



In the matter of Summit Resources Limited
[2007] ATP 09

Catchwords:

declaration of unacceptable circumstances - no orders to appropriately remedy the effects of the unacceptable circumstances - unconditional off-market scrip takeover bid - intention to vote - departure from unqualified intention statement - whether unforeseeable circumstances justified departure - truth in takeovers - supplementary target's statement - effect on target shareholders - withdrawal rights

Areva NC Australia Pty Ltd - Summit Resources Limited - Paladin Resources Ltd

These are the Panel's reasons for making a declaration of unacceptable circumstances in response to an application by Areva NC Australia Pty Ltd under section 657C concerning the affairs of Summit Resources Limited and statements by Paladin Resources Ltd (see [TP07/21](#)). In the circumstances of this case the Panel did not make orders.

SUMMARY

1. These reasons relate to an application to the Panel by Areva NC Australia Pty Ltd (**Areva**) under section 657C of the Corporations Act (*Cth*) 2001¹ concerning the affairs of Summit Resources Limited (**Summit**) and statements by Paladin Resources Ltd (**Paladin**).
2. On 11 April 2007, Summit and Areva entered into, and announced, an agreement under which Summit was to convene a general meeting to consider, and if thought fit, pass resolutions to approve the issue of shares and options in two tranches to Areva. If approved, upon the second subscription by Areva (allowing Areva to increase its shareholding to 18%), Areva would be appointed to market two-thirds of Summit's share of uranium production from its Australian projects (**Areva Transaction**).
3. At the time of entering into the Areva Transaction, Summit was the subject of an unconditional off-market scrip takeover bid by Paladin Resources Ltd (**Paladin Offer**) which the Summit board had rejected.
4. Areva's application related to statements by Paladin concerning its intention to vote its shares in favour of the Areva Transaction (**Intention Statement**) and subsequent statements that Paladin would vote against the Areva Transaction.
5. The Panel considered that Paladin's departure from its Intention Statement was not consistent with the "truth in takeovers" policy², and decided to make a declaration of unacceptable circumstances, but in these particular circumstances decided not to make orders. The Panel's declaration is attached as Annexure A.
6. The Panel considers that truth in takeovers is a fundamental tenet of the takeovers regime and on this basis made a declaration of unacceptable circumstances in

¹ All statutory references are to the Corporations Act unless otherwise indicated.

² See ASIC Policy Statement 25 for a description of ASIC's approach to the "truth in takeovers" policy.

relation to the Areva application. However, although the Panel considered unacceptable circumstances existed, in this case the Panel did not consider there were any orders which would appropriately remedy the effects of the unacceptable circumstances.

THE PROCEEDINGS

The Panel & Process

7. The President of the Panel appointed Alison Lansley (Deputy President), Simon McKeon (Sitting President) and Robert Sultan as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from Areva's application.
8. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.
9. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.
10. **Background**
11. Summit was the subject of an off-market scrip takeover bid by Paladin. The Paladin Offer had initially been rejected by the board of Summit as being too low. Paladin declared its offer unconditional on 19 March 2007.
12. On 11 April 2007, Summit and Areva entered into, and announced, an agreement in relation to the Areva Transaction. On that day, Summit issued a 2nd supplementary target's statement in connection with the Areva Transaction which described the benefits of that transaction and said:

"A meeting of Summit shareholders to approve the transaction will be convened as soon as possible and is expected to be held in late May. In the absence of a superior proposal, Summit directors will unanimously recommend that Summit shareholders vote in favour of the transaction."
13. On 12 April 2007 Paladin announced an increase of 24% in the consideration offered under its bid. In that announcement Paladin stated:

"The involvement of Areva is a positive development for Paladin as a Joint Venture Partner at Mt Isa. The discipline, uranium marketing experience and technical skills Areva bring will go some way to bridging the capability gaps and nuclear industry inexperience that exist within Summit. Accordingly, Paladin will be voting its shares in favour of the Areva transaction in late May." (emphasis added).
14. On 16 April 2007 the increased Paladin Offer was recommended by the board of Summit. Summit made no mention of the Areva Transaction in the announcement. On the same day, Paladin's managing director made a statement to the media concerning the Areva Transaction but made no reference to the Areva Transaction not proceeding or to Paladin not voting in favour of the Areva Transaction.
15. On 22 April 2007, Paladin informed Summit, but not the market or Summit shareholders, that it would not vote in favour of the Areva Transaction. Summit advised its shareholders on 23 April 2007 that it had decided not to convene the general meeting, at least in part as a consequence of Paladin's advice that it would not vote in favour of the Areva Transaction.

