Takeovers Panel

Reasons for Decision BioProspect Limited 01

In the matter of BioProspect Limited 01

[2008] ATP 8

Catchwords:

ASIC relief – contravention – equity derivative – hedge - relevant interest – securities lending – stock lending - substantial holding notice – undertaking

BioProspect Limited – Australia and New Zealand Banking Group Limited – ANZ Nominees Limited – Opes Prime Group Limited

Corporations Act 2001 (Cth) sections 602, 606(1), 611 Item 6, 609(1), 655A(1), 657A, 657C, 657E, 671B and 761D

INTRODUCTION

1. The Panel, Catherine Brenner, Kevin McCann AM (sitting President) and Anthony Sweetman, commenced proceedings but decided not to make a declaration of unacceptable circumstances following acceptance by the Panel of undertakings from ANZ.

2. In these reasons the following definitions apply:

Term	Meaning
AMSLA	Australian Master Securities Lending Agreement of the Australian Master Securities Lending Association
ANZ	Australia and New Zealand Banking Group Limited and its wholly owned subsidiaries, including ANZ Nominees Limited
Application	application by BioProspect received by the Panel on 2 April 2008 concerning the affairs of BioProspect
ASIC	Australian Securities and Investments Commission
BioProspect	BioProspect Limited
BioProspect Shares	126,610,786 BioProspect shares (approximately 25.94% of the issued capital of BioProspect) registered in the name of ANZ Nominees Limited
Current Relief	ASIC Declaration dated 3 October 2000
ISDA	International Swaps and Derivatives Association Inc. Standard Master Agreement
Opes	Opes Prime Group Limited and its wholly owned subsidiaries

BACKGROUND

Facts

3. ANZ and Opes entered into various securities lending and equity financing transactions using AMSLAs which are standard term stock lending agreements. Generally, it appeared that Opes lent securities to ANZ in return for cash or other securities (treated under the agreements as "collateral"). ANZ primarily derived income from the transactions by charging Opes interest in respect of the money provided by ANZ to Opes as cash "collateral". ANZ may have derived further income as a result of lending securities received from Opes to other parties under other AMSLAs.

4. Under the terms of the AMSLAs, ANZ acquired legal and beneficial title to securities lent by Opes. This included the BioProspect Shares.

5. BioProspect is a public company listed on ASX (ASX code: BPO) which has 487,040,944 ordinary shares on issue.

6. As at 22 May 2006, by virtue of the securities lending and equity financing transactions with Opes, ANZ held 5.286% of the total issued capital of BioProspect, and for the first time exceeded 5%. On 2 June 2006 ANZ entered into a transaction which resulted in its interest falling below 5%. On 18 July 2007, ANZ's interest in BioProspect again exceeded 5%, totalling 17.869%. By 1 August 2007, ANZ held 20.334%. As at the date of the Application, ANZ held 25.94%.

7. ANZ had not lodged any substantial holder notices pursuant to section 671B of the Corporations Act[1] in respect of their shareholdings in BioProspect.

8. On 27 March 2008 John Lindholm of Ferrier Hodgson was appointed as voluntary administrator of Opes. On the same day, "*ANZ appointed a receiver and manager to Opes Prime Stockbroking [and] Opes Prime Group Limited … pursuant to fixed and floating charges over the assets of those companies*"[2]. Goldman Sachs JB Were was appointed by ANZ to dispose of the shares (including the BioProspect Shares).

9. It appeared to the Panel that the appointment of voluntary administrators to Opes constituted an event of default under the AMSLAs. As a result the AMSLAs provide that the obligations of ANZ and Opes under the AMSLAs were accelerated and 'netted-off'.

Application

10. BioProspect sought a declaration of unacceptable circumstances. It submitted that the circumstances surrounding the acquisition by ANZ of the BioProspect Shares were unacceptable having regard to the effect they had on the control or potential control of BioProspect, or the acquisition of a substantial interest in BioProspect. In particular, BioProspect submitted that:

    (a) by ANZ not notifying the market of the substantial holding, and by exceeding 20%, the acquisition of control over shares in BioProspect did not take place in an efficient, competitive or informed market

[1] All section references are to the *Corporations Act 2001 (Cwth)* unless otherwise stated.
[2] ANZ Releases dated 7 April 2008.

