



Australian Government

Takeovers Panel

Reasons for Decision

GoldLink IncomePlus Limited 04R

[2009] ATP 3

Catchwords:

Review application – review panel – decline to conduct proceedings – proportional takeover bid – unmarketable parcel – marketable parcel – share splitting – creation of trusts – policy of provisions – offer terms and conditions – declaration of unacceptable circumstances – interim orders – final orders – new material – statutory declaration – request for summons

GoldLink IncomePlus Limited – Emerald Capital Limited – Bell IXL Investments Limited – Fortina Pty Ltd

Corporations Act 2001 (Cth) – sections 602, 618(2), 653B(1)(b), 657A, 657D, 657E, 657EA

Australian Securities and Investments Commission Act 2001 (Cth) – section 187

Australian Securities and Investments Commission Regulations 2001 (Cth) – regulations 14 and 20

Takeovers Panel v Glencore International AG and others (2005) 55 ACSR 453; [2005] FCA 1628 – GoldLink IncomePlus Limited 04 [2009] ATP 2 – Gosford Quarry Holdings Limited 01R [2008] ATP 13 – Namakwa Diamond Company NL 04 [2001] ATP 15

INTRODUCTION

1. The review Panel, Tom Bathurst QC, Vickki McFadden and Simon McKeon (sitting president), declined to conduct proceedings on an application from Fortina for a review of the initial Panel’s decision in *GoldLink IncomePlus Limited 04 [2009] ATP 2*. The review Panel agreed with the initial Panel’s decision.

FACTS

2. The facts are as set out in the reasons for the initial Panel’s decision in *GoldLink IncomePlus Limited 04*.
3. In these reasons, the following definitions apply.

Term	Meaning
Fortina	Fortina Pty Ltd
GoldLink	GoldLink IncomePlus Limited
Emerald	Emerald Capital Limited
Emerald’s bid	Takeover bid by Emerald to acquire 45% of the shares held by each GoldLink shareholder pursuant to a replacement bidder’s statement dated 22 July 2008
Mr Kestell	Mr Timothy Kestell
Mr Cellante	Mr Massimo Cellante

REVIEW APPLICATION

4. By review application dated 23 January 2009, Fortina requested that we set aside the declaration of unacceptable circumstances in *GoldLink IncomePlus Limited 04*.
5. Fortina submitted that the conduct complained of in *GoldLink IncomePlus Limited 04*:
 - (a) would not be at odds with the basic principles and policies underlying ss 618(2) and 653B¹ nor the purposes of Chapter 6 as set out in s602 if such conduct were expressly permitted under the terms of Emerald's bid and
 - (b) first occurred more than two months prior to 8 January 2009, the date on which the initial application was made by Emerald.
6. Fortina also submitted that the conduct of Emerald in the material before the initial Panel, coupled with new material, amounts to "*such encouragement and acquiescence in the conduct complained of that it is indistinguishable from express permission under the terms of [Emerald's] bid*".
7. Fortina sought interim orders in the same terms as the interim orders made in *GoldLink IncomePlus Limited 04*. The President of the Panel stayed the final orders of the initial Panel and made interim orders in the same terms as the interim orders of the initial Panel. Given that there had been some processing of Fortina's acceptances, the President also restricted Emerald from dealing with the GoldLink shares the subject of Fortina's acceptances.² The President's interim orders had effect until (among other things) the proceedings were determined.

DISCUSSION

Reviews

8. The powers of a review Panel are set out in s657EA. Subsection (4) states:

"After conducting a review under this section, the Panel may:

 - (a) vary the decision reviewed; or*
 - (b) set aside the decision reviewed; or*
 - (c) set aside the decision reviewed and substitute a new decision.*

In conducting the review, the Panel has the same power to make a declaration ... or an order ... as it has when considering an application under section 657C."
9. Section 657EA does not address whether the Panel should conduct a review. It addresses the Panel's powers after conducting a review. Whether a review should be conducted is for the Panel to consider under regulation 20 of the ASIC Regulations³, which says:

"As soon as practicable after receiving an application, the Panel must:

 - (a) decide whether to conduct proceedings in relation to the application...."*

¹ References are to sections of the *Corporations Act 2001* (Cth), unless the context requires otherwise

² See [TP09/08](#)

³ *Australian Securities and Investments Commission Regulations 2001* (Cth)