16. In Summit's 5th supplementary target's statement dated 30 April 2007 the following appeared:
"On Sunday 22 April 2007 Summit advised Areva that it had been informed by Paladin that, in view of the material change in circumstances since the announcement of Paladin's increased Offer (the recommendation to accept the Paladin Offer in preference to the Areva deal and the fact that Paladin was then expected to move to outright ownership of all the shares in Summit) Paladin would vote against any resolution put to Summit shareholders to approve the Areva transaction."
17. Paladin did not inform Summit shareholders that it no longer intended to stand by its unqualified statement.
18. Acceptances of Paladin's offer had been received throughout the period from the announcement of the Areva Transaction to the date of the Areva application. The rate of acceptances increased markedly after the Summit board recommended the Paladin Offer. By 23 April 2007, Paladin's voting power in Summit had increased to 25%³ and by the time of Areva's application Paladin's voting power had increased to 63%.
19. **Application**
20. Areva's application related to:
 - (a) Paladin's Intention Statement;
 - (b) Paladin's subsequent departure from its Intention Statement;
 - (c) statements by Paladin which Areva claimed implied that the Areva Transaction would not proceed; and
 - (d) statements by Summit that the Areva Transaction would not proceed.
21. Areva sought a declaration of unacceptable circumstances and final orders requiring:
 - (a) Summit to convene a general meeting to consider the Areva Transaction;
 - (b) Paladin to vote in favour of the Areva Transaction in accordance with its previously stated intention; and
 - (c) Summit and Paladin issue appropriate statements to this effect.

DISCUSSION

Importance of truth in takeovers

22. The Panel considers the truth in takeovers policy to be a fundamental tenet of the Australian takeovers regime and unwarranted departures by takeovers participants from statements they make to the market are to be taken very seriously.
23. The Panel considered two aspects of the Areva claims. The first was that Paladin should be held to its intention statement. The second was that Summit should be required to convene the shareholders meeting.

Paladin's Intention Statement

Unforeseeable

³ The percentage on the different dates may depend on when various acceptances were counted.

24. The Panel considered that Paladin's departure from its Intention Statement was not consistent with the truth in takeovers policy. The Panel does not accept Paladin's submission that it was justified in departing from its Intention Statement because a recommendation from the Summit board in response to Paladin increasing the consideration under its offer was "unforeseeable".
25. It should have been clear to Paladin that when it increased its offer, the Summit board would need to consider the revised offer. The only options available to the Summit board were to reject the revised offer or recommend the revised offer. Paladin had increased the bid consideration by approximately 24%. The Panel was not persuaded that the change of recommendation was unforeseeable. On this basis, the Panel did not accept that the recommendation by the Summit board was an unforeseeable change in circumstance such that it was acceptable in the circumstances for Paladin to depart from its Intention Statement.

Unqualified

26. Paladin made no clear and unambiguous qualifications to its Intention Statement at the time of making it, or at any acceptable time later.
27. The Panel considered that, where parties make unqualified statements in the context of a takeover, shareholders should be able to rely on those statements when considering whether or not to accept an offer. The Panel considered that parties involved in takeovers should be aware that making statements without qualification carries risk and that departing from publicly stated positions that are made without qualification will have consequences.

Summit's meeting statement

28. Summit submitted that there was no justification for incurring the expense of a shareholders' meeting once Paladin had advised that it would vote against the Areva Transaction. It submitted that its statement of intention to hold a meeting was implicitly qualified in its announcement on 11 April 2007 that the Summit board intended to recommend the Areva Transaction to shareholders "*in the absence of a superior proposal*".
29. The Panel considered whether Summit's qualification in recommending the Areva Transaction (in the absence of a superior proposal) impliedly put a similar qualification on the statement about calling the meeting. The Panel considered that it may have been possible to infer a qualification, because of the reference to a superior proposal in the later statement concerning the recommendation. However, the Panel considered that Summit shareholders should not have had to infer the qualification. If Summit had intended the statement concerning calling the meeting to be a qualified statement Summit should have made the qualification clear and unambiguous.
30. While the convening of the meeting was a matter for the directors of Summit, the Panel did not consider that Summit's reasons for deciding not to convene the meeting were properly explained to Summit shareholders.

