



**In the matter of SteriCorp Limited
[2005] ATP 9**

Catchwords:

rights issue – underwriting – related party – need for funds – renounceability – discount – accessibility – disclosure – underwriting commission payable in shares – supplementary prospectus – withdrawal facility – applicant delay – decision to commence proceedings – application dismissed

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

ASX Listing Rules 7.4, 10.11, cited

InvestorInfo Limited [2004] ATP 6, cited

These are the Panel's reasons for its decision declining to make a declaration of unacceptable circumstances in relation to the affairs of SteriCorp Limited. SteriCorp had undertaken a 1 for 1 non-renounceable rights issue, fully underwritten by Catilina Nominees Pty Ltd, SteriCorp's only major shareholder. The application had been made by Stericycle, Inc, a major bond-holder in, and equipment and systems provider to, SteriCorp.

SUMMARY

1. The Panel did not consider that the structure of the Rights Issue and underwriting arrangements made the Rights Issue inaccessible to SteriCorp's shareholders or that SteriCorp shareholders were likely to have been materially misled by the Rights Issue prospectus.
2. In coming to this decision, the Panel considered a number of issues including:
 - (a) SteriCorp's need for funds to repay a vendor finance loan (negotiated to be repaid early at a significant discount) and to fund previously announced capital projects;
 - (b) various fundraising alternatives had been investigated by SteriCorp with potential investors (including Stericycle);
 - (c) SteriCorp had taken legal and commercial advice with a view to structuring the Rights Issue and the underwriting arrangement with Catilina in accordance with Chapter 6; and
 - (d) the Panel considered that the Rights Issue prospectus and the supplementary prospectus had provided SteriCorp shareholders with the material information in relation to the potential increase in voting power of Catilina.
3. In considering whether any action was warranted in relation to any of the issues raised by Stericycle, the Panel also took into account the delay of the applicant in bringing the application to the Panel. Stericycle had not raised its concern with SteriCorp or ASIC until 14 April 2005, one day before the Rights Issue was due to close, despite the Rights Issue having been announced to ASX on 21 February 2005 and the prospectus having been issued on 11 March 2005.

THE PROCEEDINGS

4. These reasons relate to an application (**Application**) to the Takeovers Panel from Stericycle, Inc (**Stericycle**) on 19 April 2005 under section 657C of the Corporations Act 2001 (Cth) (**Corporations Act**)¹ in relation to the affairs of SteriCorp Limited (**SteriCorp**).
5. The Application sought a declaration of unacceptable circumstances in relation to a 1 for 1 non-renounceable rights issue undertaking by SteriCorp (**Rights Issue**). The Rights Issue was fully underwritten by SteriCorp's major shareholder, Catilina Nominees Pty Ltd (**Catilina**). Interim orders and final orders were sought in the Application and subsequent addenda to the Application dated 20, 21 and 26 April 2005 (**Addenda**).
6. In the Panel's media release [TP05/40](#) dated 29 April 2005, the Panel announced that it declined to make a declaration of unacceptable circumstances in relation to the affairs of SteriCorp.

THE PANEL & PROCESS

7. The President of the Panel appointed Jenny Seabrook, Carol Buys and John O'Sullivan as the sitting Panel (**Panel**) for the proceedings (**Proceedings**) arising from the Application.
8. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings. The Panel received additional submissions from parties on the questions of interim orders and whether the Panel should commence Proceedings.
9. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

BACKGROUND

SteriCorp and Catilina

10. SteriCorp is a company listed on Australian Stock Exchange Ltd (**ASX**) with a current market capitalisation of approximately \$5 million. Its primary activity is the management and treatment of regulated medical waste. SteriCorp's share price has steadily declined from around 40 cents during 2002 to a current price of less than 5 cents.
11. The only substantial shareholder of SteriCorp is Catilina, which, at the time of the Application, held 13.04% of the voting power in SteriCorp. Catilina acquired its interest in SteriCorp through a placement and option agreement dated 13 October 2004 (**Catilina Placement**). The issue of shares to Catilina was ratified by shareholders for the purpose of ASX Listing Rule 7.4 at SteriCorp's 2004 annual general meeting.
12. Under the Catilina Placement, Catilina subscribed for approximately 8 million shares at 4.5 cents per share. Catilina was also given an option to acquire a further 8 million shares at the same price, which it exercised on 27 October 2004.

¹ All section references in these reasons are to sections of the Corporations Act unless otherwise indicated.

