



**In the matter of Ballarat Goldfields NL
[2002] ATP 07**

Catchwords:

Acquisition of assets – break fee payable in shares of vendor – disclosure of break fee – exclusivity arrangements – intentions of target directors – Panel’s jurisdiction to hear application – standing of applicant

Corporations Act 2001 (Cth), sections 602 and 657A(2) and (3)

Normandy Mining Ltd (No 03) [2001] ATP 48

An application under section 657C of the Corporations Act by RFC Corporate Finance Limited for a declaration of unacceptable circumstances and orders concerning the entry into an agreement by Ballarat Goldfields NL (BGF) with Rexadis Pty. Ltd. whereby BGF agreed to pay a break fee (payable as shares in BGF) which would enable Rexadis to acquire a substantial interest in BGF if the shareholders of BGF rejected a proposal by Rexadis to acquire the gold assets of BGF. The Panel declared that entry into the break fee constituted unacceptable circumstances in relation to the affairs of BGF.

STATEMENT OF REASONS FOR DECISION

1. The sitting Panel comprises Chris Photakis (sitting President), Michael Burgess (sitting Deputy President) and Meredith Hellicar.
2. On 26 April 2002, RFC Corporate Finance Limited (**RFC**) applied to the Panel for a declaration of unacceptable circumstances in relation to a break fee (**Break Fee**) agreed on behalf of Ballarat Goldfields NL (**BGF**) by its directors (**Directors**) on 6 February 2002.
3. On 1 May, 2002, the Panel decided to conduct proceedings, pursuant to ASIC regulation 20.
4. These are our reasons for declaring that the Break Fee constituted unacceptable circumstances in relation to the affairs of BGF and for ordering that BGF not pay the Break Fee.
5. RFC applied to the Panel pursuant to section 657C of the Corporations Act (**Act**) for:
 - a. a declaration of unacceptable circumstances in relation to the affairs of BGF;
 - b. a declaration that the agreement entered into between BGF and Rexadis to sell the primary assets of BGF, being mining tenements in the Ballarat

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- region of Victoria and related infrastructure, (the **Ballarat Gold Assets**) to Rexadis (the **Rexadis Conditional Agreement**), or at least the Break Fee, which is part of the revised and extended Rexadis Conditional Agreement, be cancelled or declared void or voidable on behalf of BGF; and
- c. interim and/or final orders instructing BGF to notify its shareholders in advance of the 28 May 2002 shareholders meeting that:
 - i. the Panel has made a declaration of unacceptable circumstances in regard to the Break Fee;
 - ii. should shareholders vote not to proceed with the sale of the Ballarat Gold Assets to Rexadis then BGF's contractual arrangements with Rexadis will be terminated;
 - iii. the Break Fee shares will not be issued to Rexadis if shareholders decide to vote not to proceed with the sale of the Ballarat Gold Assets to Rexadis; and
 - iv. any other determination that the Panel may deem appropriate in the circumstances.
 6. RFC submitted that in the circumstances of this case the Break Fee shares proposal gives rise to unacceptable circumstances in the context of the transaction given its effect on BGF shareholders and on the market in light of the policy of section 602 and 657A of the Act.
 7. The application is made in the context of shareholders in BGF being asked to consider the fundamental nature and control of the company in a meeting originally scheduled for 28 May 2002. At the meeting, BGF shareholders will be asked to vote on three proposals, each of which would result in different futures for the company and different boards. The three proposals are from Rexadis (to buy the Ballarat Gold Assets (the **Rexadis Proposal**)), from RFC (to recapitalise BGF, in part by a rights issue which RFC has offered to underwrite (the **RFC Proposal**)), and from Republic Gold Pty. Ltd. (**Republic**) (which is a proposal to recapitalise BGF under a somewhat different rights issue and placement proposal (the **Republic Proposal**)). See Annexure 5 for a summary of each of the three proposals.

Background

8. See Annexure 3 for a detailed chronology of the events leading up to these proceedings.

Jurisdiction

9. Parties raised the issue in their submissions to the Panel whether the Panel has jurisdiction to hear the application in relation to the Break Fee. The Panel considers that it does have jurisdiction. The shares to be issued under the Break Fee agreement are 14.9% by number of the BGF fully paid shares on issue as at the day the Break Fee shares are allotted, less the number of shares issued to Rexadis by BGF as a placement on 2 April 2002. On current estimates that

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would be 12,262,038 shares, which would equal 9.54% of the expanded capital of BGF. That constitutes a substantial interest in BGF.

10. The acquisition of the Break Fee shares by Rexadis would have a material effect on control of BGF, especially when added to the 4,322,589 shares already owned by associates of Rexadis and those issued to Rexadis under the earlier placement agreement. The terms of the Break Fee Agreement make it artificial to treat the two parcels as separate acquisitions of interests.
11. Further, the Panel considers that the BGF shareholders' consideration of resolutions on the Rexadis, RFC and Republic proposals would likely be materially affected by the existence of the Break Fee.
12. RFC's standing to make the application was initially questioned, as it is not a shareholder of BGF. However, RFC advised that it was acting as agent of one of the shareholders who had instructed RFC to seek to convene the BGF shareholders meeting. The Panel considered that that established RFC's standing.

