



**In the matter of Cobra Resources Limited  
[2003] ATP 23**

**Catchwords:**

*Announcement of takeover bid - content of bidder's statement - disclosure requirements - lodgment and dispatch of bidder's statement - failure to obtain qualified legal advice - numerous contraventions of Chapter 6 - uncertainty of bid - misleading announcements to the market - confused market - bidder restrained without ASIC approval*

*Corporations Act 2001 (Cth), sections 602(a) and (b), 635, 636, 637 and 671B*

**These are our reasons for making a declaration of unacceptable circumstances in relation to the affairs of Cobra Resources Limited (Cobra) in response to an application under section 657C of the Corporations Act (Act) by the Australian Securities and Investments Commission (Application). The Application was made in connection with an announcement by Mr Terry Stephens of his intention to make a takeover bid for all the shares in Cobra.**

**Preliminary**

1. The sitting Panel was made up of Kevin McCann (sitting President), John King (sitting Deputy President) and Teresa Handicott.

**Summary**

2. The Australian Securities and Investments Commission (**ASIC**) applied to the Panel on 16 May 2002 for a declaration of unacceptable circumstances and interim and final orders in connection with an announcement by Mr Terry Stephens (**Announcement**) of his intention to make a takeover bid (**Bid**) for all the shares in Cobra.
3. ASIC asserted that the Announcement, and the document that Mr Stephens provided as a bidder's statement (**Bidder's Statement**) contravened sections of Chapter 6 of the Act (the takeovers chapter) (**Chapter 6**) and that it frustrated the principles of sections 602(a) and 602(b). ASIC asserted that the Bid, if it were made in the manner announced by Mr Stephens, would similarly contravene and frustrate the Act and its policy.
4. The Panel considered that the Announcement and Bidder's Statement contravened various sections of Chapter 6. The Panel also considered that the Bid would contravene Chapter 6 if it were made in the form announced.
5. The Panel considered that the Announcement and other statements made by Mr Stephens created confusion in the market for Cobra shares and breached the principle that the acquisition of control over the voting shares in a listed company take place in an efficient, competitive and informed market. This created unacceptable circumstances in relation to the affairs of Cobra.

## Takeovers Panel

### Reasons for Decision - [Cobra Resources Limited]

6. The Panel considered that the unacceptable circumstances and contraventions of Chapter 6 were largely due to Mr Stephens' failure to obtain qualified advice on Chapter 6 prior to making his announcements, and then subsequently when ASIC advised him that his announcements contravened Chapter 6.
7. The Panel made a declaration of unacceptable circumstances on 23 May 2003.
8. The Panel made final orders preventing Mr. Stephens:
  - from proceeding with the Bid as currently announced; and
  - making or announcing any other bid for Cobra, unless he has lodged a fresh bidder's statement with ASIC and been informed by specified senior officers of ASIC that ASIC had accepted the bidder's statement.
9. The Panel considered that unless it made the orders referred to above, there was an appreciable risk that any future public statements or conduct by Mr Stephens may again contribute to an inefficient and ill-informed market in Cobra shares.
10. The final orders provide Mr Stephens with the opportunity to make a fresh bid for the shares in Cobra provided that ASIC is satisfied that his bid complies with Chapter 6. Mr Stephens is responsible for satisfying ASIC that the fresh bid should proceed. The Panel believes that this requirement is appropriate in view of the substantial concerns raised in relation to the initial Bid, including the conduct by Mr Stephens.

### Relevant Parties

11. Cobra is a Western Australian company listed on the Australian Stock Exchange (ASX). Its principal business activity is mineral exploration (principally nickel) in Australia and overseas.
12. Mr Stephens is a private individual who at the time of the Application appeared not to have a relevant interest in any Cobra shares. A company of which Mr Stephens had been a director, Arrowlea Pty Ltd, had made a previous unsuccessful bid for Cobra in November 2001.
13. ASIC's Register of Disqualified Persons states that Mr Stephens has been permanently disqualified from managing corporations under the Corporations Act from 1 March 2002. Mr Stephens had previously been temporarily disqualified from managing companies as a result of separate conduct.

