



Australian Government

Takeovers Panel

**Reasons for Decision
Metallica Minerals Limited
[2024] ATP 9**

Catchwords:

Decline to make a declaration - section 602 principles – efficient, competitive and informed market – standstill – disclosure – supplementary target's statement

Corporations Act 2001 (Cth), section 602

Guidance Note 7: Deal Protection, Guidance Note 12: Frustrating Action, Guidance Note 23: Shareholder intention statements

ASIC Regulatory Guide 25 Takeovers: False and misleading statements

International All Sports Limited 01R [2009] ATP 5, International All Sports Limited [2009] ATP 4, Auspine Limited [2007] ATP 18, Andean Resources Limited [2006] ATP 21

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

INTRODUCTION

1. The Panel, Alberto Colla, Christian Johnston (sitting President) and Kristen Jung, declined to make a declaration of unacceptable circumstances on an application by Diatreme Resources Limited in relation to the affairs of Metallica Minerals Limited. Metallica was subject to an off-market takeover offer by Diatreme to acquire all of the issued shares in Metallica. The application concerned Metallica’s refusal to release Diatreme from a standstill agreement in a timely manner and Metallica’s disclosure to its shareholders about the likelihood of a competing proposal for Metallica. The Panel declined to make a declaration of unacceptable circumstances on the basis that Metallica agreed to address the Panel’s concerns by providing further disclosure and by deed poll amending the standstill agreement to fix a date for releasing Diatreme from the standstill. The Panel considered that it is not against the public interest to decline to make a declaration of unacceptable circumstances.

2. In these reasons, the following definitions apply.

- Cross Shareholders** The three Metallica substantial shareholders who are also shareholders of Diatreme
- Diatreme** Diatreme Resources Limited
- Diatreme Bid** Diatreme’s off-market takeover bid for Metallica announced on 16 February 2024
- Diatreme Standstill** The standstill obligations contained in clause 7.1 of the MCD

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Effective Time	The definition of 'Effective Time' in the Initial Deed Poll or the Revised Deed Poll, as the context requires
First Supplementary Target's Statement	Metallica's first supplementary target's statement in relation to the Diatreme Bid dated 22 May 2024
Initial Deed Poll	The Deed Poll Waiver of Standstill Provision signed by Metallica dated 7 May 2024
Initial Target's Statement	Metallica's target's statement in relation to the Diatreme Bid dated 24 April 2024
MCD	The Mutual Confidentiality Deed dated 30 October 2023 between Diatreme and Metallica
Metallica	Metallica Minerals Limited
Revised Deed Poll	The Deed Poll Waiver of Standstill Provisions signed by Metallica dated 17 May 2024
Second Revised Deed Poll	Has the meaning given in paragraph 85
Second Supplementary Target's Statement	Has the meaning given in paragraph 50

FACTS

3. Metallica is an ASX listed company (ASX code: MLM) which operates a silica sands project in Queensland.
4. Diatreme is an ASX listed company (ASX code: DRX) which also operates a silica sands project in Queensland.
5. On 30 October 2023, Metallica and Diatreme entered the MCD. Among other things, the MCD set out the parties' confidentiality obligations in relation to confidential information disclosed under the MCD. The MCD anticipated Metallica and Diatreme exchanging confidential information in relation to a potential merger transaction.
6. The MCD also provided for mutual standstill obligations in virtually identical terms that applied for the term of the MCD, being two years or an earlier date agreed by the parties.
7. Clause 7.1 of the MCD provided that:

Diatreme agrees that it will not, and will take reasonable steps to ensure that its Related Persons (except Related Persons who are substantial shareholders of Diatreme) do not:

 - (a) *acquire, purchase or sell, or agree to acquire, purchase or sell any securities (or any direct or indirect rights, warrants or options to acquire any securities) in Metallica;*
 - (b) *enter into any agreement or arrangement which confers rights, the economic effect of which is equivalent or substantially equivalent to the acquisition, purchase or*

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disposal of securities in Metallica (including cash settled derivative contracts, contracts for differences or other derivative contracts); or

(c) *aid, abet, counsel, procure or induce any person, corporation or other entity to do any of the things set in clauses 7.1(a) or 7.1(b),*

without Metallica's prior written consent.

