Takeovers Panel

Reasons for Decision
Village Roadshow Limited 02

In the matter of Village Roadshow Limited 02
[2004] ATP 12

Catchwords:
on-market share buy-back – disclosure obligations – effect on control – acquisition of substantial interest – reasonable and equal opportunity to share in benefits – adequate information to assess a proposal – efficient, informed and competitive market – coercion – standing – abuse of process

Corporations Act 2001 (Cth), sections 9 (definition of "control"), 50AA, 64A, 257A, 257B, 257C, 257D, 257G, 602(a), 602(b)(iii), 611, items 1, 9, 10, 13 and 19, 657A, 657C and 713
Companies Act 1981 and Codes sections 130B and 130D
Corporations Law sections 206AAB, 206AAD, 632A and 733, paragraphs 732(1)(e), (f) and (g)
NCSC Policy Statement 105
ASX Listing Rules Rule 3.8A and Appendix 3C
Guidance Note 15: Listed Trust and Managed Investment Scheme Mergers
Brierley Investments Ltd v Australian Securities Commission (1997) 24 ACSR 629
Elders IXL Ltd v NCSC [1987] VR 1
Re Village Roadshow Ltd [2003] VSC 440, (2003) 48 ACSR 167
Re Pivot Nutrition Ltd & Others [1997] ATP 1, 15 ACLC 369
Pinnacle VRB Ltd No. 11 [2001] ATP 23
Precious Metals Australia Ltd [2002] ATP 5
Colonial First State Property Trust Group [2002] ATP 15
Austar United Communications Ltd [2003] ATP 21
QR Sciences Ltd [2003] ATP 37
Village Roadshow Limited [2004] ATP 4, 22 ACLC 578
InvestorInfo Ltd [2004] ATP 6
Data & Commerce Ltd [2004] ATP 7

These are our reasons for concluding these proceedings without making a declaration of unacceptable circumstances or any orders, on Village Roadshow Limited's making additional disclosures in relation to an on-market buy-back of up to 10% of its ordinary shares.

THE PROCEEDINGS

1. These reasons relate to an application (the **Application**) from Boswell Filmgesellschaft mbH (**Boswell**) under section 657C of the *Corporations Act 2001* (Cth) (the **Act**)[1] in relation to the affairs of Village Roadshow Limited (**VRL**).

THE PANEL & PROCESS

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

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

[1] All statutory references are to the Act, unless otherwise indicated.

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

5. Boswell is a company incorporated in Germany, which holds 1000 ordinary and 1000 preference shares in VRL. The Panel's reasons for its decision in *Village Roadshow Limited* [2004] ATP 4, 22 ACLC 578 narrate previous involvement of Boswell in two proposed buy-backs of VRL's preference shares.

APPLICATION

Background

6. Immediately before the buy-backs of preference shares mentioned at [11]-[13], VRL had on issue 234,903,107 ordinary shares and 250,215,147 preference shares, for a total of 485,118,254 VRL shares on issue.

7. At all relevant times, Village Roadshow Corporation Limited (**VRC**)[2] beneficially owned 111,819,817 ordinary shares in VRL, giving it control over the votes attached to 47.6% of the ordinary shares. Since VRC also had a pre-emptive right over 6,544,167 ordinary shares held by Canberra Theatres Pty Ltd, it had relevant interests in approximately 50.4% of the ordinary shares.

8. On 7 June 2002, VRL made an ASX announcement that it had suspended dividends on ordinary shares. On 14 May 2003, VRL made a further ASX announcement stating amongst other things:

> "*… the group is now projecting a full year loss after tax and after specific items and discontinuing operations of approximately A$25-30m. The Company has now reviewed its position having regard predominantly to the full year loss and secondly its cash flow requirements and believes it is prudent economic management to not declare a dividend on both the preference and ordinary shares for the year ending 30 June 2003. The current intention of the Company is to review its dividend policy when next financial year's results are known.*"

9. In September and December 2003, VRL proposed schemes of arrangement under which it would have bought back all of the preference shares (the **First and Second Preference Share Schemes**). Those schemes were not adopted, for reasons not now relevant.

10. The Preference Share Scheme booklet dated 26 September 2003 included an independent expert's report prepared by Grant Samuel & Associates Pty Ltd, which contained statements about perceived problems with the current capital structure of VRL. For example, the Grant Samuel report states at paragraph 6.1:

> "*The current capital structure is a significant impediment to the reflection of the VRL's underlying value in share market prices (both for ordinary shares and for Preference Shares). The dividend entitlements of the Preference Shares mean that if any dividends are paid on ordinary shares, a total dividend of at least $25 million must be paid to the holders of the Preference Shares. To maintain a roughly proportionate payment to ordinary shareholders, and pay the maximum amount*

[2] VRC is connected with Mr Robert Kirby, Mr John Kirby and Mr Graham Burke, who are directors of VRL, and with companies and individuals associated with them, including Positive Investments Pty Ltd.

