



**In the matter of Rivkin Financial Services Limited 02
2005 ATP 1**

Catchwords:

rights issue - underwriting - sub-underwriting - caretaker directors - prospectus disclosure - equal opportunity to share in benefits - efficient market - shareholder approval - costs orders

Corporations Act 2001 (Cth), Chapter 2E, sections 602, 611 (items 7, 10 and 13)

Takeovers Panel Guidance Note 9 - 'Costs Orders'

InvestorInfo Limited [2004] ATP 6, cited

Anaconda Nickel Limited 02-05 [2003] ATP 4, cited

Aberfoyle Ltd v Western Metals Ltd (1998) 28 ACSR 187, cited

These are the Panel's reasons for making a declaration of unacceptable circumstances and accepting undertakings in relation to the affairs of Rivkin Financial Services Limited. RFS had proposed a 1 for 3 pro-rata, renounceable rights issue, to be fully underwritten by Westchester Financial Services Pty Limited and fully sub-underwritten by Central Exchange Limited (a significant shareholder in RFS). The Panel accepted undertakings that RFS would not proceed with the rights issue, unless certain acquisitions of relevant interests which might be made pursuant to the sub-underwriting arrangements were approved by shareholders in a manner consistent with item 7 of section 611. The Panel also accepted corresponding undertakings from RFS in relation to any rights issue which might be proposed over the next three months.

SUMMARY

1. These reasons relate to an application (the **Application**) to the Panel from Network Limited (**Network**) on 31 December 2004 in relation to the affairs of Rivkin Financial Services Limited (**RFS**).
2. The Application relates to a 1 for 3 pro-rata renounceable rights issue (**Rights Issue**) proposed by RFS, to be fully underwritten by Westchester Financial Services Pty Ltd (**Westchester**) and fully sub-underwritten by Central Exchange Limited (**CXL**) (the underwriting and sub-underwriting arrangements together being referred to as the **Underwriting**).
3. On 18 January 2005, the Panel made a declaration of unacceptable circumstances in relation to the affairs of RFS. The Panel considered that unacceptable circumstances existed in that:
 - (a) RFS was subject to an ongoing contest for control, the current status of which was clouded by uncertainty, due to the conflicting voting patterns of shareholders regarding the composition of the board of RFS as between RFS' EGM and AGM, each of which was held on 29 November 2004;
 - (b) the Rights Issue and Underwriting had the capacity to significantly impact that contest for control. There were no genuinely independent members of the board of RFS, and the contest for control could have been determined by the Rights Issue in favour of interests associated with the incumbent directors;

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- (c) there was no immediate or compelling need for the Rights Issue, nor any pressing need for it to occur before two proposed shareholder meetings which may remove the uncertainty as to the status of the incumbent board of RFS and the contest for control of RFS. There is no Australian Stock Exchange (ASX) listing requirement to increase RFS' capital at this time and, in the Panel's view, the amount of capital to be raised by the offering would have been unlikely to materially change the market's perception of RFS as an investment company;
 - (d) the Rights Issue and Underwriting¹ were not in pursuance of a course which had been put before, or approved by, RFS shareholders, notwithstanding that it was likely that shareholder approval would have been required for a proposed spin off of RFS' Avcol stockbroking business;
 - (e) there was inadequate disclosure in the Rights Issue prospectus of the potential impact of the Rights Issue on the control of RFS;
 - (f) the Rights Issue was announced on 24 December 2004, a time at which many of RFS' approximately 2,400 shareholders may not have made arrangements to receive a rights offer (there having been no earlier indication to the market of the intention to make the Rights Issue) and in the circumstances this militated against the "genuine accessibility" of the issue;
 - (g) the pricing of the Rights Issue, in that the discount was at the lower end of discounts that would have encouraged a take-up of Rights or trading in Rights; and
 - (h) in all of the above circumstances, the "underwriting" and "sub-underwriting" arrangements may be characterised as a de facto placement to a substantial shareholder with interests aligned with the incumbent board members since, unlike standard fee-based underwriting arrangements, their terms were likely to increase rather than minimise the shortfall in take-up in a situation where the sub-underwriter was not receiving any benefit which could reasonably be seen as offsetting that risk other than increased control over RFS. For instance:
 - (i) RFS retained the right to approve sub-underwriters;
 - (ii) CXL offered to sub-underwrite the entire Rights Issue;
 - (iii) CXL stipulated that it could terminate any sub-underwriting arrangements if certain other persons were appointed as sub-underwriters (which it was apparent to the Panel would include, at least, Pinnacle and likely Network); and
 - (iv) CXL offered to sub-underwrite the Rights Issue for no fee.
4. The Panel accepted undertakings from RFS which addressed the Panel's concerns. Accordingly, it was not necessary for the Panel to make final orders in response to the Application. Pursuant to the undertakings:
- (a) RFS will not proceed with the Rights Issue; and

¹ Although not required for the purposes of Chapter 6 of the Corporations Act, shareholder approval of the Rights Issue and the Underwriting would have been a mitigating factor against unacceptable circumstances existing.

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- (b) until 3 months after the date of the undertakings, RFS will not make any rights offer which might result in any Nominated Person acquiring a relevant interest in shares in RFS pursuant to an underwriting or sub-underwriting arrangement which results in an increase in the collective voting power of all Nominated Persons to above or further above 20%.

In each case the acquisition of the relevant interest under the associated underwriting and sub-underwriting arrangements may proceed if it is approved at least 7 days before the commencement of trading in the rights on ASX under item 7 of section 611. For any approval resolutions, each of the Nominated Persons will be regarded as an associate of each other Nominated Person. The **Nominated Persons** include CXL, Sofcom Limited (**Sofcom**), Altera Capital Limited (**Altera**), Fast Scout Limited (**Fast Scout**), Westchester and their respective officers and associates.

5. After the Panel decided to make a declaration of unacceptable circumstances, and after RFS had been advised of the Panel's decision to make the declaration, RFS announced that it had decided not to proceed with the Rights Issue.

