



**In the matter of Brisbane Broncos Limited (No 3)
[2002] ATP 03**

Catchwords:

Competing partial bids – review of Panel decision – conditions affecting losing bid – effect of cross-conditionality – clarity in announced conditions – regulatory interference conditions – misleading public statements – relationship of Panel proceedings with Courts – timing of Panel intervention – when may an initial bidder withdraw – “not substantially less favourable”

Corporations Act 2001 (Cth), sections 631, 654A, 670E, 670F and 1325B

ASIC Practice Note 59

These are our reasons for deciding that circumstances were unacceptable, but declining to make any declaration, in relation to the affairs of Brisbane Broncos Ltd (“Broncos”) and for accepting undertakings to ensure that Broncos shareholders received takeover offers by BB Sports Pty Ltd (“BB”) at 17 cents per share for 50% of their Broncos shares, and takeover offers by Magic Millions League Pty Ltd (“Magic Millions”) at 18 cents per share for 100% of their Broncos shares, and that, as far as possible, both bids proceed as if the unacceptable circumstances had not occurred. This decision was in response to an application by Magic Millions for review of decisions made by the Broncos 01 and 02 Panel.

In Broncos 01 and 02, BB and ASIC applied for declarations of unacceptable circumstances and orders in relation to the affairs of Broncos, because Magic Millions had announced a takeover bid for Broncos and proposed not to proceed with that bid, and because of the terms of a proposed defeating condition in an announcement by BB that it would bid for Broncos.

INTRODUCTION

1. The Review Panel was constituted by Simon McKeon (sitting President), Ian Ramsay (sitting Deputy President) and Carol Buys.
2. This review concerns the decisions of the Broncos 01 and 02 Panels in relation to two announcements of takeover bids for Broncos. Many of the facts and details are set out in the reasons for decision of the Broncos 01 and 02 Panel. We do not intend to repeat them in detail.
3. The issues raised were:
 - a. The making of misleading public statements in connection with takeovers;
 - b. Conditions in takeover bids which have the potential to inhibit competition and cause undesirable complexity, uncertainty or

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disturbance in the market for control of companies (in the context of the unusual facts of this matter);

- c. Compliance with the policy of the requirement in section 631 of the Corporations Act (**Act**) that a person who announces a takeover bid must make a bid in accordance with the announcement; and
 - d. Assessing the trade-off between less certain offers and improved consideration.
4. The parties were:
- a. Brisbane Broncos Ltd, the target - **Broncos**
 - b. Magic Millions League P/L, the first bidder - **Magic Millions**
 - c. BB Sports P/L, the second bidder - **BB**
 - d. ASIC

PRELIMINARIES

5. Before we commence our reasons, we wish to note a number of things. The first is that we consider that the circumstances in this application are most unusual and the decisions we have made relate peculiarly to those unusual circumstances. Therefore we think that this decision will make a very narrow footprint in the regulatory environment because very few matters in future will match the circumstances of this decision.
6. The second is that we do not wish to encourage by this decision some of the various actions by either bidder, and this decision should not be taken to be supportive of actions or events in this takeover.
7. The third is that this Panel is not opposed to the sensible use of conditions in bids, strategically clever or otherwise, per se. However, it is opposed to conditions which appear to inhibit competition or act against an efficient competitive and informed market.

SUMMARY

8. Our decision is divided into two, because of the two responses by Magic Millions to the two bids announced by BB. Those decisions are summarised below.
9. The first decision relates to Magic Millions' announcement on 17 December 2001 that, in light of the BB announcement on 14 December 2001, Magic Millions would not proceed with the bid it announced on 29 November 2001:

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- a. The existence of the defeating condition in BB's bid that Magic Millions proceed with its announced bid¹ (the **Cross Condition**) was likely to constitute unacceptable circumstances. This is because, in combination with the possibility of Magic Millions being entitled not to proceed with its bid if BB proceeded with its bid (which the Review Panel took as triggering the Cross Condition), it was likely to detract from an efficient, competitive and informed market and was likely to create undesirable uncertainty and disturbances in the market for control of Broncos. It was also likely to constitute unacceptable circumstances because of its tendency to detract from the policy of section 631 of the Corporations Act (**Act**).
- b. We consider that this decision meant that BB was neither entitled nor required to proceed with the bid that it announced on 14 December 2001.
- c. On 21 January 2002 we accepted an undertaking from BB that neither it nor its associates would announce or make a bid for Broncos that contained a defeating condition of the same or similar effect to the Cross Condition and that BB would not proceed with the bid it announced on 14 December 2001 unless it waived the Cross Condition.
- d. We consider that our decision that the Cross Condition, in combination with the possibility of Magic Millions being entitled not to proceed with its bid if BB proceeds with its bid, would constitute unacceptable circumstances means that it would be unreasonable to expect or require BB to proceed with the bid that it announced on 14 December 2001.
- e. We also consider that it would have been unreasonable to require BB to proceed with its bid with the Cross Condition struck down. BB was therefore free not to proceed with its then current bid of 17 cents per share for all shares, to waive the Cross Condition and continue with its current bid (**Revised BB Bid**), or to make a new bid for Broncos (**New BB Bid**), which could be on less favorable terms. BB undertook to the Panel that it would announce whether or not it would proceed with a Revised BB Bid before the end of Wednesday 23 January 2002. On 22 January 2002 BB announced that it would make a partial bid for 50% of Broncos shares at a price of 17 cents per share, subject to a 50.1% minimum acceptance condition and that no prescribed occurrences occur during the bid.
- f. We decided in that initial stage of this matter, that Magic Millions was required to proceed with its bid announced on 29 November 2001, and it was required to make the offers before the end of Tuesday 12 February

¹ We use the phrase "that Magic Millions proceed with its bid" as shorthand for the specific wording of the Cross Condition. See Annexure 2 for the exact wording of the modified Cross Condition which uses different wording to "Magic Millions proceed with its bid".

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2002². On 22 January 2002 we accepted an undertaking from Magic Millions that it would do so.

- g. However, we decided that Magic Millions was not required to proceed with its bid if, before it made its offers, BB made, or announced that it would proceed with, the Revised BB Bid or if BB announced its intention to make a new and superior takeover bid for Broncos. We decided that superior would mean a bid which offerees would reasonably be expected to prefer to the bid announced by Magic Millions on 29 November 2002. Magic Millions' undertaking reflected this.
10. The second decision was in response to Magic Millions' request for the Broncos 03 Panel's agreement that a proposal by Magic Millions' to make a conditional full bid at 18 cents per share (**New Magic Millions Bid**) would be sufficiently advantageous to Broncos shareholders that the Broncos 03 Panel did not require Magic Millions to proceed with its originally announced partial bid.
11. We advised Magic Millions of some concerns about its original proposal and allowed it some time to address those issues and try to provide the best possible opportunity for Broncos shareholders. This primarily went to trying to maximise the choice for Broncos shareholders, maximising the time both bids were open for acceptance by Broncos shareholders, and reducing the risk of shareholders being locked into one or other bid if that bid failed.
12. We considered the possible ways in which shareholders might react to such a bid, the possible ways in which they might realise the benefits being offered by Magic Millions in its proposal, and the cost to Broncos shareholders of not receiving the original partial bid announced by Magic Millions. We decided that, with some reasonable support from the Broncos board, there was a realistic possibility for Broncos shareholders to sell all of their shares for a materially higher amount than proposed to be offered under the original Magic Millions bid.
13. We considered that the benefits offered to Broncos shareholders under such a proposal outweighed the costs of receiving the original partial bid and possibly being able to accept for 50% of their shares into each bid (although dispute remains between the parties as to whether this would have been possible).
14. After discussions with Magic Millions which led to Magic Millions revising the minimum acceptance condition somewhat, we decided to consent to Magic Millions not proceeding with its original bid, on condition that it made the New Magic Millions Bid.

² On 22 January 2002, ASIC granted Magic Millions a modification to subsection 631(1) of the Act the effect of which was to insert the words "14 days" after the words "2 months" in that subsection. This explains why Magic Millions was required to make its offers before the end of 12 February 2002 rather than before the end of 29 January 2002 as would otherwise have been the case had the Act not been modified.

BACKGROUND

Magic Millions Bid

15. On 29 November 2001, Magic Millions announced to ASX that it would make a takeover bid at 16 cents per share for 50% of each shareholder's holding in Broncos. It said that the bid would be conditional as to prescribed occurrences, but that it would not be conditional as to acceptances. It nonetheless described Magic Millions' intention as being to secure a better return for all shareholders.
16. Magic Millions is 50% owned by Ognis Pty Limited (a company controlled by Mr John Singleton). Ognis and Mr Singleton then had a relevant interest in 15.66% of Broncos shares. Ognis held an additional parcel of 3.92% of Broncos shares, as a bare nominee for another company. A subsidiary of The News Corporation Limited (**News**) had a relevant interest in 44.5% of Broncos shares and for a number of years the News group has held 40% or more of Broncos shares and many of the directors of Broncos have been associated with the News group.

