Australian Government

Takeovers Panel

Reasons for Decision
Austock Group Limited
[2012] ATP 12

Catchwords:

Announcement of proposed bid – conditions not including funding condition – insufficient funding – announcement not including regulatory condition - regulatory condition added – frustrating action – break fee – undertaking not to enforce upper limit of break fee - declaration – orders

Corporations Act 2001 (Cth), sections 602, 631(1), 631(2), 657E, 670F

Insurance Acquisitions and Takeovers Act 1991, *Financial Sector (Shareholdings) Act 1998, Pooled Development Funds Act 1992, ASIC Act section 30*

ASC v Mt Burgess Gold Mining Co NL (1994) 62 FCR 389, *Re Queensland Nickel Management Pty Ltd* [1992] AATA 239, *NCSC v Monarch Petroleum NL* [1984] VicRp 65; VR 733, *Hanson v Church Commissioners for England* [1978] 1 QB 823, *George Hudson Holdings Ltd v Rudder* [1973] HCA 10, (1973) 128 CLR 387

Guidance Note 4: *Remedies General* , Guidance Note 7 *Lock-up Devices,* Guidance Note 12 *Frustrating Action,* Guidance Note 14 *Funding Arrangements,*

ASIC Regulatory Guide 37 *Takeovers – Financing Arrangements,* ASIC Regulatory Guide 59 *Announcing and Withdrawing Takeover Bids,*

NGM Resources Ltd [2010] ATP 11, *Indophil Resources NL* [2008] ATP 18, *Perilya Ltd 02* [2009] ATP 1, *SSH Medical Ltd* [2003] ATP 32, *Goodman Fielder Ltd 01* [2003] ATP 1, *Online Advantage Ltd* [2002] ATP 14, *Ausdoc Group Ltd* [2002] ATP 9, *Ballarat Goldfields NL* [2002] ATP 07, *Brisbane Broncos Ltd 01 and 02* [2002] ATP 1, *Pinnacle VRB Ltd 06* [2001] ATP 11, *Pinnacle VRB Ltd 04* [2001] ATP 7, *Taipan Resources NL 10* [2001] ATP 5

INTRODUCTION

1. The Panel, Peter Day, Byron Koster and Peter Scott (sitting President), made a declaration of unacceptable circumstances and orders in relation to the affairs of Austock Group Limited. The application concerned alleged frustration of a proposed bid by Mariner Corporation Limited for all of the shares in Austock Group Limited. The Panel declined to make a declaration as sought in the application, instead making a declaration in relation to the proposed bid announced by the applicant. It ordered Mariner to make an announcement, and not to announce or make another bid, unless ASIC is satisfied the bid is funded.

2. In these reasons, the following definitions apply.

Austock	Austock Group Limited
Corporations Act	*Corporations Act 2001* (Cth)
Folkestone	Folkestone Limited
Folkestone agreement	The agreement entered into by Austock and Folkestone on 9 July 2012 for the sale of Austock's subsidiary Austock Property Funds Management Pty Ltd and related entities in the property funds management business to Folkestone for $11 million subject to conditions, including shareholder approval

Mariner	Mariner Corporation Limited

FACTS

3. Austock is an ASX listed company (ASX code: ACK). The applicant, Mariner, is also listed on ASX (Code: MCX).

4. On 25 June 2012, Mariner announced to ASX and advised the Board of Austock that it intended to make an offer to acquire Austock for 10.5 cents per share. Mariner disclosed the conditions of its proposed bid (which did not include a regulatory approval condition). Mariner also announced that it intended to stand in the market and acquire up to 20% at 10.5 cents per share "*to enable Austock shareholders to sell now, rather than wait for our bidder's statement*".

5. Based on the last quoted price at which its shares traded on ASX on 22 June 2012, the trading day immediately before Mariner announced its proposed bid for Austock, the market capitalisation of Mariner was approximately $3.5 million. Mariner's proposed offer price of 10.5 cents per Austock share valued Austock at over $14 million.

6. On 28 June 2012, Austock wrote to Mariner, inviting it to withdraw its offer, noting that it was incapable of proceeding until regulatory requirements were met [1] and pointing out that subsection 621(3)[2] required the bid to be priced at not less than 11 cents per share, given that Mariner had acquired Austock shares at 11 cents per share within the preceding four months. ASIC raised similar issues with Mariner.

7. On 29 June 2012, Mariner announced an increase in the proposed bid price to 11 cents per share and that due to regulatory issues it would only be standing in the market to acquire up to 15%.

8. On 2 July 2012, Austock made an announcement which covered the matters in its letter of 28 June 2012 (see paragraph 6) and queried whether Mariner had finance for its proposed bid. It also criticised the proposed bid as under-priced.

9. On 3 July 2012, Mariner confirmed that it was proceeding with its proposed bid.

10. On 4 July 2012, Mariner announced that it was seeking the regulatory approvals mentioned by Austock, and restated the conditions of its proposed bid, adding a regulatory approval condition.

11. On 9 July 2012, Austock announced that it had entered into the Folkestone agreement.

12. The Folkestone agreement contains break fees payable by Austock to Folkestone, as follows:

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[1] These were due to the nature of Austock's business, under the *Insurance Acquisitions and Takeovers Act 1991*, the *Financial Sector (Shareholdings) Act 1998* and the *Pooled Development Funds Act 1992*.
[2] Except as noted, all statutory references are to the *Corporations Act 2001* (Cth).