(b) because ANZ had not notified the market of the substantial holding, the holders of shares in BioProspect and the directors of BioProspect did not:

(i) know the identity of the person who proposed to acquire a substantial interest and

(ii) have reasonable time to consider the proposal and

(c) by ANZ exceeding 20%, holders of shares in BioProspect were not given a reasonable and equal opportunity to participate in any benefits accruing through any proposal under which ANZ acquired a substantial interest in BioProspect.

Interim Orders

11. BioProspect sought interim orders:

(a) to restrain ANZ from disposing of, transferring or charging any of the BioProspect Shares or any interest in the BioProspect Shares until the Application had been considered and

(b) declaring that any agreement between ANZ and any third party for the disposal of, transfer of or charge over any of the BioProspect Shares or any interest in the BioProspect Shares be declared void and unenforceable at law.

12. The Panel did not consider that the order sought in paragraph 11(b) was an interim order.

13. The Panel did not make the interim order sought in paragraph 11(a) because on 4 April 2008, ANZ gave undertakings:

(a) not to sell any BioProspect Shares until disclosure to the market, in the form of a substantial holder notice, was provided in relation to its interest in BioProspect

(b) not to trade the BioProspect Shares other than in the ordinary course of trading on the ASX and

(c) not to sell BioProspect Shares comprising an amount greater than 5% of the issued capital of BioProspect over any three consecutive trading days.

14. On 7 April 2008, ANZ lodged a substantial holder notice in relation to its interest in BioProspect. However, BioProspect submitted that ANZ's substantial holder notice did not comply with the requirements of s 671B. It submitted that it was implicit in the undertaking that the substantial holder notice be compliant with s 671B. ANZ submitted that its disclosure provided substantive compliance and undertook not to sell any BioProspect Shares until this issue was resolved.

15. The Panel was satisfied that ANZ's disclosure provided substantive compliance with s 671B and that the information omitted was not such as would lead to a declaration of unacceptable circumstances. The Panel therefore did not require an additional substantial holder notice to be lodged by ANZ.

Final Orders

16. BioProspect did not specify the final orders that it was seeking, however submitted that it was concerned to ensure that ANZ sells down the interest in BioProspect in an orderly manner.

DISCUSSION

Ownership

17. It appeared to the Panel that the cash "collateral" provided by ANZ to Opes under the AMSLAs (see paragraph 3 above) was, in effect, a loan to Opes against which securities, including the BioProspect Shares, were held by ANZ. Whether this is the legal effect was not a question for the Panel. Nor was it necessary to the Panel's conclusions. In other words, the question of ANZ's title to the BioProspect Shares is not one for the Panel and as such, the Panel has taken the AMSLA documentation at face value.

Relevant Interest Relief

18. ANZ submitted that the Current Relief applied to disregard its relevant interest in BioProspect.

19. Section 655A(1) provides ASIC with the power to:

    (a) exempt a person from the provisions of Ch 6 and

    (b) declare that Ch 6 applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

20. In deciding whether to grant such an exemption or declaration, ASIC considers the purposes of Ch 6 as set out in s 602.

Background

21. The Panel asked for, and ASIC provided, the application(s) and all corrospondence in relation to the previous relevant interest relief granted by ASIC to ANZ. The Panel notes that prior to the Current Relief, ASIC had granted ANZ separate relief in respect of:

    (a) 'equity swap financing transactions', granted on 8 November 1996 and

    (b) 'securities lending transactions', granted on 6 March 1997.

22. The Panel considers it relevant that ANZ sought a separate instrument to cover securities lending transactions after being granted relief in respect of equity swap financing transactions. It is likely that, at least initially, ANZ took the view that the equity swap financing transactions relief (which has been replaced by the Current Relief) did not cover security lending transactions.

23. The 'equity swap financing transactions' relief allowed ANZ to disregard any relevant interest in securities that would otherwise arise solely as a result of an equity swap financing transaction. On 30 September 1998, this relief was extended to cover other forms of equity derivative transactions (the term "equity derivatives" replacing "equity swaps" in the relief instrument).

