



Australian Government

Takeovers Panel

**Reasons for Decision
Premium Income Fund
[2011] ATP 10**

Catchwords:

Managed Investment Scheme – off market takeover – disclosure – letter to unit holders – extension of bid – requirements to extend not complied with – replacement bidder’s statement – listing condition – value of the bid – litigation issues – target disclosure – declaration – orders

Corporations Act 2001 (Cth), sections 636, 638, 650D, 657A, 657C

Primelife Corporation Ltd v Aevum Ltd [2005] NSWSC 269; Pinnacle VRB Ltd v Reliable Power Inc [2001] VSC 262

Allegiance Mining NL [2008] ATP 3; Pinnacle VRB Ltd No. 9b [2001] ATP 26

INTRODUCTION

1. The Panel, Diana Chang, Byron Koster and Peter Scott (sitting President), made a declaration of unacceptable circumstances in relation to the affairs of Premium Income Fund. The application concerned disclosure in a letter to unit holders and whether a notice of variation extending the offer had been sent to all unit holders. The Panel declared that ALF PIF Finance Limited communicating with unit holders and receiving acceptances although its bid for PIF had not been validly extended, and disclosure and other issues, gave rise to unacceptable circumstances.
2. In these reasons, the following definitions apply.

ALF Finance	ALF PIF Finance Limited, the bidder for PIF
NSX	National Stock Exchange Limited
PIF	Premium Income Fund
Wellington	Wellington Capital Limited, the responsible entity for PIF

FACTS

3. PIF is listed on NSX (NSX code: PIN). It has 830,532,768 units on issue. Wellington is the responsible entity.
4. ALF Finance made a bid for all the units in PIF. The consideration offered was 0.1 redeemable preference share and 0.5 ordinary shares in ALF Finance for every unit in PIF. The offer was subject to conditions, including a 90% minimum acceptance condition.
5. On 15 June 2010, ALF Finance lodged its (replacement) bidder’s statement with ASIC and sent a copy to Wellington and NSX.
6. On 30 June 2010, Wellington lodged a target’s statement with ASIC and sent a copy to ALF Finance and NSX.

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7. The bid was scheduled to close on 28 February 2011. On 18 February 2011, ALF Finance completed a “Notice of Variation – Extension of Offer Period”. The notice said that the offer period was extended to 14 June 2011, being one year after it was made. Under cover of a letter dated 18 February 2011, a copy of the notice was released by NSX on 21 February 2011. The covering letter indicated that the notice had been lodged with ASIC and would be sent to PIF and unit holders.
8. It appears the notice was not sent to unit holders until enclosed with a letter dated 18 April 2011.
9. By letter dated 18 April 2011, ALF Finance notified PIF unit holders of an extension of its offer. The letter referred to new circumstances that had arisen since the bidder’s statement was lodged.
10. Between 3 May 2011 and 6 May 2011, the letter was sent to unit holders.
11. Wellington submitted that there were information deficiencies in the letter (see below).
12. On 31 May 2011, ALF Finance disclosed that it had a relevant interest in 1.17% of PIF’s issued capital.

APPLICATION

13. By application dated 11 May 2011, Wellington (as responsible entity for PIF) sought a declaration of unacceptable circumstances in relation to the affairs of PIF.
14. It submitted that the 18 April letter contained information which was misleading and deceptive and was misleading and deceptive by omission. It also submitted that the letter referred to new circumstances which should have been included in a bidder's statement. Thus:
 - (a) there was an inefficient, uncompetitive and uninformed market
 - (b) unit holders did not know the identity of persons who proposed to acquire a substantial interest in PIF and
 - (c) unit holders did not have enough information to enable them to assess the merits of the ALF Finance offer.
15. It also submitted that the 18 April letter, enclosing the notice of variation, was sent to some but not all unit holders.

Interim orders sought:

16. Wellington sought interim orders to the effect that:
 - (a) Mr James Byrnes and ALF Finance be prevented from publishing or dispatching any further material to PIF unit holders in respect of the offer pending final determination of the application and
 - (b) any acceptances received after 18 February 2011 pending final determination of the application be returned.

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17. Wellington did not press for these orders to be considered prior to a sitting Panel being appointed.
18. On 20 May 2011, Mr James Byrnes emailed the parties to indicate that ALF Finance had commenced preparation of a supplementary bidder's statement and notice waiving the bid conditions. Wellington renewed its request for an interim order.
19. We granted an interim order (see Annexure A).

