



Australian Government

Takeovers Panel

# MEDIA RELEASE

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No: 45/2011

Friday, 3 June 2011

## **Premium Income Fund – Declaration of Unacceptable Circumstances and Orders**

The Panel has made a declaration of unacceptable circumstances (Annexure A) and final orders (Annexure B) in relation to an application dated 11 May 2011 by Wellington Capital Limited as responsible entity for the Premium Income Fund (PIF) in relation to the affairs of PIF.

### **Background**

On 17 May 2010, ALF PIF Finance Limited (**ALF Finance**) lodged a bidder's statement with ASIC in respect of a proposal to acquire all of the units in PIF under an off-market bid. A replacement bidder's statement was lodged with ASIC on 15 June 2010.

ALF Finance lodged a notice of variation dated 18 February 2011 with the National Stock Exchange and ASIC, purporting to extend the offer period to 14 June 2011.

On or about 2 May 2011, ALF Finance dispatched a letter dated 18 April 2011 to PIF unitholders. The letter enclosed a copy of the notice of variation and contained additional information for PIF unitholders.

The bid was scheduled to close on 28 February 2011. However, the notice of variation was not dispatched to PIF unitholders until on or about 2 May 2011.

### **Declaration**

In the Panel's view, the bid was not extended in accordance with s650D of the *Corporations Act 2001* (Cth). ALF Finance has continued to communicate with PIF unitholders and receive acceptances after 28 February 2011 on the basis that the bid is still on foot.

The Panel considers that the communications after close of the bid, the receipt of acceptances after close of the bid, failure to prepare a further supplementary bidder's statement as required and the material deficiencies in the disclosure in the existing replacement bidder's statement and the 18 April letter has resulted in:

- the acquisition of control over PIF units not taking place in an efficient competitive and informed market and
- PIF unitholders not having enough information to assess the merits of the bid.

The Panel considers that even if the bid was validly extended, the corrections required would not leave unitholders with a reasonable time to consider the proposal.

The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in s657A(3).

## Orders

The Panel has made orders that:

1. ALF Finance make an announcement to the market that the bid ended on 28 February 2011 without the conditions having being fulfilled or waived and all acceptances will be returned
2. no further acceptances be processed by ALF Finance in relation to the bid
3. any acceptances that have been processed be reversed
4. any acceptances be returned to unitholders as soon as practicable after the date of the orders
5. none of ALF Finance, Mr James Byrnes or any associate of either of them communicate with PIF unitholders, except as required by these orders, until after ALF Finance has complied with the orders in paragraphs 1 to 4 above and ALF Finance has confirmed satisfaction of the orders in accordance with paragraph 6 below.
6. ALF Finance confirm in writing to the Panel and all parties when it has complied with these orders.

The sitting Panel was Diana Chang, Byron Koster and Peter Scott (sitting President).

The Panel will publish reasons for the decision in due course on its website [www.takeovers.gov.au](http://www.takeovers.gov.au).

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## Annexure A

### CORPORATIONS ACT SECTION 657A DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

#### PREMIUM INCOME FUND

#### CIRCUMSTANCES

1. Premium Income Fund (**PIF**) is a registered managed investment scheme listed on the National Stock Exchange (**NSX**). Wellington Capital Limited (**Wellington**) is the responsible entity for PIF.
2. On 17 May 2010, ALF PIF Finance Limited (**ALF Finance**) lodged a bidder's statement with ASIC in respect of a proposal to acquire all of the units in PIF under an off-market bid. A replacement bidder's statement was lodged with ASIC on 15 June 2010.
3. ALF Finance lodged a notice of variation dated 18 February 2011 with NSX and ASIC, purporting to extend the offer period to 14 June 2011.
4. On or about 2 May 2011, ALF Finance dispatched a letter dated 18 April 2011 to PIF unitholders. The letter enclosed a copy of the notice of variation and contained additional information for PIF unitholders.

#### Purported variation

5. The bid was scheduled to close on 28 February 2011. However, the notice of variation was not dispatched to PIF unitholders until on or about 2 May 2011. Accordingly, the bid was not extended in accordance with s650D of the Corporations Act 2001 (Cth) (**Act**). ALF Finance has continued to communicate with PIF unitholders and receive acceptances after 28 February 2011 on the basis that the bid is still on foot.

#### Intention to list

6. Section 3.6 of the replacement bidder's statement stated under the heading "Intention To List":

*Subject to Compliance with the Corporations Act and the Listing Rules of the Australian Securities Exchange (ASX) the Board of ALF may or may not decide to make application to apply for quotation of the ALF Ordinary Shares on ASX. The decision to list on ASX may or may not be subject to a number of factors which include:*

- *The level of acceptances received by ALF pursuant to this offer;*
- *ALF's compliance with the Listing Rules of ASX as they may be in force from time to time;*
- *The number of Shareholders in ALF and the size of their shareholdings;*
- *The cost of obtaining a listing of ALF's Ordinary Shares on ASX;*
- *Market conditions.*

