



**Australian Government**

**Takeovers Panel**

**Reasons for Decision**

**Locality Planning Energy Holdings Limited  
[2024] ATP 16**

**Catchwords:**

*Decline to make a declaration - section 602 principles – efficient, competitive and informed market – target's statement - trading ahead of release of target's statement - Undertakings – disclosure – acceptance into Bid*

*Corporations Act 2001 (Cth), section 602, 606, 671B*

*Guidance Note 1: Unacceptable Circumstances, Guidance Note 4: Remedies General*

*ASP Aluminium Holdings Pty Ltd [2023] ATP 8, AIMS Property Securities Fund 03 [2023] ATP 5, Excelsior Capital Limited [2020] ATP 25, Cromwell Property Group [2020] ATP 1, Dragon Mining Limited [2014] ATP 5, Mount Gibson Iron Limited [2008] ATP 4, Orion Telecommunications Limited [2006] ATP 23, Skywest Ltd [2004] ATP 17, Advance Property Fund [2000] ATP 7*

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

**INTRODUCTION**

1. The Panel, Michael Borsky KC, Marina Kelman and Karen Phin (sitting President) declined to make a declaration of unacceptable circumstances on an application by River Capital Pty Ltd<sup>1</sup> in relation to the affairs of Locality Planning Energy Holdings Limited. The application concerned the acquisition of Locality shares following the announcement of an off-market bid by River Capital for Locality shares it did not own but before the release of Locality’s target’s statement. The acquisitions were made by companies connected with two of the directors of Locality and by Boutique Capital Pty Ltd as trustee for Tectonic Opportunities Fund. The applicant submitted that the directors and Tectonic were associated and that the market for control of Locality shares was not efficient, competitive and informed. The Panel did not find association had been established but had concerns about the trading by the two Locality directors. The Panel declined to make a declaration of unacceptable circumstances after the directors, and companies connected with them, offered undertakings.

2. In these reasons, the following definitions apply.

<b>Bid</b>	Off-market takeover bid announced on 16 April 2024 by River Capital for all the shares in Locality that River Capital and its related entities did not already own, as extended from time to time
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<sup>1</sup> as trustee for River Capital Embedded Network Trust

## Takeovers Panel

### Reasons – Locality Planning Energy Holdings Limited [2024] ATP 16

<b>Cleansing event 1</b>	has the meaning given in paragraph 45
<b>Cleansing event 2</b>	has the meaning given in paragraph 46
<b>Kolenc Group</b>	Mr Stan Kolenc and KIC Advisor Pty Ltd as trustee for the KIC Superannuation Fund
<b>Locality</b>	Locality Planning Energy Holdings Limited
<b>Locality submissions</b>	Submissions by Locality, Mr Jarjoura, Mr Tilley, Mr Kolenc, TW Criterion Pty Ltd, Fernsha Pty Limited, Sore Tooth Pty Limited and KIC Advisor Pty Ltd as Trustee for the KIC Superannuation Fund
<b>River Capital</b>	River Capital Pty Ltd as trustee for River Capital Embedded Network Trust
<b>Subject Directors</b>	Mr Stan Kolenc and Mr Simon Tilley
<b>Tectonic</b>	Boutique Capital Pty Ltd as trustee for Tectonic Opportunities Fund
<b>Tilley Group</b>	Mr Simon Tilley and TW Criterion Pty Ltd, Fernsha Pty Limited, Sore Tooth Pty Limited

## FACTS

- Locality is an ASX listed company (ASX code: LPE) which provides an integrated embedded electricity and hot water service mainly in northern New South Wales and Queensland. It has 180,204,412 ordinary shares on issue, as well as options and performance rights.
- The Board of directors of Locality are Mr David Jarjoura (Executive Chair) and the Directors the subject of the application, namely Mr Stanislav (Stan) Kolenc (Non-Executive Director) and Mr Simon Tilley (Non-Executive Director).
- River Capital is a Melbourne based investment firm established to manage a portfolio of assets in public and private markets.
- Boutique Capital Pty Ltd is a professional fund manager investing the money of third party investors in the Tectonic Opportunities Fund.
- On 16 April 2024, River Capital announced its Bid at 8 cents per share, and commenced dispatch of its bidder's statement on 3 May 2024. The Bid was subject to several conditions, including a 90% minimum acceptance condition, prescribed occurrences and certain regulated events.
- Also on 16 April 2024, Locality announced on ASX that shareholders should take no action in response to the Bid.
- Prior to the launch of the Bid, River Capital built a pre-bid stake of 19.75% of Locality.
- On 19 April 2024, Locality released its quarterly report, including full year net profit guidance of \$1.6m to \$1.8m.
- On 24 April 2024, Locality released an announcement on ASX repeating that shareholders should take no action and stating that each of the directors in their

## Takeovers Panel

### Reasons – Locality Planning Energy Holdings Limited [2024] ATP 16

personal capacity considered that the Bid undervalued Locality and each intended to reject the Bid. The announcement further indicated that they held 19.65% of Locality shares as follows:

- (a) Mr Kolenc – 13,910,901 shares (7.72%)
  - (b) Mr Tilley – 21,300,000 shares (11.82%) and
  - (c) Mr Jarjoura – 200,000 shares (0.11%).
12. The announcement also flagged an intention by Locality to undertake a share buyback.
  13. Also on 24 April 2024, 1,100,000 shares were acquired by Kolenc Group (representing 51.6% of the daily volume traded).
  14. On 26 April 2024, 399,172 shares were acquired by Tilley Group (representing 48.4% of the daily volume traded).
  15. On 29 April 2024, 2,000,828 shares were acquired by Tilley Group (representing 45.5% of the daily volume traded).
  16. On 30 April 2024, 3,527,043 shares were acquired by Kolenc Group (representing 99.2% of the daily volume traded).
  17. On 3 May 2024, 200,000 shares were acquired by Tilley Group (representing 59.5% of the daily volume traded).
  18. On 6 May 2024, 400,000 shares were acquired by Tectonic (representing 90.7% of the daily volume traded).
  19. On 7 May 2024, 378,516 shares were acquired by Tectonic (representing 50.1% of the daily volume traded).
  20. On 8 May 2024, 6,617 shares were acquired by Tectonic (representing 0.8% of the daily volume traded).
  21. On 9 May 2024, Locality announced on ASX a Shareholder Update that included statements that:
    - (a) until release of the target’s statement, shareholders were “strongly advised” to take no action
    - (b) the Board’s view was that the Bid undervalued Locality and
    - (c) the directors’ aggregated holdings were 23.66% of Locality shares.
  22. On 14 May 2024, 1,827,091 shares were acquired by Tectonic (representing 91.1% of the daily volume traded).
  23. On 15 May 2024, 125,380 shares were acquired by Tectonic (representing 99.98% of the daily volume traded).
  24. On 16 May 2024, Locality issued its target’s statement. Included were statements to the effect that:

## Takeovers Panel

### Reasons – Locality Planning Energy Holdings Limited [2024] ATP 16

- (a) the Bid had been announced just prior to the release of Locality’s March quarterly report, which showed “*significant improvement in Locality’s year to date cash flows and the Board’s profit guidance of \$1.6m to \$1.8m net profit for FY 24 (subsequently upgraded to \$1.95m to \$2.0m)*”
  - (b) each of the directors recommended that shareholders reject the Bid and
  - (c) the Bid did not reflect “*the net profit result for FY24 with the Board’s full year updated guidance in the range of \$1.95m to \$2.0m compared to a net loss of \$12m for FY 23*”, after the board received Locality’s results for April “*during the week commencing 13 May 2024*”.
25. Also on 16 May 2024, 248,059 shares were acquired by Tectonic (representing 54.1% of the daily volume traded).
26. On 17 May 2024, Locality announced that, as set out in its target’s statement, it had:  
“*...updated its guidance for full year 2024. The updated guidance is for a significant improvement in net profit to the range of \$1.95m to \$2.0m compared to a net loss of \$12m for FY23. The Board’s EBITDA guidance is between \$3.3m and \$3.5m.*”<sup>2</sup>
27. Also on 17 May 2024, 1,718,432 shares were acquired by Tectonic (representing 37.7% of the daily volume traded) and 300,000 shares were acquired by Tilley Group (representing 6.6% of the daily volume traded).
28. On 20 May 2024, 2,989,788 shares were acquired by Tectonic (representing 92.7% of the daily volume traded).
29. Also on 20 May 2024, 100,000 shares were acquired by Tilley Group (representing 3.1% of the daily volume traded).
30. On 21 May 2024, 4,845,013 shares were acquired by Tectonic (representing 92.3% of the daily volume traded).
31. On 22 May 2024, 3,168,313 shares were acquired by Tectonic (representing 74.7% of the daily volume traded).
32. Following the above acquisitions, Tectonic had voting power in 8.72% of Locality shares.

## APPLICATION

### Declaration sought

33. By application dated 28 May 2024, River Capital sought a declaration of unacceptable circumstances.
34. It submitted (among other things) that:

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<sup>2</sup> The statement was footnoted with “*This guidance extrapolates the 10-month net profit position to 30 April 2024 out to the end of FY24 .....*”

## Takeovers Panel

### Reasons – Locality Planning Energy Holdings Limited [2024] ATP 16

- (a) Messrs Tilley, Kolenc and Jarjoura were acting in concert in relation to the affairs of Locality pursuant to section 12(2)(c).<sup>3</sup> It submitted that an inference could be drawn based on –
- (i) shared goal or purpose, namely that *“the purchases were part of a deliberate and coordinated effort to increase their shareholding*
  - (ii) common knowledge of relevant facts, namely the prospect of a competing bid and
  - (iii) actions which were uncommercial, namely Messrs Tilley and Kolenc having *“elected to buy [Locality] shares at a significant premium to the undisturbed share price”* and the approval of the acquisitions under the Share Trading Policy of Locality by the Chairman, Mr Jarjoura.
- (b) Tectonic and the Locality directors (or at a minimum, Tectonic and Mr Kolenc) were acting in concert in relation to the affairs of Locality pursuant to section 12(2)(c). River Capital submitted (among other things) that there were structural links, and Tectonic acquired shares in an uncommercial manner and in *“a manner consistent with the coordination of trading by Tilley and Kolenc.”*
- (c) The associations resulted in breaches of sections 606 and 671B. Messrs Tilley, Kolenc and Jarjoura’s collective voting power in Locality increased from 19.65% to 23.88%. Including Tectonic’s shares, the parties’ collective voting power increased to 32.6%.
35. River Capital also submitted that target directors trading shares in the period between lodgment of a bidder’s statement and issue of the target’s statement in circumstances where *“highly material price sensitive information was subsequently disclosed in the Target’s Statement”* was in this case *“relevant to the Panel’s overall consideration of whether the market for [Locality] shares and control of [Locality] is efficient, competitive and informed.”*
36. River Capital submitted that the acquisitions had had an effect on the control of Locality because the associated parties had *“been able to build and increase a substantial blocking stake.”*
37. It further submitted that because of the circumstances:
- (a) *“an efficient, competitive and informed market for control over voting shares in Locality is being inhibited”* and
  - (b) *“the holders of Locality shares do not know the identity of substantial Locality shareholders who are acting in concert in relation to Locality’s affairs, including in the context of a live takeover bid.”*

