



**In the matter of Australian Leisure & Hospitality Group Limited 03  
[2004] ATP 25**

**Catchwords:**

*virtual conditions – conditional price increases – timing of announcements – reasonable time to consider proposal – efficient market – interim orders to extend offer period – extension of offer period – withdrawal rights – disclosure in connection with acceptance facilities – competing bid and scheme of arrangement proposals*

*Corporations Act 2001 (Cth), sections 602(a), 602(b)(ii), 624(2), 654A*

*City Code on Takeovers and Mergers, rule 32.5*

*ASIC Policy Statement 25 ‘Takeovers: false and misleading statements’*

**These are the Panel’s reasons for:**

- (a) making interim orders on 18 October 2004, extending the closing date of Bruandwo Pty Ltd’s bid for all of the shares in Australian Leisure & Hospitality Group Ltd; and**
- (b) accepting undertakings from Bruandwo Pty Ltd,**

**to resolve the application by CMM Hotel & Retail Investments Pty Ltd in relation to the affairs of Australian Leisure & Hospitality Group Ltd.**

**On 22 October 2004, the Panel issued a media release regarding its decision.**

## **THE PROCEEDINGS**

1. These reasons relate to an application (the **Application**) to the Panel from CMM Hotel & Retail Investments Pty Ltd (**CMM**) alleging unacceptable circumstances in relation to the off-market takeover bid (the **Bruandwo Bid**) by Bruandwo Pty Ltd (**Bruandwo**) for all the ordinary shares in Australian Leisure & Hospitality Group Limited (**ALH**).

## **THE PANEL & PROCESS**

2. The President of the Panel appointed Jennifer Seabrook (sitting President), Ian Ramsay (sitting Deputy President) and Elizabeth Alexander as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the Application.
3. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.
4. The Australian Securities & Investments Commission (**ASIC**), ALH, Bruandwo and CMM appeared in the Proceedings.
5. The Panel consented to ALH, Bruandwo and CMM being legally represented by their commercial lawyers in the Proceedings. ASIC did not seek such representation.

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## SUMMARY

6. At 2.13 p.m. on 18 October 2004<sup>1</sup>, Bruandwo made an announcement to ASX that its existing bid for all of the shares in ALH would close at 7.00 p.m. that day if Bruandwo did not achieve a relevant interest in 20% of ALH shares by 6.00 p.m. that day. Bruandwo also announced that it would increase its offer price to \$3.40 if it achieved the 20% referred to above by 6.00 p.m. that day. Bruandwo's bid at that stage was unconditional at \$3.15 per ALH share.

### Interim order

7. In response to the Application, and following submissions from parties, the Panel made an interim order on 18 October 2004 extending the closing date of the Bruandwo Bid until 7.00 p.m. on 25 October. Bruandwo subsequently extended its bid in accordance with the *Corporations Act 2001* (Cth) (the **Corporations Act**) to ensure that its bid would not close when the interim order ceased to apply.

### Undertakings in lieu of a declaration of unacceptable circumstances

8. The Panel decided to accept the following undertakings from Bruandwo to:
- (a) give withdrawal rights to ALH shareholders who had accepted the Bruandwo Bid between 2.13 p.m. and 6.00pm on 18 October;
  - (b) release an announcement to Australian Stock Exchange Limited (**ASX**) clarifying certain issues raised by parties and the Panel in the Proceedings;
  - (c) include certain information in its next mail out to shareholders in ALH; and
  - (d) make appropriate disclosures in relation to any acceptance facility which it establishes.
9. The Panel decided that it was not in the public interest to make a declaration of unacceptable circumstances once it had received the undertakings referred to in paragraph [8] and once Bruandwo had ensured that its bid would not close before 7.00 p.m. on 25 October.

### Other matters

10. The Panel did not consider that the statement that Bruandwo made on 18 October continued to operate on the Bruandwo Bid as amended by the Panel's interim order (such that Bruandwo would be required to let its bid close if it did not achieve a relevant interest of 20% by 6.00 p.m. on 25 October). The Panel's interim order extending the closing date of the Bruandwo Bid effectively overrode the 18 October Announcement and made it unreasonable for Bruandwo to be held to the relevant statement in the 18 October Announcement.

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<sup>1</sup> Unless otherwise indicated, all references to dates are references to dates in calendar year 2004.

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11. The Panel did not stipulate any time or date by which CMM was required to 'announce its position' following its announcement on 18 October urging ALH shareholders to wait for CMM's response to the revised Bruandwo Bid.

## APPLICATION

### Background

#### *Competing 'bids'*

12. On 2 July, Bruandwo acquired a stake of approximately 16% of the ordinary shares in ALH.
13. On 8 July, Bruandwo announced a conditional takeover bid for all of the ordinary shares in ALH at \$2.75 per share. The ALH board recommended that its shareholders reject the Bruandwo Bid at that price.
14. On 28 September, ALH and Newbridge Capital announced a proposal under which Newbridge Capital would acquire all of the ordinary shares in ALH at \$3.05 per share pursuant to a scheme of arrangement. The ALH board recommended that ALH shareholders should support this proposal, subject to the announcement of a superior offer for their ALH shares.
15. On 30 September, Bruandwo announced an increase in the consideration under the Bruandwo Bid to \$3.15 per ALH share and the waiver of all conditions to the Bruandwo Bid. ALH's board announced that it recommended acceptance of the increased bid (in the absence of a higher offer). The increased offer was scheduled to close at 7.00 p.m. on 18 October.
16. On 13 October, ALH and CMM announced a recommended proposal (the **CMM Proposal**) under which CMM would acquire all of the ordinary shares in ALH at \$3.35 per share pursuant to a scheme of arrangement. The ALH board's recommendation was subject to the announcement of a superior offer.
17. On 15 October, Bruandwo announced that it intended to vote against any scheme of arrangement put to shareholders to give effect to the CMM Proposal.

