



**In the matter of iP3 Systems  
[2005] ATP 7**

**Catchwords:**

*Breach of undertakings to Panel; conditions to rights issues; Eggleston principles; genuinely accessible; media releases; non-renounceable; prospectus-level disclosure; right issues; unacceptable circumstances; unsophisticated investors; related party underwriters.*

Corporations Act 2001, section 602, section 611(item 10), Chapter 6D, *InvestorInfo* [2004] ATP 6

**These are the Panel's reasons for concluding proceedings without making a declaration of unacceptable circumstances and orders concerning a rights offer undertaken by iP3 Systems Limited. The Panel was concerned about the level of disclosure in the information memorandum prepared by iP3 in relation to the rights offer. However, prior to the conclusion of the Panel's proceedings iP3 advised that the underwriter had terminated its underwriting agreement and that the company had therefore withdrawn the rights offer.**

## **THE PROCEEDINGS**

1. These reasons relate to an application (the Application) to the Panel from Victoria University of Technology (VUT) on 15 February 2005 in relation to the affairs of iP3 Systems Limited (iP3), which was undertaking a rights offer (Rights Offer) detailed in an information memorandum dated 25 January 2005 (Information Memorandum).
2. The Panel dismissed VUT's application and determined not to make a declaration of unacceptable circumstances or orders, or require any undertakings, following the withdrawal of the Rights Offer by iP3.

## **THE PANEL & PROCESS**

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

## **SUMMARY**

6. The Panel declined to make a declaration of unacceptable circumstances in relation to the Application. VUT had complained about a number of issues in connection with iP3's Rights Offer. The Panel advised iP3 that it would need to provide a disclosure document that provided disclosure that was consistent with the level required under the prospectus provisions of Chapter 6D of the Corporations Act (**Act**) and register the document with ASIC.

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7. iP3 advised the Panel that, as the underwriter had terminated the underwriting, it no longer intended to proceed with the Rights Offer and would seek alternative ways of meeting the company's funding needs.
8. On that basis, the Panel declined to make any declaration of unacceptable circumstances and concluded its proceedings.

### Standard of disclosure in the Information Memorandum

9. iP3 had structured the Rights Offer such that the offer document for the Rights Offer could be an information memorandum rather than a prospectus.
10. However, the Panel found that the Information Memorandum dated 25 January 2005 circulated by iP3 to its shareholders concerning the Rights Offer did not contain adequate disclosure about the financial position and prospects of iP3 and the intentions of persons who may acquire control of iP3 under the offer.
11. The Panel referred to the principles set out in its decision of *InvestorInfo* [2004] ATP 6, which provide guidance as to whether a rights offer is "genuinely accessible" to all shareholders so as not to constitute unacceptable circumstances. One of those principles is that shareholders should have sufficient information to allow them to make an informed assessment whether or not to take up their rights.
12. In the circumstances of this case, the Panel found that prospectus-level disclosure was required to be given to iP3 shareholders in relation to the iP3 shares that were being offered under the Information Memorandum.
13. In addition, information needed to be included as to the likelihood of the underwriter, USA Health Inc. (**USA Health**) acquiring control of iP3, and USA Health's intentions for iP3 if it did, to the extent they are known to iP3. iP3 offered an undertaking to make further disclosure, but in the interim USA Health terminated the Underwriting Agreement, causing the Rights Offer to be terminated by iP3.

### 20 Acceptances Condition

14. The Rights Offer was subject to a condition that iP3 did not receive more than twenty completed acceptance forms from "unsophisticated" investors and no other event occurred before the closing date that would otherwise require iP3 to issue a disclosure document (**20 Acceptances Condition**). This condition had been inserted to allow the offer document to fall within the exception from the prospectus requirements in section 708 of the Act (i.e. to allow it to be an information memorandum rather than a prospectus).
15. The Panel considered that unacceptable circumstances arose as a result of the Rights Offer involving:
  - (a) a potential acquisition of control by a substantial shareholder; but
  - (b) being subject to a condition which had the effect of taking the Information Memorandum outside the content requirements of Part 6D.2 of the Act; and
  - (c) in circumstances where the Information Memorandum did not in fact meet those requirements or the requirements of section 602(b)(iii) (the requirement

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for shareholders to be given sufficient information to adequately assess the merits of the application).

