



Australian Government

Takeovers Panel

**Reasons for Decision
Bullabulling Gold Limited
[2014] ATP 8**

Catchwords:

Disclosure – bidder’s statement – target’s statement – truth in takeovers – shareholder intentions – shareholder rejection statement – shareholder acceptance statement – consent – letter to shareholders – last and final - misleading

Corporations Act 2001 (Cth), sections 636(3), 638(5)

Guidance Note 18: Takeover documents, ASIC Regulatory Guide 25: Truth in takeovers, ASIC Regulatory Guide 55: Statement in disclosure documents and PDSs: Consent to quote

Southcorp Limited [2005] ATP 4, BreakFree Limited 04R [2003] ATP 42

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

INTRODUCTION

1. The Panel, Garry Besson (sitting President), Michelle Jablko and Heather Zampatti, declined to make a declaration of unacceptable circumstances in relation to the affairs of Bullabulling Gold Limited after accepting undertakings. The application primarily concerned disclosure by Bullabulling in a letter to its shareholders in response to an off-market bid by Norton Gold Fields Limited about the intentions of certain shareholders not to accept the bid. The Panel accepted undertakings from Bullabulling to give shareholders supplementary disclosure about the intention statements.

2. In these reasons, the following definitions apply.

- Acceptance Statement(s) the statements in Norton’s bidder’s statement relating to shareholders’ intentions about accepting the bid
- Bullabulling Bullabulling Gold Limited
- Norton Norton Gold Fields Limited
- Rejection Statement(s) the statements by Bullabulling in a letter to shareholders and in its target’s statement relating to shareholders’ intentions about rejecting the bid

FACTS

3. Bullabulling is an ASX listed company (ASX code: BAB).¹

4. On 17 April 2014, Norton (ASX code: NGF) announced an off-market bid for Bullabulling at 7 cents per share. In its bidder’s statement, Norton made the following Acceptance Statement (and variants of it):

¹ Bullabulling is also listed on the London Stock Exchange’s AIM

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“Certain Bullabulling shareholders, representing 6.6% of the Bullabulling’s shares on issue, have expressed their intention to accept the Offer.”

5. On 23 April 2014, Bullabulling wrote to Norton alleging that the Acceptance Statements were deficient and misleading. Norton rejected the allegations and made no further disclosure.
6. On 30 April 2014, Bullabulling sent a letter to its shareholders in relation to the bid. The letter included the following Rejection Statements:

*“Your Company has received strong messages of support from a number of Bullabulling Gold shareholders since the Offer was announced, and to date holders of 41.8% of Bullabulling Gold’s shares have indicated that they **DO NOT** intend to accept the Offer.”*
[original emphasis]

“...your Directors believe that if Norton fails to acquire 100% of Bullabulling Gold in its first attempt (i.e. under the Offer), which is a potential outcome given holders of 41.8% of Bullabulling Gold’s shares have indicated that they do not intend to accept the Offer at the current price...”

APPLICATION

Declaration sought

7. By application dated 13 May 2014, Norton sought a declaration of unacceptable circumstances. Norton submitted that Bullabulling’s letter to shareholders, particularly the Rejection Statements, contained material deficiencies and omissions.
8. Norton submitted that the deficiencies and omissions had the effect that its bid was not taking place in an efficient, competitive and informed market.
9. We conducted proceedings in relation to the Rejection Statements.²

Final orders sought

10. Norton sought final orders to the effect that Bullabulling issue supplementary disclosure, in a form approved by the Panel, to correct the information deficiencies.
11. No interim orders were sought.

DISCUSSION

Target’s statement

12. On 14 May 2014, the day after Norton made its application, Bullabulling lodged its target’s statement with ASIC. The target’s statement included the Rejection

² There were other disclosure deficiencies raised by Norton which we declined to conduct proceedings on because we considered there was no reasonable prospect that we would declare the circumstances relating to those alleged deficiencies unacceptable. The alleged deficiencies related to (among other things) statements in the letter to shareholders that the Bullabulling directors considered it possible that Norton could make a future offer if it did not acquire 100% and statements that by accepting the bid shareholders would be unable to accept and benefit from any future offer by Norton

Statements, or variants of them. Accordingly, we considered the issues arising from inclusion of the Rejection Statements in the target's statement as well as the letter to shareholders.

