Australian Government

Takeovers Panel

Reasons for Decision
Leighton Holdings Limited 02R
[2010] ATP 14

Catchwords:

Review of Panel decision - announcement of bid – downstream acquisition - deemed relevant interest - effect on control - equal opportunity – information – efficient, competitive and informed market - relevant interest - section 602 principles - decline to make declaration – standing - the Companies and Securities Advisory Committee – CASAC – CLERP – chain principle

Australian Securities and Investments Commission Act 2001 (Cth), section 192
Corporations Act 2001 (Cth), sections 602, 606, 608(3), 611 item 14, 657A, 657C, 657EA

ASIC Regulatory Guides 71, 171

ASIC Class Order CO 02/259

ASIC information release IR 01/03

Broken Hill Proprietary Co Ltd v Bell Resources Ltd (1984) 8 ACLR 609, NCSC v Brierley Investments Ltd and Others (1988) 14 ACLR 177, QIW Retailers Ltd v Davids Holdings Pty Ltd (1992) 8 ACSR 333, Airpeak Pty Ltd v Jetstream Aircraft Ltd (1997) 23 ACSR 715

Australian Pipeline Trust 01R [2006] ATP 29, Cape Lambert MinSec Pty Ltd [2009] ATP 12, Gloucester Coal Ltd 01R [2009] ATP 9, Leighton Holdings Limited 01, 02 and 03 [2010] ATP 13

INTRODUCTION

1. The review Panel, Geoff Brunsdon, Norman O'Bryan AM SC (sitting President) and Karen Wood, declined to make a declaration of unacceptable circumstances in relation to the affairs of Leighton Holdings Limited on an application by HOCHTIEF Aktiengesellschaft to review the initial Panel's decision in *Leighton Holdings Limited 02*.[1] The Panel did not consider that the circumstances were unacceptable.

2. In these reasons, the following definitions apply.

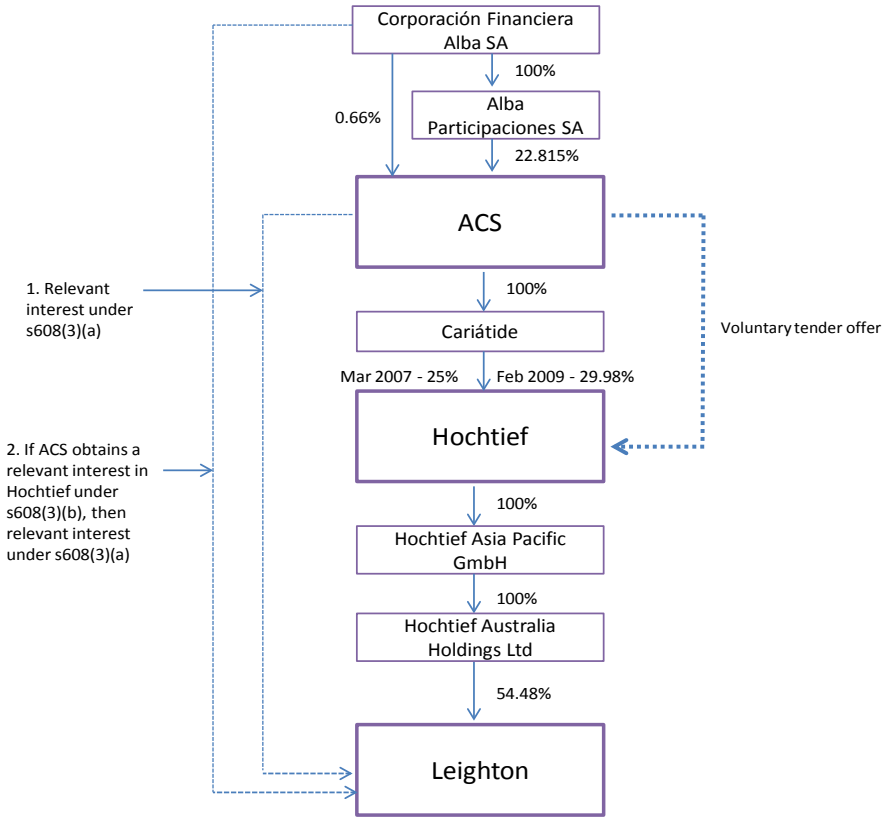
ACS	Actividades de Construcción y Servicios SA
CFA	Corporación Financiera Alba SA
Hochtief	HOCHTIEF Aktiengesellschaft
Leighton	Leighton Holdings Limited
proposed transaction	the offer and on market acquisitions proposed by ACS on 16 September 2010 which would take ACS's shareholding in Hochtief to just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

FACTS

3. The facts are set out in the initial Panel's reasons for decision, except that the review application included an additional matter that Hochtief's legal advisers said they became aware of; that is, a shareholding of more than 20% in ACS by CFA.

