

In the matter of BRICKWORKS LTD (No. 2)

An application under sections 657A and 657D of the Corporations Law by Brickworks Limited for a declaration of unacceptable circumstances and orders concerning a takeover bid by GPG (No. 4) Pty Ltd for all of the ordinary shares in Brickworks Limited

1. The sitting Panel comprises Les Taylor (sitting President) Marian Micalizzi (sitting Deputy President) and Louise McBride.
2. These are our reasons for our decision to refuse the application under section 657A and 657D of the Corporations Law by Brickworks Limited (**Brickworks**) for a declaration and orders in relation to a takeover bid by GPG (No. 4) Pty Limited (**GPG**) for all of the ordinary shares in Brickworks.¹
3. We have given reasons, although we made no declaration or orders and although the bid has closed without any change in control of Brickworks, because GPG has indicated that it may make a similar bid in the future.

Background

4. This matter principally concerns the bid consideration offered under the GPG bid. The bid consideration was \$100 and 4 shares in Washington H Soul Pattinson & Company Limited (**Soul Pattinson**) for every 5 shares in Brickworks.
5. Soul Pattinson holds 49.84% of the shares in Brickworks and Brickworks holds 42.85% of the shares in Soul Pattinson. These cross-shareholdings have existed for about 30 years. The companies have two directors in common, who have relevant interests in additional shares. Each company has only ordinary shares on issue.
6. The scrip element of the bid consideration is roughly equal to the number of Soul Pattinson shares in which an offeree has an indirect interest as a Brickworks shareholder.² In effect, GPG proposed to break up the cross-shareholdings, distribute Brickworks' holding in Soul Pattinson to the Brickworks shareholders and pay them \$20 per share cash for the remainder of Brickworks' investments and operations.

¹ Findings of fact in these reasons are based on submissions and on the bidder's and target's statements. Statutory references are to the Corporations Law, as in force at September 2000.

² The ratio of Soul Pattinson shares per Brickworks share offered under the bid is 0.8. This is a little higher than 0.776 which is the ratio of the number of shares in Soul Pattinson which Brickworks holds (10,225,783) to the number of Brickworks shares on issue (13,172,360).

7. GPG made its off-market bid for all of the shares in Brickworks on 2 May 2000. The bid was originally due to close on 21 June, but was extended on 13 June and finally closed on 21 September 2000.

Purpose and Effects of the Bid

8. The purpose and effects of the bid are described in a letter by Sir Ronald Brierley, GPG's Chairman, which accompanied the bidder's statement.

“Based on the latest market price (as at 28 April 2000) of \$41 for Soul Pattinson shares, the nominal value of the offer is \$52.80 for each Brickworks share. However, we consider the potential value is somewhat higher. The release of Soul Pattinson from the unproductive and outdated shareholding relationship with Brickworks will enhance its attraction to institutional investors and improve the saleability of the shares.

If Soul Pattinson accepts the offer (which is necessary for it to succeed in its present form) it will receive 5.25 million of its own shares, which, if cancelled or distributed to shareholders, will increase proprietors' equity by 28%. In these circumstances, (and supported by upgraded reporting and accountability) it is not difficult to envisage a significant improvement in Soul Pattinson's market rating (which has already increased by 15% since the GPG offer was announced).

The shareholding in Soul Pattinson is, by far, Brickworks' largest asset and therefore you already have a substantial indirect exposure to its diverse activities and are no doubt fully aware of its importance to the overall value of Brickworks itself. The merits of the GPG offer are entirely a matter for individual judgement and decision but we are strongly of the view that the two components provide distinct advantages to Brickworks shareholders-

1. The release of Soul Pattinson shares enables you to obtain the full direct benefit of the company's major asset, and
 2. The cash content, if reinvested at standard bank deposit rates, will show a return well in excess of that ever received from the company's clay brick operations.”
9. We have quoted the whole of the relevant passage of the letter, because it is the only discussion of any substance of the merits of the bid provided by either GPG or Brickworks.

