



**In the matter of Village Roadshow Limited 03
[2004] ATP 22**

Catchwords:

disclosure obligations – effect on control – on-market share buy-back – reasonable and equal opportunity to share in benefits – shareholder approval – undertaking to Panel – voting exclusion

Corporations Act 2001 (Cth) sections 257A, 257C, 257D, 602, 606, 611 item 7, 611 item 19, 640, 648D

ASX Listing Rule 7.33

InvestorInfo Limited [2004] ATP 06

Village Roadshow Limited 02 [2004] ATP 12

Re Hellenic & General Trust [1975] 3 All ER 382 (Ch.Div.)

Re Village Roadshow Ltd [2003] VSC 440, 48 ACSR 167

These are the Panel's reasons for concluding these proceedings without making a declaration of unacceptable circumstances or any orders, following acceptance by the Panel of an undertaking from Village Roadshow Limited which the Panel considered satisfactorily resolved the issues before it in the application.

THE PROCEEDINGS

1. These reasons relate to an application (the **Application**) to the Panel from Boswell Filmgesellschaft mbH (**Boswell**) on 17 September 2004 for a declaration of unacceptable circumstances and orders in relation to the affairs of Village Roadshow Limited (**VRL**).

THE PANEL

2. The President of the Panel appointed Andrew Lumsden (sitting President), Marian Micalizzi (sitting Deputy President) and Denis Byrne as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the Application.
3. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.
4. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

APPLICATION

Background

5. Boswell's application related to a proposed resolution (**Buy-back Resolution**) to approve a proposed on-market buy-back of up to approximately 20% of the ordinary shares in VRL (**Buy-Back**). VRL announced the proposal to seek shareholder approval of the Buy-Back on 26 August 2004. On 8 September 2004, VRL sent its shareholders notice of a general meeting to be held on 8 October 2004 to consider the Buy-back Resolution.
6. Boswell sought a declaration that unacceptable circumstances existed due to:

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- (a) a failure to provide adequate information to VRL shareholders regarding the Buy-back Resolution and its film production subsidiary, Village Roadshow Pictures (VRP); and
 - (b) the ability of Village Roadshow Corporation Limited (VRC), the majority ordinary shareholder in VRL, to vote in favour of the Buy-back Resolution.
7. Boswell sought final orders to the effect that:
- (a) VRL must, as soon as practicable, issue a supplementary explanatory memorandum to shareholders to correct all deficiencies identified by Boswell;
 - (b) VRC and its associates must not vote in favour of the Buy-Back Resolution; and
 - (c) Alternatively to (b), if VRC (or its associates) did vote in favour of the Buy-Back Resolution, VRL must not buy back ordinary shares unless and until VRC had announced to the market that it would participate in the Buy-Back, or otherwise sell shares, to the extent necessary to ensure that VRC's voting power did not increase as a result of the Buy-Back.
8. The Panel decided to conduct proceedings on the Application and on 22 September sent a brief under ASIC regulation 20 to the parties (Boswell, VRL, VRC and ASIC). It made no interim orders and received no undertakings in lieu.
9. Having received submissions and arrived at the findings and conclusions discussed below, the Panel sent a letter to the parties on 30 September 2004, setting out its conclusions.
10. Among those conclusions were that the Panel considered that the following circumstances constituted unacceptable circumstances in relation to the affairs of VRL:
- (a) the shareholders of VRL did not have sufficient information concerning whether VRC could, or would, vote on the Buy-Back Resolution;
 - (b) the uncertainty in the market for VRL securities caused by lack of information concerning VRC's ability to vote for the Buy-Back Resolution; and
 - (c) the potential consolidation of VRC's control of VRL which would be occasioned by VRC voting to approve the Buy-Back Resolution and then deciding not to participate in the Buy-Back.
11. Following that letter, VRL offered, and the Panel accepted, an undertaking that it would not proceed with the Buy-Back if approval of the Buy-Back Resolution relied upon the votes of VRC, or its associates. A copy of VRL's undertaking to the Panel is attached at Annexure A. Once it had received VRL's undertaking, the Panel decided that unacceptable circumstances no longer existed and it would not be in the public interest for the Panel to make a declaration of unacceptable circumstances.
12. In accepting the undertaking, the Panel looked at the role the Panel is intended to play in preventing unacceptable circumstances resulting from the control effects of buy-backs. It seemed appropriate to the Panel in these particular circumstances to accept a voting exclusion to the resolution to approve the Buy-Back. The Panel considers it likely that future Panels will look at the individual circumstances of each buy-back on a case-by-case basis.

