



Australian Government

Takeovers Panel

**Reasons for Decision
Lion-Asia Resources Pte Ltd
[2009] ATP 25**

Catchwords:

Review of ASIC decision – affirmed ASIC decision - joint bid relief – minimum acceptance condition - efficient competitive and informed market – future policy uncertainty – timeliness - foreseeable outcome – truth in takeovers - Lion-Asia Resources Pte Ltd - Polaris Metals NL - Mineral Resources Limited

Corporations Act 2001 (Cth), sections 602, 606, 656A

ASIC RG 25 ‘Takeovers: False and misleading statements’, RG 159 ‘Takeovers, compulsory acquisitions and substantial holdings’

Guidance Note 2 Reviewing decisions

Taipan Resources NL 06 [2000] ATP 15, Prudential Investment Company of Australia Limited [2003] ATP 36

INTRODUCTION

1. The Panel, Braddon Jolley (sitting President), Francesca Lee and Peter Scott, affirmed under s656A¹ the decision of ASIC not to grant Lion-Asia relief to waive the Minimum Acceptance Condition in Lion-Asia’s off-market takeover bid for the Polaris shares and options. The Panel was not satisfied that ASIC’s policy on joint bids was inapplicable or had been misapplied in the circumstances.
2. In these reasons, the following definitions apply.

Co-operation Agreement	Agreement between Lion-Asia and Lion Diversified dated 5 October 2009, under which Lion Diversified agreed not to accept Lion Asia’s offer in respect of its 25.45% interest in Polaris nor dispose of, sell or transfer its shares to any other person in the absence of a superior proposal that is not matched
Heron	Heron Resources Limited
LAP	Lion Asiapac Limited, a company incorporated in Singapore
LAPE	LAP Exploration Pte Ltd, a company incorporated in Singapore
Lion-Asia	Lion-Asia Resources Pte Ltd, a company incorporated in Singapore
Lion Diversified	Lion Diversified Holding Berhad, a company incorporated in Malaysia
Mineral Resources	Mineral Resources Limited

¹ References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

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Minimum Acceptance Condition

The Lion-Asia takeover offer defeating condition that, during or at the end of the offer period, Lion-Asia has received valid acceptances for not less than 50.1% of the Polaris securities that Lion-Asia offers to acquire under the offer excluding:

- any bid class securities in which Lion-Asia, Lion Diversified, Tan Sri Cheng, VBL, LAPE, LAP and their respective associates have a relevant interest at the beginning of the offer period and
- any bid class securities the subject of a pre-bid acceptance agreement between Heron and Mineral Resources

Polaris

Polaris Metals NL

VBL

Vital Bond Limited, a company incorporated in Singapore

3. In these proceedings, the Panel:
 - (a) adopted the Panel's published procedural rules and
 - (b) consented to parties being represented by their commercial lawyers.
4. In accordance with GN 2² the Panel did not initially publish a media release advising of the application for review. However, following an announcement by Lion-Asia of its Panel application, the Panel made its own announcement.

