



**In the matter of Novus Petroleum Limited 02  
[2004] ATP 09**

**Catchwords:**

*Competing bids – media reports outlining bidder’s intentions concerning bid price – alleged statement that bidder would decide whether to increase bid by specified date – failure by bidder to make announcement by specified date – truth in takeovers policy – “last and final statements” – potential to mislead the market – inefficient and uninformed market – Panel declining to commence proceedings*

*Corporations Act 2001 (Cth), section 602*

*Takeovers Panel Guidance Note 14 – “Financing Arrangements”*

*ASIC Policy Statement 25 “Takeovers: false and misleading statements”*

**These are our reasons for declining to commence proceedings in relation to an application by Sunov Petroleum Pty Ltd under sections 657A and 657D for a declaration of unacceptable circumstances and final orders.**

**THE PROCEEDING**

1. These reasons relate to an application (the **Application**) by Sunov Petroleum Pty Ltd (**Sunov**) under sections 657A and 657D of the *Corporations Act 2001 (Cth)* (the **Act**)<sup>1</sup>, dated 19 May 2004, in relation to the affairs of Novus Petroleum Limited (**Novus**).

**THE PANEL & PROCESS**

2. The President of the Panel appointed Nerolie Withnall (sitting President), Jennifer Seabrook (sitting Deputy President) and Teresa Handicott as the sitting Panel (the **Panel**) for the Application.
3. We decided not to conduct proceedings in relation to the Application and made no declaration or final orders in relation to it.

**FACTUAL BACKGROUND**

**Parties**

4. Novus is currently the subject of two competing takeover bids. Medco Energi (Australia) Pty Ltd, a wholly owned subsidiary of PT Medco Energi Internasional Tbk (collectively, **Medco**) announced a conditional takeover bid for Novus on 22 December 2003. Medco’s bid is currently due to close on 8 June 2004 and, as at the date of the Application, the bid price offered by Medco for each ordinary share in Novus was \$1.74.

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<sup>1</sup> All statutory references are to the Act, unless otherwise indicated.

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5. Sunov subsequently announced a conditional takeover bid for Novus on 19 January 2004. As at the date of the Application, Sunov's bid was due to close on 3 June 2004 and the bid price offered by Sunov for each ordinary share in Novus was \$1.85.
6. On 22 April 2004, the independent directors of Novus made an announcement to ASX recommending that shareholders accept Sunov's bid and advised that Novus had agreed to pay Sunov a break fee up to a maximum of \$2.75 million in certain circumstances.

### The Alleged Medco Statements

7. On 18 May, Sunov's legal advisers wrote on behalf of Sunov to Medco's legal advisers alleging that press reports attributed statements to Medco or its executives, in and outside Australia, indicating that Medco would decide whether to increase its bid price by a nominated date, but that Medco had let that date pass without further comment or clarification.
8. These statements were reported by various press and news wire services in March and April 2004 (the **Past Statements**) and in May 2004 (the **Current Statements**) (the Past Statements and Current Statements collectively, the **Alleged Medco Statements**). The Past Statements and Current Statements are set out as follows:

#### Past Statements:

Date	Statement	Source
29 March 2004	"We are considering raising it and we are doing an evaluation", Medco's Sugiharto said in a telephone interview in Jakarta. "We'll make the decision at the latest on April 8. That's the latest but it could be sooner"	Bloomberg
31 March 2004	"We will go ahead with our plan (to take over Novus) and expect to file a final bid before April 8," Medco's Finance Director Sugiharto told reporters Wednesday	Dow Jones
2 April 2004	Company sources said reports out of Indonesia indicated Medco would make a new offer by as early as today	AAP
7 April 2004	"Medco, Indonesia's only publicly traded oil company, will raise its offer for Novus by today", Medco Chief Financial Officer Sugiharto told reports in Jakarta last week	Bloomberg

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**Current Statements:<sup>2</sup>**

