Takeovers Panel

Reasons for Decision Pinnacle VRB Ltd No. 9b

In the matter of Pinnacle VRB Ltd No. 9b
[2001] ATP 26

Catchwords

Announcing intention to seek quotation of securities – failure to disclose intentions to seek quotation in supplementary bidder's statement – failure to make application for quotation of securities on ASX – materiality of quotation announcement – timing of quotation statements – informed market – caretaker directors – new issues raised in submissions to brief – Panel conference held

Corporations Act 2001 *(Cth), sections 602 and 625(3)*

In the course of proceedings in relation to an application by Vanteck (VRB) Technology Corp (Vanteck) regarding letters sent by Mr David Pethard to shareholders of Pinnacle VRB Limited (Pinnacle), the Australian Securities and Investments Commission (ASIC) submitted that the Panel should make a declaration under section 657A of the Corporations Act in relation to: (a) an announcement by Vanteck of its intention to list on the Australian Stock Exchange (ASX) and Vanteck's failure to apply for that listing; and (b) a letter sent to Pinnacle's directors on behalf of Vanteck asserting that the Pinnacle directors were "caretaker directors".

The Panel has made a declaration in relation to the first of these matters and has made orders requiring Vanteck to apply promptly for quotation of its shares on the ASX, giving certain Pinnacle shareholders the right to withdraw their acceptances of Vanteck's takeover bid for Pinnacle and requiring Vanteck to extend its bid until after the outcome of its ASX listing application is known.

The Panel declined to make a declaration in relation to the "caretaker director" letter.

THE APPLICATION

1. Vanteck (VRB) Technology Corp (**Vanteck**) made an application (the **Application**) under sections 657A and 657D of the Corporations Act 2001 (the **Act**) on 21 September 2001 for a declaration of unacceptable circumstance and final orders from the Panel in relation to Vanteck's takeover bid (the **Bid**) for Pinnacle VRB Limited (**Pinnacle**).

2. The Application related to the conduct of one of the directors of Pinnacle, Mr David Pethard. Vanteck alleged that the letters sent by Mr Pethard to shareholders of Pinnacle on 17 September 2001 (the **Pethard Letters**) concerning Vanteck's bid for Pinnacle and the forthcoming general meeting of Pinnacle's shareholders gave rise to unacceptable circumstances.

3. Vanteck alleged that the Pethard Letters contained information that was misleading and defamatory of Vanteck and therefore gave rise to unacceptable circumstances because of its potential to affect Vanteck's reputation.

4. The sitting Panel in this matter is Marian Micalizzi (sitting President), Robyn Ahern (sitting Deputy President) and Alison Lansley.

5. After receiving further information from Vanteck, the Panel met on 25 September 2001 and decided under Regulation 20 of the Australian Securities and Investments Commission Regulations (the **ASIC Regulations**) to conduct proceedings in relation to the Application.

6. The Panel issued its Brief under Regulation 20 of the ASIC Regulations on 25 September 2001.

7. In the submissions made by the Australian Securities and Investments Commission (**ASIC**) on 28 September 2001 in response to the Brief (the **ASIC submissions**), ASIC raised two issues regarding the Bid that had not been canvassed in the Application or the Brief.

8. ASIC submitted that the following circumstances in relation to Vanteck's bid should be declared by the Panel to be unacceptable circumstances:

   (a) The making of an announcement (the **ASX Listing Announcement**) by Vanteck on 7 September 2001 of its intention to list, and to seek quotation of its securities, on the Australian Stock Exchange (**ASX**); and

   (b) The sending of a letter (the **Caretaker Director Letter**) dated 20 August 2001 by Freehills, on behalf of Vanteck, to the Board of Directors of Pinnacle putting "the Board of Pinnacle on notice that they are now in the position of being caretaker directors" and the repetition of the advice that the Pinnacle board was in "caretaker mode" in a supplementary bidder's statement.

9. In rebuttal, Vanteck submitted that these issues were not relevant to the Application and that it was inappropriate for them to be raised in the context of the current proceedings. It also submitted that the timetable set out in the Panel's Brief gave Vanteck only 1 business day to respond to the ASIC submissions. Accordingly, the Panel decided to consider separately whether it had jurisdiction to consider these issues in these proceedings and, if necessary, prepare a supplementary Brief seeking further submissions.

10. On5 October 2001, the Panel declined to make a declaration of unacceptable circumstances in relation to the Pethard letters. The reasons for that decision were published by the Panel on 7 November 2001.

11. On10 October 2001, the Panel decided to issue a supplementary Brief under Regulation 20 of the ASIC Regulations in relation to the two

additional issues raised in the ASIC submissions. It decided that it was desirable for the sitting Panel to deal with the new issues in order to achieve a speedy resolution of all matters affecting the Bid. However, it also decided that material new issues should be specifically addressed in a supplementary Brief with a separate timetable that would allow each party a reasonable opportunity to make submissions to the Panel.

