



**Australian Government**

**Takeovers Panel**

**Reasons for Decision**

**ABM Resources NL**

**[2016] ATP 5**

**Catchwords:**

*Rights issue – debt facility – potential control impact – steps to minimise control impact – non-renounceable – underwriting – sub-underwriting – sub-underwriting fee – bookbuild – caretaker board – declaration – orders*

*Corporations Act 2001 (Cth), sections 249D, 260A, 602, item 10 of 611*

*Panel Guidance Note 17 – Rights Issues*

*Celamin Holdings NL [2014] ATP 23, Celamin Holdings NL [2014] ATP 22, Sherwin Iron Limited [2014] ATP 12, Virgin Australia Holdings Limited [2013] ATP 15, MacarthurCook Property Securities Fund 01 & 02 [2012] ATP 7, Vesture Limited 02 [2010] ATP 15, Rey Resources Limited [2009] ATP 14, DataDot Technology Limited [2009] ATP 13, Multiplex Prime Property Fund 03 [2009] ATP 22, Multiplex Prime Property Fund 04 [2009] ATP 21, International All Sports Ltd 01R [2009] ATP 5, Bisalloy Steel Group Limited [2008] ATP 29, Bowen Energy Ltd [2007] ATP 22, Magna Pacific (Holdings) Limited 05 [2007] ATP 16, Dromana Estate Limited 01R [2006] ATP 8, Rivkin Financial Services Limited 02 [2005] ATP 1, InvestorInfo Limited [2004] ATP 6, Bigshop.com.au Limited 01 [2001] ATP 20*

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

**INTRODUCTION**

1. The Panel<sup>1</sup> made a declaration of unacceptable circumstances in relation to the affairs of ABM Resources NL. The application concerned a non-renounceable rights issue. The Panel considered, among other things, that all reasonable steps to minimise the likely control effect of the rights issue on ABM had not been taken and ordered that ABM not proceed with the rights issue.

2. In these reasons, the following definitions apply:

<b>ABM</b>	ABM Resources NL
<b>APAC</b>	APAC Resources Capital Limited, a wholly owned subsidiary of APAC Resources Limited
<b>APAC Proposal</b>	APAC’s funding proposal submitted to ABM on 1 February 2016, as amended
<b>Board</b>	the board of ABM
<b>Debt Facility</b>	the \$3.8 million debt facility between ABM and PRCM
<b>Key Pacific</b>	Key Pacific Advisory Partners Pty Ltd
<b>PRCM</b>	Pacific Road Capital Management Pty Ltd as trustee for Pacific Road Fund II Managed Investment Trust

<sup>1</sup> The sitting Panel was Byron Koster, Denise McComish and Vickki McFadden (sitting President)

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<b>PRCM Proposal</b>	PRCM's funding proposal submitted to ABM on 18 January 2016, as amended
<b>Rights Issue</b>	the 3 for 5 non-renounceable rights issue announced by ABM on 9 March 2016

### FACTS

3. ABM is an ASX listed company (ASX code: ABU). It is an exploration company developing several gold discoveries in the Central Desert region of the Northern Territory.
4. The two largest shareholders of ABM are:
  - (a) PRCM which holds 19.85% of ABM and
  - (b) APAC which holds 14.83% of ABM (through a custodian).
5. In November 2015, ABM identified a need for funds including because of a need to cash back environmental and general performance bonds held by ANZ Bank.
6. On 18 January 2016, PRCM submitted a proposal to the Board in connection with a rights issue, pursuant to which it offered to:
  - (a) provide a debt facility in respect of ABM's environmental and general performance bonds obligations and
  - (b) arrange and sub-underwrite a non-renounceable rights issue to raise \$8 million at an issue price of 10 to 20% discount to the prevailing share price.
7. On 1 February 2016, APAC submitted a proposal to the Board as an alternate funding option in connection with a renounceable rights issue at \$0.015 per share to raise \$14 million and to be fully underwritten by APAC. The APAC Proposal was amended on 19 February 2016 to increase the issue price to \$0.0225 per share.
8. At some point in time before 5 February 2016, PRCM agreed to add a shortfall facility to the rights issue proposed in its proposal.
9. On 18 February 2016, APAC's custodian served on ABM a notice issued under s249D<sup>2</sup> seeking that the Board convene a shareholders' meeting to consider resolutions to appoint two directors nominated by APAC and remove the incumbent directors as at the date of the notice (except APAC's existing director nominee, Mr Andrew Ferguson).
10. On 21 February 2016, the Board approved the execution of a term sheet with PRCM in respect of the debt facility and the underwriting facility for a non-renounceable rights issue at an issue price capped at \$0.03 per share. The term sheet required ABM to pay PRCM a break fee if ABM did not proceed with the transactions contemplated by the term sheet.
11. On 22 February 2016, the term sheet between PRCM and ABM was executed.

