



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Hastings Rare Metals Limited  
[2013] ATP 13**

**Catchwords:**

*Decline to conduct proceedings – requisitioned meeting – placement – disclosure – frustrating action – efficient, competitive and informed market*

*Corporations Act 2001 (Cth), sections 249D, 602(a), 657A(2)*

*Guidance Note 12: Frustrating Action*

*IFS Construction Services Limited [2012] ATP 15, RCL Group Limited [2012] ATP 2, Padbury Mining Limited [2010] ATP 9, Redflex Holdings Limited [2009] ATP 17, Regis Resources Limited [2009] ATP 7, Bowen Energy Limited [2007] ATP 22, Magna Pacific (Holdings) Limited 05 [2007] ATP 16, Rivokin Financial Services Limited 01 [2004] ATP 14, St Barbara Mines Limited 02 [2004] ATP 13, Grand Hotel Group [2003] ATP 34, Online Advantage Limited [2002] ATP 14*

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

**INTRODUCTION**

- The Panel, James Dickson, John Humphrey and Mike Roche (sitting President), declined to conduct proceedings on an application by Mr Foon Keong (Charles) Lew in relation to the affairs of Hastings Rare Metals Limited. The application concerned a placement announced on 23 September 2013 in the context of a requisition seeking to add two directors to Hastings’ board. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.
- In these reasons, the following definitions apply.
 

<b>applicant</b>	Mr Foon Keong (Charles) Lew
<b>Hastings</b>	Hastings Rare Metals Limited

**FACTS**

- Hastings is an ASX listed mineral exploration company (ASX code: HAS). The applicant currently owns 9,900,000 shares in Hastings (5.40%).<sup>1</sup>
- On 18 September 2013, the applicant and 3 other shareholders (totalling 5.04% voting power) requisitioned a general meeting of Hastings shareholders under s249D.<sup>2</sup> The proposed resolutions sought to appoint the applicant and Mr Simon Wallace as directors of Hastings.
- On 23 September 2013, Hastings announced a placement of 16,700,000 shares at \$0.036 per share (a 10% discount to the 15 day VWAP), representing 9.10% of the

<sup>1</sup> At the time the application was made, he owned 8,900,000 shares (4.85%)

<sup>2</sup> References are to the *Corporations Act 2001* (Cth) unless otherwise specified

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issued shares of Hastings after the placement. The placees were Mair Holdings Limited (8,350,000 shares) and Armangael Investments (Malta) Ltd (8,350,000 shares).

6. Immediately after this announcement, Hastings announced that it had received the s249D requisition and was investigating the validity of it.
7. On 8 October 2013, Hastings announced that an EGM to consider the proposed resolutions was to be held on 14 November 2013, following the company's AGM. The AGM included resolutions to consider the re-election of three of the four Hastings directors.

### APPLICATION

8. By application dated 4 November 2013, the applicant sought a declaration of unacceptable circumstances. The applicant submitted that, among other things:
  - (a) the placement was not made for a proper purpose
  - (b) the timing of the placement was a frustrating action and gave rise to a breach of the Hastings directors' duties and
  - (c) the delay in announcing receipt of the requisition until after Hastings had made the placement was contrary to an efficient, competitive and informed market (s602(a)).

### Interim orders sought

9. The applicant sought interim orders to the effect that:
  - (a) the votes attaching to the placement shares be disregarded for the AGM and EGM
  - (b) no casual vacancies on Hastings' board be filled between the commencement of the AGM and the EGM and
  - (c) no further shares be issued until after the AGM and EGM.

### Final orders sought

10. The applicant sought final orders to the effect that the placement be reversed.

### DISCUSSION

#### Placement

11. The applicant submitted that the placement was not made for a proper purpose; rather, it was made "*to defeat the resolutions proposed*" by the requisitioners and enhance the probability that the existing directors would be re-elected at the AGM.
12. Hastings submitted that the possible frustration of the appointment of nominee directors (and apparent impact on the re-election of existing directors) was not a matter for the Panel as it did not involve "*the acquisition of control of voting shares in the relevant (Chapter 6) sense*".
13. Where the central concern involves a change to a company's board, the Panel has considered whether there is also an acquisition of shares such that section 657A(2) might be enlivened.

