



In the matter of Consolidated Minerals Limited 03R

[2007] ATP 28

Catchwords:

Top-up note – top up payment – matching other bid – Anti-competitive effect – competing bids – efficient, competitive and informed market – auction process upon which Chapter 6 is predicated – no voluntary extension of offer period – no increase of consideration – last and final statement

Corporations Act 2001 (Cth) 657A, 657D, s657EA

Consolidated Minerals Limited, Pallinghurst Resources Australia Limited, Palmary Enterprises Limited

These are the Panel's reasons for making a declaration of unacceptable circumstances in relation to the affairs of Consolidated Minerals.

SUMMARY

1. These reasons relate to an application (the **Application**) to the Panel by Pallinghurst Resources Australia Limited (**Pallinghurst**) seeking review of the Panel's decision in response to an application (**Initial Application**) by Palmary Enterprises Limited (**Palmary**) on 15 October 2007 in relation to the affairs of Consolidated Minerals Limited (**Consolidated Minerals**) (see [Consolidated Minerals 03 \[2007\] ATP 26](#)).
2. The Initial Application related to an off market takeover bid made by Pallinghurst for all the shares in Consolidated Minerals (**Pallinghurst Offer**).
3. On 12 October 2007, Pallinghurst increased the Pallinghurst Offer to \$4.50 per share, and added an alternative consideration of \$4.50 cash and a Top-up Note which would match any subsequent higher offer from Palmary (subject to conditions).
4. Palmary submitted that unacceptable circumstances had arisen as a result of Pallinghurst announcing and offering the Top-up Note.
5. The Panel set aside the declaration of the Initial Panel and substituted a new (albeit similar) declaration of unacceptable circumstances in relation to the affairs of Consolidated Minerals and the circumstances of Pallinghurst announcing and offering the Top-up Note as a part of an alternative consideration under the Pallinghurst Offer.
6. The Panel ordered that the Top-up Note be withdrawn and that Consolidated Minerals shareholders who had accepted the Pallinghurst Offer and had elected to receive the Top-up Note should have the opportunity to withdraw their acceptances. The right to withdraw was required because the terms of those acceptances were varied by the Panel's order to remove the Top-up Note, leaving only the cash component of \$4.50.
7. The Panel advised that it would not consider it unacceptable for Pallinghurst to withdraw the last and final statements that it made on 12 October 2007 (with respect to either or both of the no increase in price and no voluntary extension

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aspects). This would allow Pallinghurst to keep the Pallinghurst Offer open if it wished to and to increase its offer price, if it chose to do so, while the Pallinghurst Offer was open for acceptance. See annexure B for the orders.

THE PANEL & PROCESS

8. The President of the Panel appointed Robert Johanson, Simon Mordant and Norman O'Bryan SC (Sitting President) as the review Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the Application.
9. The Panel adopted its published procedural rules for the purposes of the Proceedings.
10. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

APPLICATION

Background

Pallinghurst Offer

11. On 27 July 2007, Pallinghurst made the all-cash off-market Pallinghurst Offer at \$3.30 for all the shares in Consolidated Minerals (with a minimum acceptance condition of 50.1%).
12. On 6 September 2007 Pallinghurst announced an increase of its offer to \$4.10 per Consolidated Minerals share plus *“an additional cash payment to CSM shareholders who accepted the Pallinghurst cash offer, in order to match the offer price for CSM shares under any subsequent higher off-market takeover made by a rival bidder.”*
13. The top up payment was to be implemented by varying the terms of the Pallinghurst cash offer. It was to be conditional on the rival offer being:
 - cash above \$4.10,
 - for all Consolidated Minerals shares including those issued due to conversion of notes or exercise of options,
 - announced by 27 September 2007 and becoming unconditional no later than 18 October 2007.
14. On 12 September 2007 Palmary announced an increase to \$4.50 per share for its off-market takeover bid for all of the shares in Consolidated Minerals (**Palmary Offer**), subject to a number of conditions relating to board recommendation and break fee being satisfied or waived. On 18 September 2007 Palmary announced that the conditions were satisfied.
15. On 12 October 2007, Pallinghurst increased its offer to \$4.50 to match Palmary's offer price. It also offered the alternative of \$4.50 plus the Top-up Note. The Palmary bid is the only rival offer that qualifies under the revised conditions of the Top-up Note. Pallinghurst extended the bid period of the Pallinghurst Offer to 24 October 2007.