#### Other grounds of complaint

16. The Panel did not find that unacceptable circumstances existed as a result of any of the other matters raised by VUT; namely, the pricing of the Rights Offer, the existence of concurrent litigation between VUT and iP3 over intellectual property used by iP3, the Rights Offer being non-renounceable, USA Health being a related party underwriter, or the lack of a shortfall facility.

#### Withdrawal of the Rights Offer

17. On 10 March 2006, following discussions with the Panel, iP3 wrote to the Panel advising that the underwriting agreement with USA Health had been terminated by USA Health under the withdrawal rights in the Underwriting Agreement and that iP3 had therefore decided to withdraw and cancel the Rights Offer.
18. On the basis of the withdrawal of the Rights Offer, the Panel saw no need to make a declaration of unacceptable circumstances or orders.

## BACKGROUND

19. iP3 is an unlisted public company with approximately 90 shareholders.
20. iP3 specialises in the development of electronic commerce software which allows trading organisations to conduct their trading activities – procurement and sales – over the internet.
21. The three largest shareholders in iP3 are VUT (46.49%), Caason Investments Pty Ltd (17.94%) and USA Health LLC (**USA Health**) (11.22%).
22. USA Health and iP3 share a common director.
23. VUT does not have representation on the Board of iP3.

#### Litigation

24. In June 2003, VUT commenced proceedings in the Supreme Court of Victoria against Professor Kenneth Wilson (and his private company) ("**Wilson**") and Dr Donald Feaver (and his private company) ("**Feaver**") seeking to obtain, among other things, ownership of an invention which it was alleged that Wilson and Feaver developed while employed as academics by VUT (the "**Invention Proceeding**"). The invention, the subject of the Invention Proceeding, was alleged to be embodied in at least one business process patent and two computer programmes called Electron and Ether ("**Invention**"). VUT also commenced the Invention Proceeding against iP3, which was the corporate entity to which Wilson and Feaver had transferred the Invention for development and exploitation.

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25. VUT succeeded in its claim against Wilson and Feaver to have the shares in iP3 held by Wilson and Feaver transferred to VUT. As a result, VUT acquired a shareholding of approximately 46.49% in iP3.<sup>1</sup>
26. VUT failed in its claim against iP3 to have the relevant intellectual property transferred from iP3 to VUT.
27. At the commencement of the Invention Proceeding, VUT obtained Anton Piller orders and interlocutory injunctive orders against iP3 which allegedly prevented iP3 from exploiting the Invention while the matter was being heard from June 2003 to October 2004. These orders were obtained on the basis of undertakings provided by VUT to compensate iP3 for any loss suffered as a result of these orders if VUT's claim against iP3 failed.
28. On conclusion of the Invention Proceeding on 10 March 2004, the Court ordered that there be an assessment of any damage suffered by iP3 as a result of the granting of interlocutory injunctive orders for which VUT was obliged to compensate iP3 under its undertaking. iP3 claims approximately \$55 million pursuant to the assessment of damages. This claim, which is resisted by VUT, has not yet been heard.

### Funding by USA Health

29. On or about 13 February 2003 (prior to the commencement of the Invention Proceeding), USA Health had entered into an agreement to subscribe for shares in iP3 pursuant to which USA Health was to provide iP3 with US\$12.25 million in funding over a three year period. Of this amount \$6.25 million was to be paid as subscription for iP3 shares. On 8 May 2003, these arrangements were approved by shareholders under item 7 of section 611 of the Act.
30. iP3 submitted that, as a consequence of the injunctions referred to in paragraph 27 above, USA Health terminated this agreement in October 2003.
31. On 27 January 2004, USA Health entered into a loan agreement with iP3 under which it has provided a further \$1.5+ million in funding to enable iP3 to continue operations while VUT's Anton Piller orders were in place. The loan agreement is secured by a fixed and floating charge over the assets of iP3, one of the terms of which is that USA Health can exercise its power under the charge if a director is appointed to the Board of iP3 without the approval of USA Health.

