



In the Matter of MacarthurCook Limited

[2008] ATP 20

Catchwords:

Frustrating action – pre-bid agreement – placement – shareholder approval – listing rule 7.9 – strategic alliance – commercial imperative – funding requirements – genuine potential offer – restriction on disposal of placement shares – timing of strategic alliance

AMP Capital Investors Limited – AMP Limited – MacarthurCook Limited – Ascalon Capital Managers Limited – IOOF Holdings Limited – Australian Securities Exchange

Corporations Act 2001 2001 (Cth) sections – 657A – 657D – 602 – 631

INTRODUCTION

1. The Panel, Geoff Brunson, Teresa Handicott and Norman O’Bryan AM SC (sitting President), made a declaration of unacceptable circumstances because aspects of the Strategic Alliance MacarthurCook struck with IOOF, in particular the Placement, constituted frustrating action in relation to AMP’s proposed takeover offer for MacarthurCook and had not been approved by MacarthurCook’s shareholders.

2. In these reasons the following definitions apply.

Term	Meaning
Strategic Alliance	A strategic investment management and distribution alliance between MacarthurCook and IOOF, announced by MacarthurCook on 13 June 2008
AMP	AMP Capital Investors Limited, a wholly owned subsidiary of AMP Limited
Ascalon	Ascalon Capital Managers Limited
IOOF	IOOF Holdings Limited
MacarthurCook	MacarthurCook Limited
Placement	Placement to IOOF of 3.45 million MacarthurCook shares, (representing 12.98% of MacarthurCook’s fully diluted issued capital), at \$1.15 per share pursuant to an agreement dated 13 June 2008.

3. In these proceedings the Panel:

- (a) adopted the published procedural rules and
- (b) consented to parties being represented by their commercial lawyers.

BACKGROUND

Facts

4. On 4 February 2008, MacarthurCook and IOOF met to discuss a possible strategic alliance which included a placement of MacarthurCook shares to IOOF. Further discussions took place between April and June 2008. During the early months of 2008 MacarthurCook discussed a variety of potential corporate and commercial transactions with numerous other possible counterparties, including AMP.
5. On or about 17 April 2008, AMP Limited contacted MacarthurCook to express an interest in making a takeover bid for MacarthurCook. The next day, senior management of both parties met to discuss AMP's interest in MacarthurCook. Further discussions took place in April, May and June 2008.
6. On 2 June 2008, the senior management of MacarthurCook presented a paper to the board seeking approval for the Strategic Alliance, which included the Placement. The board paper indicated that MacarthurCook had a "*short term need for . . . capital*".
7. On 6 June 2008, AMP acquired a relevant interest in 18.4% of MacarthurCook through a pre-bid agreement with Ascalon¹. On the same day, AMP wrote to MacarthurCook outlining the terms of a proposal to make takeover offers for MacarthurCook at \$1.35 per share.
8. AMP's letter included the following introductory statements:
 - (a) "*we are pleased to outline ...the terms of a proposal by AMP ...to make takeover offers to acquire all the issued securities of MacarthurCook*" and
 - (b) "*[t]he proposal is non-binding, indicative and incomplete and expresses current intentions only. The Proposal is not a takeover announcement and does not constitute a discloseable event for the purposes of the Australian Stock Exchange Listing Rules*".
9. AMP's proposal was subject to conditions, including completion of satisfactory due diligence, a recommendation by the MacarthurCook board, a commitment by the MacarthurCook board to accept the offer for all of the shares they hold in MacarthurCook (in the absence of a superior offer) and a 1% break fee. If the proposal was implemented, offers "*would be subject to customary defeating conditions including, but not limited to:*
 - (a) *No material asset sales or acquisitions by MacarthurCook or any group member*
 - (b) *No material adverse change in the MacarthurCook business*
 - (c) *No "prescribed occurrences", regulatory prohibition or unanticipated distribution and*
 - (d) *A 50.1% minimum acceptance condition by MacarthurCook shareholders*".
10. On 11 June 2008, MacarthurCook announced that it had received an "*incomplete and highly conditional proposal*" from AMP and that the board was considering its response to that proposal.

¹ AMP lodged a substantial shareholding notice in respect of its relevant interest on 10 June 2008.

