Australian Government

Takeovers Panel

Reasons for Decision
Vintage Energy Limited 02R
[2024] ATP 6

Catchwords:

Decline to conduct proceedings – rights issue – effect on control – need for funds – underwriting – sub-underwriting – board spill – frustrating action

Corporations Act 2001 (Cth), sections 203D, 249D, 657EA, 708AA

Australian Securities and Investments Commission Act 2001 (Cth), section 194

Eastern Field Developments Limited v Takeovers Panel [2019] FCA 311

Guidance Note 17: Rights issues, Consultation Paper, Guidance Note 17 – Rights issues, 23 February 2018

Vintage Energy Limited [2024] ATP 5, Tempus Resources Limited 02R [2024] ATP 2, Tempus Resources Limited [2024] ATP 1, Factor Therapeutics Limited [2019] ATP 5, Yancoal Australia Limited [2014] ATP 24, Virgin Australia Holdings Limited [2013] ATP 15, Altius Mining Limited [2012] ATP 17

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

INTRODUCTION

1. The review Panel, Alex Cartel (sitting President), Michael Lishman and Diana Nicholson declined to conduct proceedings on an application by Keybridge Capital Limited to review the decision of the initial Panel to decline to conduct proceedings in *Vintage Energy Limited*.[1] The review application concerned a placement and non-renounceable entitlement offer announced by Vintage on 25 March 2024. The Panel considered (among other things) that there were limited circumstances in which Vintage's equity raise could have an effect on the control of Vintage and that Vintage had taken steps to mitigate the potential control effect of the equity raise including by incorporating a dispersion strategy.

2. In these reasons, the following definitions apply.

Applicant	Keybridge Capital Limited
Capital Raise	means the Placement and the Rights Issue
Initial Application	application by the Applicant in *Vintage Energy Limited*
Institutional Rights Issue	has the meaning given in paragraph 5
Offer Price	has the meaning given in paragraph 5

[1] [2024] ATP 5

Placement	has the meaning given in paragraph 5
Regal	Regal Funds Management Pty Ltd
Requisition Notices	has the meaning given in paragraph 7
Retail Rights Issue	has the meaning given in paragraph 5
Rights Issue	has the meaning given in paragraph 5
Rights Issue Offer Booklet	has the meaning given in paragraph 10
Section 249D Meeting	has the meaning given in paragraph 7
Top-Up Facility	has the meaning given in paragraph 10(b)
Vintage	Vintage Energy Limited

FACTS

3. Vintage is an ASX listed company (ASX code: VEN) in the mining industry.

4. The Applicant is a shareholder in Vintage, with voting power of approximately 5.2% of Vintage at the time of the Initial Application.

5. On 25 March 2024, Vintage announced its intention to undertake an $8.0 million capital raising comprising a $1.3 million institutional placement (**Placement**) and a $6.7 million accelerated non-renounceable entitlement offer to subscribe for 1 new Vintage share for every 1.3 ordinary Vintage shares held (**Rights Issue**) at an issue price of $0.01 per share (**Offer Price**). The Rights Issue comprised two phases: an accelerated institutional component to raise approximately $0.87 million (**Institutional Rights Issue**) and a retail component for eligible retail shareholders to raise approximately $5.83 million (**Retail Rights Issue**).

6. Vintage stated that funds raised from the Capital Raise would be allocated predominately towards the drilling of two appraisal wells; Odin-2 and Odin-3, and, if successful, the completion and connection of one of those wells to increase gas production and sales from the Odin gas field.

7. On 27 March 2024, Vintage announced that it had received notices under section 203D[2] and section 249D from the Applicant seeking the removal of each of the three directors of Vintage and the appointment of two nominees of the Applicant as directors (**Requisition Notices**). The announcement stated that the directors of Vintage are required to call a general meeting to consider the resolutions (**Section 249D Meeting**) within 21 days of receipt of the Requisition Notices and to hold that meeting within two months after receipt of the Requisition Notices.

