



Australian Government

Takeovers Panel

Reasons for Decision

**Beston Global Food Company Limited
[2021] ATP 3**

Catchwords:

Decline to make a declaration – rights issue – adjournment – two-strikes rule – disclosure – effect on control – efficient, competitive and informed market – media canvassing – shortfall shares – underwriting – sub-underwriting – identity of sub-underwriters – undertaking

Corporations Act 2001 (Cth), sections 205A(7), 249N, 249Y(3), 250J(1A), 251AA, 606, 657A(3), 708AA(2), 708AA(7)(e)

Procedural Rules 2.1.1(f)

Advance Bank Australia Ltd v. FAI Insurances Ltd (1987) 9 NSWLR 464

Cardinal Resources Limited 02 [2020] ATP 21, MMA Offshore Limited [2017] ATP 21, DataDot Technology Limited [2009] ATP 13, Mount Gibson Iron Limited [2008] ATP 4, Sydney Gas Limited 02 [2006] ATP 18

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

INTRODUCTION

- The Panel, Tara Page, Philippa Stone and David Williamson (sitting President), declined to make a declaration of unacceptable circumstances in relation to the affairs of Beston Global Food Company Limited after accepting an undertaking by Beston to make further disclosure clarifying aspects of its Entitlement Offer. The application concerned Beston adjourning its annual general meeting (before any resolutions were put to shareholders) and announcing an Entitlement Offer in circumstances where it was facing a “second strike” on its remuneration report and a possible board spill resolution.

- In these reasons, the following definitions apply.

AGM	Beston’s 2020 Annual General Meeting
Applicant	Kunteng Pte Ltd (incorporated in Singapore), a subsidiary of Dalian Hairunlai Group Co Ltd (incorporated in China)
Beston	Beston Global Food Company Limited
Entitlement Offer	Beston’s entitlement offer announced on 17 December 2020 to raise up to \$15.6 million by a 1:2.5 pro rata non-renounceable entitlement offer at 6.5 cents per share, partially underwritten to \$7.25 million
SA Grant	\$2 million grant from the South Australian government announced by Beston on 7 December 2020 to accelerate the expansion of its Lactoferrin plant

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Top-Up Offer has the meaning given in paragraph 17

FACTS

3. Beston is an ASX listed company (ASX code: BFC). It sells food products with a focus on dairy and meat. Investment management accounting and other administrative functions of Beston are undertaken by Beston Pacific Asset Management Pty Ltd pursuant to an Investment Management Agreement. Dr Roger Sexton and Mr Stephen Gerlach, two of Beston's directors, are directors of Beston Pacific Asset Management Pty Ltd and have a majority ownership interest in it.¹
4. The Applicant is a substantial shareholder in Beston, holding 64,051,511 shares (approximately 10.63%).
5. On or about 31 August 2016, Dalian Hairunlai Group Co Ltd subscribed for these shares (issued to its nominee, Kunteng Pte Ltd, the Applicant) at 45 cents per share.
6. On 22 June 2020, Beston announced the completion of a (separate) placement at 8.5 cents per share. On the same day, Beston announced a review, and possible termination, of the Investment Management Agreement.²
7. On 26 October 2020, Beston issued a notice of meeting for holding its AGM on 26 November 2020. It included resolutions to be put to shareholders:
 - (a) to approve the remuneration report. Beston had received a 'first strike' against its last remuneration report and was facing the possibility of a 'second strike' against this remuneration report
 - (b) as a contingent resolution, to convene a spill meeting in the event that Beston received a 'second strike' against its remuneration report
 - (c) to re-elect certain existing directors and
 - (d) to elect Mr Yuan Ma as a director. The Applicant had sought such a resolution under section 249N.³ There had been correspondence between the parties regarding the appointment of Mr Ma prior to the section 249N notice.⁴
8. On 23 November 2020, the Applicant lodged its proxy form with Beston to vote:
 - (a) against the adoption of the remuneration report
 - (b) for the contingent spill resolution
 - (c) against the re-election of the existing directors and
 - (d) for the election of Mr Ma as a director.