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Top-up note

16. The Top-up Note would match the difference between any offer from Palmary that was higher than the Pallinghurst Offer, subject to the offer from Palmary:
 - (a) being increased to a price above the Pallinghurst Offer (i.e. \$4.50) before 8.00 p.m. on 24 January 2007 (i.e. three months after the proposed close of the Pallinghurst Offer);
 - (b) being all cash (or have an all-cash alternative);
 - (c) being for 100% of the Consolidated Minerals shares on issue and extend to any Consolidated Minerals shares issued during the Palmary offer period due to conversion of Consolidated Minerals convertible notes and exercise of Consolidated Minerals options; and
 - (d) becoming unconditional by not later than 24 January 2008.

No Increase Statement

17. Pallinghurst made a statement at 2.16 p.m. on 12 October 2007 that declared the cash component of the Pallinghurst Offer final *“in the absence of a competing offer for all [Consolidated Minerals] shares that is all cash (or has an all-cash alternative) at an offer price above \$4.50 per [Consolidated Minerals] share.”*
18. At 4.32 p.m. that day, Pallinghurst made a second statement, that it would not increase the cash component of the Pallinghurst offer unless a competing bid was made for all Consolidated Minerals shares at an offer value greater than \$4.50 per Consolidated Minerals share *“that comprises any form of consideration (including without limitation consideration that comprises only cash as either the sole or an alternative form of consideration”*.

No Extension Statement

19. On 12 October 2007, Pallinghurst said in its second supplementary bidder’s statement:

“The offer period under the Pallinghurst Offer is being extended until 7.00pm (Melbourne time) on 24 October 2007. Pallinghurst has, however, declared that there will be no further voluntary extensions beyond this date.”

Declaration and orders sought

20. In the Initial Application, Palmary sought a declaration of unacceptable circumstances under section 657A of the Corporations Act 2001 (Cth)¹ and orders under section 657D requiring Pallinghurst to:
 - (a) withdraw the second statement Pallinghurst made on 12 October; and
 - (b) withdraw the alternative consideration under the Pallinghurst Offer comprising \$4.50 in cash plus one “Top-up Note” and treat any acceptances or deemed acceptances of that alternative consideration as null and void.

¹ All section references are to the Corporations Act unless stated otherwise. All references to the “Act” are to the Corporations Act.

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DISCUSSION

21. The Panel considered the Application, the submissions and materials before the Initial Panel and the decision of the Initial Panel. The Panel issued a Brief which raised the issues before it for consideration and invited submissions and rebuttals by the parties. The Panel was assisted by the submissions from the parties and from the Australian Securities and Investments Commission.

Top-up Note

22. The Panel considered that the Top-up Note allowed Pallinghurst, in effect, to vary the terms of the Pallinghurst Offer to match any future price increase in the Palmary Offer (subject to conditions), after Pallinghurst had chosen to close the Pallinghurst Offer and after Consolidated Minerals shareholders could no longer accept the Pallinghurst Offer.
23. The Panel considered that this was at odds with basic principles and policies underlying takeovers regulation in Australia and Chapter 6. In particular, it is a fundamental principle and policy of takeovers regulation that competing bidders may only vary their offers in accordance with the strict rules set out in Part 6.6 of the Act: *Re Centennial Coal Co Ltd* (2006) 226 ALR 341, at [3]. Whilst the Panel did not consider the possibility of any breach of those provisions of the Act in this case, and made no finding of any breach, it did consider that the Top-up Note flew directly in the face of the policy which informs those provisions and constituted unacceptable circumstances for the reasons explained below.
24. The Panel considered that the fundamental purpose of Chapter 6, set out in section 602, that control of voting shares in Consolidated Minerals should take place in an efficient, competitive and informed market, requires that target shareholders are able to assess the merits of two competing bids while those bids remain open for acceptance. The “reaching from the grave” to match the Palmary Offer after Pallinghurst’s bid had closed, which the Top-up Note allowed Pallinghurst to do, was inconsistent with the efficient, competitive and informed market for control of Consolidated Minerals voting shares. Consequently it gave rise to unacceptable circumstances.
25. Palmary submitted that the effect of the Top-up note was to discourage competing bids, or to “chill the auction process”. Pallinghurst, on the other hand, submitted that there was nothing anti-competitive in a bidder electing to match another bid price. Pallinghurst acknowledged that the Top-up note went further by allowing the matching after its offer period had closed. This, it said, enhanced the competitive scenario rather than detracting from it. The Panel did not accept Pallinghurst’s arguments.
26. The Panel considered that Pallinghurst’s ability to increase the Pallinghurst Offer after it had closed was likely to inhibit Palmary from increasing the Palmary Offer. The Panel considered it arguable that the Top-up Note, in the form and circumstances before the Panel in this case, was anti-competitive and therefore arguably unacceptable on that ground also. The Panel noted that Palmary had increased the Palmary Offer after Pallinghurst had first announced

