



**In the matter of Emperor Mines Ltd 01R
[2004] ATP 27**

Catchwords:

rights issue, underwriting, equal opportunity, renounceability, discount, need for funds,

Corporations Act 2001 (Cth) sections 602, 606, 611, 615, 657EA

InvestorInfo Limited [2004] ATP 06, applied

These are the Panel's reasons for declining to make a declaration of unacceptable circumstances and orders concerning the affairs of Emperor Mines Ltd.

SUMMARY

1. These reasons relate to an application (**Review Application**) to the Panel from Durban Roodeport Deep Ltd (**DRD**) and its wholly owned subsidiary DRD (Isle of Man) Ltd (**DRD IoM**)¹ under section 657EA of the Corporations Act 2001 (Cth) (**Act**)². The application was for a review of a decision by the Panel (**Emperor 01 Panel**) on 17 October 2004 *Emperor Mines Ltd* [2004] ATP 23 (**Emperor 01**). That decision had been to make a declaration of unacceptable circumstances and final orders in response to an application by three shareholders of Emperor (**Original Applicants**) made on 29 September 2004 in relation to the affairs of Emperor Mines Ltd (**Emperor**).
2. The Panel (**Review Panel**) declined to make a declaration of unacceptable circumstances, and therefore made no final orders.
3. The Review Panel was influenced by advice from the Original Applicants that, unlike submissions which they had made to the Panel in the *Emperor 01* proceedings, in light of the orders made by the Emperor 01 Panel, they were each now considering whether or not to take up their rights in respect of the non-renounceable 4-for-10 rights issue (**Rights Issue**) proposed by Emperor in a prospectus dated 13 September 2004. In the case of one of the Original Applicants, it was considering whether it might participate in any shortfall under the Rights Issue. The Review Panel considered that if the Original Applicants advised that they were no longer prevented from participating in the Rights Issue because of their investment mandates, as two of the Original Applicants had advised the Emperor 01 Panel, then the case for a lack of equality of opportunity was reduced.
4. The Review Panel accepted undertakings from Emperor and DRD in relation to a shortfall facility which Emperor had proposed under the Rights Issue to enable Emperor shareholders to subscribe for any shares for which other Emperor shareholders had declined to subscribe (**Shortfall Facility**). The undertakings, which were in same form offered by DRD in the original application, were to the effect that

¹ Unless specifically noted otherwise, DRD and its subsidiary are referred to collectively as DRD.

² Unless specifically noted otherwise, all references to sections are to sections of the Corporations Act.

Takeovers Panel

Reasons for Decision – Emperor Mines Ltd 01R

other Emperor shareholders would receive priority to DRD in allocating any new shares under the Shortfall Facility.

Emperor 01 Decision

5. On 18 October 2004, the Emperor 01 Panel made a declaration of unacceptable circumstances and orders in relation to the affairs of Emperor. The declaration and orders related to the Rights Issue. The Rights Issue was effectively underwritten by Emperor's largest shareholder DRD, through DRD (IoM) entering into a deed (**Participation Deed**) undertaking to offer to subscribe for any shortfall (**Underwriting**). The Original Applicants alleged that the Rights Issue and Underwriting were structured in such a way that it was likely that DRD would increase its control over Emperor at a discount to market and without the other shareholders in Emperor having a reasonable and equal opportunity to benefit.

THE PANEL & PROCESS

6. The President of the Panel appointed Justice Robert Austin (sitting President), Les Taylor (sitting Deputy President) and Irene Lee as the sitting Panel for the review proceedings arising from the Review Application.
7. The Original Applicants, Emperor, DRD and the Australian Securities and Investments Commission (**ASIC**) appeared in the Proceedings. The Review Panel adopted the Panel's published procedural rules.
8. The Review Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.
9. DRD's application was made on 19 October 2004. The Review Panel decided to commence proceedings in relation to the Review Application on 21 October 2004.