FACTS

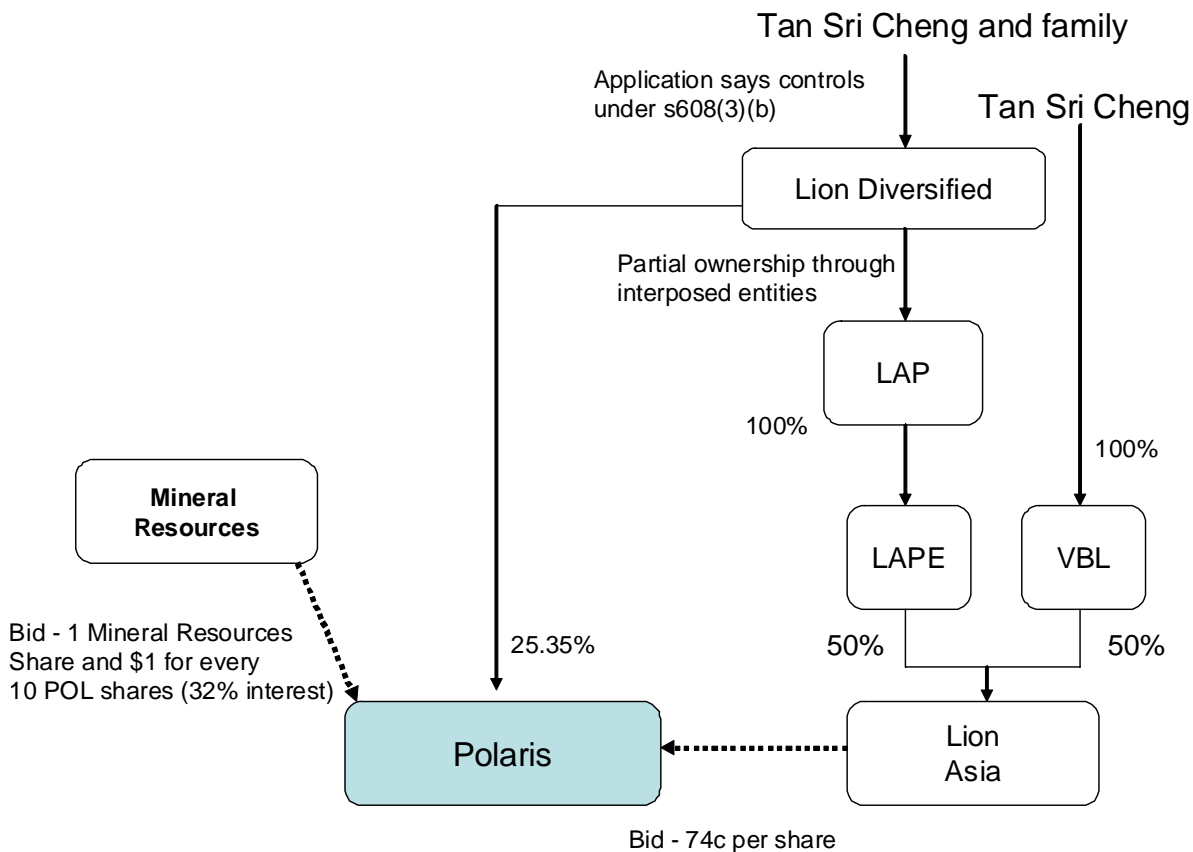
The Companies

5. Lion-Asia is a 50:50 joint venture company owned by SGX-listed LAP, through its wholly-owned subsidiary LAPE, and Tan Sri Cheng, through his wholly owned private investment company, VBL.
6. LAP is an investment holding company. Its subsidiaries engage in the business of supplying quicklime, electronics contract manufacturing and scrap metal trading.
7. Tan Sri Cheng is the chairman of Lion Diversified, a public company listed on Bursa Malaysia Securities Berhad. Lion Diversified is the largest shareholder of Polaris, holding approximately 25.35% of the shares. Tan Sri Cheng is a major shareholder in Lion Diversified. Through his direct and indirect shareholding he controls Lion Diversified for the purposes of section 608(3)(b). As a result, Tan Sri Cheng has a relevant interest in the 25.35% of Polaris Shares held by Lion Diversified.
8. Polaris is an ASX listed company (ASX code: POL).
9. Mineral Resources is an ASX listed company (ASX code: MIN)
10. The interests and relationships of relevant persons at 23 November 2009, the date of the application, are summarised in the following diagram:

² Guidance Note 2 - Reviewing Decisions, paragraph 20

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The offers

11. Polaris is subject to competing bids from Lion-Asia and Mineral Resources.
12. The Mineral Resources offer is 1 Mineral Resources share and \$1.00 for every 10 Polaris shares and 1 Mineral Resources option for every 10 Polaris options. The Mineral Resources offer is unconditional. Mineral Resources has disclosed a relevant interest in 35.05% of Polaris' voting securities. The offer was announced on 20 August 2009. The share part of the offer is scheduled to close on 9 December 2009, and the option part of the offer is scheduled to close on 23 December 2009. The offer is recommended by the Polaris board.
13. The Lion-Asia offer is 74 cents for every Polaris share and an equivalent offer for 'in the money' Polaris options. The offer is conditional only on the Minimum Acceptance Condition. The offer was announced on 5 October 2009 and is scheduled to close on 29 December 2009.