[1] *Leighton Holdings Limited 01, 02 and 03* [2010] ATP 13

4. The shareholding relationships between the parties are described in the following diagram.



APPLICATION

5. By original application dated 26 October 2010, Hochtief sought a declaration of unacceptable circumstances in relation to the affairs of Leighton.[2] The initial Panel declined to conduct proceedings. The Acting President consented to the review.[3]

6. By review application dated 9 November 2010, Hochtief submitted:

   (a) since the initial application it had become aware that there was a holder of more than 20% of ACS. As a result, ACS could not rely on s608 in respect of the proposed transaction, but needed to rely on the s611 item 14 exception for downstream acquisitions

   (b) the proposed transaction was contrary to ASIC's downstream acquisition policy

   (c) contrary to the view of the initial Panel, which focused on actual control not capacity to control, the proposed transaction would lead to a change in the control of Leighton

   (d) the initial Panel had focused on lawfulness and not on the s602 principles

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[2] Three applications were heard together by the initial Panel. The relevant one, from which the review is sought, is Leighton Holdings 02

[3] Section 657EA(2). References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

(e) international comity did not justify denying Leighton shareholders the protection of the s602 principles and

(f) for the reasons submitted in the initial application, the proposed transaction was contrary to the equality of opportunity principle,[4] the information principle[5] and the efficient, competitive and informed market principle.[6]

Final orders sought

7. Hochtief sought final orders, among others, to the effect that, if ACS acquired control of Leighton or acquired a relevant interest in securities in Hochtief other than through the voluntary tender offer, it must make a follow-on takeover bid:

(a) for all the shares in Leighton

(b) at a cash price not less than the fair value determined by an independent expert and

(c) subject only to limited conditions.

DISCUSSION

Preliminary submissions

8. ACS made a preliminary submission that the application for a declaration had not been made within 2 months after the circumstances occurred[7] because:

(a) there had been no complaint since ACS acquired more than 20% of Hochtief in 2007

(b) there was no change in ACS's relevant interest in Leighton and no change in control and

(c) the shareholding of CFA in ACS was long-standing and well known.

9. The review, in our view, is based on the application of the policy of item 14 to the proposed acquisition of further shares in Hochtief. Section 657A applies prospectively to potential acquisitions. The acquisition of more than 20% of Hochtief in 2007 is a relevant factor in our decision, but it is not the acquisition complained of. We think the application is made within time.

10. ASIC made a preliminary submission that the review Panel should conduct proceedings because:

> *ASIC considers that a critical question in this matter is whether the main purpose of ACS's bid for Hochtief is to gain or consolidate control of Leighton, ie. whether the upstream bid is an 'artifice'. We consider the currently available information is ambiguous for the purposes of resolving this question, with the objective criteria (e.g.*

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[4] Section 602(c)
[5] Section 602(b)
[6] Section 602(a)
[7] Section 657C(3)(a)

> *relative market capitalisations, percentage of assets) and subjective criteria (ACS's publicly stated intentions) possibly leading to differing conclusions.*

11. We agree with ASIC that this is a critical question in the review.

Standing

12. In its preliminary submission, ACS repeated its submission to the initial Panel that there was no evidence that Hochtief's interests were affected by an impact (if any) upon the affairs of Leighton by reason of ACS increasing its shareholding in Hochtief. This was because, irrespective of the proposed transaction, Hochtief's holding in Leighton would remain the same. The initial Panel felt that ACS's argument may have had merit, but did not explore the question because its decision was based on other grounds.

13. Hochtief submitted that it did have standing as its interests were "*clearly affected ... well beyond the effect on a member of the general public.*" It further submitted:

> *... To the extent that [Hochtief] is affected in a different manner from other shareholders in Leighton, its claim to standing is, if anything, increased (not diminished), given that it is responding to a coercive two-stage proposal to take control of [Hochtief] and Leighton in a manner that intentionally avoids Australian investor protections mechanisms and is contrary to the philosophy of the section 602 principles.* (footnote omitted)

14. Section s657C(2) provides that an application for a declaration of unacceptable circumstances may be made by the bidder, the target, ASIC or "*(d) any other person whose interests are affected by the relevant circumstances*".

15. The scope of s657C(2)(d) has not been judicially considered. However, courts appear to have adopted a liberal approach to standing in relation to similarly worded tests in the Act. For example, s1324 allows "*a person whose interests have been, are or would be affected by the conduct*" to apply for an injunction to restrain conduct constituting a breach of the Act. The courts have interpreted this provision liberally as "*giving anyone with an interest above the interests of a member of the public the right to apply for an injunction*".[8]

16. Given the scope of s657A, we think a similarly broad view of standing should be adopted. Hochtief's interest in Leighton gives it an interest above that of a member of the public. We think Hochtief has standing.

Relevant interest in Leighton

17. In the initial application it was accepted that the proposed further acquisition by ACS of shares in Hochtief would not contravene s606 because of s608(3)(a).