DISCUSSION

Background

13. Prior to the announcement of the proposed Buy-Back, VRL had undertaken previous buy-backs of both preference shares and ordinary shares, which are described in the Panel's reasons for its decision in *Village Roadshow Limited 02* [2004] ATP 12.
14. The Buy-Back Resolution was necessary under section 257A¹ because the Buy-Back would result in VRL buying back in less than 12 months shares carrying more than 10% of the votes attached to VRL's voting shares (the **10% in 12 months limit**).² Section 257C requires shareholder approval of an on-market buy-back, if it would exceed the 10% in 12 months limit. Section 257C requires only an ordinary resolution and does not exclude any shareholder from voting for or against the resolution.
15. When the Buy-Back was announced, VRL had on issue 211,413,107 ordinary shares and 110,129,033 preference shares, all of which could be voted on the Buy-Back Resolution.³ VRC held 111,819,817 ordinary shares, which were 52.9%⁴ of the ordinary shares and 34.7% of all of the shares eligible to vote on the Buy-Back Resolution. VRC also had a relevant interest in another 6,544,167 ordinary shares (3.1% of the ordinary shares, or 2.0% of all of the shares) held by Canberra Theatres Ltd, under a pre-emptive right.
16. If the Buy-Back proceeded as proposed, so that VRL bought back 20% of its ordinary shares, and VRC did not sell any shares into the Buy-Back or otherwise, VRC's voting power in VRL would increase from 56% to 70% and the proportion of ordinary shares it held in VRL would increase from 52.9% to 68.1%. This increase was specifically disclosed in the information that VRL sent to its shareholders. If the Buy-Back was conducted in accordance with section 257A, however, the acquisitions causing this increase would not involve VRL in a contravention of section 606, because item 19 of section 611 creates an exception from section 606 for "an acquisition [of shares] that results from a buy-back authorised by section 257A".
17. The notice of meeting sent to VRL shareholders stated that VRC had advised that it had not decided whether or not to participate in the Buy-Back. It did not say whether VRC would vote on the Buy-Back Resolution, or how it intended to vote. Under section 257A, whether VRC could participate in the Buy-Back would not depend on whether (or how) it voted on the Buy-Back Resolution.

Information to VRL Shareholders

18. Boswell submitted that VRL had in its possession one or more documents valuing its film production division, Village Roadshow Pictures (**VRP**), for the purpose of seeking outside investment in VRP. VRP is important to the assets, liabilities and prospects of VRL, for instance contributing 30% of group EBITDA for the financial

¹ Unless otherwise noted, statutory references are to the *Corporations Act 2001*.

² As a result of a previous buy-back of ordinary shares, VRL had already reached that limit. Section 257A authorises a buy-back which complies with applicable provisions of Part 2J.1 of the Act. Except to refer specifically to one or another requirement, these reasons refer to compliance with section 257A instead of the particular provisions.

³ Holders of preference shares were entitled to vote on the Buy-Back Resolution, because it related to a reduction of capital: *Re Village Roadshow Ltd* [2003] VSC 440, 48 ACSR 167.

⁴ All percentages are approximations.

