 2003, VRL issued a scheme booklet for a proposed scheme of arrangement (the **First Scheme**) between VRL and the holders of Preference Shares under which VRL would buy back all of the Preference Shares. The proposal comprised:

   (a) a selective buy-back of all the Preference Shares to be approved by a resolution (**Buy-back Resolution**); and

   (b) a scheme of arrangement between VRL and its preference shareholders, under which the preference shareholders would be obliged to sell their Preference Shares into the buy-back.

8. VRL convened meetings to approve the First Scheme and the Buy-back Resolution. The First Scheme received the necessary majorities by shareholders and accordingly VRL applied for approval of the scheme, which would occur if the conditions to which it was subject were fulfilled. One of those conditions was approval of the Buy-back Resolution.

9. The Buy-back Resolution was under section 257D(1)(a) which requires:

   "a special resolution passed at a general meeting of the company, with no votes being cast in favour of the resolution by any person whose shares are proposed to be bought back or their associates".

10. The Buy-back Resolution obtained the necessary majorities, but the Court did not approve the scheme, because the notice of meeting had been defective[2]. The notice said that under section 257D, only ordinary shareholders could vote and people who held only Preference Shares or both Ordinary and Preference Shares (combined

[2] *Village Roadshow v Boswell Film GmbH* [2003] VSC 440, 22 ACLC 203

holders) could not vote on the resolution (for or against). A corrective notice was published just before the meeting, but was deemed by the Court to be too late.

11. On 14 November 2003, Justice Mandie of the Supreme Court of Victoria declined to approve the First Scheme, deciding that all shareholders were entitled to vote with respect to the Buy-back Resolution as follows:

    - *"Ordinary shareholders (who held no preference shares): may have voted **in favour** or **against**;*
    - *Combined shareholders* (who held both ordinary and preference shares): may only have voted (should they have wished) **against** but not in favour;*
    - *Preference shareholders* (who held no ordinary shares): may only have voted (should they have wished) **against** but not in favour."*

12. At the date of our decision, the decision of Justice Mandie was subject to an appeal[3].

13. On 12 December 2003, VRL issued a further scheme booklet for another proposed scheme of arrangement (the **Second Scheme**) on the same terms as the First Scheme, but with voting entitlements as found by Mandie J in [11]. The meetings to pass resolutions to effect the Second Scheme were held on 21 January 2004.

14. On 23 January 2004, VRL announced the results of the meetings held on 21 January 2004 and indicated that the polls in respect of the resolutions put to shareholders at each of the meetings remained open and that the meetings were adjourned to 28 January 2004.

15. On 27 January 2004, VRL announced that the Second Scheme was approved, but the Buy-back Resolution (which must be passed in order to effect the Second Scheme) had not been passed. VRL indicated that there were 3 possible outcomes for the Buy-back Resolution:

    - *"if only votes cast by members who are entitled to vote both 'for' and 'against' the resolution are to be counted in determining whether or not the resolution has duly passed, the resolution would be duly passed with a 97.65% majority.*
    - *if only votes cast by Ordinary Shareholders (including those who also hold Preference Shares or are associates of Preference Shareholders) are to be counted, then the resolution would be passed with an 85.43% majority.*
    - *if all votes cast in respect of the resolution are to be counted (i.e. if only 37% of members could cast votes 'for' whereas 100% could cast votes 'against'), then the resolution would fail with only a 70.44% 'for' vote.*

      [VRL] is continuing to seek advice in respect to the voting on this resolution and, in particular, whether or not all votes cast 'against' the resolution are to be counted in determining the outcome of the resolution as well as the eligibility of those who cast a vote on the resolution to actually cast their vote."

16. On 28 January 2004, the general meeting of VRL shareholders was adjourned, pending the outcome of the appeal mentioned in [12], and its potential relevance in determining the outcome of the poll on the Buy-back Resolution.

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[3] The Court of Appeal dismissed the appeal: *Village Roadshow Limited v Boswell Film GmbH* [2004] VSCA 16.

17. On 10 February 2004, VRL announced that that the polls on the resolutions were closed. At the date of our decision the Buy-back Resolution had not received sufficient votes to be passed.

Major holders of Ordinary Shares

18. On 12 December 2003, Village Roadshow Corporation Limited, an entity controlled by Mr Kirby and his associates, held 111,819,817 Ordinary Shares (47.60%) and Granada Danmark A/S held 42,331,109 Ordinary Shares (18.2%).

Boswell notices

19. Boswell Filmgesellschaft mbH, is a company incorporated in Germany, and holds 1000 Ordinary Shares and 1000 Preference Shares (**Boswell Parcel**). Boswell Filmgesellschaft mbH is 100% owned by Rosco Film GmbH (**Rosco**) and Mr Hans Brockmann is the managing director. Boswell Filmgesellschaft mbH, Rosco and Hans Brockmann are collectively referred to as Boswell (**Boswell**).

20. Commencing in June 2003, VRL issued tracing notices under section 672A to the Shareholder Parties to obtain the information prescribed by section 672B.

21. In response to a tracing notice dated 3 November 2003, by letter dated 7 November 2003, Boswell disclosed that it acted in its own name and had not received instructions from any third party.

22. In response to tracing notice dated 11 November 2003 to Mr Hans Brockmann and Rosco, by letter dated 15 December 2003, Hans Brockmann disclosed that he was the beneficial owner of the shares held by Boswell in VRL.

Schroders and Swissfirst notices

23. ANZ Nominees Limited (**ANZ**) was, before 21 January 2004, the registered holder of shares (**ANZ Parcel**) representing 8.63% of the Ordinary Shares and 15.42% of the Preference Shares.

24. In response to a tracing notice, ANZ disclosed by letter dated 29 October 2003 that it held the ANZ Parcel as nominee for SegaIntersettle AG (**SegaIntersettle**), a Swiss securities services corporation.