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<sup>3</sup> References in these reasons are to the *Corporations Act 2001* (Cth) unless otherwise stated

**Takeovers Panel**  
**Reasons – Locality Planning Energy Holdings Limited**  
**[2024] ATP 16**

**Interim orders sought**

38. River Capital sought interim orders that each of Messrs Jarjoura, Tilley and Kolenc and Tectonic (and their associates) be restricted from acquiring any additional Locality shares until a determination by the Panel had been finalised.
39. We did not consider that an interim order was necessary. We considered that any unacceptable circumstances we might find, based on the circumstances alleged in the application, could be remedied by final orders.

**Final orders sought**

40. River Capital sought final orders that:
  - (a) Messrs Jarjoura, Tilley and Kolenc and Tectonic (and their associates) be restricted from exercising any votes attached to shares acquired in breach of section 606 (“**Relevant Shares**”).
  - (b) The Relevant Shares be vested in the Commonwealth for sale by ASIC.
  - (c) Corrective disclosure be made pursuant to section 671B, including disclosure of details of the associations and combined voting power.
  - (d) *“Cleansing disclosure be made by Jarjoura, Tilley and Kolenc of all non-public price sensitive information known to the directors.”*

**DISCUSSION**

41. We have considered all the material presented to us in coming to our decision, but only specifically address those things that we consider necessary to explain our reasoning.

**Preliminary submission**

42. Locality made a preliminary submission on behalf of itself and its directors. It submitted that there was no coordinated trading, the market was fully informed, and *“the association inferences the application seeks to draw in respect of Tectonic Fund are tenuous.”*
43. They further submitted that Mr Tilley’s 12.13% interest in Locality was already a blocking stake, given that the Bid had a 90% minimum acceptance condition, so the “incremental increases” in Messrs Tilley’s and Kolenc’s holdings had no bearing on the prospects of the Bid.
44. They further submitted that between 24 April and 3 May 2024, *“when the days on which Mr Tilley or Mr Kolenc traded represented a significant proportion of the daily volume”*, the market traded within a range of 7.4 cents per share and 8.2 cents per share so there was no market impact of their trading.
45. On 19 April 2024, Locality released its quarterly report on ASX, including profit guidance and then on 24 April 2024 released a further ASX announcement, including that the Bid undervalued Locality and that the directors intended not to accept, and that Locality intended to undertake a buy-back (the disclosures in this paragraph were defined in the preliminary submission as “**cleansing event 1**”).

## Takeovers Panel

### Reasons – Locality Planning Energy Holdings Limited [2024] ATP 16

46. On 16 May 2024, Locality released its Target’s Statement on ASX, which included updated profit guidance based on the outlook following the April month end (defined in the preliminary submission as “**cleansing event 2**”).
47. On the question of association with Tectonic, Locality submitted that, while there had been several conversations between Mr Kolenc and Mr Haan, “*At no time in either conversation nor since that time has Mr Kolenc provided any non-public price-sensitive information to Mr Haan, nor has he encouraged the possibility of acquisitions by Tectonic Fund of [Locality] shares.*”
48. We considered that the trading, at least that undertaken by the Subject Directors, was on first view unusual and we decided to conduct proceedings and issued a brief, including in respect of the allegations of association.
49. In deciding to conduct proceedings on association, we considered the hurdle test for association<sup>4</sup> noting that sequential or concurrent buying of shares is not necessarily evidence of an association.<sup>5</sup> However, what appears to be concerted buying activity may support an inference of an “understanding”<sup>6</sup> and in this case this was coupled with trading in unusual circumstances. Moreover, Locality’s preliminary submission as to whether non-public information passed between Mr Haan and Mr Kolenc does not directly address the question of association arising between Mr Kolenc and Tectonic.
50. Our inclination to conduct proceedings was to some extent fortified by the fact that we heard nothing from Tectonic by way of explanation or denial, leaving this aspect open.

#### Association

51. We asked what inferences (if any) we should draw from either (a) Messrs Kolenc and Tilley trading on different days or (b) Tectonic commencing trading immediately after Messrs Kolenc and Tilley were unable to trade.
52. River Capital submitted that we should infer that the trading was “*coordinated behaviour to ensure that the Directors were not bidding against each other in the market on any given day.*”
53. River Capital highlighted the conversations between Messrs Haan and Kolenc submitting that “*it was difficult to see how it could be a mere coincidence that Tectonic Fund commenced trading on the same day that Mr Kolenc and Mr Haan had a discussion.*”
54. Locality made submissions on the brief on behalf of itself, each of the directors and the companies connected with them (defined as “**Locality submissions**” in paragraph 2 above). The Locality submissions stated that King & Wood Mallesons had arranged for separate solicitors “*to collate evidence from each of the Directors in respect of relevant questions directed to them personally and used that evidence to prepare*