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Reasons for Decision – SteriCorp Limited

13. Catilina and SteriCorp have one common director, Mr Dan Daniels. Mr Daniels is the sole shareholder of Catilina.

Stericycle

14. Stericycle is a US company which provides medical waste services and equipment throughout North America and elsewhere. Stericycle has supplied medical waste treatment equipment (referred to in these reasons as the **ETD Plant**) to SteriCorp. In connection with the financing of the ETD Plant and the provision of certain working capital, SteriCorp issued convertible notes to Stericycle pursuant to three agreements dated 1 August 2001 (as amended to 24 July 2003), 16 July 2002 (as amended to 24 July 2003) and 24 July 2002 (as amended to 24 July 2003), with a combined face value of \$6.5 million (**Convertible Notes**).
15. Stericycle and SteriCorp have been involved in disputes in relation to (among other things) the performance of the ETD Plant (**Warranty Dispute**) supplied in accordance with an agreement between SteriCorp and Stericycle dated 1 August 2001. The prospects of resolution of the Warranty Dispute appear to have fallen markedly in the recent past and SteriCorp instituted proceedings in the Supreme Court of Victoria against Stericycle in relation to the Warranty Dispute on 14 April 2005.
16. In a related dispute, Stericycle claims SteriCorp has defaulted in relation to a number of obligations under the Convertible Notes, including an alleged failure to pay interest due under the Convertible Notes. Stericycle issued a notice of default in relation to the alleged failure to pay interest in November 2004 and a further notice of default in relation to other matters in December 2004 (**Notices**).
17. Pursuant to the Notices, Stericycle has declared that the whole of the sums owing under the Convertible Notes are immediately due and payable by SteriCorp to Stericycle. SteriCorp takes issue with the validity of the Notices and claims that the Convertible Notes are not currently payable.

Overview of Rights Issue

Rights Issue structure

18. On 21 February 2005, SteriCorp announced that it would proceed with a fully underwritten, 1 for 1, non-renounceable rights issue (**Rights Issue**) of approximately 123 million shares at a price of 4.5 cents per share. The Rights Issue was intended to raise \$5.6 million, with net proceeds of \$5.1 million.
19. The prospectus for the Rights Issue was lodged on 11 March 2005 (**Rights Issue Prospectus**). Australian and New Zealand resident shareholders on SteriCorp's register as at 5.00pm (Melbourne time) on 22 March 2005 were eligible to participate in the Rights Issue (**Eligible Shareholders**). The Rights Issue Prospectus was dispatched to Eligible Shareholders on 24 March 2005.
20. The Rights Issue closed on 15 April 2005. Approximately 20 per cent (by shares) and 15 per cent (by number) of all shareholders (excluding Catilina) took up shares in the Rights Issue. Of the 32 SteriCorp Eligible Shareholders with holdings of 500,000 shares or more, approximately half subscribed under the Rights Issue in both number and number of shares held (including Catilina).

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Reasons for Decision – SteriCorp Limited

21. Under the Rights Issue, the shares were to be issued with an attached option exercisable at 5.5 cents on or prior to 31 October 2005. The options were proposed to be quoted on the ASX.

Underwriting arrangements

22. The Rights Issue was fully underwritten by Catilina in accordance with the terms and conditions of an underwriting agreement dated 18 February 2005 (**Underwriting Agreement**). The Underwriting Agreement contains a number of warranties and representations by SteriCorp in favour of Catilina in respect to various matters, including the accuracy and completeness of information contained in the Rights Issue Prospectus, the validity of the Underwriting Agreement, material litigation and cooperation with Catilina, as underwriter.
23. Termination events under the Underwriting Agreement include:
- (a) a new circumstance arises since the Rights Issue Prospectus was lodged unless a supplementary prospectus is lodged which addresses the deficiency;
 - (b) any material statement in the Rights Issue Prospectus found to be or becomes misleading or deceptive or there is found to be a material omission unless a supplementary prospectus is lodged which addresses the deficiency;
 - (c) any material adverse change (greater than \$250,000) occurs in the financial position of SteriCorp with certain exceptions;
 - (d) SteriCorp becomes involved in, or threatened with, any claim, litigation, prosecution or arbitration exceeding \$500,000 that is not connected to an existing claim known to Catilina;
 - (e) any event occurs that may result in the cancellation or suspension of a material licence or permit required for the operation of SteriCorp's business;
 - (f) any person who consented to the inclusion of its name in the Rights Issue Prospectus withdrawing its consent; and
 - (g) SteriCorp failing to give a certificate to Catilina within a certain period that none of the above events has occurred, that SteriCorp has complied with all its obligations under the Corporations Act and the ASX Listing Rules and it is not otherwise in breach in any material respect of the Underwriting Agreement.
24. Under the Underwriting Agreement, Catilina was entitled to receive an underwriting commission of approximately \$266,000 (excluding GST) (**Commission Amount**), which represented 4.783% of the total amount to be raised under the Rights Issue. SteriCorp's obligation to pay the Commission Amount was to be satisfied by SteriCorp issuing to Catilina 5.9 million shares (**Commission Shares**), calculated by dividing the Commission Amount by 4.5 cents (being the issue price). The Underwriting Agreement provided that if payment of the Commission Amount was contrary to law or the ASX Listing Rules, the Commission Amount was to be payable in cash.