REVIEW APPLICATION

10. DRD requested that the Review Panel change the declaration of unacceptable circumstances made by the Emperor 01 Panel and, failing that, undertake a fresh consideration of the orders that might need to be made. DRD did not seek to challenge the Emperor 01 Panel's order modifying the shortfall facility (which was essentially to the same effect as the undertaking modifying the priority of Emperor shareholders under the Shortfall Facility which was offered to the Emperor 01 Panel and to the Review Panel, see paragraphs 21 & 22 below).

Background

Takeover bid by DRD

11. DRD had recently made a takeover for Emperor, reaching a voting power of 45.3%.

Rights Issue and Shortfall Facility

12. On 13 September 2004, Emperor lodged a prospectus in relation to the Rights Issue to raise up to \$20.4 million. Each Emperor shareholder (other than certain excluded

Takeovers Panel

Reasons for Decision – Emperor Mines Ltd 01R

foreign shareholders³) would have an entitlement (**Entitlement**) to subscribe for 4 new shares for every 10 existing shares held, at a price of \$0.45 per new Emperor share. On the day prior to the announcement of the Rights Issue, the Emperor share price closed at \$0.67.

13. Under the Shortfall Facility Emperor shareholders could subscribe for any new Emperor shares not applied for by way of Emperor shareholders taking up their Entitlements in proportion to their Entitlements under the Rights Issue (up to the limit of any limit placed by the shareholders).

Underwriting

14. Under the Participation Deed DRD undertook to take up its Entitlement and to apply to participate in the Shortfall Facility. DRD undertook to apply for the full amount of any shortfall, provided that the number of shares it could be issued under the Shortfall Facility (and successive rounds if required) would be limited to avoid its voting power in Emperor increasing beyond 60% (to comply with *Foreign Acquisitions and Takeovers Act 1975 (Cth)* requirements).

Financial position of Emperor

15. Emperor's need for funds, and the prospect of a Rights Issue, was raised during the DRD Bid. DRD had asserted in its bidder's statement and in its arguments in support of its bid that Emperor was in severe need of funds to develop its mine. In Emperor's financial report for the year ended 30 June 2004, its auditors stated that 'there is significant uncertainty whether the Group will be able to continue as a going concern and therefore whether it will realise its assets and extinguish its liabilities in the normal course of business and at the amount stated in the financial report'.

Further information

16. More background facts are set out in the Emperor 01 Panel's reasons for decision.

Additional Information

17. The Review Panel considered the information before it, including the submissions made to the Emperor 01 Panel, and on 22 October 2004 issued⁴ a brief seeking submissions on issues including:
 - (a) Emperor's financial position; and
 - (b) developments since the parties' original submissions and rebuttal submissions in the Emperor 01 proceedings

Emperor's Financial Position

18. The submissions received from Emperor supported Emperor's submissions in the Emperor 01 proceedings that Emperor was currently in need of a significant cash inflow due, amongst other things, to lower ore grades, higher fuel costs, funding requirements for its Phase 2 expansion and repayment of short term facilities.

³ Eligible shareholders were defined as having registered addresses in Australia, New Zealand, the Isle of Man, the Netherlands and Hong Kong, but not elsewhere.

⁴ Under Regulation 21 of the Corporations Regulations 2001 (Cth).

Takeovers Panel

Reasons for Decision – Emperor Mines Ltd 01R

Developments

19. In their submissions to the Review Panel, the Original Applicants advised that they were each now considering whether or not to take up their rights in respect of the Rights Issue in light of the orders made by the Emperor 01 Panel and, in the case of one, whether it might participate in any shortfall. The Original Applicants advised that part of their reasons were that if Emperor was not likely to become a 60% subsidiary of DRD, trading in its shares would be likely to be more liquid. The Original Applicants had advised the Emperor 01 Panel that two of the three funds who comprised the Original Applicants would not be able to take up their entitlements without exceeding the investment restrictions in their rules.

Consideration of the Issues

Ability of Original Applicants to subscribe

20. The Review Panel considered that the fact of the Original Applicants being prepared to reconsider their participation in the Rights Issue meant that one aspect of a lack of equality of opportunity which may have constituted unacceptable circumstances had been removed. If the Original Applicants advised that they were no longer prevented from participating in the Rights Issue because of their investment mandates, as they had advised the Emperor 01 Panel, then the case for a lack of equality of opportunity was reduced.