The relief

14. On 5 October 2009, Lion-Asia announced that it had entered into the Co-operation Agreement.
15. Also on 5 October 2009, Lion-Asia obtained an exemption from ASIC under s655A(1) from the operation of s606 under ASIC's policy on joint bid relief. The relief related to the acquisition of a relevant interest in Polaris shares as a result of Lion-Asia and Lion Diversified entering into the Co-operation Agreement.

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16. The relief was initially given to Lion-Asia, LAP, LAPE, VBL and Tan Sri Cheng. Among other things, the relief required that the Lion-Asia offer be subject to the Minimum Acceptance Condition.
17. On 7 October 2009, Lion-Asia informed ASIC that Tan Sri Cheng already had a relevant interest in Lion Diversified's 25.45% interest in Polaris because he controlled Lion Diversified. ASIC revoked the 5 October instrument and issued a new instrument on 12 October 2009, omitting Tan Sri Cheng. The Minimum Acceptance Condition remained.
18. On 17 November 2009, Lion-Asia applied for a variation of the 12 October relief to omit the Minimum Acceptance Condition. On 23 November 2009, ASIC informed Lion-Asia that it had "decided to refuse" the 17 November application.

APPLICATION

19. By application dated 23 November 2009, Lion-Asia sought a review of ASIC's decision to refuse the variation. It applied to set aside ASIC's decision and substitute a decision:
 - (a) revoking the revised relief and issuing a new relief instrument, in the same form as the revised relief but omitting the Minimum Acceptance Condition or
 - (b) permitting Lion-Asia to waive the Minimum Acceptance Condition in its discretion.
20. On 25 November 2009, ASIC provided the Panel with its reasons for refusing Lion-Asia's 17 November 2009 application.

DISCUSSION

21. The Panel treats an application for review of an ASIC decision as a *de novo* consideration on the merits.³ We have considered the matter on its merits. We have considered the factors set out in Guidance Note 2, and in particular:
 - (a) the relevant ASIC policy and whether it was applied
 - (b) the application for review of ASIC's decision and the material provided
 - (c) the reasons for ASIC's decision and
 - (d) submissions and rebuttals to the Panel's brief.
22. We appreciated the efforts of the parties in providing succinct and on-point submissions and rebuttals.

ASIC joint bid policy

23. ASIC's joint bid policy was originally described in ASIC Media Release [01/295] and later incorporated in its current form in ASIC RG 159.
24. The policy is intended to facilitate joint bids, subject to certain conditions, where s606 may otherwise prohibit bidders coming together to make a bid.⁴ The inclusion of a

³ Guidance Note 2, paragraph 10(a)

⁴ ASIC RG 159 at paragraph 288

minimum acceptance condition (ie, a minimum of 50.1% acceptance by shareholders that the joint bidders do not have voting power in at the beginning of the offer period) gives non-associated shareholders collective power of veto over the joint bid.⁵ The policy ensures that the joint bidders' collective pre-bid stake in the target does not:

- (a) discourage rival bids and any ensuing auction for control of the target⁶
- (b) deprive non-associated shareholders in the target of a fair and reasonable price for their securities⁷ or
- (c) reduce any effect on the efficient and competitive market for voting securities in the target.⁸

25. ASIC, in its reasons for decision, stated that it *"has consistently imposed the minimum acceptance condition when granting joint bid relief"* except in circumstances where the condition was *"adequately replicated, through the scheme approval process"*.
26. ASIC's joint bid policy is a published policy of long-standing. The intention of the Minimum Acceptance Condition requirement is to support outcomes consistent with the principles in s602. We consider that ASIC's policy is applicable to the circumstance of this matter and, for the reasons below, had not been misapplied.

