



Australian Government

Takeovers Panel

**Reasons for Decision
Leighton Holdings Limited 01, 02 and 03
[2010] ATP 13**

Catchwords:

Review of ASIC decision - announcement of bid - downstream acquisition - deemed relevant interest - effect on control - equal opportunity - interim order - relevant interest - section 602 principles - substantial holding - substantial holding notice - decline to conduct proceedings

Corporations Act 2001 (Cth), sections 602, 606, 608(3), 611 item 14, 655A, 656A, 657A, 657C, 671B, 673

ASIC Regulation 16

ASIC Regulatory Guide 71

ASIC Class Order CO 02/259

Lion-Asia Resources Pte Ltd [2009] ATP 25, Multiplex Prime Property Fund 03R [2009] ATP 23, Multiplex Prime Property Fund 01 and 02 [2009] ATP 18, Golden West Resources Limited 03 and 04 [2008] ATP 1, Australian Pipeline Trust 01R [2006] ATP 29

INTRODUCTION

1. The Panel, Paula Dwyer, Simon Mordant (sitting President), and Ian Ramsay declined to conduct proceedings on applications by Leighton Holdings Limited and HOCHTIEF Aktiengesellschaft in relation to the affairs of Leighton. The applications concerned whether governance arrangements between Leighton and Hochtief, or a downstream bid for Leighton, should be ordered following the announcement of the proposed acquisition of additional shares in Hochtief by Actividades de Construcción y Servicios SA. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable and no reasonable prospect of it reversing an ASIC decision not to modify the law.
2. In these reasons, the following definitions apply.

ACS	Actividades de Construcción y Servicios SA
Hochtief	HOCHTIEF Aktiengesellschaft
Leighton	Leighton Holdings Limited
proposed transaction	the offer and on market acquisitions proposed by ACS on 16 September 2010 which would take ACS's shareholding in Hochtief to just above 50%

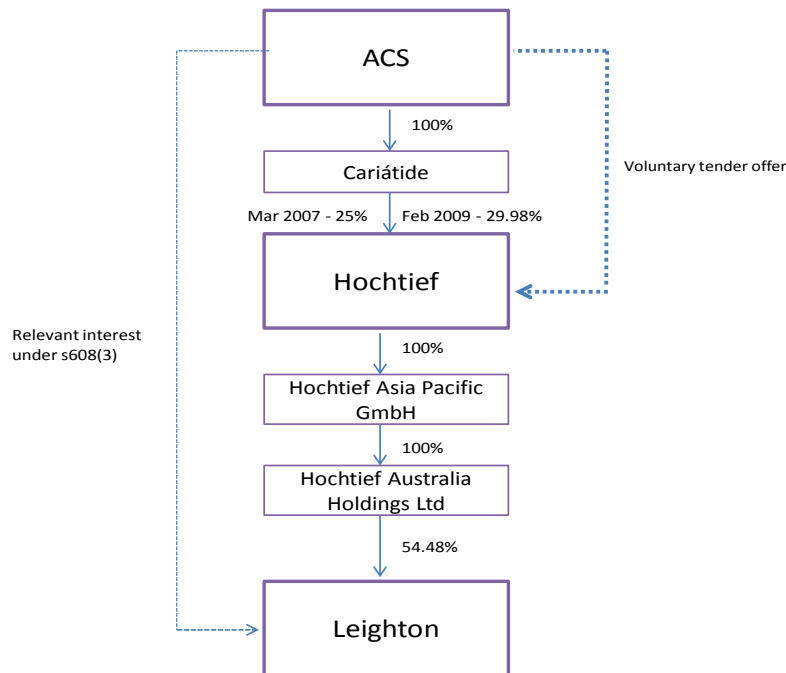
FACTS

3. Leighton is an ASX listed company (ASX code: LEI). It has a market capitalisation of approximately \$10 billion and approximately 67,000 shareholders.
4. Hochtief is a German company listed on the Frankfurt Stock Exchange. In 1983, it held a 50% stake in Thiess Pty Ltd which was acquired by Leighton in exchange for a 36% interest in Leighton. Hochtief now holds 54.48% of Leighton through subsidiaries, and this holding represents a substantial part of Hochtief's assets.

