



Australian Government

Takeovers Panel

**Reasons for Decision
Wollongong Coal Limited 02
[2022] ATP 2**

Catchwords:

Decline to conduct proceedings – compulsory acquisition – independent expert’s report – valuation of securities – fair value – undertaking – corrective disclosure

Corporations Act 2001 (Cth), sections 664A, 664C, 667A, 667AA, 667C

Australian Securities and Investments Commission Act 2001 (Cth), section 201A

ASIC Regulatory Guide 111: Content of Expert Reports

Minemakers Limited 02R [2012] ATP 16

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

INTRODUCTION

1. The Panel, Teresa Dyson, Michelle Jablko (sitting President) and Michael Lishman, declined to conduct proceedings on an application by Mr Gordon Elkington in relation to the affairs of Wollongong Coal Limited. The application concerned whether an independent expert’s report provided in the context of a compulsory acquisition commenced under Chapter 6A.²¹ by Jindal Steel & Power (Mauritius) Limited complied with section 667C(2). The Panel decided not to conduct proceedings after accepting undertakings provided by the independent expert and Jindal. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

Applicant	Mr Gordon Elkington
BDO	BDO Corporate Finance (WA) Pty Ltd
Compulsory Acquisition	Has the meaning given in paragraph 6
Compulsory Acquisition Notice	Has the meaning given in paragraph 6
Independent Expert’s Report	Has the meaning given in paragraph 6

¹ 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)

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Jindal	Jindal Steel & Power (Mauritius) Limited
Rights Issue	Has the meaning given in paragraph 4
Wollongong	Wollongong Coal Limited

FACTS

3. Wollongong is an unlisted public company with more than 50 shareholders.
4. On or about 6 July 2021, Wollongong undertook a rights issue to eligible shareholders of 56 new shares for each existing share held at an issue price of \$0.0001 per share (**Rights Issue**).
5. On 29 September 2021, Jindal, the major shareholder of Wollongong, increased its shareholding in Wollongong from approximately 61% to approximately 98.62% as result of its participation in the Rights Issue.
6. On 17 December 2021, Jindal sent a compulsory acquisition notice to the other Wollongong shareholders (**Compulsory Acquisition Notice**) advising that it proposed to acquire their shares at \$0.0001 per share (**Compulsory Acquisition**). The Compulsory Acquisition Notice was accompanied by an independent expert's report prepared by BDO (**Independent Expert's Report**).
7. The Independent Expert's Report opined that the value of Wollongong shares was nil, and that Jindal's proposed consideration under the Compulsory Acquisition (at \$0.0001 per Wollongong share) therefore gave fair value for the shares.
8. By letter dated 24 December 2021, the Applicant lodged a formal complaint with BDO expressing his concern that "*[i]n arriving at its opinion that the shares in Wollongong Coal Limited have no value, BDO appears to have disregarded the requirement of section 667C(2) of the Corporations Act that, in determining the fair value of securities in a particular class, the expert must take into account the consideration paid for securities in that class within the previous six months.*" In particular, BDO had failed to consider "*the fact that Jindal took up its full entitlement of shares under the company's recent rights issue at an issue price of \$0.0001 per share...*". The Applicant asked BDO to advise what it intended to do about his complaint.
9. BDO responded to the Applicant's letter on 7 January 2022 (after the Applicant had made its application to the Panel). BDO's response outlined its standard processes undertaken in dealing with a formal complaint and stated, among other things, that in light of the Panel application "*it is our current understanding that [the Applicant's] complaint will be managed, in the first instance, through this separate process*".

APPLICATION

10. By application received on 6 January 2022, the Applicant sought a declaration of unacceptable circumstances. The Applicant submitted, in summary, that the Independent Expert's Report, in arriving at its opinion that the Wollongong shares have nil value, did not take into account the consideration paid by Jindal in subscribing for its full entitlement under the Rights Issue, thereby breaching section 667C(2).

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11. The Applicant submitted that the effect of the circumstances was that “[Wollongong’s] minority shareholders are not being properly advised as to the value of their shares, and because of this they may not act in their best interest in relation to the acquisition”.
12. The Applicant sought final orders that another independent expert’s report be prepared and that the timetable for the Compulsory Acquisition be adjusted accordingly.

