



Australian Government

Takeovers Panel

**Reasons for Decision
Tigers Realm Coal Limited
[2014] ATP 2**

Catchwords:

Association – decline to make a declaration – undertaking – equity raising - relevant interest – financial assistance – break fee – costs reimbursement – need for funds – placement – shareholder approval – share issue

Corporations Act 2001 (Cth), sections 260A, 606, 608, 609(7), item 7 of s611

Perpetual Custodians Ltd (as custodian for Tamoran Pty Ltd as trustee for Michael Crivelli) v IOOF Investment Management Ltd; Murray v Perennial Investment Partners Ltd [2012] NSWSC 1318, HIH Insurance Ltd and HIH Casualty and General Insurance Ltd, Re; Australian Securities and Investments Commission (ASIC) v Adler (2002) 41 ACSR 72

Guidance Note 7: Lock-up devices

Moreton Resources Limited [2013] ATP 14, Firestone Energy Limited [2013] ATP 4, Touch Holdings Limited [2013] ATP 3, MYOB Limited [2008] ATP 27, National Foods Limited 01 [2005] ATP 8

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

INTRODUCTION

1. The Panel, Elizabeth Bryan, Tony Osmond and Jane Sheridan (sitting President), declined to make a declaration of unacceptable circumstances in relation to the affairs of Tigers Realm Coal Limited after the parties restructured a proposed equity raising by Tigers Realm. The application primarily concerned association between Tigers Realm Minerals Pty Limited and other shareholders and each of BV Mining Holding Limited and Russian Direct Investment Fund, potential investors in Tigers Realm, through the equity raising. The parties amended the share subscription agreements and related documents and offered undertakings, which the Panel accepted.

2. In these reasons, the following definitions apply.

- BV Mining** BV Mining Holding Limited
- RDIF** Russian Direct Investment Fund¹
- SSA** each of the share subscription agreements between Tigers Realm, TRM and each of BV Mining and RDIF
- Tigers Realm** Tigers Realm Coal Limited
- TRM** Tigers Realm Minerals Pty Limited

¹ The term sheet and SSA were executed by Limited Liability Company <<RDIF Investment Management>>

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FACTS

3. Tigers Realm is an ASX listed company (ASX code: TIG).
4. TRM is a 22.86% shareholder in Tigers Realm, related to various founders and directors of Tigers Realm.
5. The applicant, Dr Bruce Gray, is an approximately 19% shareholder in, and a director of, Tigers Realm.
6. On 12 December 2013, Tigers Realm announced it intended to raise up to \$62 million at \$0.165 per share through:
 - (a) a placement to BV Mining Private Equity Fund V, through BV Mining (in tranches of \$21.6 million and \$14.6 million)
 - (b) a placement to RDIF (\$16.3 million)
 - (c) a placement to new and existing shareholders (\$7.85 million) and
 - (d) a share purchase plan to existing shareholders (up to \$1.65 million).
7. If all components of the equity raising were completed in full, BV Mining would have a 24.4% interest in Tigers Realm and RDIF would have an 11.0% interest.
8. Each component of the equity raising, other than the share purchase plan and the first tranche investment by BV Mining was subject to shareholder approval.
9. In connection with the equity raising, Tigers Realm entered a terms sheet, which was superseded by the SSAs.
10. Under the SSA with BV Mining:
 - (a) the first tranche investment by BV Mining was conditional on, among other things, TRM, all the directors of Tigers Realm (excluding Dr Gray)² and certain management of Tigers Realm entering into escrow agreements and/or making statements that they would vote in favour of the relevant resolutions³
 - (b) TRM gave an undertaking to BV Mining regarding the operation and composition of Tigers Realm's board
 - (c) Tigers Realm and TRM agreed to exclusivity arrangements with BV Mining
 - (d) Tigers Realm agreed to reimburse BV Mining for costs incurred in the course of the transactions up to US\$400,000

² Mr Antony Manini (Chairman), Mr Craig Parry (Managing Director), Mr Owen Hegarty, Mr Brian Jamieson and Mr Craig Wiggill.

³ The SSA required escrow agreements with TRM, all directors of Tigers Realm (excluding Dr Gray), Mr Peter Balka (Chief Operating Officer), Mr David Forsyth (Company Secretary), Mr David George (Manager of Investor Relations), Mr Chris McFadden (Head of Commercial Strategy and Commercial Development), Mr Leonid Skopstov and Mr Paul Tongs. Some of the agreements were with nominee companies of the relevant beneficial shareholders. The SSA required voting statements from TRM, all directors of Tigers Realm (excluding Dr Gray), Mr Peter Balka, Mr David Forsyth, Mr David George and Mr Leonid Skopstov

