



Australian Government

Takeovers Panel

**Reasons for Decision
Winpar Holdings Limited
[2013] ATP 2**

Catchwords:

Association – substantial holding – failure to disclose – common directorships – common investments – family links – related party transactions – decline to conduct proceedings – decline to make a declaration

Corporations Act 2001 (Cth), sections 12, 602, 606, 657A, 657C

IFS Construction Services Limited [2012] ATP 15, Viento Group Limited [2011] ATP 1, Viento Group Limited 02 [2011] ATP 12, Bentley Capital Limited 01R [2011] ATP 13, Bentley Capital Limited [2011] ATP 8, CMI Limited 01R [2011] ATP 5, Padbury Mining Limited [2010] ATP 9, Mount Gibson Iron Limited [2008] ATP 4

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

INTRODUCTION

1. The Panel, Garry Besson (sitting President), Anthony Sweetman and Heather Zampatti, declined to conduct proceedings on an application by National Exchange Pty Ltd in relation to the affairs of Winpar Holdings Limited. The applicant submitted that a placement of shares in Winpar was made to associates of directors of Winpar and had the effect of increasing their combined holding from 28.48% to 34.15%.¹ The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.
2. In these reasons, the following definitions apply.

Applicant	National Exchange Pty Ltd
Level 1	Level 1 Pty Ltd
Penrose	Penrose Club Holdings Limited
Penrose Transaction	the acquisition of 16,390 Penrose shares by Winpar, announced on 31 December 2012
Placement	Winpar’s placement of 515,000 shares, announced on 31 December 2012
Winpar	Winpar Holdings Limited

¹ These figures have been calculated from information contained in the application and publicly available information, and differ slightly from those in the application

FACTS

3. Winpar Holdings Limited is an NSX listed company (NSX code: WPH).
4. The directors of Winpar are Gordon Elkington, Steven Pritchard, John Honan and Alfred Rofe.
5. The Applicant requisitioned a general meeting of Winpar shareholders (held on 20 April 2012) and proposed a resolution to appoint David Tweed as a director. The resolution was not approved (votes in favour: 1,401,138 / votes against: 1,690,853).
6. The Applicant requisitioned another general meeting of Winpar shareholders (held on 28 June 2012) and proposed a resolution to remove Steven Pritchard as a director. The resolution was not approved (votes in favour: 1,606,349 / votes against: 1,643,675).
7. Under s249N² the Applicant gave notice that a resolution to remove Steven Pritchard as a director be put at Winpar's 2012 AGM. In addition, the Applicant lodged proxies against the adoption of the remuneration report and the re-election of John Honan as a director.
8. At the 2012 AGM (held on 29 November 2012) the resolutions to adopt the remuneration report and re-elect John Honan as a director were passed on a show of hands. The resolution to remove Steven Pritchard was not put.
9. On 31 December 2012, Winpar announced that it had acquired additional shares in Penrose (an unlisted public company), increasing its interest from 4.21% to 29.31%. The Applicant submitted that the Penrose shares were presumably acquired from Level 1, a company controlled by Penrose's chairman, Anton Rosenberg. The directors of Penrose include Gordon Elkington, Steven Pritchard and Anton Rosenberg.
10. On 31 December 2012, Winpar made the Placement.
11. The Applicant's shareholding declined from 44.75% to 39.03% as a result of the Placement.
12. The acquisition of shares in Penrose was funded through the Placement, representing 12.77% of post-Placement capital. Shares were issued to the following:
 - (a) Pritchard Family Company Pty Ltd, controlled by Steven Pritchard (0.25%)
 - (b) Honan Business Services Pty Ltd, controlled by John Honan (0.25%)
 - (c) Rosemary, Margaret and Katherine Elkington (who the Applicant submitted are relatives of Gordon Elkington, 0.74%) and
 - (d) Level 1 (8.06%).
13. If they are combined, the Placement increased the combined holding of Gordon Elkington, Milly Elkington, Rosemary Elkington, Katherine Elkington, Margaret Elkington, Steven Pritchard, John Honan and Anton Rosenberg from 28.48% to 34.15%.

² References are to the *Corporations Act 2001* (Cth) unless otherwise specified

14. The Applicant requisitioned a general meeting of Winpar shareholders (held on 7 February 2013) and put resolutions to remove Steven Pritchard and John Hanon as directors. The resolutions were not approved (votes in favour 1,582,434 / votes against: 2,055,972).

APPLICATION

Declaration sought

15. By application dated 17 April 2013, the Applicant sought a declaration of unacceptable circumstances. The Applicant submitted (among other things) that:
- (a) the Placement was made to a parties including entities that are associated with directors of Winpar, and accordingly, s606 and the substantial holding provisions have been contravened and
 - (b) the Chairman of Winpar acted improperly in failing to conduct a poll at the 2012 AGM given the proxies that had been lodged. The outcome of the resolutions would have been different if a poll had been taken.

Interim orders sought

16. The Applicant sought interim orders to the effect that directors of Winpar and their associates be prevented from increasing their voting power in Winpar or disposing of, transferring or exercising voting power in respect of their Winpar shares pending determination of the application.

Final orders sought

17. The Applicant sought final orders to the effect that shares held by directors of Winpar and their associates in excess of 20% be vested in ASIC for sale, they disclose their voting power and associations as required under the substantial holding provisions and be prohibited from increasing their voting power other than as permitted by s611.

