



**In the matter of Pacific Magnesium Corporation Ltd
[2005] ATP 12**

Catchwords:

Unacceptable circumstances – association – beneficial ownership tracing notices – removal of director – insufficient evidence.

Corporation Act 2001 (Cth) section 672A

These are the Panel's reasons for declining to commence proceedings in relation to an application received by the Panel on 2 June 2005 from Mr Paul Byrne in relation to the affairs of Pacific Magnesium Corporation Ltd. The Panel found that Mr Byrne had not provided it with sufficient substantiation of his allegations to justify the Panel commencing proceedings.

THE PROCEEDINGS

1. These reasons relate to an application (the **Application**) to the Panel from Mr Paul Byrne (**Mr Byrne**) on 2 June 2005 alleging unacceptable circumstances in relation to the affairs of Pacific Magnesium Corporation Ltd (**Pacific Magnesium**)

THE PANEL

2. The President of the Panel appointed Peter Cameron (sitting President), Alison Lansley (sitting Deputy President) and Denis Byrne as the sitting Panel (the **Panel**) for proceedings arising from the Application.

BACKGROUND

3. Pacific Magnesium is a resources company listed on the Australian Stock Exchange (**ASX**).
4. At the time of the application, Mr Byrne was one of the directors of Pacific Magnesium.
5. In 2003, Mr Byrne (and certain family members) sold to Pacific Magnesium a one third interest in Ipoh Pacific Ltd (Ipoh) which owns a bentonite project in Queensland. As part of the consideration for this acquisition, Pacific Magnesium issued to Mr Byrne shares equivalent at the time to 5.13% of Pacific Magnesium. Pacific Magnesium also issued identical amounts of shares to two other members of Mr Byrne's family as part of the transaction. Pacific Magnesium also appointed Mr Byrne as a director.
6. Pacific Magnesium is currently in discussion with Mr Byrne about retransferring the interest in Ipoh to him and his family as a result of ongoing problems with its operation. The status of these discussions was not clear from the evidence before the Panel.

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7. On 10 April 2005, a shareholder in Pacific Magnesium, Mr Harry Cooper, holding 7.05% of Pacific Magnesium, issued to the company a requisition for a general meeting of Pacific Magnesium to consider the removal of Mr Byrne as a director.
8. On 29 April 2005, Pacific Magnesium convened a meeting scheduled for 7 June 2005 to consider the removal of Mr Byrne as a director of the company (**Meeting**).
9. On 17 May 2005, Mr Byrne caused to be issued to certain Pacific Magnesium shareholders notices which purported to be beneficial ownership tracing notices under section 672A of the Act (**Byrne Notices**). The notices requested details regarding the shares held by each of those holders, but were signed only by Mr Byrne and were issued without the knowledge of any of the other directors of Pacific Magnesium.
10. On becoming aware that the Byrne Notices had been sent, Pacific Magnesium wrote to the recipients advising them that the Byrne Notices were invalid and they were not required to respond to them. This fact was communicated by Pacific Magnesium to Mr Byrne on 24 May 2005 through Pacific Magnesium's commercial solicitors.
11. On 31 May 2005, Pacific Magnesium issued shares equivalent to 8% of the company to a new shareholder, Advance Publishing Pty Ltd, as trustee of the Izmar Family Trust (**Advance**), in consideration for approximately \$125,000. Pacific Magnesium submitted that the placement had been approved by a circular resolution of the directors of Pacific Magnesium on 30 May 2005. The circumstances of the calling of the meeting of directors for that resolution formed part of the application by Mr Byrne.
12. On 2 June 2005, Mr Byrne lodged an application with the Panel alleging unacceptable circumstances and seeking interim and final orders.

APPLICATION

Unacceptable circumstances

13. Mr Byrne in his Application sought a declaration of unacceptable circumstances in relation to:
 - (a) an allegation that the directors of Pacific Magnesium had been acting in concert, amongst themselves and with a substantial shareholder in Pacific Magnesium, Mr. Harry Cooper, to remove Mr Byrne as a director;
 - (b) the issue of the 8% shareholding to Advance (**Advance Placement**) immediately prior to the Meeting;
 - (c) the failure by the recipients of the Byrne Notices to respond to those notices; and
 - (d) Pacific Magnesium having written to the recipients advising them that the Byrne Notices were not valid and they did not need to respond to them.

