



**In the matter of Anzoil NL 02
[2002] ATP 21**

Catchwords:

Review of Panel decision – share sale agreement – breach by ancillary provision in agreement – contravention of section 606 – cancellation of agreement – voting control through best endeavours clause – consent to withdraw review application – unfair prejudice

Corporations Act 2001 (Cth), sections 657EA and 606(1)

ASIC Regulations 16(1)

These are our reasons for our decision to uphold the decision in the matter of *Anzoil NL (No. 1)*, to decline to permit Anzoil NL (Anzoil) to withdraw its application for review of that decision and to dismiss that application after varying the orders made at first instance.

preliminary

1. These reasons relate to an application made on 30 December 2002 by Anzoil NL (**Anzoil**) for a review of the decision in Anzoil 01 to make a declaration of unacceptable circumstances under section 657A of the Corporations Act 2001 (the **Act**), and final orders under section 657D of the Act. The declaration and orders were in relation to the affairs of Anzoil as they were affected by an agreement between Capersia Pte Ltd (**Capersia**) and IGM Group Ltd (**IGM**) for IGM to sell Capersia 9,178,336 fully paid ordinary shares in Anzoil (9.46% of 96,991,788) for 4.5 cents/share.
2. The review Panel was constituted by Dr Annabelle Bennett SC (sitting President), Mrs Nerolie Withnall (sitting deputy President) and Mr Scott Reid.

decision at first instance

3. On 21 November 2002, the sitting Panel in *Anzoil (No. 1)* made a declaration of unacceptable circumstances and orders under section 657A and section 657D of the following findings that Capersia and IGM had contravened section 606 of the Act, and that one or both of them was associated with Dormley Pty Ltd (**Dormley**) for the purpose of determining the composition of the board of Anzoil. The reasons for the decision in *Anzoil (No. 1)* have been published and are available on http://www.takeovers.gov.au/Content/Decisions/2002/Anzoil_241202.asp.
4. In a media release published when the *Anzoil (No. 1)* application was made, the Panel said:

“The concerns raised by Anzoil in its application include the following:

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- IGM and Capersia became associates of one another, and each acquired a voting power in Anzoil of 25.6%, by entering into a Share Sale Agreement on 23 August 2002. This is because completion under the Share Sale Agreement was conditional on a nominee of Capersia being appointed to the board of Anzoil, with both parties being required to use their best endeavours to satisfy this condition; and
- Although the parties to the Share Sale Agreement have purported to terminate the agreement, they continue to act as associates of one another because they seek to change the composition of the board of Anzoil.

Anzoil has sought interim orders including orders preventing IGM, Capersia and certain related parties from exercising any powers to vote at a general meeting or to requisition any meeting of members. It has also sought final orders including orders directing Anzoil not to comply with any of the notices by IGM under section 249D of the Corporations Act, or the board nominations by IGM, Capersia and another Anzoil shareholder, Dormley Pty Ltd. It has also sought final orders requiring IGM and Capersia to dispose of their shares in IGM.”

5. The principal conclusions of the *Anzoil (No. 1)* Panel are set out in the following paragraphs from its decision. By way of background, Messrs Hwang and Wong were connected with IGM, Dr Poll was a director of Dormley and Mr Jacobs was a director of Capersia. Anzoil Thailand was a subsidiary of Anzoil, which was involved in a transaction in which Dormley and Capersia were involved.

“10. At all relevant times, the following shareholdings have existed:¹

Holder	No.	% on 97M	% on 112M
IGM	21,578,336	22.25%	19.35%
Sale Parcel ²	9,178,336	9.46%	8.2%
Dormley	4,551,724	4.7%	4.1%
Capersia	3,250,608	3.35%	2.9%
Jacobs ³	973,238	1%	0.9%
Hwang ⁴	2,214,000	2.3%	2%
Wong	2,500,000	2.6%	2.2%

¹ [The footnotes to paragraph 10 are also from the original decision, with additional material in square brackets.] Except as noted, these numbers are taken from the list of the top 20 shareholders as at 26 September 2002 on page 47 of Anzoil’s Annual Report for the year to 30 June 2002. The number for Mr Wong was arrived at by adding two numbers in that list, under substantially identical names.

² Part of the IGM parcel in the previous line, included again for ease of reference. [This is the parcel which IGM agreed to sell to Capersia under the Share Sale Agreement.]