Background to the Rejection Statements

13. The Rejection Statements were compiled by Bullabulling using varied verbal and written statements from 101 shareholders. Bullabulling submitted a spreadsheet that recorded the 101 rejecting shareholders' names and shareholdings (however, the identities of the rejecting shareholders were redacted for confidentiality reasons).
14. The verbal statements were solicited by Bullabulling and provided by 13 shareholders, including two substantial holders. Bullabulling submitted that its managing director, Mr Brett Lambert, spoke to each of these shareholders (or an authorised representative) and:
 - (a) informed them that Bullabulling intended to make a statement regarding the percentage of shareholders who had indicated that they did not intend to accept the bid
 - (b) asked whether they were prepared to have their holding included in this aggregated position and
 - (c) confirmed that they would not be specifically named in the statement.
15. The written statements were not solicited by Bullabulling directly. Rather, the statements were received from, or on behalf of, 88 shareholders in response to a Bullabulling shareholder who used internet stock discussion site HotCopper to post the following:

"I've gathered support from UK retailers who aren't interested in [Norton's] pitiful offer for our substantial asset. So far I manage to find 61.13 million which I emailed to [Bullabulling].

Brett [Lambert] has asked that all shareholders, UK and Oz, who are not interested in this offer, to email him directly (no spam pls) stating:

 1. *Your name*
 2. *How many shares you have*
 3. *Who you hold the shares with (Helpful but not essential)*
 4. *State that you have NO intention of accepting the (woeful, insulting, laughable etc) offer.*

Brett Lambert's email is [email address provided].

I believe Brett has already engaged with ii's [institutional investors] and together with retail suspect he will say that the offer isn't even close to being adequate. I assume he will use this support for BGL as part of the Target's Statement.

Pls spent 5 minutes emailing your support as above. Thanks."
16. Shareholder intention statements are designed to persuade shareholders to undertake a particular course of action. It does not matter if these statements are

disclosed in communications other than a bidder's statement or target's statement. Guidance Note 18: *Takeover documents* at [34] provides that "the Panel takes the view that the same standard of care and the same standard of disclosure should be applied to any takeover document sent to offeree shareholders as is applied to the formal bidder's statement or target's statement". This is because, as the Panel has previously said, "Statements made in such documents [eg, letters to shareholders] should be presumed to be intended to be acted on".³

17. We expect that the makers of these types of statements will exercise a level of care and diligence to ensure that the manner in which the statements are compiled, and how the statements are expressed, are accurate in all material respects. This was not the case here for the reasons that follow.

Rejection Statements Misleading

18. We were not provided with a record of the verbal statements made by shareholders to Mr Lambert.
19. However, Bullabulling did submit copies of the emails sent to Mr Lambert in response to the HotCopper post.⁴ These emails revealed that:
- (a) the statements were not uniform, in particular some shareholders qualified their intention to reject the bid
 - (b) some shareholdings were expressed as approximate holdings
 - (c) some authors of emails were not the registered shareholders and
 - (d) none of the shareholders expressly consented to the Rejection Statements.

Lack of uniformity and qualifications

20. The manner in which Bullabulling expressed the Rejection Statements gave the impression that the statements were of a uniform nature. But a number of the shareholders qualified their statements by indicating that they were open to accepting an increased offer. The qualified nature of the statements given was not reflected in the Rejection Statements.
21. Bullabulling submitted "it was clear that the Rejection Statements were statements of the rejecting shareholders' intentions at a point in time, being either the date of the Shareholder Letter or the date of the Target's Statement and they were not intended to be a statement of the rejecting shareholders' future action". In the absence of express words to this effect, we do not consider that (whatever the intentions of the shareholders) the Rejection Statements conveyed this meaning.

Approximate figures used

22. Some shareholders disclosed their shareholdings in approximate terms, which Bullabulling relied on to compile the total figure for the Rejection Statements.

