



In the matter of Consolidated Minerals Limited 02

[2007] ATP 21

Catchwords:

decline to commence proceedings, efficient, competitive and informed market, poor or misleading disclosures, incomplete announcement, unwarranted delay, foreseeable market speculation, early acceptance, standing order, withdrawal of on-market order, equality principle, misleading and deceptive, failure to qualify intentions, disclosure of directors interests

Corporations Act 2001 (Cth) sections 602(c), 657C, 657A(2)(a) and / or (b), 1041H

Consolidated Minerals Limited, Pallinghurst Resources Australia Limited, Territory Resources Limited

ASIC Regulatory Guide RG 25 'Takeovers: False and Misleading Statements'

SUMMARY

1. These reasons relate to an application (the Application) to the Panel from Territory Resources Limited (Territory) on 28 August 2007 in relation to the conduct of Pallinghurst Resources Australia Limited (Pallinghurst) in the course of its off-market takeover bid for the shares of Consolidated Minerals Limited (Consolidated Minerals or CSM).
2. Territory submitted that Consolidated Minerals shareholders had not had a reasonable and equal opportunity to participate in the Pallinghurst offer, or alternatively, that Pallinghurst had failed to ensure an efficient, competitive and informed market as a consequence of:
 - (a) incomplete or misleading announcements to the market on 20 July and 16 August 2007; and
 - (b) a delay in correcting foreseeable market speculation,which combined to result in early acceptance by Consolidated Minerals shareholders of Pallinghurst's on-market purchase order for up to 11.35 million Consolidated Minerals shares.
3. Territory also submitted that statements within an announcement made by Pallinghurst on 24 August 2007 concerning the intentions or support of the Consolidated Minerals board were misleading in that they failed to disclose the number of shares that the Consolidated Minerals directors held, and that not all directors held shares.
4. The Panel noted that, in aggregate, the submissions of Territory were arguably not entirely without merit. However, the Panel considered that there was no reasonable prospect that the conduct of Pallinghurst was sufficient to give rise to a declaration of unacceptable circumstances, and accordingly declined to commence proceedings.
5. The Panel's reasons for its decision are set out below.

THE PANEL & PROCESS

6. The President of the Panel appointed John Keeves, Alice McCleary and Simon Withers as the sitting Panel (the Panel) to consider the Application.

APPLICATION

7. In summary, the Application had two central complaints:
 - (a) The events surrounding Pallinghurst's withdrawal of an on-market order for up to 5% of Consolidated Minerals shares gave rise to unacceptable circumstances; and
 - (b) Pallinghurst's statements concerning the support of the Consolidated Minerals board, without stating how many shares the directors controlled, in correspondence sent to Consolidated Minerals shareholders on 24 August 2007 was misleading and deceptive.

Background

Standing On-market Order

8. On 20 July 2007, Pallinghurst announced an off-market bid for the shares of Consolidated Minerals at \$3.30 a share (Pallinghurst Off-market Bid). Pallinghurst announced that one of the key features of the Pallinghurst Off-market Bid was that it had placed an on-market order for up to 11.35 million Consolidated Minerals shares (Standing On-market Order). In particular:

“Immediate on-market acquisition of CSM shares – in addition an on market order for up to 11.35 million CSM shares has been placed on the ASX today (see below) enabling shareholders who act promptly to obtain payment within 3 business days of the date of contract...”

9. The announcement went on to explain the key features of the Pallinghurst Off-market Bid in more detail, including:

“Immediate offer for first 5% of CSM

In order to accommodate shareholders who are seeking to obtain cash proceeds equivalent to our offer price quickly, Pallinghurst has placed through Deutsche Securities a standing order on the ASX to acquire up to 11.35 million CSM shares at A\$3.30 per share. CSM shareholders who sell their shares into this order on-market, will receive a payment of A\$3.30 per share in cash in 3 business days.

Shareholders who are attracted to this should contact their stockbrokers promptly.”

10. Prior to close of trade on 16 August 2007, Pallinghurst had not purchased any Consolidated Minerals shares under the Standing On-market Order because the market price of Consolidated Minerals shares had been consistently higher than the offer price of \$3.30, and had acquired less than 0.2% of Consolidated Minerals shares under the Pallinghurst Off-market Bid.

