



**In the matter of Allegiance Mining NL**

**[2008] ATP 3**

**Catchwords:**

*Extension of unconditional offer - notice of variation - informed market - notice to target - ASX release - despatch to shareholder - access to information - failure to announce extension prior to close of offer - lodgement with ASIC - withdrawal of acceptance - notice of extension*

*Allegiance Mining NL - Zinifex Australia Limited - Lion Selection Group Limited - Andrew Paul Lambert - Caroline Lee*

*Corporations Act 2001 (Cth) sections 650D, 657A, 657C and 657D*

**INTRODUCTION**

1. The Panel, Hamish Douglass, John Fast (sitting President) and Simon Withers, made a declaration of unacceptable circumstances and final orders in relation to the affairs of Allegiance Mining NL.
2. The actions of Zinifex deprived Allegiance shareholders of enough information in which to consider the merits of the extension of the Offer and were not given reasonable time to consider it. The Panel considered that as a result, some shareholders, who otherwise might not have accepted the Offer when they did, accepted in the mistaken belief that the Offer had not been extended.
3. In these reasons the following definitions apply:

<b>Term</b>	<b>Meaning</b>
Allegiance	Allegiance Mining NL
Lambert	Andrew Paul Lambert and Caroline Lee and the 'Lambert and Lee Superannuation Fund'
Lion	Lion Selection Group Limited
Notice	the notice of variation to extend the closing date of the Offer until 7.00 pm on Friday 22 February 2008 in accordance with section 650D(1)(a) of the Corporation Act
Offer	off-market takeover bid by Zinifex for all the ordinary shares in Allegiance pursuant to the bidder's statement and offers dated 3 January 2008
Relevant Shareholders	Lion and Lambert
Zinifex	Zinifex Australia Limited

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

## APPLICATION

### Facts

#### *Extension of Offer*

5. Zinifex made a conditional Offer on 3 January 2008. The Offer became unconditional on 17 January 2008. The Offer was scheduled to close at 7.00 pm on Friday, 8 February 2008.
6. On 8 February 2008, the Burnie Advocate published an article in which Martin McFarlane, Investor and Community Relations Manager at Zinifex, was quoted as saying on 7 February 2008: *'We have no intention other than to close the offer tomorrow afternoon.'*
7. At 10.00 am on 8 February 2008, in response to the Burnie Advocate article, Allegiance made an ASX announcement inviting Zinifex to *'urgently clarify its intentions'*.
8. In the mean time, at 9:15 am on 8 February 2008 the Zinifex board met and resolved to extend the Offer until 7:00 pm on 22 February 2008.
9. At 4.55 pm on 8 February 2008 Zinifex lodged the Notice with ASIC to extend the closing date of the Offer until 7.00 pm on Friday, 22 February 2008.
10. Letters addressed to each Allegiance shareholder informing them that the Offer had been extended were collected from Computershare in Port Melbourne by Australia Post at around 5:00 pm on 8 February 2008.
11. At 5:00 pm on 8 February 2008 the Zinifex Offer Information Line closed. The *'Key Contacts'* section of the Zinifex bidder's statement provided that the Information Line was open *'Monday to Friday, 9 am to 5 pm (Melbourne time)'*.
12. At 6:56 pm on 8 February 2008 Zinifex emailed the Notice to Allegiance. It was received by Allegiance at 6:59 pm on 8 February 2008.
13. At 7:18 pm on 8 February 2008, Zinifex emailed an announcement containing the Notice to ASX. The announcement provided that at the date of the extension, Zinifex had a relevant interest in 0.26% of Allegiance shares.
14. At 7:31 pm on 8 February 2008 the Notice appeared on the ASX website.

#### *Relevant Shareholders*

15. Lion held 37,866,851 Allegiance shares. Andrew Paul Lambert and Caroline Lee jointly held of 1,100,000 Allegiance shares. The Lambert and Lee Superannuation Fund held 51,000 Allegiance shares. Together, the Relevant Shareholders held approximately 5% of Allegiance shares.
16. Lion (through Craig Smyth) and Andrew Lambert each attended Computershare in Abbotsford and waited until 7:00 pm on 8 February 2008 for information about any extension of the Offer before accepting. Immediately prior to 7 pm on 8 February 2008, Andrew Lambert and Craig Smyth accepted the Offer. They did not receive any information about the extension of the Offer.

### Declaration Sought

17. Allegiance sought a declaration of unacceptable circumstances. It submitted that in relation to the acceptances by the Relevant Shareholders:
  - (a) the acquisition of control over the voting shares in Allegiance had not taken place in an efficient, competitive and informed market; and
  - (b) the Relevant Shareholders were not given enough information to enable them to determine whether to accept the Offer.