### The Rights Offer

32. On 25 January 2005, iP3 released the Information Memorandum pursuant to which the Rights Offer was made. The relevant terms of the Rights Offer, as set out in the Information Memorandum, were as follows:
  - (a) The Rights Offer was made to "Eligible Shareholders", being all shareholders of iP3 on the register as at 5.00 pm on 24 January 2005, on the basis of 8 new shares for every 5 shares held. The rights offer sought to raise a total of \$6.64 million.
  - (b) The Rights Offer was non-renounceable.

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<sup>1</sup> Mr Ahmed Youssef, the manager of iP3, claims an equitable interest in 1,400,000 of these shares, a claim which is disputed by VUT.

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- (c) The offer price under the Rights Offer was 22¢ per share. Payment could be made either in full or by instalments. If paying in full, payment was required to be made by 16 February 2005. If paying by instalments, the first instalment of 20% (4.4¢ per share) was to be paid by 16 February 2005 with the next three instalments (respectively, 20%, 30% and 30%) due on the subsequent anniversaries of that date. Where installment payments were made, the shares were to be issued carrying full voting rights from the time of issue.
  - (d) If a shareholder accepted the Rights Offer and elected to pay by instalments, but failed to pay any instalment when due, the Information Memorandum stated that iP3 could cancel those shares for nil consideration, but iP3 had no recourse to the shareholder for any outstanding amount. (There was some question regarding the validity of this under corporate law, but in the event the Panel was not required to consider this issue.) Shares would not be able to be transferred until all instalments had been paid.
  - (e) The Rights Offer was to close on 16 February 2005. The issue of new shares under the Rights Offer was to occur by 2 March 2005. These dates were stated in the Information Memorandum to be indicative only and subject to change by iP3, with the consent of the underwriter where required.
  - (f) The Rights Offer would not proceed if:
    - (i) USA Health terminated the underwriting agreement;
    - (ii) iP3 received more than twenty completed acceptance forms from "unsophisticated" investors or any other event occurred before the closing date that would otherwise require iP3 to issue a disclosure document (**20 Acceptances Condition**); or
    - (iii) the Board of iP3 terminated the Rights Offer prior to the closing date.
33. In relation to the condition in paragraph (ii) above, the Information Memorandum did not disclose how iP3 would identify which completed applications were from "unsophisticated" investors, although iP3 disclosed in submissions that it would treat any application for less than \$500,000 as being from an unsophisticated investor.
34. The Information Memorandum included disclaimers which expressly stated that it was not to be a disclosure document under Part 6D.2 of the Act and was provided only to "*persons who are sophisticated investors*" or otherwise in circumstances where the issue of a disclosure document was not required.

#### *Underwriting*

35. The Rights Offer was underwritten by USA Health pursuant to the terms of an underwriting agreement (**Underwriting Agreement**) – USA Health agreed to subscribe for the shortfall of applications received below the total amount sought, to a maximum of \$3.75 million. Under the terms of the Underwriting Agreement, USA Health could be required to subscribe for up to 17,045,454 iP3 shares.
36. Under the terms of the Rights Offer, USA Health was also entitled, pursuant to its entitlement as a shareholder, to acquire a further 2,905,600 iP3 shares in addition to its current holding of 2,116,000 shares. In correspondence during the proceedings,

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USA Health advised that it had intended its total exposure under the Rights Offer to be \$3.75 million. However, that was not disclosed in the Information Memorandum and the Information Memorandum did not address whether or not USA Health intended to subscribe for its entitlement separately to its obligations as underwriter.

37. Pursuant to the terms of the Underwriting Agreement, USA Health was entitled to receive an underwriting fee of \$187,500 which was stated in the Information Memorandum to be 5% of the underwritten amount. USA Health agreed, under the Underwriting Agreement, to invest up to \$3.75 million in iP3.
38. The underwritten amount was stated in the Information Memorandum to be \$3.75 million. In later submissions, iP3 submitted to the Panel that like all other subscribers, USA Health, as both shareholder and underwriter, was entitled under the terms of the Rights Offer, to pay by instalments for any shares it was required to take up under the Underwriting Arrangement. In its submissions, iP3 advised that USA Health had advised iP3 that it elected to pay the relevant subscriptions moneys by instalments. However, USA Health's election was not able to be included in the Information Memorandum because, under the terms of the Rights Offer, the time for electing whether or not to pay by instalments came at the end of the offer period i.e. after the Information Memorandum had been distributed. The Panel accepts that iP3 may hold the view that USA Health had the right to elect to pay its underwriting commitments on the same instalment basis as shareholders subscribing under the Rights Offer. However, the issue is not addressed in either the Information Memorandum or the Underwriting Arrangement. It appears to be an issue which should have been addressed in the Information Memorandum for iP3 shareholders to understand
39. The limitation referred to in paragraph 32(d) above would have limited USA Health's commitment under the Rights Offer to \$ 0.75M had USA Health decided not to continue its investment in iP3 and in the event the limitation were valid (see paragraphs 78 to 80 below).

