Australian Government

Takeovers Panel

Reasons for Decision
Northern Iron Limited
[2014] ATP 11

Catchwords:

Beneficial ownership notice - failure to disclose - identity of substantial holder - substantial holding - tracing relevant interests - efficient, competitive and informed market - Eggleston principles - declaration – orders

Corporations Act 2001 (Cth), sections Item 9 of section 611, 671A, 671B, 672A, 672B

Guidance Note 4 Remedies – General

Procedural Rule 3.1.1 note 6

Queensland North Australia Pty Ltd v Takeovers Panel [2014] FCA 591; *Australian Securities & Investments Commission v Craigside Company Limited (No 2)* [2014] FCA 371

Dragon Mining Limited [2014] ATP 5; *IFS Construction Services Limited* [2012] ATP 15, *Mount Gibson Iron Limited* [2008] ATP 4; *Rusina Mining NL* [2006] ATP 13; *Azumah Resources Limited* [2006] ATP 3; *Austral Coal Limited 03* [2005] ATP 14; *Skywest Limited 04* [2004] ATP 26, *Skywest Limited 03* [2004] ATP 17, *Skywest Limited 03R* [2004] ATP 20, *Rivkin Financial Services Limited* [2004] ATP 14; *Village Roadshow Limited* [2004] ATP 4; *National Can Industries Limited 01* [2003] ATP 35; *Grand Hotel Group* [2003] ATP 34; *Pinnacle VRB Ltd 11* [2001] ATP 23, *Taipan Resources NL 11* [2001] ATP 16, *Pinnacle VRB Ltd 06* [2001] ATP 11

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

INTRODUCTION

1. The Panel, Richard Hunt (sitting President), John Sheahan QC and Jane Sheridan, made a declaration of unacceptable circumstances in relation to the affairs of Northern Iron Limited. The application concerned non-compliance with substantial holder notice and tracing notice provisions. The Panel considered that the non-disclosure resulted in shareholders, the directors and the market not knowing the identity of a person who was proposing to acquire, and had acquired, a substantial interest. The Panel ordered disclosure, a 'creep' freeze and costs.

2. In these reasons, the following definitions apply.

Dalnor	Dalnor Assets Ltd
Dalnor Parties	Dalnor, SIX-SIS AG, SPA Fund, SPA FS and Fund GP
Fund GP	SPA GP (II) Limited
Northern Iron	Northern Iron Limited
SPA Fund	SPA Multi-Strategy Fund II LP
SPA FS	SPA Financial Services Ltd

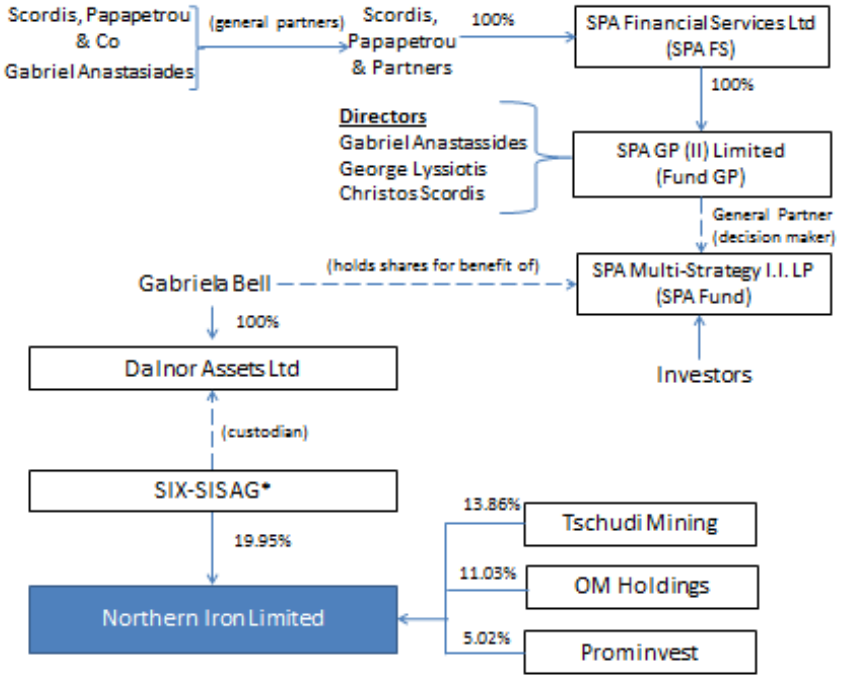
FACTS

Parties

3. Northern Iron is a company listed on the Australian Securities Exchange (ASX code: NFE). It has 484,405,314 ordinary shares on issue. It owns Sydvaranger Gruve AS, a producer of magnetite iron concentrate in Norway.