[2] 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)

8. Also on 27 March 2024, Vintage announced:

   (a) completion of the Placement and Institutional Rights Issue and

   (b) a cleansing notice under section 708AA(2)(f) in relation to the Rights Issue (**Cleansing Notice**) which stated as follows on page 2 under paragraph (f):

   (f) given the structure of the Entitlement Offer, the potential effect that the issue of the New Shares will have on the control of the Company is as follows:

   …

   (ii) 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. The Underwriters have advised the Company that a number of professional and sophisticated investors have agreed to underwrite the Entitlement Offer;

   (iii) except as detailed in paragraph (iv) below, the maximum voting power for each sub-underwriter will not exceed 9.9% assuming there is no uptake of shares under the Retail Entitlement Offer;

   (iv) Regal Funds Management Pty Ltd ACN 107 576 821 (Regal) has agreed to act as sub-underwriter to a maximum amount of 325,000,000 New Shares. As a result, Regal's potential maximum voting power increases from 6.57% to 24.74%. This maximum increase assumes a 100% shortfall under the Entitlement Offer and does not take into account any increase that may arise from participation by the sub-underwriters in the Top-Up Facility. If a substantial proportion of retail shareholders choose to take up their entitlements, then Regal may be diluted rather than have its shareholding increased …

9. On 30 March 2024, the Applicant made an application to the Panel (**Initial Application**) submitting (among other things) that:

   (a) Vintage was raising significantly more than is necessary and that other funding options were available that were less costly and less dilutive for shareholders.

   (b) The Capital Raise was unnecessary, at an unreasonable discount to fair value and was announced in circumstances where the Vintage Board was facing imminent removal.

   (c) In the absence of a discernible requirement for the funds raised via the Capital Raise, the Capital Raise was an unacceptable frustrating action to the applicant's section 249D notice.

   (d) Vintage's reliance on section 611 Item 10 resulted in an unacceptable change of control because (among other things):

      (i) Vintage was raising more capital than it required

      (ii) the Rights Issue was non-renounceable and had arbitrarily restricted retail shareholders' participation in a shortfall/top-up facility and

      (iii) other expressions of interest from potential underwriters (including from the Applicant) were rejected, when that interest would have negated the need to rely upon the exception in section 611 Item 10.

10. On 3 April 2024, Vintage issued an offer booklet for the Retail Rights Issue (**Rights Issue Offer Booklet**). The Rights Issue Offer Booklet disclosed (among other things) that:

    (a) The Rights Issue was fully underwritten by the joint lead managers.[3]

    (b) Shareholders who took up their entitlements under the Retail Rights Issue in full could also apply for additional Vintage shares up to a maximum of 100% of their entitlement under the Rights Issue (**Top-Up Facility**).[4]

    (c) Any scale-back under the Top-Up Facility would be on a pro-rata basis at the discretion of the Vintage board. In applying its discretion, the Vintage board would have regard to all relevant circumstances, including (but not limited to) the current shareholding[5] of any Eligible Shareholders to ensure that any issue of Additional New Shares is done in a manner proportionate (as determined by Vintage) to the current shareholding of any Eligible Shareholder.[6]

    (d) Vintage would not issue shares under the Top-Up Facility *"where to do so would result in a breach of its constitution, the Corporations Act or the ASX Listing Rules"*.

11. On 15 April 2024, the initial Panel declined to conduct proceedings in relation to the Initial Application. The initial Panel's media release[7] stated, among other things, that:

    "…the Panel considered that the circumstances relating to the placement and entitlement issue are not likely to have a material effect on the control of Vintage, noting that the entitlement offer contained a dispersion strategy, including a top up facility and the appointment of a professional underwriter and a number of sub-underwriters. While the Panel considered that the disclosure of the potential control effect of the entitlement offer in the retail entitlement offer booklet would have been good practice, Vintage shareholders have been notified of the potential control effect via public disclosure on the ASX."

12. Also on 15 April 2024, Vintage announced that it would not convene the Section 249D Meeting because the Requisition Notices were invalid.