8. Following entry into the MCD, Diatreme put forward non-binding, indicative proposals to acquire Metallica for scrip consideration by way of a scheme of arrangement. In each case, Diatreme sought to undertake due diligence on Metallica. Each proposal was rejected by Metallica.
9. Both Metallica and Diatreme conceded that no confidential or price sensitive information was given by Metallica to Diatreme, or by Diatreme to Metallica, under the MCD or otherwise.
10. On 16 February 2024, Diatreme announced an intention to make an off-market takeover bid for Metallica.
11. The Diatreme Bid offered 1.3319 Diatreme shares for each Metallica share and included various defeating conditions. The Diatreme Bid, as initially announced, did not include a defeating condition that Metallica waive the Diatreme Standstill.
12. Diatreme subsequently requested that Metallica waive the Diatreme Standstill, which Metallica declined.
13. On 27 February 2024, Diatreme varied the Diatreme Bid to include a defeating condition that Diatreme obtains either the written consent or waiver from Metallica to the acquisition of Metallica shares under the Diatreme Bid or the Panel makes orders and declarations that Diatreme is no longer restrained from acquiring Metallica shares under the Diatreme Bid by the terms of the MCD.
14. On 28 March 2024, Diatreme released its bidder's statement in relation to the Diatreme Bid. The Diatreme Bid was dispatched to Metallica shareholders on 11 April 2024, with an offer closing date of 27 May 2024 (unless extended or withdrawn)
15. On 24 April 2024, Metallica released its Initial Target's Statement in which the Metallica directors recommended that Metallica shareholders reject the Diatreme Bid.
16. In the Initial Target's Statement, Metallica made the following statement:

Your Directors are taking steps to identify and progress potential alternative transactions, which might result in a superior proposal. While there is no guarantee an alternative transaction will arise, acceptance of the Offer might result in Metallica Shareholders being unable to benefit from any superior proposal (should one be made).
17. Metallica also made the following statement in the Initial Target's Statement, indicating that it was prepared to waive the Diatreme Standstill following the occurrence of certain events:

Your Directors intend to waive the Standstill Condition by having Metallica sign a deed poll in favour of Diatreme, pursuant to which Metallica would waive and release

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Diatreme from any liability under the Standstill Condition, [with] such release to take effect: if a superior proposal does not eventuate, immediately prior the end of Offer Period; or if a superior proposal does eventuate and is announced to the market prior to the end of the Offer Period (and is subject to Metallica shareholder approval), immediately after the general meeting to consider the proposal, in the event that Metallica shareholders do not vote in favour of a superior proposal. For the purpose of this deed poll, a superior proposal will be one that your Directors, acting reasonably, and having consideration of all material facts, believe is or could be superior to the Offer.

18. On 7 May 2024, Metallica executed the Initial Deed Poll which set out the circumstances where Metallica will waive the Diatreme Standstill in respect of the Diatreme Bid. Clause 2.1 of the Initial Deed Poll stated:

On and with effect from the Effective Time, the Company:

- (a) unconditionally waives all of its rights and interests arising under the Standstill Provision and releases and discharges Diatreme from all obligations, covenants, liabilities or claims arising under the Standstill Provision; and*
 - (b) for the purpose of, and in addition to clause 2.1(a), unconditionally consents to Diatreme undertaking any action or other step that they are otherwise prohibited or restricted from undertaking pursuant to the Standstill Provision,*
- in each case, to allow Diatreme to acquire Metallica Shares under the Offer.*

19. The definition of Effective Time in the Initial Deed Poll was as follows:

Effective Time means the earlier of:

- (a) if a Superior Proposal does not eventuate before the end of the Offer Period, immediately prior to the end of the Offer Period; and*
- (b) if a Superior Proposal does eventuate and it announced by the Company before the end of the Offer Period (and is subject to Company shareholder approval), immediately after the general meeting of the Company's shareholders which does not approve the Superior Proposal as a 'frustrating action' by the requisite majority, as required by the applicable takeovers law and guidance.*

20. The Initial Deed Poll defined Superior Proposal as:

Superior Proposal means a proposal by a person, other than Diatreme and its associates, which the Board, acting reasonably and having consideration of all material facts, believe is, or could be, superior to the Offer.

21. On 10 May 2024, in an ASX announcement in response to Diatreme's third supplementary bidder's statement in which Diatreme noted (among other things) that Metallica had not presented Metallica shareholders with any potential alternative transaction, Metallica stated:

Metallica confirms that it is in discussions with other parties regarding potential alternative transactions. It is too early to provide any details on those discussions. If you accept the Diatreme Offer, you will likely be unable to participate in any superior proposal (should one emerge). Your Directors urge you to 'wait and see'.