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Supplementary prospectus and withdrawal facility

25. SteriCorp lodged a supplementary prospectus updating information in relation to the Warranty Dispute litigation on 15 April 2005. In accordance with section 724, SteriCorp offered shareholders who participated in the Rights Issue a right to withdraw their subscription and receive a refund of their application monies (**Withdrawal Facility**).
26. The terms of the Underwriting Agreement were amended at that time such that:
 - (a) Catilina agreed to subscribe and pay the requisite subscription monies for shares that are the subject of a valid notice of withdrawal under the Withdrawal Facility that is received by SteriCorp before the shares (and accompanying options) have been issued under the Rights Issue; and
 - (b) Catilina agreed to accept a transfer of shares and options from a shareholder who gives a valid notice of withdrawal after the shares and options have been issued to that shareholder under the Rights Issue in exchange for the payment of the issue price directly to the shareholder.
27. The shares acquired by Catilina under the Withdrawal Facility are referred to in these reasons as the **Withdrawal Shares**. The supplementary prospectus notes that Catilina's interest in shares in SteriCorp will further increase by the total number of Withdrawal Shares. However, any Withdrawal Shares which Catilina acquired would not increase the maximum extent of control which the Rights Issue Prospectus disclosed Catilina might acquire as underwriter if no other SteriCorp shareholder took up shares under the Rights Issue.

APPLICATION

Unacceptable circumstances

28. Stericycle applied to the Takeovers Panel for a declaration under section 657A to the effect that the circumstances relating to the Underwriting Agreement constituted unacceptable circumstances in relation to the affairs of SteriCorp. In particular, Stericycle submitted that:
 - (a) the Rights Issue was structured so that control of SteriCorp may pass to Catilina without a takeover bid and in contravention of section 606(1); and
 - (b) the Underwriting Agreement did not constitute a bona fide agreement to assume the risk of the shortfall and therefore acquisitions under it would not fall within the exemptions in items 10 and 13 of section 611; and
 - (c) the entry by SteriCorp into the Underwriting Agreement constituted a breach of Chapter 2E of the Corporations Act in that shareholder approval had not been obtained prior to the giving of a financial benefit to a related party.

Takeovers Panel

Reasons for Decision – SteriCorp Limited

Interim orders

29. Addenda to the Application were received on 20 and 21 April 2005, seeking certain interim orders under section 657E to the effect that SteriCorp be prevented from issuing or allotting any shares or options under the Rights Issue or Underwriting Agreement, until the conclusion of the proceedings before the Panel. Stericycle noted that it would not seek the interim relief if SteriCorp provided the Panel with an undertaking not to issue or allot any shares until the conclusion of the proceedings before the Panel.
30. On 21 April 2005, SteriCorp undertook not to issue shares or options until the earlier of:
 - (a) 5.00pm on Friday, 29 April 2005; and
 - (b) the date on which the Panel declined to commence proceedings or concluded the proceedings without making a declaration of unacceptable circumstances.
31. On 18 April 2005, the shares and options issued under the Rights Issue had commenced trading on a deferred delivery basis. On 21 April 2005, trading in the shares and options was suspended at SteriCorp's request in response to the interim orders requested by Stericycle.
32. On the basis of the SteriCorp's undertaking and voluntary suspension of deferred settlement trading, the Panel saw no need to make the interim orders requested by Stericycle.

Final orders

33. In its Application, Stericycle sought final orders under section 657D that:
 - (a) the issue of any shares to the Underwriter under the Rights Issue Prospectus be prohibited;
 - (b) in the alternative, that SteriCorp be prevented from issuing any shares to the Underwriter under the Rights Issue Prospectus which would have the effect of causing the voting power of the Underwriter (or its associates) to exceed 19.9% of the total voting power in SteriCorp unless it obtained the approval of SteriCorp's shareholders in accordance with section 611 item 7; and
 - (c) that any shares already issued under the Rights Issue Prospectus must be bought back and cancelled by SteriCorp.
34. In submissions dated 26 April 2005, Stericycle sought further final orders to the effect that Catilina be prevented from exercising any rights as a shareholder of its existing 13.04% shareholding (whether by way of transfer, voting, rights issue or otherwise) until such time as those shares have been bought back and cancelled, or an ASX waiver, court order or shareholder approval is obtained.

