



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Redflex Holdings Limited  
2009 ATP 17**

**Catchwords:**

*capital raising – effect on control – board spill – placement – rights issue – discretion to place shortfall shares – undertaking – decline to conduct proceedings*

*Corporations Act 2001 (Cth), sections 602, 657A*

*ASIC Regulation 21(1)*

*Guidance Note 17 – Rights Issues*

*Boulder Steel Limited [2008] ATP 24, Bowen Energy Limited 01 [2007] ATP 22, Dromana Estate Limited 01 [2006] ATP 4, Riokin Financial Services Limited 01 [2004] ATP 14, St Barbara Mines Limited 02 [2004] ATP 13, Grand Hotel Group [2003] ATP 34, Online Advantage Limited [2002] ATP 14*

**INTRODUCTION**

1. The Panel, Andrew Lumsden (sitting President), Anthony Sweetman and Simon Withers, declined to conduct proceedings on an application by Silverlene concerning a capital raising announced by Redflex on 10 September 2009 in the context of a proposed reconstitution of the Redflex board. Having considered the attributes of the placement and rights issue and having received an undertaking as to allocation of the shortfall, the Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

applicant group	Mr Robin Debernardi, Hunter Hall, Renaissance and Thorney
Hunter Hall	Hunter Hall Investment Management Limited
Investaco	Investaco Pty Ltd
Placees	Cheng Man Oy and Investaco
Redflex	Redflex Holdings Limited
Renaissance	Renaissance Smaller Companies Pty Ltd
Silverlene	Silverlene Pty Ltd
Thorney	Thorney Holdings Proprietary Ltd and Thorney Pty Ltd

**FACTS**

3. Redflex is an ASX listed company (ASX code RDF).
4. On 4 September 2009, a representative of the applicant group had a discussion with a Redflex director about the current composition of the Redflex board and possible changes. A conference call was arranged for the afternoon of 10 September 2009 between representatives of the applicant group and the Redflex chairman.

## Takeovers Panel

### Reasons – Redflex Holdings Limited 2009 ATP 17

5. Between 4 and 9 September 2009 several discussions concerning the proposed reconstitution of the board were held between representatives of the applicant group and the Redflex board.
6. Shortly after trading opened on 10 September 2009 Redflex announced a capital raising comprising:
  - (a) a placement at \$2.04 per share to the placees, who were existing Redflex shareholders. Under the placement, Cheng Man Oy's holding in Redflex would be increased from 3.9% to 5.7% and Investaco's holding would increase from 1.5% to 6.7% and
  - (b) a 1:12 non-renounceable, non-underwritten pro rata rights issue. The issue price would be \$2.04 (Redflex shares closed on 9 September at \$2.40) and any shortfall would be distributed at the Redflex directors' discretion.
7. On the same day the conference call scheduled for that afternoon was cancelled by the applicant group.
8. Settlement of the placement was originally scheduled to take place on 18 September 2009 and the record date for the rights issue was scheduled for 23 September 2009 with offers to be dispatched on 28 September 2009.
9. On 11 September 2009 Redflex announced that it had received from the applicant group a shareholder requisition to call a general meeting and propose resolutions for the replacement of 3 Redflex directors.
10. On 14 September 2009 Silverlene and the applicant group lodged a substantial holder notice in respect of a collective voting power of 31.05% by reason of an association between each of them *"on the basis that the ... Panel application creates a possible association ... for the duration of the Panel proceedings."*

## APPLICATION

11. By application dated 11 September 2009, Silverlene *"of its own volition and separately at the request of Thorney, Renaissance and Hunter Hall"*, made an application for a declaration of unacceptable circumstances in relation to the capital raising.
12. Silverlene submitted that:
  - (a) the capital raising was unacceptable having regard to the effect it would have on control or potential control of Redflex, and that it could have been *"structured differently to avert or minimise any potential control impact"*
  - (b) the placement should have been offered to the applicant group, who have approximately equal or larger holdings, ahead of the placees and
  - (c) the capital raising has been structured to frustrate an orderly reconstitution of the Redflex board.

## Interim orders

13. Silverlene sought interim orders to the effect that Redflex be restrained from completing the placement or proceeding with the rights issue. In the event that any shares had been issued under the placement, Silverlene sought an interim order

restraining the placees from voting or disposing of those shares pending determination of the matter by the Panel.