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22. On 17 May 2024, Diatreme extended the Diatreme Bid by one week to 3 June 2024 and announced that it had received acceptances taking its voting power in Metallica to 44%.
23. Also on 17 May 2024, the lawyers for Diatreme wrote to the lawyers for Metallica asking that Metallica:
- (a) update the market on the current position regarding alternative proposals “paying particular attention to the impact that the level of acceptances our client has now received under its bid has on the prospects of a competing proposal” and
 - (b) release the standstill unconditionally “in the interests of [Metallica] shareholders and an efficient, competitive and informed market.”
24. On 17 May 2024, Metallica executed the Revised Deed Poll which updated the definition of Effective Time in the Initial Deed Poll to, in effect, provide that the Diatreme Standstill would be released on 17 June 2024 if no superior proposal was received by Metallica before that date. The updated definition read as follows (with the amendment underlined):
- Effective Time means the earlier of:*
- (a) if a Superior Proposal is not announced before 17 June 2024, on 17 June 2024;
 - (b) *if a Superior Proposal is not announced before the end of the Offer Period, immediately prior to the end of the Offer Period; and*
 - (c) *if a Superior Proposal is announced by the Company before the end of the Offer Period (and is subject to Company shareholder approval), immediately after the general meeting of the Company's shareholders which does not approve the Superior Proposal as a 'frustrating action' by the requisite majority, as required by the applicable takeovers law and guidance.*
25. On 20 May 2024, Metallica rejected Diatreme’s requests in its letter of 17 May 2024. In relation to the potential competing proposal, the lawyers for Metallica stated that Metallica’s announcement on 10 May 2024 remained accurate. In relation to the standstill, Metallica’s lawyers rejected an immediate waiver of the Diatreme Standstill based on the level of acceptances of the Diatreme Bid noting that the acceptances had come from Metallica shareholders who were also substantial shareholders in Diatreme (being the Cross Shareholders). Metallica also stated that, given Diatreme had expressly referenced certain outcomes in the event that it achieves voting power of 80% (scrip for scrip rollover relief) and 90% (compulsory acquisition), it could not see any compelling reason why the Diatreme Bid would not be extended with a view to it declaring the bid unconditional on 17 June 2024 and that the Revised Deed Poll allowed this to occur.
26. On 21 May 2024, Diatreme announced to ASX that it had received acceptances which took its voting power in Metallica to over 56%.

APPLICATION

Declaration sought

27. By application dated 21 May 2024, Diatreme sought a declaration of unacceptable circumstances. It submitted that Metallica:
- (a) had not adequately updated the market about the status of discussions it had alluded to regarding competing proposals for Metallica and
 - (b) had refused to release the Diatreme Standstill on a timely basis, preventing the relevant condition of Diatreme’s bid being satisfied.
28. Diatreme submitted that the circumstances were unacceptable having regard to:
- *the need for a fully informed market during the course of a takeover offer;*
 - *the effect on [Diatreme’s] takeover bid for Metallica; and*
 - *the potential to prevent [Metallica] shareholders participating in benefits provided under [Diatreme’s] takeover offers.*

Interim orders sought

29. Diatreme sought interim orders that Metallica disclose:
- (a) the status of discussions with third parties regarding potential alternative transactions, including any relevant conditions and whether the third parties intend to pursue their proposals in view of the level of acceptances held by Diatreme; and
 - (b) if there was no reasonable prospect of an alternative transaction emerging prior to the close of the Diatreme Bid, a warning that Metallica shareholders should not rely on the possibility of a competing bid in deciding whether to accept the Diatreme Bid.

Final orders sought

30. Diatreme sought final orders that Metallica:
- (a) further disclose the matters disclosed by reason of the interim order and
 - (b) unconditionally releases the Diatreme Standstill either immediately or with effect from Thursday 30 May 2024, being the day before Diatreme was required to provide its notice of status of conditions based on the terms of the Diatreme Bid as at the date of the application.

DISCUSSION

31. 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

32. Metallica submitted in its preliminary submission that the disclosure interim order sought by Diatreme was unnecessary as a result of Metallica’s disclosure in its First Supplementary Target’s Statement released on 22 May 2024, which Metallica

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submitted included a detailed statement regarding both the history and current status of discussions with third parties.

33. The First Supplementary Target's Statement included the following statement:

Status of discussions with third parties

Since the announcement of Diatreme's conditional intention to bid on 16 February 2024, your Directors have been working to identify parties who may have an interest in acquiring the CFS Project, with a view to identifying whether a superior proposal could be agreed. These efforts have resulted in three interested parties being given access to a dataroom that was established for the purpose of providing disclosure in relation to the CFS Project. Each of the parties is a foreign company with credible record of resource project development. Two of those parties have a record of resource project development in Australia. One of those parties made a cash non-binding indicative offer which the board of Metallica believed did not consider appropriately valued the CFS Project. Engagement with that party recently ceased after a period of negotiation, in an attempt to increase the cash price offered. Another party continues to conduct due diligence on Metallica. Whilst this party is yet to make a proposal, the party is aware of the Diatreme Bid and the associated timetable and, based on recent discussions between that party and Metallica, that party continues to express an interest in a potential offer for the CFS Project. Your Metallica Directors will keep the market informed of material developments in this regard as they arise.