> *possible without increasing the preference dividend, would require an ordinary dividend of approximately $16.5 million. At current levels of profitability, this level of dividends is, at best, marginally supportable by VRL's earnings. Accordingly, the current capital structure has the effect of inhibiting the distribution of income to holders of both ordinary and Preference shares, and reducing the investment appeal of both ordinary and Preference shares. If the Proposal does not proceed this structure will be perpetuated.*"

The Grant Samuel report also states at page 61:

> "*The Proposal will also increase the financial risk of VRL. Repayment of the notes will substantially increase VRL's financial commitments over the next three years. VRL's financial forecasts indicate that VRL should be able to comfortably fund repayment of the notes, having regard to projected cashflow from operations, VRL's unused finance facilities and VRL's ability to divest assets if required. However forecasts are inherently uncertain. Implementation of the Proposal will significantly reduce the financial flexibility of VRL and increase its vulnerability to external and internal business shocks, including in relation to the film production business.*"[3]

11. On 1 March 2004, VRL announced that it intended to buy back up to 110 million preference shares (the **First Preference Share Buy-back**), that it had set aside up to $100 million for that purpose, using cash originally allocated for the cash component of the Preference Share Schemes and that the board believed that it was in shareholders' interests to seek to reorganise VRL's capital structure by way of a buy-back of preference shares. On 26 March it announced that it had bought back 90 million preference shares for $104 million, or about $1.15 per share.

12. On 7 April 2004, VRL announced that it intended to buy back up to another 50 million preference shares (the **Second Preference Share Buy-back**). VRL did not say how much it had set aside to pay for the shares, but it said it would fund the buy-back from internal cash reserves and existing undrawn lines of credit. On 11 May it announced that it had bought back 50 million preference shares at an average price of $1.30 per share.

13. Under the First Preference Share Buy-back and the Second Preference Share Buy-back VRL bought back a total of 140,086,114 preference shares, leaving a total of 110,129,033 preference shares on issue (and 345,033,140 VRL shares in total).

14. On 28 May 2004 VRL announced an on-market buy-back of up to 23,490,310 (i.e. 10%) of VRL's issued ordinary shares (the **Buy-back**), issuing an Appendix 3C notice and a narrative announcement. The Appendix 3C notice relevantly said that VRL had nothing further to say about the reasons for the Buy-back and the other information shareholders should have, in addition to what it had said in its narrative ASX announcement on the same day and in previous announcements.

15. The narrative announcement VRL made on 28 May was very short. Relevantly, it said that "the capital structure of VRL was a significant impediment to the reflection

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[3] The reference to notes is to unsecured notes which VRL had proposed to issue to preference shareholders under the Preference Share Schemes, in addition to a cash element of the consideration for their shares. There are similar passages in the updated report dated 12 December 2003 included in the scheme booklet for the Second Preference Share Scheme.

of VRL's underlying value in share market prices", set out the number of preference shares VRL had bought back and the overall price paid for them and added that a 10% buyback of ordinary shares would be "appropriate, consistent with [VRL's] stated goals and given the new debt profile, fiscally prudent".

16. Assuming that VRL bought back 10% of its ordinary shares and that VRC did not sell any shares into the Buy-back (and both are mere assumptions), VRC's beneficial interest in VRL ordinary shares would increase from 47.6% to 52.9% and its voting power would increase from 50.4% to about 56%.

17. On 10 June VRL announced it expected a Net Profit After Tax and Significant Items for 2003-2004 of $52 million and that a review of dividend policy could not be made until the Board could consider audited accounts. On the basis of prior years, it said that the Board was unlikely to consider the financial statements until late August and that VRL usually made dividend policy announcements when it releases its results in September.

18. On 15 and 16 June 2004, VRL lodged Appendix 3E notices with ASX advising that it had acquired a total of 484,203 shares under the Buy-back.

19. VRL announced on 15 June 2004 that it would buy back no further shares under the Buy-back until it made a further announcement to ASX.

20. VRL made a further announcement on 16 June 2004 that the commencement date for any further purchases of ordinary shares had been set at 30 June 2004 and that, consistent with its 15 June 2004 announcement, it would make a further announcement prior to buying further ordinary shares.

Interim orders sought

21. Boswell made the Application to the Panel on 15 June 2004. It initially sought an interim order prohibiting VRL from acquiring any shares under the Buy-back. In light of VRL's ASX announcement dated 16 June 2004 that it would not buy back any ordinary shares until 30 June 2004, Boswell subsequently advised that it no longer sought that interim order.