APPLICATION

Background

RFS

6. The nature of RFS' business is in dispute. Some of its shareholders regard it primarily as a listed investment company, which also owns a stockbroking business (**Avcol**). Others regard it as a stockbroking business with ancillary investments.

Major shareholders in RFS

7. Over a series of months, a number of shareholders have acquired or disposed of interests in RFS. As at the record date for two meetings held on 29 November 2004, those shareholders and their shareholdings were as follows:

Shareholder	Shares	Percentage Holding
CXL	14,993,048	14.95%
Pinnacle Asset Management Pty Ltd (Pinnacle)	10,170,363	10.14%
Network	9,000,000	8.97%
Alan Davis Group Pty Ltd (ADG)	7,305,784	7.28%
Cole Kablow Superannuation Pty Ltd (CKS)	3,460,000	3.45%
Sofcom	3,400,000	3.39%
Fast Scout	908,471	0.91%
Altera	750,000	0.75%
Others	50,324,468	50.17%
Total	100,312,134	

8. Since then, there have been further transactions in RFS shares. As such, the holdings of the following parties (collectively, except for "Others", the **Major Shareholders**) are now:

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Shareholder	Shares	Percentage Holding
CXL	14,993,048	14.95%
Pinnacle	12,123,049	12.09%
Network	9,000,000	8.97%
ADG	7,305,784	7.28%
CKS	3,460,000	3.45%
Sofcom	3,167,152	3.16%
Fast Scout	846,101	0.84%
Altera	698,718	0.70%
Others	48,718,282	48.57%
Total	100,312,134	

The meetings of 29 November 2004

9. On 29 November 2004, two meetings of shareholders in RFS took place. First, a meeting (the **EGM**) requisitioned by CXL to seek the removal of the then directors of RFS and to replace them with nominees of Sofcom, Fast Scout and Altera (the **Sofcom Group**). Secondly, the annual general meeting (the **AGM**) of RFS. The notice of AGM included resolutions in relation to the election of the pre-EGM board of RFS and the nominees of the Sofcom Group.
10. At the EGM, the then board of RFS was removed and replaced with nominees of the Sofcom Group, namely Mr Farooq Khan, Mr Christopher Ryan and Mr Simon Cato. In each case, the resolutions to remove the existing directors and to appoint the new directors were passed by margins of between 1.2 – 1.6% of the votes cast.
11. Fewer proxies were submitted to the AGM than the EGM, so that approximately 10 million fewer votes were exercised at the AGM than the EGM.
12. At the AGM, Mr Khan (as the newly appointed Chairman) withdrew from consideration of the meeting the resolutions relating to the election of the pre-EGM board of RFS and two of the three nominees of the Sofcom Group. In accordance with the RFS constitution, one of the three newly appointed directors retired at the AGM. Accordingly, Mr Ryan retired and the meeting considered the resolution to elect Mr Ryan. That resolution was defeated. Later that day, Mr Ryan was appointed to the board by the then directors, Mr Khan and Mr Cato. Mr William Johnson was also appointed to the RFS board by the post-AGM directors, and Mr Victor Ho was appointed as the company secretary of RFS.
13. As set out in paragraph 36, Messrs Khan, Cato, Johnson and Ho are officers of various shareholders of RFS.
14. The Panel received details of the proxies which were lodged in relation to the withdrawn resolutions. On the basis of that proxy information, the Panel considers it probable that, if the Board had been constituted on the basis of the resolutions included in the Notice of the AGM, the Board of RFS would have comprised the three pre-EGM directors of RFS.

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Notice of intention to requisition further meetings (Spill Meetings)

15. On 2 December 2004, Pinnacle announced its intention to call a general meeting of RFS pursuant to section 249F of the Corporations Act to remove all of the existing directors of RFS and to appoint 4 nominees of Pinnacle.
16. On 6 December 2004, Network announced its intention to call a general meeting under section 249F of the Corporations Act to remove all of the existing directors of RFS and to appoint nominees of Network.
17. While there had been no notice of meeting provided to RFS shareholders by either Pinnacle or Network since early December 2004, each had indicated to the Panel that they intended to convene the meetings for mid-February 2005. Whilst Pinnacle convened a meeting after the conclusion of Panel proceedings, it was cancelled by agreement with RFS. After the Panel proceedings had concluded, Network also agreed with RFS not to convene its foreshadowed meeting.

The Rights Issue

18. On 22 December 2004, RFS shares were placed in a pre-open trading halt at the request of RFS.
19. On 24 December, RFS announced the Rights Issue and a proposal to “spin off” its Avcol stockbroking business (the spin-off would be subject to shareholder approval). The Rights Issue was intended to raise approximately \$6.7 million, was to be underwritten by Westchester and fully sub-underwritten by CXL. The issue was priced at 20 cents per new share, being a discount of 10% to the closing market price one day before the execution of the underwriting agreement.
20. That day, RFS lodged a prospectus with the Australian Securities & Investments Commission (ASIC) in relation to the Rights Issue. On 29 December 2004, the prospectus was lodged with ASX.
21. In accordance with the minimum timetable for the conduct of a rights issue contemplated by the ASX Listing Rules, trading in the rights under the Rights Issue was scheduled to commence on 5 January 2005 and conclude on 19 January 2005, with the Rights Issue to close on 27 January 2005.

The Underwriting

22. Between 8 December 2004 and 20 December 2004, RFS sought proposals from four parties in relation to underwriting the Rights Issue. It is apparent from the three formal underwriting proposals received that RFS stipulated that the underwriters would be required to formally approach the Major Shareholders with a view to them sub-underwriting the issue. The three underwriters in question were DJ Carmichael Pty Ltd, Cameron Stockbrokers Limited and Westchester. The sole director and secretary of Westchester is Mr Christopher Ryan.
23. Ultimately, RFS determined to proceed with Westchester as the underwriter. Westchester’s offer was conditional on it being able to obtain sub-underwriting commitments for 100% of the issue. It offered to underwrite the issue for \$15,000 plus GST and any sub-underwriting fees (up to a cap of 3.5% of the amount to be sub-underwritten).

