



**Australian Government**  
**Takeovers Panel**

**Reasons for Decision**  
**Blue Energy Limited**  
**[2009] ATP 15**

**Catchwords:**

*Timeliness of application - board dispute - relevant interest - voting power - exercise of control by a mortgagee - decline to conduct proceedings*

*Corporations Act 2001 (Cth), sections 602, 606, 657B, 657C and 671B*

*Panel GN 8*

*Brickworks Ltd 01 [2000] ATP 6, Austral Coal Limited 03 [2005] ATP 14, Golden Circle Limited 02 [2007] ATP 24, BioProspect Limited 01 [2008] ATP 8*

## INTRODUCTION

1. The Panel, Garry Besson, John M Green and Karen Wood (sitting President), declined to conduct proceedings on an application by Blue Energy in relation to its affairs. The application concerned board changes proposed by the Receiver appointed by ANZ over Primebroker. The Panel considered that the application was not timely and there was no reasonable prospect of a declaration of unacceptable circumstances.

2. In these reasons, the following definitions apply.

ANZ	Australian and New Zealand Banking Group Limited
Blue Energy	Blue Energy Limited
Primebroker	Primebroker Securities Limited (In liquidation) (Receivers and Managers appointed)
Receiver	Mr Paul Kirk and Mr Stephen Longley of PricewaterhouseCoopers, appointed as receivers and managers of Primebroker on 4 July 2008

## FACTS

3. Blue Energy is an ASX listed company (ASX code: BUL).
4. Primebroker has been carrying on business as a stockbroker.
5. On 2 February 2001, ASIC exempted Primebroker from s606<sup>1</sup> and s671B in respect of certain securities financing transactions. The ASIC relief ceased to have effect in July 2008.<sup>2</sup>

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<sup>1</sup> References are to the *Corporations Act 2001 (Cth)* unless otherwise indicated

<sup>2</sup> Primebroker withdrew an application to the Panel dated 30 June 2008 for a review of ASIC's decision to revoke the declaration: see [TP08/74](#). There is no evidence before the Panel about whether the transactions comply with the relief.

6. Prior to 8 July 2008 Primebroker entered “securities financing transactions” involving Blue Energy shares, as a result of which it acquired voting power in Blue Energy of 25.56%.
7. On 12 February 2008 Primebroker granted a fixed and floating charge over certain assets to ANZ, including the Blue Energy shares. The security document is titled “Fixed and Floating Charge. PSL Margin Facilities”.
8. On 4 July 2008, ANZ exercised its powers under that charge and appointed the Receiver.
9. On 8 July 2008, ANZ (as a result of appointing the Receiver) lodged a substantial holding notice disclosing its voting power in 25.56% of Blue Energy shares.
10. In June 2009, Blue Energy completed a share purchase plan and ANZ’s interest was reduced to 20.07%. ANZ lodged a change of substantial holder notice on 10 July 2009.
11. On 29 June 2009, Blue Energy announced a placement of approximately 62.9 million shares to Korea Gas Corporation, subject to Foreign Investment Review Board approval. On completion of the placement, ANZ’s interest will be reduced to approximately 18%.
12. On 24 November 2008 the chairman of Blue Energy wrote to the Receiver. He said Blue Energy had been advised in correspondence from the Receiver on 16 July 2008 that *“PwC are of the understanding that as the BUL shares are held by PwC as receivers, there should not be an issue from the Takeovers Panel perspective provided that PwC do not attempt to exercise control or voting rights in respect of the BUL shares.”*
13. On 25 November 2008 Blake Dawson on behalf of the Receiver replied that the correspondence from the Receiver on 16 July had been taken out of context and related to the previous Panel application concerning ASIC relief.<sup>3</sup>
14. Between November 2008 and July 2009 the Receiver contacted Blue Energy in relation to board matters.
  - (a) On 20 November 2008 the Receiver sought the withdrawal of certain resolutions about Blue Energy directors’ options from consideration at the Blue Energy AGM (to be held on 28 November 2008).
  - (b) On the same day the Receiver advised the chairman of Blue Energy that it would not vote in favor of re-appointing Mr Harrison as a director of Blue Energy at the AGM.
  - (c) On 17 December 2008 the Receiver wrote to request that Mr Flanagan be appointed a director of Blue Energy (as an ANZ nominee). This was pursued by the Receiver on 5 February 2009.
  - (d) On 14 July 2009 the Receiver wrote to raise “corporate governance issues” concerning two Blue Energy directors. The Receiver suggested that, if the directors did not resign, it would request a shareholders’ meeting to remove them and the chairman.