#### *Changes to Voting Power*

40. If VUT had exercised all of its rights under the Rights Offer, it would have at least maintained its percentage voting power in iP3, irrespective of the extent of the shortfall and the number of shares taken up by USA Health. If it failed to exercise all of its rights, its voting power could have been diluted, to an extent depending on the extent of the shortfall and the number of shares taken up by USA Health.
41. If VUT had exercised all its rights, and was the only shareholder to exercise rights, and USA Health performed its underwriting obligation in full, the relevant iP3 shareholding percentages would have been as follows:
  - (a) VUT - 46.49%;
  - (b) USA Health - 37.25%;
  - (c) All other shareholders - 16.27%.
42. If VUT exercised no rights and USA Health performed its underwriting obligation in full, the relevant iP3 shareholding percentages would have been as follows:

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- (a) VUT – 24.41%;
  - (b) USA Health – 53.38%;<sup>2</sup>
  - (c) All other shareholders – 22.21%.
43. The information in these scenarios was not disclosed in the Information Memorandum nor was the possibility of a change of control in favour of USA Health properly disclosed in the Information Memorandum.

#### *Uses of funds*

44. The Information Memorandum stated that the funds raised by the Rights Offer were to be applied as follows:
- (a) \$4,800,000 for working capital;
  - (b) \$1,300,000 for repayment of money owing to USA Health;
  - (c) \$200,000 for the damages claim against VUT;
  - (d) \$90,000 for the legal costs claim against VUT; and
  - (e) \$240,000 for costs associated with the Rights Offer.

#### **Application**

##### *Unacceptable circumstances*

45. On 15 February 2005, VUT made an application to the Panel alleging that unacceptable circumstances existed in relation to the following:
- (a) iP3 shareholders not being given a reasonable and equal opportunity to participate in the benefits accruing to shareholders through the Rights Offer and Underwriting under which USA Health could potentially acquire a controlling or substantial interest in iP3;
  - (b) iP3 shareholders not being given sufficient information necessary to make an informed assessment of the merits of the proposed transactions represented by the Rights Offer and Underwriting; and
  - (c) as a consequence of the above, the transactions comprising the Rights Offer and Underwriting are not taking place in an efficient, competitive and informed market for shares in iP3.

##### *Interim orders*

46. VUT applied to the Panel for an interim order under section 657E of the Act that iP3 be restrained from issuing any shares pursuant to the Rights Offer and the Underwriting pending determination of its application.

##### *Final orders*

47. VUT sought the following final orders under section 657D of the Act; that:

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<sup>2</sup> In later submissions to the Panel, USA Health advised the Panel that it had advised IP3 at the time of the Underwriting Arrangement that USA Health had intended to subscribe only for a maximum of \$3.75 million, i.e. only the amount it was committed to as underwriter. On that basis, the maximum percentage voting power that USA Health would have acquired was 53.38%.

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- (a) iP3 be restrained from proceeding with the Rights Offer, including that:
  - (i) no shares in iP3 be issued pursuant to the Rights Offer and the Underwriting;
  - (ii) any agreement formed by acceptance of the Rights Offer by any iP3 shareholder be cancelled; and
  - (iii) iP3 refund within two business days any consideration received from iP3 shareholders under the Rights Offer; or
- (b) in the alternative to (a), iP3 be restrained from proceeding with the Rights Offer unless:
  - (i) USA Health does not act as the underwriter to the Rights Offer; or
  - (ii) in the alternative to (i) above, approval of iP3 shareholders is obtained pursuant to item 7 of section 611 of the Act for USA Health and its associates to increase voting power in iP3 to greater than 20% as a consequence of USA Health acquiring a relevant interest in iP3 shares through its underwriting of the Rights Offer; or
  - (iii) in the alternative to (i) and (ii) above, USA Health and its associates are restrained from acquiring iP3 shares pursuant to the Rights Offer and Underwriting to the extent that such acquisition would result in USA Health's and its associates' voting power in iP3 exceeding 20%.