(a) up to $250,000 to reimburse Folkestone in respect of its out of pocket costs and expenses if the transaction does not proceed for reasons outside Folkestone's control, or

(b) $250,000 if shareholders do not vote in favour of the sale to Folkestone, or

(c) $500,000 if shareholders do not vote in favour of the sale to Folkestone and any Austock director fails to recommend or withdraws a recommendation of the sale, or certain alternative proposals are completed by Austock by 31 January 2013.

13. On 11 July 2012, Mariner announced that it would apply to the Panel regarding the Folkestone agreement, and that it would not stand in the market to buy Austock shares until Panel proceedings had concluded. Mariner's application was made on 12 July, and is discussed below.

14. On 23 July 2012 ASIC, which had raised concerns with Mariner concerning the funding of its proposed bid and obtained relevant documents from Mariner under section 30 of the ASIC Act, advised Mariner that unless the proposed bid was withdrawn, it would apply to the Panel to have it stopped. This was because ASIC considered that Mariner had no reasonable basis for believing that it could pay for acceptances for a substantial proportion of the shares in Austock.

15. On 24 July 2012, Mariner announced that it had decided to withdraw its proposed bid. It invoked the condition that Austock should make no material acquisitions, disposals or changes of capital, which it said the Folkestone agreement had made it impossible to satisfy. ASIC did not apply to the Panel to have the proposed bid stopped.

APPLICATION

Declaration sought

16. By its application dated 12 July 2012, Mariner sought a declaration of unacceptable circumstances. Mariner submitted that the sale of Austock's principal business gave rise to unacceptable circumstances because:

(a) the sale was intended to defeat Mariner's proposed takeover bid and

(b) the break fees agreed by Austock were uncommercial and intended to make any alternative commercial proposition costly.

17. Mariner also submitted that trading in Austock shares since 25 June 2012 suggested that there had been a deliberate attempt to maintain the Austock share price above the bid price. This limb of the application was not developed. No evidence was presented in favour of it, Austock refuted it strongly, and Mariner did not press it. It will be discussed no further.

18. Mariner submitted that the circumstances:

(a) had an effect on the control, or potential control, of Austock or the proposed acquisition by Mariner of a substantial interest in Austock

(b) undermined the objectives of Chapter 6 set out in section 602 and

(c) constituted a contravention of the Corporations Act.

Interim order sought

19. Mariner sought an interim order that Austock be prevented from convening an extraordinary shareholder meeting to consider the proposed sale of its property funds management business to Folkestone. We did not make such an order, because there was adequate time to deal with the matter before the meeting could be held, and no pressing need to prevent shareholders from considering the Folkestone agreement.

Final order sought

20. Mariner sought a final order that Austock be prevented from entering into an unconditional contract to sell its property funds management business to Folkestone until the close (or withdrawal) of its proposed bid.

Media Canvassing Order

21. Although Mariner had given an undertaking not to canvass the issues in the proceedings in the press, its Chief Executive Officer was quoted in several newspaper articles commenting on those issues.[3] Accordingly, on 25 July 2012, the Panel made an interim order (Annexure A) that, without the Panel's consent, Mariner and its officers should not:

- publish or despatch any further material to Austock shareholders
- publish any non-public material provided in the proceedings or
- canvass in any media any issue in the proceedings.

Withdrawal of Application

22. On 24 July 2012, Mariner advised the Panel that it wished to withdraw its application, as it had announced that it was withdrawing its proposed bid. Pursuant to Procedural Rule 3.4.1, the Panel declined to consent to Mariner's withdrawal.[4]

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[3] In particular, an article in the *Australian Financial Review* on 25 July 2012 by Ruth Liew and Nick Lenaghan, entitled 'Mariner gives up on Austock takeover'. Mariner had been using the Press before it gave its media canvassing undertaking. For instance, it placed an article about its interest in Austock with Street Talk in the *Australian Financial Review* on 7 May 2012, of which it said in a submission: 'We just wanted to put a flag out into the market, and see what happened'.

[4] Rule 3.4.1 relevantly provides that an applicant may only withdraw its application with the consent of the sitting Panel. The note to the rule states that consent may be refused if there is reason to suspect that unacceptable circumstances will occur or continue to occur. See *Online Advantage Ltd* [2002] ATP 14 at

23. We declined to consent because there is a public purpose served in continuing to consider the application, given the proposed shareholder vote and Mariner's apparent intention possibly to bid again.

24. Although Mariner at first declined to make submissions on the brief, after a second request from the Panel, it did so on 30 July.

DISCUSSION

Brief

25. The Panel issued a brief on 20 July 2012. In it, we focussed on the frustrating action issues raised by the application and the funding and conditions of the proposed bid. The latter issues were inherent in the application and had already been ventilated by Austock. Without a bid or a genuine potential bid, there can be no frustrating action.[5]

Information from Austock

26. Austock disclosed in submissions that it had not conducted a formal sale process in relation to the property funds management business because of the effect that process might have had on the business. It had, however, discussed selling part or all of that business with several possible buyers before entering into a confidentiality agreement with Folkestone on 28 May 2012. Mariner submitted that sale of the property funds management business had been mentioned, though not discussed, at a meeting it had with Austock on 17 April 2012.