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<sup>3</sup> See fn 2

## APPLICATION

15. By application dated 6 August 2009, Blue Energy sought a declaration of unacceptable circumstances. Blue Energy submitted that ANZ and the Receiver acquired a relevant interest in greater than 20% of the voting shares in Blue Energy, where the original holder of that interest (Primebroker) had not disclosed its interest to the market. Blue Energy also submitted that the relevant interest acquired by ANZ and the Receiver is sufficient to control Blue Energy and is being exercised.
16. It submitted that unacceptable circumstances exist in relation to the affairs of Blue Energy because:
  - (a) the acquisition by Primebroker (and subsequent acquisition by ANZ and the Receiver) of control over 25.56% of Blue Energy's voting shares did not occur in an efficient, competitive and informed market
  - (b) holders of voting shares in Blue Energy were not:
    - (i) informed of the identity of a person who proposed to acquire a substantial interest in the voting shares of Blue Energy
    - (ii) given a reasonable time to consider the proposal and
    - (iii) given a reasonable and equal opportunity to participate in any benefits accruing through any proposal under which Primebroker, the Receiver or ANZ acquired a substantial interest in Blue Energy and
  - (c) the Receiver is now "purporting to exercise domain and control" over Blue Energy.

### Interim order sought

17. Blue Energy sought interim orders, pending the outcome of the application, to restrain ANZ and the Receiver from:
  - (a) voting, disposing of, transferring or charging any Blue Energy shares or any interest in the Blue Energy shares and
  - (b) requisitioning a meeting for Blue Energy.
18. It also sought an interim order requiring ANZ to provide copies of documents relating to its financing arrangements with Primebroker.

### Final orders sought

19. Blue Energy sought final orders on similar terms to the undertakings given by ANZ in *BioProspect Limited 01*.<sup>4</sup> Specifically, Blue Energy sought:
  - (a) that the Receiver (and ANZ) sell down its interest in Blue Energy to less than 5% of the issued capital of Blue Energy within 12 months
  - (b) if paragraph (a) is not satisfied, the Receiver (and ANZ) hand over to ASIC (by off-market transfer) 12 months from the date of the order any Blue Energy shares that it holds for sale as if the shares were vested with ASIC by way of

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<sup>4</sup> [2008] ATP 8

Panel order for disposal by ASIC in a manner the Panel decides and for the proceeds to be directed in a manner the Panel decides

- (c) until paragraph (a) is satisfied, the Receiver (and ANZ) not vote any Blue Energy shares they hold without the consent of the Panel
  - (d) until paragraph (a) is satisfied, the Receiver (and ANZ) not trade the Blue Energy shares other than in the ordinary course of trading on ASX and not sell Blue Energy shares comprising an amount greater than 5% of the issued capital of Blue Energy over any 10 consecutive trading days (as defined in the ASX Listing Rules) and
  - (e) until paragraph (a) is satisfied, the Receiver (and ANZ) first seek the consent of the Panel if it wishes to deal with Blue Energy shares other than in the manner set out above.
20. Blue Energy also sought an order that Mr Flanagan, ANZ's nominee director on the Blue Energy board, resign immediately.

## DISCUSSION

21. Blue Energy's application was not timely. Even if it were, there is no reasonable prospect that we would make a declaration of unacceptable circumstances.

### Timeliness

22. Under s657C(3) an application must be made within two months after the circumstances have occurred or a longer period determined by the Panel. Section 657B entitles the Panel to make a declaration within three months after the circumstances occur or one month after the application was made (whichever ends last). The relevant reference point is the circumstances.
23. Blue Energy submitted that the letters from the Receiver on 14 July 2009 and 20 July 2009, which, it says, "*express an unambiguous intention to exercise domain or control over meetings of members of Blue Energy for the purpose of removing up to three of its directors*" were the central circumstances to its complaint. It submitted that at no earlier time had that intention been expressed. It submitted that a circumstance is distinct from the act or event which brings it into existence.<sup>5</sup>
24. ANZ and the Receiver submitted that Blue Energy had delayed its application for more than 12 months. ANZ further submitted that the market was fully informed of the potential relevant interest of ANZ and Primebroker in Blue Energy on 8 July 2008, when ANZ lodged a notice of initial substantial holder.
25. In *Brickworks 01*, the Panel decided that the relevant circumstance was the effect on offerees and the market of the Announcement, and that was ongoing.<sup>6</sup> We do not

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<sup>5</sup> This submission was not developed, but appears to have been taken from *Brickworks Ltd 01* [2000] ATP 6 at [30], where the Panel said, in the context of whether an application had been made within time: "*A circumstance is distinct from the act or event which brings it into existence: circumstances are the relatively persistent background against which acts and events occur.*"

<sup>6</sup> Fn 5 at [31]. However it went on to say that if the circumstance was the making of the Announcement, it would extend time.

think the same approach can be adopted in connection with this acquisition of a relevant interest. Chapter 6 is concerned with the acquisition of the power to vote or dispose of shares, not with when a decision to exercise that power is taken. The acquisition occurred prior to 8 July 2008.