The Break Fee

13. The Panel accepts that on 6 February 2002, the Directors were placed in a difficult position, with material pressure on them. That pressure was both financial from the ANZ Bank, and transactional from Rexadis to complete the agreement. They had decided on a course for the future direction of the company, and had publicized that decision and course for some material period of time. They had received only one firm proposal to acquire the Ballarat Gold Assets. The buyer was asserting that it required the Break Fee to satisfy its new financier. Although RFC had informed BGF of its intention to put a proposal to BGF, by early to mid afternoon on 6 February it had not yet given the details of its proposal to the Directors, let alone formalized it.
14. However, the Panel considers that although the Directors of BGF may have considered the Break Fee was necessary to secure the Rexadis proposal at that time, given its size and the fact that it was payable in scrip, the Break Fee was likely to have a coercive effect on the decision of BGF shareholders when they considered the three alternative proposals for the future of BGF.
15. The Panel considered it unacceptable that the shareholders of BGF might be forced to allow Rexadis to acquire a substantial (or even controlling¹) interest in BGF as a cost of rejecting the Rexadis Proposal to sell the Ballarat Gold Assets to Rexadis.
16. The Panel considers that shareholders would likely feel inhibited in voting against the Rexadis Proposal if the cost was that their shareholding in BGF would be diluted by approximately 10%.

¹ See paragraph 27 as to the wide spread of BGF's shareholder base.

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17. The Panel considers that BGF Directors could reasonably have delayed their decision on the Break Fee, and possibly other elements of the 6 February agreement for a short period in order to request RFC to firm up aspects of its proposal, to substantiate its funding, and negotiate with the Directors for a more advantageous position for BGF shareholders. The Panel has seen no evidence that this would have put the Rexadis Proposal in material jeopardy.

The RFC Proposal as a viable alternative

18. BGF has asserted in its submissions that the original RFC proposal of 6 February 2002, was complicated, would give RFC 80% of BGF for only \$2 million, was subject to due diligence, did not commit to any form of underwriting and gave no comfort to BGF as to RFC's capacity to provide any monies at all at that time. However, on 6 February 2002, when the Directors decided not to wait for the original RFC proposal and to proceed with the Rexadis Conditional Agreement and the Break Fee Agreement, it did not know any of this for sure. It only knew that RFC had been in communications very recently and had advised that within a very short period of time (literally hours), RFC would offer a proposal which RFC said would be superior to the Rexadis Proposal.
19. RFC is not an unknown or insubstantial entity in the mineral resource market in Australia. BGF appears to have accepted this, because it made no submissions to the Panel that it was concerned at being approached by an unknown entity. Given that, an approach by an entity of RFC's reasonable standing in the resources market, with advice, either on 4 February 2002, or on 6 February, should have put the Directors on notice that a possibly better offer for their shareholders was now available and it is reasonable to have expected them to make some attempts to find out more particulars or to give a little more time to RFC to put its proposal forward.
20. The Panel notes that no evidence was given in submissions that Rexadis considers that an order by the Panel preventing payment of the Break Fee would be grounds or reason for Rexadis to withdraw its proposal.
21. BGF stated in its submission that the original RFC proposal was "too little, too late". We accept that there is some validity in this. The existence of discussions with Rexadis had been public for five months before RFC made any approach to BGF. RFC went very close to being "just too late". However we consider that it did give BGF sufficient notice of a proposal from a not unrespected person within the resources market of Australia, which it intimated would be superior to the Rexadis Proposal. We think that the Directors should have made some effort to allow RFC to present its proposal.
22. We consider that it would have been appropriate for BGF to say to RFC that its proposal had come very late in the process, and that BGF had a firm buyer wanting to sign up. It would also have been appropriate for BGF to advise RFC that if it wanted BGF to consider the original RFC proposal RFC would need to provide further details and a greater degree of certainty within a specified short

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period of time. However, the Directors did not do that. Nor does it appear that they treated RFC at any stage as a possible alternative to the Rexadis Proposal. The failure to offer facilitation of the original or later RFC proposal, for the possible benefit of the BGF shareholders, the Break Fee exacerbated the unacceptable circumstances arising from the Break Fee.

Other funding matters

23. BGF has raised the issue of the preparedness of Rexadis, and its associates, to provide BGF with short term funding, either in the form of subscription or loans facilities. RFC has asserted, and BGF not rebutted, that it had told BGF that it would be prepared to consider similar funding for BGF, but that BGF either refused such offer or made no attempt to follow them up.
24. We consider that that reduces the weight that the Directors should have placed on the desirability of concluding the Rexadis Proposal without considering the original RFC proposal.