Foreseeable outcome

27. Lion-Asia submitted that the strict application of ASIC's joint bid policy *"will not enhance the Eggleston principles, but will diminish them in the context of the contest of control of Polaris"* by reducing competitiveness in the market for Polaris shares. Specifically, it submitted that the application of the policy was not justified in these circumstances as:
- (a) two competing bids existed for Polaris and
 - (b) subsequent to the relief being granted and the lodgment the Lion-Asia bidder's statement, the Mineral Resources bid had become unconditional.
28. ASIC's reasons for decision stated that ASIC did not consider that the Lion-Asia application raised any *"new issues to justify waiving the minimum acceptance condition."* It further stated that:
- "ASIC does not consider the fact that Mineral Resources freed its offer from all defeating conditions on 11 November 2009 to be a new issue. The possibility was readily apparent when the initial application was made and the existing relief granted. It is inherent in ASIC's joint bid policy that a rival bid may be unconditional while a joint bid is subject to a minimum acceptance condition...[and] that joint bidders cannot declare their bid free of the minimum acceptance condition to make their bid more attractive."*
29. We agree with ASIC. Mineral Resources announced its bid for Polaris on 20 August 2009 and dispatched its bidder's statement on 23 September 2009. Lion-Asia

⁵ ASIC RG 159 at paragraph 288 and 293

⁶ ASIC RG 159 at paragraph 289

⁷ ASIC RG 159 at paragraph 292

⁸ ASIC RG 159 at paragraph 290

announced its bid on 5 October 2009, being the date on which it was granted ASIC relief. At that time it was foreseeable that the Mineral Resources bid might become unconditional and that the Lion-Asia bid would remain conditional in accordance with the relief.

The principles in s602

30. Lion-Asia submitted that *“it is in the interests of an efficient and competitive market for changes in the application of the joint bid policy to be made.”* This was because, if its offer was declared unconditional, *“Polaris shareholders will be able to choose between two wholly unconditional bids for Polaris”* thereby enabling *“the contest for control of Polaris”* to be resolved by *“competitive market forces”* and by non-associated shareholders *“through their decision on which offer to accept”*.
31. ASIC submitted that:
“the joint bid policy is also concerned to ensure that joint bidders do not get an unfair advantage over non-associated shareholders and other potential bidders. If the minimum acceptance condition is not imposed so as to give non-associated shareholders a power of veto, joint bidders are effectively able to enter into joint bid agreements, make a bid, and then retain any relevant interest acquired as a consequence of the joint bid agreement and any acceptances.”
32. Although granting the relief may allow Polaris shareholders to choose between two unconditional bids, we do not consider that this outcome is necessarily required to satisfy the principles of s602. In our view the principles in s602 are not offended by retention of the Minimum Acceptance Condition. Moreover, the Minimum Acceptance Condition is not concerned with ensuring there are equal competing bids but with whether non-associated shareholders approve of or consent to the increased voting power of joint bidders.

Improvement in offer terms

33. Lion-Asia submitted that allowing it to compete on an unconditional basis with Mineral Resources will:
 - (a) *“enhance competition in the market for Polaris voting securities and may increase the possibility of further price increases from the two competing bidders”*
 - (b) *“give the shareholders of Polaris who have not accepted either bid or who are not associated with either bidder a clear choice between an unconditional predominantly scrip bid and an unconditional cash bid”* and
 - (c) *“allow those non-associated shareholders to determine the outcome of the contest for control of Polaris.”*
34. Similarly, Polaris submitted that the removal of the Minimum Acceptance Condition *“has the potential to deliver benefits (such as the availability of an unconditional cash offer) to Polaris shareholders that have yet to accept an offer.”* And that this would be an *“optimal outcome”* for shareholders who have not accepted either bid.
35. We do not agree that the outcome argued for warrants or is justification for departure from the established joint bid policy in these circumstances. It must be the case in any contest that there will be advantages in one bid not available in the other.