Final orders sought

20. Wellington sought final orders to the effect that:
 - (a) ALF Finance prepare, and dispatch to unit holders, a supplementary bidder's statement correcting deficiencies in the bidder's statement and
 - (b) unit holders be given the right to withdraw their acceptances in accordance with section 650E as though a notice of variation were received under that section.

DISCUSSION

Extension of the bid

21. Wellington submitted that the Notice of Variation had not been sent to all unit holders. We asked ALF Finance to provide evidence of dispatch of the Notice of Variation.
22. ALF Finance attached a copy invoice and copy receipt from its mailing house. Each was dated 21 March 2011, the difference between them being one carried a "paid" stamp. They indicated, among other things, supply and printing of envelopes, data processing, allocating Australia Post barcodes, and freight and lodgement with Australia Post. No date was given for the taking of any of these actions.
23. Mr Byrnes, in his submission, responded to the question, referring to the same documents.
24. Wellington submitted, in rebuttal, that the evidence established that the Notice of Variation was sent after the offer period had closed. It also referred to "*the pattern of unit holder enquiries*":
 - (a) on 4 May 2011, a call from an adviser who had received material relating to the extension on that day
 - (b) on 5 May 2011, investor relations staff advising that they were "*starting to field enquiries*" in relation to the 18 April 2011 letter
 - (c) on 5 May 2011, a number of emails to the Wellington investor address and subsequent increased telephone call volume and
 - (d) on 9 May 2011, approximately 5 calls from advisers that they had received the 18 April letter addressed to their clients.
25. ALF Finance and Mr Byrnes submitted a joint rebuttal. They said that unit holders were sent the notice of variation and perhaps not all unit holders received it because the registry had not properly maintained the register.

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26. On 27 May 2011 ALF Finance sought to lodge an additional rebuttal, responding to Wellington's rebuttal submission. We accepted it. The submission said:
- “(d) *We have previously provided a copy of the invoice and receipt for the mail out to the Panel.*
- (e) *Mr Sayer [Solicitor for Wellington] expressed some doubt/uncertainty about the printer We now enclose the notice of lodgement that was given by the printer to Australia Post to further support 'proof of delivery'.*
- ...
5. *Unless we have been defrauded by the printer or Australia Post, we have proved position re the mail out to unitholders"*
27. Attached was a mailing statement from Australia Post showing the lodgement time as “May 2, 2011 3:26:59 PM”.
28. The evidence is that the Notice of Variation was not mailed to unit holders before 2 May 2011. This is consistent with the pattern of enquiries referred to in Wellington's submissions.
29. Extending an off-market bid must be done in conformity with s650C and s650D. The bidder under a conditional bid must, among other things, prepare a notice, lodge the notice with ASIC and thereafter give the notice to the target and “everyone to whom offers were made under the bid” before the end of the offer period. Sections 650B, 650C and 650D, subject to the Act, provide the sole method by which offers under off-market bids may be varied.¹ The result which follows from the failure to comply with the “sole method” is that there will be a failure to vary validly and the failure to vary will mean, subject to any remedial court order, that the bid has lapsed and there are no extant offers.²
30. In our view this appears to have happened here. Accordingly, the bid would have ended on 28 February 2011. Indeed, in submissions on orders, Mr Byrnes agreed that the bid ended on 28 February 2011. ALF Finance adopted this submission when it submitted “the Board had discussed Mr Byrnes submission prior to lodgment with you and the Board confirms that the statements made in Mr Byrnes submission regarding the Boards position are correct.”
31. In the absence of a remedial court order, the bid has ended without the conditions being met or waived and therefore unit holders who accepted are entitled to their units back.
32. If it is not correct that the bid ended on 28 February 2011, we address the other issues raised in the application.

Listing condition

33. The replacement bidder's statement speaks of the possible listing of the bidder on ASX. In section 3.6, under the heading "Intention To List", the replacement bidder's statement says:

¹ *Pinnacle VRB Ltd v Reliable Power Inc* [2001] VSC 262 at [9]; *Allegiance Mining NL* [2008] ATP 3

² *Primelife Corporation Ltd v Aevum Ltd* [2005] NSWSC 269 at [8]

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

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

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

34. In the 18 April letter, ALF Finance says:

[ALF Finance] wants to list on the ASX (subject to normal commercial terms and requirements) and they want to unlock the real value, including possible actions against Wellington itself..."