11. On 13 June 2008, MacarthurCook announced that “*following discussions over recent months it has formed a strategic investment management and distribution alliance with IOOF*”. The Strategic Alliance provided a range of benefits to MacarthurCook and IOOF, including:
 - (a) MacarthurCook would become the preferred direct property and mortgage manager of the IOOF group
 - (b) the MacarthurCook Mortgage Fund would be re-branded the IOOF MacarthurCook Mortgage Fund
 - (c) IOOF would be responsible for marketing and distribution of the IOOF MacarthurCook Mortgage Fund
 - (d) a member of the IOOF group would be appointed as investment manager of the fixed income component of the IOOF MacarthurCook Mortgage Fund
 - (e) MacarthurCook and IOOF would work together to develop a range of new direct property investment funds
 - (f) IOOF would become a substantial shareholder of MacarthurCook by subscribing for approximately 12.98% of the fully diluted issued capital of MacarthurCook
 - (g) IOOF would participate in the MacarthurCook dividend reinvestment plan for the year ended 30 June 2008
 - (h) IOOF would have the option to underwrite the dividend reinvestment plan until 31 December 2009 and
 - (i) an IOOF nominee would be appointed as a director of MacarthurCook.
12. In accordance with the Strategic Alliance, on 13 June 2008 IOOF subscribed for 3.45 million MacarthurCook shares at \$1.15 per share, representing approximately 12.98% of MacarthurCook shares after completion of the Placement. The shares were issued the same day².
13. IOOF was prevented from disposing of the placed shares for 24 months except where a takeover or scheme of arrangement was recommended by the MacarthurCook board or a third party acquired voting power of greater than 50% in MacarthurCook.
14. On 17 June 2008, MacarthurCook lodged a substantial holder notice in respect of the relevant interest it had obtained in 12.98% of its shares, by virtue of having the ability to exercise power over the disposal of the shares pursuant to the Placement.
15. MacarthurCook did not seek shareholder approval for the Strategic Alliance.
16. On 24 June 2008, MacarthurCook announced that ASX had found that MacarthurCook had breached Listing Rule 7.9 by undertaking the Placement without

² On 13 June 2008, MacarthurCook lodged an Appendix 3B notice and IOOF lodged a notice of initial substantial holder in relation to the Placement.

seeking shareholder approval. MacarthurCook appealed this decision to the ASX listing appeals committee, scheduled to be heard on 31 July 2008³.

Application

17. By application dated 25 June 2008, AMP submitted that the Strategic Alliance constituted frustrating action in relation to the AMP proposal.
18. AMP further submitted that the conduct of MacarthurCook offended the principles in section 602⁴ as:
 - (a) shareholders may not have a reasonable opportunity (or any opportunity) to participate in the AMP proposal as a consequence of the Placement and
 - (b) the Placement had the potential to result in the acquisition of control over MacarthurCook shares taking place otherwise than in an efficient, competitive and informed market.
19. AMP sought a declaration of unacceptable circumstances.

Orders Sought

20. AMP sought orders that:
 - (a) MacarthurCook be required to seek shareholder approval for the Strategic Alliance (which included the Placement)
 - (b) pending the obtaining of that approval, IOOF not exercise any voting or shareholder rights and not be entitled to any dividend or other distribution rights in relation to the MacarthurCook shares issued pursuant to the Placement and
 - (c) if shareholder approval was not obtained by 14 August 2008:
 - (i) the Strategic Alliance (including the Placement) be cancelled with immediate effect
 - (ii) the register of shareholders of MacarthurCook be rectified by cancelling the shares issued pursuant to the Placement and
 - (iii) immediately on cancellation of the shares issued pursuant to the Placement, MacarthurCook repay the net proceeds of the Placement to IOOF.

DISCUSSION

General

21. Where corporate action is likely to frustrate or prevent a genuine potential offer, the Panel will generally require shareholder approval for that action to be taken. The details of the Panel's policy is in Guidance Note 12.

³ MacarthurCook informed the Panel that it had withdrawn its appeal to ASX.

⁴ References are to sections of the Corporations Act 2001 (Cth) unless stated otherwise.

22. A genuine potential offer is an offer, the terms of which are communicated to target directors publicly or privately by a genuine bidder but is not yet a formal offer under Chapter 6⁵. The offer may be described as non-binding, indicative or incomplete. A genuine potential offer may not require disclosure to the market.
23. Action taken by a target company is likely to frustrate a genuine potential offer if that action had a material effect on the objective of the offer, causing the bidder not to proceed with the offer.
24. The Panel considers that when a company is informed of a genuine potential offer, any frustrating action should be put to the shareholders in general meeting. If a frustrating action is not approved by the target company shareholders, unacceptable circumstances may occur. In such a case, the Panel may make orders, in the absence of shareholder approval, to prevent the target from proceeding with the action or reverse it⁶.

