



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Gladstone Pacific Nickel Limited  
[2010] ATP 12**

**Catchwords:**

*decline to conduct proceedings, target's statement, supplementary target's statement, disclosure, efficient, competitive and informed market, failure to disclose, misleading statements, information deficiencies, independent director, director's recommendation, potential litigation, directors' duties, prima facie case*

*Corporations Act 2001 (Cth), sections 602(a), 638(1), 657A and 670A*

*ASX Corporate Governance Principles and Recommendations*

*Tully Sugar Limited 01R [2010] ATP 1, Tully Sugar Limited [2009] ATP 26, Programmed Maintenance Services Limited 02 [2008] ATP 9*

**INTRODUCTION**

1. The Panel, Kathleen Farrell (sitting President), Francesca Lee and Anthony Sweetman, declined to conduct proceedings on an application by RAB Special Situations (Master) Fund Limited in relation to the affairs of Gladstone Pacific Nickel Limited. The application concerned alleged information deficiencies in the target's statement (as amended) in relation to the off-market takeover offer for Gladstone Pacific by QNI Resources Pty Ltd. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.
2. In these reasons, the following definitions apply.

Gladstone Pacific	Gladstone Pacific Nickel Limited
QNI	QNI Resources Pty Ltd
RAB	RAB Special Situations (Master) Fund Limited

**FACTS**

3. Gladstone Pacific is an Australian company listed on the AIM market of the London Stock Exchange. It has more than 50 members.
4. On 12 August 2010, Gladstone Pacific announced that it had received an unconditional cash offer from QNI for £0.14 per ordinary share.
5. QNI is ultimately wholly owned by Mr Clive Palmer, a director of Gladstone Pacific. Immediately before the bid, QNI owned or controlled approximately 50.04% of the ordinary shares of Gladstone Pacific.
6. On 6 September 2010, QNI issued a bidder's statement for the offer.
7. On 5 October 2010, Gladstone Pacific issued a target's statement for the offer, in which Mr Martino (a director of Gladstone Pacific) stated his recommendation as follows:

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*As the only independent director, I recommend you **REJECT** the Offer if you have a medium to long term investment horizon and you are prepared to accept the significant and material ongoing risk of an investment in [Gladstone Pacific].*

*However, if you do not wish to accept those significant and material ongoing risks of an investment in [Gladstone Pacific] or have a shorter term investment horizon, you may wish to **CONSIDER ACCEPTING QNI's Offer**. (original emphasis)*

8. The target's statement included an independent expert's report which concluded that the offer was not fair and not reasonable. The target's statement also included information regarding a potential claim against Mr Palmer asserted by RAB relating to Gladstone Pacific. Reference to the potential claim was also included at page 42 of the independent expert's report.
9. Mr Martino's director profile in the target's statement stated (at page 17):

*Domenic Martino is the Chairman of Australasian Resources Limited, an ASX listed Australian resource company, and Resourcehouse Limited (both companies controlled by Mr Palmer).*
10. On 12 October, Gladstone Pacific issued a supplementary target's statement which stated the following in relation to the potential claim:

*The Board has obtained advice on the matter disclosed in section 7.1 of the Original Target's Statement. The Board has concluded that there is no evidence of any matter which gives rise to a claim and therefore it will not be pursuing that matter.*
11. The supplementary target's statement deleted reference to the potential claim in the target's statement. Gladstone Pacific also released an amended target's statement incorporating the changes (and deleting reference to the potential claim).
12. The offer closed at 5.00pm (Sydney time) on 25 October 2010. At the close of the offer, QNI had received acceptances from Gladstone Pacific shareholders holding 5.35% of the ordinary shares in Gladstone Pacific.

