



Australian Government

Takeovers Panel

**Reasons for Decision
Crescent Gold Limited 02
[2011] ATP 14**

Catchwords:

Acceptances, association, bidder's statement, compulsory acquisition, conditional offer, convertible notes, decline to conduct proceedings, defeating conditions, effect on control, lock-up device, no-talk, off-market takeover bid, proxy, relevant interest, shareholder approval, unacceptable circumstances, undertaking, voting, voting exclusion statement

Corporations Act 2001 (Cth), sections 12, 53, 606, 608(8), Item 7 of s611

Corporations Regulations 2001 (Cth), regulation 1.0.18

Class Order 04/631

Companies Act 1961 (Vic), Companies Act 1971, Companies Act 1975, Uniform Companies Acts, Companies Act 1981 (Cth), Companies (Acquisition of Shares) Act 1980 (Cth), Corporations Law

Regulatory Guide 171: Anomalies and issues in the takeover provisions, Guidance Note 7: Lock-up devices

National Foods Ltd (No 1) [2005] ATP 8

INTRODUCTION

1. The Panel, Martin Alciaturi, Graham Bradley (sitting President) and Jane Sheridan, declined to conduct proceedings on an application by Stone Mining Limited seeking a declaration of unacceptable circumstances in relation to the affairs of Crescent Gold Limited. The applicant submitted that the shareholders in Crescent who had accepted Focus Minerals Limited's conditional takeover offer had become associates of Focus by accepting the offer. The reason was that, under the terms of the offer, Focus could control the voting of those shares if the offer became unconditional.
2. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.
3. In these reasons, the following definitions apply.

Accepting Shareholders	Shareholders who accepted the Focus takeover offer
BIA	The Bid Implementation Agreement between Crescent and Focus announced on ASX on 20 June 2011
Crescent	Crescent Gold Limited
EGM	The extraordinary general meeting of Crescent shareholders held on 18 August 2011
Focus	Focus Minerals Limited
June Loan	A \$10 million facility provided by Focus to Crescent by way of a secured loan and convertible note agreement
May Loan	A \$3 million facility provided by Focus to Crescent by way of a secured loan and convertible note agreement
Stone	Stone Mining Limited

FACTS

4. Crescent is an ASX listed company (ASX code: CRE).
5. Focus is an ASX listed company (ASX code: FML).
6. Stone is a substantial holder of Crescent holding approximately 11.85% of the ordinary shares on issue.
7. In May 2011, Focus advanced the May Loan to Crescent for the purposes of funding Crescent's exploration and mining operations in Western Australia.
8. On 17 June 2011, Focus advanced the June Loan to Crescent and the parties entered into the BIA.
9. Both the May Loan and the June Loan were convertible into convertible notes at the election of Crescent, conditional on shareholder approval if necessary. The convertible notes were convertible into shares in Crescent (on a one for one basis) and options (on a one for two basis) upon the election of the holder.
10. On 20 June 2011, Crescent and Focus made a joint announcement that they had entered into the BIA under which Focus had agreed to make a conditional off-market takeover offer for all the shares in Crescent.
11. Clauses 11.10(c)(vii)(A) and (B) of the takeover offer provided:

"By signing and returning the Acceptance Form, or otherwise accepting this Offer, you will be deemed to have:

...

vii. *on this Offer, or any takeover contract resulting from acceptance of this Offer, becoming unconditional:*

A. *irrevocably appointed Focus and each of its Directors from time to time individually as your agent and attorney on your behalf to:*

aa. *attend and vote in respect of your Crescent Shares at all general meetings of Crescent;*

...

B. *agreed not to vote in person at any general meeting of Crescent or to exercise (or purport to exercise) in person, by proxy or otherwise, any of the powers conferred on the Directors of Focus by section 11.10(c)(vii)(A); of this Bidder's Statement"*
12. On 20 July 2011, Crescent convened the EGM seeking shareholder approval under Item 7 of s611¹ (among other things) for:
 - (a) the issuance of 60 million convertible notes to Focus pursuant to the conversion of the May Loan
 - (b) the issuance of 200 million convertible notes to Focus pursuant to the conversion of the June Loan

¹ References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

Takeovers Panel

Reasons - Crescent Gold Limited 02
[2011] ATP 14

- (c) the issue of shares to Focus upon conversion of the convertible notes
 - (d) the issue of shares to Focus upon conversion of the options and
 - (e) the increase of Focus' voting power as a result of the issuance of the shares issued to Focus on conversion of the convertible notes and exercise of the options.
13. On 18 August 2011, the EGM was held and Crescent shareholders approved the resolution. At the time of the EGM, Focus' takeover bid was still conditional and Focus had received acceptances from Accepting Shareholders for 65.95% of Crescent's shares.
14. On 18 August 2011, after the EGM, Focus declared the offer free from defeating conditions and extended the offer period to 31 August 2011.
15. In response to a request made in the application, Crescent provided the following details of the votes cast on the resolutions by Accepting Shareholders:

	Total Votes	Votes of Accepting Shareholders	Votes of other shareholders
Votes For	542,811,049	520,483,941	22,327,108
Votes Against	130,221,137	33,834	130,187,303
Abstain	1,755,117	1,690,617	64,500

APPLICATION

16. By application dated 19 August 2011, Stone sought a declaration of unacceptable circumstances.
17. Stone submitted that Accepting Shareholders were associates of Focus because it was a term of the takeover offer that Focus could control the votes for those shares if the takeover offer became unconditional. Therefore, as required by Item 7 of s611, votes from Accepting Shareholders should have been disregarded at the EGM.
18. Stone submitted that Crescent not disregarding the votes of Accepting Shareholders was likely to inhibit the acquisition of control over Crescent taking place in an efficient, informed and competitive market on the bases that:
- (a) by converting the convertible notes into Crescent shares, Focus would increase its shareholding in, and ability to take control of, Crescent
 - (b) Stone would have its shareholding in Crescent diluted on conversion of the convertible notes and
 - (c) there would be an increased likelihood that Focus will reach the compulsory acquisition threshold and acquire Stone's shares in Crescent, reducing the ability of Stone to proceed with a superior competing proposal.

Takeovers Panel

Reasons – Crescent Gold Limited 02 [2011] ATP 14

19. Stone submitted that the circumstances gave rise to unacceptable circumstances due to:
- (a) a failure to comply with Item 7 of s611, by Crescent counting votes in favour of the resolution by Accepting Shareholders who were associates of Focus and a subsequent breach of s606 if shares are issued to Focus on conversion of the convertible notes and exercise of the options and
 - (b) the effect on control of Crescent and the acquisition of a substantial interest in Crescent.

Interim orders sought

20. Stone sought interim orders that:
- (a) Focus be prevented from converting the May Loan and the June Loan into convertible notes until the application was determined
 - (b) Focus be prevented from converting the convertible notes into shares in Crescent until the application was determined and
 - (c) To the extent that the convertible notes or options were converted into shares before the application was initially considered, Focus be prevented from disposing of, or transferring, the shares or exercising voting rights attaching to the shares.
21. Stone also sought interim orders that Crescent and Focus provide details to the Panel of the votes in favour of the resolution by Accepting Shareholders.
22. Focus confirmed that neither the May Loan nor the June Loan had been converted into convertible notes and offered an undertaking that it would not issue a conversion notice directing Crescent to convert the May Loan or the June Loan into convertible notes.
23. The undertaking offered by Focus and the information provided by Crescent negated any need for interim orders.

Final orders sought

24. In the event that the resolution was not properly approved at the EGM, Stone sought final orders that:
- (a) the resolution was not approved at the EGM for the purposes of Item 7 of s611
 - (b) to the extent that Crescent had issued shares to Focus pursuant to conversion of the convertible notes, the shares vest with ASIC and are sold with the proceeds being remitted to Focus and
 - (c) a declaration that, following divestment, Focus be prohibited from acquiring any further shares in Crescent or increasing its voting power in Crescent other than in a manner permitted by s611.

DISCUSSION

25. The key issue raised in the application is whether shareholders who accept a takeover bid become associates of the bidder while the bid remains conditional.

Preliminary submissions

26. Both Crescent and Focus made preliminary submissions that the Panel should not conduct proceedings.
27. Focus submitted that target shareholders should not be considered to be associates of a bidder merely because they have accepted a conditional takeover offer. It submitted that otherwise they are effectively disenfranchised from their voting rights.
28. Crescent submitted that there was no association within the plain meaning of the term and that Stone's application was based on a technical argument which relied on an unduly wide reading of the definition of "affairs" in s53.
29. Crescent made other preliminary submissions but we do not need to consider them.

Definition of associates

30. Section 12 contains the definition of "associate" for the purpose of Chapter 6.

"(2) For the purposes of the application of the associate reference in relation to the designated body, a person (the second person) is an associate of the primary person if, and only if, one or more of the following paragraphs applies:

- (a) ...*
- (b) the second person is a person with whom the primary person has, or proposes to enter into, a relevant agreement for the purpose of controlling or influencing the composition of the designated body's board or the conduct of the designated body's affairs;*
- (c) the second person is a person with whom the primary person is acting, or proposing to act, in concert in relation to the designated body's affairs."*

31. Regulation 1.0.18 provides that the definition of "affairs" in s53 applies to both sections 12(2)(b) and (c). Section 53 includes references to ownership of shares in paragraph (e) and the power to exercise control over votes in paragraph (f).

