



Australian Government

Takeovers Panel

**Reasons for Decision
Riversdale Resources Limited
[2019] ATP 8**

Catchwords:

Decline to conduct proceedings – bidder’s statement – disclosure – material omission – tax treatment – despatch of target’s statement – interim orders

Corporations Act 2001 (Cth), sections 624, 630, 633, 640, 655A

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
NO	NO	NO	NO	NO	NO

INTRODUCTION

1. The Panel, Paula Dwyer, Jeremy Leibler and Ron Malek (sitting President), declined to conduct proceedings on an application by Riversdale Resources Limited in relation to its affairs. Riversdale was subject to an off-market takeover bid by Hancock. The application concerned the disclosure of certain Canadian withholding tax requirements. Before the Panel conducted proceedings, both the bidder and target issued disclosure regarding those requirements. In the circumstances, the Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

- Hancock** Hancock Corporation Pty Ltd, a wholly-owned subsidiary of Hancock Prospecting Pty Ltd
- Resource Capital** Resource Capital Fund VI L.P.
- Riversdale** Riversdale Resources Limited

FACTS

- 3. Riversdale is an unlisted public company with more than 50 members.
- 4. On 27 February 2019, Hancock lodged its bidder’s statement with ASIC for a cash off-market takeover bid for all the shares in Riversdale in which it did not have a relevant interest. The offer price was \$2.20 per Riversdale share increasing to \$2.50 per Riversdale share if Hancock’s voting power exceeded 50% on a fully diluted basis. The bid was conditional only on no prescribed occurrences.
- 5. In a letter dated 28 February 2019, the Chairman of Riversdale recommended that shareholders take no action in relation to their Riversdale shares.
- 6. On 13 March 2019, Hancock lodged with ASIC and sent its replacement bidder’s statement to Riversdale shareholders.

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7. On 21 March 2019, Riversdale received statements of intention from Resource Capital (which holds 47.97% of Riversdale) and another Riversdale shareholder (which holds 1.08% of Riversdale) to the effect that they did not intend to accept the bid.
8. Under section 633,¹ Riversdale was required to lodge its target's statement and independent expert's report² with ASIC and send copies to its shareholders by 28 March 2019.

APPLICATION

Declaration sought

9. By application dated 25 March 2019, Riversdale sought a declaration of unacceptable circumstances. Riversdale submitted that, in the course of preparing its target's statement, it had received Canadian legal advice that Hancock was required to withhold (and remit to the Canadian tax authority) 25% of the offer price from Riversdale shareholders who accept the offer and are not Canadian residents for Canadian income tax purposes. It submitted that this information was material in the context of an all cash bid and the failure to disclose this information in Hancock's replacement bidder's statement was misleading and deceptive and rendered a number of statements to be false.³
10. Riversdale submitted that the effect of the circumstances was that its shareholders did not have enough time and enough information to enable them to assess the merits of the bid and the acquisition of control of Riversdale would not take place in an efficient, competitive and informed market. It further submitted that its independent directors were not in a position to consider all material matters for the purpose of preparing the target's statement and making their recommendation and the independent expert did not have all material information to assess whether the bid was fair and reasonable.
11. On 25 March 2019, the same day as the application, Riversdale sought a declaration or modification from ASIC under section 655A to extend the time for Riversdale to lodge its target's statement until the date which was 15 days after Hancock had given supplementary disclosure to address the Canadian withholding tax matter.

Interim orders sought

12. Riversdale sought two sets of interim orders:
 - (a) in relation to Hancock – to cancel all acceptances received under the bid, restrain the processing of acceptances pending determination of its application and extending the offer period to one month after Hancock had provided supplementary disclosure in a form acceptable to the Panel and

¹ Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth), and all terms used in Chapters 6 to 6C have the meaning given in the relevant Chapter (as modified by ASIC)

² Riversdale was required to include an independent expert's report with its target's statement under section 640 because one of its directors was a director of the bidder

³ Noting that the takeover offer contained a term allowing Hancock to deduct amounts from the offer price and remit it to the Canadian tax authority

- (b) in relation to Riversdale – to delay dispatch of its target’s statement until Hancock had provided the supplementary disclosure.

