



**In the matter of Emperor Mines Ltd 01
[2004] ATP [24]**

Catchwords:

rights issue, underwriting, equal opportunity to share in benefits, genuine accessibility, renounceability, discount, need for funds, efficient market, orders

Corporations Act 2001 (Cth) sections 602, 606, 611, 615, 657A, 657D

Takeovers Panel Guidance Note 1 – ‘Unacceptable Circumstances’

ASIC Policy Statement 159

ASIC Policy Statement 60

InvestorInfo Limited [2004] ATP 06, applied

Anaconda Nickel Limited 02-05 [2003] ATP 04, approved

QR Sciences Limited [2003] ATP 37, approved

These are the Panel’s reasons for making a declaration of unacceptable circumstances and orders concerning the affairs of Emperor Mines Ltd. The declaration and orders related to a rights issue proposed by Emperor and supported by its major shareholder, Durban Roodeport Deep Ltd. The rights issue was pitched at a ratio of four rights for every ten shares held. It was non-renounceable and priced at \$0.45, which was a discount of 33% to the market price of Emperor shares immediately before the announcement of the Rights Issue. The Panel’s orders were directed at reducing the likelihood of DRD consolidating control of Emperor at a deep discount and where other shareholders did not have a reasonable and equal opportunity to share in the benefits which would flow to DRD.

SUMMARY

1. These reasons relate to an application (**Application**) to the Panel from Power Treasure Limited, Phoenix Gold Fund Limited and Floreat Fund Limited (collectively, the **Applicants**) on 29 September 2004¹ in relation to the affairs of Emperor Mines Ltd (**Emperor**).
2. On 17 October 2004, the Panel made a declaration of unacceptable circumstances and orders in relation to the affairs of Emperor. The declaration and orders related to a four for ten, pro-rata, non-renounceable rights issue (**Rights Issue**) proposed by Emperor, and associated underwriting arrangements (**Underwriting**). The Rights Issue was effectively underwritten by Emperor's largest shareholder Durban Roodeport Deep Ltd (**DRD**) through its wholly owned subsidiary, DRD (Isle of Man) Limited (**DRD IoM**) entering into a deed (**Participation Deed**) undertaking to offer to subscribe for the full amount of any shortfall under a pro-rata shortfall facility (**Shortfall Facility**) offered by Emperor to all shareholders². The Applicants alleged that the Rights Issue and Underwriting were structured in such a way that it was likely that DRD would increase its control over Emperor at a discount to market and

¹ Unless otherwise noted, all date references are to calendar year 2004.

² Unless otherwise noted, the Panel refers to DRD and DRD IoM collectively as DRD.

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without the other shareholders in Emperor having a reasonable and equal opportunity to benefit.

3. The Panel was concerned to address the unacceptable circumstances, but it was also concerned not to adversely affect the financial position of Emperor. Therefore, it was necessary for the Panel to make a number of orders.
4. The Panel considered that its orders struck an appropriate balance between a number of competing considerations:
 - (a) not causing undue prejudice to Emperor and its shareholders, in light of Emperor's financial position and stated need to complete the Rights Issue in a timely fashion; and
 - (b) reducing, in a non-punitive manner, the increase in DRD's voting power in Emperor which the Rights Issue and the Underwriting were likely to cause, in circumstances where the Panel considered that the other Emperor shareholders did not have a reasonable and equal opportunity to participate in the benefits accruing through the Rights Issue and the Underwriting.
5. The Panel ordered:
 - (a) a modification to the Shortfall Facility so that DRD IoM would not participate in any shortfall until all other shareholders' applications to do so were satisfied in full;
 - (b) an extension of the Rights Issue timetable to allow information to be sent to Emperor shareholders and to allow Emperor shareholders sufficient time to consider that information. The Rights Issue would close no earlier than 5.00pm (Sydney time) on 26 October 2004;
 - (c) a 2-year freeze until 31 October 2006 on any increased voting power arising from the Rights Issue which DRD IoM would otherwise be able to exercise at a shareholders' meeting of Emperor (subject to increases in voting power arising under future acquisitions of Emperor shares permitted by the Corporations Act 2001 (Cth) (**Act**)³);
 - (d) a 1 month period for DRD to dispose of any 'Unacceptable Shares'⁴, at any price which DRD was able to achieve, with half of any profits going to Emperor;
 - (e) a requirement that from 1 month after completion of the Rights Issue until 1 month after the release of Emperor's half-yearly report for the six months ending 31 December 2004, DRD IoM must instruct its broker to accept any order to purchase any remaining 'Unacceptable Shares' which was priced at \$0.45 (plus an allowance for costs approved by the Panel) or above; and

³ All references to section are to sections of the Corporations Act, unless otherwise noted.

⁴ 'Unacceptable Shares': for these purposes, 'Unacceptable Shares' are shares issued to DRD IoM in connection with the Rights Issue which result in DRD IoM increasing its voting power in Emperor above the voting power it had immediately prior to the Rights Issue.

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- (f) a requirement that DRD IoM not terminate the Participation Deed as a result of the effect of the Panel's orders.

THE PANEL & PROCESS

6. The President of the Panel appointed Alison Lansley (sitting President), Michael Ashforth (sitting Deputy President) and Louise McBride as the sitting Panel (the **Panel**) for the proceedings arising from the Application (**Proceedings**). Early in the Proceedings, Michael Ashforth ceased to be available and was replaced by Simon Withers.
7. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.
8. The Applicants, Emperor, DRD and the Australian Securities and Investments Commission (**ASIC**) appeared in the Proceedings. The Panel consented to those parties who applied being legally represented by their commercial lawyers in the Proceedings.
9. The Panel decided to commence proceedings in relation to the application, and, under Regulation 21 of the Australian Securities and Investments Commission Regulations 2001 (Cth), issued a brief to parties on 1 October 2004 seeking further details regarding the Rights Issue, the Underwriting and other relevant matters. The parties provided submissions in response to the brief on 5 October 2004.
10. Following the receipt of submissions and rebuttals, the Panel wrote to parties again on 9 October 2004 setting out the Panel's preliminary view that unacceptable circumstances existed in relation to the Rights Issue and the Participation Deed, setting out the Panel's initial reasons for thinking that way, proposing a number of orders that the Panel was considering making and asking for submissions on the proposed orders, including submissions on the practicalities and consequences of the orders and alternative orders which might better remedy the unacceptable circumstances which the Panel was inclined to consider existed. The parties responded on 11 October. DRD and Emperor offered a number of undertakings in response to the Panel's proposed orders.
11. The Panel considered the submissions. It decided that unacceptable circumstances did exist and that the alternative orders and undertakings proposed by the parties would not remedy the unacceptable circumstances in a better manner than the orders proposed by the Panel. Therefore, after a further series of correspondences, the Panel formulated what it proposed to be final orders and on 15 October 2004, set out its proposed orders and its proposed course of action and timetable. It also asked Emperor and DRD, again, whether they would be prepared to provide undertakings to give similar effect to the proposed final orders. Emperor advised that it would be prepared to give appropriate undertakings. However, DRD advised that it did not think that it was in its shareholders' interests to give the undertakings.
12. The Panel met on 16 and 17 October to consider the responses to its letter of 15 October. It did not receive offers of undertakings which would address its concerns. It therefore made a declaration of unacceptable circumstances and final orders as set out in Annexure A of these reasons.

APPLICATION

13. The Applicants applied to the Panel for a declaration under section 657A of the Act that the following circumstances (or one or more of the following circumstances) constituted unacceptable circumstances in relation to the affairs of Emperor:
- (a) the terms of the Rights Issue to be made by Emperor under a prospectus dated 13 September 2004 (**Rights Issue Prospectus**);
 - (b) the terms of the Participation Deed dated 10 September 2004 entered into by Emperor and DRD (IoM) in relation to the Rights Issue (**Participation Deed**);
 - (c) the likely effect of the Rights Issue and Participation Deed on control of Emperor; and
 - (d) the Rights Issue and Participation Deed being a related party transaction between Emperor and DRD (IoM) not on arms length terms and not approved by non-associated shareholders of Emperor.
14. In the event that the Panel made a declaration of unacceptable circumstances in relation to any one or more of the circumstances referred to above, the Applicants sought final orders that:
- (a) the Rights Issue be prevented from proceeding;
 - (b) in the alternative, Emperor obtain non-associated shareholder approval of the Rights Issue and the Participation Deed having regard to Chapter 2E of the Act;
 - (c) in the alternative, the parties to the Participation Deed be prevented from proceeding to perform it;
 - (d) in the alternative, the Rights Issue be made renounceable and accessible to all shareholders in Emperor, including the Ineligible Foreign Shareholders (as that term is defined in the Rights Issue Prospectus) and that the Rights Issue timetable be amended as needed to accommodate this alteration.
15. To protect the Applicants' interests, the Applicants reserved the right to seek other final orders, in the event that the Panel made a declaration of unacceptable circumstances in relation to any one or more of the circumstances referred to in paragraph 13 above.

Background

The Applicants

16. The Applicants are each shareholders in Emperor with (at the time of the Application) the following holdings:
- (a) Power Treasure Limited (a Hong Kong company) held 4,062,250 ordinary shares in Emperor (being 3.59% of the shares in Emperor) through nominees.

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- (b) Phoenix Gold Fund Limited (**Phoenix Fund**), which was incorporated in the British Virgin Islands (**BVI**) on 30 October 2000 as an International Business Company and is recognised as a "professional fund" by the BVI regulatory authorities, had relevant interests in 2,557,831 ordinary shares in Emperor (being 2.26%), held through nominees. Aims Asset Management Sdn. Bhd (**AIMS**) is the investment manager (but not investment adviser) for Phoenix Fund and holds all of the voting shares in Phoenix Fund.
- (c) Floreat Fund Limited (**Floreat Fund**), which was incorporated in the Bahamas on 1 October 1992 and had relevant interests in 4,774,223 ordinary shares in Emperor (being 4.22%), held through nominees. AIMS is the investment manager and investment adviser for Floreat Fund and holds all of the voting shares in Floreat Fund.