BB Bid

17. On 14 December BB announced that it would bid for all of the shares in Broncos at 17 cents. The bid was to be subject to no prescribed occurrences occurring during the bid, and a condition (**Cross Condition**) to the effect that neither ASIC nor Panel action nor any other event should permit Magic Millions to withdraw its bid or to make it other than in accordance with the timing requirements of the Corporations Act (as they stood at the time of the announcement) (**BB Announcement**). BB is a wholly-owned subsidiary of News.
18. BB indicated that, if at the close of its own bid it was unable to proceed to compulsory acquisition, it would consider accepting the Magic Millions bid for any shares it had in excess of a bare majority (the **offloading intention**). On 14 December, BB lodged a bidder's statement with ASIC and gave a copy to Broncos.
19. Magic Millions had not by that stage prepared its bidder's statement nor given a copy to ASIC or Broncos. In failing to do so, Magic Millions handed BB a material strategic advantage in that BB could always threaten to open and close its bid before Magic Millions' bid could close. If Magic Millions had given its bidder's statement to ASIC and Broncos by the time BB announced its bid, much of the tactics of this dispute would not have eventuated.

Magic Millions Withdrawal

20. On 17 December, Magic Millions announced that it would not proceed with its bid for Broncos, because BB had announced its bid for Broncos. It stated that, since the BB bid was at a higher price than Magic Millions' bid, BB had announced that it did not intend to accept the Magic Millions bid and News's relevant interest in Broncos shares was now 44.91%, it was unlikely that Magic Millions could achieve its primary objective of securing control of Broncos. Not

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having posted offers pursuant to its announcement, Magic Millions did not seek to withdraw them.

New BB Bid

21. On 22 January, BB announced that it would not proceed with the original BB Bid, but announced a New BB Bid which was for 50% of all shares, at 17 cents per share, and was subject to defeating conditions relating to minimum acceptance of 50% and no prescribed occurrences. This was in response to the first part of this Panel's decision that the Cross Condition would be unacceptable, and that BB was free to walk away entirely, or propose another bid.
22. Following the New BB Bid, on 24 January Magic Millions sought a decision from the Panel that Magic Millions' undertaking did not require it to proceed with the bid it announced on 29 November 2001 in the face of the New BB Bid.
23. Magic Millions' basis for asserting this was that the New BB Bid was in all ways, except the 50% minimum acceptance condition, superior, and reasonably preferable, to the Magic Millions bid proposed on 29 November 2001. Magic Millions went on to say that given News' holding of 45% of Broncos shares and Magic Millions' holding of 15%, the 50% minimum acceptance condition was immaterial when comparing a 16 cent and a 17 cent partial bid. Magic Millions did not proceed with this request after we advised that we would not require Magic Millions to proceed with the bid it announced on 29 November if it proceeded with the New Magic Millions Bid.
24. On 11 February, BB announced that it would increase its offer for 50% of Broncos shares from 17 cents to 18 cents per share, declared it unconditional, and advised that acceptors would be paid within 5 business days of acceptances.

New Magic Millions Bid

25. On 5 February, Magic Millions announced the New Magic Millions Bid. Magic Millions made the announcement following discussions with the Broncos 03 Panel concerning a proposal whereby Magic Millions would make the New Magic Millions Bid in substitution for the original Magic Millions bid. The terms of the New Magic Millions Bid were, 18 cents per share, open for acceptance for any or all Broncos shares up to 100% of an offeree's holding, subject to a prescribed occurrence condition, and subject to a defeating condition that Magic Millions acquire shares in Broncos that gave it voting power of at least 45% in Broncos and voting power in excess of that possessed by News. At that stage Magic Millions had a relevant interest in 15.66% of Broncos shares.
26. Mr David Kingston, who controlled approximately 12% of Broncos shares, said to Broncos shareholders in a letter dated 13 February 2002 that, if it appeared

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that his acceptance of the New Magic Millions Bid would take Magic Millions to a voting power of more than 50%, then it was his intention to accept the Magic Millions bid.

27. In the Broncos target's statement, the Broncos directors gave as a reason for not recommending the New Magic Millions Bid that they had spoken with a number of Broncos shareholders who indicated that they would not accept the Magic Millions offer but would accept the BB bid. At no stage did any party submit any evidence that particular Broncos shareholders would accept the existing partial bid by BB and would not accept a higher, full bid by Magic Millions.

Applications

28. On 19 December, BB applied to the Panel for a declaration that the purported withdrawal of the Magic Millions bid gave rise to unacceptable circumstances in relation to the affairs of Broncos and for orders requiring Magic Millions to proceed with its bid in accordance with its announcement (**Broncos 01**).
29. On 24 December, ASIC applied for a declaration that the Cross Condition gave rise to unacceptable circumstances and for orders requiring BB to waive the condition, or at least to state whether it intended to rely on the condition (**Broncos 02**).
30. On 3 January 2002, the Broncos 01 and 02 Panel decided that the BB bid was required to proceed, but with an alteration to a condition. The Panel decided that Magic Millions was under an obligation under section 631 of the Act to continue with its bid by 29 January, and its failure to do so by that time may give rise to unacceptable circumstances and to liability in damages. The Broncos 01 and 02 Panel decided, however, not to make orders requiring Magic Millions to proceed.
31. The Broncos 01 and 02 Panel accepted an undertaking from BB to modify the provisions of the Cross Condition to reduce the risk that it would be a self defeating condition (and therefore giving BB a free option to elect whether or not to proceed with its bid).
32. On 10 January 2002, Magic Millions applied for review of the Broncos 01 and 02 decisions. The sitting President of the Broncos 01 and 02 Panel, Ms Jenny Seabrook, consented under section 657EA of the Act to the review application.
33. We decided to commence proceedings under Regulation 20 of the ASIC Regulations, and on 11 January 2002 we provided a brief to parties with a request for submissions. We consented to parties being represented by their commercial solicitors.
34. On 31 January 2002 Magic Millions applied under section 656A of the Act for a review of a decision made by ASIC that day (**Broncos 04**). ASIC had decided not to grant an application for a modification of section 652B of the Act so that

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if, during the course of the proposed New Magic Millions Bid, BB or News or any other person, gained a relevant interest in more than 50% of Broncos shares, Magic Millions would be entitled to withdraw its bid. Magic Millions said that the modification was integral to it being commercially able to proceed with the proposed New Magic Millions Bid.

35. The decision of the Broncos 04 Panel (which was constituted by the same members as this Panel) and its reasons have been published separately by the Panel.

EXPLANATORY MATERIAL

Relevant Provisions of the Act

36. The relevant provisions of the *Corporations Act* are:

631 A person must make a takeover bid, on the terms announced, and within two months if they publicly propose to make a takeover bid.

654A A bidder must not dispose of any securities in the bid class during the bid period. An exception is disposing into a rival bid.

670E A person who deals in securities in reliance on a takeover announcement, and suffers loss because a person who announced a bid does not proceed with it, can seek damages from the person who made the announcement.

670F A person who makes an announcement has a defence for not proceeding with a takeover bid if they could not reasonably be expected to proceed with the bid because (i) at the time of the announcement there were circumstances that the announcer did not know of, or (ii) a change of circumstances occurred after the announcement could not reasonably have been expected to know of, or a change of circumstances not caused by the person.

1325B A Court may order a bidder to send offers if the bidder does not comply with section 631.

Similar provisions have been in effect since 1985 and broadly similar provisions since 1971. These sections were rewritten and simplified by the *Corporate Law Economic Reform Program Act 1999*, generally without substantive change.

Relevant Policy

37. The source of sections 631 and 670F is a report of the Eggleston Committee. In its report, the Eggleston Committee was concerned with “bluffing offers”. Eggleston described bluffing offers as a means “by which an unscrupulous person may defeat a take-over offer or run up the price by announcing his intention to make an offer without having any such intention”. The harm which Eggleston said the provisions should prevent was “that a bluffing statement may be used to defeat a genuine take-over bid, or to create a false market where no take-over bid is in fact contemplated by anyone”.

38. While we were not convinced that either Magic Millions or BB made a bluffing bid, we are concerned that together, their announcements were likely to produce the type of false market with which Eggleston was concerned.
39. The policy of section 631 is to promote certainty and confidence in the market for control of Australian companies, by preventing bids being announced and not subsequently followed through with without good reason. Takeovers are very significant events in securities markets, and the announcement of a takeover offer will usually be significant for the price of the relevant securities.
40. The intent of section 631 is to allow shareholders and investors to act on statements with confidence that persons who make statements to the market will follow through with what they have announced. The absence of such confidence is likely to decrease the efficiency of capital markets in Australia.
41. The Panel considers that this is one of the fundamental principles in Australian takeovers regulation, and that it must take action to prevent, or repair the effect of, statements or actions which detract from that policy intention, whether they were deliberate or inadvertent.

