



**In the matter of Rusina Mining NL
2006 ATP 13**

Catchwords:

substantial holdings; substantial holding notice; relevant agreement; interim orders; tracing notices; association

Corporations Act 2001 (Cth): sections 606; 657A; 657D; 657E; 671B; 672A; 672B

Village Roadshow Limited [2004] ATP 4

Rivkin Financial Services Limited [2004] ATP 14

New Ashwick Pty Ltd v Wesfarmers Ltd (2000) 18 ACLC 742

Australian Securities Commission v Bank Leumi Le-Israel (Switzerland) & Ors (1996) 14 ACLC 1,576

New Frontier Limited; Rusina Mining Limited; Island Services Limited; Kinloch Resources Limited

These are the Panel's reasons for declining to make a declaration of unacceptable circumstances following receipt by Rusina Mining NL of a response to a tracing notice and following the lodgement and publication of relevant substantial holder notices by New Frontier Limited. The Panel made interim orders restricting the disposal of specified ordinary shares in Rusina Mining NL.

SUMMARY

1. These reasons relate to an application (the **Application**) to the Panel from Rusina Mining NL (**Rusina**) on 14 March 2006 in relation to the affairs of Rusina.
2. The Application related to the alleged failure by New Frontier Limited (**New Frontier**) and parties associated with New Frontier to comply with the tracing and substantial holding provisions of the Corporations Act 2001 (Cth) (the **Act**)¹.
3. The Panel declined to make a declaration of unacceptable circumstances and therefore final orders.

THE PROCEEDINGS

The Panel & Process

4. The President of the Panel appointed John King, Simon McKeon (sitting President), and Norman O'Bryan SC (sitting Deputy President) as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the Application.
5. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.
6. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

Background

Rusina

7. Rusina is a public company incorporated in Australia and listed on Australian Stock Exchange Limited (**ASX**). Rusina has 129,510,161 fully paid ordinary shares on issue.

¹ In these reasons, statutory references are to the Act unless otherwise indicated.

Takeovers Panel

Reasons for Decision – Rusina Mining NL

New Frontier

8. New Frontier is a company incorporated in Labuan, Malaysia. At the date of the Application, New Frontier was the registered holder of 9,755,352 fully paid ordinary shares in Rusina (7.53%).

Substantial holding

9. By share sale agreement dated 26 July 2005 between New Frontier and Rusina and shareholders deed between New Frontier, Rusina and Kinloch Resources Limited (a company incorporated in the British Virgin Islands) (**Kinloch**) it was agreed (among other matters) that New Frontier would:
 - (a) be issued with 3,833,333 fully paid ordinary Rusina shares;
 - (b) acquire 3,833,333 options to subscribe for Rusina shares (exercisable at 30 cents each and expiring 31 January 2005) (these options were originally granted to Kinloch by Rusina); and
 - (c) acquire the 8,000,000 fully paid ordinary Rusina shares that were originally issued to Kinloch by Rusina on 24 October 2003.
10. Accordingly, New Frontier held 11,833,333 fully paid ordinary Rusina shares (9.14%).
11. In March 2006, prior to the Application, New Frontier sold 2,077,981 of its shares in Rusina on market.

Tracing notice

12. In 2005, Rusina's board composition changed. Following this change, the new board of Rusina has been conducting a strategic review of its assets and operations. This review extended to Rusina's share register and, in particular, its top 20 registered shareholders.
13. On 17 February 2006, Rusina posted a tracing notice under section 672A to New Frontier in order to obtain the information prescribed by section 672B.
14. Rusina submitted that it received no response from New Frontier in response to the tracing notice posted to it on 17 February 2006.
15. On 13 March 2006, Rusina posted a tracing notice under section 672A to New Frontier in order to obtain the information prescribed by section 672B.
16. Rusina submitted that it received no response from New Frontier in response to the second tracing notice, posted on 13 March 2006.

