



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Moreton Resources Limited  
[2013] ATP 14**

**Catchwords:**

*Association – break fee – decline to make a declaration – effect on control – failure to disclose – funding arrangements – identity – lock-up device – material omission – need for funds – share issue – substantial interest – undertaking*

*Corporations Act 2001 (Cth), sections 602(a), 602(b)(i), 606, items 7 and 9 of section 611*

*ASX Listing Rule 7.1*

*Guidance Note 7: Lock-up devices*

*Billabong International Limited [2013] ATP 9, GoldLink IncomePlus Limited 04 [2009] ATP 2, Mount Gibson Iron Limited [2008] ATP 4, Village Roadshow Limited 02 [2004] ATP 12, Ballarat Goldfields NL [2002] ATP 7*

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
No	No	Yes	No	No	Yes

**INTRODUCTION**

1. The Panel, Richard Hunt, Robert Sultan (sitting President) and Heather Zampatti, declined to make a declaration of unacceptable circumstances in relation to the affairs of Moreton Resources Limited after accepting an undertaking by Moreton. The application primarily concerned whether the terms of funding arrangements between Moreton and Twinkle Woods Limited included unacceptable lock-up devices and whether disclosure regarding the identity of Twinkle Woods was adequate.

2. In these reasons, the following definitions apply.

- break fee**                    \$250,000 payable “*should the Conditions Precedent to the issue of Convertible Notes not be satisfied prior to the Termination Date.*”<sup>1</sup>  
The Conditions Precedent were:
  - (a) *all regulatory and shareholder approvals of [Moreton] and Twinkle*
  - (b) *documentation for the issue of the Convertible Notes satisfactory to Twinkle in its sole discretion and*
  - (c) *FIRB approval.*<sup>2</sup>

<sup>1</sup> The termination date was initially 18 November 2013, amended to 30 November 2013

<sup>2</sup> FIRB approval was subsequently removed as a condition precedent by agreement

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<b>funding agreement</b>	the funding agreement for \$1 million between Moreton and Twinkle Woods dated 19 September 2013 as amended
<b>Moreton</b>	Moreton Resources Limited
<b>Twinkle Woods</b>	Twinkle Woods Limited

## FACTS

3. Moreton is an ASX listed company (ASX code: MRV). It was formerly named Cougar Energy Limited.
4. At the time of the application, the directors of Moreton were Andrew Matheson (Executive Chairman), Andrew Purcell (NED) and Eva Armila Djauhari (NED).
5. The applicant, Alexander Jason Elks, is a 5.6% shareholder in Moreton.
6. On 25 September 2013, Moreton announced a \$1 million secured funding agreement with Twinkle Woods. The funding was to convert as follows:
  - (a) a placement of 100 million ordinary shares at \$0.001 per share (value of \$100,000, representing a 5.2% post placement interest) and
  - (b) the balance (\$900,000) plus interest to be used to acquire convertible notes, with a conversion price of \$0.001 per share.
7. If issued, conversion of the convertible notes would have been at Twinkle Woods' discretion. If the full conversion occurred on the original terms, Twinkle Woods' interest in Moreton would have been at least 35.5%.<sup>3</sup>
8. The funding agreement included the break fee, payable if all conditions precedent to the issue of the convertible notes were not satisfied by 18 November 2013 (the termination date). The conditions precedent included approval by Moreton shareholders.
9. On 16 October 2013, Moreton announced it had received a s249D<sup>4</sup> notice from Mr Elks seeking to remove all the current directors of Moreton and appoint himself, Arthur Hood, John Thomas and Robert Canning-Ure as directors.
10. On 18 October 2013, Moreton requested a trading halt pending an announcement regarding the s249D notice. On 22 October 2013, Moreton requested a voluntary suspension, stating that Twinkle Woods had notified Moreton that it viewed the receipt of the s249D notice as an event of default under the funding agreement.
11. On 24 October 2013, Moreton announced that:
  - (a) Twinkle Woods had notified it of an event of default under the funding agreement (deriving from the s249D notice and consequential suspension of trading)
  - (b) the funding agreement had been renegotiated to increase the conversion price for ordinary shares to \$0.0017 and

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<sup>3</sup> Depending on the level of accrued interest at the time of conversion