DISCUSSION

Relevant provisions under Chapter 6A

13. It is helpful to first outline the key provisions of Chapter 6A that are relevant to these proceedings.
14. Section 664A provides a power under which a 90% holder of a class of securities may compulsorily acquire the remaining securities in that class without first making a takeover bid. However, court approval will be needed if 10% of the holders of securities object to the proposed terms of the acquisition. The power must be exercised within 6 months of becoming a 90% holder in relation to a class of securities.
15. To compulsorily acquire securities under section 664A, the 90% holder must prepare a compulsory acquisition notice in the prescribed form (section 664C(1)).
16. Under section 664C(2), the compulsory acquisition notice must be accompanied by an expert’s report under section 667A (in effect, if more than one report is obtained, all must be sent to security holders).²
17. Section 667A(1) provides that the expert must state “*whether, in the expert’s opinion, the terms proposed in the notice give a fair value for the securities concerned*” and set out the independent expert’s reasons for forming that opinion.
18. Section 667C(1) provides that to determine what is fair value for securities for the purposes of Chapter 6A:
 - (a) first, assess the value of the company as a whole and
 - (b) then allocate that value among the classes of issued securities in the company (taking into account the relative financial risk, and voting and distribution rights, of the classes) and
 - (c) then allocate the value of each class pro rata among the securities in that class (without allowing a premium or applying a discount for particular securities in that class).
19. Section 667C(2) provides that, without limiting section 667C(1), in determining what is fair value for securities for the purposes of Chapter 6A, the consideration (if any) paid for securities in that class within the previous 6 months must be taken into account.

² The expert’s report must be prepared by a person nominated by ASIC. See section 667AA.

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Preliminary submission

20. We received a preliminary submission from BDO submitting that we should decline to conduct proceedings.
21. BDO submitted, among other things, that in preparing the Independent Expert's Report, it did consider the requirements in Chapter 6A and ASIC Regulatory Guide 111: Content of Expert Reports. In particular:
 - (a) *"BDO did take into account the consideration paid for securities in that class within the previous 6 months pursuant to section 667C(2) (as required by RG 111.49). However, due to an oversight, BDO failed to include the following when finalising the Report: Pursuant to RG 111.49, we have considered the price paid for securities over the previous six months. Given the Company is unlisted, we understand that the only trading in the Company's shares over the last six months were in respect of shares acquired under the entitlement offer, and that there have been no off-market share transfers during that period."*
 - (b) BDO was *"prepared to provide corrective disclosure confirming that BDO did take into account the consideration paid for securities in that class within the previous 6 months as part of its valuation methodology" and that [s]uch corrective disclosure would not change or affect BDO's opinion or conclusions in the Report"*.
 - (c) *"Even if BDO had only adopted the price paid for [Wollongong] shares under the [Rights Issue] as the relevant value of [Wollongong] shares in the Report, BDO's opinion would not have changed as RG111.11 states that 'an offer is fair if the value of the offer price or consideration is equal to or greater than the value of the securities subject to the offer'."*
22. BDO further submitted that *"[t]he Panel should not undertake inquiries into the correctness of an independent expert report in the absence of strong preliminary indications of a clear fault in the methodology, false statements, unreasonable conclusions or independence issues³"* and that here, there were no such indications as BDO had complied with the requirements of section 667C(2).
23. BDO also informed us that *"ASIC has raised concerns with the fact that BDO did not engage an independent technical specialist to value [Wollongong's] mineral assets. BDO is liaising with ASIC in relation to this matter, but this may also necessitate a further report to be prepared by BDO, incorporating the findings of the technical specialist, in which case BDO can address the omission identified above at the same time. [Jindal] has been liaising with ASIC to agree how Jindal and BDO may update the notice of compulsory acquisition (including the Report). This may include the current notice being withdrawn and re-issued with the corrective disclosure and, if necessary, an independent technical specialist's report."*
24. We did not receive a preliminary submission from Jindal or Wollongong.