27. Austock also submitted that it had decided to call a general meeting to seek approval of the sale, in order to comply with ASX Listing Rules 11.1 and 11.2 and also pursuant to the Takeover Panel's "Frustrating Action" policy set out in Guidance Note 12. It submitted that there were no cross-shareholdings, common directorships or other conflicts of interest between Austock and Folkestone, and that the notice of meeting would contain the usual clause disregarding votes cast by Folkestone and anyone else with an interest in the transaction, except in the capacity of an ordinary shareholder.

Frustrating Action

28. Mariner submitted that the Folkestone sale was unacceptable because it frustrated Mariner's proposed bid. It submitted that:

    (i) Mariner has no interest in Austock without its property funds management business

    (ii) Mariner could not finalise its funding arrangements for its Bidder's Statement in the face of the proposed sale to Folkestone, and the uncertainty this created for Mariner's financial sponsors and

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[50]-[52], *Hanson v Church Commissioners for England* [1978] 1 QB 823 and *Re Queensland Nickel Management Pty Ltd* [1992] AATA 239.

[5] Guidance Note 12 *Frustrating Action*, particularly the definition of 'potential bid' at [5].

(iii) Mariner expects that, given the coercive nature of the high break fee, shareholders have no commercial alternative but to approve the sale to Folkestone at the forthcoming shareholder meeting.

29. ASIC submitted that under section 670F Mariner was not obliged to proceed with the bid. We agree. The sale to Folkestone was a material breach of a commercially significant condition of the proposed bid.[6]

30. In general an action which frustrates a bid will not give rise to unacceptable circumstances if shareholders are given a fair choice between the bid and the alternative proposal.[7] ASIC further submitted, however, that a large enough break fee may in effect deny shareholders a fair choice between the bid and the alternative proposal.[8]

31. ASIC took no final position on whether the break fee in this case was excessive. It observed that the highest fee which Austock might have had to pay ($500,000) was equal to 3.33% of its market capitalization, but that further information was needed about how the break fee had been calculated and how it related to the outgoings, efforts and risks incurred by Folkestone in entering the agreement.[9]

32. On the other hand, ASIC submitted that Mariner's proposed bid was not a 'genuine potential bid' to which the frustrating action policy should be applied, because it was not funded.[10] ASIC submitted that it had been about to apply to the Panel to have the proposed bid stopped on that basis when Mariner withdrew it.

33. Folkestone submitted that the sale agreement could not constitute unacceptable frustrating action, because the sale would not proceed without shareholder approval. It also provided some of the information about the break fees that ASIC said was needed:

- the break fee was not payable on a "naked no", because it would only have been payable where a competing proposal was likely to succeed
- although it exceeded the Panel's benchmark 1% level, it reflected the external and internal costs of Folkestone in connection with the transaction, which were only large as a percentage of the transaction
- the break fee replaced an agreement by Austock in the confidentiality agreement to reimburse Folkestone's due diligence costs up to $300,000, should Austock announce or agree on a competing transaction. Folkestone had insisted on the sale agreement providing it with equivalent protection and

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[6] Citing ASIC Regulatory Guide 59 *Announcing and Withdrawing Takeover Bids* at [RG59.56]-[RG59.57].
[7] Guidance Note 12 *Frustrating Action* at [7].
[8] Guidance Note 12 *Frustrating Action* at [15], compare *Perilya Ltd 02* [2009] ATP 1 and *Ballarat Goldfields NL* [2002] ATP 07 at [11] and [60].
[9] See Guidance Note 7 *Lock-up Devices* at [9]-[10].
[10] Guidance Note 12 *Frustrating Action* at [5].

- when it entered into the Folkestone agreement, Folkestone had required the cap on the break fee to be increased to $500,000, "*to reflect the increased internal and external costs that had been experienced by Folkestone in relation to the transaction and the fact that it was proceeding with a transaction recommended by the Austock board when Austock was already subject to a takeover bid*".

34. At this point in the proceedings, Folkestone offered the Panel an undertaking not to enforce payment of more than $250,000 of the break fee. We accepted the undertaking on 27 July 2012: see Annexure B.

35. We do not regard the break fee, as in effect reduced by Folkestone's undertaking, as excessive in the circumstances, although it amounts to about 1.5% of Austock's market capitalisation.[11] The break fee policy contemplates recovery of costs actually incurred[12] and, as the Panel in *Ausdoc* pointed out, it is not unusual for costs actually and reasonably incurred in small transactions to exceed 1%.[13] Evidence from both Austock and Mariner that Austock had been looking for a buyer for the property funds management business for some time, and Folkestone's submissions as to how the fee was arrived at, also tends against a conclusion that the fee was excessive in the circumstances.

36. Accordingly, we do not consider that Austock shareholders' choice whether to approve the Folkestone transaction or to allow the Mariner proposed bid to proceed was unduly fettered by the break fee, at least as reduced.