Declarations sought

22. Boswell applied for a declaration of unacceptable circumstances in relation to the following:

    (a) the resolution by the directors of VRL on 28 May 2004 to proceed with the Buy-back;

    (b) VRL's announcement to ASX on 28 May 2004 of its intention to proceed with the Buy-back;

    (c) the acquisition by VRL of 50,000,000 preference shares under the Second Preference Share Buy-back announced on 11 May 2004;

    (d) the acquisition by VRL of 90,086,114 preference shares under the First Preference Share Buy-back announced on 26 March 2004; and

    (e) the combined effect of VRL's suspension of dividends, the First and Second Preference Share Buy-backs and/or the Buy-back in coercing holders of

preference or ordinary shares in VRL to dispose of their shares, and enabling VRC and its associates to increase their control over voting shares (including the elimination/reduction of a threat to potential to control in the future).

Final orders sought

23. Boswell sought final orders:

    (a) prohibiting VRL from acquiring any shares under the Buy-back; and

    (b) if, at the time the orders are made, VRL has purchased any shares under the Buy-back:

        (i) prohibiting settlement of any acquisition of shares by VRL that has not been settled, and cancelling all such transactions; and

        (ii) vesting in ASIC for sale such number of VRL ordinary shares held by VRC as is required to return it to the level of voting power it had before the unacceptable circumstances occurred.

24. Although Boswell sought a declaration of unacceptable circumstances in relation to the Preference Share Buy-backs, it sought no orders directly affecting those buy-backs, which had had a minimal effect on control and the first of which occurred more than 2 months before the Application was made. The Preference Share Buy-backs were relevant as part of the accumulation of circumstances in which the Buy-back was to take place, and we took the Application to relate to them in that respect only.

DISCUSSION

Jurisdiction - Overall

25. The threshold question is whether the Panel has power to deal with the Application at all. That is, whether it raises an arguable case that there exist unacceptable circumstances in relation to an acquisition (or proposed acquisition) of a substantial interest, or in relation to control (or potential control) of a company.

26. Relevantly, under subsection 657A(2):

    "The Panel may only declare circumstances to be unacceptable circumstances if it appears to the Panel that the circumstances:

    (a) are unacceptable having regard to the effect of the circumstances on:

        (i) the control, or potential control, of the company or another company or

        (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in the company or another company …".

Jurisdiction - Substantial Interest

27. VRL's and VRC's submissions argued that the Buy-back is not a present or proposed acquisition of a substantial interest in VRL. On the one hand, they argue that although VRL will buy a material number of shares, those shares will be cancelled upon transfer, so the end-point of the transaction is their destruction, not their acquisition. On the other hand, they argue that although at that end-point VRC will

own a larger proportion of the shares (and particularly of the voting shares) in VRL than beforehand, that increase will not result from acquisitions made by VRC or by anyone acting on its behalf.

28. An alternative approach is to disregard the legal form of the Buy-back. VRC and VRL have argued that VRC already controls VRL, so the purchase by VRL, on the one hand, and the increased percentage holding of VRC, on the other hand, constitute an effective acquisition by VRC, whether or not the Buy-back was strictly made on VRC's behalf by VRL.

29. Given our conclusion on the alternative ground that the Buy-back may have an effect on control of VRL, there is no need to, and we do not, consider the correctness of these arguments or decide this issue.

Jurisdiction - Control of VRL

30. VRL and VRC have each submitted that the Buy-back and related circumstances can have no effect on control of VRL, and none of the circumstances described in the application can be unacceptable because of their effect on control of VRL, because:

- the Panel should apply section 50AA of the Act to determine whether the Buy-back can have any effect on control of VRL;
- control is an absolute concept, not one which admits of degrees; and
- public information establishes that VRC already has control of VRL in the relevant sense.

The first and second of these propositions are wrong, making the third proposition irrelevant.

(a) Section 50AA

31. Section 50AA provides that for the purposes of the Corporations Act:

> "an entity controls a second entity if the first entity has the capacity to determine the outcome of decisions about the second entity's financial and operating policies".[4]

32. Section 9 relevantly provides that:

> "Unless the contrary intention appears … **"control"** has the meaning given by section 50AA"

and subsection 6(1) provides that:

> "The provisions of this Part [which includes sections 9 and 50AA] have effect for the purposes of this Act, except insofar as the contrary intention appears in this Act."

(b) Control Concept in Chapter 6 – a Contrary Intention

33. The section 50AA definition of control has been borrowed from the accounting standards, and is used in the Act for related purposes, particularly concerning

[4] Section 64A relevantly defines an "entity" as a natural person, a body corporate other than an exempt public authority, a partnership or a trust.

consolidated accounts. In the accounting context, the principal need is to determine a single point at which a reporting entity has control over another entity (relevantly through control of sufficient of the votes attached to shares to have practical, majority control). The issue is whether one entity will do as it is told by another entity, which generally depends on the composition of the board of the first entity, which in turn depends on a simple majority of votes at a general meeting. The gradations of control sufficient to block or force through, for instance, a special resolution or compulsory acquisition are not directly relevant.