34. Metallica agreed that the key question for the Panel was whether "the time has now come for the standstill to be released unconditionally in the interests of [Metallica] shareholders and an efficient, competitive and informed market". Metallica also submitted that, if the Panel was inclined to commence proceedings, it would seek to make submissions.
35. Diatreme made an out of process response to Metallica's preliminary submission, which we decided to accept. Diatreme submitted that Metallica's disclosure in its First Supplementary Target's Statement was inadequate.
36. Given the potential defeating impact of the Diatreme Standstill on the Diatreme Bid, we decided that it was appropriate to conduct proceedings.

Disclosure issue

37. Diatreme submitted that both ASIC Regulatory Guide 25 and Panel policy require further disclosure by Metallica regarding the status of potential competing proposals.
38. ASIC RG 25 at paragraph [25.51] provides:

A target that has stated it is in discussions with a possible competing bidder must:

- (a) update the market about material developments in discussions; and*
- (b) in any event, update the market about the status of those discussions not more than 14 days and not less than 7 days before the end of the offer period. (This equates with the requirement to give notice of the status of a defeated condition: section 630(1)).*

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39. Diatreme referred to the Panel’s decisions in *Andean Resources Limited*¹ and *Auspine Limited*².
40. In *Andean Resources Limited*, the Panel considered that the requirement of ASIC RG 25.51 was consistent with several provisions of Chapter 6 relating to the last 7 days of an offer period.³ However in *Andean Resources Limited*, the Panel declined to conduct proceedings noting that it assumed that the target directors were aware of their obligations should statements they had made about “interest in” the company become misleading.
41. In *Auspine Limited*, the Panel required disclosure as to “*the status of the due diligence enquiries by two other parties to whom Auspine had allowed access, and its knowledge of their intentions with regard to possible alternative bids.*”⁴
42. Diatreme submitted that, in accordance with these decisions, it was incumbent on Metallica to issue an announcement to the ASX explaining the current position in relation to potential competing transactions in sufficient detail so that Metallica shareholders and Diatreme could make an informed decision about the likelihood of a competing proposal for Metallica.
43. We issued a brief asking (among other things) if Metallica should make further disclosure that includes:
- (a) the impact that the level of acceptances under the Diatreme Bid has on the prospects of a competing proposal
 - (b) a statement to the effect that no superior proposal may emerge
 - (c) a statement to the effect that, if shareholder approval for a superior proposal is required, it may be defeated by the Cross Shareholders who have accepted the Diatreme Bid or
 - (d) a statement to the effect that, if a superior proposal emerges from a foreign bidder, it may require greater regulatory scrutiny and accordingly have a longer timetable.
44. Metallica responded that it considered that it had already sufficiently disclosed those matters in the Initial Target’s Statement and the First Supplementary Target’s Statement.
45. ASIC submitted that Metallica should make further disclosure to the market on the basis of the principles in s602(a) and (b)(iii), the requirements of s644(1)(c), and ASIC’s policy in ASIC RG 25.
46. Diatreme submitted that Metallica should disclose the matters referred to in the Panel’s brief (see paragraph 43 above) and, “*so that the market can assess the likelihood of*

¹ [2006] ATP 21

² [2007] ATP 18

³ [2006] ATP 21 at [16]

⁴ [2007] ATP 18 at [56]

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a competing proposal", Metallica should also disclose in compliance with the policy of section 644 of the Corporations Act and ASIC RG 25.51:

- (a) *the indicative price in the non-binding offer proposal (which is evidence of the market value of the asset); and*
- (b) *that the third parties understand:*
 - (i) *the impact that the bid acceptances and the terms of the bid have on the ability for a competing proposal to be consummated;*
 - (ii) *any asset deal will need to satisfy ASX listing rule 11.2; and*
 - (iii) *the bid is scheduled to close on 11 June 2024.*