### Interim Orders

#### *Application*

18. Allegiance sought an interim order that Zinifex be prohibited from processing acceptances of the Relevant Shareholders received by Computershare on 8 February 2008.
19. On 14 February 2008 the Panel made interim orders to maintain the status quo that:

*'Zinifex not take any further steps to process the acceptances of Lion Selection Group Limited, Andrew Lambert and Caroline Lee and the Andrew Lambert and Caroline Lee Superannuation Fund received by Computershare Investor Services Limited on 8 February 2008 (Acceptances), or dispose of or otherwise deal with any of the shares the subject of the Acceptances'.*

### Final Orders

20. Allegiance sought final orders, that:
  - (a) each of the Relevant Shareholders has the right to withdraw their acceptance of the Offer;
  - (b) Zinifex send a letter (in a form acceptable to the Panel) to each of the Relevant Shareholders informing them of their withdrawal rights and clearly setting out what the shareholder must do to exercise those withdrawal rights; and
  - (c) Zinifex issue a statement to the market regarding the withdrawal rights of the Relevant Shareholders and the potential effect of the Relevant Shareholders exercising those withdrawal rights on Zinifex's interests in Allegiance.

## DISCUSSION

### Extension of Unconditional Offers

21. Section 650D of the Corporations Act provides that to vary an offer under an off-market bid, a bidder must:
  - (a) lodge a variation notice with ASIC; and
  - (b) after the notice is lodged with ASIC, give the notice to:
    - (i) the target; and
    - (ii) everyone to whom offers were made under the bid.

22. The Panel noted that, an offer is not validly extended until each of these steps has been taken and that the Corporations Act does not specify in what order the target and shareholders must be notified once the variation notice has been lodged with ASIC.
23. The Panel also noted that, for the purposes of giving notice of the extension to shareholders, the notice must be dispatched before the offer period expires, but it is not necessary to show that the copy had been received or served on shareholders by that time<sup>1</sup>.
24. Zinifex submitted that a bidder may take each step to extend the offer period pursuant to s650D of the Corporations Act '*a moment before the time the offer would otherwise close*'. Zinifex further submitted that it complied with its obligations under section 650D of the Corporations Act by:
  - (a) lodging the Notice with ASIC at 4:55 pm on 8 February 2008;
  - (b) Australia Post collecting the letters notifying Allegiance shareholders of the extension at around 5:00 pm on 8 February 2008; and
  - (c) emailing the Notice to Allegiance at 6:56 pm on 8 February 2008.
25. Despite lodging the Notice with ASIC at 4:55 and dispatching the letters to Allegiance shareholders around 5:00 pm on 8 February 2008, Zinifex submitted that it continued to monitor the market throughout 8 February 2008 and reserved the ability not to extend the Offer until the Notice was sent to Allegiance at 6:56 pm. Zinifex said that an extension would have not been appropriate had any new development occurred which affected Allegiance.
26. The Panel considered that Zinifex was committed to extending the Offer earlier than 6:56 pm on 8 February 2008 when it emailed the Notice to Allegiance.
27. In the Panel's view, once the letters were collected by Australia Post, at around 5:00 pm, Zinifex was effectively committed to the extension and, as a result, could no longer withhold information about the extension from Allegiance.
28. The letters stated that Zinifex '*has extended the offer period under its takeover bid*'. There was no indication that the letters to shareholders were subject to Zinifex reserving the ability not to extend the Offer had any new development occurred which affected Allegiance between posting the letters and notifying Allegiance.
29. Delivery of the letters to the Allegiance Shareholders could not be retracted and, while it may have been theoretically possible for Zinifex not to have taken the final step of giving notice to the target, to do so would, in the Panel's opinion, have resulted in significant confusion upon receipt by the shareholders had the extension not occurred.
30. Similarly, the minutes of the Zinifex board meeting, which commenced at 9:15 am on 8 February 2008 and resolved to extend the Offer, did not provide any reservations on the resolution to extend the Offer. While the Zinifex board

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1 Diamond Rose NL v Striker Resources NL (1998) 85 FCR 76 and Pinnacle VRB Ltd v Reliable Power Inc (2001) 39 ACSR 8

could have met later in the day to rescind the resolution, there is no evidence that it had this possibility in mind, and it did not in fact happen.