24. ANZ submitted in these proceedings that the use of the term "equity derivatives" instead of "equity swaps" in the relief instrument encompassed various products marketed by ANZ including 'securities lending'. The Panel noted that ASIC has submitted in these proceedings that there is nothing in the correspondence between ASIC and ANZ to support ANZ's assertion.

25. The 'equity swap financing transactions' relief expired on 30 September 2000 and was replaced by the Current Relief. In its application for the Current Relief dated 30 August 2000, ANZ provided that "*there has been no change in the nature of the underlying transactions which impacts on ASIC's policy considerations in granting (or extending) the relief*" and "*ANZ is not seeking any changes to the terms or conditions on which relief has previously been granted*".

26. The 'securities lending transactions' relief allowed ANZ to disregard any relevant interest in securities that would otherwise arise solely as a result of ANZ holding shares in connection with a securities lending transaction entered into before 30 September 1997. In October 1997, this relief was varied to cover securities lending transactions entered into before 30 September 1998. The 'securities lending transactions' relief expired on 30 September 1998 and no subsequent relief instrument had been sought or granted specifically in respect of 'securities lending transactions'.

Current Relief

27. An extract of the Current Relief is set out at Annexure A.

28. The Current Relief operates to disregard any relevant interests in connection with the acquisition of securities pursuant to an 'equity financing transaction'. An 'equity financing transaction' is defined in the Current Relief as:

    "*a transaction that is a structured financing arrangement in the nature of an equity derivative and is documented under the International Swaps and Derivatives Association Inc. standard Master Agreement (or other documentation which has substantially the same effect as that agreement)*"

29. To obtain relevant interest relief in respect of securities under the Current Relief:

    (a) ANZ must not exercise any voting rights attached to the relevant securities except to direct proxies to the Chairman to vote as the Chairman saw fit

    (b) ANZ must hold the relevant securities for the purpose of hedging ANZ's position under the transaction

    (c) the transaction must be a structured financing arrangement in the nature of an equity derivative and

    (d) the transaction must be documented under ISDA (or other documentation which has substantially the same effect as ISDA).

30. ANZ submitted that the Current Relief operates to disregard relevant interests in securities (including the BioProspect Shares) which ANZ would otherwise have as a result of securities lending transactions entered into pursuant to the AMSLAs with Opes.

31. ASIC submitted that, for the reasons set out below, ANZ cannot rely on the Current Relief in respect of securities lending transactions carried out under an AMSLA with Opes.

Voting

32. As a matter of general practice, ANZ had sought voting instructions from Opes when a right to vote arose in respect of securities transferred to it under an AMSLA. ANZ submitted that (subject to the comments noted in paragraph 35 below) this practice

means that "*the Current Relief would not technically operate with respect to those securities which ANZ has voted in accordance with instructions received from the relevant counterparty (although the practices would not affect the application of the Current Relief to other securities acquired under securities lending transactions for which ANZ did not receive voting instructions or which ANZ did not otherwise vote)*".

33. During these proceedings, ANZ had an opportunity to inform the Panel whether or not they voted the BioProspect Shares in accordance with voting instruction from Opes. ANZ did not provide the Panel with this information. The Panel infers that some or all of the BioProspect Shares were voted by ANZ in accordance with Opes' instructions.

34. The Panel notes that had ANZ received voting instructions in relation to the BioProspect Shares from Opes, the terms of the AMSLAs required ANZ to vote the shares in accordance with those instructions. The Panel considered that this was likely to lead to unacceptable circumstances.

35. ANZ submitted that, as a matter of law, it was arguable that it did not have voting power over securities in respect of which it exercised votes in accordance with the terms of an AMSLA, but rather, that it acted as proxy or agent. ANZ further submitted that, even if the case were otherwise, any "*contravention of the Act arising solely as a result of the implementation [of ANZ's voting practices] should be excused on the basis that ANZ has never sought to exercise the votes attaching to relevant securities in its own rights, but only in accordance with the voting instructions received from the relevant counterparty. As such, ANZ never exercised control over the voting rights attached to the securities, of the kind with which Chapter 6 and 6C are concerned*".