DISCUSSION

SteriCorp's need for funds

35. The Panel accepted that SteriCorp had a clear and compelling need for funds.

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36. SteriCorp is in debt to Medihold International 3 Pty Ltd (**Medihold**) for the repayment of vendor finance of approximately \$3.8 million (**Vendor Finance Loan**). Medihold is a subsidiary of Nuplex Industries Limited (**Nuplex**), a public company listed on the ASX and NZX with a market capitalisation of approximately \$220 million. Medihold was placed into voluntary liquidation by Nuplex around April 2004.
37. The Vendor Finance Loan is the balance of the purchase price owing in respect of SteriCorp's acquisition of a clinical waste business in the second quarter of 2003. The Vendor Finance Loan was scheduled to be repaid on 1 February 2005. An extension to the due date was negotiated to 1 February 2006.
38. SteriCorp entered into a deed of payment and mutual release dated 10 March 2005 with Nuplex and a Medihold company in relation to the repayment of the Vendor Finance Loan (**Repayment Deed**). The Repayment Deed provided that Medihold would accept \$2.5 million as full and final settlement of the monies owed under the Vendor Finance Loan if such funds were received by 6 May 2005. Accordingly, SteriCorp agreed to pay the Vendor Finance Loan early in consideration for a significant (approximately 35%) discount. Medihold's agreement to accept a discount was conditional on the Rights Issue proceeding.
39. The Rights Issue Prospectus disclosed that the remaining funds from the Rights Issue would be used primarily to assist in the funding of capital projects, some of which had already been announced by SteriCorp. Specifically, the remaining funds are proposed to be applied to the consolidation of the sites from which it operates in Victoria (known as the 'single site strategy'), redevelopment of the New South Wales sites and other capital projects.
40. SteriCorp submitted that the National Australia Bank, with which it has a \$4.3 million facility (**NAB Facility**), requires SteriCorp to reduce its gearing levels. The NAB Facility expires on 31 October 2005 (following a one year extension). SteriCorp further submitted that the Rights Issue would enhance its ability to meet its obligations under the Convertible Notes.
41. The onus for demonstrating that there was no need for funds or that SteriCorp was raising unnecessary funds initially fell on Stericycle in this case. The Panel was not satisfied that Stericycle had made out arguments to this effect. On the contrary, having received submissions from both parties as to SteriCorp's financial situation, the Panel accepted SteriCorp's submission that there was a clear need for funds to repay the Vendor Finance Loan, to fund pre-announced future capital projects and to improve SteriCorp's position in relation to the NAB Facility.

Search for funding alternatives

42. Prior to undertaking the Rights Issue, SteriCorp investigated various fundraising alternatives with potential investors (including Stericycle).
43. In mid-late 2003, SteriCorp commenced investigations of methods to raise capital to repay the Vendor Finance Loan and undertake capital projects. SteriCorp's adviser KPMG Corporate Finance (Aust) Pty Ltd (**KPMG**) assisted SteriCorp to approach a number of potential investors with fundraising proposals. Discussions with the potential investors were unsuccessful.

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Reasons for Decision – SteriCorp Limited

44. Stericycle noted in submissions that it was approached by SteriCorp and that Stericycle had made a funding offer that SteriCorp rejected. Stericycle's offer appears to have operated as settlement of the ongoing Warranty Dispute, together with a discounted repayment of the Convertible Notes. In a letter from Stericycle to SteriCorp dated 20 October 2004, Stericycle requested SteriCorp to explain its rationale for proceeding with the Catilina Placement rather than Stericycle's offer. The Panel was not provided with any further correspondence in relation to Stericycle's request.
45. Stericycle's offer proposed the reduction in SteriCorp's debt and the settlement of contested disputes. The Panel considers that the SteriCorp directors were entitled to decide how the interests of SteriCorp and its shareholders would best be served in the proposed fundraising. The Panel considered that it should not override the commercial decisions of the SteriCorp directors where they had formed a view on grounds that appeared on their face to be reasonable and where Stericycle had not produced cogent evidence challenging the SteriCorp directors' decisions or reasons.

