Australian Government

Takeovers Panel

Reasons for Decision
Firestone Energy Limited
[2013] ATP 4

Catchwords:

bidder's statement – relevant interest – voting power - collateral benefits – equal opportunity - disclosure – failure to disclose – identity of the bidder – material omission - confidentiality – withdrawal right – insider participation - declaration – orders

Corporations Act 2001 (Cth), sections 606, 609(7), 623, 636, 651A, 657A, 657C

Guidance Note 1, Guidance Note 19, Guidance Note 21

AG (Cth) v Alinta [2008] HCA 2

Viento Group Limited [2011] ATP 12, *oOh!media Group Limited* [2011] ATP 9, *MYOB Limited* [2008] ATP 27, *Normandy Mining Limited 06* [2001] ATP 32, *Skywest Limited 03* [2004] ATP 17

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
Yes	**No**	**Yes**	**Yes**	**Yes**	**No**

INTRODUCTION

1. The Panel, Rodd Levy, Peter Scott (sitting President) and John Story made a declaration of unacceptable circumstances in relation to the affairs of Firestone. The Panel decided that there was deficient disclosure in relation to the identity of shareholders (and potential shareholders) in Waterberg and in relation to the exposure that accepting Firestone shareholders would have in the Waterberg coal joint venture. The Panel ordered disclosure, extension of the bid and a withdrawal right.

2. In these reasons, the following definitions apply.

Ariona	Ariona Company SA
Firestone	Firestone Energy Limited
Haworth	Haworth Finance Limited
Sekoko	Sekoko Resources (Pty) Ltd and Sekoko Coal (Pty) Ltd
SPA	Share Sale and Purchase Agreement between Sekoko and Ariona dated 13 June 2012 (as amended)
Standard Bank Group	A consortium of lenders under a convertible note facility agreement between Ariona and the Standard Bank of South Africa

Waterberg	The Waterberg Coal Company Limited, formerly known as Range River Gold Limited
Waterberg JV	The joint venture in relation to the Waterberg coal project in the Limpopo Province of South Africa

FACTS

Background

3. Firestone is an ASX listed company (ASX code: FSE). Firestone's main asset is a right to a 60% participation interest in the Waterberg JV. Sekoko had the other 40% by way of a direct interest.

4. On 7 May 2012, Firestone announced that:

   (a) it had entered into a conditional term sheet with Ariona under which (among other things) Ariona would provide $30.7 million[1] to Firestone under a secured convertible note facility replacing existing convertible notes.[2] Ariona was described in the announcement as *"a special purpose vehicle representing a consortium of international institutional and private investors focusing on global resource opportunities"* and

   (b) Ariona had entered into a binding term sheet with Sekoko (see below).

5. On 29 June 2012, Firestone announced that Sekoko and Ariona had signed the SPA, under which Ariona would (among other things) acquire from Sekoko:

   (a) a minimum of 622 million shares in Firestone (20.0%) for $6.22 million up to a maximum of 800 million shares in Firestone (25.69%) for $8 million and

   (b) a 10% direct interest in the Waterberg JV.

6. On 5 October 2012, Firestone shareholders approved the acquisition of up to 56.7% voting power in Firestone by Ariona, through the acquisition of Firestone shares from Sekoko and conversion of the convertible notes.

7. On 12 December 2012, Waterberg announced that it had entered into a conditional heads of agreement (on 5 December 2012) to acquire the entire issued capital of Ariona from Haworth. The acquisition was conditional, among other things, on *"Firestone obtaining shareholder approval for the acquisition of a relevant interest by [Waterberg] in Firestone as a result of [Waterberg] acquiring Ariona."* The announcement noted that Ariona was party to several agreements with Sekoko in relation to Firestone shares and an interest in the Waterberg JV. The announcement disclosed that:

   (a) Waterberg intended to consolidate its shares, and options, on a 1 for 10 basis subject to shareholder approval

   (b) consideration for the acquisition was 125 million post consolidation Waterberg shares and

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[1] On 25 July 2012, Firestone announced that the facility had increased to $40.7 million

[2] The existing notes were held by BBY Nominees Pty Ltd, which was also a party to the agreement

(c) Waterberg agreed to provide Ariona a $250,000 unsecured loan for working capital purposes, repayable on or before 30 June 2013.

8. Also on 12 December 2012, Ariona entered into a non-binding term sheet with the Standard Bank Group to provide $35 million in convertible note funding.

9. On 17 December 2012, Waterberg announced a proposed off-market scrip takeover bid to acquire all the shares in Firestone. The bid consideration was 1 Waterberg share for every 2 Firestone shares (post consolidation, 1 for 20). On 30 January 2013, Waterberg issued its bidder's statement.

10. On 5 February 2013, three directors were nominated by Ariona to Firestone's board – David Hillier, Oren Zohar and Jack James.

11. On or about 26 March 2013, Waterberg, Sekoko and Ariona orally agreed to amend the terms of the SPA.

12. On 27 March 2013:

(a) the shareholders of Waterberg approved, among other things, the share consolidation and the acquisition of a relevant interest by Haworth (the vendor of the Ariona sale) in Waterberg of up to 46.88%

(b) Waterberg increased its bid for Firestone to 1.25 Waterberg shares for every 20 Firestone shares (post consolidation) and

(c) Waterberg freed its bid from all defeating conditions.

13. On 2 April 2013, Waterberg announced that it had waived all the conditions to its acquisition of Ariona and completed the acquisition on 28 March 2013.

