



**In the matter of Data & Commerce Limited  
[2004] ATP 7**

**Catchwords:**

*Non-renounceable rights issue – prospectus disclosure – underwriting – voting power – equal opportunity to share in benefits – supplementary disclosure – shareholder approval – withdrawal rights*

*Corporations Act 2001 (Cth), sections 606, items 10 and 13 of 611, 710, 713 and 724*

*InvestorInfo Limited [2004] ATP 6*

**These are our reasons for concluding proceedings in relation to the affairs of Data & Commerce Limited without making a declaration of unacceptable circumstances following the lodgement and dispatch of a supplementary prospectus by Data & Commerce Limited.**

**THE PROCEEDING**

1. These proceedings relate to an application (the **Application**) by Radio Australia Pty Ltd (**RAPL**) and its associate Andros Nominees Pty Ltd (**Andros**) (RAPL and Andros collectively, **Radio Australia**) under sections 657A and 657D of the *Corporations Act 2001 (Cth)* (the **Act**)<sup>1</sup> for a declaration of unacceptable circumstances and final orders in relation to the affairs of Data & Commerce Limited (**DCL**).

**THE PANEL & PROCESS**

2. Andrew Knox (sitting President), Michael Ashforth (sitting Deputy President) and Simon Withers were the sitting Panel for the proceeding (the **Proceeding**) conducted on the Application.
3. We adopted the Panel's published procedural rules for the purposes of the Proceeding.

**APPLICATION**

4. The Application was dated 30 April 2004, but the Panel was not aware of it until 6 May 2004.
5. On 10 May 2004 we decided to conduct proceedings in relation to the issues raised in the Application and issued a brief (the **Brief**) under Regulation 20 of the *Australian Securities and Investments Commission Regulations 2001 (Cth)*.

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<sup>1</sup> All statutory references are to the Act, unless otherwise indicated.

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#### Factual Background

6. The following description of the facts underlying the Application has largely been taken from the Application and the short form rights issue prospectus lodged with ASIC by DCL on 14 April 2004 (the **Original Prospectus**), the supplementary prospectus lodged with ASIC by DCL on 15 April 2004, (**Supplementary Prospectus**) (the Original Prospectus and the Supplementary Prospectus collectively, the **Prospectus**), DCL's report and financial statements for the half-year to December 2003 (the **December 2003 Report**), other information published to ASX by DCL, a substantial holder notice lodged by RAPL on 13 February 2004 and amended on 25 February 2004 and the submissions by the parties in response to the Brief.
7. DCL is an Australian registered company listed on Australian Stock Exchange Limited (**ASX**). The principal business of DCL is the management and operation of radio stations. It operates 3MP and holds the licence for 3AK, but leased the 3AK licence from the beginning of 2004. DCL has on issue 147,746,147 ordinary shares and 6,003,667 options to subscribe for ordinary shares in DCL.
8. When they made the Application, RAPL and Andros held 26,549,000 and 2,859,423 ordinary shares in DCL respectively, giving Radio Australia a voting power of about 19.9% of the total issued capital of DCL. Andros has held its shares since June 2003. RAPL bought its shares for 6.5 cents each on 30 October 2003, although the sale seems to have been settled on 3 February 2004.
9. DCL's securities were suspended from official quotation on ASX on 1 October 2003. The Application identified that the original reason for the suspension was that DCL had not lodged its 2003 financial accounts on time. The Prospectus states that ASX now requires DCL to retain \$1,000,000 in cash reserves before ASX will consider reinstating quotation of its shares.
10. The most recent sale of DCL shares on ASX was on 1 October 2003, at 5.5 cents.
11. DCL's most recent financial statements are the December 2003 Report. They reveal heavy recent losses and negative cashflow and a shortfall of current assets over current liabilities, but an excess of total assets (much of them intangible) over total liabilities. The directors' report and the Chairman's address to the Annual General Meeting indicated that measures were being taken to stop the losses and negative cash flow. The auditors' review report raised the issue whether the company could continue as a going concern, reasonably enough, although the directors' report gave some reason for confidence.