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<sup>4</sup> For example, *Mount Gibson Iron Limited* [2008] ATP 4; *Dragon Mining Limited* [2014] ATP 5

<sup>5</sup> *Cromwell Property Group* [2020] ATP 1

<sup>6</sup> *Orion Telecommunications Limited* [2006] ATP 23 at [107]

## Takeovers Panel

### Reasons – Locality Planning Energy Holdings Limited [2024] ATP 16

*these submissions.”*

55. The Locality submissions stated that it was not reasonable to draw any inferences of association from Messrs Kolenc and Tilley trading on different days or from the timing of Tectonic’s trading and that the *“basis on which to draw an inference is flimsy.”* It submitted that the trading by Messrs Kolenc and Tilley occurred over a 4-week period in which Mr Tilley traded on 5 days and Mr Kolenc traded on 2 days and on only 2 occasions did their acquisitions occur on sequential days.
56. The Locality submissions further stated that Tectonic commenced trading on 6 May 2024, which was after Mr Kolenc had ceased trading on 30 April and Mr Tilley on 3 May. It was incorrect (they submitted) to say that Tectonic started trading because the Subject Directors could not trade, and it was incorrect to say that Tectonic’s trading was uncommercial.
57. Mr Tilley confirmed by statutory declaration that at no time had he communicated with any director or employee of Tectonic concerning the acquisition or potential acquisition of Locality shares. He stated that he had had general discussions with Mr Kolenc and Mr Jarjoura *“about my desire to purchase more shares in Locality during the 6 months prior to 19 April 2024.”* He stated that between 16 April 2024 and 20 May 2024 the directors had discussed with Locality’s lawyers their ability to acquire Locality shares. He stated that he was aware of Mr Kolenc’s intentions but had no conversations about specific trading plans.
58. Mr Kolenc confirmed by statutory declaration that he had *“a number of conversations with”* Mr Haan between 6 May 2024 and 22 May 2024. The call of 6 May was *“a general catch up”*. Mr Kolenc said at no time had he *“advised or sought to encourage Mr Haan to consider acquisitions by Tectonic Manager or Tectonic Fund of [Locality] shares.”* He also said that at no time had he communicated with any other director, officer or employee of Tectonic concerning any acquisitions of Locality shares. He also said that Mr Haan had not communicated any plans for Tectonic (or a related entity) to acquire Locality shares.
59. The Locality rebuttal submissions stated that each of Messrs Kolenc and Tilley denied having knowledge of Tectonic’s share acquisitions, although Locality and the directors acknowledged that the purchases may have been prompted by a discussion on 6 May 2024 between Mr Haan and Mr Kolenc. However, they denied that it followed that it *“must have been as a result of associated conduct or the disclosure of any non-public price sensitive information.”*
60. Moreover, Locality submitted in rebuttals that, while each Director was generally aware of the other’s intention to buy additional shares, beyond that, that they had no *“knowledge of their specific acquisition plans”* stating that each *“was only made aware of acquisitions that had occurred when they were announced to the ASX.”*
61. As noted, sequential or concurrent buying of shares is not of itself evidence of



## Takeovers Panel

### Reasons – Locality Planning Energy Holdings Limited [2024] ATP 16

association.<sup>7</sup> On its face the trading appears limited and coordination has been adamantly denied. We are not satisfied that the trading was uncommercial given the prices paid and the existence of the Bid. We are not persuaded that we should use the “*undisturbed share price*” (by which we think River Capital meant the pre-Bid price) as the reference price against which to measure.

62. We are not satisfied on the material that association of the Subject Directors, or between Tectonic and the Subject Directors, or between Tectonic and Mr Kolenc, has been made out.
63. However, we are concerned by the trading undertaken by the Subject Directors that occurred after the announcement of the Bid but before the target’s statement was released.

#### Trading by the Subject Directors

64. River Capital’s Bid was announced on 16 April 2024 and Locality’s target’s statement was released on 16 May 2024.
65. In its preliminary submission, Locality submitted that “*the trading by Mr Tilley and Mr Kolenc occurred over a 4-week period in which Mr Tilley traded on 5 days and Mr Kolenc traded on 2 days. On two occasions their acquisitions occurred on sequential days.*”
66. The relevant trading<sup>8</sup> was as follows -

Trading Day	Kolenc Group	Tilley Group
24/04/2024	1,100,000	
26/04/2024		399,172
29/04/2024		2,000,828
30/04/2024	3,527,043	
1/05/2024		
2/05/2024		
3/05/2024		200,000

67. Tilley Group also acquired Locality shares on 17 May 2024 (300,000) and 20 May 2024 (100,000).
68. The market closed at 7.6 cents per share on 16 April 2024 on announcement of the Offer. Between 24 April and 3 May, the market traded in a range of 7.4 to 8.2 cents per share.
69. The Locality submissions noted that there was no ASIC or Panel guidance about target company director acquisitions or the timing of any acquisitions.
70. River Capital submitted that neither cleansing event 1 nor cleansing event 2

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<sup>7</sup> *Orion Telecommunications Limited* [2006] ATP 23 at [107]; *Cromwell Property Group* [2020] ATP 1 at [40]; *AIMS Property Securities Fund 03* [2023] ATP 5 at [48]

<sup>8</sup> The relevant trading for this purpose we took to be the trading ahead of release of the target’s statement. The 17 and 20 May trades would be relevant to the association issue