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- ACS is a Spanish company listed on the Madrid Stock Exchange. On 20 March 2007,¹ ACS became a substantial holder in Leighton as a result of one of its wholly owned subsidiaries acquiring 25% of Hochtief. This subsidiary currently holds 29.98% of Hochtief.
- Various relationships between the parties are described in the following diagram.



- On 16 September 2010, ACS announced an intention to acquire additional shares in Hochtief by a voluntary public tender offer and on market acquisitions. In its announcement, ACS said:

ACS intends to increase its shareholding to just above 50 percent over time allowing for full financial consolidation. This is not necessarily expected via this tender offer. A domination agreement is not intended. HOCHTIEF will remain a Frankfurt-listed company with a substantial free float, headquartered in Essen.

- ACS proposed to offer 8 ACS shares for every 5 Hochtief shares. The exchange ratio would be “in line with the estimated volume-weighted average share price of HOCHTIEF and the average share price of ACS during the last three months prior to the announcement of the public tender offer and thus the legally required minimum offer price.”
- ACS indicated² that it intended to reach 50% of Hochtief, either under the voluntary tender offer or by acquiring shares on market. It further indicated that it would be able to acquire shares on market without any price or time restriction

¹ Substantial holding notice lodged 17 September 2010

² ACS investor presentation 17 September 2010

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under German law if it received sufficient acceptances (0.02%) through the offer to exceed the German takeover threshold of 30%.

10. Section 608(3)³ provides (relevantly):

A person has the relevant interests in any securities that any of the following has:

(a) *a body corporate ... in which the person's voting power is above 20%;*

(b) *a body corporate ... that the person controls.*

...

11. Item 14 of section 611 provides an exception for downstream acquisitions of relevant interests in the following terms:

An acquisition that results from another acquisition of relevant interests in voting shares in a body corporate included in the official list of:

(a) *a prescribed financial market; or*

(b) *a foreign body conducting a financial market that is a body approved in writing by ASIC for the purposes of this item.*

12. Frankfurt Stock Exchange is approved by ASIC.⁴

13. Hochtief and Leighton have certain protocols in place. One lot of protocols is for information sharing and interaction between their respective management personnel. They were agreed by letter dated 3 December 2004. A second lot of protocols gave Leighton responsibility for financial management of the Leighton group. They were agreed in a 'Group Financial Framework Guideline' in December 2004.

14. There may be a third lot of arrangements related to shareholding and decision-making. These arrangements were contained in a memorandum of understanding which was in fact the first in time of the arrangements. The legal force of the MOU is disputed (see paragraph 44 and following). The MOU was prepared for commencement "*if and when the Leighton shareholders approve the Share Sale Agreement at the Annual General Meeting on 2nd November 2000 and thereafter have a four (4) year term and then be extended on a year-to-year basis until terminated.*" The arrangements under the MOU included that:

(a) Hochtief had the right to appoint up to 4 directors (currently Leighton has 12 directors)

(b) the other directors were either independent non-executive directors or executive directors

(c) Leighton's chairman was one of the independent non-executive directors and

(d) the parties would "*maintain Leighton as an independent leading Australian industrial company listed on the Australian Stock Exchange and the leading company in its sector*".

³ References are to *Corporations Act 2001* (Cth) unless otherwise indicated

⁴ Deutsche Börse AG, which operates the Frankfurt Stock Exchange, is included in ASIC Class Order CO 02/259

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15. The MOU was not released publicly.
16. Leighton's annual reports make only general reference to the arrangements it had in place. For example, the Concise Annual Report 2010 says:

... The directors who do not meet the Board's test for independence are:

 - ...
 - *Dr PM Noé, Dr HH Lütkestratkötter, Mr DP Robinson and Dr B Lohr, all of whom are representatives of the Company's majority shareholder, HOCHTIEF.*

...