Takeover bid by DRD

- 17. On 8 March 2004, DRD announced an off market takeover bid for all of the ordinary shares in Emperor (**DRD Bid**). The consideration was one DRD share for every five Emperor shares.
- 18. The DRD Bid closed on 30 July 2004 with DRD being the largest shareholder in Emperor, having relevant interests in 45.33% of the shares in Emperor. DRD had commenced the DRD Bid with a voting power of 19.78%.

Control of Emperor after takeover bid by DRD

- 19. Following the DRD Bid, two existing directors of Emperor were removed, one additional nominee of DRD was appointed to the board of Emperor and the chairman of DRD was appointed to be the managing director of Emperor.

Rights Issue and Shortfall Facility

- 20. During the DRD Bid, Emperor disclosed that it was investigating a rights issue to raise \$12.5 million. It was not disputed in the Proceedings that Emperor needed some degree of funding, at some future point or points in time. However, the amount and timing of the required funds and how they would be raised were at the centre of the Proceedings.
- 21. On 13 September 2004, Emperor lodged a prospectus in relation to the Rights Issue to raise up to \$20.4 million. Each Emperor shareholder (other than certain excluded foreign shareholders, eligible Emperor shareholders were described as Existing Shareholders) would have a non-renounceable entitlement (an **Entitlement**) to subscribe for 4 new shares for every 10 existing shares held, at a price of \$0.45 per new Emperor share. On the day before the announcement of the Rights Issue, the Emperor share price closed at \$0.67.
- 22. The Rights Issue also involved the Shortfall Facility, under which Emperor shareholders could subscribe for any new Emperor shares not applied for by way of Emperor shareholders taking up their Entitlements. Emperor shareholders would be able to apply to participate in the Shortfall Facility to the full extent possible or up to a maximum limit specified by them. Shares would be allocated to Emperor shareholders who applied for shares under the Shortfall Facility in proportion to

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their Entitlements under the Rights Issue (up to any limit placed by the shareholders). If the shortfall was not fully taken up by Emperor shareholders under the first round of the Shortfall Facility, then the process would be repeated until all rights had been taken up.

23. With some exceptions, shareholders with registered addresses outside Australia were not entitled to take up Entitlements or participate in the Shortfall Facility (**Ineligible Shareholders**⁵). This, however, affected shareholders holding less than 2% of Emperor's shares. Emperor did not appoint a nominee to participate in the Rights Issue on behalf of Ineligible Shareholders (and to remit any cash benefits accruing from such participation to the underlying foreign shareholders⁶). Rights, and therefore new shares, were not to be issued or allotted in respect of shares held by Ineligible Shareholders.
24. The Rights Issue Prospectus was lodged with ASIC on 13 September 2004. The key dates relating to the Rights Issue are as follows (some of these dates were confirmed in a correcting statement to Australian Stock Exchange Ltd (**ASX**) dated 14 September 2004):
 - (a) the notice of Rights Issue was sent to Emperor shareholders on 14 September 2004;
 - (b) Record Date for rights entitlements was 22 September 2004;
 - (c) the closing date for acceptance of Rights Issue was 8 October 2004;
 - (d) the new shares were to be allotted on 18 October 2004; and
 - (e) the trading of new shares was to start on 19 October 2004.

Underwriting

25. Under the Participation Deed, DRD undertook to take up its Entitlement and to apply to participate in the Shortfall Facility. DRD agreed to apply for as many shares as it could be issued under the Shortfall Facility (and successive rounds if required) without its voting power in Emperor increasing beyond 60% (to comply with requirements under the *Foreign Acquisitions and Takeovers Act 1975 (Cth)* (**FATA**)).
26. Therefore, as set out in the Rights Issue Prospectus, if DRD were to be the only Emperor shareholder to take up its Entitlements and/or participate in the Shortfall Facility, DRD would hold 60% of the issued capital in Emperor after the completion of the Rights Issue. The maximum percentage voting power in Emperor which DRD might have attained in the absence of any restriction under the FATA, assuming no other shareholders took up their rights under the Rights Issue, was 60.9%.

Purpose of the Rights Issue

27. The Rights Issue Prospectus disclosed that the purpose of the Rights Issue was to raise \$20.4 million in order to fund:

⁵ Eligible shareholders were defined in the Emperor Prospectus as having registered addresses in Australia, New Zealand, the Isle of Man, the Netherlands and Hong Kong, but not elsewhere.

⁶ See section 615 of the Act.

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- (a) the completion of a previously announced expansion of Emperor's gold mine at Vatukoula in Fiji;
 - (b) the repayment of money drawn for working capital requirements under an overdraft facility with Australian and New Zealand Banking Group Ltd (ANZ) (**ANZ Working Capital Facility**) (due on the earlier of the completion of the Rights Issue and 15 November 2004), of which \$2.3 million was drawn down as at 30 June 2004;
 - (c) the acquisition of heavy vehicles; and
 - (d) the costs of the Rights Issue.
28. The Rights Issue Prospectus disclosed that Emperor had previously intended to fund the first three matters outlined above out of cash flow generated by operations, but that adverse developments meant that this would no longer be possible.
29. The adverse developments which Emperor cited as preventing it from using its own cash flows to fund the expansion plans included:
- (a) an increased amount of "Gold in Circuit", meaning gold levels building up within the processing plant due to difficulties in the chemical extraction, and therefore unavailable (at least temporarily) for sale and funds generation;
 - (b) lower levels of gold in the ore currently being mined, reducing cash flow and profitability; and
 - (c) higher world fuel prices (fuel making up a significant portion of the costs of Emperor's mining processes).

Financial position of Emperor

30. Emperor's need for funds, and the prospect of a Rights Issue, was raised by Emperor during the DRD Bid. DRD itself had asserted in its bidder's statement and in its arguments in support of its bid that Emperor was in severe need of funds to develop its mine. In Emperor's financial report for the year ended 30 June 2004, its auditors stated that 'there is significant uncertainty whether the Group will be able to continue as a going concern and therefore whether it will realise its assets and extinguish its liabilities in the normal course of business and at the amount stated in the financial report'.
31. Subsequently, Emperor had publicly indicated that the timely completion of the Rights Issue was critical for it to be in a position to meet its obligations.

APPLICANTS' SUBMISSIONS

32. The Applicants based their application on a number of policy issues. Essentially they were:
- (a) Unfair dilution of non-DRD shareholders;
 - (b) Abuse of item 10 / item 13 of section 611;
 - (c) Acquisition by DRD of control of Emperor without a premium;
 - (d) Lack of equal opportunity to share in benefits;

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- (e) Information deficiencies in the Rights Issue Prospectus (primarily in relation to DRD's intentions for Emperor, DRD's funding and other material information);
- (f) Lack of exit opportunity for non-DRD shareholders in Emperor;
- (g) Related party transactions and acquisition of control, not approved under the related party provisions of the Act;
- (h) the Rights Issue was in reality a placement to DRD, not a rights issue; and
- (i) DRD(IoM) controlled its own risk but still held out that it was an underwriter, to gain the benefit of items 10 and 13 of section 611.

Unfair dilution

33. The Applicants submitted that the terms of the Rights Issue meant the following:

- (a) Those Emperor shareholders who did not exercise their Emperor rights would have their proportionate interest in Emperor diluted.
- (b) To retain their proportionate interest in Emperor, Emperor shareholders were required effectively to subscribe A\$0.18 under the Emperor Rights Issue for each Emperor share they currently held. It was submitted that this created a significant disincentive for Emperor shareholders to exercise their Emperor rights and was likely to lead to the failure by Emperor shareholders to exercise a large number of Emperor rights. In addition, the Applicants claimed that there was a range of market specific factors that meant it was unlikely that shareholders would take up their rights.
- (c) Emperor shareholders were not able to sell their Emperor rights and so could not benefit at all under the Rights Issue other than by exercising their Emperor rights at the subscription price.
- (d) The new shares offered under the Rights Issue Prospectus were being offered to Existing Shareholders (as defined in the Emperor Prospectus) with registered addresses in Australia, New Zealand, the Isle of Man, the Netherlands and Hong Kong, but not elsewhere. This was despite the Applicants' assertions that Emperor had historically enjoyed a geographically wide-spread shareholder base with shareholders resident and with registered addresses in France, Germany, the USA and elsewhere in the world and, thus, who would not be able to participate. This was particularly concerning to the Applicants since, given the Rights Issue timetable, they claimed that there was inadequate time for them to re-register their shares with an Australian nominee or custodian.

Comparison with InvestorInfo decision

34. The Panel had addressed many policy issues in relation to rights issues in its decision in *InvestorInfo*. In that decision, the Panel considered when underwriting of a rights issue might be considered to be unacceptable because it was an abuse of either or

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both the exceptions in items 10 and 13 of section 611 of the Act. The *InvestorInfo* Panel said that :

"whether the Rights Issue Exception [item 10] or either the First Underwriting Exception or the Second Underwriting Exception (insofar as it applies to rights issues) [item 13] is being used properly depends on the extent to which participation in the rights issue (and in alternative benefits) is made genuinely accessible to shareholders in general. We use the term "genuinely accessible" to include not just providing an opportunity to participate in the rights issue but as a broader concept looking at the likely reaction to the offer of shareholders and other investors and the likely effects of the issue on shareholders and the issuer."

35. The *InvestorInfo* Panel then listed 18 factors that it considered were relevant when assessing whether or not a rights issue should be considered to be "genuinely accessible". In the Application, the Applicants addressed each of the specific issues raised in the *InvestorInfo* decision.

DISCUSSION

Funding

36. Emperor strongly indicated to the Panel in its submissions during the Proceedings that, if the Rights Issue should not proceed for any reason (or if the Participation Deed did not proceed and there was a substantial shortfall under the Rights Issue), Emperor would not have sufficient funds to meet its ongoing cash requirements and complete the expansion of Emperor's gold mine referred to in the Rights Issue Prospectus and at paragraph 27 above.
37. The Panel accepted Emperor's submissions (and similar submissions also made by DRD) as to its financial status and the effect on Emperor's solvency of the Rights Issue not proceeding very close to the original timetable. In accepting Emperor's submissions as to its financial status, the Panel did not investigate Emperor's financial circumstances, and in particular, did not seek evidence from Emperor's bankers or financial advisers, for the reasons explained below.