Conditions of the Proposed Bid

37. In its announcement of 25 June 2012, Mariner said that its proposed bid would be subject to the conditions to the effect that:

1) no prescribed occurrences affect Austock
2) Mariner obtain any necessary approval from its own shareholders under ASX rules
3) there be no alternative bid for Austock
4) the S&P/ASX 200 index not fall more than 10%
5) the net tangible assets per share of either Mariner or Austock not rise or fall more than 10%
6) no event occur which was reasonably likely to have a material adverse effect on Austock's financial position or performance
7) Austock not acquire or dispose of any assets or business, or change the composition of its capital and

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[11] Calculated on the closing price of 12.5 cents per share on 6 July, the last trading day before the Folkestone agreement was announced. Market prices for Austock shares fluctuated, and the percentage could be stated as high as 1.77%.
[12] Guidance Note 7 *Lock-up Devices* at [10.f].
[13] *Ausdoc Group Ltd* [2002] ATP 9 at [35]-[36].

8) Mariner acquire no less than 50% of Austock shares.

Austock submitted that some of these conditions were unacceptably uncertain.

38. Condition 7 contained no express materiality requirement, though the heading did refer to material transactions. Austock submitted that this gave Mariner too much discretion over whether to abandon its proposed bid. As drafted, it appeared to the Panel that this might be an inappropriate "hair trigger" condition.[14] ASIC submitted that the terms of the condition itself were unduly restrictive, but was prepared to read the materiality requirement from the heading into the body of the condition. In its rebuttal, Mariner did not address the omission of a materiality qualification.

39. Austock had similar concerns with Condition 5**.** The potential reliance by Mariner on a possible increase in Austock's net tangible assets per share as a defeating condition, in particular, did not seem appropriate to us. We also had concerns over Condition 2, which did not specify what might need approval, and Condition 3.

40. ASIC submitted that Mariner's failure to include a regulatory approvals condition in the initial announcement represented a failure to include all relevant information in the announcement of the bid. This was contrary to RG 59.35 and potentially led to a contravention of subsection 631(1).[15] ASIC submitted that this was evidence that Mariner had announced its proposed bid recklessly as to whether the bid would be made or could be completed, contrary to subsection 631(2). In its rebuttal, Mariner submitted that it had added the regulatory approvals condition in response to queries from ASIC and Austock, without any acknowledgement that to do so was to foreshadow a breach of subsection 631(1).[16]

41. In view of the conclusion to which we have come on the funding of the proposed bid, it is unnecessary to take these issues further. However, as a general observation we note that the existence of "hair trigger" or otherwise inappropriate defeating conditions in an offer would be relevant to any question of frustrating action by a target. It is less likely that such action will constitute unacceptable circumstances if it simply entails such a condition being triggered by an event which is not material to the bid.[17]

Funding Issue

42. In ASIC's submission, the Folkestone transaction had not frustrated a bid which would otherwise have been available to Austock shareholders, because Mariner's proposed bid was not capable of being implemented, because it had not been

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[14] But see *NGM Resources Ltd* [2010] ATP 11 at [21]-[30].
[15] See, however, *SSH Medical Ltd* [2003] ATP 32 at [47].
[16] Even stranger, letters from Mariner's solicitors to ASIC proceeded on the assumption that Mariner was free to make a bid subject to conditions additional to those in its announcement, despite the requirement of subsection 631(1) that the terms of the bid be "not substantially less favourable than those in the public proposal".
[17] See Guidance Note 12: *Frustrating Action* at [11.i].

properly funded. We accept this submission. The issue of the financing of Mariner's proposed bid is therefore central to the matter.

43. At 10.5 cents per share, the consideration for all of the fully paid shares in Austock would have been $14.1 million. In its most recent accounts, Mariner reported total and current assets of $1.16 million and total and current liabilities of $1.67 million. In other words, its net assets were negative $0.51 million. Austock commented that Mariner would have great difficulty raising the necessary finance, for both commercial and regulatory reasons. These circumstances made it appropriate to consider the funding of the bid at this stage.[18]

44. Separately to the Panel proceedings, ASIC had made inquiries of Mariner as to whether anyone had agreed to provide Mariner the money it would need to pay for the shares in Austock. In response to a notice under section 30 of the ASIC Act, Mariner provided to ASIC a board paper which listed investors from whom Mariner considered it might raise as much as $3 million. Mariner also referred to discussions with an investment bank about the proposed sale of the property funds management business.[19] Mariner also provided a certificate to the effect that it had no other papers covered by the notice. No evidence of any definite, binding or written agreement to finance the proposed bid was produced. Mariner agreed to ask the bank to write to ASIC confirming that it had made an oral agreement with Mariner to buy Austock's property funds management business. ASIC submitted that it had received no such letter, however at Mariner's instigation ASIC spoke to representatives of the bank – who confirmed that while they were interested in acquiring Austock's funds management business, there was nothing in writing and there was no binding commitment in place to make that acquisition or fund Mariner's bid.

45. Responses to a series of letters from ASIC from Mariner and its then solicitors indicated that Mariner had intended to obtain bridging finance and repay it from the proceeds of selling off Austock's businesses. Mariner acknowledged that it had announced the bid before settling any financing arrangements, and had been unable to conclude either bridging finance or agreements to sell Austock's businesses, because of the announcement of the Folkestone agreement.[20]

46. We were also concerned that Mariner had advised ASIC through its solicitors that Mariner was seeking bridging finance to pay for acceptances for only 65% of the shares in Austock, because it believed, based on statements to the press, that shareholders aligned with the board would not accept the bid. Mariner did not say that those shareholders had given it any assurance that they would not accept the bid and we note the statements Mariner relied on were made after it announced its proposed bid. It had simply identified them as the shareholders most aligned with

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[18] see *Indophil Resources NL* [2008] ATP 18 at [17].