## Takeovers Panel

### Reasons – Locality Planning Energy Holdings Limited [2024] ATP 16

sufficiently informed the market to allow the Subject Directors to trade, noting that the trading took place in the context of the Board of directors issuing “undervalue statements” for some weeks before the target’s statement was released. For example, in Locality’s quarterly report released to the market on 19 April 2024, it says *“The Board is of the preliminary view that the River Capital offer undervalues the Company. In particular, and based on the financial metrics reflected in this Quarterly Report, the unanimous view of the Board is that the Company’s medium to long term prospects significantly exceed 8 cents per share.”*

71. River Capital submitted that it was not until the release of the target’s statement on 16 May 2024, and a further ASX announcement on 17 May 2024, that the market was aware of the updated profit guidance.
72. River Capital also submitted that the basis for the directors’ view that 8 cents per Locality share undervalued the company was undisclosed until the target’s statement.
73. We asked the parties to provide any examples of market practice of target directors acquiring shares in the target after a bid had been made and while preparing a target’s statement.
74. No examples were provided. River Capital submitted that, having undertaken a high-level desktop review of target’s statements released to the market between 2020 and 2024, it was unable *“to find sufficient examples of market practice for target directors acquiring shares in a target while a bid is on foot and while preparing a target’s statement”* although it found examples of directors exercising options or other rights, which it submitted was quite different. The Locality submissions stated that it was impractical to conduct a full review but *“While there may be examples, our expectation is that the practice would be rare.”* Further, they submitted that the market had been cleansed and *“the acquisitions by the Directors did not infringe any laws or applicable guidance.”*
75. We also asked the chairman about giving trading approval to the Tilley Group and the Kolenc Group under Locality’s security trading policy between 24 April 2024 and release of Locality’s target’s statement.
76. Locality has a detailed trading policy last approved in August 2020. The Locality submissions stated that the approvals were given on two bases:
  - (a) no ‘blackout period’ applied to prohibit the trades. The policy identified the prohibited trading period as *“periods where parties are in possession of any unpublished price sensitive information when Listing Rule 3.1A is in operation, and any other period communicated by the Board from time to time.”* It particularly identified the following prohibited trading periods –
    - (i) one week prior to, and 48 hours after the release of the Company’s Annual Financial and Half-year Financial Reports
    - (ii) one week prior to, and 48 hours after the release of the Company’s quarterly reports, and

## Takeovers Panel

### Reasons – Locality Planning Energy Holdings Limited [2024] ATP 16

(iii) the Annual General Meeting.<sup>9</sup>

(b) *“neither of Mr Kolenc or (sic) Mr Tilley was understood to have any ‘inside information’ which would prevent them trading, in particular on the basis that permission was only granted subject to the market being cleansed...of any non-public information the Board considered might be materially price sensitive.”*

77. The policy states *“All parties to which this Securities Trading Policy applies are prohibited to trade in the Company’s securities at any time when they are in possession of any unpublished price sensitive information or potentially price sensitive information.”* The policy includes specific blackout dates as noted above. The blackout dates do not include reference to trading after the announcement of a takeover bid and prior to the issue of a target’s statement, although the policy includes the flexibility for the prohibition to apply to *“any other period communicated by the Board from time to time.”* In terms of trading by the Subject Directors, the policy states that it is the Chairman who must approve.
78. In purported pursuance of this policy, we were provided with the approval given to Mr Kolenc by Mr Jarjoura. The sequence of emails, in which Mr Tilley was copied, was as follows:
- (a) on 19 April 2024, Mr Kolenc asked by email for approval to buy up to 10m shares on market *“over the next 30 days starting on Monday the 22<sup>nd</sup> of April.”*
  - (b) on 21 April 2024, Mr Jarjoura responded *“Once the Buy back arrangement has been announced to the market this week I am not aware of any other reason why you wouldnt (sic) be able to purchase these shares on market. Mr Jarjoura copied in the company secretary, asking her to confirm this.*
  - (c) on 22 April 2024, the company secretary responded *“Provide (sic) you are not in possession of inside information, I don’t believe there is anything that would preclude you from trading [Locality] shares.”*
  - (d) also on 22 April 2024, Mr Jarjoura then emailed Mr Kolenc that *“Approval to trade in [Locality] Securities as per your request is granted subject to any information given the current position of the takeover offer may cause a temporary blackout period which [the company secretary] can advise.”*
79. On receiving the copy email from Mr Kolenc, Mr Tilley also emailed Mr Jarjoura that he *“also would like to buy 14 million shares over the next 6 month period after buy back is announced Please confirm that you are happy for me to buy.”* Mr Jarjoura responded with approval other than during the blackout periods surrounding quarterly and annual reporting.
80. There is no confirmation from Mr Kolenc in the sequence of emails above, or elsewhere recorded in the materials that we have been provided with, that Mr Kolenc was not in possession of *“unpublished price sensitive information or potentially price sensitive information”* as the policy required. All the sequence shows is that Mr

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<sup>9</sup> It is unclear what time frame applies around the AGM

**Takeovers Panel**  
**Reasons – Locality Planning Energy Holdings Limited**  
**[2024] ATP 16**

Kolenc was approved to trade provided he did not have "*inside information*".