APPLICATION

Review application

13. On 17 April 2024, the Applicant sought a review of the initial Panel's decision to decline to conduct proceedings in *Vintage Energy Limited*[8] pursuant to section 657EA.[9] The substantive President provided consent to the application for review.

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[3] The capital raising presentation attached to the Rights Issue Offer Booklet disclosed that *"Morgans Corporate Limited and United Capital Partners Pty Ltd will act as the Joint Lead Managers and underwriters to the Offer (together the "Joint Lead Managers" or the "JLMs"). MST Financial Services Pty Ltd will act as Co-Lead Manager"*.
[4] Excluding shareholders with less than 100 Shares and any shareholder who substantially reduces or disposes of all of their holding during the offer period
[5] As at the record date
[6] As at the record date
[7] TP24/16 *"Vintage Energy Limited – Panel Declines to Conduct Proceedings"*, Tuesday, 16 April 2024
[8] [2024] ATP 5
[9] Section 657EA(2)

The Applicant submitted that the initial Panel had *"failed to address the prima facie unacceptable circumstances that arise pursuant to Guidance Note 17 as follows:*

(a) Vintage are raising more money than necessary

(b) An underwriter has the ability under the raise to move from below 20% to over 20% in Vintage

(c) Vintage are capping investor participation in a top up facility and have discretion to not allocate to certain investors

(d) The offer is non-renounceable

(e) Competitive underwriting has been rejected

(f) Pricing is at an unreasonable discount to fair value and market [and]

(g) Vintage's conduct generally in relation to the capital raise."

Interim order sought

14. The Applicant sought an interim order that the closure of the Retail Rights Issue be delayed until determination of the review proceedings.

Final orders sought

15. The Applicant sought the same final orders it sought in the Initial Application, namely that Vintage:

(a) cancel the Placement or, alternatively, scale back all oversubscriptions to the Placement using a consistent formula

(b) scale back the Rights Issue to only the amount required

(c) accept underwriting offers from existing shareholders on equal terms to other underwriters

(d) remove the restriction on oversubscriptions by existing shareholders under the Top-Up Facility for the Retail Rights Issue and

(e) cap costs of the Capital Raise at 3% of the funds raised or a market rate determined by the Panel.

DISCUSSION

16. We have considered all the material (including all the material before the initial Panel[10]) but address specifically only that part of the material we consider necessary to explain our reasoning.

17. At the time of our meeting to consider this matter, the initial Panel's reasons for decision were in the process of being prepared. As our role is to consider the review application on the merits on a 'de novo' basis[11], it was not necessary to wait to see the initial Panel's reasons prior to making a decision whether to conduct proceedings. In

[10] Including all the material provided by Vintage's legal advisers, see the discussion of issues of conflict below

[11] *Eastern Field Developments Limited v Takeovers Panel* [2019] FCA 311 at [181]

any event, given the impending close of the Retail Rights Issue, time was of the essence.

Guidance Note 17: Rights Issues

18. Guidance Note 17 was rewritten in 2018 to provide market participants with "*clearer guidance about the Panel's approach to rights issues*".[12] Paragraphs 7 and 8 outline some of the ways an issuer can mitigate the potential control effects of a rights issue including (among other things):

    (a) offering a shortfall facility and

    (b) using several sub-underwriters.

19. Paragraph 10 of Guidance Note 17 states that (footnotes omitted):

    "*In the Panel's experience, where there is a clear need for funds that has not been contrived, a rights issue resulting in a control effect will generally not be unacceptable (in the absence of other issues) provided the rights issue is structured appropriately and an appropriate dispersion strategy has been put in place.*"

Decision not to conduct proceedings

20. We consider that Vintage had taken steps to mitigate the potential control effect of the Rights Issue, including by incorporating a dispersion strategy in accordance with Guidance Note 17. The Rights Issue was underwritten by a professional underwriter, and Regal was one of several sub-underwriters. Vintage offered under the Retail Rights Issue a Top-Up Facility. We consider in this case that a 100% cap on the Top-Up Facility for the Retail Rights Issue was not commercially inappropriate in the circumstances, given sub-underwriters were appointed.[13]

21. Guidance Note 17 at [7(a)] states that in mitigating the potential control effects of a rights issue, a company may make "*the rights issue renounceable where an active market for the rights is likely*".[14] Drawing on our experience and the likely market for any rights, we consider that making the Rights Issue renounceable is unlikely to have a material impact on the control effect.