And later:

[ALF Finance] will, subject to normal commercial terms and requirements, expedite a listing of the company on the ASX, with the obvious associated benefits.

35. We asked whether these statements triggered s625(3). That section says:

If:

- (a) *the consideration offered is or includes securities; and*
- (b) *the offer or the bidder's statement states or implies that the securities are to be quoted on a financial market (whether in Australia or elsewhere);*

the following rules apply:

- (c) *the offer is subject to a condition that:*
 - (i) *an application for admission to quotation will be made within 7 days after the start of the bid period; and*
 - (ii) *permission for admission to quotation will be granted no later than 7 days after the end of the bid period;*
- (d) *the offer may not be freed from this condition.*

36. Wellington submitted that there had been a breach of s625(3) or at least a breach of the policy underlying it, creating unacceptable circumstances.

37. ALF Finance submitted that at 18 April 2011 it was unable to make a firm commitment to list.

38. Mr Byrnes submitted:

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For the sake of clarity, [ALF Finance] wants to list, this is not contested, however should [ALF Finance] not achieve an acceptable number of acceptances then it may be impractical to list at this time specifically for the purpose of the current bid. should (sic) [ALF Finance] achieve an acceptable number of units it would be practical thereafter to fast track a listing as opposed to what is planned. This will be fully clarified in the supplementary bidders (sic) statement or a fresh full takeover offer."

39. ASIC submitted that although the statement in section 3.6 of the replacement bidder's statement was ambiguous it occurred under the heading "Intention To List". Moreover, any statement in a bidder's statement referring to the possibility of listing triggered s625(3), because, it submitted, no matter how they were couched, such statements gave rise to an expectation and may therefore act as an inducement to target holders to accept a scrip offer.
40. Section 625(3) reflects an important policy. Information about listing is of great significance to PIF unit holders, since it affects the ability of accepting PIF unit holders to exit their resultant holding in ALF Finance and may affect the value of the consideration they are offered. Making or implying a statement that securities are to be quoted in a bidder's statement clearly attracts the section. Making or implying a statement in other correspondence connected with a bid clearly attracts the policy of the section, and may result in unacceptable circumstances.
41. In *Pinnacle VRB Ltd No. 9b*³ two views of the policy underlying the section were in issue:
- (a) the statement must be that securities are to be quoted and
 - (b) the section cannot be avoided merely by acknowledging the contingency that quotation may not be obtained.
42. The Panel in *Pinnacle VRB Ltd No. 9b* noted that s625(3) was not simply a disclosure provision but was designed to ensure that investors would not be left with unlisted securities as a result of assuming that listing would occur. The Panel did not decide the proper interpretation of s625(3), but found that statements in an ASX announcement gave rise to unacceptable circumstances. The announcement included the following statements:
- The Vantek Board has decided that it is in the best interests of Vantek to seek a listing on the Australian Stock Exchange. Vantek's bid for Pinnacle is not conditional on becoming listed on ASX.*
- Vantek has not yet formally applied to the ASX for listing and quotation of its securities. Once Vantek formally applies, the ASX has absolute discretion concerning the listing of a company and the quotation of its securities.*
- Vantek intends to formally apply for admission to the ASX in the near future.*
43. The Panel also said that a decision to seek listing made after the commencement of the bid period would "almost invariably" be material information required to be

³ [2001] ATP 26

disclosed in a supplementary bidder's statement.⁴ The statements in *Pinnacle* were stronger than here.

44. Nevertheless, in our view, the statements made in the 18 April letter raise the very policy concerns that underpin s625(3). No application for quotation has been made. This gives rise to unacceptable circumstances. Moreover, the statements should have been included in a supplementary bidder's statement. They have not. This gives rise to unacceptable circumstances.
45. Whether the more equivocal statement in the replacement bidder's statement triggers s625(3) we do not need to decide, although we would be inclined to think even that does. Simply put, if a bidder is not sure whether it will apply for listing, it should avoid any suggestion that it intends to do so.

Disclosure issues in the replacement bidder's statement and 18 April letter

46. Wellington submitted that information in the 18 April letter, and other documents publicly released by ALF Finance or its associated entities:
 - (a) made certain statements that were in the bidder's statement misleading or deceptive
 - (b) suggested that information required by s636 had not been included in the bidder's statement and
 - (c) referred to material new circumstances.