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year to 30 June 2004. There was some evidence consistent with this submission. For instance, on 31 March 2004, VRL announced to ASX that it would “explore the possibility of re-engineering its investment” in VRP, which is currently a wholly-owned subsidiary, for instance “by way of debt, mezzanine equity or strategic partnership”. Boswell submitted that a valuation of VRP would be material information for shareholders considering whether to approve the Buy-Back or to sell into the Buy-Back and that it would be unacceptable for VRL to fail to disclose such a valuation, if it had one. It also provided some evidence indicating that VRL was in possession of documents dealing with the value of VRP.

19. ASIC had in its possession some confidential documents which related to the possible re-engineering of VRP. In its submissions, ASIC indicated that in its view, although it had not completed its review of the documents, some of the documents produced raised questions as to whether there was information about the value or prospects of VRP that was not already reflected in previously disclosed material. ASIC suggested that the Panel obtain copies of relevant documents in order to make its own assessment regarding the issue.
20. Acting on ASIC’s suggestion, the Panel agreed to receive copies of some of those documents from ASIC.
21. The documents provided by ASIC were not provided to Boswell. In general, the Panel will not consider documents or information which are not provided to all parties. In the interests of progressing the proceedings, however, Boswell waived its right to see documents provided to the Panel by ASIC which the Panel considered were significantly, commercially sensitive and its rights to procedural fairness in this regard. The Panel was satisfied that the documents provided by ASIC were significantly, commercially sensitive.⁵ The Panel appreciates Boswell’s waiver, which allowed the Proceedings to be resolved more expeditiously. If the documents had raised a concern that VRL did have material information regarding the value of VRP which it had not disclosed to its shareholders, the Panel would have been minded to take account of those documents in making its decision on the Application. In such circumstances, the Panel would have reconsidered whether the documents needed to be disclosed to Boswell.
22. However, when the Panel examined the documents, the Panel considered that the documents provided by ASIC did not support an inference that the value of VRP, net of its liabilities, was materially different from the value reflected in prior disclosures by VRL, such as the Grant Samuel report.
23. In coming to this conclusion, the Panel also took into account that:
 - (a) VRL on 3 September 2004 issued its consolidated accounts for the financial year to 30 June 2004, with an unqualified audit report;
 - (b) the directors of VRL asserted (directly or indirectly) in submissions before the Panel and in the Notice of Meeting, that VRL shareholders had all the information known to VRL that was material to the decision by VRL shareholders on how to vote on the Buy-Back Resolution; and

⁵ And for that reason has not described them in these reasons.

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- (c) the Panel was provided with advice, on a confidential basis, and solely for the purposes of these proceedings, from the corporate advisory arm of a national accounting firm to the effect that it was highly unlikely that the current fair market value of VRP would exceed the value ascribed by Grant Samuel in the Grant Samuel Report.
24. Boswell submitted that VRL should provide the Panel and ASIC with a large number of documents relevant to the value and prospects of VRP. ASIC, which received a considerable number of such documents and had only a limited time to review them, provided the Panel with only a few documents. The Panel had some extra time to review those documents. Given the Panel's findings in relation to the documents referred to in paragraph 19 above, the Panel did not expect that examination of further documents would reveal evidence that the notice of meeting and other public information about VRL was materially misleading concerning VRL's assets, liabilities and prospects. Accordingly, the Panel did not seek further documents from VRL, either voluntarily or under summons.

Independent Expert Report

25. Boswell submitted that the Panel should require VRL to commission a report by an independent expert to advise VRL shareholders whether the Buy-Back is in their best interests, on the analogy of section 640, ASIC policy regarding notices of meeting under item 7 of section 611 and the practice regarding schemes of arrangement. An expert could value VRL and advise on such issues as:
- (a) the benefits and disadvantages to VRL shareholders other than VRC of the potential effects of the Buy-Back on control of VRL (especially any increase in VRC's voting power);
 - (b) the potential effects of the Buy-Back on the liquidity of the market in VRL shares;
 - (c) whether the ordinary share buy-back would be likely to deliver the capital management goals asserted by VRL management; and
 - (d) whether those capital management goals are in the best interests of VRL shareholders.
26. Such a report would have had the merit of presenting the information required by VRL shareholders in a systematic manner and in one place, rather than their having to piece the information together from a number of different sources.
27. Ultimately, however, the Panel decided it would not require such a report, because overall and on balance, it decided that VRL shareholders had received sufficient information on the proposed Buy-Back to be able to make properly informed decisions on the Buy-Back Resolution. This decision takes into account:
- (a) the Independent Expert Report provided by Grant Samuel for the VRL preference share buy-back scheme in late 2003 (albeit over 9 months old and written for a different purpose),
 - (b) the Notice of Meeting,
 - (c) the disclosures provided by VRL as required by the *Village 02* Panel,
 - (d) discussions in the media, and