34. The content of Chapters 6, 6A, 6B and 6C manifests a different concept of control, which has been recognised in decisions of the Panel and the Courts and which constitutes a contrary intention. The takeovers code is consistently concerned with fine gradations of control, and does not treat control as an absolute concept. Chapter 6 regulates acquisitions of shares conferring voting power across the whole of the range from 20% to 90% voting power. Chapter 6C requires disclosure of voting power across the whole of the range from 5% to 100% voting power, in increments of 1%. Panels have consistently explained the relationship between unacceptable circumstances and control in terms of increments of control, as have the Courts.

35. In *Pinnacle VRB Ltd No. 11* [2001] ATP 23 at [18], the review Panel found that a transfer of 3.11% of the shares in Pinnacle to a bidder which had already acquired 32% of the ordinary shares "had the potential to have a significant effect on the control of Pinnacle".

36. In *Brierley Investments Ltd v Australian Securities Commission* (1997) 24 ACSR 629 at 638-639, Emmett J explained the notion of a substantial interest in terms of "a step along the way to a change in control". That reasoning is consistent with control changing at a single and absolute point, but contemplates that control of a particular company can be affected by acquisitions of voting shares in that company. The context was a submission that an increase in voting power from 20% to 23%, in the absence of board control and the presence of unassociated substantial holdings, could not be a substantial acquisition, because the acquisition of the additional 3% could not confer control. In other words, Emmett J was saying that the additional 3% at that stage could have an effect on control because it could make it easier for the acquirer to obtain control and to some extent, harder for anyone else to do so.

37. Emmett J quoted with approval *Elders IXL Ltd v NCSC* [1987] VR 1 at 17-18, to the effect that the meaning of "substantial interest" in a particular case "must attach to a step in the direction of takeover or a change in corporate control" and paragraph 8 of NCSC Policy Statement 105 to the effect that "a substantial interest normally involves an interest which affects control by being a parcel which may influence either a change of or maintenance of existing control". Although the context in each case is the substantial interest limb of what is now subsection 657A(2), there is clear agreement that in Chapter 6, control is a graduated concept. This accords with common sense and experience, not least that bidders are prepared to pay more to obtain greater levels of control, e.g. for sufficient shares to force through special resolutions or initiate compulsory acquisition.

(c) Effect on Control

38. Even on the view taken by VRC and VRL, that there are no degrees of control, however, it would not follow that a 5% increase in the votes a shareholder controls has no effect on control. With control over 48% of the votes, a shareholder has a high degree of comfort that it can control the outcome of an ordinary resolution, on which it is not prevented from voting. At 53%, that holder has the certainty of being able to determine the outcome of such a resolution. That is, even if the measure of control stays the same, an increase in voting power in a company may affect control of the company according to that measure, by increasing the degree of assurance that the relevant degree of control does in fact exist. Similarly, the creation of a buffer above a bare 50% of votes may have an effect on control (or at least potential control) by reducing the risk of control being taken away by, for instance, new issues of voting shares.[5]

39. One way of looking at this issue is to say that:

- if no-one has control (as defined in section 50AA), then circumstances may have an effect on potential control and the Panel must look at how the circumstances will impede or facilitate a person obtaining control;

- if someone has such control, then circumstances may have an effect on that control either by adding to or diminishing the extent of the control (or facilitating or impeding the controller reaching levels of influence that will add to or diminish that control) – this is the situation we are dealing with here and we are considering whether this either adds to VRC's control in the way set out above or by making it easier for VRC to obtain other aspects of control which will cement its ability to dominate VRL's decision-making (such as to be able practically, and then formally, to ensure passage of a special resolution and further on to trigger compulsory acquisition rights to obtain all elements of control).

40. Accordingly, we do not accept the submission that the Buy-back can have no effect on control of VRL, because there is scope for the Buy-back to have an effect on control, even if control is defined according to section 50AA, and because Chapter 6 uses a wider concept of control than the section 50AA definition.

Jurisdiction - Legislative History

41. The history of the buy-back provisions of the Act sheds some light on their interaction with section 657A.

42. In *Share Buy-backs: Proposal for Simplification*, March 1994, the Corporate Law Simplification Task Force proposed:

> "10. Takeover Provisions
>
> ... Part 6.9 (reference to Panel about unacceptable conduct) will apply. The rest of Chapter 6 (takeovers) will not apply."

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[5] Similarly, in *Skywest Limited* [2004] ATP 10 at [84] - [86], the sitting Panel rejected a submission that a statement of intentions in a bidder's statement was unclear because some of the bidder's intentions were premised on it obtaining "effective control", pointing out that what constituted effective control would depend on a number of variables, of which the bidder's percentage holding after the bid was only one.

43. The current buy-back provisions were enacted by the *First Corporate Law Simplification Act 1995.* The Explanatory Memorandum for the *First Corporate Law Simplification Bill 1994* said at paragraph 5.16 (references omitted):

> "To avoid duplication of regulation, the main takeover rules in Chapter 6 of the [Corporations] Law will not apply to a buy-back. However, if the effect of a buy-back on the control of the company would be unreasonable, the ASC will be able to ask the Corporations and Securities Panel to declare that the buy-back is unacceptable."