ASIC Practice Note

42. In 1995 ASIC published Practice Note 59 concerning predecessors of sections 631 and 670F. Relevant passages include:
 32. An offeror generally assumes the risks of publicly announcing a bid, unless it anticipates those risks by announcing that it intends to make a bid subject to specified conditions.
 49. The first element [of the defence in section 670F] is that there must have been either ... a change of circumstance after the public announcement, over which the offeror had no control ... that is, a change of circumstance not caused by the offeror ...
 51. The second element [of the defence in section 670F] is that, as at the time the bid is abandoned, it must be unreasonable to expect the bidder to proceed with the bid, ... because of the newly changed circumstances.
 61. The third class of case [where it would be unreasonable to expect an offeror to proceed with an announced bid] is where the offeror can no longer get control of the target company: e.g. because it has been clearly overbid. However, the mere public announcement of a rival bid at a higher price will not be sufficient for this purpose.
 62. ... It is not part of the policy of [sections 631 and 670F] that an underbidder must give a successful bidder the opportunity to offload the target company. On the contrary, [section 654A] allows one bidder to sell out to a later (normally higher) bidder.

DISCUSSION

43. In the first part of this decision we were faced with two, interrelated questions, the answer for each of which would affect the answer to the other. They both arose because of the BB Announcement and the proposed Cross Condition. Each question also raised some subsidiary questions. The first question (we address it first merely because Magic Millions was the first to bid) was whether BB's announcement made it unreasonable to expect Magic Millions to proceed with its announced bid. The second was whether the Cross Condition, in combination with the possibility of Magic Millions being entitled not to proceed with its bid if BB proceeded with its bid, was likely to bring about unacceptable circumstances.
44. If Magic Millions was entitled not to proceed with its announced bid (or there was a material risk that this was the case) then the Cross Condition, unless BB waived it, would likely have caused BB's bid to fail³. There would have been increased trading, almost certainly a material increase in the traded price of Broncos shares, and no bid at the end. This would amount to an unacceptable level of uncertainty and disruption in the market for control of Broncos, especially where Magic Millions' withdrawal was not attributable to any material change in Broncos financial position or prospects.
45. We recognize that uncertainty is a constant in all securities markets, and that every takeover brings with it material additional uncertainty and disruption to the market. We do not suggest that of itself, this uncertainty and disruption is necessarily a bad thing.
46. However, we are concerned that there not be cases where the uncertainty and disturbance reduce investors' confidence in the market or inhibit investors from taking investment decisions based on announcements in that market.
47. We consider that the current matter was an example of unacceptable disruption and uncertainty where a person made a statement that it proposed to make a takeover bid, and a second person made another announcement of a takeover, and both takeover bids might evaporate because of the structure of a condition in the second bid.

Clear and careful statements and conditions

48. We are particularly concerned at the lengths this Panel has had to go to to infer objectives into announcements and conditions for both of these bidders. We think that the market has now been put on notice of the problem in this matter. Therefore, we think it unlikely that future Panels will go to similar lengths.

³ BB advised the Review Panel that it would rely on the Cross Condition in the event that the Magic Millions bid did not proceed and BB had not reached the levels of acceptance required for compulsory acquisition.

49. We repeat the sensible advice in various ASIC Practice Notes that if offerors have specific objectives, or wish to protect themselves from certain eventualities, they should make that abundantly clear in any announcement. Both offerors have failed significantly in this respect in these matters, which is very regrettable.

SECTION 631

50. We consider that section 631 of the Act applied to Magic Millions' announcement i.e. unless Magic Millions made out the defences in section 670F, it was required to proceed with the bid it announced on 29 November 2001.
51. We consider that there is no basis for asserting that a rival bidder should not expect to benefit from the confidence and market certainty that section 631 is intended to bring to Australian securities markets. The legislative and policy history of the provision refer to minority shareholders as the primary beneficiaries, but there is no evidence of any intention to exclude rival bidders. Therefore there is no basis to say that BB should not have applied to the Panel for the protections offered under section 631.

TIMING, POWER AND UNFAIRNESS

Timing

52. We accepted BB's submission that although the time period of section 631(1) had not expired in relation to Magic Millions' announcement, it was both open to, and desirable for, the Panel to decide the issue of whether Magic Millions' purported non-proceeding with its announced bid constituted unacceptable circumstances.
53. We consider that the words in section 657A(2)(a) are clear indication that the Panel may look forward to the future effect on, or of, a proposed bid or a proposed acquisition of a substantial interest when considering whether or not to make a declaration of unacceptable circumstances.
54. We agree with the submissions of BB and Broncos that where possible, it will usually be preferable for the Panel to prevent any unacceptable circumstances rather than force a person harmed by a breach of a provision, such as section 631, to seek damages under a provision such as section 670E. Prevention is likely to reduce the harm and cost to the person directly affected and to provide more certainty and confidence for the market in general.

Power

55. We agree with the Broncos 01 and 02 Panel's analysis that the view is open that ASIC is empowered by section 1325B(1)⁴ to approach the Court for an order requiring a person who has made an announcement to follow through and

⁴ However, section 1325B appears to operate only when a bidder's statement has been lodged.

make offers under a bid, thereby by-passing the Panel. We also agree that other parties however, were intended to be able to seek comparable orders from the Panel, which the Panel could enforce in Court under section 657G. That would explain why the Panel and private parties do not have standing under section 1325B. We also agree with the Broncos 01 and 02 Panel that the preferable view is that the Panel has power to order either or both Magic Millions or BB to proceed with, and make, takeover offers in the terms announced.

56. We also agree with the Broncos 01 and 02 Panel's view that ordering either or both of Magic Millions or BB to proceed with their announced bids would not constitute an order "directing a person to comply with a requirement of Chapter 6, 6A, 6B or 6C". The Panel is prohibited from doing this under section 657D(2).
57. However, we did not have as many concerns as the Broncos 01 & 02 Panel about the practicality of ordering either Magic Millions or BB to proceed with, and make, takeover bids that they had announced. The directors of a company which announces a takeover bid should have considered all the issues required for a bid and have decided that they were feasible, possible and in the best interests of the company. Once the directors have caused the company to make such an announcement, the company is committed to it and it should not be extraordinarily impractical to require its directors and officers to continue with, and complete, the train of events which they had contemplated and prepared for, unless the exception in section 670F applied.

Relationship of Panel proceedings with the Courts

58. We agree with the view of the Broncos 01 and 02 Panel, and the submissions of all of the parties, that the decision in *Precision Data Holdings Ltd. v Wills (1991) 173 CLR 167* is positive support for the Panel determining this matter. We agree that the decision supports the view that the mere existence of the provisions of sections 670E and F does not compel the Panel to allow the unacceptable circumstances to occur and leave their resolution to the Courts. The Panel is not usurping the proper role of the Courts in dealing with, and preventing, these unacceptable circumstances before they are forced to go to the Court for resolution.
59. Similarly, because one of the grounds for the Panel to declare circumstances to be unacceptable is a contravention of a provision of Chapters 6, 6A, B or C (section 657A(2)(b)), it is appropriate, and not disrespectful of the Court in any way, for this Panel to express views on the rights and liabilities at law of the parties. It would essentially be impossible for the Panel to function if it could not.
60. It could not be the legislature's intention that the Panel could only declare circumstances to be unacceptable when there exists a breach of the spirit or policy of the law, but not when there is a breach of the letter of the law, and yet that is the logical conclusion of any argument that the Panel may not express

views on whether or not circumstances or actions constitute a contravention of the Act. This view forms the basis for the Panel's discussion in these reasons on the application and applicability of various provisions of the Act, especially sections 631 and sections 670E and 670F.

Unfairness

61. For the reasons we set out below in our discussion of section 670F, we do not think that it would have been unfair to order Magic Millions to proceed with the bid it announced if BB did not proceed with the Revised BB Bid or a superior New BB Bid. Magic Millions made an announcement that had material market consequences. Magic Millions chose not to protect itself from the possibility of not acquiring control under its announced bid (for example, by means of a minimum acceptance condition). As long as a superior BB bid did not occur, Magic Millions was required to proceed with its announced bid.
62. We do not think it unfair to BB to have prevented it proceeding with its bid as announced. BB did not seek to protect itself by consulting with the regulator prior to proposing a novel and adventurous condition in its offer.

BRONCOS AS A "CLUB" RATHER THAN A LISTED COMPANY

63. It was put to the Review Panel that it should treat this application differently to others because shareholders in Broncos may have acquired shares in Broncos because they are supporters of the Brisbane Broncos rugby league team and that they would be more interested in who ran their favorite sporting team than solely financial issues. In part it was suggested that this might make a partial bid superior, in such shareholders' eyes, to a full bid, because it allowed them to retain an interest in their favorite football team⁵.
64. We do not think this justifies us treating this application differently from any other, for a number of reasons.
65. The first is a very practical issue in that it would make it very difficult for any Panel to make decisions if it were asked to place weight on issues such as how emotionally attached shareholders in a particular company were to the operations of that company.
66. Such considerations may be acceptable in unlisted or proprietary companies or cooperatives, and those types of institutions, appropriately, are likely to have restrictions on share transfers written into their constitution to take account of just such issues. However, it is in the nature of listed public companies that such restrictions are not part of their constitutions, and shareholders who invest in them do so on that basis.