18. Section 608(3) provides:

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

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[8] *Airpeak Pty Ltd v Jetstream Aircraft Ltd* (1997) 23 ACSR 715 at [721]. See also *Broken Hill Proprietary Co Ltd v Bell Resources Ltd* (1984) 8 ACLR 609 at [613] and *QIW Retailers Ltd v Davids Holdings Pty Ltd* (1992) 8 ACSR 333 at [336]

(a) a body corporate, or managed investment scheme, in which the person's voting power is above 20%;

(b) a body corporate, or managed investment scheme, that the person controls.

Paragraph (a) does not apply to a relevant interest that the body corporate or scheme itself has in the securities merely because of the operation of that paragraph in relation to another body corporate or managed investment scheme.

19. The initial Panel said:

> *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.*[9]

20. It went on:

> *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.*[10]

21. Hochtief submitted on the review that it was now not the case that the market and ACS would be entitled to expect that there would be no further issues with an increase in ACS's holding based on the application of s608(3). The voting power of CFA would change if ACS acquired control of Hochtief. This, Hochtief submitted, was because ACS would have its relevant interest in Leighton because of s608(3)(b) so s608(3)(a) could then be applied to CFA's holding of more than 20% in ACS.

22. This technical argument potentially removed the ability of ACS to rely on s608 as a 'safe harbour' for the increase in its holding in Hochtief. But ACS may still be able to rely on the s611 item 14 exemption for downstream acquisitions. Hochtief's review application focused on the policy of item 14.

Should we conduct proceedings?

23. The initial Panel concluded that there was no real evidence that control of Leighton was a main purpose of the proposed transaction.

24. Hochtief submitted that it had not been given an opportunity to produce evidence of purpose, although we note that it could have included such evidence initially in its application. Before deciding whether to conduct proceedings, we informed Hochtief that, based on the material before us, our preliminary view was that we were disinclined to conduct proceedings. We invited Hochtief to produce evidence that would show that a main purpose of the ACS proposal was control of Leighton.

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[9] [2010] ATP 13 at [42]
[10] n 9 at [54]

25. Hochtief submitted in response:

    (a) evidence of actual purpose would be available only if the review Panel exercised its powers under s192 of the ASIC Act, but there was a considerable amount of circumstantial evidence of ACS's likely purposes

    (b) control over downstream shares must be incidental for item 14(b) to be relied on and

    (c) the evidence of ACS's control purpose was:

        (i) the importance of ACS consolidating Leighton for accounting purposes. ACS represented to Hochtief's Supervisory Board that a strategic objective of the proposed transaction was to strengthen ACS's financial structure

        (ii) the interest in Leighton was crucial to ACS achieving its objective of regional diversification, so the Panel should infer that acquisition of control over Leighton is an objective of ACS

        (iii) ACS effectively gained control of Grupo Dragados SA following the acquisition of just under 24%, providing "*an indication of its modus operandi*" and

        (iv) ACS had held high-level meetings with Leighton representatives, showing its interest in Leighton.

26. Based on the further material provided by Hochtief, sufficient evidence has been provided to justify conducting proceedings and we did so.

History of the downstream acquisition exception

27. Section 611 item 14 provides that the s606 prohibition does not apply to:

> *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*

28. Deutsche Börse (which operates the Frankfurt Stock Exchange, where Hochtief is listed) has been approved by ASIC.[11]

29. The history of item 14 shows greater or lesser relaxation of the exemption over time.

30. The exemption was first articulated as s12(k) of the *Companies (Acquisition of Shares) Act* 1980,[12] which provided that the prohibition on exceeding the 20% limit:

> *does not apply to or in relation to an acquisition of shares in a company as a result of the acquisition of shares in another corporation that were listed for quotation on the stock market of a stock exchange.*

31. As defined, the exemption allowed the acquisition of shares in any corporation (Australian or otherwise) listed on ASX.[13]

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[11] Class Order CO 02/259

[12] And state Codes

32. The explanatory memorandum noted that the exemption prevented the use of downstream holdings as an undesirable defence tactic. It also noted that listing reduced the scope for misuse (the listing rules contained takeover provisions at the time).

33. In 1989, the National Companies and Securities Commission issued policy statement 157 dealing with the exercise of its discretionary power to extend s12(k) to the acquisition of shares in an upstream corporation listed on a stock exchange other than ASX.[14] It said:

> *The Commission will exercise its discretion to modify paragraph 12(k) where it is satisfied that:*
>
> - *the upstream acquisition is not an artificial device to acquire a substantial interest in a downstream Australian company;*
> - *the acquisition was otherwise acceptable; and*
> - *the stock exchange on which the upstream corporation is listed has regulatory standards comparable to those of Australian Stock Exchange Ltd.*

34. PS 157 gave as an example of an unacceptable acquisition the situation where the substantial holding in the downstream company was the principal asset of the upstream company and the proposed upstream acquisition was designed to gain control of the downstream company without offers to downstream shareholders. The test required satisfaction of both limbs.