DISCUSSION

Association and s606

18. Section 12 sets out the tests for association as applied to Chapter 6. There are two relevant tests here:
- (a) s12(2)(b) - which provides, in essence, that B is an associate of A if (and only if) B is a person with whom A has, or proposes to enter into, a relevant agreement for the purpose of controlling or influencing the composition of a company's board or conduct of its affairs and
 - (b) s12(2)(c) - which provides, in essence, that B is an associate of A if (and only if) B is a person with whom A is acting or proposing to act in concert in relation to the company's affairs.
19. A relevant agreement is an agreement, arrangement or understanding:
- (a) whether formal or informal or partly formal and partly informal and

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- (b) whether written or oral or partly written and partly oral and
 - (c) whether or not having legal or equitable force and whether or not based on legal or equitable rights.³
20. In *Mount Gibson Iron Limited*⁴ the Panel stated its starting point for conducting proceedings in association cases. It said “*that it was for Mount Gibson – the applicant – to demonstrate a sufficient body of evidence of association and to convince the Panel as to that association, albeit with proper inferences being drawn.*”⁵
21. The Applicant submitted that:
- (a) “*three directors of Winpar are also, whether directly or indirectly through relatives or entities controlled by them, shareholders of Penrose*”
 - (b) two directors of Winpar, Gordon Elkington and Steven Pritchard, are also directors of Penrose and
 - (c) the controller of Level 1, Anton Rosenberg, the largest recipient of the Winpar shares under the Placement, is a director of Penrose.
22. The common directorships and investments constitute structural links, but only relate to the companies involved in the circumstances. No other material supported the submission of association. In particular, evidence of structural links between Anton Rosenberg and the directors of Winpar is limited.
23. The Applicant submitted that the purpose of the Placement was to dilute its control in Winpar. It submitted that:
- the assets of Penrose an unlisted public company holding rural land generating no recurring income, are not consistent with the operations and corporate objectives of Winpar and there is no compelling commercial reason supporting the acquisition by Winpar of additional shares in Penrose.*
24. Winpar owned shares in Penrose prior to the Penrose Transaction, so prima facie it does not seem unreasonable that it might want to acquire more. While the effect of the Placement is that the Applicant’s voting power over Winpar has diminished, the only material in the application supporting the submission that the Placement was an uncommercial transaction is the statement above.
25. In our view, the Applicant did not provide sufficient material to support the submission of association, or convince us that such material exists to support its application. To conduct proceedings we would need to see, for example, material in support of some or all of the following: further structural links, a shared goal or purpose in relation to Winpar, prior collaborative conduct, other common investments and dealings, common knowledge of relevant facts and/or uncommercial actions.⁶

Substantial holder disclosures

³ Section 9

⁴ [2008] ATP 4

⁵ At [15]

⁶ *Bentley Capital Limited 01R* [2011] ATP 13 at [38]

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26. If combined, the relevant interest of the Elkingtons in Winpar is 19.01%. Other than Milly Elkington being the wife of Gordon Elkington, no conclusive evidence has been provided that the Elkingtons named in the application are related. However, given the common names and contact information it appears likely that they are.
27. Assuming the Elkingtons are related, no additional material was provided from which we could infer an association.

Conduct of 2012 AGM

28. The Applicant submitted in relation to the 2012 AGM that the Chairman of Winpar failed to:
 - (a) call a poll on the resolutions that the remuneration report be adopted and that John Honan be re-elected as a director, which was an indication that the directors of Winpar are acting in a manner that is improper and in furtherance of cementing their control of the company that is not efficient or competitive and
 - (b) discharge his duties to Winpar by not putting forward the resolution that had been validly proposed by the Applicant in accordance with s249N to remove Steven Pritchard as a director.
29. In *IFS Construction Services Limited*⁷, the Panel decided that it had jurisdiction to consider how proxies were dealt with in a s249D meeting because it “*was to have taken place in the context of a proposed bid and its outcome might well defeat the bid.*” In this matter there is no bid, and the 2012 AGM related to a possible change of control of the board of Winpar that occurred prior to the Placement. On the material provided we are not satisfied that there is a sufficient link between the 2012 AGM and the Placement. Accordingly, we are not satisfied that this aspect of the application involves the acquisition of control over voting shares as required by sections 602 and 657A.⁸
30. It is open to the Applicant to raise its concerns in other forums, namely ASIC and the Courts.

Application is out of time

31. Pursuant to s657C(3), an application for a declaration under s657A can be made only within 2 months after the circumstances have occurred or a longer period determined by the Panel.
32. The key events in this matter are the conduct of the 2012 AGM, which occurred on 29 November 2012, and the Penrose Transaction and the Placement, announced on 31 December 2012. The application was dated 17 April 2013. The Applicant did not provide any justification for the delayed application. If we had been minded to conduct proceedings, we would have required some explanation of the delay from

⁷ [2012] ATP 15, at [26]

⁸ *Padbury Mining Limited* [2010] ATP 9

the Applicant before considering whether to extend the time for making the application.

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 have decided not to conduct proceedings, we do not need to make interim orders.
35. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

Garry Besson
President of the sitting Panel
Decision dated 29 April 2013
Reasons published 30 April 2013

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Advisers

Party	Advisers
Applicant	Piper Alderman
Gordon Bradley Elkington	N/A