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

## Takeovers Panel

### Reasons - ABM Resources NL [2016] ATP 5

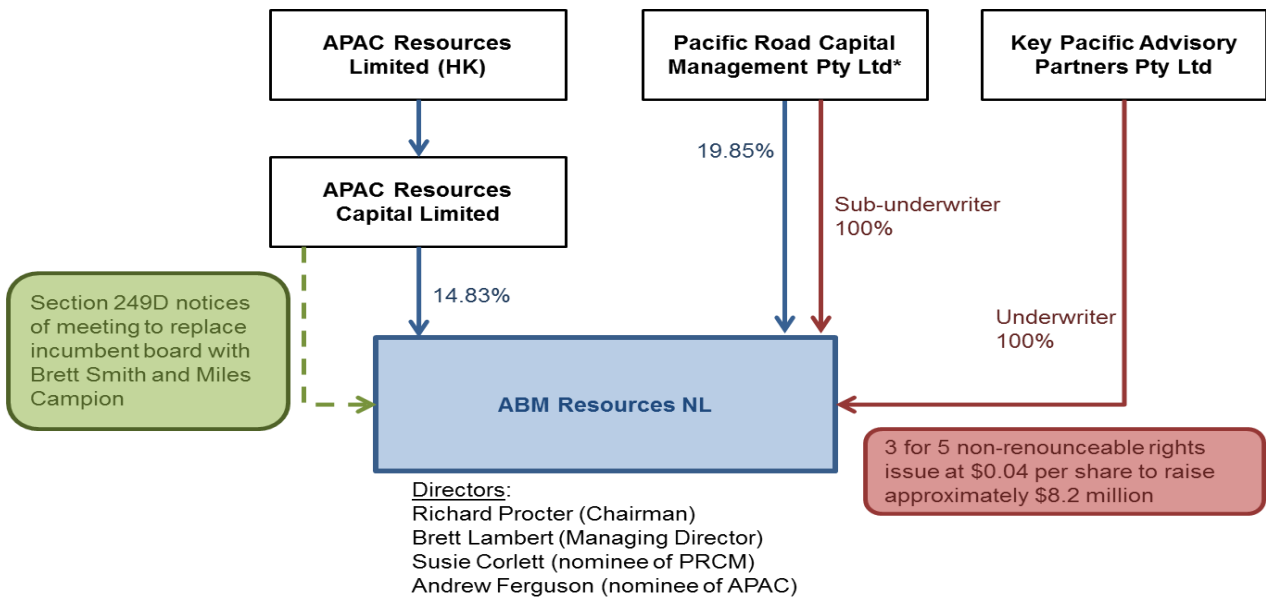
12. On 7 March 2016, ABM's management recommended to the Board that ABM accept an amended PRCM Proposal. The PRCM Proposal was amended, among other things, to increase the issue price to \$0.04 per share.
13. On 8 March 2016, the Board (excluding Mr Ferguson) resolved by circular resolution that ABM proceed with the PRCM Proposal. Later on the same day, a full board meeting was held and resolved to proceed with the rights issue.<sup>3</sup>
14. On 9 March 2016, ABM announced:
  - (a) a 3 for 5 non-renounceable rights issue at an issue price of \$0.04 per share to raise a total of approximately \$8.2 million. The rights issue was fully underwritten by Key Pacific and fully sub-underwritten by PRCM
  - (b) entry into a \$3.8 million debt facility with PRCM in relation to environmental and general performance bonds. The facility was subject to a number of conditions, including the rights issue occurring with PRCM as sole arranger and underwriter and ABM granting a first ranking security interest over its assets in favour of PRCM
  - (c) the appointment of Mr Brett Lambert as Managing Director of ABM
  - (d) the resignation of one director from the Board and the intention of two further directors to resign upon completion of the capital raising (one of whom, in fact, resigned the next day) and
  - (e) the appointment of two new directors, one being Mr Lambert and the other a nominee of PRCM.
15. The Debt Facility provided for:
  - (a) PRCM to receive an upfront fee of 10 million 5-year options with an exercise price of \$0.058, equivalent to 1.8% of ABM's issued capital on a fully diluted basis and
  - (b) an interest rate of 15% per annum of the drawn amount, payable in cash or shares of ABM (at ABM's discretion), which if paid in shares will be equivalent to 2.3% of ABM's issued capital on a fully diluted basis.
16. Also on 9 March 2016, BNP served on ABM a further s249D notice requesting the Board to convene a shareholders' meeting to consider resolutions to appoint APAC's two director nominees and remove the incumbent directors as at the date of the notice (except Mr Ferguson).
17. The structure of holdings of the various parties are shown in the following diagram:

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<sup>3</sup> ABM provided an unapproved board minute dated 8 March 2016 that stated that this resolution was resolved by a majority of 3 to 1 with Mr Ferguson dissenting

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\* As manager of Pacific Road Fund II Managed Investment Trust