14. On 2 April 2013, Waterberg, Sekoko and Ariona signed a deed of amendment to the SPA. However on 4 April 2013, Waterberg, Sekoko and Ariona signed a further deed of amendment to the SPA, which stated that (in clause 1.4) the 2 April amendment did not "*fully and correctly record the amendment agreed between the Parties on 26 March 2013*". The amendments reflected in the 4 April 2013 amendment had the following effects (among others):

(a) to reduce the number of Firestone shares to be acquired by Ariona from Sekoko to 480 million from 800 million

(b) to provide for payment by Ariona to Sekoko of $2.735 million in consideration for Sekoko extending the completion date under the SPA and waiving certain rights in relation to liquidated damages and

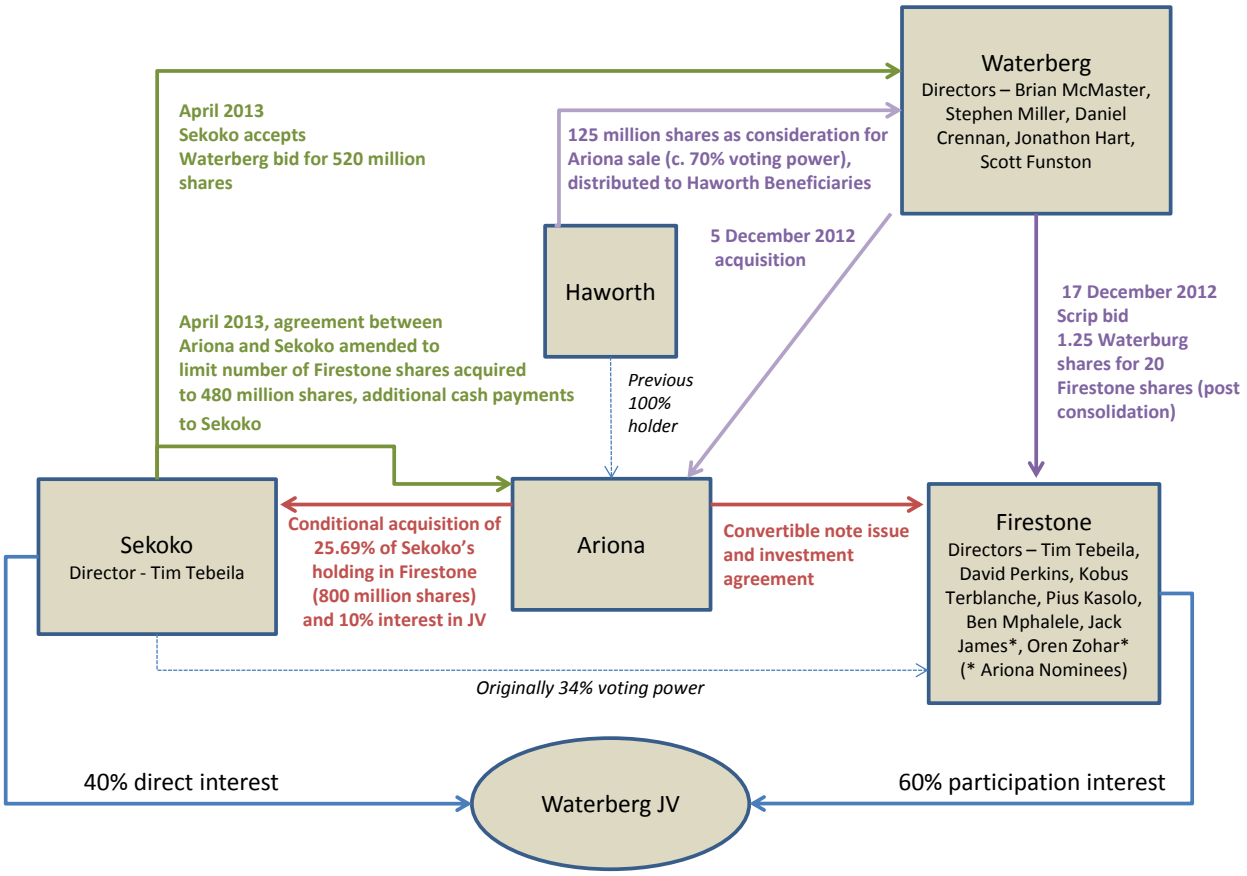
(c) to increase the consideration for the acquisition of the 10% interest in the Waterberg JV by $1.2 million.

15. Also on or about 4 April 2013:

(a) Sekoko signed an acceptance form in relation to Waterberg's bid for 520 million Firestone shares, conditional on Waterberg obtaining Johannesburg Stock Exchange listing and

(b) David Hillier resigned as a director of Firestone.

16. Various relationships between the parties are described below:



APPLICATION

Declaration sought

17. By application dated 18 April 2013, Firestone sought a declaration of unacceptable circumstances. Firestone submitted (among other things) that:

    (a) the downstream acquisition of a relevant interest in 800 million shares in Firestone, as a result of Waterberg's agreement to acquire Ariona, contravened s606[3] because the agreement ceased to be a conditional agreement under s609(7) and Ariona and Waterberg were *"associates as a result of their acting in concert in relation to Firestone's affairs"*[4]

    (b) the payments made to Sekoko at the time the SPA was amended constituted collateral benefits which had not been offered to other Firestone shareholders

    (c) Waterberg's bidder's statement failed to disclose *"material information in relation to the identity of persons who propose to acquire a substantial interest"* in Firestone, in particular the investors behind Haworth and the Standard Bank Group and

[3] References are to the *Corporations Act 2001* (Cth) unless otherwise specified
[4] Firestone also submitted that it followed that Haworth also contravened s606 because it *"acquired the same relevant interest in"* Firestone shares as Waterberg, *"by virtue of s608(3)"*

(d) Mr Zohar and Mr James *"refused to exclude themselves from board meetings considering the offer and potential competing proposals"*. They should have excluded themselves because they were Ariona nominees.

18. Firestone submitted that the effect of the circumstances was that:

(a) Waterberg had acquired a relevant interest in Firestone shares of more than 20% without Firestone shareholder approval

(b) Firestone shareholders had not been given an equal opportunity to participate in the benefits provided to Sekoko, including those benefits provided to Sekoko to induce acceptances under the bid and

(c) Firestone shareholders did not know the identity of persons who propose to acquire a substantial interest in Firestone.