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a proposed top-up payment mechanism on 6 September 2007. The Panel did not accept Pallinghurst's argument that this was evidence that the Top-up Note was not anti-competitive or that it had had no effect on the efficient, competitive and informed market for Consolidated Minerals voting shares. In any event, the Panel did not need to and so did not base its finding of unacceptable circumstances in this case on competition grounds, but rather on the policy grounds identified in paragraphs 23 and 24 above.

27. The Panel considered that the Top-up Note was a device to allow Pallinghurst to continue to compete with the Palmary Offer after the Pallinghurst Offer had closed and after Consolidated Minerals shareholders could no longer accept the Pallinghurst Offer. The Panel considered that to meet the purposes of Chapter 6, such variations, in competition with a rival bid, should be made while the varied offer was open for acceptance.
28. The Panel did not consider that the mere fact that the value of offer consideration might vary after the close of an offer was unacceptable.
29. The Panel considered that if the Top-up Note was allowed to stand as part of Pallinghurst's consideration:
 - (a) Palmary was likely to be inhibited from increasing the Palmary Offer;
 - (b) the Palmary Offer was likely to be less successful;
 - (c) the Pallinghurst Offer was likely to be more successful;
 - (d) Palmary was less likely to acquire a substantial interest in Consolidated Minerals;
 - (e) Pallinghurst was more likely to acquire a substantial interest in Consolidated Minerals;
 - (f) the market for control of Consolidated Minerals shares was likely to be less efficient, competitive and informed.
30. For the above reasons, the Panel considered that the Top-up Note gave rise to unacceptable circumstances.

Enough information to assess the merits

31. Palmary submitted that shareholders were not given sufficient information to assess the merits of the proposal because there was insufficient disclosure of funding and credit risks.

Funding risk

32. As it considered the Top-up Note was unacceptable for the reasons given above, the Panel did not need to decide this aspect of the Application.
33. However, the Panel was concerned that the terms of the Top-up Note potentially exposed Pallinghurst to unlimited liability, and that Pallinghurst:
 - (a) had expressly stated that it would manage the upper limit of that liability by its ability to accept into the Palmary Offer; and

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- (b) had not adequately disclosed its funding arrangements to meet the potentially unlimited liability.

The Panel acknowledged that Pallinghurst might accept into the Palmary Offer if the Palmary Offer reached a price that Pallinghurst was unwilling to pay or that Pallinghurst's funders were unwilling to lend it.

34. Had the Panel not decided that the Top-up Note was unacceptable for other reasons it is likely to have had concerns with Pallinghurst's funding disclosure and arrangements for the Top-up Note.

Credit risk

35. For similar reasons, and despite similar concerns, the Panel decided that it did not need to decide this aspect of the Application.

Final statement

36. The Panel considered the following two aspects to the First Statement:
- (a) the "no increase of consideration" statement; and
 - (b) the "no voluntary extension" statement.

No increase of consideration

37. Palmary did not pursue this issue following the Initial Panel's decision. Accordingly the Panel did not commence proceedings in relation to the No Increase Statement.

No voluntary extension to offer period

38. On 12 October 2007, Pallinghurst said in its second supplementary bidder's statement:

"The offer period under the Pallinghurst Offer is being extended until 7.00pm (Melbourne time) on 24 October 2007. Pallinghurst has, however, declared that there will be no further voluntary extensions beyond this date."

39. The Panel considered that Consolidated Minerals adequately informed Consolidated Minerals shareholders at section 1.5 of Consolidated Minerals' supplementary target's statement of the possibility of extensions in the Pallinghurst Offer period other than by "voluntary extensions" by Pallinghurst. The Panel considered that this obviated any need for further disclosure.
40. Although not necessary, given its decision on commencing proceedings, the Panel agreed with the Initial Panel's conclusion that the implications of the statement, and the circumstances in which the bid could be extended, would not have been readily understood by ordinary market participants, although perhaps sophisticated market participants who read the statement closely enough and had a ready grasp of takeovers law would have done so.
41. The Panel agreed with the Initial Panel that Pallinghurst should have clearly identified the qualifications to its last and final statement. It may not be necessary to draft statements for the merely casual reader, but they should be drafted for ordinary readers of reasonable intelligence and who take reasonable care in tending to their affairs. Last and final statements must be made clearly

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and any material qualifications stated. The Panel does not accept that the statement here was clear enough, and there should have been further disclosure as to the limitations of the statement. The Panel noted that if Pallinghurst chooses to affirm the No Extension Statement, it should not repeat or affirm the statement without the clear qualifications described above.

