CSP

The Takeovers Panel

# Reasons for Decision
# Ashton Mining Ltd

**In the matter of Ashton Mining Ltd**
**[2000] ATP 9**

**Catchwords:**

*Statements concerning marketing of target production - whether in fact misleading - whether deemed misleading because no reasonable basis shown - whether reasonable basis must be disclosed - omission of information concerning sale prices and underground mine expansion - attribution of statement to government minister - requirements for consent*

*Corporations Law* (Cth) sections 636(3), 670A(2)

*Email Ltd (No. 1)* [2000] ATP 3 applied

*Email Ltd (No. 2)* [2000] ATP 4 applied

These are our reasons for our decision to refuse the application under sections 657A, 657D and 657E of the Corporations Law by De Beers Australia Holdings Pty Ltd (*De Beers*) for an interim order and a declaration and final orders in relation to Ashton Mining Limited (*Ashton*)

REASONS FOR DECISION

## INTRODUCTION

1. The Panel comprises Brett Heading (sitting President), Karen Wood (sitting deputy President) and Denis Byrne.

2. De Beers applied for:

   (a) interim orders preventing dispatch of a bidder's statement in relation to a takeover bid by Capricorn Diamonds Investments Pty Limited (***Rio Tinto***) for all of the ordinary shares in Ashton;
   (b) declarations that unacceptable circumstances exist in relation to that bid; and
   (c) orders to rectify those circumstances.

   These are our reasons for refusing those applications.

## BACKGROUND

### The Parties

3. De Beers is a subsidiary of De Beers Centenary AG, one of the holding companies of the De Beers companies worldwide. Rio Tinto is a subsidiary of Rio Tinto Limited, which is combined with Rio Tinto plc in a dual listedcompany structure.

4. The largest part of Ashton's business is its 40.2% interest in the Argyle Diamond Mining Joint Venture with Rio Tinto Limited to mine diamonds in the Kimberley region of Western Australia. Rio Tinto Limited has a 59.7% interest in the joint venture, and is the mine operator. These numbers include interests held through the third joint venturer,

the Western Australian Diamonds Trust (***WADT***), which is largely owned by Ashton and Rio Tinto Limited.

5. We gave leave under section 194 of the *Australian Securities and Investments Commission Act* for all parties to be represented by their solicitors.

## The Bids

6. De Beers has made a cash bid for all of the ordinary shares in Ashton. The bid is conditional on De Beers obtaining 50.1% control of Ashton and (in effect) on Ashton being able to withdraw from its present marketing arrangements by the end of 2001. There are other conditions, not presently relevant. Ashton has issued a target's statement in response to that bid.[1]

7. Rio Tinto has announced a bid for Ashton. There are scrip and cash alternatives. The bid is conditional on Rio Tinto obtaining acceptances for 29.9% of Ashton's shares.[2] Again, there are other conditions, not now relevant. Rio Tinto lodged a bidder's statement on 19 September and a supplementary bidder's statement on 28 September. In the absence of interim orders, it may post offers and a replacement bidder's statement (incorporating the supplementary bidder's statement) on 4 October.

8. Malaysian Mining Corporation Berhad holds 49.94% of the shares in Ashton. It has committed 19.9% to each of the rival bids. It is possible that control of Ashton will pass to either of the bidders (or a third bidder), without them being able to compulsorily acquire the minority shares in Ashton. Accordingly, one of the alternatives facing Ashton shareholders is to remain as minority holders in an Ashton controlled by De Beers or Rio Tinto.

## The Application

9. De Beers applied for interim orders restraining the dispatch of Rio Tinto's bidder's statement for Ashton, unless and until certain changes were made. The Panel's general policy is not to hold up dispatch of a bidder's statement, unless it contains misleading matter, and its dispatch may spread erroneous ideas which later supplementary statements may not succeed in removing.[3] Formal defects and omissions which are not misleading can generally be remedied by a supplementary bidder's statement and an extension of the relevant bid, if necessary.

## Marketing Arrangements

10. The marketing of the Argyle diamonds is regulated by a number of agreements between the joint venturers, to some of which the Western Australian government is also party. Important parts of those agreements are confidential. Changes to the marketing arrangements such as De Beers proposes would require the approval of the Western Australian government. A number of other quite basic issues about implementing those

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[1] References to Ashton's target's statement are to this document.

[2] Together with the 19.9% committed by Malaysian Mining Corporation Berhad, this would amount to nearly 50%.