#### *The events of 18 October*

18. At 2.13 p.m. on 18 October, Bruandwo released an announcement to ASX (the **18 October Announcement**) via one of its shareholders, Woolworths Limited. So far as relevant, the 18 October Announcement stated that:
  - (a) Bruandwo would let its bid for ALH lapse at 7.00 p.m. on 18 October if Bruandwo did not achieve a relevant interest in ALH in excess of 20% by 6.00 p.m. that day;
  - (b) Bruandwo would increase its cash offer to \$3.40 per ALH share if Bruandwo's relevant interest in ALH was in excess of 20% by 6.00 p.m. on 18 October; and
  - (c) Bruandwo would increase its cash offer to \$3.50 per ALH share if Bruandwo's relevant interest in ALH was in excess of 20% by 6.00 p.m. on

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18 October and if it was in excess of 50% by the closing time for the Bruandwo Bid.

19. The 18 October Announcement did not disclose the automatic extensions to the Bruandwo Bid which would result under section 624<sup>2</sup> from either of the above price increases.
20. Bruandwo did not expressly reserve its rights to act otherwise than in accordance with any of the above statements in the 18 October Announcement.
21. At approximately 3.20 p.m. on 18 October, the Panel received the Application. CMM subsequently lodged an amended Application on 19 October which was prepared with the benefit of more time.
22. At approximately 5.30 p.m. on 18 October, after providing ALH, Bruandwo and CMM the opportunity to make submissions on the Application, the Panel made an interim order extending the Bruandwo Bid until 7.00 p.m. on 25 October (this order is discussed further in paragraphs [29] to [41]).
23. On 18 October, CMM made an announcement welcoming the Panel's interim order. In that announcement, CMM said that 'CMM is currently considering its position in relation to the revised Bruandwo offer. It proposes to announce its position before the close of the Bruandwo bid. In the meantime, CMM encourages all ALH shareholders not to accept the Bruandwo bid'.

#### *The events of 19 October*

24. At approximately 9.30 a.m. on 19 October, Bruandwo released a further announcement to ASX (the **19 October Announcement**). So far as relevant, the 19 October Announcement stated that:

'Bruandwo will increase its unconditional cash offer of \$3.15 cash per ALH share to:

  - \$3.40 cash per ALH share provided that Bruandwo has received or is satisfied that it will receive sufficient acceptances to increase its relevant interest in ALH to in excess of 20% by 6.00 p.m. on Monday, 25 October 2004; and
  - \$3.50 cash per ALH share if it has achieved the above threshold by 6.00 p.m. on Monday, 25 October 2004, and Bruandwo subsequently receives or is satisfied that it will receive sufficient acceptances to increase its interest in ALH to in excess of 50% by the closing time of its offer.'
25. The 19 October Announcement did not contain any statement as to Bruandwo's intentions if the '20% condition' in that announcement was not satisfied. In particular, it did not contain a statement that Bruandwo would let its offer lapse if it did not receive sufficient acceptances to increase its relevant interest in ALH to in excess of 20% by 6.00 p.m. on 25 October.

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<sup>2</sup> All references to sections are to sections of the Corporations Act.

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#### Declaration and orders sought in the Application

26. Initially, CMM sought a declaration of unacceptable circumstances and an order extending by 48 hours the 6.00 p.m. deadlines mentioned in the 18 October Announcement.
27. Subsequently, CMM sought a declaration of unacceptable circumstances and orders that:
  - (a) any ALH shareholder who accepted the Bruandwo Bid after 2.13 p.m. on 18 October be given the opportunity to withdraw their acceptance until the end of the offer period for the Bruandwo Bid and that Bruandwo be prevented from processing any such acceptances until the end of that offer period;
  - (b) as soon as practicable, Bruandwo write to each ALH shareholder with a withdrawal right to inform them of that right;
  - (c) as soon as practicable, Bruandwo advise the market of any shares that ALH shareholders have committed to Bruandwo or its advisers under an acceptance facility and that Bruandwo make full disclosure of the parties to, structure of and terms of the acceptance facility;
  - (d) Bruandwo be restrained from announcing increases to its bid which do not comply with the formal variation procedures in the Corporations Act and otherwise be held to the details of the 18 October Announcement and not be allowed to depart from them;
  - (e) as soon as practicable, Bruandwo be required to make an announcement to the ASX informing the market of the above; and
  - (f) Bruandwo pay CMM's costs in bringing the Application.
28. In responding to the Application, Bruandwo sought an order that CMM be required to 'announce its position' in response to the 18 October Announcement (and, by extension, the 19 October Announcement) by 9.00 a.m. on 20 October.

## DISCUSSION

### Interim order

29. The Panel issued an interim order on 18 October extending the Bruandwo Bid to the later of 7.00 p.m. on 25 October and a time permitted by the Corporations Act which was determined by Bruandwo.
30. The Panel considered that the timing and content of the 18 October Announcement were unacceptable in that the 18 October Announcement:
  - (a) provided shareholders with an unreasonably short period of time in which to consider material developments in the bid; and
  - (b) contained an inadequate explanation of the consequences of accepting the Bruandwo Bid and of other persons accepting the Bruandwo Bid. In this

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regard, the failure of the 18 October Announcement to mention the automatic extension of the offer period which would result if the 20% threshold was achieved was particularly concerning as it did not highlight to ALH shareholders the prospect that they might have a further opportunity to consider and accept Bruandwo's bid after 18 October.