*Please note that there is no guarantee that ALF will decide to list its Ordinary Shares on ASX or that if ALF was to apply for a listing on ASX that ASX will agree to admit ALF to the official list of ASX. (original emphasis)*

7. The 18 April letter contained statements that “ALF [Finance] will, subject to normal commercial terms and requirements, expedite a listing of the company on the ASX, with the obvious associated benefits” and “ALF [Finance] wants to list on the ASX”.
8. The statements in the 18 April letter make the implication in section 3.6 of the replacement bidder’s statement clear, attracting s625(3) of the Act.
9. Moreover, the statement in section 3.6 includes as conditions matters that are subjective, so it is likely to confuse or mislead unitholders.
10. Moreover, the bid consideration under ALF Finance’s bid is scrip consideration. The statements of intention regarding listing in the 18 April letter are material information for unitholders. They should have been included in a supplementary bidder’s statement.
11. Moreover, the statements regarding listing in the 18 April letter are contrary to the policy inherent in s625(3) of the Act.

### **Disclosure regarding ALF Finance**

12. The 18 April letter included statements:

*[ALF Finance is] offering PIF unitholders what could be a last chance to recover lost value from their investment and*

*The market value of all units is less than \$70M i.e. less than half of the ALF [Finance] offer.*
13. Page 18 of the replacement bidder’s statement stated:

*The ALF Redeemable Preference Shares are redeemed at \$0.15 cents per unit (of which redemption there is no guarantee).*
14. ALF Finance has not demonstrated a reasonable basis for making these statements.
15. The 18 April letter also included the following statement:

*ALF Group Holdings AG and Kingsley Finance Co Limited have agreed to subscribe for \$5 million in new capital in ALF [Finance], and the paid in capital of ALF PIF Finance Limited will be \$5,001,200.*
16. The 18 April letter is misleading in that it failed to disclose that the subscription for the \$5 million of new capital in ALF Finance consisted of shares in ALF Group Holdings AG.

### **Disclosure regarding litigation funding and claims against PIF**

17. The 18 April letter states that “ALF [Finance] have received an offer from Australian Litigation Funders Pty Ltd to provide litigation funding to pursue all avenues of recovery against Wellington.”
18. The statement in the 18 April letter is misleading in the absence of disclosure of the relationship between Australian Litigation Funders Pty Ltd and ALF Finance.
19. The 18 April letter also included the statement: “ALF [Finance] have **the rights to over \$40m in claims against PIF** that will be scrapped when or if the offer is accepted and ALF [Finance] have control of PIF.” (original emphasis).
20. The statement in the 18 April letter is misleading in the absence of additional disclosure in relation to the substance of these claims.
21. Moreover, the statement is likely to coerce unitholders into accepting the bid.

22. The Panel considers that the communications after close of the bid, the receipt of acceptances after close of the bid, failure to prepare a further supplementary bidder's statement as required and the material deficiencies in the disclosure in the existing replacement bidder's statement and the 18 April letter has resulted in:
  - (a) the acquisition of control over PIF units not taking place in an efficient, competitive and informed market and
  - (b) PIF unitholders not having enough information to enable them to assess the merits of the bid.
23. Even if the bid was validly extended, the corrections required would not leave unitholders with a reasonable time to consider the proposal.
24. It appears to the Panel that the circumstances are unacceptable:
  - (a) having regard to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:
    - (i) the control, or potential control, of PIF
    - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in PIF and
  - (b) having regard to the purposes of Chapter 6 set out in section 602 of the Act and
  - (c) because they gave or give rise to, or will or are likely to give rise to, a contravention of a provision of Chapter 6 of the Act.
25. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3).

## **DECLARATION**

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of PIF.

**Allan Bulman**  
**Director**  
**with authority of Peter Scott**  
**President of the sitting Panel**  
**Dated 3 June 2011**

## **Annexure B**

### **CORPORATIONS ACT SECTION 657D ORDERS**

#### **PREMIUM INCOME FUND**

The Panel made a declaration of unacceptable circumstances on 3 June 2011 in relation to the affairs of the Premium Income Fund (**PIF**)

The Panel **ORDERS**:

1. ALF PIF Finance Limited (**ALF Finance**) must make an announcement to the market (in a form approved by the Panel) that its off market takeover bid for all the units in PIF ended on 28 February 2011 without the conditions having been fulfilled or waived and that all acceptances will be returned as soon as is practicable.
2. No acceptances be processed that have not already been processed by ALF Finance in relation to the bid.
3. Any acceptances that have been processed be reversed.
4. All acceptances received by ALF Finance in relation to the bid be returned to unit holders as soon as practicable after the date of this order.
5. None of ALF Finance, Mr James Byrnes or any associate of either of them communicate with unit holders in PIF, except as required by these orders, until after ALF Finance has complied with the orders in paragraphs 1 to 4 above and ALF Finance has confirmed satisfaction of the orders in accordance with order 6.
6. ALF Finance confirm in writing to the Panel and all parties when it has complied with these orders.

**Allan Bulman**  
**Director**  
**with authority of Peter Scott**  
**President of the sitting Panel**  
**Dated 3 June 2011**