## APPLICATION

### Declaration sought

13. By application dated 25 October 2010, RAB sought a declaration of unacceptable circumstances. RAB submitted that Gladstone Pacific's amended target's statement was misleading:
  - (a) in stating that Mr Domenic Martino was the only independent director of Gladstone Pacific when he was not, objectively, independent of QNI or its ultimate owner (Mr Palmer) and, in this asserted capacity, gave a recommendation about QNI Resources' offer which was more favourable than the recommendation given by the independent expert and
  - (b) as it did not contain any information about the prima facie case Gladstone Pacific has against one of its directors (Mr Palmer) and companies related to him.

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14. RAB submitted that the defects in the amended target's statement:

- (a) were contrary to s602(a) and
- (b) contravened s638(1) and s670A(1).

#### Interim orders sought

15. RAB sought interim orders to the effect that:

- (a) the offer be extended until further order of the Panel. The President considered that, in view of the timing of the application,<sup>1</sup> there was no opportunity to consider the impact of this order. Moreover, the risk that unacceptable circumstances would occur, continue or worsen in the absence of such an order was outweighed by the potential adverse effects of the order on the person to whom it would be directed and the market and
- (b) QNI be prohibited from processing any acceptances that had been received from shareholders of Gladstone Pacific, and from issuing consideration to those shareholders until further order. The President of the Panel made interim orders to this effect (annexure A) on 25 October 2010, before the bid closed, to maintain the status quo pending determination of the application by the sitting Panel. The President considered that these orders could be made without the adverse effects of the orders outweighing the risk that unacceptable circumstances would occur, continue or worsen.

#### Final orders sought

16. RAB sought final orders to the effect that:

- (a) Gladstone Pacific issue a second supplementary target's statement to address the defects identified in the application and
- (b) QNI offer to any shareholders of Gladstone Pacific who had accepted the offer the right to withdraw their acceptance or to rescind any concluded agreement.

## DISCUSSION

### Independence and recommendation of Mr Martino

17. RAB submitted that Mr Martino's assertion in the amended target's statement that he was "*the only independent director*" of Gladstone Pacific was materially misleading because he was a "*long time associate of Mr Palmer*" and had frequently been appointed to boards of companies owned by Mr Palmer. Some of these past

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<sup>1</sup> The matters that RAB submitted had given rise to unacceptable circumstances arose on 5 October 2010 (in relation to the independence of Mr Martino) and 12 October 2010 (in relation to the disclosure of the potential claim against Mr Palmer). However, RAB did not make the application until the day the offer was scheduled to close. We do not consider that an adequate explanation for the delay in making the application was provided by RAB.

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relationships were not disclosed in the target's statement or the supplementary target's statement. Further, it submitted that Mr Martino's recommendation was more favourable to QNI than the conclusion of the independent expert. It also submitted that his recommendation was "*given the imprimatur of his asserted independence*", which we take to mean that target shareholders would give his recommendation more weight than it deserved.

18. Gladstone Pacific submitted that it was not misleading to describe Mr Martino as independent because he does not occupy any position as an officer of a company that conflicts with his duties to Gladstone Pacific and because in his roles he had not received any remuneration beyond what was reasonable for a person occupying his position. It pointed to the *ASX Corporate Governance Principles and Recommendations* in support of Mr Martino's independence (although it noted that they do not apply to Gladstone Pacific) and submitted that, consistent with best practice recommendations, the target's statement disclosed his directorships in two companies controlled by Mr Palmer.
19. It further submitted that, in any event, Mr Martino's recommendation in the target's statement was not misleading because it was a statement of opinion (which could not be misleading or deceptive if reasonably held) and, in forming the recommendation, Mr Martino considered that the risk profile of shareholders was relevant.
20. QNI submitted that none of the matters raised by the applicant evidenced a lack of independence. It further submitted that there was no reasonable basis to suggest that Mr Martino's recommendation could not reasonably be made by an independent director of Gladstone Pacific.
21. Shareholders place a great deal of emphasis on the recommendation of directors during a takeover bid. This is even more so for the recommendation of an independent director. Directors should therefore consider very carefully their recommendation and whether to describe themselves as "independent",<sup>2</sup> particularly where they have numerous business relationships with the bidder or another interested party (even where those other relationships might each be considered independent if considered in isolation).
22. We do not consider that Mr Martino's recommendation was misleading or unreasonable in the circumstances. The weight of his recommendation was to "reject" but drew appropriate attention to the fact that Gladstone Pacific is already majority owned by QNI and took into account this and other risks associated with remaining a shareholder of the company. The target's statement included a copy of the independent expert's report and made no attempt to minimise the not fair and not reasonable recommendation of the expert.