³ *BreakFree Limited 04R* [2003] ATP 42 at [57]

⁴ Details that would identify the authors of the emails and the registered holders were redacted

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Bullabulling confirmed that it did not attempt to verify all holdings against its register.

Statements by persons other than the registered holders

23. A number of the persons who emailed Mr Lambert were making statements on behalf of the registered holders. It did not appear that Bullabulling verified the identities of the persons who emailed it or whether they had authority to speak on behalf of the registered shareholder.
24. Sourcing statements from an internet stock discussion site to include in a communication to shareholders in relation to a bid is inherently risky and should not be undertaken. The dangers and inappropriateness of this ought to have been obvious to Bullabulling.

Consents

25. None of the rejecting shareholders who emailed Mr Lambert consented to the use of their statements to make the Rejection Statements. Consent was required under the Corporations Act as addressed later in these reasons.

Further information

26. Bullabulling submitted that the Rejection Statements were not misleading and shareholders required no further information because the Rejection Statements complied with ASIC's truth in takeovers policy on acceptance statements. Regulatory Guide 25: *Truth in takeovers* at RG 25.74 provides:
"... a statement by a bidder or target that a substantial holder said it will or will not accept the offer should be in specific, percentage terms: eg "X, holding 8% of ordinary shares, has stated that it will not accept at the current price"; or "holders of 5.4% of ordinary shares have stated their intention to accept the bid."
27. ASIC submitted that RG 25.74 does not stand for the proposition that any statement that anonymously aggregates holdings is generally acceptable or cannot be misleading, deceptive, confusing or subject to the truth in takeovers policy.
28. We agree with ASIC. For the Rejection Statements not to be misleading we consider that Bullabulling should have at least disclosed the manner in which the Rejection Statements were compiled, whether the shareholders had given consent to the statement and whether any qualifications to the statement were given.

Rejection Statements not binding

29. Despite submitting that the Rejection Statements were clearly statements of present intention, Bullabulling submitted that it was *"entirely reasonable to expect the rejecting shareholders to comply with the Rejection Statement"*. This is not consistent. Bullabulling's latter submission was based on Bullabulling not being aware of any of the rejecting shareholders who had sought to resile from their intention in any way. Subsequently though, we were informed by Bullabulling and Norton that one of the rejecting shareholders, who held 2.5% of Bullabulling, had accepted the bid.

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30. As for whether the rejecting shareholders should be held to their statements, this matter is similar to *BreakFree Limited 04R*.⁵ BreakFree was subject to a takeover proposal from S8 Limited. In a letter to its shareholders, BreakFree said that its financial adviser had conducted a survey of BreakFree shareholders to ascertain their likely acceptance of the scrip offer. The financial adviser informed BreakFree, and BreakFree stated in its letter, that “shareholders holding a majority of shares indicated that they would not accept the current all scrip offer from S8”. The review Panel found that this statement did not accurately reflect the surveyed shareholders’ responses and was incorrect, misleading and deceptive⁶ and the surveyed shareholders should not be held to their statements in accordance with truth in takeovers policy.⁷
31. The Rejection Statements share a number of the characteristics of the statement made by BreakFree, in particular the rejecting shareholders who responded to the HotCopper post were not informed about how their statements would be used and a number of shareholders attached their own qualifications to their statements that were not reflected in the Rejection Statements.
32. Further, it appeared that Bullabulling did not inform the rejecting shareholders about the possible implications of making the statements under truth in takeovers policy.
33. In these circumstances, we do not consider that truth in takeovers policy applies to the rejecting shareholders. They were, accordingly, free to accept the bid. It follows for this reason as well that the Rejection Statements were not able to be relied on and thus misleading and should not have been made.