25. In response to a tracing notice, SegaIntersettle by facsimiles dated 28 October 2003 and 10 November 2003 (with respect to Ordinary Shares) and 20 January 2004 (with respect to Preference Shares), disclosed that it held the ANZ Parcel as nominee for:

    (a) Schroder and Co Bank AG (**Schroders**) as to 15,443,174 Ordinary Shares and 34,707,843 Preference Shares; and

    (b) Swissfirst Bank AG (**Swissfirst**) as to 4,823,854 Ordinary Shares and 3,885,428 Preference Shares.

26. In response to a tracing notice dated 11 June 2003 with respect to Ordinary Shares, Schroders indicated by emails dated 11 June 2003 and 25 June 2003, that it acted only "as Bare Trustee" and due to "Swiss Banking Secrecy" it was not entitled to disclose any information.

27. Further tracing notices were sent to Schroders with respect to Preference Shares on 13 June 2003 and both Preference and Ordinary Shares on 10 November 2003 and 13 February 2004.

28. Tracing notices were sent by VRL to Swissfirst on 13 June 2003 with respect to Preference Shares, and on 12 February 2004 with respect to Ordinary and Preference Shares. By letter dated 13 February 2004, Swissfirst's legal advisers indicated that Swissfirst did not hold any of the shares in VRL for its own account, the shares being held for the account of one of the customers of Swissfirst and that Swiss Banking law prohibits the disclosure of the name of the account holder and/or the beneficiary without explicit prior relief from this obligation granted by Swissfirst's customer or the Swiss Federal Banking Commission.

29. Neither Swissfirst nor Schroders provided the information requested in responses to any of the tracing notices sent to them.

001Invest and Stefan Hamm notices

30. Citicorp Nominees Pty Limited (**Citicorp**) was, before 21 January 2004, the registered holder of shares (**Citicorp Parcel**) representing 1.62% of the Ordinary Shares.

31. In response to a tracing notice Citicorp disclosed by report dated 29 October 2003 that it held the Citicorp Parcel as nominee for GNI Limited (**GNI**).

32. In response to a tracing notice, GNI disclosed by letter dated 20 January 2004, that it held:

    (a) 3,656,850 shares in VRL as nominee for Mr Thomas Davis, c/o The Meridian Group located in Bermuda; and

    (b) 150,067 shares in VRL as nominee for Mr Hamm of the British Virgin Islands.

33. In response to a tracing notice dated 29 January 2004 with respect to Ordinary Shares, Meridian Corporate Services Limited disclosed, by email dated 4 February 2004, that shares are held by GNI under the name of 001Invest World Currency Fund Ltd (**001Invest**) of which Mr Thomas Davis is a director and that Mr Davis has no beneficial ownership in the shares.

34. On 4 February 2004, a tracing notice with respect to Ordinary Shares was sent by VRL to 001Invest and a follow up letter was sent on 12 February 2004. We are not aware of any response to the tracing notice by 001Invest. Further, while 001Invest acknowledged receipt of our brief and other correspondence it did not provide any substantive response.

35. On 29 January 2004, a tracing notice with respect to Ordinary Shares was sent by VRL to Hamm and a follow up letter was sent on 12 February 2004. We are not aware of any formal response to the tracing notice by Hamm. However, in response to our brief, Mr Hamm indicated that he did not have a relevant interest in shares held by Boswell and that "no one has a relevant interest in shares controlled by [him]".

36. By letter dated 12 November 2001, from Mr Hans Brockmann to VRL on 001 Media & Entertainment AG letterhead, Mr Brockmann refers to a "deal" with VRL and to Mr Stefan Hamm as his "partner" and copies the letter to S. Hamm.

Proxies for Second Scheme meeting

37. On 19 January 2004, ANZ lodged an open proxy in favour of Mr Con Plastiras, a partner of the law firm Plastiras Meredith Mohr, to vote with respect to the ANZ Parcel at the VRL general meetings held on 21 January 2004.

38. On 15 January 2004, Boswell lodged an open proxy in favour of Mr John Meredith, also a partner of Plastiras Meredith Mohr, to vote with respect to the Boswell Parcel at the VRL meetings held on 21 January 2004.

39. On 15 January 2004, GNI requested that Citicorp lodge an open proxy in favour of Mr Mark Stunden, a barrister in Queensland, to vote with respect to the Citicorp Parcel at the VRL general meetings held on 21 January 2004. VRL alleged in the Application that Mr Stunden had *"been engaged by Plastiras Meredith Mohr in relation to this matter*".

Declaration and orders sought in the Application

40. VRL sought orders that:

    (a) "[the shareholders holding about 15.42% of the Preference Shares and 10.25% of the Ordinary Shares, who voted against the Buy-back Resolution] disclose:

        (i) the identity of the person or persons using them as a front; and

        (ii) the instructions they received in relation to that purpose; and

    (b) if the Panel considers that either or both:

        (i) the conduct of the persons behind [Boswell]; and

        (ii) the failure of [Boswell] to properly respond to the tracing notices and the fact that this led to VRL and the market being uninformed,

    was unacceptable, the votes of the persons behind [Boswell] be disregarded for the purpose of determining whether resolutions put [to the Second Scheme meeting] on 21 January 2004 were passed."

41. VRL suggested that one option was for the Panel to order that the poll on the Buy-Back Resolution be reconducted at a resumed general meeting with the Shareholder Parties prohibited from voting against the resolution.

DISCUSSION

Preference Shares – non voting shares

42. Sub-section 672A(1) provides:

    *"**[Direction to make disclosure]** ASIC, a listed company or the responsible entity for a listed managed investment scheme, may direct:*

    (a) A member of the company or scheme; or

    (b) A person named in a previous disclosure under section 672B as having a relevant interest in, or having given instructions about, voting shares in the company or interests in the scheme;

    to make the disclosure required by section 672B.