Size, Substantial Interest, Effect on Control

25. We considered that the size of the Break Fee was sufficient to constitute a substantial interest in BGF. We considered that in terms of the number of shares to be issued under the Break Fee and the position they would place Rexadis into if they were issued. We did not attempt to assess a monetary value for the Break Fee or what percentage of the value of the proposed acquisition that it might constitute. We considered that there were a number of elements of such a calculation that made it too uncertain.
26. We also considered that if it was issued with the Break Fee shares Rexadis would be likely to be able to exercise a material degree of control over the affairs of BGF. Rexadis and Eureka offered some undertakings to the Panel in relation to voting at the meeting called for 28 May 2002. However, the Panel did not consider that the undertakings adequately addressed its concerns.
27. In considering these issues we particularly considered the wide spread and small size of shareholdings in BGF. BGF has 8,500 shareholders, the two largest (including Rexadis) hold a little over 4% each and the top 20 shareholders hold approximately 22.4% of its shares (including the recent placement to Rexadis).
28. We did not consider it appropriate to give any view on what level of Break Fee would be appropriate. It seemed likely that that would involve the Panel in commercial decisions which were properly the place of the relevant parties. We did not seek submissions on the issue in the brief and no parties sought any such decision from us.
29. Given our focus on the effect of the Break Fee on the shareholders of BGF we made no finding, and make no comment on the quantum of expenditure which Rexadis asserted it had made and which it said that the Break Fee was intended to recover.

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Scrip vs. Cash Break Fee

30. The fact that the Break Fee was payable in shares was essential to the Panel having jurisdiction. If it had been merely for cash we consider the issue would have been one solely of directors' duties and corporate governance.
31. We do not wish to state here any views as to the merits or problems with scrip break fees where they are of an appropriate size.

Disclosure

32. We asked a wide range of questions of parties about disclosure of issues relating to BGF's annual report, and the three competing proposals which are to be put before BGF shareholders. We considered whether we should include those disclosure issues in our decision, for example, requiring Rexadis, RFC and Republic to provide further information on the source, certainty and terms of funding of their proposals, but considered that we should focus on the Break Fee issue.
33. We consider that the fact of our order prohibiting BGF from paying the Break Fee is a material fact which requires both disclosure, and reasonable time for BGF shareholders to consider the decision and its consequences. If the thinking of BGF shareholders had been materially affected by the existence of the Break Fee they may well need time to reconsider both the RFC and Republic proposals.
34. On that basis we decided that the decision to order BGF not to pay the Break Fee required us to make a consequential order postponing the three meetings in order to allow BGF shareholders reasonable time to consider the three proposals under two of which (the RFC and Republic Proposals) a person might acquire a substantial interest in BGF. We agreed with the proposition of the Directors that all three meetings should proceed on the same day.

Continuous Disclosure

35. We sought submissions on a range of issues relating to BGF's disclosure to the market in relation to the Rexadis Proposal, and specifically in relation to the Break Fee. We have seen no evidence that, prior to 31 January 2002, BGF failed to meet its continuous disclosure obligations in relation to its negotiations with Rexadis (see a list and summary of BGF's disclosures to ASX over the relevant period at Annexure 4).
36. We note that BGF still has not provided its annual report to its shareholders. In particular, we note that rival proposals may well have been materially less likely when their proponents were denied the financial information on BGF which they might expect to find in BGF's periodic reporting. We also note that both BGF and the principals of Rexadis appear to have had access to such information throughout the relevant periods.

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The Break Fee

37. BGF entered into the Break Fee Agreement on 6 February 2002. It first mentioned the existence of the Break Fee and its terms on 22 April in the explanatory memorandum to the notice of meeting. We think that delay was far too long and too obscurely located. When BGF announced the revised agreement with Rexadis on 8 February 2002, it should have also disclosed the Break Fee. The Panel's Guidance Note on Break Fees indicates that a target company which enters into a break fee should disclose the terms of the break fee immediately. BGF appears to have failed this important criterion of continuous disclosure in relation to the Break Fee.
38. BGF said in its submissions that it did not think that the Break Fee would have a material effect on the price or value of BGF shares. We do not agree with such an assertion. A Break Fee which had a material effect on the possibility of rival proposals was essential information for shareholders and investors in a company like BGF which was expressly seeking to divest its main assets.
39. The Panel's Guidance Note on Break Fees is clear that the Break Fee should have been disclosed. In terms of ASX Listing Rules, the Break Fee is a circumstance which would influence decisions whether to buy or sell shares in BGF and should have been disclosed, see Listing Rule 19.3 and section 677 of the Act .

The Exclusivity Agreement

40. We note that BGF refused to give RFC access to internal BGF data and facilities to conduct "due diligence", on 11 February 2002 in relation to the original RFC proposal of 6 February 2002, on 12 April 2002 in relation to the amended RFC "underwriting" Proposal, and again on subsequent occasions.
41. BGF advises² that it refused on 11 February to allow RFC to do due diligence based on the agreement of 6 February with Rexadis under which BGF agreed to grant Rexadis exclusivity in relation to proposals to acquire the Ballarat Gold Assets (**Exclusivity Agreement**). BGF also advised that it refused on 11 April to allow RFC to do due diligence on the basis that the Directors had decided not to proceed with the alternative of a rights issue proposed by RFC after BGF had refused the original 6 February RFC proposal.
42. RFC's application did not allege that BGF's refusal constituted unacceptable circumstances. RFC suggested in its responsive submissions that the Panel should consider whether BGF should have excluded RFC from doing due diligence.
43. We considered whether to include the Exclusivity Agreement in our considerations, and if we found it unacceptable, whether we should order BGF to allow RFC to conduct due diligence. We included it in our brief, to allow us

² BGF and RFC statement of agreed facts 1 May 2002.