Orders

14. Mr Byrne sought the following orders:

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- (a) The Panel make a declaration that the circumstances relating to the Advance Placement constitute unacceptable circumstances;
- (b) The Panel make a remedial order which may include one or more of the following:
 - (i) That the Advance Placement be declared void if the shares have in fact been issued and allotted;
 - (ii) If the shares have not been issued and allotted, an order requiring that the shares not be issued without further shareholder approval of Pacific Magnesium convened in accordance with the provisions of the Act, with full disclosure to the shareholders of Pacific Magnesium.
- (c) In view of the Meeting, Mr Byrne sought urgent interim orders that the shares to be issued to Advance either not be issued, or that they not be voted at the Meeting.
- (d) The Panel make a declaration that the circumstances relating to non-compliance by each of the recipients of the Byrne Notices constitutes unacceptable circumstances;
- (e) The Panel make an order requiring each of the recipients of the Byrne Notices to comply with the Byrne Notices;
- (f) With respect to the shares held by one shareholder that they be forfeited and vested in ASIC, and the shares be disposed of under the supervision of ASIC;
- (g) Pending disposal that the shares not be voted at the Meeting or any other general meeting of Pacific Magnesium;
- (h) An interim order as a matter of urgency, that the shares held by entities associated with Mr Althaus be restrained from voting at the Meeting;
- (i) An interim order as a matter of urgency, that the shares held by the recipients of the Byrne Notices be restrained from voting at the Meeting;
- (j) An order that various shareholders of Pacific Magnesium be restrained from acquiring any further shares in Pacific Magnesium.
- (k) A request for production of documents be issued in respect of any correspondence between Pacific Magnesium and various shareholders.

DISCUSSION

Association

Preliminary questions from Panel

15. In his application Mr Byrne did not state specifically how the directors of Pacific Magnesium acting in concert to remove him from office (assuming they had acted and done so) might have caused unacceptable circumstances to exist in terms of the requirements of section 657A(2). In other words, there did not appear to be an explanation of how the circumstances referred to constituted unacceptable circumstances having regard to their effect on control of the company or the

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acquisition of a substantial interest in the company. It was therefore not clear to the Panel how Mr Byrne's complaint was properly one for the Panel to consider.

16. The Panel was mindful of the fact that two persons who between them control less than 20% of a company may enter into an agreement regarding the voting or disposal of shares without contravening the provisions of Chapter 6 (but, where appropriate, disclosure must be made under Chapter 6C). In his application, however, Mr Byrne had not argued or demonstrated that any persons were associated or identified any persons whose voting power exceeded 20%.
17. The Panel also noted submissions in the Application to the effect that the issue to Advance was for an improper purpose and involved the directors in breach of their duties under section 180 of the Act. The Panel notes, however, that it is not its role to conduct proceedings in relation to breaches of corporate law absent an effect on control of a company, an acquisition of a substantial interest in it or contravention of any of the principles in section 602.
18. Accordingly, the Panel wrote to Mr Byrne asking for clarification of certain matters contained in his Application, including whether he believed there had been a breach of the prohibition in section 606 of the Act.

Submissions of Mr Byrne

19. In response to the Panel's request, Mr Byrne submitted a list of persons (including the companies through which they held their Pacific Magnesium shares) whom he claimed were associated for the purposes of Chapter 6 of the Act in being party to a conspiracy to remove Mr Byrne from office and vote accordingly at the Meeting.
20. In aggregate those persons had voting power of 24.36%, which was above the 20% threshold in section 606.
21. In support of the contention that those persons were associates, Mr Byrne put forward a number of arguments.
22. Pacific Magnesium provided submissions to the Panel to assist in its consideration of whether to commence proceedings, including:
 - (a) There is currently a dispute between Mr Byrne and Pacific Magnesium in regard to the Ipoh project; this was alleged to be the real motivation for the Application.
 - (b) Pacific Magnesium had been trying to raise capital for several months prior to the Advance Placement. This was discussed at a Board meeting on 11 April 2005 at which Mr Byrne was present, minutes of which were provided.
 - (c) The purpose of the Advance Placement was to raise capital which the company required.

No evidence of an association

23. The Panel did not consider that the Application or subsequent submissions by Mr Byrne raised sufficient evidence of any association between any of the persons named by Mr Byrne for the Panel to commence proceedings.

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24. While the Panel noted the timing of the Advance Placement (being very near to the Meeting), the Panel considered that that fact provided at best circumstantial evidence for propositions which were otherwise unsubstantiated.
25. In particular, to the extent that the argument was implicit in the Application, the Panel noted that a mere common intention to vote in favour of a particular resolution at a general meeting of a company does not cause persons to become associates of each other. "Association" would require an added factual element evidencing a relevant agreement or an acting in concert so as come within the definition of associate in section 12(2) of the Act.
26. The other arguments put forward by Mr Byrne to persuade the Panel were either speculative assertions which were not substantiated by factual matters, or factual submissions which were categorically denied by Pacific Magnesium.
27. Mr Byrne complained that he was unable to ascertain specific factual matters to further support his arguments and that the Panel should require Pacific Magnesium to provide the requested information. The Panel, however, did not consider that it should require Pacific Magnesium to produce information which would assist in making out Mr Byrne's claim, when he had not made out a sufficient case at the outset to commence proceedings.