Failure of the Bid

10. Amongst other conditions, the bid was conditional on:
 - (a) GPG receiving enough acceptances to compulsorily acquire the remaining shares in Brickworks;
 - (b) approval under the *Foreign Acquisitions and Takeovers Act 1975*; and
 - (c) approval by a general meeting of GPG's holding company, Guinness Peat Group plc (***GPG plc***), in accordance with the listing rules of the London Stock Exchange.
11. The bid failed, because none of these conditions was satisfied and none of them was waived by GPG.
12. The number of acceptances received fell far short of those required. The necessary meeting of GPG plc was not convened. On 13 September, the Treasury made an order under the *Foreign Acquisitions and Takeovers Act 1975*, preventing GPG from acquiring the shares in Soul Pattinson held by Brickworks, which would confer an indirect interest in the operator of a television station.
13. GPG announced that it would allow the bid to expire. In its announcement, GPG stated that it intends to proceed with a renewed bid for Brickworks on the terms of this bid or revised terms.

Disclosure in the Bidder's Statement about Soul Pattinson

14. GPG's bidder's statement is a slender document. The only facts it contains about Brickworks are the number of shares Brickworks has on issue, the number of those shares held by GPG and the number of Soul Pattinson shares Brickworks holds. It contains no information about Soul Pattinson, but GPG offers to provide a copy of Soul Pattinson's most recent annual report. There is more information (though still not a lot) in Sir Ronald Brierley's Chairman's letter, quoted above.
15. On their own, the bidder's statement, offer and Chairman's letter clearly do not provide enough information for a shareholder to make an informed decision whether to accept the GPG bid.
16. Annual reports of Brickworks and Soul Pattinson have been sent to their respective shareholders. Those and other releases have been made available to the market.
17. Brickworks submits that unacceptable circumstances have arisen because of deficiencies in the information in the bidder's statement and that GPG should have provided information about:

- (a) the tax consequences of the bid, including whether scrip rollover relief would be available;
- (b) the Soul Pattinson shares being offered as consideration, including the effect of completion of the bid on Soul Pattinson and those shares;
- (c) the basis for the statement by Sir Ronald Brierley in his Chairman's letter that the potential value of Soul Pattinson shares is higher than their market price at 2 May 2000; and
- (d) whether the bid is in the interests of Brickworks shareholders.

We largely agree, except with the last proposition.

Information about Soul Pattinson not required under Section 636

- 18. Paragraph 636(1)(g) requires a bidder's statement to comply with sections 710 to 713³ where:
 - (a) the bidder offers scrip in a body; and
 - (b) that body is the bidder itself or is controlled by the bidder.⁴
- 19. Because GPG offered scrip issued by Soul Pattinson, which GPG does not control, paragraph 636(1)(g) did not apply the prospectus provisions to its bid.
- 20. Paragraph 636(1)(m) requires a bidder to provide any other information which is known to it and relevant to a decision whether to accept a bid. It does not, however, require information about the value of securities offered as consideration.⁵ Because of this exclusion, paragraph 636(1)(m) does not require a bidder to comply with the prospectus provisions or to provide equivalent information, where paragraph 636(1)(g) does not.
- 21. It follows that GPG was not required to comply with section 636 in relation to information about the Soul Pattinson scrip it offered as consideration. We next consider whether section 602 requires it to provide more information than it did.

Our Function

- 22. This is an unusual takeover bid and by takeovers standards the information needs of the offerees in relation to it are unusual. Chapter

³ These sections are in Chapter 6D and relate to the contents of prospectuses.

⁴ The policy of requiring prospectus disclosure only where the offeror either is or controls the issuer of the scrip parallels the prospectus provisions: compare section 707.

⁵ Subparagraph 636(1)(m)(iii).

6 is designed to cover run of the mill takeovers, but it is not designed to deal with every possible takeover.⁶

23. Parliament has supplemented the Chapter by giving the Panel the function of declaring that unacceptable circumstances exist in a particular case and of making remedial orders, *whether or not there has been a contravention of the Corporations Law*.⁷ On occasion, that function will require a Panel to order a bidder to provide information over and above the requirements of section 636. This will happen if anomalous cases arise, where section 636 does not require a bidder to provide as much information as offerees reasonably need to make a decision on a particular bid.⁸
24. That is to say, in administering Part 6.10, we are required to have regard to the policy of section 602 (that offerees be provided with the information they require to make a decision on a bid and that control transactions take place in an efficient, informed and competitive market) in addition to the specific requirements of section 636.