31. The Panel considered it highly relevant that these circumstances were entirely of Bruandwo's own making and apparently deliberately arranged to maximise time pressure on ALH shareholders. The Panel also considered it highly relevant that curing the circumstances (by making appropriate disclosures and extending the timeframes involved) was entirely within the control of Bruandwo.
32. Bruandwo asserted that over 50% of the shares in ALH were, by 18 October, held by institutional investors and hedge funds. Bruandwo submitted that these shareholders were very sophisticated, watched market developments very closely and were fully capable of making an informed decision on the merits of its revised proposal within the time period announced by Bruandwo.
33. The Panel recognised that a significant number of ALH's largest shareholders were institutional shareholders. However, the Panel thought that the time provided for shareholders to respond in the 18 October Announcement was inadequate for shareholders to consider properly the consequences on the competition for their shares, and control of ALH, if they accepted the revised Bruandwo Bid for all or a part of their holdings.
34. The Panel was conscious that ALH also had a number of retail shareholders. The Panel was of the view that a number of retail shareholders, in particular, would not have had a reasonable opportunity to be aware of the 18 October Announcement, let alone consider how to respond to it, before 6.00 p.m. on 18 October. Accordingly, the Panel was not merely concerned at the 'stampeding' aspect of Bruandwo's behaviour on some shareholders, but also the prospect that other shareholders might not have been aware of the material development in Bruandwo's offer and denied the opportunity to accept the Bruandwo Bid in light of that development by reason of the offer lapsing.
35. The Panel concluded that, prima facie, the timing and content of the 18 October Announcement were inconsistent with the principle in section 602(b)(ii) that the holders of shares in a company should have a reasonable time to consider proposals to acquire a substantial interest in the company. The Panel was also conscious of section 624(2) which reads:

'If, within the last 7 days of the offer period:

(a) for an off-market bid – the offers under the bid are varied to improve the consideration offered; or

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the offer period is extended so that it ends 14 days after the event referred to in paragraph (a) or (b). The bidder must give the target and everyone

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who has not accepted an offer under the bid written notice that the extension has occurred within 3 days after that event.’

36. The Panel was mindful of the specific policy objective underlying section 624(2). This is reflected in the explanatory memorandum to the *Corporate Law Economic Reform Program Bill 1998* that introduced section 642(2) which states at [7.82]:
- ‘In order to give sufficient time for target holders to consider increases in bid offers that occur late in the bid period, off-market bid periods will be extended automatically by 14 days if the consideration in an off-market bid is improved in the last 7 days (proposed subsection 624(2)).’
37. The Panel also had regard to other principles in section 602 in deciding to grant the interim order, including the principle that acquisitions of control in companies should take place in an efficient, competitive and informed market. In this regard, the Panel did not consider that last minute increases in bid consideration (whether conditional or otherwise) without sufficient time for shareholders to consider them were consistent with an informed market.
38. The Panel also considered whether an interim order extending the Bruandwo Bid was appropriate, or whether it would be more appropriate to issue a brief, call for submissions and rebuttal submissions from affected parties and then determine whether to grant a final order. Before granting the interim order, the Panel sought and received submissions from Bruandwo and CMM. All the parties received those submissions. Having considered those submissions, the Panel formed the view that:
- (a) It was highly unlikely that the Panel would form a different view as to the appropriateness of extending the Bruandwo Bid after the Proceedings had run their full course.
  - (b) If the Panel did not make an interim order on 18 October and it ultimately formed the view that the timing and content of the 18 October Announcement warranted a declaration of unacceptable circumstances, there was no guarantee that the Panel would be able to grant a final order which rectified the unacceptable circumstances comprised by the 18 October Announcement. Specifically:
    - (i) there was a prospect that Bruandwo’s bid might lapse because certain shareholders had not had a reasonable time to become aware of and consider the 18 October Announcement, and it may not be feasible for the Panel to order Bruandwo to commence a new bid; and
    - (ii) if Bruandwo’s bid did not lapse, the only way to rectify the unacceptable circumstances would be to offer withdrawal rights to ALH shareholders accepting the Bruandwo Bid between 2.13 p.m. and the announcement of the Panel’s final orders or void their acceptances. However, particularly where a large number of shareholders is involved, these approaches are far from ideal. Both

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lead to market confusion. In addition, in the case of withdrawal rights, inertia makes it likely that some shareholders will not withdraw their acceptances when given the right to do so following unacceptable conduct even if they would never have accepted the bid if the unacceptable conduct had never occurred.