¹ See Beston 2020 Annual Report, pp28, 32

² Termination required a resolution of shareholders and a termination payment

³ Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth), and all terms used in Chapter 6 or 6C have the meaning given in the relevant chapter (as modified by ASIC)

⁴ Beston submitted that it was prepared to appoint Mr Ma but could not complete due diligence

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9. On 25 November 2020, the Applicant (according to its submission) received a call on behalf of Beston asking about its voting intentions and suggesting that their current voting intentions amounted to *"a very hostile act"*.
10. On 26 November 2020, the Chairman of Beston, Dr Sexton, adjourned the AGM (to a date and time to be advised) shortly after opening it. No resolutions were considered. By ASX announcement on the same date, Beston said:
"The Company is concerned about possible voting associations in the proxy votes which were received by the Company for the meeting.
*The adjournment will allow the Company time to consider whether there has been any unacceptable circumstances, and to have the opportunity to obtain legal advice on the matter."*⁵
11. On 4 December 2020, Beston announced that the AGM would be reconvened on 29 January 2021. It also announced that it had referred its concerns to ASIC and FIRB.
12. On 7 December 2020, Beston announced that two directors would resign.⁶ It also referred to its previous willingness to appoint Mr Ma, subject to normal due diligence verification and that it had written to the Applicant for relevant information. It added that the board changes announced did not relate to *"the current disagreements with [the Applicant], or matters referred to the Australian regulatory authorities"*.
13. Also on 7 December 2020, Beston announced that it had won the SA Grant.
14. On 11 December 2020, Beston announced that it was internalising its management and had *"reached an in-principle agreement to terminate the Investment Management Agreement ('IMA'), which is currently in place for the day to day management of Beston."* A termination fee of \$5.6 million was payable by way of \$1,130,000 and 21,125,000 new shares in Beston.⁷ Termination was to take effect in August 2021.
15. On 17 December 2020, Beston announced that it proposed to undertake the Entitlement Offer to raise up to \$15.6 million by the issue of 241,005,629 shares on 25 January 2021. It announced that the purpose of the Entitlement Offer was to *"capitalise on the recently awarded South Australian Government grant of \$2.0 million to accelerate the Stage 2 expansion of the Company's Lactoferrin plant...."*. The announcement also stated that Eligible Shareholders (see paragraph 18) who accepted their full entitlement would have the opportunity to apply for additional shares. The Entitlement Offer was due to close on 18 January 2021.

⁵ Although not in the announcement, Beston submitted that a primary source of concern were the proxy votes received for the 2020 AGM which displayed anomalous, identical voting behaviour by a small group of overseas based shareholders, which included the Applicant

⁶ It announced that Ms Cooper would be replaced by Ms Joanna Andrew. It subsequently announced that Mr Neil Longstaff would replace Mr Kouts

⁷ Implied share price of 21 cents per share

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16. On the same day Beston issued a 'cleansing notice' under section 708AA(2)(f). In terms of potential control effect, the notice said:
- (a) If all Eligible Shareholders take up their entitlements there will be no material effect on control. Shareholders who are ineligible to participate will be diluted and, if their shares are acquired by Eligible Shareholders, those shareholders' interests will increase.
 - (b) To the extent that Eligible Shareholders do not take up their entitlements they will be diluted.
 - (c) *"The Company has entered into an Underwriting Agreement to underwrite \$7.25 million of the Entitlement Offer. The underwriters are entitled to appoint sub-underwriters. The issue of New Shares to the Underwriters or sub-underwriters may increase the voting power of each of the Underwriters or sub-underwriters in the Company, however this is not expected to have any material effect or consequence on the control of the Company."*
17. On 29 December 2020, Beston issued the Entitlement Offer Booklet, which disclosed, in relation to Eligible Shareholders who take up their full entitlement having an opportunity to apply for additional shares (**Top-Up Offer**) that:
- (a) *"the Top-Up Offer is not capped but no Eligible Shareholder may receive any New Shares which would result in the relevant Shareholder having voting power in the Company in excess of 20% of the total issued share capital of the Company"* and
 - (b) *"there is no guarantee that any Application for Additional New Shares under the Top-Up Offer will be successful and the Directors reserve the right to issue any shortfall by way of the Top-Up Offer"*.
18. On the same day, Beston issued an announcement identifying that it was not making offers to shareholders in jurisdictions other than Australia, New Zealand, Singapore and Hong Kong. It stated that Eligible Shareholders could also apply for *"a further discretionary offer of New Shares that have been initially offered to Eligible Shareholders under the Entitlement Offer, and have not been taken up by them."*
19. On 30 December 2020, Beston issued a notice of meeting for the adjourned AGM.