#### *Arguments in support of application*

48. In support of its application, VUT raised the following arguments:

- (a) the 20 Acceptances Condition had the effect of inhibiting unsophisticated investors from accepting. In addition to offending the equality of opportunity principle, it was argued that this ensured that there would be a shortfall and USA Health would have the opportunity to subscribe for shares under the Underwriting Agreement;
- (b) the level of disclosure in the Information Memorandum was insufficient to encourage shareholder participation in the Rights Offer. The Information Memorandum should have included:
  - (i) more detailed disclosure on iP3's business, financial performance, plans and prospects;
  - (ii) in relation to a valuation report referred to in the Information Memorandum (**Valuation Report**), the name of the valuer and the Valuation Report itself;
  - (iii) information in regard to the likelihood of USA Health gaining control;
  - (iv) information in regard to the intentions of USA Health if it gains control; and
  - (v) further explanation of why 22c was chosen as the issue price;
- (c) the Rights Offer was priced at the top of the valuation range provided in the Valuation Report. This made the offer unattractive to shareholders and



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indicated that iP3 was not genuinely seeking to raise funds from its shareholders;

- (d) the Information Memorandum did not make a clear case for any compelling, urgent need for funds;
- (e) the fact that part of the funds raised were to be used in the pursuit of the damages claim against VUT discouraged participation by VUT and suggested that iP3 anticipated a shortfall;
- (f) the Rights Offer was non-renounceable;
- (g) the underwriting was not in the ordinary course of USA Health's business;
- (h) because the manager of USA Health was a director of iP3, USA Health would have the benefit of more detailed information than had been made available to other shareholders. The suggestion was made that the underwriting was not on arm's length terms; and
- (i) no shortfall facility was made available to iP3 shareholders, which would have allowed them to participate in the allocation of any shortfall in priority to the underwriter.

## DISCUSSION

### Interim orders

- 49. On 16 February, iP3 undertook not to proceed with the Rights Offer without providing one business day's notice to the Panel of its intention to do so.
- 50. On the basis of this undertaking, the Panel saw no need to make the interim orders requested by VUT.

### Standard of disclosure in the Information Memorandum

#### *General principles*

- 51. Whether unacceptable circumstances result from a rights issue which may result in a shareholder or underwriter exceeding the 20% takeover threshold, and which therefore depends on the exception in item 10 of section 611 of the Act, depends on the factors mentioned in paragraph [38] of *InvestorInfo* [2004] ATP 6. A rights issue which may involve a shareholder or underwriter exceeding the 20% takeover threshold, and which therefore relies on the exception in item 10 of section 611 must be made genuinely accessible to all shareholders (*InvestorInfo* 2005 ATP 6 at paragraph [37]).

#### *Applicable standard of disclosure*

- 52. The principle of genuine accessibility derives from the Eggleston principles in section 602 of the Act, and not merely from the requirement in section 611, item 10(c) that all persons have a reasonable opportunity to accept the offers.<sup>3</sup>

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<sup>3</sup> The Panel considers that the "reasonable opportunity" requirement in item 10(c) is simply one of the many examples of the legislature setting out specific examples or requirements of the general principle in the black letter provisions of the Act.

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53. One of the requirements of genuine accessibility, and the principles in section 602, is that all shareholders are provided with sufficient information to allow them to make an informed assessment whether or not to take up their rights (*InvestorInfo* at paragraph [38(f)]). This requirement is derived from the following:
- (a) Section 602(b)(iii) which requires shareholders to be given enough information to enable them to assess the merits of a proposal.
  - (b) Section 602(c) which requires shareholders to have a reasonable and equal opportunity to participate in the benefits of the proposal.
  - (c) Section 611, item 10(c) which requires that all offerees under the rights issue have an equal opportunity to accept it.
54. The Panel was of the view that for shareholders to make such an assessment, they needed to have the same sort of information regarding:
- (a) the rights and liabilities attached to the new shares; and
  - (b) the company's assets, liabilities, financial position and performance, profits, losses and prospects,
- as would have been required in a prospectus. This disclosure would for the most part have been incremental, given that over the previous two years iP3 shareholders had already been provided with significant information about the company's previous performance.
55. The Panel, therefore, considered that iP3 should have provided prospectus-level disclosure to its shareholders in order to rely on the exception in item 10 of section 611.
56. The finding that prospectus-level disclosure was required for the Information Memorandum is consistent with USA Health having a common director with iP3. USA Health may be taken to have a more intimate knowledge of iP3's business than the other shareholders; detailed disclosure is, therefore, required in order to satisfy the *equality of opportunity* principle in section 602(c).
57. The finding that prospectus-level disclosure was required for the Information Memorandum is also consistent with the context of the inclusion of the rights issue exemption in item 10 of section 611 of the Act and its predecessor in the Corporations Law; at the time of inclusion these provisions, a prospectus was generally required for a rights issue made by a public company.