39. Having formed the view that an interim order was appropriate, the Panel considered the appropriate extension to put in place. The Panel noted that section 624(2) recognises two timeframes as being appropriate for a shareholder to digest price related information:
  - (a) 14 days – being the automatic extension where a price increase is announced in the last 7 days of an offer period; and
  - (b) 7 days - being the minimum period before the end of an offer in which a price increase can be announced without triggering the 14 day extension.
40. The 7 day time period is also consistent with the minimum period which a bidder must allow between freeing an offer of a defeating condition and the end of the relevant offer period.
41. The Panel decided that a 7 day extension was appropriate because:
  - (a) that was a reasonable period for shareholders to digest and respond to Bruandwo's increased bid price proposal;
  - (b) that was consistent with one of the two timeframes (being 7 days and 14 days) provided for in the Corporations Act as being sufficient for shareholders to consider and respond to material developments in a bid;
  - (c) that would give the Panel sufficient time to consider fully and dispose of the Application;
  - (d) if the condition to the increase to \$3.40 per share was met, there would be a mandatory 14 day extension of the Bruandwo Bid (meaning that the total extension in conjunction with the first conditional increase would be up to 21 days). There may have been a further mandatory 14 day extension of the Bruandwo Bid if the condition to the increase to \$3.50 per share was met (further increasing the potential length of any extension associated with the proposed conditional increases);
  - (e) the Panel considered that an extension by any lesser period (such as the 48 hours contemplated in the Application) pending a final order would have resulted in unjustified disruption and confusion in the market due to the real prospect that ASIC, ALH or CMM might apply for and the Panel might order a further extension of the Bruandwo Bid after conducting a full proceeding. Further, the proposed period of 48 hours did not correspond to any legislative period; and
  - (f) if necessary to rectify appropriately unacceptable circumstances, the Panel could always grant a further extension.



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#### Acceptances between 2.13 p.m. and 6.00 p.m. - withdrawal rights

42. Bruandwo advised the Panel that 100 shareholders had accepted the Bruandwo Bid for 172,400 shares, between 2.13 p.m. and 6.00 p.m. on 18 October.
43. After conducting full Proceedings, the Panel remained of the view that the timing and content of the 18 October Announcement comprised unacceptable circumstances (for the reasons set out in paragraphs [30] to [37]). Accordingly, the Panel considered that the 100 shareholders should have the opportunity to withdraw their acceptances of the Bruandwo Bid. There was a risk that such shareholders had accepted under duress resulting from the time pressure created by the 18 October Announcement and without properly considering their decision.
44. Bruandwo offered to extend withdrawal rights to those shareholders. Specifically, Bruandwo undertook to the Panel to courier by 5.00 p.m. on 25 October to those 100 shareholders a notice advising them of their right to withdraw their acceptances and a withdrawal form, at the same time as sending them a cheque representing money owing to them by Bruandwo under its bid. Under Bruandwo's undertakings those shareholders had 14 days to exercise those withdrawal rights by returning to Bruandwo the withdrawal form and the cheque (or cash in lieu of the cheque). The withdrawal rights were to continue for the full 14 days regardless of whether the Bruandwo Bid remained on foot or lapsed during that period.
45. Before the Panel determined to accept this undertaking, Bruandwo approached ASIC for a modification to section 654A of the Corporations Act to permit Bruandwo to carry out its proposed undertaking. ASIC granted the necessary modification and the Panel decided to accept the undertaking. The Panel acknowledges and appreciates the very tight timeframes within which ASIC was asked to consider Bruandwo's application to modify the Corporations Act in order to facilitate the resolution of these Proceedings.

#### 'Truth in Takeovers'

##### *18 October Announcement v 19 October Announcement*

46. CMM submitted that there were a number of inconsistencies between the 18 October Announcement and the 19 October Announcement and that Bruandwo should be required to adhere to the following positions (each of which corresponds with the position under the 18 October Announcement, but with the relevant dates changed from 18 October to 25 October):
  - (a) to let its offer lapse if it did not achieve relevant interests of 20% by 6.00 p.m. on 25 October; and
  - (b) to base the triggers for the conditional increases to \$3.40 per share and \$3.50 per share (the **Conditional Increases**) on the levels of 'relevant interests *achieved*' rather than the levels of 'acceptances that Bruandwo has received or is *satisfied that it will receive*' [emphasis added].

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47. Bruandwo advised the Panel that by 'satisfied that it will receive' it meant only those acceptances committed to any acceptance facility which it might establish or sponsor (see paragraphs [57] to [61]).
48. In essence, CMM argued that the positions adopted in the 18 October Announcement were 'last and final statements' and that Bruandwo should not be permitted to resile from them except as necessary to cater for the extension of time imposed by the Panel. ASIC supported CMM's position.
49. The Panel was very concerned to give effect to the principles of 'Truth in Takeovers' which are summarised in ASIC Policy Statement 25: 'Takeovers: false and misleading statements'. The Panel considers it essential that market participants should not be able to resile from 'last and final statements' made during the course of a takeover bid.
50. However, the circumstances of 18 October needed to be considered.
51. The Panel's order of 18 October fundamentally changed the landscape against which Bruandwo made its announcement. Accordingly, the Panel's orders fundamentally changed the analysis underlying Bruandwo's commitment to let the offer lapse (and its analysis as to whether an acceptance facility would be necessary to achieve the trigger conditions to either of the price increases).
52. The Panel does not consider that market participants should be required to qualify 'last and final statements' by reference to the possibility of Panel intervention. That is not required for the existence of an efficient, competitive and informed market (and may detract from it by leading to market confusion).
53. Accordingly, the Panel did not consider that Bruandwo should be required to adhere to either of the positions outlined in paragraphs [46(a) and (b)].

#### *No increase statements*

54. CMM also contended that the 18 October Announcement contained 'last and final statements' to the effect that Bruandwo would not increase its bid and that the 19 October Announcement sought to depart from these statements. The Panel did not agree with that interpretation of the announcement. Bruandwo announced what it intended to do in terms of price increases, but neither the 18 October Announcement nor the 19 October Announcement placed any limitation on price increases in excess of those actual proposals.