44. The amendments made by that Act gave the Panel power to make a declaration of unacceptable circumstances under section 733, having regard to the circumstances of a buy-back. Under paragraph 732(1)(e), unacceptable circumstances could result if:

> "a company carries out, or proposes to carry out, a buy-back that is unreasonable having regard to:
>
> (i) the effect of the buy-back on control of that company or of another company; and
>
> (ii) the fact that the disclosure and other safeguards of this Chapter [i.e. Chapter 6] do not apply to the buy-back because of section 632A".[6]

45. That provision was repealed as part of the reorganisation and simplification of the takeovers code by the *Corporate Law Economic Reform Program Act 1999*. Neither the Task Force paper *Takeovers: Proposal for Simplification* (January 1996) nor the Explanatory Memorandum for the bill explains the decision to omit paragraph 732(1)(e). In the absence of any express policy reversal, the repeal must have been based on a view that there was no need for a specific provision, as buy-backs were sufficiently covered by the general terms of sections 602 and 657A, in particular paragraph 657A(3)(b):

> "in exercising its powers under this section, the Panel:
>
> …
>
> (b) may have regard to any other matters it considers relevant".

46. In addition, it would have been desirable to omit paragraph 732(1)(e) and other accretions to the Eggleston Principles when they were moved from previous section 732 (where they guided the Panel, with the three additional principles mentioned above) and section 731 (where they guided ASIC in giving exemptions and modification, and there were no accretions) to new section 602 (as the objects of Chapter 6).[7]

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[6] Paragraphs 732(1)(a) – (d) set out the Eggleston Principles now in paragraphs 602(b) and (c). Section 632A (now item 19 of section 611) provided that section 615 (now section 606) did not apply to a buy-back authorised by section 206B (now section 257A).

[7] When buy-back provisions were first enacted in 1989, the NCSC was given power to make a declaration that a buy-back had occurred in unacceptable circumstances (section 130D of the *Companies Code*). That power was retained when those buy-back provisions were first incorporated into the *Corporations Law* (section 206AAD). The ASC was given the power to make this declaration (which it never exercised), although the Panel had been created and given the previous section 60 power in relation to takeovers (section 733).

47. In view of the clear legislative intention that the Panel be available to deal with buy-backs with unreasonable effects on control of companies and of the indications that that policy has not been abandoned, but merely subsumed into a broader policy, we believe that it is open for us to conduct proceedings in relation to an apparent effect of control of VRL of the present Buy-back.

Boswell's Standing

48. Under paragraph 657C(2)(d), to make an application, Boswell must be a person whose interests are affected by the unacceptable circumstances which it alleges. VRC and VRL have submitted that Boswell does not have standing, as its interest (disclosed as 1,000 ordinary and 1,000 preference shares, worth about $3000) will not be affected by the Buy-back (as based on VRC's and VRL's submissions, VRC already controls VRL, Boswell's voting rights are not being diluted and Boswell has an equal opportunity to either participate in the Buy-back or not participate). As we did not make a declaration or orders on the Application, we did not need to finally determine the question of standing. However, we note that although Boswell's interest is small in amount, its interests as an ordinary shareholder coincide with those of other ordinary shareholders.

Abuse of Process

49. The smallness of Boswell's interest raised a concern whether the Application was an abuse of process, since Boswell could in theory use the Proceeding to achieve objectives alien to those of the Panel and the Act. If the Application had been made to gather information for extraneous purposes (a court challenge, say, as in *Precious Metals Australia Ltd* [2002] ATP 5) it would be contrary to the Panel's function and its rules.[8] That would, however, involve Boswell in a breach of its undertaking to the Panel and to VRL to use and disclose confidential information it receives in the course of the Proceeding, only for the purposes of conducting the Proceeding.

50. In its submissions VRL alleged that the Application had been made for collateral purposes, namely to affect the position of ordinary shareholders other than Boswell. This is not a reason to decline to hear the Application. It is part of the Panel's ordinary function under sections 602 and 657A to take into account the effects of alleged unacceptable circumstances on shareholders who are not parties to the relevant proceedings.

51. Since we see no evidence that the Application is a stalking horse for any purpose inconsistent with the Panel's primary functions or the subsidiary objectives of its rules and procedures, we see no basis for refusing to hear it as an abuse of process.

The power was premised on a company using a buy-back (of some description - obviously not a complying buy-back and cancellation) to obtain control of shares in itself. Sections 130B and 206AAB provide that the power relates only to a self-acquisition scheme, which is a scheme (other than a permitted buy-back) under which a company acquires a direct or indirect interest in or control over, shares in itself.

The *Company Law Review Act 1998* added further paragraphs 732(1)(f) (unreasonable reductions of capital) and (g) (self-acquisition schemes), which were also omitted by the *Corporate Law Economic Reform Program Act 1999*, without specific explanation.