## APPLICATION

### Declaration sought

18. By application dated 10 March 2016, APAC sought a declaration of unacceptable circumstances. APAC submitted that, among other things:
  - (a) the Rights Issue had structural features that failed to comply with the principles in Guidance Note 17 "Rights Issues" and the policy objectives in s602
  - (b) the Debt Facility was subject to a number of conditions and there was no disclosure of the risks associated with the Debt Facility, including if the Rights Issue closed but PRCM was not obligated to advance the debt funds because the conditions were not satisfied
  - (c) given the pending s249D meeting, the incumbent Board was effectively in 'caretaker' mode and should generally refrain from making major decisions
  - (d) the Board relied on the recommendations of Mr Lambert (and his senior management) to approve the PRCM Proposal, notwithstanding that Mr Lambert had a conflict of interest and
  - (e) PRCM, together with the incumbent Board and senior management, had sought to enable PRCM to obtain effective control of ABM. APAC submitted that the evidence for this included ABM's failure to engage with APAC regarding the APAC Proposal which was designed to address weaknesses in the PRCM Proposal.
19. APAC submitted that the effect of the circumstances was that the potential control effect of the Rights Issue exceeded what was reasonably necessary for the fundraising purpose and the likely acquisition of control over shares in ABM would not take place in an efficient, competitive and informed market.

**Interim order sought**

20. APAC sought an interim order that the Rights Issue and Debt Facility or, alternatively, just the Rights Issue not proceed prior to the later of the s249D meeting and final orders by the Panel.
21. The President of the Panel considered an interim order to defer the ex-rights date and record date for the Rights Issue pending determination of the application. ABM amended the timetable for the Rights Issue to defer the ex-rights date and record date by three business days. On this basis, the President did not make an interim order.
22. After deciding to conduct proceedings, given the pending ex-rights date, we reconsidered the question of an interim order. Again, ABM amended the timetable for the Rights Issue and did so on two further occasions during the course of the proceedings. Accordingly, we did not make an interim order.

**Final order sought**

23. APAC sought a final order that the Rights Issue not proceed prior to the occurrence of both:
  - (a) voting on the resolutions to be put at the s249D meeting and
  - (b) either:
    - (i) the satisfaction of all conditions precedent under the Debt Facility (including shareholder approval of the giving by ABM of the security interest) or
    - (ii) disclosure by ABM of the action it would propose to take if it failed to satisfy those conditions precedent.

**Preliminary Submission**

24. ABM made a preliminary submission that the Panel not conduct proceedings because, among other things, ABM had a genuine need for funds, the Board had sought legal and financial advice on its obligations and had acted in accordance with Guidance Note 17, and APAC's application had been made to disrupt ABM's funding endeavours ahead of the s249D meeting.

**DISCUSSION**

25. We have considered all the submissions and rebuttals from parties, but address specifically only those we consider necessary to explain our reasoning.

**Rights Issue**

*Potential control impact of the Rights Issue*

26. In this case, there is a potential for the Rights Issue to have a substantial impact on the control of ABM. If no other shareholders take up their rights, PRCM would obtain voting power of up to 49.91% of ABM under the sub-underwriting arrangement. ABM submitted that it anticipated take up under the Rights Issue to be reasonably low. Accordingly, it is reasonably likely that the shortfall, which

will flow through to the underwriter and then the sub-underwriter, may be substantial.

27. We note that here we have two major shareholders with proposals that would potentially affect control of ABM. It is the Board's decision to choose between the two proposals. The consideration for us is whether the Rights Issue has an unacceptable effect on control.

### *Steps to minimise potential control impact*

28. In circumstances where there is a potential for a rights issue to affect control, the directors need to consider carefully all reasonably available options to mitigate that effect.
29. ABM submitted that it negotiated extensively with PRCM to obtain a more favourable proposal with less potential control effect. It submitted that the final proposal mitigated the potential control effect by, among other things:
- (a) being at an issue price sufficiently discounted to market to encourage take up, but not too deeply discounted so as to minimise the dilutive impact for those shareholders who do not take up their rights
  - (b) including a shortfall facility to enable shareholders to subscribe for shares not taken up (which was not initially offered by PRCM) and
  - (c) limiting the equity component of the capital raising, with the balance of the required funds coming through the Debt Facility, so that the dilutive effect of the share issue was reduced when compared to a larger equity raising.