Furthermore, the Board considers HOCHTIEF's Board representation to be reasonable and appropriate given that HOCHTIEF presently owns a majority interest of 54.48% of the Company."
17. On 6 October 2010, Hochtief applied to ASIC under section 655A(1)(b) for relief, which would have had the effect of applying chapter 6 to the proposed transaction. It sought modifications to insert:
 - (a) a new item 14A in s611 to require a downstream bid for Leighton and
 - (b) a new s610(3A) so that acquiring control of Hochtief would result in an increase in the person's voting power, assessed from the point immediately before the person was taken to have a relevant interest by virtue of having more than 20% (ie, before March 2007).
18. On 20 October 2010, ASIC refused the relief.
19. Also on 20 October 2010, ACS issued a press release stating that it "*has no intention of making any changes to the current arrangements between Leighton and HOCHTIEF*".

APPLICATIONS

First application (Leighton 01): s657A

20. By application dated 25 October 2010, Leighton sought a declaration of unacceptable circumstances in relation to its affairs. It submitted that the voluntary tender offer was an artifice designed to authorise ACS under German law to purchase an additional 'controlling' stake of Hochtief shares on market for cash. Further, it submitted that ACS failed to commit to the protection of Leighton's minority shareholders.
21. Leighton submitted that the effect of the circumstances was that:
 - (a) it was likely that the acquisition of control of Leighton would take place in a market that was not efficient, competitive and informed, contrary to s602(a) and
 - (b) the circumstances would prevent, or would be likely to prevent, all Leighton shareholders having a reasonable and equal opportunity to participate in any benefits accruing to the holders of Hochtief shares who sell to ACS following the offer, contrary to s602(c).

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Interim orders sought

22. Leighton sought interim orders to the effect that:
- (a) ACS disclose to the Panel and the market details of any derivative interests which it or an associate has over or in relation to shares in Hochtief
 - (b) ACS disclose to the Panel and the parties all board papers which detail its objectives in making the offer and its strategies for obtaining control of Leighton and
 - (c) pending determination of the application, if ACS obtains control of Hochtief, it be restrained from causing or allowing Hochtief to end Leighton's governance arrangements without the consent of Leighton's independent directors.

Final orders sought

23. Leighton sought final orders to the effect that:
- (a) ACS commit to maintaining Leighton's independence from Hochtief and ACS. It sought to achieve this in 3 ways:
 - (i) *'binding governance undertakings'* comparable to the arrangements operating with Hochtief
 - (ii) failing undertakings, limiting ACS's voting power in Leighton to 20%, increasing over time consistently with item 9 of s611 ('creep' provision)
 - (iii) if (i) or (ii) are not complied with, a takeover bid for Leighton (see (b)) and
 - (b) alternatively, an unconditional cash takeover bid to Leighton's minority shareholders at a fair value to be determined by an independent expert.

Second application (Leighton 02): s657A

24. By application dated 26 October 2010, Hochtief sought a declaration of unacceptable circumstances in relation to the affairs of Leighton.
25. It submitted that the proposed transaction, intended to increase ACS's holding in Hochtief to 50.1%, was contrary to the purposes of chapter 6 for 3 reasons, namely that Leighton shareholders would not:
- (a) have an opportunity to approve the proposal
 - (b) be given an equal opportunity required by s602(c)⁵ and
 - (c) receive information required by s602(a)⁶ or 602(b).⁷

⁵ As far as practicable, holders of the relevant class of voting shares have a reasonable and equal opportunity to participate in any benefits accruing to the holders through any proposal under which a person would acquire a substantial interest

⁶ The acquisition of control over voting shares takes place in an efficient, competitive and informed market

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26. It also submitted that reliance on item 14 was inconsistent with ASIC's policy because the interests of international comity and certainty in international capital markets did not justify departure from s602 here. This was because a follow-on bid would be required under German law if Leighton was listed in Frankfurt.
27. Hochtief further submitted that ACS's failure to lodge a substantial holding notice in 2007 provided a basis for a declaration.