31. In all the circumstances the Panel is satisfied that Zinifex was effectively committed to extending the Offer and accordingly at 5:00 pm on 8 February 2008 Zinifex should have informed Allegiance of the extension of the Offer at or soon after that time. This would have enabled Allegiance to notify its shareholders. The Panel did not have to consider whether or not Zinifex may also have needed to make an announcement on ASX, nor did the Panel need to address whether this was material information for Zinifex.
32. By delaying notifying Allegiance from 5:00 pm on 8 February 2008 until just prior to the scheduled close of the Offer, Allegiance shareholders were deprived of the opportunity to obtain sufficient information in which to consider the merits of the extension and were not given reasonable time to consider it. As a result, some shareholders, who otherwise might not have accepted the Offer when they did, accepted in the mistaken belief that the Offer had not been extended.
33. Those shareholders included the Relevant Shareholders who made diligent and demonstrable efforts to acquire information in relation to the status of the Offer right up until the scheduled closing time at 7:00 pm on 8 February 2008. In the Panel's view it also included other shareholders who were entitled to the information. It is not a requirement of the takeovers provisions that a person is entitled to information only if they seek it. The purposes of Chapter 6 set out in section 602 are stated to ensure that (among other things) holders of shares are given enough information. In any event, other shareholders may have had conversations about the closing of the Offer with their brokers or other advisors.
34. Therefore, it appears to the Panel that the circumstances are unacceptable having regard to the effect of the circumstances and the purposes of section 602 of the Corporations Act.
35. The Panel does not consider it is against the public interest to make this declaration. The Panel considered that the acquisition of control over voting shares in Allegiance should take place in an informed market and shareholders should have enough information to consider the merits of the extension and reasonable time to consider it. Also, in making the decision the Panel has had regard to the matters in s657A(3) of the Corporations Act.

### **Other Considerations**

#### *Notice of extensions*

36. The Panel considered that the facts of this case are clear. Other cases may be less so, and should be considered on their facts as they arise. Bidders should think carefully about delaying an extension until it is too late for the information about the extension to be publicly disclosed.

*Burnie Advocate*

37. Allegiance submitted that by making the statement which was quoted in the *Burnie Advocate*, Zinifex impliedly indicated to the market that it did not intend to extend its Offer beyond the scheduled closing time. Allegiance further submitted that by failing to clarify its intentions, Zinifex created confusion in the market as to whether the Offer would be extended.
38. The Panel struggled with that submission. The Panel considered that the quote in the *Burnie Advocate* did not create confusion in the market which created unacceptable circumstances. Moreover, Allegiance's ASX announcement at 10:00 am on 8 February 2008 provided shareholders with information that removed any potential risk of confusion by saying that the Zinifex quote '*may not legally bind Zinifex to close the offer today*'.

*Computershare*

39. Allegiance submitted that the Relevant Shareholders were misled or deceived into believing that:
  - (a) Computershare would be notified if the Offer was to be extended; and
  - (b) in the absence of any notification to Computershare, the Offer had not been extended.
40. The Panel considered that the Relevant Shareholders attendance at Computershare evidenced that they made diligent and demonstrable efforts to acquire information in relation to the status of the Offer. Although some play was made of the conversations of Computershare officers, in the Panel's view, those conversations were not relevant to determining whether the circumstances are unacceptable and the Panel expressly makes no comment about the conversations, not having undertaken any testing of them.

## DECISION

### Declaration

41. Under section 657A, the Panel declared that the circumstances constituted unacceptable circumstances in relation to the affairs of Allegiance (See Annexure A).

### Orders

42. The Panel received submissions from the parties concerning the orders that should be made.
43. The Panel made the final orders set out in Annexure B, including to the following effect:
  - (a) Zinifex notify Allegiance shareholders who accepted the Offer after 5:00 pm (Melbourne time) but before 7.30 pm (Melbourne time) on 8 February 2008, that they have a right to apply to Zinifex before 5:00 pm on Wednesday, 27 February 2008 to cancel their acceptance.
  - (b) All necessary steps are taken to ensure that acceptances made after 5:00 pm (Melbourne time) but before 7.30 pm (Melbourne time) on 8 February

## **Takeovers Panel**

**[2008] ATP 3**

2008 are cancelled as soon as practicable after 5:00 pm on Wednesday, 27 February 2008.

### **Costs**

44. The Relevant Shareholders applied for an award of costs.
45. The Relevant Shareholders submitted that while it is very unusual for the Panel to make costs orders, the conduct of Zinifex warranted the Panel considering costs.
46. The Panel did not make any costs orders.