Date	Statement	Source
12 May 2004	“We will decide next week on whether or not to raise our bid for Novus”, Sugiharto said	Bloomberg
12 May 2004	<p>“Indonesia’s largest listed oil and gas firm PT Medco Energi Internasional Tbk (MEDC.JK) said on Wednesday it would decide by next week if it would raise the bid and remain in the contest for Australia’s Novus Petroleum Limited ...</p> <p>Medco president director Hilmy Panigoro said on Wednesday the company had appointed UBS as financial adviser and would this week complete a study on whether to proceed with its Novus bid.</p> <p>So next week we will have decided whether we will raise the bid price or not,” he told reporters</p>	Reuters News
13 May 2004	“PT Medco Energi has claimed that it will make a final decision on its takeover bid for Novus Petroleum next week ... It has insisted that it will not become engaged in a bidding war”	WMRC Daily Analysis

9. In the letter from Sunov’s legal advisers dated 18 May, Sunov claimed that the Alleged Medco Statements were “last and final” statements in accordance with ASIC’s “Truth in Takeovers” policy (ASIC Policy Statement 25), and requested that Medco confirm and undertake by 19 May that it would issue a supplementary bidder’s statement or make an ASX announcement before 24 May stating either that Medco would increase its offer price to a specified price or that its then current offer price of \$1.74 was final and would not be increased.

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<sup>2</sup> We inferred that the references to “next week” in the Current Statements (reported on 12 and 13 May) referred to the week ending on the close of business on Friday 21 May.

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10. On 19 May, Medco's legal advisers responded to Sunov's letter on behalf of Medco, denying that Medco or any of its executives had made any "last and final" statements regarding Medco's bid and that as a result there was no basis for Sunov's assertion that the market had been, or would be, misinformed regarding Medco's intentions or that Medco was subject to any self-imposed deadline. However, Medco offered to issue a supplementary bidder's statement setting out its position regarding the status of its bid by 24 May.
11. Sunov's legal advisers sought clarification as to whether the supplementary bidder's statement would set out the matters referred to in [9]. Sunov found Medco's response to this request to be unsatisfactory and subsequently lodged the Application with the Panel.

### **THE APPLICATION**

12. In the Application, Sunov alleged that, as at the date of the Application, Medco had repeatedly failed to do what it had publicly promised to do in the Alleged Medco Statements, namely announce a decision in relation to its bid price by the specified date.
13. Sunov further alleged that Medco had not denied or clarified the Alleged Medco Statements which, Sunov claimed, were stated in clear and unambiguous terms and without qualification or reservation. Sunov submitted that the Alleged Medco Statements created an expectation that an increase from Medco was imminent and that they were "last and final statements" thereby attracting the operation of ASIC Policy Statement 25.
14. Sunov submitted that the Alleged Medco Statements were last and final statements therefore had a serious detrimental effect on the market for Novus shares resulting in the market for control of Novus not being efficient, competitive and informed, and in shareholders in Novus not having sufficient information to assess the merits of the bids by Medco and Sunov.
15. Sunov also submitted that the Alleged Medco Statements were unlikely to be regarded as acceptable in England or in other major financial markets, noting the relevant rules from the London City Code on Takeovers and Mergers.
16. In light of the above, Sunov sought that we make a declaration of unacceptable circumstances and the orders specified in its Application because the Current Statements:
  - (a) offended the policy objectives of section 602 that takeovers take place in an efficient, competitive and informed market and that target shareholders be given enough information to enable them to assess the merits of a bid;

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- (b) were misleading or deceptive, in breach of section 1041H and section 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth); and
- (c) offended the requirements in ASIC Policy Statement 25 relating to “last and final statements”.

#### Orders sought by Sunov

- 17. Sunov requested that we make final orders that:
  - (a) Medco prominently and clearly announce its intentions (the **Statement of Intentions**), by way of issuing a supplementary bidder’s statement or making an announcement to ASX, either that it would increase its bid to a specified price or that its then current price of \$1.74 would not be increased; and
  - (b) Medco not do anything inconsistent with the Statement of Intentions.