47. We did not consider that Metallica had made sufficient disclosure. We considered that Metallica shareholders should have the benefit of the enhanced disclosure referred to in the Panel's brief (see paragraph 43 above). However, we did not consider that the additional disclosure submitted by Diatrene (see paragraph 46 above) was required by the policy of section 644 of the Corporations Act, ASIC's guidance or Panel policy.
48. Metallica had confirmed in its submissions that it would be comfortable making further disclosure. However, Metallica submitted that FIRB approval is not required in relation to the potential competing transactions that it was discussing.
49. We invited Metallica to issue a further supplementary target's statement, in a form satisfactory to us, that specifically included:
- (a) the impact that the level of acceptances under the Diatrene Bid has had on the prospects of a competing proposal
 - (b) a statement explaining the status regarding superior proposals, and a statement reminding shareholders to the effect that no superior proposal may emerge and
 - (c) a statement to the effect that, if shareholder approval for a superior proposal was required, the outcome of the vote may be determined by the Cross Shareholders.
50. Metallica made this further disclosure in its second supplementary target's statement dated 4 June 2024 (**Second Supplementary Target's Statement**).
51. In our view, Metallica's further disclosure in the Second Supplementary Target's Statement resolves the disclosure issues submitted by Diatrene in its application.

Standstill issue

52. These proceedings are the first time substantive issues around a standstill agreement have come before the Panel since 2009 when *International All Sports Limited*⁵ was decided. However, this matter raises a different fact scenario, being an agreement that includes a mutual standstill under which no confidential or price sensitive information has been shared.

⁵ *International All Sports Limited 01* [2009] ATP 4 and *International All Sports Limited 01R* [2009] ATP 5

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International All Sports Limited

53. In *International All Sports Limited 01* the initial Panel said: “Our view is that, subject to their duties, target directors are entitled to release the target's information at their discretion and with the conditions they desire. In this case, one such condition was the standstill and the recipient of the information agreed to that condition.”⁶
54. The review Panel confirmed the initial Panel’s decision, stating “... [w]e think that there is a public interest in enforcing standstill arrangements where they encourage business transactions through the exchange of information. Therefore, the party seeking to be released from the arrangement needs to establish that unacceptable circumstances exist by it not being released.”⁷
55. Diatreme submitted that, in the context of a standstill given in contemplation of an exchange of confidential information, the Panel should only uphold the standstill if it was shown to be required to protect information shared by the target from being used improperly. Diatreme submitted that the provision of confidential information was the determining factor that led the Panel to uphold the standstill in *International All Sports Limited* and that, had no confidential information been given, each Panel in *International All Sports Limited* would have made a declaration that not releasing the standstill would have created unacceptable circumstances.
56. Diatreme noted that it is not disputed by Metallica that no confidential price sensitive or commercially sensitive information was disclosed in these circumstances.
57. ASIC submitted that it agreed with the Panel’s statement in *International All Sports Limited* that “[t]here is a public interest in enforcing confidentiality agreements and standstills as they promote the exchange of information and the maximisation of value to shareholders. Failure to enforce such agreements could disrupt the process of negotiating and consummating business transactions”⁸ but noted that the MCD and Diatreme Standstill was not an example of “such agreements” contemplated in *International All Sports Limited*. This was because, if a bidder promised a standstill in exchange for confidential information but none had been provided, the standstill “will not uphold the public interest identified in *International All Sports Limited* because the standstill will [not have] been used to encourage that particular transaction through the ‘exchange of information’.”
58. Metallica did not agree that *International All Sports Limited* is an appropriate case to apply in these circumstances. Metallica submitted that the *International All Sports Limited* decision did not go so far as to say that the disclosure of price sensitive confidential information was the only basis on which a standstill was not unacceptable and that the Panel in *International All Sports Limited* was supportive of allowing parties to enforce standstills where they help facilitate sale processes.
59. Metallica submitted that a regime that allows parties to rely on a standstill where no confidential information has been exchanged provides some opportunity for

⁶ [2009] ATP 4 at [22]

⁷ *International All Sports Limited 01R* [2009] ATP 5 at [18]

⁸ *International All Sports Limited 01* [2009] ATP 4 at [21]

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competitive tension in respect of the passing of control of Metallica and that its reliance on the Diatreme Standstill has narrowly opened the door to the prospect of a superior proposal.

