



**Australian Government**

**Takeovers Panel**

## **Reasons for Decision**

### **Drillsearch Energy Limited 02**

**[2009] ATP 11**

#### **Catchwords:**

*Replacement bidder's statement – ASX announcement - misleading announcements to the market - decline to conduct proceedings – not likely to make a declaration*

*Corporations Act 2001 (Cth), section 657C*

*Guidance Note 5 – Specific Remedies: Information deficiencies*

*Programmed Maintenance Services Limited [2008] ATP 9; Pinnacle VRB Ltd No. 9 [2001] ATP 25*

## **INTRODUCTION**

1. The Panel, Guy Alexander, John Fast and Chris Photakis (sitting President) declined to conduct proceedings on an application by Beach in relation to the affairs of Drillsearch. The Panel considered that there was no reasonable prospect that it would declare unacceptable circumstances in relation to an announcement made by Drillsearch to ASX on 1 June 2009.
2. In these reasons, the following definitions apply.

<b>Term</b>	<b>Meaning</b>
announcement	announcement by Drillsearch dated 1 June 2009 titled “Replacement bidder’s statement makes material new disclosures and bid condition waived”
Beach	Beach Petroleum Limited
Drillsearch	Drillsearch Energy Limited

## **FACTS**

3. Beach is an ASX listed company (ASX code: BPT). Drillsearch is an ASX listed company (ASX code: DLS).
4. On 5 May 2009, Beach announced an off market scrip takeover bid for Drillsearch Energy Limited.
5. On 15 May 2009, Beach lodged its bidder’s statement with ASIC.
6. On 29 May 2009, Beach lodged a supplementary and replacement bidder’s statement with ASIC.<sup>1</sup>
7. On 1 June 2009, Drillsearch made the announcement on ASX. The announcement refers to the replacement bidder's statement, stating that it included “substantial new information”, that the original bidder's statement was materially incomplete and

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<sup>1</sup> Not yet dispatched to shareholders.

potentially misleading and that the replacement bidder's statement came about because of action by Drillsearch.

## APPLICATION

8. By application dated 3 June 2009, Beach sought a declaration of unacceptable circumstances. It submitted that the announcement contained misleading and deceptive statements. In summary, it cited the following.
  - (a) The original bidder's statement complied with the requirements in the Corporations Act, yet Drillsearch stated that it was "materially incomplete and potentially misleading" and that Beach had "failed to provide detailed information" and had withheld material information. The additional information was voluntarily provided in the spirit of cooperation.
  - (b) Drillsearch said that Beach had lodged the replacement bidder's statement as a result of "action by Drillsearch", yet Beach had no obligation to include such information.
  - (c) Drillsearch said that Beach had withheld information from Drillsearch shareholders, yet Drillsearch failed to disclose that the same information had been in its possession since early April 2009 (and if material Drillsearch should have disclosed it).
  - (d) There was no reasonable basis or explanation for making the statement that the Beach Offer was "highly opportunistic".
  - (e) Beach's decision to waive a condition of its offer was not a "vindication" of any Drillsearch position as claimed.
  - (f) Statements regarding the Beach offer, Beach and the additional information in the announcement have been presented, and taken, out of context.
  - (g) The presentation of the statements as to prospects without reference to risks was misleading and deceptive.
  - (h) A statement in the announcement that "Beach considers PEL<sup>2</sup> 91 to sit right in the heart of the Western Flank Oil Fairway" did not reflect a statement made by Beach.
  - (i) Statements made by Drillsearch regarding further information on the PEL's are confusing to shareholders.
9. Beach also submitted that it is confusing and misleading for Drillsearch shareholders to receive Drillsearch's comments and responses to the bidder's statement from Beach via ASX announcements.
10. The effect of these circumstances, Beach submitted, was that there was a deficiency of information, inhibiting an efficient, competitive and informed market in Drillsearch shares, and shareholders did not have the information necessary to make an informed decision.

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<sup>2</sup> Petroleum exploration licence

### Orders sought

11. Beach sought an interim order to restrain Drillsearch from further distributing the announcement. As we have declined to conduct proceedings, this does not need to be considered further.
12. Beach sought final orders that Drillsearch retract and apologise for the statements made in the announcement and be restrained from further distributing it.

## DISCUSSION

13. Material information that shareholders may require to make their decision is normally provided in bidder's and target's statements. It is therefore important to get these documents right. If information deficiencies are identified, it is entirely appropriate that the identifying party promptly inform the party responsible for the document, and it is equally appropriate that the party responsible for the document make appropriate amendments.<sup>3</sup>
14. In the cut and thrust of a contested takeover, sometimes the amendments will be corrections or clarification of information and sometimes they will be no more than accommodations. In either case, we think it is worthwhile for this process to be undertaken as it allows shareholders to focus on the real issues concerning control over the acquisition of their shares. We do not consider it appropriate to turn this process into a point-scoring exercise. The directors of the target – and no less the bidder – must ensure that their advice is reasonably based, clear, concise, objective, not misleading and presented with the highest degree of care.<sup>4</sup>
15. There may be an element of point-scoring in the announcement. The announcement seems unnecessary and indeed, it would have been preferable for it not to have been issued. We agree with the submission of Beach that it is preferable for the target to communicate its views on the bidder's statement through the target's statement, rather than through an announcement on ASX. But it is too late. It cannot be retracted. And when we go through the complaints about the announcement, we are not satisfied that it is likely that we would declare unacceptable circumstances.
16. Looking at the concerns, some of the changes evidence that material information was added to the replacement bidder's statement; and the replacement bidder's statement did come about as a result of action by Drillsearch. That Drillsearch had not disclosed the same information is not to the point.
17. The more emotive statements like "highly opportunistic", and "vindication" were not helpful but these, and other statements that were said to be out of context or lacking additional information, can be addressed by Beach. We do not think any of them was so problematic as to give rise to unacceptable circumstances. To take an example, Beach did not say, as the announcement suggests, that "*Beach considers PEL 91 to sit right in the heart of the Western Flank Oil Fairway*". Beach said "*PEL 91 (Drillsearch 60%, Beach 40%) lies on the western flank of the Cooper Basin ...*"<sup>5</sup> There may be a subtle

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<sup>3</sup> See GN 5 at [23], *Pinnacle VRB Ltd No. 9* [2001] ATP 25

<sup>4</sup> *Programmed Maintenance Services Limited* [2008] ATP 9

<sup>5</sup> Replacement bidder's statement, p18

difference – the former statement suggesting that PEL 91 is at the centre of a deposit not at the edge - but it would be a subtlety in our view not readily apparent to most reasonable shareholders and something that Beach can address if it chooses.

## **DECISION**

18. The statements by Drillsearch were unfortunate, rather than misleading in our view. The actions of Beach reflect that some additional information at least was required to be included in its bidder' statement. In this situation, and given that the Panel was left with considering if it should make a declaration as a statement of disapprobation of a party rather than of a set of circumstances, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances.
19. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the Australian Securities and Investments Commission Regulations 2001 (Cth).
20. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

**Chris Photakis**  
**President of the Sitting Panel**  
**Decision dated 9 June 2009**  
**Reasons published 10 June 2009**