



Australian Government

Takeovers Panel

Reasons for Decision
TheChairmen1 Pty Ltd and Guildford Coal Limited
[2010] ATP 10

Catchwords:

Association, acting in concert, capital raising, decline to conduct proceedings, deemed relevant interests, effect on control, efficient, competitive and informed market, interim orders, final orders, placement, relevant interest, rights issue, share issue, substantial holding disclosure

Corporations Act 2001 (Cth), sections 602, 608(3), 609(9)

Mount Gibson Iron Limited [2008] ATP 4

INTRODUCTION

1. The Panel, Byron Koster, Mark Paganin (sitting President) and Nora Scheinkestel, declined to conduct proceedings on an application by Lenark Pty Limited in relation to the affairs of TheChairmen1 Pty Ltd and Guildford Coal Limited. The application concerned a proposed capital raising in C1 by way of placement and rights issue.
2. In these reasons, the following definitions apply.

C1	TheChairmen1 Pty Ltd
Guildford	Guildford Coal Limited
Lenark	Lenark Pty Limited
offer letter	the offer letter dated 6 September 2010 from C1 to its shareholders in respect of a rights issue of 4,109,589 shares at \$1.46 (to raise approximately \$6,000,000) and a placement of the same (to raise the same amount)

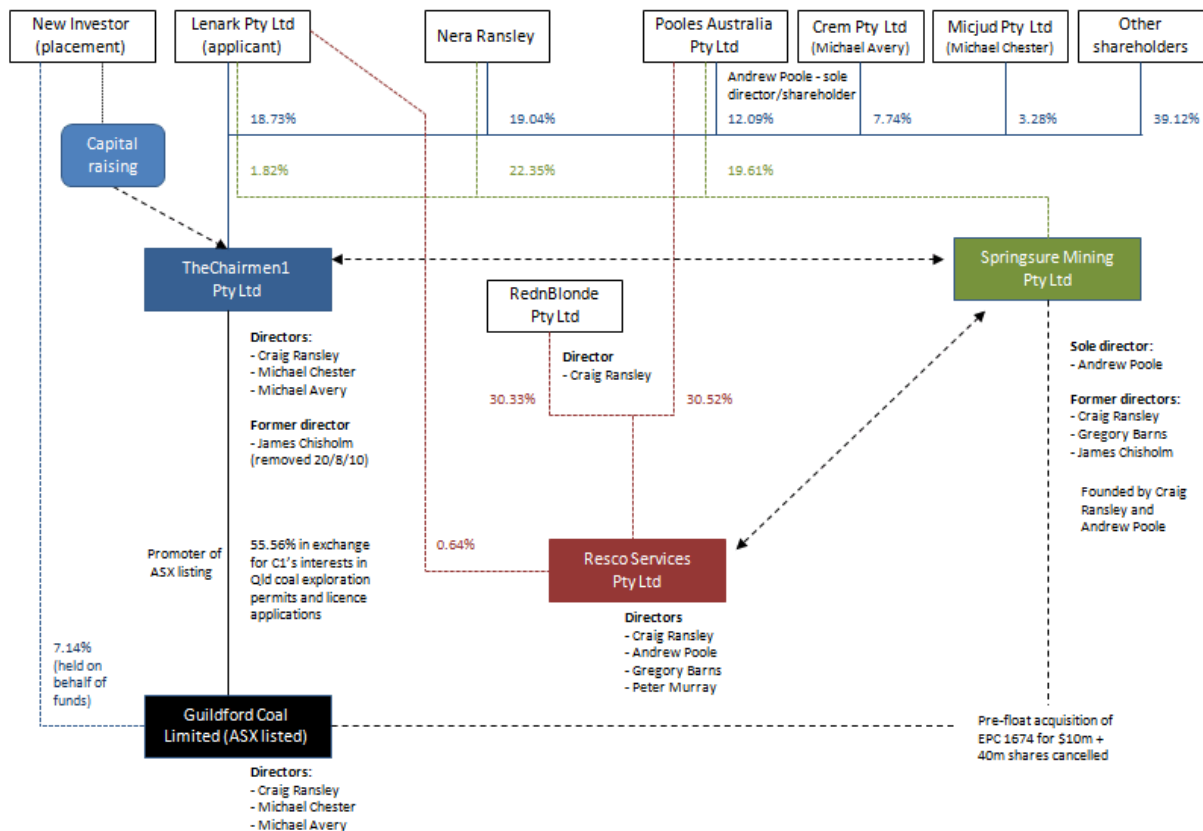
FACTS

3. C1 is a proprietary company with 27,373,606 shares on issue and 12 shareholders at 17 September 2010 (the date of the application). It promoted the initial public offering and ASX listing of Guildford (ASX code: GUF), which listed on 22 July 2010. Guildford acquired from C1 its interests in certain Queensland coal exploration permits and applications in exchange for shares in Guildford. C1 holds 55.6% of the issued shares in Guildford.
4. The directors of C1 and Guildford are Mr Craig Ransley, Mr Michael Chester and Mr Michael Avery.
5. Lenark (the applicant) holds 18.73% of the issued shares in C1 and is the second largest shareholder. The largest shareholder in C1 is Ms Nera Ransley with a 19.04% shareholding.