12. We deal with each of the issues raised by ASIC in turn.

REMEDIES SOUGHT BY ASIC

13. ASIC originally sought, in the ASIC Submissions, the following final orders from the Panel in relation to the ASX Listing Announcement:

    (a) that Vanteck extend a right to withdraw to all offerees who accepted the Bid after the date of the ASX Listing Announcement;

    (b) that the Bid be subject to the condition set out in section 625(3)(c) of the Act[1] (the **Quotation Condition**) and that the directors of Vanteck fulfil their obligation to proceed with due haste to apply for quotation, and that the Vanteck bid be extended by such a period as would enable a reasonable time for ASX to consider and determine the application for quotation;

    (c) that Vanteck be restrained from exercising any voting or other rights attached to Pinnacle securities received as a result of acceptances under the Bid to date, pending receipt of offeree's confirmation of acceptance of offer; and

    (d) that Vanteck lodge a supplementary bidder's statement in accordance with section 643 setting out the company's intention to apply for quotation of its securities and the effect of each order made by the Panel.

13. In its submissions responding to the Panel's supplementary Brief, ASIC subsequently withdrew its request for an order that the Bid be subject to the Quotation Condition on the basis this would be prejudicial to those offerees who accepted the Bid prior to the making of the ASX Listing Announcement. Instead it sought the following remedial orders:

    (e) that Vanteck be required to immediately make application for quotation of its securities on the ASX;

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[1] This is a condition that:

(a) an application for admission to quotation will be made within 7 days after the start of the bid period; and

(b) permission for admission to quotation will be granted no later than 7 days after the end of the bid period.

(c)

(f) that Vanteck extend to those offerees who accepted the Bid after the ASX Listing Announcement (**Post Announcement Acceptors**) a right to withdraw their acceptances;

(g) that Vanteck be required to extend the Bid until 3 business days after the ASX decides on Vanteck's application for quotation and that determination is communicated to offerees and the market;

(h) that Vanteck immediately issue a supplementary bidder's statement making full disclosure regarding the application for quotation and the timing for determination of it, the right of withdrawal available to Post Announcement Acceptors and full disclosure of the effect of the Panel's orders; and

(i) that Vanteck be restrained from exercising any voting or other rights attached to Pinnacle securities received as a result of acceptances received subsequent to the ASX Listing Announcement pending receipt of offeree's confirmation of acceptance of the offer.

Facts – ASX Listing Announcement

14. The facts in relation to this matter are not disputed in any material respect by the parties:

(a) The vast majority of Pinnacle shareholders are resident in Australia.

(b) On 7 September 2001 Vanteck made the ASX Listing Announcement by way of a news release to the ASX.

(c) The ASX Listing Announcement was made after the commencement of the offer period in relation to the Bid (which commenced on 30 July 2001).

(d) Vanteck did not prepare a supplementary bidder's statement disclosing its intention to list, and seek quotation of its securities, on ASX, although it did send a copy of ASX Listing Announcement to Pinnacle shareholders in the same envelope as the Notice of Extension of its Bid which was also announced on 7 September.

(e) As at 16 October 2001, Vanteck had not applied for listing, or for quotation of its securities, on the ASX.

(f) As at 16 October 2001, Vanteck had not issued a supplementary bidder's statement or made any other public disclosure in relation to the progress, or lack of progress, in its listing application.

(g) In its submissions dated 12 October 2001, Vanteck informed the Panel that it had

(i) prepared a draft application to the ASX for listing;

(ii) been working on collating the various documents required to be provided to the ASX under the Listing Rules; and

(iii) obtained an in principle commitment from the Federation group that it will agree to its shareholding in Vanteck being placed in escrow if a waiver cannot be obtained from ASX.

(h) However, Vanteck also informed the Panel that it was not then in a position to provide the ASX with all of the documents the ASX requires under the Listing Rules in support of an application for quotation. Vanteck informed the Panel that there were a number of outstanding issues that Vanteck would prefer to resolve before lodging its application, including:

(i) analysing Australian and Canadian laws and CDNX and ASX Listing Rules to identify any inconsistencies and whether or not Vanteck needs to apply for waivers of various Listing Rules as part of its application;

(ii) appropriate CUFS[2] arrangements; and

(iii) whether or not the ASX is prepared to accept Vanteck's bidder's statement and supplementary bidder's statements, together with Pinnacle's ASX announcements, as an information memorandum in lieu of a prospectus.

SUBMISSIONS

Introduction

15. ASIC submitted on 12 October 2001 in response to the supplementary Brief that the ASX Listing Announcement falls clearly within the principles on which s625(3) of the Act is predicated and that Vanteck's:

(a) failure to make the announcement of its intention to seek quotation of its securities on the ASX in a bidder's statement or supplementary bidder's statement; and

(b) failure to make an application to ASX for quotation of its securities on the ASX on an urgent basis after the making of the ASX Listing Announcement;

gave rise to circumstances which should declared to be unacceptable circumstances.