### *Background*

30. ABM identified a need for funds in November 2015 and approached PRCM shortly thereafter to see if PRCM was willing to provide financial support. PRCM submitted its original proposal to the Board on 18 January 2016.
31. ABM submitted that it also sought out alternative funding options with corporate adviser Ochre Capital Management Pty Ltd (**Ochre**) and broker Hartleys Limited (**Hartleys**):
- (a) on 18 January 2016, ABM received an unsigned draft proposal from Ochre to arrange a placement of ABM's shares of up to \$5 million but, after further discussions with Ochre, decided that the proposal was too uncertain and was insufficient to fully fund ABM's operations and
  - (b) at a meeting with Hartleys on 2 February 2016, Hartleys indicated its willingness to assist with fundraising, but also indicated that it would need at least two weeks to prepare and get sufficient understanding of ABM to formulate a formal proposal. Given market conditions, it would not have an indication of the likelihood of success of the fundraising until marketing of ABM had commenced. Due to the lack of certainty and ABM's need for funds, ABM considered that engaging further with Hartleys was not desirable. We note that it was some weeks before the Rights Issue was announced, sufficient time for Hartleys to see whether it could put forward a formal proposal, if requested.

32. ABM submitted that it also considered that entering into discussions with other stockbrokers and corporate advisers would yield similar results.
33. In late January 2016, after receiving legal advice (see paragraph 52), ABM invited APAC to submit a funding proposal.<sup>4</sup> APAC submitted the APAC Proposal on 1 February 2016. Following this, we understand that only limited discussions occurred between ABM and APAC.
34. After ABM executed the term sheet with PRCM on 22 February 2016, ABM retained Treadstone Resource Partners (**Treadstone**) to compare the PRCM Proposal and the APAC Proposal. In its evaluation dated 4 March 2016, Treadstone noted that:

*“The PRCM proposal is significantly more advanced in nature to the point where it could reasonably be executed and ready to launch by Wednesday, 9 March (subject to external factors). In contrast the APAC proposal is currently only a 2-page term sheet that has been subject to only limited discussions between the parties and is not supported by any documentation or due diligence process. Therefore, at this point in time the PRCM proposal represents a more certain outcome for the Company relative to the APAC proposal.”*

#### *Pricing*

35. APAC submitted that the issue price of the Rights Issue was at a relatively small discount – a 31% discount to the share price on the day the amended PRCM Proposal was submitted to the Board<sup>5</sup> – which was likely to discourage participation and increase the consequential shortfall available to the underwriter and sub-underwriter.
36. ABM submitted that the discount to market was an appropriate balance between encouraging shareholders to take up shares and reducing the potential dilutive effect of a larger discount on shareholders who elect not to participate. It submitted that it anticipated take up under the Rights Issue was likely to be reasonably low so wanted to avoid too large a discount. It also submitted that a greater discount was unlikely to result in a significantly greater take up of shares.
37. ABM submitted that the discount resulted from discussions between it and PRCM, with it taking legal and corporate advice in relation to price. ABM submitted that earlier proposals from PRCM had contemplated an issue price cap of \$0.03 per share. ABM received legal advice that the price cap should be removed if ABM’s share price remained at the then current trading price of \$0.05 per share because the significant discount would result in a far more dilutive rights issue and increase the control effect given that ABM expected low participation.

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<sup>4</sup> APAC had earlier indicated an interest in participating jointly with PRCM to underwrite or sub-underwrite the proposed rights issue

<sup>5</sup> ABM submitted that the offer price of \$0.04 per share represented an 18% discount to the theoretical ex-rights price based on last close prior to the offer announcement, a 26% discount to last close before the date of the offer announcement and a 31% discount to 20-day VWAP before the date of the offer announcement

38. It is not for us to set the price, but we are concerned about the circumstances in which the price of the Rights Issue was determined. For further discussion of our concerns, see paragraphs 58 and 85.

*Renounceability*

39. APAC submitted that structuring the Rights Issue as non-renounceable did not allow shareholders to be compensated for share dilution.
40. ABM submitted that any advantage in making the capital raising renounceable was not likely to reduce materially the control effect and therefore the additional steps involved in making the capital raising renounceable were not justified. In reaching this conclusion, it had regard to advice from Treadstone that: “[t]he theoretical benefits of using a renounceable structure are viewed as being marginal given the anticipated lack of a liquid market for rights trading”.
41. We consider the non-renounceability of the Rights Issue a factor weighing in favour of unacceptability. As noted in Guidance Note 17, a “non-renounceable rights issue may result in greater flow through to an underwriter or sub-underwriter, so increasing the potential control effect. The effect is exacerbated if the rights issue is underwritten or sub-underwritten by a related party”.<sup>6</sup> While non-renounceability is not necessarily a significant factor,<sup>7</sup> ABM had time to make the Rights Issue renounceable. Making the Rights Issue renounceable would have created an opportunity for trading and at a sufficient discount an active market for rights may be achieved.

