



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Vesture Limited 02  
[2010] ATP 15**

**Catchwords:**

*Capital raising – decline to make a declaration – effect on control – rights issue – shortfall facility – underwriting*

*Corporations Act 2001 (Cth), sections 602, item 7 of s611*

*Guidance Note 17 (Rights Issues)*

*Bisalloy Steel Group Limited [2008] ATP 9, Mount Gibson Iron Limited [2008] ATP 4, Dromana Estate Limited 01R [2006] ATP 8*

**INTRODUCTION**

1. The Panel, Geoff Brunson (sitting President), Garry Besson and Rodd Levy, declined to make a declaration of unacceptable circumstances in relation to the affairs of Vesture Limited. The application concerned the rights issue announced by Vesture on 16 November 2010. The Panel was not satisfied that the circumstances in relation to the rights issue were unacceptable. The Panel also declined to conduct proceedings on the allegation of association.
2. In these reasons, the following definitions apply.

Ernst transaction	Vesture’s proposed acquisition of all of the ordinary shares of Ernst Body Corporate Management Pty Ltd
JBFT	JBFT Pty Limited as trustee for the Jurg Bruhlmann Family Trust
PICA	Prudential Investment Company of Australia Pty Limited
Vesture	Vesture Limited

**FACTS**

3. Vesture is an ASX listed company (ASX code: VES).
4. At 26 November 2010 (the record date for the rights issue), Vesture had 65,405,848 shares on issue. PICA (the applicant) held 43.96% of Vesture. The other substantial shareholders in Vesture were Mr Marcel Nauer (17.91%), JBFT (16.7%) and Ms Phillipa Bond (17.87%). The public held the remaining 3.56%.
5. Mr Patrik Bruhlmann is Mr Nauer’s brother in law. Mr Bruhlman was appointed CEO of Vesture on 13 August 2010. Mr Bruhlmann was the original trustee of the Jurg Bruhlmann Family Trust but was replaced by JBFT on 20 May 2010. Mr David Henderson is the sole director of JBFT.

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6. On 21 June 2010, PICA announced a cash bid for Vesture at 15 cents.<sup>1</sup> The bid closed on 19 October 2010. PICA's holding increased from 18.89% to 45.2%. This was slightly diluted by two issues of shares to its current holding of 43.96%.
7. Between 18 August 2010 and 19 October 2010, Vesture and PICA engaged in discussions, including in relation to a proposed transaction involving Vesture and PICA.
8. On 19 October 2010, PICA informed Vesture that it would not proceed with the proposed transaction.
9. On 22 October 2010, Vesture issued 1,900,000 shares to Mr Marcel Nauer at 12 cents per share. Following this issue, Mr Nauer, JFBT and Ms Bond between them held 50.07% of Vesture.
10. On 16 November 2010, Vesture announced a 1 for 1 non-renounceable rights issue to raise \$6,540,384 by issuing 65,403,848 shares at 10 cents. The terms of the rights issue were set out in the offer document dated 16 November 2010. The offer document stated that the funds raised by the issue would be applied "*to fund acquisitions*".
11. The rights issue was fully underwritten by Mr Nauer. The s708AA<sup>2</sup> notice issued by Vesture on 16 November 2010 (but dated 17 November 2010) stated: "*Mr Nauer currently owns 17.91% of the issued shares in the Company. If no shareholders take up any of their entitlements, Mr Nauer would own 58.95% of the shares on issue after completion of the Rights Issue.*"
12. The underwriting fee was 8% of the total amount of the rights issue (\$523,230).
13. The closing date for acceptances was 13 December 2010. Deferred settlement trading of new shares to be issued under the rights issue was to commence on 14 December 2010. The President made interim orders on 13 December 2010 to postpone the commencement of deferred settlement trading of new shares and prevent Vesture from issuing or allotting any new shares under the rights issue without the prior approval of the Panel (see paragraphs 22 to 23 below).
14. On 30 November 2010, at Vesture's annual general meeting, shareholders approved the issue of 2,083,333 shares to Mr Bruhlmann. These shares were issued on 8 December 2010.
15. On 2 December 2010, Vesture announced the Ernst transaction, to be funded partly out of proceeds from the rights issue.

