



**In the matter of GoldLink Growthplus Limited
[2007] ATP 23**

Catchwords:

appointment of directors, board control, power or control, frustrating action, shareholder approval

Corporations Act s50AA, 249D, 602, 657A(2)(a)(i), 657D

Panel Guidance Note 12

In the matter of Bowen Energy Limited [2007] ATP 22

GoldLink Growthplus Limited, GoldLink Capital Asset Management Ltd; Gulf Resources Limited, Tidewater Investments Limited

These are the Panel's reasons for declining to commence proceedings on an application dated 14 October 2007 from Gulf Resources Limited (Applicant) regarding the affairs of GoldLink GrowthPlus Limited (GoldLink).

FACTUAL BACKGROUND

1. GoldLink is a public company listed on ASX (ASX code: GLC). Its business involves accessing arbitrage opportunities in the gold forward and options market.¹
2. The Applicant, Gulf Resources Limited, was, at all relevant times, GoldLink's largest registered shareholder, holding 8.6% of the shares on issue².
3. On 18 May 2007, the GoldLink board announced that:
"...decisive steps have been taken to prevent further unrealized losses in the investment portfolio and the Board has initiated immediate measures to determine the best ways of optimizing value for shareholders."
4. On 27 August 2007, the Applicant lodged a request that GoldLink convene a meeting of shareholders (under section 249D³). The resolutions to be considered concerned the removal of Messrs Kovacs, Smith, Horton and Van Veenendaal as directors of GoldLink, and the appointment to the GoldLink board of two directors of the Applicant, Messrs Reid and Treisman.
5. The Applicant submitted that, if approved by GoldLink shareholders, the effect of the proposed resolutions would be that the Applicant's nominees, Messrs Reid and Treisman, would have constituted the majority of the GoldLink board and be able to implement the *"conduct of a thorough investigation of the company's affairs."*⁴
6. An extraordinary general meeting of GoldLink shareholders was convened for 18 October 2007 (EGM). The notice of meeting was dispatched on 17 September 2007.

¹ GoldLink prospectus dated 23 May 2005.

² As at the date of the Application

³ Unless otherwise expressed, all statutory references are to the *Corporations Act (Cth)* 2001.

⁴ The quoted intention is from Gulf Resources' application. It is similar in intent to intentions set out in an explanatory statement that Gulf Resources circulated to GoldLink shareholders prior to the GoldLink EGM.

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7. On 24 September 2007, GoldLink announced receipt of a letter from its second largest registered shareholder, Tidewater Investments Limited⁵ (**Tidewater**), indicating that Tidewater would vote against the resolutions at the EGM, and putting forward a proposal to “*expand the capital base*” of GoldLink. Amongst other things, the proposal would include (subject to GoldLink shareholder approval):
 - (a) the acquisition of Tidewater’s wholly owned entity, Discount Assets Limited, through the issue of GoldLink shares; and
 - (b) the appointment of Tidewater Asset Management Pty Limited as investment manager to GoldLink.
8. On 2 October 2007, GoldLink announced that its management agreement with GoldLink Capital Asset Management Ltd⁶ was terminated. Further, it announced that Mr Kovacs had resigned as chairman and director; Messrs Horton and Walsh had resigned as directors; and Mr Brown and Ms Porta, the managing director and company secretary of Tidewater respectively, had been appointed to the GoldLink board to fill the casual vacancies (**Tidewater Related Directors**).
9. On 14 October 2007 the Applicant applied to the Panel for a declaration of unacceptable circumstances in relation to the affairs of GoldLink.

THE PANEL & PROCESS

10. The President of the Panel appointed Marie McDonald (Sitting President), Robyn Ahern (Deputy President) and Robert Sultan as the Panel to consider the Application.

APPLICATION

11. The Applicant submitted that unacceptable circumstances had arisen in relation to the affairs of GoldLink for two reasons:
 - (a) by restructuring the company’s board, the incumbent and previous directors acted in a way that frustrated the opportunity of the company’s shareholders to consider the Applicant’s control proposal; and
 - (b) with nominees of Tidewater⁷ forming one half of the GoldLink board and having veto power over all board decisions, the board restructure delivered a substantial degree of control to Tidewater without shareholders having the opportunity to vote on it.

Declaration and orders sought in the Application

12. The Applicant sought a declaration of unacceptable circumstances, and final orders that the Tidewater Related Directors resign as directors of GoldLink, and that GoldLink use its best endeavours to appoint a non-executive director independent of Tidewater. Alternatively, the Applicant sought orders that:

⁵ As at the date of the Application, Tidewater held 7.96% of the shares in the company).

⁶ Under which GoldLink Capital Asset Management Ltd was appointed to manage GoldLink’s alternative investment business.

⁷ The 2 October announcement described Mr Brown and Ms Porta as: “...nominees of Tidewater Investments Limited (Tidewater), the largest individual shareholder in the Company”.