4. Dalnor is a company incorporated in the British Virgin Islands. It holds 96,637,800 shares in Northern Iron (approximately 19.95%) and is Northern Iron's largest shareholder.

5. The relationship between the Dalnor Parties, and various shareholdings in Northern Iron, is shown in the following diagram.



* Shares are held by JP Morgan Nominees Australia Limited as sub-custodian for SIX-SIS AG

Increase in holding

6. On 11 December 2012, Dalnor lodged a substantial holder notice which disclosed that the registered holder of the securities was SIX-SIS AG as depository and the holder of a relevant interest in 3,561,379 shares (5%) was Dalnor.

7. From December 2012 to May 2014, Dalnor acquired additional shares. A number of notices of change of interests of substantial holder were lodged.

8. On 13 May 2014, Dalnor lodged a notice of change of interests of substantial holder, which disclosed that it had acquired 5,481,164 shares on 5 May 2014. The notice disclosed that the registered holder of the securities was SIX-SIS Ag as depository, and the holder of the relevant interest was Dalnor.

9. On 22 May 2014, Dalnor lodged a revised notice of change of interests of substantial holder, which disclosed that the registered holder of the securities was

SIX-SIS AG and each of the following held a relevant interest in 91,972,188 shares (18.99%):

- SIX-SIS AG (as custodian and bare trustee for Dalnor)
- Dalnor
- Ms Gabriela Bell (as sole shareholder of Dalnor, for the benefit of Fund GP - a wholly owned subsidiary of SPA FS - in its capacity as general partner of SPA Fund)
- SPA Fund, Fund GP and SPA FS.

10. The additional information in the revised notice of 22 May 2014 had not been disclosed in previous substantial holder notices.

Tracing notice

11. On 27 March 2013, a tracing notice under section 672A[1] was issued to Dalnor.
12. On 11 April 2013, Dalnor responded by letter stating that it considered the acquisition of the shares to be *"a reliable and long term investment"*.
13. The letter did not provide the information required by section 672B.
14. On 23 May 2013, Dalnor was notified that the response to the tracing notice did not appear to provide the information required and a further response was requested by 29 May 2013.
15. On 28 May 2013, Ms Gabriela Bell was disclosed to Northern Iron as the sole shareholder of Dalnor.
16. On 31 May 2013, Northern Iron again requested the information required by the tracing notice.
17. No response was received until, by letter dated 20 May 2014, Dalnor (through Clayton Utz as its solicitor):
    (a) provided the information referred to in paragraph 9 and advised that a substantial holder notice would be lodged
    (b) advised that the shares in Dalnor held by Ms Gabriela Bell were held for the benefit of SPA Fund, an international investment limited partnership regulated by the Central Bank of Cyprus
    (c) advised that SPA Fund was a limited partnership in respect of which Fund GP (a company registered in Cyprus) was the general partner and was a wholly-owned subsidiary of SPA FS (a company also registered in Cyprus and regulated by the Cyprus Securities and Exchange Commission)
    (d) advised that the sole shareholder in SPA FS was Scordis, Papapetrou & Partners (a professional partnership engaged in the business of providing corporate fiduciary services, among other things)

[1] References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

(e) advised that the investors in the SPA Fund had no right or control in relation to investment decisions, including in respect of voting and disposal of any securities held on behalf of SPA Fund

(f) advised that all the shares in Northern Iron were acquired at the direction of Fund GP and

(g) stated that it was not aware of any other person who had given it instructions in respect of the shares.

Director nomination

18. While Northern Iron was seeking information about the beneficial ownership of the shares held by Dalnor, a request was made by Dalnor for a board seat.

19. By letter dated 17 January 2014, Dalnor requested the appointment of Mr Richard Glasspool as nominee director to the board of Northern Iron. This led to a meeting with representatives of Dalnor at which Dalnor was described as an "investment fund" having other investors. Neither the identity, nor the origin, of the investors was disclosed.

20. A further request was made for information about, among other things, the ultimate beneficial owners of Dalnor. Dalnor responded that it intended to answer Northern Iron's request for information in due course.