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24. On 20 December 2004, Westchester wrote identical letters to each of the Major Shareholders inviting them to offer to sub-underwrite the Rights Issue. Major Shareholders were given until 5pm on 22 December 2004 to make sub-underwriting offers. Westchester required that such offers remain open until 5pm on 31 December 2004.
25. CXL was the only Major Shareholder to offer to sub-underwrite the Rights Issue. Pinnacle, Network and ADG both responded by protesting to either Westchester or RFS about the approach from Westchester and/or about the fact that the Rights Issue was being pursued at all.
26. CXL might only have received formal notice of the sub-underwriting opportunity on 20 December 2004. However, the Panel considers that it is reasonable to infer that CXL knew about it considerably before then because two of its officeholders, Mr William Johnson and Mr Victor Ho, were present at a RFS strategic review board meeting over 6 to 8 December 2004 at which it was discussed and endorsed. Therefore, they should be presumed to have known by 8 December 2004 the details of the Rights Issue, in particular that Major Shareholders, including CXL, would be approached to sub-underwrite it.
27. CXL offered to fully sub-underwrite the offer for no fee. CXL reserved the right to withdraw from its sub-underwriting position if “IWL [IWL Limited – Pinnacle’s holding company] or any party which CXL regarded as being associated with IWL” was granted a sub-underwriting position. CXL sought to justify its position on the basis of a concern that if IWL increased its shareholding in RFS materially above its current level of 12% it would have a destabilizing effect on the value of CXL’s substantial investment in RFS. CXL did not seek a termination right if IWL bought shares on market – only if IWL participated in the sub-underwriting.
28. On 23 December 2004, Westchester and RFS entered into an Underwriting Agreement, and CXL and Westchester entered into a Deed of Sub-underwriting, to record the Underwriting arrangements.

Declaration and orders sought in the Application

29. Network sought a declaration that unacceptable circumstances existed in relation to the affairs of RFS.
30. Network sought interim orders in the alternative that:
 - (a) RFS be prevented from dispatching the prospectus for the Rights Issue to shareholders pending determination of the Application; or
 - (b) RFS be prevented, until determination of the Application, from:
 - (i) allotting any shares on exercise of rights under the Rights Issue; and
 - (ii) allowing trading of rights under the Rights Issue to occur on ASX.
31. Network sought final orders in the alternative that:
 - (a) the Rights Issue be prevented from proceeding until approval has been given by shareholders of RFS;

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- (b) the period of the Rights Issue be extended for a reasonable period to enable RFS shareholders to consider the Rights Issue and the proposed underwriting by Westchester and CXL;
- (c) Westchester and CXL be prevented from acting as underwriter and sub-underwriter respectively of the Rights Issue and that Westchester be prevented from receiving fees from acting as underwriter; or
- (d) RFS be prevented from issuing any shares to Westchester, CXL or any associate of them which would have the effect of causing the voting power of those parties (or any party associated with one or more of them) in RFS to exceed 19.9% unless RFS shareholder approval is obtained in accordance with item 7 of section 611.

DISCUSSION

Interim orders

- 32. The Panel issued interim orders on 5 January 2005 postponing the commencement of Rights trading until 14 January 2005. On 13 January 2005, the Panel issued further interim orders requiring the record date for the Rights Issue to be no earlier than 7 business days after the date on which the Panel's proceedings (the **Proceedings**) were determined. One effect of the Panel's further interim orders was that Rights trading could not commence before the Proceedings were determined.
- 33. The Panel was concerned to ensure that Rights trading did not occur in circumstances where, due to the Panel's ongoing proceedings, there continued to be uncertainty as to whether the Rights Issue would proceed or the terms on which it would proceed.

Court proceedings

- 34. After Network made the Application to the Panel, Pinnacle initiated proceedings against RFS in the Supreme Court of Victoria seeking to prevent the Rights Issue going ahead. Although both the Proceedings and the Court proceedings related to the Rights Issue and the Underwriting, the basis on which Pinnacle sought to challenge the Rights Issue in the Court proceedings was different to the basis on which Network sought to challenge the Rights Issue in the Proceedings. The Panel did not consider that there was any reason to defer its own consideration of the Application by reason of the Court proceedings.

Relationship between Network and Pinnacle

- 35. During the Proceedings, CXL and RFS alleged that Network and Pinnacle were associates and that, in light of that association, they had breached the Corporations Act. Network and Pinnacle denied these allegations. The Panel did not deliberate on the merits of this allegation. The Panel considered that it was not germane to the Application. To the extent that the parties wished the Panel to consider this issue, it would more appropriately be the subject of a separate application. No such application has been made. The Panel notes, however, that merely because two persons with aggregate shareholdings of over 20% of a company are associates does not mean that they have contravened the Corporations Act.

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Relationship between CXL, Sofcom, Altera, Fast Scout and RFS

36. There is considerable overlap between the officeholders of RFS, CXL, Sofcom, Altera and Fast Scout, as well as Queste Communications Limited (which is the controlling shareholder in CXL).

RFS	William Johnson (Director) Farooq Khan (Director) Christopher Ryan (Director) Simon Cato (Director) Victor Ho (Company Secretary)
CXL	William Johnson (Director) Victor Ho (Director and Company Secretary) Yaqoob Khan (Director)*
Sofcom	Farooq Khan (Director) Victor Ho (Director and Company Secretary) Simon Cato (Director)
Fastscout	Farooq Khan (Director) Yaqoob Khan (Director)* Victor Ho (Director and Company Secretary) Azhar Chaudri (Director)
Altera	Farooq Khan (Director) Victor Ho (Director and Company Secretary) Simon Cato (Director)
Queste Communications Limited	Farooq Khan (Director) Yaqoob Khan (Director)* Azhar Chaudhri (Director) Michael van Rens (Director) Victor Ho (Company Secretary)

* Yaqoob Khan is the brother of Farooq Khan.