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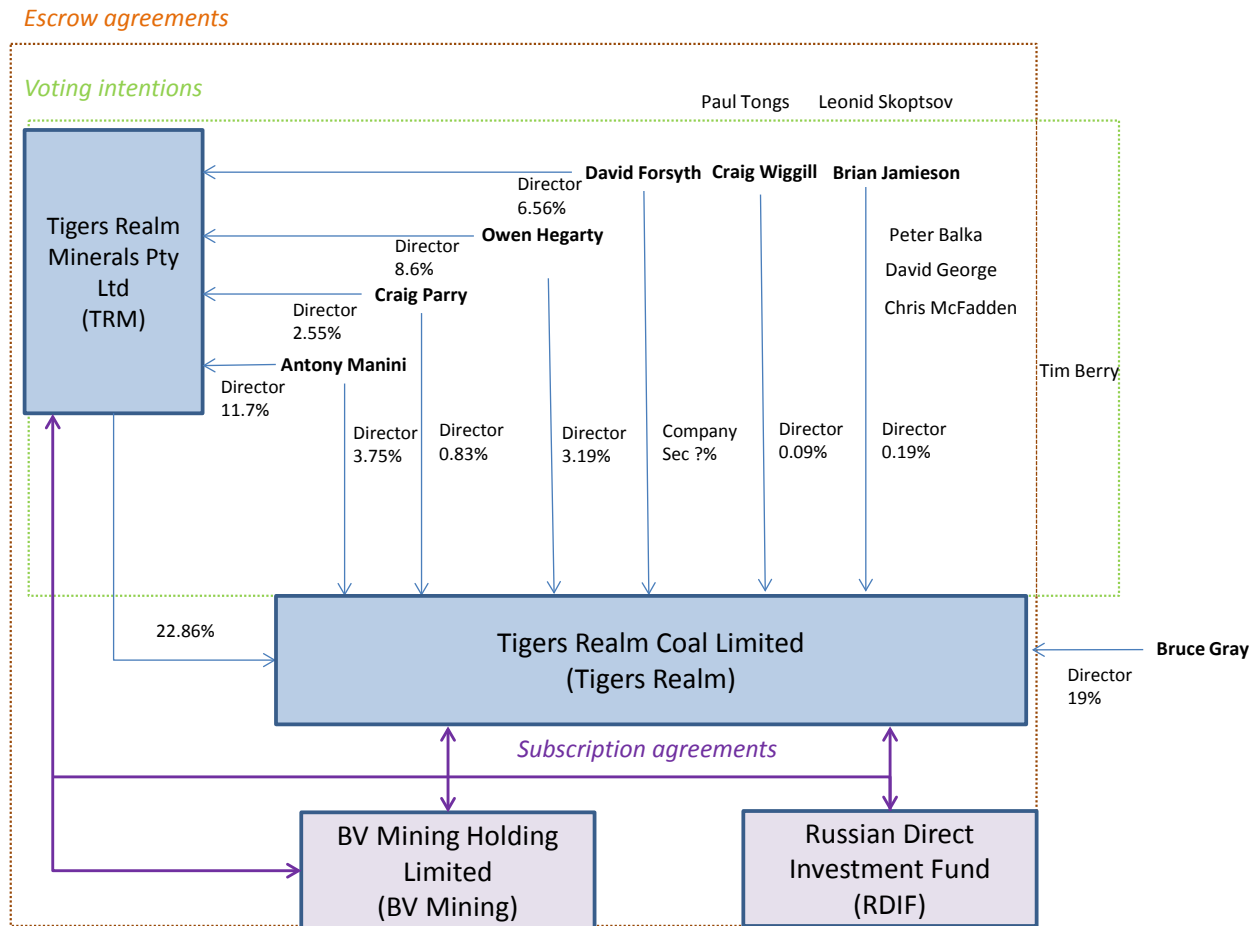
- (e) BV Mining was entitled to a break fee of US\$400,000 if, among other things, shareholders failed to approve the second tranche investment by BV Mining. Tigers Realm and TRM were jointly and severally liable for the break fee and
- (f) Tigers Realm provided an indemnity to BV Mining in relation to costs incurred regarding specified matters, including certain litigation and government actions. To the extent that Tigers Realm did not pay any amount due to BV Mining under the terms of the litigation and government actions indemnity, TRM was liable for the payment. Such payment could be satisfied by the transfer of TRM's shares in Tigers Realm Coal to BV Mining.
11. The SSA between Tigers Realm, TRM and RDIF was similar to BV Mining's, except that (relevantly) RDIF's investment was to be in one tranche only (subject to shareholder approval), the costs reimbursement amount was US\$150,000 and there was no break fee.
12. The escrow agreements were entered into between Tigers Realm and each of the relevant shareholders on 12 December 2013. The escrow agreement between Tigers Realm and TRM was terminated on 16 December 2013.
13. The voting statements were contained in Tigers Realm's 12 December 2013 announcement as follows:
- [TRM] (a 22.86% holder in the company) has informed the Company that it will vote all of its shares in the Company in favour of all resolutions in respect of the Second Component.*
- In addition, each of the following individuals all of whom own shares in the Company and who are directors or senior employees of the Company, has informed the Company that he will vote all of his shares in the Company in favour of all the resolutions in respect of the Second Component (other than where they are excluded from voting on a particular resolution by the ASX listing rules):*
- Peter Balka, Chief Operating Officer*
 - Tim Berry, General Manager HSEC⁴*
 - David Forsyth, Company Secretary*
 - David George, Manager, Investor Relations*
 - Owen Hegarty, Director*
 - Brian Jamieson, Director*
 - Antony Manini, Board Chairman*
 - Chris McFadden, Head of Commercial, Strategy and Corporate Development*
 - Chris Parry, Managing Director and CEO*
 - Craig Wiggill, Director*
14. None of the voting statements were qualified by reference to there being 'no superior proposal'.

