



Australian Government

Takeovers Panel

**Reasons for Decision
Phosphate Australia Limited
[2015] ATP 5**

Catchwords:

decline to conduct proceedings – bidder’s statement - supplementary bidder’s statement - substantial holder notices

Corporations Act 2001 (Cth), sections 602(a), 602(b)(i), 608(1)(b), 608(3), 636, 671B

ASIC RG 9 – Takeover Bids

Guidance Note 5: Specific Remedies – Information Deficiencies

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

INTRODUCTION

1. The Panel, Rod Halstead, Nora Scheinkestel (sitting President) and Anthony Sweetman, declined to conduct proceedings on an application by Phosphate Australia Limited in relation to its affairs. The application concerned non-disclosure of persons who have acquired, and will acquire, a relevant interest in Phosphate shares as a result of an on-market takeover bid by Mercantile Investment Company Ltd. Further disclosure was made and the Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

Mercantile	Mercantile Investment Company Ltd
Phosphate	Phosphate Australia Limited
Siblow	Siblow Pty Ltd

FACTS

3. Phosphate is an ASX listed company (ASX code: POZ). Phosphate is a mineral exploration company.
4. Mercantile is an ASX listed investment company (ASX code: MVT). Siblow holds 45.55% of Mercantile’s voting shares. Sir Ron Brierley, the Chairman and a non-executive director of Mercantile, holds 50% of the shares in Siblow.
5. On 5 January 2015, Mercantile lodged a notice of initial substantial holder notice disclosing it had voting power of 7.2% in Phosphate. The notice disclosed that Siblow was an associate of Mercantile because of an agreement “with Mercantile for it to acquire Siblow’s shares”. The notice stated that Mercantile was entitled to be

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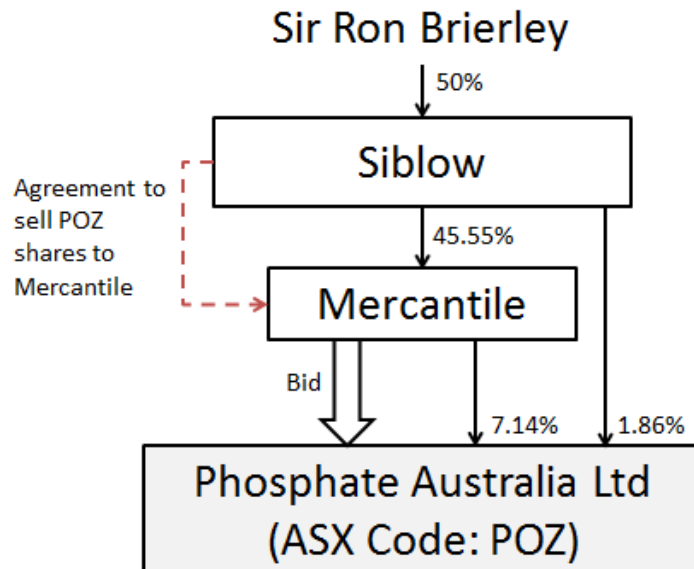
registered as holder of 8,625,514 Phosphate shares (5.35%) and Siblow was entitled to be registered as holder of 3,000,000 Phosphate shares (1.86%).¹

6. On 9 March 2015, Mercantile lodged a notice of change of interests of substantial holder, disclosing that it had voting power of 8.2% in Phosphate. On 31 March 2015, Mercantile lodged a further notice, disclosing that it had voting power of 9.0% in Phosphate. Neither notice disclosed that Siblow was an associate of Mercantile or had an interest in Phosphate.
7. On 30 March 2015, Mercantile announced an on-market takeover offer for all the ordinary shares of Phosphate. The offer opened on 14 April 2015 and is currently scheduled to close on 14 May 2015.
8. On 1 April 2015, Phosphate wrote to Mercantile asking whether Siblow intended to lodge a substantial holder notice disclosing its interest in Phosphate. On 8 April 2015, Phosphate wrote again to Mercantile stating, among other things, that Siblow and Sir Ron Brierley should lodge substantial holder notices in relation to Phosphate.
9. On 10 April 2015, Mercantile wrote to Phosphate stating, among other things, that while it was a matter for Siblow and Sir Ron Brierley whether they provided substantial holder notices, Mercantile understood that Siblow intended to lodge “*a substantial holding notice with respect to Mercantile’s holding in Phosphate*”.
10. On 14 April 2015, Siblow lodged a notice of initial substantial holder, disclosing (as at 30 December 2014) that it had a relevant interest in:
 - (a) 3,000,000 Phosphate shares as the holder of those shares under s608(1)(b)² and
 - (b) 8,625,514 Phosphate shares that are controlled by Mercantile under s608(3)(a).³
11. On 20 April 2015, Phosphate wrote to Sir Ron Brierley (copying Mercantile), requesting that he lodge substantial holder notices in relation to his relevant interest in Phosphate and procure that Mercantile issue a supplementary bidder’s statement disclosing the relevant interest acquired by himself and Siblow as a result of Mercantile’s takeover offer.
12. The relationship between the parties is shown in the following diagram.