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- (e) the on-market nature of the Buy-Back, including the fact that the buy-back price was not fixed.
28. The Panel remained concerned about the adequacy of VRL's explanation and discussion of its capital management objectives – particularly the relative benefits and disadvantages to VRL of buying back ordinary shares as opposed to preference shares – but after careful consideration did not require VRL to provide further clarification. The Panel considers that, generally, companies putting a buy-back proposal to shareholders should make every effort to ensure that shareholders are able to properly understand that company's capital management objective, as this is central to any shareholder's decision on a buy-back resolution.

The proposed terms of the buy-back

29. ASIC submitted that the price at which VRL proposed to buy shares under the Buy-Back should be specified in the Buy-Back Resolution. This submission has some force. Section 257C requires a company to which it applies to obtain approval of "the terms of the buy-back agreement" and requires the notice of meeting to set out "all information known to the company that is material to the decision how to vote on the resolution". Although section 257C does not refer to the buy-back price, the other terms of an on-market buy-back agreement are standard. As a matter of general law and particularly given the requirements of section 257C, if shareholders of a company are not given a sufficiently firm proposal on which to vote, then the approval of the buy-back terms is not valid.
30. Similarly, Boswell submitted that the Buy-Back Resolution was too wide to constitute approval of any particular terms or to ensure that shareholders approval of the Buy-Back would be informed.
31. If shares are bought back without a valid and applicable approval, unacceptable circumstances could arise because the buy-back contravened section 606 because it did not comply with section 257A and thus with item 19 of section 611. Unacceptable circumstances could also arise if the relevant notice of meeting did not satisfy the information principles in section 602 of the Act.
32. The Panel does not find that the circumstances surrounding the Buy-Back were unacceptable because the Notice of Meeting did not state a precise buy-back price. In making this decision, the Panel took into account the following factors:
- (a) on-market buy-backs are intended to be regulated by the ASX Listing Rules, as well as by section 257A;
 - (b) Listing Rule 7.33 limits the maximum price at which a company can buy back its shares to no more than 5% above the average market price on the last 5 days on which sales of shares in the relevant class were recorded;
 - (c) the minimum price at which shares can be purchased in the ordinary course of trading on ASX depends on the market on the day;
 - (d) Section 257C covers a number of different situations, applying to employee share buy-back schemes and equal access buy-back schemes well as on-market buy-backs, in each case if they exceed the 10% in 12 months limit; and

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- (e) in the Panel's view, the details of the terms of the Buy-Back (including an indicative price) in the Notice of Meeting gave VRL shareholders adequate information on which to decide whether to vote to approve those terms.
- 33. Although it did not accept ASIC's submissions that the price at which VRL proposed to buy shares under the Buy-Back should be specified in the Buy-Back Resolution, the Panel was of the view that if the price at which VRL was able to buy back its shares in compliance with the ASX Listing Rules differed materially from the indicative terms disclosed in the Notice of Meeting, at some point VRL would no longer be entitled to rely on the Buy-Back Resolution as a valid approval of continued buying of VRL shares on market.