Whether there is Insufficient Information about Soul Pattinson

25. In our view, in the particular circumstances of this bid, offeree shareholders were not provided with enough information about the value of the Soul Pattinson shares which would have been transferred to them, had the bid succeeded, taking into account the state of affairs which would then have existed. To make an informed decision, they needed to be provided with much more information on the effects of breaking up the cross-shareholdings.
26. If the bid had succeeded, the cross-shareholdings between Brickworks and Soul Pattinson would have been broken up, by sale or cancellation. Soul Pattinson would have disposed of a material asset, for cash or (less likely) shares in itself which it would have had to cancel or distribute to other shareholders.
27. Offerees would have become shareholders in Soul Pattinson. At the same time, there would have been material changes in the balance sheet of Soul Pattinson. In GPG's view, there would have been a material change in the value of its shares. They needed to know the effect of the breakup on Soul Pattinson, as well as historical

⁶ A scheme of arrangement is a more usual vehicle for a demerger. Compare the documents issued in this bid with the detail which would be usual in an explanatory statement for a scheme.

⁷ Subsection 657A(1).

⁸ A common example which paragraph 636(1)(g) does not cover is a subsidiary offering scrip in its holding company, by arrangement with the holding company.

information about that company and the current market price of its shares.⁹

28. The sort of information which could be provided, and how useful it could be, are illustrated by Sir Ronald Brierley's Chairman's letter, quoted above. It sketches a compelling argument for accepting the bid. Much could be said in support or refutation of it. The earnings, operations and investments of both Brickworks and Soul Pattinson could be set out and compared with the elements of the bid consideration. The benefits and detriments of breaking up the cross-shareholdings, as regards that company's assets, financial position, value, profitability, accountability, tax, dividends, franking credits, rollover scrip bid relief and other matters could be discussed. None of that material is in either the bidder's statement or the target's statement.
29. Information about the effects of breaking up the cross-shareholdings on the value of Soul Pattinson shares is not available from other public sources. GPG clearly has views on these issues, and it would not be onerous to require it to explain those views and their basis, particularly in the light of the contents of the Chairman's letter.
30. In our view, had the bid proceeded, a strong argument could be made that GPG should have provided such information as it had about Soul Pattinson and the effects of the bid on that company, along the lines of section 713.
31. If it renews the bid, GPG should give consideration to:
 - (a) offering to provide offerees with copies of Soul Pattinson's releases to the market since the issue of the annual report, including the half-yearly report at 31 December 1999, as well as the annual report for 1998-1999, which it has already offered them; and
 - (b) discussing the effect on Soul Pattinson of disposing of its holding in Brickworks, even if that discussion is likely to need supplementation when and if Soul Pattinson decides to accept and how it will do so.
32. The effects on Soul Pattinson would have depended on the method that company adopted to unwind the cross-shareholdings. As discussed below, a straightforward method would have been to sell the Brickworks shares for cash, and the effects of that sale could have been

⁹ Previous Panels have insisted that a bidder provide information about the effect of the bid on the value of securities being offered, and that it is not enough that historical information about them is available, see *Re Email Limited (No. 3)* paragraph 108 and *Re Infratil Limited (No. 2)* paragraphs 40 to 46.

described fairly easily. Any other choice might have required a supplementary statement by the bidder, the target or both.

Tax Implications of Acceptance

33. The bidder's statement does not deal with the tax implications of the bid succeeding. We would not expect it to deal with the tax affairs of particular offerees, but it is important that it sets out the framework in which offerees should obtain advice about the tax effects of the bid on them. Scrip rollover relief is a clear example of this: if available, it applies to the bid as a whole, but each offeree needs to make their own assessment of its relevance to them.¹⁰

Target's Statement

34. The issue is not simply whether GPG has discharged its obligations under section 636. It is whether unacceptable circumstances have occurred because target shareholders have insufficient information about the bid or because the acquisition of shares in Brickworks will not take place in an efficient, informed and competitive market.
35. While we must consider GPG's contribution to the information available to the target shareholders and the market, we have to consider the totality of that information, which includes Brickworks' own contribution.
36. If the bidder's statement does not provide the information offerees need, the target's statement does not contain it either, notwithstanding the target's independent obligation to provide much of the same information. A target's statement should contain all of the information available to the target company's board which holders of bid class securities and their advisers would reasonably require to make an informed assessment whether to accept an offer under the bid.¹¹
37. Shareholders were entitled to expect the target's statement to contain an informed and reasoned appraisal of the issues raised by Sir Ronald Brierley's Chairman's letter i.e. appraisals of whether offerees are better off holding Soul Pattinson shares directly or through Brickworks, and of the cash element of the consideration as a price for the rest of Brickworks.
38. Brickworks' target's statement contains no such analysis and almost none of the materials for such an analysis. It does not rely on Soul Pattinson's decision not to accept the bid, which was published only after the target's statement was released.