⁵ However, the BB bid, even though for all of an offeree's shares, would allow an offeree to accept for only part of those shares.

67. We do not think that the requirements in section 636 of the Act for a bidder to state in its bidder's statement its intentions concerning the future employment of the present employees of the target, or the future operation of the business of the target, is evidence that the Review Panel should take into account any non-financial considerations of Broncos shareholders in this application.
68. Finally, we do not think that the emotional, or “non-financial” attachment of Broncos shareholders to the operations, or choice of ownership, of Broncos i.e. the rugby league club, is necessarily any less or more than other shareholders might have to the ownership of iconic Australian biscuit companies or companies developing cutting edge electrochemical inventions of talented Australian inventors.
69. Therefore, the Review Panel has assessed the takeovers issues in Broncos 03 in the same way it would for essentially any other listed Australian company subject to a cash takeover bid.

TRIGGERING OF THE CROSS CONDITION

70. It was argued before the Broncos 01 and 02 Panel, but not directly before us, whether the concept of “withdrawal” in the Cross Condition (both original and modified) included both:
 - a. Magic Millions withdrawing, as used in the Act,⁶ the bid it had announced (after it had made the offers); and
 - b. Magic Millions not proceeding, say, in reliance on the exception in section 670F, with the bid it had announced.
71. We accepted the arguments that were put, indirectly before us, that BB’s intention, and the intention that the market inferred, was that BB intended the Cross Condition to apply to Magic Millions either withdrawing or not proceeding with, its announced bid, and that functionally, not proceeding would constitute withdrawal.
72. We agree with the submissions of Broncos that, if the intention of BB was that the Cross Condition should also apply if Magic Millions sought not to proceed with its bid, the drafting of the Cross Condition was both unclear and confusing (and quite possibly ineffective). The market would have been better served if the Cross Condition had been termed to be triggered if Magic Millions had either not proceeded with its bid prior to making its offers, or, once it had made offers, had withdrawn its bid. Other Panels may well have decided that the Cross Condition did not apply in the case that Magic Millions did not proceed with its proposed bid.

⁶ The term “withdrawal” is used in sections 652A to C, and the BB bidder’s statement provides that terms which aren’t defined in the bidder’s statement (and “withdrawal” isn’t) shall have the sense in which they are used in the Corporations Act.

73. We think that both BB and Magic Millions have caused the market material uncertainty by the lack of clarity and certainty in their conditions and announcements and by requiring so many important issues to be implied into their statements. We reiterate that bidders should take proper care in formulating their announcements and offer terms and risk being held liable for failing to do so.

WITHDRAWAL BY MAGIC MILLIONS

74. On balance, the Review Panel considers that the BB Announcement made it unreasonable to require Magic Millions to proceed with the partial takeover bid for Broncos that it announced on 29 November. This decision was subject to the requirement below for Magic Millions to proceed with its bid if BB did not proceed with the bid it announced on 14 December but without the Cross Condition, or a new, superior bid (as defined below).
75. We make this decision very much “on balance” and do not wish to be seen to be rescuing Magic Millions (or any future bidders) from what we perceive to be a very risky action in making a partial takeover offer with no minimum acceptance, or other protective defeating condition where it was well aware of the existence of a major rival shareholder which could take action to preserve its strategic position, for example, by making a rival bid.
76. Magic Millions submitted that it had been overbid by BB and that the combined effect of sections 631 and 670F, supported by ASIC policy, was that it was not liable for its failure to proceed. It said that the making of the BB bid (a circumstance which was beyond its control and which occurred after its announcement) rendered its bid nugatory, and it would not be reasonable to expect Magic Millions to incur the cost of completing documentation and dispatching offers.
77. We consider that it would have been unreasonable to require Magic Millions to proceed in face of a Revised BB Bid (or a superior New BB Bid) proceeding, for various reasons including:
- a. The BB bid announced on 14 December was superior to the Magic Millions bid: the consideration offered was plainly higher, it was subject to no more onerous conditions than the Magic Millions bid (once the Cross Condition is removed) and it was for 100% of offerees’ Broncos shares; and
 - b. The fact of BB seeking to move to 50.1% of Broncos would materially adversely affect Magic Millions’ stated strategy to gain more say in the affairs of Broncos.
78. However, as indicated above, if BB did not proceed with the Revised BB Bid, or New BB Bid, we consider that Magic Millions did not have a reasonable basis

for not proceeding and was required to follow through with its announcement. The decision whether or not BB's bid will proceed was BB's. Magic Millions, by its firm announcement, with no defeating conditions other than a prescribed occurrence condition, led the market to expect that it would bid. The only reason for allowing Magic Millions not to proceed was if a clearly superior bid was actually made.

79. The Panel was not prepared to allow Broncos shareholders to receive no bid.

Control, and the Magic Millions proposal

80. Magic Millions did not expressly say that it was seeking control of Broncos when it announced its bid. It also failed (we say, rashly) to make its bid subject to any minimum acceptance condition that was predicated on reaching a controlling position in Broncos (BB pointed out that the ASIC Practice Note suggests that bidders should do so). BB put it to us that these facts meant that we should not accept Magic Millions' arguments that control of Broncos was a fundamental objective of its bid. BB also said that its announcement of a bid that would likely take it to absolute, i.e. 50.1%, control of Broncos was not a reasonable basis for Magic Millions not to proceed with its bid as announced. BB further pointed out that its announcement did not trigger any defeating condition of Magic Millions' bid.
81. While we consider that Magic Millions' announcement was rash, we do consider that its stated intention "to secure a better return for all shareholders" could only be achieved by Magic Millions achieving some degree of control over the affairs of Broncos. BB gaining more than 50% of Broncos under its bid would make that materially less likely. Under such a scenario, Magic Millions could not achieve any better position than it was before its bid. While Broncos was not a subsidiary of BB, Magic Millions could hope to increase its influence, and, with the support of other, like minded shareholders, exercise control over Broncos. However, in a Broncos that is a subsidiary of BB, no increase in Magic Millions shareholding would increase its influence in the operations of Broncos. Its bid would be futile.
82. On that basis, although on balance, we consider that Magic Millions did make adequate reference in its announcement to its intention to gain some degree of control (we find it regrettable that Magic Millions expressed these intentions so much more clearly in its submissions to the Panel than in its earlier public statements). Therefore we accept that the announcement of BB's bid, and the far greater likelihood (if both bids proceeded) of BB cementing control than of Magic Millions gaining control, should be considered a material change of circumstances for Magic Millions in considering whether to proceed with its bid. We think that Magic Millions sufficiently "implied" the existence of an intention to gain control of Broncos and therefore a basis under section 670F not to proceed with its announced bid.

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83. We note that although the Broncos 01 and 02 Panel, on balance, came down on the side of considering that Magic Millions was not seeking control, its reasons raise a number of points where it accepted that control was an issue in Magic Millions' mind and had been an issue in the interplay between BB and Magic Millions. On balance, we have given Magic Millions perhaps a greater benefit of doubt.

REVISED MAGIC MILLIONS BID

84. Following BB's announcement of its New BB Bid, Magic Millions initially sought the Panel's advice that Magic Millions' undertaking to the Panel of 22 January did not require Magic Millions to proceed with its originally announced bid because the New BB Bid was superior to the bid Magic Millions announced on 29 November 2001 and was one which Broncos shareholders would reasonably prefer. Alternatively, Magic Millions sought the Panel's consent to withdraw or vary its undertaking.
85. The Panel was not required to decide the issue, and a number of consequential issues, because Magic Millions returned to the Panel with an alternative proposal i.e. that it make its New Magic Millions Bid. The New Magic Millions Bid would be for all Broncos shares, would be at a bid price of 18 cents per share and would be subject to a minimum acceptance condition that reflected the objective of control of Broncos that Magic Millions said was its objective with its original bid.
86. We were attracted to this proposal and advised Magic Millions of some concerns about its original proposal and allowed it some time to address those issues. Magic Millions spent some time seeking to develop it into a proposal that would provide Broncos shareholders with a realistic opportunity to receive a materially improved offer while still providing them with maximum flexibility in their choice. One of the main issues was the terms and mechanics of the minimum acceptance condition. It was later to form part of the Broncos 04 application.
87. It was put to us by Broncos and by BB that the proposed New Magic Millions Bid was unrealistic. They argued that it required too high a level of acceptances by Magic Millions to provide any real prospect of Magic Millions succeeding, therefore the Panel was, in reality, merely allowing Magic Millions to withdraw its original bid. However as we have said before, at no stage did any party submit any evidence that particular Broncos shareholders would accept the existing partial bid by BB and would not accept a higher, full bid by Magic Millions.
88. At the time of the proposal, Magic Millions had a relevant interest in 15.7% of Broncos shares, News had a relevant interest in 44.9%. Magic Millions' minimum acceptance condition required it to gain a relevant interest in Broncos shares that matched News'. Of the 39.4% of Broncos shares outstanding, Magic

Millions required 29.2% to achieve parity if News' relevant interest did not increase. That was a little less than three quarters of the outstanding shares.