43. Sub-section 672B(1) provides:

*"**[Content of disclosure when direction given]** A person given a direction under section 672A must disclose to the person giving the direction:*

(a) full details of their own relevant interest in the shares or interests in the scheme and of the circumstances that give rise to that interest; and

(b) the name and address of each other person who has a relevant interest in any of the shares or interests together with full details of:

(i) the nature and extent of the interest; and

(ii) the circumstances that give rise to the other person's interest; and

(c) the name and address of each person who has given the person the instructions about:

(i) the acquisition of or disposal of the shares or interests; or

(ii) the exercise of any voting or other rights attached to the shares or interests; or

(iii) any other matter in relation to the shares or interests;

together with full details of those instructions (including the date or dates on which they were given)."

44. Tracing notices were issued by VRL under sub-section 672A(1) with respect to both Ordinary and Preference Shares. As set out above, a notice under sub-section 672A(1)(a) (**primary tracing notice**) can be given to any member, that is anyone who holds shares of any class and that person must give the information required by section 672B[4]. Thus the tracing notices sent to ANZ, Citicorp and Boswell Filmgesellschaft mbH in their capacity as holders of the Preference Shares required them to give details in relation to the shares. There was no suggestion that ANZ or Citicorp failed to give adequate information in response to the various tracing notices given to them.

45. A notice under sub-section 672A(1)(b) (**secondary tracing notice**) can only be given to a person named in a previous response to a tracing notice as having a relevant interest in "voting shares" or having given instructions in relation to "voting shares".

46. "Voting share" is defined in section 9 as issued shares in a body that carry voting rights beyond certain prescribed rights. Each of VRL, Boswell and ASIC submitted that the Preference Shares do not include any rights beyond those prescribed and as such are not voting shares.

47. We agree that the Preference Shares are not voting shares. Thus, any such secondary tracing notice issued with respect to Preference Shares was invalid and did not legally require a response. We ignored all failures to respond to those secondary tracing notices as any non-compliance with them did not give rise to unacceptable circumstances.

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[4] It may appear to be somewhat illogical that a secondary notice cannot be given in relation to non-voting shares, although it is possible that a primary notice can be, but we consider that the legislative words make it inevitable. In terms of policy (see [49] – [51]), we consider that the important aspect of these provisions is that they relate to voting securities which are the only securities to which the substantial holding provisions apply. It may be implicit in paragraph 672A(1)(b) that notices under paragraph 672A(1)(a) can only be given to members who are holders of voting shares. For present purposes, there is no need to resolve this issue.

48. We note that although the Preference Shares are not voting shares under section 9, there are times when a holder of Preference Shares can vote at a general or class meeting in respect of these shares.

49. VRL submitted that the failure to disclose who controlled the voting and disposal of Boswell's Preference Shares was unacceptable given the role of Preference Shares in an attempted takeover, that is, the ability of VRL preference shareholders to influence the affairs of the company and that the policy of Part 6C.2 is to ensure full and complete disclosure. We do not agree with VRL's submissions. In general we consider that being able to block a specific transaction by the use of the voting power conferred in limited circumstances which include transactions of that kind, is not control.[5]

Purpose of tracing notice provisions

50. We consider that a contravention of Part 6C.2 by failing to respond accurately or at all to tracing notices where required to do so may constitute unacceptable circumstances as the market will be trading on an uninformed basis, contrary to the policy objectives articulated in section 602 and underpinning Chapter 6C.

51. Section 602 provides, among other things, that the purpose of Chapter 6 is to ensure that the acquisition of control over the voting shares in a listed company takes place in an efficient, competitive and informed market (section 602(a)(1)) and the holders of the shares and the directors of the company know the identity of any person who proposes to acquire a substantial interest in the company (section 602(b)(i)). Although section 602 does not in terms state that these purposes also apply to Chapter 6C, we consider that they do and that we are required by section 657A(39) to consider these purposes when considering under section 657A(2)(b) whether a contravention of Chapter 6C is unacceptable.

52. The tracing notice provisions of Part 6C.2 enable companies to ascertain relevant interests in their shares and in turn protect against any breach of the substantial holding disclosure requirements of Part 6C.1.

53. In *Re North Broken Hill Holdings Ltd*[6], North Broken Hill Ltd sent tracing notices to a shareholder bank under predecessor provisions to sections 672A and 672B in Victoria. The relevant response was received one month after the notice had been issued. The Court ordered that the shares in question be vested in the NCSC and subsequently sold on the basis that the bank had taken more than the required two days to respond to the tracing notices. The Court noted that the purpose of the tracing notice provisions is to promote an informed market for the shares in public companies.[7]

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[5] *Mendes v Commissioner for Probate* (1967) 122 CLR 152 and *Re The News Corporation Ltd and Others* [1987] 70 ALR 419

[6] (1986) 10 ACLC 270

[7] at 282

VRL tracing notices

Service and fees

54. Section 672B(2) provides that a person must make the disclosure requested in response to a direction under section 672B(1), within 2 business days after the person is given the direction. In light of the responses received to the tracing notices provided to Boswell, Schroders and Swissfirst, we assume that the notices were received, despite not having any details of receipt.

55. Neither Hamm nor 001Invest directly responded to tracing notices sent by VRL. Hamm indicated in his response to our brief that he was "not aware of violating any reporting obligation" and requested explanation of what a tracing notice is. Despite this, we were provided with copies of the tracing notices and subsequent reminder letters sent to both Hamm and 001Invest (refer [29] and [34]). Further, during the Proceeding both Hamm and 001Invest were made aware of the tracing notices and VRL's intentions. The correspondence received by us from Hamm and Mr Davis showed that they had received these materials because they were referred to in our brief and the parties submissions and copies of them accompanied the Application. Accordingly, we decided that it was reasonable to infer that the notices and letters had been received by both Hamm and 001Invest.