16. S625(3) provides as follows;

"If:

(a) the consideration offered is or includes securities; and

[2] CUFS stands for CHESS Units of Foreign Shares, and is a system ASX uses to facilitate trading of foreign securities. See the ASX Listing Rules for more information on CUFS.

(b) the offer or the bidder's statement states or implies that the securities are to be quoted on a stock market of a securities exchange (whether in Australia or elsewhere);

the following rules apply:

(c) the offer is subject to a condition that:

(i) an application for admission to quotation will be made within 7 days after the start of the bid period; and

(ii) permission for admission to quotation will be granted no later than 7 days after the end of the bid period;

(d) the offer may not be freed from this condition."

ASIC's submissions

17. In light of this provision, ASIC made the following submission;

(a) the making of the ASX Listing Announcement after the commencement of the offer period for the Bid constitutes unacceptable circumstances;

(b) the making of the ASX Listing Announcement in a separate announcement to ASX after the commencement of the offer period constitutes unacceptable circumstances;

(c) it constitutes unacceptable circumstances for Vanteck to avoid any consequences which normally flow under s625(3) of the Act by making the ASX Listing Announcement in a separate announcement to the ASX rather than in "the offer or the bidder's statement";

(d) Vanteck's failure to make an application to ASX for quotation of its securities on the ASX on an urgent basis after the making of the ASX Listing Announcement constitutes unacceptable circumstances; and

(e) having made the ASX Listing Announcement, it constitutes unacceptable circumstances for Vanteck to have failed for a period of over one month from the ASX Listing Announcement to update Pinnacle's shareholders on the status of Vanteck's application to ASX for quotation

Vanteck's submissions

18. Vanteck agreed with a number of ASIC's submissions in relation to section 625(3), including the following;

(a) it should not be possible to avoid the application of section 625(3) by making a statement that states or implies that securities are to be listed on a stock market of a securities exchange (whether in Australia or elsewhere) (a **Quotation Statement**) that is not part of the relevant offer or bidder's statement;

(b) where a Quotation Statement is made, the bidder should apply promptly for listing of the shares offered under the bid; and

(c) section 625(3) serves an important policy function by ensuring that target shareholders who accept a scrip takeover bid on the basis that the bidder has stated or implied that the scrip will be listed are not faced with the risk that the scrip is not listed (and are thereby locked into a liquid investment).

19. However, Vanteck also submitted that:

(a) the ASX Listing Announcement only indicated that Vanteck intended to seek a listing and clearly indicated that it could not guarantee that its shares are to be listed on ASX and that its Bid is not conditional on ASX listing so there was no breach of the wording or the spirit of section 625(3);

(b) Vanteck's announcement accorded with accepted commercial practice (which Vanteck alleged had been previously acknowledged by the Panel);

(c) there was no evidence that the market in Pinnacle shares was misinformed or that any Pinnacle shareholders have been induced to accept Vanteck's Bid on the assumption that Vanteck's shares will be listed on the ASX; and

(d) Vanteck did not make the ASX announcement lightly – it is committed to proceed with the ASX listing and has already made significant progress on its listing application.

20. Vanteck explained that it had not progressed its ASX listing application further because its limited management time had been focussed on the Bid, various Panel proceedings and its ongoing business activities.

21. Vanteck also submitted that many of the benefits of ASX quotation are already available to its shareholders. In particular, it contended that Vanteck is subject to various obligations as a result of its listing on the Canadian Venture Exchange (**CDNX**) and its shareholders have a high degree of liquidity in the trading of their shares on the CDNX.

Pinnacle's submissions

22. A majority of the Board of Pinnacle made submissions in support of Vanteck. In particular, they submitted that Pinnacle shareholders were fully informed in relation to Vanteck's intended ASX quotation. They also submitted that, because Vanteck's shares are already quoted on the CDNX, having its shares quoted on the ASX would make no real difference to the liquidity of accepting shareholders' investments.

Mr Pethard

23. While Mr Pethard remained a party to the proceedings, he did not make any submissions in response to the supplementary Brief.

ANALYSIS

Introduction

24. While the Panel may declare circumstances to be unacceptable because they constitute, or give rise to, a contravention of a provision of Chapter 6 of the Act, it was not submitted that Vanteck had contravened section 625(3). Rather, it was submitted that Vanteck's actions went against the policy underlying section 625(3), and that the Panel should consider this in determining whether to make a declaration under section 657A.

Policy underlying s625(3)

25. In this regard, the Panel was presented with two different views as to the policy underlying section 625(3).

26. Vanteck emphasised that a Quotation Statement only attracts the operation of the provision if it "states or implies that the securities **are to be** quoted". It submitted that the reference to "are to be" quoted should be read as meaning "will be" quoted – not "might be or are likely to be" quoted. Accordingly, it suggested that, as a matter of policy, the provision should only apply "if a statement is made by a bidder which would lead an ordinary target shareholder to expect that the scrip being offered by the bidder will be listed". On this basis, it argued that "an average Pinnacle shareholder, on a fair reading of Vanteck's announcement, could not possibly hold the expectation or assumption that Vanteck's shares will be listed on the ASX".