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#### The Rights Offer

12. On 14 April 2004, DCL lodged with ASIC the Original Prospectus for an underwritten non-renounceable rights offer (the **Rights Offer**) of 147,646,147 ordinary shares in DCL (the **New Shares**) at an issue price of 4 cents per share. The Rights Offer was made on the basis of 1 New Share for every 1 share held as at 23 April 2004 to raise approximately \$5.9 million to, among other reasons, retire debt (DCL was required to repay a secured bank facility of \$3,000,000 by 31 May 2004) and provide DCL with the working capital required by ASX to reinstate quotation of its shares.
13. The Original Prospectus relied on section 712 of the Act to incorporate by reference parts of the December 2003 Report.
14. The directors of DCL stated in the Original Prospectus that they, and entities associated with them, would take up their rights under the Rights Offer, covering 27,101,021 New Shares (about 19% of the New Shares).
15. DCL entered into an underwriting agreement (the **Underwriting Agreement**) with Rentamobile Pty Ltd (**Rentamobile**) to underwrite the remainder of the issue for a fee of \$143,812 (i.e. 3% of the value of the underwritten shares), subject to certain terms and conditions. There are 119,843,526 underwritten New Shares, representing approximately 81% of the Rights Offer (the **Underwriting**).
16. The Original Prospectus invited shareholders to apply for part of the shortfall arising from shareholders not exercising their right to take up New Shares. The shortfall New Shares would be allotted at the absolute discretion of the underwriter. It did not otherwise deal with sub-underwriting of the issue.
17. The Supplementary Prospectus disclosed that Rentamobile did not currently hold any shares in DCL, and that if none of the shareholders other than the directors and their associates took up their entitlements under the Rights Offer and Rentamobile took up all of the underwritten shares, Rentamobile would hold approximately 40.56% of DCL.
18. On 27 April, DCL announced that it had dispatched the Prospectus to DCL shareholders.
19. The key dates, as set out in the Original Prospectus, were as follows:

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Event	Date
Lodgment of Prospectus with ASIC	14 April 2004
Lodgment of Prospectus with ASX	15 April 2004
DCL sends notice to shareholders containing information required by Appendix 3B	16 April 2004
“Ex” date	19 April 2004
Record date for determining entitlement	23 April 2004
Opening date and dispatch of prospectus	27 April 2004
Closing date of entitlement issue	11 May 2004
Shares quoted on deferred settlement basis	12 May 2004
Advise underwriter of shortfall	13 May 2004
Deferred settlement trading ends and dispatch date	17 May 2004

20. On 6 May, DCL extended the closing date of the Rights Offer from 11 May to 18 May 2004. In the course of the Proceeding, this was further extended to 27 May 2004. Since DCL’s bank debt was due to be repaid on 30 May 2004, and the shareholders by then would have had sufficient time to consider the information provided concerning the Rights Offer, we did not ask DCL to extend the closing date again.

**The Application**

21. On 29 April, Radio Australia wrote to DCL raising a number of concerns in relation to the Rights Offer and the Underwriting. On 30 April, DCL wrote to Radio Australia responding to the allegations raised by Radio Australia.
22. On 30 April, Radio Australia applied to the Panel for a declaration of unacceptable circumstances under section 657A and final orders in relation to the affairs of DCL, in particular, the underwriting arrangements for the Rights Offer.<sup>2</sup>
23. In the Application, Radio Australia alleged that the Rights Offer may allow Rentamobile to acquire a substantial holding in DCL and possibly obtain control of DCL in circumstances where there was:

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<sup>2</sup> The Panel wrote to the parties on 7 May 2004 informing them that despite the application being sent by Radio Australia to the Panel on 30 April 2004, the Panel was not made aware of its existence until 6 May 2004.

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- (a) insufficient disclosure of the background relating to Rentamobile and in particular Rentamobile's intentions in relation to DCL and its existing shareholders;
- (b) an unreasonably short period of time for existing shareholders to consider their position in relation to the Rights Offer; and
- (c) no DCL shareholder approval to the acquisition of DCL shares by Rentamobile or takeover bid in compliance with Chapter 6 of the Act.

### Orders sought in the Application

24. Radio Australia sought the following final orders:

- (a) that DCL be prevented from accepting entitlement and acceptance forms under the Prospectus unless and until:
  - (i) DCL supplement or replace the Prospectus providing for additional information in relation to Rentamobile including in respect of Rentamobile's intentions with respect to DCL upon obtaining control, a statement to the effect that Rentamobile has (or the directors of DCL consider that it has) sufficient funds available to satisfy the cash consideration if it is required to underwrite the issue and general disclosure of the identity of Rentamobile and its business generally;
  - (ii) DCL extend the period of the offer pursuant to the Prospectus for a reasonable period to enable DCL shareholders additional time to consider the proposed underwriting by Rentamobile;
- (b) in the alternative, an order preventing the issue of any shares to Rentamobile under the Prospectus which would have the effect of causing the voting power of Rentamobile (or its associates) to exceed 19.9% of the total voting power in DCL unless DCL shareholder approval in accordance with section 611 item 7 of the Act is obtained;
- (c) in the alternative, an order preventing the issue of any shares to Rentamobile under the Prospectus.