35. With the introduction in 1990 of the *Corporations Law,* the exemption, then found in s629, was narrowed. It said that the prohibition on exceeding the 20% limit:

> *does not apply in relation to an acquisition of shares in a company as a result of the acquisition of shares in a company if:*
>
> *(a) at the time of the last-mentioned acquisition, the other company is a listed company; and*
>
> *(b) the acquisition of the shares in the other company:*
>
> *(i) results from the acceptance of an offer to acquire those shares that was made under a takeover scheme or a takeover announcement; or*
>
> *(ii) would, but for [an exemption for on-market acquisitions], contravene [the prohibition on exceeding 20%].*[15]

36. The explanatory memorandum similarly referred to undesirable takeover defence tactics.

37. As defined, the exemption was narrowed to apply only to an acquisition of shares under a takeover in an Australian incorporated company.

38. In 1994 the Legal Committee of the Companies and Securities Advisory Committee, reporting on anomalies in the downstream exemption, noted that *"[t]he reasons for*

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[13] Originally the state stock exchanges
[14] In response to *NCSC v Brierley Investments Ltd and Others* (1988) 14 ACLR 177
[15] References to 'company' in paragraphs (a) and (b) became 'body corporate' in 1991

making the Corporations Law narrower than CASA in these two respects are obscure."[16] It recommended that the exemption be extended to upstream companies listed on overseas exchanges prescribed by regulations, after consultation with the ASC,[17] and that ASC have the power to approve additional foreign exchanges rather than relying on extension case-by-case through ASC relief.

39. The report said:

> *The rationale for this type of exemption is that a downstream acquisition that is merely incidental to the main objective of acquiring the upstream company should not inhibit the upstream acquisition, especially where the upstream company is listed. Put another way, unless the upstream acquisition is a mere artifice, having as its true object the acquisition of the downstream company, the downstream acquisition should be exempt. Rather than articulate an exemption along these uncertain lines, the policy has been to provide a clear exemption where the upstream acquisition is in a listed company. In those circumstances, the upstream acquisition is likely to be a serious bid, involving the acquisition of a substantial company with a large number of shareholders, not an artifice to gain control of the downstream company. If the acquisition of a listed company were used as an artifice to acquire another company, the ASC could seek a declaration under s 733 that an unacceptable acquisition or unacceptable conduct had occurred.*
>
> *Without the exemption for downstream acquisitions, companies could make themselves takeover-proof by holding strategic parcels of shares in a series of other companies.*
>
> *A further reason for exempting downstream acquisitions that result from takeovers of listed companies is that, while the offer price for the securities in the upstream listed company is set by the market, the price that the bidder for the upstream company should pay for the shares in the downstream company (the 'see through' price) has to be determined by an inevitably unsatisfactory process of calculation or valuation rather than by the market.*[18]

40. The ASC had submitted to CASAC that it (the ASC) should continue to have discretion to consider individually proposed upstream acquisitions in overseas listed companies, but CASAC disagreed, saying "*effective participation by Australia in international capital markets requires greater certainty.*"[19] CASAC also said that downstream shareholders should be treated the same whether the upstream company was listed in Australia or on a recognised overseas exchange.

41. The ASC had further submitted to CASAC that any exemption from listing in Australia should be dependent on an upstream acquisition complying with the listing rules and laws in the foreign jurisdiction, but CASAC rejected this also, saying:

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[16] Legal Committee of the Companies and Securities Advisory Committee, "Anomalies in the Takeovers Provisions of the Corporations Law", Report, March 1994, p28

[17] As ASIC then was

[18] n 16 pp 28-29 (footnotes omitted)

[19] n 18 p30

> *The ASC proposal may create considerable uncertainty about the application of the exemption to individual cases. Moreover, compliance is a matter for the authorities of the particular jurisdiction.*[20]

42. Importantly, the report noted that the *Companies (Acquisition of Shares) Act* did not restrict the types of upstream acquisition that attracted the exemption and advocated a return to that position from the one adopted in the *Corporations Law*.

43. The position under the *Corporations Law* involved ASC modification for any foreign takeover. ASIC established policy for dealing with this in Policy Statement 71 "Downstream Acquisitions" in 1993. PS 71 was updated in 1996, and renamed RG 71 in 2007. RG 71 set out parameters for the granting of relief. For unrestricted relief[21] it required that:

    (a) the shares in the downstream company not comprise a substantial part of the assets of the upstream company (for this purpose, 50% was the threshold)

    (b) control of the downstream company not be one of the main purposes of the acquisition of the upstream company

    (c) the upstream acquisition was by way of a takeover or merger which was legal in the jurisdiction in which it took place and

    (d) the jurisdiction in which the upstream acquisition was made, or the stock exchange on which it was made, afforded a comparable level of investor protection to Australian law.