<sup>4</sup> All references are to the *Corporations Act 2001* (Cth) unless otherwise stated

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- (c) the event of default could be cured by repayment of all monies owing (plus the break fee) or shareholder approval of the conversion of the Twinkle Woods funding.
12. Also on 24 October 2013, Moreton and Twinkle Woods extended the termination date of the funding agreement to 30 November 2013.
13. After the amendments to the funding agreement announced on 24 October 2013, the placement would give Twinkle Woods voting power of 5.2% in Moreton and, if all the convertible notes were converted, 24.7%.
14. On 29 October 2013, Moreton issued a notice of meeting in relation to an Annual General Meeting scheduled for 28 November 2013, including resolutions to approve the placement of 100 million shares and issue of convertible notes to Twinkle Woods for the purpose of Listing Rule 7.1. The notice of meeting stated that:
- (a) Twinkle Woods could acquire up to a 24.7% interest in Moreton through conversion of the convertible notes, but that it would only convert notes such that its interest would not exceed 20% to ensure compliance with s606 and
- (b) if Twinkle Woods wished to convert additional notes (ie increase its interest above 20%) Moreton would seek shareholder approval under Chapter 6.
15. The notice of meeting described Twinkle Woods as a private investment company based in Singapore, adding it had “*diversified investment interests in real estate, energy, forestry, agriculture and coal mining across the Asian region.*” On 5 November 2013, Moreton announced a correction stating that Twinkle Woods was a company incorporated in the British Virgin Islands and based in Singapore.

## APPLICATION

16. By application dated 7 November 2013, Mr Elks sought a declaration of unacceptable circumstances. Mr Elks submitted that the funding arrangements involved unacceptable and coercive lock-up devices, that the transaction had been structured to avoid s602 principles, that shareholders did not have sufficient information regarding Twinkle Woods and that Twinkle Woods was associated with some of the Moreton directors, such that its acquisition of a 20% interest would breach s606.

### Interim orders sought

17. Mr Elks sought interim orders to the effect that the funding arrangements between Moreton and Twinkle Woods be postponed until at least 16 January 2014.<sup>5</sup>
18. The request for interim orders was renewed during the proceedings after Moreton’s announcement of 19 November 2013 (see paragraph 44(b)).
19. The Panel declined to make any interim orders.

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<sup>5</sup> A date proposed by Mr Elks, being after the Christmas/New Year holiday period

**Final orders sought**

20. Mr Elks sought final orders to the effect that:
- (a) Moreton offer a capital raising to all shareholders on the same terms as those offered to Twinkle Woods
  - (b) the break fee be removed and the security for the funding arrangement be cancelled
  - (c) the period for loan repayment be extended to 60 days after the relevant shareholder vote (if shareholders did not approve the transaction)
  - (d) additional information be provided to shareholders regarding Moreton’s financial position and valuation and
  - (e) the identity of Twinkle Woods be disclosed.

**DISCUSSION**

**Scope of proceedings**

21. In *Mount Gibson Iron Limited* the Panel said, “[t]he Panel’s starting point was that it was for Mount Gibson – the applicant – to demonstrate a sufficient body of evidence of association and to convince the Panel as to that association, albeit with proper inferences being drawn.”<sup>6</sup>
22. While it was clear that there was some relationship between Twinkle Woods and one of the Moreton directors, the applicant did not satisfy this test. Accordingly, we did not conduct proceedings in relation to association or the breach of s606 claims.
23. We conducted proceedings in relation to the terms of the funding agreement and the identity of Twinkle Woods.

**Control transaction**

24. Guidance Note 7 *Lock-up Devices* applies to control transactions.<sup>7</sup>
25. Moreton submitted that the approvals to issue shares and convertible notes to Twinkle Woods should not be regarded as a control transaction because those approvals would not give Twinkle Woods voting power above 20% in Moreton. We do not agree.
26. In *Ballarat Goldfields NL* the Panel found a break fee that involved the issue of a 9.54% stake to be a “substantial interest” and unacceptable.<sup>8</sup> In *Village Roadshow Limited 02* the Panel stated that “there is clear agreement that in Chapter 6, control is a graduated concept”<sup>9</sup> and considered that the potential for Village Roadshow

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<sup>6</sup> [2008] ATP 4 at [15]

<sup>7</sup> At [1]