56. We do not accept the argument of Boswell that payment of the $5 fee, payable under paragraph 672C(2)(c) and prescribed by the *Corporations Regulations* 2001,[8] by cheque was not sufficient to satisfy the requirement for payment. As there had been tender of payment by way of cheque which had not been rejected expressly, payment could be assumed to have been made, which we knew they received from emails received in reply.

Responses – failure to comply

57. As set out in [29] and [34], Schroders, Swissfirst and 001Invest did not provide any of the information requested in any of the tracing notices sent to them. Further, our requests for information, which we sent to each of them and receipt of which they acknowledged, provided another opportunity for them to provide the information requested and also drew to their attention their obligations under, and their breach of, section 672B and further the possible consequences of breach.

58. We decided that the continuing failure of Schroders, Swissfirst and 001Invest to respond fully and adequately to tracing notices served on them under section 672A(1)(b) with respect to Ordinary Shares constituted a breach of section 672B. Further, we also considered the Shareholder Parties' failure to respond fully and adequately to requests for information sent to them by us.

59. Swissfirst and Schroders failed to provide any information requested in tracing notices sent to them, but replied indicating that Swiss Banking Law prevented them from disclosing the information requested.

60. The Courts have clearly indicated in *Australian Securities Commission v Bank Leumi Le-Israel (Switzerland) and Others* [9] that the failure of Swiss companies to provide notices

[8] Item 5 Schedule 4

[9] (1996) 21 ACSR 474

under section 672B is a contravention of section 672B, even though it may take place in Switzerland and they would breach Swiss banking laws by providing the information. Essentially, confidentiality requirements under foreign law do not relieve a recipient of a tracing notice from complying with section 672B or constitute a basis for excusing contravention of that section.

61. As previously set out, 001Invest did not respond to tracing notices sent on behalf of VRL, but we infer that the tracing notices were in fact received. In response to our brief, 001Invest through Mr Davis requested an extension of time to provide submissions, but never provided us with these submissions.

62. Given that the shares to which the non-disclosure by Schroders, Swissfirst and 001Invest relates (**Sale Shares**) constitute approximately 10.2% of the total number of Ordinary Shares and an even greater percentage of the Ordinary Shares available to vote on many resolutions given related party issues, we consider that the breaches of section 672B in relation to the Sale Shares, taken in aggregate resulted in unacceptable circumstances. This does not involve an inference that the clients of Swissfirst, Schroders and 001Invest are the same persons or associated.

Responses – substantive compliance

63. Boswell responded to each of the tracing notices sent on behalf of VRL, although several of the responses were outside the time for making disclosure under section 672B(2), being within 2 business days after the person is given the direction. Despite the delay in providing responses to notices, we consider that Boswell had made reasonable efforts to comply. Further, Boswell engaged legal representatives in Australia who responded on Boswell's behalf to our queries, providing sufficient explanations of Boswell's responses.

64. Despite the fact that Hamm did not respond to tracing notices issued on behalf of VRL, he confirmed in writing to us that he:

    (a) is not controlled by anyone and has the absolute power to make investment decisions with respect to the VRL shares held by him;

    (b) does not have a relevant interest in shares owned by Boswell and no one has a relevant interest in the shares controlled by him; and

    (c) is not aware of violating any obligations to respond to tracing notices.

65. With respect to both Boswell and Hamm, because the parcels of VRL shares held by them are not material in size and because they provided the information required by section 672B, we consider that any breach in relation to the Ordinary Shares held by them did not result in unacceptable circumstances at the time of our decision.

Association – no clear evidence

66. VRL submitted that the Buy-back Resolution had not received sufficient votes to be passed because persons holding 15.42% of the Preference Shares and 10.25% of the Ordinary Shares voted against the Buy-back Resolution. VRL asserted that those persons included Boswell, Swissfirst, Schroders and GNI, the Shareholder Parties, and that the circumstances surrounding the Application, including evidence of association, raised questions as to whether the Shareholder Parties had contravened

the takeover prohibition in section 606 and the substantial holder notice requirements in section 671B(1).

67. VRL highlighted various facts which it asserted amounted to evidence of an association, including the provision of various correspondence which purported to link Boswell and Hamm as business associates[10]. VRL also highlighted the fact that each of ANZ and Boswell appointed a partner of Brisbane law firm Plastiras Meredith Mohr as their proxy, and that GNI appointed a barrister who had allegedly been engaged by Plastiras Meredith Mohr. Each proxy voted the same way at the meetings on 21 January 2004.

68. Further, VRL noted in its submissions that GNI instructed that a copy of the proxy form go to its proxy Mr Stunden and also Mr Meredith (Boswell's proxy). VRL also asserted that the form of the instructions given by the shareholder in respect of the 'open' proxy for each of ANZ, Boswell and GNI was substantially the same.

69. In response to VRL's submissions, Boswell submitted that it had advised any VRL shareholders with whom it was in contact that it was appointing Plastiras Meredith Mohr its proxy. Further, Boswell responded that previously Mr Brockmann had joined Hamm and incorporated special purpose companies to invest in VRL's film production company, that the investment had not eventuated and that Hamm and Mr Brockmann had not been in contact for over one year.

70. We consider that Boswell had sufficiently explained Mr Brockmann's prior relationship with Hamm and any cooperation that may have existed with respect to the appointment of proxies. We decided that there was not sufficient evidence to conclude that there was any association between any of the Shareholder Parties.