Applicants' submissions on funding

38. The Applicants raised three main issues in relation to funding:
- (a) whether Emperor needed funds at all, given the recent reduction of the Gold in Circuit problem and rising ore grades;
 - (b) the sum sought to be raised was too large (with the inference that it was larger than it needed to be in order to increase the size of the Rights Issue and the possibility of a large shortfall increasing the level of DRD's control of Emperor); and
 - (c) there were other ways of raising funds if needed, such as restructuring of its bank debts, further project financing, medium term note or bond issues, listing and raising monies on AIM in London or TSE in Canada.

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39. The Applicants also sought to rebut Emperor's assertions about the unavailability of cash flow from its mines to fund the repayment of the ANZ Working Capital Facility and the Phase 2 expansion of Emperor's mines.
40. The Panel considered that Emperor had reasonably demonstrated that it had significant outflows of funds pending, and that they were for apparently bona fide purposes. The Panel considered that it was not appropriate, and likely not feasible, for it to attempt to enquire into Emperor's financial position beyond that. The Panel also considered that the Applicants had not materially impeached the Emperor directors' entitlement to have their business decision as to a need for funds accepted. Had the Panel considered that a precise determination of Emperor's financial position was material to its decision, it would have required Emperor to provide more recent financial information and evidence than provided by Emperor in these proceedings. The Panel considered that, as the views of the Emperor board and DRD on the quantum and urgency of Emperor's need for funding, and the relative merits of alternative sources of funding, were being challenged, it was unlikely that they would be able to provide disinterested views on these points.
41. While an examination of alternative methods of funding may have been open to the Panel if the Application had been made earlier, the timetable faced by the Panel meant that it had little option but to proceed on the basis that Emperor was in urgent need of funds. Once the Panel decided to proceed on the basis of Emperor's assertions as to its need for funds, the due date for repayment of the ANZ overdraft facility left little scope to look at alternatives, even within the structure of the Rights Issue, let alone a completely new source or means of funding. The due date for repayment of the ANZ Working Capital Facility also meant that the Panel had little time to allow the parties to develop their own solutions, but was required to make orders imposing a solution to remedy the unacceptable circumstances.
42. The Panel noted the advice of both NM Rothschild & Sons (Australia) Ltd (**Rothschild**) and Deloitte Corporate Finance Pty Ltd (**Deloitte**) which the board of Emperor had procured, which addressed a range of alternative funding mechanisms available to Emperor and concluded that a rights issue was an appropriate method of raising the funds the board of Emperor had advised were needed. The alternatives considered by Rothschild and Deloitte covered most of the alternatives proposed by the Applicants. The Panel noted that both those advices were given on the basis of the amount and timing of fund raising which the board of Emperor gave to the two advisors. The Panel also noted that Rothschild advised the board of Emperor that the rights issue should be renounceable - this is further discussed below. No independent advice as to the amount, and timing of any need for funds was provided to the Panel. Such independent advice would have been useful to the Panel in these proceedings.⁷
43. The Panel also noted that throughout the Proceedings, Emperor provided no correspondence or any information on discussions it may have had with ANZ about the repayment deadline, and it did not offer to seek an extension from the bank. So,

⁷ As noted in paragraph 30 above, Emperor's auditor raised concerns about Emperor as a going concern if it did not raise further funds. The portion of the report provided to the Panel it did not address either the quantum or timing required.

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although the Panel commenced from the basis of accepting Emperor's assertions about the risk of insolvency, Emperor did not avail itself of any opportunities to provide firm evidence as to the firmness of the 15 November repayment date, and therefore the timing pressure on the Rights Issue.

Related Party transactions

44. The Panel did not consider that the related party issues raised in the application were within the Panel's jurisdiction. Many of the issues raised under the Related Party heading were in fact restatements of issues raised elsewhere in the Application in terms of the takeovers chapters.

Information deficiencies in the Rights Issue Prospectus

45. The Panel considered that many of the points raised by the Applicants had been adequately addressed in the Rights Issue Prospectus, including DRD's intentions and other material information. This conclusion was supported by the submissions made by ASIC.
46. However, the Rights Issue Prospectus did not address the ability of DRD to fund its participation in the Rights Issue and in the Shortfall Facility nor the details of its funding arrangements. Emperor stated in the Rights Issue Prospectus that "DRD IoM has indicated to Emperor that it intends to fund its participation in the Rights Issue out of a mix of internal cash resources and external debt facilities". DRD provided evidence to the Panel in the Proceedings as to its ability to fund its entitlements under the Rights Issue and its obligations under the Shortfall Facility.
47. Consistent with decisions in *QR Sciences Ltd*, *InvestorInfo* and *Anaconda Nickel Ltd 02-05*, the Panel considered that the information principles in section 602 applied to the Rights Issue Prospectus. The Panel considered that Emperor should have disclosed additional information on DRD's ability to fund its entitlements under the Rights Issue and its obligations under the Participation Deed to participate in the Shortfall Facility. The Panel considered that this was material information which should normally be included in a prospectus for a rights issue which was likely to result in a shareholder such as DRD acquiring a substantial interest in Emperor⁸.
48. The Panel decided that although it would have been preferable to have made such disclosure in the Rights Issue Prospectus, any deficiency was not sufficient to warrant making orders requiring supplementary disclosure.

Lack of equal opportunity to share in benefits

49. The Panel considered that the following issues raised by the Applicants in relation to the Rights Issue could be considered part of the "equality of opportunity principle" set out in section 602:
- (a) Unfair dilution of non-DRD shareholders;
 - (b) Abuse of item 10 / item 13 of section 611;

⁸ For example, a shareholder would likely be less willing to subscribe for rights if the company would be insolvent without the full amount being subscribed, but the underwriter did not have sufficient funds to fulfil its obligations. The shareholder might subscribe their funds but the underwriter fail to meet its obligations, with the company then being liquidated with consequent loss of shareholders' funds.

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- (c) Acquisition by DRD of control of Emperor without a premium;
 - (d) Lack of equal opportunity to share in benefits;
 - (e) Lack of exit opportunity for non-DRD shareholders in Emperor;
 - (f) Related party transactions, not approved under the Related Party provisions of the Act;
 - (g) the Rights Issue was, in fact, a placement rather than a rights issue.
50. Therefore, the Panel considered all of those issues together when it considered whether the Rights Issue and the Participation Deed together constituted unacceptable circumstances. In considering those issues, the Panel also reviewed them in terms of consistency with the issues and principles raised in the *InvestorInfo* decision.
51. In considering whether the Rights Issue and the Participation Deed constituted unacceptable circumstances, the Panel looked at four issues as being of primary concern:
- (a) the non-renounceable nature of the Rights Issue;
 - (b) the deep discount;
 - (c) the underwriting was with Emperor's major shareholder; and
 - (d) the voting power of DRD before the Rights Issue and the voting power to which DRD might move in the event of a material shortfall in the Rights Issue.
52. While each issue was material, but may not have in itself been sufficient to have caused unacceptable circumstances to exist, the Panel considered that the combination and interaction of these four issues brought about the unacceptable circumstances.

Non-renounceability of the Rights Issue

53. Non-renounceability of the Rights Issue was a major concern for the Panel. The Panel tried to find ways for the Rights Issue to be made renounceable. However, Emperor advised that there was insufficient time for it to restructure the Rights Issue and comply with ASX time requirements, while still meeting the time limit imposed by repayment of the ANZ Working Capital Facility.
54. In its submissions, Emperor put forward three reasons why it had rejected the possibility of making the Rights Issue renounceable. They were:
- (a) *"it was thought that DRD would be required to make an application to ASIC to modify the application of the Corporations Act. The Subcommittee [which Emperor had established to oversee the Rights Issue] was concerned at the time that any such application would require in order to be processed.*
 - (b) *Having regard to the shareholder profile of Emperor, it was considered unlikely that there would be significant trading in the Rights Issue. In this respect, it was taken into account that DRD and Arduina, the two largest shareholders, together own over 60% of Emperor's shares.*

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(c) *Finally, there was the possibility of arbitrage resulting in Emperor's share price being driven down by trading, thus undermining the incentive provided by the discount in the Rights Issue."*

55. Emperor advised the Panel, and DRD confirmed, that DRD had indicated it preferred that the offer be non-renounceable for similar reasons. However, DRD had also indicated to Emperor that it would be prepared to consider supporting the issue on a renounceable basis if Emperor resolved to proceed on this basis.
56. The Panel rejects each of the three reasons put forward by Emperor as having any reasonable basis for removing one of the most important protections for Emperor shareholders where the Rights Issue was underwritten by its major shareholder. The Panel considered that each of the issues raised by Emperor were either easily resolvable, or posed little additional risk to Emperor. For example, in the case of [54(c)] above, any risk of downward pressure on the Emperor share price under a renounceable Rights Issue would be offset, to a greater or lesser extent, by a reduction of the risk of downward pressure caused by existing Emperor shareholders selling shares on market to fund the acquisition of the discounted shares under a non-renounceable Rights Issue.
57. Further, the Panel notes that non-renounceability appears to have been an active choice on the part of the Emperor board, despite external advice from two advisers that the Rights Issue should be renounceable. The reasons Emperor provided to the Panel for deciding to make the Rights Issue non-renounceable are almost direct copies from the Deloitte report which was provided to the Emperor board after the Emperor board had apparently decided to make the Rights Issue non-renounceable⁹.
58. In the Panel's view, the decision by the Emperor board to make the Rights Issue non-renounceable was the major factor that was likely to cause control of Emperor to be consolidated in DRD's hands and for unacceptable circumstances to exist.
59. The Panel notes that both extensive advice from Emperor's legal advisers, Kemp Strang, and its advice from its initial investment advisers, Rothschild, strongly indicated that renounceability was preferable for a number of reasons.

