



Australian Government

Takeovers Panel

**Reasons for Decision
Gladstone Pacific Nickel Limited 02
[2011] ATP 16**

Catchwords:

Rights issue – not underwritten – need for funds – potential effect on control – prospectus disclosure – compulsory acquisition – undertaking – withdrawal of prospectus – decline to make a declaration

Corporations Act 2001 (Cth), sections 602, item 10 of s611, s657A

ASIC Act section 201A

Guidance Note 17 – Rights Issues

Multiplex Prime Property Fund 03 [2009] ATP 22, Anaconda Nickel Limited 02-05 [2003] ATP 04

INTRODUCTION

1. The Panel, Garry Besson, Peter Hay (sitting President) and Heather Zampatti, declined to make a declaration of unacceptable circumstances in relation to the affairs of Gladstone Pacific Nickel Limited. The application concerned a proposed 11 for 1 non-renounceable rights issue. The Panel was minded to declare that the Rights Issue gave rise to unacceptable circumstances as GPNL did not take all reasonable steps to minimise the potential control effect of the Rights Issue and the disclosure in the Prospectus was inadequate. However, GPNL announced on 9 September 2011 that the Prospectus had been withdrawn. The Panel decided that the withdrawal of the Prospectus had removed the likelihood of unacceptable circumstances.

2. In these reasons, the following definitions apply.

Ernst & Young	Ernst & Young Transaction Advisory Services Limited
GPNL	Gladstone Pacific Nickel Limited
QNI	QNI Resources Pty Ltd
Palmer Companies	Companies owned or controlled by Mr Clive Palmer
Project	Gladstone Nickel Project
Prospectus	The prospectus lodged with ASIC on 12 August 2011
Rights Issue	The proposed 11 for 1 non-renounceable rights issue for the issue of up to 780,292,689 shares at \$0.08 per share to raise approximately \$62.4 million
Robash	Robash Pty Ltd, the applicant before the Panel
Waratah	Waratah Coal Pty Ltd

FACTS

3. GPNL is an unlisted Australian public company with more than 50 members. From 17 March 2005 to 24 November 2010, GPNL was listed on the Alternative

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Investment Market (AIM) of the London Stock Exchange. GPNL shares last traded on the AIM at around GBP 0.145 per share.¹ GPNL allowed itself to be delisted from the AIM.

4. GPNL is developing the Project which comprises a nickel refinery in Gladstone, central Queensland. The refinery will be fed by a blend of nickel laterite ore from mining tenements to be owned or acquired by GPNL.
5. On 2 July 2009, BHP Billiton Limited announced that Palmer Companies had agreed to purchase the Yabulu Refinery, a nickel and cobalt refinery near Townsville, Queensland. GPNL had attempted to purchase the refinery.
6. On 6 September 2010, QNI, a company ultimately owned by Mr Palmer, lodged a bidder's statement in relation to an unconditional cash offer for all the ordinary shares in GPNL for GBP 0.14 per ordinary share. At the close of the offer, QNI had received acceptances from shareholders holding approximately 5.4% of GPNL shares. Subsequently, QNI transferred the shares it held to Waratah, a company ultimately owned by Mr Palmer, for GBP 0.14² per share.
7. On 6 June 2011, Waratah lodged a bidder's statement in relation to an unconditional cash offer for all the ordinary shares in GPNL for \$0.05 per ordinary share. At the close of the offer on 1 August 2011, Waratah had received acceptances from shareholders holding less than 1% of GPNL shares. Subsequently, Waratah transferred the shares it held to a related body corporate, Fairway Coal Pty Ltd, for \$1.00.
8. On 29 July 2011, Robash filed and served an application for leave to bring proceedings, on behalf of and in the name of GPNL, against Mr Palmer and entities owned by him for alleged breaches of duties by Mr Palmer arising out of the acquisition of the Yabulu Refinery by the Palmer Companies.
9. On 5 August 2011, Mr Palmer commenced proceedings against Mr Robert Pearce, the owner of Robash, in the Supreme Court of Western Australia and proceedings against Mr Pearce, Robash and others in the Supreme Court of Queensland. The Western Australian proceedings concern a claim in defamation and the Queensland proceedings concern a claim of misleading and deceptive conduct relating to Mr Palmer's investment in GPNL.
10. On 12 August 2011, GPNL lodged its Prospectus in relation to the Rights Issue. The Rights Issue was scheduled to open on 22 August 2011 and close at 5.00pm AEST on 2 September 2011. The Rights Issue is not underwritten and there is no shortfall facility or other dispersion strategy. GPNL announced that the minimum amount to be raised was \$25 million.

