



Australian Government

Takeovers Panel

**Reasons for Decision
KBL Mining Limited
[2015] ATP 3**

Catchwords:

board spill - decline to conduct proceedings - effect on control - efficient, competitive and informed market - Eggleston principles - excluded relevant interest - failure to disclose - failure to attach relevant agreement - meeting cancelled - section 602 principles - substantial holder notice

Corporations Act 2001 (Cth), sections 249D, 608(3), 608(8), 609(1), 657A, 671B

ASIC Regulatory Guide 5: Relevant interests and substantial holding notices

Re Adelaide Holdings Ltd and the Companies Act [1982] 6 ACLR 675

Northern Iron Limited [2014] ATP 11, MYOB Limited [2008] ATP 27, Alpha Healthcare Limited [2001] ATP 13, Re

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

INTRODUCTION

1. The Panel, Peter Day (sitting President), Lee Dewhirst and Michelle Jablko, declined to conduct proceedings on an application by KBL Mining Limited in relation to its affairs. The application concerned contraventions of the substantial holder provisions following a sale of KBL Mining shares and the effect on control of KBL Mining. Following further requested disclosures, and withdrawal of a s249D¹ requisition, the Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.
2. In these reasons, the following definitions apply.

Capri	Capri Trading Pty Ltd as trustee of the Capri Family Trust
Extension Fee	25,200,000 fully paid ordinary shares in Kidman Resources
KBL Mining	KBL Mining Limited
Kidman Mining	Kidman Mining Pty Ltd
Kidman Resources	Kidman Resources Limited
RIKID	RIKID511 Pty Ltd

FACTS

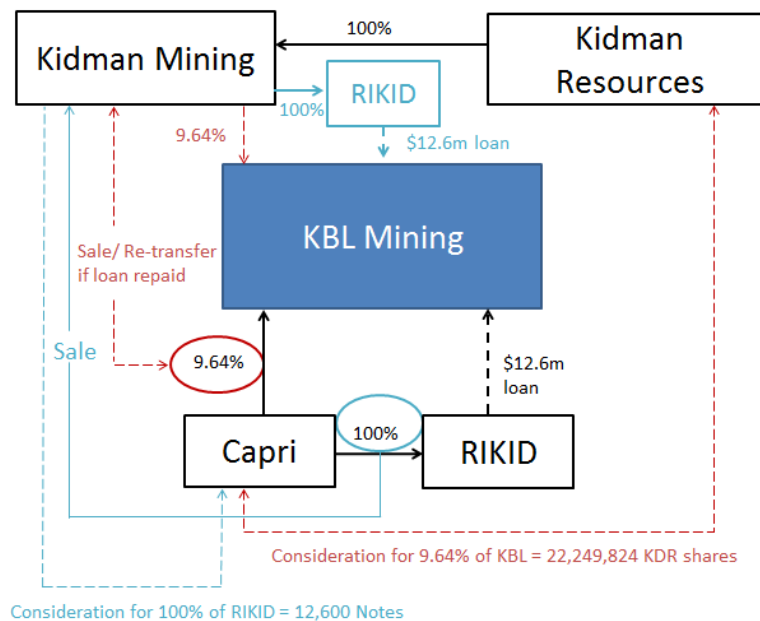
3. KBL Mining is an ASX listed company (ASX code: KBL). It is a base and precious metals resources company. Its main assets are the Mineral Hill project in New South Wales, and a 75% interest in the Sorby Hills project in Western Australia.

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

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4. On 6 March 2013, Capri lent \$10m to KBL Mining. The terms of the loan required that KBL Mining repay \$12.6m by 15 March 2015.² To secure the loan, Capri held security interests over all of KBL Mining's assets and mining tenements.
5. On 5 November 2014, the loan was assigned to RIKID, a wholly owned subsidiary of Capri. Capri's security interests in KBL Mining were also assigned to RIKID.
6. On 7 November 2014, Capri entered into a share sale agreement to sell to Kidman Mining its 37,925,836 shares in KBL Mining (approximately 9.64%) and the sole ordinary share on issue in RIKID.
7. The following key terms of the share sale agreement are relevant:
 - (a) the consideration for the shares in KBL Mining was the deferred issue of 22,249,824 fully paid ordinary shares in Kidman Resources by no later than 31 March 2015³
 - (b) the consideration for the RIKID share was 12,600 notes in Kidman Mining with a face value of \$12.6m, which were to be issued pursuant to a note deed
 - (c) Kidman Mining could extend the 15 March 2015 maturity date of the notes to 31 March 2018 by procuring the issue of 25,200,000 fully paid ordinary shares in Kidman Resources ("Extension Fee") and
 - (d) if the loan was repaid by 31 March 2015, Kidman Mining could elect whether or not to complete the purchase of the KBL Mining shares from Capri. If Kidman Mining elected not to complete the purchase, it would transfer the KBL Mining shares back to Capri and Capri would not be issued the consideration shares in Kidman Resources referred to in paragraph (a).
8. In diagram form, the transaction had the following effect:



² KBL Mining's ASX announcement dated 7 March 2013 stated that the repayment amount was \$11.3m if the loan was repaid before 15 March 2014 and otherwise, \$12.6m to be repaid before 15 March 2015

³ As at 24 December 2014, Kidman Resources had 119,610,593 ordinary shares on issue

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9. On 11 November 2014, Kidman Resources announced to ASX that the sale of the KBL Mining shares had occurred and that, among other things:
 - (a) it had acquired the share in RIKID, which held the loan to KBL Mining, in consideration for 'Kidman' undertaking the note issue to Capri
 - (b) the Kidman Resources shares would not be issued to Capri until 31 March 2015, subject to any shareholder approval that may be required and
 - (c) if the loan to KBL was repaid on or before 31 March 2015, the KBL Mining shares would be transferred back to Capri and Capri would not be issued the Kidman Resources shares.
10. On 11 November 2014, Capri filed a Form 605 (Notice of ceasing to be a substantial holder) disclosing that it had disposed of its relevant interest in the KBL Mining shares. It did not attach a copy of the share sale agreement.
11. On 13 November 2014, Kidman Resources filed a Form 603 (Notice of initial substantial holder) disclosing Kidman Mining's acquisition of a relevant interest in the KBL Mining shares and that Kidman Resources' voting power in KBL Mining was 9.64%. It did not attach a copy of the share sale agreement.
12. On 19 November 2014, Kidman Mining filed a s249D notice with KBL Mining requisitioning a general meeting of shareholders to consider the removal of all KBL Mining directors and the election of three Kidman Mining nominees.
13. On 24 November 2014, KBL Mining notified Kidman Resources and Capri of inconsistencies in their substantial holder notices in respect of the date of disposal of the shares and requested that:
 - (a) Kidman Resources file an amended Form 603, attaching a copy of the share sale agreement and
 - (b) Capri file a Form 603 attaching a copy of the share sale agreement, on the basis that Capri continued to have a relevant interest in the KBL Mining shares under the share sale agreement.
14. On 28 November 2014, Kidman Resources provided a copy of the share sale agreement to KBL Mining. The copy was incomplete in that the note deed, a schedule to the agreement, was not provided.
15. On 3 December 2014, KBL Mining requested that Capri withdraw its 11 November 2014 notice of ceasing to be a substantial holder and reiterated its view that Capri continued to have a relevant interest in the KBL Mining shares.
16. On 10 December 2014, RIKID issued a notice to KBL Mining alleging that an event of default had occurred under the terms of loan security arrangements. It stated that it had appointed an investigating accountant to investigate the financial affairs of KBL Mining.
17. On 17 December 2014, KBL Mining commenced proceedings in the NSW Supreme Court for a declaration that an event of default had not occurred. The proceedings were set down for hearing on 8 April 2015.

18. On 14 January 2015, Kidman Resources withdrew the s249D notice. KBL Mining cancelled the requisitioned meeting.

APPLICATION

Declaration sought

19. By application dated 9 January 2015, KBL Mining sought a declaration of unacceptable circumstances.
20. It submitted, among other things, that:
- (a) Capri had contravened, and continues to contravene, the substantial holder provisions by:
 - (i) disclosing that it ceased to have a substantial holding in KBL Mining when it continued to do so and
 - (ii) failing to provide KBL Mining and ASX a copy of the share sale agreement giving rise to its continued substantial holding
 - (b) Kidman Resources and Kidman Mining continued to contravene the substantial holder provisions by failing to amend the Form 603 dated 13 November 2014 (ie, by attaching a copy of the share sale agreement as required by section 671B) and
 - (c) the circumstances constituted contraventions of the substantial holder provisions, contrary to the policy objectives in section 602 and Chapter 6C.
21. KBL Mining submitted that the effect of the circumstances was that:
- (a) shareholders of KBL Mining were uninformed as to the identity of all persons who had acquired a substantial interest in KBL Mining, at a time when shareholders were being asked to make decisions about voting their shares and
 - (b) efforts by Kidman Resources to acquire effective control of KBL Mining, other than by way of a takeover bid, were taking place in a market that was not efficient, competitive and informed.