Voting by VRC on the Buy-Back Resolution

- 34. The Buy-Back is capable of having an effect on control of VRL. Its potential effect on VRC's voting power is different from its potential effect on the voting power of any other VRL shareholder, as VRC is the only shareholder whose control of VRL may be consolidated by the Buy-Back. Although the voting power of other shareholders who do not participate in the Buy-Back will be concentrated by the Buy-Back in the same proportion as that of VRC, the effects of such concentration on a controlling interest, on the one hand, and on a minority interest, on the other hand, are qualitatively different. This difference makes it appropriate for VRC to be treated differently from any other shareholder in voting on the Buy-Back Resolution.
- 35. The Panel considered two interrelated issues when addressing the issue raised by Boswell as to VRC voting on the Buy-Back Resolution. They were whether:
 - (a) VRC voting in favour of the resolution; or
 - (b) VRC's voting power being increased in consequence of the Buy-Back, would constitute unacceptable circumstances, separately or in combination.
- 36. The Panel decided that it would be unacceptable for these factors to occur together, but that (all other things being equal) it would not be unacceptable for either to occur without the other. If the Buy-Back Resolution was approved by shareholders in VRL not associated with VRC, with sufficient information, a change in VRC's voting power as a consequence of the Buy-Back would not be objectionable. The fact of this potential increase in VRC's voting power was disclosed to VRL shareholders in the Notice of Meeting. On the other hand, if the Buy-Back Resolution was approved by a resolution which passed on the basis of VRC voting in favour, and VRC sold 20% of its ordinary shares into the Buy-Back (or at much the same time) the Buy-Back would have no (or no enduring) effect on VRC's degree of control of VRL. This also would not be objectionable.

Voting by VRC

- 37. The Panel considers that, in the circumstances of VRL, it would have been unacceptable for its controlling shareholder to vote for a shareholder resolution to authorize a transaction in circumstances where that transaction could increase that shareholder's control over VRL. To allow this would conflict with the equality of opportunity principle in paragraph 602(c) and its logical counterpart, which is that shareholders who cannot participate in the benefits accruing to shareholders under a

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control transaction should have the right to approve or veto the proposed transaction.

38. The requirements of the equality of opportunity principle can be addressed, in suitable cases, by the application of a voting exclusion principle. Such a voting exclusion principle is reflected in:
- (a) item 7 of section 611, which allows only shareholders who are not directly involved in the transaction to vote in favour of an acquisition of shares which would otherwise be prohibited by section 606. Since it attracts the exception in item 19, a resolution under section 257C is in effect a substitute for a resolution under item 7;
 - (b) paragraph 648D(1)(b), which excludes the bidder and its associates from voting on a resolution to approve a proportional bid;
 - (c) established practice in relation to takeovers by scheme of arrangement, under which the person who would take control of the scheme company does not vote in the same class as members whose shares would be transferred or cancelled;⁶ and
 - (d) the systematic use of voting exclusions in the ASX Listing Rules.
39. As well as these parallel rules, there are reasons of principle supporting the voting exclusion principle. As discussed above, the effect of the Buy-Back may be to enhance the degree of control which can be exercised by a shareholder in the position of VRC to the corresponding detriment of every other shareholder. VRC has no “community of interest” with other shareholders concerning the potential control effects of the Buy-Back. For VRC and the other shareholders to vote together would frustrate the legislative policy that a meeting to consider a section 257C resolution be an opportunity for shareholders to consider the potential implications for control over the company of substantial buy-backs.⁷
40. As a general concept, the voting exclusion principle is not new and has stood in the Australian takeovers legislation since the introduction of the *Companies (Acquisition of Shares) Act 1980*. It has applied to buy-backs from the time that buy-backs were first permitted under Australian company law⁸.
41. As noted above, section 257C does not apply the voting exclusion principle. In particular, it does not prevent any shareholder from voting on a resolution to approve a buy-back. Under the exclusion in item 7, no person acquiring or selling the relevant shares (or their associate) may vote. In its application to buy-backs, the voting exclusion principle cannot be applied as broadly or as mechanically as it is to item 7 approvals, because a buy-back concentrates the voting power of all continuing

⁶ *Re Hellenic & General Trust* [1975] 3 All ER 382 (Ch.Div.)