Rothschild advice

60. Emperor received advice from investment bankers Rothschild in July 2004. Rothschild provided an extensive and detailed discussion of the issues that Emperor faced in raising funds. Rothschild's recommendation was to conduct a renounceable rights issue. Some of the advice given to the Emperor board on the issue of renounceability included:
 - (a) a renounceable rights issue is more likely to be preferred by Emperor's minority shareholders as they receive value for the rights they decide not to take up;

⁹ Emperor did not advise exactly when it decided that the Rights Issue should be non-renounceable. However, Deloitte prepared its 10 September report on the basis of instructions that Emperor intended to make the Rights Issue non-renounceable.

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- (b) for the same reason, non-renounceable rights issues are viewed as unfair, as minority shareholders who do not have the capacity to take up their rights receive no value;
- (c) a renounceable rights issue is more equitable for all parties.

Deloitte advice

61. The only external support for Emperor's decision to make the Rights Issue non-renounceable came from the report from Deloitte after Emperor had apparently started on the course preferred by DRD that the Rights Issue be non-renounceable. However, Deloitte's report also raised serious questions about control in the event of the Rights Issue being non-renounceable. It cited a number of benefits from making the Rights Issue renounceable which, in the Panel's view, were more compelling than those put forward by Emperor against making the Rights Issue renounceable.

Policy

62. Renounceability provides two forms of protection to shareholders. The first is that it protects the value of the shareholder's investment in the company by allowing shareholders who either do not wish or do not have the financial resources to take up their rights, to sell those rights in the market. In doing so, they can recoup some of the diminution in value caused to their shareholding by the rights issue discount, without having to invest further monies. In general, the greater the discount, the greater the diminution in value, the greater the need for renounceability.
63. The second form of protection is that renounceability increases the chance that the rights will be sold to other investors rather than falling through to the underwriter (in this case, DRD). It thereby provides a degree of protection to shareholders against a potential increase in control. The Panel noted that this protection would depend on there being a reasonable market for the forgone rights. The Panel considered that the deep discount made such a market more likely. The Panel noted that making the Rights Issue renounceable would have allowed the rights to be traded by investors other than existing Emperor shareholders and other market participants. This would also encourage a reasonable market for the rights.
64. The Panel noted the statement in the *InvestorInfo* decision that renounceability indicates, particularly when combined with an attractive issue price, that a company wants the rights to be taken up and not flow through to an underwriter.
65. The Panel discussed renounceability with the parties a number of times. It is likely that, had Emperor been prepared to make the Rights Issue renounceable, the Panel would have accepted that alteration as an adequate resolution to the issues raised.
66. However, Emperor maintained that renounceability was not an option, because of the timetable required to run rights trading on ASX, the cost of renewing the Rights Issue Prospectus for a renounceable issue, and the consequent risk of insolvency to Emperor. Emperor cited \$250,000 as having been spent on preparing the Rights Issue Prospectus. The Panel considered that a considerably smaller sum would be needed to update the existing prospectus, so it discounted Emperor's submissions to a great extent on this issue.

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Discount

67. The Applicants said the deep discount (33% to the market price of Emperor shares on the day before the announcement of the Rights Issue) was a factor which added to the unacceptability of the Rights Issue.
68. In the *InvestorInfo* decision, and other guidance documents such as ASIC PS 159, a deep discount is generally taken as being an indicator that a rights issue has been structured to give shareholders an incentive to subscribe for their entitlements rather than allow them to flow through to an underwriter i.e. to increase genuine accessibility, rather than detract from it.
69. Both DRD and Emperor argued that the deep discount was an issue that the Panel should take as increasing the genuine accessibility of the Rights Issue. The submissions by ASIC also supported that contention. Emperor advised that it had taken into account advice from Deloitte regarding the discount. Deloitte also advised that the terms of the Participation Deed would be reasonable if Emperor and DRD were dealing on arm's length terms.
70. Emperor advised, in relation to the pricing of the Rights Issue, that :
- "Once DRD had been appointed to support the Rights Issue by undertaking in advance to apply for 100% of any shortfall, there were negotiations directly between the Underwriting Subcommittee¹⁰ and DRD regarding pricing of the Rights Issue. Ultimately, the question of pricing was approved by the entire Board¹¹, as discussed above."
71. The Applicants asserted that the deep discount did not increase the genuine accessibility of the Rights Issue. They argued that the deep discount did four things:
- (a) It increased the number of shares which were required to be issued to raise the amount of money determined as necessary by the Emperor board (disregarding the dispute by the Applicants as to the sum required or the need). This increased the diluting effect on the voting power exercisable by non-DRD Emperor shareholders who did not take up their Entitlements (and thereby also increased the concentration of control of Emperor by DRD under the Shortfall Facility).
 - (b) It failed to provide an incentive to Emperor shareholders to subscribe with a view to then selling their new shares to realise the deep discount, because the market for Emperor shares had historically been very thin.
 - (c) It failed to provide an incentive to non-DRD Emperor shareholders to subscribe because many of them would not wish to further invest in Emperor where DRD had de-facto control and wished to achieve greater control. The Applicants supported this argument by citing the recent result of the DRD Bid, in which DRD acquired less than 50% of Emperor,

¹⁰ Emperor advised that the sub-committee comprised the independent directors of Emperor. The Panel noted, however, that DRD had removed two independent Emperor directors who had opposed the Rights Issue. In addition, Emperor advised in its submissions to the Panel that it considered that DRD had already demonstrated its control over Emperor.

¹¹ By that time DRD controlled the structure of the Emperor board.

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and the voting against DRD's proposed resolutions at recent meetings of Emperor.

- (d) It would deliver a substantial shortfall to DRD at a discount, rather than requiring DRD to pay any form of premium for control or premium for increased control of Emperor.
72. The Panel accepted DRD's and Emperor's arguments that, *other things being equal* [the Panel's qualification], a deep discount should be counted as adding to the genuine accessibility of a rights issue. This is consistent with the decision in *InvestorInfo*. The Panel considered that the discount did provide an incentive to all Emperor shareholders to subscribe for their Entitlement, and to that extent the Panel considered that the deep discount did increase the genuine accessibility of the Rights Issue.
73. However, like all matters before a Panel, the question of a rights issue's pricing or discount needs to be considered in context.
74. In the circumstances before it, where the Rights Issue was non-renounceable and the major shareholder, DRD, had committed to apply for any shares available under the Shortfall Facility, it was highly likely that DRD's holding in Emperor would increase¹². The Panel accepted the Applicants' submission that non-DRD shareholders, having only recently declined DRD's takeover offer, may be unwilling to participate in the Rights Issue, notwithstanding the deep discount, where it was highly likely that DRD's control of Emperor would increase, probably to more than 50%. The Panel also considered that, as the deep discount would result in a larger number of shares being issued, it increased the likelihood of DRD's control of Emperor being consolidated. The Panel was concerned that this appeared likely to happen in circumstances where non-DRD shareholders did not have reasonable and equal opportunity to participate in the benefits which would flow to DRD (those benefits being the increase or consolidation of control which would flow to DRD through acquiring a substantial interest in Emperor under the Shortfall Facility and Participation Deed).

Underwriting by DRD

75. The Participation Deed agreed by DRD and Emperor was not a normal commercial underwriting arrangement. However, it had many essentially similar features and it had the same effect as a traditional underwriting agreement i.e. DRD agreed (subject to the last 0.9% limitation imposed to meet FATA requirements) to subscribe for all and any shares to be issued on exercise of rights not taken up by Emperor shareholders. The unusual aspects were that DRD charged no fee to Emperor for performing this underwriter role, underwriting securities issues is not part of DRD's ordinary course of business, DRD was not an unrelated third party but rather Emperor's major shareholder, and the agreement was expressly not called, or drafted as, an underwriting agreement.

¹² Because no offers were made to the excluded foreign Emperor shareholders, it was certain that DRD's percentage voting power would increase a little if it merely subscribed for all of its Entitlement. However, that was a separate issue to any increase due to the operation of the Participation Deed and the Shortfall Facility.

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76. The Panel considered that the Rights Issue and the underwriting arrangement (i.e. the Participation Deed) could have (and in the Panel's view was likely to have) a significant effect on the degree to which DRD IoM controlled Emperor. Any increase in that control would take place at a significant discount to the market price of Emperor shares.
77. The Panel did not consider that DRD underwriting the Rights Issue would, of itself, constitute unacceptable circumstances. Indeed, the *InvestorInfo* decision makes it clear that in some cases an underwriting by a major shareholder may be the only way forward for a small or struggling company. The Panel notes and agrees with this position, as set out in paragraph 42 of the *InvestorInfo*. The Panel also notes the warning set out in paragraph 43 of the *InvestorInfo* decision that the type of rights issue which is the subject of these proceedings is "*likely to attract closer scrutiny to determine whether it may have the effect of infringing on the policies, or avoiding the protections, of Chapter 6.*"
78. However, when the Panel considered the DRD underwriting in the context of the Rights Issue being non-renounceable, the deep discount, the 4 for 10 ratio of the Rights Issue and DRD's existing voting power, it decided that the DRD underwriting was an element giving rise to unacceptable circumstances.
79. Had the Rights Issue been renounceable, underwriting by DRD may not have caused the Rights Issue to constitute unacceptable circumstances.
80. The unacceptable circumstances were the likelihood of a material increase in DRD's control of Emperor where other Emperor shareholders did not have a reasonable and equal opportunity to share in the benefits flowing to DRD in acquiring a substantial interest in Emperor. The Panel considered that the circumstances were inconsistent with the policy of the takeovers chapters of the Act.

Emperor's efforts to find alternative underwriters

81. Emperor advised the Panel that it had sought underwriting proposals from third parties unrelated to Emperor or DRD. Emperor advised that, of the four proposals sought, two parties declined to submit proposals and, of the two proposals submitted, both involved an element of sub-underwriting by DRD (or, at least, required DRD to commit to subscribe for its Entitlements under the Rights Issues). Emperor gave no details about the degree of sub underwriting required, or other terms, to allow the Panel to assess the reasonableness of Emperor's decision to enter into the Participation Deed rather than commercial underwriting arrangements with these parties. Neither did Emperor provide any evidence as to its selection process of the four relatively small underwriters which it approached.
82. The two underwriting proposals received related to a lesser amount (A\$12.5 million), which Emperor was seeking at the time. They were also received before the modified audit report on Emperor's financial statements. Emperor provided no evidence of any attempts to find underwriters for the higher amount of A\$20.4 million subsequent to mid August 2004.