The value and capital structure of ALF Finance

47. The replacement bidder's statement includes charts showing the offer price per unit as 15 cents against the unit price on 10 May 2010, the last practical date before the offer was made public, of 7.5 cents. A note to the chart says:
 2. *The [ALF Finance] Redeemable Preference Shares are redeemed at \$0.15 cents (sic) per unit (of which redemption there is no guarantee)*
48. The 18 April letter says that ALF Finance is "offering PIF Unitholders what could be a last chance to recover lost value from their investment" and "the market value of all of the units is less than \$70m i.e. less than half of the [ALF Finance] offer."
49. The latter statement compares apples and oranges: PIF's market price and PIF's stated net asset backing (from which the implied value of the bid consideration derives).
50. The replacement bidder's statement does not go into any detail about how the value of the bid consideration is derived. PIF's stated net asset backing at 31 December 2009 was 35 cents per unit. Accepting unit holders get a preference share in ALF Finance, said to be worth 15c per unit (assuming redemption), plus 19.09% of ordinary equity. ALF Finance and Mr Byrnes in submissions each derived a value for the offer consideration based on the stated net asset backing of PIF units. Therefore, the value of the offer comes from the value that is assumed to be in the target itself.

⁴ [2001] ATP 26 at [45]

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51. This of course assumes that the preference shares are redeemed for cash, which ALF Finance is not required to do. It also assumes access to the net asset backing of the PIF units, which may be unavailable if ALF Finance does not get all the units.
52. In our view, the value of the offer, and particularly the fact that it is based on the value of the target, was not disclosed adequately, or at all, to unit holders. Nor were the risks of the preference shares not being able to be redeemed.
53. The 18 April letter also says that ALF Group Holdings AG and Kingsley Finance Co Ltd “*have agreed to subscribe for \$5 million in new capital in [ALF Finance] and the paid in capital of [ALF Finance] will be \$5,001,200.*”
54. Kingsley Finance owns more than 50% of ALF Group Holdings. ALF Group Holdings AG owns 100% of ALF Group Pty Ltd. ALF Group Pty Ltd owns 90% of the bidder (ALF Finance) and 100% of Australian Litigation Funders Pty Ltd.
55. The subscription referred to in paragraph 53 was shares in ALF Group Holdings. Wellington submitted that full disclosure should be made of this. We agree. We asked Mr Byrnes what the current market capitalisation of ALF Group Holdings was. He did not answer other than to say “*Relevance. This is a public company, a Swiss company*”. Wellington, in rebuttal submissions, said:

The [ALF Finance] letter stated that the \$5 million subscription was to occur on or about 30 April 2011. At that time ALF Group Holdings AG was trading at around 0.06 Euro per share. If Bloomberg is correct and there is (sic) 1,775,000 shares on issue in ALF Group Holdings AG, the market capital of ALF Group Holdings AG would have been approximately 106,500 Euro.
56. Whether or not Wellington’s submission is correct, the point remains that the real value of the subscription is unclear to us and we believe that unit holders would be unlikely to be able to establish it from what was disclosed.

Litigation issues

57. The replacement bidder's statement contained little in the way of a discussion of litigation issues involving PIF or Wellington. The 18 April letter, however, said:

[ALF Finance] have the rights to over \$40m in claims against PIF that will be scrapped when or if the offer is accepted and [ALF Finance] have control of PIF

and

[ALF Finance] has obtained a Litigation Funding offer so that it can properly bring proceedings against Wellington and or its management should they be found liable to PIF.
58. Wellington submitted that further details regarding the terms of litigation funding needed to be disclosed. We agree. The litigation funding offer referred to is from Australian Litigation Funders Pty Ltd, a wholly-owned subsidiary of ALF Group Pty Ltd. In our view, the statement about litigation funding is potentially misleading. The financing is not independent of the bidder, yet the statement has been written in a way that suggests an independent third party has made an assessment of the claims.

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59. Perhaps more importantly, in our view the statement that claims will be scrapped if unit holders accept the offer has a tendency to coerce unit holders into acceptance of the bid and is unacceptable. While it may be a statement of the obvious (ie, 'if we gain ownership, we will not sue ourselves') it is unlikely that unit holders will understand it in that way, even assuming that it was intended to be understood in that way.
60. Of course, if there are claims which Wellington is aware of, they should be disclosed in the target's statement unless not material.