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the possibility of including it in our decision if we chose. We decided not to include it in our decision and not to make orders.

44. We made no findings as to whether the wording of the Exclusivity Agreement prevents BGF from allowing RFC to do due diligence.
45. We decided that, directing BGF to allow RFC access to conduct due diligence ran a material risk of adversely affecting the timing of providing the information to BGF shareholders before the meetings. We encourage the Directors to consider giving RFC access, even at this late stage, if it will allow a more developed and firmer proposal to be put to BGF shareholders.
46. We note that BGF's responsive submissions, in discounting the RFC Proposal because it was subject to a due diligence condition, at the same time acknowledge that the Rexadis Proposal at that stage was still also subject to a due diligence condition with respect to its financier. We consider this is further grounds for deciding that the Directors should reasonably have delayed the entry into some or all of the agreements of 6 February with Rexadis to allow it to tell RFC where it needed to firm up its proposal and to make it more certain and advantageous for BGF shareholders.

Pressure from ANZ Bank

47. The Panel considered whether there was any evidence that agreeing to the Break Fee was required in order to avoid BGF's financier, the ANZ Bank, placing BGF into receivership or administration. The Panel's brief specifically gave parties an invitation to make submissions about the financial pressures that BGF was under at the time. The Directors made numerous references in their submissions that BGF relied on the support of the ANZ Bank to continue its operations, and referred to pressures applied by the bank to repay funds loaned to BGF. However, we received no evidence that administration or receivership was imminent, or that failure to enter into the Break Fee was seen as the only alternative to administration or receivership.
48. Had the Directors produced evidence that they had been faced with a real and immediate choice of agreeing to the Break Fee, or having a creditor commence administration, or receivership, the Break Fee might well have been clearly in the best interests of BGF shareholders and not given rise to unacceptable circumstances.

Directors' Intentions

49. The Panel did not look to the intentions or motivations of the Directors when considering whether the circumstances of the Break Fee were unacceptable. We looked only at the effect on shareholders of BGF. We made no adverse finding on the intentions or good faith of the Directors. We reiterate our acceptance, despite our declaration and orders, that the Directors were faced with a difficult decision, with considerable uncertainty and limited time.

Republic Proposal

50. Republic has also put an alternative proposal to BGF shareholders for consideration (which it first canvassed with BGF on 5 February 2002 and put to BGF as a firm proposal on 8 March 2002). We have considered various aspects of the Republic Proposal and how it relates to the issue before the Panel. We consider that we can decide the application before us without needing to make any findings in relation to the Republic Proposal and without needing to rely on any facts concerning the Republic Proposal.
51. We note in passing that BGF did not feel constrained by the Exclusivity Agreement with Rexadis in allowing Republic some access to BGF information on 25 March 2002. BGF also entered into a confidentiality agreement with RFC in relation to some information about BGF on 10 April 2002.
52. BGF cites Republic's preparedness to proceed with its proposal, despite learning of the existence of the Break Fee on 21 April 2002, as evidence that the Break Fee has not deterred at least one other person putting a proposal forward, and therefore the Break Fee has caused no harm. We do not accept that in the circumstances of this matter this is determinative of whether the Break Fee constitutes unacceptable circumstances.

Normandy 03

53. BGF argued that the fact that RFC and Republic were prepared to proceed with their proposals was evidence, based on the reasoning in the decision of the Panel in the Normandy 03 matter, that unacceptable circumstances could not be said to exist.
54. We do not think that the Normandy 03 matter is a relevant precedent for this case. In Normandy 03 the rival proposals were takeover bids for 100% of the target, whereas in this matter the rival proposals are reconstructions, and the Break Fee would likely leave Rexadis with a substantial level of control over the future of those rival proposals. In addition, in Normandy 03 the break fee was cash, it was only 1%³ of the value of the target, and the harm which might have been caused was primarily in relation to the actions of potential bidders. In this matter, by almost whatever calculations, the Break Fee is materially more than 1%, and the primary effect is not on rival bidders, but on the economic freedom of the BGF shareholders to decide between rival proposals.

Orders

55. Having decided that the Break Fee constituted unacceptable circumstances we considered whether we should make any orders to protect the interests of BGF shareholders.

³ Neglecting variances due to changes in the share prices of the securities offered which initially made it slightly more and later slightly less than 1%.

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56. We decided that we should order BGF not to issue the Break Fee Shares. We also ordered BGF not to give any other consideration in substitution for the Break Fee. We considered this order was desirable in order to protect the interests of the shareholders of BGF in ensuring they were able to make a free choice between three competing proposals for the future of BGF unfettered by the threat of the Break Fee.
57. We have ordered the Directors to postpone the three meetings of BGF in order to allow BGF shareholders time to consider the three proposals in light of the Panel's order preventing the payment of the Break Fee.
58. We have also made ancillary orders to ensure that this delay in the meeting does not adversely affect the Rexadis Conditional Agreement and to preserve the effect of that agreement as far as practical in light of our decision.
59. In response to requests from the Directors, we have made further orders clarifying that the Panel has ordered the Directors to postpone the meetings and to allow the BGF board to make any necessary or appropriate consequential arrangements for the deferred meetings.