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Moreover, in our view best price or best bid terms (ie, unconditionally) for offerees does not necessarily mean best policy. ASIC's policy on joint bids is of long standing and was well understood by Lion-Asia when it entered the contest for Polaris.

36. ASIC submitted that it remained open for Lion-Asia to *"make its bid more attractive so as to improve its prospects of satisfying the [Minimum Acceptance Condition]"* and further submitted that Lion-Asia had *"already done so announcing, on 23 November 2009, its intention to increase the consideration being offered."* We agree.
37. Polaris submitted that *"by maintaining the [Minimum Acceptance Condition], ASIC is imposing a competitive disadvantage on the joint bidders which goes beyond the intention of the Policy."* We do not agree. Also, there is a risk that granting the relief will impose a competitive disadvantage on other parties, notably Mineral Resources. The market for Polaris shares has operated on the basis of the Minimum Acceptance Condition.

Future policy uncertainty

38. ASIC stated in its reasons for its decision that the removal of the Minimum Acceptance Condition *"would undermine ASIC's policy on joint bids, and have the potential to create market uncertainty"*. In particular, ASIC stated that it *"would reduce certainty for rival bidders competing against a joint bid because it would be more difficult to plan their bid if they thought there was a risk that ASIC would subsequently change the conditions of the joint bid relief during the bid process."*
39. Similarly, Mineral Resources submitted that the removal of the Minimum Acceptance Condition was *"a radical departure from ASIC's existing policy by replacing the concept of a 'non-waivable' minimum acceptance condition with the concept of a minimum acceptance condition that can be waived in the event that a rival bid is made."*
40. We too are concerned that uncertainty in the market may arise from a departure from ASIC's policy particularly as it is so late after the initial modification and announcement to the market (and on which the market had been operating).

Timeliness

41. The relief was first granted, with the Minimum Acceptance Condition, on 5 October 2009. The revised relief on 12 October 2009 contained the same condition and an application to ASIC for consent to waive the condition was not made until 17 November 2009, after the Mineral Resources offer had been declared unconditional on 11 November 2009.
42. We are of the view that the appropriate time to challenge ASIC's inclusion of the Minimum Acceptance Condition was when it was imposed, rather than to wait until 17 November 2009.
43. Over this time, a lot has happened. Specifically:
 - (a) some Polaris shareholders have accepted the Mineral Resources' bid in circumstances where the Lion-Asia Minimum Acceptance Condition was expressed to be not waivable⁹, and some have accepted when the Minimum

⁹ Lion-Asia's takeover bid announcement on 5 October 2009, Annexure A. See also these reasons at para 55

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Acceptance Condition was expressed to be not waivable without the prior consent of ASIC.¹⁰

In support of this point, Mineral Resources submitted that since 5 October 2009, when Lion-Asia announced that it would not waive the Minimum Acceptance Condition, 8.98% of Polaris shareholders have accepted the Mineral Resources bid

- (b) Polaris shareholder's accepting Lion-Asia's bid did so with the knowledge that the Minimum Acceptance Condition was expressed to be not waivable without the prior consent of ASIC
 - (c) Polaris shares have been traded on market on these understandings and
 - (d) the Mineral Resources bid became unconditional.
44. Polaris submitted that, based on the Polaris boards' view that the Mineral Resources offer was superior to the Lion-Asia offer, the relief sought by Lion-Asia ought not have any affect on the shareholders who accepted the Mineral Resources unconditional offer.
45. However, ASIC submitted that those shareholders would be adversely affected because they may *"have already based their decision to accept the Mineral Resources offer on, inter alia, the fact that the Lion-Asia offer is subject to a minimum acceptance condition, in determining the relative prospects for success of the two bids"*. It further submitted that the *"only way to address any adverse effect would be to offer the shareholders a right of withdrawal"* which would be *"inconsistent with the efficient, competitive and informed market principle given the potential impact on the Mineral Resources bid."*
46. We agree with ASIC. Knowledge of the terms of each of the bids was widely distributed and would have been well understood by many market participants. The bids offer different consideration. A shareholder might have accepted the scrip offer but have preferred an unconditional cash offer, even if of some lesser value. Alternatively, a shareholder might have decided to accept the scrip offer having regard to the potential impact on the value of that scrip if Mineral Resources were to succeed in gaining control of Polaris, and the conditionality of Lion-Asia's bid might have been a factor in that decision. Yet to offer withdrawal rights in these circumstances would be clearly unfairly prejudicial to Mineral Resources and would have an impact on its bid.
47. We consider that the passing of time has brought about complexities which it is not clear to us can be satisfactorily dealt with if the Minimum Acceptance Condition was removed.