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6. Various relationships between the parties at 17 September 2010 (the date of the application) are described in the diagram below.



7. On 6 September 2010, C1 wrote to its shareholders informing them of a proposed acquisition by C1. The counterparty to the acquisition was an entity associated with Mr Andrew Poole, a 12% shareholder in C1 and sole director of Springsure Mining Pty Ltd.
8. The offer letter stated that the funds for the acquisition would be procured by a rights issue (\$6m) and placement to an institutional investor (\$6m) with the balance to be paid in cash from C1. The issue price for the rights issue and placement was \$1.46 per share, "which price is based upon the day one listing value of C1 owned [Guildford] shares".¹
9. The rights issue was initially due to close at 5pm on 20 September 2010, but was later extended by C1 to 5pm on 24 September 2010.
10. The placement completed on 21 September 2010. The placement shares that were going to be issued to the institutional investor were taken up by 3 investors, being the principals of the institutional investor. Each principal received an equal allocation of 1,369,863 shares (being a total of 4,109,589 shares).

¹ Guildford shares closed at 18c on the first day and closed at 39.5c on 24 September 2010

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APPLICATION

Declaration sought

11. By application dated 17 September 2010, Lenark sought a declaration of unacceptable circumstances. It submitted that almost no information about the proposed acquisition and related capital raising in C1 had been provided. Consequently, *“shareholders in C1 and [Guildford] do not know the identity of the person or persons who propose to acquire substantial interests in C1 and/or [Guildford], and do not have enough information to assess the merits of that proposal or a reasonable time to consider that proposal”*.
12. It also submitted that, if there was an association between *“the Ransley and Poole parties”* in relation to C1, this would give rise to a deemed relevant interest in Guildford that had not been disclosed to the market in accordance with Chapter 6C. We note that the initial substantial holder notice lodged by C1 on 3 August 2010 in respect of its shareholding in Guildford did not identify any associates of C1.
13. Lastly it submitted that, if two or more C1 shareholders were associates and their voting power exceeded 20% of C1, they would acquire or may have acquired a relevant interest in C1's shares in Guildford and hence the placement and rights issue are part of a transaction under which a person may acquire a substantial interest in Guildford.

Interim orders sought

14. Lenark sought interim orders preventing, pending determination of its application:
 - (a) C1 from issuing any shares pursuant to the placement or rights issue and
 - (b) the execution or performance of any agreements or arrangements relating to the placement, the rights issue and a related transaction.
15. In a preliminary submission C1 offered to extend the closing date of the rights issue to 22 September 2010. The Acting President considered that he did not need to make interim orders and could leave the issue to a sitting Panel once appointed.
16. We considered that, because the placement and rights issue were to take place in a private company, we did not need to make interim orders unless it became apparent that a step would be taken that could not be reversed if necessary.
17. On 22 September 2010, following completion of the placement, Lenark sought further interim orders including that:
 - (a) C1 immediately notify each allottee that the shares issued to them may be cancelled if Lenark prevails in its application and
 - (b) all proceeds of the issue of shares be transferred into a separate bank account and maintained intact pending further order of the Panel.

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18. Before deciding whether to conduct proceedings, we requested further information from C1 about the 3 investors under the placement and their relationships with each other and other parties referred to in the application. We made interim orders (annexure A) to maintain the status quo until we could consider the further material and decide whether to conduct proceedings.

Final orders sought

19. Lenark sought final orders including:
- (a) the withdrawal of all, and cancellation of any contracts arising from, existing offers under the placement or rights issue
 - (b) the cancellation of any shares issued under the placement or rights issue
 - (c) that the rights issue may proceed only if C1 issues a new disclosure document that discloses material information as to the terms and effect of the rights issue and the placement (including the identity of all persons who will or may acquire a substantial interests in C1 and/or Guildford) and allowing C1 shareholders a period of 2 weeks to consider it and
 - (d) that the alleged associated parties lodge substantial holder notices disclosing their association and any deemed relevant interest in Guildford shares held by C1.

DISCUSSION

Jurisdiction

20. In preliminary submissions, C1 submitted that the issue raised by Lenark was essentially a private dispute and not an appropriate matter to be considered by the Panel. This submission was supported by Guildford.
21. Although C1 is a proprietary company, it holds a substantial interest in Guildford, an ASX listed entity, and changes in its ownership could have a control effect on Guildford.
22. We consider that we have jurisdiction to hear the application. Accordingly, we are prepared to consider whether we should conduct proceedings.