#### *Intentions*

58. Further, because of the potential for control to pass to USA Health, iP3 shareholders would also require information in the Information Memorandum in regard to the likelihood of USA Health acquiring control and its intentions in relation to the operations of iP3, its fixed assets and its employees if USA Health did acquire control. This latter information is consistent with the principles in section 602(b)(i) and (iii) that shareholders know the identity of the person proposing to acquire control and are given sufficient information to enable them to assess the merits of the proposal. These principles find embodiment in the requirement for a bidder's statement to include information regarding the bidder's intentions for the target: section 636(1)(c).

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59. USA Health submitted that over the previous two years the shareholders of iP3 had been advised on a number of occasions as to USA Health's intentions to support and develop iP3 and its software products. While the Panel accepted that USA Health may have provided IP3 shareholders with information on its support and intentions over that period, it considered that specific disclosure of USA Health's current intentions in relation to the specific areas was required in the Information Memorandum.
60. USA Health also made submissions in relation to the allegation that its underwriting of the Rights Offer was intended to enable it to acquire control of IP3. In its submissions, as evidence that the underwriting had not been intended by USA Health or iP3 to be a means of USA Health acquiring control of iP3, USA Health submitted that it was willing to assign the underwriting of the Rights Offer to VUT if VUT wished. VUT did not respond to USA Health's submissions in this regard.

#### *Valuation Report*

61. VUT submitted in its application that iP3 should have included an independent valuation of shares in iP3 in the Information Memorandum.
62. However, in the circumstances of the matter before it, the Panel, did not consider it necessary for iP3 to include a report as to the valuation of its shares in the Information Memorandum. Independent valuation reports are not a standard feature of prospectuses and the Panel did not consider that the inclusion of such a report was obligatory in this instance.

#### *VUT's specific information circumstances*

63. VUT submitted expressly that the Information Memorandum failed to provide it, as a shareholder, with sufficient information to enable it to make a rational decision on whether or not to participate in the Rights Offer.
64. iP3 responded that VUT had, through the course of discovery and cross examination in the Invention Proceedings, been provided with all available information on iP3's assets and current and future financial position and performance. iP3 offered to waive confidentiality obligations owed by VUT to allow VUT to make use of the information it had gained in the Invention Proceedings to allow it to decide whether or not to participate in the Rights Offer. VUT did not take up the offer.

#### *Whether the standard of disclosure is met*

65. The Panel was of the view that the Information Memorandum as submitted, failed to meet the standard of disclosure required by section 602(b)(iii) and that this therefore constituted unacceptable circumstances. The Panel noted that iP3 had offered during the Proceedings, to amend or add to the Information Memorandum to the extent necessary to satisfy the Panel's requests. However, IP3's submissions and offer had been on the basis of a prospectus not being required for the Rights Offer, and for the reasons set out below, the Panel considered that this would not be a feasible resolution of the Proceedings.