71. We considered that circumstances in these proceedings could be distinguished from those in *Online Advantage Limited*[11] where the Panel decided that co-operation between shareholders to secure the adjournment of a meeting constituted an association. In *Online Advantage* the Panel decided that there was a relevant agreement to act in concert by co-operating to achieve an explicit common goal to adjourn the meeting instead of allowing it to vote. The Panel considered that it was probable that there had been some consultation over the form of proxies and there were close business ties between several parties. The agreement constituted an association which had the effect of achieving a 28% voting power. We consider the Panel's statements at [54] and [55] relevant:

> *"In general, it does not offend against the policy of section 602 for people to buy and vote shares in a company, even if by doing so they change the policies of the company and frustrate the intentions of previous directors and shareholders, provided they do not do so in ways which contravene section 606 or otherwise represent combinations to purchase a block of over 20% of the votes, directly or indirectly.*
>
> *Nor is it offensive for like-minded shareholders to vote the same way (including to replace a board), if each of them votes in that way because they see it as in their interest as a shareholder to vote in that way, and they do not vote together because they have entered into an understanding, affecting 20% or more of the votes, to exercise joint*

[10] See [36]
[11] [2002] ATP 14

> *control over the company. After all, resolutions are put to a vote just so that shareholders can resolve disputed questions by majority, according to their perception of their respective interests."*

72. We also considered the Panel's discussion with respect to association in *Winepros Limited.*[12]

Unacceptable Circumstances

Failure to comply with tracing notices and disclose information

73. The Panel may make a declaration concerning a contravention of the tracing notice provisions under section 657A(2)(b) if the Panel is satisfied that the contravention is an unacceptable circumstance.

74. We consider that there have been contraventions of the tracing notice provisions contained in Chapter 6C in relation to VRL and that the Sale Shares to which those contraventions related were in aggregate material to the control of VRL.

75. Due to those contraventions and the substantial number of the Sale Shares, it was impossible to determine whether or not the substantial shareholding notice provisions had also been breached. The continuing contraventions resulted in the market being potentially misinformed, and therefore were sufficient in themselves to constitute unacceptable circumstances.

76. This is consistent with the Courts' previous approach to tracing notice breaches – the Courts have considered these breaches sufficiently serious to warrant action: *Re North Broken Hill Holdings Ltd*, *Australian Securities Commission v Bank Leumi Le-Israel (Switzerland) and Others* and *Brunswick NL v Blossomtree Pty Ltd* .[13]

77. The circumstances in this Proceeding can be distinguished from previous Court decisions relating to breaches of the tracing notice provisions in that the shares to which it related were held by more than one nominee. However, whenever one or more nominees refuse to disclose for whom they are holding shares, the number, identity and interests of their principals are unknown and the circumstances causing the unacceptability may arise.

78. In deciding whether the breaches of Chapter 6C created unacceptable circumstances, we considered the policy reasons behind the tracing notice provisions. They are there to promote an informed market for shares in public companies and are in effect anti-avoidance provisions enabling compliance with the substantial shareholding notice provisions. The policy objectives behind the tracing notice provisions are consistent with the purposes outlined in sections 602(a) (ensuring an efficient, competitive and informed market) and 602(b) (knowing the identity of any person who proposes to acquire a substantial interest). Because of the anti-avoidance nature of the provisions, it was not necessary to conclude that the individual parcels were held by associated beneficial owners to find the circumstances resulting from breaches in relation to a substantial number of shares were unacceptable.

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[12] [2002] ATP 18, 43 ACSR 566

[13] (1992) 10 ACSR 542

79. As discussed, we consider that the Sale Shares (being 10.2% of Ordinary Shares on issue) are substantial. However, we also take account of the substantial shareholdings already in VRL. With Village Roadshow Corporation Limited, holding 47.6% and Granada Danmark A/S holding 18.2%, this meant that 10.2% was a large proportion of the free float of VRL Ordinary Shares which yielded significant voting power where the 47.6% holding could not vote.

80. We do not consider that an association between the Shareholder Parties was required to be established. Regardless of any association, the tracing notice provisions were breached and the market was unaware of the controllers of 10.2% of Ordinary Shares which in itself was unacceptable. People who fail to respond to tracing notices, in relation to parcels which are insubstantial in isolation, assume the risk that their breaches will contribute to a substantial default in aggregate.

Voting on Buy-back resolution not unacceptable

81. We do not consider that the unacceptable circumstances identified in the Proceeding would be remedied by an order affecting the result of the Buy-back Resolution. Voting on a resolution is not of itself necessarily unacceptable, there is no requirement under a tracing notice to disclose voting intentions and disclosure of relevant interests or associations in responses to tracing notices would not have shown the holding of Ordinary Shares to be disqualified from voting on the Buy-back Resolution (unless they were shown to be associates of other shareholders who were already disqualified from voting). Ultimately we considered that there was no evidence that if the tracing notice provisions had not been breached the result of the Buy-back Resolution would have been different.

82. We note that ASX Listing Rule 3.1 no longer requires responses to tracing notices to be disclosed unless that information would have a material effect on the price or value of the entity's securities.

83. We did not accept VRL's argument that had its shareholders known of the control over the Ordinary Shares held by the Shareholder Parties, they may have voted differently by supporting the Buy-back Resolution. There was no evidence to suggest that knowing who the beneficial owners of the Sale Shares were would have influenced VRL shareholders to support the Buy-back Resolution.

84. Further, we did not accept VRL's argument that persons who previously sold some of their VRL shares would not have sold the number they did had they known that the Shareholder Parties intended to use their shares to seek to defeat the Second Scheme. Disclosure of beneficial ownership would not necessarily assist shareholders in this regard as there is no legal requirement to disclose voting intentions with respect to proposed resolutions.

Role of the Panel

85. From the outset we were concerned not to trespass on areas of responsibility of ASIC and/or the Court, but to facilitate their roles.

The Court's role - schemes of arrangement

86. The question arose in the Proceeding whether we should decline to make any declaration or decision, on the basis that the proposed buy-back of Preference Shares

was connected with the Second Scheme which would only take effect if it was approved by the Court.

87. The issues raised in the Application are not issues the Court will or should take into account in deciding whether or not to approve the Second Scheme, and a decision on the Application does not involve us in prejudging any issue which will or should be decided by the Court. We agree with ASIC's submission that the Court's role in relation to an application to approve a scheme of arrangement has some limits. In considering whether to approve the Second Scheme, the Court has no capacity to vary the outcome of the Buy-back Resolution, the relief which VRL sought from us.