*Underwriting*

42. APAC submitted that the underwriter of the Rights Issue was an associate of PRCM and therefore, each would hold a relevant interest in any shares of ABM acquired by the other under the Rights Issue.
43. PRCM and Key Pacific each submitted that there was an historic connection between PRCM and Key Pacific involving common directors and some common shareholdings, but that those connections ceased from 1 July 2014. Key Pacific submitted that it had entered into various arms’ length commercial transactions with PRCM since that date.
44. We do not need to consider whether Key Pacific and PRCM are associates for purposes of determining relevant interest because it is expected that PRCM will take up 100% of the new shares not taken up under the Rights Issue (including the shortfall facility).<sup>8</sup>
45. We asked ABM why it chose Key Pacific as the underwriter. ABM submitted that PRCM could not underwrite the Rights Issue. PRCM identified Key Pacific, a professional underwriter, to act as an intermediary underwriter.

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<sup>6</sup> GN 17 at [16]-[17]

<sup>7</sup> GN 17 at [18]

<sup>8</sup> The Offer Document provides that the underwriter will not have a relevant interest in ABM as a result of the offer on the basis that the offer is fully sub-underwritten



46. Key Pacific also submitted that PRCM approached it to act as underwriter and that as part of the offer to sub-underwrite the Rights Issue, PRCM had agreed that it would arrange an underwriter. This was reflected in the Facility Agreement for the Debt Facility which was conditional on the Rights Issue having occurred and PRCM being the sole arranger and sub-underwriter of the Rights Issue.
47. Guidance Note 17 provides that underwriting or sub-underwriting by a major shareholder does not, of itself, give rise to unacceptable circumstances. However, *“greater care is needed to mitigate the potential control effects if a related party or major shareholder underwrites (sub-underwrites). The failure of directors to properly canvass professional underwriters or seek out alternatives to a related party or major shareholder underwriter (sub-underwriter) may increase the likelihood of unacceptable circumstances.”*<sup>9</sup>
48. ASIC submitted that, given the potential for PRCM to acquire up to 49% of ABM as the sole sub-underwriter under the Rights Issue, ABM should have taken greater care and approached alternative underwriters in order to seek to mitigate the potential control effect of the proposal rather than simply engage a party recommended by PRCM.
49. In *Bisalloy Steel Group Limited*,<sup>10</sup> the Panel stated that reasonable steps it would expect to minimise the potential control impact of a rights issue include (in appropriate cases):
- “(a) seeking to share participation in any shortfall among existing shareholders (for example, by way of a shortfall facility or back end bookbuild) and*
  - (b) where the rights issue is to be underwritten or sub-underwritten, seeking to appoint a number of underwriters or sub-underwriters or approaching non-related persons (such as professional underwriters or institutional shareholders) to act as an underwriter or sub-underwriter.”*<sup>11</sup>
50. ABM was advised by its legal adviser on several occasions that in order to minimise the control issues associated with the PRCM Proposal ABM should offer its two other major shareholders the opportunity to participate in the underwriting. ABM’s legal adviser also said that professional underwriters (in addition to Treadstone who at the time was PRCM’s proposed underwriter<sup>12</sup>) also be offered the opportunity to submit a proposal to underwrite the rights issue.
51. We asked ABM whether it had canvassed other professional underwriters or sought out alternative underwriters and sub-underwriters to Key Pacific and PRCM. ABM submitted that it had engaged with other funding sources including APAC, Ochre and Hartleys but *“ultimately came to the conclusion that the alternatives did not offer the certainty of raising the required funds that was offered by the PRCM proposal”*. While these persons were contacted to provide separate funding

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<sup>9</sup> GN 17 at [21]

<sup>10</sup> [2008] ATP 29 at [23]

<sup>11</sup> This statement of principle was adopted in *DataDot Technology Limited* [2009] ATP 13, *Rey Resources Limited* [2009] ATP 14, *Vesture Limited 02* [2010] ATP 15, *MacarthurCook Property Securities Fund 01 & 02* [2012] ATP 7 and *Virgin Australia Holdings Limited* [2013] ATP 15

<sup>12</sup> Treadstone later advised PRCM that its licence did not allow it to underwrite

proposals, it appears no attempt was made to see if any of them were interested in participating in the PRCM Proposal. Further, even though they were contacted, it seems to us that little opportunity was afforded to them to develop an alternative proposal.