⁷ Paragraph 5.17 of the Explanatory Memorandum for the *First Corporate Law Simplification Bill* explains that the requirement now in section 257C “is to allow members to consider the potential implications for control of the company in the case of substantial buy-backs.” The Panel noted that section 257D, which relates to selective buy-backs contains a voting exclusion. However, the Panel was not convinced that this meant the application of other voting exclusions in all buy-back scenarios had been exhaustively considered and rejected by the legislature.

⁸ The basis for saying this is that buy-backs were initially subject to unacceptable self-acquisition review by ASIC when the buy-back legislation was first introduced, and that was later changed to unacceptable circumstances review under the Panel’s jurisdiction.

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shareholders, not just the parties to the relevant acquisition or disposal. In particular, since a buy-back will usually only consolidate the control of the company of one block of shareholders, it would not be sensible to exclude every continuing shareholder from voting in favour of a resolution to approve buy-back.

42. Excluding all, or even substantial, ongoing shareholders would not be sound policy, as it would tend to leave the decision to authorise a substantial buy-back to a small minority, or those who had no interest in control of the company as they were leaving the company.⁹
43. Having regard to these difficulties with a broad-brush voting exclusion and the role the Panel is intended to play in preventing unacceptable circumstances resulting from the control effects of buy-backs, it seems appropriate to the Panel to apply voting exclusions to resolutions to approve buy-backs on a case-by-case basis. This policy is intended to prevent a shareholder who already has a substantial measure of control from consolidating control by voting through a resolution to approve a buy-back.

VRC Voting Against the Buy-Back Resolution

44. Nothing in the policy considerations mentioned above supports preventing VRC from voting *against* the Buy-Back Resolution. Each of the provisions mentioned above as embodying similar policy prevents a person from voting to authorise a control transaction, but not from voting to prevent it. A vote against a buy-back would not tend to bring about a change in control of VRL. In the absence of any such effect, VRC should be able to vote to protect its investment in VRL.

Alternative remedies

45. Before accepting VRL's undertaking, the Panel considered a range of other remedies, including seeking an undertaking from VRC concerning selling down, and not voting, any shares in VRL by which its voting power had been increased by the Buy-Back. VRC argued strongly in its submissions that it would be, in practical terms, impossible to give effect to such an undertaking or order. The Panel does not agree with VRC's analysis of that alternative.
46. In particular, the Panel considered ordering VRC not to vote, or VRL not to count any votes cast by VRC or its associates, on the Buy-Back Resolution. It considered that such an order would more quickly and clearly remedy as many of the causes of unacceptable circumstances as possible. Ordering VRC not to vote would have:
 - (a) immediately informed the market;
 - (b) removed any concerns about VRL shareholders being dissuaded from voting on the Buy-Back Resolution;
 - (c) removed the need for further Panel proceedings in the event of VRC both voting on the Buy-Back Resolution and having its voting power increased by the Buy-Back;

⁹ No resolution is required to approve a buy-back under the 10% in 12 months limit, other than a selective buy-back. This is not surprising, as the effects of such buy-backs on control (in the most sensitive range between 20% and 50%) are roughly commensurate with the effect of creeping acquisitions under item 9, for which no approval is required.

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- (d) removed VRC's apprehensions about any future forced sale by it of VRL shares; and
- (e) avoided the need for postponing the meeting with the resulting increased cost and expense that that would incur for VRL.

