



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Laneway Resources Limited  
[2013] ATP 7**

**Catchwords:**

*Entitlement offer – renounceable – underwriting – sub-underwriting – debt to equity conversion – need for funds – potential effect on control – shareholder approval – withdrawal of entitlement offer – undertaking – decline to make a declaration*

*Corporations Act 2001 (Cth), sections 602 and 606, item 7 of section 611, item 10 of section 611, item 13 of section 611*

*Guidance Note 17: Rights Issues*

*MacarthurCook Property Securities Fund 01 & 02 [2012] ATP 7, Real Estate Capital Partners USA Property Trust [2012] ATP 6, Gladstone Pacific Nickel Limited 02 [2011] ATP 16, Bisalloy Steel Group Limited [2008] ATP 29, Rivkin Financial 02 [2005] ATP 1, InvestorInfo Limited [2004] ATP 6*

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

**INTRODUCTION**

1. The Panel, Peter Day, Peter Hay (sitting President) and Jane Sheridan, declined to make a declaration of unacceptable circumstances in relation to the affairs of Laneway Resources Limited after Laneway withdrew its 16 for 1 pro rata renounceable entitlement offer.

2. In these reasons, the following definitions apply.

- ASIC** Australian Securities and Investments Commission
- Bizzell Capital** Bizzell Capital Partners Pty Ltd, wholly owned by Stephen Bizzell
- Bizzell entities** Stephen Bizzell and entities controlled by him
- Bizzell loan facility** the loan facility between Bizzell Nominees and Laneway
- Bizzell Nominees** Bizzell Nominees Pty Ltd, wholly owned by Stephen Bizzell
- entitlement offer** the pro rata renounceable entitlement offer announced by Laneway on 6 June 2013, offering 16 new shares for every 1 share held by eligible shareholders to raise approximately \$22 million at an offer price of \$0.02 per share
- Laneway** Laneway Resources Limited, formerly Renison Consolidated Mines NL

**FACTS**

3. Laneway is an ASX listed gold and coal exploration company (ASX code: LNY).

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4. The directors of Laneway are Messrs Stephen Bizzell, Benjamin Harrison and Richard Anthon. Mr Bizzell is the Chairman of both Laneway and Bizzell Capital.
5. Since 2007, the Bizzell loan facility has been the primary source of funding for Laneway.
6. On 11 October 2012, Laneway announced an intention to undertake an entitlement offer to provide sufficient capital to, among other things, repay the Bizzell loan facility.
7. On 31 December 2012, the date for repayment of the Bizzell loan facility was extended to 30 June 2014 and a letter of comfort was provided by Bizzell Nominees to Laneway's auditors committing to increase the facility from \$19.5 million (its current limit) to \$22.5 million in the event that Laneway did not complete an asset sale and/or capital raising in excess of \$2 million by the start of the 2014 financial year.
8. At 31 March 2013, Laneway's total liability under the Bizzell loan facility was approximately \$18.9 million.
9. On 6 June 2013, the entitlement offer was announced. It was underwritten to \$20.3 million by Bizzell Capital. It was sub-underwritten to \$18.9 million by Bizzell Nominees, which sub-underwriting was to be satisfied by the conversion of its loan to equity.
10. In its prospectus, Laneway described the purpose of the entitlement offer as to "*facilitate the conversion of the Bizzell Nominees Loan Facility and other creditors into New Shares...and raise new capital to continue to develop Laneway's projects and meet its strategic goals*".
11. The conversion of Bizzell Nominees' loan to equity would, potentially, increase the voting power of the Bizzell entities in Laneway from approximately 23.73% to approximately 86.45%.
12. On 1 July 2013, Laneway announced that the entitlement offer had been withdrawn.

## APPLICATION

### Declaration sought

13. By application dated 11 June 2013, ASIC sought a declaration of unacceptable circumstances. ASIC submitted that the entitlement offer was unacceptable having regard to the effect the issue of shares to Bizzell entities would, or would be likely to, have on the control of Laneway, given that Bizzell entities:
  - (a) may increase their voting power from 23.73% to 86.45% without the approval of non-associated shareholders and
  - (b) were seeking to rely on the exceptions in items 10 and 13 of s611<sup>1</sup> to effect a transaction which was inconsistent with the underlying purpose of the exceptions.