Application

17. In the Application, Rusina submitted that the circumstances relating to the failure by New Frontier to respond to the tracing notice posted by Rusina on 17 February 2006 and the failure by New Frontier to lodge a substantial shareholder notice in compliance with section 671B, constituted unacceptable circumstances.
18. Rusina sought that the Panel:

Takeovers Panel

Reasons for Decision – Rusina Mining NL

- (a) make interim orders pursuant to section 657E to the effect that New Frontier not transfer, dispose of or otherwise deal with, in any respect, including exercising any rights in relation to, any of its shareholding in Rusina; and
 - (b) conduct its own investigations as to the beneficial owners of the shares held by New Frontier and whether circumstances exist sufficient to constitute evidence of an association between New Frontier and other Rusina shareholders in breach of section 606.
19. Rusina sought the following orders pursuant to section 657D:
- (a) an order requiring that New Frontier comply fully with the tracing notice of 17 February 2006 and lodge a substantial holder notice with ASX; or
 - (b) an order requiring that the legal title to and beneficial ownership of New Frontier’s 11,833,333 fully paid ordinary Rusina shares be vested in the Australian Securities and Investments Commission (ASIC); and
 - (c) such other orders as deemed appropriate in the circumstances.

DISCUSSION

Substantial holding

20. As indicated in *Village Roadshow Limited* [2004] ATP 4 and in *Rivkin Financial Services Limited* [2004] ATP 14, the Panel considers any material failure to comply with the substantial holding and tracing notice provisions in chapter 6C to be contrary to the policy objectives of section 602.
21. Pursuant to section 671B, a person must give a notice containing certain specified information to a listed company and ASX if the person:
- (a) acquires or ceases to have a substantial holding; or
 - (b) has a substantial holding and there is a movement of at least 1% either way in that holding,
- within two business days² after the person becomes aware of the relevant acquisition or change.
- A person has a substantial holding in a company if the total votes attached to voting shares in the company in which they or their associates have relevant interests is 5% or more of the total number of votes attached to the voting shares in the company.
22. At all relevant times New Frontier was the registered holder of 5% or more of the voting shares in Rusina and therefore had a substantial holding. It should have provided a Form 603 “Notice of initial substantial holder” to both Rusina and ASX within two business days of the day it became aware it was a substantial holder³.

² The deadline for lodging this information will be restricted to lodgement by 9.30am on the next trading day of the relevant financial market if a takeover bid is made for voting shares or voting interests in the relevant company or scheme and the holder becomes aware of the information during the bid period.

³ See section 671B(6).

Takeovers Panel

Reasons for Decision – Rusina Mining NL

23. As submitted by Rusina, ASIC Policy Statement 159 states that the purpose of the substantial holding provisions is that holders, directors and the market have access on a timely basis to sufficient information to know:
 - (a) who the controllers of substantial blocks of voting shares are;
 - (b) who the associates of substantial holders are;
 - (c) details of any consideration or special benefits a person received for disposing of their relevant interest; and
 - (d) details of any agreements or special conditions or restrictions that may affect the disposal of shares or the way in which they are voted⁴.
24. On 21 March 2006, following contact from the Panel, New Frontier lodged with Rusina two substantial holding notices in relation to the shares it initially held and the shares it currently held. These notices were published on ASX.
25. New Frontier submitted that its failure to lodge the notices before this time was unintentional. New Frontier also submitted that the market was not uninformed regarding New Frontier's holding because it had already been disclosed on ASX (for example, in Rusina's annual report).
26. Following receipt of these two notices and a response to the tracing notice of 17 March 2006 (see below) it became clear that New Frontier was not the only person with a relevant interest in the Rusina shares registered in the name of New Frontier and that New Frontier had in March 2006 sold 2,077,981 of its shares in Rusina on market.
27. Therefore Rusina submitted that the two notices provided by New Frontier on 21 March 2006 still did not comply with section 671B and that they were inconsistent with New Frontier's response to the tracing notice sent by Rusina on 17 March 2006.
28. Rusina noted that in New Frontier's response to the 17 March 2006 tracing notice, New Frontier had stated that:
 - (a) New Frontier was wholly owned by Island Services Limited; and
 - (b) Mr Teo Soo Tong was a beneficiary under a declaration of trust between Mr Teo Soo Tong and Island Services Limited in relation to Island Services Limited's share in New Frontier and therefore Mr Teo Soo Tong had a relevant interest in New Frontier's shareholding in Rusina.
29. Accordingly, the Panel contacted New Frontier and noted the following defects in the two notices provided by New Frontier on 21 March 2006:
 - (a) the notices did not state that Mr Teo Soo Tong had a relevant interest in New Frontier's shareholding in Rusina and attach copies of documents establishing the relevant interest⁵;
 - (b) New Frontier had lodged two Form 603s when, strictly, it should have lodged a Form 603 and a Form 604 "Notice of Change of Interests of substantial holder";

