



Australian Government

Takeovers Panel

MEDIA RELEASE

No: TP12/53

Friday, 10 August 2012

Austock Group Limited – Declaration of Unacceptable Circumstances and Orders

The Panel has made a declaration of unacceptable circumstances (Annexure A) and final orders (Annexure B) in relation to an application dated 12 July 2012 by Mariner Corporation Limited in relation to the affairs of Austock Group Limited (see [TP12/42](#), [TP12/44](#) and [TP12/52](#)).

Background

On 25 June 2012, Mariner announced an intention to make a takeover offer for all the shares in 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.

On 29 June 2012, Mariner announced that it had increased its proposed offer to 11 cents per share and that “due to regulatory issues” it had decided to stand in the market at 11 cents per share for up to 15%.

On 2 July 2012, Austock announced that it had invited Mariner to withdraw its proposed bid, given that (among other things) Mariner had not made its bid subject to obtaining a number of necessary regulatory approvals and the offer price of 10.5 cents breached the minimum bid price rule.

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

On 4 July 2012, Mariner announced (among other things) a new condition to its proposed bid relating to regulatory approvals.

On 9 July 2012, Austock and Folkestone Limited 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.

On 11 July 2012, Mariner announced that it had decided to make an application to the Panel regarding the agreement with Folkestone and that that it would not be

bidding on-market for any Austock shares while the Panel was reviewing the matters set out in the application.

On 12 July 2012, Mariner made an application to the Panel. Mariner submitted that the Folkestone transaction was intended to frustrate its bid and that the break fees which Austock had agreed to pay were excessive, so that shareholders did not have a fair opportunity to choose between the Mariner bid and the Folkestone transaction.

The Panel accepted from Folkestone an undertaking not to enforce the break fee of \$500,000 so that the break fee will be a maximum of \$250,000 in all circumstances in which any break fee is payable.

Given that the application by Mariner submitted that the bid would be frustrated, the Panel looked at the proposed bid and had some concerns.

The proposed bid was not subject to a funding condition. Despite requests from the Panel, Mariner provided no evidence to the Panel of any written agreement in relation to funding of its proposed bid. Previously, in response to an ASIC notice to produce, Mariner had confirmed that the only written document regarding the proposed funding arrangements was a Mariner board paper. The paper did not record any satisfactory funding arrangements for the bid.

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.

The proposed bid was also subject to a number of conditions that were written in such a way that there was uncertainty regarding their triggers.

On 24 July 2012, Mariner announced that it had decided to invoke a 'No material acquisitions, disposals or changes to capital' condition in the proposed bid (which had been triggered by the Folkestone transaction) and withdraw the proposed bid.

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

The Panel declined to consent to Mariner withdrawing its application to the Panel. The market needs to know whether Mariner intends to stand in the market to buy up to 15% of Austock after the conclusion of the Panel proceedings, and Austock shareholders need to know the circumstances surrounding the proposed bid when they vote on the Folkestone transaction.

Declaration

The Panel has declared that the following circumstances are unacceptable:

- 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

- the market is uninformed as to the circumstances relating to the making of the proposed bid and its withdrawal and
- 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 (ie, Mariner has not given Austock shareholders sufficient information).

The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in s657A(3).

Orders

The Panel has made orders (Annexure B) to the effect that:

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

The Panel also sought submissions from the parties on costs. It has made a costs order in favour of Austock, Folkestone and ASIC. It ordered only part of the costs involved in the proceedings for reasons including that Mariner's application resulted in a modification of the break fee.

The sitting Panel was Peter Day, Byron Koster and Peter Scott (sitting President).

The Panel will publish its reasons for the decision in due course on its website www.takeovers.gov.au.

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Australian Government

Takeovers Panel

Annexure A

**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 B

**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