### Background

#### *Bid announcement*

14. On 28 April 2003 Cobra released an announcement to ASX (**Announcement**) that contained the following extract of an email that had been sent by Mr Stephens to Cobra and ASX on that day:

## Takeovers Panel

### Reasons for Decision - [Cobra Resources Limited]

*...as at this 28th day of April 2003 it is the intention of Terry Stephens to purchase all shares on offer to take control of Cobra Resources Ltd. My bids will be both on and off market at a price of 0.025 cents per share....*

15. Immediately before the Announcement was made Cobra shares were trading at approximately 0.5 cents per share. After the Announcement the share price rose considerably for a short period of time.
16. On 29 April 2003 Cobra released an announcement to ASX advising that Mr Stephens had clarified that offers under the bid would be made at 0.25 cents per share.
17. On 7 May 2003 Cobra released a further announcement to ASX, attaching a document received from Mr Stephens on 6 May 2003 entitled "Bidder's Statement". The statements in the Bidder's Statement implied that the offer was an on-market bid.
18. The Bidder's Statement had been prepared without legal advice. It was one page long and stated amongst other things that:
  - the Bid would be both on and off market;
  - a broker would be appointed in 14 days;
  - the offer was subject to a 100% minimum acceptance condition;
  - Mr Stephens was unable to acquire a different, presumably lower, interest in Cobra as he was barred by ASIC from being a company director or manager; and
  - Mr Stephens intended to challenge the ruling which prevented him being a company director or manager.
19. The Bidder's Statement did not satisfy the disclosure requirements in section 636 of the Act. The document had not been lodged with ASIC nor was it dispatched to Cobra shareholders<sup>1</sup>.
20. The only comment by Cobra on the Bid was to state that it was seeking legal advice in connection with the Bid. Cobra published the information about the Announcement and the Bid set out in paragraphs 14, 16, and 17 above onto the ASX Company Announcements Platform after receiving advice from ASX that it was required to do so under ASX Listing Rules. Cobra also considered that it was appropriate to publish the information because it believed that the Bidder's Statement had been given to members of the media.

---

<sup>1</sup> As a result there was some doubt whether the document amounted to a 'Bidder's Statement' for the purposes of sections 636 and 637 of the Act.

## Takeovers Panel

### Reasons for Decision - [Cobra Resources Limited]

#### *Media statements regarding support for Bid*

21. Mr Stephens received significant attention from the media in response to the Announcement. On 8 May 2003 Mr Stephens was quoted in a major Australian newspaper as stating that he was '50 to 60 per cent' of the way to taking over Cobra. It was unclear what these statements meant. Mr Stephens did not lodge any substantial shareholder notices under section 671B of the Act.

#### *Correspondence with ASIC*

22. On 8 May 2003 ASIC wrote to Mr Stephens advising of ASIC's serious concerns with the Bidder's Statement and other related matters. ASIC suggested that Mr Stephens should retain a suitable lawyer to help resolve the issues as quickly as possible. ASIC requested various undertakings from Mr Stephens (**see paragraphs 23 and 24**).
23. On 9 May 2003 Mr Stephens confirmed to ASIC<sup>2</sup> that he would not purchase any shares in Cobra on-market, where this would result in his voting power in Cobra exceeding 20%. Mr Stephens stated that he would appoint a broker and solicitor within 14 days and that he would also lodge a supplementary bidder's statement within 14 days.
24. Mr Stephens, however, did not indicate that he would not send out the Bidder's Statement to shareholders, as was requested by ASIC. It appeared, however, that at that date Mr Stephens had not sought to obtain Cobra shareholders' names and addresses from Cobra.
25. On 12 May 2003 a representative of ASIC informed Mr Stephens that ASIC still had serious concerns with the Announcement and the Bid (if it were to proceed as announced) and the resulting uncertainty in the market for Cobra shares. In particular it was concerned that Mr Stephens had not yet engaged a lawyer or broker to assist him with the Bid.
26. On 12 May 2003 Mr Stephens informally requested that ASIC permit him to withdraw the Announcement. Mr Stephens stated that he had held discussions with the Cobra board about him acquiring various assets from Cobra and that this 'may solve all matters without a takeover bid'.
27. On 14 May 2003 ASIC informed Mr Stephens that it would be unlikely to allow him to withdraw the Announcement.
28. On 14 May 2003, after ASIC had informed him that it would be unlikely to allow him to withdraw the Announcement, Mr Stephens informed ASIC that he would proceed with the Bid. On this same day the Cobra board's solicitors informed Mr Stephens that the Cobra board was not able to discern the terms of either Mr Stephens' Bid or possible other offers by Mr Stephens for shares or assets in Cobra and could not therefore consider them.