Extension of the Panel's order to other VRL shareholders

47. VRL and VRC put it to the Panel that the consistent application of the voting exclusion principle would prevent many other VRL shareholders from voting, so that the Buy-Back Resolution would be decided by a small and unrepresentative minority. The Panel rejected this argument. The principle applies only to a shareholder whose voting power at the time of the meeting already confers a degree of control, which would be consolidated by the buy-back (see [41] to [43] above). VRC is the only shareholder in VRL to whom this proposition applies.¹⁰

Disclosing Voting Intentions

48. VRC advised the Panel that it intended to vote for the Buy-Back Resolution, but that it had not disclosed this intention because various corporate governance organisations had published policy that suggested that a majority shareholder should not announce its voting intention prior to a meeting or resolution because that might stifle debate on the issue.
49. The Panel considered that non-associated VRL shareholders needed to be told well in advance as to VRC's, and its associates', voting intentions. The Panel considers that this was very material information for VRL shareholders. In the absence of such information, the Panel foresaw a real risk that minority VRL shareholders would not trouble to vote, because the passage of the Buy-Back Resolution might seem certain.
50. The Panel considered that non-associated shareholders of VRL would have been adequately informed by the announcements made on 1 October and the newspaper advertisements placed by VRL shortly after that date that the Buy-Back would not proceed unless a majority of their votes were cast in favour of it.

Related Party Transaction

51. While the issue was not raised in the application or in submissions, the Panel considered whether the Buy-Back raised any concerns with compliance with the related party transactions provisions in Chapter 2E, or their policy. The Panel was satisfied that it did not, either because the same benefits were available to all ordinary shareholders or because the benefits were provided on arm's length terms. If the Buy-Back proceeded, VRC would benefit from it financially in the same way as all the other shareholders who remained as shareholders in VRL, or who sold into the Buy-Back, as relevant. As the buying was to be on market in the ordinary course of trade, the Panel considered that the Buy-Back would be conducted on arm's length terms.

¹⁰ It was common ground that, based on substantial holder notices, the second-largest concentration of voting power in VRL was about 15% and would be increased to 17.2% by the Buy-Back, if none of those shares were sold.

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Consistency with Previous Panel Decisions

52. In its submissions, VRL asserted that it was not open to the Panel to find that the Buy-Back (if it complied with section 257A) would lead to unacceptable circumstances, because that would be inconsistent with the statement in the reasons for decision in *Village 02* that the Panel gave full weight to the exception in item 19 of section 611. That submission sits oddly with the decision in *Village 02* which was made on the basis that a buy-back can give rise to unacceptable circumstances, although it complies with section 257A, if it results in an increase in a person's voting power, coupled with circumstances which are contrary to the policy of Chapter 6.
53. Had it been the intention of the legislature that a buy-back which complied with section 257A could not lead to unacceptable circumstances, the exception in item 19 of section 611 would say that none of the provisions of Chapter 6 applied to such a buy-back.¹¹ All that item 19 says is that a person does not contravene section 606 by acquiring shares under a complying buy-back. The relevant secondary materials show that the remainder of Chapter 6 was not excluded, precisely so that the Panel would have jurisdiction.¹²
54. Otherwise, regardless of findings on the facts, the item 19 exception would be an absolute protection against a finding that a complying buy-back had given rise to unacceptable circumstances. Whenever relevant, however, the Panel has insisted that unacceptable circumstances can result from inappropriate reliance on the exceptions in section 611.¹³ Historically, the original power to declare conduct or acquisitions unacceptable was intended to enable the NCSC and the Panel to prevent avoidance of the main requirements of the takeovers code by astute use of the exceptions. That function has not been discarded in the move to a wider function of declaring circumstances unacceptable.

UNDERTAKING

Undertaking

55. After the Panel explained its views to the parties, VRL offered to undertake:
- (a) not to buy back any shares under the Buy-Back if the Buy-Back Resolution would not have been passed but for votes cast by VRC, or its associates, in favour of the Buy-Back Resolution; and
 - (b) to announce the undertaking to ASX and to publish advertisements in major Australian financial newspapers explaining the effect of the undertaking to VRL shareholders (in a form acceptable to the Panel), though not to send any additional letter to VRL shareholders.

¹¹ There is a very similar provision in subsection 130B(4) of the *Companies Act 1981 and Codes*.

¹² The relevant materials are collected in *Village Roadshow Ltd 02* at [41] – [47].