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#### 20 Acceptances Condition

66. VUT submitted that the existence of the 20 Acceptances Condition prevented all shareholders having a reasonable and equal opportunity to participate in the benefits of the Rights Offer. It also submitted that either:
  - (a) the disclaimer in the Information Memorandum that the Information Memorandum was only provided to “persons who are sophisticated investors” was misleading if the Rights Offer was open to all iP3 shareholders; or
  - (b) the Rights Offer was not open to all iP3 shareholders and the requirement in item 10 of section 611 was not met.
67. The Panel considered that unacceptable circumstances arose as a result of the Rights Offer involving a potential acquisition of control by a substantial shareholder in circumstances where the Information Memorandum did not in fact meet content requirements of Part 6D.2 of the Act or the requirements of section 602(b)(iii). The Panel was of the view that such an approach offended the principle in section 602(b)(iii) that shareholders be given sufficient information to enable them to assess the merits of the offer. In the absence of the 20 Acceptances Condition which had the effect of taking the Information Memorandum outside the content requirements of Part 6D.2 of the Act, iP3 would have been required to issue a prospectus and lodge that prospectus with ASIC. The Panel did not see it as appropriate for it to define and oversee the content of the Information Memorandum when lodging a prospectus with ASIC would fit into a well developed and established content and supervision process.
68. The Panel, therefore, found that the Rights Offer being subject to the 20 Acceptances Condition contributed to the unacceptable circumstances described above.

#### Price per share of Rights Offer

69. VUT submitted that pricing the Rights Offer at the top end of the valuation range provided in the Valuation Report indicated that iP3 was not genuinely seeking to attract shareholders to exercise their rights, making a substantial shortfall more likely and that the Rights Offer had been structured to achieve this result. VUT submitted that the level of acceptances under the Rights Offer was an indication that the pricing of the Rights Offer had deterred iP3 shareholders from taking up their rights.
70. VUT at the same time submitted that the ratio of the Rights Offer was too high, causing it to have a significantly dilutive effect on shareholders who elected not to participate in the Rights Offer. This sat oddly with VUT’s submissions that the Rights Offer had been priced too high, given that a higher issue price would reduce the issue ratio required to raise the sum of money iP3 considered necessary to continue its business.
71. The Panel was of the view that insufficient evidence had been provided that the issue price of 22c was inappropriate.
72. Further, from the perspective of VUT, VUT would benefit from a higher issue price on the basis that, if it elected not to take up its entitlement, the dilutive effect of USA Health’s subscription would have been minimised.

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#### Existence of litigation between VUT and iP3

73. VUT submitted that the Rights Offer unfairly discriminated against VUT because one of the purposes of the Rights Offer was to raise funds for iP3 to continue its attempts to recover damages from VUT under the undertakings that VUT gave to the court.
74. The Panel considered that the litigation between VUT and iP3 was not a relevant consideration to the matter at hand.
75. The Panel did not consider that the fact that some of the proceeds of the rights issue were to be used to fund this litigation implied that:
  - (a) VUT was not being treated equally to other shareholders under the rights issue, in accordance with the equality of opportunity principle; or
  - (b) It was economically impossible for VUT to subscribe under the rights issue, contrary to reasonable opportunity principle.
76. The principle of genuine accessibility merely requires that the rights issue be genuinely accessible to VUT *as a shareholder* of iP3.

#### Need for capital

77. The Panel did not accept VUT's submission that iP3 did not have a genuine need for capital and that the Rights Offer was merely a device to achieve a change in control. The Panel considered that iP3 adequately demonstrated in its submissions that it had an urgent and pressing need for capital.

#### Inability of iP3 to call for instalments

78. The Information Memorandum stated that iP3 had no right to call for the future instalments of the subscription moneys and if a shareholder defaulted on payment of an instalment, the only recourse of iP3 was to cancel all of the shares which were issued to the shareholder under the Rights Offer.
79. Although it was not raised as an issue in VUT's application, the Panel noted that this restriction on iP3's ability to pursue shareholders for instalments is not possible as a matter of corporate law. A limited liability company which issues shares partly paid has the right to make calls on shares on which instalments are due. Any forfeiture or cancellation of shares as a result of a shareholder's default would only occur *at the election of iP3*.
80. This deficiency reinforced the Panel's finding that the disclosure in the Information Memorandum was inadequate.

#### Other Issues

81. While the Panel was not required to consider the following additional submissions of VUT, for the following reasons the Panel did not consider that they gave rise to unacceptable circumstances:
  - (a) In relation to the offer being non-renounceable, the Panel took into account that iP3 was unlisted and the renounceability of any rights would have accordingly less value to shareholders.