27. In contrast, ASIC contended that section 625(3) operates broadly in relation to Quotation Statements, including those that include a disclaimer to the effect that "the ASX has absolute discretion concerning the listing of a company and quotation of its securities". Otherwise, it submitted the bidder could effectively shift to target shareholders the risk that the application for admission to quotation would be unsuccessful. It also pointed out that the section necessarily deals with contingencies and that, in the case of a pending or future application for quotation, the bidder cannot give a definitive assurance that securities will be quoted. Accordingly, it argued that the application of the section cannot be avoided by merely acknowledging the contingency that the bidder may fail to obtain quotation.

28. ASIC's submissions also noted that section 625(3) is concerned with risk allocation rather than disclosure and suggested that, if the policy of the provision were to require bidders to disclose that admission and quotation are not guaranteed, this would have been more simply achieved by an additional disclosure requirement in section 636(1).

Fundraising provisions

29. In support of these submissions, ASIC noted that section 625(3) substantially mirrors sections 711(5) and 723(3) in the fundraising provisions. These provisions (along with section 625(3) itself) were originally enacted by the Corporate Law Economic Reform Program Act 1999 (the **CLERP Act**). Prior to the CLERP Act, former section 1031 regulated Quotation Statements in the context of prospectuses in terms which would clearly have applied to a Quotation Statement qualified in the manner of Vanteck's ASX Listing Announcement. ASIC submitted that the replacement provisions were intended to operate as a restatement of former section 1031 and that the different language in section 1031 on the one hand and sections 625(3), 711(5) and 723(3) on the other should be attributed to the simplification of the provision and not any change in policy. In essence it argued that there had been a change in style but not a change in meaning.[3]

30. The Explanatory Memorandum to the CLERP Act provides some guidance on this point, but it is not conclusive. It states:

31. "The Bill will replace current sections 1024E, 1028, 1031 and 1035 to 1043. The Bill will restate the current sections in plain English to clarify their operation and the choices available to the issuer (proposed sections 723, 724 and 725)."

32. Vanteck submitted, however, that sections 711(5) and 625(3) could have a narrower application than former section 1031 and referred to commentary to that effect.[4]

33. It also noted that the Panel had appeared to accept a narrower interpretation of the current provisions in *Re Email Limited* (003/00), where the Panel stated:

34. "The bidder's statement stated that Smorgon was seeking to arrange quotation of the CAPs on the Australian Stock Exchange. Evidence at the conference was that these negotiations were fairly far advanced. However, there is no certainty that the CAPs will be quoted. In order to avoid implication by subsection 625(3) of a non-excludable condition that quotation of the CAPs be arranged, the bidder's statement is very clear that it does not represent that they will be quoted."

35. While this statement is consistent with Vanteck's submissions, it does not represent a decision of the Panel on the proper interpretation of

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[3] Section 15AC of the Acts Interpretation Act 1901 might provide some support for this argument, but it only operates where a later Act expresses the "same idea" as an earlier Act in a "different form of words". It does not assist in determining whether the different form of words is intended to represent the same idea or a different idea.

[4] See for example *"CLERP" Explained* (2000) para 4-565: "It [the requirement in section 711(5)] is similar to that previously contained in former sec 1031(9)(b), but it could have a narrower application (as former sec 1031(9)(b) applied to statements 'in any way' referring to quotation of the securities)."

section 625(3) or the policy underlying the provision. Section 625(3) was not raised as an issue by the parties in the Email matter. While the Panel did invite the parties in that matter to make submissions as to whether section 625(3) applied to Smorgon's offer as a result of the statements made regarding the proposed listing of the CAPs, none of the parties made a submission that the section applied as a matter of construction (although Email contended that the "matter may not be free from doubt"). In these circumstances, the Panel's statement simply reflects what was assumed to be the bidder's rationale for drafting the disclosures in its bidder's statement in the way it did.

The Panel's approach

36. The Panel acknowledges that there is considerable difficulty in determining the meaning and interpretation of section 625(3). It notes that the approach adopted by Vanteck can be reconciled with a literal interpretation of the words used in the section. However, it does not believe that this narrow interpretation would promote the purpose or object of the provision.

37. The Panel agrees with ASIC that section 625(3) is not simply a disclosure provision. It does not require the bidder to disclose either the status of any application for listing or quotation or whether its bid is conditional on the success of that application. Rather, it prescribes a non-waivable condition that prevents the bidder from shifting to accepting shareholders the risk the that the application does not succeed. To this extent, the underlying policy seems to be the same as the policy originally enunciated in the U.K. Report of the Committee on Company Law Amendment 1945, which originally recommended the introduction of a provision regulating Quotation Statements. That policy was intended to ensure that investors would not be left with unlisted securities as a result of assuming that an application for quotation would be successful even though the disclosures made about the listing application may not have been misleading.

