



Monday, 28 April 2008

BioProspect Limited 01 – Panel Decision

The Takeovers Panel commenced proceedings on the application by BioProspect (see TP 08/22, TP 08/23), but has decided not to make a declaration of unacceptable circumstances following the receipt of an undertaking from the Australia and New Zealand Banking Group Limited and one of its subsidiaries.¹

ANZ has undertaken to:

- Sell down its interest in BioProspect to less than 5% of BPO's issued capital within 12 months.
- Not vote any BioProspect securities during the sell down, without the consent of the Panel.
- If ANZ holds more than 5% of BioProspect's issued capital after 12 months, to hand over to ASIC for sale its remaining holding, to be disposed of as determined by the Panel.
- Unless the Panel otherwise consents, conduct the sell down in the ordinary course of trading on the ASX and not to sell BioProspect securities comprising an amount greater than 5% of BioProspect's issued capital over any three consecutive trading days.

Background

On 27 March 2008, ANZ appointed Deloitte Touche Tohmatsu as receivers and managers of Opes Prime Group Limited and its subsidiaries. ANZ has an interest in approximately 25.75% of BioProspect as a result of securities lending transactions with Opes Prime. BioProspect submitted that ANZ had not lodged a substantial holding notice in relation to this shareholding and that it was unclear whether ANZ obtained its interest in compliance with the takeover provisions of the Corporations Act. BioProspect was also concerned that ANZ would dispose of its BioProspect interest other than in accordance with the principle that the acquisition of control over shares takes place in an efficient, competitive and informed market.

ANZ submitted that it had obtained ASIC relief from the 20% takeovers prohibition and the substantial holding provisions.

¹ ANZ Nominees Limited. For the purposes of this release, both are referred to as ANZ.

Decision

The Panel considered that the ASIC relief relied on by ANZ did not apply to its securities lending with Opes Prime in relation to BioProspect shares.

The Panel considered that the circumstances were unacceptable because of contraventions of Chapters 6 and 6C of the Corporations Act as the relief did not apply. The Panel's conclusion of unacceptable circumstances because of a contravention is not determinative of legal rights – see *Attorney-General of the Commonwealth of Australia v Alinta Limited & Ors* [2008] HCA 2.

Alternatively the Panel considered that the circumstances 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, and were otherwise unacceptable having regard to the Eggleston and Masel principles in s602 of the Corporations Act.²

The Panel considered however that the undertakings offered by ANZ dealt with the effect of the unacceptable circumstances. In particular, the Panel considered that ANZ had committed to an orderly sell down of BioProspect shares.

The sitting Panel for the proceedings was Catherine Brenner, Kevin McCann AM (President) and Anthony Sweetman.

The Panel will publish its reasons for its decision on its website at www.takeovers.gov.au in due course.

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² Ensuring a efficient, competitive and informed market for corporate control, sufficient information (including identity of the acquirer) and time to consider a control proposal and equality of benefits flowing from a proposal to shareholders.