---

<sup>2</sup> These statements were provided by email. ASIC did not however receive the email from Mr Stephens as the email was sent to an incorrect email address. Solicitors for Cobra forwarded the email to ASIC later that day.

## Takeovers Panel

### Reasons for Decision - [Cobra Resources Limited]

#### *Supplementary Bidder's Statement*

29. On 15 May 2003, Mr Stephens provided a supplementary Bidder's Statement to ASIC confirming that the Bid was to be a market bid.
30. The supplementary Bidder's Statement attempted to address some of ASIC's concerns. However, it contained the statement that the on-market bid was subject to a 51% minimum acceptance condition<sup>3</sup>.
31. This document was not formally lodged with ASIC as it was not signed.

#### *Discussions with Cobra board*

32. Mr Stephens informed the Panel that he had held discussions with the board of Cobra regarding his acquiring assets from Cobra or being issued shares in Cobra.
33. On 15 May 2003 Cobra made an announcement to ASX that it was 'review[ing] all its non-core mining assets with a view to crystallising the investment in those assets.'
34. The Panel was not able to ascertain whether the Cobra board was considering or had at any point contemplated any dealings with Mr Stephens or third parties. The Panel however assumed that the Cobra board was complying with the ASX Listing Rules and that it would inform shareholders if any material transactions were likely to proceed.

#### *Application to Panel*

35. On 16 May 2003 ASIC applied to the Panel for a declaration of unacceptable circumstances and interim and final orders detailed in **paragraphs 39 and 41** below.

#### *Difficulty obtaining legal representation*

36. On 21 May 2003 Mr Stephens advised the Panel that he was experiencing difficulties engaging a solicitor to represent him for the Panel proceedings or more generally in relation to the Bid.
37. In view of these issues Mr Stephens informed the Panel that he agreed to orders being made that:
  - (a) he would withdraw his current Bid; and
  - (b) not make a fresh bid for Cobra shares until he appointed a solicitor to prepare the bid to ensure that it complied with Chapter 6.
38. Mr Stephens also requested an order be made enjoining Cobra and its directors from changing the name of Cobra or selling any Cobra assets for 90 days so as to give him time to make a fresh takeover bid for the company.

---

<sup>3</sup> Section 625(1) provides that offers under a market bid must be unconditional.

## Takeovers Panel

### Reasons for Decision - [Cobra Resources Limited]

#### Orders sought by ASIC

##### *Interim orders*

39. ASIC sought the following interim orders under section 657E of the Act:
- (a) that Mr Stephens be restrained from dispatching the Bidder's Statement to Cobra shareholders, pending final determination of the Application;
  - (b) that Mr Stephens be restrained from purchasing any Cobra shares on-market, where this would result in his voting power in Cobra exceeding 20%, in reliance on the exception from section 606 set out in Item 2 of section 611, pending final determination of the Application; and
  - (c) any other interim orders that the Panel saw fit to make.

##### *Declaration*

40. ASIC sought a declaration of unacceptable circumstances in relation to the affairs of Cobra.

##### *Final orders*

41. ASIC sought the following final orders under section 657D of the Act:
- (a) that Mr Stephens be permanently restrained from making offers under the Bid;
  - (b) an order for ASIC's costs in the Application; and
  - (d) any other final orders the Panel saw fit to make.

#### **Application**

##### *A. Contravention of provisions of Chapter 6*

42. ASIC alleged that the Bidder's Statement created unacceptable circumstances by contravening numerous provisions of Chapter 6.
43. The main deficiencies that ASIC identified with the Bidder's Statement were that:
- (a) the terms of the Bid were uncertain because the Bid purported to be a market bid, yet was expressed to be subject to a minimum acceptance condition; and
  - (b) the Bidder's Statement omitted much of the information required under the Act, and has not been lodged with ASIC.
44. ASIC further stated that it believed the supplementary Bidder's Statement contained material information that was false and misleading. It indicated that if the document had been lodged with it, it would have refused to register the document pursuant to subsection 1274(8) of the Act.

