



**In the matter of Resource Pacific Holdings Limited**

**[2007] ATP 26**

**Catchwords:**

*Adequacy of disclosure – commercial detriment of delay – comparison of advantages and disadvantages – defeating condition – decline to commence proceedings – delay in bringing application – frustrating action – imbalance of information provided between competing proposals – issue of shares – need for funds – notice of meeting – pro-rata rights issue – shareholder approval of rights issue – sufficient time and information – timeliness – triggering action*

*Corporations Act 2001 – sections 657A(2)(a), 657A(2)(b)*

*Guidance Note 12*

*New Hope Corporation Limited – Resource Pacific Holdings Limited*

## **INTRODUCTION**

1. The Panel, Martin Alciaturi, Tom Bathurst QC and John Fast (President), declined to commence proceedings.
2. In these reasons the following definitions apply.

<b>Term</b>	<b>Meaning</b>
Application	application by New Hope dated 19 October 2007 concerning the affairs of Resource Pacific
Entitlement Offer	\$165 million pro rata offer of ordinary shares to existing shareholders of Resource Pacific
New Hope	New Hope Corporation Limited
Resource Pacific	Resource Pacific Holdings Limited

3. In these proceedings the Panel :
  - (a) adopted the published procedural rules; and
  - (b) consented to parties being represented by their commercial lawyers.

## **DISCUSSION**

### **Facts**

4. On 26 September 2007 New Hope announced its intention to make a scrip bid for all the issued ordinary shares in Resource Pacific. It was to offer 1.04 shares for every Resource Pacific share. It had not dispatched its bidder's statement at the time of the Panel's decision.
5. On 27 September 2007 Resource Pacific announced a re-capitalisation plan, the major part of which comprised the Entitlement Offer.
6. On 28 September 2007 Resource Pacific dispatched the notice of meeting for a general meeting to be held on 31 October 2007 to approve the Entitlement Offer. The notice provided for shareholders to consider the following resolution:

## Takeovers Panel

### Reasons for Decision – Resource Pacific Holdings Ltd

*THAT the Company is authorised to proceed with a renounceable pro rata entitlement offer of ordinary shares to shareholders to raise approximately A\$165 million (even though that offer will trigger a condition of the takeover bid by New Hope Corporation Ltd announced on 26 September 2007) on terms and conditions determined by the board.*

7. The Explanatory Memorandum accompanying the notice:
  - (a) indicated that directors convened the meeting because of the bid,
  - (b) noted that New Hope has the right to withdraw the bid if shareholders approved the Entitlement Offer,
  - (c) recommended that shareholders vote in favour of the Entitlement Offer, and
  - (d) said in respect of pricing the Entitlement Offer:

*Prior to the Bid, the directors anticipated pricing the Entitlement Offer consistently with market practice. If shareholders approve the resolution, the directors expect that the Entitlement Offer pricing will remain consistent with market practice with an allowance made for the impact of the Bid on the Company's share price.*

8. On 9 October 2007 New Hope raised with Resource Pacific concerns it had with the Entitlement Offer. It received a response on 11 October. Further correspondence ensued.

### Application

9. New Hope sought a declaration of unacceptable circumstances on the bases that:
  - (a) Resource Pacific shareholders had not had (and would not have by 31 October) sufficient time and adequate information to enable them to properly assess the relative merits of its bid and of the Entitlement Offer,
  - (b) the Entitlement Offer was a significant issue of shares that would affect the structure of its scrip bid,<sup>1</sup>
  - (c) the Entitlement Offer amounted to frustrating action by Resource Pacific,
  - (d) the directors' recommendation of the Entitlement Offer was premature given that they had not seen New Hope's bidder's statement, and
  - (e) the preparation of its bidder's statement was prejudiced by the lack of detail surrounding the Entitlement Offer.
10. New Hope sought interim orders that Resource Pacific make immediate disclosure of the details of the Entitlement Offer, the reasons why it was announced the day after the bid, and why it was in the best interest of shareholders.
11. New Hope sought final orders that:
  - (a) Resource Pacific make full disclosure in relation to the Entitlement Offer, including a comparison of the relative advantages and disadvantages of the Entitlement Offer and of the bid, and

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<sup>1</sup> On 8 October 2007 New Hope had written to ASIC seeking modification of sections 621(3) and 631(b) of the Act so that its Bid Consideration may be equal to the price at which a Resource Pacific share may be acquired under the Entitlement Offer.

## Takeovers Panel

### Reasons for Decision – Resource Pacific Holdings Ltd

- (b) the 31 October meeting be adjourned to a date 28 days after shareholders have had an opportunity to consider the disclosed information, the bidder's statement and the target's statement.
12. Resource Pacific submitted that the Panel should not conduct proceedings because:
- (a) the choice was not simply between the Entitlement Offer proceeding or New Hope's bid proceeding, since there were other avenues open to New Hope for its bid to proceed,
  - (b) Resource Pacific had an immediate need to raise funds,
  - (c) it was not consistent with normal market practice or in the commercial interests of Resource Pacific to finalise the offer terms yet, and
  - (d) the Application was a delaying tactic.