Undertakings to modify the Shortfall Facility

21. Emperor and DRD offered to undertake to change the Shortfall Facility so that DRD would not participate in the Shortfall Facility until all other Emperor shareholders who wished to participate in the Shortfall Facility had had their subscriptions filled in full. Emperor and DRD renewed that offer in the Review Panel proceedings.
22. The Review Panel considered that undertakings, when combined with the new position of the Original Applicants as to subscription for their rights, meant that the Original Applicants then had it within their power to manage the level of control which DRD would have after the Rights Issue.
23. The Review Panel accepted the undertakings offered, as set out in Annexure A.

Renounceability

24. One of the factors discussed in the *InvestorInfo* decision was renounceability. When discussing renounceability the *InvestorInfo* Panel said:

"whether the rights issue is renounceable – renounceability, especially when combined with an attractive issue price, indicates that the issuer wants the rights exercised and that, given that there is no relevant exception from section 606 for the buyers of rights who then exercise them, that the exercise of rights should have the least effect possible on proportionate interests of existing shareholders;"
25. The fact that the Rights Issue was non-renounceable was a significant issue to the Emperor 01 Panel. However, the Original Applicants advised the Review Panel that as a consequence of the Emperor 01 Panel's orders they were now prepared to reconsider their position as to subscribing for their entitlements under the Rights Issue i.e. taking away the proposition that some shareholders were precluded from

Takeovers Panel

Reasons for Decision – Emperor Mines Ltd 01R

participating in the Rights Issue. On that basis, the Review Panel considered that the case for a lack of reasonable and equal opportunity for the Original Applicants, relating to dilution or effect on control or otherwise, was reduced.

Discount

26. Another effect of the change in the Original Applicants' position on subscribing, related to the discount of the Rights Issue. Being unable to participate in the Rights Issue would mean that the Original Applicants would not be able to recoup that value if the Rights Issue was non-renounceable, but could have potentially recouped that value if the Rights Issue had been renounceable and the rights tradeable. Being able to participate in the Rights Issue meant that the Original Applicants had the opportunity, if they wished, to recoup some of that diminution in value, and may have, if they chose, looked to sell their shares to persons other than DRD if DRD's level of control of Emperor was an issue for them.
27. The Review Panel considered that the deep discount could be viewed more in the light of an encouragement to Emperor shareholders to participate in the Rights Issue rather than an added detriment to the Original Applicants and other Emperor shareholders in passing control of Emperor to DRD at a discount. It therefore militated against intervention by the Review Panel.

Underwriting

28. The fact of DRD, being the largest shareholder in Emperor at 45.3% voting power, underwriting the Rights Issue had been viewed by the Emperor 01 Panel as one of the factors which cumulatively caused it to consider that unacceptable circumstances existed in relation to the Rights Issue.
29. The Review Panel accepted Emperor's submissions that there was no other obvious alternative to Emperor's funding needs than to obtain the funds via a rights issue underwritten by DRD. This is consistent with the decision in *InvestorInfo*, which acknowledged that in some cases a rights issue underwritten by a shareholder may be the only rational means by which necessary funds may be raised.
30. The Review Panel recognised that in cases where a smaller company is in urgent need of funds there is often likely some form of trade-off between certainty of funding and issues of concentration of control.

Extension of time for Rights Issue

31. The Review Panel was concerned that Emperor shareholders may have had insufficient time to consider any new information, given that the Rights Issue was then due to close on 3 November 2004 and that the last information given to Emperor shareholders was a supplementary prospectus setting out the decision and orders of the Emperor 01 Panel. However, Emperor advised that it would send (in an expedited manner where feasible) a further supplementary prospectus to Emperor shareholders setting out the effects of the Review Panel's decision and extending the closing date of the Rights Issue to a date not earlier than 11 November 2004.

Takeovers Panel

Reasons for Decision - Emperor Mines Ltd 01R

CONCLUSION

32. Given the additional information before it, and in considering the factors which weighed on the sitting Panels in *InvestorInfo* and the Emperor 01 Panel, the Review Panel concluded that those factors, considered severally and together, did not have the significance which required a declaration of unacceptable circumstances and orders. It therefore declined the application by the Original Applicants.