21. At Northern Iron's annual general meeting on 29 May 2014, the nominee was not elected to the board.

APPLICATION

22. By application dated 23 May 2014, Northern Iron sought a declaration of unacceptable circumstances. It submitted, among other things, that:

(a) Dalnor had breached the substantial holder notice provisions by not disclosing the details required by section 671B

(b) Dalnor had breached the tracing notice provisions by not disclosing the information required by section 672B in response to a tracing notice issued under section 672A[2] and

(c) the circumstances were contrary to the policy objectives in section 602 and underpinning Chapter 6C. It submitted that shareholders have a right to know the information that was required to be provided in relation to the identity and status of a substantial shareholder, and they have a right to know the information at the time when they are making decisions concerning the voting of their shares.

[2] The application also noted that Northern Iron had not had adequate responses to tracing notices sent to Valartis Bank (Liechtenstein) (7.07%) and Banque Cramer & Cie (Geneva) (6.98%), which entities had not lodged substantial shareholder notices, but these were not pursued in the application

23. Northern Iron submitted that the effect of the circumstances was that Northern Iron shareholders were misinformed as to the identity of Dalnor, in circumstances where Dalnor had increased its holding.

Interim and final orders sought

24. In its application, Northern Iron sought interim orders and final orders to the same effect, namely that at its AGM (to be held on 29 May 2014) Dalnor and any other person holding or seeking to exercise votes on its behalf:

    (a) be restrained from exercising any voting power and such voting rights be disregarded to the extent votes are cast and

    (b) be restrained from exercising any voting rights and any exercise of voting rights be disregarded in respect of any resolution or motion to elect a person as a director of Northern Iron.

25. Northern Iron modified its application to seek:

    (a) an interim order restraining Dalnor and any other person holding or seeking to exercise votes on its behalf from voting in respect of any procedural motion that any resolution concerning the election of Mr Glasspool (or any other person nominated by Dalnor) be disposed of without being put to a vote or not be put and

    (b) a final order restraining Dalnor and any other person holding or seeking to exercise votes on its behalf from voting in respect of any resolution or motion to elect Mr Glasspool (or any other person nominated by Dalnor) as a director of Northern Iron for three months.

26. Northern Iron submitted that the modified orders were intended to restrict Dalnor's voting on the election of Mr Glasspool but otherwise allow Dalnor to vote on all resolutions.

27. We made an interim order (Annexure A) preventing any resolution to appoint Mr Glasspool to the board of Northern Iron taking effect. In the event, the resolution was not passed.

DISCUSSION

Time

28. Under section 657C(3) an application must be made within two months after the circumstances have occurred or a longer period determined by the Panel. Section 657B entitles the Panel to make a declaration within three months after the circumstances occur or one month after the application was made (whichever ends last). The relevant reference point is the circumstances.

29. Circumstances may be ongoing.[3] In our view they are here. There is non-disclosure of information that has not been remedied. This constitutes or gives rise

[3] *Queensland North Australia Pty Ltd v Takeovers Panel* [2014] FCA 591 at [61]. This decision is subject to appeal

to contravention of section 671B. Moreover, a tracing notice under section 672A has not been complied with. This constitutes or gives rise to contravention of section 672B.

30. The legislative purpose of Chapter 6C is to ensure that transactions in listed securities occur in an efficient, competitive and informed market. The provisions are designed to ensure that people cannot conceal their control of substantial parcels of listed securities from other market participants.[4] In this case, the company, its shareholders and the market have been, and continue to be, uninformed about "*the identity of persons with voting power … [and] the reason why the disclosing person has the disclosed level of voting power*".[5]

31. The Panel's Procedural Rules note that an applicant should not delay unreasonably in making its application.[6] The application here was made on 23 May 2014. The concerns about disclosure were known to the applicant, and raised by the applicant with Dalnor, about a year before. Attempts were made to get additional information, and we accept that it can be difficult to know when the disclosure that is made is complete.

32. The Dalnor Parties submitted that Northern Iron unreasonably delayed in making its application and only made it for the tactical reason of affecting voting at the AGM. They submitted that Northern Iron's objective was supported by the orders it sought.