Structure of the joint bid

48. Lion-Asia submitted that the:

"Lion-Asia bid for Polaris was structured as a joint bid as [Lion Diversified] wished to separately retain its 25.35% stake in Polaris in spite of the Lion-Asia bid but subject to its

¹⁰ Lion-Asia's bidder's statement lodged on 13 November 2009 at section 8.9(a)(i). See also these reasons at para 55

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right to sell those shares into a superior proposal which is not matched by Lion-Asia in accordance with the terms of the Co-operation Agreement”.

49. Thus, the Co-operation Agreement was desirable “so that it would not need to arrange the funding required to acquire any part of the [Lion Diversified] shareholding in Polaris.”
50. The Lion-Asia bid was structured as a joint bid for reasons that suited the bidding parties. There is no objection to this. However, we consider there is now no compelling reason for us to interfere with the Minimum Acceptance Condition. It was one of the foreseeable and accepted consequences of that structure.

Removal of the Minimum Acceptance Condition

51. Lion-Asia submitted that if the Minimum Acceptance Condition is removed, its bid will become unconditional and shareholders who have not accepted either bid will have the benefit of a “clear choice between an unconditional predominantly scrip bid and an unconditional cash bid”.
52. Polaris submitted that such a choice would be an “optimal outcome” for its shareholders who have not as yet accepted either bid, however, it identified in its submissions that, if the Minimum Acceptance Condition were removed, a possible outcome was that neither Lion-Asia nor Mineral Resources would effectively control Polaris. It submitted that it was not in the best interests of shareholders to remain as a minority in company controlled by neither bidder as:
 - (a) “Polaris will require additional funding for working capital purposes and to meet the ongoing expenses associated with responding to the takeover bids, potentially before the end of 2009. Both bidders have indicated a preparedness to assist with short term funding, subject to achieving control. In the absence of this funding support, Polaris may have to undertake a rights issue which has the potential to dilute the interests of shareholders” and
 - (b) “There is the potential for the creation of a deadlocked board or other inefficiencies in Polaris' corporate governance or ownership structure which may occur where it has two substantial, but not controlling, shareholders.”
53. Mineral Resources submitted that Lion-Asia’s application to remove the Minimum Acceptance Condition sought to “obtain all of the advantages and benefits of a joint bid arrangement, but being subject to none of the disadvantages and restrictions.” And further, that “it is unfair to MIN shareholders (which includes a number of former POL shareholders) to allow Lion an advantage in circumstances where MIN has complied in all respects with the relevant takeover requirements in proceeding with its bid.”
54. In considering the impact of the removal of the Minimum Acceptance Condition, we have regard to the effect on all interested persons, not just Polaris shareholders who are yet to accept the bid. We consider it is too simplistic to look at only price and offer terms when considering outcomes. Other relevant factors may include regulatory certainty, the position which the target will find itself in, the legitimate expectations of any potential or actual rival bidders and so on. There are advantages and disadvantages with both outcomes. Accordingly, we are not satisfied that by removing the Minimum Acceptance Condition at this stage, there would necessarily

be any better outcome, having regard to all affected persons, than by leaving the condition in place.