## DISCUSSION

### The Brief

- 25. The Brief raised a number of issues about the structure and process of the Rights Offer, the Underwriting and the contents of the Original Prospectus and Supplementary Prospectus.
- 26. In asking those questions, we paid regard to the general criterion set out in *InvestorInfo*<sup>3</sup> for proper reliance on the exception in item 10 of section 611,

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<sup>3</sup> *InvestorInfo Limited* [2004] ATP 6 at [37]-[39].

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that the structure, process and disclosure of the rights issue should be such as to make participation in the issue and its associated benefits genuinely accessible to the shareholders in general, having regard to the company's position and the requirements of Chapter 6D. We also had regard to the particular factors listed in *InvestorInfo* at [38], as relevant to DCL's position, the Prospectus and the Underwriting.

#### Responses to the Brief

27. The answers to the Brief revealed that DCL had a current need for the amount of money sought to be raised by the Rights Offer, to reduce debt and satisfy ASX's preconditions to reinstatement of quotation. This was supported by the Prospectus, the December 2003 Report and other public disclosures by DCL.
28. They also revealed that DCL had made inquiries without finding a satisfactory alternative way to raise the necessary money and that it had satisfied itself by inquiries that Rentamobile had the resources to underwrite the issue. DCL had received advice from an adviser about the terms of the issue, and the alternatives to making an issue. This was supported by Board minutes.
29. We obtained a copy of the Underwriting Agreement. There appeared to be nothing uncommercial or unusual in the terms of the Underwriting. Radio Australia did not assert, and DCL's directors denied, that there was any association between the Rentamobile and the DCL Board. During the Proceeding, DCL amended the Second Supplementary Prospectus (see paragraph 32) to reflect that Rentamobile had a small shareholding (70,000 shares). DCL had been introduced to the Board by their financial adviser and so far as we are aware, Rentamobile does not carry on a business of underwriting share issues. There was no suggestion or evidence of unusual trading in the company's shares which might be connected with a control transaction.
30. Because of the suspension of quotation of DCL's shares, there were no recent market prices with which to compare the 4 cents issue price under the Rights Offer. That price was not excessive by comparison with the pro forma balance sheet in the Prospectus for DCL after the Rights Offer or with the price paid by Radio Australia for its holding or with the prices paid by others to buy DCL shares off-market since quotation of its shares was suspended.
31. The Prospectus fairly described the purposes for which the funds raised by the Rights Offer are to be used and the effect of it on DCL's balance sheet and on the number of shares on issue. It was clear about the possible effect of the shortfall on Rentamobile's shareholding in DCL.
32. While the Proceeding was underway, DCL agreed to issue a second supplementary prospectus (the **Second Supplementary Prospectus**) to resolve the issues raised in the Application and extended the closing time

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of the Rights Offer from 11 May until 18 May (this was later further extended to 27 May). DCL submitted to us and the other parties a draft of the Second Supplementary Prospectus. The Second Supplementary Prospectus described the level of applications which had by then been received by DCL from shareholders under the Rights Offer and offered shareholders proportionate participation in the underwriting shortfall. It also provided further information about Rentamobile and its shareholding after the issue, depending on various assumed levels of shortfall and some limited further information concerning DCL's recent financial performance.

33. The Second Supplementary Prospectus also stated that DCL had received applications for approximately 50.02% of the New Shares under the Rights Offer, although neither RAPL nor Andros had applied to take up their rights. Of the approximate 50% of the rights which had not been taken up, Radio Australia had 20%. If no further applications were received to take up rights or for shortfall shares, Rentamobile would hold approximately 25% of the shares on issue after the Rights Offer, 10% of that due to having taken up rights Radio Australia had allowed to lapse.
34. There was an issue whether the Prospectus relied on section 713 (the transaction specific prospectus provision). DCL advised that it had not relied on section 713. Since DCL was able to rely on incorporation by reference under section 712 and on investors and their advisers being able to access information it had already published, the requirements of sections 710 and 713 and of paragraphs 602(a) and (b)(iii) were much the same: DCL needed to provide such information as shareholders would reasonably require and expect to find in the Prospectus to make an informed assessment of the prospects of the company after the rights issue, having regard to its effects on the company's finances and its control.