¹⁰ This issue was dealt with in the Panel decision in *Re Infratil Limited (No.2)* paragraphs 56 to 58.

¹¹ Section 638(1).

39. The target's statement contains a recommendation not to accept the bid 'at this time'.¹² It mentions the availability of Brickworks' published annual and half-yearly reports and that Soul Pattinson has recently declared and paid ordinary and special dividends totalling 80 cents per share.
40. It argues, *inter alia*, that the bid was futile, because Soul Pattinson could not accept it.¹³ This argument was only tangentially relevant to Soul Pattinson's options, if that company had chosen to use the bid as an opportunity to break up the cross-shareholdings with Brickworks. It also argues that GPG could not perform its obligations, should the bid succeed. We discuss this argument below.

Cash Substantiation

41. Brickworks submitted that GPG should have disclosed how it intended to arrange to buy Soul Pattinson shares from Brickworks. We discuss below whether GPG could have bought the shares within 21 days of the bid closing. The price would have depended on the market price of Soul Pattinson shares at the time.
42. With one exception, additional details of how GPG bought the shares would not have affected Brickworks shareholders, so they would not have been material to the shareholders' decisions.
43. The exception is that GPG did not state its source of funds to buy the Soul Pattinson shares from Brickworks. At \$37.50 per share,¹⁴ the amount would have been about \$355 million. In contrast, GPG set out in its bidder's statement the source of the \$20 per share cash element of the consideration, as required by paragraph 636(1)(f) (about \$240 million). Brickworks submits that GPG should have disclosed the source of the funding to buy the shares.
44. We agree. Paragraph 636(1)(f) does not require GPG to disclose the source of the cash to buy the Soul Pattinson shares, because that cash is not offered to Brickworks shareholders as consideration. The information should have been disclosed under paragraph 636(1)(m), however, as GPG's ability to obtain these funds is just as relevant to offerees' prospects of receiving their consideration as GPG's ability to find the cash element of the bid consideration.¹⁵
45. Brickworks submitted that GPG and its related companies did not have access to sufficient funds to pay for the shares. Brickworks would have

¹² Refer to paragraphs 2.1 to 2.3 and Appendix 2 of the target statement.

¹³ Refer to paragraphs 2.1 to 2.3 and Appendix 2 of the target statement.

¹⁴ An example given by Brickworks, based on the market price of Soul Pattinson shares before GPG's bid was made. The market price at 28 April cited by Sir Ronald Brierley was \$41.

¹⁵ Compare *Savage Resources Ltd v Pasmenco Investments Pty Ltd* (1998) 30 ACSR 1 at 5.

been almost a wholly-owned subsidiary of GPG when it sold the Soul Pattinson shares to GPG.¹⁶ In that situation, it may have been prepared to lend the purchase money back to GPG.

GPG plc Meeting

46. The bid was subject to a condition requiring approval by shareholders of GPG plc and the bidder's statement said that GPG plc had undertaken to hold a meeting to satisfy this condition. The bid closed 5 months later, without the resolution having been put to a meeting. Brickworks submitted that this was unacceptable, either because GPG was 'unable to satisfy the conditions of its offer' or because it failed to disclose material information, namely the information which would have to be provided to the shareholders of GPG plc.
47. This is potentially a serious issue, because an associate of GPG in effect retained an option as to whether the bid could succeed. In addition, GPG was probably obliged to procure the meeting to be held under an implied term of bid contracts. A situation of this kind could lead to unacceptable circumstances under paragraph 602(c), by denying offerees reasonable opportunities to participate in the benefits accruing to shareholders under a bid.
48. In general, we expect that where a bid is subject to a condition requiring approval by shareholders of the bidder or of a related company, the bidder will have the right to require that meeting to be held, the bid will initially be open for long enough for the meeting to be held and the meeting will be convened without delay.
49. There is no point in our now requiring the meeting to be held. There was already insufficient time to hold the meeting before the close of the bid when Brickworks' application was made.¹⁷
50. The argument that GPG failed to disclose material information which would need to be disclosed in a notice of meeting of GPG plc is speculation.