33. While such a delay may lead a Panel not to conduct proceedings,[7] in this case there has been an increase in the holding approaching 20% quite recently and there was an attempted exercise of the voting rights quite recently. Just before proxies closed for the AGM a revised substantial holder notice was lodged. Rather than take the view that the application was tactical, we prefer the view that it was brought on by developments. As noted, in our view the circumstances are ongoing. However, for the avoidance of doubt, we extend the time within which an application must be made for the purposes of section 657C(3)(b) to the date on which it was made.

34. The Dalnor Parties submitted in preliminary submissions, and repeated in response to our supplementary brief, that the Panel should not extend time. It submitted that there were no good reasons for the Panel to exercise its discretion, noting that the discretion should not be exercised lightly.[8] It submitted that Northern Iron had failed to act promptly.

35. Northern Iron submitted that no extension was necessary, but it was desirable that any decision be made on the merits and not on procedural considerations.

36. ASIC submitted that the circumstances are cast as ongoing and an extension was not necessary.

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[4] As submitted, and apparently accepted, in *Australian Securities & Investments Commission v Craigside Company Limited (No 2)* [2014] FCA 371

[5] *Grand Hotel Group* [2003] ATP 34 at [34]

[6] Procedural Rule 3.1.1 note 6

[7] For example, *Dragon Mining Limited* [2014] ATP 5

[8] *Austral Coal Limited 03* [2005] ATP 14 at [18]-[19]

Substantial holder notices

37. A requirement to disclose information about the ownership of shares was introduced into the law in 1972, based on recommendations made by the Eggleston Committee that security holders of publicly-traded entities should know who had, or may have, an influence over the future direction of an entity.[9]

38. As the Panel said in *National Can Industries Limited 01*:

> *Although we recognise that compliance with section 671B and the prescribed forms can often be difficult and may sometimes seem to be a somewhat artificial exercise, care should be taken at all times to ensure that substantial holding notices not only comply with the provisions of Chapter 6C of the Act but also with the spirit and purpose of these provisions. Chapter 6C relates to the purpose of the legislation set out in paragraph 602(b), particularly enabling the shareholders and directors of the target company to know the identity of the controllers of significant parcels of shares in a company and, by reason of the timing provisions and triggers of giving notices, to afford a reasonable time to consider any proposal. The notices are also essential for the existence of an informed market.*[10]

39. ASIC submitted that the information in the 22 May 2014 revised notice was not adequate corrective disclosure. We agree with ASIC's assessment.

40. Dalnor disclosed on 22 May 2014 that the shares held by Ms Gabriela Bell were held for the benefit of an investment fund (SPA Fund), but this and other information was not disclosed in substantial holder notices lodged by Dalnor from 11 December 2012 to 22 May 2014. Moreover, the revised substantial holder notice on 22 May 2014 did not disclose the declaration of trust by Ms Gabriela Bell in favour of SPA Fund or how the shares in Northern Iron were acquired, and in particular that one of the transactions was off-market.

41. In more detail, the revised notice of change of interests of substantial holder does not include all of the information required by section 671B including:

    (a) details of any relevant agreement through which the parties disclosed have a relevant interest

    (b) the declaration of trust by Ms Gabriela Bell in favour of SPA Fund

    (c) how the shares in Northern Iron were acquired, in particular that one of the transactions was off-market

    (d) a copy of the relevant documents, including the SPA Fund Memorandum

    (e) any explanation of why the owners of SPA FS do not have a relevant interest and

    (f) every person who does have a relevant interest.

42. ASIC also submitted that "*the broadly cast requirements of s671B(4) contribute to ensuring that the market is fully aware of the nature of, and details concerning, the substantial holder and their associates' interests and the potential impact of the terms of*

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[9] *Grand Hotel Group* op cit at [33] and following

[10] *National Can Industries Limited 01* [2003] ATP 35 at [62(a)]

any relevant agreement…." We agree. All the more so, in our view, when the party holding a substantial interest, here 19.95%, attempts to exercise control by seeking a board appointment.

43. Accordingly, we were minded to make a declaration of unacceptable circumstances and issued a supplementary brief indicating this and also seeking further information before deciding what orders might be appropriate.

44. The Dalnor Parties submitted that they "*accept that there has been a failure to disclose certain information required to be disclosed under Part 6C*" and that they should bear ultimate responsibility for obtaining professional advice to ensure that they comply. They submitted that the breaches "*in this case were genuinely the result of inadvertence or mistake*". They attached a further revised notice of change of interests of substantial holder that they proposed to lodge.

45. The Dalnor Parties also submitted that the further proposed disclosure removed the unacceptable circumstances and no declaration was justifiable or necessary.