[19] Mariner identified these investors and this investment bank.

[20] ASIC had reservations about the basis of this proposal, which are understandable given the minimum acceptance condition was set at 50.1%, but there is no need to explore those, since bridging finance was never arranged.

the current board: precisely the shareholders who, in our view, would have been least inclined to retain their shares if control of the company changed. We do not consider it was appropriate for Mariner to assume funding of less than 100% based on a judgment of who might accept the proposed bid.

47. As noted above, these inquiries ended with ASIC telling Mariner that it would take the funding issue to the Panel if it was not resolved, and with Mariner withdrawing its proposed bid.

48. Mariner submitted that its proposed bid had been "*fully funded and capable of being completed if Austock had not sold its property funds management business to Folkestone*". We do not accept this submission.

49. Mariner also described discussions it had held with the investment bank mentioned above. Those discussions were to the effect that Mariner would bid for Austock with bridging finance arranged by the bank, with a view to selling Austock's property funds management business to the bank to repay the bulk of the finance. Mariner also said that it had discussed the possible sale of Austock's life insurance business with another financial services company and the possible issue of $3 million of convertible notes to clients of another investment bank.[21]

50. Mariner did not say that any of these proposed transactions was definite or binding. Mariner did not provide (or say that it had) any written or binding agreement to provide or arrange loan funds, or to buy assets from Austock after a successful takeover. In fact, Mariner said that both potential buyers of Austock's businesses had distanced themselves from the proposed bid for Austock once the Folkestone transaction was announced. While they may have remained interested in acquiring assets from Austock after a successful bid by Mariner, they did not commit to financing or otherwise supporting the bid.

51. Mariner continued:

> *Mariner's inability to finalise funding arrangements with [the potential buyers] for its Bidder's Statement was a direct result of Austock's sale of the property funds management business to Folkestone. … The simple fact is that the Austock sale to Folkestone scared off Mariner's funders, so Mariner could not continue to have a bid in the market any longer.*

52. Section 631(2) provides that a person must not announce a takeover bid if they are reckless as to whether they will be able to perform their obligations if a substantial proportion of the offers under the bid are accepted. Mariner submitted that it had not contravened section 631(2) unless it had been reckless as to whether it could meet its obligations. Mariner's submissions, however, showed it had been clearly aware that it needed to raise funds to pay for shares in Austock, but nonetheless decided to proceed on the basis of funding arrangements which were both loose and inadequate as to amount.

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[21] Mariner identified each of these proposed counterparties.

53. In addition, the Panel may declare circumstances unacceptable because of the effect they are likely to have on a proposed acquisition of a substantial interest in a company, whether or not those circumstances contravene Chapter 6. If a bidder were to proceed entirely unaware of a deficiency in its funding arrangements (and so arguably not reckless as to that deficiency) the Panel could nonetheless declare the circumstances unacceptable.

54. A bidder should be able to pay for all the shares to which its bid relates, either because it has already made binding arrangements for a sufficient amount when it announces the bid, or because it has a reasonable basis to believe that it will have binding arrangements in place in time to pay for the shares. [22] In the latter case, a detailed terms sheet or commitment letter, at a minimum, should be signed before offers are posted.

55. In *Goodman Fielder 01* the Panel considered finance facilities which, at the time offers were dispatched, were embodied in signed terms sheets, falling short of complete agreements. The Panel was concerned that offerees did not have adequate information on the merits of the proposal to acquire their shares. It did not make a declaration, but said that it would have been better practice to have finalised finance facilities, and required the bidder to allow acceptances to be withdrawn until the facilities were finalised.[23]

56. In *Taipan Resources 10* a bid was based on financing arrangements which did not bind the intended lender, who withdrew from them. The Panel made a declaration of unacceptable circumstances, even though the bidder arranged alternative funding and would have been able to pay for acceptances by selling liquid assets, even without special purpose financing. As in *Goodman Fielder 01*, the Panel was concerned that shareholders had not been properly informed about the bidder's funding arrangements. It made no orders.[24]

57. In *Pinnacle VRB 04*, a bid was made with an informal funding arrangement, with no definite arrangements as to either the ultimate source of the funds or the basis on which they would be provided to the bidder. The Panel stopped the bid, on the basis that it could not go ahead in an efficient, competitive and informed market while the funding was uncertain.[25]

58. If a bid is made without finance, particularly if it also lacks a financing condition, and the bidder cannot pay for the acceptances, offerees who have accepted the bid are at risk of heavy losses. On the terms which are usually offered under an off-

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[22] Guidance Note 14 *Funding Arrangements* at [10]-[20], see also ASIC Regulatory Guide 37 *Takeovers – Financing Arrangements*, particularly at [37.10], and *Brisbane Broncos Ltd 01 and 02* [2002] ATP 1 at [13]-[18].
[23] *Goodman Fielder Ltd 01* [2003] ATP 1. The issues the Panel examined were recklessness, undue discretion and disclosure: see at [45].
[24] *Taipan Resources NL 10* [2001] ATP 5.
[25] *Pinnacle VRB Ltd 04* [2001] ATP 7 at [31]-[48]. A review Panel endorsed the policy of the initial decision, but allowed the bid to resume after funding was arranged: *Pinnacle VRB Ltd 06* [2001] ATP 11.

market bid, transfer and payment are not concurrent conditions,[26] so accepting offerees are exposed to the risk that their shares will be transferred to the bidder, but they will not be paid and may need to prove in its liquidation.