#### DISCUSSION

- 18. The Application was received on 19 May, two days before the end of “next week” (ie. 21 May) as referred to in the Current Statements. Therefore, we wrote to the parties stating that we would defer making a decision under ASIC Regulation 20 whether to commence proceedings in relation to the Application until after the close of business on Friday 21 May, on the basis that we wished to consider what action (if any) had been undertaken by Medco to fulfil, retract or correct the Current Statements before that time.
- 19. For the purpose of assisting us in relation to our decision whether or not to commence proceedings, Medco made preliminary submissions on 19 May seeking to explain the circumstances of the making of the Alleged Medco Statements.
- 20. Medco asserted in these submissions that:
  - (a) if and to the extent that the Alleged Medco Statements were based on statements made by Medco or its executives, they were not an accurate report of those statements and that, as a consequence, no “last and final statements” had been made by Medco and there was no justification for Medco being required to make the Statement of Intentions;
  - (b) neither it nor its executives had made any public statements (to reporters or otherwise) regarding Medco having made a decision regarding an increase in the consideration offered under Medco’s bid or a commitment to the timing in which any decision regarding any increase in consideration might be made by Medco;

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- (c) if the Alleged Medco Statements were attributable to any conduct by it or its officers, they appeared to have originated from interviews given by Medco executives in the Bahasa Indonesian language with Indonesian reporters who were unfamiliar with Australian takeovers concepts and this was likely to have contributed to the inaccurate reporting of the statements made by the Medco executives;
  - (d) in response to questions in those interviews, the relevant executives had made comments to the effect that Medco expected to make a decision regarding its bid before the date applicable at the time under sections 630 and 650C as the date by which it would need to decide whether or not it would extend the offer period under the bid; and
  - (e) none of the Current Statements were reported in Australian metropolitan print, radio and television media and that this was significant given that the orders requested in the Application only related to the Current Statements.
21. We noted Medco's assertions but also noted that the Current Statements did appear on well-known financial news services accessible on the internet and that Medco did not identify any attempt or effort on its part to retract or correct any inaccuracies in the Alleged Medco Statements.
22. On 21 May, Medco lodged a supplementary bidder's statement with ASIC stating that Medco would increase its bid price from \$1.74 to \$1.90 per Novus share (**Medco's Revised Bid**), conditional upon:
- (a) Medco successfully completing negotiations to arrange a binding financing package to fund the revised bid;
  - (b) Novus agreeing to similar break fee arrangements for Medco as it currently has with Sunov in relation to Sunov's bid for Novus; and
  - (c) an announcement by the independent directors of Novus recommending Medco's revised bid to Novus shareholders, in the absence of a superior offer.
23. Given the extent to which Medco's announcement on 21 May appeared to fulfil the Current Statements and so made unnecessary the declaration and the principal order sought by Sunov, we wrote to the parties inviting Sunov to advise whether it wished to continue with the Application and to provide any supporting reasons, and inviting the other parties to make submissions as to whether we should commence proceedings on the remaining issues (being the alleged past existence of unacceptable circumstances in relation to the Past Statements and the order sought by Sunov that Medco not do anything inconsistent with the Statement of Intentions).

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24. On 24 May, Sunov notified us that it did not wish to continue with the Application. Medco submitted that we should not commence proceedings on the remaining issues.
25. However, on the same day, ASIC submitted that we should commence proceedings on the basis that ASIC considered that Medco's supplementary bidder's statement was contrary to the principles set out in the Panel's Guidance Note 14 "Funding Arrangements", and because it gave rise to unacceptable circumstances, insofar as it disclosed Medco's intention to increase its bid consideration, subject to it obtaining adequate finance. ASIC submitted that this detracted from an efficient, competitive and informed market for the control of Novus and also contravened the policy underlying section 631.<sup>3</sup>
26. On 25 May, and before we had considered ASIC's submission, Medco announced to ASX that it had secured the financing package required to fund Medco's Revised Bid. Also, the independent directors of Novus announced to ASX their recommendation that subject to there being no superior offer, shareholders accept Medco's Revised Bid, the withdrawal of their recommendation of Sunov's bid and that a break fee arrangement had been entered into between Novus and Medco. Accordingly, Medco increased its bid price to \$1.90 per Novus share and at the same time declared its offer to be unconditional.
27. Following this announcement, we received confirmation from ASIC that, in the current circumstances, ASIC did not wish to make any application to the Panel concerning the Past Statements or the supplementary bidder's statement relating to Medco's Revised Bid.

## DECISION

28. Given that after these developments the circumstances described in the Application as being unacceptable were substantially changed so that we considered it was unlikely that we would make a declaration or orders on the Application, we decided not to commence proceedings in relation to the Application, notwithstanding the important matters that Sunov had raised in the Application.
29. The Application raised several important issues concerning factual matters which appeared to be quite troubling. Although not necessary to our decision, we consider it to be important for us to make some comments in relation to those issues and matters.