88. By similar reasoning we considered that our decision would not interfere with VRL's appeal against Mandie J's decision not to approve the First Scheme.

DECISION

Declaration

89. As discussed in these reasons, we decided that the various contraventions of sub-section 672B(1) the subject of the Proceeding were unacceptable. Accordingly, we make a declaration under sub-section 657A(2)(b).

90. As mentioned in [87] we did not consider that contraventions of sub-section 672B(1) would be addressed by the Court. Further, we consider that if ASIC took issue with the contraventions, the Panel would be an appropriate forum for them to be dealt with.

91. Our declaration of unacceptable circumstances is set out in Annexure C.

Orders

Interim Orders – Annexure B

92. We made interim orders on 13 February 2004 which restricted the transfer or disposal of all Ordinary Shares in the Boswell Parcel, ANZ Parcel and Citicorp Parcel until the conclusion of the Proceeding.

93. We considered it desirable to make these interim orders because, based on the submissions received from parties, it was clear that one potential order, should unacceptable circumstances be established, could be the forced disposal of any or all of those shares.

94. We made the interim orders to prevent the Sale Shares from being shifted during the course of the Proceeding, which would have:

    (a) rendered any such final orders ineffective; and

    (b) required VRL to recommence the tracing notice process with respect to the relevant parcels.

95. Our interim orders are set out in Annexure B.

Orders sought by VRL not appropriate

96. We do not consider that the unacceptable circumstances identified in the Proceeding would be remedied by an order affecting the result of the Buy-back Resolution. Such an order would not address the fact that substantial parcels of Ordinary Shares were

held by unidentified parties and that the market was therefore trading on an uninformed basis. It is not clear that such an order would protect the rights or interests of any person affected by the unacceptable circumstances of the non-disclosure: section 657D(2)(b).

97. VRL asserted in its submissions that market participants may have acted differently in respect of the Second Scheme had the relevant parties complied with the disclosure obligations under Chapter 6C. However, we rejected VRL's arguments at [83] and [84] and consider that this was mere conjecture.

Delay in Application

98. It was raised in ASIC's submissions that VRL was aware of Schroders' and Swissfirst's non-compliance with Chapter 6C well before the First and Second Schemes. VRL responded that although they were aware of the breaches, they did not become aware of the "association" of these parties with Boswell until 19 January 2004, when proxies for the Second Scheme meeting were submitted.

99. We determined that the submissions provided by the parties did not clearly establish that the Shareholder Parties (i.e. Schroders, Swissfirst, Boswell, Hamm and 001Invest) are or were associates for the purposes of section 12(2). The unacceptable circumstances arise due to the non-disclosure in response to tracing notices issued, which resulted in the market being uninformed about the identity of holders of 10.2% of the Ordinary Shares, irrespective of whether those holders were associated. Therefore, VRL was aware of the unacceptable circumstances well before the Buy-back Resolution was put to VRL shareholders. We took this into account in concluding that retrospective orders were not appropriate.

Order to vest and sell shares – Annexure D

100. The Full Federal Court has held that, although a Swiss bank may be acting in contravention of Australian law, it is an appropriate exercise of discretion by the Court to take into account that a specific relief sought (such as requiring disclosure in response to tracing notices) may compel conduct which is in breach of law, such as Swiss secrecy law: *Australian Securities Commission v Bank Leumi Le-Israel (Switzerland) and Others* per Lehane J at 488. We considered it appropriate to take account of this issue when exercising our discretion regarding appropriate orders.

101. Both Schroders' and Swissfirst's responses to secondary tracing notices issued on behalf of VRL refer to prohibitions under Swiss banking law which prevent them from disclosing the information sought without consent. Nothing in the parties' submissions refuted the claim by Schroders and Swissfirst that they were subject to these prohibitions. In the circumstances, we considered it preferable to avoid making any order which may expose those corporations or their officers to prosecution under Swiss law.

102. We considered that an order for the vesting of the Sale Shares in ASIC to be sold by bookbuild adequately served the primary objects of the disclosure provisions to create and maintain an informed market for shares in listed companies, in circumstances where an order to comply may have resulted in a breach of foreign law. Through the vesting and sale process, the Sale Shares will be removed from those parties who are sheltering behind their Swiss nominees' inability to comply

with the disclosure requirements of the tracing notices and will be acquired by non-related parties.

103. Our final orders are set out in Annexure D. Order 2 was varied at the request of ASIC on 2 April 2004 to enable a broker to conduct the sale of the Sale Shares who itself provided statutory declarations satisfying ASIC and the Panel of its independence but was unable to provide them with respect to its foreign related entities.

Unfair prejudice

104. The Panel must not make an order if the order would unfairly prejudice any person: section 657D(1). The vesting and sale of the Sale Shares is plainly prejudicial to their beneficial owners.

105. Not all prejudice is unfair, however, and whether particular prejudice is unfair to a particular person depends on their role in the transaction.

106. Once we found that concealment of relevant interests in 10.25% of the shares in VRL constituted unacceptable circumstances, we sought to remedy those circumstances in the manner which caused the least unnecessary collateral damage.

Structure of sale process

107. There was no existing takeover bid for the Ordinary Shares at the time of the vesting order to support the market for VRL shares during the vesting process as has been the case often when the Courts have made vesting orders. We were mindful of the need to ensure that the vesting process does not overly disrupt the market for VRL shares or unnecessarily prejudice the beneficial holders of the Sale Shares by obtaining a less than fair price for the Sale Shares.

108. In order to achieve these objectives, the vesting orders established a sale process on the following basis:

    (a) allowing adequate time for a bookbuild to be established; and

    (b) requiring the broker to seek the maximum price possible and setting the minimum sale price at the prevailing market price on the date immediately prior to the order.