36. ASIC submitted that to obtain relevant interest relief under the Current Relief, ANZ must not have exercised any voting rights except to direct proxies to the Chairman of BioProspect to vote as the Chairman saw fit. In contrast, the AMSLAs between ANZ and Opes allowed securities lent to ANZ, including the BioProspect Shares, to be voted in accordance with Opes' instructions. ANZ's practice was to vote securities in accordance with Opes' instructions, which accorded with the requirements of the expired 'securities lending transactions' relief[3] applicable to transactions entered into prior to 30 September 1998, but not with the terms of the Current Relief.

37. The Panel did not think that ANZ can rely on the Current Relief as its practice of voting securities in accordance with Opes' instructions is inconsistent with the requirements of the Current Relief. As noted, if ANZ received voting instructions, it would be required to vote the shares in a way that resulted in the Current Relief not applying.

38. The Panel considers that ANZ's voting practice is enough to disapply the Current Relief, however the Panel also considered whether the transactions could be characterised as a hedge or an equity derivative.

Hedging

39. ANZ submitted that securities acquired by it were required for the purposes of hedging its exposure under the transaction in the following ways:

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[3] The 'securities lending transactions' relief allowed ANZ to vote the borrowed securities in accordance with the instructions of the lender.

(a) if there is not an event of default under the AMSLAs, ANZ had a commercial imperative to hold equivalent securities as a hedge against the requirement to return equivalent securities to Opes and

(b) if there is an event of default under the AMSLAs, ANZ had a commercial imperative to hold the securities for the purposes of sale in order to hedge the payment obligations arising in connection with the 'netting off' process provided for in the AMSLAs in such event.

40. ASIC submitted that it unduly stretched the meaning of hedge to suggest that ANZ could hold the securities (including the BioProspect Shares) as a hedge against exposure as a result of borrowing the same securities in the first place.

41. The Panel considers the submissions by ASIC to be more compelling. It is difficult to characterise a transaction under the AMSLAs as a hedge taking the natural meaning of that term. The Panel considers it the better view that securities were acquired by ANZ as "collateral" rather than acquired for the purposes of hedging its exposure to the borrowed securities.

42. The Panel considers that ANZ is unable to rely on the Current Relief as it did not hold the BioProspect Shares for the purpose of hedging its position under the transaction as required by the Current Relief.

Structured financing arrangement in the nature of an equity derivative

43. ANZ submitted that a securities lending transaction may be characterised as a 'structured financing arrangement' similar to an equity derivative and may be referred to as a 'physically settled equity swap' because:

(a) the money ANZ provides to Opes is referable to the value of the securities transferred by Opes to ANZ

(b) ANZ is required to provide an income stream to Opes, referable to dividends and other distributions paid in respect of securities transferred to ANZ

(c) ANZ is required to redeliver securities to Opes upon request. That is, Opes had a call option against ANZ in respect of such securities and

(d) ANZ's obligations to redeliver securities ceases on Opes' default and the value of any securities which have not been 'returned' by ANZ to Opes are 'netted off' against the monies and securities previously provided.

44. ASIC submitted that a securities lending transaction cannot be characterised as a derivative because:

(a) the dividend payment is not the 'underlying', rather the underlying is the securities

(b) the number of securities to be returned by ANZ to Opes is fixed and

(c) the fee paid by ANZ to Opes does not vary by reference to the value of the 'underlying' i.e. the securities.

45. Under a derivative, the consideration must be payable at a future time and the value of that consideration, or the value of the arrangement must be determined, derived from or vary by reference to something else[4].

46. The Panel considers the submissions by ASIC to be more compelling. The securities lending transactions, in this case using an AMSLA, were not equity derivatives as they are arrangements under which the lender agreed to return a fixed number of securities and the amount or value of consideration to be provided did not vary with reference to something else.

47. Accordingly, the Panel did not think that ANZ can rely on the Current Relief as the securities lending transaction cannot be characterised as an equity derivative as required by the Current Relief.

AMSLA and ISDA

48. The Panel did not need to decide whether an AMSLA was "substantially the same effect" as an ISDA for the purposes of the Current Relief.