History and policy of the concept of associates

32. The concept of 'association' was first introduced in the 1970s in the *Uniform Companies Acts* to aggregate relevant interests into 'entitlements' (which operated in the same way that voting power now aggregates parties' relevant interests) for the purpose of the takeover threshold.² The policy intention was to aggregate the interests of parties who were seeking to gain control of a company.
33. The definition of associate used in the *Uniform Companies Acts* was redrafted for inclusion in the *Companies Act 1981* (Cth) and the *Companies (Acquisition of Shares) Act*

² For example, the *Companies Act 1961* (Vic) as amended by the *Companies Act 1971* and the *Companies Act 1975*. See also discussion in *Company Law Advisory Committee Second Interim Report to the Standing Committee of Attorneys-General on Substantial Shareholdings and Takeover Bids* Government Printer, Sydney 1970

1980 (Cth). The definition underwent further legislative surgery when moved into the *Corporations Law*.

34. The definition in the *Corporations Law* operated to make buyers and sellers of shares associates.³ This included the acquisition of shares by way of a takeover offer. However, unlike the previous definition, for the purpose of calculating a person's 'entitlement', only the shares the subject of the acquisition were counted (as opposed to all the shares the seller owned).⁴
35. The definition was again amended during the CLERP reforms by the Simplification Task Force, which yielded the current definition in s12.⁵ This amendment removed the provisions which made buyers and sellers of shares associates.⁶ Instead, agreements which related to the buying and selling of shares were felt to be adequately covered by the definition of a relevant interest (now in s608(8)).⁷ The stated policy was that "*The concept of associate in these provisions is mainly directed at persons who will or may act together to achieve common goals.*"⁸
36. This shows a clear legislative intention to limit association for the purposes of Chapter 6 to exclude agreements for the sale and purchase of shares, without more. In this case there is no evidence that there was anything more.

Does acceptance of the conditional bid give rise to an association?

37. The effect of the terms of Focus' off-market takeover offer is that target shareholders who accept the bid retain their voting rights while the bid remains conditional.
38. While the definition of "affairs" in s53 expressly includes the power of persons to exercise, or to control the exercise of, the rights to vote attached to shares, it must be read in its legislative context.
39. In our view, acceptance of the takeover offer creates a relevant interest for the bidder, but not an association. Absent a case that there is a common goal of seeking to "*control or influence the conduct of a company's affairs ... aimed at exerting pervasive control or influence over the company's direction and management,*"⁹ we do not accept that an association as the legislation intends has been established here.
40. Stone submitted that "*Accepting Shareholders had a clear vested interest to approve the Resolution, an interest that was not shared with Shareholders who had not yet decided whether to accept the Focus Offer.*"
41. We do not agree. The same package is available to all shareholders. Those shareholders who have not yet made up their minds in relation to the Focus bid have the same interest in having the benefit of an unconditional offer.

³ See s12(1)(f) and (g) of the *Corporations Law* related to the acquisition and disposal of shares respectively
⁴ Section 609 of the *Corporations Law*

⁵ Section 12 is further modified by Class Order 04/631

⁶ Specifically, section 12(1)(g) and (f) of the *Corporations Law* were excluded from the new definition

⁷ See *Takeovers Proposal For Simplification*, Corporations Law Simplification Program, Simplification Task Force, Attorney-General's Department (January 1996) at 15 - 16

⁸ *Takeovers Proposal For Simplification*, Corporations Law Simplification Program, Simplification Task Force, Attorney-General's Department (January 1996) at 15

⁹ *Re National Foods Ltd (No 1)* [2005] ATP 8 at [55] - [58]. See also RG171 at 171.199

Takeovers Panel

Reasons – Crescent Gold Limited 02
[2011] ATP 14

42. In our view, shareholders were free to act and vote independently, according to their own self-interest. While there may be some alignment of interests, this is insufficient to amount to an association.

Other matters

43. Stone submitted that if the convertible notes were issued to Focus and then converted into shares, it may have its shareholding in Crescent diluted and Focus would be more likely to reach the compulsory acquisition threshold. This would reduce Stone's ability to make a competing offer for Crescent.
44. Whether or not Stone has the capacity to block compulsory acquisition does not affect its ability to make a competing offer. Stone is free to make a competing offer for Crescent regardless of its shareholding in Crescent.
45. Stone also submitted that Crescent had been restrained by the 'no-talk' provision in the BIA from responding to its attempts to make a superior cash offer for Crescent.
46. Crescent submitted that *"there was no proposal for the Crescent board to consider, given that no details were provided as to the form of the proposal, price, conditions, timing due diligence sought or whether Stone has the funding required to make a bid."*
47. The 'no-talk' provision is subject to a fiduciary carve-out consistent with the Panel's guidance in Guidance Note 7. As no arguments were made regarding the unacceptability of the 'no-talk' provision, we did not consider it further.

DECISION

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

Orders

49. Given that we have made no declaration of unacceptable circumstances, we made no final orders, including as to costs.

Graham Bradley
President of the sitting Panel
Decision dated 26 August 2011
Reasons published 29 August 2011

Takeovers Panel

Reasons - Crescent Gold Limited 02
[2011] ATP 14

Advisers

Party	Advisers
Stone	Steinepreis Paganin
Crescent	Gilbert + Tobin
Focus	Mallesons Stephen Jaques