46. We do not agree. Noting the submission of Northern Iron - that it was "*beginning to take little comfort from statements such as the proposed further SSN 'will comply with the relevant requirements of Chapter 6C'*" - there has been a long period of non-disclosure, there have been breaches of the Act, there have been a number of iterations of substantial holder notices with steadily increasing (but still incomplete) amounts of information, and complete disclosure has not yet been made. It was not until we asked further questions in a supplementary brief that it was disclosed that one of the persons with a relevant interest was Mr Gabriel Anastasiades. In our view, a declaration of unacceptable circumstances is justified and necessary. Moreover, should it become apparent that the information now proposed to be disclosed is also incomplete, orders can be varied if a declaration has been made.[11]

Tracing notice

47. Information was first sought in a tracing notice issued on behalf of Northern Iron on 27 March 2013. The information sought was clearly set out. The reply received on 11 April 2013 was late and non-responsive. Further enquiries elicited information in piecemeal fashion.

48. During the time when information pursuant to the tracing notice was not being provided, Dalnor requested the appointment of a nominee director to the board of Northern Iron. Included in its request was the statement "*Dalnor intends to respond to Northern Iron's request for information in due course*". It never did so properly.

49. Following a letter dated 16 May 2014 from Clifford Chance, on behalf of Northern Iron, to Clayton Utz, on behalf of Dalnor, information was provided on 20 May 2014. The letter of 20 May 2014 disclosed additional information (see paragraph 17). However, in so far as it was a response to the tracing notice dated 27 March 2013, it did not include all the information required by section 672B including:

[11] Section 657D(3)

(a) the name and address of each person who has given instructions about the acquisition or disposal of the shares

(b) the name and address of each person who has given instructions about the voting rights in respect of the shares and

(c) depending on whether the owners of SPA FS have a relevant interest, their names and addresses.

50. The Dalnor Parties submitted[12] that the specific non-disclosure was of the controllers and the structure of the interest, not the size of the holding, and that control of the parcel was not material to decisions by market participants about whether to buy or sell Northern Iron securities. They also submitted that they were in material compliance from 22 May 2014. Accordingly, they submitted, any unacceptable circumstances were historical.

51. We do not agree. The cases make it clear that the identity of persons who control a parcel of shares is material information. Indeed, establishing that identity is the purpose of the tracing provisions. The information that should have been disclosed is material and the non-disclosure is ongoing.

Association

52. The application noted that various parties could be acting in association, but that it was not able to establish it at this time. We have not considered any question of association. If a sufficient case[13] can be made at a later date, Northern Iron can make an application in respect of this issue.

DECISION

Declaration

53. Material failure to comply with the substantial holder and tracing notice provisions in Chapter 6C is contrary to the policy objectives of section 602.[14]

54. We are not satisfied that, as submitted by the Dalnor Parties, the non-disclosure was "*the result of inadvertence or mistake.*" The request for information in the tracing notice was clear and the Panel has previously stressed the importance of persons who may be substantial holders obtaining proper professional advice to ensure that they comply with the requirements of Chapter 6C in giving substantial holder notices and responding to tracing notices.[15] The required information was only slowly extracted from the Dalnor Parties.

55. The Dalnor Parties submitted that Dalnor had relied upon its broker and foreign lawyer, MNP Avocats, to ensure applicable legal requirements were met. However

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[12] The same submissions were made in respect of the substantial holder notice provisions

[13] *Mount Gibson Iron Limited* [2008] ATP 4

[14] *Village Roadshow Limited* [2004] ATP 4 at [50]-[53]; *Rivkin Financial Services Limited* [2004] ATP 14 at [19]; *Rusina Mining NL* [2006] ATP 13 at [20]

[15] *Azumah Resources Limited* [2006] ATP 3 at [48]

Dalnor did not meet the requirements of Chapter 6C and did not appear to have taken advice from an Australian law firm until late in the piece.

56. In any event, our decision to make a declaration rests on the policy that adequate and timely disclosure under substantial holder notice and tracing notice provisions is important to the objectives of section 602. Our concern is with the effect of the circumstances. Our decision is not based simply on contravention.

57. In our view:

    (a) the acquisition of control over voting shares in Northern Iron has not taken, and continues not to take, place in an efficient, competitive and informed market and

    (b) the holders of Northern Iron shares, the board of Northern Iron and the market in general has not known, and continues not to know, the identity of persons who acquired a substantial interest in Northern Iron.