Decision

60. We decided that the Break Fee should not proceed because it constitutes unacceptable circumstances in relation to the affairs of BGF that shareholders in BGF should be asked to decide on a proposal to sell the major asset of BGF facing a consequence that Rexadis and its financier, Eureka would acquire a substantial interest in BGF if they reject the Rexadis Proposal.
61. We decided to make orders preventing those circumstances proceeding.

Chris Photakis
Sitting President
30 November 2004



Corporations Act 2001 - Sections 657A and 657D

Declaration of Unacceptable Circumstances and Orders

In the matter of Ballarat Goldfields NL

Whereas:

- A. On 3 August 2001, Ballarat Goldfields NL (**BGF**) by its directors (the **Directors**) entered into an agreement (the **Rexadis Conditional Agreement**) with Rexadis Pty Ltd (**Rexadis**) for the sale of certain mines, mining licences and related property (the **Gold Assets** of BGF);
- B. Leading up to 6 February 2002, the Directors had been facilitating satisfaction by Rexadis of conditions to the Rexadis Conditional Agreement and had extended the date for completion of that agreement, but those conditions were not satisfied on 6 February 2002;
- C. Shortly prior to, and on, 6 February 2002, RFC Corporate Finance Ltd. (**RFC**) advised the Directors that RFC would, on 6 February, fax to BGF a conditional offer that “would be superior to” the proposal before BGF from Rexadis;
- D. At 3.30 p.m. on 6 February 2002, the Directors entered into an agreement with Rexadis to amend the Rexadis Conditional Agreement (the **Break Fee Agreement**). Amongst other things, under the Break Fee Agreement BGF agreed to pay Rexadis a Break Fee if shareholders of BGF did not approve the sale of the Gold Assets;
- E. The Break Fee would be paid by issuing to Rexadis shares in BGF equal to 14.9% by number of the BGF fully paid shares on issue as at the day the Break Fee shares are allotted, less the number of shares issued to Rexadis by BGF as a placement on 2 April 2002;
- F. If it acquired the Break Fee Shares, it is likely that Rexadis would then hold approximately 13.42% of the expanded issued capital of BGF. This would constitute a substantial interest in BGF;
- G. The only consideration payable by Rexadis to BGF for the Break Fee Shares is that under clause 4.8 of the Break Fee Agreement, Rexadis must release BGF from all claims Rexadis may have against BGF in relation to BGF’s failure to proceed;
- H. BGF has called a general meeting (the **Rexadis Meeting**) to approve the sale of the Gold Assets pursuant to the Rexadis Conditional Agreement on 28 May 2002;
- I. On the same day, BGF has convened general meetings which were requisitioned by RFC and by Republic Gold Limited (the **RFC Meeting** and the **Republic Meeting**); and

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- J. At those meetings, shareholders are to consider resolutions to approve proposals which are effectively alternative future directions for BGF, compared to the Rexadis Conditional Agreement,

The Takeovers Panel **declares** that the entry into the Break Fee Agreement by the Directors of BGF on 6 February 2002 brought about unacceptable circumstances in relation to the affairs of Ballarat Goldfields Limited; and

The Takeovers Panel **orders**:

- (a) BGF not to issue, and Rexadis not to acquire, the Break Fee Shares as defined in the Break Fee Agreement or any shares or other benefit in substitution for those shares;
- (b) that the Rexadis Meeting, the RFC Meeting and the Republic Meeting be postponed by 7 days to 4 June 2002; and
- (c) that the Completion Date under the Rexadis Conditional Agreement, which by the Break Fee Agreement is extended to 31 May 2002, be further extended by 7 days to 7 June 2002;
- (d) that the Rexadis Conditional Agreement, as amended by the Break Fee Agreement, and in particular clause 4.8 of the Break Fee Agreement, be otherwise unaffected by these orders.

Chris Photakis
President of the Sitting Panel

13 May 2002

Corporations Act 2001 - Section 657D

Supplementary Order

In the matter of Ballarat Goldfields NL

Whereas:

- A. On 13 May 2002, the Panel made a declaration that unacceptable circumstances existed in relation to the affairs of Ballarat Goldfields NL (**BGF**) and certain orders;
- B. One of those orders required three meetings convened by BGF for 28 May 2002 to be postponed to 4 June 2002;
- C. BGF wishes to adjust the arrangements it has made for those meetings, in the light of the postponement and of other circumstances;

The Takeovers Panel varies those orders by omitting paragraph (b) and substituting the following paragraph:

“(b) that BGF postpone the Rexadis Meeting, the RFC Meeting and the Republic Meeting by 7 days to 4 June 2002, and make any adjustments to the arrangements for those meetings which the directors of BGF think necessary or appropriate because of the postponement and which are authorised by section 249D of the Corporations Act 2001 or otherwise. This order does not otherwise limit any existing power of BGF or its directors to adjust those arrangements;”.