⁴ Mr Tim Berry appears to have made the statement in place of Mr Leonid Skopstov as required by the SSAs

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15. Collectively, the shareholders who entered escrow agreements and/or made voting statements have an interest of approximately 33% in Tigers Realm.
16. The relationships between the various companies and people are set out below:



17. The first tranche of the BV Mining placement was expected to complete on Friday, 20 December 2013. The shareholders' meeting was to be held in late January 2014.

APPLICATIONS

18. By application for interim orders dated 13 December 2013, Dr Gray sought an interim order that Tigers Realm be prevented from completing the first tranche investment by BV Mining or, if the investment had already completed, that the proceeds be held by Tigers Realm and not used pending the outcome of the Panel proceedings.
19. On 13 December 2013, Tigers Realm undertook not to proceed with the first tranche placement without giving the Panel 24 hours' notice. On this basis the acting President declined to make any interim order.
20. By application for a declaration and orders dated 16 December 2013, Dr Gray sought a declaration of unacceptable circumstances. Dr Gray submitted that:

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- (a) as a result of the escrow agreements and voting statements, BV Mining and RDIF had each acquired a relevant interest of greater than 20% in Tigers Realm in contravention of s606⁵
 - (b) BV Mining and RDIF were associated with the shareholders who entered escrow agreements and/or made voting statements. Accordingly, the first tranche investment by BV Mining would also contravene s606
 - (c) as a result of the escrow agreements, Tigers Realm had a relevant interest in itself of greater than 20% in contravention of s606
 - (d) all the shareholders who entered escrow agreements and/or made voting statements are associated. Accordingly, if any of them acquired shares through the \$7.85 million placement that person would breach s606
 - (e) the indemnity and other arrangements involved Tigers Realm giving financial assistance to BV Mining and RDIF in contravention of s260A and
 - (f) the break fee was a “naked no vote” break fee.
21. Dr Gray further submitted that the proposed placements to BV Mining and RDIF offended the principles in:
- (a) s602(a) because it was not efficient for a market to operate on the basis that existing shareholders would be significantly diluted, at a discount, when the issuer had no immediate need to raise that amount of capital and
 - (b) s602(c) because other shareholders did not have an opportunity to participate in the proposed placements.
22. Dr Gray also submitted that the proposed placements inhibited the potential for an alternative proposal and that the break fee had a coercive effect on shareholders.

Interim order sought

23. In the 16 December 2013 application, Dr Gray re-applied for an interim order to the effect that Tigers Realm be restrained from completing the first tranche investment with BV Mining pending the outcome of the Panel proceedings.
24. As the undertaking given on 13 December 2013 was still in effect (see paragraph 19) and Tigers Realm had indicated that the parties proposed to restructure the transaction so that the first tranche would no longer be issued to BV Mining (see paragraph 27), we declined to make any interim order.

Final orders sought

25. Dr Gray sought final orders to the effect that the first tranche investment by BV Mining, the share purchase plan, the escrow agreements and the indemnity given by Tigers Realm be subject to shareholder approval (including a special resolution for giving financial assistance), and that the shareholders who had entered escrow agreements and/or made voting statements be excluded from voting on such

⁵ References are to the *Corporations Act 2001 (Cth)* unless otherwise specified

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resolutions. He also sought a final order that the ‘naked no vote’ break fee be cancelled.

26. Following submissions, Dr Gray requested additional final orders to the effect that the break fee and expense reimbursement be reduced so that they were, in aggregate, 1% of the amount to be raised from BV Mining and RDIF, the acquisition of relevant interests inherent in the TRM indemnity be subject to shareholder approval and that each resolution in relation to the equity raising be inter-conditional (but that there be a separate resolution to approve the second tranche investment by BV Mining). He also sought an order for costs.

DISCUSSION

Initially proposed modifications to the equity raising

27. Early in the course of the matter Tigers Realm, BV Mining and RDIF proposed to amend their agreements to address concerns raised in the application. They proposed to:
- (a) make the escrow agreements subject to shareholder approval
 - (b) remove the escrow agreements as a condition precedent to the issue of shares to BV Mining and RDIF
 - (c) seek shareholder approval for the entire placement to BV Mining in a single tranche
 - (d) make the issue of shares to RDIF conditional on shareholder approval for the issue of shares to BV Mining
 - (e) remove the ‘naked no vote’ break fee and
 - (f) amend the condition precedent requiring voting intentions statements to allow the intention to support the transactions to be “in the absence of a superior proposal”.
28. We conducted proceedings in the context of these proposed modifications.

Commercial circumstances

29. Overall, the transactions are not commercially unreasonable. However, the parties contravened the provisions of Chapters 6 and 6C in a way that was more than technical. It was clear that Tigers Realm needed funds, even though Dr Gray disputed the amount needed. It was also clear, and not commercially unreasonable, that BV Mining and RDIF wanted some measure of protection and certainty about the other shareholders’ positions (hence, for example, the escrow agreements committing existing shareholders). Tigers Realm has, it submitted, “*managed to attract substantial investment proposals from strategic, cornerstone investors*”. However, the parties to the SSAs went too far.
30. The attempt to remedy the problems at the outset of the application was helpful, but did not go far enough.