Final orders sought

28. Hochtief sought final orders to the effect that ACS make a follow-on takeover bid for all the shares in Leighton at a cash price not less than the fair value determined by an independent expert and subject only to limited conditions.

Third application (Leighton 03): s656A

29. By application dated 26 October 2010, Hochtief sought a review of ASIC's decision not to modify chapter 6. The effect of the relief would be to require ACS to make a follow-on cash bid for Leighton.
30. It also sought a review of ASIC's decision to approve certain foreign bodies conducting financial markets (including Deutsche Börse AG) in class order CO 02/259 without a proviso. The proviso would be that item 14(b) would only apply if the law or applicable market or listing rules in the jurisdiction in which the foreign body conducted its main board would not require that a bid be made for a downstream company, had the downstream company been listed on the main board of that foreign body.

Final orders sought

31. Hochtief sought final orders to the effect that ASIC's decision be set aside and relief be granted by way of:
 - (a) a new item 14A in s611 or inclusion of the proviso in CO 02/259 and
 - (b) a new s610(3A).

DISCUSSION

Related matters heard together

32. We direct that the 3 applications, being related matters in our view, be considered together in this Panel proceeding.⁸

⁷ The holders of shares, and the directors, are given (among other things) enough information to enable them to assess the merits of the proposal

⁸ ASIC Regulation 16(1)(a). See also *Multiplex Prime Property Fund 01 and 02* [2009] ATP 18, *Golden West Resources Limited 03 and 04* [2008] ATP 1

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Preliminary submissions

33. ASIC made a preliminary submission that the Panel did not have jurisdiction to conduct review proceedings in relation to the decision in CO 02/259. See paragraph 73.
34. ACS made a similar preliminary submission.
35. ACS also made a preliminary submission that the Panel should not conduct proceedings because:
 - (a) the applications for declarations of unacceptable circumstances had not been made within 2 months after the circumstances occurred.⁹ ACS submitted that it has had a deemed relevant interest in Leighton since 2007, which acquisition came within item 14. It also submitted that, since then, ACS has not controlled or sought to control Hochtief or Leighton. And ACS had announced it had no intention of changing the arrangement between Hochtief and Leighton and
 - (b) Hochtief does not have standing to make its applications. ACS submitted that there is no evidence that Hochtief's interests are affected by ASIC's decision - which "*merely maintains the status quo*" - or are affected by the circumstances in the Leighton 02 application - in which Hochtief's holding in Leighton will remain the same and is not affected.
36. Hochtief made a preliminary submission that the Panel "*need not conduct proceedings*" on Leighton's application in so far as it concerned proposed governance undertakings or voting limits and that a cash downstream bid at fair value is the only appropriate order the Panel should consider.

ASIC's statement of reasons

37. In accordance with Procedural Rule 3.2.3, ASIC provided reasons for its decision to refuse relief.
38. ASIC noted that, as ACS has the same relevant interest in Leighton as Hochtief under s608(3)(a), any acquisition of Hochtief shares under the tender offer or otherwise will not change its relevant interest in Leighton.
39. ASIC decided not to grant relief for two reasons:
 - (a) it will not grant relief to reverse the usual and intended effect of the Act. The intention of the downstream exception was to give a clear exemption where the upstream acquisition was in an appropriately listed company. It would not meet that intention to create an uncertain exemption, for example by reference to the object of a particular acquisition, which Hochtief's application sought to do. Further, ACS had already acted in reliance on the existing provisions and

⁹ Section 657C(3)(a)

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- (b) it considers the Panel the appropriate forum to consider the issues raised by Hochtief, which essentially amount to an argument that unacceptable circumstances would arise if ACS gained control of Hochtief. ASIC noted that it had previously spelt out its policy¹⁰ that an acquirer risked a declaration of unacceptable circumstances if the shares in the downstream company comprised a substantial part of the assets of the upstream company, or control of the downstream company was a main purpose of the upstream acquisition.