## Takeovers Panel

### Reasons for Decision - [Cobra Resources Limited]

#### B. *Efficient, competitive and informed markets*

45. ASIC further alleged that the Bidder's Statement and surrounding circumstances frustrated the principles in sections 602(a) and 602 (b)(iii) of the Act. It alleged that consequently the proposed acquisition of control of shares in Cobra would not take place in an efficient, competitive and informed market and that Cobra shareholders would not have sufficient information to enable them to assess the merits of the Bid.

#### C. *Bidder's identity*

46. Section 602(b)(i) of the Act states that one of the purposes of Chapter 6 is to ensure that shareholders know the identity of any person who proposes to acquire a substantial interest in a company.

47. ASIC alleged that the disqualification mentioned in **paragraph 12** above meant that it was likely that, if the Bid were successful, Mr Stephens would not be able to be a director or manager (formally or informally) of Cobra.

48. This disqualification would apply regardless of whether:

- Mr Stephens obtained 100% of the shares in Cobra; or
- Cobra was a private or public company.

#### D. *Intentions*

49. Further, ASIC asserted that the statements in the Bidder's Statement regarding Mr Stephens' intentions for Cobra were incomplete, and possibly misleading. Additional information was required as to the effect of Mr Stephens' disqualification and the manner in which it will impact his ability to implement his intentions with regard to Cobra.

50. ASIC asserted that if the Bid proceeded successfully it was likely that Mr Stephens' disqualification would have created unacceptable circumstances as Cobra shareholders would have had insufficient information regarding the person or persons who would effectively control a substantial interest in Cobra acquired under the Bid.

#### **Interim orders made by Panel**

51. On 20 May 2003 the Panel made the interim orders referred to in **sub-paragraphs 39** (a) and (b) above.

52. Mr Stephens had offered to provide undertakings to the same effect as the orders made.

53. However, the Panel believed that Cobra shareholders and the market would have greater certainty in relation to the affairs of Cobra if it made interim orders with immediate effect, rather than proceeding by way of signed undertakings.

## Takeovers Panel

### Reasons for Decision - [Cobra Resources Limited]

#### Panel consideration of issues

54. The Panel considered that the Announcement and the Bidder's Statement contravened numerous sections of Chapter 6. It also considered that it was reasonable to expect that the Bid would contravene Chapter 6 if the Bid were made as announced.
55. In particular the Bidder's Statement did not address the disclosure requirements under section 636 of the Act.
56. It was also likely, amongst other things, that Mr Stephens had breached the procedural requirements in section 635.
57. The Announcement and Bidder's Statements created confusion in the market for Cobra shares and breached the principle set out in section 602(a) of the Act that the acquisition of control over the voting shares in a listed company take place in an efficient, competitive and informed market.
58. Statements to the media by Mr Stephens before and during Panel proceedings were also likely to have had this effect.
59. The Panel considered that the confusion which Mr. Stephens' Bid had caused in the market for Cobra shares was largely due to his failure to seek qualified advice prior to making the Bid.
60. Bearing in mind the fact that Mr Stephens had previously been the subject of Federal Court action as a result of non-compliance with the requirements of the Act, the Panel considered that he should have been aware that he would have difficulty in complying with the takeover provisions without the benefit of legal advice.
61. Initially the Panel was open to the view that the problems surrounding the Bid could have been resolved by orders that the current Bid proceed if Mr Stephens engaged an appropriate lawyer to enable him to modify the bid so that it complied with the law.
62. However, during the course of proceedings it became apparent that this was not a feasible course of action. Despite time extensions given to Mr Stephen, he was not able to engage a lawyer. In view of this, the Panel had no assurance that the delay would not continue for a further significant period.
63. The Panel considered that it was unsatisfactory for the market for Cobra shares to remain uninformed about the Bid for an indeterminate period of time.
64. The Panel also considered that further time extensions may have unduly restricted the management of Cobra.