Consents

34. Bullabulling submitted that it was not required to obtain the consent of the rejecting shareholders before it could include the Rejection Statements in its target’s statement. This was because the Rejection Statements, which involved the aggregation of each rejecting shareholders’ statement, were analogous to:
 - (a) the use of a person’s view without express or implied attribution in accordance with ASIC Regulatory Guide 55 *Statement in disclosure documents and PDSs: Consent to quote* at RG 55.18(b)⁸ and
 - (b) *Re Southcorp*,⁹ where the Panel concluded that third party consent was not required for an averaged broker valuation on the basis that the averaged broker valuation was attributable to the company making the statement, not

⁵ [2003] ATP 42

⁶ [2003] ATP 42 at [59]

⁷ [2003] ATP 42 at [69]

⁸ The underlying consent to quote policy is identical in its application to prospectus/product disclosure statements and bidder’s/target’s statements

⁹ [2005] ATP 4

the individual brokers who made the statements on which the aggregation was based.¹⁰

35. Bullabulling also submitted that consent was not required because no individual shareholder could have consented to the Rejection Statements as they were presented as an aggregate and were not attributed to any particular shareholder.
36. ASIC submitted that it was clear that Bullabulling was required to obtain the rejecting shareholders' consents under s638(5).¹¹ The consent requirement applied, ASIC submitted, because the Rejection Statements were attributed to the rejecting shareholders and represented an 'indication' or statement they made.
37. ASIC also submitted that *Re Southcorp* was not an apt analogy because an averaged broker valuation used a number of valuations to derive one figure. The Rejection Statements aggregated a number of statements to amplify the significance of the statement.
38. We agree with ASIC. We consider either that the consent requirement in s638(5) applies to the Rejection Statements in the circumstances in which those statements were made or, if there are reasons why the section should not apply, then for the reasons briefly mentioned in paragraph [28], the making of the Rejection Statements in the circumstances in which those statements were made was unacceptable. In addition, a key difference in this application to the application considered by the Panel in *Re Southcorp* is that the broker valuations, from which an average was derived in *Re Southcorp*, were published independently of the bid. The Rejection Statements, on the other hand, were made in response to Norton's bid.

Conclusion

39. We were minded to make a declaration of unacceptable circumstances in relation to the Rejection Statements. However, we accepted an undertaking (Annexure A) from Bullabulling to issue and send to its shareholders a supplementary target's statement in a form approved by us.
40. The supplementary target's statement we approved¹² retracted the Rejection Statements and disclosed:
 - (a) the manner in which the Rejection Statements were compiled including that Bullabulling did not verify the holdings of rejecting shareholders that emailed it against the company's share register
 - (b) that although Bullabulling represented to us that, in its view, the Rejection Statements:

¹⁰ [2005] ATP 4 at [97]

¹¹ Subject to limited exceptions, s638(5) provides that a target's statement must only include, or be accompanied by, a statement by a person, or a statement said in the target's statement to be based on a statement if: (a) the person has consented to the inclusion of the statement in the form and context in which it is included in the target's statement (b) the target's statement states that the person has given the consent and (c) the consent has not been withdrawn before the target's statement is lodged with ASIC

¹² First supplementary target's statement dated 5 June 2014

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- (i) represented an aggregation of the rejecting shareholders' holdings at the date of the letter to shareholders or the target's statement and
- (ii) were not intended to be forward looking or statements as to the possible future actions of any individual rejecting shareholder
that had not been made clear to Bullabulling shareholders in its disclosures
- (c) that each rejecting shareholder was able to accept the bid at any time and that some of the rejecting shareholders had, in fact, accepted the bid and
- (d) that Bullabulling did not obtain consents from the rejecting shareholders in accordance with s638(5).

DECISION

41. Given the undertakings offered by Bullabulling, we declined to make a declaration and are satisfied that it is not against the public interest to do so. We had regard to the matters in s657A(3).

Orders

42. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

Norton Acceptance Statements

43. Bullabulling submitted that the Rejection Statements were made in the context of, and in response to, Norton making the Acceptance Statements in its bidder's statement. The Acceptance Statements do not justify or excuse the Rejection Statements.
44. The circumstances surrounding the Acceptance Statements were different to the Rejection Statements but the Acceptance Statements were also problematic.
45. Norton submitted that the Acceptance Statements were based on signed consents by two shareholders, Gold Mountains (H.K.) International Mining Company Limited, which held 2.5%, and Phoenix Gold Fund Limited, which held 4.1%, at the time the bidder's statement was lodged with ASIC. Gold Mountains was an associate of Norton's and therefore Norton already had voting power in Gold Mountains' holding, although this was not disclosed in the bidder's statement.¹³
46. The consents given by each accepting shareholder were in a form that complied with s636(3)¹⁴ and set out the unqualified acceptance statements to be included in the bidder's statements. Phoenix Gold consented to the inclusion of an unqualified acceptance statement despite it having previously emailed Norton that it would accept the bid "*in the absence of a better competing bid*". This should have raised a doubt that should have been double checked.