³ Mr Jacobs controls Capersia, and other entities connected with him hold the additional 973,238 shares. This number is taken from his substantial shareholding notice of 26 August.

⁴ The draft agreement between Mr Hwang and Capersia says 2,314,000 shares.

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Anzoil issued 14,540,000 shares ... on 18 October [2002] ... increasing the number of fully paid shares on issue from 96,991,788 to 111,531,788. The percentage holdings are given above on both bases. ...⁵

...

64. *We conclude that Capersia agreed to buy some of IGM's shares and offered to buy all of Messrs Hwang's and Wong's shares with a view to obtaining voting and board control over Anzoil, relying on obtaining the support of Dormley in relation to voting for the board and in the purchase of shares from IGM. Among Capersia's objectives was to secure Anzoil's co-operation in relation to Anzoil Thailand. Dr Poll and Mr Jacobs acted in concert in relation to negotiations with Anzoil concerning Anzoil Thailand i.e in relation to the conduct of Anzoil's affairs. Circumstantial evidence indicates that Dr Poll was also associated with Mr Jacobs in relation to the composition of the board of Anzoil.*
 65. *The evidence establishes clear contraventions of section 606 by IGM and Capersia, involving the purchase of a substantial interest at an 80% premium to market and offers to acquire more shares, which would have resulted in Capersia having voting power of not less than 30%, connected with proposals to change the board and intervene in the conduct of the company's affairs. We are satisfied that these breaches, the willingness of the parties to carry forward the purchase from IGM by means other than the Agreement and the continued acting in concert regarding the composition of the Anzoil board constitute ongoing unacceptable circumstances in relation to the affairs of Anzoil.*
 66. *The evidence does not establish that Dormley or Dr Poll were involved in the contravention, but it does show that Dr Poll was so closely associated with Mr Jacobs in relation to the affairs of Anzoil and prepared to take the benefit of Mr Jacobs' support, as to make it preferable that his candidacy for the board be restrained, as well as those of IGM's and Capersia's nominees.*
 67. *The events set out above constitute unacceptable circumstances in relation to the affairs of Anzoil. They involve an attempt to amass a block of shares carrying 36% or more of the votes in that company, acquiring most of those shares at a large premium to the market price, for the purpose of using those votes to take control of the company, change its board and intervene in its affairs in the interests of the parties who acquired the shares. That conduct involved actual and contemplated contraventions of Chapter 6. Other shareholders had no opportunity to sell at the prices offered to IGM and its directors, and their approval to the sales was not obtained."*
6. On 21 November 2002 the Anzoil (No. 1) Panel made a declaration and orders, copies of which are attached. It ordered:
- "Anzoil, its directors, other officers and members not to put before a general meeting of Anzoil any resolution:*

⁵ The fully paid ordinary shares are the only shares now material to control of Anzoil or to calculations of voting power, although Anzoil also has 7,433,500 partly paid shares on issue.

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- (a) to remove or to appoint a director on the requisition or nomination of any of the Associated Parties unless the requisition or nomination is received after the Relevant Date; or
- (b) to appoint as a director at or before the Relevant Date a person who has, at any time before the date of this order, been nominated for appointment as a director of Anzoil by any of the Associated Parties,

where a reference to:

- the *Relevant Date* is a reference to 20 December 2002 or the date of the Annual General Meeting of Anzoil held during the year 2002 (whichever is first); and
- the *Associated Parties* is a reference to IGM, Capersia, Dormley, their respective related bodies and the officers of all of those bodies."

The parties were given a brief statement of the Panel's findings on 21 November. Final reasons for decision were provided to parties on 2 December, in time for use in the review proceedings.

