



In the Matter of Lion Selection Limited

[2008] ATP 14

Catchwords:

Decline to conduct proceedings – supplementary target’s statement – history of merged entities – pre-bid agreement – disclosure of terms – disclosure of management fees – conflict of interest – Lion Plan

Lion Selection Limited – Indophil Resources NL – Xstrata Queensland Limited

Corporations Act 2001 (Cth) sections 2001 602, 657A, 657D

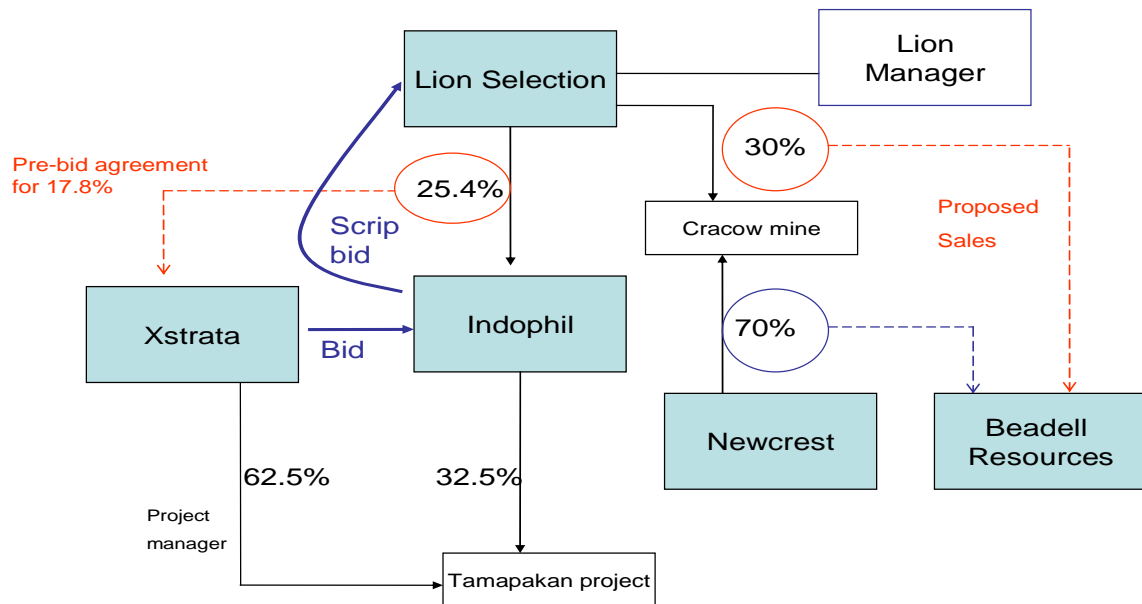
INTRODUCTION

1. The Panel, Robyn Ahern, Hamish Douglass and Alison Lansley (sitting President), declined to conduct proceedings after Lion provided additional disclosure in relation to its target’s statement and notice of meeting.
2. In these reasons the following definitions apply.

Term	Meaning
Beadell Resources	Beadell Resources Limited
Indophil	Indophil Resources NL
Lion	Lion Selection Limited
Lion Manager	Lion Manager Pty Ltd
Lion Plan	A plan to sell Lion’s interests in the Cracow Gold Mine and Indophil and from the sale by African Lion funds’ interest in Albidon Limited and to return surplus cash to Lion shareholders
Newcrest	Newcrest Operations Pty Limited
Notice of meeting	Lion’s Notice of Meeting and Explanatory Memorandum dated 19 May 2008 and announced to the ASX on 23 May 2008
Target’s statement	Lion’s Target Statement dated 23 May 2008
Xstrata	Xstrata Queensland Limited

BACKGROUND

3. Various relationships between the parties are described in the following diagram:



Facts

4. On 19 March 2008, Indophil announced its intention to make a scrip takeover bid for Lion. The offer was subject to a number of conditions, including a minimum acceptance of 50.1%.
5. Lion’s assets included a 30% interest in the Cracow Gold Mine and a 25% interest in Indophil. On 15 May 2008, Lion announced that it had:
 - (a) agreed to sell its 30% interest in the Cracow Gold Mine for \$80 million to Beadell Resources, subject to Indophil’s consent or Lion shareholder approval being obtained¹ and
 - (b) entered into a pre-bid agreement with Xstrata to sell a 17.8% interest in Indophil to Xstrata for \$1.00 cash per share if Xstrata made a takeover offer for Indophil.
6. On the same day, Xstrata announced it intended to make a takeover offer for Indophil conditional on:
 - (a) Indophil’s takeover bid for Lion not being declared unconditional
 - (b) Indophil’s 50.1% acceptance condition not being waived or fulfilled and
 - (c) Indophil consenting to Lion’s acceptance of the Xstrata offer in accordance with the pre-bid agreement or Lion shareholder approval being obtained.
7. On 19 May 2008, Lion announced the Lion Plan. The Lion Plan involved 4 stages:
 - (a) sale of Lion’s investments in the Cracow Gold Mine and Indophil

¹ Lion also announced that it has granted an option to Newcrest to buy Lion's 30% interest in the Cracow Gold Mine for \$80 million in the event that the Beadell Resources' acquisition of the Cracow Gold Mine did not complete, subject to Indophil’s consent or Lion shareholder approval being obtained.