59. Announcing or making an unfunded bid is a serious matter. The penalties for breach of section 631 are the heaviest of any section in Chapter 6. An announced takeover bid usually has a profound effect on the prices at which bid class securities trade.[27] If the proposed bid does not proceed, bid class securities may trade in a false market, and people are again at risk of heavy losses.[28]

60. Mariner's arrangements to finance its proposed bid fall a long way short of those in *Goodman Fielder 01*. They fall short of those in *Taipan Resources 10*, where a declaration was made, and resemble what was done in *Pinnacle VRB 04*, where a declaration was made and the bid was stopped. We agree with ASIC that the bid should not have been announced, or allowed to proceed at all, unless and until finance had been arranged. In our view, the announcement of Mariner's unfunded bid was likely to have an adverse effect on Austock and its shareholders.

61. Mariner's omission to arrange finance for its proposed bid was unacceptable, having regard to the effect that it would have had on the proposed acquisition of a controlling interest in Austock, by bid and on-market purchases. Until and unless that omission was rectified, those acquisitions would have proceeded in a market which was uninformed as to Mariner's arrangements and ability to pay for the shares, and without Austock shareholders being properly informed as to the merits of the proposal to acquire their shares.

62. This unacceptability is exacerbated by the risk that Mariner would have succeeded in its objective of stopping Austock shareholders approving the Folkestone transaction. This could have been brought about by some combination of Mariner buying shares on market and voting them against the transaction and persuading other shareholders to vote against approval of the transaction in order to avoid triggering the defeating condition in Mariner's bid. If the transaction had not been approved, Austock would have lost both the opportunity to realise the sale of the property funds management business and the break fee. The loss of the Folkestone transaction may have been worth incurring to secure a superior transaction, but only one reasonably capable of being implemented.

63. Although the finding is a grave one, we are not satisfied that Mariner at any stage had detailed or binding commitments to fund its proposed bid, or any reasonable basis for believing that it could pay for more than a few acceptances.

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[26] Contrast the position in *George Hudson Holdings Ltd v Rudder* [1973] HCA 10, (1973) 128 CLR 387 and the discussion in Guidance Note 14 *Funding Arrangements* at [10.f].

[27] See paragraph 64.

[28] See the facts discussed in *NCSC v Monarch Petroleum NL* [1984] VicRp 65; VR 733, and in *ASC v Mt Burgess Gold Mining Co NL* (1994) 62 FCR 389, with the discussion of principles in the latter case. Although *Monarch Petroleum* was (and *Mt Burgess* may have been) a case of fraudulent manipulation, the effects on the market of a reckless announcement would be similar.

64. In the absence of information about the funding deficiencies of Mariner's proposed bid, however, it would have appeared to the market to be a genuine alternative to the Folkestone agreement (i.e. one capable of being implemented). In our experience, the announcement of a bid puts a floor under the price of the relevant shares, which would not otherwise exist, and encourages trading in those shares, which would not otherwise occur.

65. Nor was that all. Mariner had indicated in submissions that it was contemplating announcing another bid for Austock which would in the Panel's view, unless made with due attention to its terms and funding, have potential for adverse consequences similar to that of the proposed bid which we have examined.[29] At that time, moreover, Mariner had not finally withdrawn its proposal to buy shares in Austock on market (see paragraphs 4, 7 and 13 above), which would also have supported the price of, and trading in, Austock shares, although it had offered to make an announcement abandoning that proposal.

66. Mariner submitted that it had an obligation to announce its proposed bid once its board had resolved to make it. We do not agree. Even if Mariner was obliged to announce its proposed bid, and assuming it had a reasonable expectation of funding, it should have made it subject to obtaining finance.

67. In our view, this gave rise to unacceptable circumstances.

DECISION

Declaration

68. It appears to us that the following circumstances are unacceptable:

    (a) Mariner did not have a reasonable basis to expect that it would have the funding in place to pay for all acceptances when its proposed bid became unconditional

    (b) the market is uninformed as to the circumstances relating to the making of the proposed bid and its withdrawal and

    (c) in the context of the vote to be undertaken on the Folkestone transaction, Austock shareholders do not have sufficient information regarding Mariner's proposed bid to assess the merits of the purported alternative of an offer by Mariner.

69. It appears to us that the circumstances are unacceptable having regard to:

    (a) the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:

        (i) the control, or potential control, of Austock or

[29] Bearing in mind that Mariner's announcement of 24 July 2012 that it was withdrawing its proposed bid referred only to how the Folkestone transaction frustrated the bid, and not to its financing issues.

(ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Austock and

(b) the purposes of Chapter 6 set out in section 602 of the Corporations Act 2001 (Cth).

70. Accordingly, we made the declaration set out in Annexure C and consider that it is not against the public interest to do so. We had regard to the matters in s657A(3).