Legal and commercial advice taken

46. SteriCorp submitted that it had taken legal and commercial advice in relation to the Rights Issue. The Panel was satisfied that, following such advice, the independent directors of SteriCorp were in a position to give proper consideration to the various means by which capital could be raised and their respective advantages and disadvantages. The commercial terms of the Rights Issue were also the subject of advice, following a review of the history of SteriCorp's share price and trading activity and its financial position.
47. KPMG was retained by SteriCorp in October 2003 to provide commercial advice to the board. As noted above, KPMG assisted SteriCorp in its various fundraising efforts, including preparing information memoranda for circulation to potential investors. Following unsuccessful fundraising attempts, in February 2005, KPMG provided a letter of advice to SteriCorp concluding that by undertaking the proposed Rights Issue and underwriting arrangements with Catilina, the directors of SteriCorp were acting in the best interests of SteriCorp shareholders (**KPMG Advice**). KPMG took into account SteriCorp's difficulty in raising capital in the past, a progressive reduction in SteriCorp's share price over the last 3 years and unresolved matters that may affect, both positively and negatively, the company's future value.
48. SteriCorp also obtained legal advice in relation to the potential Chapter 6 limitations of using a related party underwriter, analysing the Rights Issue structure against (among other things) the InvestorInfo criteria. Such advice was referred to in the KPMG Advice and, following a request from the Panel, circulated to the Panel and all parties.
49. The Panel considered that, following commercial and legal advice, the directors reasonably formed the view that the Rights Issue was the best option for SteriCorp to raise capital, that Catilina was the only party willing to underwrite the Rights Issue and that the proposed terms of the underwriting were commercially justifiable.

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Reasons for Decision – SteriCorp Limited

Pricing

50. Stericycle submitted that the Rights Issue was priced so as to be inaccessible to shareholders. Stericycle also submitted that the Rights Issue was offered at the same price as the Catilina Placement to ensure that the value of Catilina's investment was protected. SteriCorp submitted in response that during its 2004 annual general meeting SteriCorp shareholders had noted their interest in participating in a capital raising on the same terms offered to Catilina. The Panel did not consider that there was sufficient evidence to make an adverse finding on the pricing of the Rights Issue.
51. The Rights Issue was offered at a price which was very close to the market price of SteriCorp shares at the date of the announcement of the Rights Issue. Using the volume weighted average price of SteriCorp shares over 1 month before the announcement of the Rights Issue, it appeared to the Panel that the Rights Issue was not priced at a discount unless a significant value was attributed to the attached option.
52. The Panel considered that the lack of a discount was a factor weighing in favour of unacceptability. Pricing the Rights Issue more closely to (or above) the market value of SteriCorp shares could have reduced the incentive for shareholders to take up the Rights Issue and, therefore, may have increased the likelihood of control becoming concentrated with Catilina.
53. However, the Panel noted that Catilina had offered to underwrite the Rights Issue at the lower price of 4 cents. SteriCorp submitted that its directors preferred the higher price for various reasons, including the intention to raise as much capital as possible within the ASX 1:1 limit for rights issues without the requirement for shareholder approval. The Panel also noted that although the higher price may have been a disincentive to some shareholders to subscribe to the Rights Issue, it meant less dilution for the shareholders who did not subscribe.
54. The Panel also took into account that an attractive discount was not readily feasible given the factors noted in paragraph 53 above and the low price of SteriCorp shares. The Panel found that, in the particular circumstances before it, the price was not so high as to deter shareholders from taking up their rights. In this context, the Panel noted the participation by SteriCorp's shareholders in the Rights Issue and that some of those shareholders were sophisticated investors. The Panel also noted SteriCorp's submission that no shareholder had complained about the price offered or the lack of access to the Rights Issue.

Non-renounceability

55. Subject to the rights having a value and demand existing for them, more of the rights may have been exercised if they had been renounceable. This may have reduced the number of shares not taken up by the original shareholders flowing through to Catilina as the underwriter. The Panel noted that Catilina, as underwriter, had specifically requested that the Rights Issue be non-renounceable, for the same reasons as were provided to the Panel by SteriCorp, as noted below in paragraph 57.
56. Accordingly, the Panel considered that the fact that the Rights Issue was non-renounceable would be, absent persuasive reasons for non-renounceability, a factor in favour of the Rights Issue constituting unacceptable circumstances.