DRD's voting power

83. After its partially successful bid for Emperor, DRD had voting power of 45.33% in Emperor. The next largest shareholder was Arduina Holdings BV with

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approximately 15%. Collectively, the Applicants held approximately 10% of Emperor.

84. If no shareholders other than DRD took up their Entitlements, and DRD fulfilled its obligations under the Participation Deed, DRD's voting power would increase to 60.9% (subject to DRD obtaining approval under FATA to acquire more than 60% of Emperor). This would be a very significant and material change in the level of control DRD had over Emperor.
85. While not determinative of itself, the Panel considered that the fact that DRD might move from normally having effective control over Emperor to being assured of absolute control was a material issue. It added to the risk that the Rights Issue and the Participation Deed, when considered in light of the other issues such as renounceability, would constitute unacceptable circumstances.

Onus on Emperor directors

86. The Panel considered that the facts of DRD's voting power being close to control, the significant dilutionary effect of the Rights Issue and the results of the recent DRD Bid placed a greater onus on the Emperor board to ensure that the interests of non-DRD shareholders were not adversely affected by the structure and execution of the Rights Issue. For the reasons set out here, the Panel considers that the Emperor board failed to do this.
87. In saying this, the Panel notes that at several critical steps, DRD and Emperor appeared to choose options which would tend to promote the likelihood of DRD's control of Emperor increasing, rather than options which would minimise that likelihood. These choices were:
 - (a) making the Rights Issue non-renounceable; and
 - (b) not accepting Kemp Strang's advice as to giving non-DRD shareholders priority under the Shortfall Facility.

Emperor did not provide – and the Panel could not see – any reasonable, commercial basis for either decision.

88. The Panel notes that at no stage did Emperor appear to have entered into discussions with the major non-DRD shareholders in Emperor to assess their attitude to the form and structure of the proposed Rights Issue or other issues.¹³¹⁴

¹³ In the *InvestorInfo* decision, the attitude of a company's major shareholders to a proposed rights issue is cited as a legitimate issue in considering the acceptability of a proposed rights issue. In this particular case, two of the applicants, which held between them approximately 6.48% of Emperor's shares, indicated to the Panel that they were unable to take up their rights or participate in the shortfall facility. The three applicants were among the largest shareholders in Emperor after DRD. In addition, the Applicants advised that Arduina, the largest non-DRD shareholder, had withdrawn its application to the FIRB to increase its voting power beyond 15% and would thus be prevented from participating in the Shortfall Facility.

¹⁴ Emperor noted that two persons associated with two of the Applicants had been directors of Emperor during the early stages of the Rights Issue discussions. Emperor declined to consent to these ex-directors providing information about the Rights Issue to these proceedings which they gained while they were directors of Emperor.

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Control issues

89. The board of Emperor advised that it considered that DRD had demonstrated its control over Emperor by successfully promoting resolutions for the removal of two directors, Messrs Patterson and Elliott. Therefore, in making its determination to proceed with the Rights Issue, the board of Emperor did not consider control to be an issue, as DRD already had demonstrated its control over Emperor.
90. Emperor's Board advised that, nevertheless, it was well aware that, because of DRD's significant shareholding in Emperor, issues may arise because the extent of that interest could increase. Accordingly, Emperor's Board and the Underwriting Subcommittee took advice from Deloitte and Rothschild.

The section 611 exceptions to section 606 - rights issues and underwriting

91. In making its determination as to whether the Rights Issue and Participation Deed constituted unacceptable circumstances, the Panel considered the issue both as a straightforward issue of whether unacceptable circumstances existed, and also as whether the Rights Issue and Participation Deed constituted an abuse of the exceptions in section 611. To do that, it had to consider the general policy of the rights issue and underwriting exceptions in section 611. The policy of those exceptions is that, where directors of a company think it desirable or necessary for the company to raise money by issuing shares, Chapter 6 considerations should not prevent them from making and carrying out the arrangements necessary to make the issue successful.
92. Parliament having chosen to create exceptions to section 611 and having directed the Panel to take account of the policy of the provisions of Chapter 6, the Panel will respect the right to proper use of the exceptions.
93. However, the Panel, consistent with long-standing policy put in place by ASIC and its predecessors, will not tolerate abuse of the exceptions. The exceptions operate subject to the overriding policy of Chapter 6 i.e. they are permissive exceptions to section 606, not abrogations of Chapter 6. In using the exceptions, directors of companies are not entitled simply to disregard the policy of Chapter 6.
94. Relevantly:
 - (a) item 10 excepts acquisitions of voting shares from the limit in section 606, where the acquisitions are made under a pro-rata rights issue, and extends to an underwriter or sub-underwriter of the rights issue;
 - (b) item 13 similarly excepts acquisitions by a person who underwrites an offer made by a prospectus which discloses the possible effect of the shortfall on that person's voting power.
95. The policy of both exceptions was discussed in paragraphs 35 to 37 of the *InvestorInfo* decision.

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96. NCSC Policy Statement 112 considers the abuse of the underwriting exception for rights issues (then section 14, now item 10).¹⁵ It has been subsumed into paragraphs 159.152 to 159.187 of ASIC Policy Statement 159 *Takeovers: Discretionary Powers*, which also mentions item 13, though with no separate discussion of the policy of that exception.
97. ASIC Policy Statement 61 *Underwriting - application of exceptions* discusses what constitutes underwriting or sub-underwriting for the purposes of former subsection 622(3) of the Corporations Law (what is now item 13). It points out that in general underwriting means assuming a risk, and in this context it means assuming the risk of a shortfall in the take-up of an offer of shares. Accordingly, ASIC indicates that shares “taken firm” (i.e. allotted irrespective of the level of demand by other applicants) by an underwriter are not covered by the exception.

What constitutes an abuse of the exceptions

98. As a matter of policy, the Panel needed to consider whether the exceptions were being abused. If the transaction and DRD’s role in it was in effect a placement, it would not make it acceptable that it took the form of underwriting a rights issue. That is, whether the exception was being properly used depended in part on the underwriter taking the **risk** of a shortfall. If the shortfall was certain or unduly likely to occur, whether by contrivance or otherwise, it would be unsuitable to characterise the arrangement as the assumption of a risk.
99. The Panel recognises, as did the *InvestorInfo* decision, that in some cases a serious shortfall is likely and cannot be averted: for instance, a distressed company with an urgent need for a substantial amount of cash like Anaconda Nickel Ltd. Whether a shortfall is unduly likely in such a case will depend on whether the structure and presentation of the issue take advantage of the difficulties of the situation to increase the underwriter’s holding in the company, or whether they are handled responsibly with a view to providing genuine accessibility and completing the issue successfully.
100. On this approach, as a matter of policy, the Panel may not allow an underwriter to rely on the item 13 exception if the underwritten issue has been structured and presented in ways likely to make it less attractive to the primary offerees than could responsibly have occurred. That is as true of an underwritten offer to the general public as it is of an underwritten rights issue.
101. As regards a rights issue, the general policy means that the rights issue should not be structured or presented in ways that make it less genuinely accessible than it need be, considering the issuing company’s situation at the time.

Technical non-compliance with item 10 of section 611

102. The Panel noted that, because certain foreign shareholders¹⁶ were not able to participate in the Rights Issue and because a nominee facility had not been

¹⁵ It does not also deal with paragraph 12(d) of CASA. The two exceptions were more distinct than they are now. Under the *Companies Act 1981 and Codes*, a rights issue was not an offer to the public, and a prospectus was not required.

¹⁶ Emperor advised the Panel that the excluded foreign shareholders held only 1.533% of the voting shares in Emperor.

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established in respect of those shareholders, the exception in item 10 of section 611 (the ‘rights issue exception’) did not apply to the Rights Issue. Therefore, any acquisitions of shares under the Rights Issue which would cause an increase in any Emperor shareholder's percentage voting power over 20%, could be in breach of the 20% threshold in section 606.¹⁷

103. The exclusion of foreign shareholders meant that there would be a small increase in DRD and DRD IoM's voting power as a result of DRD IoM taking up its Entitlement. This would not be exempt from section 606.
104. DRD and Emperor argued that the rights issue was not unacceptable, as it was in substantial compliance with item 13 of section 611, as well as with item 10. Although there were technical difficulties with reliance on either of those provisions, this argument required the Panel to consider when compliance with either of them (be it strict or substantial compliance) would be satisfactory, and when it would be unacceptable for an underwriter to rely on them.
105. The Panel noted that it would have been possible¹⁸ for Emperor to set up a nominee facility to sell the shares issued pursuant to the rights which were not offered to the excluded foreign shareholders and remit the proceeds to them. Emperor did not do so and was not able to make it clear to the Panel why such a facility would not have been possible.
106. However, despite its concern that Emperor did not see fit to set up such a facility, the Panel considered that any increase in DRD's voting power as a result of the excluded foreign shareholders not being offered Entitlements under the Rights Issue would be relatively small, and would therefore not in itself justify a declaration of unacceptable circumstances
107. Emperor and DRD offered undertakings¹⁹ during the Proceedings to modify DRD's Entitlement under the Rights Issue to scale it back so that DRD's voting power would not, by taking up its Entitlement, increase above DRD's then voting power solely because of the non-offer of Entitlements to the excluded foreign shareholders. The Panel welcomed the offers and would have been pleased to accept them in undertakings if the Proceedings had been capable of being resolved by way of undertakings. However, once it became apparent that it was not able to resolve the Proceedings by way of undertakings, the Panel included an order similar to the offered undertakings in the final orders that the Panel made.