81. In our view this approval is insufficient. We agree with the general thrust of the rebuttal submission of River Capital that "*Trading approvals were caveated in a way to obfuscate any responsibility for assessment of inside information.*"
82. Moreover, until the market had been 'cleansed' by release of the target's statement, based on our experience, we think that trading by the Subject Directors was inappropriate and gave rise to a significant risk of unacceptable circumstances. Locality's target's statement contained profit guidance information (among other things), which was repeated in an ASX announcement titled "Guidance Update" released on the following day.
83. Our view appears to be confirmed in Mr Tilley's statutory declaration in support of his response to our brief in which he states, referring to a conversation with Mr Jarjoura on 15 May 2024 about the reopening of the trading window, that Mr Jarjoura said words to the effect that "*once the target's statement was released all price sensitive information would be disclosed.*" However, there was no material to suggest Mr Jarjoura or the company secretary considered whether to create an "other period"<sup>10</sup> of prohibition during the period of the preparation of the target's statement prior to 14 May 2024.
84. On 14 May 2024, two days before the release of Locality's target's statement, Mr Jarjoura emailed Messrs Tilley and Kolenc stating "*Given that the April accounts have been shared and showed a significant improvement above budget and to what is currently released to the market I am closing the trading window for Directors to trade [Locality] shares until further notice.*"
85. We have also been provided with a copy of the minutes of the board meeting of Locality held on 23 April 2024. At the meeting, Locality's CFO provided an overview of her March 2024 report, noting that "*year to date net profit was \$1.85 million*" and that "*cash was strong for the month with receipt of \$264k. This is expected to continue. March billing has slowed however, they are exceeding the forecast and are monitoring it closely.*"
86. As discussed below, at that time the market was informed that the full year net profit guidance was in the range of \$1.6m to \$1.8m.<sup>11</sup>
87. As disclosed in Locality's target's statement, the full year profit forecast was updated from the 19 April 2024 figures of \$1.6m to \$1.8m to the 16 May 2024 figures of \$1.95m to \$2.0m, which the Locality submissions said in rebuttals was approximately "*29.17% improvement for April, May and June in aggregate.*" This is significant in our view.
88. The Locality submissions to our supplementary brief confirmed that the \$1.85m figure was the March year to date snapshot and "*the Directors had previously been presented with this figure on or around 17/18 April in the March Finance Report.*" However, Locality submitted that on 18 April Mr Jarjoura proposed a range of \$1.6m

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<sup>10</sup> For the purposes of the Share Trading Policy

<sup>11</sup> "Extrapolating" the 9 month position out to the end of FY 24

## Takeovers Panel

### Reasons – Locality Planning Energy Holdings Limited [2024] ATP 16

-\$1.8m on the basis that there would be a likely loss for the fourth quarter of FY24 due to provisioning. Mr Kolenc confirmed the estimate. This estimate was released to the market on 19 April in the Quarterly Report.

89. River Capital submitted that Locality’s explanation as to the \$1.85m profit figure was “tenuous”. It submitted that one would not expect the profit to reduce and there was “*ample basis to infer that the Directors were well aware of the financial performance of Locality at all relevant times, and they acted accordingly.*”
90. Putting to one side the profit upgrade information, in general we would be surprised that a target’s statement contained no “*unpublished price sensitive information or potentially price sensitive information*”, although we acknowledge that it is possible. We leave for an appropriate case the consideration of whether, for example, collating previously released information generates insights that warrant a trading prohibition.
91. River Capital has not asked the Panel to investigate, or make a finding that there has been a breach of, the insider trading provisions of the Corporations Act. That is a matter for ASIC and the courts; and we do not venture there. But that is not to say that facts and circumstances relevant to any potential application of those provisions are necessarily irrelevant to our task.<sup>12</sup> As stated in ASP, “*allegations concerning information asymmetry may have had the potential to undermine the principles in section 602.*”<sup>13</sup> Our concern is whether the Subject Directors’ trading ahead of the release of the target’s statement gives rise to unacceptable circumstances. This may come about because information known to a board of directors, but not the market, means that the market is not efficient, competitive and informed and target shareholders cannot make informed decisions whether to accept or reject the Bid.
92. River Capital submitted that the trading by the Subject Directors included the following effect on control of Locality:
  - (a) it increased the blocking stake. We note that whereas there was previously one director holding a stake above 10%, now there are two.
  - (b) selling shareholders missed the opportunity to accept the Bid at the higher offer price. We note that selling shareholders were not as informed as the Subject Directors, even accepting that there may not have been insider trading.
93. In our view, trading after the announcement of a takeover bid and ahead of the release of a target’s statement generally poses a significant risk of unacceptable circumstances. It is unusual in our experience for there to be no new information in a target’s statement. We are not surprised that examples of directors trading ahead of the release of a target’s statement were said to be rare (and indeed could not be found by any of the parties to this proceeding).

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<sup>12</sup> *Skywest Ltd* [2004] ATP 17 at [47]; *Advance Property Fund* [2000] ATP 7 at [41]; *Excelsior Capital Limited* [2020] ATP 25 at [20] and [21]

<sup>13</sup> *ASP Aluminium Holdings Pty Ltd* [2023] ATP 8 at [78]

## Takeovers Panel

### Reasons – Locality Planning Energy Holdings Limited [2024] ATP 16

94. Guidance Note 1<sup>14</sup> quotes as one example involving possible unacceptable circumstances: “use of ‘inside’ information (which may also breach the insider trading provisions).”
95. In this case, the risk of unacceptable circumstances was heightened because in our view, having considered the financial information as reported on 23 April 2024 and in the profit guidance disclosures on 19 April 2024<sup>15</sup> and 16 and 17 May 2024<sup>16</sup>, there was a risk that material information regarding Locality’s profit was not available in the market at the time of the trading. Additionally, we have concerns with the way in which Locality’s trading policy was implemented. In these circumstances, we considered that the trading of the Subject Directors in Locality shares was inappropriate.
96. We were minded to make a declaration of unacceptable circumstances.