Other disclosure issues

61. Wellington submitted that there were other areas of the replacement bidder's statement or the 18 April letter of concern:
- (a) statements about the performance of Wellington
 - (b) statements misdescribing Wellington's public statements by suggesting that Wellington had conceded it had done little to pursue a litigation claim against Fortress Capital
 - (c) statements suggesting that PIF's accounts were fictitious and
 - (d) comments regarding Ms Jenny Hutson, Wellington's managing director.
62. While these raised concerns, we do not need to pursue them further.

Other matters

The involvement in the offer by disqualified director Mr James Byrnes

63. Wellington submitted that the 18 April letter, and an email from Mr Byrnes to NSX and Wellington's lawyers dated 11 May 2011, demonstrated that Mr Byrnes was involved in the management, control and direction of ALF Finance.
64. Mr Byrnes has been banned by ASIC from managing a corporation. On 13 September 2006, ASIC issued a media release stating that Mr Byrnes had been banned from managing corporations for five years. It noted that he had previously been banned. In relation to the latest banning, ASIC said it "*was of the view that Mr Byrnes' management of the four failed companies demonstrated incompetence, a lack of commercial morality and a disregard for his statutory duties as a director.*"
65. Mr Byrnes submitted that he was a consultant to ALF Finance. ALF Finance submitted that Mr Byrnes provided his services on an informal basis to the board, had no day-to-day role and was not remunerated.
66. In numerous emails to the Panel there appeared to be minimal separation of ALF Finance and Mr Byrnes. Mr Byrnes appeared to speak for the company on many occasions, notwithstanding that it was separately a party.
67. In response to the orders brief, Mr Byrnes acknowledged for the board of ALF Finance that it accepted that the bid had closed. Subsequently we received an email from ALF Finance, saying: "*As a point of clarification and to remove any possible confusion, the Board had discussed Mr Byrnes submission prior to lodgment with you and the Board confirms that the statements made in Mr Byrnes submission regarding the Boards position are correct*".

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68. It seems to us that Mr Byrnes is very closely involved in ALF Finance's bid. It is a matter for other authorities to determine whether he has been involved in the management, control and direction of ALF Finance.

Wellington's disclosure

69. In his submissions, Mr Byrnes raised issues regarding Wellington's target's statement. He submitted, among other things, that the target's statement contained statements that were misleading or factually incorrect.
70. ALF Finance, in its submissions, sought orders that Wellington, among other things, issue a supplementary target's statement.
71. We think that Wellington should have addressed, either in the target's statement or a supplementary target's statement as appropriate, the circumstances surrounding the need to raise capital shortly after making a distribution, whether there are legitimate claims by or against it or PIF that are likely to be the subject of litigation, and information regarding the 'PIF Action Group', being unit holders holding approximately 27% of the issued units who are seeking to replace Wellington as the responsible entity.
72. Mr Byrnes was informed of his ability to make an application, as such matters were not addressed in the application before the Panel. He did not do so. He was also informed that he could perhaps raise his concerns in a preliminary submission (if he became a party), but the Panel may decide that they were not relevant to the application. We are inclined to think there is some merit in his concerns, and we would have been prepared to consider these issues (and possibly others that he and ALF Finance raised), and we may perhaps have issued a supplementary brief. There is no utility in taking this course in all the circumstances.

Media canvassing

73. Neither Wellington nor Mr Byrnes has acted in conformity with the undertakings required in a Notice of Appearance.
74. On 24 May 2011 Wellington issued a press release which addressed the bid and the requisition for a unit holders' meeting by the PIF Action Group. It then said: "*The correspondence from both parties makes misleading and ambiguous statements about your Fund and your manager.*"
75. The statement breached the media canvassing undertaking that Wellington gave and a further undertaking was accepted by us (see Annexure B). The further undertaking was to the effect that:
- (a) Wellington would not publish or dispatch any further material to PIF unit holders in respect of the bid contrary to the undertaking it had provided in its Notice of Appearance and
 - (b) until the Panel had determined the proceedings, Wellington would provide to the Panel for its consideration, any future statements that it wished to publish or send to unit holders in relation to the bid before those statements were made public.

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76. On 30 May 2011 an article appeared in the Sydney Morning Herald anticipating the release of Wellington's further undertaking. It said:

THE manager of the struggling Premium Income Fund (PIF), Wellington Capital, is expected to receive a humiliating rebuke from the Takeovers Panel today just as opposition grows to its controversial rights issue.