Relevant interest in Leighton

- 40. The applicants acknowledge that the proposed transaction will not result in contravention of s606. There are two reasons:
 - (a) ACS acquired a relevant interest in Leighton's shares (being Hochtief's 54.48% interest) in 2007 when it acquired more than 20% of Hochtief under item 14 and
 - (b) the proposed further acquisition by ACS of shares in Hochtief will not contravene s606 because of s608(3)(a), which operates to give ACS a relevant interest in Hochtief's 54.48% of Leighton. Even if this were not the case, the proposed acquisitions would fall within the exemption in item 14.
- 41. Hochtief pointed to a contravention of s671B based on ACS's failure to lodge a substantial holding notice in 2007.

DECISION

- 42. The applications face a considerable initial difficulty. ACS acquired more than 20% of Hochtief in 2007. This was widely publicised. No action was then taken. The market and ACS would be entitled to expect that there would be no further issues with an increase in the holding based on the application of s608(3). The current acquisitions will not change ACS's relevant interest in Leighton.

First application (Leighton 01): s657A

- 43. Leighton seeks a declaration of unacceptable circumstances. It is key to Leighton's application that Leighton is currently controlled "*in a practical and substantive sense*" by an independent board and independent management, which is well known to the market, and this will change for the first time as a result of a change in the control of Hochtief.
- 44. Before deciding whether to conduct proceedings, we asked whether there were binding governance arrangements in existence. Leighton submitted that Hochtief was legally bound to preserve the independence of the Leighton board and management. This was a consequence of:
 - (a) an MOU prepared in 2000 and two agreements executed in 2004. The two agreements concern (among other things) information sharing and do not have any significant impact on the issue before us. The MOU concerns

¹⁰ IR 01/03

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(among other things) Hochtief's shareholding in Leighton and Leighton's board composition. It carried two initials but no signatures. It was intended to have a four-year term and then be extended on a year-to-year basis until terminated and

(b) a course of conduct by Hochtief and Leighton since 2000.

45. Both Hochtief and ACS dispute that the MOU is binding.
46. In our view, the status of the governance arrangements in the MOU is not clear. The two companies involved disagree about whether the MOU is binding and we are not prepared to conclude that it is. Statements in the governance section of Leighton's annual reports have been very general and do not refer to any agreements and no agreements have been publicly disclosed, so we think it is unlikely that minority shareholders have any understanding about the governance arrangements that may exist between Hochtief and Leighton beyond those very general statements.
47. Leighton's application primarily seeks a remedy of a binding governance arrangement, which in all the circumstances we think should be a matter of commercial negotiation between the parties rather than a Panel application. In saying this, we note:
 - (a) ACS's acquisition of shares in Hochtief appears to be legal under German law (as we are currently advised) and our law
 - (b) the governance of Hochtief is a matter for German law
 - (c) Leighton shareholders are, or should be, aware that the acquisition of control of Hochtief by any person could happen without a downstream bid or other remedy as a consequence of item 14
 - (d) Leighton shareholders are, or should be, aware that the acquisition of additional shares in Hochtief by ACS could happen without any change in ACS's relevant interest as a consequence of s608. We further note the preliminary submission of ACS that it is now too late to consider the consequences of the 2007 transaction which took ACS over 20% in Leighton¹¹ and
 - (e) ACS has made statements to the effect that it is not proposing to change the existing arrangements.
48. We consider that it is not possible to conclude that anything of substance is changing for Leighton shareholders, particularly with the statements made by ACS that nothing will change.
49. Alternatively, Leighton seeks that Hochtief commit to maintaining Leighton's independence by a voting limit (ie, ACS could only vote 20% of the total number of Leighton shares it has a relevant interest in, increasing over time in accordance with s611 item 9). We are not satisfied that there is a change of control taking place

¹¹ At the time, newspapers in Australia widely reported the transaction, but no substantial holding notice was filed until 17 September 2010. While this may be of interest to ASIC, we do not think it gives rise to unacceptable circumstances

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in such a way as to warrant a declaration and an order of that type. We note Hochtief's preliminary submission that such an order "*would almost certainly*" unfairly prejudice it given the duties of its directors under German law and that it had not itself contributed to any unacceptable circumstances.