¹ At the time this equated to approximately A\$0.23

² At the time this equated to approximately A\$0.23

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11. On 12 August 2011, GPNL had 70,935,699 shares on issue. Relevant shareholdings in GPNL as at this date were approximately as follows:
 - (a) Palmer Companies: 39,984,226 shares (56.37%)
 - (b) Robash³: 1,612,100 shares (2.27%) and
 - (c) RAB Special Situations (Master) Fund Limited: 16,367,642 shares (23.07%).

APPLICATION

Declaration sought

12. By an application dated 19 August 2011, Robash sought a declaration of unacceptable circumstances. Robash submitted (among other things) that:
 - (a) the Rights Issue was punitive and there had been no attempt to mitigate the effect of the offer on shareholders who do not participate in the Rights Issue
 - (b) shareholders had not been adequately informed of the identity of persons who proposed to acquire a substantial interest in GPNL
 - (c) shareholders, other than Palmer Companies, were unlikely to have an equal opportunity to participate in the Rights Issue due to its ratio and pricing and the short offer period and
 - (d) the Rights Issue was an abuse of s611, item 10 as it was being inappropriately used as mechanism to entitle Palmer Companies to proceed to compulsory acquisition of the remaining GPNL shares.
13. Robash also submitted that the disclosure in relation to the Rights Issue in the Prospectus was deficient.

Interim order sought

14. Robash sought an interim order that GPNL not issue the Prospectus until the application had been determined.
15. On 23 August 2011, we accepted an undertaking from GPNL (Annexure A) that it would not issue the Prospectus before 19 September 2011 or thereafter without first giving the Panel and the parties 48 hours' notice of its intention to do so. Accordingly, we did not make the interim order sought by Robash.

Final orders sought

16. Robash sought final orders that:
 - (a) the Rights Issue be prevented from proceeding and
 - (b) any applications received by GPNL under the Rights Issue be considered void and all application money be returned to applicants.

³ Anroca Pty Ltd, an associate of Robash, has an option to acquire approximately a further 14.1% from RAB Special Situations (Master) Fund Limited

DISCUSSION

Conduct proceedings

17. GPNL made preliminary submissions to the effect that the Panel should decline to conduct proceedings because:
 - (a) parts of the application had been presented in a vexatious manner in that the Panel was invited to draw conclusions about the effects and merits of other proceedings currently on foot and
 - (b) the application was not consistent with the Panel’s procedural rules given its length.
18. We decided to conduct proceedings but did not issue a brief until Robash submitted a revised application in compliance with procedural rule 3.1.1, which it did.

Effects of the Rights Issue on control of GPNL

Pricing, ratio and discount

19. The Rights Issue is not attractive to minority shareholders and is highly dilutive.
20. To maintain their relative equity and voting power in GPNL, minority shareholders need to subscribe for 11 new shares under the Rights Issue for each share held, at a total cost of \$0.88. GPNL shares last traded on the AIM at approximately \$0.23. In other words, to maintain their equity in GPNL, minority shareholders need to invest an amount almost four times the price of the shares when last quoted on the AIM. Consequently, the Rights Issue would have a significant dilutive effect on existing GPNL shareholders who did not take up their new shares.
21. Secondly, the ratio is so high that the Rights Issue could consolidate Palmer Companies’ control of GPNL. The high ratio (and the amount shareholders are being asked to contribute to maintain their proportionate interest) means that minority shareholders risk being diluted to below 10%. The Prospectus does not include a statement about whether the Palmer Companies would seek to compulsorily acquire minority shares if they reach a 90% interest⁴ and an explanation of the process to be followed and the rights of the minority if they do so.
22. Robash submitted the following table which sets out the voting power which would have been exercisable by the Palmer Companies and other shareholders following the Rights Issue under various scenarios.