37. The Panel did not consider it necessary to resolve whether one or more of the above parties were technically “associates” within the meaning of the Corporations Act.
38. The Panel noted:
- (a) the overlap in officeholders of these companies and the relationship between the officeholders;
 - (b) in proceedings against the Sofcom Group in the Federal Court of Australia in late 2004, Emmett J found that “The similarity of the reports, the common directorships and interconnected holdings, together with the fact that Mr Khan is the managing director of each of the Khan Companies, indicate clearly enough that the mind of Mr Khan was relevantly the mind of each of the Khan Companies.”. While the proceedings before Emmett J were specifically in relation to insider trading, Emmett J considered how decision making occurred in the Sofcom group of companies, and especially how decisions in relation to securities transactions occurred. Emmett J’s findings as to Mr. Khan being the

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controlling mind of the companies concern transactions in RFS shares that are clearly precursors to the current proceedings before the Panel. No evidence was brought in these proceedings that relationships within the Sofcom group have changed since Emmett J's findings or that his findings were in error. Accordingly, they appear relevant to the Panel and appropriate for it to take into account when considering the issue of relationships within the Sofcom Group;

- (c) Mr Khan has a relevant interest in shares held by CXL²; and
- (d) CXL and the Sofcom Group had previously been party to an agreement under which they agreed to co-operate in relation to their shareholdings in RFS (although ASX was advised that that agreement was terminated on 16 December).

39. In light of the above, irrespective of whether CXL, Sofcom, Fast Scout and Altera were collectively "associates" within the meaning of the Corporations Act, the Panel determined that it was necessary in the interests of an efficient, competitive and informed market for the control of RFS for shareholders (and potential shareholders pursuant to renounced rights) to be informed of the maximum voting power which those entities might collectively exercise following completion of the Rights Issue. The prospectus for the Rights Issue disclosed only the percentage shareholding which CXL might hold directly.
40. In addition, in considering this issue and the material before it, the Panel formed the view that Mr Farooq Khan has a relevant interest in all of the RFS shares held by each of CXL and the Sofcom Group. That is, Mr Khan's voting power was equivalent to that which CXL and the Sofcom Group might collectively exercise. The Panel noted that the prospectus did not disclose the impact of the Rights Issue on Mr Khan's voting power and that this was information which was required in the interests of an efficient, competitive and informed market for control of RFS.
41. The Panel was particularly conscious that the RFS board was comprised only of representatives or nominees of CXL and the Sofcom Group. This was in circumstances where the collective voting power of CXL and the Sofcom Group, and the voting power of one of the directors of RFS, might increase significantly pursuant to the Rights Issue and where neither the Rights Issue nor Underwriting had been approved by shareholders.

Effect of the Rights Issue and Underwriting on the control of RFS

42. It was apparent that the contest for control of RFS was finely balanced at the time of the Proceedings. It was equally apparent that the Rights Issue and, in particular, the Underwriting had the capacity to have a significant effect on the control of RFS.
43. The following table sets out the voting power which would have been exercisable by CXL in its own right and the collective voting power which would have been exercisable by two groups of Major Shareholders following the Rights Issue under various scenarios. Each scenario assumes that no shareholder other than a Major Shareholder participated in the Rights Issue. The sensitivities examined are whether

² ASX Appendix 3Y notice lodged by Mr Khan dated 20 December 2004.

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the Underwriting also proceeded and which Major Shareholders participated. The Panel has grouped the respective voting power of the Major Shareholders on the basis of its understanding as to how they voted at the EGM and the AGM. However, the information presented is based on the holdings of shareholders at the date of the prospectus for the Rights Issue.

Potential Impacts of Rights Issue and Underwriting

	CXL	CXL and Sofcom Group	Pinnacle, Network, ADG, CKS
Present Voting Power	14.95%	19.64%	31.79%
Post Rights Issue, no Underwriting, only CXL takes up Rights	18.98%	23.46%	30.28%
Post Rights Issue, with Underwriting, only CXL takes up Rights	36.21%	39.73%	23.84%
Post Rights Issue, no Underwriting, only CXL and Sofcom Group take up Rights	18.70%	24.58%	29.84%
Post Rights Issue, with Underwriting, only CXL and Sofcom Group take up Rights	35.50%	39.73%	23.84%
Post Rights Issue, no Underwriting, all Major Shareholders take up Rights	17.01%	22.36%	36.18%
Post Rights Issue, with Underwriting, all Major Shareholders take up Rights	27.09%	31.79%	31.79%

Ongoing contest for control

44. Network argued that it comprised unacceptable circumstances for the RFS board to pursue the Rights Issue and Underwriting because, given that it had received notice of the two Spill Meetings, it was acting in a “caretaker capacity”. In *BigShop.com.au Limited 01* and *02*, the sitting Panels were not prepared to accept that any caretaker director doctrine applied in a case where a 12.59% shareholder had requisitioned a meeting. The Panels in those matters considered that this would risk undue restriction on directors. In the current Proceedings, the Panel saw no reason to depart from this position merely because two shareholders with aggregate holdings of 21.06% had each requisitioned a Spill Meeting.
45. However, the circumstances of 29 November 2004 were shrouded in confusion. It was not at all clear whether the RFS board would comprise the current directors if the motions withdrawn from consideration at the AGM had been put to the AGM.

