Australian Government

Takeovers Panel

Reasons for Decision
BC Iron Limited
[2011] ATP 6

Scheme implementation agreement, termination, undisclosed condition, reliance on condition, declaration of unacceptable circumstances, orders

Corporations Act 2001 (Cth), sections 602, 631, 657A, 657D, 1041E

GN 1 Unacceptable Circumstances

SSH Medical Ltd [2003] ATP 32, *AMP Shopping Centre Trust (No 2)* [2003] ATP 24, *AMP Shopping Centre Trust (No 1)* [2003] ATP 21, *Brisbane Broncos Ltd 03* [2002] ATP 3

INTRODUCTION

1. The Panel, Guy Alexander (sitting President), John M Green and Vickki McFadden, made a declaration of unacceptable circumstances in relation to the affairs of BC Iron Ltd. The application concerned the termination of a scheme implementation agreement by a proposed acquirer of BCI shares in reliance on a termination right which had not been disclosed to the market prior to the termination. The termination occurred approximately two months after announcement of the transaction. The Panel declared the circumstances unacceptable as the non-disclosure had the result that there had not been an efficient, competitive and informed market for the acquisition of control over shares in BCI.

2. In these reasons, the following definitions apply.

BCI	BC Iron Limited
ConsMin	Consolidated Minerals Pty Ltd
HKSE	The Stock Exchange of Hong Kong Ltd
Pilbara	Regent Pacific Pilbara Pty Ltd, a wholly owned subsidiary of Regent Pacific
Regent Pacific	Regent Pacific Group Limited
SIA	Scheme implementation agreement under which Regent Pacific proposed to acquire BCI shares through Pilbara, announced to HKSE on 20 January 2011 and to ASX on 21 January 2011

FACTS

3. BCI is an ASX listed company (ASX code: BCI). Its major shareholders are ConsMin, which owns or controls 20.7%, and Regent Pacific, which owns or controls 19.9%.

4. Regent Pacific is listed on HKSE.

5. On 20 January 2011 BCI entered a scheme implementation agreement with Regent Pacific and its wholly owned subsidiary, Pilbara.

6. Under the SIA, Pilbara would acquire by scheme of arrangement all the fully paid ordinary shares in BCI (except those already held by or for Regent Pacific) for $3.30 per share.

7. Each of BCI and Regent Pacific made an announcement in relation to the SIA.

8. Regent Pacific announced to the HKSE on 20 January 2011 that it had entered the SIA. It included the following in its announcement:

   (a) the transaction required the approval of Regent Pacific shareholders under HKSE listing rules

   (b) a break fee and reverse break fee were payable in certain circumstances and

   (c) *the Transaction will be subject to various customary conditions, including:*

   - *obtaining foreign investment approval from the Australian Federal Treasurer;*
   - *all required court approvals and approvals by BCI shareholders by the requisite majorities under the Corporations Act;*
   - *approval by the Company's shareholders in accordance with the HK Listing Rules and the Company's constitutive documents;*
   - *the financing under the Debt Facility remaining available through to the Implementation Date; and*
   - *no material adverse change in respect of BCI.*

9. BCI announced to ASX on 21 January 2011 that it had entered the SIA. It included the following in its announcement:

   (a) the board unanimously recommended that BCI shareholders vote in favour of the scheme in the absence of a superior proposal and subject to the independent expert concluding that the scheme was in the best interests of BCI shareholders and

   (b) a summary, in some detail, of key terms of the SIA. This was an appendix to the announcement. Relevantly, the summary stated that implementation of the scheme was conditional upon Regent Pacific shareholder approval; that Regent Pacific was obliged to convene a meeting of its shareholders in accordance with HK Listing Rules to seek that approval; and that Regent Pacific was obliged to pay a break fee of $500,000 if that shareholder approval was not obtained. The summary also included the following section headed "*Termination*" –

   (a) Termination by either party

   The SIA provides that either party may, prior to the Second Court Date, terminate the SIA if:

   - *the Independent Expert concludes that the Scheme is not in the best interests of BC Iron shareholders;*