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- (a) an independent legal practitioner be appointed as a “*delegate of the Chairman of [GoldLink] to chair the [EGM]*” on 18 October 2007;
- (b) no GoldLink shares be issued, or assets of GoldLink (or any related party) be sold, transferred or otherwise disposed of to Tidewater (or any related party) before the conclusion of the EGM; and
- (c) GoldLink (or any related party) not acquire, assume or receive or accept assignment of any assets or liabilities of Tidewater (or any related party) before the conclusion of the EGM.

GoldLink also sought certain interim relief including an order that the EGM be adjourned for 1 week.

DISCUSSION

“Control” of GoldLink

13. Under section 657A(2)(a)(i), the basis for a declaration is that it appears to the Panel that the circumstances are unacceptable having regard to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on the control, or potential control, of the company (or another company).
14. The Applicant submitted that, in view of section 657A(2)(a)(i), the Panel’s jurisdiction is not limited to questions of control arising from the acquisition of voting shares, but rather extends to considering whether circumstances surrounding “*corporate control*” transactions are unacceptable.
15. As recently discussed in the matter of [Bowen Energy Limited \[2007\] ATP 22](#), the Panel assesses the effect of the relevant circumstances on the control or potential control of a company by reference to the policy aims of Chapter 6. It is for this reason that the sitting Panel there concluded:

“... it is unlikely that circumstances will be unacceptable by reason only that they affect control as contemplated by section 50AA⁸ without also in some way affecting voting power in the controlled company.”
16. In the current context, the circumstances complained of do not relate to the acquisition of GoldLink shares, or affect voting power in the company. Rather, they concern alleged “*corporate control*”, achieved through a transaction affecting the composition of the GoldLink board, without affecting the distribution or exercise of voting power in the company.
17. Accordingly, and having regard to the various circumstances listed in para 18 below, the Panel considered the Application did not give rise to a question of control for the purposes of Chapter 6, as set out in s.602.
18. The Panel also noted that:

⁸ Section 50AA provides that one entity controls another entity, “*if the first entity has the capacity to determine the outcome of decisions about the second entity’s operating and financial policies*”, without reference to the source of that capacity. Under subsection 6(1), section 50AA has effect subject to a contrary intention appearing in the Act.

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- (a) the Tidewater Related Directors are subject to re-election at the imminent AGM (due by 30 November 2007), and accordingly GoldLink shareholders will have an opportunity to vote on their appointment;
 - (b) it is always open to shareholders with 5% of the votes to either requisition the GoldLink directors to convene a meeting of the company, or to convene the meeting themselves, to consider resolutions to reconstitute the Board;
 - (c) no evidence was presented to suggest the Tidewater Related Directors were acting other than in accordance with their duty to act in the best interests of all shareholders of GoldLink;
 - (d) GoldLink was attempting to identify a suitable person for appointment as an independent chairman;
 - (e) GoldLink was in the process of engaging (and subsequently advised that it had engaged) an independent person to chair the 18 October EGM; and
 - (f) any issue of shares to Tidewater or any of its related parties, or any acquisition, assumption or assignment of assets or liabilities from Tidewater would be subject to GoldLink shareholder approval.
19. Accordingly, on the material provided, the Panel did not consider there was any reasonable prospect it would conclude that the circumstances affected control, or potential control, of GoldLink.
20. The Panel determined that the board restructure could not be characterised as "frustrating action". The Panel did not need to consider whether, as submitted by the Applicant, the policy in Panel Guidance Note 12 (Frustrating Action) should be extended to "*corporate control*" transactions.
21. In the absence of a circumstance to which the sec 602 policies are directed, the Panel did not consider, and makes no finding concerning, whether the appointment of the Tidewater Related Directors to the GoldLink Board was or was not a proper exercise of the GoldLink Directors' power to fill casual vacancies.

Other matters

22. While not necessary to its conclusion, the Panel noted that in light of the matters set out in paragraph 18, and given that the resolutions to be considered at the EGM would have the same legal effect regardless of whether the EGM is held on 18 October, or adjourned for a week, there may not have been any appropriate orders it could reasonably make in respect of the matters raised in the Application.
23. The Panel was concerned by the delay between announcement of the 'restructure' and lodgement of the Application. However, having decided not to commence proceedings, it did not need to consider whether the delay had a material impact on the Application.

DECISION

24. For the reasons set out above the Panel concluded that there was no reasonable prospect the subject matter of the Application would give rise to unacceptable circumstances, and therefore, under Regulation 20 of the Australian Securities and

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Investments Commission Regulations 2001, declined to commence proceedings in response to the Application.

25. The Panel considered it had sufficient information to make this decision based on the submissions in the Application and the submissions received on behalf of GoldLink.

Marie McDonald

President of the Sitting Panel

Decision dated 18 October 2007

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