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46. In those circumstances, the Panel considered that it was incumbent on the RFS board to have taken *all reasonable steps* to structure any transaction which it undertook in such a way as not to have any material impact on the contest for control of RFS and, if it was unable or did not wish to do so, to obtain shareholder approval for the transaction. The Panel did not consider that the results of the EGM and AGM could in any way be considered a de facto approval for such a transaction: not only would the uncertainty clouding the result of the EGM and AGM also cloud any implied shareholder approval, but the prospect of a Rights Issue and related party underwriting was not raised with shareholders in the explanatory material for those meetings³ or at the meetings. In this regard, the Panel was informed by RFS that the decision to proceed with a Rights Issue had been made after the EGM and AGM and following a three-day examination by the new RFS board between 6 December 2004 and 8 December 2004 of strategic options for the company (that is, little over a week after the EGM and AGM).
47. The Panel was also mindful that the timing of and timetable for the Rights Issue were such that CXL and the Sofcom Group would benefit at the proposed Spill Meetings from any increased voting power which they obtained as a result of the Rights Issue and Underwriting.

Absence of a compelling need for funds

48. The requirements of reasonableness in the context of the “reasonable steps” referred to above will vary according to the extent to which the company needs to undertake the corporate transaction in question: for instance, because the company has an urgent or compelling need to conduct a fundraising.
49. The Panel did not accept that RFS had an urgent or compelling need to conduct the Rights Issue. Accordingly, it was feasible for RFS to have sought shareholder approval in advance for the Rights Issue and Underwriting.
50. RFS asserted that the purpose of the fundraising was to improve the company’s position in the market as a listed investment company by increasing its asset base (which would, for instance, reduce its management expense ratio and improve its ability to diversify its investments). In this regard, RFS pointed to the fact that a listed investment company would only be admitted to the official list of the ASX if its investment asset base was at least \$15 million and that, unless the Rights Issue and Underwriting both proceeded, RFS could not be assured of having such an asset base (since the capital of the Avcol stockbroking business could not be considered part of RFS’ investment base).
51. The Panel noted that this requirement for a minimum asset base only applies to companies seeking to be admitted to the official list of ASX and that ASX will not, in the ordinary course, remove a company from the official list merely because it does not continue to satisfy this initial listing requirement. RFS acknowledged that it was not subject to any formal requirement to maintain an asset base at this level, and the

³ The Sofcom Group’s “statement from members” at the EGM did not contain any reference to any plans to raise capital by means of an underwritten rights issue or otherwise – there was only a general statement about seeking to “grow RFS”.

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Panel did not receive any indication that RFS was at risk of being removed from the official list if the Rights Issue and Underwriting did not proceed.

52. While the Panel recognised that it might be desirable for RFS to increase its asset base and reduce its management expense ratio, it did not accept that this needed to be done urgently. Also, based on its collective experience and market knowledge, the Panel was not convinced that there would be any material difference to RFS' position in the market if the Rights Issue was completed relative to its position if it was not completed. A material change in RFS' position in the market would require RFS to raise a considerably larger amount of money.

Structure of the Rights Issue

53. Subject to concerns in relation to timing (which are discussed below), the Panel accepted that the Rights Issue complied with the technical requirements of Item 10 of section 611 such that, prima facie, that exception would apply to any acquisition of a relevant interest under the Rights Issue and associated underwriting arrangements which would otherwise constitute a breach of section 606.
54. The Panel has, however, previously recognized that where a Rights Issue is not "genuinely accessible", unacceptable circumstances may exist notwithstanding technical compliance with Item 10 of section 611⁴. In this regard, the Panel was concerned that the following factors (taken together) made the Rights Issue less accessible to shareholders and therefore made a shortfall under the Rights Issue more likely.

Discount

55. The Panel considered the trading history in RFS shares, in particular the volatility of its share price and the volatility of volumes traded. The Panel also considered the nature of RFS' business, the size of its share register and the end of the market in which it operated. Having regard to these factors, the Panel was concerned that the 10% discount for the Rights Issue was at the bottom end of the range of discounts which would have encouraged a take-up of Rights or trading in Rights. In this regard, the Panel was conscious that RFS did not seek external advice on the appropriate discount.

Renounceability

56. The Panel welcomed the decision to make the Rights Issue renounceable. At the same time, the Panel recognised that the small discount and the proposed timing of the issue meant that it was unlikely that there would be a significant market for the Rights.
57. The Panel noted that some Major Shareholders would be constrained in their ability to exercise rights purchased on market due to section 606 (whereas CXL, while being constrained in this regard, might be able to increase its voting power above 20% pursuant to the underwriting exceptions). At the same time, the Panel recognised that those Major Shareholders were offered the opportunity to sub-underwrite the offer (and thus acquire shares in a manner exempt from section 606). However, these

⁴ See, for example, *InvestorInfo Limited* [2004] ATP 6.

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sub-underwriting offers did not outweigh the Panel's other concerns about the circumstances surrounding the Rights Issue and Underwriting.

Timing

58. The Panel was concerned that the issue had been announced for the first time on 24 December. The period over which the Rights Issue was to be conducted, namely the Christmas and January period, was a period during which it was reasonable to expect that, due to absence through holiday and leave, some RFS shareholders would have less time to consider properly the proposed Rights Issue. This would further restrict the accessibility of the Rights Issue to shareholders in general, and was likely to result in an increased shortfall.
59. This concern was reinforced by the fact that, given RFS' position in the market, the Rights Issue received (and was always likely to receive) little press coverage – particularly, during the Christmas and New Year period, and RFS' own observation that it had sought to announce the Rights Issue before Christmas because its board was going on leave over the Christmas-New Year period.
60. In considering RFS' submissions regarding the reasons for conducting the Rights Issue over this period, the Panel noted that the RFS Board did not obtain independent financial advice regarding the timing, or other aspects, of the Rights Issue.
61. It follows from the Panel's conclusion that RFS did not have an urgent or compelling need for the funds proposed to be raised that the Panel could see no acceptable reason why it was necessary to conduct the Rights Issue over this period. That is, the Panel could see no acceptable reason for the accessibility of the Rights Issue being reduced by conducting it over the holiday period.