44. RG 71 also required that it not appear that "*unacceptable circumstances*" may occur in relation to the proposed acquisition.

45. If control was a main purpose, ASC relief might still be available but on the following conditions:

    (a) if less than 50% of the upstream company's voting shares were acquired, no more be acquired and those held be voted only as the 'creep' provision would have allowed their acquisition or

    (b) if more than 50% of the upstream company's voting shares were acquired, a follow-on bid be made.

46. RG 71 acknowledged the need for Australia to meet its obligations in relation to international comity. In *Cape Lambert* the Panel said that RG 71 was based on a number of broad policy considerations, including that a:

> *regulated upstream bid or other chapter 6 protection will help ensure that the upstream acquisition is not an artifice for gaining control of the downstream entity.*[22]

47. Item 14 was introduced following the Corporate Law Economic Reform Program (CLERP) reforms in 1999:

> *liberalising the current exemption for downstream acquisitions that occur as a result of an acquisition of shares in an Australian listed company (the upstream acquisition), by*

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[20] n 18 p31

[21] That is, relief without any voting or standstill restrictions or the requirement to make a downstream bid

[22] *Cape Lambert MinSec Pty Ltd* [2009] ATP 12 at [46], footnote omitted

> *allowing the upstream acquisition to fall under any of the exemptions from the 20 per cent threshold and extending the exemption to foreign bodies approved by ASIC....* [23]

48. The explanatory memorandum to the CLERP Bill provided no guidance on the meaning of 'artifice'. CASAC had equated "*merely incidental to the main objective of acquiring upstream company*" with "*mere artifice*", which it suggested was that the true object of the acquisition was the downstream company (see paragraph 39 above).

49. In *Australian Pipeline Trust 01R* the Panel noted that, under item 14, control of the downstream company could pass without downstream shareholders being afforded the normal protections of chapter 6. This was because the legislature had put the interests of shareholders in the downstream company behind those of the upstream company to ensure an efficient market for control of the upstream company.

50. The initial Panel in *Leighton 01, 02 and 03* quoted this rationale for the exemption from *APT 01R*. Hochtief submitted that, without the benefit of s608(3), ACS had to rely on item 14 and the review Panel should therefore enquire into whether item 14 was being abused. Hochtief referred to the additional statements made by the Panel in *APT 01R*:

> *... However, there is clear indication in the explanatory memoranda and the relevant extrinsic material (for the Corporations Act and its preceding legislation) that the legislature was concerned that the exemption set out in Item 14 not be abused and the intent of Chapter 6 not be avoided. In part, it is the role of the Takeovers Panel to ensure this, and protect the interests of the shareholders of the Downstream Company, by declaring that circumstances are unacceptable where the provision is being used other than for the legislature's intended purposes.*[24]

51. We agree that this is the relevant enquiry for the review Panel.

52. Following amendments to the Corporations Act made by the CLERP legislation, in 2001 ASIC issued regulatory guide RG 171 "Anomalies and issues in the takeover provisions" to address anomalies.[25] RG 171 states:

> *The rationale behind item 14 of s611 is that a downstream acquisition merely incidental to the main objective of acquiring the upstream body corporate should not inhibit the upstream acquisition. Without this kind of exception, a company could acquire strategic parcels in a series of companies as a takeover defence.*
>
> *If the downstream acquisition is not merely incidental, an acquirer may risk a declaration of unacceptable circumstances by the Panel even where the upstream body corporate is listed on an approved foreign exchange: see [IR 01/03]....*[26]

53. ASIC's information release, IR 01/03, says:

> *An acquirer may risk a declaration of unacceptable circumstances by the Corporations and Securities (Takeovers) Panel where the upstream body corporate is listed on a foreign stock market conducted by an approved body but:*

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[23] Corporate Law Economic Reform Program Bill, Explanatory Memorandum, 1998 para 7.17
[24] [2006] ATP 29 at [106], footnote omitted
[25] First issued 13/12/2001, updated 3/12/2003 and 17/6/2004
[26] RG 171 at 47-48, footnote omitted

1. the shares in the downstream company comprise a substantial part of the assets of the upstream body corporate (in most circumstances, over 50%); or

2. control of the downstream company is a main purpose of the upstream acquisition. (For example, a recent unsuccessful takeover bid for shares in the downstream company or offer to purchase a business of the downstream company may indicate such a purpose.)

Application of item 14

54. We think there are important differences between ASIC granting relief to make lawful something that is unlawful, and the Panel declaring circumstances to be unacceptable. It is the former situation that RG 71 addresses - granting relief prior to a takeover. In our view, the considerations relevant to the making of a declaration of unacceptable circumstances after a takeover has been made or announced, relying on item 14, are not identical to the considerations ASIC would take into account under RG 71.