Compliance with item 13 of section 611

108. The Panel considered that, while the technical requirements of the exception in item 13 of section 611 (the ‘underwriting exception’) may have on one view been met, the fact that the Rights Issue, as Emperor had structured it, there was an increased likelihood that there would be a large shortfall that would flow through to DRD, in

¹⁷ Any increase would have breached section 606 as DRD had no entitlement under the “creep” provisions having just acquired shares under the DRD Bid.

¹⁸ While possible, a foreign shareholder facility under a non-renounceable rights issue is somewhat more difficult than for a renounceable rights issue.

¹⁹ This undertaking was in addition to the undertaking offered to modify the Shortfall Facility to give non-DRD shareholders priority.

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the Panel's view indicated that the "Underwriting" was not in fact bona fide risk taking, and therefore not within the exception.

InvestorInfo

109. The Panel considered the issues raised in this application against those in the *InvestorInfo* decision. There were sufficiently significant similarities between the two matters for the same policy considerations to apply in both matters. However, there were material factual differences (after the *InvestorInfo* Panel accepted undertakings from the major shareholder) which required a decision in these proceedings different from that made in *InvestorInfo*. These included:
- (a) the rights issue in the *InvestorInfo* decision was renounceable;
 - (b) the major shareholder in *InvestorInfo* repeatedly affirmed that he had no intention or desire to increase his voting power in *InvestorInfo*;
 - (c) the major shareholder in *InvestorInfo* offered an undertaking to sell-down any "Unacceptable Shares" to ensure that his voting power did not increase as a result of the rights issue; and
 - (d) the rights issue in *InvestorInfo* was substantially underwritten by a person not associated with the major shareholder.
110. Renounceability was the main difference between the two proceedings. In the *InvestorInfo* proceedings, the Panel noted that no particular issue was likely to be decisive on its own. However, renounceability is particularly significant, and in these Proceedings, where there were a number of other issues which contributed to unacceptability, the fact of the Rights Issue being non-renounceable was decisive.

Media canvassing

111. During the Proceedings, DRD complained about a story which appeared in *The Australian Financial Review* concerning the Rights Issue and the Proceedings. Among other things, this story contained comments attributed to Mr Colin Patterson, an officer of Phoenix Fund, airing the complaint that the Rights Issue comprised an attempt to take over Emperor "on the cheap" and that it should have been renounceable.
112. Mr Patterson maintained to the Panel that he only discussed rights issues with the relevant journalist in general terms and, in particular, did not make the statements attributed to him in relation to the Rights Issue. Mr Patterson noted that the general discussion related to "rights issues, both renounceable and non-renounceable, and to deep discounts being offered in such issues".
113. Mr Patterson was reprimanded by Phoenix Fund. In the Panel's view, such a reprimand was appropriate. The Panel takes a dim view of Mr Patterson's participation in the relevant phone conversation. Regardless of whether Mr Patterson spoke to the journalist in specific terms concerning the Emperor fact scenario or in more general terms concerning relevant issues (which would necessarily be interpreted as being comments concerning the specific fact scenario under consideration by the Panel), the Panel considers that the fact that the conversation apparently covered more than the select matters outlined in Procedural Rule 12 (concerning media canvassing) would constitute a breach of that rule. That

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rule is intended to ensure that the subject matter of Panel proceedings is not debated by the parties in the media so that the Panel can resolve disputes before it efficiently and effectively, and without needing to be concerned that the proceedings are resulting in a misinformed market.

DECISION

Interim orders

114. On 6 October 2004, following receipt of parties' submissions, the Panel made interim orders delaying the acceptance date under the Rights Issue from 8 October 2004 until 22 October 2004. The Panel made this order to ensure that Emperor shareholders were not required to make a decision in relation to whether or not to participate in the Rights Issue in circumstances where there was uncertainty as to whether the Rights Issue would proceed or the circumstances in which it would proceed.

Declaration

115. The Panel concluded that unacceptable circumstances existed in relation to the affairs of Emperor as a result of the terms of the Rights Issue, the Shortfall Facility and the Participation Deed. The Panel considered that shareholders other than DRD did not have a reasonable and equal opportunity to share in the benefits that were likely to flow to DRD as major shareholder and effective underwriter of the Rights Issue.

116. As set out in more detail above, the Panel was influenced by the following factors when making its decision:

- (a) *The Rights Issue was non-renounceable.*
This prevented shareholders from renouncing and selling their rights so as to mitigate any reduction in value of their ordinary shares caused by the issue of shares under the Rights Issue at a significant discount (since there was no prospect of those rights being traded to a third party, thus increasing the likely size of the shortfall).
- (b) *The rights issue was priced at a deep discount meaning that, to raise the amount of money in question, the issue ratio was 4-for-10.*
While on its own not unacceptable, this meant that the Rights Issue would have a significant dilutionary effect on any shareholder who did not exercise their rights, and the fact that the Rights Issue was non-renounceable meant that shareholders who did not wish to subscribe had no compensating benefit from the sale of their rights.
- (c) *Emperor's underwriting arrangements in relation to the Rights Issue did not comprise normal commercial underwriting arrangements with an unrelated third party, but rather an arrangement with Emperor's major shareholder.*
This meant that the Rights Issue could have (and in the Panel's view was likely to have) a significant effect on the degree to which DRD IoM controlled Emperor, with any increase in that degree taking place at a significant discount to the market price of Emperor shares.
- (d) *DRD IoM currently (ie before completion of the Rights Issue) had voting power of approximately 45.33% in Emperor.*
This meant that the Rights Issue had the potential to increase DRD's

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control of Emperor significantly (in that DRD IoM's voting power could potentially move from 45.33% to slightly over 60%).

117. In the Panel's view, the combination of the above circumstances had the potential to affect the degree to which DRD has control over Emperor in a manner which was inconsistent with the policy of Chapter 6 of the Act.
118. The Panel considered that it was in the public interest to make a declaration of unacceptable circumstances in relation to the affairs of Emperor, and did so on 17 October 2004. A copy of the declaration is attached to these reasons as Annexure A.

Orders

119. Having decided that unacceptable circumstances existed in relation to the Rights Issue, the Panel considered what was required to remedy them. The Panel proposed a number of orders which it considered would remedy the unacceptable circumstances and invited parties to make submissions on the practicalities and commercial issues associated with the Panel's proposed orders. The Panel also asked parties to make alternative suggestions for possible orders or undertakings to remedy the Panel's concerns. The Panel received submissions from all of the parties in relation to its proposed orders and made final orders on 17 October, at the same time as the declaration of unacceptable circumstances.

Emperor's financial position

120. In making final orders, the Panel was particularly mindful of the submissions made to it concerning Emperor's financial position and Emperor's stated need to complete the Rights Issue in a timely manner. As stated above, the Panel accepted Emperor's submissions on its funding requirements and solvency at face value without making enquiries of Emperor's bankers or financial advisers.
121. The Panel considered making, and in other circumstances it may have made, final orders requiring that the parties not proceed with the Rights Issue. It would then have been open to the parties to pursue a rights issue with a different structure or different underwriting arrangements. However, the Panel received submissions (and, after making independent inquiries and on the basis of its own experience, accepted) that it would not have been possible to complete such a restructured rights issue within the timeframe which Emperor indicated was necessary to meet its financial needs.

Renounceability

122. The Panel's preference would have been for the Rights Issue to have been pursued on a renounceable basis. This would have increased the possibility of other investors taking up the new shares and reducing the concentrating effect of the Rights Issue on DRD's control of Emperor. In addition, the sale of renounceable rights would have compensated to some extent Emperor shareholders who did not take up their rights, for the financial dilution of their interests.
123. The Panel noted that if the Rights Issue had been made renounceable, the large discount to the market price at which the Rights Issue was being conducted would have made a ready market for Emperor rights likely. The Panel also noted that making the Rights Issue renounceable would have allowed the rights to be traded by

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investors other than existing Emperor shareholders, and other market participants.. This would also encourage a reasonable market for the rights.

124. In the circumstances of these Proceedings, the Panel accepted Emperor's submissions that seeking, at this late stage, to make the Rights Issue renounceable would have introduced delays which, in the circumstances, would have prejudiced Emperor's ability to complete the Rights Issue within Emperor's required timetable.

Underwriting arrangements

125. The Panel also accepted that Emperor would not, at this late stage, be able to replace the Participation Deed with normal commercial underwriting arrangements with an unrelated third party without introducing a significant delay.
126. Emperor advised that the auditor's modified audit report, which identified significant uncertainty as to whether Emperor would be able to continue as a going concern, was then a significant deterrent to any commercial underwriting. Any third party underwriter approaching underwriting of the Rights Issue would require extensive due diligence. Emperor submitted that the repayment date for the ANZ Working Capital Facility ruled this out and, accordingly, any such new underwriting would be at significant cost to Emperor both in terms of the due diligence itself, and if an underwriter could be identified, in higher underwriting fees because of the nature of the risk that was by then involved.

Sell down arrangements

127. The Panel considered making final orders requiring DRD to sell-down, within a set timeframe, any shares obtained by it in connection with the Rights Issue which increased DRD's voting power. The Panel took into consideration the possible downward pressure on Emperor's share price which such an order might cause, particularly given the potentially large shortfall to the Rights Issue and the historically thin trading in Emperor shares. The Panel was also conscious of the potential prejudice which such an order might cause DRD if DRD was required to sell shares acquired by it at a loss.
128. Emperor submitted that the least prejudicial order to Emperor may be an order that DRD sell down shares acquired through the Rights Issue. However, Emperor argued, such an order would prejudice both Emperor and its shareholders, as a sell down order would lead to a significant reduction in Emperor's share price, which could persist into the medium to long term and would also impede the rate of take-up under the rights issue.
129. However, the Panel decided that simply allowing DRD to retain the shares it acquired under the Underwriting would not be acceptable. The Panel considered that the orders that it made were a reasonable balance between the reasonable interests of DRD (especially acknowledging that DRD had agreed to provide needed finance for Emperor) and the interests of other Emperor shareholders.
130. When considering the issue of a sell-down order, the Panel noted a material difference between these proceedings and those in *InvestorInfo*. In the *InvestorInfo* proceedings, the major shareholder made firm and repeated statements that increasing or consolidating his voting power was not an intention of the rights issue or the underwriting arrangement. In addition, the major shareholder in the

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InvestorInfo proceedings voluntarily offered to sell down, within a specified period, any shares he acquired under the underwriting which increased his voting power in *InvestorInfo* Ltd. However, in these proceedings, DRD resisted any suggestion by the Panel that it sell-down any increase in its voting power which arose as a result of DRD's participation in the Shortfall Facility pursuant to the Participation Deed.