Justice Robert Austin

President of the Sitting Panel

Decision dated 31 October 2004

Reasons published 24 December 2004

Takeovers Panel

Reasons for Decision - Emperor Mines Ltd 01R

Annexure A

Takeovers Panel

In the matter of Emperor Mines Limited (Review)

Proceeding No: 26/2004 ("Proceedings")

Undertakings by Emperor Mines Limited and DRD (Isle of Man) Limited

BACKGROUND

The undertaking set out below relates to the 4-for-10 pro-rata non-renounceable rights issue to be made by Emperor Mines Limited ACN 007 508 787 (**Emperor**) under a prospectus dated 13 September 2004 (**Rights Issue**) and the basis upon which DRD (Isle of Man) Limited (**DRD IoM**) and any of its associates (including Durban Roodepoort Deep, Limited (**DRD**)) can participate in that Rights Issue.

EMPEROR UNDERTAKINGS

Pursuant to s201A(1) of the Australian Securities and Investments Commission Act 2001 (Cth), Emperor undertakes to the Panel that it will:

- (a) retain the restructured shortfall facility (as described in section 3.2 of Emperor's supplementary prospectus dated 21 October 2004 in relation to the Rights Issue) (**Restructured Shortfall Facility**) such that none of DRD, DRD IoM and their associates participate in any stage of the shortfall allocation under the Restructured Shortfall Facility until all Emperor shareholders (other than DRD, DRD IoM and their associates) have had their applications to participate in any shortfall to the Rights Issue satisfied in full;
- (b) use its best endeavours to send (including, in respect of any Emperor shareholder that has a registered address as at the record date outside of Australia, by use of airmail or, to the extent Emperor is aware of a fax or email contact address for such a shareholder, by fax or email) a supplementary prospectus, by no later than 5 pm (Perth time) on 2 November 2004, to each Emperor shareholder who is entitled to participate in the Rights Issue:
 - (i) notifying them of the Review Panel's decision to set aside the declaration of unacceptable circumstances and the orders of the Initial Panel, and the consequences of that decision;
 - (ii) confirming that the Restructured Shortfall Facility will continue to govern the allocation of any shortfall under the Rights Issue; and
 - (iii) notifying them of the extension of the closing date of the Rights Issue until 5pm (Perth time) on 12 November 2004;
- (c) place an advertisement to appear as soon as possible in *The Australian Financial Review* notifying shareholders of the matters set out in paragraph (b) above; and
- (d) upon receipt of any application by DRD IoM for its Entitlement under the Rights Issue, scale back the number of shares to be issued to DRD IoM pursuant to that

Takeovers Panel

Reasons for Decision - Emperor Mines Ltd 01R

application to the extent necessary (if at all) to ensure that DRD IoM and its associates do not, in DRD IoM taking up its Entitlement, increase their voting power above that as at the date of these undertakings as a consequence only of the ineligibility of Ineligible Foreign Shareholders (as defined in the Prospectus) to participate in the Rights Issue.

DRD IOM UNDERTAKINGS

DRD IoM acknowledges the undertakings to be provided by Emperor upon execution of this document and, pursuant to s201A(1) of the Australian Securities and Investments Commission Act 2001 (Cth), undertakes to the Panel that it:

- (e) will waive any rights it has to terminate the Participation Deed to the extent necessary to permit Emperor to take any action that it is required to take as a direct result of the execution and performance by Emperor of these undertakings; and
- (f) consents to Emperor scaling back the number of shares to be issued to DRD IoM upon receipt of an application for DRD IoM's Entitlement under the Rights Issue to the extent necessary (if at all) to ensure that DRD IoM and its associates do not, in DRD IoM taking up its Entitlement, increase their voting power above that as at the date of these undertakings as a consequence only of the ineligibility of Ineligible Foreign Shareholders (as defined in the Prospectus) to participate in the Rights Issue.

Dated:

Signed for
Emperor Mines Limited
by:

Director

Signed for
DRD (Isle of Man) Limited
by:

Director