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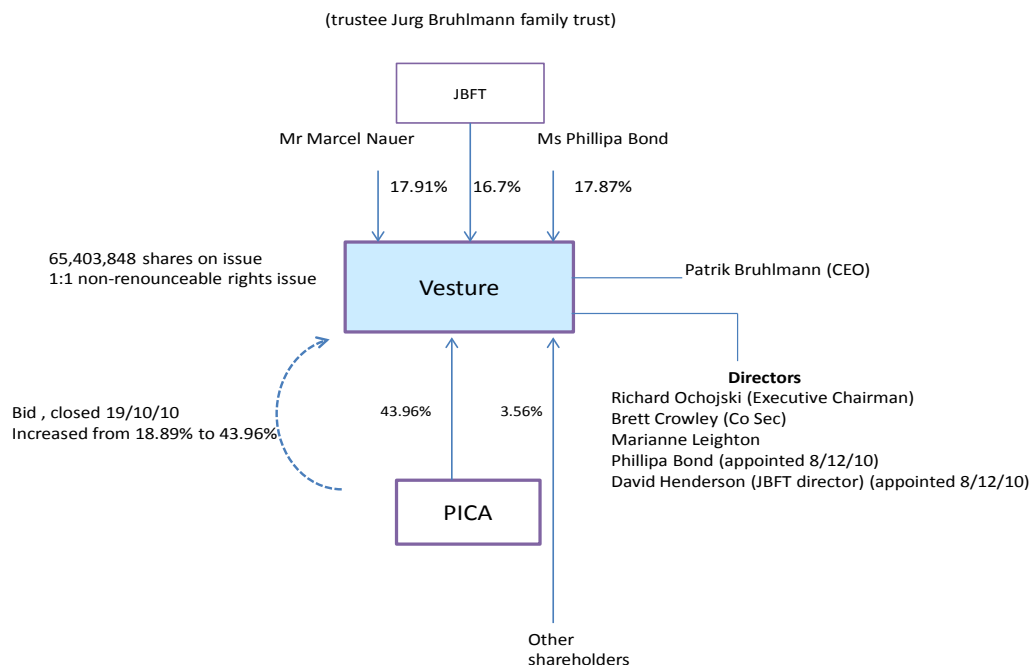
<sup>1</sup> PICA had previously made a takeover bid for Vesture, announced on 9 October 2009

<sup>2</sup> References are to sections of the *Corporations Act 2001* (Cth) unless otherwise indicated

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16. On 8 December 2010, Ms Bond and Mr Henderson were appointed to the Vesture board.
17. On 13 December 2010 the rights issue closed.
18. PICA did not take up its entitlement under the rights issue. The issue of shares to Mr Nauer, under the rights issue and as underwriter, would give him a 46.38% relevant interest in Vesture. PICA would be diluted to approximately 21.6%.
19. The following diagram summarises the board positions and relevant shareholdings in Vesture at the date of the application:



## APPLICATION

### Declaration sought

20. By application dated 10 September 2010, PICA sought a declaration of unacceptable circumstances in relation to the rights issue. It submitted (among other things) that:
  - (a) the independent directors of Vesture failed to take all reasonable steps to minimise the potential control impact of the rights issue
  - (b) underwriting of the rights issue conferred an opportunity for Mr Nauer to obtain control of Vesture without paying any control premium and

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- (c) insufficient information had been disclosed in relation to the rights issue regarding proposed acquisitions and Mr Nauer's intentions with respect to the Vesture business following completion of the rights issue.
21. PICA also submitted that the voting power of one or more of Mr Nauer, Mr Bruhlmann, Ms Bond and JBFT should be aggregated on the basis they were related parties or associates under the Corporations Act and therefore the issues of shares to Mr Nauer and Mr Bruhlmann should be deemed invalid because they should have been subject to shareholder approval under item 7 of s611.

### Interim orders sought

22. PICA sought interim orders including that Vesture be prevented from closing the offer period under the rights issue until 7 days after the withdrawal or determination of the application.
23. The President of the Panel made interim orders on 13 December 2010 (annexure A) to maintain the status quo until we could consider whether to conduct proceedings. The interim orders required Vesture to immediately take all action necessary to postpone the commencement of deferred settlement trading of new shares under the rights issue and to prevent Vesture issuing or allotting of any new shares under the rights issue without the prior approval of the Panel. It was not necessary to prevent closure of the rights issue, as it could be reopened if necessary.

### Final orders sought

24. PICA sought final orders to the effect that:
- (a) Vesture not issue any shares pursuant to the rights issue otherwise than in accordance with orders made by the Panel
  - (b) Mr Nauer disclose any intentions he may have formed as a consequence of his maximum shareholding in Vesture pursuant to the rights issue
  - (c) the offer period be extended to a date no later than 7 days after disclosure of matters pursuant to (b) above
  - (d) if PICA subscribed for shares pursuant to the rights issue prior to the end of the extended offer period, PICA would be entitled to participate in the underwriting jointly with Mr Nauer; and PICA and Mr Nauer each would be entitled to apply for, and receive, a maximum number of excess shares in proportion to the number of shares they subscribed for pursuant to the rights issue
  - (e) if PICA elected to take up a proportion of the excess shares, it disclose to Vesture any intentions it may have formed as a consequence of PICA's maximum shareholding in Vesture pursuant to the rights issue and

- (f) the issue of 1,900,000 shares to Mr Nauer and 2,083,333 shares to Mr Bruhlmann be cancelled and the share subscription price for the shares be refunded.