89. We indicated to Magic Millions that if it was to proceed with its proposed New Magic Millions Bid it would be most desirable that it and the New BB Bid be open together for as long a period as possible. To that end we placed some pressure on Magic Millions and its solicitors to finalise Magic Millions' bidder's statement, and on the directors of Broncos to accede to abridging the period of time between Magic Millions giving the bidder's statement to Broncos and being permitted to dispatch its offers (as contemplated in item section 652B of subsection 633(1)). Eventually Magic Millions lodged its bidder's statement with ASIC and gave its bidder's statement to Broncos and ASX on 6 February and it dispatched its offers under an abridged timetable on 15 February.
90. It seemed to us that the conditions that we had agreed with Magic Millions would reduce the adverse effects of adding a minimum acceptance condition to the Magic Millions bid. We would have preferred that Broncos shareholders received both bids simultaneously, and that they had been assured of accepting whichever bid was ultimately successful. Magic Millions offered an undertaking which would have facilitated this. BB, however, declined to give up its tactical timing advantage.

ACCEPTING TWO PARTIAL BIDS

91. BB argued, and it was similarly argued in the media, that Broncos shareholders *would* be able to accept for 50% of their initial holding into both a BB 50% bid and a Magic Millions 50% bid. Magic Millions disputed this. We do not think that the issue has been satisfactorily resolved. We do not consider that we need to form a view on the issue, and hope that it will not arise again.

RELIANCE ON ASIC PRACTICE NOTE

92. Magic Millions submitted that in purporting not to proceed with its announced bid, it had relied on the policy set out in ASIC Practice Note 59 on Withdrawal of Takeover Offers. While we think that in the face of a Revised BB Bid or New BB Bid, Magic Millions had a basis for not proceeding with its bid, we think that it took a material and rash risk in placing so much reliance on its interpretation of the Practice Note. ASIC's Practice Note is written in deliberately cautious terms, as is sensible for a regulator discussing the very significant step of a person who has announced a takeover bid withdrawing, or not proceeding with, that bid. We do not see in ASIC's Practice Note any clear or unequivocal advice that the circumstances in which Magic Millions found itself entitled it to withdraw from, or not proceed with, its announced bid.
93. We note that the ASIC Practice Note does not expressly contemplate conditions such as the Cross Condition and must therefore be read more generally than if it addressed circumstances on all fours with the current matter. However, we consider that the Practice Note sets out sensible policy which the market has

used and relied upon for some time as a factor in assisting the interpretation of the provisions and policy of section 631 and section 670F. We agree with the Broncos 01 and 02 Panel that parts of the Practice Note's policy may be expressed too widely for the circumstances that we find in this application, but we have already stated that we think these are most unusual circumstances. We consider that it is unreasonable to expect policy documents written for the general run of takeovers to deal with every possible detail in every possible condition.

94. While a rival bid may reduce the likelihood of success of an initial bid, that of itself does not give the initial bidder the right to withdraw or not proceed. To do so would expose the target shareholders and the market to an unacceptable risk of disturbance.
95. We think that an initial bidder only has a reasonable right to seek to withdraw its bid, or not proceed with an announced bid, where the second bid makes the first bid futile (frequently because the second bid is clearly superior to the first). This materially reduces the circumstances where a bidder is clearly entitled not to proceed with an announced bid, or that it is entitled to expect that ASIC will consent to it withdrawing its bid.
96. Superiority must go to three things: consideration, conditions and terms.
Consideration: A bid will be clearly superior in terms of consideration if it offers a higher amount of the same consideration. Bidders are not automatically entitled to assert that one bid is superior if it offers different consideration. The obvious example is where one bid offers scrip and another offers cash.
Conditions: Similarly, a bid cannot be superior if it is subject to more defeating conditions than another. If the conditions are different it will not necessarily be clear that it is superior or inferior.
Terms: Finally, if the terms of a bid are different it will frequently be difficult to say unequivocally that one is superior to another. However, it seems clear that a partial bid is unlikely ever to be clearly superior to a full bid. We did not have to resolve the issue of whether either one of two 50% partial bids would or could be superior to the other.
97. Being materially better in one or two things may outweigh not being superior, or being slightly inferior, in another element. However, this is likely to open bids up to very subjective assessments. We strongly recommend bidders to consult with ASIC staff before placing too much reliance on their own, necessarily subjective, assessments of whether such bids are clearly superior.
98. For so long as the BB bid was subject to the Cross Condition, it was not clearly superior to the Magic Millions Bid and Magic Millions did not have a reasonable basis not to proceed with its first bid. If BB decided to proceed with a New BB Bid which made the Magic Millions bid futile, at that time it would be unreasonable to require Magic Millions to proceed.

When to consider Magic Millions' reliance on the ASIC Practice Note

99. BB submitted to us that because Magic Millions did not protect itself with a minimum acceptance condition, or unambiguously state its intention was to control Broncos, the Panel should either consider that Magic Millions did not rely on the ASIC Practice Note and therefore the Panel should disregard the Practice Note in considering the issues, or that Magic Millions only relied on the Practice Note after BB announced its bid, in which case BB said, it was too late for Magic Millions to claim reliance.
100. We accept that there is argument as to when Magic Millions actually relied on the ASIC Practice Note. However, we think that the proper time for Magic Millions actually to decide whether it could rely on the ASIC Practice Note was when Magic Millions came to consider whether or not it could decide not to proceed with its announced bid, because that is when the policy set out in the ASIC Practice Note became operative for Magic Millions. We believe it is likely that Magic Millions did so at that time and that therefore the ASIC Practice Note is relevant to our consideration. However, it would not detract from the propriety of its action if Magic Millions had in fact arrived at the same view of the requirements of sections 631 and 670F as ASIC, but without the assistance of the Practice Note.
101. We think that it would have been normally prudent for Magic Millions, before it announced its bid, to have considered the possibility of it wanting, or needing, to withdraw from its bid if circumstances changed materially. Even though it could not necessarily predict how circumstances might change against it, Magic Millions should have considered the possibility that they would. When it came to consider such a possibility it should have taken the warnings in the ASIC Practice Note into account. However, as we have said above, on balance, we do not think that Magic Millions has left itself so exposed as to fail to have the benefit of the ASIC Practice Note being taken into account.

BB'S CROSS CONDITION

102. We commenced from the position of accepting that BB had relied upon the announcement of Magic Millions concerning its proposed bid. We also accepted that section 631 would initially require Magic Millions to proceed with its announced bid, when BB decided to announce its own bid, and in formulating the conditions and terms of that proposal.
103. We consider that both the original and the revised Cross Condition were likely to give rise to unacceptable circumstances when taken in conjunction with what we see, on balance, as the possibility under section 670F(b) for Magic Millions not to proceed with its bid. We agree with Broncos that this would create undesirable uncertainty and disturbances in the market for control of Broncos.
104. If the Cross Condition was allowed to operate, because Magic Millions did not proceed with its bid (which we think is possible although not definite),

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shareholders of Broncos would have seen a major disturbance in the market for control of Broncos, with no live takeover bid at the end. Those circumstances, and the uncertainty as to whether either bid would proceed, might last for the whole of the period of the BB bid. That cannot be acceptable, especially where there has been no change in the condition of the target company.

105. That uncertainty would detract from an efficient, competitive and informed market, contrary to the purposes identified in section 602(a) of the Act, and would act against the policy of section 631.

Reasonableness of BB including the Cross Condition in its bid

106. We consider that the existing ASIC Practice Note and the legislation should have put BB on clear notice that Magic Millions would very likely seek not to proceed with its announced bid, and that there was a real possibility that Magic Millions would be entitled to do so.
107. ASIC's stated in its submissions that it considered that Magic Millions should be permitted not to proceed on the basis of the Cross Condition. This is further basis for suggesting that BB took an incautious risk in announcing a bid with a novel condition that BB ought reasonably to have suspected may be incompatible with the Australian takeovers regime.

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108. The difference between our decision and that of the Broncos 01 and 02 Panel in relation to the primary function of the Cross Condition is not great. The Broncos 01 and 02 Panel recognized the same unacceptable possibility that both announced bids may not have proceeded. The Broncos 01 and 02 Panel's position is fully consistent with ours on that issue. As we have said above, the Broncos 01 and 02 Panel decided, on balance, that there was a somewhat less strongly arguable case than we have seen that Magic Millions might have a basis under section 670F for not proceeding with its bid.

