



Australian Government

Takeovers Panel

**Reasons for Decision
LinQ Resources Fund
[2012] ATP 21**

Catchwords:

Effect on control – efficient competitive and informed market – adjournment of meeting – deemed relevant interest – substantial holder notice – related party transaction – ASX Listing Rule 10.1 – undertaking – decline to conduct proceedings

Corporations Act 2001 (Cth), sections 210, 601LC, 608(3)(a) and 661A(1)(b)

MacarthurCook Property Securities Fund 01 and 02 [2012] ATP 7

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
NO	NO	NO	NO	NO	YES

INTRODUCTION

1. The Panel, Guy Alexander (sitting President), Catherine Brenner and Peter Hay, declined to conduct proceedings on an application by FESSB in relation to a bid by IMC for all the units in LinQ Resources. The application concerned (among other things) a condition of the bid requiring the acceptance in respect of approximately 37% of the units in LinQ Resources held as Treasury Units, within 3 weeks after the opening of offers under the bid. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable after accepting undertakings provided by LinQ Capital, LinQ Capital 2 and IMC.
2. In these reasons, the following definitions apply.

Acceptance Condition	a condition to the Offer that within 3 weeks after the opening of the Offer, LinQ Capital 2 accepts the Offer in respect to the Treasury Units
FESSB	WA Fire and Emergency Services Superannuation Board
IMC	IMC Resources Holdings Pte Ltd
LinQ Capital	LinQ Capital Limited
LinQ Capital 2	LinQ Capital No. 2 Pty Ltd
LinQ Resources	LinQ Resources Fund
LinQ Resources 2	LinQ Resources Fund No. 2
Offer	the takeover offer by IMC for all of the units in LinQ Resources
Treasury Units	67,640,071 units in LinQ Resources held by LinQ Capital 2 as trustee for LinQ Resources 2, representing approximately 37% of the total units on issue in LinQ Resources

FACTS

3. LinQ Resources is a registered management investment scheme listed on the ASX (ASX code: LRF). The responsible entity of LinQ Resources is LinQ Capital.
4. LinQ Resources holds 100% of the units in LinQ Resources 2. LinQ Capital 2 is the trustee of LinQ Resources 2 and is a wholly owned subsidiary of LinQ Capital. LinQ Capital 2 (as trustee for LinQ Resources 2) owns the Treasury Units.¹
5. FESSB holds approximately 6% of the units in LinQ Resources.
6. On 4 September 2012, IMC made an application to ASIC seeking relief to allow IMC to exclude the Treasury Units from the relevant percentage thresholds for determining compulsory acquisition in relation to a proposed bid by IMC for LinQ Resources.
7. On 13 September 2012, LinQ Capital announced that it had entered into a bid implementation agreement with IMC in relation to the Offer. A proposed condition of the Offer in the bid implementation agreement was that within 3 weeks after the opening of the Offer, either IMC must obtain the ASIC relief or LinQ Capital 2 must accept the Offer in respect of the Treasury Units.²
8. On 17 September 2012, a meeting of LinQ Resources unit holders was held to consider a proposal to delist LinQ Resources from the ASX and provide unit holders with the opportunity to redeem units. The meeting was adjourned to a time and place to be advised pending the outcome of IMC's bid.
9. On 20 September 2012, IMC was advised by ASIC that it was not minded to grant the relief because the same purpose could be achieved lawfully by acceptance of the Treasury Units into the Offer.
10. On 27 September 2012, IMC lodged its bidder's statement with ASIC. The Offer contained the Acceptance Condition but not a condition relating to ASIC relief.
11. On the same day, LinQ Capital (as responsible entity for LinQ Resources) lodged its target's statement which said that LinQ Capital 2 intended to accept the Offer for the Treasury Units within 3 weeks of the opening of the Offer in the absence of a superior proposal. It also said that the directors of LinQ Capital considered the bid to be superior to the delisting proposal.
12. On 16, 17, 22 and 24 October 2012, IMC lodged substantial holder notices, which showed it had a relevant interest and voting power in LinQ Resources including the Treasury Units, because it had obtained an interest in more than 20% of the LinQ Resources units.