### Preliminary submissions

25. Vesture made a preliminary submission that the application was a means of preventing it becoming a major well-funded competitor to PICA. It also submitted that PICA was attempting to prevent Vesture raising funds other than in a way which delivered control to PICA. It further submitted that the rights issue will:
- (a) not result in a change of control of Vesture
  - (b) not result in any person or group of persons having control and
  - (c) make Vesture much more difficult and expensive for PICA to control.
26. Vesture also made a preliminary submission that PICA had provided no evidence to support the allegation of association between the substantial shareholders.
27. Vesture also submitted that PICA had delayed in making its application, which Vesture said put at risk the underwriting and the Ernst transaction. The rights issue was announced on 16 November 2010. The application was made on 10 December 2010, 1 business day before the rights issue was due to close. Although delay was factor we took into account in deciding whether to conduct proceedings, we did not think PICA's delay should prevent us from considering the application. PICA had tried to deal with its concerns commercially, which is a course of action the Panel supports.

## DISCUSSION

### Structure of rights issue

28. Guidance Note 17 states that the Panel considers "*among other things, whether the control effect exceeds what is reasonably necessary for the fundraising purpose*" and that directors "*should carefully consider all reasonably available options to mitigate that effect*".<sup>3</sup> In relation to the structural matters, such as price, renounceability and underwriting, Guidance Note 17 states that these cannot be considered in isolation and the Panel will look at "*the structure of the rights issue as a whole, and the market, in deciding whether the rights issue gives rise to unacceptable circumstances*".<sup>4</sup> Greater care is needed "*to mitigate the potential control effects if a related party or major shareholder underwrites*",<sup>5</sup> as is the case here.

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<sup>3</sup> Guidance Note 17, at [5]. See also *Bisalloy Steel Group Limited* [2008] ATP 29, at [21] – [23]

<sup>4</sup> Guidance Note 17, at [9]

<sup>5</sup> Guidance Note 17, at [21]

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29. Vesture submitted that given *“the current economic climate the only way it would be able to raise more capital was from its shareholders by way of a rights issue. It was desirable to have that rights issue underwritten to ensure certainty of the additional capital required to implement its growth strategy and to fund the immediate cash flow requirements of its business.”* It further submitted that its directors believed *“there were no other capital raising alternatives”*.
30. We have a number of concerns about the structure of the rights issue:
- (a) it does not contain a shortfall facility for shareholders to apply for additional shares in excess of their entitlements. This is despite the fact that the s708AA notice stated that a shortfall facility would be available
  - (b) there is no dispersion strategy in place for dealing with shortfall shares, such as the appointment of non-associated sub-underwriters and
  - (c) the major shareholder, PICA, was not offered an opportunity to participate in the underwriting before the rights issue was announced.
31. Vesture did not seek formal advice in relation to the rights issue. Vesture submitted that it *“dealt with all financial and legal issues internally”*.
32. As well, we think that the s708AA notice did not adequately disclose the intentions of Mr Nauer should he have been required to take up shortfall shares.
33. The underwriting fee of 8% is high. It is based on the total amount of the offer, including Mr Nauer’s 17.91% entitlement under the rights issue. It also appears that Vesture did not take steps to establish whether its major shareholders would apply for shares under the rights issue before deciding on the structure of the rights issue and the underwriting fee. These matters increase our level of concern with the rights issue.

#### Need for funds

34. Guidance Note 17 states that, considering a company’s need for funds, *“the Panel will look at the company’s financial situation, the amount sought to be raised and the suitability of raising capital by the rights issue”*.<sup>6</sup>
35. On 16 November 2010, Vesture announced that it would apply the funds from the rights issue *“to fund acquisitions”*. It made no further disclosure about the proposed use of funds. Vesture submitted that its capital, revenue and profits were not sufficient to maintain its ASX listing in the long term. It further submitted that the purpose of the capital raising was to *“fund its acquisition strategy”*.
36. Vesture submitted that it had entered into an agreement to acquire Ernst after the rights issue was announced. Details of the Ernst transaction were not

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<sup>6</sup> Guidance Note 17, at [7]

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announced until 2 December 2010, although Vesture submitted that a term sheet had been agreed with Ernst at the time the rights issue was announced. The Ernst transaction was conditional on the rights issue proceeding.

37. We are satisfied that Vesture had a genuine need for the funds to support its growth strategy. However, we would have expected Vesture to disclose details of the proposed use of funds when announcing the rights issue.
38. Nonetheless, this need for funds was not so urgent or compelling. We think Vesture should have properly structured the rights issue to reduce the potential control effect.