58. It appears to us that the circumstances are unacceptable:

    (a) having regard to the effects the circumstances have had, and are having, on:

        (i) the control, or potential control, of Northern Iron or

        (ii) the acquisition by a person of a substantial interest in Northern Iron

    (b) having regard to the purposes of Chapter 6 set out in section 602 and

    (c) because they constitute a contravention of provisions of Chapter 6C.

59. Accordingly, we made the declaration 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

60. Following the declaration, we made final orders (Annexure C). Under s657D the Panel's power to make orders is very wide. The Panel is empowered to make 'any order'[16] if 4 tests are met:

    (a) it has made a declaration under s657A. This was done on 19 June 2014.

    (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person.

    The application sought voting restrictions at the AGM held on 29 May 2014 in respect of the shares held on behalf of Dalnor, noting that the intention behind the requested orders was to restrict Dalnor's voting on the election of Mr Glasspool. That intention is no longer relevant.

    ASIC submitted that orders restricting voting should be wider, in that they should apply in respect of all votes until the company, its shareholders and the market have had time to digest the disclosures that should have been made some time ago. Northern Iron made a similar submission. The Dalnor

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

Parties submitted that, once corrective disclosure has been made, there should be no voting restriction. It submitted that a substantial holder can acquire a substantial holding and vote it immediately, and it should be no different here once the disclosure has been made. In our view there is no need for a voting restriction in this case. We agree with ASIC and Northern Iron that the market should have sufficient time to digest corrective disclosure. We do not need to decide how long that should be. As there is no meeting of Northern Iron shareholders proposed, there will be at least 28 days (ie, the notice period) for the market to digest the corrective disclosure.

We do, however, think that, consistent with the objective behind allowing 'creep'[17] over time, there should be a restriction on allowing the Dalnor Parties to creep until 6 months after the required disclosure is made. The application did not seek orders in respect of creep, but the issue was raised by the applicant in submissions. As a substantial holder approaches the 19% level in item 9 of section 611, the company, its shareholders and the market are aware of the ownership because increases of 1% or more must be advised. It is only after 6 months that a holding of 19% or more can be increased by 3%. Here, the company, its shareholders and the market were not aware of the ownership because the substantial holder notice provisions (and tracing notice provisions) had not been complied with. The Dalnor Parties will now comply with them. The six months should run from the making of the disclosure.

The Dalnor Parties submitted that the proposed orders would have the effect of punishing them. We do not agree. In our view, the orders are proportionate to the mischief. 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 11 June 2014. Each party made submissions and rebuttals.

(d) (relevantly) it considers the orders appropriate to protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons. In our view, the orders protect Northern Iron, its shareholders and the market. The orders do this by requiring disclosure that should have been made, and limiting the ability to increase the holding in accordance with what the position would have been had disclosure been made.

61. Accordingly, we made orders that the proposed substantial holder notice provided by the Dalnor Parties in rebuttal submissions in response to our supplementary brief be lodged with ASX, subject to a correction and additional documentary disclosure. We also ordered the creep restriction discussed above.

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[17] Item 9 of section 611

Costs

62. The Panel's policy is that an award of costs is the exception not the rule and is generally informed by the following considerations:

> *27. The Panel's approach to cost orders is guided by the following considerations:*
>
> *1. the Panel's primary role is to resolve disputes expeditiously and informally*
>
> *2. a declaration relates to circumstances, not conduct, and may involve no finding of fault*
>
> *3. costs orders are the exception not the rule, so may not follow to a 'successful' party and*
>
> *4. a party is entitled to make, or resist, an application once without exposure to a costs order, provided it presents a case of reasonable merit in a businesslike way.*[18]

63. So the Panel has awarded costs in circumstances such as where the party failed to provide new evidence on, or hindered, a review[19], knowingly engaged in questionable behaviour costing the applicant considerable time and money[20] or engaged in predictably unacceptable circumstances.[21]

64. In our view the non-disclosure by the Dalnor Parties was apparent (indeed it has been admitted) and it should not have required the application to the Panel to run its full course before being remedied. Proposed disclosure offered during the proceedings was inadequate. It cannot be said that the Dalnor Parties presented a case of reasonable merit.