Takeovers Panel

Reasons for Decision – SteriCorp Limited

57. SteriCorp submitted that, following commercial advice, it had decided that there was unlikely to be a significant market for the rights, had they been made renounceable, and that, given the limited discount offered, the rights would have been of little value. SteriCorp also said that it had taken into account the additional administration costs of making the Rights Issue renounceable, although it acknowledged that a non-renounceable rights issue no longer has the benefit of a shorter timetable under ASX Listing Rules.
58. The Panel noted the commercial factors SteriCorp considered in deciding to make the Rights Issue non-renounceable. These commercial factors reduced the weight of non-renounceability as a factor towards unacceptability. However, the Panel notes that, if SteriCorp had had reason to expect there to be a market for the rights, it would have been better practice for SteriCorp to have made them renounceable.

Related party underwriter

59. One of the complaints put by Stericycle related to the fact that Catilina, as underwriter of the Rights Issue, was also the major shareholder in SteriCorp. Stericycle submitted that the entry by SteriCorp into the Underwriting Agreement constituted a breach of Chapter 2E and that shareholder approval should have been obtained. Stericycle pointed to the lack of certain typical termination events (e.g. termination in the event of a fall in market index) as evidence that the Underwriting Agreement was not on arm's length terms and evidence of Catilina's intention and purpose to acquire control of SteriCorp.
60. SteriCorp submitted in response that its directors had formed the view that the terms of the Underwriting Agreement were agreed at arm's length. SteriCorp noted that it reached this conclusion having regard to advice it received from KPMG. KPMG expressed the view that the lack of certain typical termination clauses in fact provided SteriCorp with additional protection (rather than benefiting Catilina) but did not address the specific concerns raised by Stericycle. KPMG noted other factors relevant to its view that the Underwriting Agreement was on arm's length terms, including:
- (a) the Underwriting Agreement did not provide for additional management fees which are typical in underwriting arrangements;
 - (b) reimbursement of expenses was capped at \$10,000 in respect of legal costs; and
 - (c) the Commission Amount payable under the Underwriting Agreement was appropriate having regard to market practice over the previous 12 months, the size of the Rights Issue and the uncertainties surrounding the current and future operations of SteriCorp.
61. SteriCorp also noted that Catilina was represented by its advisers, DMR Corporate Pty Ltd, in all negotiations with SteriCorp and that Mr Daniels absented himself from all meetings of SteriCorp that involved consideration of the Underwriting Agreement.
62. The Panel accepted SteriCorp's submissions on the factual question of the Underwriting Agreement being on arm's length terms.

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Reasons for Decision – SteriCorp Limited

63. The Panel did not consider that it was required to make a finding in relation to compliance with Chapter 2E. The Panel was not persuaded that compliance with Chapter 2E was relevant to these Proceedings. Rather, the Panel considered whether the Underwriting Agreement constituted unacceptable circumstances in the context of section 602 and items 10 and 13 of section 611 and having regard to section 657A(2).
64. The Panel noted that the fact that a major shareholder is the underwriter for a rights issue and that the normal business of the underwriter does not include underwriting are two of the criteria which the Panel normally considers when assessing whether or not a rights issue constitutes unacceptable circumstances. However, the Panel also noted that frequently, in relation to small companies, the major shareholder will be the only feasible source of financial support (that is, underwriting of a rights issue) for such companies.
65. The Panel considered the circumstances surrounding the SteriCorp Rights Issue and Catilina's involvement as underwriter. The Panel did not receive material evidence to suggest that the Rights Issue had been structured to cause a flow through of shares to Catilina or that the involvement of Catilina caused the Rights Issue to constitute unacceptable circumstances.

Disclosure

Potential voting power of Catilina

66. Stericycle submitted that the Rights Issue Prospectus provided insufficient disclosure in relation to the potential voting power of Catilina.
67. The Rights Issue Prospectus contained a table setting out the shareholding of Catilina according to two scenarios, assuming that no optionholders exercise their options and no convertible notes are converted:
 - (a) that all shareholders (including Catilina in its capacity as shareholder) exercise their rights to acquire shares under the Rights Issue; and
 - (b) no shareholders other than Catilina, as shareholder, exercise their rights to acquire shares under the Rights Issue and that Catilina, as underwriter, subscribes for the entire shortfall.
68. The Rights Issue Prospectus discloses that the maximum voting power of Catilina would be 57.5% under the second scenario and assuming that the Commission Amount is paid in Commission Shares. The Rights Issue Prospectus also discloses that if Catilina was to exercise the options issued to it under the Rights Issue, "its relevant interest ... would be further increased".

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Reasons for Decision – SteriCorp Limited

69. The Panel considered that the Rights Issue Prospectus and the supplementary prospectus provided SteriCorp shareholders with the material information in relation to the potential increase in voting power of Catilina. The Panel accepted SteriCorp's submission that there would be little scope for Catilina to increase its voting power by exercising options issued to it under the Rights Issue if there was a significant shortfall, without seeking shareholder approval.² Accordingly, the Panel found that the disclosure in relation to an increase in Catilina's voting power following the exercise of options was also adequate.