Underwriting arrangements

62. The Corporations Act contains two exceptions relating to underwriting. One (contained in item 10 of section 611) relates specifically to increases in voting power as a result of a complying rights issue and extends to any associated underwriting or sub-underwriting arrangements. The second (contained in item 13 of section 611) relates specifically to increases in voting power as a result of underwriting or sub-underwriting arrangements.
63. In each case, the increase in voting power must result from underwriting or sub-underwriting arrangements. The Panel will consider unacceptable circumstances to exist where the increase in voting power results from arrangements which although described as underwriting arrangements are, in fact, better characterised as something else, such as placement arrangements.
64. One of the essential elements of underwriting arrangements is that a person bears the risk of a shortfall⁵. Normally, this is in exchange for valuable consideration (for example, a fee or significant discount in the issue price). It will generally be inconsistent with the nature of underwriting for the "underwriter" to agree to

⁵ See *Aberfoyle Ltd v Western Metals Ltd* (1998) 28 ACSR 187 at 205.

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arrangements which unduly or unnecessarily increase the risk of a shortfall – so that, in effect, their risk becomes that shareholders will participate in the underlying issue.

65. In this case, the Underwriting was not a conventional combination of underwriting and sub-underwriting on ordinary commercial terms. In the Panel's view, the proposed "underwriting" and "sub-underwriting" arrangements, when looked at in combination with the accompanying Rights Issue, were not properly characterised as underwriting arrangements. Rather they may more appropriately be characterised as having the likely effect of placing shares with a particular party. The Panel had regard to the following factors:
- (a) The timing of the Rights Issue over the Christmas-New Year period. Given that the first announcement of the Rights Issue was on 24 December, this was likely to increase substantially the shortfall under the Rights Issue.
 - (b) RFS had no compelling need for the additional funds to be raised under the Rights Issue. By definition, therefore, there was not actually a need for the underwriting and sub-underwriting arrangements at the time.
 - (c) Although RFS approached four underwriters, in each case it requested that the Major Shareholders (including, therefore, CXL) be approached to sub-underwrite the Rights Issue. Accordingly, the process in relation to the underwriting was such as to ensure that CXL would always be able to put forward its proposal.
 - (d) RFS reserved the right to veto sub-underwriters.
 - (e) The structure of the CXL sub-underwriting proposal tended to ensure that any shortfall would fall to it. In this regard, CXL put Westchester in the position where it would have little choice but to select CXL (or CXL in conjunction with a member of the Sofcom Group) as sub-underwriter(s) because:
 - (i) CXL stipulated that it reserved the right to terminate or reduce the arrangements if any of IWL or persons whom CXL regards as IWL's associates were appointed as sub-underwriters (and it is apparent to the Panel that CXL would likely regard at least Network as an associate of Pinnacle); and
 - (ii) CXL stipulated that it would underwrite the issue for no fee, and it is reasonable to infer that no other person would have offered "sub-underwriting" services on such an uncommercial basis (at least, unless that other person was seeking to acquire shortfall shares for strategic reasons).
 - (f) The ordinary course of CXL's business did not appear to include underwriting activities in the nature or magnitude of its sub-underwriting of the Rights Issue.
 - (g) CXL was prepared to sub-underwrite the issue for no fee and the Rights Issue was offered at only a modest discount (see further the Panel's analysis as to discount above) which would not compensate for the zero fee basis of its sub-underwriting offer. In other words, the only material benefit which CXL would obtain in exchange for the "risk" of subscribing for further shares was that, in addition to its Rights, it would have an opportunity to acquire new RFS shares

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(including above the 20% limit imposed by section 606) at close to their market value.

- (h) The invitations to sub-underwriters other than CXL did not provide them with a reasonable period of time to consider the proposal, having regard to the ongoing contest for control and the Panel's inference that officeholders of CXL had advance notice of the Rights Issue proposal (through a common director and, in all likelihood, the common company secretary) and the prospect of underwriting offers (see paragraph 26).
- (i) RFS was aware that, given the hostility between CXL and the Sofcom Group (on the one hand) and the other Major Shareholders (on the other hand) any approach to Major Shareholders other than CXL and the Sofcom Group to sub-underwrite the Rights Issue was likely to result in a hostile response.

- 66. The Panel also noted that the Underwriting arrangements were not in furtherance of any specific proposal previously put to shareholders and could not in any way be said to have been sanctioned by shareholders.
- 67. The Panel accepts that a company or underwriter may, in many circumstances, properly and sensibly approach major shareholders to sub-underwrite an issue as a legitimate means of securing financial support for a capital raising. However, in such circumstances, where a board may expect any shareholder willing to sub-underwrite to retain any shortfall allocation they receive, the board must make every effort to ensure that the underwriting process provides as equal an opportunity as possible for shareholders to participate. Alternatively, it could obtain shareholder approval for the underwriting arrangements. To do otherwise is inconsistent with the equal opportunity principle in section 602(c).

UNDERTAKINGS

- 68. The Panel considered a range of options which might remedy the unacceptable circumstances.
- 69. Some elements of the unacceptable circumstances might have been able to be rectified by specific undertakings or orders. For instance, concerns relating to the timing of the Rights Issue in the Christmas-January period would have been able to be addressed by undertakings or orders relating to the timetable of the Rights Issue (if they had not already been addressed by the interim orders). That aspect of the unacceptable circumstances relating to the failure to disclose adequately the potential effects of the Rights Issue on the collective voting power of CXL and the Sofcom Group, and the voting power of Mr Khan, might have been resolved by an undertaking that RFS would issue, or an order requiring RFS to issue, a supplementary or replacement prospectus for the Rights Issue.
- 70. RFS offered to issue a supplementary prospectus. However, the Panel decided that disclosure alone would not adequately remedy the unacceptable circumstances. The Panel considered that in order to address the totality of the unacceptable circumstances, the most appropriate undertakings or orders would require RFS shareholder approval of the Underwriting, in order for the Rights Issue and

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Underwriting to proceed. On 18 January 2005, RFS offered and the Panel accepted such undertakings.