Interim orders sought

19. Firestone sought interim orders to the effect that, for a period of two months or until the final decision of the Panel:

(a) Waterberg and Ariona be restrained from exercising any voting rights attached to Firestone shares and

(b) Waterberg be restrained from acquiring Firestone securities or any interest in Firestone securities.

20. Firestone also sought interim orders to the effect that:

(a) Mr James and Mr Zohar be excluded from participating in those parts of meetings of directors of Firestone dealing with the bid, any alternative proposals and funding arrangements

(b) Waterberg issue a supplementary bidder's statement disclosing the controllers of Waterberg and Haworth and the members of the Standard Bank Group and

(c) Waterberg, Mr James and Mr Zohar provide specified documents to the Panel.

21. We considered that the interim orders sought were unnecessary or in the nature of final orders. The request for documents could be dealt with (if necessary) in the process of seeking submissions to a brief.

22. However, we were concerned, given Waterberg's voting power in Firestone (then 42.07%), that Waterberg could seek to change Firestone's board. Also, the matter was complicated and we were concerned about the information that might be given to shareholders while we considered the application. We made interim orders (Annexure A) preventing:

(a) Waterberg and Firestone from publishing or dispatching any further material to Firestone shareholders in respect of Waterberg's bid, unless we consented or it was required under ASX Listing Rule 3.1 and

(b) Waterberg from seeking to change the board of Firestone.

Final orders sought

23. Firestone sought final orders, including orders to the effect that:

    (a) Waterberg's bid be varied to include an alternative all cash consideration of 1.8c per share, equivalent *"to the value of the consideration received by Sekoko in respect of the securities acquired from it by Ariona and [Waterberg]"* and

    (b) Waterberg's bid be extended and Waterberg shareholders who have accepted the bid be given the opportunity to receive the cash consideration or withdraw their acceptances.[5]

24. Firestone sought an alternative final order that the 1 billion shares acquired by Waterberg from Sekoko (via Ariona and Sekoko's acceptance under the bid) *"be vested in ASIC for orderly disposal"*.

DISCUSSION

25. We decided to conduct proceedings on the issues raised in Firestone's application and two further issues:

    (a) whether Waterberg and Ariona, in amending the SPA, triggered an obligation under s651A on Waterberg to offer an all cash alternative in its bid and

    (b) whether Waterberg's bidder's statement in disclosing that Firestone shareholders *"will have exposure to a 70% interest in the Waterberg Project (whereas currently [Firestone] holds a 60% interest)"* was misleading.

Contravention of s606

26. Ariona had a relevant interest in 800 million Firestone shares under the SPA pursuant to s608(8). Firestone submitted that, when Waterberg completed its acquisition of Ariona on 28 March 2013, it obtained by operation of s608(3) a relevant interest in those 800 million shares and could not rely on any of the s611 exceptions.

27. The SPA was conditional on Firestone shareholder approval. Firestone submitted in the alternative that Waterberg could no longer avail itself of the exception in s609(7) as Waterberg's first supplementary bidder's statement, lodged on or about 20 March 2013, had omitted Firestone shareholder approval as a condition to that agreement. Therefore, from that time, Waterberg's acquisition of Ariona was no longer subject to Firestone shareholder approval and s609(7) ceased to apply.

28. Firestone also submitted that the amendments to the SPA which reduced the number of Firestone shares to be acquired by Ariona to 480 million and the subsequent acceptance by Sekoko into Waterberg's bid for 520 million Firestone

[5] Firestone also sought final orders (similar to the requested interim orders) restraining the voting rights attached to Firestone shares held by Waterberg (and its associates and related bodies corporate) and Ariona for varying periods

shares was *"a misguided attempt to avoid the earlier contravention of s606"* by Waterberg.

29. Waterberg submitted that the SPA was amended verbally on 26 March 2013, prior to the completion of its acquisition of Ariona. The amendment to reduce the number of Firestone shares acquired was made, it submitted, because Firestone would not convene a general meeting of its shareholders to approve the acquisition.

30. When Waterberg entered into the heads of agreement with Ariona on or about 5 December 2012, it obtained a relevant interest in 100% of Ariona.[6] Therefore, in the absence of an exception, Waterberg would have had the same relevant interest as Ariona because of s608(3)(a). This included Ariona's relevant interest in 800 million Firestone shares under the SPA.

31. Section 609(7) prevents a relevant interest arising by reason of an agreement conditional on either shareholder approval under item 7 of s611 or ASIC exemption. Section 609(7) only operates if the agreement *"does not restrict disposal of the securities for more than 3 months from the date when the agreement is entered into"*.[7]

32. While the heads of agreement was conditional on shareholder approval under item 7 of s611, it did not meet the other requirements of s609(7). Clause 2.2 provided that the agreement would be terminated if the conditions were not satisfied before the "*end date*". This was initially defined as 31 March 2013, which was more than 3 months from the date of the heads of agreement. This was later extended to 30 April 2013.

33. Ariona covenanted under clause 6.1(d) of the heads of agreement that it would not "*except as contemplated in this Agreement, without the prior consent of*" Waterberg:

    other than in the ordinary course of its business, dispose of, agree to dispose of, assign, agree to assign, encumber or grant any option over any of its assets or any interest in any of them other than as specified in this Agreement.[8]

34. Clause 6.1(d) restricts Ariona from disposing of its contractual right to acquire 800 million Firestone shares from Sekoko. This constitutes a relevant interest. The clause would also prevent Ariona allowing Sekoko to dispose of those shares. As these restrictions were to operate until the 'end date' of 31 March 2013, the restrictions apply for more than 3 months and, accordingly, the exception in s609(7) does not apply.

35. Waterberg submitted that clause 6.1(d) cannot restrict disposal of 800 million Firestone shares because Ariona's interest in those shares was only a right to acquire them, not the shares themselves. Therefore Waterberg could rely on s609(7)(c) because the heads of agreement did not restrict disposal of the 800 million Firestone shares for more than 3 months from the date when the agreement was entered into.