### Decision

#### *Disclosure*

13. The Panel was concerned about the level and adequacy of disclosure provided to Resource Pacific shareholders regarding the Entitlement Offer, particularly given that the issue of shares by Resource Pacific would trigger a defeating condition under New Hope's bid. The Panel felt that Resource Pacific shareholders should have been provided with all the information material to their making of an informed decision regarding the Entitlement Offer. The Panel was also of the view that a relative imbalance existed between information provided about the merits of the Entitlement Offer, as compared to the merits of the bid.
14. Resource Pacific submitted that the Panel should not commence proceedings. It said that "*[d]eferring the meeting and therefore the capital raising will cause real commercial detriment to Resource Pacific*".
15. The Panel did not wish to delay the meeting unless it proved necessary in order for Resource Pacific shareholders to be provided with the additional information referred to above. It therefore indicated its concerns to the parties and determined that these could be addressed if Resource Pacific disclosed:
- (a) the indicative terms of the rights issue (ie, the range of expected issue prices and indicative entitlement ratio);
  - (b) whether the board of Resource Pacific expected the Entitlement Offer to be underwritten;
  - (c) the basis on which the board believed that the Entitlement Offer was the better alternative for shareholders, even if that were to lead to the bid not proceeding.
16. Resource Pacific disclosed this information by letter to its shareholders, by an announcement on the ASX<sup>2</sup> and by posting it on its website on 25 October 2007. The additional information assisted in ensuring that Resource Pacific shareholders understood that a vote in favour of the Entitlement Offer may mean that the New Hope bid would not proceed. It also assisted them to understand the potential effects of the rights issue on control of Resource Pacific and on the value of Resource Pacific

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<sup>2</sup> At 9:37am on 25 October 2007.

## Takeovers Panel

### Reasons for Decision – Resource Pacific Holdings Ltd

shares. In the Panel's view there was sufficient time to consider the additional information before the meeting on 31 October 2007.

17. The disclosure also assisted New Hope to better understand the effect of the rights issue on the capital structure of Resource Pacific and on its bid (ie, if it did not wish to waive the defeating condition).
18. The Panel felt that the inclusion of information reminding shareholders about dilution, and what might occur if New Hope's bid did or did not proceed, sufficiently addressed its concerns about the imbalance in the information previously provided to shareholders in Resource Pacific that had been identified by the Panel.
19. As the Panel considered that (with the additional information) shareholders had enough information to enable them to assess the merits of the proposal, and sufficient time in which to consider that additional information, it determined that it was not necessary to commence proceedings.

#### *Frustrating Action*

20. Guidance Note 12, Frustrating Action, opens with the following sentence:

*Although it is generally the responsibility of a company's directors to make company decisions, decisions about control and ownership of the company are properly made by shareholders.*
21. The Entitlement Offer is a triggering action as defined in the Guidance Note; that is, an action taken by the target board that triggers a defeating condition in the bid. The Guidance Note makes it clear that triggering actions may *not* give rise to unacceptable circumstances if, for example:
  - (a) they are part of the ordinary course of business,
  - (b) they carry out agreements entered into or announced before the bid, or
  - (c) there is a commercial or legal imperative for them.
22. In the present case, Resource Pacific submitted to the Panel that it had an immediate need for funds. It also informed the Panel that the Entitlement Offer was to have proceeded on 1 October 2007, had it not been for the bid announcement on 27 September 2007. The Panel accepted these submissions, noting that the pricing for the Entitlement Offer (and hence the entitlement ratio) would, in the normal course, not be fixed until close to the launch date of the rights issue. It noted that the amount sought to be raised by Resource Pacific was fixed.
23. The Panel did not need to decide whether the triggering action would have given rise to unacceptable circumstances because Resource Pacific shareholders were afforded the opportunity to decide whether to proceed with the Entitlement Offer with the knowledge that it would amount to a triggering action. With the inclusion of the additional information, shareholders in Resource Pacific were provided with a balanced and realistic set of options that they could properly consider on their respective merits.

## **Takeovers Panel**

### **Reasons for Decision - Resource Pacific Holdings Ltd**

#### **Timing of Application**

24. The Entitlement Offer was announced on 27 September 2007. The Application was made on 19 October 2007. Resource Pacific's shareholders' meeting was to be held on 31 October 2007.
25. The Panel was concerned at the delay between announcement of the Entitlement Offer and making the Application. Resource Pacific raised the issue of delay, but because obtaining further disclosure would address its primary concerns, the Panel did not pursue that issue any further, including by seeking any submissions from New Hope.

**John Fast**

**President of the Sitting Panel**

**Date of decision: 31 October 2007**

**Date reasons published: 16 November 2007**