#### **Confusion as to future increases or extensions**

55. Given the broad similarities between the 18 October Announcement and the 19 October Announcement, but given that there were also some differences, the Panel accepted that there was capacity for market confusion in relation to Bruandwo's ability to extend or increase its bid and the references in the 19 October Announcement to acceptances which Bruandwo is 'satisfied that it will receive'.
56. Bruandwo undertook to the Panel to clarify promptly its intentions with respect to the above matters in an announcement to ASX.

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#### Acceptance facilities

57. Based on the 'satisfied that it will receive' language in the 19 October Announcement, CMM raised the prospect that Bruandwo may have established an 'acceptance facility' which had not been disclosed to market. CMM alleged that the combination of such an acceptance facility, and the failure to disclose the level of acceptances in that acceptance facility, constituted unacceptable circumstances.
58. Bruandwo advised the Panel that it had not established any such facility. However, it noted that it might wish to do so.
59. In this context, an acceptance facility means a facility under which certain target shareholders can lodge acceptances or instructions to accept a bid with a third party on a provisional basis. The effect is that the participating shareholders are free to withdraw their acceptances or instructions at any time prior to the satisfaction of one or more known conditions. However, after the satisfaction of that condition or those conditions, the operator of the acceptance facility lodges the relevant acceptances into the takeover bid or causes them to be lodged into the takeover bid.
60. Bruandwo undertook to make the following disclosures to ASX if it (or any of its associates or advisers) established an acceptance facility:
  - (a) On establishment of the acceptance facility (or on any material change to the acceptance facility), each of the following:
    - (i) the nature and essential aspects of the acceptance facility's structure and operational procedures;
    - (ii) the person or persons who will manage the acceptance facility and their relationship with Bruandwo;
    - (iii) whether persons who commit ALH shares to the acceptance facility will have a right to withdraw their commitment (and the nature, if any, of any restriction on their right to withdraw); and
    - (iv) who is eligible to participate in the acceptance facility or the criteria for determining who is eligible to participate in the acceptance facility; and
  - (b) By 9.30 a.m. on each business day following a movement of 1% in the aggregate of the voting power attaching to shares committed to each acceptance facility and Bruandwo's voting power, the details of that aggregate voting power (and a breakdown as to how much of the aggregate voting power falls in each category).
61. The Panel accepted that these undertakings rendered it unnecessary for the Panel to consider further issues associated with any potential acceptance facility. The Panel noted that there remained the possibility that the form of any acceptance facility ultimately adopted might give rise to unacceptable

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circumstances. However, the Panel could not assess that until an acceptance facility had been established and its terms disclosed to ASX.<sup>3</sup>

#### Anti-competitive conduct

62. In light of Bruandwo's announcement of 15 October that it intended to oppose any scheme to give effect to a merger of ALH and CMM (and subsequent announcements to similar effects), the question arose as to whether it would be unacceptable for one protagonist for control of a target company to vote, or announce that it would vote, its shares against a rival proposal for control.
63. The Panel concluded that the mere fact that Bruandwo was actively seeking control of ALH was not a good ground to interfere with Bruandwo's rights to exercise the votes attaching to shares which Bruandwo had legitimately acquired.

#### Timing of CMM's announcement of its position

64. Given CMM's announcement on 18 October, Bruandwo asserted that it would constitute unacceptable circumstances for CMM not to 'announce its position' to ALH shareholders in a timely manner and that, accordingly, the Panel should direct CMM to 'announce its position' by 9.00 a.m. on 21 October 2004.
65. Bruandwo submitted that this was necessary to ensure that ALH shareholders had a reasonable time to consider the content of CMM's response before the close of the Bruandwo Bid.
66. Bruandwo argued that CMM would not be unfairly prejudiced by such a requirement because CMM had always contemplated that 48 hours would be sufficient time for it to respond. That was evidenced by CMM's original application to the Panel which had sought an order extending the deadlines in the 18 October Announcement by 48 hours.
67. While not supporting the specific order sought by Bruandwo, ASIC argued that, in general in a competitive bid situation, Bidder A should make a public announcement of its intentions at least 1 week before the close of Bid B to allow target shareholders sufficient time to make an informed decision regarding Bid B.
68. Conceptually, the Panel considered that the order sought by Bruandwo (or a similar order but with a different deadline for responding) might be seen to be consistent with the principle in section 602(b)(ii) that shareholders should have a reasonable time to consider a proposal to acquire a substantial interest in their company. The Panel was conscious that a late announcement by CMM might leave ALH shareholders facing very significant time pressure as the Bruandwo

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<sup>3</sup> Bruandwo ultimately announced an acceptance facility in conjunction with other matters which the Panel considered should be announced to ASX (and which Bruandwo undertook to announce) (as contemplated by, for example, paragraphs [55] to [56]). The fact that details of the acceptance facility were included in the announcement which Bruandwo undertook to make should not be taken as an endorsement by the Panel of the terms of the acceptance facility (as distinct from the type of disclosures made).

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Bid was due to close, wondering whether there would be a response or competitive increase from CMM.