#### DECLARATION AND DECISION

65. The Panel made a declaration of unacceptable circumstances in relation to the affairs of Cobra. It consented to the parties being represented by their solicitors.



## Takeovers Panel

### Reasons for Decision - [Cobra Resources Limited]

#### ORDERS MADE

66. The Panel ordered that Mr. Stephens not proceed with the Bid, and not make or announce any other bid for Cobra, before he had:
  - lodged a fresh bidder's statement with the ASIC; and
  - been informed in writing by an officer of ASIC occupying the position of Assistant Director of Corporate Finance or Corporate Finance Counsel that he or she had accepted the document for lodgement.
67. The final orders were made to restore the integrity of the market in Cobra shares. They indicated clearly to the market that the Bid was at an end.
68. The final orders were also designed to ensure that the market would be able to rely on any subsequent announcement of a bid for Cobra by Mr Stephens.
69. The Panel believed that these orders were necessary to prevent future public statements or conduct by Mr Stephens contributing to an inefficient and ill-informed market in Cobra shares.
70. The final orders also overcame the risk that a fresh bidder's statement lodged by Mr Stephens would be accepted by ASIC without an appropriate degree of scrutiny by an ASIC officer who was familiar with the history of this matter.
71. The final orders provided Mr Stephens with the opportunity to make a fresh bid provided that ASIC accepted the new bidder's statement for lodgement. Mr Stephens would be responsible for satisfying ASIC that the bid complied with Chapter 6 and should proceed. The Panel believed that this was appropriate in view of the substantial concerns raised in relation to the initial Bid.
72. The Panel did not make the orders restricting Cobra identified in **paragraph 38** above as it had not been provided with evidence that the transactions were likely to occur or should be restricted in the manner sought by Mr Stephens.

#### Costs

73. The Panel did not make an order on costs.
74. ASIC had informed the Panel that it no longer sought an order requiring Mr Stephens to pay its costs in this matter. ASIC indicated that its costs in the Application had been modest.
75. Owing to ASIC's position and the very brief nature of Cobra's submissions and as Mr Stephens conducted himself co-operatively in relation to the Panel proceedings and without undue delay, the Panel decided not to require Mr Stephens to pay Cobra's costs in this matter.

Dated 1 July 2003

Kevin McCann

**Takeovers Panel**

**Reasons for Decision - [Cobra Resources Limited]**

President of the Sitting Panel  
In the Matter of Cobra Resources

## Takeovers Panel

### Reasons for Decision - [Cobra Resources Limited]

#### CORPORATIONS ACT 2001

#### SECTIONS 657A AND 657D

#### DECLARATION AND ORDERS

In the matter of **Cobra Resources Limited** the Panel finds that:

- A. On 28 April 2003 Mr. Terry Stephens gave a notice (**Notice**) to Cobra Resources Limited (**Cobra**) of his intention to make a takeover bid for all of the shares in Cobra (**Bid**);
- B. The Notice was released by Cobra to Australian Stock Exchange Limited (**ASX**);
- C. On or about 7 May 2003 a document from Mr. Stephens entitled 'Bidder's Statement,' setting out the Bid referred to in the Notice, was given to Cobra. Cobra then released that document to ASX;
- D. It is likely that the Notice and Bidder's Statement contravened various sections of Chapter 6 of the Corporations Act (**Act**);
- E. In particular the Bidder's Statement did not address the issues required by section 636 of the Act;
- F. The Notice and Bidder's Statement created a degree of confusion in the market for Cobra shares and frustrated the principle set out in section 602(a) of the Act that the acquisition of control over the voting shares in a listed company take place in an efficient, competitive and informed market.

Therefore, the Takeovers Panel:

- (a) declares that the circumstances set out above are unacceptable circumstances in relation to the affairs of Cobra; and
- (b) orders that Mr. Stephens not proceed with the Bid, and not make or announce any other bid for Cobra, before he has lodged a fresh bidder's statement with the Australian Securities and Investments Commission (**ASIC**), and been informed in writing by an officer of ASIC occupying the position of Assistant Director of Corporate Finance or Corporate Finance Counsel that he or she has accepted the document for lodgement.

Dated 23 May 2003

Kevin McCann  
Sitting President  
Cobra Resources Proceedings