[3] Compare *Re Email Ltd (No. 1)* [2000] ATP 3 at [33]; *Re Email Ltd (No. 2)* at [48].

changes are most unclear: De Beers does not have access to the complete relevant agreements. While Ashton has published a great deal of information about those agreements, Ashton, De Beers, and Rio Tinto have published conflicting views on their interpretation.

# SUBSTANTIVE ISSUES

### Rio Tinto's Statement about De Beers' Marketing Proposals

11. De Beers complains of the following statement made by Rio Tinto in its amended bidder's statement at paragraph 6.8(b):[4]

> "In light of De Beers' stated intention in clause 4.3(b) of its Bidder's Statement "that Ashton would market its share of rough diamond production from Argyle through the De Beers Group's marketing arm", Rio Tinto considers that the replacement marketing arrangements contemplated by De Beers are not likely to be reasonable alternative marketing arrangements as they involve the separate marketing of Ashton's share of Argyle production and the sale of that production through the De Beers Group's marketing arm and are likely to unduly harm Rio Tinto's and WADT's ability to market their diamonds and be detrimental to the interests of the State [of Western Australia]. Rio Tinto also considers that such alternative arrangements are likely to have an adverse impact on the market for Argyle diamonds generally and hence on Ashton's interest in Argyle. Rio Tinto notes Ashton's views expressed on p14 of its Target's Statement that:
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> > "The loss of critical mass that would result from the separate marketing by Ashton of its share of production from Argyle may render it sub-economic for Rio Tinto to continue marketing its share of production.
> >
> > "Argyle" has become a valuable brand name in its own right with an excellent reputation in the marketplace. The loss of production to sell under the Argyle brand would be likely to dilute the goodwill associated with the product. Further, if Ashton were to terminate its participation in Argyle's joint marketing arrangements, Rio Tinto may lose its right to use the Argyle brand name."
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> Rio Tinto also notes the views of the independent expert in its report attached to Ashton's Target's Statement (in respect of De Beers' intentions) that:
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> > "If the De Beers Offer is successful, De Beers has indicated that it will

[4] In the original version, this was as follows: "Further, Rio Tinto considers that the replacement marketing arrangements contemplated by De Beers are not likely to be reasonable marketing arrangements, and are likely to unduly harm Rio Tinto's and WADT's ability to market their diamonds and to be detrimental to the interests of the State [of Western Australia]. Rio Tinto also considers that such alternative arrangements are likely to have an adverse impact on the market for Argyle diamonds generally and hence on Ashton;'s interest in Argyle,

terminate Ashton's existing marketing arrangement in relation to its share of production from the Argyle Diamond Mine. This action is likely to significantly weaken ADS and may cause a fall in Argyle diamond prices, which would reduce the value of Rio Tinto's controlling interest in the Argyle JV.""[5]

12. This passage is a commentary on, and uses terms derived from, two paragraphs of Rio Tinto's original bidder's statement which in turn paraphrase paragraphs 6.8(b)(iii) and (iv) of Ashton's target's statement:

"(iii) Ashton's view is that it is entitled to terminate the existing marketing arrangements in relation to its share of production from the Argyle Diamond Mines Joint Venture at any time, subject to giving 12 months notice and subject to two qualifications.

(iv) The first qualification is that Ashton has submitted [to the Minister] reasonable alternative marketing arrangements. The second qualification seems to be that any proposals to change or replace existing marketing arrangements should not unduly harm Rio Tinto's or WADT's ability to market their diamonds or be detrimental to the interests of the State of Western Australia."

**Whether this Statement is Misleading**

13. De Beers submits that the statement is misleading, in that it implies that Rio Tinto is aware of De Beers' replacement marketing proposals and is in a position to form a judgement that their effects are likely to be adverse to WADT, Rio Tinto, the State of Western Australia and Ashton itself.

14. De Beers' basic submission is that Rio Tinto cannot have any reasonable ground for its statement, because "De Beers has not informed Rio Tinto of any form of alternative marketing arrangements that De Beers would propose." This assertion is not supported by the facts. De Beers has made it plain that it proposes to market Ashton's share of the Argyle diamonds outside ADS. Rio Tinto's objections are specifically directed to that aspect of De Beers' proposal.

15. Similarly, as regards the other limbs of this submission, Rio Tinto has given some reasons to support its view that De Beers proposed changes would be detrimental to it, WADT, Western Australia and Ashton. Rio Tinto has also cited in support of its view (and largely adopted) statements made by Ashton[6] and KPMG Corporate Finance[7] in Ashton's target's statement. De Beers has not submitted that Ashton's views are mistaken, or that there are offsetting benefits.

