



Australian Government

Takeovers Panel

**Reasons for Decision
Wollongong Coal Limited 03
[2022] ATP 9**

Catchwords:

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

Corporations Act 2001 (Cth), sections 657A(2), 664C, 664E, 664F, 667C

Wollongong Coal Limited 02 [2022] ATP 2

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

INTRODUCTION

1. The Panel, Teresa Dyson, Michelle Jablko (sitting President) and Michael Lishman, declined to conduct proceedings on an application in relation to the affairs of Wollongong Coal Limited. The application concerned the content of a revised independent expert’s report for compulsory acquisition under Chapter 6A¹ commenced by Jindal Steel & Power (Mauritius) Limited. The Panel considered that, assuming jurisdiction, shareholders have been provided with enough information to form a view about the proposed compulsory acquisition and 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 Notice	Notice under section 664C served on 17 December 2021 by Jindal to acquire the minority shareholdings in Wollongong at \$0.0001 per share
Independent Expert’s Report	Report prepared by BDO to accompany the Compulsory Acquisition Notice
Jindal	Jindal Steel & Power (Mauritius) Limited
Revised Compulsory Acquisition Notice	New notice under section 664C served on 21 March 2022 by Jindal to acquire the minority

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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	shareholdings in Wollongong at \$0.0001 per share
Revised Independent Expert's Report	The independent expert's report that accompanied the Revised Compulsory Acquisition Notice
Technical Specialist	Mining Insights Pty Limited, an independent specialist appointed by BDO
Technical Specialist Report	The Independent Mineral Asset Valuation Report prepared by the Technical Specialist for the Revised Independent Expert's Report
Wollongong	Wollongong Coal Limited

FACTS

3. This matter follows the Panel's decision in *Wollongong Coal Limited 02*.²
4. Wollongong is an unlisted public company with more than 50 shareholders. Jindal has voting power of approximately 98.62% in Wollongong.
5. On 17 December 2021, Jindal served on minority Wollongong shareholders the Compulsory Acquisition Notice. It was accompanied by the Independent Expert's Report.
6. In response to receiving the Compulsory Acquisition Notice, the Applicant applied to the Panel for a declaration of unacceptable circumstances, submitting that the Independent Expert's Report did not take into account the consideration paid by Jindal under a rights issue, in breach of section 667C(2).
7. On 21 January 2022, the Panel accepted undertakings and declined to conduct proceedings.
8. As part of the resolution of *Wollongong Coal Limited 02*, BDO gave an undertaking that, in respect of the Independent Expert's Report, it would prepare a supplementary or replacement independent expert's report, which included:
 - (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".

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9. On 21 March 2022, Jindal served on minority Wollongong shareholders the Revised Compulsory Acquisition Notice. It was accompanied by the Revised Independent Expert's Report and Technical Specialist Report.

APPLICATION

Declaration sought

10. By application dated 4 April 2022, the Applicant sought a declaration of unacceptable circumstances.
11. The Applicant submitted (among other things) that the Revised Independent Expert's Report did not comply with the undertaking that BDO had given the Panel. He submitted that BDO:
- (a) appointed the Technical Specialist to prepare a valuation report on the mineral assets of Wollongong rather than a report in accordance with the JORC Code and
 - (b) took into account the matters identified in section 667C(2) in determining the "*fair market value of a Wollongong share*" whereas the section is concerned with the "*fair value for securities for the purposes of this Chapter*" as defined in section 667C(1).
12. The Applicant also submitted that it was unclear that the Technical Specialist was a 'Competent Person' under the JORC Code.

Interim order sought

13. The Applicant did not seek any interim orders.

Final order sought

14. The Applicant sought a final order that another independent expert's report be prepared and that the timetable for the compulsory acquisition be adjusted accordingly.

DISCUSSION

Preliminary submissions

15. BDO made preliminary submissions that the Panel should decline to conduct proceedings.
16. It submitted that:
- (a) BDO had complied with section 667C(2). It had undertaken a valuation of "fair value" but had used the terms "fair value" and "fair market value" interchangeably and
 - (b) The Technical Specialist Report satisfied paragraph (b) of the undertaking (see paragraph 8(b) above). BDO had engaged the Technical Specialist, the Technical Specialist Report had been prepared in accordance with the VALMIN Code 2015 and JORC Code 2012, and ASIC had been consulted and any issues resolved.