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[6] See s608(2) and s608(8). Any condition precedent is ignored for these purposes

[7] s609(7)(c)

[8] Schedule 5 of the heads of agreement provides that the *"Ariona Assets"* includes "*Ariona's proposed acquisition of 800,000,000 FSE Shares…"*

36. ASIC submitted that the definition of 'dispose' in s9 provides that, for the purposes of Chapter 6, *"a person who has a relevant interest in securities **disposes** of the securities if, and only if, they cease to have a relevant interest in the securities"* (emphasis in the original). ASIC submitted that:

    Clause 6.1(d) of the Heads of Agreement restricts Ariona, being a person who has a relevant interest in Firestone securities, from disposing of its right to acquire the shares in Firestone from Sekoko (i.e. ceasing to have a relevant interest in the securities) and the end date under the agreement is more than three months from the date of the agreement (originally and as amended). Therefore s609(7)(c) does not apply and s606 has been contravened.

37. We agree. Therefore we consider the terms of the heads of agreement did not comply with s609(7)(c).

38. Moreover, we consider that Waterberg did not take proper steps to convene a meeting of Firestone shareholders to approve its acquisition. Waterberg submitted that it had attempted to engage with Firestone to convene a meeting of Firestone shareholders to approve the acquisition and its intention to seek approval *"only ceased when it became clear that [Firestone] would not take actions to convene the relevant shareholder meeting in time for completion to occur"*.

39. Waterberg and Firestone provided correspondence regarding the proposed shareholders' meeting. On 15 February 2013, Firestone queried whether Waterberg had requested or would request a meeting to approve the acquisition. On 19 February 2013, Waterberg asked Firestone when it intended to convene the meeting. On 15 March 2013, Waterberg asked for an update and Firestone's lawyers responded that Firestone had not received a formal request and that Firestone expected Waterberg would undertake to pay for the costs of convening the meeting. Issues around the mechanics of calling the meeting were not resolved.

40. Firestone submitted that it was open to the Panel to infer from this correspondence that Waterberg either did not have any intention to seek, or failed to *"prosecute with due diligence"*, shareholder approval. Waterberg submitted that it was reasonable for it to presume that Firestone was prepared to convene a meeting because:

    (a) Firestone had convened and funded a shareholder meeting on 5 October 2013 to approve Ariona's acquisition of Firestone shares

    (b) there was significant co-operation between Firestone and Ariona prior to 12 March 2013, when BBY Nominees Pty Ltd terminated the Investment Agreement (see paragraph 4a) between Firestone, BBY and Ariona and

    (c) there had been a number of conversations between directors of Waterberg and Firestone in January and February 2013 in which the matter was raised.

41. Waterberg also submitted that factors including the Christmas/New Year period and the work Waterberg was required to undertake in progressing the bid meant that *"it is easy to understand the delay between December 2012 and February 2013"*.

42. We think Waterberg did not take proper steps to call a meeting of Firestone shareholders. There are a number of steps Waterberg could have taken including a

formal request to Firestone to convene a meeting, an undertaking to reimburse Firestone for the costs of convening the meeting, providing the wording for the resolution, asking Sekoko to requisition a meeting, complaining to ASIC or making its own Panel application.

43. We also consider that, even if the heads of agreement had restricted the disposal of the securities for less than 3 months, it was unacceptable for the parties to agree to extend the restriction period so that it was more than 3 months in total. We consider that, where the parties are running out of time for the shareholder meeting to be held, the correct course of action is to seek a modification of the legislation from ASIC (which would, in the ordinary course, consult with the target company before deciding whether to grant the modification). Extending the restriction period is inconsistent with the policy objectives of the legislation.

44. We consider that Waterberg breached s606 when it entered into the heads of agreement with Ariona and Haworth on or about 5 December 2012. Alternatively, because Waterberg did not take proper steps to call a meeting of Firestone shareholders, and extended the restriction period, unacceptable circumstances may have arisen at a later date.[9]

45. ASIC Regulatory Guide 74 states (at [95]) *"Section 609(7) presumes that the parties intend to seek item 7 approval. If the parties do not intend to seek item 7 approval, or do not act to seek approval, they may risk an application to the Takeovers Panel for a declaration of unacceptable circumstances."*

46. Section 609(7) was introduced to facilitate reliance on the exception in item 7 of s611. Previously there was uncertainty as to the extent to which a seller could be bound to proceed with a sale if the agreement had to be submitted to shareholder approval. The policy of s609(7) is not simply to allow shares to be tied up for a period not exceeding 3 months, but to enable parties to submit their transaction to shareholders. If the parties do not take proper steps to effect this, it may constitute unacceptable circumstances if the locking up of the shares has or may have affected the market for control of the target.[10]

47. Usually a breach of s606 results in unacceptable circumstances. But before deciding that unacceptable circumstances exist, the Panel must take into account the public interest and relevant policy considerations.[11] We may have found unacceptable circumstances if we had evidence that the restriction on the disposal of 800 million Firestone shares had deterred any rival bidders.[12]

48. Here the only evidence we have is Firestone's submission that Waterberg's acquisition deterred a potential alternative funding proposal for Firestone. Drawing on our commercial experience and with the benefit of hindsight (given the heads of agreement was entered into over 4 months before the date of the Panel application), we consider it was unlikely that the heads of agreement deterred any

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[9] *oOh!media Group Limited* [2011] ATP 9 at [52]
[10] See also example 5, paragraph 32 of GN 1 – *Unacceptable circumstances* and *oOh!media Group Limited* [2011] ATP 9 at [45]
[11] *AG (Cth) v Alinta* [2008] HCA 2 at [82], [167]
[12] *MYOB Limited* [2008] ATP 27 at [35]-[40]

rival bids for Firestone. In addition, the amendments to the SPA meant that there was ultimately no lock up of Firestone shares over 20%.