Conclusion

31. Accordingly, the Panel considered that disclosure of information by both Paladin and Summit was unsatisfactory and that Summit shareholders had not been well served

in terms of the information that each of Paladin and Summit provided about their intentions in relation to the Areva Transaction.

32. In particular, the Panel considered it unacceptable for Paladin to have changed its intention in relation to an unqualified statement and to have made no statement as to its change in intentions to any of Summit shareholders, Paladin's shareholders or the market.

Orders in these circumstances

Accepting shareholders

33. The Panel concluded that there were no orders which could be made which would be appropriate to remedy the effect of the unacceptable circumstances on shareholders who had accepted into the Paladin Offer, especially given the passage of events between the time of the circumstances and the time when the matter was put before the Panel.
34. The Panel's decision not to grant orders should be viewed in light of the particular circumstances of this case. If the Panel had considered that granting orders would have been effective in remedying the unacceptable circumstances, it would have done so.
35. In reaching its decision not to grant orders the Panel considered:
 - (a) the likely effect the unacceptable circumstances had on Summit shareholders who had accepted into the Paladin Offer, or who had sold their Summit shares on-market, between the time of Paladin's Intention Statement and 23 April 2007 when Summit announced that it would not call a meeting to consider the Areva Transaction (**affected shareholders**); and
 - (b) whether orders would remedy the unacceptable circumstances in a manner that protected the rights and interests of affected shareholders, or ensured that the Paladin Offer proceeded in a way that it would have proceeded if the unacceptable circumstances had not occurred.

Effect

36. No evidence was available to the Panel to establish a reasonable basis for concluding that any accepting shareholders had been influenced by Summit's announcement of the Areva Transaction or Paladin's Intention Statement, or by the unsatisfactory way in which information about the changed positions came into the market.
37. The Panel considered the steady flow of acceptances into the Paladin Offer following Summit's recommendation of the Paladin Offer, and the fact that the flow of acceptances did not decrease after Summit announced its decision not to convene a meeting (which became known through Summit's 23 April announcement) or after Paladin's departure from its Intention Statement (which became known through Summit's 5th supplementary target's statement of 30 April).

Withdrawal rights

38. Although Areva did not specifically seek an order giving affected shareholders a right to withdraw their acceptances, the Panel considered whether such an order would remedy the unacceptable circumstances. However, the Panel considered that

no evidence was available to it that any Summit shareholders would avail themselves of withdrawal rights if they were ordered.

39. The Panel is entitled to make an evaluation based on its own experience and expertise as to the effect of the circumstances. However, in the absence of any evidence to the contrary, the Panel considered in this instance that, although the circumstances were unacceptable, any effect on accepting shareholders was not such that it warranted the granting of orders.
40. In this case, the Panel was reluctant to order that affected shareholders should be given withdrawal rights where no evidence was available to it that the unacceptable circumstances had had an effect that withdrawal rights were likely to address.

Requiring Paladin and Summit to act in accordance with their statements

41. Areva sought final orders requiring:
 - (a) Summit to convene a general meeting to consider the Areva Transaction; and
 - (b) Paladin to vote in favour of the Areva Transaction in accordance with its previously stated intention.
42. The Panel did not consider these orders were appropriate to address the effect of the circumstances. The Panel was not dismissing Areva's position, but considered that in any event it was in the power of Areva under section 249F to requisition a meeting of Summit shareholders if it wished⁴.
43. The Panel considered ordering that Paladin vote some or all of the shares it had acquired under the Paladin Offer, should there be a meeting, but considered that such an order was not practical because:
 - (a) the Panel would not be able to determine which shares were accepted on the basis of the Paladin Intention Statement and which were accepted on the basis that the Areva Transaction would not be put to Areva shareholders; and
 - (b) requiring all Summit shares held by Paladin to be voted for the Areva Transaction would:
 - (i) force Paladin into a commercial alliance with Areva that Paladin now did not wish to be in and that would potentially cause harm to the new and existing shareholders of Paladin; and
 - (ii) require some shares to be voted against the intentions of the accepting Summit shareholders and against the expectations of those Summit shareholders who had accepted the Paladin Offer after 23 or 30 April 2007.
44. In short, the Panel considered that the effect the circumstances had on Areva's proposed acquisition of a substantial interest in Summit was unacceptable, but that there were no orders reasonably available to it which were appropriate.
45. The Panel's decision not to make orders given the particular facts of this case was a reflection of the circumstances before it, and not in any way an endorsement of the conduct of Paladin and Summit.