50. Alternatively, Leighton seeks a follow-on bid. Similarly, we are not satisfied that there is a change of control taking place in such a way as to warrant a declaration and an order of that type.
51. Thus, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances and we decline to conduct proceedings on this application.

Second application (Leighton 02): s657A

52. Hochtief seeks a declaration of unacceptable circumstances and an order for a follow-on bid. It does so because:
 - (a) the proposed transaction, which is a two-step transaction, is "*contrary to the philosophy of the section 602 principles*". This is because it denies Leighton shareholders an opportunity to approve it, to share in any control premium, or to receive information relevant to control of their company
 - (b) ACS is acquiring control of Leighton and will have the ability to change its direction in future and
 - (c) ACS does not intend to make a downstream bid for Leighton.
53. Section 608 allows this transaction to take place. What ACS is doing appears to be legal in both Germany (as we are currently advised) and under our law. Furthermore, ACS has an existing relevant interest in 54.48% of Leighton.
54. Even if s608 didn't allow the transaction, item 14 allows it. Moreover, downstream acquisitions are an expected consequence of the exemption in item 14, hence changes of control can occur. As we note above in respect of the Leighton application, it is not possible to conclude that ACS's proposed acquisition changes anything of substance for Leighton shareholders.
55. While Hochtief's shares in Leighton may represent a substantial part of Hochtief's assets, there is no real evidence that this is an artifice in the sense that the purpose of the acquisition is the acquisition of control of Leighton. An article in "*Welt am Sonntag*" on 31 October 2010, reported (as translated) that

"Florentino Pérez (CEO of ACS):

All this is not about creating a large integrated construction group. Instead, each subsidiary is to operate under its own flag. Hochtief is to remain German, Leighton Australian and Turner and Flatiron American. The co-operation we envisage with Hochtief is similar to Hochtief's approach towards Leighton today. We are talking about entrepreneurial independence within a large global group, no less.

Welt am Sonntag:

Would you be willing to guarantee that to Hochtief in writing?

Florentino Pérez:

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We stand by what we have already said. We won't backpedal. And we can of course codify it in a written investor agreement."

56. AAP picked up the interview with this interpretation: "Spanish constructor ACS says it would be willing to guarantee in writing the independence of Leighton Holdings Ltd as part of a takeover of the contractor's German parent Hochtief AG."
57. We asked, as part of preliminary inquiries, what (if any) written guarantee in relation to Leighton's independence ACS would agree to give and disclose to the market (and in what form it proposed to give it). While the response was equivocal, ACS did affirm the public statements that it has made to the effect that ACS has no intention of making any changes to the current arrangements between Leighton and Hochtief.
58. Lastly, we think it is an important consideration that Hochtief seeks the remedy of a downstream bid. The likelihood of a suitable remedy is an important consideration in deciding whether to conduct proceedings.¹² We regard this remedy as unlikely to be granted here.
59. Thus, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances and we decline to conduct proceedings on this application.
60. We note also the preliminary submission by ACS questioning Hochtief's standing. ACS submitted that Hochtief's interests are not affected by an impact (if any) on the affairs of Leighton by reason of ACS increasing its shareholding. Hochtief is a fellow shareholder of minority shareholders in Leighton. However, it is the major shareholder, already holding over 50% of Leighton. Whilst we feel that ACS's argument may have merit, we do not need to explore further the question of standing because our decision is based on other grounds.