49. Waterberg's actions that led to what we consider to be a contravention of s606, its failure to take proper steps to call a shareholders' meeting and its repeated submissions that there was no contravention of s606 did not assist us. Moreover, Waterberg did not lodge a substantial holder notice attaching the heads of agreement when it was required to do so.[13] However, in our view contraventions of s606 by Waterberg have not resulted in unacceptable circumstances.

Collateral benefits/s651A

50. Firestone submitted that the following payments made to Sekoko when the SPA was amended on 4 April 2013 contravened s623:

    (a) Ariona agreeing to pay Sekoko $2.735 million[14] *"in consideration for Sekoko extending the completion date and waiving certain rights to liquidated damages"* and

    (b) increasing the purchase price for the acquisition of the 10% interest in the Waterberg JV from $20.5 million to $21.7 million.

51. Firestone also submitted that Sekoko had been paid cash consideration in contrast to the scrip consideration offered under Waterberg's bid.

52. Waterberg submitted that Ariona had not made payments due under the SPA to Sekoko. Therefore Sekoko was entitled to terminate the SPA. The revised consideration under the SPA *"was negotiated by the parties on arms length terms in order to preserve Ariona's right to secure the exposure to the Project Interest, and is entirely unrelated to Sekoko's acceptance"* of the Waterberg bid. Waterberg also submitted that the $2.735 million payment included the following:

    (a) Under the SPA, Ariona had lent $2.185 million to Sekoko. Clause 8.8 of the SPA provided that if Ariona failed to complete the agreement by the completion date, this loan would be forfeited. Because difficulties would arise for Waterberg's financing if this amount was forfeited, *"Ariona instead agreed to pay the same amount ($2.185 million) as part of the extension payment and keep the loan on foot"*.[15]

    (b) There was a $250,000 payment due on 28 February 2013 that had not been paid by Ariona.

    (c) $300,000 as compensation to Sekoko for waiving its contractual rights to liquidated damages[16] and extending the completion deadline.

53. Waterberg submitted that the increase in consideration for the interest in the Waterberg JV reflected *"the value of the Waterberg Coal Project increasing over that period. Sekoko's right to terminate the [SPA] put it in a position to renegotiate commercial*

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[13] Even if Waterberg could have relied on s609(7), see s671B(7)
[14] Plus 2% interest on $2.185 million
[15] There was a provision for Sekoko to take this payment in Waterberg shares for effectively the same value as $2,185,000
[16] Including $125,000 under clause 2.2(6) of the SPA

terms and demand compensation given Ariona's failure to make the relevant payments and failure to complete on time…..These matters are entirely separate to Sekoko's consideration of" Waterberg's bid.

54. Sekoko was not a party to these proceedings. We invited Sekoko to make submissions on this issue. Sekoko submitted that it had accepted the Waterberg bid because Waterberg increased its offer on 27 March 2013 and it had made an assessment of Waterberg's technical and financial abilities compared to Firestone's. Sekoko also submitted (among other things) that:

    (a) *"There is no scientific basis for the calculation of the $300,000. It was simply a negotiated outcome, as agreed on 28 February 2013 and subsequently documented on 7 March 2013"*.

    (b) Between June 2012 and April 2013, the 10% interest in the Waterberg JV *"became a significantly more valuable asset as the project advanced, even whilst the [Firestone] share value became more and more depressed"*.

55. We consider that the payments made to Sekoko under the renegotiated SPA were pursuant to its contractual entitlements or as payments to ensure that it did not terminate the agreement. They were not obviously connected to the bid.[17]

56. We accept Sekoko's submission as to why it accepted Waterberg's bid and consider that the payments made were not inducements for Sekoko to accept Waterberg's bid.[18]

57. We consider that these payments are not benefits under the bid that should be provided to other Firestone shareholders, and are not contrary to the equal opportunity principle in s602(c).[19] The SPA primarily concerned the acquisition of 10% of the Waterberg JV. It *"did not appear to be a stratagem to avoid compliance with"* the provisions of Chapter 6 relating to equal opportunity.[20]

58. Therefore we are not satisfied that these payments constituted collateral benefits.

59. ASIC submitted that if the Panel:

    …takes the view that the cash purchase of the 480,000,000 shares from Sekoko is properly characterised as a purchase made by Ariona, this may amount to a breach of s623 if Ariona was an associate of Waterberg at the time Ariona made, or gave the benefits (eg settlement) of, the purchase. The benefit would be that Sekoko gets to sell 480,000,000 of its 800,000,000 Firestone shares (that ASIC understands that it holds) for a cash sum whereas other Firestone shareholders are offered Waterberg scrip.

60. We initially shared ASIC's concern and were also concerned that Waterberg may have triggered s651A by the purchase of Firestone shares outside the bid during the bid period for cash (or at least may have given rise to unacceptable circumstances if the purchase was by an associate). Waterberg submitted that

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[17] Guidance Note 21, *Collateral Benefits* at [9]
[18] GN 21 at [30]-[33]
[19] GN 2 at [11]-[26]
[20] *Normandy Mining Limited 06* [2001] ATP 32 at [16]

"Ariona's acquisition of [Firestone] shares was pursuant to the Sekoko SPA, which is entirely separate to, and significantly pre-dated, the [Waterberg] takeover bid…".

61. The right to receive cash consideration under the SPA arose before the bid was made. We consider that the changes made to the SPA in March/April 2013 did not constitute a new agreement or purchase.[21] Therefore, there was no purchase during the bid period, s651A is not triggered and the cash consideration received by Sekoko did not amount to a collateral benefit.

Disclosure

Haworth

62. Firestone submitted that:

    (a) Waterberg's bidder's statement did not include any information regarding Haworth, "*other than identifying that it entered into an agreement with [Waterberg] for the Ariona*" acquisition and

    (b) information regarding Haworth (including its officers, shareholders, history and intentions regarding Waterberg) was "*material information from the point of view of [a Firestone] shareholder in deciding whether to accept*" Waterberg's bid.