review application

7. On 25 November 2002, Anzoil applied under section 657EA of the Act for review of the decision to make that declaration and those orders. Anzoil submitted that the orders made by the Panel in *Anzoil (No. 1)* should be reviewed on the following grounds:
 - (a) An illegal association existed between IGM, Capersia and Dormley, and would continue to exist;
 - (b) The orders were not sufficient to prevent the illegal objective of the association between IGM, Capersia and Dormley, being to control the composition of the Board of Anzoil. In this regard, 2 of the 3 current directors of Anzoil were required to retire by rotation and seek re-election at the general meeting of Anzoil then scheduled to be held on 31 December 2002. At that general meeting, IGM, Capersia and Dormley would have the opportunity to achieve their objective by voting against the re-election of the 2 retiring directors and rendering the Board dysfunctional;
 - (c) The orders did not take into account the Panel's findings that the illegal association between IGM and Capersia did not end when the share sale agreement between IGM and Capersia dated 23 August 2002 was cancelled and that the illegal association between Dormley and IGM and/or Capersia had not ended; and
 - (d) Pursuant to public policy considerations, a breach of the Corporations Act should not be allowed to continue.
8. Anzoil sought the following additional orders under section 657D of the Act:

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- (a) That IGM, Capersia and Dormley not be entitled to exercise their rights to vote at any general meeting of Anzoil relating to the appointment or removal of directors; and
- (b) That IGM, Capersia and Dormley be required to dispose of their shares in Anzoil forthwith.

That is, where the original orders merely prevented IGM, Capersia and Dormley from nominating their own candidates for election at the Annual General Meeting, Anzoil sought orders which:

- prevented them from voting for or against any candidate; and
- compelled them to dispose of their shares.

nature of application

9. A review under section 657EA of the Act is a *de novo* reconsideration of the decision at first instance, on the merits and on the facts as they stand at the date the review Panel makes its decision. The review Panel may re-examine all of the facts and issues and may, as it considers appropriate, affirm, vary or set aside the decision of the Panel at first instance and substitute its own decision. This includes affirming, varying or setting aside the existing declaration and orders and making new ones.

dealing with the application

10. The review Panel was appointed on 28 November. On 30 November it decided, under Regulation 20 of the ASIC Regulations, to conduct proceedings in relation to the Application. On 2 December it issued a brief to all parties who had taken part in *Anzoil (No. 1)*, together with the final reasons for decision in *Anzoil (No. 1)*.
11. Several of the *Anzoil (No. 1)* parties, including ASIC, did not make submissions on the brief. However, the review Panel had the submissions and evidence in *Anzoil (No. 1)* and the reasons for decision in that matter. Additional submissions were received from:
 - Anzoil - supporting the inferences drawn and the declaration and orders made at first instance, but seeking the additional orders, for the reasons, set out above;
 - Dormley - denying that it had ever been associated with IGM or Capersia or that there was any direct or reliable evidence of such an association;
 - Capersia - that Capersia no longer had any agreement to acquire shares from IGM or any intention of acquiring shares in or control of Anzoil, although expressly acknowledging that it had entered into the Share Sale Agreement for the purpose of acquiring control of Anzoil; and
 - IGM - that there had been no continuing association between IGM and Capersia after the Share Sale Agreement was cancelled, and that there was no evidence of such a continuing association.

Both Capersia and IGM submitted that they had been trying to sell their Anzoil shares to third parties and that the declaration and orders should be revoked, either because they were unfounded when they were made, or because there was no further need for them.

igm sells to monarch

12. In addition, IGM advised that it had sold all of its shares in Anzoil on 4 December, the day submissions were due and received, to Monarch Resources Ltd (**Monarch**). Monarch's substantial shareholding notice of 6 December disclosed no other relevant interests in shares in Anzoil.⁶ No close connection was shown between Monarch and any of the parties to the proceedings.

anzoil seeks to withdraw

13. As a result, on 6 December, Anzoil applied for consent to withdraw its application for review, leaving the declaration and orders in *Anzoil (No. 1)* unaltered. It submitted that the sale of the IGM parcel constituted such a change of circumstances that no good purpose would be served by continuing the proceedings. Anzoil dropped its application for additional orders, but submitted that the declaration and orders made in *Anzoil (No. 1)* should stand, as the Panel's conclusions had been supported by the evidence before it and its orders had been appropriate to the facts it had found.
14. IGM, Capersia and Dormley all opposed the application to withdraw, on the basis that withdrawal of the application would deprive them of the opportunity to have the findings and orders at first instance set aside. IGM and Capersia argued that the sale vindicated their previous submissions that any association between them had ceased when the share sale agreement was dissolved and that the declaration and orders in *Anzoil (No. 1)* should be revoked, as there had been no proper foundation for them.
15. Dormley argued that it would be particularly affected by a decision to leave on foot the orders in *Anzoil (No. 1)*, as it had on 8 October 2002 nominated Dr Poll for election to the Board of Anzoil at the Annual General Meeting. That was the only remaining nomination by any of the Dormley, IGM and Capersia parties, and it could not be voted on while the orders remained in effect.