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Association between BV Mining, RDIF and TRM

31. Section 12 provides that persons are associated if they have a relevant agreement for the purpose of controlling or influencing the composition of a company's board or the conduct of its affairs, or they are acting in concert in relation to a company's affairs.
32. The SSAs between Tigers Realm, TRM and each of BV Mining and RDIF are relevant agreements. They have the purpose (among other things) of controlling or influencing the composition of Tigers Realm's board. The SSAs give BV Mining and RDIF the right to appoint nominees to the Tigers Realm board. They also included undertakings by Tigers Realm and TRM in relation to board composition and operation. Tigers Realm submitted that *"through an oversight, TRM was included in those undertakings. BV Mining and RDIF have agreed to TRM being deleted from those clauses"*.
33. The SSAs also have the purpose of controlling or influencing the conduct of Tigers Realm's affairs. The SSAs include provisions relating to TRM:
 - (a) voting in favour of the proposed equity raising
 - (b) indemnifying each of BV Mining and RDIF in relation to certain matters
 - (c) supporting exclusivity arrangements in relation to future debt or equity raisings by Tigers Realm
 - (d) assuming liability for the break fee that may be payable to BV Mining and
 - (e) entering into an escrow agreement.
34. Tigers Realm submitted that there was no association between TRM and either BV Mining or RDIF. It submitted that the prevailing circumstances – including the company's dire financial position and the identities of BV Mining and RDIF⁶ – provided the commercial context for the SSAs. It further submitted that, consistent with TRM being independent of BV Mining and RDIF, TRM had resisted requests from them to assume obligations under the SSAs, and that Tigers Realm had argued the position that TRM *"should not be singled out as needing to accept exposures and restrictions that other shareholders in [Tigers Realm] were not required to bear."*
35. BV Mining submitted that it was not a party to the escrow agreement (or its termination). Moreover, the voting intentions statement, litigation indemnity, break fee and other liabilities assumed by TRM had been negotiated simply to protect BV Mining.
36. ASIC, in a very helpful submission, said that the *"deliberately broad scope of the associate definition will clearly capture the terms of the term sheet and written share subscription agreements"* and that *"justifications on commercial and economic grounds do not displace the deliberately broad concept of association set out in s12(2)."*

⁶ BV Mining will hold the investment ultimately for Baring Vostok Private Equity Fund V. Baring Vostok Private Equity Fund V is advised by Baring Vostok Capital Partners Limited (Guernsey) which is one of the *"leading private equity firms"* focused on Russia and the region and RDIF is owned by the Russian government

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37. In *Touch Holdings* the Panel said:

*To enliven the definition of associates requires the purpose of either (a) controlling or influencing the composition of the board or (b) controlling or influencing the conduct of affairs: Perpetual Custodians.*⁷ In that case, Stephenson J found that the purpose was only to acquire shares under the scheme of arrangement and what flowed from that was simply an effect. That is not the same as here, where the parties have agreed to conduct of business provisions and a specific board composition control provision. In our view, the SSA is an agreement (or evidence of one) for the purposes in s12(2)(b) or between all the parties to act in concert in relation to the affairs of Touch.⁸

38. Although not intended to confer total control, it is clear that the parties have agreed conduct of business and board composition provisions. It is clear, for example, that making the voting intentions statement of TRM a condition precedent to the placements was intended to ensure (so far as possible) that the required shareholder approvals would be obtained.

39. Dr Gray submitted that provisions in the SSA (break fee, exclusivity and indemnity), the escrow agreement and the voting intentions statement represented “a lot of conduct by TRM of assistance to RDIF and [BV Mining] and it shows a shared goal or purpose of all of them in which TRM is an actively engaged participant.” He also submitted that it was uncommercial for TRM to have provided an unqualified voting statement or to have given the indemnity.

40. ASIC submitted that in its view “the relevant agreements and concerted actions between TRM and BV Mining and RDIF respectively are of a kind that give rise to an association under s12(2).”

41. There are some types of agreement that influence a company’s affairs yet are not contrary to the policy of the association provisions. Discussing the scope of the association definition in s12, the Panel in *National Foods Limited 01* said:

*Paragraphs 12(2)(b) and (c) should not be read unduly widely, as many agreements relate to the conduct of a company's affairs, which should not ordinarily be treated as within the policy of the association provisions, and which have never been held to be associations. For instance, covenants in an arm's length loan agreement may intrude into the conduct of a borrower company's business and intellectual property agreements commonly intrude into the conduct of the licensee's business. At the same time, an agreement or concerted action in relation to a company's affairs may amount to an association, although it is not intended to confer total control over the conduct of the company's affairs: an agreement for the purpose of influencing the conduct of the company's affairs is enough, and the role of association is to extend the concept of a relevant interest in shares, which itself requires only imperfect control over their voting or disposal.*⁹

42. While we agree with the Panel’s approach in *National Foods 01*, there are many provisions in the SSAs that go considerably beyond what would be expected. We agree with the ASIC submission that the proposal:

⁷ *Perpetual Custodians Ltd (as custodian for Tamoran Pty Ltd as trustee for Michael Crivelli) v IOOF Investment Management Ltd; Murray v Perennial Investment Partners Ltd* [2012] NSWSC 1318

⁸ *Touch Holdings Ltd* [2013] ATP 3at [80]

⁹ *National Foods Limited 01* [2005] ATP 8 at [58]

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...goes beyond merely providing for BV Mining and RDIF to subscribe for a substantial equity interests (sic) in Tigers Realm. In addition to Tigers Realm Coal, the party with the power to issue the equity, it involves TRM and other shareholders in a broader plan that incorporates arrangements with respect to certain affairs of Tigers Realm... and in doing so co-opts the voting power of TRM and others to influence the outcome of resolutions necessary to implement the proposal for the benefit of BV Mining and RDIF.