63. Waterberg submitted that Haworth:

    (a) "*is controlled by Richard MacLellan who is its sole shareholder and director*"

    (b) *"is a company registered in the British Virgin Islands. It is a trustee company for a discretionary trust. The beneficiaries of the trust are those who have provided financial or other support to Ariona"* and

    (c) *"as trustee, and MacLellan as controller of the trustee, have discretion as to whom the assets of the trust may be distributed"*.

64. Waterberg submitted that following the completion of the Ariona acquisition from Haworth, Haworth was entitled to be issued 125 million Waterberg shares (approximately 70% voting power in Waterberg). Haworth directed Waterberg to issue those shares to the beneficiaries of the trust, "*other than a small holding of approximately 6.23% in its own name*".

65. Waterberg submitted that, as far as it was aware, none of the beneficiaries under the Haworth trust owned more than 20% of Waterberg. Only three beneficiaries own more than 5% of Waterberg - Richard Maclellan, Stephen Miller (a director of Waterberg) and *"a further London based entity"*. On successful completion of the Waterberg bid, no beneficiary under the Haworth trust will own more than 15% of Waterberg (which will be further diluted by future capital raisings *"in the order of $400 million"*).

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[21] Had the agreement made material changes to the substance of the share purchase (such as increasing the purchase price of the shares, rather than a payment as compensation for past breaches) we may have treated it as constituting a new purchase of the shares, which have had implications under the policy of s651A

66. Waterberg submitted that neither Haworth, nor any beneficiaries of the Haworth trust, will be in a position to influence the affairs of Waterberg, other than to the extent that the person is a director of Waterberg.

67. Waterberg shareholders on 27 March 2013 approved the acquisition by Haworth of Waterberg shares *"up to a maximum of 46.88%"*. They were not informed that the shares, initially totalling approximately 70% of Waterberg's issued capital, would be directed to be issued to a number of beneficiaries in the Haworth trust.

68. Waterberg submitted on 1 May 2013 that Richard Maclellan, Stephen Miller and the London based entity will be issuing substantial holder notices *"shortly"*. To date, this has not occurred.

69. We asked for the names of the beneficiaries of the Haworth trust and how many Firestone shares were issued to each. We were initially given a list of 15 companies (including Haworth). We were given information about the potential controller of only 3 of these companies.[22] After further prompting, we were given some further information.

70. Firestone submitted that investors would not provide funds without there being some arrangement or understanding as to how the return on the investment was to be distributed. It also submitted that:

> *The nature of the complex arrangements …serves to highlight that failure to disclose the details of the arrangements in the Bidder's Statement is both misleading and highly prejudicial to Firestone shareholders.*

71. Waterberg submitted that Waterberg shares were issued to the Haworth beneficiaries based *"on a number of factors, including relative contributions of funds and/or consultancy services and also the progress of the transaction"* and each beneficiary *"understood these matters from the outset and agreed on arms length terms to be distributed [Waterberg] shares in consideration for their contribution at the trustee's discretion"*.

72. We consider these arrangements unusual. Indeed, the idea that an investor would accept being allocated shares at the discretion of the trustee rather suggests that there is more to the arrangement. Waterberg submitted that, other than the entities associated with Mr Miller, the beneficiaries *"of the Haworth trust are not associated with each other"*. Regardless of whether this is the case, we consider that disclosure of the Haworth beneficiaries was required by s602(b)(i) and s636(1)(m). We consider the omission of this information gives rise to unacceptable circumstances.

73. Waterberg submitted that the owner or controller of two of the Haworth trust beneficiaries, Vernon Finance Limited and Jarvest Finance Limited[23], was Mr V Falbo who manages *"investments for various investors that are not known to [Waterberg] or any of its directors"*. Vernon Finance Limited holds 4.35%, and Jarvest Finance Limited holds 10.72%, in Waterberg. We are aware that in *Viento Group Limited 02*, Vernon Finance Limited lodged a substantial holding notice on 5 July

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[22] In each case the controller was Mr Miller, who has voting power in Waterberg of approximately 11.26%
[23] Both incorporated in the British Virgin Islands

2011 in relation to Viento Group Limited, disclosing (among other things) that Mr Maclellan was its associate.[24]

74. We put this fact to Waterberg as it is inconsistent with what it had submitted. Waterberg submitted in response that:

    (a) it was not aware of Mr Maclellan's relationship with Viento Group Limited *"or the background which lead (sic) to Mr Maclellan lodging a substantial holder notice in respect of Viento Group Limited, some 2 years ago"* and

    (b) *"Mr Miller has been dealing with Mr Falbo in respect of the [Waterberg] shares held by Vernon Finance, and understands that Mr Falbo controls and directs the shares held through Vernon Finance. Accordingly, to [Waterberg's] knowledge, Mr Falbo is now the 'controller' of the Vernon finance shareholding in [Waterberg]"*.

75. We consider that Waterberg should have made further enquiries into the identity of those behind Vernon Finance Limited, and possibly other beneficiaries of the Haworth trust, not only because of the bid, but given their interests in Waterberg. We have decided to refer the matters of:

    (a) the identity of the owners and controllers of Vernon Finance Limited and Jarvest Finance Limited

    (b) the failure of Haworth and Jarvest to disclose their substantial holdings in Waterberg and

    (c) a possible association between Haworth, Vernon, Jarvest and Richard Maclellan

    to ASIC for investigation.

Identity of the Standard Bank Group

76. Firestone submitted that:

    (a) Waterberg's bidder's statement did *"not disclose the identity of the members of the Standard Bank Consortium (other than Standard Bank itself)"*, contrary to s602(b)(i)

    (b) Waterberg's bidder's statement *"discloses that on conversion of the Standard Bank Convertible Facility, 459,375,000 [Waterberg] shares…will be issued to the Standard Bank Consortium"* and

    (c) on conversion, the Standard Bank Group would in aggregate have a relevant interest in 46% of Waterberg.