⁴ See paragraph 269.

⁵ See sections 617B(3)(c) and (4)(a) and *New Ashwick Pty Ltd v Wesfarmers Ltd* (2000) 18 ACLC 742.

Takeovers Panel

Reasons for Decision – Rusina Mining NL

- (c) the shareholdings stated were not accurate given the recent sales and acquisitions by New Frontier.
30. On 23 March 2006, New Frontier lodged with Rusina an amended Form 603 and new Form 604. These notices were published on ASX.
31. These notices failed to attach the declaration of trust between Mr Teo Soo Tong and Island Services Limited and failed to identify the relevant interest of Mr Teo Soo Tong. New Frontier submitted that to do so without the consent of the beneficiary would result in a contravention of certain legislation which governs New Frontier. New Frontier submitted that such consent was not forthcoming because the beneficiary considered the declaration of trust to be a private document.
32. The Panel informed the parties that it did not consider that New Frontier and Mr Teo Soo Tong had substantially complied with the substantial holder provisions and requested further submissions on whether or not it should make a declaration of unacceptable circumstances and orders. The Panel considered that non-compliance with the substantial holder provisions was not excused by a person's compliance with foreign legislation⁶.
33. Following further submissions and correspondence, on 31 March 2006 New Frontier lodged an amended Form 603 and 604 with Rusina. The declaration of trust between Mr Teo Soo Tong and Island Services Limited was also lodged. These notices (and attachments) were published on ASX.
34. In the circumstances and despite the delays, the Panel considered that New Frontier and Mr Teo Soo Tong had made reasonable efforts to comply with the substantial holder provisions once they were drawn to their attention and therefore the Panel did not consider it would be in the public interest to make a declaration of unacceptable circumstances.

Tracing notice

35. Section 672B(2) provides that a person must make the disclosure requested in response to a direction under section 672B(1), within 2 business days after the person is given the direction.
36. Rusina submitted that New Frontier had failed to comply with the tracing notice provisions.
37. On 15 March 2006, the Panel notified Rusina that it had been informed by New Frontier that New Frontier had moved offices and had not received the tracing notice sent to it by Rusina on 17 February 2006.
38. On 17 March 2006, Rusina faxed (at the Panel's suggestion) a new tracing notice under section 672A to New Frontier.
39. On 21 March 2006, New Frontier provided a response to the tracing notice sent by Rusina on 17 March 2006. The response provided by New Frontier confirmed that

⁶ See *Coporate Affairs Commission v Orlit Holdings Ltd* (1983) 8 ACLR 164; *Re North Broken Hill Holdings Ltd* (a986) 10 ACLR 270, *Australian Securities Commission v Bank Leumi Le-Israel (Switzerland) & Ors* (1996) 14 ACLC 1,576; *Village Roadshow Limited* [2004] ATP 4.

Takeovers Panel

Reasons for Decision – Rusina Mining NL

New Frontier had held 11,833,333 shares. The response also confirmed each other person who New Frontier was aware of having a relevant interest in the shares.