38. While it is possible that the provision is intended to apply only where there are statements which imply that the relevant securities will definitely be quoted, that would leave the provision with very little (if any) field of operation.[5] It would allow every bidder to shift to accepting shareholders the risk that the application for quotation may not succeed simply by making an essentially pro forma disclaimer that quotation is in the discretion of the exchange. This would largely deprive the provision of any function.

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[5] A statement in a bidder's statement that an application for quotation will succeed will, in any event, be taken to be misleading if the bidder does not have reasonable grounds for the statement – section670A(2). Since quotation is typically in the discretion of the relevant exchange, bidders could rarely make an unqualified statement that an application **will** succeed.

The Function of the Panel

39. Ultimately, the Panel does not need to make a decision on the proper interpretation of section 625(3) as a matter of law.

40. The relevant functions of the Panel are conferred on it by sections 657A and 657D of the Act. They are the power to declare that unacceptable circumstances exist in relation to a company and the power to make any orders it thinks appropriate to protect the interests of persons affected by those circumstances and to ensure that a bid proceeds as far as possible as if the circumstances had not occurred. Whether unacceptable circumstances exist is to be judged by reference to the principles set out in section 602, to the public interest and to other matters considered relevant by the Panel.

41. Unacceptable circumstances may exist in relation to a company, even if the Act has not been breached.[6] Moreover, the orders the Panel can make do not include orders requiring a person to comply with Chapter 6.[7] These provisions enable the Panel to provide quick remedies during a bid, directed principally to the matters enumerated in subsection 657D(2).

42. In these circumstances, the Panel must have regard to the spirit of the takeover rules in Chapter 6 and may make its decisions on the basis of the policy underlying provisions such as section 625(3) rather than on the basis of the precise legal effect of those provisions.

Materiality of Quotation Statements

43. In a scrip bid, the Panel considers that the quotation of a bidder's shares on the ASX is something which is material to shareholders of Australian target companies particularly in circumstances like these where a majority of those shareholders are resident in Australia. An ASX listing provides Australian investors with a familiar, convenient and, usually, liquid market for their securities. It also attracts ASX disclosure rules and ASX supervision of the listed entity. It would be reasonable to expect that the loss of those attributes of an ASX listing would have a material effect on the price or value of the securities. If a bidder makes a statement that it intends to apply for such quotation, target shareholders may assume the application is likely to be granted and accept the bid. This may be so even though the bidder discloses that quotation is at the discretion of the ASX (which is essentially the case in every such application). Shareholders may then be prejudiced if the bidder fails to proceed with its application or the ASX refuses to quote its shares.

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[6] Subsection 657A(1).

[7] Subsection 657D(2).

Quotation Statements should not be made lightly

44. Whether or not section 625(3) is applicable, the Panel believes it is unacceptable for a bidder to state that it intends to apply for listing, and to seek quotation of its securities, on the ASX when it is not in a position to proceed with the application within a reasonably short period. The Panel considers that the period of 7 days set out in section 625(3) is a good guide.

45. In this case, it is clear that Vanteck made the ASX Listing Announcement before it had resolved a number of material issues that may affect its application. According to its own submissions, it did not obtain confirmation from the Federation group that it would agree to the escrow of its shares until after the date of the ASX Listing Announcement. More than a month later, the issues referred to in paragraph 13(g) were still outstanding. All of these matters should have been addressed well before the ASX Listing Announcement was made.

Timing of Quotation Statements

46. The Panel believes it is clearly preferable for the bidder's decision to seek a listing or quotation to be made before the commencement of the bid period and for the intention to be disclosed in the offer or bidder's statement. However, there may be circumstances in which a bidder may properly make that decision after the commencement of the bid period. If the decision to seek a listing is made after the commencement of the bid period, the Panel believes that it will almost invariably be material information that needs to be disclosed in a supplementary bidder's statement.[8] To the extent this may create difficulties in dealing with section 625(3)(c)(i) (which requires an application for admission to quotation to be made within 7 days after the start of the bid period), this is a matter which the Panel believes should appropriately be dealt with by an application to ASIC prior to the statement regarding listing being made to modify the provision under section 655A of the Act.

47. It is unacceptable for a bidder to seek to avoid the operation of section 625(3) by making an announcement otherwise than in the offer or bidder's statement (as supplemented).

Quotation Statements should be acted upon immediately

48. Once a bidder has disclosed a clear intention to apply for quotation of its securities, it is important that the bidder applies for quotation within a reasonably short period and uses its best efforts to obtain quotation promptly so that accepting shareholders gain the benefits of quotation on a timely basis.

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[8] In addition to the obligation to disclose material information under section 636(1)(m), it should also be noted that section 636(1)(g) requires disclosure of material that would be required in a prospectus under sections 710 to 713, including material that would be required under section 711(5).