APPLICATION

Declaration sought

20. By application dated 4 January 2021, the Applicant sought a declaration of unacceptable circumstances. It submitted, in summary, that:
- (a) the structure and timing of the Entitlement Offer was intended to maximise the number of securities to be issued to the underwriters or under the Top-Up Offer or in respect of the discretion to place shortfall securities
 - (b) the Entitlement Offer was an artifice *"to facilitate Beston issuing a significant number of voting shares in advance of the adjourned AGM in an attempt to change the likely outcome of the votes on key resolutions (including the contingent spill resolution)"* and

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- (c) there was inadequate disclosure in relation to:
 - (i) the control effect under the Entitlement Offer which was required under section 708AA(7)(e)
 - (ii) the mechanics of how the underwriting might be increased and
 - (iii) if any scale back is necessary in relation to the Top-Up Offer, how this would be conducted.

21. The Applicant submitted that the effect of the circumstances was that:

- (a) acquisition of control over shares in Beston would not take place in an efficient, competitive and informed market given that the potential control effect of the Entitlement Offer exceeded what was reasonably necessary for the fundraising purpose and
- (b) shareholders of Beston had not had a reasonable time (given the holiday period) or been given enough information to consider the proposal.

Interim order sought

22. The Applicant sought an interim order that the Entitlement Offer not proceed prior to the date of the reconvened AGM or the date the Panel made final orders, whichever came last.

Final orders sought

23. The Applicant sought final orders:

- (a) for supplementary disclosure
- (b) that the Entitlement Offer not proceed until after voting at the reconvened AGM had been completed
- (c) that Beston's directors be restrained from issuing shares under the Top-Up Offer or shortfall and
- (d) that Beston be restrained from making any similar Entitlement Offer before voting was completed:
 - (i) at the AGM or
 - (ii) if Beston received a "second strike" on its remuneration report, on the spill motion or at the subsequent spill meeting (if needed).

DISCUSSION

24. We have considered all the material, but address specifically only that part of the material we consider necessary to explain our reasoning.

Subsequent events and the decision to conduct proceedings

25. Beston made a preliminary submission that the Panel should decline to conduct proceedings because, among other things:

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- (a) The Entitlement Offer was being undertaken to secure sufficient funding for Stage 2 of its Lactoferrin expansion project and, therefore, to meet one of the conditions attaching to the SA Grant.
 - (b) There were no disclosure deficiencies in the section 708AA(2) notice.
 - (c) There was no requirement to disclose sub-underwriters (unless they were directors or their associates or major shareholders).
 - (d) It would make supplementary disclosure that applicants under the Top-Up Offer would be allocated the full amount of top-up shares applied for, unless scale back was required and then shareholders would be scaled back pro rata in accordance with their entitlements. It confirmed that the remaining shortfall after top-up and underwriting would not be placed with directors or their associates or otherwise as would result in a contravention of section 606.
26. Beston also submitted that the application was being used as a means of applying commercial pressure on Beston *“to discourage the Beston Board from pursuing enquiries through ASIC and FIRB as to possible voting association issues and the Board's attempts to alert shareholders to the possibility that shareholders could lose control of the company because of these possible voting associations rather than through the making of a formal takeover offer.”*
27. Beston indicated that it had resolved to extend the closing date for the Entitlement Offer to 3 February 2021 and would in the near future announce this with its allocation policy in respect of the Top-Up Offer and shortfall. It did so on 11 January 2021, announcing an extension of the closing date of the Entitlement Offer to 5pm on 3 February 2021 and also providing details of the proposed use of the funds to be raised.
28. On the same day Beston released a Supplementary Offer Booklet detailing, among other things, the allocation policy for the Top-Up Offer and shortfall. It stated that applications under the Top-Up Offer would be allocated in full subject to pro rata scale back if applications exceeded the available shares. It also limited the issue of top-up shares if that would result in a shareholder having voting power exceeding 20%. It stated that any shortfall (that is, shares for which there had been no applications) would be placed at the directors' discretion but not with any of the directors or their associates or as would contravene section 606.
29. We asked the Applicant whether it wished to make any submissions in response to Beston's preliminary submissions and 11 January 2021 announcements.
30. The Applicant acknowledged that some of what it considered were the unacceptable effects of the Entitlement Offer had been mitigated. However, the Applicant submitted that it still had disclosure concerns, including in relation to the control effect of the Entitlement Offer.
31. The Applicant also submitted that:
- “... clear and transparent disclosure regarding the consequences of the adjournment of the AGM (including that the securities issued under the Rights Issue were capable of being voted*