43. In our view, the situation is similar to that in *Touch Holdings*. The SSAs have specific board composition and conduct of business provisions, even accepting that the obligation of TRM in relation to board composition was apparently an error.
44. Collectively, the SSAs, escrow agreement and voting intentions statement are, or evidence, an association under s12 between TRM and each of BV Mining and RDIF in relation to Tigers Realm.

Association between BV Mining, RDIF and TRM directors

45. TRM has four directors, each of whom is a shareholder in TRM – Antony Manini, Owen Hegarty, David Forsyth and Craig Parry. David Forsyth is also Tigers Realm’s company secretary and the other three are directors of Tigers Realm.
46. In their capacity as Tigers Realm shareholders, each of the TRM directors has entered into an escrow agreement and made a voting intentions statement. The escrow agreements and voting intention statements are in the same form as TRM’s.
47. Dr Gray submitted that, in circumstances where all the directors of TRM are directors or management of Tigers Realm and are able to control board decisions, Tigers Realm, TRM and the board/management shareholders should be considered to be acting together.
48. Tigers Realm made submissions on each of the aspects under consideration. It submitted that the escrow agreements, which were between each relevant shareholder and Tigers Realm (neither BV Mining nor RDIF were parties), did not evidence an association because there were “*sound and rational commercial reasons*” for them. In any event, the escrow agreements would be cancelled under the proposed modifications and new agreements subject to shareholder approval entered into.
49. Tigers Realm also submitted that the voting intentions statements did not evidence an association because BV Mining and RDIF required them as “*some degree of comfort that there was a reasonable prospect of the general meeting resolutions necessary for tranche 2 being passed*” and required that the statements be unqualified. It submitted that each person requested to give the statements was comfortable to do so.
50. BV Mining submitted that the escrow agreements and voting intentions statements did not create an association between it and the relevant shareholders. It submitted that it merely required a “*sufficient ongoing commitment to the development of the company’s project*” as a condition precedent to its investment and that it had “*left Tigers Realm*” to deal with the relevant shareholders.

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51. While BV Mining and RDIF are not parties to the escrow agreements, the agreements were required by them and agreed by the TRM directors. While the TRM directors do not control TRM (in the sense that their aggregate shareholding is approximately 29%), they do control the decisions of the board and were necessarily involved in the terms of the SSAs. They are the people who have formed the understanding between TRM and each of BV Mining and RDIF. In their personal capacities they have acted consistently with that understanding to support the proposed equity raising.
52. We consider that Antony Manini, Owen Hegarty, David Forsyth and Craig Parry are each associated with each of BV Mining and RDIF in relation to Tigers Realm.

Association between BV Mining, RDIF and other shareholders

53. In addition to the TRM directors, other management of Tigers Realm entered escrow agreements and made voting intentions statements.
54. Tigers Realm submitted that many of the shareholders who entered escrow agreements and/or made voting intentions statements had limited or no contact with BV Mining and RDIF, and that the requests for such agreements/statements were put to the shareholders (by Tigers Realm) and agreed by them. Further, Tigers Realm submitted that it understood that the shareholders entered the escrow agreements because they “*considered that the proposed investments by BV Mining and RDIF were highly attractive to the company*” and “*were well aware of the prevailing circumstances*” of the company. Accordingly, Tigers Realm submitted there was no association between these shareholders and each of BV Mining and RDIF.
55. BV Mining made similar submissions. It submitted that it “*considered it prudent*” to require the escrow agreements and voting intentions statements as conditions precedent in its SSA, to protect its significant proposed investment.
56. It is unsurprising that a proposed investor would seek commitments from existing shareholders and comfort that its proposal would be approved by shareholders. This is particularly the case for BV Mining, because it originally proposed to make one tranche of its investment first, then seek shareholder approval for the remainder.
57. In the absence of material that these shareholders did more than respond to a request to support the proposed equity raising, we are not satisfied that there is any underlying agreement, arrangement or understanding between them and BV Mining or RDIF. We note the proposed modifications to the escrow agreements and voting intentions statements.

TRM indemnity

58. The SSAs contain an indemnity from Tigers Realm to BV Mining and RDIF (respectively) against various costs, losses and expenses including in relation to any dispute against Tigers Realm or its directors by any person that arise out of the specified matters or conduct. TRM has also given an indemnity, including in relation to any dispute against Tigers Realm or its directors, to the extent that

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Tigers Realm does not pay under its indemnity. The liability is effectively uncapped.