Circumstances unacceptable

42. It appeared to the Panel that the circumstances of Pallinghurst's announcement, and offer, of the Top-up Note (**Circumstances**) were unacceptable having regard to:
- (a) the effect that the Panel was satisfied that the Circumstances have had, were having, or were likely to have, on:
 - (i) the control or potential control of Consolidated Minerals; or
 - (ii) the acquisition or proposed acquisition by Pallinghurst or Palmary of a substantial interest in Consolidated Minerals; and
 - (b) the purposes of Chapter 6 as set out in section 602 (in particular, the efficient, competitive and informed market for the acquisition of control over Consolidated Minerals voting shares).

Public interest

43. The Panel considered that it was not against the public interest to make a declaration of unacceptable circumstances in relation to the Circumstances and the affairs of Consolidated Minerals because:
- (a) it is in the public interest that an efficient, competitive and informed market be promoted for the acquisition of voting shares in listed companies; and
 - (b) orders, which create new rights, were available to the Panel, and the orders would not unfairly prejudice any person.
44. In deciding to make a declaration of unacceptable circumstances the Panel had regard to the matters in subsection 657A(3). The Panel has not had, and in its view did not need in this case to have, regard to whether the Circumstances constitute, will constitute or are likely to constitute or give rise to a contravention of Chapters 6, 6A, 6B or 6C of the Act.
45. Under section 657A, the Takeovers Panel set aside the Initial Panel's declaration and declared that the Circumstances constituted unacceptable circumstances in relation to the affairs of Consolidated Minerals. (See Annexure A)

Orders

46. The Panel considered that the orders proposed by the Initial Panel were appropriate orders to make following its declaration of unacceptable circumstances (other than order 9). The Panel considered the submissions from the parties on the Initial Panel's proposed orders and further submissions on the orders it proposed.

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47. The Panel was satisfied that the proposed orders would not unfairly prejudice any person.
48. The Panel considered:
- (a) that the orders most appropriately:
 - (i) addressed the effects of the unacceptable circumstances on Consolidated Minerals shareholders or other persons; and
 - (ii) ensured that the Pallinghurst Offer and Palmary Offer would proceed as if the unacceptable circumstances had not occurred;
 - (b) the effects of any proposed orders on any person to whom the orders were directed or any other person were not excessive when compared to the magnitude of the effects of the unacceptable circumstances on Consolidated Minerals shareholders or other person; and
 - (c) that it did not need to take any steps to mitigate any adverse effects of any proposed orders.
49. The Panel made the orders set out at Annexure B.

Top-up Payment proposal – 6 September 2007

50. The original Application related solely to Pallinghurst's announcements and actions concerning the Top-up Notes. The Panel's declaration and orders therefore relate to the Top-up Note and acceptances made after 12 October 2007. The Panel notes the statements made by Pallinghurst on 6 September 2007 concerning a proposed Top-up Payment, which was apparently intended to have a similar effect to the eventual Top-up Note but did not progress past a proposal stage and was superseded by the Top-up Note before being implemented. The Panel did not receive submissions on whether the announcement of the proposed Top-up Payment gave rise to unacceptable circumstances. The Panel therefore made no finding about the Top-up Payment and has not addressed acceptances made in the period between 6 September 2007 and 12 October 2007 in its orders.

Norman O'Bryan SC
President of the Sitting Panel
Decision dated 10 November 2007
Reasons published 16 November 2007



**Corporations Act
Section 657A
Declaration of Unacceptable Circumstances**

**In the matter of CONSOLIDATED MINERALS LIMITED
03R**

WHEREAS

Circumstances

1. Consolidated Minerals Limited is a listed public company (**Consolidated Minerals**). It is the subject of an off market takeover bid (**Pallinghurst Offer**) by Pallinghurst Resources Australia Limited (**Pallinghurst**) and an off market takeover bid (**Palmary Offer**) by Palmary Enterprises (Australia) Pty Limited (**Palmary**).
2. On 12 October 2007 Pallinghurst lodged with ASX Limited its second supplementary bidder's statement in relation to the Pallinghurst Offer. This provided for an additional form of consideration of \$4.50 cash plus a Top-up Note, as an alternative to the existing \$4.50 cash offer consideration.
3. The Top-up Note would operate to pay electing shareholders an additional cash payment that would match an increase in the offer price for Consolidated Minerals shares under the Palmary Offer, subject to the conditions set out in Pallinghurst's second supplementary bidder's statement. The cash payment under the Top-up Note (if any) would be payable even if it was triggered after the Pallinghurst Offer had closed.