¹³ For example, in *InvestorInfo Limited* [2004] ATP 06, the Panel said at [36]:

"Ensuring that these exceptions [items 10 and 13] are not being used in a way that infringes the policies, or avoids the protections, of Chapter 6 is an important element of the policy."

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Effect of the Undertaking

56. The Panel considered that effectively, the decision on whether or not the Buy-Back would proceed was therefore in the hands of the shareholders of VRL who were not associated with VRC. If those shareholders approved the Buy-Back Resolution then:
 - (a) VRL could buy back up to 20% of its ordinary shares; and, significantly; and
 - (b) if VRC did not dispose of VRL shares, either into the Buy-Back or otherwise, its voting power would increase as a consequence of VRL buying back and cancelling those shares.
57. This is consistent with the underlying policy of Chapter 6 that a vote which authorises a transaction, which would otherwise be prohibited because of its effect on control of a company, should be passed only on the support of shareholders who will not participate in increased control.
58. About 3% of VRC's 56% voting power in VRL arises under a pre-emptive right that VRC has over a parcel of ordinary VRL shares held by Canberra Theatres Limited (CTL). A pre-emptive right would not, without more, constitute an association. The undertaking provided that the Panel would notify VRL whether to treat CTL as an associate of VRC for the purposes of the undertaking. After receiving evidence and submissions from VRC and CTL on the nature of the agreement between them, the Panel advised VRL that CTL should not be treated as an associate of VRC.

DECISION

59. The Panel considered that unacceptable circumstances existed in relation to the affairs of VRL arising out of the proposed Buy-Back, until VRL undertook that it would not proceed with the Buy-Back if approval of the Buy-Back Resolution relied upon the votes of VRC, or its associates. The Panel accepted VRL's undertaking, however, on the basis that it remedied those unacceptable circumstances and that it would not be in the public interest to make a declaration of unacceptable circumstances or orders. The undertaking resolved the related issues of shareholders' understanding of the voting intentions of VRC and their ability to prevent the Buy-Back from going ahead. It imposed no restriction on VRC, or its associates, voting against the Buy-Back Resolution, or on VRL relying on any such votes.
60. Among the reasons that the Panel considered that it would not be in the public interest to make a declaration of unacceptable circumstances was that, although as a general concept the voting exclusion principle is not new, until this matter, its application to approval of a share buy-back had not been considered by the Panel and may not have been a part of Australian market practice. The Panel will consult with market participants to determine whether guidance on the issue is desirable.
61. Except as regards VRC's voting intentions, the Panel did not agree with the Applicant that the disclosures relevant to the Buy-Back in the Notice of Meeting and other releases was defective so as to give rise to unacceptable circumstances.

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Andrew Lumsden

President of the Sitting Panel

Decision dated 1 October 2004

Reasons published 15 October 2004

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Annexure A – Undertaking given by Village Roadshow Limited

UNDERTAKING

By: Village Roadshow Limited (Village)
To: The Takeover's Panel (Panel)
Date: 1 October 2004
Matter: In the matter of Village Roadshow Limited 03
Proceeding No: 24 / 2004

We refer to the Panel's draft decision dated 29 September 2004. Defined terms in the Panel's draft decision have the same meaning in this undertaking.

Pursuant to subsection 201A(1) of the *Australian Securities and Investments Commission Act* 2001 (Cth), Village undertakes that:

- (a) it will not buy-back any ordinary shares under the Buy-Back if the Resolution would not have been passed but for VRC or its associates voting in favour of it:
and
- (b) it will without delay announce this undertaking and its effects to Australian Stock Exchange Limited, on its web site and by advertisement in *The Australian* and *Australian Financial Review* newspapers.

The Panel will advise Village before the meeting at which the Resolution is to be considered whether Canberra Theatres Limited is to be treated as an associate of VRC for the purposes of this undertaking.

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John R Kirby	Peter E Foo
Director of Village Roadshow Limited	Director of Village Roadshow Limited