71. Having regard to the Panel's view that the Underwriting, as structured and on the process gone through, might better be characterised as a placement, the appropriate shareholder approval regime for the Underwriting was that set out in item 7 of section 611. Given the Panel's concerns as to the relationships between CXL, Westchester, the Sofcom Group and their officers and related companies, those entities would be considered associates for the purposes of any such shareholder approval of the Underwriting.
72. The Panel also accepted undertakings to the effect that RFS would obtain shareholder approval before RFS made any further rights offer in the next three months, if the rights offer might result in any of CXL, Westchester, the Sofcom Group and their officers, associates and related parties increasing their collective voting power in RFS over or further over 20% pursuant to underwriting or sub-underwriting arrangements.
73. While there is still considerable uncertainty as to the contest for control of RFS, there should, in general, not be any transaction which might be better characterised as a placement which might have a significant impact on that contest and which has not been sanctioned appropriately by shareholders. Any such transaction would most likely involve underwriting arrangements. Hence the Panel's concern that any undertakings which it accepted from RFS should relate to underwriting arrangements which might be proposed over the next three months. It remains possible that another type of transaction with control consequences might be proposed. The Panel expressly notes that is not limiting its ability or the ability of any future Panel to declare that unacceptable circumstances exist, accept undertakings and make orders in relation to any such other type of transaction.
74. The Panel accepted undertakings in relation to a three month period as the Panel considered that the contest for control of RFS would be likely to be resolved in that period and, if not, that at least the confusion surrounding the status of the contest was likely to be resolved. The Panel will be prepared to consider agreeing to RFS varying its undertakings so that they cease to apply earlier than the conclusion of three months if the contest for control (or the attendant confusion) is resolved before then. The Panel will also be prepared to consider agreeing to RFS varying its undertakings if RFS proposes an underwriting which the Panel is satisfied does not comprise unacceptable circumstances.

CHAPTER 2E

75. A considerable portion of the argument before the Panel concerned the question of whether there were any related party transactions involved, within the meaning of Chapter 2E. Network argued that, for various reasons, shareholder approval for the Rights Issue and Underwriting should be required under Part 2E.2. The Panel did not form a view of the correctness of these arguments.
76. It is not the Panel's role to enforce Chapter 2E of the Corporations Act, nor inquire as to whether the policy and purposes of Chapter 2E have been upheld. It may be relevant for the Panel to explore whether parties are related in the course of its

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inquiries as to whether the policy objectives of Chapter 6 have been met. Such inquiries are directed at determining issues relevant to the Panel's jurisdiction, such as whether:

- (a) unacceptable circumstances exist having regard to the effect of the circumstances on the control, or potential control, of a company, or the acquisition, or potential acquisition, of a substantial interest in a company; or
- (b) circumstances are unacceptable because they constitute or give rise to a breach of Chapter 6, 6A, 6B or 6C.

COSTS

- 77. Pinnacle applied for an award of costs. The Panel did not make any costs orders.
- 78. Pinnacle argued that RFS displayed "intransigence" in the sense contemplated by paragraph 9.25 of Guidance Note 9. That paragraph notes that "Clear evidence that a party had been offered a reasonable compromise during the course of ... negotiations [before or during Panel proceedings], but refused the offer or made unreasonable demands, would be a relevant factor in considering whether a costs order for or against the party may be justified."
- 79. In this respect, Pinnacle argued that, because it had written to RFS on 24 December 2004 demanding that RFS not proceed with the Rights Issue until after the Spill Meeting to be convened by Pinnacle, it had offered a reasonable compromise and that RFS had rejected it.
- 80. The Panel did not accept this argument. Paragraph 9.25 is concerned with the case where there are negotiations, not where one person merely asserts that circumstances are unacceptable and proposes a solution, and the other person rejects that solution.
- 81. Pinnacle also argued that paragraph 9.26 of Guidance Note 9 applied to warrant a costs order. That paragraph states that "Costs may also be awarded when a party runs an application or defence that is without merit". In this case, the Panel clearly disagreed with RFS' defence. However, a defence is not "without merit" in the relevant sense simply because the Panel does not accept it.
- 82. For the reasons set out in its Guidance Note, the Panel reiterates that costs orders are the exception, rather than the rule. A party is generally entitled to make or resist an application in relation to a specific issue once, presenting a case of reasonable merit, in a businesslike way, without exposure to a costs order.

THE PANEL & PROCESS

- 83. The President of the Panel appointed Simon McKeon (sitting President), Kathleen Farrell (sitting Deputy President) and Graham Bradley as the sitting Panel for the Proceedings.
- 84. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.
- 85. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

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DECISION

Declaration

86. The Panel declared the combination of the matters set out in recitals A to K of Annexure A to be unacceptable circumstances.

Undertakings

87. The Panel accepted the undertakings set out in Annexure B.

Orders

Interim orders

88. The Panel initially made the interim orders set out in Annexure C, and subsequently made the interim orders set out in Annexure D.

Final orders

89. In light of the undertakings set out in Annexure B, the Panel decided that it was not necessary to make any final orders.

Simon McKeon

President of the Sitting Panel

Decision dated 20 January 2005

Reasons published 21 April 2005

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Annexure A – Declaration of Unacceptable Circumstances