[8] See also the discussion of an application which dealt with issues of concern to shareholders generally but which had to have been made for quite different reasons in *Austar United Communications Ltd* [2003] ATP 21 at [52] – [56].

Unacceptable Circumstances - Generally

52. In principle, the Buy-back could lead to unacceptable circumstances, because of the effect of one or more of the following on the Buy-back and the potential it has to bring about an effect on control of VRL:

    (a) holders of ordinary shares did not all have reasonable and equal opportunities to participate in the benefits accruing to some ordinary shareholders under the Buy-back;

    (b) holders of ordinary shares did not have adequate information to assess the merits of selling their shares into the Buy-back;

    (c) the Buy-back did not take place in an efficient, competitive and informed market; or

    (d) the Buy-back was otherwise unacceptable in view of:

        (i) the policy of Chapter 6, 6A, 6B or 6C; or

        (ii) some other policy consideration the Panel chose to take into account.

Unacceptable Circumstances – Approach to Exceptions

53. As a threshold issue, a share buy-back (at least if it is conducted in accordance with section 257A) is within item 19 of section 611, which is an express exception to the prohibition in section 606, Parliament having seen fit to create a wide exception from Chapter 6 for buy-backs. The Panel gives full weight to that exception, recognising that the general supervision of compliance of buy-backs with the requirements of Part 2J belongs to ASIC and the courts.

54. As with any other provision of the Act, the Panel gives this exception its intended operation. But the exception itself gives effect to part of a legislative scheme, and its intended operation must be seen in that context. It is, for instance, often an arbitrary choice of the drafter whether to allow people to do certain things by refining the terms of a prohibition or by creating an exception to that prohibition. Items 1 (acquisition resulting from acceptance of a takeover offer) and 15 (acquisition by will or operation of law) in section 611 are clear examples of where the legislature has in effect refined section 606 by creating exceptions to it. Whether an acquisition fairly falls under one of these exceptions can reasonably be tested by applying Chapter 6 concepts. Similarly, the Panel applies Chapter 6 concepts in decisions and policy in areas where the legislative policy is indistinct, such as trust schemes.[9]

55. Some exceptions do, however, represent intrusions into areas which might otherwise be covered by Chapter 6 of policies which are at least partly alien to takeovers law and policy. Examples are items 10 and 13 of section 611, for rights issues and underwriting rights issues and other prospectuses. We cannot disregard the existence of these exceptions or read them down on the basis that they are incommensurable with the policies and protections of Chapter 6. Panels have

[9] *Guidance Note 15: Listed Trust and Managed Investment Scheme Mergers*; *Colonial First State Property Trust Group* [2002] ATP 15.

recently dealt with those exceptions with due regard to both their legislative policy and that of Chapter 6.[10]

Unacceptable Circumstances - Reasonable and Equal Opportunity

56. It is not suggested, and does not appear, that shareholders other than VRC[11] will not have reasonable and equal opportunities to participate in the Buy-back. Of course, how most of the Buy-back is conducted remains to be seen, but there are no complaints of selective buying about the First and Second Preference Buy-backs or the small amount of ordinary share buying that has been done to date. We see no reason to suppose that VRL will not limit its buying to the ordinary course of trading on ASX, as required by subsection 257B(6).

57. In addition, the structure of the Buy-back means that it has the potential to allow shareholders a degree of access to the price which is out of proportion to the shift in control. A 5% increase in VRC's voting power will result from VRL buying back 10% of the ordinary shares, if VRC does not sell into the Buy-back: i.e. 20% of the shares held by interests other than VRC will be bought back.

58. A particular benefit will accrue to VRC from the Buy-back in its capacity as an ordinary shareholder, namely that its voting power will be concentrated by 10%. VRC and VRL submitted that every other ordinary shareholder who retains their shares through the Buy-back will receive a corresponding benefit. The increase in their percentage voting power is real (the votes attached to their parcels will also be concentrated by 10%), but the benefit is illusory: whereas VRC will gain assured control of VRL, other ordinary shareholders will lose what little prospect they have of outvoting VRC on an ordinary resolution.

59. Having regard to the structure of Chapter 6, it is evident that the legislature has not applied the reasonable and equal benefits principle to require a bidder to offer other shareholders access to the same benefits as those which will accrue to it as the controller of the target company (or to benefits of equal value), although those benefits will in a sense accrue to it as a holder of bid class shares. Instead, Chapter 6 requires the bid to be exposed to competition in an informed market, as a means of allowing the market to test the adequacy of the price that other shareholders are offered under the bid. Similarly, whether the benefits accessible to other ordinary shareholders under the Buy-back are commensurate with the benefits accruing to VRC in connection with the Buy-back (allowing for the effect on the other shareholders of the further shift in control) is an issue which should be resolved not by the Panel under the reasonable and equal access principle, but by the market, provided the market is informed and not coerced.