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<sup>1</sup> References are to the *Corporations Act 2001* (Cth) unless otherwise specified

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14. ASIC submitted that structuring the conversion of debt to equity as an underwriting of the entitlement offer meant that:
- (a) the acquisition of control over voting shares in Laneway would not take place in an efficient, competitive and informed market (s602(a))
  - (b) holders of voting shares in Laneway would not have a reasonable and equal opportunity to participate in benefits accruing through the proposal to allow the Bizzell entities to convert their debt to equity (s602(c)) and
  - (c) the purported reliance on items 10 and 13 of s611 may give rise to a contravention of s606.

#### Interim order sought

15. ASIC sought an interim order that Laneway make an announcement to ASX deferring the commencement date for renounceable rights trading and the record date until the earlier of the Panel deciding not to conduct proceedings and, if the Panel decided to conduct proceedings, the determination of those proceedings.
16. On 12 June 2013, the President accepted an undertaking from Laneway to this effect (Annexure).

#### Final order sought

17. ASIC sought a final order that the entitlement offer be withdrawn and the non-associated members of Laneway approve the conversion of debt to equity by Bizzell Nominees for the purposes of item 7 of s611.

## DISCUSSION

18. The entitlement offer was renounceable and priced at a 36.4% discount.<sup>2</sup> It was large and likely to be highly dilutive. To maintain their proportionate holding in Laneway, shareholders needed to pay 32 cents in aggregate for each share then held. On the day prior to the announcement of the entitlement offer, Laneway shares closed at 3.5 cents.
19. Laneway submitted that its financial position was “*parlous*”. It submitted that the Bizzell loan facility was effectively fully drawn, interest was accruing at approximately \$180,000 per month, the company had no other sources of cash and had other creditor demands to meet. It submitted that “*an issue of this size allows a repayment of the Bizzell Nominees Loan Facility to occur together with the raising of a sufficient amount of new capital to repay creditors and pay for Laneway’s ongoing activities*”.
20. We accept that Laneway has a genuine need for funds.

#### *Underwriting – abuse of the exceptions*

21. The entitlement offer incorporated a shortfall facility and, to the extent that there would be unallocated shares after shortfall applications had been satisfied, the Laneway directors were to attempt to place shares with new investors. Failing that,

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<sup>2</sup> This discount was to the average closing market price of Laneway shares over the 5 trading days prior to the announcement of the entitlement offer

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shares would be allocated to Bizzell Capital to the extent of the underwriting commitment.

22. There was little or no material provided to suggest that these mechanisms were likely to significantly reduce the potential increase in the voting power of the Bizzell entities. In fact, the prospectus for the entitlement offer states:

*Whilst it is impossible to predict with a high degree of accuracy the level of take up of shares by existing Shareholders under the issue the Independent Director considers it likely that a take up in the range of \$1 million to \$3 million will be received from existing Shareholders.*<sup>3</sup>

23. The prospectus is clear about the purposes of the entitlement offer, being to:

- (a) *Facilitate the conversion of the Bizzell Nominees Loan Facility and other creditors into New Shares and*
- (b) *Raise new capital to continue to develop Laneway's projects and meet its strategic goals.*<sup>4</sup>

24. Even without this statement, we would be concerned. The effect of the entitlement offer on the control or potential control of Laneway was likely to be significant. We agree with ASIC that the entitlement offer “*appears to be principally and commercially designed to enable the Bizzell Entities to convert the debt owed by Laneway to the Bizzell entities into equity in a manner that is expected or likely to result in the Bizzell entities acquiring a controlling holding in Laneway.*”

25. In the context of whether a rights issue is sufficiently accessible to all shareholders, the Panel has outlined the policy behind the exceptions in items 10 and 13 of s611.<sup>5</sup> The Panel said “*Ensuring that these exceptions are not being used in a way that infringes the policies, or avoids the protections, of Chapter 6 is an important element of the policy.*”<sup>6</sup> In our view, Bizzell Capital and Bizzell Nominees are not entitled to rely on items 10 and 13 of s611 to achieve the outcome likely from the entitlement offer.