Final orders sought

22. KBL Mining sought final orders to the effect that:
- (a) Kidman Resources and its associates file an amended Form 603 rectifying the deficiencies identified by KBL Mining and attaching a copy of the share sale agreement (including the note deed) and
 - (b) Capri and its associates:
 - (i) withdraw the Form 605 dated 11 November 2014 and
 - (ii) file a new substantial holder notice disclosing their continued substantial holding in KBL Mining and attaching a copy of share sale agreement (including the note deed) and any other relevant agreement that contributed to the acquisition of that substantial holding.

23. KBL Mining also sought orders that Kidman Resources and Capri be required to make an announcement to ASX detailing the deficiencies and rectifications made to the substantial holder notices and the reasons for the delay in remedying those deficiencies.

DISCUSSION

Failure to attach relevant agreements to substantial holder notices

24. In preliminary submissions, Kidman Resources, Kidman Mining and Capri submitted that proceedings should not be conducted because:
- (a) the market had been fully informed of the arrangements between Capri, Kidman Resources and Kidman Mining by Kidman Resources' ASX announcement of 11 November 2014. Therefore, as the share sale agreement did not contain any material information not already disclosed to the market, unacceptable circumstances did not exist and
 - (b) KBL Mining could have released the share sale agreement to the market if it had concerns about information asymmetry in the market.
25. In addition, Capri submitted that it did not retain a relevant interest in the KBL Mining shares.
26. In our view there have been contraventions of s671B. Kidman Resources, Kidman Mining and Capri should have attached a copy of the share sale agreement, including the note deed which was schedule 4 to that agreement, to their respective substantial holder notices.
27. We accept that Kidman Resources' ASX announcement on 11 November 2014 partially addressed the information deficiency. It set out key terms of the agreement and referred to the possibility of the KBL Mining shares being transferred back to Capri.⁴
28. Nevertheless, it appears to us that the announcement was insufficient to address fully the information deficiency created by not attaching the share sale agreement to the substantial holder notices. In part this is because:
- (a) the notes were expressed in the share sale agreement to be convertible but the announcement made no reference to this
 - (b) it was unclear whether Kidman Resources or Kidman Mining was the issuer of the notes and
 - (c) the circumstances in which the 'Extension Fee' was payable was not apparent and the announcement made no reference to this either.
29. We advised the parties that we were minded to conduct proceedings if the share sale agreement was not released to the market in its entirety. Kidman Resources agreed to release it. Capri agreed to Kidman Resources doing so.

⁴ The announcement appeared under both Kidman Resources' and KBL Mining's tickers

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30. Although a copy of the share sale agreement had been provided to KBL Mining (curiously without the note deed which was schedule 4 to the agreement), it was not KBL Mining's obligation to release it, even though it may have chosen to do so.
31. Kidman Resources released the share sale agreement to ASX on 16 January 2015 by attaching it to an amended Form 603.
32. The release of the agreement clarified that the notes were to be issued by Kidman Mining and were not convertible, despite being expressed as such in the share sale agreement, and also that Capri was entitled to the 'Extension Fee' if Kidman Mining elected to extend the maturity date of the notes.

Capri's disclosure of cessation of relevant interests

33. KBL Mining submitted that Capri continued to have a relevant interest in the KBL Mining shares. This was because the share sale agreement included an arrangement under which the KBL Mining shares sold to Kidman Mining could be transferred back to Capri if the loan was repaid. The agreement provided:

If the Capri Loan has been repaid in full ... the Purchaser will have no obligation to complete the purchase of the KBL Shares, and if it elects not to complete the purchase, it will immediately do all acts and execute all documents necessary to re-transfer the KBL Shares to the Vendor (or as directed by the Vendor)....

34. KBL Mining submitted that this attracted the operation the 'accelerator provision' in section 608(8). Section 608(8) provides:

If at a particular time all the following conditions are satisfied:

- (a) *a person has a relevant interest in issued securities;*
- (b) *the person (whether before or after acquiring the relevant interest):*
 - (i) *has entered or enters into an agreement with another person with respect to the securities; or*
 - (ii) *has given or gives another person an enforceable right, or has been or is given an enforceable right by another person, in relation to the securities (whether the right is enforceable presently or in the future and whether or not on the fulfilment of a condition); or*
 - (iii) *has granted or grants an option to, or has been or is granted an option by, another person with respect to the securities;*
- (c) *the other person would have a relevant interest in the securities if the agreement were performed, the right enforced or the option exercised;*

the other person is taken to already have a relevant interest in the securities.