The AMP Offer

25. MacarthurCook submitted that the letter from AMP dated 6 June 2008 was an *"incomplete, indicative and highly conditional expression of interest"* and did not constitute a genuine potential offer.
26. AMP submitted that it made a genuine potential offer in its letter to MacarthurCook, as the letter clearly set out a proposal to make a takeover, including the price and conditions on which it would proceed. It further submitted that the offer was characterised as an *"incomplete proposal"* so as to fall within the exception to ASX Listing Rule 3.1⁷ and hence not be disclosed. AMP submitted that the announcement of an incomplete proposal could have critical and adverse commercial ramifications if withdrawn before it was properly consummated (i.e. it could result in a possible run on the target's share price). The Panel expresses no view on the correctness of the submissions regarding Listing Rule 3.1.
27. The Panel considered that the AMP letter was a genuine potential offer concerning control of MacarthurCook as:
 - (a) AMP was a genuine potential bidder. It had sufficient resources to comply with its obligations under the offer and had demonstrated a commitment to the offer by entering into discussions with MacarthurCook and through its pre-bid agreement with Ascalon
 - (b) statements in the AMP letter that the proposal was *"non-binding, indicative and incomplete and expresses current intentions only"* have to be read in the context of the whole letter and the likely concerns that AMP had about the proposal being disclosed and s 631 being triggered (see paragraph 26) and

⁵ See Guidance Note 12.2

⁶ There are some actions that may be taken without shareholder approval: see Guidance Note 12.28 and following

⁷ ASX Listing Rule 3.1A3 provides that Listing Rule 3.1 (continuous disclosure) does not apply to particular information if such information concerns an incomplete proposal or negotiation.

- (c) the letter set out (in sufficient detail) a proposal to make a takeover, including the price and conditions on which it would proceed, if made. The Panel considered that offer terms need not be finally settled for a proposal to be a genuine potential offer.
28. MacarthurCook further submitted that AMP's indicative conditions were "*onerous in the context of the overall incomplete proposal*". The Panel considered that bidders should, within the confines of the Corporations Act, be entitled to make a potential offer conditional on the terms which they choose⁸. The Panel did not consider that the indicative conditions were unusual. It was also open to MacarthurCook to negotiate any conditions which were unacceptable to the Board.
29. The Panel considered that, after receipt of the AMP letter, it was incumbent on MacarthurCook not to take any action that was likely to frustrate the AMP offer, unless it had first been approved at a general meeting of MacarthurCook's shareholders⁹.

Timing of Strategic Alliance

30. Guidance Note 12 provides that, in general, a target will not give rise to unacceptable circumstances if it undertakes a corporate action as part of the ordinary course of its business or that was entered into or announced before a proposed offer was made known to the target, so long as the action is not otherwise found to create unacceptable circumstances¹⁰.
31. MacarthurCook announced the Strategic Alliance on 13 June 2008. The Placement was executed and completed on 13 June 2008. Notwithstanding any preliminary discussions between MacarthurCook and IOOF, it is clear to the Panel that MacarthurCook and IOOF finalised and executed these agreements after the AMP offer had been made known to MacarthurCook. In particular the Panel noted in the submissions by MacarthurCook that when it received the AMP proposal:
- (a) notwithstanding that the parties were negotiating a price between an agreed range, the final price of the Placement had not been agreed and
 - (b) restrictions on IOOF disposing of the Placement shares had not been discussed.

Frustrating Action

32. AMP submitted that the Strategic Alliance constituted frustrating action in relation to the AMP proposal, as:
- (a) it gave IOOF approximately 12.98% (fully diluted) of MacarthurCook, making a full takeover impossible without IOOF's support (and reduced the likelihood of a 90% minimum acceptance condition being satisfied). The Panel considered that this constituted an acquisition of a substantial interest.

