



**In the matter of Equity-1 Resources NL
[2002] ATP 20**

Catchwords:

Previous breach of Chapter 6 – tactical timing of announcement of bid – inadequacy of information provided to shareholders – Panel declining to commence proceedings

Corporations Act 2001 (Cth), sections 631(1) and (2)

These are our reasons for declining to commence proceedings in relation to an application by Equity-1 Resources NL (Resources) concerning an announcement of a proposed takeover bid by Equity-1 Limited (Limited).

1. The application was made by Resources on 9 December 2002.
2. The sitting Panel for the application was Ms Meredith Hellicar (sitting President), Mr Brett Heading (sitting Deputy President) and Mr Andrew Lumsden.
3. The Panel decided not to conduct proceedings in relation to the application.
4. The Panel advised the parties of its decision in this matter on 11 December 2002.

Background

5. The following is a description of the facts underlying the application, which has largely been taken from the application.
6. Resources' principal business activity is mining exploration and it holds tenements in Australia and Argentina.
7. Limited's holding company holds approximately 14% of the issued share capital of Resources and has one nominee sitting on Resources' Board.
8. On 11 December 2001, Limited announced an intention to proceed with an off-market takeover for 51% of the issued share capital of Resources at an offer price of 6.7 cents (the **Previous Bid**).
9. On 17 April 2002, Limited provided shareholders with a bidder's statement. The offer and the bidder's statement were sent to shareholders later than the maximum 2 month time limit in contravention of section 631(1)(b) of the Corporations Act (**Act**). The Board of Resources recommended that the Previous Bid be rejected by shareholders.
10. At the expiration of the bid period, the 51% minimum acceptance condition was not met and Limited announced that the Previous Bid would not proceed.

Annual General Meeting of Resources and Subsequent Takeover Offer

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11. Resources convened its annual general meeting (**Meeting**) on 29 November 2002 at 10.00am. The meeting was to consider a number of resolutions (**Resolutions**) to approve a change to Resources' activities, including a proposed investment in MIS Orthopaedics.
12. Before the Resolutions were considered at the Meeting, the lawyer for Limited arrived at the meeting and notified Resources' board that a renewed conditional offer by Limited had been announced to the market (the **Proposed Bid**).
13. The terms of the Proposed Bid include:
 - An offer price of 3.5 cents per share;
 - 51% minimum acceptance condition; and
 - a condition that Resources' shareholders reject the Resolutions.

Adjournment of the Meeting

14. Following the announcement of the Proposed Bid, the Meeting was adjourned until 13 December 2002, to provide shareholders the opportunity to consider the terms of the Proposed Offer.

The application

15. The application made the following allegations:
 - (a) that Limited was aware of the status of proxy voting and was aware that the Resolutions were unlikely to be rejected (which would mean that one of the conditions of the Proposed Bid would not be met);
 - (b) that Limited was in breach of section 631(2)(a) of the Act because it announced the Proposed Bid in circumstances where it was reckless as to whether the proposed bid would be made; and
 - (c) that Limited announced the Proposed Bid with a view to disrupting shareholder proceedings at the Meeting and using the announcement as a platform to announce its dissatisfaction with the Company's performance and the proposed change to Resources' activities.
16. The application sought orders that Limited not proceed with the proposed takeover offer. Alternatively, the application sought orders that the proposed takeover offer proceed as currently announced and that Limited not prevent the adjourned meeting from occurring at the designated time and place.

Discussion

17. The primary issue for the Panel was whether Limited's conduct could potentially constitute unacceptable circumstances.

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18. The Panel noted that Limited may have chosen the timing of the announcement of its bid for tactical reasons. However the Panel considers that this fact alone does not necessarily constitute unacceptable circumstances. Limited is a substantial shareholder and it is entitled to make an alternative proposal in response to the Board's proposed investment in MIS Orthopaedics.
19. The Panel considered that, on the facts before it, the announcement of the takeover bid by Limited did not constitute frustrating action and did not prevent Resources' shareholders from making an informed decision in relation to the Resolutions to be considered at Resources' adjourned meeting. Therefore the Panel decided that there was no basis for ordering that the proposed bid not proceed.
20. The Panel considered that the actions of Resources' directors in adjourning the meeting were appropriate and sensible.
21. Resources sought alternative orders that the proposed bid proceed as currently announced and that Limited not prevent the adjourned annual general meeting from occurring at the designated time and place. The Panel considered that Limited already had an obligation to proceed with the bid pursuant to section 631(1) of the Act. There was no evidence put before the Panel that the bid would not proceed. Therefore, the Panel considered that it was not necessary to make the alternative orders sought by Resources. If unacceptable circumstances were to arise in the future, a separate application would be warranted at that time.
22. There was no evidence put to the Panel that there was a risk of Limited acting to drag out the process of its offer, or delay its bid (thus adversely putting pressure on the Resources directors to further delay the adjourned meeting).

Previous bid

23. In deciding not to commence proceedings, the Panel considered Limited's conduct in relation to the Previous Bid and its contravention of section 631(1)(b) of the Act in relation to the Previous Bid. The Panel did not consider that this conduct was relevant for the purposes of this application. However the Panel reminded Limited of its obligations under section 631(1)(b).

Disclosure

24. The Panel was concerned at the adequacy of information currently provided to Resources' shareholders. The Panel noted its concerns in relation to:
 - (a) the information provided by Resources in relation to its proposed investment in MIS Orthopaedics; and
 - (b) the information provided to Resources shareholders by Limited in relation to the details of the bid, the future direction of Resources under Limited controllership and the relationship of Limited's proposed takeover bid with a proposed share placement Limited requested Resources to make to it.
25. The Panel advised both Resources and Limited that it considered that there appeared to be a risk that Resources shareholders may have been asked to make material

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decisions about the future ownership, control and direction of their company with inadequate information.

26. The Panel considered that, although there were a number of issues of potential concern in relation to both transactions, which may warrant future applications to the Panel, it considered it appropriate to allow the promoters of those transactions the opportunity to address those issues rather than interfere prospectively on the basis of the current application.

Decision

27. The Panel declined to conduct proceedings on the application before it.
28. The Panel consented to the parties being represented by their commercial solicitors.

Meredith Hellicar

President of the Sitting Panel

Decision dated 11 December 2002

Reason published 12 February 2003