52. For example, at one point ABM told its legal adviser that, based on the legal adviser's advice, it had invited APAC to submit a financing proposal. In response, ABM's legal adviser told ABM that its advice was not about "*simply substituting a control orientated proposal from one shareholder with a similarly orientated proposal from another shareholder*" but rather seeking a proposal that modified any control effect (such as by seeking joint underwriting or including a shortfall facility).
53. In a memo dated 3 February 2016 from Mr Lambert to the Board (excluding Mr Ferguson), Mr Lambert noted that the PRCM Proposal was conditional on PRCM being the sole sub-underwriter and "*[b]eyond asking if they would entertain APAC being a sub-underwriter, which was flatly refused, I have not pushed Pacific Road*" on this point. Mr Lambert also reported that under the APAC Proposal, APAC would sub-underwrite through a broker and had spoken to Hartleys who would allocate as much of the sub-underwriting to its clients as it wished. However, having been rebuffed by PRCM, APAC had indicated that it would not work alongside PRCM if Hartleys' brought in PRCM as a sub-underwriter.
54. In our view, ABM appeared to be hamstrung by the PRCM Proposal; there was either no capacity to seek out other underwriters or sub-underwriters because of the terms of the PRCM Proposal or it was not realistic to expect that any underwriter or sub-underwriter would participate in the PRCM Proposal based on its terms.
55. While ABM ultimately appointed a professional underwriter for the Rights Issue, that underwriter was identified by PRCM. By its own submission, Key Pacific was not appointed to act as investment adviser or to undertake any commercial role; its role was to facilitate the PRCM Proposal. As such, Key Pacific did not consider any other potential sub-underwriters.
56. In *InvestorInfo Limited* the Panel said of attempts to find unrelated underwriters and sub-underwriters "*this indicates that someone who has no collateral involvement is prepared to take the risk of a shortfall; such a person will seek to reduce that risk by seeking to increase the likelihood of shareholders taking up their rights and by attempting to lay off their risk to other investors through sub-underwriting*".<sup>13</sup>
57. Other than negotiating the underwriting agreement with Key Pacific, there was no evidence of any engagement between Key Pacific and ABM. We view the arrangement with Key Pacific as merely a "pass-through" arrangement that would result in PRCM taking up all of the unsubscribed shares. In appointing Key Pacific, ABM knew that it was not engaging an underwriter that would seek to pass the risk to several sub-underwriters such as a financial institution or stockbroker would ordinarily seek to do.

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<sup>13</sup> [2004] ATP 6 at [38(b)]

58. A professional underwriter wanting to offload risk would also typically be concerned with the price of the rights issue and would be involved in finding a price at which sub-underwriters would be interested. ABM did not have an independent financial advisor providing it with advice regarding structuring the rights issue<sup>14</sup> and we have no evidence that pricing for purposes of finding underwriters and sub-underwriters was tested with any financial institutions or stockbrokers.
59. We accept that joint participation in the sub-underwriting by PRCM and APAC appeared not to be an option, but we are not satisfied that ABM made any attempt, or any genuine attempt, to find additional sub-underwriters or to accommodate an institution that could do so. This was against the advice of ABM's own legal advisers. ABM sought separate funding proposals from Ochre and Hartleys but no evidence was provided that these entities or any other persons were approached in respect of underwriting the PRCM Proposal. Similarly, no evidence was provided that ABM offered any shareholders the opportunity to participate in the underwriting of the PRCM Proposal.

*Sub-underwriting fee*

60. APAC submitted that it was unacceptable that the sub-underwriting fee of 6% on the capital subscribed was without reduction for any new shares subscribed for by PRCM and its associates.
61. ABM submitted that the sub-underwriting fee was determined by way of arm's length commercial negotiation and that 6% is a typical and standard market rate. It submitted that *"in circumstances where ABM had already negotiated other terms to mitigate any potential control effects ... ABM did not seek to further negotiate the proposed fee"*. It further submitted that the underwriting and the fee payable delivered commercial certainty that ABM would receive funds close to the time at which its cash resources would be depleted.
62. PRCM submitted that pursuant to an earlier subscription agreement between PRCM and ABM, PRCM was entitled to a fee of 4% of the amount of funds provided by and on behalf of PRCM to ABM except in limited circumstances. In the circumstances of the Rights Issue, PRCM had waived its right to this fee in lieu of the sub-underwriting fee.
63. In *Celamin Holdings NL*,<sup>15</sup> the sub-underwriters were entitled to fees (including options) in respect of sub-underwritten shares, including shares taken up as part of their own entitlements. The Panel stated that *"shareholder sub-underwriters receiving a fee for the portion relating to their own entitlements is problematic because they are essentially assuming no risk. It may also constitute financial assistance. It is not a development we would want to see become the norm because of the risk of abuse."*<sup>16</sup> In the circumstances, the Panel in *Celamin* decided on balance not to declare the fee unacceptable.

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<sup>14</sup> As noted, ABM retained Treadstone to compare the PRCM Proposal and the APAC Proposal after it executed the term sheet with PRCM on 22 February 2016

<sup>15</sup> [2014] ATP 22

<sup>16</sup> At [42]

64. The review Panel in *Celamin Holdings NL 01R*<sup>17</sup> agreed with “the initial Panel’s articulation of the reasons why this sub-underwriting model has problems” and added that “[t]his arrangement may not treat Celamin shareholders equally because the fee and options may result in the sub-underwriters effectively paying less than other shareholders for taking up their entitlements.”<sup>18</sup> It also did not make a declaration.<sup>19</sup>
65. ABM submitted that even if the sub-underwriting fee is financial assistance, the financial assistance would not be prohibited by s260A as any such assistance would not materially prejudice the interests of ABM or its shareholders, or ABM’s ability to pay its creditors.
66. We consider PRCM is taking a fee for no risk and is accruing a benefit not available to other ABM shareholders. This heightens our concern about the underwriting arrangements.