Conclusion

49. For the reasons set out above, the Panel considered that ANZ is unable to rely on the Current Relief to disregard its relevant interest in the BioProspect Shares.

Other exemptions

50. As the Panel considers that the Current Relief does not operate to disregard ANZ's relevant interest in the BioProspect Shares, the Panel considered whether ANZ had the benefit of ss 609(1) or 611 Item 6.

51. Section 609(1) operates to disregard a relevant interest which would otherwise result from a person taking a mortgage, charge or other security over shares in the ordinary course of that person's business.

52. Section 611 Item 6 provides that an acquisition of a relevant interest in a company's voting shares is exempt from the prohibition in s 606(1) (the 20% threshold) if the acquisition results from the exercise by a person of a power, or appointment as a receiver, or receiver and manager, under a mortgage, charge or other security.

53. ANZ submitted that the principles in ss 611 Item 6 and 609(1) are relevant to the securities lending transactions by analogy. Therefore, ANZ submitted, as a matter of policy and ignoring the Current Relief, ANZ should have been required to lodge a substantial holder notice only following an event of default under the AMSLAs i.e. the point its interest in the securities became more analogous to an interest resulting from the exercise by a person of a power under a mortgage.

54. ASIC submitted that ANZ's position should not be regarded as analogous to a person who has the benefit of ss 611 Item 6 and 609(1). ASIC submitted that the amount of control that ANZ could exercise over securities borrowed under the securities lending transactions was significantly greater than that of a financier taking a mortgage or charge over securities.

55. The Panel considers that ANZ is unable to rely on the exemptions in ss 609(1) or 611 Item 6 as ANZ acquired legal and beneficial title in the BioProspect Shares under the

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[4] Section 761D of the Corporations Act 2001 (Cwth)

terms of the AMSLA. Moreover, the Panel considers the arrangement not to be one contemplated by those sections when they refer to "a mortgage, charge or other security".

Corporations Act

Section 671B – Substantial holding notice

56. Pursuant to s 671B, a person must give a notice containing certain specified information if the person:

    (a) acquires or ceases to have a substantial holding or

    (b) has a substantial holding and there is a movement of at least 1% in that holding.

    The person must give the notice within two business days after the person becomes aware of the acquisition or change.

57. A person has a substantial holding in a company if the total votes attached to voting shares in the company in which they or their associates have relevant interests is 5% or more of the total number of votes attached to the voting shares in the company.

58. On 22 May 2006, the Panel considers ANZ had a relevant interest in 5% or more of BioProspect and therefore had a substantial holding. ANZ ceased to have a substantial holding on 2 June 2006 when it entered into a transaction which upon settlement, resulted in ANZ's interest in BioProspect falling below 5%. On 18 July 2007, ANZ again had a substantial holding when it held 17.869% of BioProspect.

59. ANZ failed to lodge substantial holder notices within two business days of becoming aware it was a substantial holder on both 22 May 2006 and 18 July 2007 and failed to provide a substantial holder notice each time there was a movement of at least 1% in its BioProspect holding. ANZ also failed to lodge an ASIC Form 605 (Ceasing to be a Substantial Holder) on 2 June 2006 when ANZ ceased to be a substantial holder of BioProspect.

60. ANZ said that it might be argued that ANZ was only required to lodge a substantial holder notice after an event of default under the AMSLAs. The basis for this was that the Current Relief might be viewed as operating to disregard relevant interests in securities acquired by ANZ as a result of transactions pursuant to AMSLAs only until that date. In making this submission, ANZ assumed that the Current Relief applied.

61. The Panel noted that even if, as submitted by ANZ, ANZ were required to lodge a substantial holder notice only after an event of default under the AMSLAs (see paragraphs 53 and 60), such notice should have been lodged by Monday, 31 March 2008[5]. ANZ did not lodge a substantial holder notice in respect of its BioProspect interest until 7 April 2008.

Sections 606(1) – 20% threshold

62. Section 606(1) prohibits a person from acquiring a relevant interest in voting shares through a transaction where their interest increases from 20% (or below) to more than 20%, or increases from a starting point that is above 20% and below 90%.

