



In the Matter of InterMet Resources Limited

[2008] ATP 17

Catchwords:

Bidder's statement – deficiencies in disclosure – share price comparisons – pro forma balance sheet – disclosure concerning material asset – risk disclosure – inconsistencies in offer conditions – declined to make declaration of unacceptable circumstances

InterMet Resources Limited – Hillgrove Resources Limited

Corporations Act 2001 – 602, 631, 636, 657A, 657D and 657E

INTRODUCTION

1. The Panel, Ian Ramsay (Sitting President), Mike Roche and Heather Zampatti, declined to make a declaration of unacceptable circumstances after Hillgrove agreed to provide further disclosure in a replacement bidder's statement.
2. In these reasons the following definitions apply.

Term	Meaning
Hillgrove	Hillgrove Resources Limited
InterMet	InterMet Resources Limited

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

FACTS

4. InterMet is a public company listed on ASX (ASX code: ITT). Hillgrove is a public company listed on ASX (ASX code: HGO). Hillgrove currently has a 24.5% interest in the share capital of InterMet.
5. On 12 May 2008, Hillgrove announced an off-market scrip takeover bid for InterMet. Hillgrove is offering 4 Hillgrove shares for every 5 InterMet shares.
6. On 2 June 2008, Hillgrove served its bidder's statement on InterMet and lodged it with ASIC and ASX. Hillgrove proposed to despatch the bidder's statement to InterMet shareholders on 16 June 2008.
7. On 8 June 2008, InterMet wrote to Hillgrove drawing their attention to what InterMet considered were a number of material defects in Hillgrove's bidder's statement.
8. On 11 June 2008, InterMet lodged an application with the Panel in respect of the alleged deficiencies identified in its letter of 8 June.
9. On 12 June 2008, in response to InterMet's letter of 8 June 2008, Hillgrove agreed to address some of the alleged deficiencies.

Application

10. InterMet sought a declaration of unacceptable circumstances in relation to 29 deficiencies in Hillgrove's bidder's statement, of which the Panel conducted proceedings in respect of five. The five issues were:
 - (a) the calculation and disclosure of the share prices and premiums
 - (b) the omission from the pro forma merged group balance sheet of adjustments relating to the transaction
 - (c) disclosure in relation to the Kanmantoo Project, a material asset of Hillgrove
 - (d) disclosure of risks associated with the scrip offer and Hillgrove's mining and exploration activities, particularly the Kanmantoo Project and
 - (e) inconsistencies between the conditions to Hillgrove's offer in the announcement dated 12 May 2008 and the bidder's statement.
11. Hillgrove subsequently agreed to address many of the alleged deficiencies in the bidder's statement. Hillgrove provided a copy of this additional disclosure to the Panel. The Panel reviewed the amendments and was satisfied by them.

Interim Orders

12. InterMet sought an interim order that Hillgrove be restrained from dispatching its bidder's statement, pending the determination of the proceedings. Hillgrove had intended to dispatch its bidder's statement to InterMet shareholders on 16 June 2008.
13. Hillgrove gave an undertaking not to dispatch its bidder's statement, including any supplementary or replacement thereof, to InterMet shareholders until the proceedings had been completed or until further order of the Panel.
14. On the basis of the undertaking, the Panel did not need to make the interim order sought.

Final Orders

15. InterMet sought a final order that Hillgrove lodge a replacement bidder's statement correcting the alleged deficiencies to the satisfaction of InterMet and the Panel, including such disclosures as necessary for Hillgrove to meet its disclosure obligations.

DISCUSSION

16. After considering the submissions, the Panel was minded to make a declaration of unacceptable circumstances only in relation to the following aspects of the application:
 - (a) the calculation and disclosure of the share prices and premiums
 - (b) disclosure in relation to the Kanmantoo Project and
 - (c) disclosure of risks associated with the scrip offer and Hillgrove's mining and exploration activities, particularly the Kanmantoo Project.

Share Prices and Premiums

17. In its bidder's statement, Hillgrove had calculated the Hillgrove and InterMet share premiums using share prices at different times. The Hillgrove share price was

calculated at 30 May 2008, being the last trading day before the lodgement of the bidder's statement. The InterMet share price was calculated at 9 May 2008, being the last trading date before the announcement of the Hillgrove offer. Hillgrove had also calculated the premiums using a range of VWAP prices for InterMet shares and compared it to the Hillgrove spot price.

18. InterMet submitted that:
 - (a) the calculation of the premiums using share prices at different times inflated the premium between the implied offer price and InterMet's share price
 - (b) the VWAP/spot price comparison was misleading, as it implied that the value of the Hillgrove offer was a fixed and certain amount
 - (c) Hillgrove had failed to provide adequate disclosure regarding its reasons for using the method of calculation and
 - (d) Hillgrove should have made additional disclosure in respect of the premiums based on more up-to-date share prices.
19. In the Panel's view, it was open to Hillgrove to calculate the premiums using share prices at different times, provided that an adequate explanation of why such an approach was adopted was included in the bidder's statement. The Panel did not consider that Hillgrove had adequately explained in the bidder's statement why it had adopted this approach.
20. Consistent with previous decisions, the Panel also did not consider that it should limit the ways in which premiums might be calculated. However, an explanation of why a particular valuation methodology was chosen was required because the result was compared with a result calculated on a different basis (ie, not on a "like for like" basis). This ensures that target shareholders are not misled.¹ Such an explanation should adequately explain why the valuation methodology has been adopted. The Panel did not consider that Hillgrove had adequately explained in the bidder's statement why it had adopted its chosen valuation methodology.
21. As best practice, Hillgrove should also include the most recent share prices of Hillgrove and InterMet in the bidder's statement.² If it also wishes to use a value based on another date for the bidder's share price, it should clearly disclose the reasons for using that date in the bidder's statement.³ Although it was open to Hillgrove to value its offer using a pre-lodgment date, it was unacceptable that Hillgrove did not include the most recent share prices of both itself and InterMet. The Panel considered that in a scrip bid such information is relevant to shareholders in assessing the value of the offer.