40. On that basis, the Panel considered that New Frontier and Mr Teo Soo Tong had substantially complied with the tracing notice provisions and therefore the Panel did not consider it would be in the public interest to make a declaration of unacceptable circumstances.

Association

41. The Panel considered that it was not the role of the Panel to make investigations into all the shareholders on Rusina's register of members to find out if any associations existed between them, without first being provided by Rusina with substantive allegations and reasons for or evidence supporting those allegations. The Panel considered that Rusina could make its own investigations and then make an application to the Panel which provided details of alleged associations and relevant interests, provided reasons or evidence of the associations and relevant interests and provided details of how those associations may result in a breach of section 606.
42. Therefore, the Panel did not consider it necessary for it to address the request regarding associations in the Application because Rusina had not made any substantive allegations or presented evidence.

DECISION

Decline to make a declaration of unacceptable circumstances

43. The Panel considered that although New Frontier had not given a substantial holding notice when the obligation to do so initially arose, it had responded promptly and diligently when informed by the Panel of its obligations. The Panel also considered that New Frontier had responded promptly and diligently when it had actually received the beneficial ownership tracing notice from Rusina.
44. The Panel accepted New Frontier's submissions that it did not actually receive a beneficial ownership tracing notice from Rusina until the 17 March 2006 notice was faxed to it. New Frontier submitted that Rusina had posted the beneficial ownership tracing notices dated 17 February 2006 and 13 March 2006, the notices were incorrectly addressed and Rusina had not called to confirm receipt of the notices or tried to fax the notices when no response was received from New Frontier.
45. Following receipt by Rusina of New Frontier's response to the beneficial ownership tracing notice and following receipt by Rusina and publication on the ASX of New Frontier's Form 603 and 604, the Panel considered that the market for shares in Rusina was properly informed.
46. On that basis, the Panel decided that in the circumstances (for example, Rusina had not been, in the period of non disclosure, a takeover target and its shares were generally thinly traded), it would not be against the public interest not to make a declaration of unacceptable circumstances, and that orders vesting New Frontier's Rusina shares in ASIC were not required.

Takeovers Panel

Reasons for Decision – Rusina Mining NL

Final orders

47. As the Panel did not make a declaration of unacceptable circumstances, it made no orders.
48. The Panel also declined to make orders as to costs.

Interim orders

49. Rusina sought interim orders that New Frontier not transfer, dispose of or otherwise deal with, in any respect, including exercising any rights in relation to, any of its shareholding in Rusina until the conclusion of the proceedings.
50. On 16 March 2006, the Panel made the interim orders set out in Annexure A.
51. Following the making of the interim orders, New Frontier informed the Panel that it had given instructions to its broker to sell on market 922,019 Rusina shares on 16 March 2006. New Frontier advised that it had given its broker a sell order prior to receipt of the Panel's interim orders.
52. ASX advised that the transactions were unable to settle because of the interim orders the Panel had made on 16 March 2006.
53. Accordingly, at the request of New Frontier to vary or substitute the interim orders and following an undertaking by New Frontier to buy in an equivalent number of Rusina shares to replace shares which the Panel allowed to be used to settle the outstanding transactions, on 23 March 2006, the Panel made a variation⁷ to the interim orders.
54. Following the variation to the interim orders, New Frontier successfully acquired a further 922,019 Rusina shares and the variation to the interim orders restricted the transfer of those shares and the exercise of voting or other rights attached to those shares.

Simon McKeon
President of the Sitting Panel
Decision dated 5 April 2006
Reasons published 4 May 2006

⁷ Annexure B sets out the variation to the interim orders.