71. The circumstances unacceptably affected Mariner's proposed acquisition of a substantial interest in Austock. This effect is exacerbated by their effect on the meeting to consider the Folkestone agreement. At the time we made our declaration, Mariner had abandoned its bid, and was contemplating announcing another bid for Austock.

72. Moreover, the proposed bid involved a significant departure from the requirements of Chapter 6, and therefore from the standards that the market expects, when a proposed bid is announced. One function served by the making of a declaration of unacceptable circumstances is to identify appropriate standards to be maintained by market participants during a takeover.[30] This function helps engender confidence on the market, which is also a purpose of Chapter 6.

73. In our view, unacceptable circumstances would have resulted if Mariner had announced another bid for Austock, given the likelihood that such a bid would not be properly funded.

Orders

74. Following the declaration, we made the final orders set out in Annexure D. Under s657D the Panel's power to make orders is very wide. The Panel is empowered to make 'any order'[31] if 4 tests are met:

(a) it has made a declaration under s657A. This was done on 10 August 2012.

(b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. We are satisfied that our orders do not unfairly prejudice any person.

(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 3 August 2012. Each party made submissions. There were no rebuttals.

(d) it considers the orders appropriate to either protect the rights and interests of persons 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 proposed takeover is no longer proceeding. The orders protect the rights and interests of Austock shareholders.

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[30] For example, see *Summit Resources Limited* [2007] ATP 09.

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

75. The orders require that:

    (a) Mariner immediately advise the market, in a form approved by the Panel, whether or not it intends to stand in the market to buy up to 15% of Austock at 11 cents per share after the conclusion of the Panel proceedings and if so, whether it has sufficient funding to do so and

    (b) Mariner not announce or make another bid for Austock unless it obtains independent verification acceptable to ASIC as to its funding of the bid.

76. The prejudice which the orders occasion Mariner is minimal and not unfair. Mariner had already volunteered to announce that it would not stand in the market to buy shares in Austock, and did so on 10 August 2012, the same day the orders were made. The order that Mariner not announce another bid for Austock without clearance from ASIC will merely enforce compliance with section 631, and only in case Mariner proposes to announce another bid. In view of the deficiencies of the announcement of 25 June 2102, this is both necessary and proportionate.

77. We also sought submissions from the parties on costs. Austock, Folkestone and ASIC sought recovery of costs in the proceedings. Mariner submitted that the Panel "*should not be seen to be punishing bidders, or discouraging applications to the Panel, by making cost orders against bidders*".

78. We think that the application should not have been made in support of a proposed bid which could not be implemented as it stood, because no finance had been arranged, putting to one side our concerns with the conditions of the proposed bid. One element of the Panel's policy on costs orders is that "*a party is entitled to make … an application once without exposure to a costs order, provided it presents a case of reasonable merit in a businesslike way*",[32] but this proposition does not extend to an application to restrain a transaction merely because it frustrated a proposed bid which could not be completed.

79. We considered that all of the costs claimed by Folkestone and ASIC and two thirds of the costs claimed by Austock represented costs actually, necessarily, properly and reasonably incurred in the course of the proceedings. Given that Mariner's application resulted in a modification of the break fee, the Panel then discounted those reasonable costs of Austock and Folkestone by approximately 50% to reflect the outcome of the proceedings. Mariner must bear its own costs of the proceedings.

Peter Scott
President of the sitting Panel
Decision dated 10 August 2012
Reasons published 27 August 2012

[32] Guidance Note 4: *Remedies General* at [27.d].

Advisers

Party	Advisers
Austock	Baker & McKenzie
Folkestone	Clayton Utz
Mariner	None

Australian Government

Takeovers Panel

Annexure A

CORPORATIONS ACT
SECTION 657E
INTERIM ORDERS

AUSTOCK GROUP LIMITED

Mariner Corporation Limited (**Mariner**) made an application to the Panel dated 12 July 2012 in relation to the affairs of Austock Group Limited (**Austock**).

The Panel ORDERS:

1. Mariner and its officers not, directly or indirectly:
   (a) publish or despatch any further material to Austock shareholders
   (b) cause or authorise the publication of any material provided in the proceedings that is not public (other than by a breach of confidentiality) or any report in which such material forms part or
   (c) cause, participate in or assist the canvassing in any media of any issue that is before (or is likely to be before) the Panel in the proceedings,

   except with the consent of the Panel.
2. These interim orders have effect until the earliest of:
   (i) further order of the Panel
   (ii) the determination of the proceedings and
   (iii) 2 months from the date of these interim orders.

Alan Shaw
Counsel
with authority of Peter Scott
President of the sitting Panel
Dated 25 July 2012

Australian Government

Takeovers Panel

Annexure B

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT 2001 (CTH) SECTION 201A UNDERTAKING

AUSTOCK GROUP LIMITED

FOLKESTONE LIMITED undertakes to the Panel that it will:

1. not enforce the break fee of $500,000 under the Share Sale Agreement announced to the Australian Securities Exchange on 9 July 2012 between it and Austock Group Limited, therefore the break fee under the Share Sale Agreement will be a maximum of $250,000 in all circumstances in which any break fee is payable and
2. advise the Panel when it has satisfied its obligations under this undertaking.