<sup>8</sup> [2002] ATP 7 at [9]. The Panel considered the wide spread and small size of shareholdings in Ballarat Goldfields in reaching this conclusion (at [27]). Moreton’s largest shareholder is Feitelson Group (7.9%) and its second largest is Mr Elks (5.6%)

<sup>9</sup> [2004] ATP 12 at [37]

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Corporation Limited to increase its beneficial interest from 47.6% to 52.9% (and voting power from 50.4% to about 56%) could have an effect on control of Village Roadshow Limited.<sup>10</sup> In *GoldLink IncomePlus Limited 04* the Panel stated that a “9.9% parcel is a substantial interest and has, or is likely to have, an effect on the control or potential control of GLI”.<sup>11</sup>

27. ASIC submitted that while the current process did not involve an item 7 of s611 approval it did involve the acquisition of a substantial interest and also provided an alternative path to an interest greater than 20% through the item 9 of s611 ‘creep’ exception.
28. We consider that the proposed placement and issue of convertible notes to facilitate an interest of up to 20% initially, which could be increased with shareholder approval or via item 9 of s611,<sup>12</sup> is a control transaction.

#### Terms of the funding agreement

29. Moreton submitted that it required funding and may not have survived but for the funds provided by Twinkle Woods. It also submitted that shareholders had benefited from the time that the funding allowed for directors to resolve various financial matters affecting the company. It further submitted that the break fee was based on Twinkle Woods’ estimate that its costs in implementing the transaction were approximately \$250,000 (ie the amount of the break fee) on a “*transactional and risk adjusted basis.*”
30. Mr Elks submitted that the break fee was intended to coerce shareholders to approve the issue of shares and convertible notes to Twinkle Woods.
31. ASIC submitted that “*the quantum of the break fee alone appears to be at a level sufficient to give rise to concern on the basis of the guidance in GN 7*” and that it was a “naked no vote” break fee.
32. In *Billabong International Limited* the Panel stated “*where a company is in financial distress it is likely that shareholders may feel commercial pressure to approve a transaction, however, the Panel has stated that it is a matter of degree as to whether the magnitude of the pressure applied by the specific terms of the transaction is unacceptable.*”<sup>13</sup>
33. In *Billabong* the Panel found an increased interest rate to be a “naked no vote” break fee “*because it is, in effect, a payment triggered by the absence of shareholder approval.*”<sup>14</sup> Similarly, here, the break fee would be payable if shareholders did not approve the issue of convertible notes to Twinkle Woods.

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<sup>10</sup> At [40]

<sup>11</sup> [2009] ATP 2 at [48]

<sup>12</sup> With shareholder approval the remaining convertible notes could be converted, resulting in Twinkle Woods having a 24.7% interest. During the 12 month term of the convertible notes Twinkle Woods could convert notes to increase its interest to 23.0% under item 9 of s611

<sup>13</sup> [2013] ATP 9 at [44]

<sup>14</sup> Ibid

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34. GN7 states that "naked no vote" break fees may be unacceptable because the trigger may be unreasonable and may coerce shareholders into approving a transaction they might otherwise reject.<sup>15</sup>
35. We consider the break fee, being \$250,000 in the context of a \$1 million loan, was likely to substantially coerce shareholders into approving the issue of convertible notes to Twinkle Woods. We do not need to decide whether a reasonable estimate of costs of a similar magnitude would be unacceptable, because we do not agree that this amount represents a reasonable estimate of Twinkle Woods' costs.

#### Identity of Twinkle Woods

36. The identities of the beneficial owners of Twinkle Woods had not been disclosed to shareholders.
37. Simply stating the name of the company "Twinkle Woods Limited" and providing a broad description of its activities did not provide shareholders with any useful information about the people who may gain significant influence over Moreton through the proposed issue of shares and convertible notes.
38. Therefore, while there may not be a specific legislative or regulatory requirement for the disclosure of the identities of the beneficial owners of Twinkle Woods in these particular circumstances, consistent with the principle in s602(b)(i) that shareholders should know "*the identity of any person who proposes to acquire a substantial interest in the company*", we consider that this information should have been disclosed.