60. We agree with the Panel and review Panel in *International All Sports Limited 01*⁹ and *International All Sports Limited 01R*¹⁰ that “in order to not give rise to unacceptable circumstances, the term of a standstill should be commercially justifiable according to the nature of the information to be provided under it”. We also agree with the Panel in *International All Sports Limited 01*¹¹ that a standstill period of 6 to 12 months from a relevant time is generally consistent with market practice in circumstances where confidential information has been exchanged.
61. We do not accept the proposition that a standstill is necessarily unacceptable where no confidential information has been exchanged. We consider that it may not be unacceptable to hold a party to a standstill, even if no confidential information has been provided to it, where the term of the standstill is commercially justifiable and is not inconsistent with the policy objectives of promoting an efficient, competitive and informed market. However, that period is generally likely to be shorter than in the circumstances where confidential information has been exchanged. We agree with the review Panel in *International All Sports Limited 01R*¹² that “boards proposing to enter into confidentiality and standstill arrangements need to consider carefully the term of the standstill and the restraint it imposes” before they are entered into. Given standstills are voluntary arrangements, we would caution parties against relying on Panel intervention to rewrite the terms of a standstill after the fact.
62. Diatreme submitted that it was unacceptable for the Diatreme Standstill not to be released immediately because it “is, prima facie, unacceptable as a ‘frustrating action’ unless it can be justified as being in the public interest”.
63. Metallica submitted that the Panel and review Panel in *International All Sports Limited* made it clear that standstill arrangements are commercially justifiable and that they are not prima facie unacceptable as a frustrating action.
64. We do not agree that standstill agreements are prima facie unacceptable as a frustrating action noting that parties have voluntarily agreed to enter into such agreements. However, a point in time may come when, like a frustrating action, the enforcement of a standstill agreement may have an effect on shareholders that is unacceptable.¹³

Section 602 and public interest

65. ASIC submitted that the overarching policy objective that takeover bids should occur because they increase market efficiency, provided shareholders are appropriately protected, is an objective that is likely to override standstill agreements which do not

⁹ [2009] ATP 4 at [23]

¹⁰ [2009] ATP 5 at [19]

¹¹ [2009] ATP 4 at [25], which gave the example of a relevant time as the withdrawal from the sale process

¹² [2009] ATP 5 at [20]

¹³ See Guidance Note 12: Frustrating action at [4] and [11]

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have a public interest. ASIC submitted that it considered that Metallica shareholders were, contrary to section 602(c), being denied a reasonable opportunity to participate in the benefits that would accrue to them through the Diatreme Bid.

66. ASIC further submitted that, unless Metallica can articulate a public interest in enforcing the Diatreme Standstill, the Diatreme Standstill should be released unconditionally in the interests of an efficient, competitive and informed market.
67. Metallica submitted that its reliance on the Diatreme Standstill is consistent with, and promotes the objectives of, section 602. Metallica submitted that it has relied on the Diatreme Standstill to provide Metallica shareholders the opportunity to participate in a potential superior proposal. Metallica further submitted that, absent the Diatreme Standstill, Diatreme could have declared the bid unconditional, which would be inconsistent with the principle that the acquisition of control for Metallica takes place in a competitive market.
68. Metallica also submitted that its reliance on the Diatreme Standstill is necessitated because of the Cross Shareholders' material shareholding and because no competing bidder may emerge for Metallica because the Cross Shareholders would "*likely favour the Diatreme bid, given their respective interests in Diatreme. Absent the standstill obligation, there would be no competition for control of Metallica (or its assets).*" Put another way, Metallica submitted that, absent the Diatreme Standstill, the acquisition of control of Metallica would not occur in a competitive market because the control was "*stitched up*" by virtue of the acceptances of the Cross Shareholders.
69. Diatreme submitted that enforcing the Diatreme Standstill in the current circumstances is inconsistent with the policy of Chapter 6 because:
 - (1) *no information was given which justifies the standstill (as in International All Sports). Diatreme did not receive an advantage over other bidders from receiving information;*
 - (2) *the standstill is now serving no useful purpose as Metallica has had enough time to sound out possible rival bidders, far more than the 21 days contemplated in GN23 at [10c];*
 - (3) *acceptances have been received for 56% of issued shares;*
 - (4) *the prospects of a genuine competing proposal are now diminished by ASX listing rule 11.2; and*
 - (5) *not releasing the standstill is contrary to the interests of Metallica shareholders due to the impact it is having on the takeover bid...*
70. As set out in the Revised Deed Poll, Metallica has agreed to waive the Diatreme Standstill by 17 June 2024 unless there is a Superior Proposal (as defined in the Revised Deed Poll). Accordingly, the question for us is whether the Diatreme Standstill should be released earlier than the Effective Time under the terms of the Revised Deed Poll.

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71. We note Diatreme’s suggestion that we apply the 21-day period¹⁴ provided for in our guidance on shareholder intention statements¹⁵ as guidance for what is an acceptable time to allow a rival bid to emerge. The 21-day period is specific to when it is reasonable for a shareholder who has provided an acceptance statement qualified by reference to a superior proposal to accept a bid. In other contexts, what is a reasonable time for a rival bid to emerge will depend on the prevailing circumstances.