Signed by Jonathan Sweeney
with the authority, and on behalf, of Folkestone Ltd
Dated 27 July 2012

Australian Government

Takeovers Panel

Annexure C

CORPORATIONS ACT
SECTION 657A
DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

AUSTOCK GROUP LIMITED

CIRCUMSTANCES

1. On 25 June 2012, Mariner Corporation Limited (Mariner) announced an intention to make a takeover offer for all the shares in Austock Group Limited (Austock) at 10.5 cents per share. Mariner also announced that it intended to stand in the market and acquire up to 20% of the issued share capital of Austock at 10.5 cents per share.

2. On 29 June 2012, Mariner announced that it had increased its proposed offer to 11 cents per share and that it had decided to stand in the market at 11 cents per share for up to 15% of the issued share capital of Austock.

3. On 9 July 2012, Austock and Folkestone Limited (Folkestone) announced that they had reached agreement for Folkestone to acquire all of Austock's shares in its subsidiary Austock Property Funds Management Pty Ltd and related entities in the property management business. The transaction was conditional on shareholder approval by Austock shareholders.

4. On 11 July 2012, Mariner announced that it had decided to make an application to the Panel regarding the agreement with Folkestone and that it would not be bidding on-market for any Austock shares while the Panel was reviewing the matters set out in the application.

5. On 12 July 2012, Mariner made an application to the Panel for a declaration of unacceptable circumstances regarding the agreement with Folkestone.

6. The proposed bid by Mariner included the following condition:

   "NO MATERIAL ACQUISITIONS, DISPOSALS OR CHANGES TO CAPITAL

   That after the date of this announcement neither [Austock] nor any subsidiary (or registered scheme of [Austock]) … sells, offers to sell or agrees to sell one or more companies, businesses or assets (or any interest therein) or makes an announcement in relation to such a disposal, offer or agreement."

7. The proposed bid did not contain a funding condition.

8. On 24 July 2012, after ASIC had made inquiries of Mariner regarding the funding of its proposed bid, Mariner announced that it had decided to invoke the condition set out in paragraph 6 and withdraw its proposed bid for Austock on the basis that Austock's agreement with Folkstone frustrated Mariner's proposed bid. On the same day, following the announcement, Mariner sold all of the Austock shares held by Mariner at 12 cents per share.

9. Mariner submitted to the Panel that, depending on the outcome of the Panel proceedings, it may consider making another bid for Austock.

10. Despite requests from the Panel, Mariner provided no evidence of any written agreement in relation to funding of its proposed bid. Previously, in response to an ASIC notice to produce, Mariner confirmed that the only written document regarding the proposed funding arrangements was a Mariner board paper. The paper included internal calculations showing support Mariner said it had obtained from brokers and investors. The Panel infers that Mariner did not have funding arrangements that had been formally documented or sufficiently detailed binding commitments in place when it announced its proposed bid.

11. While Mariner announced that it would not stand in the market during the Panel proceedings, it has made no announcement concerning whether it intends to continue to stand in the market to buy up to 15% of the issued share capital of Austock at 11 cents per share after the conclusion of the Panel proceedings.

12. It appears to the Panel that:

    (a) Mariner did not have a reasonable basis to expect that it would have the funding in place to pay for all acceptances when its proposed bid became unconditional

    (b) the market is uninformed as to the circumstances relating to the making of the proposed bid and its withdrawal and

    (c) in the context of the vote to be undertaken on the Folkestone transaction, Austock shareholders do not have sufficient information regarding Mariner's proposed bid to assess the merits of the purported alternative of an offer by Mariner.

13. It appears to the Panel that the circumstances mentioned in paragraph 12 are unacceptable having regard to:

    (a) the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:

        (i) the control, or potential control, of Austock or

        (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Austock and

(b) the purposes of Chapter 6 set out in section 602 of the Corporations Act 2001 (Cth).

14. 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 mentioned in paragraph 12 constitute unacceptable circumstances in relation to the affairs of Austock.

George Durbridge
with authority of Peter Scott
President of the sitting Panel
Dated 10 August 2012

Australian Government

Takeovers Panel

Annexure D
CORPORATIONS ACT
SECTION 657D
ORDERS

AUSTOCK GROUP LIMITED

The Panel made a declaration of unacceptable circumstances on 10 August 2012.

THE PANEL ORDERS

1. Mariner Corporation Limited (**Mariner**) must immediately advise the market, in a form approved by the Panel:

   a) whether it intends to stand in the market to buy up to 15% of the issued share capital of Austock Group Limited (**Austock**) at 11 cents per share after the conclusion of the Panel proceedings and

   b) if it does, whether it has sufficient funding to buy up to 15% of the issued share capital of Austock at 11 cents per share.

2. Mariner must not announce or make another bid for Austock unless it first obtains independent verification acceptable to ASIC that it has funding, or has a reasonable basis to expect that it will have funding, to pay for all acceptances. If Mariner asks ASIC to provide such confirmation, Mariner must provide any information that ASIC requests. In the event that ASIC and Mariner are unable to agree on any aspect of this order 2, either party may refer the matter to the Panel for determination.

3. Within 10 business days of the date of this order Mariner must pay:

   (a) to Austock, $22,500

   (b) to Folkestone Limited, $8,500 and

   (c) to ASIC, $4,384

   representing an appropriate proportion of the costs actually, necessarily, properly and reasonably incurred in the course of the proceedings.

George Durbridge
with authority of Peter Scott
President of the sitting Panel
Dated 10 August 2012