10. Regulation 20, and the other provisions in Part 3 of the ASIC Regulations, apply to Panel proceedings in addition to the requirements of the corporations legislation (other than the excluded provisions).⁴
11. The term "*Panel proceedings*" are defined in the Corporations Act. Panel proceedings include "(a) an application made to the Panel under the Corporations Act", which includes a review application.
12. The term "*Panel*" is defined in s187 of the ASIC Act⁵ as follows:
"For the purposes of the performance or exercise, in relation to a particular matter, of any of the Panel's functions and powers, this Division has effect as if:
(a) a reference to the Panel were a reference to the Panel as constituted in relation to that matter...."
13. The matter in this case is the review. The Panel, therefore, in this case is the review Panel.
14. In our view, we are not only entitled to consider whether to conduct proceedings but must do so. We note that previous review Panels have declined to conduct proceedings.⁶ We note that Finkelstein J in *Takeovers Panel v Glencore*⁷ made some observations about how a review Panel can deal with a review, when considering an application for an extension of time.⁸ His Honour stated:
*"... If the panel is satisfied that the first declaration was appropriately made, then, as I have said, that declaration can be confirmed by the dismissal of the application for review on that aspect ..."*⁹
15. Therefore, in appropriate cases, a review Panel can decline to conduct proceedings and allow the initial Panel's declaration and orders to stand.

Material considered

16. The Panel treats applications for review as hearings *de novo*.¹⁰ The review Panel has considered the matter on its merits. We have considered:
 - (a) all the material before the initial Panel including the initial application, the briefs to the parties, the submissions and rebuttals from the parties (including those in respect of orders)
 - (b) the reasons for the initial Panel's decision, the declaration of unacceptable circumstances and orders and
 - (c) the review application and the new material provided.

⁴ See ASIC regulation 14

⁵ *Australian Securities and Investments Commission Act 2001* (Cth)

⁶ See, for example, *Gosford Quarry Holdings Limited 01R* [2008] ATP 13 and *Namakwa Diamond Company NL 04* [2001] ATP 15

⁷ *Takeovers Panel v Glencore International AG and others* (2005) 55 ACSR 453; [2005] FCA 1628

⁸ The legislation has now changed to include a specific time limit in which the review Panel can consider a review application: see s657EA(5), which was introduced on 13 March 2007

⁹ *Takeovers Panel v Glencore International AG and others* (2005) 55 ACSR 453 at 457; [2005] FCA 1628 at [17]

¹⁰ Guidance Note 2, paragraph 25

17. The new material provided by Fortina included a statutory declaration by Mr Cellante. Mr Cellante stated that he had been told by a journalist who wrote an article in the Rivkin Report¹¹ that Mr Kestell, a director of Emerald, *“was pleased that the information about the splitting opportunity was being published and felt that the prospects of the [Emerald] bid succeeding would be enhanced by people following the advice in the article”*. However, Mr Cellante noted that the journalist was not prepared to sign a statutory declaration confirming this point. Emerald provided a draft statutory declaration, which it indicated Mr Kestell would be willing to declare, which refuted that he had made those statements to the journalist.
18. Fortina also asked us to issue a summons to Emerald requiring it to produce information relating to unmarketable parcels remaining after acceptance. We do not think this is necessary. We agree with the initial Panel that, while Emerald may have been able to take actions to avoid share splitting, it does not answer whether unacceptable circumstances now exist. This reasoning applies equally to whether or not Emerald encouraged share splitting.
19. Having regard to all the material, we agree with the initial Panel’s decision, including the form of its declaration and orders.

DECISION

20. We affirm the decision of the initial Panel and decline to conduct proceedings.
21. We considered whether it would be against the public interest to decline to commence proceedings. We decided that it would not be.

ORDERS

22. As we decline to conduct proceedings, the interim orders dated 29 January 2009 in relation to this application are discharged. Accordingly, the declaration and final orders of the initial Panel dated 21 and 28 January 2009 respectively continue to apply.
23. The initial Panel made no orders as to costs and we also agree with this decision.

Simon McKeon
President of the Sitting Panel
Decision dated 2 February 2009
Reasons published 2 February 2009

¹¹ “Update: GoldLink IncomePlus Ltd (GLI), Just Group Ltd (JST) - 02 July 2008”. The article referred readers to an arbitrage opportunity that could be utilised by purchasing shares so that an unmarketable parcel remained after acceptance