



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Padbury Mining Limited  
[2010] ATP 9**

**Catchwords:**

*Decline to commence proceedings, efficient, competitive and informed market, misleading announcement, requisitioned meeting, section 602 principles*

*Corporations Act 2001 (Cth), sections 249D, 249E, 602 and 657A*

*Grand Hotel Group [2003] ATP 34, St Barbara Mines Limited 02 [2004] ATP 13, Bowen Energy Ltd [2007] ATP 22, Transurban Group [2010] ATP 5*

**INTRODUCTION**

1. The Panel, Michael Ashforth (sitting President), Diana Chang and John Keeves, declined to conduct proceedings on an application by McInerney Holdings Pty Ltd in relation to the affairs of Padbury Mining Limited as there was no reasonable prospect it would declare the circumstances unacceptable. The application concerned alleged misleading and incorrect statements in a letter to shareholders that related to a general meeting to effect a change of control of the Padbury board.
2. In these reasons, the following definitions apply.

Fe	Fe Limited
McInerney	McInerney Holdings Pty Ltd
Padbury	Padbury Mining Limited

**FACTS**

3. Padbury is an ASX listed mining exploration company (ASX code: PDY).
4. On 8 July 2010, Fe announced a cash and scrip takeover for Padbury subject to conditions. One condition was the removal of 3 of 4 Padbury directors and their replacement with 4 Fe directors.
5. On 26 August 2010, Padbury announced that it had received a request from shareholders (including McInerney) to call a general meeting of shareholders pursuant to s249E<sup>1</sup> and that it consented to the meeting being held on 8 September 2010.<sup>2</sup> Padbury also advised that it had previously received a number of earlier 249D requests which it considered were deficient. The announcement also included a notice of meeting for the 8 September meeting.

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

<sup>2</sup> Padbury had argued that it was invalidly called

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6. The notice of meeting contained 5 resolutions. Resolutions 1 and 2 concerned the removal of Messrs Luke Innes and Colin Stirling from the Padbury board. Resolutions 3 to 5 concerned the appointment of Messrs Tony Sage, Mark Gwynne and Paul Kelly. The new proposed appointees were all directors of Fe.
7. On 30 August 2010, Padbury released two announcements to ASX including a document entitled “Correction to Media Reports” and a letter to Padbury shareholders. The letter related to the 8 September meeting. This application concerns the letter.
8. The meeting was held on 8 September 2010. All the resolutions were defeated.

## APPLICATION

### Declaration sought

9. By application received on 7 September 2010, McInerney sought a declaration of unacceptable circumstances. It submitted that the 30 August letter contained misleading and incorrect statements, including:
  - (a) statements about the achievements of the “*current Board*”
  - (b) the failure to disclose further information about a “*breakthrough non-binding MOU with a Chinese investor*” and “*a major value adding event within the current drilling program*”
  - (c) references to a proposed director as “*a convicted market rigger*” without also disclosing that he was appealing to the High Court and
  - (d) the Padbury share price chart only showed Padbury’s share price from June 2009 rather than from 2008.
10. McInerney also submitted that the Padbury board had, in issuing the letter, acted inappropriately in influencing the outcome of the director election process.
11. McInerney submitted that the effect of the circumstances was to prevent the acquisition of control of Padbury taking place in an efficient, competitive and informed market in that:
  - (a) the Padbury directors had provided misleading and incorrect information to shareholders, for the purpose of maintaining their positions and
  - (b) Padbury shareholders were not fully informed of all relevant information and were unable to make a properly informed decision on how to vote at the meeting.

### Interim order sought

12. McInerney sought an interim order that the 8 September meeting be postponed for 14 days.

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13. The Acting President declined to make any interim orders. He said that he considered the following circumstances important:
- (a) McInerney's concerns primarily related to alleged misleading disclosure in connection with the 30 August letter, which related to a meeting to effect a change of the Padbury board. There may be some relationship between McInerney and Fe (the bidder), although this was not developed in the application. The Panel has indicated on a number of occasions that it will generally not intervene in matters involving a change of the board of a company, in the absence of other relevant factors<sup>3</sup>
  - (b) the application for an interim order was not made on a timely basis. The announcement occurred on 30 August 2010, some 7 days before the application. The application was made only the day before the meeting was to be held. No explanation for the delay was provided. The Acting President was not satisfied that the risk that unacceptable circumstances would continue or worsen (if unacceptable circumstances existed) outweighed the potential adverse effects of orders at that late stage<sup>4</sup> and
  - (c) the application did not make out any basis for an interim order stopping the convening of the 8 September meeting.
14. The Panel informed the parties in sufficient time for McInerney to apply to the court to postpone the meeting if it chose to.
15. The meeting has now been held so interim orders do not need to be considered by us.

#### Final orders sought

16. McInerney sought final orders that Padbury issue a corrective announcement and correspond with its shareholders.

## DISCUSSION

17. In preliminary submissions, Padbury submitted that the statements in the 30 August letter related to matters concerning a change of control of the Padbury board and "*do not relate to the acquisition of control over voting shares as required by section 602 and s657A of the Corporations Act*". We agree.
18. In *Grand Hotel*,<sup>5</sup> the Panel said:

*Chapter 6 is essentially concerned with situations in which control of the general meeting is changed, by acquiring relevant interests in securities or acquiring voting power by creating associations. Chapter 6 is not designed to prevent security holders from using their votes to replace the management of companies and trusts, unless they*

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<sup>3</sup> See *Grand Hotel Group* [2003] ATP 34 at [52 to 54], *St Barbara Mines Limited 02* [2004] ATP 13 at [9 and 10] and *Bowen Energy Ltd* [2007] ATP 22 at [32]

<sup>4</sup> See *Transurban Group* [2010] ATP 5 at [15]

<sup>5</sup> [2003] ATP 34 at [52]. See also *Rivkin Financial Services Limited 01* [2004] ATP 14 at [26] and *St Barbara Mines Limited 02* [2004] ATP 13 at [9 and 10]

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*enter voting arrangements in relation to them which contravene section 606 (the 20% threshold) of the Act...(footnotes omitted)*

19. In *Bowen Energy Ltd*,<sup>6</sup> the Panel said:

*In the Panel's view it is unlikely that circumstances will be unacceptable by reason only that they affect control as contemplated by section 50AA without also in some way affecting voting power in the controlled company...*

20. McInerney submitted that: “*Put simply, the Meeting is concerned solely with the makeup of Padbury's board*”. In our view, the application does not relate to control or potential control of Padbury as the term is used for the purposes of Chapter 6.

21. In any event, the 8 September meeting has been held.

## DECISION

22. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. 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).

## Orders

23. As we have decided not to conduct proceedings, we make no orders, including as to costs.

**Michael Ashforth**  
**President of the sitting Panel**  
**Decision dated 10 September 2010**  
**Reasons published 13 September 2010**

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<sup>6</sup> [2007] ATP 22 at [32]