Bluffing Bid

51. GPG offered shares in Soul Pattinson as part of the consideration for Brickworks shares. The bid was subject to a minimum acceptance condition. Soul Pattinson itself, however, was one of the offerees, and the minimum acceptance condition could only be satisfied if Soul Pattinson or someone else accepted the bid for the Brickworks shares held by Soul Pattinson.

¹⁶ Depending on the progress of compulsory acquisition.

¹⁷ There would be no point in holding it after the bid closed, as the condition could only be satisfied before that time: section 650G.

52. Brickworks submitted that these facts give rise to unacceptable circumstances because the bid could not succeed unless Soul Pattinson accepted the offer made to it, but Soul Pattinson was legally unable to accept GPG's offer, because it could not acquire shares in itself, or agree to do so.¹⁸
53. We reject this submission. If Soul Pattinson had chosen to exit the cross-shareholdings, it had a number of ways of doing so, and the bid would have assisted with some of them:
- (a) Soul Pattinson could have sold its Brickworks shareholding for cash to persons who were free to accept the bid;¹⁹
 - (b) Soul Pattinson could cancel or buy back some or all of the shares now held by Brickworks, for cash or reciprocally with Brickworks. The bid would need to have been varied to accommodate this.

Ability to provide Scrip Consideration

54. GPG did not hold enough Soul Pattinson shares to satisfy the bid contracts, but it stated in the bidder's statement that Brickworks itself held enough Soul Pattinson shares and that GPG would buy them from Brickworks, 'at market value', in time to perform the contracts.
55. Brickworks submits that GPG may have been unable to perform its obligations under bid contracts even if the bid had succeeded, because GPG would have needed the approval of remaining Brickworks shareholders to implement its proposal. It adds that this gave rise to unacceptable circumstances, either because GPG had no basis for believing that it could perform its obligations under the bid contracts, or because it did not disclose that basis.
56. We reject this submission. Had the bid succeeded, GPG should have been able to buy the shares within 21 days of the close of the bid,²⁰ unless it had to obtain approval for the purchase at a general meeting

¹⁸ Section 259A. Section 259C prevents a subsidiary of Soul Pattinson from accepting an offer under which the consideration includes Soul Pattinson shares. Paragraph 259A(c) contemplates a company acquiring shares in itself 'under a court order', but there is no reason to expect such orders to be made, except in cases such as oppression actions and disputed allotments, where courts have in the past ordered companies to acquire their own shares.

¹⁹ The usual market risk in breaking up a large parcel is reduced because the bid underwrites the market price. In addition, there is standard ASIC relief designed to reduce the market risk in selling down a large parcel piecemeal, by allowing the shares to be sold in one line to a broker who on-sells in lots of less than 5%.

²⁰ So as to comply with subparagraph 620(2)(a)(ii).

of Brickworks held after the close of the bid and before GPG completed compulsory acquisition.²¹

57. GPG could have avoided a meeting of Brickworks being held to approve the purchase under the Listing Rules of Australian Stock Exchange Limited. Once GPG issued notices of compulsory acquisition for outstanding shares in Brickworks, it could have applied to have Brickworks delisted, so that it would not have to hold a meeting to comply with Listing Rule 10.1.²² This should have been readily granted, as there are no quoted securities of Brickworks, other than the bid class shares. A company can normally be delisted in these circumstances in less than 21 days.
58. If GPG paid the market price for Brickworks' shares in Soul Pattinson, as it said it would, it could also have avoided any need for Brickworks to hold a meeting under the related party transaction provisions of the Corporations Law.²³