⁴ On 26 April, 2007 Areva acquired 10.46% of Summit.

46. Accordingly, the Panel concluded that no orders were appropriate to remedy the effect of the unacceptable circumstances on Areva.
47. The Panel would not regard the fact that it decided in this situation not to make orders as any precedent for future cases involving the truth in takeovers policy. Had Areva either:
- (a) made its application before a significant number of Summit shareholders accepted the Paladin Offer after 30 April 2007; or
 - (b) regardless of the timing of its application, presented evidence that shareholders had been adversely affected,
- the Panel may have considered that withdrawal rights, or other orders, were appropriate.

Simon McKeon
President of the Sitting Panel
Decision dated 18 May 2007
Reasons published 6 July 2007

Annexure A



Corporations Act Section 657A Declaration of Unacceptable Circumstances

In the matter of SUMMIT RESOURCES LIMITED

WHEREAS

1. Paladin Resources Limited (**Paladin**) is making takeover offers (**Paladin Offer**) for all the shares in Summit Resources Limited (**Summit**) under a bidder's statement dated 27 February 2007 and offers dated 15 March 2007. The consideration offered is Paladin shares. The Paladin Offer became unconditional on 19 March 2007.
2. On 2 March 2007, Summit announced that its directors recommended that Summit shareholders reject the Paladin Offer.
3. A transaction (**Areva Transaction**) was proposed between Summit Resources Limited (**Summit**) and Areva NC Australia Pty Ltd (**Areva**).
4. On 11 April 2007, Summit issued a 2nd supplementary target's statement in connection with the Areva Transaction in which described the benefits of that transaction and said:

"A meeting of Summit shareholders to approve the transaction will be convened as soon as possible and is expected to be held in late May. In the absence of a superior proposal, Summit directors will unanimously recommend that Summit shareholders vote in favour of the transaction."
5. Paladin made an unqualified statement on 12 April 2007, released to ASX when announcing an increase to its offer for Summit shares, as follows:

"The involvement of Areva is a positive development for Paladin as a Joint-Venture Partner at Mt Isa. The discipline, uranium marketing experience and technical skills Areva bring will go some way to bridging the capability gaps and nuclear inexperience that exist within Summit. Accordingly, Paladin will be voting its shares in favour of the Areva transaction in late May."
6. Paladin no longer intends to stand by its unqualified statement. In Summit's 5th supplementary target's statement dated 30 April 2007 the following appears:

"On Sunday 22 April 2007 Summit advised Areva that it had been informed by Paladin that, in view of the material change in circumstances since the announcement of Paladin's increased Offer (the recommendation to accept the Paladin Offer in preference to the Areva deal and the fact that Paladin was then expected to move to outright ownership of all the shares in Summit) Paladin would vote against any resolution put to Summit shareholders to approve the Areva transaction."

7. On 16 April 2007 Summit announced that it would recommend the increased Paladin Offer. Summit made no mention of the Areva Transaction in the announcement.
8. On 16 April 2007 Paladin's managing director made a statement to the media concerning the Areva Transaction but made no reference to the Areva Transaction not proceeding or to Paladin not voting in favour of the Areva Transaction.
9. On 23 April 2007, Summit announced that it had decided not to convene a meeting of shareholders to consider the Areva Transaction.
10. Paladin has not, to date, informed Summit shareholders that it no longer intends to stand by its unqualified statement.
11. Acceptances were received into Paladin's takeover bid for Summit throughout the events referred to above (the **Circumstances**).
12. It appears to the Panel that the Circumstances are unacceptable having regard to:
 - A. their effect on the control or potential control of Summit, and
 - B. their effect on the proposed acquisition by Areva of a substantial interest in Summit.
13. The Panel has considered the purposes of the Takeovers Chapters of the Corporations Act as set out in section 602 and in particular, the desirability that the acquisition of control of Summit shares take place in an efficient, competitive and informed market, and that Summit shareholders are given enough information to assess the merits of the various proposals before them.
14. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances in relation to the Circumstances and the affairs of Summit.

Under section 657A of the Corporations Act, the Takeovers Panel declares that the Circumstances constitute unacceptable circumstances in relation to the affairs of Summit.

Simon McKeon

President of the Sitting Panel

Dated 11 May 2007