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- (b) In relation to USA Health being a related party underwriter, rather than an independent or professional underwriter and potentially having more information on iP3 than would other shareholders, the Panel noted iP3's evident urgent need for capital and dire financial situation and the likelihood that no other shareholder or investor would be likely to agree to underwrite the offer. USA Health also submitted that it had been involved as an underwriter professionally in a number of capital raisings around the world and that such capital market transactions were part of its normal business.
  - (c) In relation to there being no shortfall facility, in its submissions iP3 indicated it was willing to provide a shortfall facility if required. However, given the withdrawal of the Rights Offer as described below, this was not necessary.
82. Having considered in detail the background set out above, the Panel was of the view that none of the elements above would cause the Rights Offer to constitute unacceptable circumstances, other than as found above.

### Withdrawal of Rights Offer

83. On 10 March 2005, following discussions with the Panel, iP3 wrote to the Panel advising that USA Health had withdrawn from the Underwriting Agreement and iP3 had therefore decided to withdraw and cancel the Rights Offer. On the same day, iP3 wrote to its shareholders advising of the withdrawal of the Rights Offer.
84. On the basis of the withdrawal of the Rights Offer, the Panel saw no need to make a declaration of unacceptable circumstances or orders.

### VUT Media Release

85. On 10 March 2005, following receipt of the advice from iP3 that the Rights Offer would be withdrawn, but prior to the Panel having made a decision regarding the application, VUT released a media release (**VUT Media Release**) which suggested that the Panel had already made a decision that the Rights Offer constituted unacceptable circumstances.
86. In the Panel's view, the VUT Media Release included inflammatory and self-serving statements and was drafted in a manner that was not calculated to give a balanced and impartial view of the Panel's proceedings or its decision. The VUT Media Release implied that the Panel had found that the Rights Offer and underwriting had been conducted for improper purposes, which VUT had no basis to believe or assert. The VUT Media Release had also been released at a time when the Panel proceedings were still on foot.
87. The Panel considered that the VUT Media Release constituted a breach of undertakings provided by VUT to the Panel and the other parties to the Panel's Proceedings, in the form required by the Panel's Rules for Proceedings, the relevant undertaking being as follows:

*Victoria University ... undertakes to the Panel and the other parties to this proceeding that, consistent with the intent of the introduction to Rule 12 of the Panel's Rules for Proceedings, Victoria University and its advisers will not participate in, induce or facilitate the canvassing in the media of issues that are, or are likely to be, before a sitting Panel in the proceeding specified above.*

## **Takeovers Panel**

### **Reasons for Decision – IP3 Systems**

88. The Panel wrote to VUT inviting VUT to make submissions as to why it should not apply to the Court for orders in accordance with section 201A(3) of the ASIC Act 2001 in relation to VUT's issue of the Media Release. The Panel subsequently made its own media release regarding this issue (see Takeovers Panel Media Release TP05/27).
89. On 15 March 2005, VUT issued a further media release which:
  - (a) referred to the VUT Media Release;
  - (b) explained that the Panel had not yet reached a decision regarding VUT's application and that the breach of VUT's undertakings was inadvertent; and
  - (c) apologising to the Panel for the mistake.
90. On consideration of VUT's submissions and iP3's submissions, the Panel determined that no application to the Court was warranted. The Panel accepted that the publication of the VUT Media Release was an inadvertent breach by VUT of its undertakings. The Panel also took into account that iP3, in one of its communications to its shareholders on 11 March 2005 in response to the VUT media release appeared to breach its own undertaking not to canvas the matter while the proceedings were still on foot, although the breach was of a significantly less serious nature. The Panel accepted, however, that iP3 in sending the letter to its shareholders on 10 March 2005 advising of withdrawal of the Rights Offer (refer paragraph 83 above) was merely keeping its shareholders properly informed.
91. The Panel considered that in the circumstances, the Panel's media release of 11 March 2005, and VUT's subsequent media release of 15 March 2005 constituted a sufficient sanction. The Panel published a Media Release on 15 March 2005 accepting VUT's apology and VUT's explanation that the original Media Release had been published through inadvertence.

## **DECISION**

92. Following withdrawal of the Rights Offer on 10 March 2005, the Panel determined that no declaration of unacceptable circumstances or orders were warranted.

**Peter Scott**  
**President of the Sitting Panel**  
**Decision dated 23 March 2005**  
**Reasons published 11 April 2005**