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at the reconvened AGM and that voting at the re-convened AGM could materially impact the composition of the Board and control of Beston), the potential requirement to hold a spill meeting (and the impact any securities issued under the Rights Issue could have on the outcome of the spill meeting, including the subsequent potential impact upon the composition of the Board and control of Beston) and the proposed issue of equity securities was necessary to ensure that the acquisition of control over securities occurred in an efficient, competitive and informed market”.

32. The Applicant also submitted that Beston had in effect not indicated whether any of its major shareholders were sub-underwriters.
33. The extension of the closing date of the Entitlement Offer, to 5pm on 3 February 2021, meant that the issue of shares under the Entitlement Offer would take place after the adjourned AGM. However that issue of shares would still occur prior to any subsequent spill meeting, if shareholders passed the spill resolution at the adjourned AGM.
34. We also remained concerned about the timing of the Entitlement Offer and the adjourned AGM, noting that Beston’s announcement that it had received the SA Grant had not included disclosure that the SA Grant was conditional on Beston funding the balance of \$7.5 million for Stage 2 of the Lactoferrin plant extension or that it required further funds. Another concern was that Beston might decline applications for shortfall on the basis of its opinions regarding associations between shareholders (including the Applicant) who may have a combined voting power in excess of 20%.
35. Accordingly, we decided to conduct proceedings.

The adjournment of the AGM

36. The reason Beston gave for the adjournment was possible voting associations in the proxy votes it had received, *“which displayed anomalous, identical voting behaviour by a small group of overseas based shareholders”*. That group included the Applicant. It referred its concerns to ASIC and FIRB. Beston submitted that it referred the matters to ASIC and FIRB instead of the Panel because of their *“investigative powers”* given that it did not have sufficient information to establish conclusively whether there was an association giving rise to unacceptable circumstances.
37. The Applicant submitted that the Panel (or a Court) was the proper forum for Beston to *“ventilate its allegations”* and the failure to do so allowed an inference that Beston did not have evidence of its concerns. In rebuttal submissions, the Applicant also submitted *“Kunteng strongly and unequivocally denies the existence of an association between itself and any other shareholder of Beston.”*
38. We make no comment on the referral to FIRB.
39. ASIC submitted that it was *“currently conducting preliminary analysis in relation to the allegations of undisclosed associations, including to identify what contraventions of the Corporations Act may exist and through what means ASIC may obtain evidence to demonstrate such contraventions.”*

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40. On the referral to ASIC, rather than to the Panel, we think that was reasonable in this case. The ‘evidence of association’ as indicated to us would not necessarily enliven a Panel and it is understandable that a potential applicant would make an assessment of the likelihood of the Panel conducting proceedings on the material in its possession. The Panel has been consistent in its position – most recently in *Cardinal Resources Limited 02*⁸ - that its starting point is that it is for an applicant to demonstrate a sufficient body of evidence of association and to convince the Panel as to that association, albeit with proper inferences being drawn.⁹
41. On the other hand, Beston also submitted that, once it had decided on its capital raising, it considered that bringing a Panel application could have a negative effect on its share price, on the likelihood of shareholders taking up their entitlement, and on the likelihood of obtaining underwriting.
42. Beston submitted that, accordingly, it was in the best interests of all shareholders for voting on the resolutions to be held in abeyance. However, the overlay of a capital raising meant that the status quo potentially was not maintained, which could have led to an unacceptable control effect.¹⁰
43. Subsequent events¹¹ mean that we do not need to consider the impact of the adjournment and intervening communications further. As a consequence, the issue of shares under the Entitlement Offer will not immediately affect Beston shareholders’ consideration of resolutions for board changes.
44. The Applicant submitted that Beston¹² had engaged telemarketers to contact shareholders who had provided proxies against the remuneration report, for the spill resolution, and for the election of Mr Ma, to ask why they voted that way. The Applicant described this as “*an aggressive campaign to change the votes of shareholders*” suggesting that the AGM had been adjourned not for the reason Beston gave but to maintain the position (and control) of the current board. In this case, we do not think this is a matter for us, including whether this was an appropriate use of company funds.¹³ We were however concerned about media canvassing by Beston (see below).