Conditions which affect losing bids

109. The Review Panel does not wish to do anything to encourage takeover bids which appear to be financed in part by an unwilling and losing rival bidder. We consider that this is likely to introduce undesirable confusion and complexity to the takeovers markets that would detract from their efficiency and fairness.
110. We note that this is consistent with the policy set out in the ASIC Practice Note.
111. We also consider that such conditions are likely to inhibit, rather than encourage competition in takeovers. We think that initial bidders may well be inhibited if such conditions are allowed.

112. A purpose of the takeovers provisions is to ensure, as far as possible, that the acquisition of control of companies takes place in an efficient and competitive market. We consider that there is a real risk that conditions which are designed to allow a bidder to gain control of the target, but force a rival, lower bid to acquire those securities which the first bidder does not want, will detract from competition and reduce the efficiency of Australian takeovers markets.

Overseas

113. Having come to an initial decision (which was the same as our final decision) we thought it prudent to review whether other jurisdictions had considered the sort of circumstances which we found ourselves considering and whether they had different policy considerations that we ought to address. Following discussions with the London Panel on Takeovers and Mergers, we understand that such conditions would not be accepted in the United Kingdom.
114. We also note that under the London regime an initial bidder's timetable is usually reset at the making of a second rival bid⁷. This ensures that the tactical pressures that BB was able to employ by being a lot more nimble in issuing its bidder's statement would not be a crucial issue. It also places the issue of deciding between bids far more clearly on the merits before shareholders.

THE REGULATORY CONDITION IN THE CROSS CONDITION

115. The revised Cross Condition purports to provide that BB's bid will be defeated if ASIC or the Panel allow the original Magic Millions Bid not to proceed, or if ASIC or the Panel cause or allow the Magic Millions Bid to proceed outside the time periods in sections 631 or 633 (as they stood at the time of the BB Bid).
116. The Broncos 01 and 02 Panel considered, inter alia, that the original Cross Condition restricted the freedom of ASIC and the Panel to discharge their statutory responsibilities, by attaching extraneous consequences to their acts.
117. We accept BB's submission that every action by a regulator will have consequences, and some of those will be extraneous, unexpected and perhaps even undesirable. We accept that it is part of the regulator's role to consider these consequences and not be paralysed by them. However, we consider that the original, and even the revised, Cross Condition unnecessarily imposed additional extraneous consequences for a regulator to consider that could and should have been avoided by refinement and specificity in the drafting of the condition. We think that BB could have done so with little or no adverse effect to itself, for example by making the Cross Condition subject to a material adverse effect filter. It is part of the regulator's role to make the judgements that balance the positive, the negative and the extraneous effects of its decision. That job should not be made harder than necessary.

⁷ This is from a combination of rules under the London Code, principally Rule 10 which requires a non-waivable 50% minimum acceptance condition and Rule 31.6 which relates to the final day for takeover offers.

118. We agree with the Broncos 01 and 02 Panel's decision to accept ASIC's submission that restricting ASIC or the Panel's ability to act appears to be contrary to public policy.
119. In this respect, BB had relied on a previous Panel decision,⁸ which to it appeared to accept that a defeating condition could acceptably be triggered by decisions of ASIC or the Panel. That issue had not been raised in the previous matter, for which reasons had not then been published, and BB had not sought any advice from the Panel or its Executive as to whether the previous Panel decision would apply to its proposed condition in the way it assumed. We wish to reiterate the ready availability of the Panel Executive to discuss such issues (and we believe ASIC takeovers staff are also prepared to discuss issues with prospective bidders).
120. The Broncos 01 and 02 Panel advised BB that the Cross Condition was not acceptable in its original form, but that it would accept a substitute condition which was not in any respect more onerous than the Cross Condition, was not self-defeating and did not interfere with ASIC's and the Panel's functions. In view of BB's reliance on the previous Panel decision and having regard to the particular circumstances, the Broncos 01 and 02 Panel allowed part of the replacement condition to relate to decisions of ASIC and the Panel.
121. Subsequently, on 9 January 2002 Magic Millions applied to ASIC for a modification to extend the time under section 631 within which it would be required to make its announced takeover offers. The parties, and the Review Panel, then realized that such a modification, although in no way inimical to BB's plans and strategy, would trigger the modified Cross Condition. Had we allowed the substance of the Cross Condition to remain, it would have been necessary to require a further modification of the condition. Preferably, as discussed below, such conditions should be subject to a "material adverse effect" filter.
122. Our decision on the regulatory issues in the Cross Condition is therefore essentially similar to those of the Broncos 01 and 02 Panel, except that the parties, who had proposed and accepted the revised Cross Condition, had not recognized the pitfall still open in the reformulated version.
123. In general, we think that it would be unacceptable for a bidder to impose a "blanket" defeating condition relating to regulatory action by the Panel or ASIC. We consider that this would expose shareholders to unnecessary risk of announced bids not proceeding where ASIC or the Panel conducted their proper regulatory functions. For example, it could place ASIC or the Panel in the unacceptable circumstance of being forced to decide whether to allow an offer which did not comply with the Act to be made, or risk the bid being defeated with the consequential loss of opportunity for target shareholders.

⁸ *Normandy Mining Ltd (No 4) [2001] ATP 31*

124. However, we do recognise that some decisions by the Panel, ASIC, or other regulators may have material effects on the commercial viability of a takeover bid. For example, blocking of an acquisition by the Foreign Investment Review Board in the national interest, or a divestment requirement by the Australian Consumer and Competition Commission in order to maintain competitive markets, or an unexpectedly high valuation for a compliance downstream bid as a condition of an ASIC modification, may materially affect the commercial viability of a proposed takeover.
125. We consider that defeating conditions **concerning regulatory action** should not apply to action requiring the bidder to comply with Chapters 6 to 6C or to prevent or overcome unacceptable circumstances. They should apply only to a regulatory action having a material adverse effect on the bid, or apply in terms similar to the exception in section 670F of the Act i.e. that the regulatory decision would, objectively, make it unreasonable to require the bidder or proposed bidder to proceed.
126. We think that preferably, such “regulatory effect” conditions should set out the specific regulatory actions and the adverse effects against which the bidder is concerned to protect itself. This greater specificity would increase certainty for the market and offerees and make the conditions more objective. However, we recognize that this may not always be feasible, nor strategically desirable for bidders.

SECTION 670F

127. Section 670F, as described above, is an exception to the requirement in section 631 that a bidder must proceed with an announced bid, the terms and conditions of which are the same as or not substantially less favourable than those announced. As the Broncos 01 and 02 Panel described, it is a provision which attempts to weigh the harm to shareholders and the market of an announced bid not proceeding against the harm or unfairness of requiring a person who has announced a bid to proceed in the face of new, or newly discovered, materially adverse circumstances.
128. We consider that there is a requirement in the “reasonable” test in the opening words of the provision, that bidders should make reasonable enquiries and endeavors to protect themselves against such circumstances before announcing a bid. The London Panel requires persons to take “the most careful and responsible consideration” before announcing a bid and states that such an announcement “should be made only when an offeror has every reason to believe that it can and will continue to be able to implement the offer”⁹.

⁹ Rule 2.5(a) of The City Code on Takeovers and Mergers.

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129. We think that the provisions of section 670F should be taken with section 652B and section 654A to form the legislature's framework for situations where a person who has announced or made a bid and has been overbid.
130. We consider that a person who has announced a bid has a basis for not proceeding with their announcement if to do so would clearly be futile.

Magic Millions' position at the time of BB's announcement

131. We think it is uncertain whether Magic Millions had a basis under section 670F for not proceeding with its bid in the face of the original BB announcement.
132. On the one hand, the original BB bid was very largely superior to the original Magic Millions bid, and it would be reasonable to expect shareholders in Broncos to prefer the BB bid, in which case Magic Millions' bid appeared highly unlikely to attract any acceptances. BB's announcement of its bid also appeared to materially reduce any chance of Magic Millions gaining any form of control, or increased influence, over Broncos and thus would prevent it from its clearly stated purpose in bidding "to secure a better return for all shareholders".
133. However, the existence of the Cross Condition in the proposed BB bid meant that it is not clear that BB's proposed bid would be superior, which is a prerequisite for suggesting that it would be pointless and unreasonable to expect or require Magic Millions to proceed with its announced bid. In addition, the existence of the Cross Condition meant that if Magic Millions did not proceed with its bid, there existed a real possibility that the BB bid would not proceed, which would leave a clearly unacceptable absence of any bid.