109. However, each purchaser was prohibited from acquiring more than 1% of the total Ordinary Shares to ensure that no new voting blocks are created through the vesting process and to try and prevent the beneficial owners of the Sale Shares from simply re-acquiring the Sale Shares through nominees participating in the bookbuild process. We also required each purchaser to provide a statutory declaration that they were not an associate of the beneficial owners of the Sale Shares to reduce the risk that those owners would simply arrange for the shares to be sold to associates.

110. The vesting orders provide flexibility to ASIC to apply for variations of the orders should the prescribed sale process prove too restrictive or unworkable.

Ancillary order - meeting restriction

111. We made an ancillary order restricting VRL from reopening any poll from a previously held meeting or holding any general meeting at which votes attached to

Ordinary Shares are to be cast during the period in which ASIC has to sell the Sale Shares.

112. It is ASIC's policy not to cast votes attached to shares vested in it. As indicated above, the Panel considered the aggregate Sale Shares to be material to the control of VRL, in part due to the size of the 'free float' in Ordinary Shares. ASIC argued in its submissions and the Panel agreed that it was appropriate to make the ancillary order to ensure that the vesting of the Sale Shares does not distort the voting process on any significant resolution.

113. To ensure that this order does not unfairly prejudice VRL or its shareholders, the order provides that VRL may seek the prior approval of the Panel or act in accordance with a court order to reopen a poll or hold a general meeting, should the circumstances require it.

Costs

114. The Panel decided that no cost orders should be made.

Michael Tilley
President of the Sitting Panel
Decision dated 16 February 2004
Reasons published 7 April 2004

Annexure A – share ownership matrix

BOSWELL (Hans Brockmann – Managing Director)	**ANZ NOMINEES**	**ANZ NOMINEES**	**CITICORP NOMINEES**	**CITICORP NOMINEES**
• 1000 ordinary shares • 1000 preference shares ↓ **Rosco**	• 15,443,174 (6.5%) ordinary shares • 34,707,843 (13.87%) preference shares ↓ **SegaIntersettle** ↓ **Schroders**	• 4,823,854 (2.05%) ordinary shares • 3,885,428 (1.55%) ordinary shares ↓ **SegaIntersettle** ↓ **Swissfirst**	• 3,656,850 (1.56%) ordinary shares ↓ **GNI Limited** ↓ **001 Invest** (Davis – Director)	• 150,067 (0.64%) ordinary shares ↓ **GNI Limited** ↓ **Stefan Hamm**

Annexure B – Copy of Interim Orders in Village Roadshow

Corporations Act
Section 657E
Interim Order

In the matter of Village Roadshow Limited

Pursuant to section 657E of the *Corporations Act 2001* (Cth) the Takeovers Panel HEREBY ORDERS each of the persons named below not to transfer or dispose of, in any respect, the ordinary shares (**Ordinary Shares**) in Village Roadshow Limited, specified in relation to that person:

- 1000 Ordinary Shares held by Boswell Filmgesellschaft mbH;
- 15,443,174 Ordinary Shares held by ANZ Nominees Limited as nominee for SegaIntersettle AG on behalf of Schroders and Co Zuerich;
- 4,823,854 Ordinary Shares held by ANZ Nominees Limited as nominee for SegaIntersettle AG on behalf of Swissfirst Bank Zuerich;
- 3,656,850 Ordinary Shares held by Citicorp Nominees Pty Limited as nominee for GNI Limited on behalf of 001 Invest World Currency Fund Ltd; and
- 150,067 Ordinary Shares held by Citicorp Nominees Pty Limited as nominee for GNI Limited on behalf of Mr Stefan Hamm.

This interim order remains in effect until the first to occur of:

(a) a further order by the Takeovers Panel;

(b) 12 April 2004; or

(c) the conclusion of the proceeding.

Michael Tilley
President of the Sitting Panel

Dated 12 February 2004

Annexure C – Copy of Declaration of Unacceptable Circumstances in Village Roadshow

Corporations Act
Section 657A
Declaration

In the matter of Village Roadshow Limited

WHEREAS:

A. Swissfirst Bank AG, the holder of a beneficial interest in approximately 2.05% of the ordinary shares in Village Roadshow Limited (**VRL**), has failed to comply with section 672B of the Corporations Act (**Act**) by not disclosing the details required by that provision in response to notices relating to ordinary shares given on behalf of VRL under section 672A of the Act on 11 June 2003 and 13 February 2004.

B. Schroders and Co Zuerich, the holder of a beneficial interest in approximately 6.57% of the ordinary shares in VRL, has failed to comply with section 672B of the Act by not disclosing the details required by that provision in response to notices relating to ordinary shares given on behalf of VRL under section 672A of the Act on 11 June 2003, 10 November 2003 and 13 February 2004.

C. 001Invest World Currency Fund Ltd, the holder of a beneficial interest in approximately 1.56% of the ordinary shares in VRL, has failed to comply with section 672B of the Act by not disclosing the details required by that provision in response to a notice relating to ordinary shares given on behalf of VRL under section 672A of the Act on 4 February 2004.

Under section 657A of the Act, the Takeovers Panel declares that the circumstances set out in recitals A to C are unacceptable circumstances in relation to the affairs of VRL.

Dated 17 February 2004.