¹ both holdings were registered in the name of McNeil Nominees Pty Ltd

² all references are to the *Corporations Act 2001* (Cth)

³ Siblow lodged a change of substantial holder notice on 14 April 2015, disclosing its voting power of 9.0% in Mercantile



APPLICATION

Declaration sought

13. By application dated 23 April 2015, Phosphate sought a declaration of unacceptable circumstances. Phosphate submitted (among other things) that:
- (a) Sir Ron Brierley controlled Siblow and therefore had the same relevant interest in Phosphate shares as held by Siblow pursuant to s608(3)(b)
 - (b) Sir Ron Brierley had not lodged a substantial holder notice in relation to his relevant interest in Phosphate shares and
 - (c) Mercantile's bidder's statement:
 - (i) had not disclosed that Siblow and Sir Ron Brierley had, and will acquire, a relevant interest in Phosphate shares as a result of the takeover bid
 - (ii) did not disclose that Mr Gary Weiss was an alternative director of Mercantile and
 - (iii) incorrectly disclosed that Mr Gabriel Radzysinski was a non-executive director of Mercantile when he was an executive director.
14. Phosphate submitted that the effect of the circumstances was that:
- (a) Mercantile's bidder's statement omitted material information required under s636(1)(m) and was contrary to the principle that holders of shares in a company should know the identity of any person who proposes to acquire a substantial interest in the company (s602(b)(i)) and
 - (b) Sir Ron Brierley's failure to lodge a substantial holder notice was a contravention of s671B and contrary to an efficient, competitive and informed market for the shares of Phosphate (s602(a)).

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Interim order sought

15. Phosphate sought an interim order to the effect that Mercantile, Siblow and Sir Ron Brierley be prevented from acquiring any shares in Phosphate pending determination of the application.

Final orders sought

16. Phosphate sought final orders to the effect that:
 - (a) Mercantile issue a supplementary bidder's statement, in a form approved by the Panel, that included adequate disclosure of the identities of Siblow and Sir Ron Brierley and the relevant interests they hold and would acquire as a result of the takeover offer, disclosure of Mr Gary Weiss as an alternative director of Mercantile and that Mr Gabriel Radzyminski is an executive director of Mercantile
 - (b) Mercantile release the supplementary bidder's statement on ASX and dispatch it to everyone in the same manner as the offers were sent
 - (c) Sir Ron Brierley lodge a substantial holder notice in relation to the relevant interests he holds in Phosphate shares
 - (d) a statement be included in the corrective disclosure that corrective disclosure was required by the Panel and
 - (e) Mercantile, Siblow and Sir Ron Brierley pay Phosphate's costs.

DISCUSSION

17. On 30 April 2015, Mercantile lodged a supplementary bidder's statement and released it on ASX disclosing, among other things:
 - (a) that Mr Gary Weiss is an alternative director of Mercantile for Mr Daniel Weiss
 - (b) by way of confirmation, that Mr Gabriel Radzyminski is a non-executive director of Mercantile
 - (c) that "*Siblow holds 45.55% voting power in Mercantile, creating a Relevant Interest for Siblow in Mercantile's*" shares in Phosphate and
 - (d) that Sir Ron Brierley controls Siblow and therefore holds a relevant interest in Phosphate shares held by Siblow and Mercantile.
18. We consider that Mercantile's supplementary bidder's statement deals with the issues raised by Phosphate in relation to Mercantile's bidder's statement. Phosphate used public information to prepare its application and the information complained of as not being disclosed to the market was already available to the market. We do not need to decide whether the information was required to be disclosed in the bidder's statement because Mercantile were prepared to lodge a supplementary bidder's statement and Phosphate agreed to the form of the additional disclosures prior to

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lodgement. The parties settled the issues related to Mercantile’s bidder’s statement, which the Panel always encourages.⁴

19. We did not ask whether Mercantile intended to dispatch copies of its supplementary bidder’s statement and left that to Mercantile.⁵
20. This leaves the submission that Sir Ron Brierley is required to lodge a substantial holder notice in relation to his relevant interest in Phosphate. Given the market is informed about his interest, we consider that this is a compliance matter for ASIC to pursue.

DECISION

21. 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).
22. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any interim or final orders.

Nora Scheinkestel
President of the sitting Panel
Decision dated 30 April 2015
Reasons published 6 May 2015

⁴ Guidance Note 5: Specific Remedies – Information Deficiencies at [29]

⁵ see ASIC Regulatory Guide 9, Takeover Bids, at [9.412]-[9.418] for a discussion of when not dispatching a supplementary bidder’s or target’s statement may be unacceptable

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Advisers

Party	Advisers
Mercantile	Watson Mangioni Shaw Stockbroking
Phosphate	Hardy Bowen