49. The Panel does not consider it to be acceptable for a bidder to defer its application on the basis that its announcement only discloses an intention to apply for quotation "in the future". If the bidder is not in a position to prosecute its application expeditiously, the better course is to avoid making any statement of its intentions. It is not acceptable for a bidder to defer an application because of constraints on management time arising as a result of its bid, associated Panel proceedings or the bidder's ordinary business activities. In the present case, the problem was exacerbated because Vanteck had announced that it would make its application "in the **near** future".

The market should be informed of progress

50. Because target company shareholders and the market as a whole will normally expect a bidder to apply for quotation promptly, any delays in the prosecution of the application and any other information that may materially affect the outcome of the application should be disclosed to the market by way of a supplementary bidder's statement. The Panel considers that this information will be material to the holders of bid class securities. In this instance, the Panel considers that Vanteck's failure to issue one or more supplementary bidder's statements advising of the status of its application and the issues affecting the progress of the application (such as the willingness of the Federation group to having its shares in Vanteck placed in escrow) has led to an inefficient and uninformed market.

Vanteck's CDNX listing

51. The Panel does not consider that Vanteck's existing CDNX listing materially alters the issues under consideration. The Panel acknowledges that Vanteck's listing on the CDNX provides a market for Vanteck securities which is subject to supervision by the CDNX. However, the policy considerations outlined in these reasons apply whenever a bidder announces an intention to apply for the quotation of its securities on the ASX. While it is increasingly becoming more straightforward for Australian retail investors to transact on overseas stock markets, if a bidder decides to hold out the prospect of a listing on the ASX (which remains the primary trading exchange for Australian retail investors) in the context of a bid,, it must comply with the policy of section 625(3) irrespective of any other listing which it has already obtained. The relative merits of the existing listing and an ASX listing are not relevant to this policy.

Quotation Statements regarding foreign listings

52. Vanteck questioned whether the same policy considerations would apply if a bidder listed on the ASX announced an intention to apply for quotation of its securities on a foreign stock market during the course of a bid. The Panel expresses no view on this issue. It notes that section

625(3) expressly deals with Quotation Statements relating to stock markets "whether in Australia or elsewhere", but it acknowledges that in some circumstances the policy considerations regarding a listing on a foreign exchange may be different. However, the current proceedings concern a statement regarding a listing on the ASX and the Panel considers this statement squarely attracts the policy of section 625(3).

DECISION

53. The Panel decided to declare the following circumstances to be unacceptable circumstances, namely that:

    (a) Vanteck made offers to acquire all of the issued shares in Pinnacle on 30 July 2001;

    (b) on 7 September 2001, Vanteck announced its intention to list, and to seek quotation of its securities, on the ASX in the near future;

    (c) Vanteck did not prepare a supplementary bidder's statement disclosing its intention to list, and to seek quotation of its securities, on the ASX;

    (d) Vanteck has not applied for admission to the official list of the ASX or for quotation of its securities;

    (e) Vanteck has not prepared a supplementary bidder's statement disclosing that it has not applied for admission to the official list of the ASX or for quotation of its securities; and

    (f) Vanteck has not informed the market of its progress, or lack of progress, in applying for admission to the official list of ASX or for quotation of its securities.

The declaration is set out in Annexure 1.

ORDERS

54. At the request of Vanteck, the Panel agreed to hold a conference on Tuesday 16 October to explain the Panel's decision to make a declaration under section 657A and to give the parties an opportunity to make oral submissions on the terms of the final orders to give effect to that decision.

55. After receiving both oral and written submissions from the parties, the Panel accepted ASIC's submission that it would not be appropriate to make an order making the Bid subject to a Quotation Condition. Accordingly, the Panel decided to make orders giving Post Announcement Acceptors the opportunity to withdraw their acceptances of the Bid should they so choose. The Panel also ordered Vanteck to make an application for quotation within 14 days, to issue a supplementary bidder's statement informing the market of the Panel's

decision and the timetable for its listing application and to extend its Bid.

56. Vanteck submitted that it should only be required to extend its Bid for the period in which Post Announcement Acceptors have a right to withdraw their acceptances. However, ASIC submitted that this would not give effect to the policy of section 625(3) because Post Statement Acceptors and the remaining Pinnacle shareholders who have not accepted the Bid would then be required to decide whether to accept (or to confirm their acceptance of) the Bid without knowing whether Vanteck's application for quotation would succeed. ASIC submitted that the Bid should be extended until after the outcome of Vanteck's listing application is known so that these shareholders would not have to assume the risk that the application does not succeed.

57. The Panel acknowledged that Vanteck might be prejudiced by an order requiring it to extend its Bid for what may prove to be a lengthy period although, because the Bid was already unconditional, the possibility of a defeating condition being triggered was not relevant. However, it decided to make the order sought by ASIC in order to give effect to the policy of section 625(3). It also noted that the length of the period is largely within Vanteck's control in that Vanteck can control how vigorously it progresses its application.