Effective Time

72. Diatreme submitted that “[t]he *Effective Time* concept created by Metallica does not enable Diatreme’s bid to proceed in an efficient, competitive and informed market. The effect of this term is that the standstill condition will not be satisfied until the last moment of the bid or 17 June 2024, assuming no ‘superior proposal’ emerges before then.”¹⁶
73. Diatreme submitted that this timing had a number of implications including stifling any momentum for its bid with many shareholders delaying acceptance while the condition is in place and incentivising Diatreme to close its offer as soon as possible, to the detriment of Metallica’s shareholders, to minimise the risk of a ‘Superior Proposal’. Diatreme noted that a ‘Superior Proposal’ as defined by Metallica need only be something that the Metallica board considers ‘could’ be superior to the Diatreme Bid and submitted that “could be triggered by the board latching on to a competing proposal that is half-baked, even if not attractive to the majority of shareholders”.
74. Diatreme also submitted that releasing Diatreme from the standstill now would not stymie an auction in light of the fact that no other bidders had emerged despite Metallica having had since October 2023 to seek alternative proposals and having acknowledged in its First Supplementary Target’s Statement that it had been seeking rival proposals since February 2024.
75. Metallica submitted that:

The date of 17 June 2024 was selected as it represents an extension of the Diatreme Offer by exactly one month. The relevance of one month is that Diatreme could, if minded to, declare its bid unconditional on 17 June 2024 without the need to offer withdrawal rights.

The date also seemed to, intuitively, provide a reasonable opportunity for the sale process to run its course and for Metallica to have settled a binding (but conditional) sale agreement or have decided that the third party is unlikely to proceed (or to proceed on terms that the board of Metallica is confident would amount to a superior proposal). If that position changes, and Metallica believes a superior proposal is likely to eventuate given time, we would be minded to apply to the Panel to vary the position.

¹⁴ after an offer has opened

¹⁵ See Guidance Note 23: Shareholder intention statements at [10(c)]

¹⁶ On 24 May 2024, Diatreme further extended its offer to 11 June 2024 with the date for giving notice on the status of conditions postponed to 3 June 2024

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76. We consider that the Diatreme Standstill remaining in effect until 17 June 2024 in the current circumstances is not inconsistent with section 602 and the policy objectives of promoting an efficient, competitive and informed market in Metallica Shares.
77. However, we were concerned that the Diatreme Standstill could remain in effect for an undetermined time after 17 June 2024 if a ‘Superior Proposal’ was announced (limb (c) of the definition of Effective Time). While we were mindful of the fact that the Diatreme Standstill was on mutual terms and had been voluntarily assumed by Diatreme, and that Metallica submitted it was relying on the Diatreme Standstill to solicit competing proposals, in the particular circumstances of this matter (including those outlined in paragraph 78 below), we consider that the market should have more certainty as to when the standstill will end.
78. We were therefore minded to consider that the Diatreme Standstill, if enforced on its terms, may give rise to unacceptable circumstances as Metallica's reliance on the Diatreme Standstill beyond 17 June 2024 would not be consistent with, and would not promote the objectives of, section 602. We took into account a number of relevant factors that were specific to the circumstances, including:
- (a) the competing proposals being solicited by Metallica at the time would require shareholder approval, the outcome of which may be determined by the Cross Shareholders, who had accepted the Diatreme Bid
 - (b) no Metallica confidential information had been disclosed to Diatreme under the MCD or otherwise
 - (c) the time that had passed for a competing proposal for Metallica to emerge
 - (d) no competing proposal for Metallica had emerged in that time and
 - (e) we considered that the definition of ‘Superior Proposal’ in the MCD was insufficiently consistent with the generally accepted definition without a requirement that such proposal be genuine or reasonably likely of being completed (including by receiving shareholder approval from all shareholders eligible to vote).
79. However, we considered that the potential unacceptable circumstances could be resolved by further amendments to the Revised Deed Poll by Metallica.
80. In view of our concerns, we conveyed to the parties that we were minded not to make a declaration of unacceptable circumstances if Metallica amended the Revised Deed Poll to:
- (a) delete the definition of ‘Superior Proposal’ and insert a replacement definition more consistent with market practice, namely:
 - Superior Proposal* means a bona fide written proposal by a person, other than Diatreme and its associates (Competing Proposal), which the Board acting in good faith, and after receiving written legal advice from its external legal adviser and written financial advice from its financial adviser, determines:
 - a. is reasonably capable of being valued and completed in a reasonable timeframe;
 - and

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b. would, or would be reasonably likely to, if completed substantially in accordance with its terms, provide an outcome that is more favourable to the Company's Shareholders (as a whole) than the Offer, in each case, taking into account all relevant factors, including the identity and financial standing of the party or parties making the Competing Proposal, its terms and conditions, any timing considerations, and any other aspects of the Competing Proposal that would affect the probability of the Competing Proposal being completed substantially in accordance with its terms.