77. Waterberg submitted:

    The identity of the individual members of the Standard Bank financing consortium is not material to a shareholder's assessment of the [Waterberg] takeover bid. Standard Bank is the leader and agent of the consortium providing the financing and we understand that the other investors are not active. Accordingly, the only relevant fact is the identity and financial wherewithal of Standard Bank, which is well established. In addition, as set out in the detailed disclosure in the supplementary bidder's statement dated 19 March 2013,

[24] [2011] ATP 12 at fn 9, [28], [31] and [44]–[46]

individual lenders in the consortium have separate conversion rights. Accordingly, one lender may choose to await repayment of their loaned funds, while another may choose to convert their loan into shares. Any lender who converts their interests in shares and holds over 5% of [Waterberg] will need to lodge a substantial shareholder notice at such time.

78. Waterberg submitted that it was *"subject to strict confidentiality obligations and accordingly is not able to make the disclosure required without being in breach of such obligations"*. Regardless of whether confidentiality obligations can override a bidder's disclosure obligations,[25] we consider that some disclosure in relation to the Standard Bank Group was required by s602(b)(i) and s636(1)(m) and its omission gives rise to unacceptable circumstances.

Exposure to the Waterberg JV

79. Page 14 of Waterberg's bidder's statement states that Firestone shareholders *"will have exposure to a 70% interest in the Waterberg Project (whereas currently [Firestone] holds a 60% interest)"*.

80. Waterberg submitted that on completion of its bid it would *"have a 70% interest in the Project, comprising the 10% Project Interest acquired from Sekoko and the 60% 'participation interest' currently owned by [Firestone]. [Firestone] shareholders who accept the offer will have "exposure" to this, and all of [Waterberg's] other assets. The point is that the post-acquisition [Waterberg] will have a higher degree of control and enjoy a higher proportion of the economic upside, of the Project. The statement is therefore literally true"*.

81. Waterberg also submitted that Firestone's interest in the Waterberg JV was an *"inferior interest"* because its *"only rights in relation to the Project are a contractual right to a participation interest in a joint venture"*.

82. In our view the statement in Waterberg's bidder's statement is misleading and gives rise to unacceptable circumstances. Firestone shareholders' indirect economic interest in the Waterberg JV, assuming Waterberg obtains 100% of Firestone, would be initially 36%.[26] While Firestone's target's statement provided detailed disclosure about the dilution of accepting shareholders' interest in the Waterberg JV, we think it is appropriate for Waterberg to provide supplementary disclosure in light of its complex and evolving capital structure.

Role of Mr Zohar and Mr James as directors of Firestone

83. Firestone submitted that Mr Zohar and Mr James were nominated by Ariona and *"had refused to exclude themselves from board meetings considering the offer and potential competing proposals"*. It submitted that they were *"participating insiders."* [27]

84. Mr Zohar and Mr James submitted that they resisted being excluded from Firestone board meetings on the basis that *"there is no agreement, arrangement or understanding, whether written or unwritten between themselves on the one hand"* and

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[25] *Skywest Limited 03* [2004] ATP 17 at [60]
[26] Given Waterberg intends to issue a further 89,625,000 shares, this interest would decline to 29%. If the convertible notes issued to the Standard Bank Group are converted, it would decline further to 14.5%
[27] See Guidance Note 19 *Insider Participation in Control Transactions*

Ariona, Waterberg and "*their respective directors, officers, employees and related entities*".

85. Guidance Note 19 identifies persons connected to the target and who are involved in the bid as "participating insiders", and states:

> *As soon as the board of a company becomes aware or informed of a bid or potential bid for the company, in which there is, or is likely to be, participation by insiders, it should establish appropriate protocols. Normally this will involve appointing an independent board committee (**IBC**) consisting of those directors who are not participating insiders to oversee the application of these protocols and the process in the interests of target shareholders.* [28]

86. While we do not consider Mr Zohar and Mr James to be "participating insiders", each was nominated to the Firestone board by Ariona and may be in a position of actual or potential conflict.

87. Establishing an independent board committee, which excluded any directors in a position of conflict, would likely have been advisable here. It is not clear to us why Firestone did not do so.

DECISION

Declaration

88. 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 Firestone or

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

    (b) the purposes of Chapter 6 set out in section 602.

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

Orders

90. Following the declaration, we made the final orders set out in Annexure C that Waterberg dispatch a supplementary bidder's statement in a form approved by the Panel, provide Firestone shareholders who have accepted the offer a withdrawal right and extend its offer until at least 7 days after the conclusion of the withdrawal right.

91. Under s657D the Panel's power to make orders is very wide. The Panel is empowered to make 'any order'[29] if 4 tests are met:

    (a) It has made a declaration under s657A. This was done on 17 May 2013.

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[28] At [16] (emphasis in original)

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

(b) It must not make an order if it is satisfied that the order would unfairly prejudice any person. Waterberg submitted that ordering withdrawal rights was unfairly prejudicial to a number of parties, including Firestone (given its financial situation), Firestone shareholders who accepted the bid (because they accepted on the basis of Waterberg's voting power in Firestone at the time of acceptance) and Waterberg (because it declared the bid unconditional on the basis of its voting power in Firestone at the time).

Firestone submitted (among other things) that Waterberg only had voting power of 5.67% at the time it declared its bid unconditional (on the basis of Waterberg's substantial holder notice). We consider that any prejudice to Firestone shareholders and Waterberg is outweighed by the prejudice to Firestone shareholders who may have accepted the bid on the basis of insufficient and misleading disclosure. 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 10 May 2013.

(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 orders do this by ordering further disclosure and a withdrawal right, so that the takeover will proceed as it would have if the circumstances had not occurred.