Entitlement Offer

45. Beston submitted that it needed to raise further funds to meet the condition of the SA Grant. It also considered it prudent to raise funds for upgrading equipment at the same time as it undertook the Lactoferrin expansion. It submitted that its funding

⁸ [2020] ATP 21

⁹ *Mount Gibson Iron Limited* [2008] ATP 4 at [15]

¹⁰ See *MMA Offshore Limited* [2017] ATP 21 at [10] to [19]

¹¹ Those events are the extension of the closing date of the Entitlement Offer and that at the reconvened AGM the resolution for adoption of the remuneration report was not carried (with 44.58% against), but the resulting contingent spill resolution was also not carried. Also, the resolution for the election to the board of Mr Ma was not carried

¹² or Beston Pacific Asset Management Pty Ltd

¹³ *Advance Bank Australia Ltd v. FAI Insurances Ltd* (1987) 9 NSWLR 464

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plans evolved over the last 6-9 months to respond to changing circumstances, including the need to maintain a prudent level of debt in the COVID-19 environment.

46. The Applicant submitted that Beston did not appear to have provided any evidence that it had entered into a formal, binding arrangement with the SA Government in respect of the SA Grant.
47. We have been provided with some evidence in respect of the SA Grant, including in respect of the timing of the commitment, and we leave formalities as a matter for Beston's directors. In our view, while it is generally undesirable to take a corporate action when there are issues affecting control to be determined, Beston does appear to have a reasonable basis for undertaking its capital raising during the period of the AGM adjournment.
48. Turning to disclosure:
- (a) The securities to be issued under the Entitlement Offer were not issued prior to the reconvened AGM,¹⁴ so have not had an effect on the voting at the AGM – therefore on control at the relevant time - of Beston.
 - (b) The proxy position is normally disclosed, albeit at the meeting.¹⁵ Requiring disclosure earlier is potentially misleading. Proxies can be changed up to the last day on which a proxy may be delivered¹⁶ and may be negated by attendance at the meeting.¹⁷
 - (c) The mechanics of the underwriting and disclosure of sub-underwriting arrangements together with the identities of the sub-underwriters are areas that we think do require disclosure in this case.
49. The Panel has indicated a clear preference for more disclosure regarding the potential control effect of a rights issue rather than less. For example, in *DataDot Technology Ltd*¹⁸ the Panel considered that a rights issue letter of offer contained insufficient disclosure of the potential voting power in DataDot that two substantial shareholders of DataDot may have obtained as a result of sub-underwriting. The Panel said:

*“Not only did the letter of offer not identify the sub-underwriters, it was misleading to the extent that the intentions of the underwriter were disclosed when the offer had been fully sub-underwritten. It was silent on the intentions of the sub-underwriters.”*¹⁹

¹⁴ And the “spill resolution” at the AGM was not passed

¹⁵ Under section 251AA, listed companies must disclose proxy voting details to the ASX, albeit after the voting. Section 250J(1A) requires that, for a company that is subject to a replaceable rule and does not provide for the contrary in its constitution, the Chair must inform the meeting, before any vote is taken, whether any proxy votes have been received and how the proxy votes are to be cast. There is debate about whether this provision acts to stifle discussion at the meeting, a concern that may be exacerbated by earlier disclosure

¹⁶ Section 250A(7)

¹⁷ Section 249Y(3)

¹⁸ [2009] ATP 13

¹⁹ [2009] ATP 13 at [48]

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And, similarly, the disclosure “*did not accurately convey the true potential effect of control because it did not alert shareholders to the involvement of*” the two substantial shareholders as sub-underwriters.²⁰

50. In line with the principle in that decision and like decisions²¹ we consider that disclosure of sub-underwriting and the identity of the sub-underwriters to be important information for shareholders, particularly when the sub-underwriters potentially could acquire (or increase) substantial holdings. Beston has included this disclosure in an announcement dated 1 February 2021.
51. The Applicant also raised a concern about the possibility of an increased level of underwriting, which has been resolved by Beston announcing that it would not increase the level.
52. We were also concerned that Beston might seek to scale back applications for top up shares from the Applicant or others, in reliance on its ASIC reference regarding association. While that matter remains under investigation, such association has not yet been established. Beston addressed our concern in the undertaking it offered (see paragraph 62(d)).