14. Redflex offered the Panel an undertaking not to complete the placement until 23 September 2009. On this basis, we declined to make the interim order in relation to the placement. The interim order could be reconsidered at the time we considered whether to conduct proceedings.
15. We also declined to make any interim order in relation to the rights issue. As we had yet to decide whether to conduct proceedings, and the market was on notice that the Panel was considering the issue given our media release dated 14 September 2009 and the per share value of the rights was negligible given the then prevailing share price and the terms of the rights issue, it was unlikely that there would be any material share price impact of the shares trading ex the entitlement to the rights issue. Thus, we considered there was no reason for us to interrupt the company's capital raising schedule at that stage.

### Final orders

16. Silverlene sought final orders to the effect that:
  - (a) the placement and rights issue be subject to shareholder approval, with the placees and their associates prohibited from voting in favour of the resolution
  - (b) if Redflex shareholders did not approve the placement and rights issue, the placement and rights issue not proceed or if any shares had been issued under the placement, the transaction be reversed, or alternatively the shares be vested in ASIC for sale and
  - (c) Redflex bear Silverlene's costs in respect of the Panel proceedings.

## DISCUSSION

### Placement

17. Silverlene submitted that the capital raising was contrary to section 602<sup>1</sup> and Guidance Note 17 and was "*proposed and structured in a way to frustrate a legitimate request by [Silverlene and the applicant group] of the Company to seek an orderly reconstitution of [the Redflex] Board*". In a preliminary submission it said "*It is a complaint that arises squarely out of the structure, timing and other elements of the Capital Raising which the Applicant believes do have a control effect and otherwise create unacceptable circumstances.*"
18. Redflex, in a preliminary submission, denied that the capital raising was structured to attempt to frustrate the proposed changes to the board. It also submitted that there was no takeover involved, the matters complained of were not unacceptable, control was not impacted and the Panel generally does not focus on directors' duties.
19. The Panel's power in s657A to declare circumstances to be unacceptable having regard to their effect on control or potential control of a company was intended to be

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<sup>1</sup> References are to sections of the *Corporations Act 2001* (Cth) unless otherwise indicated

## Takeovers Panel

### Reasons – Redflex Holdings Limited 2009 ATP 17

exercised by reference to the policy aims of chapter 6.<sup>2</sup> As the Panel stated in *Rivkin Financial Services Limited 01*:

*“the Panel will not generally treat issues about the composition of a company’s board as control issues for the purposes of section 657A, unless an accumulation of voting power was involved in contravention of section 606 or without proper disclosure under Chapter 6C.”<sup>3</sup>*

20. We considered the application on the basis of its potential control effect. Whether the capital raising – particularly the placement aspect – should have gone ahead in the face of discussions about board composition is something we do not address.
21. There was no contravention of chapters 6 or 6C alleged. Silverlene submitted that the capital raising would have a material effect on control of Redflex because one of the placees would increase its holding to 6.7%. We do not consider that there was any evidence that the placement is likely to have a material effect on the control of Redflex.
22. Firstly, the placement comprises approximately 7.5% of the fully diluted issued capital in Redflex after the placement but before the rights issue. In our view, absent improper purpose, it is within the directors’ discretion to make such a placement without consultation with their shareholders or necessarily canvassing all substantial shareholders.
23. Secondly, neither of the placees would increase their shareholding to over 20% (the greatest voting power being accumulated is 6.7%) and Silverlene's and the applicant group’s collective voting power would be diluted by only approximately 2%, from approximately 31% to approximately 29%.
24. Finally, there was nothing to suggest that the balance of control at the general meeting would be tipped one way or the other by the placement. Silverlene submitted that (based on inferences it had drawn as to how certain parties would vote) votes cast on the resolutions proposed by the applicant group would be affected as follows:

<u>Scenario</u>	<u>Votes for</u>	<u>Votes against</u>
Without Capital Raising	31%	21%
With placement and 100% rights issue take-up*	29%	27%
With placement and 50% rights issue take-up*	29%	29%

\* Assumes Silverlene and the applicant group take up their full entitlement, that shares issued under the placement would be eligible to participate in the Rights Issue and that the placees, among others, would vote against the resolution to reconstitute the board.