Acquisition of substantial interests and association

23. Lenark submitted that:
- (a) both the placement and rights issue were part of a transaction under which a person or persons would or were likely to acquire substantial interests in C1
 - (b) if 2 or more C1 shareholders were associates and the voting power of those persons in C1 exceeded 20%, those persons would acquire a relevant interest in the shares that C1 held in Guildford under section 608(3)(a)²

² All references are to the *Corporations Act 2001* (Cth)

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- (c) consequently, both the placement and rights issues were part of a transaction under which a person or persons may acquire substantial interests in Guildford and
 - (d) the acquisition of any such substantial interest in Guildford would not take place in an efficient, competitive and informed market because no disclosure of that acquisition had been made in the offer letter to C1 shareholders or elsewhere.
24. Lenark further submitted that “*the Ransley and Poole parties*” were acting in concert in relation to the affairs of C1 by promoting the capital raising and a related transaction. Alternatively, it submitted that those persons had a relevant agreement for the purpose of influencing the conduct of C1’s affairs.
25. In a preliminary submission, C1 denied the allegations of association. It submitted that the only information provided by Lenark to support its case “*amounts to no more than Ransley and Poole have investments in and/or directorships of a number of common companies. This cannot sensibly justify a conclusion that those persons are associates within the meaning of the Corporations Act.*”
26. C1 further submitted that in any event, “*neither the rights issue or (sic) the placement have the natural consequence that the alleged association’s voting power in Chairmen 1 would increase. In fact, the consequence is that the alleged association’s voting power would decrease.*” We think this fact is important. If there is an existing association between the alleged associated parties, its impact would be reduced by the placement (assuming there is no association with the investors under the placement).
27. C1 further submitted that the rights issue and placement did not result in the acquisition by anyone of control over C1 or Guildford or a substantial interest in C1 or Guildford.
28. We are not satisfied on the evidence that there has been a change in C1 such as to affect the holding in Guildford in a way that might give rise to unacceptable circumstances. While the intended institutional investor (whose principals took up the placement) itself has a 7.4% interest in Guildford, it holds those shares on behalf of funds in which the principals have no ownership interest. While we do not know who has the ownership interest in the funds, we do not regard this as sufficient to justify a decision to conduct proceedings.³
29. Nor do we think there is a significant change that results in the acquisition of a substantial interest in Guildford not taking place in an efficient, competitive and informed market.
30. In *Mount Gibson Iron Limited*,⁴ the Panel said:

³ Two of the investors under the placement have personal holdings in Guildford of up to approximately 1.8%. This does not affect our conclusion

⁴ [2008] ATP 4 at [15]

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"The Panel's starting point was that it was for Mount Gibson - the applicant - to demonstrate a sufficient body of evidence of association and to convince the Panel as to that association, albeit with proper inferences being drawn."

31. Before deciding whether to conduct proceedings, we asked C1 for further information about the 3 new investors under the placement. C1 submitted that none of these persons had any direct or indirect shareholding in C1, Resco Services Pty Ltd or Springsure. Having obtained that further information, we consider there is insufficient evidence to suggest the existence of an association to warrant conducting proceedings.
32. Lenark submitted that the Appendices 3X filed by Guildford stated that each of the C1 directors had a relevant interest in the 55.56% of Guildford and therefore, given s609(9), there had to be some arrangement between them. We do not think this is enough to meet the test for conducting proceedings to investigate association.

Substantial holder notice disclosure

33. Given that we decide not to pursue the allegations of association, we do not pursue this aspect of the application.

DECISION

Declaration

34. 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 decide not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).
35. If Lenark identifies further or better evidence it can make a further application. It is also free to seek other remedies if it wishes.

Orders

36. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs. The determination of these proceedings brings to an end the interim orders dated 23 September 2010.

OTHER MATTERS

37. A number of additional preliminary submissions, in the nature of responses to preliminary submissions and responses to the responses, were lodged by the parties outside those contemplated by the procedural rules. We did not accept them.

Mark Paganin

President of the sitting Panel

Decision dated 27 September 2010

Reasons published 28 September 2010



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Annexure A

**CORPORATIONS ACT
SECTION 657E
INTERIM ORDERS**

THECHAIRMEN1 PTY LTD AND GUILDFORD COAL LIMITED

Lenark Pty Limited made an application to the Panel dated 17 September 2010 in relation to the affairs of TheChairmen1 Pty Ltd (C1) and Guildford Coal Limited.

On 6 September 2010, C1 proposed a capital raising including a rights issue and a placement.

The Panel ORDERS:

1. C1 continue to hold any proceeds of the capital raising in the bank account in which the proceeds are currently deposited.
2. C1 not issue or allot any further shares in connection with the capital raising.
3. C1 not complete any further aspect of the capital raising, or enter into any further agreements or arrangements in relation to the capital raising.
4. These interim orders have effect until the earliest of:
 - (i) further order of the Panel
 - (ii) the determination of the proceedings and
 - (iii) 2 months from the date of these interim orders.

**Alan Shaw
Counsel
with authority of Mark Paganin
President of the sitting Panel
Dated 23 September 2010**