decision

16. The review Panel decided to uphold the declaration and make only one change in the orders in *Anzoil (No. 1)*. It decided that the findings at first instance were available inferences from the considerable documentary evidence available to the Panel at first instance and that the declaration and orders had been appropriate in the light of those findings.
17. Accordingly, the review Panel decided to change those orders only to the extent necessary to prevent unfair prejudice to Dormley, in the light of Dormley's

⁶ Monarch bought 22,000,000 shares on market, including the whole of the IGM parcel and some other shares.

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secondary role in the association found by the Panel at first instance and the subsequent sale by IGM to Monarch. The continued operation of the orders would not be prejudicial to IGM or Capersia, as neither had a current nomination for the Annual General Meeting or could have nominated anyone for election to the Board before the orders ceased to operate at the end of 2002.

18. For this reason, subject to Dr Poll providing the statutory declaration mentioned below and in the absence of any evidence to the contrary, the review Panel decided to vary the orders to allow Dr Poll's nomination to be put to the annual general meeting of Anzoil on 31 December 2002. As mentioned above, Dr Poll's nomination was the only subsisting nomination affected by the orders. While its effect had been suspended as a result of the orders, it had not been withdrawn.
19. Dr Poll made a statutory declaration to the effect that there was no relationship in the nature of an association between him or Dormley or any of Dormley's related bodies or their respective officers, on the one hand, and Monarch or any of the related bodies of Monarch or their respective officers, on the other hand. In reliance on this declaration, the Panel varied the orders by omitting reference to the Dormley parties, so as to allow Dr Poll's nomination to be put to a vote (which it was, at the Annual General Meeting on 31 December 2002).
20. The review Panel refused Anzoil's request to withdraw its application for review, as a withdrawal would have prevented it from varying the orders as regards the Dormley interests. With that exception, it declined to vary the original decision.
21. A copy of the variation order is attached to these reasons.

costs

22. Parties other than Anzoil sought orders for their costs of the review proceedings, particularly as Anzoil did not obtain the orders it sought on review and had sought to withdraw its application after other parties had incurred considerable expense in responding to the application. As the review Panel upheld a declaration of unacceptable circumstances, there was power to order costs. However, the Panel decided that Anzoil had acted reasonably in bringing the application, on the facts as they stood when the application was made, and had acted reasonably in seeking to withdraw the application promptly when it learned of the sale of the IGM parcel. Accordingly, it made no order for costs.
23. The Panel consented to each party being represented by its solicitors.
24. The decision was communicated to the parties on 17 December, and Anzoil issued amended proxy forms before its Annual General Meeting was held on 31 December.

Nerolie Withnall

Deputy President of the Review Panel

Decision dated 19 December 2002

Reasons published 04 September 2003



**Takeovers Panel
Corporations Act 2001
Sections 657A and 657D
Declaration and Order**

WHEREAS:

- A Anzoil NL (*Anzoil*) is a company incorporated under the *Corporations Act 2001* and listed on the Australian Stock Exchange Ltd;
- B On 23 August 2002, IGM Group Limited (*IGM*) held shares to which were attached 22.25% of the votes attached to shares in Anzoil and Capersia Pte Ltd (*Capersia*) held shares to which were attached 3.35% of the votes attached to shares in Anzoil;
- C On 23 August 2002, IGM agreed to sell to Capersia shares (the *Share Sale Agreement*) to which were attached 9.46% of the votes attached to shares in Anzoil;
- D It was a condition precedent to completion of the Share Sale Agreement that a representative of Capersia be appointed to the board of Anzoil, by invitation or otherwise, and IGM and Capersia agreed to use their best endeavours to have such an appointment made;
- E Since 23 August 2002, IGM has twice requisitioned a general meeting of Anzoil, with a view to removing some or all of the directors then in office and appointing as directors two nominees of Capersia, and both IGM and Capersia have nominated one of those nominees for appointment to the board at Anzoil's Annual General Meeting;
- F On 22 October 2002, IGM and Capersia agreed to cancel the Share Sale Agreement;
- G The resolutions to which the requisitions and nominations relate have not been considered at a general meeting of Anzoil;
- H The requisitions and nominations were not withdrawn when the Share Sale Agreement was cancelled, or until after proceedings were commenced in the Panel;
- I While the Share Sale Agreement was on foot, Dormley Pty Ltd (*Dormley*) participated in discussions with IGM and Capersia about proposals:
 - (a) for Dormley to acquire the remainder of IGM's shares in Anzoil; and
 - (b) to change the composition of the board of Anzoil; and
- J By a placement on 18 October 2002, IGM's holding in Anzoil was diluted to 19.35% of the votes in Anzoil, Capersia's holding was diluted to 2.91%, the parcel to which the Share Sale Agreement related was diluted to 8.23% and Dormley's holding was diluted from 4.7% to 4.1%,