Underwriting

53. On receiving the underwriting agreement, it became apparent that it contained some unusual features, perhaps more closely reflecting an underwriting typical of an accelerated offer. It described the Entitlement Offer as “accelerated”, which Beston submitted was an oversight from an earlier draft. (Indeed, in an email to Beston of 28 November 2020, the underwriter recommended that the offer be an accelerated, non-renounceable entitlement offer.) It also excluded from its definition of valid applications for shares, applications made by “excluded parties”, namely:
 - (a) the Applicant (10.63% shareholder in Beston)
 - (b) Australia Aulong Auniu Wang Food Holdings Pty Ltd (11.1% shareholder in Beston)
 - (c) Allianz SE (9.21% shareholder in Beston)
 - (d) Wilson Asset Management (an underwriter and 5.17% shareholder in Beston) and
 - (e) directors and management of Beston (approximately 3% shareholders in Beston).
54. This definition had the effect that the minimum amount that Beston would receive was the underwritten amount (\$7.25 million) plus any amount from applications made by the excluded parties. We required this unusual feature of the underwriting – and its effect on potential control of Beston – to be disclosed.

²⁰ [2009] ATP 13 at [51]. See also [64(d)]

²¹ See for example *Sydney Gas Limited 02* [2006] ATP 18 at [2]

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55. Beston has explained in an announcement dated 1 February 2021 how these underwriting arrangements work.

Media canvassing and documents to the Panel

56. On 13 January 2021, an article was published online by “*Farm Online National*”, titled “*Beston’s Chinese investors blamed for lost sales and business setbacks*”. The article contained a number of quotes from the CEO of Beston regarding the adjourned AGM. We were concerned that this contravened Beston’s undertakings to the Panel regarding media canvassing.
57. Beston submitted that while it considered that all the information in the article was in the public domain at the time of publication and that no media canvassing had taken place, “*Beston acknowledges the Panel’s rules and regulation concerning confidentiality and the Panel’s process letter in connection with this application regarding media canvassing*” and “*has reviewed and updated its internal management process for reviewing any queries it receives, whether from members of the public or the media*”.
58. We take that issue no further.
59. These proceedings were also made more difficult than needed because documents that should have been made available to the Panel and parties were not provided until specifically identified and requested:
- (a) First, a board paper recommending the Entitlement Offer had not been uploaded to the data room, although the minutes of the relevant board meeting were uploaded and they referred to the paper. It is incumbent on parties to check that everything identified in their submissions has been correctly uploaded into the data room for all to access. We took some comfort from this board paper and it was conceivable that proceedings could have been shortened if we had received this earlier.
 - (b) Second, we had to ask for a copy of the underwriting agreement. Beston submitted when providing the agreement that it took the view that the document did not meet the description of “correspondence relating to the underwriting agreement”.²² As the application directly concerned the underwriting, it was unhelpful not to offer it up, even if it was not specifically asked for (although it was an attachment to an email from one of the underwriters to Beston and its lawyers dated 16 December 2020 and the reply dated 17 December 2020). We do not expect parties to adopt such a minimalist approach to providing information to the Panel.²³
60. This issue gave us pause on the question of costs.
61. The Applicant sought an order for costs (if a declaration of unacceptable circumstances was made). It submitted, among other things, that Beston’s conduct

²² Our request was for “*A copy of all correspondence (whether by letter or email or otherwise) between it [Beston] and the underwriter regarding the underwriting of the entitlement offer.*”

²³ Procedural Rule 2.1.1(f) requires documents to be accompanied by any relevant material (unless already provided)

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had delayed or obstructed the proceedings and caused the Applicant to incur significant costs. In part, the conduct complained of by the Applicant was failure to provide documents.