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<sup>2</sup> See, for example, *Tully Sugar Limited* [2009] ATP 26 at [52], *Tully Sugar Limited O1R* [2010] ATP 1 and *Programmed Maintenance Services Limited 02* [2008] ATP 9 at [17]

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23. We consider that Mr Martino's past business relationships with companies connected with Mr Palmer should also have been disclosed in the target's statement to put shareholders in a better position to assess his independence.
24. In all of the facts of this case, we do not consider that the description of the director as "independent" is sufficient to declare unacceptable circumstances, despite our reservations as to whether it is accurate.

#### Disclosure of potential claim

25. RAB submitted that the target's statement (as amended) was misleading because it failed to disclose "*a prima facie claim by [Gladstone Pacific] that Mr Palmer had breached his duties as a director and fiduciary*" of Gladstone Pacific. It submitted that the value to Gladstone Pacific of successfully bringing a claim against Mr Palmer was "*substantial*" and was information shareholders would reasonably require in order to make an informed decision about the QNI offer.
26. Gladstone Pacific submitted that the claim was uncertain, that it was not appropriate "*for details of unproven allegations...to be published in a supplementary target's statement*" and that RAB had "*taken no steps to otherwise pursue its allegations*". It submitted that, having received legal advice on the potential claim after issuing the original target's statement, the board of Gladstone Pacific (absent Mr Palmer) concluded that there was "*no evidence of any matter which gives rise to a claim*". Further, it submitted that, in any event, shareholders had the information because reference to the claim was included in the original target's statement and the independent expert referred to it in its report.
27. QNI submitted that adequate disclosure had been made to Gladstone Pacific shareholders and noted that the allegations against Mr Palmer were refuted.
28. We consider that there is no reasonable prospect that we would find unacceptable circumstances because the target's statement (as amended) did not disclose the potential claim against Mr Palmer. The supplementary target's statement referred to the relevant parts of the original target's statement<sup>3</sup> that outlined the potential claim and outlined the reason for the deletion (see paragraph 10), and in doing so drew shareholders' attention to it. Further, the independent expert referred to the potential claim in its report.

#### DECISION

29. 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).

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<sup>3</sup> The original target's statement was mailed to all shareholders and depository interest holders on 5 and 6 October 2010

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### **Orders**

30. Given that we make no declaration of unacceptable circumstances, we make no final orders, including as to costs. The determination of the proceedings brings to an end the interim orders dated 25 October 2010.

**Kathleen Farrell  
President of the sitting Panel  
Decision dated 3 November 2010  
Reasons published 3 November 2010**



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## **Annexure A**

### **CORPORATIONS ACT SECTION 657E INTERIM ORDERS**

#### **GLADSTONE PACIFIC NICKEL LIMITED**

RAB Special Situations (Master) Fund Limited made an application to the Panel dated 25 October 2010 in relation to the affairs of Gladstone Pacific Nickel Limited (**GPNL**).

GPNL is the subject of a takeover offer from QNI Resources Pty Ltd (**QNI**) which is due to close at 5.00pm (Sydney time) on 25 October 2010 (**Offer**).

The President ORDERS:

1. QNI be prohibited from processing any acceptances that have been received from shareholders of GPNL in response to the Offer the subject of QNI's Bidder's Statement and from issuing consideration to those GPNL shareholders until further order of the Panel.
2. 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 Kathleen Farrell**  
**President**  
**Dated 25 October 2010**