The Panel finds that:

1. Under the Share Sale Agreement, IGM and Capersia were associates in relation to Anzoil, because they:

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- (a) were parties to a relevant agreement; and
- (b) acted in concert,

for the purpose of determining the composition of the Board of Anzoil by the exercise of their joint voting power in Anzoil;

2. By entering into the Share Sale Agreement, both IGM and Capersia breached section 606 of the *Corporations Act 2001*, because Capersia acquired relevant interests in shares in Anzoil by a transaction in relation to shares at the same moment as the voting power in Anzoil of both Capersia and IGM increased to a percentage between 20% and 90%;
3. In view of the association between IGM and Capersia, the Share Sale Agreement related to the acquisition of a substantial interest in Anzoil;
4. Other holders of shares in Anzoil had no opportunity to participate in the benefits proposed to accrue to IGM in relation to that acquisition;
5. Until the Share Sale Agreement had been entered into, neither the directors of Anzoil nor other shareholders in Anzoil:
 - (a) knew that Capersia proposed to acquire a substantial interest in Anzoil; or
 - (b) had any opportunity to consider the merits of that proposal, or information to enable them to assess the merits of that proposal;
6. The acquisition detracted from the achievement of an efficient, competitive and informed market in shares in Anzoil;
7. The association between IGM and Capersia did not end when the Share Sale Agreement was cancelled;
8. Dormley was associated with IGM, Capersia or both of them in relation to Anzoil, because they:
 - (a) proposed to become parties to a relevant agreement; and
 - (b) proposed to act in concert,for the purpose of determining the composition of the Board of Anzoil by the exercise of their joint voting power in Anzoil; and

9. The association between Dormley and IGM and/or Capersia has not ended,

Accordingly, the Panel DECLARES that the circumstances set out above are unacceptable circumstances in relation to the affairs of Anzoil and ORDERS Anzoil, its directors, other officers and members not to put before a general meeting of Anzoil any resolution:

- (a) to remove or to appoint a director on the requisition or nomination of any of the Associated Parties unless the requisition or nomination is received after the Relevant Date; or
- (b) to appoint as a director at or before the Relevant Date a person who has, at any time before the date of this order, been nominated for appointment as a director of Anzoil by any of the Associated Parties,

where a reference to:

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- the *Relevant Date* is a reference to 20 December 2002 or the date of the Annual General Meeting of Anzoil held during the year 2002 (whichever is first); and
- the *Associated Parties* is a reference to IGM, Capersia, Dormley, their respective related bodies and the officers of all of those bodies.

Carol Buys
President of the Sitting Panel
Dated 21 November 2002



**Takeovers Panel
Corporations Act 2001
Sections 657D and 657EA
Variation of Orders**

WHEREAS:

- A On 21 November 2002, the Panel (as constituted at first instance) made a declaration and orders in relation to the affairs of Anzoil NL (*Anzoil*) under sections 657A and D of the *Corporations Act 2001*, respectively; and
- B On 25 November 2002, Anzoil applied for a review of the Panel's decision under section 657E of the *Corporations Act 2001*.

In accordance with sections 657EA(4) and 657D(3) of the *Corporations Act 2001*, the Panel (as constituted for the review) varies, with effect from 18 December 2002, the orders that were made on 21 November 2002 by deleting the reference to Dormley, its related bodies and the officers of those bodies in the definition of "Associated Parties" which forms part of those orders.

**Nerolie Withnall
Deputy President of the Sitting Panel
Dated 19 December 2002**