#### Undertakings

97. The Locality submissions stated repeatedly that, should the Panel consider that the Subject Directors erred in acquiring Locality shares in these circumstances, they would accept that and take any rectification steps the Panel felt appropriate.
98. Accordingly, we issued a supplementary brief in which we proposed certain undertakings and asked whether those undertakings would ‘rectify’ any potential unacceptable circumstances.
99. The application included as an effect of the circumstances that, without corrective orders to deal with the “false market” the circumstances created, the Bid was unlikely to be successful. We proposed undertakings from the Tilley Group and the Kolenc group addressing this effect. The undertakings by each of the Tilley Group and Kolenc Group would provide that (except with the Panel’s consent) they will accept into the Bid for those shares acquired after 23 April 2024 but before the release of the target’s statement if when aggregated with the shares in Locality acquired by the other Director it would result in River Capital obtaining voting power in Locality over 50%.
100. The Locality submissions, although continuing to deny that unacceptable circumstances existed, expressed concern that the undertakings should be limited in time because the Bid may be extended for many months. River Capital submitted that the unacceptable circumstances could continue to persist after any time limit ended, and in any event a time limit was arbitrary. We think that adding a consent proviso to the undertakings resolves the need to time limit the undertakings, so we can address the appropriateness of requiring continuing compliance if need be. On this basis, the Subject Directors offered to give the proposed undertakings.
101. River Capital submitted that theoretically such undertakings might assist to resolve the unacceptable circumstances although the undertakings did not deal with the

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<sup>14</sup> Guidance Note 1: *Unacceptable Circumstances*, 6<sup>th</sup> issue, 11 July 2018 at [32]

<sup>15</sup> See paragraph 10

<sup>16</sup> See paragraph 26

## Takeovers Panel

### Reasons – Locality Planning Energy Holdings Limited [2024] ATP 16

profits the Subject Directors will make on the shares (if they sell them into the Bid). This assumes that the Bid succeeds in getting to 50% (with these shares) given that the offer price has been increased to 10.5 cents per share. We note that the Bid has become unconditional. Our role is remedial. As Guidance Note 4<sup>17</sup> says “*The Panel does not seek to punish when deciding on a remedy.*” Accordingly, we decided not to pick up the River Capital submission on this point.

102. River Capital also submitted that, if it did not obtain voting power of at least 50%, the unacceptable circumstances would be unrectified. The chief mischief that concerns us is the potential impact that removing the shares from the market might have had on the control of Locality under the Bid, noting the effect the applicant claimed in its application, and in our view the undertakings address that. The bidder has chosen to make its Bid unconditional.
103. River Capital also submitted that allowing the Subject Directors to continue to acquire shares remained problematic. We consider that any further acquisitions by the Subject Directors would be a new circumstance which a Panel could consider if a fresh application were made.
104. Guidance Note 4 also says “*The Panel considers that the public interest is generally served by accepting an undertaking that addresses unacceptable circumstances to the Panel's satisfaction.*”<sup>18</sup> In our view in this case undertakings sufficiently address any unacceptable circumstances.
105. Lastly, River Capital submitted that we should consider corrective disclosure, but the trades have been disclosed to the market and our reasons make clear the circumstances that existed and our views regarding unacceptability.
106. We are satisfied that the undertakings sufficiently address any unacceptable circumstances. Having decided this, we take the view that a declaration of unacceptable circumstances is not necessary in this case.
107. In a supplementary brief, we asked for a copy of the CFO’s March 2024 report that had been referred to in the Board minutes of 23 April 2024. Locality submitted that it “*contains commercially sensitive information and metrics to an extent that redaction would render it meaningless*” and it was uncomfortable allowing River Capital access to it. Locality offered to provide it on a confidential basis to the Panel and extracted some “*key information of relevance*” in its submission on the supplementary brief. River Capital submitted that it was hard to see the prejudice if the Subject Directors were maintaining that the market was sufficiently ‘cleansed’ already, but agreed that we could see it on that confidential basis. In the end, in light of the offer of undertakings and our analysis of the facts, we decided that we did not need to see the report.

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<sup>17</sup> Guidance Note 4: Remedies General, 6<sup>th</sup> issue, 30 January 2017 at [5]

<sup>18</sup> At [40]

## Takeovers Panel

### Reasons – Locality Planning Energy Holdings Limited [2024] ATP 16

#### DECISION

108. In summary, Tilley Group and Kolenc Group agreed to address our concerns regarding the unacceptable circumstances by offering undertakings (**Annexures A and B**) which we accepted.
109. For the reasons above, we declined to make a declaration of unacceptable circumstances. We consider that it is not against the public interest to decline to make a declaration. We had regard to s657A(3).

#### Orders

110. Given that we have decided not to make a declaration, we do not (and do not need to) consider whether to make any orders.