Final orders sought

13. Riversdale sought final orders to the effect that any acceptances received to date be cancelled, Hancock lodge with ASIC and send supplementary disclosure in a form acceptable to the Panel to address the Canadian withholding tax matter and the bid be extended by one month from the date of further disclosure.

DISCUSSION

Interim orders on Hancock

14. In relation to the interim orders on Hancock, the substantive Acting President (Ron Malek) did not consider it necessary (at the time he considered the matter) to make those interim orders, noting that acceptances were not currently being processed given that the bid was still conditional and there would be time for this to be considered further if necessary by him (or the sitting Panel once appointed).

Interim orders on Riversdale

15. After receiving submissions, the substantive Acting President was also not minded to make interim orders on Riversdale. He noted that (at the time) ASIC was still considering Riversdale’s application for relief to delay lodgement of the target’s statement and considered that if the Panel (once constituted) conducted proceedings and accepted Riversdale’s arguments, it could potentially make final orders consistent in whole or part with those sought by Riversdale.

ASIC relief refused

16. On 27 March 2019, ASIC advised that it had decided to refuse Riversdale’s relief application taking into account:

- “1. its stated policy position that we will consider giving the relief requested if the target’s statement is sent to holders more than 10 business days before the offers are scheduled to close: Regulatory Guide 9 Takeover bids (RG 9), at paragraph 366(b),
2. the offer by Hancock Corporation Pty Ltd (Hancock) is scheduled to close on 14 April 2019, and
3. Hancock has expressed its refusal to extend the close of the offer.”

Deciding whether to conduct proceedings

17. We received preliminary submissions from Hancock and Resource Capital. Resource Capital submitted that we should commence proceedings noting concerns regarding the adequacy of disclosure and the time that Riversdale shareholders would have to decide their course of action.
18. Hancock submitted that we should not commence proceedings on the basis that it had already agreed to issue supplementary disclosure⁴ dealing with the Canadian tax matter and offer withdrawal rights, resolving the need for orders requiring disclosure or cancelling acceptances. On the basis that the supplementary disclosure

⁴ In response to a letter from Riversdale’s legal advisers to Hancock requesting such disclosure

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was issued on the day of its preliminary submission, shareholders would have 17 days to consider the information before the offer was due to close which “*accords with the legislation*”.⁵ It also submitted that Riversdale had “*extensive knowledge*” of the Canadian tax issue and could address the issue in its target’s statement on time, pointing out that the Canadian tax issue applied to all sales of shares by shareholders who are not resident in Canada, whether or not under Hancock’s bid.

19. Later that day, Hancock lodged with ASIC its second supplementary bidder’s statement containing disclosure on the Canadian withholding tax matter including the actions Hancock intended to take in relation to the withholding tax requirements. Hancock also provided Riversdale shareholders who had accepted the offer prior to 27 March 2019 with a right to withdraw their acceptances.
20. On 28 March 2019, Riversdale lodged its target’s statement with ASIC also providing information regarding the Canadian withholding tax matter.
21. Given these events, we asked some preliminary questions before deciding whether to conduct proceedings, including whether there was sufficient time to consider the disclosure. In order to permit sufficient time for us to consider these matters, we accepted an undertaking that Hancock would not, until the conclusion of these proceedings, declare its bid free from conditions unless it provided the Panel Executive at least 2 business days’ notice.
22. Acknowledging that information had been issued by both the bidder and target, Riversdale, Hancock and ASIC each considered that Riversdale shareholders have sufficient time to consider the supplementary bidder’s statement and target’s statement and Riversdale submitted that it did not seek any further orders.

DECISION

23. Given the circumstances above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

Orders

24. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any interim or final orders.

Ron Malek

President of the sitting Panel

Decision dated 29 March 2019

Reasons given to parties 11 April 2019

Reasons published 15 April 2019

⁵ Noting that the Corporations Act requires time periods of 7 – 14 days for significant changes in an offer before the offer closes (referring to section 624 (the 14 day extension for a late increase in offer consideration or late change in control) and section 630 (the 7 days after which an offer may close after being freed from conditions))

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Advisers

Party	Advisers
Riversdale	Ashurst
Hancock	Herbert Smith Freehills Corrs Chambers Westgarth
Resource Capital	King & Wood Mallesons