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<sup>2</sup> *Bowen Energy Limited 01* [2007] ATP 22 at [30]

<sup>3</sup> *Rivkin Financial Services Limited 01* [2004] ATP 14 at [26]. See also *St Barbara Mines Limited 02* [2004] ATP 13 at [9-10] and *Grand Hotel Group* [2003] ATP 34 at [7] and [51-53] and *Online Advantage Limited* [2002] ATP 14 at [53-56]

## Takeovers Panel

### Reasons – Redflex Holdings Limited 2009 ATP 17

25. Under this analysis (which appears to assume that the directors would place any shortfall shares with shareholders they know would vote against the resolutions), even in the ‘worst case scenario’ for the applicant group (ie with placement and 50% rights issue take-up) there would still be 42% of the votes that could be voted either for or against the resolution. It is hence not clear that there would be any material effect on the outcome of the general meeting as a result of the capital raising. While Sivlerlene assumed that the placees would vote against the resolutions to change the board, it did not submit that the placees were associates either with each other or any of the Redflex directors.<sup>4</sup> In any event, it is less likely that this would eventuate, since, having regard to the undertaking (see 29 below), shareholders, including Silverlene and the applicant group, can now apply for shortfall shares before any are allocated by the directors.
26. In the absence of evidence to the contrary, we are not satisfied that the placement is likely to have a significant effect on control of Redflex.

#### Rights issue

27. The rights issue proposed will be a pro rata offer. All Redflex shareholders may participate. We were not provided with any evidence that any attributes of the rights issue will make shareholders less likely to participate. We noted that the rights issue is priced at a 15% discount to the trading price of Redflex shares on the day prior to the announcement.
28. We were concerned with the potential for there to be some control effect of the rights issue given that the directors retained the discretion to place any shortfall shares. In *Dromana Estate 01*<sup>5</sup> the Panel accepted an undertaking to remove a similar discretion.
29. Redflex offered an undertaking to the effect that all shareholders may apply for excess shares and will be allocated them on a proportional basis, with remaining shares (if any) being allocated to unrelated parties who hold (or will hold) less than 3% of the voting power in Redflex. A copy of the undertaking is in the annexure.
30. Redflex also confirmed its intention that shortfall shares will be issued at a similar time to the issue of shares under the rights issue and at least in time to count for the annual general meeting.
31. Given the undertaking, we are not satisfied that the rights issue will have a material effect on control of Redflex.

#### DECISION

32. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

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<sup>4</sup> See *Boulder Steel Limited* [2008] ATP 24

<sup>5</sup> *Dromana Estate Limited 01* [2006] ATP 4

## **Takeovers Panel**

**Reasons - Redflex Holdings Limited  
2009 ATP 17**

### **Orders**

33. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

**Andrew Lumsden**

**President of the Sitting Panel**

**Decision dated 23 September 2009**

**Reasons published 25 September 2009**



**Australian Government**

**Takeovers Panel**

**Annexure**

**Section 201A**

**Australian Securities and Investments Commission Act (Cth)**

**Undertaking**

**Redflex Holdings Limited**

Pursuant to section 201A of the *Australian Securities and Investments Commission Act 2001* (Cth), Redflex Holdings Limited (**Redflex**) undertakes to the Panel that, in respect of the non-renounceable rights issue announced by Redflex on 10 September 2009, Redflex will:

1. offer a shortfall facility to shareholders, on the basis that if there are excess applications for shortfall shares, the shortfall will be allocated on a proportionate basis having regard to the shareholdings of the applicants on the record date
2. in circumstances where there are insufficient applications for shortfall shares under the shortfall facility, not issue any remaining shortfall shares to any:
  - 2.1. related party of Redflex or Redflex's officers or directors
  - 2.2. person with 3% or more voting power or
  - 2.3. person if that issue of shortfall shares would have the effect of that person acquiring 3% or more voting power in Redflex and
3. immediately confirm in writing to the Panel once it has fulfilled its obligations.

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**Signed by Graham Davie**  
**with the authority, and on behalf, of**  
**Redflex Holdings Limited**  
**Dated 22 September 2009**