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14. In *Padbury Mining Limited*<sup>3</sup> the Panel said that an application concerning a change of control of Padbury's board did "*not relate to control or potential control of Padbury as the term is used for the purposes of Chapter 6*".<sup>4</sup> In *RCL Group Limited*<sup>5</sup> the Panel declined to conduct proceedings on an application concerning clauses in a financing agreement, noting that the lender's contractual rights in response to the approval of the board spill resolutions did not change the circumstances into a control transaction in the relevant (Chapter 6) sense. In *Regis Resources Limited*<sup>6</sup> the Panel noted that it "*will not treat issues about the composition of a company's board as a control issue for the purposes of s657A unless an accumulation or exercise of voting power occurs in contravention of Chapters 6-6C or in otherwise unacceptable circumstances*".<sup>7</sup> In *IFS Construction Services Limited*<sup>8</sup> the Panel considered that a meeting to change the composition of a company's board in the context of a proposed bid (where it affected a condition of the proposed bid) was a matter it could (and did) address.<sup>9</sup>
15. The placement here was made around the time of the requisition, which in other circumstances might be enough to enliven s657A(2). The applicant submitted that it had been made for the purpose of affecting control of the general meeting. We return to this below. While the timing is coincidental, the placement was made to two persons each of whom holds less than 5% and against whom there is no evidence of association (between themselves or with one or more of the directors).<sup>10</sup> Although occurring in the context of proposed changes to the Hastings board, we are not satisfied that the placement, comprising 9.10% of the company's issued capital after the placement, had an effect on the control of Hastings, or occurred in circumstances, such as to bring the matter within s657A(2).<sup>11</sup>
16. The application rightly acknowledged that Hastings had no obligation to extend an invitation to the applicant to participate in the placement.
17. Moreover, Hastings submitted in its preliminary submission, evidenced by board minutes, that "*the Placement was actually the result of a strategy that was conceived and in the process of implementation for some months before*" the requisition was received.
18. We have not considered whether the placement was made for a proper purpose, for which the court is the appropriate forum.<sup>12</sup>

#### **Frustrating action**

19. The applicant submitted that the Company's "*execution and timing of the Placement was 'frustrating action' pursuant to Guidance Note 12*".

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<sup>3</sup> [2010] ATP 9

<sup>4</sup> At [20]

<sup>5</sup> [2012] ATP 2

<sup>6</sup> [2009] ATP 7

<sup>7</sup> *Ibid* at [19], fn 8, citing *Bowen Energy Limited* [2007] ATP 22 at [29-32], *Rivkin Financial Services Limited 01* [2004] ATP 14 at [26], *St Barbara Mines Limited 02* [2004] ATP 13 at [9-10] and *Grand Hotel Group* [2003] ATP 34 at [7 and 51-53], and *Online Advantage Limited* [2002] ATP 14 at [53-56]

<sup>8</sup> [2012] ATP 15

<sup>9</sup> At [26]

<sup>10</sup> The application merely submitted that one of the directors had "*sourced these investors*"

<sup>11</sup> See *Redflex Holdings Limited* [2009] ATP 17 at [22]

<sup>12</sup> See for example *Magna Pacific (Holdings) Limited 05* [2007] ATP 16 at [11]

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20. Guidance Note 12 applies to an action by a target, whether taken or proposed, by reason of which a bid may be withdrawn or lapse or a potential bid does not proceed. The application did not develop the basis on which this policy should be applied in this situation.

#### Requisition

21. The requisition that the application contended had been affected or "*frustrated*" by the placement was to add two directors to the Hastings board.
22. In the context of a board comprising four existing directors, the addition of two, is not likely to give rise to circumstances having an effect on control or potential control of the company, even assuming that a change of the board is a control transaction for the purposes of Chapter 6. This is all the more the case where there is no evidence of a change in the board's balance of power.

#### Conclusion

23. Accordingly, there is no basis on which the placement could be considered a frustrating action or otherwise involve circumstances that we could address.

#### Disclosure

24. The applicant had concerns with the delay in disclosing the requisition until after the placement, and the lack of disclosure in relation to the requisition (including in Hastings' annual report).
25. Regardless of whether these concerns were legitimate, we do not consider that the circumstances relate to the control or potential control of Hastings. Accordingly, they are not matters for us.

#### DECISION

26. 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

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

#### Post script

29. At the AGM held on 14 November 2013, the three existing Hastings directors were re-elected. At the EGM held on the same day, the applicant and Mr Simon Wallace were not appointed as directors of Hastings.

**Mike Roche**

**President of the sitting Panel**

**Decision dated 12 November 2013**

**Reasons published 22 November 2013**

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### Advisers

Party	Advisers
Hastings Rare Metals Limited	Norton Rose Fulbright Australia
Mr Foon Keong (Charles) Lew	Nick Stretch Legal