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<sup>3</sup> It should be noted that ASIC's submission did not specifically relate to the issues raised by Sunov in the Application.

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30. Paragraph 602(a) directs the Panel's attention to the need for an efficient, competitive and informed market. In the context of takeover bids, ASIC Policy Statement 25 provides useful guidance to bidders, targets and significant shareholders on this subject. Like all policy documents, it should be read not as legislation but as providing a framework enabling market participants to identify appropriate behaviour in particular circumstances, even if the circumstances are not specifically dealt with in the policy document. We, like other Panels, support the approach of ASIC Policy Statement 25<sup>4</sup> and commend adherence to its policy to bidders, targets and significant shareholders.
31. Section 631(2) is a specific example of the mischief that may be caused by the making of inappropriate statements: it indicates that an announcement of a bid should not be made recklessly. The Panel has issued guidance in Guidance Note 14: "Financing Arrangements" (GN 14) concerning the need to have a reasonable basis for believing that the bidder will have the necessary cash to provide the consideration under the proposed bid and has indicated that there will be unacceptable circumstances where the structure of the bid alter (eg. by an increase in bid consideration) which means that the financing arrangements become inadequate.<sup>5</sup> However, these are just specific example of a general principle, that markets in target shares should remain at all times efficient, competitive and informed. This is also the basis for Policy Statement 25, and the Panel decisions which have supported the approach of Policy Statement 25.
32. The facts of this matter, which do not appear substantially to have been in dispute, prompt the following additional observations, based on the comments in [30] and [31]:
  - (a) It is desirable that information be released to the market through market processes, such as announcements to ASX, rather than through briefing journalists. Not only do we consider this to be a more efficient way of ensuring the information is brought to the market's attention, it also reduces the possibility that a company officer has been misunderstood or misquoted. It provides objective evidence of what the relevant party intends the market to know and enables the market to trade on a properly informed basis.
  - (b) Consistently with ASIC Policy Statement 25, if a bidder, target or significant shareholder is reported in the media in a way that that party considers to be inaccurate, it is important for the party, promptly and clearly to correct the situation by a new release to the market (preferably through ASX). It is not appropriate for a party to

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<sup>4</sup> See *BreakFree 04(R) [2003] ATP 42* at [62]-[65] and the Panel decisions cited there.

<sup>5</sup> GN 14 at [14.3(d)]



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allow the market to trade on an ill-informed basis knowing the statement to be inaccurate.

- (c) We note the difficulties caused by translation of oral statements made in one language into another. We consider that, given the importance of efficient, competitive and informed markets in Australia, this is a further reason why statements should be made through ASX rather than informally in discussions in other languages in other countries with journalists whose knowledge of the other language or of English (or indeed of the peculiarities of Australian takeover law and procedure) may be imperfect.
- (d) We consider that where statements (wherever they may originally have been made) are reported on major international news services (for example, Reuters and Bloomberg), this will be sufficient to constitute a publication likely to affect the market in securities in Australia. We consider that the use by Australian securities traders of these and similar services is sufficiently well-known to mean that a publication of information in that manner is as effective as a publication in Australia.
- (e) It was particularly troubling that statements concerning possible increases of the consideration of the bid were reported, at a time when the bidder apparently could not fulfil the obligation discussed in GN14 in relation to having a “reasonable basis” for the funding of any increase in consideration. We consider that a bidder who makes a public statement that there may be a price increase should have the same degree of certainty in relation to funding that price increase as it would need to have concerning the initial consideration when an announcement is made to which section 631 applies. This is not because that provision applies directly, but because the principle which underpins that section (being the need for efficient, competitive and informed markets) also applies to statements about increases in bid price: price is one of the most important elements in a takeover bid and, particularly where there are competing bids, bidders must be especially careful to ensure that the market is not encouraged to draw incorrect inferences as to possible price increases where the bidder does not have a reasonable basis for believing that it would be able to meet its obligations under an increased bid.

33. We made no declaration or orders in relation to the Application.

**Nerolie Withnall**  
**President of the Sitting Panel**  
**Decision dated 26 May 2004**  
**Reasons published 7 June 2004**