35. KBL Mining submitted that the transfer-back clause in the share sale agreement was akin to a put option. A put option was considered to be caught by the ‘accelerator provision’⁵ in *Re Adelaide Holdings*, in which it was said of the provision at that time:
- ... the effect..., and no doubt the desired effect, is to bring back to the earliest possible point in time in some transactions affecting shares the moment at which a person will be treated as having a relevant interest in those shares. It makes, for example, the time of entry into an agreement with respect to an issued share, or the time of the giving of an option, the time at which the person shall be treated as having a relevant interest in the share in question.*⁶
36. Not all agreements that could result in the acquisition of a relevant interest will attract the operation of the ‘accelerator provision’.⁷ We do not need to decide if this one did, as the disclosure of the agreement sufficiently addressed the unacceptable circumstances given that the s249D notice was withdrawn.
37. Capri submitted that the mechanism allowing the re-transfer of the KBL Mining shares back to it amounted to a security interest which secured the performance of Kidman Mining’s obligations to it. Capri submitted that it therefore did not hold a relevant interest in the shares as its interest came within the financier exception provided by s609(1). We do not have enough information about the business of Capri to establish that it meets the qualification in s609(1)(a) that the security was in the ordinary course of its business of providing financial accommodation. Nor have we formed any view as to the proper characterisation of the transfer-back clause.
38. KBL Mining also submitted that, on completion of the share sale agreement, Capri would have a relevant interest in the KBL Mining shares because, even if the loan was not repaid, Capri would acquire approximately 28.41% of voting shares in Kidman Resources and have a relevant interest in the KBL Mining shares due to the operation of the ‘tracing rule’ in section 608(3). However, without the note deed it necessarily based this submission on speculation that Capri was entitled to be issued a further 25,200,000 and 12,600 ordinary shares in Kidman Resources for the Extension Fee and upon conversion of the notes respectively. The notes, it now appears, are not convertible.
39. We leave the question of whether there was properly a notice of cessation of substantial holding to others should they wish to pursue it.

Control effect on KBL Mining

40. KBL Mining submitted that Kidman Resources was attempting to acquire effective control of it other than by way of a takeover bid through, among other things, seeking to replace the board of directors with Kidman Resources’ own nominees.
41. Kidman Resources withdrew its s249D notice on 14 January 2014. Given this, we do not consider this aspect of KBL Mining’s application any further. If new

⁵ At the time, s9(6) *Companies (Acquisition of Shares) Act 1980*. The section’s origins trace back to s6A(6) of the *Uniform Companies Act 1961*

⁶ *Re Adelaide Holdings Ltd and the Companies Act* [1982] 6 ACLR 675 at 679

⁷ *Alpha Healthcare Limited* [2001] ATP 13. Cf *MYOB Limited* [2008] ATP 27

circumstances arise as a result of developments relating to the control of KBL Mining, it is open to a party to file a fresh application.

Conclusion

42. Compliance with the substantial holder disclosure obligation is important to ensure an efficient, competitive and informed market, and we consider any material failure to comply with it to be contrary to the policy objectives of section 602.⁸
43. Kidman Resources, Kidman Mining and Capri each contravened the substantial holder provisions by failing to attach a copy of the share sale agreement to their respective substantial holder notices.
44. Further, it may be that Capri continues to have a relevant interest in the KBL Mining shares.
45. Noting that the s249D notice was withdrawn and the requisitioned meeting cancelled, we are primarily concerned with the practical consequences of technical contraventions, being the lack of information in the market regarding the share sale agreement. This has been remedied. We consider that the disclosure of the share sale agreement in its entirety to the market adequately addresses our primary concerns. Any technical contraventions of substantial holder provisions which have arisen can be dealt with in a different forum.

DECISION

46. 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

47. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any final orders.
48. *Post script: On 21 January 2015, Kidman Resources announced that it had amended its agreement with Capri and RIKID, Kidman had "redeemed" the notes and RIKID was a wholly owned subsidiary of Capri.*

Peter Day
President of the sitting Panel
Decision dated 16 January 2015
Reasons published 23 January 2015

⁸ *Northern Iron Limited* [2014] ATP 11 at [53]

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Advisers

Party	Advisers
KBL Mining	Addisons
Kidman Resources	Minter Ellison
Kidman Mining	Minter Ellison
Capri	K&L Gates