- *the resolution to approve the Scheme is not approved by the requisite majority of BC Iron shareholders at the Scheme Meeting;*
- *the Court refuses to make an order convening the Scheme Meeting or approving the Scheme;*
- *FIRB approval to the Scheme is not obtained;*
- *a court or other regulatory authority (including ASIC) issues an order, decree or ruling or takes any other action which permanently restrains or prohibits the Scheme;*
- *Regent Pacific shareholders fail to approve Regent Pacific proceeding with the Offer under the Scheme;*
- *there is a failure of any condition precedent; or*
- *the BC Iron Board publicly changes its recommendation or publicly recommends a Superior Proposal.*

(b) Termination by BC Iron

The SIA provides that BC Iron may, prior to the Second Court Date, terminate the SIA if:

- *there is a material breach by Regent Pacific of the SIA (in relation to payment of the Scheme Consideration, its obligations for implementation of the Scheme and its representations and warranties); or*
- *the board of Regent Pacific publicly changes its recommendation in relation to proceeding with the Offer under the Scheme.*

(c) Termination by Regent Pacific

The SIA provides that Regent may, prior to the Second Court Date, terminate the SIA if:

- *there is a material breach by BC Iron of the SIA (including in relation to obligations for implementation of the Scheme, its representations and warranties, conduct of business and exclusivity obligations) which is not remedied within 10 Business Days or before 5pm on the last Business Day before the Second Court Hearing Date.*

10. Other than the Regent Pacific announcement on 20 January 2011 and the BCI announcement on 21 January 2011, there was no disclosure of the terms of the SIA until the SIA was released to ASX by BCI on 22 March 2011, after BCI had made its application to the Panel.

11. On or about 14 February 2011, an article appeared on the "Business insider" website which included the following statements:

> *… - the biggest shareholder of BC Iron, Ukrainian mining magnate Gennady Bogolyubov, owner of manganese specialist Consolidated Minerals, is flatly opposed - and he has the votes to veto the deal*

and

> *Speaking for the Consmin group, Oleg Sheiko said "the logic of Regent Pacific's offer, as well as of the acceptance by the BC Iron directors, escapes us. Here is an iron-ore miner on a roll toward substantial export revenues at an iron-ore price which may not go higher, but will certainly not decline for the foreseeable future. Regent Pacific comes along with a share price offer whose multiple to BC Iron's earnings is lower than anyone in our business would look twice at. In addition, Regent Pacific is almost too small to identify – a loss-making venture, with less than half the cash required to make good on its offer."*

12. On 15 February 2011, BCI made an announcement to ASX that it believed that the article was highly misleading. It said that it had been in recent discussions with ConsMin regarding the scheme and was unable to confirm ConsMin's intention with respect to the scheme.

13. On 9 March 2011, Regent Pacific was provided with a draft copy of BCI's expert report.

14. On 10 March 2011, Regent Pacific provided a competent person's report and valuation report to BCI.

15. In a letter of 10 March 2011, ConsMin responded to a written request dated 4 March 2011 from Regent Pacific that it was not in a position to provide Regent Pacific with an unequivocal position as to how it would vote its shares in BCI in the proposed transaction.[1]

16. On 14 March 2011, Mr Gibson telephoned Mr Kiernan to indicate Regent Pacific's intention to terminate the SIA. This was followed by a letter that Regent Pacific intended to publicly withdraw its recommendation of the necessary Regent Pacific shareholder resolutions in reliance on clause 10.2 of the SIA and, accordingly, it was terminating the SIA pursuant to clause 15.1(d) with immediate effect.