69. However, the Panel declined to declare or anticipate that there might necessarily be unacceptable circumstances in relation to the timing of CMM's response.
70. The Corporations Act clearly requires a bidder to have regard to milestones in its own takeover bid in making statements in relation to that bid. For instance, the legislation imposes various requirements on bidders to make statements about the waiver or otherwise of conditions in their bid at particular times<sup>4</sup>. It also requires a bidder to extend its offer if it increases its bid in the last week, or it achieves more than 50% voting power in its bid<sup>5</sup>. However, unlike the position under The City Code on Takeovers and Mergers in the United Kingdom<sup>6</sup>, there is no specific provision, nor general principle, in the Corporations Act which requires one bidder (or protagonist for control) to have regard to the timetable of another rival takeover bid in conducting its own bid (or control proposal). The Panel did not consider that it would be justified in introducing such a principle without consultation in the context of the Proceedings.
71. The following factors reinforced this view:
  - (a) The commercial pressures applicable to Bruandwo and CMM meant that it was likely that shareholders would be given a reasonable opportunity to respond to any further CMM announcement before the close of the Bruandwo Bid. In this regard:
    - (i) CMM would want to minimise the prospect of shareholders accepting into the Bruandwo Bid (necessarily to the exclusion of supporting the CMM Proposal) by announcing its response a reasonable period before the close of the Bruandwo Bid. In this regard, the later a rival bidder chooses to delay announcing its response to a conditional increase by a first bidder, the greater will be the risk to the rival bidder that the target shareholders will choose to accept the first bidder's offer for fear of it lapsing. The commercial imperative was particularly acute for CMM because any revised CMM Proposal was likely to be implemented using a scheme of arrangement and thus require the support of holders of 75% of ALH shares. Since Bruandwo had a relevant interest in approximately 16.58% of ALH shares at the time, any further acceptances into the Bruandwo Bid were likely to have a real impact on CMM's prospects of successfully acquiring ALH.
    - (ii) If shareholders had held off accepting the Bruandwo Bid in anticipation of a revised CMM Proposal, and were indicating that

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<sup>4</sup> Sections 630 and 650F.

<sup>5</sup> Section 624(2).

<sup>6</sup> See rule 32.5.

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they required additional time to consider such a revised CMM Proposal by not accepting the Bruandwo Bid, it would remain open to Bruandwo to extend unilaterally the close of its offer. If it did not extend the bid, Bruandwo would risk losing acceptances that may have given it victory in the competition for ALH. Alternatively, if Bruandwo chose to extend, ALH shareholders would retain the opportunity to consider the merits of, and choose between, the Bruandwo Bid and the CMM Proposal.

- (b) The breadth of possible CMM responses and accompanying circumstances meant that it was impossible for the Panel to be certain that the failure by CMM to announce its response more than a certain period of time before the end of the Bruandwo Bid would be unacceptable. The appropriate time to make this assessment was after the response had been announced (or when it became clear that the response would not be announced in the timeframe previously announced by CMM). The Panel could then consider any further application on the circumstances which existed at the relevant time.
  - (c) It would be difficult to frame an appropriate order. If the Panel ordered CMM to 'announce its position' by a certain date, the Panel would, in effect, be ordering CMM to come to a certain mental state, which is clearly impossible. In all likelihood, CMM would comply by saying 'We have not made up our mind yet', which would not advance the information before ALH shareholders. Alternatively, the Panel might make an order that CMM 'announce its position' to the satisfaction of the Panel by a certain time or else be forbidden to make any announcement increasing or varying the CMM Proposal after that time. Leaving aside questions of jurisdiction and the appropriateness of the Panel making such an order in relation to a proposal which is to be effected by way of scheme of arrangement, it appeared to the Panel that such an order would be inappropriate because it would restrict competition rather than enhance it. Indeed, CMM submitted that because the CMM Proposal was leveraged and because the approval of numerous parties was required in order to increase the consideration under it, CMM would not be able to announce a proposal by the time suggested by Bruandwo.
72. The Panel was conscious that this was not simply a case where Bruandwo's rival had remained silent but rather that CMM had actively urged ALH shareholders not to accept the Bruandwo offer while waiting for CMM to 'announce its position'. Such a 'wait for our announcement' statement might constitute unacceptable circumstances if it was not followed by the contemplated announcement in a timely manner. That follows from the application of 'Truth in Takeovers' principles. The active intervention by the rival bidder may, in such cases, require it to ensure that it does make its announcement in a timely manner, whereas not making a 'wait for our announcement' statement may preserve the rival bidder's right to choose when it makes its own statement (if indeed it makes one at all).

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73. However, for the various reasons set out above, the Panel did not find there to be unacceptable circumstances, or make any order in advance of CMM's actual response (or the absence of such a response at a time closer to the end of the Bruandwo Bid). That said, if CMM did not give ALH shareholders an adequate period of time to consider any announcement of its position before the Bruandwo Bid was due to close, the Panel would consider any further application on the circumstances which existed at the time.

### Conditional increases

#### *Confusion as to conditional increases*

74. The Panel received submissions to the effect that Bruandwo should promptly make an announcement to ASX clearly explaining the following matters with respect to the Conditional Increases:
- (a) that a shareholder who accepted the Bruandwo offer prior to the trigger for a Conditional Increase might receive only \$3.15 per share if Bruandwo did not achieve the relevant level of acceptances for the \$3.40 and \$3.50 increases;
  - (b) that the price increase on reaching the 20% threshold would result in an automatic 14 day extension and that reaching the 50% threshold would also result in an automatic 14 day extension (in each case, if the threshold is reached during the last 7 days of the offer period for the Bruandwo Bid); and
  - (c) that all ALH shareholders who accepted the Bruandwo Bid would receive the benefit of the increased consideration if one or both of the Conditional Increases occurred regardless of when they accepted the Bruandwo Bid.
75. Although the Panel considered that the above disclosure would be helpful to shareholders in the target and draw their attention to material information, the Panel was satisfied that it did not need to be included in an immediate announcement to ASX. However, the Panel indicated to Bruandwo that it would expect Bruandwo to include such information in a supplementary bidder's statement and any upcoming mail-out to shareholders. Bruandwo offered to make an ASX announcement addressing the above points and to include corresponding disclosure in its next mail-out to shareholders. The Panel accepted Bruandwo's undertaking to do those things.