26. As the Panel said in *Rivkin Financial 02*,<sup>7</sup> adopted in *MacarthurCook*,<sup>8</sup> concerning the underwriting exceptions:

*In each case, the increase in voting power must result from underwriting or sub-underwriting arrangements. The Panel will consider unacceptable circumstances to exist where the increase in voting power results from arrangements which although described as underwriting arrangements are, in fact, better characterised as something else, such as placement arrangements.*<sup>9</sup>

27. No doubt Bizzell Capital and Bizzell Nominees stand in a different position to a normal underwriter and sub-underwriter, given the loan facility. But the Panel

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<sup>3</sup> Prospectus dated 6 June 2013, p 30

<sup>4</sup> Prospectus dated 6 June 2013, p 11

<sup>5</sup> *InvestorInfo Limited* [2004] ATP 6

<sup>6</sup> *Ibid* at [36]

<sup>7</sup> [2005] ATP 1, see also *InvestorInfo Limited* [2004] ATP 6

<sup>8</sup> *MacarthurCook Property Securities Fund 01 & 02* [2012] ATP 7

<sup>9</sup> [2005] ATP 1 at [63]

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looks at the effect of the rights issue against the principles in section 602.<sup>10</sup> The Panel has considered the abuse of the underwriting exceptions on numerous occasions.<sup>11</sup>

28. ASIC also submitted that *“while it is evident that [Laneway] does require capital in the short term, there is no evidence to suggest that a delay to seek Non-Associated Member approval of the Offer under item 7 of s611 will be materially adverse to [Laneway]”*.
29. We agree that conversion into equity of the Bizzell loan facility should be subject to shareholder approval.

## DECISION

30. It appeared to us that the circumstances were unacceptable having regard to:
  - (a) the effect that we were satisfied the circumstances were likely to have on:
    - (i) the control, or potential control, of Laneway or
    - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Laneway and
  - (b) the purposes of Chapter 6 set out in s602.
31. Our reasons included:
  - (a) it was a stated purpose of the 16:1 entitlement offer announced by Laneway on 6 June 2013 to *“facilitate conversion of debt”*
  - (b) the underwriting and sub-underwriting arrangements, with companies associated with the chairman of Laneway, purported to rely on items 10 and 13 of s611
  - (c) the entitlement offer was, or was likely to, result in the acquisition of control of, or a substantial interest in, Laneway without shareholder approval and
  - (d) there appeared to be no valid reason why shareholder approval had not been, or could not be, sought.
32. Moreover, we considered that there were deficiencies in the information provided to shareholders.
33. We were minded to make a declaration of unacceptable circumstances and informed the parties of our views. We provided a supplementary brief inviting submissions as to proposed orders, including that the entitlement offer not proceed unless any conversion of debt by the Bizzell entities was approved by Laneway shareholders under item 7 of s611.
34. Subsequently, Laneway withdrew the entitlement offer. There have since been discussions between Laneway and ASIC, which is appropriate. We expect Laneway to structure any future entitlement offer so that it complies with Chapter

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<sup>10</sup> Guidance Note 17: Rights Issues at [6]. See also *Real Estate Capital Partners USA Property Trust* [2012] ATP 6 at [47]

<sup>11</sup> *Real Estate Capital Partners USA Property Trust* [2012] ATP 6; *Gladstone Pacific Nickel Limited 02* [2011] ATP 16; *Bisalloy Steel Group Limited* [2008] ATP 29 to name but a few

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6 and its policies. Indeed, Laneway submitted that it “*intends to structure a fresh entitlement offer (New Offer) with parameters the Panel does not regard as constituting unacceptable circumstances.*”

35. The entitlement offer having been withdrawn, we decline to make a declaration of unacceptable circumstances.
36. Given that we do not make a declaration, we make no orders, including as to costs. However, should a revised entitlement offer come back to the Panel because ASIC has similar concerns, we would be inclined to look favourably on an application for costs made by ASIC.

**Peter Hay**  
**President of the sitting Panel**  
**Decision dated 5 July 2013**  
**Reasons published 8 July 2013**

#### Advisers

Party	Advisers
Australian Securities and Investments Commission	NA
Laneway Resources Limited	Hemming+Hart Lawyers



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**Annexure**

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

**LANEWAY RESOURCES LIMITED**

Laneway Resources Limited (**Laneway**) undertakes to the Panel that the commencement date for renounceable rights trading and the record date in relation to the 16 for 1 rights issue announced by Laneway on 6 June 2013 will not occur until after the earlier of:

- (a) the Panel deciding not to conduct proceedings in relation to this matter and
- (b) if the Panel decides to conduct proceedings, the determination of those proceedings.

Laneway agrees to confirm in writing to the Panel when it has satisfied its obligations under this undertaking.

**Signed by Richard Anthon, Director of Laneway Resources Limited  
with the authority, and on behalf, of  
Laneway Resources Limited  
Dated 12 June 2013**