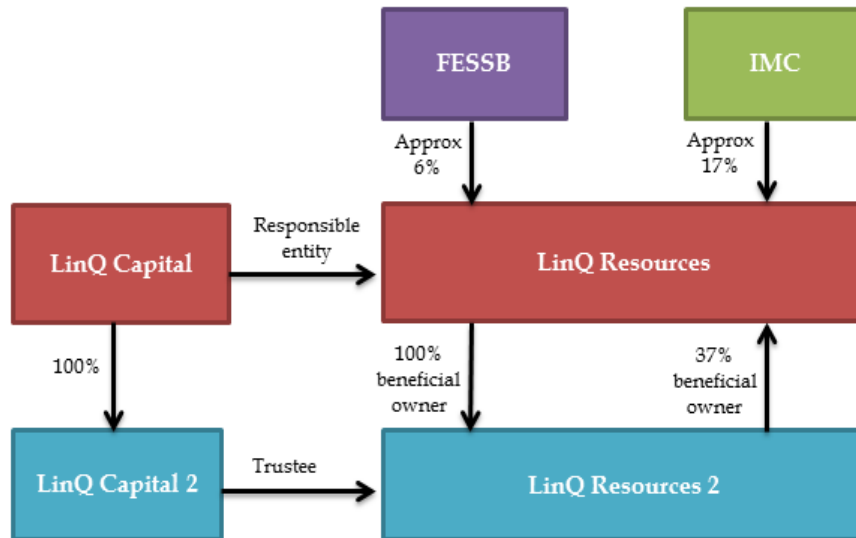
¹ The Treasury Units were acquired by LinQ Capital 2 on behalf of LinQ Resources 2 from arbitrage funds in 2008 with the necessary unit holder approvals. LinQ Capital 2 intended to (1) on sell the Treasury Units or (2) in the event the Treasury Units could not be on-sold, to redeem or cancel those units (subject to the resolution to amend the LinQ Resources constitution to allow that to occur being passed). For various reasons, neither of these things has occurred

² On 17 September 2012, LinQ Capital made submissions to ASIC in support of IMC's application for ASIC Relief

Takeovers Panel

Reasons – LinQ Resources Fund [2012] ATP 21

13. Various structural relationships between the parties identified in the application are described below.



APPLICATION

Declaration sought

14. By an application dated 23 October 2012, FESSB (among other things) sought a declaration of unacceptable circumstances. FESSB submitted that:
- by accepting the Treasury Units into the bid, LinQ Capital is using a substantial asset owned by LinQ Resources to deliver control of LinQ Resources to IMC without recourse to the views or participation of the other unit holders
 - the adjournment of the unit holder meeting to consider the delisting proposal denied unit holders the opportunity to consider the delisting proposal
 - the substantial holder notices lodged by IMC were misleading
 - by agreeing to accept the offer in respect of the Treasury Units, LinQ Resources had breached section 601LC³, because it was giving a financial benefit to IMC, a related party, without first obtaining unit holder approval and
 - by agreeing to accept the offer in respect of the Treasury Units, LinQ Resources had breached ASX Listing Rule 10.1, because it was agreeing to sell a substantial asset to IMC without obtaining unit holder approval.

³ This section applies the related party provisions in Chapter 2E to a registered scheme. Unless otherwise indicated, references are to the *Corporations Act 2001* (Cth)

15. FESSB submitted that the circumstances had (amongst other things) the following effects:
- (a) the acquisition of control over voting interests in LinQ Resources were not taking place in an efficient, competitive and informed market and
 - (b) LinQ Resources unit holders were being misled about the progress of the bid.

Interim orders sought

16. FESSB sought interim orders that:
- (a) the directors of LinQ Capital 2 be prohibited from dealing in the Treasury Units and
 - (b) IMC be required to confirm in clear terms its level of voting power without counting the Treasury Units.
17. On 23 October 2012, the acting President of the Panel considered the interim orders but declined to make them. The acting President considered that if the Panel decided to conduct proceedings and unacceptable circumstances were found, the Panel was in a position to order that any acceptance of the Treasury Units by LinQ Capital 2 into the Offer be reversed.

Final orders sought

18. FESSB sought final orders including:
- (a) an order requiring the Acceptance Condition be removed as a condition to the Offer
 - (b) an order requiring that the directors of LinQ Capital 2 be restrained from accepting the Offer in relation to the Treasury Units unless and until IMC acquires 90% of the units in LinQ Resources excluding the Treasury Units
 - (c) an order requiring that the adjourned meeting to consider the delisting proposal proceeds so unit holders can consider the alternative proposal
 - (d) a declaration that the proposed conduct appears to be in breach of ASX Listing Rule 10.1 and section 601LC and
 - (e) an order for costs in favour of FESSB.