55. The reasons why they differ include:

    (a) a declaration is made after the event (here, after announcement of the proposed acquisition but often after the acquisition itself), whereas relief is ordinarily granted before the event

    (b) the Panel does not have a power to give rulings, suggesting that a "bright line" test, such as a 50% level, cannot have been intended for the Panel in the same way it was relied on by ASIC and

    (c) proper weight, informed by the history of the provision, must be given to the exception in item 14, which was designed to give a clear exemption.[27]

56. Leighton submitted that, while the Panel was not bound to its previous decisions in the same way as a court, it should not depart from previous decisions without prior notification to the market as to do so "*would introduce unwarranted, unnecessary and inefficient complexities for market participants as they plan their actions*". Thus, it submitted, the review Panel should follow the decision in *APT 01R*[28] to the effect that the Panel would apply ASIC's policy. We think this overstates the position. A departure from a previous decision may be warranted by the circumstances without prior notification. And in our view *APT 01R* does not say the Panel will apply ASIC's policy. It acknowledges that ASIC's policy is a relevant factor and says that the Panel will declare circumstances unacceptable if item 14 is being abused.

57. Hochtief submitted that the Panel's approach must be broadly consistent with ASIC's policy for relief where the upstream company is not listed on an approved exchange. This was because there would otherwise be "*arbitrary inconsistency between the two categories of cases.*" We think the two approaches are 'broadly consistent', given that one is pre-event and the other post-event. We also agree with ACS's submission that RG 71 addressed the law as it stood on 1 July 1996 and must be viewed now in the context of the law as it stands after amendment.

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[27] See similar proposition in relation to item 4 of s611 in *Gloucester Coal Ltd 01R* [2009] ATP 9 at [28]

[28] n 24. Note that the parcel involved was a holding of 30% in the downstream company

58. Accordingly, where ASIC may have refused to grant relief if the shares in the downstream company comprised more than 50% of the assets of the upstream company, since relief had to be granted before any action could be taken on the part of the acquirer, we regard the 50% level as simply one of the factors we need to take into account. In other words, while exceeding the 50% level may be a basis for the Panel to consider whether there are unacceptable circumstances, it is not necessarily sufficient to result in a declaration.

59. If the 50% level was sufficient to result in a declaration, a downstream acquisition where this applied could easily have been carved out from the exception in item 14, since it would be apparent at the outset of any takeover. Instead, a very broad exception has been created.

60. ASIC has recognised the breadth of the exemption by its approval of various exchanges. ASIC's rebuttal submission also recognises this when it says:

    a. unacceptable circumstances are highly likely if not certain to exist if the main purpose of ACS's proposed acquisitions is to obtain control of Leighton; and

    b. unacceptable circumstances may exist if one of the main purposes of ACS's proposed acquisitions is to gain control of Leighton. In order to decide whether unacceptable circumstances exist in this situation, we submit it is necessary for the Panel to consider all relevant circumstances including the factors listed under the heading "Relevant Factors" below. (Original emphasis)

61. The relevant factors ASIC referred to were:

    (a) the significance of other purposes of the proposed acquisition

    (b) ACS's commitment regarding corporate governance of Leighton (including questions of enforceability and bearing in mind that capacity to exercise control is paramount)

    (c) that ACS has had a relevant interest in Hochtief since 2007 and

    (d) the length of time that Hochtief has held the Leighton parcel.

62. In short, in deciding whether unacceptable circumstances arise we must consider a number of factors including the s602 principles and the requirements of s657A, the purpose of the exception in item 14, the policy considerations in the CASAC report that led to item 14, and the fact that acquirers relying on the exception cannot obtain regulatory clearance before proposing or making the upstream acquisition.

Unacceptable circumstances

63. In our view, the policy of item 14 turns on whether the upstream acquisition was an "artifice".

64. The Shorter Oxford English Dictionary includes the following definition of "artifice":

    4. An ingenious expedient; a cunning trick; a device, a contrivance

65. The Macquarie Concise Dictionary defines "artifice" as:

    1. a crafty device or expedient; a clever trick or stratagem 2. craft; trickery. 3. skilful or apt contrivance

66. The initial Panel said:

> *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...*[29]

67. Given that, on some measures, the shares in Leighton comprise over 50% of the assets of Hochtief, it is relevant to consider whether reliance on item 14 was an artifice and unacceptable. We do not consider that there is evidence of this.

68. In our brief, we asked for the following documents relating to ACS's decision to make the voluntary public tender offer and subsequent on market acquisitions:

    (a) board minutes and papers

    (b) board committee minutes and papers (including the executive committee)

    (c) management committee minutes and papers and

    (d) advice from external advisers.