17. Clause 10.2 of the SIA provides:

> *The Regent Pacific Board may change or withdraw its recommendation, and any Regent Pacific Director may announce his intention to vote against the Regent Pacific Shareholder Resolutions or to abstain from voting on the Regent Pacific Shareholder Resolutions any Regent Pacific Shares in respect of which they have the power to direct a vote, if the Regent Pacific Board has determined in good faith, having received a specific written opinion from a Senior Counsel on the matter, that its fiduciary and statutory duties to Regent Pacific (including having regard to the best interests of holders of Regent Pacific Shares) require it do so.*

18. Clause 15.1(d) of the SIA provides:

> *Regent Pacific may terminate this agreement at any time before 8.00 am on the Second Court Date by notice in writing to [BCI]:*

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[1] On 16 March 2011, ConsMin made a public statement that included the following: "*On 10 March 2011 Consmin responded to a written request from Regent Pacific in which Regent Pacific sought Consmin's unequivocal support for the takeover of [BCI]. Consmin confirmed to Regent Pacific at that time that it was awaiting the explanatory statement and Independent Expert's Report before deciding its position. Consmin believes that all [BCI] shareholders have a right to this information and due process before committing a position on the voting of their shares*"

(d) if the Regent Pacific Board publicly changes or withdraws its recommendation;

19. On 15 March 2011, Regent Pacific announced the Regent Pacific board's withdrawal to the HKSE.

20. Correspondence has passed back and forth between the solicitors for BCI and the solicitors for Regent Pacific.

APPLICATION

21. By application dated 21 March 2011, BCI sought a declaration of unacceptable circumstances. It submitted that Regent Pacific:

    (a) had no basis for terminating the SIA (in that the board had not validly determined that its fiduciary duties required it do so in accordance with clause 10.2 of the SIA) and

    (b) was attempting to walk away from a publicly proposed control transaction at its election, contrary to the certainty required to maintain an efficient, competitive and informed market for control.

22. It submitted that the effect of the circumstances was that:

    (a) the acquisition of control over BCI shares was not taking place in an efficient, competitive and informed market

    (b) there was a lack of adequate information in the market for BCI shares (where shareholders will have traded or not traded on the understanding that the scheme would be put to members) and

    (c) as far as practicable, BCI shareholders did not have a reasonable and equal opportunity to participate in any benefits that may accrue to them through the publicly proposed scheme.

Final orders sought

23. BCI sought final orders to the effect that:

    (a) the purported termination of the SIA by Regent Pacific was void

    (b) Regent Pacific be required to proceed in accordance with the SIA and

    (c) neither Regent Pacific nor its board could rely on clause 10.2 or 15.1(d).

DISCUSSION

24. When a scheme proposal is announced, the parties to the proposal should ensure that the announcement is either accompanied by a copy of the scheme implementation agreement or includes a summary of those provisions of the agreement necessary to ensure that, when the full agreement is published (usually in the scheme booklet), the market does not become aware that the proposal is in

fact less favourable than was announced.[2] This would include dealing in the announcement with matters such as conditions, termination rights, exclusivity provisions and break fees. Such disclosure is necessary to ensure that there is an efficient, competitive and informed market for the acquisition of control over shares in the target following the announcement.

25. Here, neither Regent Pacific nor BCI disclosed to the market the right in clause 15.1(d) for Regent Pacific to terminate the SIA if its directors changed their recommendation that Regent Pacific shareholders vote in favour of the scheme. It was that right that was subsequently relied upon. A summary of the key terms of the agreement was provided to the market in the announcement of BCI. It should have included all termination rights.

26. Even a sophisticated reader of the announcements would not have inferred that Regent Pacific had the termination right that it ultimately relied on. The announcements stated that Regent Pacific was obliged to seek approval from its shareholders under HK Listing Rules, and that a break fee was payable if that approval was not obtained. Nowhere did they make it clear that Regent Pacific could terminate the agreement before seeking that approval where its directors changed their recommendation that its shareholders support the transaction.

27. The termination right in clause 15.1(d) was not a common right found in schemes, although even if it had been we are inclined to think that it could not have been relied upon without causing unacceptable circumstances. This is because its absence from the summary of material terms disclosed would be likely to have led the market to believe that the right was not present in this scheme. This is even more strongly the case here because of the inclusion in the BCI announcement of a detailed summary of the termination rights.

28. The existence of the SIA had a significant effect on the market for BCI shares. As the application makes clear, from 21 January 2011, when the scheme was announced, significantly increased volumes of trading took place. From 13 February 2011, when the "Business insider" article was published, the price of BCI shares fell. On 15 March 2011, when Regent Pacific announced the termination of the SIA, the BCI share price fell significantly more (in the order of 15%).