Undertaking by Advance

28. Pacific Magnesium advised the Panel in its submissions that Advance would be prepared to undertake not to vote at the Meeting (**Advance Undertaking**).
29. Notwithstanding the conclusions reached by the Panel above, the Panel believed that the Advance Undertaking would prevent any unacceptable circumstances arising even if the associations which Mr Byrne alleged existed in fact existed. This follows from the fact that the persons that Mr Byrne alleged were associated would not between them be exercising more than 20% of the votes at the Meeting.

The Byrne Notices

Submissions of Mr Byrne

30. Mr Byrne alleged that unacceptable circumstances arose as a result of:
 - (a) the recipients of the Byrne Notices not having responded to them; and
 - (b) Pacific Magnesium having written to the recipients advising them that the notices were not valid and they did not need to respond to them.
31. On consideration of the Application, the Panel noted that the Byrne Notices purported to be notices under section 672A of the Act requesting the details regarding beneficial ownership of shares as described in that section.
32. Only a company (not a director of the company, unless so authorised) may give a notice under section 672A(1). However, it appeared from the Application that the Byrne Notices may have been issued without the authority of Pacific Magnesium. Accordingly, the Panel invited Mr Byrne to make submissions as to why he considered himself authorised to issue these notices on behalf of the company.

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33. Mr Byrne did not rely on any delegation or authorization from the Board. He submitted that the following provisions of the Constitution gave him authority to issue the notices on behalf of Pacific Magnesium:
- (a) Article 9(6) of the constitution of Pacific Magnesium provided:

Despite any other provision in this Constitution, Directors must do all things it considers (sic) necessary, required or authorized by law, the Listing Rules or SCH Business Rules in connection with any computerised or electronic share transfer system.
 - (b) Article 63(1) of the Constitution provided:

The business of the Company is managed by or under the direction of the Directors who may exercise all of the powers of the Company that this Constitution, the Law or the Listing Rules do not require to be exercised by the Company in general meeting.
 - (c) The definition of “Directors” read:

All or some of the Directors acting as the Board.

Mr Byrne’s authority to issue the Byrne Notices

34. The Panel considered Mr Byrne’s arguments but did not believe the provisions of the Constitution to which he directed its attention gave him the authority to issue the Byrne Notices on behalf of the company without the authority of the Board.
35. Mr Byrne argued that the effect of Article 63(1) and the definition of “Directors” were to give any one director alone power to manage the company; that is, any one director may act as the Board and manage the company.
36. The Panel did not agree with Mr Byrne’s argument. These provisions do not empower any one director to act as the Board. The definition of “Directors” itself confers no power on Mr Byrne – any power must come from Article 63(1). Article 63(1) empowers the “Directors” to manage the company. The definition defines Directors as “all of some of the Directors acting as the Board” (emphasis added). Therefore, in order for Mr Byrne to prove that he is empowered to manage the company, he must first show that he is acting as the Board.
37. Mr Byrne tendered no evidence to suggest he was acting as the Board and none of the facts before the Panel suggested he was. The issue of the notices was apparently done without knowledge of the other directors and, if put before a Board meeting, would apparently not have been approved. Further, the covering letters for the Notices were forwarded by the solicitors for Mr Byrne, not the company’s usual commercial solicitors, and appeared to have been carefully drafted so as to avoid a representation that they were issued on behalf of Pacific Magnesium itself; they were expressed to be issued by the solicitors “[at] the request of Paul Byrne, a director of Pacific Magnesium”.
38. The Panel did not understand Articles 9(6) and 63(1) to be materially different from articles commonly found in constitutions which vest the power to manage the company in the Board. This power would not ordinarily extend to allow a director alone to issue a notice on behalf of a company without the authority of the Board.

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39. The Panel was, accordingly, not persuaded by Mr Byrne’s arguments as to his authority to send the Byrne Notices so as to support a conclusion that those notices were valid notices under section 672A. The Panel, therefore, saw no unacceptable circumstances arising from the recipients of those notices not having responded to them.

The correspondence issued by Pacific Magnesium to the recipients of the Byrne Notices

40. The Panel did not consider that unacceptable circumstances arose from Pacific Magnesium issuing a letter to recipients of the Byrne Notices on learning of their having been sent, stating that the notices had been issued without the authority of the company and informing the recipient that they were accordingly not required by the company to respond.
41. The Panel considered that this response was an appropriate reaction to the company becoming aware that documents had been despatched under the name of the company without authorisation.

DECISION

42. For the reasons outlined above, the Panel declined to commence proceedings.

UNDERTAKING

43. The Panel accepted the undertaking from Advance not to vote its Pacific Magnesium shares at the Meeting. Because the Panel had not commenced proceedings and the undertaking would not have been binding under section 201A of the ASIC Act, the undertaking was executed as a Deed Poll in favour of the Panel.

COSTS

44. As the Panel has made no declaration of unacceptable circumstances, it made no orders as to costs.

Peter Cameron
President of the Sitting Panel
Decision dated 6 June 2005
Reasons published 22 July 2005