⁸ Bigshop.com.au [2001] ATP 20 at para 54

⁹ See footnote 6

¹⁰ GN 12.28

- (b) IOOF could not dispose of the shares pursuant to the Placement for 24 months except where a takeover or scheme of arrangement was recommended by the MacarthurCook board or a third party acquired more than 50% of the voting rights in MacarthurCook and
 - (c) it expanded the capital base of MacarthurCook (at a substantial discount to AMP's proposed offer price of \$1.35), making the total consideration required to succeed in a takeover greater than before the Placement.
33. The Panel considered that the following aspects of the Strategic Alliance, taken together, constituted frustrating action in relation to the proposed AMP offer¹¹:
- (a) the Placement
 - (b) the contractual restriction on IOOF disposing of the MacarthurCook shares acquired under the Placement and
 - (c) the option for IOOF to underwrite the MacarthurCook dividend reinvestment plan until 31 December 2009.
34. The Panel accepted MacarthurCook's submission that the other aspects of the Strategic Alliance (see paragraph 11) were 'business as usual' matters for a property fund management company such as MacarthurCook and were unlikely to have an impact on the control or potential control of MacarthurCook, or the acquisition or proposed acquisition of a substantial interest in MacarthurCook.

Funding Requirement

35. Guidance Note 12 provides that triggering action will not normally give rise to unacceptable circumstances if there is a commercial imperative for that action (i.e. other than some voluntary action taken by the target directors after they become aware of an offer or a potential offer). The target may, for example, be seeking to avoid a materially adverse financial effect¹².
36. MacarthurCook submitted that the Placement provided funding it needed to have in place by 30 June 2008 to enable the board to continue to operate the business in a manner that was in the best interests of the shareholders. It further submitted that the Placement was not a response to the AMP proposal, but rather a considered transaction, pursued since February 2008 and entered into to meet its funding requirements.
37. AMP submitted the funding requirements of MacarthurCook did not justify the Strategic Alliance not being referred to shareholders. AMP further submitted that the relevant commercial imperative would only exist if MacarthurCook were under such financial stress that it could not continue to trade until a shareholder meeting had taken place.

¹¹ MacarthurCook submitted that outside the Placement, the dividend reinvestment plan underwriting option and the IOOF lock-up, the other key aspects of the Strategic Alliance did not impact on the control or potential control of MacarthurCook.

¹² GN 12.32

38. The Panel considered that it was not essential for MacarthurCook to undertake the Placement by 30 June 2008 to satisfy its funding requirements; rather the Placement was a voluntary action taken after MacarthurCook became aware of the potential offer from AMP. In particular, the Panel noted that the board paper (see paragraph 6) indicated that the “*short term need for ... capital*” arose from matters that, in the Panel's view, were not so urgent as to prevent MacarthurCook from seeking shareholder approval for the Placement.
39. These matters included:
- (a) contingent payment obligations which may be triggered in November 2008 and April 2009
 - (b) reduction of debt and
 - (c) increase in working capital.
40. The Panel inferred from the information provided that MacarthurCook could have made alternative arrangements to meet its 30 June 2008 obligations, enabling MacarthurCook to obtain shareholder approval of the Placement without a materially adverse financial effect. Therefore, the Panel considered that MacarthurCook did not have a commercial imperative to justify undertaking the Placement without seeking shareholder approval.

DECISION

41. For these reasons the Panel considered that:
- (a) the AMP letter dated 6 June 2008 was a ‘genuine potential offer’ concerning control or ownership of MacarthurCook
 - (b) the effect of certain aspects of the Strategic Alliance constituted frustrating action in relation to the AMP offer
 - (c) those aspects of the Strategic Alliance which constituted frustrating action should have been made conditional upon shareholder approval and
 - (d) the absence of shareholder approval gave rise to unacceptable circumstances.

Declaration

42. It appeared to the Panel that the circumstances were:
- (a) unacceptable having regard to 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 MacarthurCook or
 - (ii) the acquisition or proposed acquisition of a substantial interest in MacarthurCook or
 - (b) unacceptable having regard to the purposes of Chapter 6 set out in s602.
43. The Panel considered that it was not against the public interest to make a declaration of unacceptable circumstances.

Takeovers Panel

MacarthurCook Limited

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44. The Panel had regard to the matters in s657A(3). In particular it had regard to s602(c) and the actions of the directors of MacarthurCook.
45. Accordingly, under s657A, the Panel declared that the circumstances constituted unacceptable circumstances in relation to the affairs of MacarthurCook.
46. A copy of the declaration is Annexure A.