59. BV Mining submitted that the indemnity was required because of litigation threatened by Dr Gray.
60. The TRM indemnity includes the following provision (using the BV Mining SSA as an example):

[BV Mining] (at its sole discretion) may demand that, subject to [Tigers Realm] shareholder approval under item 7 of section 611 of the Corporations Act (if required), the amount payable by TRM to [BV Mining] ... be paid by way of the transfer to [BV Mining] of such number of shares held by TRM equal to the amount payable....
61. Depending on the amount of any payment required under the TRM indemnity, part of the payment could be required to be made by way of TRM transferring Tigers Realm shares to BV Mining/RDIF. This could require TRM to dispose of at least some of its shareholding in Tigers Realm to BV Mining/RDIF and implies an obligation that it will not otherwise dispose of the shares.
62. The indemnity was part of the SSAs that also had, as a condition precedent to the placement, that TRM enter an escrow agreement in respect of its Tigers Realm shares.
63. Section 608(1) states that a person has a relevant interest in securities if, among other things, they have power to dispose of, or control the exercise of a power to dispose of, the securities. It does not matter how remote the relevant interest is or how it arises.
64. Section 608(8) has the effect that a person is taken to have a relevant interest in securities that another person has if they have an agreement with respect to the securities or the latter has given the former an enforceable right in relation to the securities.
65. Dr Gray submitted that BV Mining and RDIF had each acquired a relevant interest in all of TRM's shares in Tigers Realm (22.86%) and that, accordingly, each had contravened s606.
66. BV Mining submitted that it had not acquired a relevant interest in TRM's shares because s609(7) states that *"a person will not acquire a relevant interest in shares in relation to an agreement that is conditional on shareholder approval under section 611 item 7"*. Further, it submitted that *"[s]ection 609(7) makes it clear that an agreement does not give rise to a relevant interest in securities if it is conditional on an item 7, section 611 resolution being passed and (relevantly) [the agreement] does not restrict disposal of the securities for more than 3 months from the date when the agreement is entered into. The TRM Escrow Deed (if and when it is entered into) is a separate agreement from the SSA. BV Mining is not, and will not be, a party to the TRM Escrow Deed and has no ability to enforce its terms"*. BV Mining also submitted that the TRM indemnity was therefore an agreement that fell within the scope of s609(7)(c) and did not give rise to a relevant interest.
67. ASIC submitted that the requirements of s609(7) had not been satisfied because the relevant clauses *"only state that the obligations are subject to item 7 approval 'if required'*

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and there is accordingly no certainty that item 7 approval will be sought and no corresponding commitment to seek that approval (s609(7)(a)(i)).” Moreover, ASIC submitted that the SSAs did not expressly provide that they were for a period of no greater than three months as section 609(7)(c) requires.¹⁰ ASIC also submitted that *“it is not sufficient to simply enter a relevant agreement restricting disposal and rely on the agreement not having been in existence for more than 3 months at all relevant times as a basis to assert s609(7) is satisfied.”*

68. We agree with Dr Gray and ASIC that each of BV Mining and RDIF (respectively) acquired a relevant interest in the 22.86% of Tigers Realm held by TRM. We consider that the TRM indemnity resulted in a contravention of s606 by each of BV Mining and RDIF.

Break fee and costs reimbursement

69. The SSA with BV Mining provided for:

- (a) Tigers Realm to pay *“all of [BV Mining’s] reasonably incurred legal and due diligence expenses up to a maximum amount of US\$400,000 less any such expenses paid in accordance with the Term Sheet”* and
- (b) Tigers Realm and TRM, jointly and severally, to pay a break fee in circumstances including because of a breach of the SSA where, as a consequence, a subscription did not occur or was adversely affected.

70. The SSA with RDIF provided for Tigers Realm to pay its expenses on the same basis, except that the amount was US\$150,000 (plus any applicable VAT). No break fee is payable.

71. The costs reimbursement and break fee (each US\$400,000) that could be payable to BV Mining each represent approximately 1.2% of the amount to be raised from BV Mining.

72. The costs reimbursement (US\$150,000) that could be payable to RDIF represents approximately 1.0% of the amount to be raised from RDIF.

73. BV Mining submitted that the break fee and costs reimbursement should be considered with reference to the total equity value of Tigers Realm and the maximum amount payable (US\$950,000) represented approximately 1.2% of that figure. It further submitted that the Panel should only be concerned to *“ensure that such fees do not have a significant impact on competition for control, or a substantial coercive effect on shareholders.”*

74. Tigers Realm submitted that it had undertaken an extensive process to source equity funding, including engaging professional advisers and approaching over 70 potential investors. Guidance Note 7 *Lock-up devices* states that whether *“the fee was agreed after a public, transparent process designed to elicit proposals”* is a relevant factor in considering whether a break fee gives rise to unacceptable circumstances.¹¹

¹⁰ See also *Firestone Energy Limited* [2013] ATP 4 at [34]

¹¹ At [10(a)]