Third application (Leighton 03): s656A

61. Hochtief seeks a review of the following decisions by ASIC:
 - (a) the decision not to grant a modification under s655A to apply chapter 6 to the proposed transaction in accordance with ASIC's downstream exemption policy¹³ and
 - (b) the decision approving ASIC class order CO 02/259 (Downstream acquisitions: Foreign stock markets) without the proviso.
62. The Panel treats an application for review of an ASIC decision as a *de novo* consideration on the merits.¹⁴ We have considered the application on its merits.
63. ASIC regulation 20(a) requires the Panel, as soon as practicable after receiving an application, to decide whether to conduct proceedings. ASIC regulation 15 defines an application to include an application under s656A. Accordingly, we must

¹² *Multiplex Prime Property Fund 03R* [2009] ATP 23 at [21], Procedural Rule 6.1.1 note 2

¹³ Set out in *ASIC Regulatory Guide 71: Downstream Acquisitions and Information Release 01/03 - ASIC approves overseas exchanges: safe harbours for downstream acquisitions*

¹⁴ Procedural Rule 3.3.1, *Lion-Asia Resources Pte Ltd* [2009] ATP 25 at [21]

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consider whether to conduct proceedings on an application to review an ASIC decision.

ASIC decision to decline modification

64. The modification would have had the effect that ACS would need to make a cash takeover bid for Leighton if it were to acquire control of Hochtief. The application to ASIC sought to introduce a new item 14A into s611 and a new s610(3A). See annexure A.
65. Hochtief submitted, among other things, that:
- (a) the proposed transaction was contrary to the s602 principles¹⁵
 - (b) the application of item 14(b) to the proposed transaction was not justified by international comity. This was because a downstream bid would be required if Leighton was a German-listed company. International comity did not justify denying shareholders in Australian companies the protections that German law would afford to German-listed companies in the same circumstances
 - (c) ASIC's downstream policy in RG 71, which should be applied here, would require a downstream bid
 - (d) there was a "regulatory gap" due to the discrepancy between the takeover thresholds in Australia and Germany that created an unsatisfactory investor protection outcome. This was because ACS's deemed relevant interest in Leighton was acquired before the point at which it was required to make a mandatory offer in Germany, thereby allowing ACS to avoid scrutiny as to whether the proposed transaction was contrary to s602
 - (e) the relief sought did not reverse the usual and intended effect of the Act. Leighton's circumstances were highly unusual and granting relief which applied specifically in respect of Hochtief's shareholding would not result in item 14(b) operating in an uncertain manner
 - (f) the requested relief was necessary to provide certainty to the market in Australia and Germany and
 - (g) the relief sought was not an improper takeover defence.
66. ASIC's reasons for declining to grant a modification are summarised in paragraph 39. In our view, ASIC properly applied its policy when it made its decision and we would be rewriting the policy to reverse the decision.
67. We agree with ASIC that granting the modification would reverse the usual and intended effect of item 14 and was not appropriate. ACS acted within the law. The review (as the original application to ASIC did) seeks to make ACS's actions or proposed actions a contravention of the Act. We agree with ASIC that it should be reluctant to modify the Act to reverse its intended effect and impose more onerous obligations on a person where the person has already acted in reliance on the existing statutory provisions.

¹⁵ s655A(2) requires ASIC to consider the purposes of chapter 6 set out in s602

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68. Moreover, we have reservations about using our powers to effect law reform of the type sought. Shareholders in a downstream company where item 14 applies know that control can pass without them being afforded chapter 6 protections.

69. The Panel said in *Australian Pipeline Trust 01R*:

...Under Item 14, control of the Downstream Company may pass, with a change of control of the Upstream Company without the Downstream Company shareholders being given the normal protections of Chapter 6 or section 602. This is the legislature putting the interests of the shareholders in the Downstream Company behind those of the Upstream Company referred to above, and this has been done by the legislature to ensure the efficient market for control of the Upstream Company...¹⁶

70. Having reviewed the application and other material, we do not consider that there is any reasonable prospect that we would make a different decision to the decision ASIC made. We agree with ASIC's decision and with its reasons.