Kanmantoo Project

22. In its bidder's statement, Hillgrove stated that the Kanmantoo Project was one of its key assets. Some information about the funding, strategy and progress of the project was included and InterMet shareholders were referred to previous announcements and reports released to the market for further information.

¹ Programmed Maintenance Services Limited 02 [2008] ATP 9; Consolidated Minerals Limited [2007] ATP 20.

² Consolidated Minerals Limited [2007] ATP 20.

³ Consolidated Minerals Limited [2007] ATP 20.

23. InterMet submitted that Hillgrove had not disclosed adequate details of the funding and strategy of the Kanmantoo Project, which rendered the bidder's statement incomplete and misleading. InterMet submitted that such information would have a direct impact on the performance of Hillgrove and the value of Hillgrove shares it had offered InterMet shareholders.
24. The Panel considered that, given the importance of the Kanmantoo Project to Hillgrove's business, to merely refer to previous announcements was unhelpful to shareholders. Accordingly, the Panel considered that further disclosure of the funding arrangements and progress of the project was necessary.

Risks

25. The Panel considered that the risk disclosure in the bidder's statement was general and vague. Further risk disclosure was required by Hillgrove to sufficiently identify the risks affecting Hillgrove's business. In the Panel's view, it was potentially misleading for a bidder to discuss risks in general terms, without apparent regard to the risks particular to its business.

Pro forma balance sheet

26. The Panel was satisfied that amendments to the pro forma balance sheet by Hillgrove adequately addressed the issues raised by InterMet.

Conditions to the Hillgrove offer

27. The Panel noted that there were a number of inconsistencies between the conditions to the offer set out in Hillgrove's announcement dated 12 May 2008 and those contained in the bidder's statement.
28. Section 631 relevantly provides that the terms and conditions of a takeover bid must be the same as or not substantially less favourable than those in the public proposal. Section 631 is "directed to preventing distortion of the market"⁴, compliance with which the Panel regards as very important.⁵
29. The Panel considered that the changes to the conditions were not substantially less favourable to shareholders and were not likely to distort the market.⁶
30. One change that was of particular interest to the Panel was the insertion of the words "or disposes of" after the word "acquire" or "acquires" in condition 1. In the Panel's view, the extension of condition 1 to disposals was foreshadowed in the heading to condition 1 "No acquisition or disposal of material asset" in the announcement and could be characterised as nothing more than an elaboration of the no material adverse change condition of the Hillgrove offer.
31. It appeared to the Panel that the changes were the result of carelessness on the part of the drafter of the announcement. Notwithstanding, the importance of conditions being sufficiently definite so that a target and its shareholders can assess the risk that the conditions will not be satisfied should not be underestimated. Accordingly, considerable care should be taken by a bidder in drafting the conditions to its offers,

⁴ ASC v Mt Burgess Gold Mining (1994) 15 ACSR 714, 720.

⁵ SSH Medical Limited [2003] ATP 32, [40].

⁶ Ampolex Ltd v Mobil Exploration (1996) 19 ACSR 354; Realestate.com.au Ltd [2001] ATP 1; Volante Group Ltd [2006] ATP 2.

in the announcement or otherwise. In this case, the differences did not give rise to unacceptable circumstances.

DECISION

32. The Panel informed the parties that it was minded to decline to make a declaration of unacceptable circumstances, if supplementary disclosure was made to address the issues identified above.
33. Hillgrove agreed to prepare a replacement bidder's statement which addressed the Panel's concerns, as well as the issues it had separately agreed with InterMet. The Panel reviewed the replacement bidder's statement and was satisfied that it adequately dealt with the issues. On the basis of the further disclosure, the Panel decided not to make a declaration of unacceptable circumstances.
34. The application raised a number of minor issues which detracted from the other issues and which the Panel considered could not be substantiated. In the Panel's view, an application which contains such issues, detracts from the overall credibility of the application and makes it difficult for the Panel to determine the substantive issues.⁷

Costs order

35. InterMet sought an order that Hillgrove bear its costs in relation to the proceedings.
36. The Panel did not make a declaration of unacceptable circumstances, so it did not have power to make an order as to costs under s657D(2)(d). In any event, the Panel would not have been inclined to make a cost order.

Ian Ramsay
President of the Sitting Panel
Decision dated 24 June 2008
Reasons published 7 July 2008

⁷ This is not the first time this concern has been raised by the Panel. See, for example, Taipan Resources NL (No. 10) [2001] ATP 5, [125].