62. Beston offered an undertaking to make an ASX announcement clarifying that:
- (a) it would not close the Entitlement Offer prior to 3 February 2021
 - (b) the underwritten amount of the Entitlement Offer would not be increased beyond \$7.25 million
 - (c) applications under the Top-Up Offer would be filled before any shares were placed with the underwriters or sub-underwriters and
 - (d) if shareholders whom Beston was concerned may be associated applied for top-up shares, they would be filled except to the extent:
 - (i) ASIC informs Beston, before the date of the allocation and issue, of the names of the parties (if any) it is satisfied are acting in association or
 - (ii) of the scale back policy.
63. It also offered to disclose the potential control effect of the above, the mechanics of the underwriting arrangement and the identities of the sub-underwriters.
64. We are satisfied that, given the subsequent events that have taken place (see above) and the undertaking offered to make disclosure, we do not need to make a declaration of unacceptable circumstances.
65. A costs order would require a declaration. This was one factor we considered when deciding if it was appropriate to accept Beston's offer of an undertaking. Ultimately we have decided that a costs order should not be made, but we note that Beston's conduct has added to the time it took to resolve the matter.
66. We accept Beston's undertaking.

DECISION

No declaration - undertaking

67. Given the undertaking offered by Beston and accepted by us (Annexure A), we decline to make a declaration and are satisfied that it is not against the public interest to do so. We had regard to the matters in section 657A(3).

ASIC

68. By letter dated 4 January 2020, Beston asked ASIC to investigate whether certain Beston shareholders [REDACTED] might be associated. It considered that possibly [REDACTED] shareholders holding approximately [REDACTED]% of Beston also had not complied with the substantial holder provisions.
69. As noted, ASIC's consideration of the matters raised is continuing.²⁴

²⁴ As at the date of our decision. Beston subsequently informed us that ASIC had "decided to take no further action at this time"

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70. We leave the matter of shareholder association raised by Beston in ASIC's hands and make no comment on the material that Beston provided. Should ASIC consider there is sufficient material to warrant a Panel application (and consider that an application is the appropriate course to take), it is free to make one.

Orders

71. Given that we made no declaration of unacceptable circumstances, we make no final orders.

David Williamson

President of the sitting Panel

Decision dated 1 February 2021

Reasons given to parties 3 March 2021

Reasons published 9 March 2021

Party	Advisers
Beston Global Food Company Limited	Minter Ellison
Kunteng Pte Ltd	Squire Patton Boggs



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Annexure A

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

BESTON GLOBAL FOOD COMPANY LIMITED

Beston Global Food Company Limited (**Beston**) undertakes to the Panel that it will:

1. Disclose (by way of ASX announcement(s) no later than two (2) days before the Entitlement Offer closes, in a form approved by the Panel):
 - (a) that Beston will not close the Entitlement Offer prior to 3 February 2021;
 - (b) that the Underwritten Amount of the Entitlement Offer will not be increased beyond the level currently agreed, being \$7.25 million.
 - (c) that any Applications for Additional New Shares under the Top-Up Offer in the Offer Booklet and Supplementary Offer Booklet will be filled before any shares are placed with the Underwriters, or through the Underwriters to the Sub-Underwriters;
 - (d) that, in the event that any Applications for Additional New Shares under the Top-Up Offer are made by shareholders the subject of Beston's concerns regarding shareholder association (i.e. those subject of the matters referred to ASIC and FIRB) Beston will fill the Applications without regard to the concerns of shareholder association-
 - (i) except in the event that ASIC informs Beston, before the date of the allocation and issue, the names of the parties (if any) of which ASIC is satisfied are acting in association; and
 - (ii) in accordance with the scale back policy for Additional New Shares as set out in the Supplementary Offer Booklet;
 - (e) the potential control effect of each of the above occurring, including in respect of (and the identities of) the sub-underwriters and including details of how Valid Applications (as defined in the underwriting agreement) operates.
2. Comply with all of the matters outlined above in paragraphs 1(a) to 1(d) of these Undertakings, unless otherwise agreed in writing by the Panel.

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

**Signed by Dr Roger N Sexton of Beston
with the authority, and on behalf, of
Beston Global Foods Company Limited
Dated 1 February 2021**