In the matter of Rivkin Financial Services Limited 02

WHEREAS

- A. Rivkin Financial Services Limited (RFS) is subject to an ongoing contest for control, the current status of which is clouded by uncertainty following two shareholder meetings on 29 November 2004;
- B. RFS has proposed a 1 for 3 pro-rata renounceable rights issue (the Rights Issue) to be conducted pursuant to a prospectus dated 24 December 2004 and which is fully underwritten by Westchester Financial Services Pty Limited (Westchester) and fully sub-underwritten by Central Exchange Limited (CXL) (the combination of the underwriting and sub-underwriting arrangements being referred to in this Declaration as the Underwriting);
- C. CXL owns 14.95% of the shares in RFS and companies connected with CXL (namely Sofcom Limited, Altera Capital Limited and Fast Scout Limited (the Sofcom Group)) own a further 4.70% of the shares in RFS between them;
- D. the board of RFS does not contain directors who are genuinely independent of CXL and the Sofcom Group;
- E. the Rights Issue and Underwriting have the capacity to impact the contest for control of RFS significantly in that, potentially, the collective voting power of CXL and the Sofcom Group could increase to 39.73% if only CXL and the Sofcom Group took up their rights (Rights) under the Rights Issue;
- F. there is no immediate or compelling need for the Rights Issue, nor any pressing need for it to occur before two proposed shareholder meetings which may remove the uncertainty as to the status of the incumbent board of RFS and the contest for control of RFS;
- G. the Rights Issue is not in pursuance of a course which had been approved by shareholders, notwithstanding that it is likely that shareholder approval will be required for a proposed spin off of RFS' Avcol business;
- H. there is inadequate disclosure in the Rights Issue prospectus of the potential impact of the Rights Issue on the control of RFS;
- I. the Rights Issue was announced on 24 December 2004 and conducted over the Christmas-January period in accordance with the minimum timetable permitted under the Australian Stock Exchange Listing Rules, and there had been no earlier indication to the market of the intention to make the Rights Issue;
- J. the pricing of the Rights Issue is such that the discount is at the lower end of discounts that would have encouraged take-up of Rights or significant trading in Rights; and
- K. the structure of the Underwriting and the process leading to its implementation were likely to increase rather than minimise the shortfall taken up by CXL under the Rights Issue and were such that the sub-underwriter would not be receiving any

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benefit which could reasonably be seen as offsetting the risk of having to take up the shortfall other than increased control over RFS.

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

Simon McKeon

President of the Sitting Panel

Dated 18 January 2005

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Annexure B - Undertakings by Rivkin Financial Services Limited

Rivkin Financial Services Limited (**RFS**) undertakes, pursuant to section 201A of the ASIC Act 2001, that

- (i) RFS will not proceed with the 1 for 3 pro rata renounceable rights issue (the **Rights Issue**) proposed to be conducted by it pursuant to a prospectus dated 24 December 2004 unless each acquisition of a relevant interest in shares in RFS by a Nominated Person pursuant to the underwriting and sub-underwriting arrangements associated with the Rights Issue is approved at least 7 days before the commencement of trading in the rights on Australian Stock Exchange Limited (**ASX**) under item 7 of section 611 of the Act and on the basis that each Nominated Person is regarded as an associate of each other Nominated Person; and
- (ii) until 3 months after the date of these orders [sic], RFS will not make any rights offer which might result in any Nominated Person acquiring a relevant interest in shares in RFS pursuant to an underwriting or sub-underwriting arrangement which results in an increase in the collective voting power of all Nominated Persons to or further above 20%, unless the acquisition of the relevant interest by the Nominated Person is approved at least 7 business days before the commencement of trading in the rights on ASX under item 7 of section 611 of the Act and on the basis that each Nominated Person is regarded as an associate of each other Nominated Person.

For the purposes of these orders [sic], each of the following is a Nominated Person:

- (A) Altera Capital Limited;
- (B) Central Exchange Limited;
- (C) Fast Scout Limited;
- (D) Queste Communications Limited;
- (E) Sofcom Limited;
- (F) Westchester Financial Services Pty Limited;
- (G) each officer, associate and related party (within the meaning of section 228 of the Act) of any of the companies identified in paragraphs (A) to (F) as at the date of this undertaking and from time to time while this undertaking remains in force; and
- (H) each entity of or with whom any of the persons identified in paragraph (G) is an officer, associate or related party (within the meaning of section 228 of the Act) as at the date of this undertaking and from time to time while this undertaking remains in force.

Farooq Khan
Chairman
Rivkin Financial Services Limited

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Dated 18 January 2005

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Annexure C - Initial Interim Orders

**Corporations Act
Section 657E
Interim Orders**

In the matter of Rivkin Financial Services Ltd 02

Pursuant to section 657E of the *Corporations Act 2001* (Cth) the President of the Sitting Panel HEREBY ORDERS Rivkin Financial Services Ltd (**RFS**) to:

- (i) immediately take all action necessary to postpone the commencement of rights trading in relation to its proposed renounceable rights issue (**Rights Issue**) (to be made under a prospectus dated 24 December 2004 (**Prospectus**)) until Friday, 14 January 2005 including, if the ASX so requires, a corresponding postponement of any or all of the record date for the Rights Issue, the dispatch of the Prospectus to RFS shareholders and the closing date of the Rights Issue; and
- (ii) as soon as possible, and in any event by no later than 10.00am (AEDT) on Thursday 6 January 2005, make an announcement on Australian Stock Exchange Limited regarding the postponement of rights trading and any other relevant postponements.

This interim order remains in effect until the first to occur of:

- (a) further order by the Takeovers Panel;
- (b) 14 January 2005; and
- (c) the conclusion of these proceedings.

George Durbridge

At the direction of Simon McKeon

President of the Sitting Panel

Dated 05 January 2005

Takeovers Panel

Reasons for Decision - Rivkin Financial Services Limited 02

Annexure D - Subsequent Interim Orders

Corporations Act

Section 657E

Interim Orders

In the matter of Rivkin Financial Services Ltd 02

Pursuant to section 657E of the *Corporations Act 2001* (Cth) the President of the Sitting Panel HEREBY ORDERS Rivkin Financial Services Ltd (**RFS**) to immediately take all action necessary to ensure that the proposed record date for its proposed renounceable rights issue (the terms of which are set out in a prospectus dated 24 December 2004) (**Rights Issue**) is no earlier than 7 business days after the date on which these proceedings are determined.

This interim order remains in effect until the first to occur of:

- (a) further order by the Takeovers Panel;
- (b) 12 February 2005; and
- (c) the determination of these proceedings.

Simon McKeon

President of the Sitting Panel

Dated 13 January 2005