- (b) generation of cash from the above sales and from the sale by African Lion funds of their interest in Albidon Limited
 - (c) return to shareholders of surplus cash and
 - (d) Lion retaining a portfolio of early stage mining and exploration investments.
8. On 23 May 2008, Lion lodged the notice of meeting and a target's statement. The notice of meeting sought shareholder approval of:
- (a) sale of a 17.8% stake in Indophil to Xstrata pursuant to the pre-bid agreement,
 - (b) sale of Lion's other Indophil shares for not less than \$1 per share
 - (c) sale of a 30% interest in the Cracow Gold Mine for \$80 million and
 - (d) distribution to Lion shareholders of up to \$1.50 per Lion share (expected to be \$1.35).
9. Lion called the shareholders' meeting because the sales to Xstrata and Beadell Resources (or Newcrest) and the return of surplus cash to shareholders could be defeating conditions; that is, prevent Indophil's offer conditions from being able to be satisfied, amounting to frustrating action.
10. On 30 May 2008, Indophil wrote to Lion outlining 33 issues it had with the target's statement, notice of meeting and other ASX disclosures. Following correspondence, Lion offered to provide corrective disclosure to address many of the issues.

Application

11. By application dated 5 June 2008, Indophil submitted that 6 'key disclosure' issues remained:
- (a) Lion's assertion that "The Lion Plan will deliver shareholders a return in excess of \$2.05 per share, fully diluted for options; or over \$2.00 per share in total value" used a notional net tangible assets of \$0.69 which did not take into account Lion's average historical discount to NTA
 - (b) Lion implied that \$1.35 proposed as cash return was absolute and not qualified by any risks. This was a key aspect of the "\$2.05 per share value" argument
 - (c) the pre-bid agreement gave Lion no ability to opt out of the sale to Xstrata as of right in the event of a higher competing offer and this had not been properly disclosed
 - (d) Lion frequently referred to its history going back many years when, in fact, Lion was incorporated in January 2007 and listed on ASX in April 2007
 - (e) disclosure of fees payable to Lion Manager. There were substantial conflict of interest issues involving Lion Manager and Robin Widdup (a director of Lion and a director and substantial shareholder of Lion Manager) which had not been addressed and
 - (f) the target's statement and the notice of meeting suggest that management fees after implementation of the Lion Plan will be lower, and there was inadequate disclosure in relation to this.

12. Indophil sought a declaration of unacceptable circumstances on the basis that Lion's disclosures or omissions were false and misleading and have an effect on the control or potential control of Lion (s657A(2)(a)), or have an effect on the acquisition of control taking place in an efficient competitive and informed market (s602(a)), or that Lion's security holders and directors do not have a reasonable time or enough information to assess the merits of the proposal (s602(b)(ii) and (iii)).

Orders

13. Indophil did not seek interim orders.
14. Indophil sought final orders that Lion:
 - (a) issue corrective disclosure, in the form of "replacement" documentation, to all Lion security holders and
 - (b) send a replacement proxy form to shareholders who had already submitted a proxy form in relation to the Lion shareholder meeting.

DISCUSSION

15. As a consequence of the making of the application, and before the Panel had met to consider whether to conduct proceedings, Lion proposed further disclosures in its proposed supplementary target's statement.
16. Three of the six issues Indophil raised in the application were, in the Panel's opinion, adequately addressed by the proposed further disclosures and the Panel decided that it would not conduct proceedings in respect of them. They were the following three issues.

Return to shareholders

17. The Panel was satisfied that this was now adequately covered in the proposed supplementary disclosure.

Risks disclosure of the cash return

18. The Panel considered that the risks had now been sufficiently identified in the supplementary disclosure. While it may have been helpful to include additional cross-references, this was not such as would be likely to give rise to unacceptable circumstances.

History

19. Lion was formed by the 'merger' of AuSelect Limited and Lion Selection Group Limited in April 2007. The companies were of approximately equal size. Many of the shareholders were the same. The Panel considered that it was not unreasonable to reflect their combined results as the history of Lion. The reasons were:
 - (a) Lion is the target, not the bidder. It is discussing its history with its own shareholders
 - (b) the merger was of 'equals' and both previous companies are now wholly owned subsidiaries of the holding company and
 - (c) the disclosure was sufficiently clear.