58. ASIC also submitted that the Panel should order a postponement of the general meeting of Pinnacle shareholders convened for Monday 22 October to allow time for shareholders to consider the information to be disclosed in Vanteck's supplementary bidder's statement. The Panel decided not to make this order. It was provided with evidence that two Post Announcement Acceptors (whose shares represented approximately 13.39% of Pinnacle's ordinary shares) had confirmed their acceptances irrespective of any ASX listing. Accordingly, the shares subject to withdrawal rights would represent less than 2% of Pinnacle's ordinary shares. In these circumstances, the Panel decided that it was preferable to allow the meeting to proceed. The Panel ordered that Vanteck's supplementary bidder's statement be issued no later than Thursday 18 October and also ordered that Vanteck not exercise any voting or other rights attaching to shares subject to withdrawal rights unless it received a written confirmation of the acceptance from the relevant shareholder. The orders are set out in Annexure 2.

CARETAKER DIRECTOR LETTER

59. ASIC submitted that by sending the Caretaker Director Letter to Pinnacle's directors Vanteck had sought to restrain Pinnacle's Board from taking action in relation to Pinnacle's business which restricted their ability to promote an efficient and competitive market for Pinnacle

shares.[9] ASIC submitted that this was contrary to one of the purposes of Chapter 6 of the Act as set out in section 602(a).

60. ASIC submitted that an inefficient market may operate for a period where a company is restricted in promoting the value of its underlying assets, particularly where that restriction is imposed during a contested takeover. ASIC submitted therefore that by Vanteck sending the Caretaker Director Letter, unacceptable circumstances had arisen.

61. ASIC also submitted that it was unacceptable for Vanteck also to have referred to the Caretaker Director Letter and Vanteck's view that Pinnacle's directors were in "caretaker mode" in its supplementary bidder's statement dated 20 August 2001 (**Vanteck Supplementary**).

62. In its submissions Pinnacle stated that the Caretaker Director Letter had no effect on the actions its Board considered it could or could not take in respect of Pinnacle's business. However, Pinnacle also asserted that from 20 August 2001, when Vanteck convened the Pinnacle EGM pursuant to section 249F of the Act, Pinnacle's Board was nevertheless already in caretaker mode due to the continuation of Reliable Power Inc.'s bid, the decisions of the Pinnacle No.5 and No.8 Panels and the existence of Vanteck's unconditional bid.[10]

63. The Panel does not consider that the sending of the Caretaker Director Letter, or description of it in the Vanteck Supplementary, gives rise to unacceptable circumstances. The Panel does not consider that the assertions made by Vanteck as to the ability of the Pinnacle directors to exercise their duties had any effect on the market for shares in Pinnacle in the context of the Bid. The Panel notes that Pinnacle's Board does not consider that the Caretaker Director Letter had an effect on their ability to perform their duties. Further, the Panel notes that the combination of events in relation to Pinnacle over the last few months has prevented Pinnacle from pursuing a strategy for commercialisation of its technology in any event. This is a fact of which all shareholders are well aware.

64. However, the Panel cautions bidders and targets against adopting unreasonably aggressive and threatening approaches to communications between them. The Panel considers it is even more undesirable for persons who should be demonstrating temperate and considered behaviour to be placing this type of information before target

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[9] Some of the actions which Vanteck alleged in the Caretaker Letter Pinnacle was restricted from taking include share allotments or placements, soliciting a takeover offer from, or making a takeover offer for, another company, altering any commercial arrangements, entering into any new transactions or management agreements and appointing any new directors to the Board (other than Vanteck approved candidates).

[10] Pinnacle submitted that if it took action contrary to Vanteck's interest, because the Bid is unconditional, Pinnacle risked Vanteck being able to withdraw its offers under section 652B of the Corporations Act.

shareholders during a contested takeover bid and that any such correspondence, if required, should be presented in a balanced and non-emotive manner. The Panel's primary concern in these cases is to ensure that, consistent with the principles set out in section 602(a), shareholders are provided in a timely manner with all material information on which to assess the Bid in a manner that does not potentially mislead them.

65. To the extent that there is debate over the application of the principles of caretaker directors under Australian law (and the scant case law suggests that there is limited application), this is a matter between the directors of the bidder and the target. It is not an issue that should be put into the minds of shareholders when they are considering whether to accept an offer.

66. It is also important to note that companies should not be paralysed simply due to the existence of a takeover bid. While the Panel's decision in the Pinnacle 8 matter makes it clear that certain transactions may need shareholder approval in the context of a takeover, directors of a target company remain bound by their duties to act in the best interests of the company. They should not cease to pursue transactions which it is in the interests of the company to pursue simply because of the existence of a takeover. Even if the transaction is one which may require shareholder approval, it may be in the interests of an efficient, competitive and informed market for the target board to seek the transaction out and to place it before shareholders for approval.

COSTS

67. We decided not to make any orders as to costs in relation to the issues considered in this part of the Pinnacle No.9 proceedings.