### Debt Facility

67. We understand that by having around one third of ABM’s required funds raised through debt, this reduced the capital amount raised and consequently the potential control effect of a much larger rights issue. However, the Debt Facility itself raised concerns.
68. PRCM submitted that the “sub-underwriting facility and the debt facility were only linked to the extent that PRCM was not interested in providing the debt facility solely. Hence, it was a condition of PRCM providing the debt facility that PRCM also provide the sub-underwriting facility.”
69. We consider the linking of the Debt Facility with the Rights Issue, particularly given the sub-underwriting arrangement, has the potential to exacerbate the control effect. This is because the arrangement limited ABM’s options to mitigate the potential control effect of the Rights Issue, for example, by seeking to appoint other underwriters or sub-underwriters.
70. Under the Debt Facility, PRCM was to be granted a security interest over ABM’s assets. The granting of that security interest required shareholder approval under ASX Listing Rule 10.1 or a waiver of such requirement from the ASX. We are concerned that if the conditions precedent to the Debt Facility are not satisfied, especially in respect of the granting of security, ABM’s funding needs will not be met by the capital raised under the Rights Issue. This further supports the inference that the Rights Issue was not structured in a way that genuinely mitigated the potential control effect, which we discuss further below.

### Board and Management

71. APAC submitted that the original PRCM Proposal required, as a condition precedent, that Mr Lambert (then interim CEO of ABM) be appointed as the Managing Director of ABM on a full time basis, which is a material benefit to Mr

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<sup>17</sup> [2014] ATP 23

<sup>18</sup> At [19]-[20]

<sup>19</sup> The review Panel declined to conduct proceedings

Lambert, and that the Board relied on the recommendations of Mr Lambert to approve the PRCM Proposal, notwithstanding Mr Lambert's conflict of interest.

72. In minutes of a meeting of the Board on 20 January 2016, in reviewing the conditions precedent to PRCM's proposal:
- (a) the then Chairman of the Board confirmed his willingness to resign "*as was requested as a condition of the Pac Road proposal*" and
  - (b) the Board unanimously "*supported Pac Road's request*" to appoint Mr Lambert full time Managing Director, subject to agreement of terms.
73. ABM made a preliminary submission that Mr Lambert's appointment was not a condition in the signed term sheet with PRCM dated 22 February 2016. However, given that Mr Lambert's appointment was approved on 20 January 2016, subject to agreement of terms, it appears to us that there was no need.
74. ABM submitted that Mr Lambert's appointment as interim CEO followed an assessment of his qualifications, experience and overall qualities and having had the benefit of Mr Lambert being interim CEO for four months, the Board was unanimously of the view that he should be appointed on a full time basis.
75. PRCM submitted that it requested Mr Lambert's retention to provide stability to ABM. We accept this. We do not pursue whether Mr Lambert was conflicted in recommending the PRCM Proposal.

### Conclusion on Control

76. APAC submitted that the structural features of the PRCM Proposal and the actions of PRCM, together with the Board and senior management, meant that ABM and PRCM had intentionally sought to enable PRCM to obtain effective control of ABM.
77. In considering the control implications of a rights issue, the Panel has stated that it is "*not primarily concerned with the motive of the issuer, but whether the effect, or likely effect, of the rights issue does not inhibit the principles set out in s602*".<sup>20</sup> A number of things leave us with an impression that the Rights Issue, coupled with the Debt Facility, was not structured in a way that genuinely mitigated the potential control effect including:
- (a) the early fulfilment of at least some of the conditions precedent to the PRCM Proposal, including the resignation of the Chairman and the appointment of Mr Lambert as full time Managing Director (notwithstanding the separate reasons for those decisions)
  - (b) the failure to develop other funding proposals
  - (c) the underwriting not being a typical underwriting
  - (d) the Rights Issue being structured in a way that was unattractive for underwriters

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<sup>20</sup> *Bisalloy Steel Group Limited* [2008] ATP 29 at [21]. See also *Dromana Estate Limited 01R* [2006] ATP 8 at [43]

- (e) the reluctance to negotiate the sub-underwriting fee
- (f) the resistance to testing price despite the expected low participation
- (g) actions taken only to demonstrate compliance with the form over the substance of Guidance Note 17 (such as in respect of canvassing alternative proposals)<sup>21</sup> and
- (h) the granting of a security interest over the assets of ABM to PRCM under the Debt Facility in circumstances where PRCM could potentially obtain control of 49.91% of ABM under the Rights Issue.