- (b) amend limbs (a) and (b) of the 'Effective Time' definition as follows to align limbs (a) and (b) with limb (c):

if a Superior Proposal is not announced by the Company before...

- (c) amend limb (c) as follows to provide certainty as to when the Diatreme Standstill will end where a Superior Proposal is announced by Metallica on or before 17 June 2024, and to give shareholders who accepted Diatreme's bid the opportunity to decide whether to withdraw their acceptance to support the competing proposal:

if a Superior Proposal is announced by the Company on or before 17 June 2024 ~~the end of the Offer Period (and is subject to Company shareholder approval), immediately after the general meeting of the Company's shareholders which does not approve the Superior Proposal as a 'frustrating action' by the requisite majority, as required by the applicable takeovers law and guidance, on 28 June 2024.~~

81. In suggesting these amendments, we considered that Metallica shareholders should be free to decide how to respond to any 'Superior Proposal' once it has been announced. We suggested 28 June 2024 as the release date as that would also give shareholders who have accepted Diatreme's offer the time to decide whether to withdraw their acceptance (in reliance on the statutory withdrawal right which would come into effect) to support the competing proposal¹⁷.
82. Diatreme responded that the words "on or" should not be included in limb (c), which should instead only be "before" 17 June to align limb (c) with limb (a) of the Effective Time definition. Metallica agreed to this submission.
83. Metallica responded by submitting that the concluding words in limb (c) should include the words "or such later date determined by the Takeovers Panel" after "on 28 June 2024". Diatreme objected.
84. We did not accept the addition of the words "or such later date determined by the Takeovers Panel". We have concerns about those additional words, including that it is not clear what the Panel's powers would be in those circumstances. We also consider that those words are unnecessary, as a new application would likely need to be made in any event and, on a new application, it would be open to the sitting Panel to order a different release date if the circumstances then warrant it.

¹⁷ We were not minded to require an earlier release date that did not trigger the statutory withdrawal right as that would mean that Diatreme could potentially 'shut down', and deprive shareholders the opportunity to consider, a 'Superior Proposal' by declaring its bid to be unconditional once released from the standstill

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85. On 4 June 2024, Metallica executed a replacement Deed Poll Waiver of Standstill Provisions (the **Second Revised Deed Poll**) reflecting the amendments set out above and described the amendments in the Second Supplementary Target’s Statement.
86. In our view, this resolves the issues submitted by Diatreme in its application in relation to the Diatreme Standstill.

Other issues

Association

87. In its submissions, Metallica raised a potential issue of association in relation to the common ownership of Diatreme and Metallica for reasons including the top three shareholders of Metallica have voting power of approximately 51% of Metallica and approximately 49% of Diatreme.
88. We did not consider that the alleged association raised issues sufficiently connected to the application. Any allegations of association would constitute a new circumstance that would need to be addressed via a separate application.

Notices to become a party

89. During the proceedings, we received an application to become parties to the matter from three Metallica shareholders, who collectively held 3.43% of Metallica as part of a ‘Small Shareholders Action Group’.
90. We invited the parties to make submissions on whether to accept the notice to become a party.
91. We declined to accept those shareholders’ notice to become parties because we considered that the interests of shareholders were sufficiently addressed and therefore accepting those shareholders, and inviting them to make submissions, would not further assist us and, at that stage of the proceedings, may have delayed the matter further.

DECISION

92. In summary, Metallica agreed to address our concerns regarding:
 - (a) Metallica’s disclosure in relation to potential competing proposals for Metallica, which Metallica addressed in the Second Supplementary Target’s Statement
 - (b) the definition of ‘Superior Proposal’ in Metallica’s Initial Deed Poll and Revised Deed Poll, which Metallica addressed in the Second Revised Deed Poll and
 - (c) the release date of the Diatreme Standstill where a ‘Superior Proposal’ is announced by Metallica before 17 June 2024, which Metallica addressed in the Second Revised Deed Poll.
93. 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).

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Orders

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

Christian Johnston

President of the sitting Panel

Decision dated 5 June 2024

Reasons given to parties 28 August 2024

Reasons published 6 September 2024

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Advisers

Party	Advisers
Diatreme	Herbert Smith Freehills
Metallica	Baker McKenzie