[5] 2 business days following the voluntary administration which was an event of default under the AMSLAs

63. ANZ submitted that because ss 609(1) and 611 Item 6 applied by analogy (see paragraph 54), for the purposes of considering whether unacceptable circumstances occurred, ANZ should only be taken to have had a requirement to lodge a substantial holder notice following an event of default under the AMSLAs. Further, if the Current Relief did operate to disregard relevant interests in securities acquired by ANZ as a result of transactions pursuant to AMSLAs only until that date, ANZ would not have contravened s 606(1) upon the Current Relief ceasing to operate as no 'transaction' occurred merely because of the event of default.

64. The Panel considers that ANZ did not have the benefit of ss 611 Item 6 or 609(1) by analogy or otherwise and that on and from 1 August 2007, ANZ contravened s 606(1) as ANZ held 20.334% of the total issued capital of BioProspect.

Unacceptable Circumstances

Section 657A(2)(b)

65. The Panel considered that the circumstances in which ANZ acquired a legal and beneficial interest in the BioProspect Shares were unacceptable because they constituted or gave rise to contraventions of chapters 6 and 6C.

66. As established in Alinta[6], the Panel consideration that there has been a contravention of chapters 6 and 6C is simply a step towards its conclusion regarding unacceptable circumstances. It is not a final determination of non-compliance with the Corporations Act.

Section 657A(2)(a) and (c)

67. Alternatively, it appeared to the Panel that the circumstances were unacceptable having regard to the effect they had, will have or are likely to have on the control or potential control of BioProspect, or the acquisition of a substantial interest in BioProspect, and were otherwise unacceptable having regard to the purposes in section 602. In particular, the Panel considered that by:

    (a) not notifying the market of the substantial holding, and by exceeding 20%, the acquisition of control over shares in BioProspect did not take place in an efficient, competitive or informed market

    (b) not notifying the market of the substantial holding, the holders of shares in BioProspect and the directors of BioProspect did not:

        (i) know the identity of ANZ (i.e. the person who proposed to acquire a substantial interest in BioProspect)

        (ii) have reasonable time to consider the proposal and

    (c) exceeding 20%, holders of shares in BioProspect were not given a reasonable and equal opportunity to participate in any benefits accruing through any proposal under which ANZ acquired a substantial interest in BioProspect.

Undertakings

68. The Panel informed the parties that it was minded to declare the circumstances unacceptable, however considered that, subject to hearing from the parties, the issues

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[6] *Attorney-General of the Commonwealth of Australia v Alinta Limited & Ors* [2008] HCA 2.

before it could be satisfactorily resolved if ANZ provided an undertaking that dealt with the unacceptable circumstances.

69. Following submissions from the parties, on 28 April 2008 the Panel accepted the following undertakings from ANZ:

    (a) To sell down its interest in BioProspect to less than 5% of the issued capital of BioProspect within 12 months from the date of the undertaking.

    (b) If (a) is not satisfied, to hand over to ASIC (by off-market transfer) any BioProspect Shares that it holds as if the shares were vested with ASIC by way of Panel order, for disposal by ASIC in a manner to be determined by the Panel.

    (c) Until (a) is satisfied, not to vote any BioProspect Shares without the consent of the Panel.

    (d) Until (a) is satisfied, not to trade the BioProspect Shares other than in the ordinary course of trading on the ASX and not to sell BioProspect Shares comprising an amount greater than 5% of the issued capital of BioProspect over any three consecutive trading days.

    (e) Until (a) is satisfied, to first seek the consent of the Panel if they wish to deal with BioProspect Shares other than in the manner set out above.

70. In the 6 months to April 2008, turnover of BioProspect securities was approximately 20% of the total issued capital[7]. ANZ holds 25.94% of the issued capital of BioProspect. The Panel considers that it was appropriate to allow ANZ 12 months to sell down its substantial interest in BioProspect given the illiquid nature of BioProspect securities.