77. This was communicated to the press by Mr Byrnes, who has since accepted that "It would seem I have misinterpreted the undertaking I gave."

78. We regard this as a serious breach. But for completion of the matter we would have considered taking this further.

New Bid

79. ALF Finance has hinted at the prospect of a fresh bid for PIF. Wellington sought an additional order, in response to our orders brief, that ALF Finance, Mr Byrnes or any associate of either of them not make a bid during the six month period following the date of the Panel's orders.

80. The Corporations Act does not prevent a new bid being made immediately after the close of a bid, although of course the circumstances in which that might happen may give rise to unacceptable circumstances.

81. We do not think we should include the additional order sought by Wellington. If a new bid materialises, we would expect the clear message from this proceeding to have reached and been understood by both the bidder and target, namely that unit holders are entitled to clear, accurate, timely and complete disclosure of all material information.

DECISION

Declaration

82. It appears to us that the circumstances are unacceptable:

(a) having regard to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:

(i) the control, or potential control, of PIF

(ii) the acquisition, or proposed acquisition, by a person of a substantial interest in PIF and

(b) having regard to the purposes of Chapter 6 set out in section 602 of the Act and

(c) because they gave or give rise to, or will or are likely to give rise to, a contravention of a provision of Chapter 6 of the Act.

83. Accordingly, we made the declaration in Annexure C and consider that it is not against the public interest to do so. We had regard to the matters in s657A(3).

Orders

84. Following the declaration, we made the final orders in Annexure D. Under s657D the Panel's power to make orders is very wide. The Panel is empowered to make 'any order'⁵ if four tests are met:
- (a) It has made a declaration under s657A. This was done on 3 June 2011.
 - (b) It must not make an order if it is satisfied that the order would unfairly prejudice any person. We are satisfied that our orders do not unfairly prejudice any person. The bid has ended and the orders address the return of acceptances. We consider that orders for further disclosure would now serve no purpose.
 - (c) It gives any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. This was done on 31 May 2011. Each party made submissions and rebuttals.
 - (d) It considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons, or ensure that a takeover or proposed takeover proceeds as it would have if the circumstances had not occurred. The orders do the former by returning acceptances to unit holders.
85. As noted earlier, ALF Finance has indicated that it may make a fresh bid. Wellington submitted that there was a real risk of unit holders being confused and accepting offers under a follow-on bid based on misleading statements made in the original bid. It submitted that it was appropriate to prevent a follow-on bid for six months. For the reasons given earlier, we do not think we should make this order.
86. ALF Finance and Mr Byrnes submitted that there should be no orders against ALF Finance as the bid had ended. We do not agree. The declaration of unacceptable circumstances is based, in part, on communications with unit holders and receipt of acceptances after the bid had ended. It is appropriate to make orders, including that the market be clearly informed that the bid has ended and consequential orders about return of acceptances to accepting unit holders.
87. ALF Finance and Mr Byrnes also submitted that there should be a declaration and orders in relation to PIF made concerning Wellington's disclosure. We have not done so, and submissions and rebuttals on this were not sought, for the reasons given earlier.
88. There may be no utility in now ordering further disclosure by ALF Finance (or considering the question of further disclosure by Wellington). However, should the closing of the bid because of non-compliance with the Act be remedied by a court order, we would require further disclosure, by variation to our orders. This,

⁵ Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

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and indeed the disclosure issues in themselves, warrants the making of a declaration in our view.

Peter Scott
President of the sitting Panel
Decision dated 3 June 2011
Reasons published 14 June 2011

Party	Advisers
PIF	McCullough Robertson
ALF Finance	NA
Mr Byrnes	NA



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Annexure A
CORPORATIONS ACT
SECTION 657E
INTERIM ORDERS

PREMIUM INCOME FUND

Wellington Capital Limited as responsible entity for the Premium Income Fund (**PIF**) made an application to the Panel dated 11 May 2011 in relation to the affairs of PIF.

The Panel **ORDERS**:

1. Mr James Byrnes and ALF PIF Finance Limited (**ALF Finance**) not publish or dispatch any further material to PIF unitholders in respect of the off-market takeover bid by ALF Finance for all of the units in PIF (**ALF PIF Offer**) or make any variations to the ALF PIF Offer.
2. These interim orders have effect until the earliest of:
 - (i) further order of the Panel
 - (ii) the determination of the proceedings and
 - (iii) 2 months from the date of these interim orders.