20. The Panel thought that the three remaining issues were not adequately addressed in the draft supplementary target's statement provided by Lion. However, Lion offered additional disclosure the form and content of which was approved by the Panel. On the basis of the additional disclosure the Panel declined to conduct proceedings.
21. On the three remaining issues the Panel's reasons are as follows.

Pre-Bid Agreement

22. On 15 May 2008 Lion issued an ASX release in which the following appeared:
"Lion benefits from any increase in Xstrata's Offer and the opportunity exists to accept any higher competing offer under certain circumstances."
23. The circumstances in which Lion could accept a higher competing offer for its Indophil shares were described in section 5.4 of the notice of meeting and on pages 75 and 76 of the target's statement. They were complicated. The Panel regarded the ASX announcement as poor disclosure. It gives no sense of the conditions under which Lion could accept a higher competing offer and, indeed, leaves a reader with the impression that the opportunity is reasonably open, which it is not.
24. While the supplementary disclosure includes details of the conditions, the Panel considered that a table of contents in the supplementary target's statement directing shareholders to the relevant section was needed.
25. In addition the Panel considered that it was important to clarify the ASX announcement in the supplementary target's statement and for the statement to be released on the ASX. This dealt with the poor disclosure in the announcement and clarified the complicated disclosure in the target's statement and notice of meeting.

Disclosure of Fees – 2 issues

26. There were two aspects to this part of the application:
 - (a) disclosure of incentive fees payable if the Lion Plan is implemented. As part of this, there was a concern about the potential for conflict of interest involving Mr Widdup, a director of Lion and a director and substantial shareholder of Lion Manager and
 - (b) disclosure in relation to management fees after the Lion Plan is implemented. In particular, it was submitted that Lion indicated the fees would be lower but this was not certain.
27. The Panel required additional disclosure in the supplementary disclosure of the fees payable.
28. Moreover, the Panel considers that related party transactions, or transactions which if not technically related party transactions are of the same character, must be very carefully and fully disclosed. A section has been added to the supplementary target's statement which informs shareholders of the roles taken by participants in the fee negotiations. Indophil did not pursue whether there were conflict issues that needed to be addressed beyond disclosure. There are also additional disclosures of

fees payable to the Lion Manager regarding the African Lion's fund sale of interest in Albidon Limited.

29. As for fees payable after the Lion Plan is implemented, the applicant's issue was that it was misleading to suggest that Lion Manager was willing to negotiate a lower fee as there was no legal obligation on it to do so. It is not the Panel's role to insist that new agreements are in place before the shareholders' meeting, but the risks and corporate governance arrangements for their negotiation must be disclosed. Additional information was added.

Further disclosure

30. The supplementary disclosure (ie, a supplementary target's statement and notice of meeting) was released on ASX on Friday 13 June 2008 and was dispatched to shareholders (after printing) on Monday 16 June 2008. The Lion shareholder meeting is scheduled for 23 June 2008. The Panel considers that there is sufficient time for shareholders to take in the additional disclosure and replace any proxies (if they wish). The Panel considered that the order sought by Indophil relating to sending a replacement proxy form was unnecessary.
31. While the Panel is pleased that many of the issues were resolved by negotiation between Indophil and Lion before the application was made, and further issues were resolved after the application was made, it did consider that the circumstances warranted the inclusion in the supplementary disclosure of a statement of the type required by guidance note 16² and that the supplementary disclosure be sent to all shareholders. Lion agreed to do this.

DECISION

32. Lion provided a draft supplementary disclosure in response to Indophil's application which, in the Panel's view, largely addressed the deficiencies in Lion's original target's statement and notice of meeting. The Panel required some amendments to this document where it did consider there were still some deficiencies. On the basis of the additional and corrective material in Lion's supplementary disclosure, the Panel declined to conduct proceedings.

Costs orders

33. As the Panel did not make a declaration it did not consider an order as to costs. In any event, the Panel would not have been inclined to make a costs order.

² GN 16, paragraph [16.22], which says:

16.22. *Once it has commenced proceedings, the Panel will generally require a corrective statement to make a standard set of statements that advise recipients that the statement: (a) is a corrective statement; (b) corrects false, misleading, confusing or inadequate information in the earlier document; (c) identifies the issue or information which required correction; and (d) was made at the request of the Takeovers Panel.*

Other parties

34. Xstrata had an interest in these proceedings. Indophil informed Xstrata that for reasons of relevance and confidentiality Indophil did not give Xstrata a copy of the application, even when asked. Xstrata did not ask the Panel to become a party but did ask if it might be invited³ to comment on potential orders that might have the effect of delaying the shareholders meeting. It was not necessary to take this further.

Alison Lansley

President of the Sitting Panel

Decision dated 16 June 2008

Reasons published 18 June 2008

³ See ASIC regulations 16(1)(g) and 24, and Panel Rule 3.4.