65. We indicated to the parties that we were minded to consider costs incurred post-application. ASIC submitted costs of approximately $10,000. It did not have any involvement until the application was filed, and we think its claim is reasonable. The applicant submitted costs, despite our indication, that included the disbursement for filing the application. Significant costs were claimed for preparing the bill of costs. The applicant submitted a quite detailed, date-by-date bill although it did not indicate which lawyers had spent time on each item. We were not minded to undertake a detailed analysis of this claim. The Panel is not a taxing authority.

66. Moreover, lawyers at many levels were involved and the time was included in the costs claimed by both ASIC and the applicant. Given the size of ASIC's claim in total we did not reduce its claim. But we did reduce the applicant's. The Panel is a commercial tribunal and in this as well as its general remit, it takes a commercial approach - which we have done.

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[18] *Guidance Note 4 Remedies – General* at [27]
[19] *Pinnacle VRB Ltd 06* [2001] ATP 11 (costs because of delay), *Taipan Resources NL 11* [2001] ATP 16 (costs because of lack of merit), *Pinnacle VRB Ltd 11* [2001] ATP 23 (costs because no grounds for review)
[20] *Skywest Limited 03* [2004] ATP 17 and *03R* [2004] ATP 20
[21] *Skywest Limited 04* [2004] ATP 26; *IFS Construction Services Limited* [2012] ATP 15

67. Accordingly we have varied our final orders (Annexure D) to add a costs order for ASIC's costs and part of Northern Iron's costs. We exclude the costs of making the application and costs attributable to aspects of the proceedings that did not succeed, and discount the amount claimed (similarly to the Dalnor Parties submission) "*by a factor … to reduce to an amount … likely to be assessed according to a Federal Court scale on a party-party basis*". Our assessment is an approximation.

68. We do not think the costs order is unfairly prejudicial to the Dalnor Parties. It is a proportion of the costs sought and, in our view, represents an approximation of costs necessarily, properly and reasonably incurred[22] in taking steps that might have been avoided.

Postscript

69. On 25 June 2014, the Dalnor Parties lodged a revised substantial holder notice in accordance with our orders.

Richard Hunt
President of the sitting Panel
Decision dated 19 June 2014
Reasons published 30 June 2014

Advisers

Party	Advisers
Dalnor Parties	Clayton Utz
Northern Iron	Clifford Chance

[22] GN 4 at paragraph [33]

Australian Government
Takeovers Panel

Annexure A

CORPORATIONS ACT
SECTION 657E
INTERIM ORDER

NORTHERN IRON LIMITED

Northern Iron Limited made an application to the Panel dated 23 May 2014 in relation to its affairs.

THE PANEL ORDERS

1. Any passing of a resolution to appoint Mr Richard Glasspool as a director of the Northern Iron board at the Northern Iron annual general meeting scheduled to be held on 29 May 2014, including any adjournment of that meeting, is not effective until the earliest of:
   (i) further order of the Panel
   (ii) the determination of the proceedings and
   (iii) 2 months from the date of this interim order.

Allan Bulman
Director
with authority of Richard Hunt
President of the sitting Panel
Dated 29 May 2014

Annexure B

CORPORATIONS ACT
SECTION 657A
DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

NORTHERN IRON LIMITED

CIRCUMSTANCES

1. Northern Iron Limited (**Northern Iron**) is a company listed on the Australian Securities Exchange (ASX code: NFE).

2. Dalnor Assets Ltd (**Dalnor**) is a company incorporated in the British Virgin Islands. It holds approximately 19.95% of the shares in Northern Iron.

3. On 11 December 2012, Dalnor lodged a substantial holder notice which disclosed that the registered holder of the securities was SIX-SIS Ag as depository and the holder of a relevant interest of 5% was Dalnor.

4. On 27 March 2013, a tracing notice under section 672A[23] was issued to Dalnor. On 11 April 2013, Dalnor responded without providing the information required by section 672B. On 28 May 2013, Ms Gabriela Bell was disclosed to Northern Iron as the sole shareholder of Dalnor.

5. On 13 May 2014, Dalnor lodged a notice of change of interests of substantial holder, which disclosed that the registered holder of the securities was SIX-SIS Ag as depository and the holder of a relevant interest of 18.99% was Dalnor.