Alan Shaw
Counsel
with authority of Peter Scott
President of the sitting Panel
Dated 24 May 2011



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Annexure B

Australian Securities and Investments Commission Act (Cth) 2001 Section 201A

Undertaking

PREMIUM INCOME FUND

Pursuant to section 201A of the Australian Securities and Investments Commission Act 2001 (Cth), Wellington Capital Limited as Responsible Entity of the Premium Income Fund (**PIF**) undertakes to the Panel that:

1. it will not publish or dispatch any further material to PIF unit holders in respect of the takeover bid by ALF PIF Finance Limited (**ALF Finance**) contrary to the undertaking it has provided in its Notice of Appearance.
2. until the Panel has determined the proceedings, it will provide to the Panel for its consideration, any future statements that it wishes to publish or send to PIF unit holders in relation to the ALF Finance bid before those statements are made public.

Signed by Jenny Hutson

with the authority, and on behalf, of Wellington Capital Limited as Responsible Entity of the Premium Income Fund

Dated 30 May 2011



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Annexure C

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

PREMIUM INCOME FUND

CIRCUMSTANCES

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

Purported variation

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

Intention to list

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

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

- *The level of acceptances received by ALF pursuant to this offer;*
- *ALF's compliance with the Listing Rules of ASX as they may be in force from time to time;*
- *The number of Shareholders in ALF and the size of their shareholdings;*

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- *The cost of obtaining a listing of ALF's Ordinary Shares on ASX;*
- *Market conditions.*

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

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

Disclosure regarding ALF Finance

12. The 18 April letter included statements:

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

The market value of all units is less than \$70M i.e. less than half of the ALF [Finance] offer.

13. Page 18 of the replacement bidder’s statement stated:

The ALF Redeemable Preference Shares are redeemed at \$0.15 cents per unit (of which redemption there is no guarantee).

14. ALF Finance has not demonstrated a reasonable basis for making these statements.

15. The 18 April letter also included the following statement:

ALF Group Holdings AG and Kingsley Finance Co Limited have agreed to subscribe for \$5 million in new capital in ALF [Finance], and the paid in capital of ALF PIF Finance Limited will be \$5,001,200.

16. The 18 April letter is misleading in that it failed to disclose that the subscription for the \$5 million of new capital in ALF Finance consisted of shares in ALF Group Holdings AG.

Disclosure regarding litigation funding and claims against PIF

17. The 18 April letter states that “ALF [Finance] have received an offer from Australian Litigation Funders Pty Ltd to provide litigation funding to pursue all avenues of recovery against Wellington.”
18. The statement in the 18 April letter is misleading in the absence of disclosure of the relationship between Australian Litigation Funders Pty Ltd and ALF Finance.

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19. The 18 April letter also included the statement: “*ALF [Finance] have the rights to over \$40m in claims against PIF that will be scrapped when or if the offer is accepted and ALF [Finance] have control of PIF.*” (original emphasis).
20. The statement in the 18 April letter is misleading in the absence of additional disclosure in relation to the substance of these claims.
21. Moreover, the statement is likely to coerce unitholders into accepting the bid.
22. The Panel considers that the communications after close of the bid, the receipt of acceptances after close of the bid, failure to prepare a further supplementary bidder’s statement as required and the material deficiencies in the disclosure in the existing replacement bidder’s statement and the 18 April letter has resulted in:
 - (a) the acquisition of control over PIF units not taking place in an efficient, competitive and informed market and
 - (b) PIF unitholders not having enough information to enable them to assess the merits of the bid.
23. Even if the bid was validly extended, the corrections required would not leave unitholders with a reasonable time to consider the proposal.
24. It appears to the Panel that the circumstances are unacceptable:
 - (a) having regard to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of PIF
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in PIF and
 - (b) having regard to the purposes of Chapter 6 set out in section 602 of the Act and
 - (c) because they gave or give rise to, or will or are likely to give rise to, a contravention of a provision of Chapter 6 of the Act.
25. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3).

DECLARATION

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

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



Australian Government

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Annexure D
CORPORATIONS ACT
SECTION 657D
ORDERS

PREMIUM INCOME FUND

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

The Panel **ORDERS**:

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

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