29. Regent Pacific submitted that market integrity had not been affected by non-disclosure of clause 15.1(d), including because there were always risks that the scheme may not proceed. Regent Pacific pointed to the fact that the scheme was conditional on, among other things, BCI and Regent Pacific shareholder approval and continuity of the financing, and that this had been made clear in the announcement on 21 January 2011. We think that this argument misses the point. While those risks were appreciated by the market from 21 January 2011, the fact that Regent Pacific could terminate the transaction if its own directors changed their recommendation was a transaction risk that was not appreciated by, and would have had an effect on, the market during the relevant period. On this point, ASIC submitted, and we agree, that the termination right in clause 15.1(d) "*gave*

[2] Similar to s631 of the *Corporations Act 2001* (Cth) for bids. See also s1041E

rise to a significant failure risk, particularly as it provided an avenue for Regent Pacific to terminate the proposal as a result of events initiated by its own board." The submission by Regent Pacific that there was no evidence that trading would have proceeded differently if clause 15.1(d) had been disclosed is unpersuasive. There is no market replay with the disclosure to compare against. But there was clearly market sensitivity to the proposed scheme going ahead, as the fall in the share price on publication of the article and on termination of the SIA showed.

30. In our view, the proponents of a scheme, both the acquirer and the target, have a responsibility for ensuring that those provisions, the disclosure of which is necessary to ensure an efficient, competitive and informed market for target shares, are in fact disclosed. However, Regent Pacific submitted that it should not be precluded from relying on the termination right because it was not responsible for the disclosure of the key terms of the SIA. It submitted that its announcement was made in accordance with the rules of the HKSE and that the announcement to the ASX was a BCI announcement for which it could not be held responsible. We do not agree.

31. While it may be that the Regent Pacific announcement was pre-vetted by the HKSE, we do not take that to mean disclosure of the termination right in clause 15.1(d) was prohibited. Moreover, the submission did not go so far as to say that HKSE took responsibility for ensuring that all material terms were included.

32. In relation to the BCI announcement, the SIA in any event makes it clear that the announcement by BCI was to be in a form agreed by the parties. Regent Pacific submitted that, despite this, the announcement had not actually been agreed. We do not think Regent Pacific can now validly make this argument.

33. Even on Regent Pacific's submissions, it is not clear that Regent Pacific's suggested changes to the disclosure would have addressed the non-disclosure of the termination right. In the course of correspondence Regent Pacific marked up a draft of the BCI announcement. It added a summary of Regent Pacific's right to terminate the agreement if a majority of the board of BCI publicly changed its recommendation. It also added a note that it "*might be worth Middletons reviewing these termination disclosures against clause 15 of the SIA for consistency*." In our view neither the addition (ie, the mark up) nor the note supports the submission. The addition specifically referred to BCI changing its recommendation, not Regent Pacific doing so.

34. Moreover, we do not think that a reference to BCI's right to terminate because the Regent Pacific board changed its recommendation can have implied that Regent Pacific could terminate if the Regent Pacific board changed its recommendation. If anything, in our view, it implied the contrary – that Regent Pacific did not have an equivalent right.

35. We also point out that, as stated in Guidance Note 1, the existence of unacceptable circumstances does not depend on conduct or intention.[3] The existence of unacceptable circumstances is not based on fault.

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[3] GN 1 'Unacceptable Circumstances' para [24]

36. In *AMP (No 1)*,[4] the Panel declared that unacceptable circumstances existed. In that matter the prospectus for the float of a trust summarised agreements under which the trust would acquire interests in shopping centres. The summaries did not disclose the possibility that a change of trustee without consent activated pre-emptive rights to purchase those interests. Centro proposed to bid for all the units in the trust and, if it acquired a majority of the units, to replace the responsible entity. There was some doubt about whether the pre-emptive rights would be activated in the circumstances. If they were, then unit holders who remained in the minority might have found themselves without a significant asset of the trust and instead investors in a cash box. One basis for the Panel's declaration and orders was that the availability of pre-emptive rights had not been disclosed, and this was inconsistent with an efficient competitive and informed market. The Panel ordered that the pre-emptive right could not be enlivened as a direct or indirect result of the bid.

