



In the Matter of Indophil Resources NL

[2008] ATP 18

Catchwords:

Bid announcement – bidder’s statement – cash consideration – decline to conduct proceedings – funding – reasonable basis – sufficient funding – no evidence of reasonable basis

Xstrata Queensland Limited – Mr Richard Laufmann – Alsons Group – Crosby Capital Limited – Indophil Resources NL

Corporations Act 2001 2001 (Cth) sections – 602 – 657A – 657D – 631(1) – 636(1)(f)

INTRODUCTION

1. The Panel, Robyn Ahern, John Keeves and Chris Photakis (sitting President), declined to conduct proceedings on the basis that there was insufficient evidence to infer that the Consortium might not have a reasonable basis to expect that it would have sufficient funding to fulfil its obligations under the bid it announced for Indophil.
2. In these reasons the following definitions apply.

Term	Meaning
Consortium	Mr Richard Laufmann (MD and CEO of Indophil), the Alsons Group and Crosby Capital Limited
Indophil	Indophil Resources NL
Xstrata	Xstrata Queensland Limited

BACKGROUND

Facts

3. Indophil is a public company listed on ASX (ASX code: IRN).
4. On 15 May 2008, Xstrata announced it intended to make cash takeover offers for Indophil at \$1.00 per share.
5. On 20 June 2008, the Consortium announced a competing cash takeover bid for Indophil at 1.28 per share. The announcement provided that the bid valued Indophil at approximately \$540 million (on a fully diluted basis).
6. On 22 June 2008, Xstrata announced that it would increase its offer price under its bid for Indophil to \$1.28 per share.
7. On 24 June 2008, the Australian Financial Review reported Mr Laufmann, speaking in his capacity as a member of the Consortium, as saying that “*the Consortium was seeking financial support out of Russia and China*” and that “*he expected strong backing given the dearth of big, undeveloped, copper resources*”.

8. On 26 June 2008, Xstrata wrote to the Consortium requesting clarification regarding the funding arrangements for the Consortium's Indophil bid. The Consortium responded that it had "*access to significant existing internal resources, which it may augment with additional financial support*".

Application

9. By application dated 30 June 2008, Xstrata sought a declaration of unacceptable circumstances in relation to Indophil because Xstrata submitted that:
- (a) the Consortium appeared to have announced its bid without having sufficient funding or a reasonable basis for believing it will be able to secure such funding and
 - (b) the Consortium's bid had created a false market for Indophil securities with the result that:
 - (i) it was not possible for the acquisition of control of shares in Indophil to take place in an efficient, competitive and informed market and
 - (ii) Indophil's shareholders did not have enough information to enable them to make an informed decision about the relative merits of the Consortium bid and the Xstrata offer.

Orders Sought

10. Xstrata sought final orders including that the Consortium:
- (a) provide the Panel with evidence (satisfactory to the Panel) of the Consortium's ability to pay the consideration under its bid
 - (b) be prohibited from proceeding with its bid until it provided such sufficient evidence and
 - (c) be required to include in the bidder's statement certain information about the funding, including the ultimate source of the funds, the proportion given by each lender and the security given for the funds.

DISCUSSION

Funding

11. According to the Panel's guidance note 14, section 631 of the Corporations Act¹ requires that a bidder only announce a takeover bid after careful and responsible consideration and when the bidder has reason to believe that it can and will be able to implement the offer. The Panel considers that when announcing a bid, s 631 requires that a bidder have a "reasonable basis" to expect that it will have sufficient funding arrangements in place to satisfy full acceptance of its offers when the bid becomes unconditional.²

¹ All references are references to the Corporations Act 2001 (Cth)

² Guidance Note 14.6

12. Section 631(2)(b) requires that a person not announce a bid *“if... the person is reckless as to whether they will be able to perform their obligations relating to the takeover bid if a substantial proportion of the offers under the bid are accepted.”*
13. The guidance note states that where a bidder does not have sufficient funding arrangements in place or a “reasonable basis” for expecting that it will have sufficient funding arrangements in place to satisfy full acceptance of its offers when the bid becomes unconditional, it is likely that there would be a false market in the target’s securities, and hence unacceptable circumstances under s 602(a)³.
14. The Consortium will require approximately \$540 million in cash to fund the bid.
15. Xstrata submitted that the Consortium acted recklessly by announcing its bid as, at the time of the announcement, the Consortium did not appear to have:
 - (a) any external funding in place to support its bid and
 - (b) access to sufficient cash resources to fund the bid⁴.
16. The Panel considered that there was insufficient evidence to conduct proceedings.
17. The Panel considered that, prior to lodgement of the bidder’s statement, the Panel should not normally undertake inquiries as to whether a bidder had funding or had a “reasonable basis” to believe it can obtain funding. However, this would not apply if, on its face:
 - (a) it is obvious that the bidder may have difficulty in funding the bid. One example of this might be where the bidder is an individual or entity with obviously limited financial means in comparison to the bid consideration
 - (b) there are some reputation or historical reasons why inquiries should be made or
 - (c) some other basis exists for raising concerns.
18. There was nothing in the application to impugn the reputations of the Consortium members and in that event the Panel saw no reason, in absence of some other cogent probative material, to conduct an investigation into whether the Consortium would have been reckless in announcing a bid.
19. Section 636(1)(f) sets out the disclosure requirements of a bidder’s statement when cash consideration is offered under a bid. Unacceptable circumstances may exist at this stage if disclosure in the bidder’s statement fails to establish that the bidder has a “reasonable basis” to believe that they will be able to fund the bid.
20. The Panel did receive some information from the Consortium, in general terms, about its capacity to fund the bid. Xstrata commented on this information. This did not change the Panel’s view.

³ Guidance Note 14.3

⁴ This submission was made following a review of publicly available information only.

DECISION

21. For the reasons above the Panel decided not to conduct proceedings.

Chris Photakis
President of the Sitting Panel
Decision dated 4 July 2008
Reasons published 7 July 2008