**John Fast**

**President of the Sitting Panel**

**Decision dated 19 February 2008**

**Reasons published 3 March 2008**



Annexure A

**Corporations Act  
Section 657A**

**Declaration of Unacceptable Circumstances**

**In the matter of ALLEGIANCE MINING NL**

**WHEREAS**

1. Zinifex Australia Limited (**Zinifex**) made an off-market takeover bid for all the ordinary shares in Allegiance Mining NL (**Allegiance**) dated 3 January 2008 (**Offer**). The Offer was scheduled to close at 7.00 pm on Friday 8 February 2008.
2. The Offer became unconditional on 17 January 2008.
3. At 4.55 pm on 8 February 2008 Zinifex lodged with ASIC a notice of variation to extend the closing date of the Offer until 7.00 pm on Friday 22 February 2008 (**Notice of Variation**).
4. A Notice of Variation (addressed to each Allegiance shareholder) was collected by Australia Post from Computershare at around 5:00 pm on 8 February 2008.
5. Zinifex emailed the Notice of Variation to Allegiance at 6:56 pm on 8 February 2008.
6. At 7:18 pm on 8 February 2008, Zinifex emailed an announcement containing the Notice of Variation to ASX. At 7:30 pm on 8 February 2008 the Notice of Variation appeared on the ASX website.
7. By Zinifex not informing Allegiance of the extension of the Offer as soon as practicable after the Notice of Variation to shareholders was collected by Australia Post:
  - (a) the acquisition of control over voting shares in Allegiance had not taken place in an efficient, competitive and informed market; and
  - (b) Allegiance shareholders were not given enough information to assess the merits of the extension of the Offer and reasonable time to consider it.(the **Circumstances**).
8. It appears to the Panel that the Circumstances are unacceptable having regard to:
  - (a) the effect that the Panel is satisfied that the Circumstances have had on:
    - (i) the control or potential control of Allegiance; or
    - (ii) the acquisition or proposed acquisition by Zinifex of a substantial interest in Allegiance; or
  - (b) the purposes of Chapter 6 set out in section 602 of the Act.



**Takeovers Panel**  
**Allegiance Mining NL**

9. 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 Allegiance.
10. The Panel has had regard to the matters in section 657A(3).

Under section 657A, the Panel declares that the Circumstances constitute unacceptable circumstances in relation to the affairs of Allegiance.

**Alan Shaw**  
**Counsel**  
**with authority of John Fast**  
**President of the Sitting Panel**  
**Dated 20 February 2008**



**Annexure B**  
**Corporations Act**  
**Section 657D**  
**Orders**

**IN THE MATTER OF ALLEGIANCE MINING NL**  
**PURSUANT TO:**

A declaration of unacceptable circumstances dated 20 February 2008 in relation to the off market takeover offer for Allegiance Mining NL (**Allegiance**) by Zinifex Australia Limited (**Zinifex**) (the **Offer**)

**UNDER SECTION 657D THE PANEL ORDERS**

1. On Monday, 25 February 2008, as soon as practicable before 10:00 am (Melbourne time), that Zinifex issue a statement (in a form acceptable to the Panel) to the market. The statement must inform Allegiance shareholders who accepted the Offer after 5:00 pm (Melbourne time) but before 7.30 pm (Melbourne time) on 8 February 2008 that:
  - (a) at any time before 5:00 pm on Wednesday, 27 February 2008 they have a right to apply to Zinifex to cancel their acceptance;
  - (b) how and to whom that application is to be directed; and
  - (c) such application must be accompanied with evidence that is reasonably satisfactory to Zinifex as to the time of acceptance of the Offer.
2. The contracts that were formed on the acceptances of the Offer by the following shareholders be cancelled as soon as practicable after 5:00 pm on Wednesday, 27 February 2008:
  - (a) Lion Selection Group Limited, Andrew Lambert and Caroline Lee and the Lambert and Lee Superannuation Fund on 8 February 2008; and
  - (b) any Allegiance shareholder who contacts Zinifex by 5:00 pm on Wednesday, 27 February 2008 providing reasonably satisfactory evidence (whether by statutory declaration which will be taken as prima facie evidence, or otherwise) that they accepted the Offer after 5:00 pm (Melbourne time) but before 7.30 pm (Melbourne time) on 8 February 2008,(each a **Qualifying Shareholder**).
3. Zinifex and the Qualifying Shareholder take all necessary steps and, to the extent necessary, any third party including a Participating Organisation of ASX or the ASX Transfer and Settlement Corporation take any necessary steps, to cancel the relevant acceptance as soon as practicable after 5:00 pm on Wednesday, 27 February 2008.

**Alan Shaw**  
**Counsel**  
**with authority of John Fast**  
**President of the Sitting Panel**

**Dated 22 February 2008**