FINAL MATTERS

68. We gave leave for the parties to be represented by their commercial solicitors. We thank all parties for their submissions and for their attendance at the conference.

Marian Micalizzi
President of the Sitting Panel
Decision dated 17 October 2001
Reasons published 7 November 2001

Annexure 1

Corporations Act
Section 657A
Declaration

Whereas:

A. Vanteck (VRB) Technology Corp (**Vanteck**) made offers to acquire all of the issued shares in Pinnacle VRB Limited (**Pinnacle**) on 30 July 2001;

B. On 7 September 2001, Vanteck announced its intention to list, and to seek quotation of its securities, on the Australian Stock Exchange (**ASX**) in the near future;

C. Vanteck did not prepare a supplementary bidder's statement disclosing its intention to list, and to seek quotation of its securities, on the ASX;

D. Vanteck has not applied for admission to the official list of the ASX or for quotation of its securities;

E. Vanteck has not prepared a supplementary bidders statement disclosing that it has not applied for admission to the official list of the ASX or for quotation of its securities; and

F. Vanteck has not informed the market of its progress, or lack of progress, in applying for admission to the official list of ASX or for quotation of its securities

under section 657A of the Corporations Act, the Takeovers Panel declares that the circumstances set out in recitals A to F are unacceptable circumstances in relation to the affairs of Pinnacle.

17 October 2001

Marian Micalizzi
President

Annexure 2

TAKEOVers PANEL
CORPORATIONS ACT SECTION 657d
orderS

Pinnacle VRB Limited
Application by VANTECK (VRB) TECHNOLOGY CORP

The Takeovers Panel (the **Panel**) has declared under section 657A of the Corporations Act that unacceptable circumstances exist in relation to the application by Vanteck (VRB) Technology Corp (**Vanteck**) dated 21 September 2001. The circumstances (the **Relevant Circumstances**) declared to be unacceptable circumstances relate to the takeover offers (the **Bid**) made by Vanteck for shares in Pinnacle VRB Limited (**Pinnacle**), Vanteck's announcement on 7 September 2001 of an intention to list, and to seek quotation of its securities, on the Australian Stock Exchange (**ASX**), Vanteck's failure to have made an application to ASX for such listing or for quotation of its securities and Vanteck's failure to make adequate disclosures in relation to these matters (whether by supplementary bidder's statement or otherwise).

PURSUANT TO SECTION 657D OF THE CORPORATIONS ACT, THE PANEL ORDERS THAT:

1. Vanteck make an application for admission to the official list of Australian Stock Exchange Limited (**ASX**) and for quotation of Vanteck's ordinary shares as soon as practicable and in any event within 14 days after the date of these orders and thereafter do all things reasonably required of it in order to be admitted to the official list of ASX and to obtain quotation of its securities on ASX;

2. Any person (each, a **Relevant Person**) who accepted the Bid on or after 7 September 2001 and before 22 October 2001 (the **Relevant Period**) may withdraw their acceptance of the Bid. To withdraw their acceptance, the Relevant Person must:

   (a) give Vanteck notice within 1 month beginning on the day after the day on which the Relevant Person receives a copy of the notice from Vanteck referred to in order 4; and

   (b) return any consideration received by the Relevant Person for accepting the Bid;

3. Vanteck and each Relevant Person who wishes to withdraw their acceptance of the Bid comply with the provisions of section 650E of the

Corporations Act as if the withdrawal were a withdrawal under that section;

4. On or before 18 October 2001, Vanteck send to each Relevant Person in accordance with sections 648B and 648C of the Corporations Act a notice informing the Relevant Person of their right to withdraw their acceptance of the Bid in accordance with these orders.

5. As soon as practicable, Vanteck send to ASX a notice to the effect that Relevant Persons may withdraw their acceptances of the Bid in accordance with these orders;

6. On or before 18 October 2001, Vanteck prepare a supplementary bidder's statement setting out:

   (a) The terms of these orders;

   (b) Vanteck's proposed timetable for listing and quotation of its ordinary shares; and

   (c) Any other material information known to Vanteck in relation to its proposed application to ASX and its prospects;

7. Vanteck comply with the provisions of section 647 of the Corporations Act in relation to the supplementary bidder's statement on or before 18 October 2001;

8. Vanteck extend the offer period for the Bid so that the offer period does not end until not less than 7 days after Vanteck's ordinary shares are admitted to quotation by ASX or such quotation is withdrawn or refused;

9. If Vanteck wishes to withdraw its application to ASX, Vanteck give the Panel a notice in writing to that effect not less than 7 days before withdrawing its application; and

10. At any time when a Relevant Person may withdraw their acceptance of the Bid, Vanteck not exercise any voting rights or other rights attached to the fully paid ordinary shares in Pinnacle which were acquired by it as a result

of acceptances of the Bid by the Relevant Person unless the Relevant Person has provided Vanteck with a written notice that it does not wish to withdraw its acceptance of the Bid.

Dated: 17 October 2001

Signed:

MARIAN MICALIZZI