³ Citing *Minemakers Limited 02R* [2012] ATP 16

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Consideration of undertakings

25. We have considered all the material, but address specifically only that part of the material we consider necessary to explain our reasoning.
26. The application asked us to consider whether there were unacceptable circumstances because of a contravention of section 667C(2).
27. However, given BDO's preliminary submissions (in particular, that it had taken into account the consideration paid for Wollongong shares within the previous 6 months as part of its valuation methodology, its willingness to provide corrective disclosure and that providing such corrective disclosure would not change BDO's opinion) and that ASIC's enquiries in respect of the Independent Expert's Report could also lead to BDO preparing a further expert's report, we considered it appropriate to explore whether undertakings would be sufficient to address any concerns raised in respect of section 667C(2) before deciding whether to conduct proceedings.
28. We considered that, if BDO was willing to undertake to provide corrective disclosure as to how it considered and rationalised the relevance of the matters referred to in section 667C(2) in forming its opinion that the terms of the Compulsory Acquisition gives fair value to Wollongong shareholders, that would be sufficient to address the concerns that the requirements of section 667C(2) had not been complied with.
29. In the process of considering whether undertakings would be satisfactory, ASIC was invited to make submissions on its enquiries in relation to the Independent Expert's Report.
30. ASIC submitted, among other things, that *"ASIC's primary concern is that BDO did not engage an independent technical specialist to assess the mineral assets of Wollongong... ASIC considers that where BDO undertakes to provide corrective disclosure which includes an explanation as to how it took the matters referred to in s667C(2) of the Corporations Act 2001 (Act) into account, it would also be practical for BDO to provide any additional disclosure as a result of ASIC's enquiries into the contents of the IER (including but not limited to the report of an independent technical specialist on the mineral assets of Wollongong prepared in accordance with the JORC Code 2012). ASIC considers that the supplementary/updated IER should only be provided following resolution of ASIC and BDO's ongoing discussions in relation to the IER..."*.
31. Having regard to ASIC's submission, we considered that any offer of undertakings would also need to address ASIC's concerns raised in respect of the Independent Expert's Report.
32. Accordingly, we asked BDO whether it was prepared to provide an undertaking that it will prepare a supplementary or replacement independent expert's report (for Jindal to lodge with ASIC and dispatch to shareholders as soon as practicable) which includes:
 - (a) an explanation as to how it took the matters referred to in section 667C(2) into account when determining the value of Wollongong's securities (in respect of this, it was noted to BDO that we queried whether its proposed disclosure, as set out in paragraph 21(a), would be sufficient)

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- (b) a report from an independent technical specialist on the mineral assets of Wollongong prepared in accordance with the JORC Code 2012 and
 - (c) any additional disclosure required as a result of ASIC's enquiries.
33. We also considered that Wollongong shareholders should be provided with a new compulsory acquisition notice accompanied by BDO's updated independent expert's report which would, in effect, restart the compulsory acquisition process. We considered this to be in the interests of Wollongong's minority shareholders.
34. Accordingly, we asked Jindal whether it was prepared to provide an undertaking that it will:
- (a) apply to ASIC for relief from section 664C(6) to allow Jindal to withdraw its Compulsory Acquisition Notice and, subject to ASIC granting such relief, withdraw that notice
 - (b) issue a new compulsory acquisition notice in relation to Wollongong which encloses a revised independent expert's report with the further disclosure from BDO and
 - (c) not proceed to compulsory acquisition under the Compulsory Acquisition Notice.
35. In response, both Jindal and BDO agreed to give the attached undertakings (**Annexures A and B** respectively) which we are satisfied sufficiently address any concerns regarding the requirements of section 667C(2) raised in the application.
36. In respect of Jindal's undertaking, we note ASIC's submissions that "*[w]here a notice of compulsory acquisition is withdrawn in accordance with the Panel's orders or an undertaking, ASIC assumes that any objection notices lodged in respect of that compulsory acquisition notice also lapse. ASIC considers that where a new compulsory acquisition notice is then provided within a short time of, and on the same terms as, the original notice, it should be made clear to holders that previous objection notices have lapsed and that anyone wishing to object will be required to lodge a new notice. Any new or updated disclosure in the second compulsory acquisition notice should also be identified.*"
37. ASIC's submission aligns with our expectation on what should occur upon Jindal withdrawing its Compulsory Acquisition Notice and issuing a new notice.
38. Given the undertakings proffered by BDO and Jindal, we did not need to reach a conclusion on whether there had in fact been a contravention of section 667C(2) (or any of the other compulsory acquisition provisions) in preparing the Independent Expert's Report.