Unacceptable Circumstances - Adequate Information

60. Boswell submitted that shareholders were not provided with sufficient information to assess the merits of the Buy-back (i.e. whether to sell into it). VRL and VRC argued that the level of information sought under Boswell's submissions was not generally appropriate for the conduct of an on-market buy-back. We considered that

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[10] See *QR Sciences Ltd* [2003] ATP 37, *InvestorInfo Ltd* [2004] ATP 6 and *Data & Commerce Ltd* [2004] ATP 7.

[11] VRC is under a specific self-imposed restriction designed to avoid insider trading and other conflicts, that it can only deal in VRL shares during a short window after VRL publishes its accounts.

the appropriate level of disclosure was somewhere between the extremes argued by the parties.

61. The legislation leaves it to the ASX Listing Rules to specify the information requirements for an on-market buy-back, within the 10% in 12 months limit. For a selective buy-back, a resolution would be required, and for an equal-access buy-back, the company would be required to provide an offer document. In each case, it would be required to disclose all information known to the company which is material to the decision whether to accept the offer or how to vote on the resolution.[12] Listing Rule 3.8A and Appendix 3C require a company undertaking an on-market buy-back to release the following information:

    (a) the reason for the buy-back (item 7 of Appendix 3C); and

    (b) any other information material to a shareholder's decision whether to accept the offer (item 8 of Appendix 3C).

62. Item 8 imposes a general disclosure requirement, with no confidentiality exception comparable to Listing Rule 3.1A. The terms of this disclosure requirement are similar to the information which would be required for a comparable transaction under Chapter 6 and are shared with several provisions of the Act, in the context of a specific decision to be made by shareholders and viewed from their perspective as persons being asked to consider participating as sellers and not merely in terms of the price or value of securities. This requires the relevant announcement to be approached like a transaction-specific prospectus under section 713 or a notice under section 257C, 257D or 257G, not as a form-filling exercise or as routine continuous disclosure. In other words, like a listed company's other disclosure documents (and takeover and meeting documents) this is an occasion of heightened disclosure against a background of prior continuous disclosure.

63. Acknowledging that it is the responsibility of VRL to decide what information needs to be released and provided to shareholders in order to satisfy these requirements and that in doing so VRL was entitled to take into account information previously announced to ASX, we considered that the announcement made by VRL on 28 May 2004, taken together with previous announcements and disclosures made by VRL, was insufficient for the purposes of paragraph 602(a) and subparagraph 602(b)(iii).

64. VRL has never described its own capital management objectives any more precisely than Grant Samuel did in the report included in the Preference Share Buy-back Scheme booklet. Nor has VRL made it clear publicly that it adopted the Grant Samuel analysis in formulating its capital management objectives.

65. Although VRL has since then bought back 29% of its issued shares and the Buy-back would increase that proportion to 33.6%, it has provided limited information to update the Grant Samuel report. The principal additional items were the numbers of preference shares bought back, the overall price paid for them, and the fact that funding which it had arranged to pay initial cash outgoings under the preference share buy-back schemes had been spent on the First and Second Preference Share Buy-backs. It also announced separately a small increase in its expected net profit

[12] Section 257C, 257D or 257G.

after tax for the financial year to 30 June 2004 and that it is unlikely to publish a revised dividend policy until it releases its accounts for that financial year, probably in September 2004.

66. VRL had not, however, brought up to date the information Grant Samuel provided as to the relationship between VRL's dividends, profits and expenses, in light of the substantial change in the company's capital base already made, the further change proposed by the Buy-back and some change in its projected profit.

67. Neither had VRL explained the source and effect of the borrowings necessary to pay for the Buy-back. VRL announced on 1 March 2004 that it would use for the First Preference Share Buy-back the funds it had previously allocated for the Preference Share Schemes, which were disclosed in the scheme booklets. However, essentially all of that fund was expended in the First and Second Preference Share Buy-backs. Some other source of funds would be required for the Buy-back.

68. These were serious omissions, particularly given that Grant Samuel had characterised the First and Second Preference Share Schemes as designed to allow VRL to pay higher dividends on its ordinary shares, so as to make them more attractive in the market.

69. In particular, information in relation to the following issues was either unclear (due in part to the wide scatter of relevant sources of information, both over time and between documents) or needed to be updated:

    (a) A clear statement of VRL's capital management objectives and a more detailed explanation of how the Buy-back fits in with those objectives.

    (b) The aggregate effect of the First and Second Preference Share Buy-backs and the Buy-back on VRL's ability to pay dividends. This information was necessary to enable ordinary shareholders to assess the price being offered against (for instance) the possible re-rating of the ordinary shares by the market after the Buy-back. While the necessary raw data may have been published, the effect had not been sufficiently explained or brought up to date.

    (c) The extent, source, and terms of the borrowings VRL will make to fund the Buy-back. Shareholders should have a statement in relation to the source of the funds to be used to acquire shares under the Buy-back.