Withdrawal of Standing On-market Order

11. On 16 August 2007 at approximately 6.59pm (EST), Pallinghurst announced that it would withdraw the Standing On-market Order, with effect from close of trading on 17 August 2007. In its announcement, Pallinghurst:

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- (a) cited as its reason for withdrawing the Standing On-market Order the recent equity market softening (for example the S&P/ASX 200 weakening by 5% over three days); and
 - (b) stated that the Pallinghurst Off-market Bid remained open, with a closing date (unless extended) of 1 September 2007.
12. On 17 August 2007 an article appeared in the Australian newspaper citing *'sources close to the bid'* and speculating that Pallinghurst was *'preparing to walk away from the bitter battle for Consolidated Minerals and [was] unlikely to extend its \$870 million bid for the carbon steels miner beyond the current deadline.'*
13. At or about 4.13 pm (EST) on 17 August 2007, Pallinghurst made an announcement, the material terms of which were:
- "Pallinghurst notes an article in the Australian newspaper today that states that Pallinghurst is unlikely to extend the current closing date for its takeover bid.*
- To the extent that the article implies that this statement is based on the indication provided by Pallinghurst, it is mere speculation. While not extending the current closing date for its takeover bid is an option available to it, Pallinghurst has not at this stage made any decision whether or not to extend the current closing date."*
14. In the period between the opening of trade and half an hour prior to the close of trade on 17 August 2007 the share price of Consolidated Minerals fell to \$3.30 and the Standing On-market Order was filled. The share price of Consolidated Minerals fell further after the Standing On-market Order was filled but recovered the next trading day.
15. In the context of the trading history for Consolidated Minerals shares post 17 July 2007, being the period in which the competing bids by Pallinghurst and Territory had been announced, the fall in the share price represented a significant change as the market price of Consolidated Minerals shares had previously been consistently higher than the offer price of \$3.30.

Failure to qualify Consolidated Minerals 'director support' statement

16. On 24 August 2007, in a letter to Consolidated Minerals shareholders¹, Pallinghurst stated that:
- "Your Board unanimously recommends our Offer as being in the best interest of CSM shareholders (in the absence of a superior offer) and has indicated that they intend to accept the Offer with respect to 60% of their personal shareholdings (in the absence of a superior offer)."*
17. While consistent with previous statements in the Pallinghurst bidder's statement and the Consolidated Minerals target's statement, the 24 August 2007 letter did not specify that Consolidated Minerals directors, collectively, held less than 1% of Consolidated Minerals shares.

Declaration and orders sought in the Application

18. Territory sought a declaration of unacceptable circumstances under either or both sections 657A(2)(a) and (b)².

¹ Released to ASX on the same day

² Unless otherwise expressed, all statutory references are to the *Corporations Act (Cth)* 2001

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19. Territory sought orders under section 657D that Pallinghurst be required to divest itself of the shares purchased on 17 August 2007 by selling them into the market and making appropriate corrective statements to the market.

DISCUSSION

Pallinghurst Off-market Bid and conditionality, and Pallinghurst announcements of 20 July, 16 and 17 August 2007

20. In summary, Territory submitted that:
- (a) in its ASX announcement of 20 July 2007, Pallinghurst did not draw a distinction between the Standing On-market Order and the Pallinghurst Off-market Bid. Rather, both were represented as forming part of the one cash offer;
 - (b) Pallinghurst did not qualify the Standing On-market Order by expressly reserving the right to withdraw it;
 - (c) the market understood (and 'truth in takeovers' principles would require) that Pallinghurst could not depart from its commitment to leave the Standing On-market order in the market until such time as it was filled or upon the occurrence of some other defeating event;
 - (d) when announcing withdrawal of the Standing On-market Order on 16 August 2007, Pallinghurst did not make a clear statement of its intention with respect to the Pallinghurst Off-market Bid;
 - (e) the uncertainty created by Pallinghurst's change of position, combined with media speculation and market volatility at the time of the announcement resulted in 'panic selling' by Consolidated Minerals shareholders who had deferred making a decision to accept that aspect of the Pallinghurst Off-market Bid until faced with the announcement of Pallinghurst's intention to withdraw; and
 - (f) the events summarised in paragraphs (a)-(e) above led to Consolidated Minerals shareholders being coerced into accepting the Standing On-market Order, removing the opportunity to benefit in the competing change of control transactions in a way that was not reasonable or equal as required under section 602(c). Alternatively, they prevented the control transactions from taking place in an efficient, competitive and informed market under section 602(a) and (b).

Standing On-market Order as part of the Pallinghurst Off-market Bid

21. The Panel did not consider that the Standing On-market Order formed part of the Pallinghurst Off-market Bid, or that a reasonable Consolidated Minerals shareholder would have failed to understand the distinction between the two.
22. The Panel noted that while Pallinghurst's announcement on 20 July 2007 did make reference in the 'Key features of the Pallinghurst Off-market Bid' section of the announcement to the Standing On-market Order, the statement was qualified as being 'in addition' to the Pallinghurst Off-market Bid.