Chris Photakis
President of the Sitting Panel

Dated 17 May 2002



Chronology

1. The Directors of BGF announced in late 2000, that sale of the Ballarat Gold Assets and focus on Oztrack as BGF's primary business was the most promising future for BGF. BGF commenced its process of attempting to sell the Ballarat Gold Assets at that time.
2. BGF and RFC submitted an agreed statement of facts to the Panel on 1 May 2002. The chronology below is based on that agreed statement of facts and on ASX announcements, except where indicated. The Panel accepted the facts below as the basis for its decision.
3. On 3 August 2001, BGF first announced that it had entered into the Rexadis Conditional Agreement.
4. On 29 August 2001, Rexadis announced that it had been granted an exclusivity period in which to conduct due diligence, commencing on 3 August 2001 and expiring on 30 September 2001, with completion expected by the end of calendar 2001 (the **Exclusivity Agreement**). The announcement on 29 August 2001 of the Exclusivity Agreement was the first announcement that any exclusivity period was in place. The Exclusivity Agreement initially ran from 3 August 2001 to 31 January 2002.
5. On 1 October 2001, Rexadis satisfactorily concluded its technical due diligence review and had elected to continue with the acquisition process. At that time, the conclusion of the acquisition was not expected prior to the end of December 2001.
6. On 3 January 2002, BGF announced that the ANZ Bank had extended the overdraft facility operated by Oztrack Group Pty Ltd (**Oztrack**) from 19 November 2001 to 31 January 2002.
7. On 3 January 2002, Rexadis advised that its endeavors to secure the funding it required to complete the acquisition were proceeding towards finalisation and BGF had agreed to extend the Exclusivity Agreement granted to Rexadis until 21 January 2002.
8. On 3 January 2002 the Exclusivity Agreement was announced as having been extended until 21 January 2002. In an announcement on 22 January 2002, BGF stated it had extended the exclusivity period until 31 January 2002.
9. On 22 January 2002, Rexadis had requested and BGF had agreed to further extend the Exclusivity Agreement granted to Rexadis until 31 January 2002. Rexadis advised that it expected its efforts to secure funding would be concluded by that date.

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10. Between 31 January and 6 February, BGF extended the Exclusivity Agreement with Rexadis, apparently twice, without making any public announcement of these further extensions.
11. On 6 February 2002 Rexadis and BGF entered into an amended Exclusivity Agreement that extended, until 31 March 2002, Rexadis' exclusive right to purchase the Ballarat Gold Assets. This period was to enable Eureka Capital Partners Ltd (**Eureka**) to complete its due diligence.
12. BGF represented that the revised Rexadis agreement, which amended the Rexadis Conditional Agreement, was first discussed between Rexadis and BGF in broad terms on 1 February 2002. BGF represented that the revised Rexadis agreement was subsequently negotiated over 3, 4 & 5 February 2002 with various drafts of the negotiations and documentation being circulated over that period by email and facsimile. The final form of the revised Rexadis agreement was circulated to the Directors for approval by facsimile at 3.00 p.m. on 6 February 2002. A telephone linkup by the Directors at approximately 3.15 p.m. confirmed its execution. BGF executed the revised Rexadis agreement at a meeting which ran from 3.30 p.m. to 4.30 p.m. on 6 February 2002. Rexadis executed the agreement at the end of the meeting of BGF directors.
13. BGF was first advised that it would receive the RFC Offer on 4 February 2002 and again on the morning of 6 February 2002. The letter of offer was faxed to BGF at 3.30 p.m. on 6 February 2002.
14. BGF represented that it was not aware of the contents of the RFC Offer until it was received, however, it acknowledged that RFC had advised BGF that the RFC offer would be superior to the Rexadis Conditional Agreement previously announced to the market by BGF and that BGF expected to receive the RFC Offer during the afternoon of 6 February 2002.
15. The RFC Offer of 6 February 2002 proposed the injection of \$2 million into Ballarat by RFC and other investors. The RFC Offer also proposed the restructure of BGF by an in-specie distribution of BGF's interest in Oztrack to the current BGF shareholders. The RFC Offer was subject to RFC being able to complete due diligence on BGF.
16. BGF received the RFC Offer shortly after 3.30 p.m. on 6 February 2002.
17. BGF represented that Mr Woskett first became aware of the existence of the written RFC Offer at about 4.30 p.m. on 6 February 2002, which was after the 6 February 2002 agreement with Rexadis was signed, and was after the Rexadis representative (Mr Trevor Slater) had left the office with his signed copy of the agreement.
18. On 8 February 2002, Rexadis concluded its agreement with Eureka whereby Eureka would provide or arrange funding for the proposed acquisition of the Ballarat Gold Assets.