Denis Byrne
By authority of the Sitting Panel

Annexure D – Copy of Orders in Village Roadshow

Corporations Act
Section 657D
Final Orders

In the matter of Village Roadshow Limited

Pursuant to section 657D of the Corporations Act 2001 (**Act**) and pursuant to a declaration of unacceptable circumstances made by the Panel on 17 February 2004, the Takeovers Panel HEREBY ORDERS:

(1) that the legal title to and beneficial ownership of the ordinary shares in Village Roadshow Limited (**VRL**) listed in the Schedule (the **Sale Shares**) be vested in the Australian Securities and Investments Commission (**ASIC**) by the transfer of the Sale Shares by the holders to ASIC, to sell the Sale Shares by bookbuild and account to ANZ Nominees Limited and Citicorp Nominees Pty Limited as appropriate (who shall account to the person on whose behalf they hold the Sale Shares) for the proceeds of sale, net of the costs, fees and expenses of the sale (including the costs, fees and expenses incurred by ASIC in complying with order (2));

(2) that ASIC retain a competent and independent broker (**Broker**) to conduct the sale, who (in order to assist ASIC to determine whether it is independent) has provided a statutory declaration that states that, having made proper inquiries, either:

(a) the Broker, having made appropriate enquires, is not aware that it or any of its related entities that carries on business in Australia has acted in the course of a financial services business for any of the following (the **Parties**) or any associate of a Party in the past 12 months in any respect:

- VRL;
- Schroders and Co Zuerich;
- Swissfirst Bank AG;
- GNI Limited;
- Segaintersettle AG;
- 001Invest World Currency Fund Limited;
- Meridian Corporate Services Limited; or

(b) if one or more of them has so acted, sets out full particulars in respect of each of them of the circumstances in which it acted (including, the terms of its engagement to act, the conduct involved in so acting the amounts received by it for so acting and the circumstances in which it ceased to act).

(3) ASIC will instruct the Broker:

(a) that none of the Parties nor any respective associate may buy any of the Sale Shares;

(b) to seek to maximise the sale price of the Sale Shares while not selling more than 1% of the total ordinary shares in VRL to any person, alone or together with its associates (the **1% cap**);

(c) that it obtain from any prospective purchaser of Sale Shares a statutory declaration or statement in accordance with rule 7.1(c) of the Panel's Rules for Proceedings:

(i) that it is not associated with any of the Parties; and

(ii) setting out, to the best of its knowledge, the identity of any associate who is bidding for any of the Sale Shares;

(4) without limiting ASIC's ability to seek further orders, that ASIC seek further orders from the Panel if:

(a) the Broker is unable to dispose of the whole parcel within the 1% cap within 6 weeks from the date of this order, at a price not below $1.72 per share, and without unduly depressing the market price of VRL ordinary shares;

(b) the Broker receives bids which are so high as to suggest that the bidder is indifferent as to the price it pays;

(c) it appears to the Broker, in the course of the bookbuild, that selling under the 1% cap would materially reduce the return to the beneficial owners of the Sale Shares on the sale;

(5) that each of ANZ Nominees Limited and Citicorp Nominees Pty Limited not sell, transfer, mortgage or otherwise deal with the Sale Shares (except to give effect to the vesting or sale), or exercise the votes attached to the Sale Shares, until the vesting is completed by registration of a transfer or transmission of the Sale Shares (**Transfer**);

(6) that VRL not register any transfer or transmission of the Sale Shares (except to give effect to the vesting) or pay any dividend on the Sale Shares, until Transfer;

(7) that during the period specified in order (4)(a) (or any further period ordered by the Panel in which ASIC is to dispose of the Sale Shares), without an order of the Court or the prior approval of the Panel, VRL not reopen a poll taken at any meeting previously held or hold any general meeting at which votes attached to ordinary shares are entitled to be cast on any item of business;

(8) that in this document, "**associate**" has the meaning given to that term by sections 12, 15 and 16 of the Act with the modification that in sub-paragraph 12(2)(a)(ii) the expression "a body corporate" is replaced by the expression "an entity";

(9) that each party have the liberty to apply for further orders in relation to the matters covered by orders (2), (3), (4) and (7).

Schedule - the Sale Shares

(A) 15,443,174 ordinary shares in VRL held by ANZ Nominees Limited;

(B) 4,823,854 ordinary shares in VRL held by ANZ Nominees Limited; and

(C) 3,656,850 ordinary shares in VRL held by Citicorp Nominees Pty Limited.

Dated 17 Februay 2004
Denis Byrne
On behalf of the Sitting Panel

Annexure E – Lexicon of terms defined in these reasons

Term	Definition	Where defined (para)
001Invest	001Invest World Currency Fund Ltd	33
ANZ	ANZ Nominees Limited	23
ANZ Parcel	8.63% of Ordinary Shares and 15.42% of Preference Shares held by ANZ for SegaIntersettle who held them for Schroders and Swissfirst	23
Application	Application under section 657C made by VRL on 23 January 2004.	1
ASX	Australian Stock Exchange Limited	6
ASIC	Australian Securities and Investments Commission	4
Boswell	Collectively Boswell Filmgesellschaft mbH, Rosco and Mr Hans Brockmann	19
Boswell Parcel	1000 Ordinary Shares and 1000 Preference Shares held by Boswell Filmgesellschaft mbH	19
Buy-back Resolution	A resolution to approve the selective buy-back of all Preference Shares	7
Citicorp	Citicorp Nominees Pty Limited	30
Citicorp Parcel	1.62% of Ordinary Shares held by Citicorp for GNI who hold them for 001Invest	30
First Scheme	Scheme of arrangement proposed by scheme booklet dated 26 September 2003 to buy-back all Preference Shares	7
GNI	GNI Limited	31
Hamm	Mr Stefan Hamm	4
Ordinary Shares	Ordinary shares in VRL	6
Preference Shares	A class preference shares in VRL	6
Rosco	Rosco Film GmbH	19
Sale Shares	10.2% of the Ordinary Shares held by Schroders, Swissfirst and 001Invest, the subject of the Panel's declaration and orders	62
Schroders	Schroder and Co Bank AG	25
Second Scheme	Scheme of arrangement on the same terms as the First Scheme, proposed by scheme booklet dated 12 December 2003	13

SegaIntersettle	SegaIntersettle AG	24
Shareholder Parties	Boswell, Schroders, Swissfirst, 001Invest and Hamm	4
Swissfirst	Swissfirst Bank AG	25
VRL	Village Roadshow Limited	1