16. De Beers does submit that Rio Tinto has no basis for suggesting that "De Beers would make a substantial investment of over A$500 million in acquiring Ashton only to seek to implement proposals which would reduce the value of Ashton's interests in its main investment (Argyle)." In the absence of any evidence about the marketing strategies

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[5] Paragraph 6.8(b) of Rio Tinto's bidder's statement.
[6] Page 14 of the target's statement.
[7] Paragraphs 9.9 and 9.10 of the Independent Expert's Report.

that Ashton would adopt under De Beers' control, the materials cited by Rio Tinto appear to support its view that Ashton would be adversely affected by withdrawing from ADS. It is not self-evident that De Beers would not accept some reduction in Ashton's profitability from changes which were beneficial to its other marketing arrangements and adverse to those of its competitors.

17. We should not restrain dispatch of Rio Tinto's bidder's statement, unless we have reason to believe that its dispatch would lead to unacceptable circumstances in relation to the affairs of Ashton. Relevantly, those would be constituted by an insufficiency of information for shareholders to decide on one or other bid, or by an uninformed market in Ashton shares. Misinformation is as bad as insufficient information.

18. De Beers has not, however, demonstrated that Rio Tinto's statement is in fact false or misleading. It has put before us no evidence that its proposals will not be detrimental to the ability of Rio Tinto and WADT to market their share of the Argyle diamonds (or that any detriment will not be excessive), or detrimental to the State of Western Australia and Ashton itself. In the absence of a prima facie case that Rio Tinto's statement is in fact false or misleading, we would not be justified in holding up dispatch of the bidder's statement. Accordingly, De Beers' submission must fail.

**Whether deemed misleading**

19. De Beers has confined itself to saying that Rio Tinto's statement is misleading, because Rio Tinto has no foundation for it. Accordingly, we have considered whether the statement should be *deemed* to be misleading, because it is a statement about the future and Rio Tinto has no reasonable basis for making it, under subsection 670A(2):[8]

> "A person is taken to make a misleading statement about a future matter (including the doing of, or refusing to do, an act) if they do not have reasonable grounds for making the statement. This subsection does not limit the meaning of a reference to a misleading statement or a statement that is misleading in a material particular."

20. Subsection 670A(2) reverses the onus of proof where a person suffers loss or damage by reliance on a statement about the future. The provision requires a person who makes a statement about the future to *have* a reasonable basis for the statement, but it does not require them to *set out* that basis. To imply into subsection 670A(2) a requirement that supporting evidence be published with every statement about the future would lead to an infinite regress: relevant evidence would itself relate to the future and would equally need supporting.

21. Even if there existed a requirement to set out the basis on which such a statement was made, in the absence of evidence to the contrary, and having regard to the partial support derived from Ashton's target statement, we accept that the context provided by Rio Tinto indicates that it has reasonable grounds for its views. That should not be taken to imply that we adopt those views.

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[8] De Beers did not expressly rely on this section.

**No evidence of motive to discredit**

22. De Beers submitted that this statement was made only to discredit De Beers and its bid. It provides no evidence for this submission. Our concern is with unacceptable circumstances, which might relevantly result from Ashton's shareholders and directors having inadequate information about the bids or from the market in Ashton shares being uninformed. In any event, such evidence would not cast light on whether its statement is in fact false or misleading.

**Prices for Argyle Diamonds**

23. De Beers complains that Rio Tinto has omitted to include in its bidder's statement information about the prices recently achieved for Argyle diamonds. It does not suggest that the omission renders the bidder's statement misleading.

24. Recent prices are canvassed in Ashton's target's statement, so that shareholders and the market in Ashton shares already have a source of information on them. De Beers does not suggest that Ashton's discussion is anything less than full and accurate.

25. De Beers does suggest that the price used in financial projections by Ashton ($12.50 per carat +/- 10%) is inconsistent with a price mentioned by Mr Leigh Clifford of Rio Tinto ("an average price of $13 per carat"). Given the error range, there is no strict inconsistency. Even ignoring the error range, since $12.50 is a long-term price and Ashton report that the market for Argyle diamonds has been particularly buoyant of late,[9] there is no inconsistency with Mr Clifford's statement.

26. We are not satisfied that unacceptable circumstances would result from dispatch of the bidder's statement without the addition of information on recent prices for Argyle diamonds, whether because Ashton shareholders would not have adequate information on which to decide whether to accept an offer, or because the market in Ashton shares would be uninformed.