Costs

92. Firestone sought a costs order. We do not make any costs orders.

Peter Scott
President of the sitting Panel
Decision dated 17 May 2013
Reasons published 31 May 2013

Advisers

Party	Advisers
Firestone Energy Limited	Kelly & Co BBY Limited
Mr Zohar and Mr James	Allion Legal
The Waterberg Coal Company Limited	Gilbert + Tobin Steinepreis Paganin Garrison Capital Pty Ltd

Australian Government
Takeovers Panel

Annexure A

CORPORATIONS ACT
SECTION 657E
INTERIM ORDERS

FIRESTONE ENERGY LIMITED

Firestone Energy Limited (**Firestone**) made an application to the Panel dated 18 April 2013 in relation to its affairs.

The Panel **ORDERS**:

1. Neither Firestone nor The Waterberg Coal Company Limited (formerly Range River Gold Limited) (**WCC**) may publish or dispatch any further material to Firestone shareholders in respect of the off-market takeover bid by WCC for all the shares in Firestone unless:
   (a) the Panel consents or
   (b) it comprises only information required by ASX listing rule 3.1 to be disclosed.
2. WCC and its subsidiaries must not make or initiate any changes to the composition of the board of Firestone.
3. 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 29 April 2013

Australian Government
Takeovers Panel

Annexure B

CORPORATIONS ACT
SECTION 657A
DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

FIRESTONE ENERGY LIMITED

CIRCUMSTANCES

1. Firestone Energy Limited (**Firestone**) is an ASX listed company. It has a right to a 60% participation interest in a coal project in South Africa (the **Waterberg Project**).
2. On 17 December 2012, The Waterberg Coal Company Limited, formerly known as Range River Gold Limited (**Waterberg**), announced an off-market scrip bid for all the shares in Firestone. The consideration was 1 Waterberg share for every 2 Firestone shares (post Waterberg consolidation, 1:20).
3. On 30 January 2013, Waterberg issued its bidder's statement. The bidder's statement included the following:

   "[Firestone] shareholders will have exposure to a 70% interest in the Waterberg Project (whereas currently [Firestone] holds a 60% interest)."
4. On 20 March 2013, Waterberg issued a supplementary bidder's statement, advising (among other things) of variations to existing arrangements affecting its capital structure.
5. On 27 March 2013, Waterberg issued a second supplementary bidder's statement, increasing its bid consideration to 1.25:20 and freeing its bid from all defeating conditions.
6. Also on 27 March 2013, Waterberg's shareholders approved (among other things) the acquisition of 46.88% of Waterberg by Haworth Finance Limited (**Haworth**).
7. The original bidder's statement and the supplementary bidder's statements contain information deficiencies, in that:
   (a) they do not adequately disclose the identities of the owners and controllers of Haworth
   (b) they do not adequately identify the lenders under the convertible financing facility between Waterberg and Standard Bank of South Africa and the facility's potential impact on Waterberg's capital structure and
   (c) they do not adequately inform Firestone shareholders of their exposure to the Waterberg Project given the contemplated capital structure of Waterberg.

8. By reason of the information deficiencies, Firestone shareholders:
   (a) do not know the identity of persons holding a substantial interest in Waterberg, which proposes to acquire a substantial interest in Firestone
   (b) have not been given enough information to enable them to assess the merits of Waterberg's bid and
   (c) are required to make decisions whether to hold their shares, accept the offer or dispose of their shares in other ways on the basis of inadequate information, causing the market for control of Firestone shares not to be efficient, competitive and informed.
9. It appears to the Panel 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 Firestone or
      (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Firestone and
   (b) the purposes of Chapter 6 set out in section 602 of the *Corporations Act* 2001 (Cth) (**Act**)
10. 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) of the Act.

DECLARATION

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of Firestone.

Alan Shaw
Counsel
with authority of Peter Scott
President of the sitting Panel
Dated 17 May 2013

Australian Government
Takeovers Panel

Annexure C

CORPORATIONS ACT
SECTION 657D
ORDERS

FIRESTONE ENERGY LIMITED

The Panel made a declaration of unacceptable circumstances on 17 May 2013.

THE PANEL ORDERS

1. The Waterberg Coal Company Limited (**Waterberg**) must issue a supplementary bidder's statement in relation to its bid for Firestone Energy Limited (**Firestone**), in a form approved by the Panel, that includes:

   (a) adequate disclosure of the identities of the owners and controllers of Haworth Finance Limited, the identities of persons who own or control the beneficiaries of the Haworth Trust (**Haworth Beneficiaries**) and the aggregate and individual shareholdings of the Haworth Beneficiaries

   (b) adequate disclosure of the identity of lenders under the convertible financing facility between Waterberg and Standard Bank of South Africa and the facility's potential impact on Waterberg's capital structure

   (c) adequate disclosure of Firestone shareholders' exposure to the coal project known as the Waterberg Project, given Waterberg's contemplated capital structure

   (d) a right to withdraw by any Firestone shareholder who accepted the bid

   (e) instructions setting out what a shareholder must do to exercise the withdrawal right

   (f) a statement that the corrective disclosure was required by the Panel and

   (g) a statement that the offer period has been, or will be, extended so as to comply with these orders.

2. Waterberg must release the supplementary bidder's statement on ASX and dispatch it to everyone to whom offers were made in the same manner as the offers were sent.

3. Waterberg must give each Firestone shareholder who accepted Waterberg's offer a right to withdraw their acceptance:

(a) by giving Waterberg notice (so that it is received within 10 days of the date of dispatch of the supplementary bidder's statement) in the form attached to the supplementary bidder's statement or complying with Corporations Regulation 6.6.01(1), as the case may be and

(b) by giving Waterberg any certificates and transfer documents needed to effect the return of the securities issued as consideration or complying with Corporations Regulation 6.6.01(2), as the case may be.

4. Waterberg must comply with Corporations Regulation 6.6.01(3) in relation to each person who withdraws their acceptance.

5. Waterberg must extend its offer so that it is open for no less than 7 days after the last date for Firestone shareholders to withdraw acceptances.

6. In respect of each acceptance withdrawn, the securities issued as consideration are cancelled.

Alan Shaw
Counsel
with authority of Peter Scott
President of the sitting Panel
Dated 17 May 2013