Takeovers Panel

Reasons for Decision – Rusina Mining NL

Annexure A – Interim orders

**Corporations Act
Section 657E
Interim Order**

In the matter of Rusina Mining NL

Upon

- A. An application being received in relation to the affairs of Rusina Mining NL (**Rusina**) on 14 March 2006 under Section 657C of the Corporations Act 2001 for a declaration of unacceptable circumstances and consequential orders (**Application**);
- B. The Application being in respect of circumstances arising out of the issue by Rusina of a beneficial ownership tracing notice under Section 672A of the Corporations Act to New Frontier Investment Limited (**New Frontier**) on 17 February 2006;
- C. The Application seeking an interim order that New Frontier not transfer, dispose of or otherwise deal with, in any respect, including exercising any rights in relation to, any of its shareholding in Rusina,

Under section 657E of the Corporations Act, the Panel orders:

1. New Frontier:
 - (a) not to dispose of any shares or interests in shares in Rusina that it has at the date of this order (**the shares**); and
 - (b) not to exercise any voting or other rights attached to the shares.
2. New Frontier to give written notice of this order to any person whom it knows to be entitled to exercise a right to vote attached to the shares.
3. Rusina:
 - (a) not to register any purported transfer or transmission of shares registered in the name of New Frontier at the date of this order; and
 - (b) to disregard any voting or other rights attached to shares registered in the name of New Frontier at the date of this order.
4. These orders continue in effect until the earliest of:
 - (a) a further order of the Panel;
 - (b) the application being determined; or
 - (c) 15 May 2006.

Dated 16 March 2006

Simon McKeon
President of the Panel

Annexure B – Variation to interim orders

Corporations Act

Section 657E

Variation of Interim Order

In the matter of Rusina Mining NL

Upon

- A. The Panel making an interim order dated 16 March (**interim order**) to the following effect:
- (i) restraining New Frontier Investment Limited (**New Frontier**) from disposing of any shares or interests in shares in Rusina that it had at 16 March 2006 and from exercising any voting or other rights attached to those shares;
 - (ii) requiring New Frontier to give written notice of that order to any person whom it knew to be entitled to exercise a right to vote attached to those shares; and
 - (iii) prohibiting Rusina from registering any purported transfer or transmission of shares registered in the name of New Frontier at the date of that order and requiring Rusina to disregard any voting or other rights attached to shares registered in the name of New Frontier at the date of that order;
- B. New Frontier selling 922,019 Rusina shares on 16 March 2006 (**16 March Shares**);
- C. Australian Stock Exchange Limited advising that the transactions are unable to settle because of the interim order;
- D. A request by New Frontier to vary or substitute the interim order and undertaking to replace the 16 March Shares;

Under section 657E of the Corporations Act, the Panel orders:

1. Rusina Mining NL (**Rusina**):
 - (a) to allow the registration of the transfer of the 16 March Shares;
 - (b) otherwise to comply with the terms of the interim order; and
 - (c) in respect of up to 922,019 shares acquired or to be acquired by New Frontier since the date of the interim order –
 - (i) once registered to New Frontier, not to register any purported transfer or transmission from New Frontier; and
 - (ii) to disregard any voting or other rights attached to any of the 922,019 shares.
2. New Frontier:
 - (a) to comply with the terms of the interim order except that it may transfer 922,019 shares which it sold on market on 16 March 2006;
 - (b) not to dispose of up to 922,019 further shares or interests in shares in Rusina that it has acquired or will acquire since the date of the interim order; and
 - (c) not to exercise any voting or other rights attached to up to 922,019 further shares or interests in shares in Rusina that it has acquired or will acquire since the date of the interim order.

Takeovers Panel

Reasons for Decision - Rusina Mining NL

3. New Frontier to give written notice of these orders to any person whom it knows to be entitled to exercise a right to vote attached to shares affected by these orders.
4. The interim order continues in full force and effect except as varied by these orders.
5. These orders continue in effect until the earliest of:
 - (a) a further order of the Panel;
 - (b) the application being determined; or
 - (c) 15 May 2006.

Dated 23 March 2006

Simon McKeon
President of the Panel