71. Accordingly, we decline to conduct proceedings in relation to this aspect of application.

ASIC decision approving CO 02/259

72. Class Order 02/259 approves certain foreign bodies conducting a financial market (including Deutsche Börse AG) for the purposes of item 14 of s611.¹⁷ Hochtief submitted that the class order should not have been approved without the proviso that the exception in item 14 would not apply where a downstream bid would be required if the Australian downstream company was itself listed on the approved foreign exchange.

73. ASIC made a preliminary submission that the Panel did not have jurisdiction to conduct review proceedings in relation to ASIC's decision to approve CO 02/259, without the proviso Hochtief seeks, because that decision was not made under s655A or s673. ACS made a similar submission. We agree.

74. In any event, the proposed modification is significant law reform.

75. Accordingly, we also decline to conduct proceedings in relation to this aspect of the application.

76. ACS made a preliminary submission that Hochtief did not have standing to make the application because there was no evidence that its interests were affected by a decision under s655A.¹⁸ We do not need to address this.

77. The decision of ASIC stands.

¹⁶ [2006] ATP 29 at [106]

¹⁷ The s606 prohibition does not apply to an acquisition that results from another acquisition of a relevant interest in voting shares in another body corporate if the other body corporate is listed on a prescribed financial market or an ASIC approved financial exchange: s611 item 14

¹⁸ s656A(2) relevantly provides that an application to the Panel for a review of the decision by ASIC under s655A may be made by any person whose interests are affected by the decision

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Conclusion

78. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances or any reasonable prospect that we would reverse the ASIC decision not to modify the law.
79. Accordingly, we have decided not to conduct proceedings in relation to the applications under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

Orders

80. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make an interim order, as Leighton requested.
81. Further, we make no final orders, including as to costs.

Simon Mordant
President of the sitting Panel
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Annexure A

Proposed amendments

Proposed item 14A

"14A Where an acquisition (*Downstream Acquisition*) results from an acquisition (*Upstream Acquisition*) of relevant interests in the voting shares in another company and:

- (a) the shares in the body corporate which is the subject of the Downstream Acquisition comprise a substantial part of the assets of the upstream body corporate the subject of the Upstream Acquisition; or
- (b) control of the body corporate which is the subject of the Downstream Acquisition is one of the main purposes of the Upstream Acquisition,

then the Downstream Acquisition is not an exempt acquisition under item 14 unless a takeover bid is made under Chapter 6 of the Act for all the voting shares in the body corporate which is the subject of the Downstream Acquisition (*Downstream Bid*) and:

- (c) the consideration offered to each shareholder in the body corporate under the Downstream Bid is cash or includes a cash alternative for each share, which amount of cash shall be not less than the fair value ascribed to the shares in the body corporate by an independent valuer approved by ASIC; and
- (d) the duration of the offer period, the terms of the offers to be made and any defeating conditions to be placed on the Downstream Bid have been approved by ASIC."

Proposed item 610(3A)

"610(3A) If:

- (a) a transaction in relation to, or an acquisition of an interest in, securities occurs; and
- (b) before the transaction or acquisition, a person did not have a relevant interest in particular voting shares (*Voting Shares*) under paragraph (b) of subsection 608(3) but the person did have a relevant interest in the Voting Shares under paragraph (a) of that subsection; and
- (c) because of the transaction or acquisition, the person acquires a relevant interest in the Voting Shares under paragraph (b) of subsection 608(3),

then, for the purposes of applying section 606 to the transaction or acquisition, the person's voting power is taken to have increased because of the transaction or acquisition from what it was immediately before the person acquired a relevant interest in the Voting Shares under paragraph (a) of subsection 608(3) to what it was after the transaction or acquisition."