131. In the circumstances, the Panel made the orders set out in Annexure B.

Alternative proposals

132. Although the Panel considered alternatives to the orders it made, and it specifically asked the parties for alternative proposals, none of the parties raised alternatives which would have addressed appropriately the unacceptable circumstances (including, for example, an undertaking to pursue a renounceable rights issue or to ensure that DRD's shareholding did not increase as a result of the Underwriting. For example, the Panel would have been prepared to accept a sell-down structured in a different way but which still met the Panel's objectives).
133. DRD proposed a modification to the Shortfall Facility which meant that other Emperor shareholders who applied under the shortfall facility would have their shortfall applications filled before any shares passed through to DRD.
134. The Panel considered that this proposal had significant merit and would be likely to increase the accessibility of the Rights Issue to Emperor shareholders, and therefore reduce the prospect of DRD's control of Emperor being materially increased. The Panel therefore included it in the proposed orders which it put to parties for consideration.
135. The Panel noted that the proposal had in fact been put to Emperor by its solicitors in August while the Rights Issue Prospectus was still being prepared. Emperor's legal advisers were expressly concerned that the proposed structure of the Rights Issue and Shortfall Facility would not be consistent with the Panel's requirements for genuine accessibility. However, Emperor had chosen not to take that advice.
136. The Panel also noted that the proposal would not likely be sufficient to fully resolve its concerns. If there was a large shortfall in the Rights Issue because Emperor shareholders found the prospect of investing in a company controlled by DRD to be unattractive, there would likely be a similar lack of interest in taking up the rights via the Shortfall Facility. The proposed amendment to the Shortfall Facility would therefore probably not be effective in circumstances where there was a large shortfall and where the most harm was likely to befall Emperor shareholders in terms of control being given to DRD.
137. DRD did not propose any alternative resolutions or undertakings by which any increased percentage voting power it may have acquired under the Rights Issue and Underwriting would be reduced.
138. The Panel proposed its final orders to parties and invited DRD and Emperor to give undertakings to the same effect, as an alternative to the need for the Panel to make a declaration and orders. Emperor provided an undertaking in the form invited. DRD initially responded to the orders that the Panel had proposed with an offer of an undertaking that contained many elements of the orders that the Panel had advised it was considering. However, the undertaking did not address all of the issues which

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the Panel considered necessary. DRD advised that it could not, in the interests of its shareholders, give an undertaking in terms which were acceptable to the Panel..

Balance in orders

139. The Panel considers that its orders struck an appropriate balance between a number of competing considerations:
- (a) not causing undue prejudice to Emperor and its shareholders, in light of Emperor's financial position and stated need to complete the Rights Issue in a timely fashion;
 - (b) ensuring that all Emperor shareholders had a reasonable and equal opportunity to participate in the benefits accruing through any proposal under which DRD significantly increased its control in Emperor; and
 - (c) not punishing DRD for its involvement in the proposed Rights Issue.
140. The key features of the orders are:
- (a) a modification to the Shortfall Facility so that DRD IoM would not participate in any shortfall until all other shareholders' applications to do so were satisfied in full;
 - (b) an extension in the Rights Issue timetable to allow information to be sent to Emperor shareholders and to allow Emperor shareholders to consider that information. The Rights Issue would then close no earlier than 5.00pm (Sydney time) on 26 October 2004;
 - (c) a 2-year freeze on any increased voting power arising from the Rights Issue which DRD IoM would otherwise be able to exercise at a shareholders' meeting of Emperor (subject to increases in voting power arising under future acquisitions of Emperor shares permitted by the Act);
 - (d) a 1 month period for DRD to dispose of any 'Unacceptable Shares', at any price which DRD was able to achieve, with half of any profits going to Emperor;
 - (e) a requirement that from 1 month after completion of the Rights Issue until 1 month after the release of Emperor's half-yearly report for the six months ending 31 December 2004, DRD instruct its broker to accept any order to purchase any remaining 'Unacceptable Shares' which was priced at \$0.45 (plus an allowance for costs) per Emperor share or above; and
 - (f) a requirement that DRD IoM not terminate the Participation Deed as a result of the effect of the Panel's orders.

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Takeover bid by DRD

141. The Panel's orders would generally terminate in the event of a successful²⁰ takeover bid by DRD, or one of its associates, for the outstanding shares in Emperor. The Panel considered that in those circumstances, Emperor shareholders would have had a reasonable opportunity to benefit from an increase in DRD's control.

One month initial period to sell 'Unacceptable Shares'

142. The Panel allowed a 1 month period between completion of the Rights Issue and the commencement of the instruction to accept 'buy' orders. This would allow DRD a chance to find an alternative means of disposing of the 'Unacceptable Shares' and, so far as practicable, reduce the prospect of downward pressure on Emperor's share price. For instance, DRD might conduct a bookbuild to dispose of the shares with some recompense to DRD for accepting the risk of underwriting the Rights Issue. However, the Panel ordered that DRD and its associates must not buy any of these shares.

143. The initial one month sell down period and the offering, on market, of any remaining Unacceptable Shares after that one month initial period would also allow other investors to acquire shares in Emperor, which may reduce any concentrating effect on DRD's power that the Rights Issue and Underwriting may have had.

144. The Panel considered that if, at the end of the initial one month period, and the on-market sell down period, buyers had not come forward for all of the Unacceptable Shares, DRD should be entitled to retain any remaining shares.

145. In order to minimise any economic harm or risk to DRD, the Panel drafted its orders to ensure that those orders did not require DRD to sell any Emperor shares at a loss. When considered with the provisions allowing DRD to keep any unsold shares after a proper test of the market, the Panel considered that its orders would not cause any unfair prejudice to DRD. The Panel also believed that those orders would not cause any unfair prejudice to DRD if it was not its intention to increase its holding in Emperor through the Underwriting.

Half profits to Emperor

146. The Panel believed that Emperor's shareholders who had been disadvantaged by the unacceptable circumstances should be the primary beneficiaries of any profit which arose from the Panel's resolution of unacceptable circumstances, as they might have done by selling their Entitlements under a renounceable Rights Issue.

147. If these profits were to be used to compensate the Emperor shareholders who did not take up their rights, the Panel, in theory, could have required the profits to be paid pro rata to them. However, given the practical difficulties in implementing such an arrangement, the Panel directed that share of the profits to go to Emperor where those shareholders would at least gain some indirect benefit.

²⁰ The Panel notes that the term "successful" in this context specifically means acquiring more than 50% of the shares bid for in any bid which DRD did make. The Panel also specifically notes it had not been notified of any intention of DRD to make any takeover.

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148. The Panel considered requiring DRD to remit all profits from the sale of Unacceptable Shares during the 1 month period to Emperor. However, the Panel was concerned that this would remove any incentive for DRD IoM to dispose of the Unacceptable Shares during the 1 month period. Accordingly, the Panel settled on an, admittedly arbitrary, 50-50 split of the net proceeds from the sale of the Unacceptable Shares between DRD and Emperor during this one month initial period.

DRD not to exercise withdrawal rights from the Underwriting solely due to the Panel's decision and orders

149. The Panel ordered DRD not to exercise the withdrawal rights which it had under the terms of the Participation Deed where those rights would be triggered as a result of these Proceedings, the Panel's declaration or the Panel's orders. The Panel affirmed that DRD was free to exercise any withdrawal rights which arose independently of, and not due to, the Panel's Proceedings.

150. The Panel wished to interfere with DRD's commercial rights to the least possible extent. However, it would not be acceptable for a Panel's decision, which was intended to remedy unacceptable circumstances, to be negated by a person relying on the existence of that very remedy. To decide otherwise would be to allow an underwriter to be bound to the underwriting only as long as unacceptable circumstances persisted. The Panel drafted the terms of the orders with a view to minimising any prejudice to DRD and considered that the terms of the orders made were not materially prejudicial to DRD and commercially were not materially different from those which DRD accepted when it entered into the Participation Deed.

151. The Panel noted that condition 9.8(g) of the DRD Bid expressly contemplated that adverse determinations by the Panel should not trigger a defeating condition in the DRD Bid. The Panel considers that condition, and the Panel's order directing DRD not to rely on the Panel's decision in these Proceedings as an event of default under the Participation Deed, to be analogous and should not have surprised DRD.

Costs

152. The Panel did not receive any application for an award of costs, and made no order for costs.

Undertakings

153. As described above, DRD and Emperor proposed undertakings early in the Proceedings to modify the Shortfall Facility to place all other Emperor shareholders in front of DRD in the Shortfall Facility. The Panel also offered Emperor and DRD the opportunity to provide undertakings to the effect of the Panel's proposed final orders. However, it was not possible to put a complete remedy in place via undertakings, so the Panel did not accept any undertakings in the Proceedings.

Alison Lansley

President of the Sitting Panel

Decision dated 18 October 2004

Reasons published 24 December 2004

Takeovers Panel

Reasons for Decision - Emperor Mines Ltd 01

Annexure A

Emperor Mines - Panel Declaration of Unacceptable Circumstances

In the matter of Emperor Mines Limited

WHEREAS

- A. Emperor Mines Limited (**Emperor**) has proposed a 4-for-10 rights issue (the **Rights Issue**) to be made pursuant to a prospectus dated 13 September 2004.
- B. Emperor has proposed that eligible shareholders will be able to take up their entitlements under the Rights Issue and also to apply to participate in any shortfall under the Rights Issue (in proportion to their respective entitlements under the Rights Issue).
- C. The Rights Issue is non-renounceable.
- D. The subscription price under the Rights Issue is at a deep discount to the market price of Emperor shares prior to the announcement of the Rights Issue, such that the Rights Issue will have a significant dilutionary impact on those existing shareholders of Emperor who do not participate in the Rights Issue.
- E. DRD (Isle of Man) Limited (**DRD IoM**) currently (before completion of the Rights Issue) has voting power of approximately 45.33% in Emperor.
- F. Emperor's underwriting arrangements in relation to the Rights Issue do not comprise normal commercial underwriting arrangements with an unrelated third party, but rather an assurance from Emperor's major shareholder that it will take up its rights under the Rights Issue and apply to participate in any shortfall under the Rights Issue (to the extent that such participation does not result in DRD IoM having voting power in Emperor of greater than 60%).