#### Possible transfer of convertible notes

39. Mr Elks submitted that at a meeting in October 2013 with Andrew Purcell and Andrew Matheson he had been informed that the actual funder was not Twinkle Woods and that the investor wished to stay confidential.
40. Emails on 10 and 15 September 2013 between Moreton and Twinkle Woods referred to the possibility of transferring 60 – 65% of the convertible notes to a third party.
41. We were concerned that there may have been an undisclosed agreement or intention between Moreton and Twinkle Woods that a significant proportion of the convertible notes would be transferred to a third party. If so, consistent with the principle in s602(b)(i), the identity of any such third party should have been disclosed.

#### DECISION

42. We think that:
  - (a) the break fee is likely to substantially coerce shareholders into approving the issue of shares and convertible notes to Twinkle Woods, contrary to the principle in s602(a) and

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<sup>15</sup> At [9]

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- (b) Moreton's failure to disclose the beneficial owners of Twinkle Woods and, if one existed (see paragraphs 39 - 41), any agreement or intention to transfer convertible notes to a third party, is contrary to the principle in s602(b)(i).
43. We advised the parties that we were minded to make a declaration of unacceptable circumstances and final orders.

#### *Subsequent events*

44. During the proceedings:
- (a) on 14 November 2013, Moreton announced that the resources at its Wandoan Coal Project had been reduced from 360Mt (indicated and inferred) to 84Mt (inferred) and
- (b) on 19 November 2013, Moreton announced that it had been advised by Twinkle Woods that the Wandoan Coal Project resource downgrade announced on 14 November 2013 was a further event of default under the funding agreement.
45. On 22 November 2013, after we advised the parties that we were minded to make a declaration of unacceptable circumstances, Moreton announced that Twinkle Woods would waive all then existing events of default, Moreton would repay Twinkle Woods the principal and pay all accrued interest on the loan (\$1,018,071 in total) and Moreton could redraw the funding if the appropriate resolutions were approved by shareholders at the upcoming Annual General Meeting.
46. On 26 November 2013, Moreton announced, among other things, that the funding agreement had been terminated, the break fee would not be paid and the resolutions to approve the issue of shares and convertible notes to Twinkle Woods would not be put to the Annual General Meeting.<sup>16</sup>

#### *Revised decision*

47. Moreton provided an undertaking to the Panel (Annexure) that confirmed the position as per its announcement of 26 November 2013 in respect of the break fee, further payments to Twinkle Woods and the associated resolutions.<sup>17</sup>
48. Given the undertaking provided by Moreton, we declined to make a declaration and are satisfied that it is not against the public interest to do so. We had regard to the matters in s657A(3).

#### *Post script*

49. On 28 November 2013, Andrew Matheson, Andrew Purcell and Eva Armila Djauhari resigned as directors of Moreton. James Canning-Ure, John Thomas, Arthur Hood and Alexander Jason Elks were appointed directors on the same day.

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<sup>16</sup> On 15 November 2013, Moreton announced it had received approximately \$987,500 from a refund of a bond with Ergon Energy Corporation Limited and had applied for a \$7.1 million refundable tax offset associated with its research and development activities

<sup>17</sup> Moreton's 2013 AGM was held on 28 November 2013. The resolutions were not put to shareholders

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### **Orders**

50. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

**Robert Sultan  
President of the sitting Panel  
Decision dated 26 November 2013  
Reasons published 10 December 2013**

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### Advisers

Party	Advisers
Alexander Jason Elks	N/A
Moreton Resources Limited	McCullough Robertson



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**Annexure**

**AUSTRALIAN SECURITIES AND  
INVESTMENTS COMMISSION ACT 2001 (CTH) SECTION 201A  
UNDERTAKING**

**MORETON RESOURCES LIMITED**

Moreton Resources Limited undertakes to the Panel that:

- (a) it will not pay the break fee or make any further payments to Twinkle Woods Limited in connection with the funding agreement between Moreton Resources Limited and Twinkle Woods Limited dated 19 September 2013 as amended and
- (b) Resolutions 2 and 3 proposed for the Annual General Meeting scheduled to be held on 28 November 2013 will be withdrawn from consideration and voting.

Moreton Resources Limited agrees to confirm in writing to the Panel when it has satisfied its obligations under undertaking (b).

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**Signed by Rajeev Chandra, Company Secretary  
with the authority, and on behalf, of  
Moreton Resources Limited  
Dated 26 November 2013**