**Underground Mining**

27. The Argyle mine is currently worked as an open cut. Recent drilling work has indicated that the ore body extends below the depth to which the open cut can be taken. Ashton has in its target's statement (and previously) mentioned the potential to mine the deeper parts of the ore body by underground mining, starting in 2006. Ashton has given no figures for the costs or revenue of such an extension. [10]

28. De Beers complains that Rio Tinto has omitted to include in the Bidder's Statement information about the quantum and timing of the capital expenditure required for, and the likely production potential of, the proposed underground extension.

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[9] See, for instance, page 6 of Ashton's half-yearly report for the period to 30 June 2000.

[10] The expert reports in Ashton's target's statement bring into account the potential for underground mining in valuing Ashton's interest in Argyle: see paragraphs 7.9, 7.10 and 8.6 of the KPMG Independent Expert's Report and paragraphs 3.5, 3.5.6 and 3.7 of the AMC Technical Expert's Report, where the uncertainty of the figures is discussed.

29. In its bidder's statement, Rio Tinto refers readers to Ashton's discussion of the extent of the ore body and the potential for underground mining of the deeper parts of it and states that it has no material disagreements with that discussion. It then declines to enter into speculation on the financial aspects of the underground extension on the grounds that no decision on that extension is reasonably anticipated before 2003, the joint venture partners have made no commitment to proceed with the underground extension and evaluation of it is ongoing.[11] It also states that it "intends to continue the evaluation of the underground potential of the Argyle mine."[12]

30. We agree with Rio Tinto that the financial aspects of the underground extension are too speculative to be properly commented on in a bidder's or target's statement.

31. Accordingly, we are not satisfied that unacceptable circumstances would result from dispatch of the bidder's statement without the addition of information on capital expenditure for, and production potential of, a potential underground extension of the Argyle mine.

**Statement attributed to WA Government**

32. In the course of discussing the obstacles which De Beers would have to surmount to market Ashton's share of the Argyle diamonds outside ADS, Rio Tinto mentions that its view that all joint venturers would have to join in an approach to the Minister to change the arrangements is consistent with that of the Western Australian Department of Resources Development.[13] De Beers submits that the Department's consent should have been obtained to the publication of this statement, since it is based on the Department's opinion on the matter. The issue is the Department's consent, not the correctness of the view attributed to it. It is implicit that it is open to us to find that the attribution is capable of leading to unacceptable circumstances, because of a breach of a provision of Chapter 6.

33. Under subsection 636(3), Rio Tinto should not have included the statement without the Department's consent.[14] Rio Tinto has undertaken to issue a supplementary bidder's statement, withdrawing the reference to the Department, within a week after dispatch of its bidder's statement.

34. In our view, the attribution without consent is a real but minor defect in the bidder's statement: one which does not justify holding up dispatch. The context is set by Rio Tinto's statement that:

> "The resolution of the issues relating to termination of the current marketing arrangements will depend on the construction of and implications from the various documents executed by the parties and the State of Western Australia and

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[11] Paragraph 6.16.
[12] Paragraph 6.7(c)(iv).
[13] Paragraph 6.8(b) of Rio Tinto's bidder's statement.
[14] This would be true even if there were implied a requirement that the person be an expert (as in repealed section 1032): the Department is plainly expert on the matters under its administration. However, we should not be understood to support such an implication.

the conduct of the parties over time."[15]

The effect of accepting the view attributed to the Department is to incrementally increase the force of the case that De Beers will have difficulty in arranging for Ashton to sell its share of the Argyle diamonds outside ADS.

# LATE APPLICATION

35. This application was lodged at 6.30p.m. on Friday 30 September. Absent a decision to restrain it, Rio Tinto was entitled to dispatch its takeover documents on Wednesday 4 October. The fact that the application was made so late increased the difficulties the Panel and all parties experienced in resolving it satisfactorily, without holding up dispatch while we made our decision. We appreciate that Rio Tinto's supplementary bidder's statement was lodged on 28 September and that it addressed some of De Beers' concerns (though not to De Beers' satisfaction), no doubt requiring late amendments to the application.

36. Given that the Panel's policy is not to restrain dispatch of takeover documents, unless it has clear reason to do so, delay in applying for an order restraining dispatch works against the applicant.

# CONCLUSION

37. For the above reasons, we have dismissed De Beers' applications for interim and substantive relief. We thank all parties for submissions made in a very short space of time. There will be no order for costs.

**Brett Heading**
10 October 2000

[15] Paragraph 6.8(b) of Rio Tinto's bidder's statement.