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Withdrawal of the Standing On-market Order

23. The Panel did not consider that Consolidated Minerals shareholders were likely to have understood from the 20 July announcement that the Standing On-market Order would remain open for the duration of the Pallinghurst Off-market Bid. In any event, it could have been filled earlier.
24. While the Panel considered that if Pallinghurst had expressly advised in the 20 July announcement that it reserved the right to withdraw the Standing On-market Order, Consolidated Minerals shareholders would have been somewhat better informed (and this aspect of the Application might have been avoided), it did not consider that the failure to do so was likely to give rise to a declaration of unacceptable circumstances.
25. In reaching its conclusion, the Panel:
 - (a) considered that, in the absence of a last and final statement that could not be departed from (which Pallinghurst had not made), market practice would be to assume an entitlement to withdraw an on-market order;
 - (b) considered it was clear from the limitation on the order of "*up to 11.35 million CSM shares*" that:
 - (i) there could not be a reasonable and equal opportunity for all Consolidated Minerals shareholders to participate in the Standing On-market Order; and
 - (ii) the Standing On-market Order may not remain open indefinitely, or for the duration of the Pallinghurst Offer;
 - (c) took into account the fact that the Standing On-market Order was for 5% of the voting shares in Consolidated Minerals and Pallinghurst held, at all times, less than 20% of the voting power in Consolidated Minerals; and
 - (d) took into account that 24 hours notice of withdrawal was given.

Pallinghurst's 'partial release' of information to the market on 16 August 2007 and failure to quickly remedy foreseeable speculation

26. The Panel did not consider that Pallinghurst's release of information to the market on 16 August 2007 was incomplete, or 'coercive' of Consolidated Minerals shareholders.
27. In reaching its conclusion, the Panel:
 - (a) noted that the 16 August announcement stated that the Pallinghurst Off-market Bid remained open, and stated the closing date of the Pallinghurst Off-market Bid (two weeks away) and that it could be extended;
 - (b) considered that nothing in the media reports referred to in the Application indicated anything other than that the Standing On-market Order was being withdrawn. They did not state or imply that the Pallinghurst Off-market Bid itself would be withdrawn, merely that Pallinghurst may be considering not extending the Pallinghurst Off-market Bid when the current end date was reached;
 - (c) considered that even if Pallinghurst had stated that it would not extend the Pallinghurst Offer, Pallinghurst's actions would not have given rise to

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unacceptable circumstances, the closing date being two weeks away and the announcement merely being a statement of Pallinghurst's intentions.

28. The Panel also considered that, notwithstanding the 'bundling' of the on-market order with the terms of the off market bid in the 20 July announcement, the market could not reasonably have expected that withdrawal of the Standing On-market Order indicated an intention to withdraw the Pallinghurst Off-market Bid, particularly given the statement in the 16 August announcement that the Pallinghurst Off-market Bid remained open, and the difficulty in obtaining ASIC consent to the withdrawal of a bid.

Time in responding to market speculation

29. The Panel was concerned at the time taken by Pallinghurst to address the market speculation that followed from the 16 August announcement and subsequent media commentary. Ideally, the announcement would have been made prior to the opening of trade on 17 August, and reiterated clearly that the withdrawal related solely to the Standing On-market Order, and not the Pallinghurst Off-market Bid.
30. However, the Panel did not consider that the reasons for the delay set out in correspondence between lawyers for Territory and Pallinghurst (which formed annexures to the Application) were unreasonable, or that the delay was likely to give rise to a declaration of unacceptable circumstances.
31. The Panel also considered that the content of the article in 'The Australian' newspaper attributed to '*sources close to the bid*' was not objectionable, even if it had been contained in an ASX announcement, so there was no point in the Panel commencing proceedings where there appeared little likelihood of finding the circumstances complained of were unacceptable.
32. The Panel considered it had sufficient information to make the decisions referred to above based on Territory's submissions in, and the annexures to, the Application.

Failure to inform of directors holding less than 1% in total

33. In summary, Territory submitted that correspondence to Consolidated Minerals shareholders dated 24 August 2007 failed to disclose that:
- (a) the directors of Consolidated Minerals held less than 1% of the company's issued share capital; and
 - (b) not all of the directors held Consolidated Minerals shares,
- and that this was misleading and deceptive in so far as shareholders would be unsure of the effect the qualified acceptance of the Consolidated Minerals directors would have on the success of the Pallinghurst bid.
34. The Panel considered that Consolidated Minerals shareholders were unlikely to have understood the statement to reflect anything other than the type of acceptance option their directors intended to take up, and the market could be taken to be generally aware of director interests as a consequence of regulated disclosure.
35. Accordingly, the Panel concluded that this aspect of the Application was unlikely to give rise to a declaration of unacceptable circumstances, and that it did not need to have regard to section 1041H.

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- 36. While the Panel was of the view that it might be considered desirable for Pallinghurst to have provided context to its statement about the support of the Consolidated Minerals board by noting the number of shares the board controlled, this would not reflect current market practice where the interest held is less than a substantial interest. The Panel would encourage market participants to consider additional disclosure of the number of shares controlled by boards, in the context of recommendations and acceptance intention statements.**
- 37. The Panel considered it had sufficient information to make this decision based on Territory's submissions in the Application.**

DECISION

- 38. For the reasons set out above the Panel concluded that there was no reasonable prospect the conduct of Pallinghurst would give rise to unacceptable circumstances, and therefore, under Regulation 20 of the Australian Securities and Investments Commission Regulations 2001, declined to commence proceedings in response to the Application.**

John Keeves

President of the Sitting Panel

Decision dated 29 August 2007

Reasons published 21 September 2007