22. In addition, Vintage submitted that "*even if there is a 78.23% shortfall from the total entitlement offer flowing through to the four sub-underwriters, with Regal receiving a full pro rata allocation, Regal's relevant interest will still remain below 20%*".

23. Accordingly, we consider that there are limited circumstances in which the Rights Issue could have an effect on the control of Vintage.[15]

24. The Applicant also submitted that Vintage did not require all the money to be raised under the Rights Issue because in effect it did not immediately need the funds to drill the Odin-3 well.

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[12] Consultation Paper, Guidance Note 17 – Rights issues, 23 February 2018
[13] See *Virgin Australia Holdings Limited* [2013] ATP 15 at [34]-[42]
[14] See also *Altius Mining Limited* [2012] ATP 17 at [38]
[15] Postscript, Regal increased its voting power in Vintage to 14.33% after the issue of shares under the Rights Issue

25. Vintage submitted that it was *"both impractical and more costly to conduct a separate capital raising to fund Odin-3 following joint venture approval due to:*

    - *the short period of time between completion of drilling for Odin-2 and commencement for Odin-3 and the use of the same drilling infrastructure (with considerable cost savings and in line with market practice of drilling two wells in close succession);*
    - *further market risk to any future hypothetical fundraising caused by any delay;*
    - *the considerable advantages in time and cost savings when moving the same rig from one well to the other in close succession; and*
    - *the drilling for Odin-3 already being included in the FY24 joint venture budget and could not be considered a recent contrivance."*

26. We consider that the decision of the amount to raise in the Rights Issue were matters for the directors of Vintage. In any event, we had sympathy for Vintage's submission that it would be impractical to conduct a separate capital raising to fund Odin-3, particularly in the current commercial environment, and we consider that to do so would have added additional costs and risks.

27. We also consider that the pricing of the Rights Issue was a matter for the directors of Vintage but may in the circumstances facilitate participation and was unlikely to exacerbate the control effect.[16]

28. Accordingly, there was nothing to suggest that a deeper enquiry as to the directors' decisions in relation to these issues was warranted in the circumstances.

29. The Initial Application submitted that in the absence of a discernible requirement for the funds raised, the Placement was an unacceptable frustrating action to the Applicant's section 249D notice.[17] This submission was not raised in the Review Application. We did not consider that conducting a deeper enquiry into this issue was warranted, noting that on the materials provided fundraising was contemplated prior to the section 249D notice.[18]

30. We are concerned that Vintage's legal representatives in this and the initial proceedings were acting for another company in separate Court proceedings brought against the Applicant.[19] However, given we have decided not to conduct proceedings it is not necessary to deal with whether we should grant leave for Vintage to be legally represented by its nominated legal advisers.[20]

DECISION

31. 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

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[16] See *Yancoal Australia Limited* [2014] ATP 24 at [96]
[17] As noted at paragraph 12 above, Vintage has announced that it will not convene the Section 249D Meeting because the Requisition Notices were invalid
[18] See *Factor Therapeutics Limited* [2019] ATP 5 at [12]-[13]. See also *Tempus Resources Limited* [2024] ATP 1 and *Tempus Resources Limited 02R* [2024] ATP 2
[19] Noting the initial Panel was similarly concerned, see *Vintage Energy Limited* [2023] ATP 5 at [37] to [43]
[20] Under section 194 of the *Australian Securities and Investments Commission Act 2001* (Cth)

decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

32. 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.

Alex Cartel
President of the sitting Panel
Decision dated 26 April 2024
Reasons given to parties 5 June 2024
Reasons published 14 June 2024

Advisers

Party	Advisers
Vintage	
Keybridge	