#### Underwriting

39. The rights issue was underwritten solely by Mr Nauer. PICA submitted that it had not been approached by Vesture to participate in the underwriting before the rights issue was announced. Following a meeting between Vesture and PICA on 30 November 2010, Vesture offered PICA participation in the underwriting on a 50/50 basis jointly with Mr Nauer. This offer to underwrite was refused by PICA on the basis that it *“could not guarantee representation on the Vesture Board and believed it would remain ‘out of the loop’ with respect to the Company’s operations”*.
40. We understand PICA’s concern, and query why as the largest shareholder it has not been offered a seat on the Vesture board. However, ultimately this is an internal matter for the board and shareholders (absent any question of association).
41. PICA, being Vesture’s largest shareholder with a 43.96% interest in Vesture at the time of the underwriting, should have been offered an opportunity to participate in the underwriting initially.
42. In our supplementary brief, we asked PICA whether, if the rights issue was re-opened, it would agree to participate in the underwriting with Mr Nauer, and if so, on what basis. PICA responded that it would only agree to participate if it would obtain a 51% interest in Vesture (and thereby obtain control of Vesture). We do not think the Panel should insist on an underwriting that is conditional on delivering control.

#### Conclusion on rights issue

43. PICA has taken a commercial decision not to share the underwriting. We are not prepared to order an arrangement designed to deliver control to PICA.
44. Given the composition of Vesture’s tightly held share register (approximately 96% of Vesture’s issued share capital at the time of the rights issue was held by the 4 largest shareholders), and PICA’s decision not to participate in the rights issue or underwriting unless it could secure a 51% interest in Vesture, we do

not consider that there are any appropriate orders that we can make that would have a material effect on the outcome of the rights issue in this case.

45. Accordingly, we decline to make a declaration of unacceptable circumstances in relation to the rights issue.

### Association

46. In *Mount Gibson Iron Limited*,<sup>7</sup> the Panel said:

*“The Panel's starting point was that it was for Mount Gibson - the applicant - to demonstrate a sufficient body of evidence of association and to convince the Panel as to that association, albeit with proper inferences being drawn.”*

47. Each allegation of association needs to be assessed on its own facts. Examples of the evidence that may assist the Panel in considering whether to conduct proceedings on association may include: details of meetings of the relevant persons, emails between them, uncommercial dealings, timing coincidences, advisers being used in common and past relationships.<sup>8</sup>
48. The only relevant material we have before us on the issue of association is the family relationship referred to in paragraph 5, the suggestion that Mr Bruhlmann and Mr Nauer acquired shares in Vesture in March 2010 and that Mr Nauer had met Ms Bond once on a ski holiday in Switzerland in April 2005. Therefore we consider there is insufficient material to warrant conducting proceedings in relation to the allegation of association. PICA can bring a new application if it obtains additional evidence.

## DECISION

### Declaration

49. For the reasons above, we decline to make a declaration of unacceptable circumstances. We consider that it is not against the public interest to decline to make a declaration and we had regard to the matters in s657A(3).
50. We decline also to conduct proceedings on association.

### Orders

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

## OTHER MATTERS

52. We think that the application could have been clearer that PICA would not agree to participate in the rights issue or underwriting unless it would obtain a

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<sup>7</sup> [2008] ATP 4 at [15]

<sup>8</sup> See also *Dromana Estate Limited 01R* [2006] ATP 8 at [25]



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51% interest in Vesture. This would no doubt have influenced the decision whether to make any interim orders. It did influence our decision whether to conduct proceedings.

**Geoff Brunsdon**  
**President of the sitting Panel**  
**Decision dated 24 December 2010**  
**Reasons published 7 January 2011**

**Party:**

PICA

Vesture

Mr Marcel Nauer

**Advisers:**

Clark McNamara Lawyers

Not applicable

Esplins Solicitors



**Australian Government**

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## **Annexure A**

### **CORPORATIONS ACT SECTION 657E INTERIM ORDERS**

#### **VESTURE LIMITED 02**

Prudential Investment Company of Australia Pty Limited (**PICA**) made an application to the Panel dated 10 December 2010 in relation to the affairs of Vesture Limited (**Vesture**).

The President **ORDERS**:

1. Vesture immediately take all action necessary to postpone the commencement of deferred settlement trading of new shares to be issued under the rights issue announced by Vesture on 16 November 2010.
2. Vesture must not issue or allot any new shares under the rights issue without the prior approval of the Panel.
3. These interim orders have effect until the earliest of:
  - (i) further order of the Panel
  - (ii) the determination of the proceedings and
  - (iii) 2 months from the date of these interim orders.

**Alan Shaw**  
**Counsel**  
**with authority of Kathleen Farrell**  
**President**  
**Dated 13 December 2010**