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19. On 8 February 2002, the Rexadis Exclusivity Agreement was announced to have been extended until 31 March 2002 (with a possible extension to 31 May 2002, provided Eureka subscribed for \$100,000 of BGF shares), through an agreement dated 6 February 2002.
20. BGF and RFC were asked by the Panel to agree the content and dates of the communications between BGF and RFC in relation to RFC undertaking due diligence on the Ballarat Gold Assets.
21. BGF and RFC agreed that BGF refused RFC access to complete due diligence under both the RFC Offer of 6 February 2002 and the RFC Proposal to underwrite a BGF rights issue (as set out in the Notice of Meeting).
22. BGF refused RFC access to complete due diligence on 11 February 2002 (regarding the RFC offer of 6 February 2002) and 12 April 2002 (regarding the RFC Proposal to underwrite a BGF rights issue) and again on subsequent occasions.
23. The refusal on 11 February 2002 was based upon the 6 February 2002 agreement with Rexadis regarding the Rexadis Exclusivity Agreement. The refusal on 12 April was based upon the Directors deciding not to proceed with the alternative of a rights issue proposed by RFC on behalf of a block of BGF shareholders.
24. RFC and BGF were not able to materially agree the content and dates of communications between them in relation to RFC undertaking due diligence on the Ballarat Gold Assets.
25. On 2 April 2002, BGF announced that on 28 March 2002 Rexadis had advised it intended to proceed to complete the purchase under the terms of the Agreement dated 6 February 2002.
26. On 10 April 2002, BGF and RFC entered into a confidentiality agreement in relation to some information on BGF which BGF agreed to provide to RFC.
27. On 19 April 2002, Rexadis had received confirmation from Eureka that it would provide financial support for the acquisition.
28. On 22 April 2002, BGF issued a Notice of shareholder meeting. This Notice included the first public announcement regarding the Break Fee entered into as part of the 6 February 2002 agreement.
29. On 23 April 2002, BGF announced that it had consented to order in the Federal Court to lodge its audited financial report and director's report for the year ended 30 June 2001, by 24 May 2002. ASIC obtained the consent orders following BGF's consistent failure to lodge the reports despite numerous requests to do so.
30. On 23 April 2002, BGF also issued a Notice of shareholder meeting requisitioned by members. The meeting would be held on 28 May 2002 and would consider the RFC Proposal.

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31. On 26 April 2002, BGF issued a notice of shareholder meeting requisitioned by members. The meeting would be held on 28 May 2002 and would consider the Republic Proposal.
32. On 26 April 2002, BGF announced that its subsidiary, Oztrack, had been advised of the outcome of two Appeal Hearings in the High Court in Munich, Germany. BGF announced that the court had rejected the appeal, and that Oztrack could expect to receive the full value of the earlier awards made in April 2001 and August 2001.
33. On 26 April 2002, RFC applied to the Takeovers Panel for a declaration of Unacceptable Circumstances in relation to the Break Fee agreed on behalf of BGF by the Directors.
34. On 3 May 2002, BGF announced that it had entered into an agreement with Eureka dated 3 May 2002, which provided for Eureka to lend \$300,000 to BGF on normal terms and conditions.
35. On 6 May 2002, BGF issued a letter to BGF shareholders in which it outlined the Directors' recommendations on the competing proposals before shareholders (namely the Rexadis Proposal, the RFC Proposal and the Republic Proposal – see Annexure 5).
36. On 7 May 2002, Rexadis issued a letter to BGF shareholders in which it provided the views of the Rexadis directors on the competing proposals before shareholders.
37. On 10 May 2002, BGF issued a letter to BGF shareholders in which it referred to the Rexadis letter dated 7 May 2002 and the BGF letter dated 6 May 2002, and set out the reasons why the BGF board considered that the board's proposed course of action for BGF (i.e. recommending the Rexadis Proposal) was the best solution.



Annexure 4

Relevant BGF Disclosures to ASX

Date	Headline
06/09/00	BGF to Focus on Technology Interests
24/10/00	BGF to Divest Gold Assets
03/08/2001	Agreement for Sale of Gold Assets
29/08/2001	Banking Facility & Sale of Assets
01/10/2001	Sale of Gold Assets and accounts - update
23/10/2001	Suspension from Official Quotation - 24/10/2001
23/10/2001	Background to Voluntary Suspension of Quotation
01/11/2001	Letter to Shareholders re Company Update
03/01/2002	Sale of Gold Assets & Banking Facility
22/01/2002	Sale of Gold Assets
08/02/2002	Sale of Gold Assets
22/02/2002	Banking Facility
12/03/2002	Dates of Appeal Hearings in Germany
02/04/2002	Sale of Gold Assets
03/04/2002	Requisition of Meeting by Members
05/04/2002	Explanatory Statement re Meeting requisitioned by members
12/04/2002	Banking Facility
15/04/2002	Interim outcome of Appeal Hearing in Germany
19/04/2002	Alternative Recapitalisation Proposal
19/04/2002	Sale of Gold assets
22/04/2002	Notice of General Meeting & Letter to Shareholders
23/04/2002	Finalisation & Lodgment of 2001 Financial Reports
23/04/2002	Notice for Meeting requisitioned by members
26/04/2002	Alternative Recapitalisation Proposal from Republic
26/04/2002	Results of Appeal hearings in Germany
29/04/2002	RFC Application to Takeovers Panel

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03/05/2002	New Loan
06/05/2002	Letter to Shareholders re Action by two parties
08/05/2002	Rexadis Letter to Shareholders
10/05/2002	Letter to Shareholders : Shareholding Briefing
13/05/2002	Takeovers Panel Decision



Annexure 5

Summary of the three competing proposals

REXADIS PROPOSAL

BGF entered into the Rexadis Conditional Agreement with Rexadis on 3 August 2001 whereby Rexadis, or its nominee, would acquire all exploration and mining assets of BGF and its several controlled entities.

The Rexadis Conditional Agreement provides that Rexadis or its nominee will, subject to certain conditions, pay a gold royalty to BGF of 1% of future gold production from some specified tenements in the Ballarat area. The royalty commences after a minimum of 20,000 ounces of production is achieved from the Ballarat East tenements, provided that the price of gold sold is above A\$520 per ounce. Receipt of the gold royalty does not require BGF to incur any further expenditure.