	Palmer's interests	Minorities' interest	Total
Current shareholding	39,984,226	30,951,473	70,935,699

⁴ In *Anaconda Nickel Limited 02-05* [2003] ATP 4 at [72] the Panel mentioned that the rights issue prospectus should have disclosed the intentions of an underwriter who was likely to emerge with control

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	Palmer's interests	Minorities' interest	Total
	56.4%	43.6%	100.0%
Planned 11 for 1 Rights Issue Entitlement			
All shareholders take up their rights	439,826,486	340,466,203	780,292,689
Total shares on Issue after Rights Issue	479,810,713	371,417,676	851,228,389
	56.4%	43.6%	100.0%
No minority shareholders take up their rights	479,810,713	30,951,473	510,762,186
	93.9%	6.1%	100.0%
Number of shares to be taken up for the minorities to maintain > 10%		22,953,846	533,716,032
	479,810,713	3,905,319	533,716,032
	89.9%	10.1%	100.0%

23. With such potential implications for control, we would expect the Rights Issue to contain a number of mechanisms to mitigate the potential control effect. It does not.
24. Although it is usual for a rights issue to be made at a discount to the current market price of the shares, the discount for a single Rights Issue share in this instance is very deep: 66% from the last trades on the AIM, and up to 90% from the values given in the independent expert's reports on the two recent bids for GPNL.⁵ While a deep discount can encourage participation, it also has the potential to exacerbate the dilution.⁶
25. GPNL submitted that the failure of successive bids by QNI and Waratah at GBP 0.14 and \$0.05 respectively "*showed that these comparatively low prices were regarded as unattractive, and therefore the scope to price capital at a substantially higher price did not exist*", and that the board had sought to make the issue attractive "*as a mitigant to the consolidation of Mr Palmer's control of GPNL*".
26. Neither of these arguments holds water. The failure of the bids shows only that many of the minority shareholders thought those prices too low. Robash submitted that the failure of the bids was consistent with shareholders in GPNL being willing to pay substantially more than the bid prices for shares in a rights issue. We agree. Although each Rights Issue share is offered at a discount, shareholders need to buy 11 of them to maintain their interests.

⁵ In relation to the bids by QNI and Waratah, the experts valuation range for GPNL was between GBP 0.382 and GBP 0.768 and \$0.606 and \$1.271 respectively

⁶ Guidance Note 17, at paragraph 13

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No underwriting or other dispersion strategy

27. The Rights Issue is not underwritten and there is no dispersion strategy to mitigate its potential control effect, such as a shortfall facility or backend bookbuild. GPNL did not obtain independent advice as to whether such dispersion strategies may have minimised the potential control effect of the Rights Issue. Nor did GPNL approach any professional underwriters or other investors to ascertain whether they would be prepared to support such a capital raising in the current circumstances.
28. GPNL is unlisted and is controlled by the Palmer Companies. Accordingly, there is unlikely to be a market for the rights. GPNL submitted that “*the Board considered that the only feasible underwriter would be Mr Palmer, but recognising the need to mitigate the control effects of the Offer, it considered this would be inappropriate*”. ASIC and Robash each submitted that a shortfall facility or other dispersion strategy would not cure the potential control effect of the Rights Issue.
29. In our view it was unlikely that GPNL shareholders would apply for shortfall shares given, among other things, the pricing and ratio of the Rights Issue. Moreover, a dispersion strategy would be unlikely to minimise the potential control effect in this instance. Therefore, given the structure of the Rights Issue, even if there was an underwriting or dispersion strategy, that would not mitigate the unacceptable circumstances.

Renounceability

30. Given that GPNL is unlisted, the Rights Issue has to be non-renounceable. That circumstance limited GPNL’s ability to structure the Rights Issue in a way which might mitigate the unacceptable circumstances.