71. The undertakings are set out in full at Annexure B.

DECISION

72. For the reasons set out above, the Panel considered that unacceptable circumstances existed and was minded to make a declaration of unacceptable circumstances. However, the Panel considers that those unacceptable circumstances will be properly remedied if the BioProspect Shares are sold down in accordance with the terms of ANZ's undertaking.

73. Consequently, it did not appear to be in the public interest to make any declaration or orders.

Kevin McCann AM
President of the Sitting Panel
Decision dated 22 April 2008
Reasons published 12 May 2008

[7] IRESS

Annexure A

Current Relief

Australian Securities and Investments Commission
Corporations Law - Subsections 655A(1) and 673(1) - Declaration

Pursuant to subsections 655A(1) and 673(1) of the Corporations Law (the "Law") the Australian Securities and Investments Commission declares that Chapters 6 and 6C of the Law apply in relation to the persons referred to in Schedule A in the case mentioned in Schedule B as if the Law were modified or varied by:

1. Inserting the following after the definition of "equal access scheme" in section 9:

   "equity financing transaction" means:

   (a) a transaction that is a structured financing arrangement in the nature of an equity derivative and is documented under the International Swaps and Derivatives Association Inc. standard Master Agreement (or other documentation which has substantially same effect as that agreement); and

   (b) where:

      (i) any holding of securities in a listed corporation by one party (the "equity amount payer") is solely responsible for the purpose of the equity amount payer hedging its position under the transaction; and

      (ii) at the end of the transaction, the equity amount payer is obliged or the other party to the transaction or a related body corporate of the other party (a "counterparty") may oblige the equity amount payer to transfer to the counterparty securities identical to those referred to in subsection (b);"; and

2. Inserting the following section after section 609(1):

   "609(1A) A person does not have a relevant interest in securities if the relevant interest arises solely as a result of an equity financing transaction entered into by that person as the equity amount payer in the ordinary course of its business, other than an equity financing transaction entered into with an associate of the person."

SCHEDULE A

Australia and New Zealand Banking Group Limited (ABN 11 005 357 522) and each of its wholly owned subsidiaries each, a "Party').

SCHEDULE B

The entry by a Party into an equity financing transaction, where the voting rights attached to the underlying shares acquired as a hedge to the equity financing transaction are not exercised by the Party in any manner other than by giving the Chairman of the company in which the shares are held proxies to vote the shares as the Chairman sees fit.

Dated this 3rd day of October 2000

Annexure B

UNDERTAKINGS BY AUSTRALIA AND NEW ZEALAND BANKING GROUP AND ANZ NOMINEES LIMITED

Introduction

1. Pursuant to an application (**Application**) to the Takeovers Panel dated 2 April 2008 by BioProspect Limited (**BPO**), the Panel was minded to make a declaration of unacceptable circumstances in relation to the affairs of BPO and orders.
2. Australia and New Zealand Banking Group Limited (**ANZ**) and its wholly owned subsidiary ANZ Nominees Limited (**ANZ Nominees**) offer enforceable undertakings to the Panel to avoid the need for a declaration and orders.

Undertaking

1. Pursuant to Section 201A of the ASIC Act 2001, each of ANZ and ANZ Nominees undertakes:
   a) To sell down its interest in BPO securities to less than 5% of the issued capital of BPO within 12 months from the date of this undertaking.
   b) If a. is not satisfied, to hand over to ASIC (by off-market transfer) 12 months from the date of this undertaking any BPO securities that it holds for sale as if the shares were vested with ASIC by way of Panel order for disposal by ASIC in a manner to be determined by the Panel and for the proceeds to be directed in a manner determined by the Panel.
   c) Until a. is satisfied, not to vote any BPO securities they hold without the consent of the Panel.
   d) Until a. is satisfied, not to trade the BPO securities the subject of the Application other than in the ordinary course of trading on the ASX and not to sell BPO securities the subject of the Application comprising an amount greater than 5% of the issued capital of BPO over any three consecutive trading days (as defined in the ASX Listing Rules).
   e) Until a. is satisfied, to first seek the consent of the Panel if they wish to deal with BPO securities other than in the manner set out above.

Dated: 28 April 2008

Signed by Jon Webster
of Allens Arthur Robinson
with authority of ANZ and ANZ Nominees