The Rexadis Conditional Agreement was subject to achievement of several pre-conditions, the principal ones being approval of the sale by the members of BGF in general meeting and Rexadis having satisfied itself on its' technical and financial due diligence.

BGF and Rexadis entered into an amending agreement on 6 February 2002. This agreement provided an extension, until 31 May 2002, of the exclusivity period in which Rexadis was required to secure unconditional financing and, subject to the approval of shareholders, to complete the assets sale transaction. Following execution of the amending agreement Rexadis made payment to BGF of a \$50,000 non-refundable deposit.

On 28 March 2002 Rexadis notified BGF that its financial backers, Eureka, had satisfied itself on key technical and commercial matters relating to the gold assets and related matters and, as a result, Rexadis intended, with the support of Eureka, to proceed to Completion of the acquisition.

Rexadis notified BGF on 18 April 2002 that Eureka had advised Rexadis that it would provide Rexadis with the funding necessary for Completion.

Upon shareholder approval of the Rexadis Proposal and completion of the proposed Sale Agreements, Rexadis would make payment of the agreed consideration of one million Australian dollars to BGF (subject to adjustments on settlement including deposit paid). At Final Completion, all gold exploration and mining tenements and related infrastructure and related other assets that are currently the property of BGF and its subsidiaries would become the property of Rexadis or its nominee.

RFC Proposal

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The RFC Proposal was developed to be put before the BGF shareholders as a derivative of the 6 February 2002 RFC Offer, because of RFC's inability to obtain BGF's consent to proceed with the 6 February 2002 RFC Offer.

The RFC Proposal was:

- to provide BGF with the capacity to issue in excess of 15% of its current issued shares through an offer of shares at 2 cents per share to existing shareholders currently holding under 12,500 shares each in addition to the 1 for 1 non-renounceable rights issue;
- to allow those BGF shareholders the opportunity to increase their holding to 25,000 shares, which at the proposed issue price of 2 cents per share would constitute a marketable parcel of \$500 in value in accordance with the ASX Listing Rules;
- for BGF to enter into an underwriting agreement with RFC to a combined maximum underwriting commitment of \$2 million for the 1 for 1 non-renounceable rights issue and the issue to be made to shareholders not holding marketable parcels to allow them to increase their holding to a marketable parcel;
- for the removal of the current chairman (Mr John Roberts) and other non-executive director (Mr Kerry Penna) with a new chairman (Mr Laurence J Shervington) and director with significant corporate finance expertise (Mr Stephen Allen) to be appointed; and
- for the appointment of RFC as the corporate finance adviser to BGF, for the purposes of assisting BGF with the management of the proposed restructure of BGF's capital, equity issues and other matters which may be required to return BGF to the status of a gold development company quoted on the ASX Official List.

The RFC Proposal was subject to the following conditions:

- the completion of due diligence to RFC's satisfaction; and
- approval by the shareholders of BGF.

REPUBLIC PROPOSAL

The Republic Proposal was: -

- To change the composition of the Board of BGF by securing the eventual resignation of the existing two non-executive directors and replacing them with four nominees of Republic.
- To underwrite a 3-for-2 non-renounceable Rights Issue to BGF shareholders at 1.75 cents per share with an attaching free option for each two new shares issued under the Rights Issue for a maximum underwriting of \$2,921,788. The terms of the options are an exercise price of 3.5 cents per option exercisable on or before 30 May 2003.

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- If the underwriting for the Rights Issue results in Republic being entitled to less than 19.99% of the capital in BGF, Republic would subscribe for shares in BGF to bring its entitlement to 19.99%.
- To arrange for a debt-for-equity swap with existing creditors, including the Directors, in order to maximise the cash reserves.
- In due course, to present to shareholders of BGF a creditable and staged plan for the development of BGF's gold assets, concentrating on the Ballarat Goldfield as the priority target.
- To arrange for the sale or joint venture of the Oztrak business in an orderly fashion in order to return some of BGF's equity injected into Oztrak.
- To seek other attractive precious metals assets to inject into BGF to seek to transform BGF into a mid-sized gold producer.
- To eventually offer BGF shareholders the opportunity to further invest in BGF by a shareholder share purchase plan.
- To arrange for an eventual consolidation of BGF's capital structure at the most appropriate time to preserve shareholder value.
- As part of the remuneration of the Board, Republic would propose that options be issued to the Directors once BGF's financial position has stabilised, these options being subject to shareholder approval.

The Republic Proposal is subject to the following conditions:

- that the shareholders vote against the Rexadis Proposal and the RFC Proposal and in favour of the Republic Proposal;
- that all information required to be disclosed by BGF and which is material to the decision of shareholders of BGF to vote in relation to the Rexadis Proposal, the RFC Proposal and the Republic Proposal be released by BGF to the market before the general meeting is held to put those proposals before shareholders;
- that in the opinion of Republic, BGF will be solvent after the completion of the rights issue; and
- that the ASX agrees to lift the suspension in trading of BGF's securities as soon as practicable and in any event on terms acceptable to Republic.