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75. The costs reimbursement would only occur if the placement completed. Under most circumstances, the break fee would only be payable if the placement to BV Mining did not proceed. There appear to be circumstances in which both are payable. The break fee was prefaced in the SSA with an acknowledgement that BV Mining “has and will incur significant costs, expenses and damages if it enters into this Agreement and the Investment is not completed” and was stated to be “a reasonable pre-estimate of [BV Mining’s] costs, expenses and damages.”
76. GN7 states that a break fee not exceeding 1% of the equity value of the target is generally not unacceptable.¹² The policy basis for this statement is that a break fee of this magnitude will generally not be anti-competitive. GN7 also states that multiple fees are likely to be aggregated for the purpose of the 1% guideline.¹³ Further, GN7 states that the Panel will consider “whether the fee reimburses actual expenses” as one factor in determining whether a fee is unacceptable.¹⁴
77. GN7 does not discuss the appropriate reference point for an equity placement, but we think it follows from the logic of GN7 that it is the amount of the equity placement rather than the equity value of the company.¹⁵ The (implied) assumption in GN7 is that there is a bid for all the shares, so the 1% guideline is measured by reference to the total equity value of the target.¹⁶
78. In a placement to more than one party, as here, the reference point could be the amount to be raised specifically from the party who has the benefit of the break fee or the total amount of equity to be raised. Factors that are likely to influence which of these is the appropriate reference point include the proportion of equity to be raised from the party who has the benefit of the break fee and whether the party who has the benefit of the break fee has ‘anchored’ the equity raising in some way.
79. BV Mining submitted that there could be circumstances under which both the costs compensation and break fee would be payable. Provided there were no circumstances under which both would be paid, the maximum that could be paid by Tigers Realm is US\$550,000 (the aggregate of the costs reimbursement amounts), representing approximately 1.2% of the equity to be raised from BV Mining and RDIF and 1.0% of the total equity amount to be raised.
80. Tigers Realm initially proposed an amendment to remove the ‘naked no vote’ trigger (see paragraph 27). Assuming that has been done, provided there are no circumstances under which both the expense reimbursement and break fee would be paid, we think the arrangements are not unacceptable. This is because the maximum amount payable is approximately 1.2% of the equity to be raised from BV Mining and RDIF, 1% of the total equity to be raised and the amounts were agreed after an extensive investment solicitation process.

¹² At [9]

¹³ At [11]

¹⁴ At [10(f)]

¹⁵ Consistent with the approach the Panel took in *Moreton Resources Limited* [2013] ATP 14 at [35]

¹⁶ GN7 footnote 7: *The aggregate of the value of all classes of equity securities issued by the target having regard to the value of the bid consideration when announced.*

Financial assistance

81. Section 260A provides that a company may financially assist a person to acquire shares in itself only if:
- (a) giving the assistance does not materially prejudice the interests of the company, its shareholders or the company's ability to pay its creditors or
 - (b) the assistance is approved by shareholders under s260B (by special resolution).
82. Dr Gray submitted that the break fee, costs reimbursement and indemnity provided by Tigers Realm to BV Mining and RDIF each constituted financial assistance within the meaning of s260A. He further submitted that the financial assistance was materially prejudicial having regard to Tigers Realm's current and forecast cash resources. In the alternative, he submitted that the test to be applied was that in *ASIC v Adler*. The test in that case asks where the "net balance of financial advantage lies from the giving of financial assistance."¹⁷ Here, Dr Gray submitted, BV Mining and RDIF were favoured because there may be a transfer of net value to them. Therefore, he submitted, consistent with the decision in *Midwest*,¹⁸ it would give rise to unacceptable circumstances for shares to be issued in breach of the law as part of a control transaction.
83. Tigers Realm submitted that, in circumstances where the BV Mining placement was not available without the break fee, it did not materially prejudice the interests of the company, its shareholders or its ability the pay creditors. Tigers Realm submitted that the break fee was essentially "payable where Tigers Realm...breaches the subscription agreement or 'walks away'" from the transaction, which it was "highly unlikely to do ...unless an alternative, more favourable transaction emerges."
84. Tigers Realm further submitted that the cost reimbursement and indemnity would only have effect if the placements completed. Accordingly, Tigers Realm's financial position would be substantially stronger in circumstances where they may be payable.
85. While a clear beach of s260A in conjunction with a control transaction could be a matter for a Panel to contemplate, we do not consider that such circumstances exist here.

DECISION

86. After considering the submissions and rebuttals we advised the parties that we were minded to make a declaration of unacceptable circumstances. Tigers Realm requested time to negotiate revised agreements with BV Mining and RDIF and to seek a settlement with Dr Gray. Dr Gray supported these requests. Subsequently, Tigers Realm requested two further extensions. We granted these extensions, but made it clear that the second extension was 'final'. We were concerned that the

¹⁷ *HIH Insurance Ltd and HIH Casualty and General Insurance Ltd, Re; Australian Securities and Investments Commission (ASIC) v Adler* (2002) 41 ACSR 72 at [349]

¹⁸ *Midwest Corporation Limited* [2008] ATP 15

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matter should be resolved in a reasonably timely manner (particularly as Tigers Realm and Dr Gray had originally requested the proceedings be conducted in an expedited manner).

Revised documents and undertakings offered

87. Tigers Realm, TRM, BV Mining and RDIF revised the SSAs in accordance with the initially proposed modifications (see paragraph 27), and in addition:
 - (a) the break fee was removed entirely and the payment of the cost reimbursement was accelerated
 - (b) the voting intentions statements by TRM, Mr Antony Manini, Mr Craig Parry, Mr Owen Hegarty and Mr David Forsyth were removed as a condition precedent to the placements
 - (c) the BV Mining and RDIF placements were made inter-conditional
 - (d) each of BV Mining and RDIF were given a termination right that may be exercised at their discretion
 - (e) TRM's obligations with respect to board composition were removed and
 - (f) the ability for BV Mining or RDIF to receive Tigers Realm shares under the TRM indemnity was removed.
88. Other than in respect of the terms that gave rise to unacceptable circumstances, we make no comment on the additional modifications; they are for the parties involved.
89. Tigers Realm offered an undertaking (see Annexure A), including to the effect that it would:
 - (a) not issue shares to BV Mining or RDIF without all necessary shareholder approvals
 - (b) include voting exclusion statements in the relevant notice of meeting, excluding at least TRM, Mr Antony Manini, Mr Craig Parry, Mr Owen Hegarty and Mr David Forsyth from voting on the resolutions to approve share issues to BV Mining and RDIF and
 - (c) make an announcement regarding the variation and withdrawal of the shareholders' voting intentions statements. (Tigers Realm made the announcement on 23 January 2014.)
90. The shareholders who had made voting intentions statements and would be entitled to vote each offered undertakings (see Annexure B) to the effect that their voting intentions were subject to there being no superior proposal and they would consider any rival proposal in good faith and on its merits.
91. Given the revised agreements and undertakings offered, we accepted the undertakings and declined to make a declaration. We are satisfied that it is not against the public interest to do so. We had regard to the matters in s657A(3).