Technical Refinement

59. Under section 661A, a bidder can only compulsorily acquire remaining bid class securities if it has 'acquired at least 75% (by number) of the securities that the bidder offered to acquire under the bid'. GPG's minimum acceptance condition reproduces this wording.
60. Brickworks submitted that a person does not *acquire* a share for this purpose until they provide the consideration for the share. It follows that GPG cannot issue compulsory acquisition notices until it has completed the purchase of the Brickworks shares for which it has received acceptances, by providing the bid consideration for them. If it cannot provide the bid consideration until it has acquired the shares to which the bid contracts relate, it can neither complete the bid contracts nor issue compulsory acquisition notices.
61. That puts a lot of weight on one of the possible readings of 'acquire' to reach a result that Parliament is unlikely to have intended. References to acquisition of shares in Chapters 6 and 6A are sometimes to the completed acquisition of the legal and beneficial interest in a share and sometimes to the acquisition of an interest: compare section 666B and item 1 of section 611.
62. A normal and proper use of a minimum acceptance condition is to ensure that the bidder can proceed to compulsory acquisition after the

²¹ While section 661A allows a bidder to issue notices of compulsory acquisition before the bid closes, GPG could not have relied on being able to do so before its bid closed.

²² This would have required GPG to maintain the minimum acceptance condition in the bid.

²³ Section 210.

close of the bid.²⁴ The terms of minimum acceptance conditions are commonly aligned with those of section 661A. It is also normal, and contemplated by Chapter 6, that shares for which acceptances are received under a conditional bid are paid for after the close of the relevant bid.

63. If a share is not acquired for the purposes of subparagraph 661A(1)(b)(ii) until it has been paid for, in the ordinary course a bidder does not acquire shares under a conditional bid until after the instant at which the relevant bid closes. But a minimum acceptance condition operates to avoid any bid contracts at that moment, unless it has already been satisfied.²⁵
64. Accordingly, on this view any bidder making a bid subject to a minimum acceptance condition which reflects section 661A can only ensure that it can compulsorily acquire shares (or even retain the shares for which it receives acceptances) by paying for most acceptances before its bid closes. This result is implausible and uncommercial. It does not depend on a bidder needing to make unusual arrangements to perform bid contracts.

Parcel-Splitting and Section 618

65. Brickworks submitted that GPG's offers did not comply with section 618 of the Corporations Law, which requires each offer to relate to all shares held by the offeree, or a fixed proportion of those shares. Each offer was to acquire 'all or any lesser number of your holding of Brickworks shares'.
66. We reject this submission. GPG having elected to make a full bid, section 618 requires it to offer to acquire all of every parcel of shares in the bid class. GPG has offered to acquire all of every parcel of shares in the bid class, on the same terms; terms which do not vary with the level of acceptances, whether from particular shareholders or overall. In addition, GPG offers to acquire part of each parcel, if the offeree chooses to sell part. This is common practice,²⁶ long accepted, and does not offend against the letter or the policy of section 618.

Technical Refinement

67. In oral submissions, Brickworks argued that GPG contravened subsection 606(4), because:
 - (a) it invited offerees to make counter-offers to sell it some of their shares; and

²⁴ Compare paragraph 602(d).

²⁵ Section 650G.

²⁶ Though mainly in bids which are not dependent on compulsory acquisition.

- (b) acquisitions arising from GPG's acceptance of counter-offers are not permitted by item 1 of section 611, which relates only to acquisitions resulting from acceptances by offerees of the bidder's offers.
68. On a plain reading, GPG's offer and acceptance form indicate that a binding contract would result from an acceptance lodged by an offeree, whether for some or all of the shares held by that offeree.²⁷ There is no reason for the reasonable bystander to doubt that GPG intended to be bound by an acceptance for some of an offeree's shares. The terms of a contract resulting from an acceptance for a specified number of shares are no less certain than those of any other bid contract.
69. Under general contract law, an offeror has the right to accept or reject a counter-offer. Because the terms of the offer excluded such a right, they were inconsistent with an acceptance for some of an offeree's shares being strictly a counter-offer. Accordingly, GPG made an offer in the strict sense for some of each offeree's shares, as well as an offer for all of them.

Policy Elaboration

70. Brickworks added in oral submissions that it is important for offerees to know whether they may be a 'locked in' minority at the close of the bid, because the bidder holds a majority of the shares in the target, but has less than 90% of the bid class. If the bidder and its associates have relevant interests in 90% of the bid class shares at the close of the bid, the bidder must offer to buy out remaining shareholders under section 662A.²⁸
71. We agree with this principle.²⁹ The reason why some offerees are at risk of being locked in is not that other offerees may split their parcels, however: it is that a bidder may accept control at a level short of 90%. A bidder can specify a minimum acceptance condition at a level below 90% or none at all, and it usually reserves the freedom to waive any minimum acceptance condition it does set.
72. A term in an offer which has the effect of allowing offerees to split their parcels does not increase this sort of uncertainty. Whether a minority is locked in does not depend on the splitting of particular parcels. Rather, it depends on the overall level of acceptances, whether the bid's minimum acceptance level is reached (or waived) and whether the

²⁷ Or indeed, for additional shares, under section 653B.