Timing

31. The length of the offer period for the Rights Issue is less than 2 weeks. This did not give GPNL shareholders adequate time to properly consider the Rights Issue because the Rights Issue is likely to receive minimal or no press coverage given GPNL is unlisted and GPNL’s position in the market.
32. We note that the GPNL board did not obtain independent advice regarding the timing of the Rights Issue.
33. Also, GPNL did not have an urgent or compelling need for the funds proposed to be raised (see below) so there was no apparent reason why it was necessary to conduct the Rights Issue over a period as short as 2 weeks.

Absence of an urgent or compelling need for funds

34. Potential control effects are inherent in any large capital raising. The need for funds might be a mitigating factor. In assessing GPNL’s need for funds we looked at its financial position and solvency and the relative amount sought to be raised.
35. GPNL submitted that it needed to raise funds for the acquisition of the key development site for the Project from the Queensland Government and to reach the final investment decision phase for the Project (\$57.5 million to \$75.5 million) and for other purposes it identified.

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36. GPNL further submitted that the land purchase was of such strategic importance that it should be completed as soon as possible within the next 3 years. The payment of \$37 million as consideration for the purchase is to be made no later than 31 December 2015. This does not support the need for this Rights Issue.
37. As at 31 August 2011, GPNL's cash balance was \$6,343,965. GPNL's cash burn is approximately \$1,500,000 per year. The Prospectus states that if only the minimum subscription is raised (i.e. \$25 million) then GPNL will not apply those proceeds to the acquisition of the land. Even if GPNL's current cash balance were combined with the minimum subscription amount this would not be enough to pay for the land. This does not support the need for this Rights Issue.
38. At no stage prior to the close of Waratah's bid did GPNL make mention of any immediate need for funds. Very shortly thereafter, shareholders were informed of GPNL's intention to undertake this significant capital raising. GPNL is not apparently in financial distress, nor is there any suggestion of uncertainty as to whether the company can continue as a going concern.
39. Nothing in the Prospectus, and nothing in the submissions, indicates that GPNL has an urgent or compelling need for funds. The fact that the minimum subscription is less than half the amount which would be raised if the issue was fully subscribed, and that GPNL has recently allowed itself to be delisted from AIM, both point to GPNL having no urgent or compelling need for funds.
40. In *Anaconda Nickel Limited 02-05*⁷ and *Multiplex Prime Property Fund 03*⁸ the Panel found that highly dilutive rights issues were not devices to pass control of the relevant companies to the underwriters of the issue, or otherwise unacceptable because of their effects on control, as the companies were in severe financial difficulty. This is not the case here.

Advice

41. Guidance Note 17 identifies as a relevant factor in considering whether a rights issue that may affect control of a company gives rise to unacceptable circumstances, that the company took and followed advice from financial advisers.
42. The GPNL board obtained advice from Ernst & Young concerning the company's funding needs. In particular, Ernst & Young stated that they were instructed that GPNL "*considers that it needs to raise between \$21m and \$75m in the next two months in order to meet key milestones in the years to come*".
43. The advice given by Ernst & Young did not in our view assist GPNL in one way or the other. The instructions given by GPNL to Ernst & Young were extremely restrictive in the sense that Ernst & Young were not asked to advise on the structure of the Rights Issue, in particular the proposed pricing and ratio, at all.

Disclosure

44. Disclosure is of increased importance when shareholders are considering the desirability of making a further investment in a company, what the control

⁷ [2003] ATP 4 at [16]-[20], [39] and [58]

⁸ [2009] ATP 22 at [47]

implications of a rights issue might be and whether to take steps to protect against the dilution of their existing holding.⁹