BB before the Review Panel's decision

134. In the event of the Magic Millions bid not proceeding, we consider that it would, on balance, have been somewhat unreasonable to expect or require BB to proceed with its announced bid. BB had clearly taken the future existence of the Magic Millions bid into consideration when it announced its bid, and had sought to protect itself against the Magic Millions bid not proceeding. Similarly, it would not be reasonable to expect or require BB to proceed with its announced bid if the Panel struck down the Cross Condition with which BB had sought to protect itself from having to pay for more than a controlling interest in Broncos if it did not gain 100% ownership.
135. However, it does seem that BB should have known that Magic Millions would seek to avoid proceeding with its bid once it saw the consequences of failing to protect itself with appropriate defeating conditions. Similarly, we would have expected BB or its advisers to be aware of ASIC's Practice Note on withdrawals and to be on notice (whether or not it believed the Practice Note applied to Magic Millions) that Magic Millions might seek to rely on the policy advice in the Practice Note.

Rashness of Cross Condition

136. We note that the Cross Condition is novel in Australia, and that there should have been some uncertainty in BB's, or its advisers', mind whether the condition would be acceptable. As far as we know, neither BB nor its advisers took any steps to discuss the operation or acceptability of this novel condition with ASIC. We think that this was a risky action to take, in the same way as Magic Millions took a risky step in announcing its bid without any minimum acceptance condition. Failing to take such sensible precautions may well have defeated any reliance that BB could have had on the condition or on sections 670E or F.

Magic Millions after the Review Panel's decision

137. We considered that following our decision, Magic Millions did not have any basis to rely on section 670F unless the Revised BB Bid or a superior New BB Bid was announced or made prior to the end of 12 February 2002.

DECISION

Original Cross Condition

138. We agree with the Broncos 01 & 02 Panel that the Cross Condition in BB's bid in its original form was likely to constitute unacceptable circumstances because of its potential self-triggering form.

139. If, as is arguable, the announcement of the original BB bid, gave Magic Millions the right not to proceed with its announced bid, then the Cross Condition was triggered by BB merely making the announcement of its intention to make the bid, of which the Cross Condition was a part. This was regardless of whether Magic Millions at any time sought not to proceed or to withdraw. Essentially, there was a real risk that the Cross Condition gave BB, from the instant of making its announcement, a free option whether to proceed with its bid or not.

140. Given the significance which the law places on the making of an announcement that a person will make a takeover, that cannot be acceptable. Therefore we agree with the Broncos 01 & 02 Panel that the self-triggering aspect of the original Cross Condition had to be removed.

Modified Cross Condition

141. However, we consider that even with the self triggering aspect of the Cross Condition removed, it remained an unacceptable condition. In combination with Magic Millions' possible right to decide not to proceed with its bid in light of BB's announcement, the modified Cross Condition still left the real possibility that neither bid would proceed, despite there being no material changes in the target company. This was likely to create undesirable uncertainty and disturbances in the market for control of Broncos. This is likely to detract from an efficient, competitive and informed market and is likely to subvert the policy of section 631.

142. We considered whether to order that BB, or its associates, may not announce or make a takeover bid for Broncos which was subject to a defeating condition which has the same or similar effect as the Cross Condition. However, BB offered to provide an undertaking to similar effect, therefore such an order was unnecessary.

Requiring BB to proceed with its full bid, without the Cross Condition

143. We decided, on balance, that the Panel's forced variation of a material term of BB's bid meant that it would not be reasonable to require BB to proceed with its announced bid (although BB was free to proceed if it wished). We say this was a decision "on balance" because of the rashness of BB that we have noted previously. We considered whether requiring BB to proceed would be in the interests of certainty, and sending a strong signal to the market that bidders should approach novel devices cautiously. We decided not to, future Panels may well come to different views now that the market has been placed on notice of the Panel's concerns with novel devices that are likely to create undesirable uncertainty and disturbances in the market for control of target companies.

Timeliness of Parties' proceeding

144. We decided that it was in the interests of an efficient market to require BB to decide in a timely manner whether or not it would proceed with its bid with the Cross Condition struck out. BB offered an undertaking which satisfied our concerns in this area and made any order unnecessary.
145. We decided that Magic Millions was required to proceed with the bid it announced on 29 November 2001 and that Magic Millions should commence preparations immediately to do so. Magic Millions initially offered an undertaking which made any order in these terms unnecessary.
146. However, if BB proceeded with a Revised BB Bid, or a New BB Bid that was superior to the Magic Millions bid, it would have been unreasonable to expect or require Magic Millions to proceed with its bid. Not proceeding with its bid, in the face of a Revised BB Bid, or a superior New BB Bid, would not constitute a contravention of section 631 of the Act and would not constitute unacceptable circumstances. Magic Millions' 22 January undertaking was expressed to similar effect.
147. On 22 January we accepted undertakings to the following effect:
- a. From Magic Millions that it would, by 12 February 2002, make takeover offers for shares in Broncos in accordance with its announcement of 29 November 2001 unless BB announced before then that it would make the Revised BB Bid or a New BB Bid;

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- b. From BB that it would not announce or make takeover offers for Broncos shares which were subject to a condition which had the same or similar effect to the Cross Condition (original or modified); and
- c. From BB that it would announce by the end of 23 January 2002 whether or not it would waive the Cross Condition and proceed with its current bid, i.e. the Revised BB Bid.

Magic Millions' proposal for the New Magic Millions Bid

148. We decided to accept Magic Millions' offer to make its New Magic Millions Bid on the basis that we considered that it would provide a net benefit to Broncos shareholders. We considered that the higher price, and the extension of the offer to all shares, rather than 50%, outweighed the negative effect on offerees of the minimum acceptance condition.
149. We agree with ASIC's view that the addition of the minimum acceptance condition made the New Magic Millions Bid less favorable than the original bid in that respect. ASIC considered that the new minimum acceptance condition was a condition that the market would not have expected when Magic Millions made its first announcement. However, we think that the increased price and the extension to all shares, in these particular circumstances, outweigh the detriment, which we acknowledge, of the additional defeating condition.
150. As set out above, Magic Millions required less than 75% of the outstanding shares to match BB's voting power. Given the increased price, and wider terms, we considered that it was not an unreasonable target, if shareholders in Broncos wished to sell their the company. At no stage did any party submit any evidence that particular Broncos shareholders would accept the existing partial bid by BB and would not accept a higher, full bid by Magic Millions.
151. We considered that the overlap of the two bids for almost three weeks, and the modification of section 652B allowing withdrawal of shares from the Magic Millions offer if the minimum acceptance condition was triggered, would give Broncos shareholders a very feasible way of indicating their preference. In the event that BB acquired more than 50% of Broncos before the last week of its offer, Broncos shareholders who had wished to sell all of their shares for 18 cents would have at least a week to accept the BB offer for half of their shares. If BB acquired more than 50% in the last week of its offer its offer would be automatically extended by a period of two weeks under section 624(2). We considered this would give Broncos shareholders reasonable time to maximise their opportunities under both bids.
152. The Panel was concerned at a risk to which Broncos shareholders might be exposed, i.e. that Magic Millions' voting power might not reach the minimum acceptance condition in its bid, and BB might not acquire more than 50% of Broncos. The Panel considered the likelihood of that to be remote. However, in

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that scenario, Broncos shareholders who had accepted the Magic Millions bid would not be able to accept the BB bid before it closed. We invited BB and Magic Millions to give undertakings to the Panel that if either of the bids “succeeded” then that bidder would extend its bid to ensure that shareholders who had accepted into the other bid would have a week to accept into the “successful” bid. Magic Millions proffered the undertaking, BB declined to do so.

153. Given the lack of such an undertaking, the Panel decided that facilitating the proposed rapid withdrawal modification which Magic Millions applied for in Broncos 04 was the furthest it could go to minimise this risk for Broncos shareholders.

Procedural issues

154. There being no declaration of unacceptable circumstances we have made no orders and no costs orders.

Simon McKeon
President of the Sitting Panel
Decision dated 5 February 2002
Reasons published 09 April 2002

Annexure 1 - Original Cross Condition

2.6(a) Magic Millions Offer

Between the Announcement Date [14 December 2001] and the end of the Offer Period:

- (i) there is not in effect any preliminary or final decision, order or modification of the Corporations Act by ASIC or the Takeovers Panel;
- (ii) no action or investigation is instituted or threatened by ASIC or the Takeovers Panel; and
- (iii) no other event occurs,

which permits or (in the case of (ii) or (iii) above) may permit,

- (iv) the withdrawal of the Magic Millions Offer [defined by reference to the 29 November announcement]; or
- (v) the making of the Magic Millions Offer otherwise than in accordance with s631(1) or in accordance with the time periods set out in s633 of the Corporations Act,

as those sections apply prior to any modification or declaration under s655A of the Corporations Act.

Annexure 2 – Modified Cross Condition

2.6(a) Magic Millions Offer

Between the Announcement Date and the end of the Offer Period no event occurs which permits or may permit

- (i) the withdrawal of the Magic Millions Offer; or
- (ii) the making of the Magic Millions Offer otherwise than in accordance with s631(1) of the Corporations Act or in accordance with the time periods set out in s633 of the Corporations Act, as those sections apply prior to any modification or declaration under s655A of the Corporations Act.