Intentions of Catilina in relation to SteriCorp

70. Stericycle also submitted that the Rights Issue Prospectus should have set out (among other matters) further information regarding Catilina Nominees and its intentions should it obtain control of SteriCorp, including any changes to be made to SteriCorp's business and board of directors.
71. The Panel considered that if Catilina had particular intentions for SteriCorp, those intentions should have been disclosed. However, the Panel noted that Catilina is solely controlled by Mr Daniels, and that Mr Daniels was already a director of SteriCorp and had consented to the lodgement of the Rights Issue Prospectus, including disclosures about the future path of SteriCorp's business. The Panel was not provided with evidence that Catilina's intentions for SteriCorp were any different to SteriCorp's own intentions, as previously announced and as set out in the Rights Issue Prospectus and supplementary prospectus.

Withdrawal facility

72. As noted above, when SteriCorp issued a supplementary prospectus and notified applicants that under section 724 that they could withdraw their applications, it agreed with Catilina to amend the Underwriting Agreement so that Catilina would:
- (a) subscribe for shares, the applications for which were withdrawn before the shares were issued (**Subscription Underwriting Acquisitions**); and
 - (b) take transfers of shares, the applications for which were withdrawn after they were issued (**Transfer Underwriting Acquisitions**).
73. Stericycle submitted that Transfer Underwriting Acquisitions by Catilina would fall outside the underwriting exception in item 10 of section 611.
74. The Panel considered the issue on the basis of whether or not the acquisitions of Withdrawal Shares would constitute unacceptable circumstances having regard to the effect the acquisitions may have on control of SteriCorp in the circumstances. It decided that the acquisition of Withdrawal Shares in this case would not be contrary to the policy of Chapter 6. On that basis, the Panel did not find it necessary to determine whether the Transfer Underwriting Acquisitions would fall outside item 10, and did not do so.

² Neither the rights issue nor underwriting exceptions in items 10 and 13 of section 611 would extend to the exercise of options.

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75. The Panel considered that, from an unacceptable circumstances perspective, the Withdrawal Facility should properly be treated as an appropriate extension of the underwriting arrangements in response to a statutory requirement to give shareholders a right to withdraw. If the underwriter's function is to make up the shortfall, and part of the shortfall is ascertained late in the process, it seems to be a genuine underwriting function to make up that part of the shortfall when it is ascertained.
76. The acquisition by transfer is part of the discharge by the underwriter of its function of ensuring that the whole of the issue is taken up, albeit a new aspect of that function which has been adopted in response to section 724. Whether shares are returned before or after they are issued is merely an effect of the time taken by different subscribers to withdraw their applications. It has no policy significance, as shown by section 258E, which allows, but does not require, the company to cancel shares which are returned after they are issued.
77. Accordingly, whether the shares are cancelled and re-issued to the underwriter, or transferred to the underwriter without cancellation, seems, from the point of view of Chapter 6, to be purely a machinery matter. Even if there was a technical argument that item 10 did not extend to transferring the shares instead of cancelling and re-issuing them, the Panel did not consider that to do so would frustrate the intention of Parliament when it enacted item 10, or the expectations of shareholders reading about the underwriting arrangements in a rights issue prospectus.
78. The Panel noted that it may be appropriate for future issuers and underwriters to set out in the underwriting agreement:
- (a) how the issuer would treat shares returned under section 724 or section 737 after they are issued; and
 - (b) the underwriter's obligations in relation to such shares.
79. Issuers may consider that the prospectus should disclose that, where an application is withdrawn, the relevant shares will form part of the shortfall.
80. The Panel also noted that it may be appropriate for future issuers and underwriters to take legal advice on any arrangements for dealing with shares returned under a withdrawal facility, both in terms of the fundraising and takeovers provisions.

Commission payable in shares

81. SteriCorp advised that the terms of the Underwriting Agreement under which the underwriting fee to Catilina was payable in Commission Shares was intended to retain cash for the purposes set out in the Rights Issue Prospectus.
82. The Panel was not satisfied that the issue of Commission Shares would fall within an exception to section 606. Although the Panel was not minded to find that the mere payment of the Commission Amount in shares would have rendered the Rights Issue unacceptable in this case, the Panel welcomed SteriCorp's offer to pay the underwriting fee in cash or, alternatively, structure the issue of the Commission Shares so that their issue does not cause Catilina to breach section 606 (if possible under the Underwriting Agreement).