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17. ASIC made preliminary submissions that, overall, it was satisfied that its concerns regarding the Technical Specialist Report had been addressed.
18. ASIC considered that the approach BDO had taken was consistent with ASIC's regulatory guidance and general market practice.

Conduct proceedings?

19. A balance must be struck between enabling the overwhelming owner of a company to obtain the (often) substantial benefits of complete ownership and the protection of minority shareholders whose ownership of property is being appropriated.
20. An important plank in the protection of minority shareholders is the independent expert's report.
21. There is a mechanism for dealing with concerns regarding (for example) an independent expert's report. It is section 664E, which entitles a person who holds securities covered by the Compulsory Acquisition Notice (or Revised Compulsory Acquisition Notice) to object and, if 10% or more do so, the majority holder can apply to the Court under section 664F for approval for the compulsory acquisition to go ahead. Accordingly, there is a venue to ventilate a dispute. That mechanism would be open in this matter, if enough objectors were to join the Applicant.³
22. Section 657A(2)(c) covers circumstances that are:
 - “unacceptable because they:*
 - (i) constituted, constitute, will constitute or are likely to constitute a contravention of a provision of this Chapter or of Chapter 6A, 6B or 6C; or*
 - (ii) gave or give rise to, or will or are likely to give rise to, a contravention of a provision of this Chapter or of Chapter 6A, 6B or 6C.”*
23. In this matter, the Applicant alleges an *“ongoing contravention of section 667C(2) and a contravention of section 667C(1)(a)”*. These sections are in Chapter 6A.
24. Section 667C sets out how to determine what is fair value for securities for the purposes of Chapter 6A. The first step is to assess the value of the company as a whole (section 667C(1)(a)), which the Applicant alleges has been contravened. Section 667C(2) expands on what is meant by 'fair value,' by requiring that *“the consideration (if any) paid for securities in that class within the previous 6 months must be taken into account.”* The Applicant alleges an *“ongoing”* contravention of this provision.
25. The Applicant, however, founds the application on sections 657A(2)(a)(i) (effect on control) and 657A(2)(b) (section 602 principles). Rather than taking a technical point, we have assumed that we have jurisdiction for this purpose and looked at the merits of the matter. For the reasons below, we decline to conduct proceedings.
26. In our view, it is clear enough that BDO and the Technical Specialist have turned their minds to the relevant considerations, and ASIC has been engaged. The

³ We are not told that the Applicant alone holds enough shares, or that a sufficient objection has been lodged

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information concerns that the Panel had in *Wollongong Coal Limited 02* are sufficiently addressed in the Revised Independent Expert's Report provided pursuant to BDO's undertaking, and in our opinion, shareholders have now been provided with enough information to form a view about the proposed compulsory acquisition.

27. It is not for us to determine 'fair value', and it is by no means clear that it has been done incorrectly. Indeed, the Applicant says in the application "*The fact that BDO has explained what they have done does not mean that they have complied with [the undertaking].*" We do not agree with the Applicant.
28. There may be some language differences (and one minor error conceded in the preliminary submission on behalf of BDO), but we are not satisfied that the reports are non-compliant.
29. If there is a further concern about the compulsory acquisition, and in particular value, there is a process which minority shareholders can follow to address that. If the Applicant thinks the outstanding shares have been valued incorrectly, he can take that up elsewhere (if, as noted, 10% object).

DECISION

30. For these reasons 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

31. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

Michelle Jablko

President of the sitting Panel

Decision dated 19 April 2022

Reasons given to parties 10 May 2022

Reasons published 13 May 2022

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Advisers

Party	Advisers
Applicant	-
BDO Corporate Finance (WA) Pty Ltd	Norton Rose Fulbright
Jindal Steel and Power (Mauritius) Limited	Thomson Geer