DISCUSSION

Proposed acceptance of the Treasury Units into the Offer

19. FESSB submitted that by accepting the Treasury Units into the bid within 3 weeks of the Offer opening, LinQ Capital was using a substantial asset owned by LinQ Resources to deliver control of LinQ Resources to IMC without recourse to the views or participation of the other unit holders. FESSB submitted that this is because once the Offer in respect of the Treasury Units was accepted by LinQ Capital 2, regardless of the number of other unit holders who have accepted the Treasury Units into the Offer, IMC would have a relevant interest in more than

Takeovers Panel

Reasons – LinQ Resources Fund [2012] ATP 21

50% of the units in LinQ Resources. FESSB further submitted that this had the effect of discouraging competing bidders from making a bid for LinQ Resources.

20. LinQ Capital, LinQ Capital 2⁴ and IMC offered in preliminary submissions to provide undertakings to the effect that the Treasury Units will not be accepted into the Offer until IMC has achieved a relevant interest in 90% or more of the LinQ Resources units excluding the Treasury Units.
21. Absent the undertakings, it is likely that we would have decided to conduct proceedings. We were concerned that the Acceptance Condition and LinQ Capital 2's stated intention in relation to accepting the Offer may have had an anti-competitive effect on the market for LinQ Resources units by deterring potential rival bidders and may have impeded an auction for control of LinQ Resources. In particular, we would have wanted to investigate whether the 3 week period which LinQ Capital had allowed for a superior proposal to come forward before it accepted the Offer (thereby satisfying the Acceptance Condition) was or was not sufficient in the circumstances.
22. Therefore, we sought undertakings from LinQ Capital, LinQ Capital 2 and IMC on similar terms to that offered by them to the effect that:
 - (a) LinQ Capital 2 will not accept the Offer in respect of the Treasury Units until IMC acquires a relevant interest in 90% or more of the units in LinQ Resources excluding the Treasury Units
 - (b) within one business day after IMC acquires a relevant interest in 90% of the units in LinQ Resources, excluding the Treasury Units, LinQ Capital 2 will accept the Offer in respect of the Treasury Units
 - (c) LinQ Capital will procure LinQ Capital 2 to comply with the undertakings provided by it and
 - (d) IMC will not rely on the Acceptance Condition to allow the Offer to lapse.
23. On 26 October 2012, LinQ Capital 2 and LinQ Capital provided the undertakings sought by the Panel from them (Annexure A). On 29 October 2012, IMC provided the undertaking sought by the Panel from IMC (Annexure B).
24. We are satisfied that the undertakings offered by LinQ Capital, LinQ Capital 2 and IMC adequately address any potential unacceptable circumstances arising from the Acceptance Condition and LinQ Capital 2's stated intention in relation to accepting the Offer. The undertakings will ensure that the independent unit holders will have the opportunity to determine the outcome of the Offer rather than the directors of the responsible entity of the target and provide any counter bidder with the maximum amount of time to put forward a competing proposal.

Adjournment of unit holder meeting to consider the delisting proposal

25. FESSB submitted that by adjourning the unit holder meeting at which the delisting proposal was to be considered pending the outcome of the Offer, unit holders have been denied the opportunity to vote on the delisting proposal. This is because once

⁴ LinQ Capital and LinQ Capital 2 made a joint preliminary submission

LinQ Capital 2 accepts the Treasury Units into the Offer, control in LinQ Resources would effectively have passed to IMC. Accordingly, the unit holder meeting in relation to the delisting proposal should proceed.

26. Any concerns about this issue are addressed by the undertakings provided by LinQ Capital, LinQ Capital 2 and IMC. The undertakings preserve the ability of the independent unit holders to not accept the Offer if they prefer the delisting proposal.

Substantial holder notices

27. FESSB submitted that IMC’s substantial holder notices are misleading because they do not sufficiently delineate between:
 - (a) relevant interests arising from IMC’s pre-bid stake and acceptances under the Offer and
 - (b) deemed relevant interests in the Treasury Units pursuant to section 608(3)(a) as a result of IMC holding more than 20% of the units in LinQ Resources,and therefore LinQ Resources unit holders will be misled into believing that control in LinQ Resources has passed. FESSB further submitted that this may have the effect of inducing unit holders in LinQ Resources to accept into the Offer.
28. We do not consider the substantial holder notices to be misleading nor do we consider that they have an unacceptable effect on control. IMC was merely complying with its obligations under the Corporations Act by stating in the substantial holder notices that it has a deemed relevant interest in the Treasury Units by virtue of section 608(3)(a). Further, IMC explained its deemed relevant interest in a cover page to its substantial holding notice dated 15 October 2012.