69. More than 1,200 pages were supplied, although there was much repetition through multiple drafts and submissions to both the ACS board and its executive committee. ACS was concerned about Hochtief having access to confidential information. Hochtief agreed to the material supplied to it being redacted.[30] We appreciate the efforts of parties in dealing constructively with a substantial amount of material in a short time.

70. We did not get from the material any sense that ACS intended to acquire Leighton using the takeover of Hochtief as a device or contrivance to achieve it. While the significance of Hochtief's shareholding in Leighton was made clear in the material, the extent of information on Leighton was in proportion to information on Hochtief's other assets. Indeed, there was very little, if any, information regarding Leighton on which to base a conclusion that the acquisition of Leighton was the main purpose of the proposed transaction. This could have been because ACS was well advised. However, given our experience in transactions and board approvals, on balance we think it was because the acquisition of Leighton was not ACS's primary purpose. Hochtief has significant assets other than its shareholding in Leighton. ACS's proposed acquisition of shares in Hochtief will involve exposure to the risks associated with those other assets as well as Leighton.

71. We noted that there was virtually no financial modelling and a limited amount of other information. ACS confirmed that "*to the best of ACS's knowledge and belief after due inquiry all material has been provided that was requested...*" It said in particular:

> *ACS and its advisers did not prepare a financial model to undertake modelling of the effect of the proposed transaction. ACS' expressed objective is to increase its stake in*

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[29] n 9 at [55]

[30] Hochtief requested that ASIC and the Panel review the redacted material for relevance and, if it appeared unnecessarily broad, ACS be asked to reduce their redactions and provide a summary (in a form that could be provided to Leighton and Hochtief) of the substance of any material that could be relevant to ACS's purpose

Hochtief to achieve full financial consolidation and the effect of financial consolidation is readily apparent without the need to undertake financial modelling.

72. We also looked at whether the acquisition of Leighton was a main purpose of the takeover of Hochtief. The test ("a main purpose") is difficult to understand and apply. It may be better understood as "a significant purpose" since, presumably, there can be only one main purpose. The UK rule has recently been changed to avoid this problem and be more objective.[31]

73. We do not think this test, however expressed, has been met. ACS has had a relevant interest in 54.48% of Leighton since 2007. Hochtief has held a substantial interest in Leighton for a considerable time. ACS has indicated that it is prepared to make similar governance arrangements with Leighton as Hochtief has in place.[32] And while Leighton may be the most important asset of Hochtief, that alone does not make the acquisition of Leighton a main purpose of ACS's acquisition of Hochtief. From the material, it seems clear that:

    (a) ACS decided to acquire additional shares in Hochtief principally to obtain financial consolidation and international business diversification into Germany, North America and the Asia/Pacific region

    (b) on other metrics[33] Hochtief's businesses excluding Leighton are about proximate to Leighton and

    (c) while the market capitalisation of Hochtief (listed in Europe where the global financial crisis hit hard and economic conditions remain difficult) has been less than the market value of its shareholding in Leighton (listed in Australia which weathered the global financial crisis well and economic conditions are better), Hochtief has a substantial portfolio of other businesses in Western Europe and North America which are material to its business portfolio.

74. ACS pointed to the scale of Hochtief as shown in its 2009 annual report and investor presentations. Hochtief is:

    (a) the largest construction company in Germany

    (b) the third largest construction company in Europe and

    (c) the sixth largest company on the German MidCap market.

75. Moreover, one of its businesses, Turner, is the largest general builder in the United States and another, Flatiron, is a leading US participant in complex infrastructure projects and a top-10 participant in the US transportation infrastructure market.

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[31] The UK chain principle stated, in part, that the Panel would not normally require an offer for a downstream company unless "*(b) one of the main purposes of acquiring control of the first company was to secure control of the second company.*" This test was replaced by the more objective: "*securing control of the second company might reasonably be considered to be a significant purpose of acquiring control of the first company*": London Takeover Panel, PCP 2009/2, issued 16/7/09 and RS 2009/2, issued on 16/12/09

[32] On 29 November 2010, Leighton announced that "*discussions have resulted in a formal undertaking by ACS which enshrines the existing governance arrangements in place between Leighton and Hochtief*"

[33] For example, the contribution of Hochtief's businesses in the Americas and Asia Pacific (Leighton), when measured on the basis of weighted average cost of capital and return on net assets, is proximate

76. ACS also submitted that Hochtief itself had repeatedly described the intrinsic value and importance of all parts of Hochtief. ACS submitted that it had a strong interest in the non-Australian assets.

77. Hochtief submitted that the Panel should adopt a more objective approach to the 'control purpose' test, consistent with the approach in the United Kingdom, New Zealand, Hong Kong and Singapore. In the UK, for example, the test is whether securing control of the downstream company might reasonably be considered to be a significant purpose of the upstream acquisition. The UK Panel takes into account a number of factors including, as appropriate, the assets, profits and market values of the companies, with relative values of 50% or more normally regarded as significant.