**Karen Phin**

**President of the sitting Panel**

**Decision dated 5 July 2024**

**Reasons given to parties 5 August 2024**

**Reasons published 7 August 2024**



**Takeovers Panel**  
**Reasons - Locality Planning Energy Holdings Limited**  
**[2024] ATP 16**

**Advisers**

Party	Advisers
Locality Planning Energy Holdings Limited, David Jarjoura, Simon Tilley, Stan Kolenc, TW Criterion Pty Ltd, Fernsha Pty Limited <Simon's Brooklyn A/C>, Sore Tooth Pty Limited <Simon Tilley Super Fund A/C> and KIC Advisor Pty Ltd as Trustee for the KIC Superannuation Fund	King and Wood Mallesons
River Capital	Gilbert + Tobin



**Australian Government**

**Takeovers Panel**

**ANNEXURE A**

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

**Locality Planning Energy Holdings Limited**

Pursuant to section 201A of the *Australian Securities and Investments Commission Act 2001* (Cth) each member of Kolenc Group undertakes jointly and severally that, except with the consent of the Panel, the Subject Shares will be accepted into the River Capital Bid if:

- (a) acceptance into the River Capital Bid of those shares, when aggregated with the shares in Locality acquired by members of the Tilley Group between 23 April 2024 and 21 May 2024 the subject of an undertaking in similar terms by Tilley Group, would result in River Capital obtaining voting power in Locality over 50% and
- (b) prior to the close of the River Capital Bid, River Capital notifies Kolenc Group in writing that paragraph (a) will be satisfied if those shares, when aggregated with the shares in Locality acquired by members of the Tilley Group between 23 April 2024 and 21 May 2024 will result in River Capital obtaining voting power of over 50% of Locality.

Kolenc Group agrees to:

1. provide an email address to River Capital for the purpose of notification under paragraph (b) above
2. do all things necessary to give effect to this undertaking, including, if necessary, transferring the Subject Shares to a nominee of Kolenc Group and directing that nominee to accept into the River Capital Bid and
3. confirm in writing to the Panel when it has satisfied its obligations under this undertaking.

In this undertaking the following terms have their corresponding meaning:

<b>Kolenc Group</b>	Mr Stan Kolenc and KIC Advisor Pty Ltd as trustee for the KIC Superannuation Fund
<b>Locality</b>	Locality Planning Energy Holdings Limited
<b>River Capital</b>	River Capital Pty Ltd as trustee for River Capital Embedded Network Trust

**Takeovers Panel**

**Reasons – Locality Planning Energy Holdings Limited  
[2024] ATP 16**

**River Capital Bid**

Off-market takeover bid announced on 16 April 2024 by River Capital for all the shares in Locality that River Capital and its related entities does not already own as extended from time to time

**Subject Shares**

Shares in Locality acquired by any of the Kolenc Group between 23 April 2024 and 21 May 2024

**Tilley Group**

Mr Simon Tilley and TW Criterion Pty Ltd, Fernsha Pty Limited and Sore Tooth Pty Limited

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**Signed by Stanislav Michael Kolenc of [address provided]  
with the authority, and on behalf, of each member of the Kolenc Group  
Dated 9 July 2024**



**Australian Government**

**Takeovers Panel**

**ANNEXURE B**

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

**Locality Planning Energy Holdings Limited**

Pursuant to section 201A of the *Australian Securities and Investments Commission Act 2001* (Cth) each member of Tilley Group undertakes jointly and severally that, except with the consent of the Panel, the Subject Shares will be accepted into the River Capital Bid if:

- (a) acceptance into the River Capital Bid of those shares, when aggregated with the shares in Locality acquired by members of the Kolenc Group between 23 April 2024 and 21 May 2024 the subject of an undertaking in similar terms by Kolenc Group, would result in River Capital obtaining voting power in Locality over 50% and
- (b) prior to the close of the River Capital Bid, River Capital notifies Tilley Group in writing that paragraph (a) will be satisfied if those shares, when aggregated with the shares in Locality acquired by members of the Kolenc Group between 23 April 2024 and 21 May 2024 will result in River Capital obtaining voting power of over 50% of Locality.

Tilley Group agrees to:

1. provide an email address to River Capital for the purpose of notification under paragraph (b) above
2. do all things necessary to give effect to this undertaking, including, if necessary, transferring the Subject Shares to a nominee of Tilley Group and directing that nominee to accept into the River Capital Bid and
3. confirm in writing to the Panel when it has satisfied its obligations under this undertaking.

In this undertaking the following terms have their corresponding meaning:

<b>Kolenc Group</b>	Mr Stan Kolenc and KIC Advisor Pty Ltd as trustee for the KIC Superannuation Fund
<b>Locality</b>	Locality Planning Energy Holdings Limited
<b>River Capital</b>	River Capital Pty Ltd as trustee for River Capital Embedded Network Trust

**Takeovers Panel**

**Reasons - Locality Planning Energy Holdings Limited  
[2024] ATP 16**

**River Capital Bid**

Off-market takeover bid announced on 16 April 2024 by River Capital for all the shares in Locality that River Capital and its related entities does not already own as extended from time to time

**Subject Shares**

Shares in Locality acquired by any of the Tilley Group between 23 April 2024 and 21 May 2024

**Tilley Group**

Mr Simon Tilley and TW Criterion Pty Ltd, Fernsha Pty Limited and Sore Tooth Pty Limited

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**Signed by Simon Tilley of [address provided]  
with the authority, and on behalf, of each member of the Tilley Group  
Dated 10 July 2024**