DECISION

39. Given the undertakings offered by BDO and Jindal, and for the reasons 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).

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40. 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.

Michelle Jablko

President of the sitting Panel

Decision dated 21 January 2022

Reasons given to parties 22 February 2022

Reasons published 25 February 2022

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Advisers

Party	Advisers
BDO Corporate Finance (WA) Pty Ltd	Norton Rose Fulbright
Mr Gordon Elkington	-
Jindal Steel and Power (Mauritius) Limited	Thomson Geer
Wollongong Coal Limited	Steinepreis Paganin



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ANNEXURE A

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

WOLLONGONG COAL LIMITED 02

Jindal undertakes to the Panel that it will:

1. apply to ASIC for relief from section 664C(6) of the *Corporations Act 2001 (Cth)* to allow Jindal to withdraw the Compulsory Acquisition Notice;
2. subject to ASIC granting the relief to Jindal under paragraph 1, withdraw the Compulsory Acquisition Notice;
3. following the withdrawal of the Compulsory Acquisition Notice:
 - (a) issue a new compulsory acquisition notice in relation to the shares of WCL that Jindal does not already own; and
 - (b) enclose a revised independent expert's report which addresses the matters which were raised by certain shareholders of WCL and ASIC in relation to the First Independent Expert's Report; and
4. not proceed to compulsory acquisition under the Compulsory Acquisition Notice.

In this undertaking, the following terms have their corresponding meaning:

Term	Meaning
ASIC	Australian Securities and Investments Commission
Compulsory Acquisition Notice	The compulsory acquisition notice lodged by Jindal with ASIC on 17 December 2021 in relation to the shares of WCL that it does not already own
First Independent Expert's Report	The independent expert's report dated 13 December 2021 prepared by BDO Corporate Finance (WA) Pty Limited which was distributed to shareholders along with the Compulsory Acquisition Notice

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Jindal

Jindal Steel & Power (Mauritius) Limited

WCL

Wollongong Coal Limited

**Signed by Mr Avinash Patodia, Director, Jindal Steel & Power (Mauritius) Limited
With the authority, and on behalf, of
Jindal Steel & Power (Mauritius) Limited
Dated 20 January 2022**

ANNEXURE B

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

WOLLONGONG COAL LIMITED 02

Pursuant to section 201A of the *Australian Securities and Investments Commission Act 2001* (Cth), BDO Corporate Finance (WA) Pty Ltd (**BDO**) undertakes to the Panel that, in respect of its independent expert's report dated 13 December 2021 attached to Jindal Steel & Power (Mauritius) Limited's (**Jindal**) notice of compulsory acquisition to acquire ordinary shares in Wollongong Coal Limited (**WCL**) under Chapter 6A of the *Corporations Act 2001* (Cth), it will:

1. prepare a supplementary or replacement independent expert's report, which includes:
 - (a) an explanation as to how BDO took the matters referred to in section 667C(2) of the *Corporations Act 2001* (Cth) into account when determining the valuation of WCL's securities
 - (b) a report from an independent technical specialist on the mineral assets of WCL prepared in accordance with the JORC Code 2012 and
 - (c) any additional disclosure required as a result of ASIC's enquiries into the contents of the independent expert's report,for Jindal to lodge with ASIC and despatch to shareholders as soon as practicable and
2. confirm in writing to the Panel when it has satisfied its obligations under this undertaking.

Signed by Sherif Andrawes, Director
with the authority, and on behalf, of
BDO Corporate Finance (WA) Pty Ltd
Dated 20 January 2022