Truth in takeovers

55. We considered, but did not need to decide, whether the application raised a truth in takeovers issue. Lion-Asia's bid announcement on 5 October 2009 stated that Lion-Asia would not waive the Minimum Acceptance Condition. Its bidder's statement, lodged with ASIC on 13 November 2009, differed stating that it would not waive the Minimum Acceptance Condition without the prior consent of ASIC.
56. Mineral Resources submitted that Lion-Asia's application to the Panel was "*directly at odds with the position stated in its Bidder's statement which was released to the market on 13 November 2009 – that the condition would only be waived with the consent of ASIC*". Mineral Resources referred to the decision in *Taipan Resources NL 06*¹¹, submitting that, in that matter, the Panel applied ASIC's truth in takeovers policy and "*refused to allow Troy to waive a condition that it had previously publicly stated it would not waive, instead requiring Troy to make a fresh takeover bid*".
57. Similarly ASIC submitted shareholders were entitled to consider that the Lion-Asia bid was subject to a non-waivable 50.1% minimum acceptance condition, relying on ASIC's "truth in takeovers" policy.
58. Lion-Asia submitted that there was a clear distinction between a condition of the type required in *Taipan* (which was imposed because it was consistent with public statements the bidder had made) and a condition which is imposed by ASIC as a requirement of relief. Lion-Asia cited the decision in *Prudential Investment Company of Australia Limited*.¹² In other words the condition in *Taipan* was self imposed and the condition in *Prudential* was ASIC imposed.
59. We consider that this matter is similar to *Taipan* and *Prudential*. *Taipan* involved ASIC requiring a non-waivable condition because it was a condition announced by the bidder as part of the bid. Here and in *Prudential*, the condition was a consequence of a structure adopted by the joint bidders. In that sense in all three matters the conditions were self-imposed.
60. However, there are also features that distinguish the present matter from *Prudential*. In that matter, ASIC imposed a minimum acceptance condition to joint bid relief of "*50.1% of target company shareholders who are not associated with the joint bidders*".¹³ The applicant was able to prove that this condition would be met if shareholders who could not be contacted were excluded. Therefore, it sought a modification of the relief on this basis. Adjusting headcount provisions for uncontactable shareholders was well established policy to deal with a problem of a mechanical nature.
61. In the present matter the requested relief involves the removal of the Minimum Acceptance Condition rather than modifying the mechanics of the condition (which we note have already been modified to take into account the pre-bid agreement

¹¹ [2000] ATP 15

¹² [2003] ATP 36

¹³ [2003] ATP 36 at 21

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between Heron and Mineral Resources). In *Prudential*, a rival bid had already been made and was unsuccessful. In this matter a rival bid is still on foot.

62. We agree with the following statement of the sitting Panel in *Prudential* and consider it further supports our concerns about the effect on market participants of removing the Minimum Acceptance Condition:

“Whether any particular decision under section 655A would engender uncertainty and undermine the integrity of the market is, of course, a relevant consideration whenever ASIC exercises its discretion whether to grant a modification. In the particular circumstances of this matter, however, the grant of relief did not engender uncertainty or adversely affect market integrity.”¹⁴

63. Removal of the Minimum Acceptance Condition would, we think, add to future uncertainty.
64. Lion-Asia submitted that, in *Prudential*, the Panel noted that a condition included at ASIC’s insistence “*would be better disclosed if the bidder stated that it could declare its bid free of that condition, but only with ASIC’s approval*”.¹⁵ That was not done in *Prudential*. Lion-Asia submitted that it had complied by including such wording in its bidder’s statement. However, it did not do so in its bid announcement.

DECISION

65. For the reasons above, we affirm the decision of ASIC not to grant consent to Lion-Asia to waive of the Minimum Acceptance Condition or to reissue the revised relief omitting the Minimum Acceptance Condition.

Braddon Jolley
President of the sitting Panel
Decision dated 3 December 2009
Reasons published 8 December 2009

¹⁴ [2003] ATP 36 at [67]

¹⁵ [2003] ATP 36 at [74]