²⁸ With some exceptions - see subs 662A(2). This is an entitlement test, not a voting power test.

²⁹ Subsection 624(2) and paragraph 650F(1)(b) were included to alleviate this uncertainty.

bidder and its associates have relevant interests in 90% of the bid class shares when the bid closes.

Misleading effect of Extension

73. On 25 May Soul Pattinson announced that it would not accept GPG's bid. The bid could not succeed, unless Soul Pattinson accepted it, or sold its Brickworks shares to persons who did accept.
74. On 13 June GPG extended its bid by 3 months to close on 21 September. The notice of variation did not refer to Brickworks' criticism of the bid in its target's statement or to Soul Pattinson's rejection of it. Brickworks submits that to extend the bid in this way was misleading and deceptive conduct, because it would have suggested to offerees that the bid had some prospect of success.
75. We reject this submission. The bidder's statement and the target's statement made it very clear that the bid would fail unless Soul Pattinson accepted it, or sold its shares to persons who accepted it. The announcement by Soul Pattinson that it would not accept has been well publicised. The extension added no implied or express representation that the bid was likely to succeed. The number of acceptances does not suggest that offerees were in fact misled, for there were very few of them.³⁰

Restraining GPG from Bidding Again

76. Brickworks mentioned several letters from GPG to Brickworks shareholders and submitted that 'GPG has made its takeover offer merely to give GPG a forum to criticise Brickworks and its board'. It applied for an order preventing GPG from making a similar bid for Brickworks shares for a year, citing an analogous rule of the City Code and the burden on Brickworks of responding to the bid.
77. This submission was not developed, but the mention of a forum may be an allusion to the limits which the Corporations Law sets on the use of information extracted from a company's register. Briefly, section 177 prohibits a person from using such information, unless the use is relevant to the holding of the interests recorded in the register or is permitted by the company. In writing to Brickworks shareholders, GPG was using information from a Brickworks register. To make a binding offer to acquire shares and to provide offerees with information relevant to that offer, however, are uses squarely within the letter and policy of Chapter 6 and section 177.

³⁰ GPG's notice under subsection 630(3) on 14 September implies that it then held acceptances for 0.01% of Brickworks' shares.

78. We would not be justified in ordering GPG not to bid again. If adequate information is provided by both bidder and target, a new bid will not prevent acquisitions of shares in Brickworks occurring in an efficient, informed and competitive market or otherwise defeat the policy of section 602. Brickworks has not suggested that the conditions of the bid prevented it from carrying on its business as usual or undertaking new initiatives. Brickworks does not appear to have been unduly burdened by its reply to the bid.

Decision

79. In all the circumstances, we have decided not to make a declaration or orders.
80. GPG's bid closed on 21 September. It failed for reasons unrelated to the defects we have identified. Brickworks' application was made 4 ½ months after the bid was made, 16 days before it closed. In the light of Soul Pattinson's rejection of the bid and the low level of acceptances, there was already little point in making orders for these matters to be rectified.
81. GPG should have:
- (a) offered to provide offerees with copies of Soul Pattinson's releases to the market since the issue of the annual report, including the half-yearly report at 31 December 1999, as well as the annual report for 1998-1999;
 - (b) discussed the effect on Soul Pattinson of disposing of its holding in Brickworks;
 - (c) discussed the overall tax implications of the bid, so as to enable offerees to obtain meaningful advice about its effect on them;
 - (d) disclosed the source of funding to purchase the Soul Pattinson shares held by Brickworks; and
 - (e) procured a meeting of Guinness Peat Group plc to be convened to approve the bid, before the closing date of the offers, before any extension.

82. If the bid is renewed, without these matters being first attended to, we would be minded to order GPG to attend to them.
83. Similarly, if the bid were renewed and Brickworks issued a target's statement, we would expect it to contain sufficient information to enable shareholders to be in a reasonable position to make an informed decision.

Les Taylor
President
10 October, 2000