26. Even if the application is to be understood as separating the acquisition from the decision to exercise the power, Blue Energy became aware of the Receiver's intention to exercise voting power as early as 20 November 2008.
27. Although we were not provided with the email correspondence dated 16 July 2008 (see paragraph 12), we are of the view that the communications on 20 November 2008 and 25 November 2008 clearly indicated to Blue Energy that the Receiver intended to exercise voting power in the Blue Energy shares. If an application was to be made to the Panel, assuming the separation of acquisition of voting power and decision to vote can be sustained, this would have been the appropriate time.
28. We do not consider the Receiver's communications on 14 and 20 July 2009 (raising corporate governance issues concerning two of Blue Energy's directors and seeking the removal of those directors and the chairman) to be inconsistent with its position at November 2008 to exercise its voting power in Blue Energy shares.
29. In our view, Blue Energy has not established any "credible allegations of clear, serious and ongoing unacceptable circumstances"<sup>7</sup> to warrant the Panel agreeing to a longer period. No basis for the exercise of discretion has been provided, and no request for an extension was made. We would not exercise our discretion to extend the time for making an application. We are of the view that it is in the public interest, and it is the clear intention of the legislature, that applicants bring applications to the Panel as soon as reasonably practicable after they become aware of potentially unacceptable circumstances.
30. As well, we have discretion not to conduct proceedings. Timeliness is a factor, an aspect of which is that an application may not be considered timely if the applicant has delayed bringing the application because it waited for, or has been selective in choosing, 'more serious' or 'more unacceptable' circumstances. This is not to say that an applicant must always come forward at the first sign of trivial circumstances. As noted, the 20 November 2008 circumstances were the proper trigger. ANZ submitted that the application has not been made to promote the objectives of s602 or to rectify unacceptable circumstances but "for the tactical purpose of disabling the receiver from exercising its voting rights as a shareholder ...". The Receiver submitted that taking action to preserve the value of Primebroker's assets was not contrary to s602.
31. In Guidance Note 8 the Panel says:  
*"Parties should ensure that they do not delay unreasonably in making an application. The time periods in takeovers are short. While the Panel endeavours to work quickly and*

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<sup>7</sup> *Austral Coal Limited 03* [2005] ATP 14

*informally, there are limits as to the time within which it can sensibly consider issues put before it and give parties sensible and reasonable time to make submissions on those issues.”<sup>8</sup>*

32. Noting that this matter does not involve a takeover, we nevertheless consider that the policy behind the statement in the Guidance Note applies. In this matter, apart from the time limit in the Act, we do not think the application is timely and would exercise our discretion not to conduct proceedings.
33. Further, in *Golden Circle Ltd 02* the Panel said:  
*“... When an application is made late in a process, the prejudice to one or other party is likely to be greater and the Panel requires more cogent reason to intervene.”<sup>9</sup>*
34. We note that the shareholding has been exposed to market for more than 12 months now.
35. We therefore consider the application to be untimely and decide not to conduct proceedings.

#### **Likelihood of declaration**

36. We also consider, for the following reasons, that there is no reasonable prospect we would make a declaration of unacceptable circumstances.
37. First, the relevant interest the subject of this application will fall below 20% (subject to FIRB approval). It is currently only just above 20%, although in July 2008 it was approximately 25%. The market has been informed of any relevant interest of ANZ and the Receiver since 8 July 2008. This disclosure appears to have been in compliance with the Act. We are of the view that, in these circumstances, such a relevant interest as now exists is unlikely to give rise to unacceptable circumstances, even assuming it has come about from a breach of s606 or there is a breach of s671B. The passing of time, the disclosure, and the manner in which ANZ acquired the interest are all relevant factors. There may be others in other cases.
38. In any event, the application does not suggest that the acquisition of any relevant interest by ANZ or the Receiver was not in compliance with the Act. The application suggests that the Receiver and ANZ came by the shares following an aggregation by Primebroker, yet ASIC would not have granted the exemption to Primebroker had it been aware that Primebroker was aggregating shares *“for the purpose of exercising the aggregated voting power without informing the market”*. This is, at the least, speculative as to ASIC’s intentions. Moreover, no material has been provided to show that that was what Primebroker was doing.
39. Second, the applicant's real concern appears to be related to a board dispute. We note Blue Energy’s submission that the Receiver’s complaints in relation to corporate governance issues have been referred for an independent probity audit. Panel intervention is not required.

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<sup>8</sup> GN 8 *Matter Procedures*, at para 8.86. Also, in para 8.45 the Panel identifies factors to be considered in deciding whether or not to conduct proceedings. One of those is whether the application is within time – see 8.45(f)

<sup>9</sup> [2007] ATP 24 at [14(d)]

40. Third, we were concerned about the application being lodged on 6 August 2009 when ANZ had advised Blue Energy that it would respond to a request for undertakings (in terms like the final orders sought) by 7 August. This alone is not enough for us to say that we would not conduct proceedings, but it does support ANZ's submission that the application had a tactical element to it. However, we do not have enough information to say whether the application is purely tactical.
41. For the above reasons, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances.

## DECISION

42. 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).
43. Given that we make no declaration of unacceptable circumstances, we make no final orders, including as to costs. We made no interim orders.

**Karen Wood**  
**President of the Sitting Panel**  
**Decision dated 14 August 2009**  
**Reasons published 14 August 2009**