37. The decision was affirmed in *AMP (No 2)*.[5] In response to a submission that the Panel could not make an order affecting AMP Life because it had not engaged in unacceptable circumstances, the review Panel said:

> *45. The Panel rejects this argument entirely for two reasons. The first is that it misses the fact that the CLERP Act reform of the Panel's legislation expressly and deliberately removed any reference to "unacceptable conduct" and deliberately directed the Panel to look to the circumstances affecting target unitholders or shareholders and to remedy those circumstances by its orders. Looking to the person who caused the unacceptable circumstances may be relevant in assessing the appropriateness of any orders, which the Panel has done, but the fact that a person was not directly involved in causing any unacceptable circumstances is not a bar to the Panel's power as AMP Life contends.*
>
> *46. The second reason is that the Panel has found that AMP Life did participate in bringing about, or was aware of, the circumstances in existence today. The Panel sets out at paragraphs 58(b) & (c) how and why it considers AMP Life participated in the bringing about, or was aware, of today's circumstances.*[6]

38. BCI submitted that a proper interpretation of clause 10.2 of the SIA, on which the termination right in clause 15.1(d) was founded, was narrower than Regent Pacific was asserting. We do not need to, and do not, make any finding on this.

39. ASIC submitted that the market for control of BCI shares was not efficient competitive and informed for two reasons:

    (a) the market was entitled to expect that the summary would reflect all the material terms and

    (b) the market was entitled to expect that the parties would act consistently with the announcement.

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[4] *AMP Shopping Centre Trust (No 1)* [2003] ATP 21
[5] *AMP Shopping Centre Trust (No 2)* [2003] ATP 24
[6] [2003] ATP 24 at [45]-[46]

40. ASIC drew an analogy with section 631. We do not need to go this far. Section 631 (discussed for example in *SSH Medical* and *Brisbane Broncos 03)*[7] is an example of the principle in section 602(a).

DECISION

Declaration

41. It appears to us that the circumstances are unacceptable having regard to the purposes of chapter 6 set out in section 602, namely the efficient, competitive and informed market principle in section 602(a). Accordingly, we made the declaration set out in Annexure A and consider that it is not against the public interest to do so. We had regard to the matters in s657A(3).

Orders

42. Following the declaration, we made the final orders set out in Annexure B.

43. The order reflects one of the orders BCI sought. Under s657D the Panel's power to make orders is very wide. The Panel is empowered to make 'any order'[8] if 4 tests are met:

    (a) it has made a declaration under s657A. This was done on 5 April 2011.

    (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. We are satisfied that our order does not unfairly prejudice any person. It addresses directly the circumstances that are unacceptable, namely non-disclosure of clause 15.1(d) and subsequent reliance upon it. While the order limits Regent Pacific's ability to rely on clause 15.1(d), it does not unfairly prejudice Regent Pacific. It does not, for example, affect other terms of the SIA (about which we make no comments other than the one in paragraph 44).

    (c) it gives any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. This was done on 1 April 2011. Each party made submissions and/or rebuttals.

    (d) it considers the orders appropriate to either protect the rights and interests of persons (or groups) affected by the unacceptable circumstances, or any other rights or interests of those persons, or ensure that a takeover or proposed takeover proceeds as it would have if the circumstances had not occurred. The control transaction here is a scheme of arrangement not a bid. The orders protect the rights and interests of persons affected by the unacceptable circumstances by stopping Regent Pacific relying on a condition that the market was unaware of. This removes the undisclosed risk.

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[7] *SSH Medical* Ltd [2003] ATP 32, *Brisbane Broncos Ltd 03* [2002] ATP 3

[8] Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

44. ASIC submitted (among other things) that "*… the Panel may wish to consider whether the actions of Regent Pacific may mean that there is another ground of termination available to Regent Pacific which is a direct result of its purported reliance on clause 15.1(d) (e.g. a termination right based on the termination of the financing arrangements). If another such ground of termination were available, that would limit the ability of the proposed orders to fully address the unacceptable circumstances…*" In other words, if financing for the scheme has been withdrawn because of Regent Pacific's reliance on clause 15.1(d), Regent Pacific should not be allowed to rely on a 'finance condition' to terminate the SIA. There is some merit in ASIC's submission, but on balance we do not think we should make such an order on the information before us.