Circumstances are unacceptable

4. It appears to the Panel that the circumstances referred to above (**Circumstances**) are unacceptable having regard to:
 - (a) the effect that the Panel is satisfied that the Circumstances have had, are having, or are likely to have, on:
 - (i) the control or potential control of Consolidated Minerals; or
 - (ii) the acquisition or proposed acquisition by Pallinghurst or Palmary of a substantial interest in Consolidated Minerals; or
 - (b) the purposes of Chapter 6 of the Act as set out in section 602 of the Act.
5. 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 Consolidated Minerals.
6. The Panel has had regard to the matters in subsection 657A(3) of the Act, but has not had regard to whether the Circumstances constitute, will constitute or

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are likely to constitute or give rise to a contravention of Chapters 6, 6A, 6B or 6C of the Act.

DECLARATION

The Panel sets aside the Declaration of the Panel dated 30 October 2007 and, under section 657A of the Act, the Takeovers Panel declares that the Circumstances constitute unacceptable circumstances in relation to the affairs of Consolidated Minerals.

Norman O'Bryan SC

President of the Sitting Panel

Dated 10 November 2007



Annexure B

Corporations Act Section 657D Orders

In the matter of CONSOLIDATED MINERALS LIMITED 03R

PURSUANT TO:

1. A declaration of unacceptable circumstances (**Declaration**) in relation to the affairs of Consolidated Minerals Limited (**Consolidated Minerals**) made by the Takeovers Panel (**Panel**) on 10 November 2007 under section 657A of the Corporations Act 2001 (Cth) (**Act**); and
2. Section 657D of the Act;

THE PANEL ORDERS THAT

3. As soon as practicable after the date of this order, Pallinghurst Resources Australia Limited (**Pallinghurst**) withdraw from its off market takeover bid for Consolidated Minerals (**Pallinghurst Offer**) the alternative consideration of \$4.50 cash and one Top-up note by issuing a supplementary bidder's statement.
4. All Top-up notes issued by Pallinghurst pursuant to the Pallinghurst Offer be cancelled.
5. Each Consolidated Minerals shareholder who did both of the following:
 - (a) accepted the Pallinghurst Offer after the dispatch of Pallinghurst's second supplementary bidder's statement; and
 - (b) accepted the consideration alternative of \$4.50 and one Top-up note;**(Affected Consolidated Minerals Shareholder)**

has a right to withdraw their acceptance, which is equivalent to the right conferred by section 650E of the Corporations Act (except that the period of notice in paragraph 650E(2)(a) of the Corporations Act shall be 10 business days after Pallinghurst sends the letter referred to in paragraph 6).
6. Pallinghurst as soon as practicable send:
 - (a) a letter (in a form acceptable to the Panel) to each Affected Consolidated Minerals Shareholder informing them of their withdrawal rights and clearly setting out what the shareholder must do to exercise those withdrawal rights; and
 - (b) a letter (in a form acceptable to the Panel) to each shareholder who accepted the Pallinghurst Offer before the dispatch of Pallinghurst's second supplementary bidder's statement and subsequently elected to receive the consideration alternative of \$4.50 and one Top-up note informing them of the effect of these orders on the alternative.

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7. Pallinghurst may withdraw its statement of 12 October 2007 that it has declared the \$4.50 cash component of the Pallinghurst Offer final in the absence of a competing higher offer. If Pallinghurst chooses to withdraw its statement, it must do so by issuing a supplementary bidder's statement no later than 4.00 pm (Melbourne time) on the day after the date of these orders.
8. Pallinghurst may withdraw its statement of 12 October 2007 that there will be no further voluntary extension of the Pallinghurst Offer. If Pallinghurst chooses to withdraw its statement, it must do so by issuing a supplementary bidder's statement no later than 4.00 pm (Melbourne time) on the day after the date of these orders.
9. If Pallinghurst is required to issue a supplementary bidder's statement by paragraph 7 or 8 above, Pallinghurst must further extend its offer until the date at least 7 days after the day that it issues the supplementary bidder's statement.

Norman O'Bryan SC

President of the Sitting Panel

Dated 10 November 2007