### Assessment of the Materials

35. Reviewing this information in the light of the general and specific criteria mentioned in *InvestorInfo*, we decided that:
  - (a) there was a real prospect that Rentamobile would acquire a substantial interest as underwriter of the Rights Offer, needing to rely on item 10 of section 611;
  - (b) if there was a shortfall and if Rentamobile needed to rely on item 10, it was likely that those consequences would in large measure result from Radio Australia's decision not to take up its rights;
  - (c) the amount and timing of the fundraising were reasonable in DCL's circumstances, as were the price and ratio of the Rights Offer;

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- (d) given that DCL's securities were suspended from quotation and that the Rights Offer was being made to qualify them for re-admission, the Rights Offer could not have been made renounceable;
- (e) the level of shareholder support for the Rights Offer did not support an inference that it was inaccessible to shareholders;
- (f) while it may have been preferable for the rights issue to have been sub-underwritten, DCL had addressed that issue by offering the shortfall shares to the shareholders in priority to their falling into the Underwriting;
- (g) the market in DCL's shares had been kept informed;
- (h) the Prospectus appropriately incorporated by reference the most recent financial statements and in most respects appropriately disclosed the purpose and effect of the Rights Offer;
- (i) if the Second Supplementary Prospectus was dispatched on 17 or 18 May, shareholders would have a reasonable time to make a decision on the supplementary disclosures, having regard to the moderate amount of additional information and to ASX's standard rights issue timetable;<sup>4</sup>
- (j) in view of the disclosures in the most recent financial statements, the Prospectus disclosed less than it might reasonably have done about DCL's recent financial performance, and how it would be affected by paying off the debt; and
- (k) the Second Supplementary Prospectus should contain the most recent information available about the level of applications received by DCL from shareholders under the Rights Offer.

### Second Supplementary Prospectus

36. We asked DCL to include in the Second Supplementary Prospectus recent information about its financial performance and the level of applications. That information was included before the Second Supplementary Prospectus was dispatched on 18 May, nine days before the extended closing date of the offer, in turn 3 days before the extended due date for repayment of DCL's bank debt.

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<sup>4</sup> We note that the recent amendments to ASX's Listing Rules have abbreviated the timetables for pro-rata entitlements offers from those that applied before 31 March 2004. To ensure that shareholders have sufficient time to consider the information contained in disclosure documents for these issues, we suggest that the letter dispatched to shareholders 5 business days before the relevant record date under the relevant timetables in Appendix 7A to the Listing Rules not only prominently advise of the availability of the disclosure document in electronic form, but also suggest that shareholders take advantage of this to maximise the time available to them to consider the offer as the hard copy of the disclosure document will only be posted to them 7 business days before the close of the offer in accordance with the ASX timetable.



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37. In *InvestorInfo*, the company not only offered shareholders the right to participate by taking up shares in relation to which other shareholders had not exercised their rights, but offered those who had exercised their right a right to withdraw their application. This was expressed to be under section 724.
38. In our view, none of the additional disclosures in the Second Supplementary Prospectus dealt with a misstatement or omission which was materially adverse from the point of view of a shareholder. That is, we are not aware of any misstatements in the Prospectus and the additional information supplemented and brought up to date information which had already been provided in the Prospectus. If the Prospectus had a deficiency, it was that it provided too little information about DCL's prospects after the Rights Offer and the other recent changes to its business.
39. In appropriate circumstances, we consider that a withdrawal right may be required to ensure that unacceptable circumstances in relation to a rights issue are remedied. In most cases, that will be when the Act requires that an issuer make an election under section 724 (i.e. that there must be a supplementary disclosure document and the matter is materially adverse to the interests of investors). Accordingly, we considered whether we thought that the Second Supplementary Prospectus would attract section 724. We considered that it did not and that there was no other reason to require it to remedy any unacceptable circumstances.

### **DECISION**

40. The Second Supplementary Prospectus dealt with the only issues raised by the Application which would have lent any support to a declaration of unacceptable circumstances. Accordingly, we concluded the Proceeding without making any declaration or any of the final orders sought in the Application.
41. Having made no declaration, we made no costs order.
42. We thank the parties for their prompt co-operation.

**Andrew Knox**  
**President of the Sitting Panel**  
**Decision dated 18 May 2004**  
**Reasons published 24 May 2004**