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Settlement between Dr Gray and Tigers Realm

92. We note that Tigers Realm and Dr Gray have settled claims in conjunction with the restructured placements. The terms of the settlement have not been before the Panel and it makes no comment on the settlement.

Costs

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

94. The applicant sought costs. He submitted that *“The various denials of association made by [Tigers Realm] and BV Mining in this matter were so clearly without merit that the Panel is justified in making such an order.”*

95. In our view, the agreements clearly established (or evidenced) association; ASIC thought so as well. We disagree strongly with the submission by Tigers Realm that *“ASIC has effectively become a proponent for an outcome in a control dispute without a complete picture of the prevailing circumstances.”* The picture was clear. However, costs orders are the exception rather than the rule¹⁹ and the respondents to the application could not be said to have so delayed or obstructed proceedings or presented a case in total so unmeritorious that a cost order should be made if we had made a declaration of unacceptable circumstances.

Jane Sheridan

President of the sitting Panel

Decision dated 23 January 2014

Reasons published 3 February 2014

¹⁹ Guidance Note 4: *Remedies – general* at [27]

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Advisers

| Party | Advisers |
|---------------|---------------------------|
| BV Mining | Herbert Smith Freehills |
| Dr Bruce Gray | Johnson Winter & Slattery |
| RDIF | Allen & Overy |
| Tigers Realm | Allens |



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ANNEXURE A

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

Tigers Realm Coal Limited

Tigers Realm Coal Limited (TIG) undertakes to the Panel that it will:

In relation to the proposed acquisition of shares in TIG by Baring Vostok Private Equity Fund V through BV Mining Holdings Limited (or its permitted nominees) (BVMHL) pursuant to the subscription agreement between TIG, BVMHL and Tigers Realm Minerals Pty Ltd (TRM) dated 11 December 2013 (as amended from time to time) and Russian Direct Investment Fund (or its permitted nominees) (RDIF) pursuant to the subscription agreement between TIG, RDIF and TRM dated 11 December 2013 (as amended from time to time):

1. not issue shares to BVMHL or RDIF without obtaining all necessary shareholder approvals, including under item 7 of s611 of the Corporations Act 2001 (Cth)
2. include voting exclusion statements in the notice of meeting to be sent to shareholders of TIG specifying (in addition to any others that might be excluded) that TRM, Antony Manini, Craig Parry, Owen Hegarty and David Forsyth are excluded from voting on:
 - (a) all resolution(s) in connection with the share issues to BVMHL and RDIF and
 - (b) all resolution(s) to approve escrow arrangements between TIG and each of TRM, Antony Manini, Owen Hegarty, Brian Jamieson, Craig Wiggill, Craig Parry, David Forsyth, Peter Balka, Leonid Skoptsov, Chris McFadden, Paul Tongs and David George
3. ensure that shareholder approval of the share issues is not conditional on shareholder approval of the escrow arrangements
4. in respect of the statements of voting intention given by Brian Jamieson, Craig Wiggill, Peter Balka, Chris McFadden, David George and Tim Berry and announced by TIG on 12 December 2013, issue a public announcement in a form approved by the Panel stating that each person has undertaken to the Panel to amend their statement of voting intention in the form set out in the annexure
5. in respect of the statements of voting intention given by TRM, Antony Manini, Owen Hegarty, Craig Parry and David Forsyth and announced by TIG on 12 December 2013, issue a public announcement in a form approved by the Panel stating that each statement has been withdrawn.

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TIG agrees to confirm in writing to the Panel when it has satisfied its obligations under this undertaking.

Signed by David Forsyth, Company Secretary of Tigers Realm Coal Limited with the authority, and on behalf of, Tigers Realm Coal Limited

Dated 20 January 2014



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ANNEXURE B

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

Tigers Realm Coal Limited

I undertake to the Panel that I will:

In relation to the proposed acquisition of shares in Tigers Realm Coal Limited (*TIG*) by Baring Vostok Private Equity Fund V through BV Mining Holdings Limited (or its permitted nominees) (*BVMHL*) and Russian Direct Investment Fund (or its permitted nominees) (*RDIF*) (together, the *Placements*), consider any rival proposal to the Placements in good faith and on its merits, and after considering all aspects of that proposal, only support the Placements if I considered that the rival proposal was not a superior proposal to the Placements.

Signed by **Brian Jamieson, 10 January 2014**
 Christopher Walter McFadden, 10 January 2014
 Peter Balka, 13 January 2014
 Timothy George Berry, 13 January 2014
 David George, 13 January 2014
 Craig Wiggill, January 2014