Under section 657A of the Corporations Act, the Takeovers Panel declares that the combination of the circumstances set out in recitals A to F constitute unacceptable circumstances in relation to the affairs of Emperor.

Alison Lansley

President of the Sitting Panel

Dated 17 October 2004

Takeovers Panel

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Annexure B

Emperor Mines – Panel Final Orders

In the matter of Emperor Mines Limited

Pursuant to:

- (a) section 657D of the *Corporations Act 2001* (Cth); and
- (b) a declaration of unacceptable circumstances in relation to the affairs of **Emperor Mines Limited (Emperor)** made by the President of the Sitting Panel on **17 October 2004**,

the Takeovers Panel HEREBY ORDERS:

Emperor

- (i) That the shortfall facility (**Shortfall Facility**) described in section 1.4 of the prospectus dated 13 September 2004 issued by Emperor in relation to the 4-for-10 non-renounceable rights issue (the **Rights Issue**) to be made by Emperor is modified so that Durban Roodepoort Deep, Limited (**DRD**), DRD (Isle of Man) Limited (**DRD IoM**) and their associates do not participate in any stage of the shortfall allocation under the Shortfall Facility until all Emperor shareholders eligible to participate in the Rights Issue (other than DRD, DRD IoM and their associates) have had their applications to participate in any shortfall to the Rights Issue satisfied in full.
- (ii) That, by 5 pm (Sydney time) on 19 October 2004, Emperor must send by post (and, in the case of an Emperor shareholder with a registered address outside Australia, airmail and, to the extent Emperor is aware of a fax or email contact address for any such shareholder, by fax or email) a notice to:
 - (A) each Emperor shareholder who is entitled to participate in the Rights Issue notifying them of the arrangements contemplated by Orders (vi) and (ix), the change to the operation of the Shortfall Facility, the possible consequences to them of the change to the operation of the Shortfall Facility and inviting them to participate in the Rights Issue (as amended); and
 - (B) each Emperor shareholder who has accepted the Rights Issue and not specified a maximum limit for their participation in the Shortfall Facility notifying them of the arrangements contemplated by Orders (vi) and (ix), the change to the operation of the Shortfall Facility, the additional consequences of the change for them as such a shareholder and inviting them to specify a maximum limit for their participation in the Shortfall Facility.
- (iii) That Emperor must extend the closing date for acceptances under the Rights Issue to no earlier than 5 pm (Sydney time) on 26 October 2004.
- (iv) That, until the earlier of:
 - (A) 11.59 pm (Sydney time) on 31 October 2006; and
 - (B) DRD, DRD IoM or any of their associates acquiring pursuant to a takeover bid 50% of the shares in Emperor in which DRD, DRD IoM or any of their associates did not have a relevant interest immediately prior to the bid,

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Emperor must:

- (C) in its announcement to the Australian Stock Exchange after the conclusion of each meeting of Emperor (other than a meeting of directors), specify the number of votes exercised by DRD, DRD IoM and (to the best of Emperor's knowledge) their associates at that meeting;
- (D) send a copy of the notice referred to in paragraph (C) above to the Panel Executive within 24 hours after the conclusion of each such meeting; and
- (E) disregard any votes cast by DRD, DRD IoM and (to the best of Emperor's knowledge) their associates in contravention of Order (v).

DRD IoM

(v) That, until the earlier of:

- (A) 11.59 pm (Sydney time) on 31 October 2006; and
- (B) DRD, DRD IoM or any of their associates acquiring pursuant to a takeover bid 50% of the shares in Emperor in which DRD, DRD IoM or any of their associates did not have a relevant interest immediately prior to the bid,

DRD, DRD IoM and their associates must not exercise in aggregate more than the following number of votes at a meeting of Emperor (other than a meeting of directors):

- (C) the total votes attached to any shares in Emperor which DRD, DRD IoM or any of their associates acquires after the issue of the Unacceptable Shares, other than pursuant to item 9 of section 611 of the Corporations Act 2001 (Cth) (the Act),

plus

- (D) the votes which constitute A% of the maximum number of votes which could be cast at the meeting (where votes which DRD, DRD IoM or any of their associates does not exercise pursuant to these Orders are counted as votes which could not be cast at the meeting),

provided that if Emperor's share capital is proposed to be reconstructed, DRD IoM must seek a variation of these orders in order to determine the appropriate number of votes which DRD, DRD IoM and their associates might exercise.

The number of votes referred to in paragraph (D) will be calculated as follows:

A	x (Issued Votes - DRD Votes)
100 - A	

For the purposes of these Orders:

$$A = (51,305,307 / 113,186,911) \times 100 + (\text{Creep Votes} / \text{Issued Votes}) \times 100$$

Creep Votes are the aggregate votes attaching to shares in Emperor acquired by DRD, DRD IoM or any of their associates after 31 July 2004 pursuant to the exception in item 9 of section 611 of the Act;

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DRD Votes are the aggregate votes attaching to shares in Emperor held by DRD, DRD IoM and their associates at the date of the relevant meeting minus such of those votes as are attached to the shares in Emperor referred to in paragraph (C).

Issued Votes are the aggregate votes attaching to the shares in Emperor on issue at the date of the relevant meeting; and

Unacceptable Shares are any shares acquired by DRD IoM under the Rights Issue or Shortfall Facility which result in DRD IoM increasing its voting power above the voting power it had immediately prior to the Rights Issue.

- (vi) That, with effect from the date which is 1 month after the issue of the Unacceptable Shares and until the earliest of:
- (A) 11.59 pm (Sydney time) on the date which is 1 month after the release of Emperor's Half-Year Report for the six months ending 31 December 2004;
 - (B) the sale by DRD IoM of all of the Unacceptable Shares; and
 - (C) DRD, DRD IoM or any of their associates acquiring pursuant to a takeover bid 50% of the shares in Emperor in which DRD, DRD IoM or any of their associates did not have a relevant interest immediately prior to the bid;
- (the time of such earliest occurrence being the **Trigger Time**), DRD IoM must:
- (D) instruct its broker to accept any 'buy' orders on the Australian Stock Exchange for such of the Unacceptable Shares as it continues to hold from time to time by any person offering to buy such shares on the Australian Stock Exchange at a price of not less than the price determined by the following formula:

$$\text{Offer price} = \frac{(\text{Unacceptable Shares} \times \text{A\$0.45}) + \text{Costs}}{\text{Unacceptable Shares}}$$

where **Costs** means:

- (1) an amount approved by the Panel representing the direct transaction costs and funding costs incurred by DRD and DRD IoM in subscribing for Unacceptable Shares and underwriting the Rights Issue, and the expected brokerage costs in selling the Unacceptable Shares pursuant to this paragraph (D); or
 - (2) if the Panel does not receive within 3 weeks after the issue of the Unacceptable Shares a request to approve the amount referred to in paragraph (1) which itemises the relevant costs, an amount determined by the Panel by way of an estimate as to what would constitute reasonable costs in relation to the matters referred to in paragraph (1).
- (E) DRD IoM must send a notice to the Australian Stock Exchange before 9.30 am on each trading day advising the market as to the number of Unacceptable Shares which it sold on the previous trading day and the total number of Unacceptable Shares which it has not yet sold,

except that if DRD, DRD IoM or any of their associates announces a takeover offer for Emperor shares, the operation of this Order (vi) will be suspended until the end of the offer period at which time (subject to paragraph (C) of this Order (vi)) this Order

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- (vi) will recommence operation but on the basis that the date in paragraph (A) of this Order (vi) is 1 month after the end of the offer period.
- (vii) That, until the Trigger Time, DRD and its associates must not buy any of the Unacceptable Shares.
- (viii) That, during the period ending 6 months and 1 week after the Trigger Time, DRD, DRD IoM and their associates must not acquire a relevant interest in any Emperor share which they would lawfully only be able to acquire because of item 9 of section 611 of the Act unless, as a result of the relevant acquisition, none of them would have voting power in Emperor which is more than the higher of:
- (A) 3 percentage points higher than such persons had immediately after the Trigger Time; and
- (B) the percentage of Emperor shares that DRD, DRD IoM or any of their associates would lawfully have been able to acquire under item 9 of section 611 of the Act if the Rights Issue had not proceeded.
- (ix) That DRD IoM must remit to Emperor 50% of the Net Proceeds arising from the sale by DRD IoM or any of its associates of any Unacceptable Shares during the 1 month after the issue of the Unacceptable Shares (any shares sold during this period being **Bookbuild Shares**). For these purposes, Net Proceeds means:
- (A) the gross amount received on the sale of the Bookbuild Shares,
less
- (B) A\$0.45 x Number of Bookbuild Shares,
less
- (C)
- | |
|------------------------------------|
| Costs x Number of Bookbuild Shares |
| Number of Unacceptable Shares |
- (x) That DRD IoM must, between 1 month and 1 week after the issue of the Unacceptable Shares, notify the Panel Executive in writing of the identity of the purchaser of any Bookbuild Shares and (to the extent that DRD or DRD IoM is aware) of the identity of the beneficial owners of those shares immediately following their purchase from DRD IoM.

Participation Deed

- (xi) That the Participation Deed entered into by DRD IoM and Emperor on or about 10 September 2004 be amended to the extent necessary to give effect to Order (i).
- (xii) That DRD IoM not terminate or seek to terminate the Participation Deed as a result of the effect of these Orders.

Alison Lansley

President of the Sitting Panel

Dated 17 October 2004