6. On 22 May 2014, Dalnor lodged a revised notice of change of interests of substantial holder, which disclosed that the registered holder of the securities was SIX-SIS Ag and each of the following held a relevant interest of 18.99%:

    - SIX-SIS Ag (as custodian and bare trustee for Dalnor)
    - Dalnor
    - Ms Gabriella Bell (as sole shareholder of Dalnor, for the benefit of Fund GP - a wholly owned subsidiary of SPA Financial Services - in its capacity as general partner of SPA Fund)

[23] References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

- SPA Multi-Strategy Fund II LP (**SPA Fund**), SPA GP (II) Limited (**Fund GP**) and SPA Financial Services Ltd (**SPA Financial Services**).

7. By letter dated 20 May 2014, Dalnor provided, in response to the tracing notice dated 27 March 2013, the information referred to in paragraph 9 and advised that it was not aware of any other person who had given it instructions in respect of the shares.
8. The information referred to in the third and fourth bullet points in paragraph 9:
   (a) was not disclosed in previous substantial holder notices and
   (b) was not provided for more than a year in response to the tracing notice.
9. Moreover, the revised notice of change of interests of substantial holder does not include all of the information required by section 671B including:
   (a) details of any relevant agreement through which the parties disclosed have a relevant interest
   (b) the declaration of trust by Ms Gabriella Bell in favour of SPA Fund
   (c) how the shares in Northern Iron were acquired, in particular that one of the transactions was off-market
   (d) a copy of the relevant documents, including the SPA Fund Memorandum
   (e) any explanation of why the owners of SPA Financial Services do not have a relevant interest and
   (f) every person who does have a relevant interest.
10. Moreover, the 20 May 2014 response to the tracing notice dated 27 March 2013 does not include all of the information required by section 672B including:
   (a) the name and address of each person who has given instructions about the acquisition or disposal of the shares
   (b) the name and address of each person who has given instructions about the voting rights in respect of the shares and
   (c) depending on whether the owners of SPA Financial Services have a relevant interest, their names and addresses.
11. Consequently:
   (a) the acquisition of control over voting shares in Northern Iron has not taken, and continues not to take, place in an efficient, competitive and informed market and
   (b) the holders of Northern Iron shares, the board of Northern Iron and the market in general has not known, and continues not to know, the identity of persons who acquired a substantial interest in Northern Iron.
12. It appears to the Panel that the circumstances are unacceptable:
   (a) having regard to the effects that the Panel is satisfied the circumstances have had, and are having, on:

(i) the control, or potential control, of Northern Iron or

(ii) the acquisition by a person of a substantial interest in Northern Iron

(b) having regard to the purposes of Chapter 6 set out in section 602 and

(c) because they constitute a contravention of provisions of Chapter 6C.

13. 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).

DECLARATION

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

Alan Shaw
Counsel
with authority of Richard Hunt
President of the sitting Panel
Dated 19 June 2014

Australian Government
Takeovers Panel

Annexure C

CORPORATIONS ACT
SECTION 657D
ORDERS

NORTHERN IRON LIMITED

The Panel made a declaration of unacceptable circumstances on 19 June 2014.

THE PANEL ORDERS

1. Dalnor Assets Ltd (Dalnor) must lodge with ASX a notice of change of interests of substantial holder that is not materially different to the draft notice proposed by Dalnor in its rebuttal submissions provided to the Panel on 17 June 2014 and which:

   (a) discloses the nature of the relevant interest held by Gabriel Anastasiades in section 4 of the notice and

   (b) also attaches a copy of the SPA Multi-strategy Fund I.I. L.P. Private Placement Memorandum.

2. Dalnor and its associates must not make an acquisition of shares in Northern Iron Limited in reliance on the exception in item 9 of section 611 of the *Corporations Act 2001* until six months after the lodgement of the notice referred to in order 1.

Alan Shaw
Counsel
with authority of Richard Hunt
President of the sitting Panel
Dated 19 June 2014

Australian Government
Takeovers Panel

Annexure D

CORPORATIONS ACT

SECTION 657D(3)

VARIATION OF ORDERS

NORTHERN IRON LIMITED

Pursuant to section 657D(3) of the *Corporations Act 2001* (Cth)

THE PANEL ORDERS

The final orders made on 19 June 2014 are varied by adding the following paragraph:

3. Within 10 business days of the date of this order Dalnor must pay the following costs:

   (a) A$25,000.00 to Northern Iron Limited and

   (b) A$10,326.98 to the Australian Securities and Investments Commission.

Alan Shaw
Counsel
with authority of Richard Hunt
President of the Sitting Panel
Dated 27 June 2014