Related party issue

29. FESSB submitted that by agreeing to accept the Offer in respect of the Treasury Units, LinQ Resources had breached section 601LC because it had given a financial benefit to IMC, a related party, without first obtaining member approval.
30. LinQ Capital and LinQ Capital 2 submitted that IMC is not a “related party” for the purposes of the relevant provisions of the Corporations Act and as such there has been no breach of section 601LC.
31. We consider that in this case, compliance with the related party provisions is not a matter for us.⁵ In any event we note that following the undertakings provided by LinQ Capital, LinQ Capital 2 and IMC, if IMC gains a relevant interest in 90% of the units in LinQ Resources (excluding the Treasury Units) through independent unit holders accepting the Offer, there is an argument that the acceptance of the Treasury Units by LinQ Capital 2 into the Offer falls within the arm’s length exception to the related party provisions in section 210.

⁵ *MacarthurCook Property Securities Fund 01 and 02* [2012] ATP 7 at [73]

ASX Listing Rule 10.1

32. FESSB submitted that by agreeing to accept the Offer in respect of the Treasury Units, LinQ Resources has breached ASX Listing Rule 10.1 by agreeing to sell a substantial asset to IMC without complying with the requirements of ASX Listing Rule 10.1. We do not need to consider this issue as enforcement of the ASX Listing Rules is not a matter for us.

DECISION

33. 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

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

Guy Alexander
President of the sitting Panel
Decision dated 29 October 2012
Reasons published 30 October 2012

Takeovers Panel

Reasons - LinQ Resources Fund
[2012] ATP 21

Advisers

Party	Advisers
WA Fire and Emergency Services Superannuation Board	Herbert Geer
IMC Resources Holdings Pte Ltd	Hardy Bowen Macquarie
LinQ Capital Limited (individually and as responsible entity for LinQ Resources Fund)	Herbert Smith Freehills Gresham
LinQ Capital Limited No. 2 (individually and as trustee for LinQ Resources Fund No. 2)	Herbert Smith Freehills Gresham



Australian Government

Takeovers Panel

Annexure A

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

LinQ Resources Fund (LRF)

LinQ Capital No. 2 Pty Ltd (in its own capacity and as trustee for LinQ Resources Fund No. 2) (**LinQ Capital No. 2**) undertakes to the Panel that:

1. it will not accept the takeover offer by IMC Resources Holdings Pte Ltd (**IMC**) for all of the units in LRF (**Offer**) in relation to the 67,640,071 units held by LinQ Capital No. 2 (**Treasury Units**) unless and until IMC acquires a relevant interest in 90% of the units in LRF, excluding the Treasury Units and
2. within one business day after IMC acquires a relevant interest in 90% of the units in LRF, excluding the Treasury Units (as confirmed by service of a "Form 604 – Notice of change of interests of substantial holder on LRF"), LinQ Capital No. 2 will accept the offer in relation to the Treasury Units.

LinQ Capital Limited (in its own capacity and as responsible entity for LRF) (**LinQ Capital**) undertakes to procure that LinQ Capital No. 2 complies with the undertakings provided by it above.

These undertakings have effect until the close of the Offer.

LinQ Capital No. 2 and LinQ Capital each agree to confirm in writing to the Panel when they have satisfied their obligations under these undertakings.

**Signed by Bruno Camarri AM of LinQ Capital No. 2 Pty Ltd
with the authority, and on behalf, of LinQ Capital No. 2 Pty Ltd
Dated 26 October 2012**

**Signed by Bruno Camarri AM of LinQ Capital Limited
with the authority, and on behalf, of LinQ Capital Limited
Dated 26 October 2012**



Australian Government

Takeovers Panel

Annexure B

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

LinQ Resources Fund (LRF)

IMC Resources Holdings Pte Ltd (**IMC**) undertakes to the Panel that it will not rely on the condition in clause 8.5(a)(ii) of its bidder's statement in relation to its takeover offer for all of the units in LRF (**Offer**) to allow the Offer to lapse.

IMC agrees to confirm in writing to the Panel at the end of the offer period that it has complied with this undertaking.

**Signed by Mr Michael Chye of IMC Resources Holdings Pte Ltd
with the authority, and on behalf, of
IMC Resources Holdings Pte Ltd
Dated 29 October 2012**