    (d) In addition to statements regarding the source of funds, a clear explanation of the effect of acquisitions under the Buy-back (when taken together with the First and Second Preference Share Buy-backs) on VRL's financial position and prospects.

    (e) A statement of the material information known to VRL regarding VRC's intentions with respect to the Buy-back.

70. We considered that this deficiency of disclosure in relation to the Buy-back constituted unacceptable circumstances.

71. We rejected as unproven submissions that VRL had in its possession price-sensitive information about its finances and trading results which had not been shared with the market. There was no evidence that VRL was not in compliance with its accounts

and continuous disclosure obligations under the Act and the Listing Rules. It had recently made an updated profit projection and was near the end of its financial year, when audited accounts would not be ready for a number of weeks.[13]

Unacceptable Circumstances – Increased Voting Power

72. Boswell submitted that the circumstances of the Buy-back are unacceptable, because of the increase in VRC's voting power which is likely to result from the Buy-back. The potential increase in VRC's voting power in VRL is in excess of the 3% creep allowed under item 9 of section 611. The increase in beneficial interest would take VRC from being able to secure the passage of an ordinary resolution, on which VRC is entitled to vote, unless nearly all other ordinary shareholders vote against the resolution, to being able to force through such a resolution, regardless of opposition.

73. We do not agree that the increase in VRC's voting power is unacceptable in and of itself. Because the Buy-back will take place under an express exception from section 606 which must contemplate similar increases in voting power, which are a generic feature of buy-backs in companies with substantial holders (the only companies to which the exception could be relevant), it is not open to us to object to the Buy-back, simply on the ground of the increase in VRC's voting power.

Unacceptable Circumstances - Efficient, Competitive and Informed Market

74. Boswell submitted that the circumstances of the Buy-back are unacceptable, because the combined effect of the increase in VRC's voting power which is likely to result from the Buy-back and the deficiency of information which we have just mentioned is apt to coerce shareholders into accepting offers under the Buy-back. If holders are coerced into selling, the market in which the Buy-back takes place would not be efficient, because prices and volumes would not reflect informed views as to the worth of and demand for the securities, but concern that the value of the securities to their holders may be artificially reduced.[14]

75. We agree. In our view, the combined effect of a deficiency of information on the issues mentioned above and the anticipated effect of the Buy-back (assuming VRC does not participate) to consolidate the control of VRL by VRC had some tendency to coerce ordinary shareholders into selling into the buy-back. That combination is not something the legislature must have had in mind as a generic characteristic of buy-backs when it enacted item 19 of section 611, and it is open to us to decide that it is unacceptable. We note that former paragraph 732(1)(e) required both an unreasonable effect on control and the absence of protections under Chapter 6.

76. Unless the information deficiency mentioned above was remedied, the Buy-back would be conducted under precisely such a combination of high voting power concentration and lack of shareholder protection. For the reasons just explored, however, that deficiency is an essential part of this set of unacceptable circumstances.

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[13] ASX announcement by VRL on 10 June 2004.
[14] cf *Re Pivot Nutrition Ltd & Others* [1997] ATP 1, 15 ACLC 369.

DECISION

Declaration and Orders

77. Accordingly, we advised VRL and the other parties that in our view, absent additional information, any resumption of the Buy-back would take place under circumstances which would be unacceptable having regard to their effect on control of VRL and that we proposed to make a declaration and such orders as necessary to rectify those circumstances.

78. Prior to making a declaration and orders, we gave VRL an opportunity to rectify the circumstances by providing an appropriate undertaking to the effect that VRL would not acquire any shares under the Buy-back, or under any other on-market buy-back, unless and until VRL had made a further ASX announcement, in a form approved by the Panel, regarding the Buy-back, and would not resume on-market buying until a full trading day had elapsed from the release of that announcement. VRL provided us with the undertaking (a copy of which is Annexure A) and made such an announcement before the commencement of trading on 1 July 2004. Later on 1 July 2004 we announced that we had concluded the proceedings without making a declaration or any orders.

79. There having been no declaration, there will be no costs order. We gave leave for parties to be represented by their solicitors.

Andrew Lumsden
President of the Sitting Panel
Decision dated 01 July 2004
Reasons published 26 July 2004

Annexure A – Undertaking provided by VRL during the Proceeding

By:	**Village Roadshow Limited (Village)**
To:	**The Takeover's Panel (Panel)**
Date:	**29 June 2004**
Matter:	**In the matter of Village Roadshow Limited**
Proceeding No:	**2004/10**

We refer to the Panel's letter dated 28 June 2004. In this undertaking, defined terms in the Panel's Brief dated 18 June 2004 have the same meaning.

Pursuant to subsection 201A(1) of the Australian Securities and Investments Commission Act 2001 (Cth), Village undertakes that Village will not acquire any ordinary shares under the Buy-back, or under any other on-market buy-back, unless and until Village has made a further ASX announcement, in a form approved by the Panel, regarding the Buy-back.

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Signed for and on behalf of Village by Greg Basser, authorised representative