Guy Alexander
President of the sitting Panel
Decision dated 5 April 2011
Reasons published 12 April 2011

Advisers

Party	**Advisers**
BCI	Middletons Cochrane Lishman Carson Luscombe Argonaut Capital Ltd
Regent Pacific	Clayton Utz Standard Chartered Bank (until 18 March 2011)

Australian Government
Takeovers Panel

Annexure A

CORPORATIONS ACT
SECTION 657A
DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

BC IRON LIMITED

1. BC Iron Limited (**BCI**) is an ASX listed company (ASX code: BCI).
2. On 20 January 2011, BCI entered a scheme implementation agreement with Regent Pacific Group Limited (**RP**), which owns or controls 19.49% of BCI, and RP's wholly owned subsidiary, Regent Pilbara Pty Ltd (**Pilbara**).
3. Under the agreement, Pilbara would acquire by scheme of arrangement all the fully paid ordinary shares in BCI (except those already held) for $3.30 per share.
4. Clause 10.2 of the agreement provided:

   The Regent Pacific Board may change or withdraw its recommendation, and any Regent Pacific Director may announce his intention to vote against the Regent Pacific Shareholder Resolutions or to abstain from voting on the Regent Pacific Shareholder Resolutions any Regent Pacific Shares in respect of which they have the power to direct a vote, if the Regent Pacific Board has determined in good faith, having received a specific written opinion from a Senior Counsel on the matter, that its fiduciary and statutory duties to Regent Pacific (including having regard to the best interests of holders of Regent Pacific Shares) require it do so.

5. Clause 15.1(d) of the agreement provided:

   Regent Pacific may terminate this agreement at any time before 8.00 am on the Second Court Date by notice in writing to [BCI]:

   (d) if the Regent Pacific Board publicly changes or withdraws its recommendation;

6. Under clause 8 of the agreement, BCI was required to issue an announcement to ASX. "Announcement" was defined as an announcement by BCI in the form agreed by the parties.
7. BCI made an announcement to ASX dated 21 January 2011 and RP made an announcement to the Hong Kong Stock Exchange (**HKSE**) dated 20 January 2011 of the agreement. Each announcement contained a summary of the key terms of the agreement, including termination rights, but neither announcement referred to RP's right to terminate the agreement based on clause 15.1(d).
8. On 14 March 2011, RP advised BCI that the RP Board intended to publicly withdraw its recommendation of the necessary RP shareholder resolutions in reliance on clause

10.2 of the SIA and that RP was terminating the SIA pursuant to clause 15.1(d) with immediate effect from the time of that withdrawal. On 15 March 2011, RP announced its withdrawal to the HKSE.

9. By reason of the non-disclosure of RP's right to terminate based on clause 15.1(d) and RP's subsequent reliance on the right, the acquisition of control over voting shares in BCI has not taken place in an efficient, competitive and informed market.

10. It appears to the Panel that the circumstances are unacceptable having regard to the purposes of Chapter 6 set out in section 602.

11. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3).

DECLARATION

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of BCI.

Alan Shaw
Counsel
with authority of Guy Alexander
President of the sitting Panel
Dated 5 April 2011

Australian Government
Takeovers Panel

Annexure B
CORPORATIONS ACT
SECTION 657D
ORDERS

BC IRON LIMITED

The Panel made a declaration of unacceptable circumstances on 5 April 2011.

THE PANEL ORDERS

Regent Pacific Group Limited and Regent Pilbara Pty Ltd cannot rely on clause 15.1(d) of the Scheme Implementation Agreement to terminate that agreement (the Scheme Implementation Agreement was referred to in BC Iron Limited's announcement to ASX on 21 January 2011 and released to the ASX on 22 March 2011).

Alan Shaw
Counsel
with authority of Guy Alexander
President of the sitting Panel
Dated 5 April 2011