#### *Efficient, competitive and informed market*

76. The Panel also considered the issue of whether or not the Conditional Increases would constitute unacceptable circumstances in themselves (for example, regardless of the time periods which were set for achieving the various acceptance levels). In particular, the Panel considered whether it was consistent with the existence of an efficient, competitive and informed market for shareholders to be able to accept an offer where they did not know what the bid consideration under that offer would ultimately be and in circumstances where they were forced to accept the risk of lower offer consideration (here

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\$3.15 or \$3.40 per share) in order to obtain the higher consideration which they truly wanted (here \$3.40 or \$3.50 per share).

77. With the provision of adequate information about the Conditional Increases and adequate time to consider them, the Panel did not think that the Conditional Increases proposed were inconsistent with the existence of an efficient, competitive and informed market. Indeed, the Panel recognised that conditional increases allow bidders to put higher offers on the table than they otherwise might be prepared to put and thus generally facilitate a more competitive market.
78. There have been a significant number of takeover bids in Australia under the Corporations Act and its predecessors going back to the *Companies (Acquisitions of Shares) Act 1980* (Cth) where the bidder had made similar announcements about its intention to increase the bid consideration if certain criteria were met or had a multi-tiered consideration structure under the terms of its takeover bid. Although recognising that such bids had not been frequent, the Panel considered that such conditional increases are, and have been for some time, an accepted part of the Australian takeovers market. The Panel did not have any cause to consider that the market had operated inefficiently in those precedent cases by reason of the relevant bids featuring a multi-tiered pricing structure.

#### *Guidance*

79. However, having said that, the Panel considered that it was clear from the Proceedings that there may be need for guidance in the market about the terms and timing of conditional increases in the future. The Panel will consider whether it would assist the market for it to draft a Guidance Note for consultation with the market on this area.

## DECISION

### **Undertakings and no declaration of unacceptable circumstances**

80. The Panel considered that the timing and content of the 18 October Announcement constituted unacceptable circumstances, in particular in that it did not give ALH shareholders adequate time to consider Bruandwo's Conditional Increase. However, by the time the Panel came to decide whether to make a declaration of unacceptable circumstances, the Panel considered that those circumstances had been or would be remedied by the following:
  - (a) The extension of the Bruandwo Bid and conditional increases so that ALH shareholders would receive an adequate period of time to consider those conditional increases; and
  - (b) Bruandwo giving the undertakings to the Panel which were summarised in paragraph [8] and are set out in Appendix A.
81. Accordingly, the Panel did not consider it to be in the public interest to make a declaration of unacceptable circumstances.



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82. With respect to the extension of the Bruandwo Bid, the Panel highlighted to Bruandwo that the bid had originally been extended by an interim order of the Panel. Interim orders cease to have effect at the conclusion of the proceedings in connection with which they are made. Accordingly, the Panel was only prepared not to make a declaration of unacceptable circumstances if Bruandwo itself extended its bid to at least 7.00 p.m. on 25 October in compliance with the terms of the Corporations Act. Bruandwo did this before the Panel finally determined not to make a declaration of unacceptable circumstances and concluded Proceedings.
83. There having been no declaration, the Panel did not make any costs order.

**Jennifer Seabrook**

**President of the Sitting Panel**

**Decision dated 22 October 2004**

**Reasons published 21 December 2004**

## Takeovers Panel

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#### Appendix A – Undertakings

##### Background

The undertakings set out below relates to the off-market takeover offer (**Offer**) by Bruandwo Pty Limited (**Bruandwo**) for all the issued ordinary shares in ALH dated 26 July 2004.

##### Undertaking

1. Bruandwo will dispatch by courier before 5.00pm on 25 October 2004 to the 100 shareholders of ALH who accepted Bruandwo's Offer between 2.13pm and 6.00pm on 18 October 2004 by CHESS, by fax or by hand or by mail post marked 18 October 2004 a notice advising them of their right to withdraw their acceptance, a withdrawal form and a cheque representing money owing to them in respect of their acceptances under the Offer. Bruandwo will allow those shareholders until 5.00pm on 8 November 2004 in which to exercise the withdrawal right by returning to Bruandwo the duly completed withdrawal form and the cheque representing the money paid to them by Bruandwo (or cash in lieu of the cheque). Bruandwo will ensure that the withdrawal right remains open until 8 November 2004 regardless of whether Bruandwo's Offer remains on foot or lapses before that time. Bruandwo has asked Australian Securities & Investments Commission (**ASIC**) to modify section 654A of the Corporations Act to facilitate this undertaking.
2. Bruandwo will release to ASX by the close of trading today an announcement which comprises or includes the matters set out in Annexure "A" to this undertaking.
3. Bruandwo will make the following disclosures to ASX if it (or any of its associates or advisers) establishes an acceptance facility:
  - (a) On establishment of the acceptance facility (or on any material change to the acceptance facility), each of the following:
    - the nature and essential aspects of the acceptance facility's structure and operational procedures;
    - the person or persons who will manage the acceptance facility and their relationship with Bruandwo;
    - whether persons who commit ALH shares to the acceptance facility will have a right to withdraw their commitment (and the nature, if any, of any restriction on their right to withdraw); and
    - who is eligible to participate in the acceptance facility or the criteria for determining who is eligible to participate in the acceptance facility; and
  - (b) By 9.30am on each business day following a movement of 1% in the aggregate of the voting power attaching to shares committed to each acceptance facility and Bruandwo's voting power, the details of that

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aggregate voting power (and a breakdown as to how much of the aggregate voting power falls in each category).