45. ASIC and Robash had a number of disclosure concerns with the Prospectus. ASIC submitted that the exposure period for the Rights Issue had been extended by it on the basis that the Prospectus may contravene the Corporations Act.
46. We consider that the disclosure in the Prospectus fell short of what was required. In particular, the Prospectus failed to adequately inform shareholders about:
 - (a) the potential control effects on GPNL in the event that Palmer Companies exercised their rights fully and no other shareholders exercised their rights
 - (b) the intentions of Palmer Companies as regards exercising their voting rights should they become entitled to proceed to compulsory acquisition
 - (c) GPNL's need for and proposed use of funds and
 - (d) the reasons why GPNL considered the pricing and ratio of the Rights Issue to be appropriate.
47. We also consider that the inadequate disclosure in the Prospectus contributed to the potential control impact on GPNL as shareholders were not given enough information to make an informed decision whether to participate. GPNL submitted that the alleged deficiencies in the Prospectus could be cured. Although information deficiencies might be cured by adequate disclosure in a supplementary prospectus, this does not solve the structural problems of the Rights Issue.
48. ASIC submitted that it had concerns regarding the entire nature of the transaction:

“ASIC is concerned about the ultimate purpose of the fundraising. ASIC considers that the transaction may offend s602 of the Act and may constitute an attempt to circumvent the takeover provisions. If so, the transaction would not be sufficiently remedied by disclosure”.
49. We share ASIC's concerns.

DECISION

Declaration and orders?

50. It appeared to us that, given the unattractiveness of the Rights Issue to minority shareholders and its highly dilutive nature, the circumstances were unacceptable having regard to:
 - (a) the effect which we were satisfied that the circumstances were likely to have on the control or potential control of GPNL and
 - (b) the purposes set out in s602(a), s602(b) and s602(c).
51. We informed the parties of our views and provided a supplementary brief inviting submissions as to proposed orders. We proposed orders that the Rights Issue not

⁹ Guidance Note 17, paragraph 25

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proceed unless any acquisition by the Palmer Companies under the Rights Issue was approved by disinterested shareholders.

52. Subsequently, we were informed by GPNL that it had withdrawn the Prospectus.¹⁰
53. Robash submitted that we should make orders limiting the terms on which GPNL may make rights issues in the future. In particular, Robash submitted that GPNL should not proceed with any other rights issue, under which Palmer Companies could become entitled to proceed to compulsory acquisition if no shareholders other than Palmer Companies participate, unless the resulting acquisition by Palmer Companies is approved by shareholders (other than Palmer Companies).
54. We do not do so as we do not consider it appropriate to limit GPNL's fundraising options in the future, other than to say that we would expect GPNL to have regard to the principles flowing from these reasons.
55. While the nature of the unacceptable circumstances here is serious, the withdrawal of the Prospectus has removed the ground on which we are minded to declare that the Rights Issue would give rise to unacceptable circumstances in relation to the affairs of GPNL.

Costs

56. Robash also submitted that, in light of the egregious nature of the Rights Issue, it would be appropriate for the Panel to order GPNL to pay Robash's costs of the application. Given that we did not make a declaration, we make no orders, including as to costs.

Peter Hay
President of the sitting Panel
Decision dated 14 September 2011
Reasons published 19 September 2011

Advisers

Party	Advisers
GPNL	Blake Dawson
Robash	Norton Rose Australia

¹⁰ This was announced on Gladstone's website on 9 September 2011 and ASIC was advised on 12 September 2011. GPNL has consented to ASIC issuing a stop order in respect of the Prospectus



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Annexure A

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT (CTH) SECTION 201A UNDERTAKING

GLADSTONE PACIFIC NICKEL LIMITED 02

Pursuant to section 201A of the *Australian Securities and Investments Commission Act 2001* (Cth), Gladstone Pacific Nickel Limited (**Gladstone**) undertakes to the Takeovers Panel (**Panel**) that it will not issue the prospectus lodged with ASIC on 12 August 2011 relating to the proposed 11 for 1 non-renounceable rights issue:

- before 19 September 2011 or
- after 19 September 2011 without first giving the Panel and the parties 48 hours of its intention to do so.

This undertaking has effect until the earliest of:

- an order of the Panel or
- the determination of the Panel proceedings.

**Signed by Blake Dawson (R A Flynn, Partner)
with the authority, and on behalf, of
Gladstone Pacific Nickel Limited
Dated 23 August 2011**