78. This test does not adequately reflect item 14. Moreover, this test is applied by the UK Panel, like ASIC's downstream policy, pre-event.

79. Hochtief submitted, in its initial application, that the application of item 14 to the proposed transaction was not justified by international comity. It submitted that German law would require a downstream bid for Leighton if Leighton was a publicly listed German company, and that German law did not prevent a downstream bid if that was what Australian law required. In its review application, Hochtief put this slightly differently - that the departure from s602 principles would only be justified if international comity required it, which it did not.

80. In our view, international comity is not about requiring in Australia what would be required in Germany. It is about Australian law not interfering with a transaction that German law allows. It is based on requirements of certainty, the desire not to unnecessarily impede international capital flows and recognition of overseas jurisdictions. We think the test as reframed in the review application begs the question. Item 14 will not save a transaction that gives rise to unacceptable circumstances, but we must be satisfied that there are unacceptable circumstances. As to whether the proposed transaction is contrary to chapter 6, Hochtief relied on submissions in its initial application concerning international comity, which we have just addressed, an alleged regulatory gap and that the relief it sought did not reverse the usual and intended effect of the Act. We turn to the latter two.

81. Hochtief submitted that there was a regulatory gap "*that allows ACS to avoid scrutiny as to whether the transaction through which it is likely to gain control of [Leighton] is contrary to the section 602 principles*." It submitted that this was because ACS was already deemed to have a relevant interest in Leighton, having gone over 20%, while the German takeover threshold was 30%. ACS does not need to rely on s608 but on item 14. Anyway, we do not agree that there is a regulatory gap. A number of jurisdictions recognised by item 14 and the class order, the UK included, have a threshold of 30%. And in any event we note that whether there is a gap is disputed and we are not in a position to determine the foreign law and practice.[34]

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[34] ASIC provided the initial Panel with an opinion from the German regulator, BaFin, on the operation of the Takeover Act and Stock Corporations Act. Hochtief had provided ASIC an opinion from the law firm Hengeler Mueller. ACS submitted an opinion during the review, from a Professor Baums of the Institute for Law and Finance at Frankfurt University, that there was no gap because of the way German companies, and Hochtief as a co-determined company in particular, are controlled

82. We also do not agree that the transaction is contrary to the s602 principles (see below).

83. Hochtief submitted that the relief it sought was not effecting law reform. We agree that, if unacceptable circumstances exist, appropriate orders would not be law reform. Finding unacceptable circumstances simply on the basis of a 50% level would amount to a substantive change to the present law.

84. Hochtief's review application included a copy of its application to the initial Panel under s656A for review of ASIC's refusal to modify the Act. We took this to be incorporating by reference certain information in that application. To the extent that Hochtief's application to us seeks to reopen the review of ASIC's decision, the initial Panel dealt with that and it is not open to further review by us.

Section 602

85. Hochtief submitted that the proposed transaction would be contrary to s602 principles in that Leighton's shareholders:

    (a) may be coerced into selling their shares on-market because of a concern that the share price would fall as a result of ACS exercising control (s602(a))

    (b) would not be provided with the opportunity (or time or information) to consider the proposal (s602(b)) and

    (c) would not share in any control premium paid for control (s602(c)).

86. We do not agree. There is a clear recognition that, in the absence of an 'artifice', the normal protections of chapter 6 or section 602 do not apply to downstream shareholders with a change of control upstream.[35] Such investors are aware of a real possibility of effective control changing.[36]

Other factors

87. While Hochtief may have standing, it was not clear what it might gain from a successful application other than a possible takeover defence. We did not need to explore this further, but of course such a purpose would be clearly contrary to the purpose of item 14 and, if established, would be another reason why a declaration of unacceptable circumstances should not be made.

88. Hochtief sought to address whether there was an appropriate remedy available if unacceptable circumstances were established. It said in its review application:

> *Even if the Review Panel is unable to envisage a suitable remedy, it is submitted that the Review Panel should still make a declaration of unacceptable circumstances and invite further submissions on orders.*

89. We did not need to explore this, but again the availability of suitable orders would be relevant to whether a declaration should be made.

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[35] *Australian Pipeline Trust 01R,* n 24

[36] CASAC report p31

DECISION

90. For the reasons above, we decline to make a declaration of unacceptable circumstances. We consider that it is not against the public interest to decline to make a declaration and we have regard to the matters in s657A(3).

Orders

91. Given that we make no declaration of unacceptable circumstances, we make no final orders, including as to costs.

92. ACS, in its preliminary submissions, submitted that the applications were unmeritorious and so Hochtief should have been required to give an undertaking as to costs if the Panel conducted proceedings. We did not require an undertaking. We would also not be minded to make an order for costs (against any party) had we made a declaration of unacceptable circumstances.

Norman O'Bryan AM SC
President of the review Panel
Decision dated 29 November 2010
Reasons published 3 December 2010