¹³ The relationship between Norton and Gold Mountains was disclosed in Norton's initial substantial holding notice dated 22 April 2014

¹⁴ Which applies to bidder's statements and is equivalent to s638(5)

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47. The actual statements to which the consents related were not included in the bidder's statement. It appeared that the consents had not been received by the time the bidder's statement was lodged with ASIC.
48. On 20 May 2014, Norton lodged a supplementary bidder's statement in which the names of the accepting shareholders were disclosed. Norton also disclosed that Phoenix Gold had sold approximately 1.2% of its Bullabulling shareholding on-market and that:
- "It is evident that Phoenix Gold's stated intention within Section 6.2 of the Bidder's Statement [ie, the Acceptance Statement] was to be subject to a qualification that they retained the ability to accept a superior alternative to the Offer, which Phoenix Gold subsequently did by selling the ... Bullabulling Shares on market at a price higher than the Offer Price."*
49. The supplementary bidder's statement also stated, without qualification, that Gold Mountains and Phoenix Gold had instructed their custodians to accept the bid in respect of their aggregated 5.39% shareholding.
50. We consider that the Acceptance Statements in the bidder's statement were misleading because Norton did not say whether the accepting shareholders had consented to the Acceptance Statements being made. It was also misleading for Norton to include Gold Mountains as an accepting shareholder without disclosing that it was an associate of Norton's and that Norton already had voting power in Gold Mountains' holding.
51. Norton undertook (Annexure B) to address our concerns by lodging a supplementary bidder's statement in a form approved by us.
52. The supplementary bidder's statement approved by us:¹⁵
- (a) confirmed that Gold Mountains and Phoenix Gold had accepted the bid and
 - (b) disclosed that Gold Mountains was an associate of Norton's and that Norton included Gold Mountains' 2.5% shareholding in the Acceptance Statements without disclosing its association with Norton, thereby misleading Bullabulling Shareholders about the level of support for the bid from non-associated shareholders.

Garry Besson
President of the sitting Panel
Decision dated 5 June 2014
Reasons published 25 June 2014

¹⁵ Second supplementary bidder's statement dated 5 June 2014

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Advisers

Party	Advisers
Bullabulling	Herbert Smith Freehills
Norton	HopgoodGanim

Annexure A
Section 201A
Australian Securities and Investments Commission Act (Cth)
Undertaking

BULLABULLING GOLD LIMITED (BULLABULLING)

Bullabulling undertakes to the Panel that it will:

1. release to ASX;
2. lodge with ASIC;
3. send to Norton Gold Fields Limited; and
4. dispatch to Bullabulling shareholders,

a supplementary target's statement in the form approved by the Panel as soon as reasonable practicable, and in any event on or before 9 June 2014.

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

**Signed by Brett Lambert, Managing Director of Bullabulling Gold Limited
with the authority, and on behalf, of Bullabulling Gold Limited**

Dated 5 June 2014



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Annexure B

**Section 201A
Australian Securities and Investments Commission Act (Cth)
Undertaking**

NORTON GOLD FIELDS LIMITED (Norton) undertakes to the Panel that as soon as reasonably practicable it will:

1. send to Bullabulling Gold Limited;
2. lodge with ASIC; and
3. release to ASX and AIM,

a second supplementary bidder's statement in a form approved by the Panel, and in any event on or before 6 June 2014.

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

**Signed by Dr Dianmin Chen, Managing Director of Norton Gold Fields Limited,
with the authority, and on behalf, of Norton Gold Fields Limited**

Dated 5 June 2014