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Reasons for Decision – SteriCorp Limited

83. On 29 April 2005, SteriCorp announced that Catilina had agreed to SteriCorp paying the Commission Amount in cash and allow SteriCorp shareholders the opportunity at the next general meeting of the company to approve a placement to Catilina of approximately 6 million shares at 4.5 cents per share, being the same subscription amount as the Commission Amount.

Relationship between Catilina and Nuplex

84. Stericycle submitted that there appeared to be a relationship between Nuplex and Mr Daniels. If such a relationship existed, Stericycle alleged that the only reason why the Vendor Finance Loan was conditional on the successful completion of the Rights Issue was to ensure that Mr Daniels obtained control of SteriCorp. The Panel noted that Medihold was acquired by Nuplex from Mr Daniels around early 2001, more than 3 years before Mr Daniels was appointed as a director of SteriCorp. Nuplex and Mr Daniels are currently joint venture partners for sharps disposal services in New Zealand. The Panel was not presented with sufficient evidence that such a commercial relationship would have influenced the terms of the Repayment Deed for the discounted Vendor Finance Loan. The Panel also noted that Nuplex is a significant listed company and Stericycle's allegations would also extend to the third party liquidator of Medihold.

Delay by Stericycle

85. In considering whether any action was warranted in relation to any of the issues raised by Stericycle, the Panel also took into account the delay of the applicant in bringing the Application to the Panel. Stericycle had not raised its concern with SteriCorp or ASIC until 14 April 2005, one day before the Rights Issue was due to close, despite the Rights Issue and the proposed underwriting arrangement with Catilina being announced on 21 February 2005 and the Rights Issue Prospectus having been issued on 11 March 2005.
86. The Panel noted that Stericycle and SteriCorp are currently involved in the Warranty Dispute. As noted above, SteriCorp instituted proceedings in the Supreme Court of Victoria against Stericycle in relation to the Warranty Dispute on 14 April 2005. Stericycle lodged its Application in relation to these Proceedings on 19 April 2005. The Panel also noted that Stericycle and SteriCorp are in dispute about whether default had occurred on the Convertible Notes. The Panel was not required to make findings about this but did note that completion of the Rights Issue may assist SteriCorp to meet its obligations under the Convertible Notes.
87. SteriCorp submitted that the escalation of the Warranty Dispute precipitated Stericycle's complaint in these Proceedings. In considering whether to commence proceedings (that is, whether the Application was vexatious), the Panel carefully considered SteriCorp's submissions in this regard, but did not infer from the evidence that the Application was vexatious. The Panel therefore commenced proceedings.

Takeovers Panel

Reasons for Decision - SteriCorp Limited

88. However, the Panel considered that the potential prejudice to SteriCorp resulting from Stericycle's delay was one of the factors relevant to the decision whether to make a declaration of unacceptable circumstances. SteriCorp would have been restricted in its ability to restructure the Rights Issue so late in the timetable, such that the discounted repayment of the Vendor Finance Loan on terms agreed with Medihold would have been impossible.

Initial placement to Catilina

89. Stericycle claimed in submissions in response to the Brief that Catilina's acquisition of 13.04% following the Catilina Placement was in breach of ASX Listing Rule 10.11 and improper. This argument was not raised in the Application and parties were not asked to consider the issue in response to the Panel's Brief. Further, Stericycle's submissions did not set out the reasons why the Catilina Placement was allegedly in breach of ASX Listing Rule 10.11 nor provide the Panel with submissions as to why an alleged breach of the ASX Listing Rules is relevant to the Proceedings.
90. Given that Stericycle's submissions were not raised in the Application or Addenda nor clearly made out, the Panel did not consider it necessary to provide parties with additional time to make submissions on the matter. The Panel notes that the issue of shares to Catilina under the Catilina Placement had been ratified by shareholders at SteriCorp's AGM for the purposes of ASX Listing Rule 7.4. The Panel considers that, for its purposes, shareholder approval would have cured a deficiency (if any in fact existed).

DECISION

91. For the reasons set out above, the Panel declined to make a declaration of unacceptable circumstances in relation to the affairs of SteriCorp.
92. The Panel did not consider that the structure of the Rights Issue and underwriting arrangements made the Rights Issue inaccessible to SteriCorp's shareholders or that SteriCorp shareholders were likely to have been materially misled by the Rights Issue Prospectus. The Panel also declined to make orders in relation to Catilina's existing 13.04% shareholding.

Jenny Seabrook

President of the Sitting Panel

Decision dated 29 April 2005

Reasons published 13 May 2005