Orders

47. The Panel received submissions from the parties concerning the orders that should be made.
48. The Panel made the final orders set out in Annexure B, including to the following effect:
 - (a) MacarthurCook seek shareholder approval for the those aspects of the Strategic Alliance which constituted frustrating action
 - (b) MacarthurCook disregard any votes cast on any resolutions by IOOF and its associates
 - (c) in the event that shareholder approval is not obtained by 1 September 2008:
 - (i) all agreements that form part of those aspects of the Strategic Alliance which constituted frustrating action are cancelled and
 - (ii) shares issued under the Placement are cancelled with subscription moneys repaid to IOOF.

Norman O'Bryan AM SC
President of the Sitting Panel
Decision dated 9 July 2008
Reasons published 17 July 2008



Annexure A

Corporations Act Section 657A

Declaration of Unacceptable Circumstances

In the matter of MACARTHURCOOK LIMITED

WHEREAS

1. On 6 June 2008, AMP Capital Investors Limited (**AMP**) wrote to MacarthurCook Limited (**MacarthurCook**) outlining the terms of a proposal to make a takeover offer for MacarthurCook at \$1.35 per share.
2. On 13 June 2008, MacarthurCook entered into the following transactions:
 - (a) a strategic investment management and distribution alliance with IOOF Holdings Limited (**IOOF**);
 - (b) IOOF became a substantial shareholder of MacarthurCook by subscribing for 3.45 million MacarthurCook shares under a private placement at a price of \$1.15 per share (the **Placement**), representing approximately 13% of MacarthurCook after completion of the Placement;
 - (c) a contractual restriction on IOOF disposing of the MacarthurCook shares acquired under the Placement for a period of 24 months, except where a takeover or scheme was recommended by the MacarthurCook board or a third party acquired greater than 50% of the voting rights in MacarthurCook; and
 - (d) an option for IOOF to underwrite MacarthurCook's dividend reinvestment plan until 31 December 2009.(together the **Transaction**).
3. MacarthurCook did not seek shareholder approval prior to entering into the Transaction, or any aspect of it.
4. Items 2 (b), (c) and (d) of the Transaction, taken together, constituted frustrating action in relation to the proposed AMP offer (the **Circumstances**).
5. 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, are having, and will have or be likely to have on:
 - (i) the control or potential control of MacarthurCook; or
 - (ii) the acquisition or proposed acquisition of a substantial interest in MacarthurCook; or
 - (b) the purposes of Chapter 6 set out in section 602 of the Corporations Act.
6. 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 MacarthurCook.
7. The Panel has had regard to the matters in section 657A(3) of the Act.

DECLARATION

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

Allan Bulman
Director
with authority of Norman O'Bryan AM SC
President of the Sitting Panel
Dated 9 July 2008



Annexure B
Corporations Act
Section 657D
Orders

IN THE MATTER OF MACARTHURCOOK LIMITED
PURSUANT TO

1. A declaration of unacceptable circumstances in relation to the affairs of MacarthurCook Limited (**MacarthurCook**) on 9 July 2008.
2. Section 657D of the Corporations Act 2001 (Cth).

THE PANEL ORDERS

1. MacarthurCook seek shareholder approval for the following aspects of the strategic investment management and distribution alliance with IOOF Holdings Limited (**IOOF**), announced on 13 June 2008, as a package:
 - (a) the placement to IOOF of 3.45 million MacarthurCook shares (**Placement**);
 - (b) the restriction on IOOF disposing of the MacarthurCook shares acquired as part of the Placement for a period of 24 months (except where a takeover or scheme is recommended by the MacarthurCook board or a third party acquires greater than 50% of the voting rights in MacarthurCook); and
 - (c) the option of IOOF to underwrite MacarthurCook's dividend reinvestment plan for the period to 31 December 2009,(together the **Transaction**).
2. MacarthurCook disregard any votes cast on any resolution to approve the Transaction by IOOF and its associates (as defined in the Corporations Act 2001 (Cth)).
3. MacarthurCook dispatch a notice of meeting and explanatory memorandum for the shareholder meeting referred to in paragraph 1 in a form approved by the Panel.
4. In the event that shareholder approval for the Transaction is not obtained by 1 September 2008:
 - (a) all agreements that form part of the Transaction are cancelled; and
 - (b) shares issued under the Placement are cancelled with subscription moneys repaid to IOOF.

Allan Bulman
Director
with authority of Norman O'Bryan AM SC
President of the Sitting Panel
Dated 9 July 2008