This clause does not apply to an act of BB Sports, or where the event is a decision, order or modification of ASIC or the Takeovers Panel, except a decision relating to the time periods in s631(1) or s633 of the Corporations Act.

Annexure 3 - Magic Millions Undertaking

Please note that the following two undertakings both quote and cross refer to each other. Please note the page headers in referencing the two undertakings.

Conditional undertaking by Magic Millions League Pty Limited in connection with the decision in Re Brisbane Broncos Limited (No 3)

Subject to the conditions below, Magic Millions League Pty Limited (ACN 098 527 185) (**Magic Millions**) undertakes, pursuant to section 201A of the Australian Securities and Investments Commission Act 2001 (Cth), to the Takeovers Panel that Magic Millions will make takeover offers for shares in the Brisbane Broncos Limited (ACN 009 570 030) (the **Broncos**) on terms and conditions which are the same as or not substantially less favorable than those proposed in its announcement of 29 November 2001 (**Magic Millions Bid**), by 12 February 2002.

Condition 1

This undertaking will be of no force or effect unless and until the Takeovers Panel receives undertakings from BB Sports Pty Limited Pty Limited (ACN 009 659 107) (**BB Sports**), pursuant to section 201A of the Australian Securities and Investments Commission Act 2001 (Cth.), in the terms of that attached in schedule 1.

Condition 2

This undertaking will cease to apply (and Magic Millions will not be obliged to proceed with the Magic Millions Bid) if BB Sports (or an associate) announces that:

1. BB Sports will delete or waive the condition in clause 2.6(a) of its replacement bidder's statement dated 3 January 2002 and otherwise proceed to make the offers set out in that bidder's statement; or
2. BB Sports (or an associate) will make offers under a takeover bid which:
 - (i) *do not contain a condition which in any way relates to the Magic Millions Bid or to any variant or substitute bid, other than a condition that any variant or substitute bid not be on terms that offerees (other than BB Sports, Magic Millions and their respective associates) would reasonably be expected to prefer over the relevant bid by BB Sports; and*
 - (ii) are on terms that offerees (other than BB Sports, Magic Millions and their respective associates) would reasonably be expected to prefer over the Magic Millions Bid.

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Dated: [insert date]

Signed on behalf of Magic Millions by:

Garry Charny, Director

Schedule 1 – BB Sports undertaking

In the Matter of ASIC, BB Sports Pty Limited (ACN 009 659 107) (*BB Sports*) and Magic Millions League Pty Limited (ACN 098 527 185) (*Magic Millions*) in relation to Brisbane Broncos Limited (ACN 009 570 030) (*Broncos*).

Undertakings by BB Sports pursuant to section 201A(1) of the Australian Securities & Investments Commission Act 2001

1. Undertakings

Subject to section 2 hereof, BB Sports undertakes to the Takeovers Panel pursuant to section 201A(1) of the Australian Securities & Investments Commission Act 2001 as follows:

- (i) BB Sports will announce to the Australian Stock Exchange Limited (*ASX*) by the end of Wednesday 23 January 2002 whether it will delete or waive the condition in clause 2.6(a) of its replacement bidder's statement dated 3 January 2002 and otherwise proceed to make the offers set out in that bidder's statement (the *BB Sports' Offer*);

neither BB Sports nor an associate will make offers under a takeover bid which contains a condition which in any way relates to the takeover bid announced by Magic Millions on 29 November 2001 or to any variant or substitute bid, other than a condition that any variant or substitute bid not be on terms that offerees (other than BB Sports, Magic Millions and their respective associates) would reasonably be expected to prefer over the relevant bid by BB Sports; and

- (c) if BB Sports elects (in accordance with paragraph 1(a)) to not proceed with the *BB Sports' Offer*, BB Sports will make an announcement to *ASX* to the effect that BB Sports will not be proceeding with the *BB Sports' Offer* because the Takeovers Panel:

has found that public policy required that conditions to the effect of the Cross Condition would detract from an efficient, competitive and informed market and accordingly

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would be likely to give rise to unacceptable circumstances under section 657A of the Corporations Act 2001; and

also found that, having regard to that finding, it would not be reasonable to expect or require BB Sports to proceed with the BB Sports' Offer.

2. Condition

The undertakings of BB Sports in section 1 hereof, are conditional upon the Takeovers Panel receiving undertakings from Magic Millions pursuant to section 201A(1) of the Australian Securities & Investments Commission Act 2001 in the terms of the attached draft.

DATED: 21 January 2002

SIGNED FOR AND ON BEHALF OF)

BB SPORTS PTY LIMITED)

Keith Brodie
Director



**In the Matter of ASIC, BB Sports Pty Limited (ACN 009 659 107)
(BB Sports) and Magic Millions League Pty Limited
(ACN 098 527 185) (Magic Millions) in relation to Brisbane Broncos
Limited (ACN 009 570 030) (Broncos).**

**Undertakings by BB Sports pursuant to section 201A(1) of the
Australian Securities & Investments Commission Act 2001**

3. Undertakings

Subject to section 2 hereof, BB Sports undertakes to the Takeovers Panel pursuant to section 201A(1) of the Australian Securities & Investments Commission Act 2001 as follows:

- (i) BB Sports will announce to the Australian Stock Exchange Limited (ASX) within 2 business days of the date of this undertaking, whether it will delete or waive the condition in clause 2.6(a) of its replacement bidder's statement dated 3 January 2002 and otherwise proceed to make the offers set out in that bidder's statement (the *BB Sports' Offer*);
- (b) *neither BB Sports nor an associate will make offers under a takeover bid which contains a condition which in any way relates to the Magic Millions Bid or to any variant or substitute bid, other than a condition that that bid not be on terms that offerees (other than BB Sports, Magic Millions and their respective associates) would reasonably be expected to prefer over the relevant bid by BB Sports; and*
- (c) if BB Sports elects (in accordance with paragraph 1(a)) to not proceed with the BB Sports' Offer, BB Sports will make an announcement to ASX to the effect that BB Sports will not be proceeding with the BB Sports' Offer because the Takeovers Panel:
 - (A) has found that public policy required that conditions to the effect of the Cross Condition would detract from an efficient, competitive and informed market and accordingly would be likely to give rise to unacceptable circumstances under section 657A of the Corporations Act 2001; and
 - (B) also found that, having regard to that finding, it would not be reasonable to expect BB Sports to proceed with the BB Sports' Offer.



4. Condition

The undertakings of BB Sports in section 1 hereof, are conditional upon the Takeovers Panel receiving undertakings from Magic Millions pursuant to section 201A(1) of the Australian Securities & Investments Commission Act 2001 in the terms of the attached draft.

DATED: 21 January 2002

SIGNED FOR AND ON BEHALF OF)

BB SPORTS PTY LIMITED)

Keith Brodie
Director



Conditional undertaking by Magic Millions League Pty Limited in connection with the decision in Re Brisbane Broncos Limited (No 3)

Subject to the condition below, Magic Millions League Pty Limited (ACN 098 527 185) (**Magic Millions**) undertakes, pursuant to section 201A of the Australian Securities and Investments Commission Act 2001 (Cth), to the Takeovers Panel that Magic Millions will make takeover offers for shares in the Brisbane Broncos Limited (ACN 009 570 030) (the **Broncos**) on terms and conditions which are the same as or not substantially less favorable than those proposed in its announcement of 29 November 2001 (**Magic Millions Bid**), by 12 February 2002.

Condition 1

This undertaking will be of no force or effect unless and until the Takeovers Panel receives undertakings from BB Sports Pty Limited Pty Limited (ACN 009 659 107) (**BB Sports**), pursuant to section 201A of the Australian Securities and Investments Commission Act 2001 (Cth), substantially in the terms of that attached in schedule 1.

Condition 2

This undertaking will cease to apply (and Magic Millions will not be obliged to proceed with the Magic Millions Bid) if BB Sports (or an associate) announces that:

3. BB Sports will delete or waive the condition in clause 2.6(a) of its replacement bidder's statement dated 3 January 2002 and otherwise proceed to make the offers set out in that bidder's statement; or
4. BB Sports (or an associate) will make offers under a takeover bid which:
 - (i) do not contain a condition which in any way relates to the Magic Millions Bid or to any variant or substitute bid, other than a condition that any variant or substitute bid not be on terms that offerees (other than BB Sports, Magic Millions and their respective associates) would reasonably be expected to prefer over the relevant bid by BB Sports; and
 - (ii) are on terms that offerees (other than BB Sports, Magic Millions and their respective associates) would reasonably be expected to prefer over the Magic Millions Bid.



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Annexure 4 - BB Undertaking

Dated: 22 January 2002

Signed on behalf of Magic Millions by:

Garry Charny, Director