4. Bruandwo will include the information set out in the last four bullet points of Annexure “A” to this undertaking in its next mail out to shareholders of ALH.

**DATED:** 22 October 2004

**SIGNED** for and on behalf of  
**BRUANDWO PTY LIMITED**

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R K S Jeffs  
Company Secretary

## Takeovers Panel

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#### ANNEXURE “A”

The Takeovers Panel has asked Bruandwo Pty Limited (**Bruandwo**) to clarify the revised proposal which it announced on 19 October 2004.

Bruandwo’s offer is \$3.15 cash per ALH share. However, Bruandwo will increase this offer to:

- \$3.40 cash per ALH share provided that Bruandwo has received or is satisfied that it will receive sufficient acceptances to increase its relevant interest in ALH to in excess of 20% by 6.00pm on Monday, 25 October 2004; and
- \$3.50 cash per ALH share if it has achieved the above threshold by 6.00pm on Monday, 25 October 2004, and Bruandwo subsequently receives or is satisfied that it will receive sufficient acceptances to increase its relevant interest in ALH to in excess of 50% by the closing time of its offer.

Bruandwo’s offer is unconditional and is scheduled to close at 7.00pm on Monday, 25 October 2004. Bruandwo has not made any decision to further extend or vary the offer but reserves its right to do so. Bruandwo notes the significant media speculation regarding the intentions of CMM Hotel & Retail Investments Pty Ltd and fully reserves its rights to respond in such manner as it chooses after that uncertainty has been resolved.

Bruandwo announces that an acceptance facility which is open to certain professional investors (as defined in the Corporations Act) has been established in order to facilitate its receipt of acceptances to its offer. Bruandwo advises that for the purposes of its proposal referred to above it will ‘be satisfied that it will receive’ acceptances to its offer only in respect of any acceptances or instructions which are lodged under the acceptance facility and not withdrawn.

Under the Acceptance Facility:

- Shareholders may lodge with Deloitte Corporate Finance Pty Limited (**Deloitte**) acceptance instructions (in the form of Acceptance and Transfer Forms and/or directions to custodians to accept Bruandwo’s offer) that demonstrate their intention to accept the offer. Deloitte will hold the acceptance instructions subject to a bare trust as collection agent and will not acquire a relevant interest in any of the ALH shares the subject of the acceptance instructions.
- If shareholders lodge acceptance instructions with Deloitte, they will direct Deloitte to lodge the acceptance instructions as formal acceptances of Bruandwo’s offer once Bruandwo has issued a written announcement to the ASX that it will unconditionally increase its offer price for ALH to \$3.50 per share (Price Increase Announcement).
- Shareholders are able to withdraw their acceptance instructions at any time prior to Bruandwo making the Price Increase Announcement. Further, if prior to Bruandwo making the Price Increase Announcement, a third party announces an alternative proposal to acquire all ALH shares at a price in excess

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of \$3.50 per share, shareholders are able to withdraw their acceptance instructions within 24 hours from announcement of the alternative proposal.

Before 9:00am each business day, Deloitte will inform Bruandwo of the number of ALH shares in respect of which acceptance instructions have been received.

Following receipt of this information from Deloitte, Bruandwo will disclose this to the market by 9.30am on the business day following a movement of more than 1% in the aggregate of the number of ALH shares subject to the facility and the number of ALH shares in which Bruandwo has a relevant interest together with a breakdown of the aggregate amount between those 2 categories.

Deloitte is a related entity of Deloitte Touche Tohmatsu the independent auditor of Woolworths Limited. Deloitte will be remunerated in accordance with Deloitte's standard hourly rates.

ALH shareholders should note the following in relation to Bruandwo's revised proposal:

- if you accept Bruandwo's offer but Bruandwo does not receive or become satisfied that it will receive sufficient acceptances to increase its relevant interest in ALH to in excess of 20% by 6.00pm on Monday, 25 October 2004, then as Bruandwo's bid is currently constituted you will receive \$3.15 cash per ALH share;
- if the 20% threshold referred to above is reached by 6.00pm on Monday, 25 October 2004, Bruandwo will increase its offer price to \$3.40 cash per ALH share. This will result in the offer period being automatically extended for a further period of 14 days;
- if the 50% threshold referred to above is reached before the end of Bruandwo's offer period then Bruandwo will increase its offer price to \$3.50 cash per ALH share and, if this occurs in the last seven days of Bruandwo's offer period, Bruandwo's offer period will again be automatically extended for a further period of 14 days. Bruandwo cannot at present advise ALH shareholders of the exact date when its offer period would close;
- all ALH shareholders who accept, or have accepted, Bruandwo's Offer will be able to participate in any increased offer price which will result if the 20% and/or 50% thresholds referred to above are reached, regardless of when they accepted the offer. This also applies to any other increases which Bruandwo might make. Shareholders who accept, or have accepted, Bruandwo's Offer before a price increase is effected will be paid the increase within five business days after the increase is effected. Shareholders who accept Bruandwo's Offer after a price increase is effected will be paid their consideration within five business days after a valid acceptance is received by Bruandwo's share registry.