### Revised Rights Issue structure

78. On 30 March 2016, ABM offered to amend the structure of the Rights Issue (the **Revised Rights Issue**). The amendments provided for:
- (a) a backend bookbuild<sup>22</sup> having the following features:
    - (i) the bookbuild would occur only after allocations under the offer and the shortfall facility were known
    - (ii) the bookbuild would be open for two days
    - (iii) the remaining new shares after the offer and the shortfall facility would be offered to institutional investors who were wholesale clients and
    - (iv) the remaining new shares would be offered under the bookbuild at the same issue price for the new shares under the offer and the shortfall facility and
  - (b) a reduction of the underwriting fee so that Key Pacific would charge 6% of 80.15% of the amount offered under the Rights Issue, rather than 6% of the full offering under the Rights Issue, on the basis that instead of waiving 100% of its right under the 2014 subscription agreement to a fee of 4% of any funds provided by PRCM, it would waive 80.15% of that fee.
79. ABM submitted that it was its preference to retain the current structure of the Rights Issue, with the Debt Facility. However, it had negotiated with PRCM the possibility of increasing the Rights Issue to \$10 million without any debt facility, limiting the underwriting amount to \$8.25 million. However, ABM submitted that

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<sup>21</sup> In a memo to the Board dated 3 February 2016 Mr Lambert noted that he “agreed to meet with Hartley’s as it is in our interests to be able to demonstrate that we have canvassed alternatives to the Pacific Road financing proposal in case the Takeovers Panel or ASIC raise concerns about the potential concentration of control”

<sup>22</sup> PRCM expressed concern that it would not be able to rely on item 10 of s611 because of the inclusion of a bookbuild and on that basis, ABM submitted that it would only be able to implement the bookbuild if we made orders to enable PRCM to sub-underwrite without breaching Chapter 6. ASIC submitted that, while it was not clear that the inclusion of the bookbuild would, of itself, exclude reliance in item 10 of s611, PRCM should seek to make a relief application under s655A to ASIC for a variation to permit the underwriting notwithstanding the bookbuild. However, ASIC submitted that PRCM, in its capacity as sub-underwriter, may still rely on item 10 of s611 if PRCM does not participate in the bookbuild process, allocations under the bookbuild are made to investors in circumstances that do not need disclosure under Part 6D.2 because of s708(8) to (12) and an appropriately qualified broker is engaged to conduct the bookbuild process

this was not its preference because, if no shareholders took up any shares under the Rights Issue, it would result in only \$8.25 million being raised.

80. In exploring options to restructure the Rights Issue, ABM submitted that it had discussions with Hartleys and Patersons Securities Limited (**Patersons**) regarding opportunities to underwrite the Rights Issue but neither was willing to underwrite the Rights Issue "*in these circumstances*".
81. We sought submissions from the other parties on the Revised Rights Issue.
82. APAC submitted that the proposed amendments were not likely to remove the control implications of the Rights Issue. We generally agree for the reasons below.
83. With its submissions, APAC provided a letter from Hartleys dated 31 March 2016 indicating that Hartleys was willing to underwrite a \$14 million renounceable rights issue at a price of \$0.0225 per share conditional on a sub-underwriting agreement with APAC being executed for the full amount of the rights issue, less any other sub-underwriting by parties introduced by Hartleys. APAC submitted that ABM's failure to attract a genuinely independent broker to underwrite the Rights Issue was a result of ABM's refusal to "*meet the market*" in relation to a sufficiently attractive price.
84. In a response to APAC's submissions, ABM submitted that in discussing amendments to the Rights Issue Hartleys had initially indicated interest in underwriting a \$12 million non-renounceable rights issue alongside Key Pacific, with PRCM sub-underwriting \$8.2 million, but Hartleys had declined to proceed citing insufficient support and the current dispute with APAC. It also submitted that ABM's share price had consistently traded above the offer price since announcement of the Rights Issue and this indicated that the pricing of the Rights Issue had 'met the market'.
85. In approaching Hartleys and Patersons, we were given no evidence that ABM allowed these brokers the opportunity to set the terms of the Rights Issue. We know based on Hartleys' letter to APAC that, on certain terms, a professional underwriter was willing to underwrite a renounceable rights issue for ABM. We infer from this that the current Rights Issue is structured in a way that is unattractive for underwriters other than the one selected by PRCM.
86. APAC also submitted that there was no certainty that the bookbuild would achieve any dispersion because it did not have the character of a bookbuild typically understood by the institutional wholesale market and was at the offer price of the Rights Issue. The ASX Listing Rules require that the bookbuild price must not be less than the price at which the shares are offered under the rights issue.<sup>23</sup> Typically, we would expect bids under a bookbuild to be sought before a right issue is announced and therefore, the bookbuild sets the price of the rights issue.<sup>24</sup> In certain circumstances, a placement made to wholesale investors after a rights issue has been announced may achieve dispersion.<sup>25</sup> However, given our concerns

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<sup>23</sup> Exception 3 to ASX Listing Rules 7.1 and 7.1A

<sup>24</sup> See GN 17 at [22]

<sup>25</sup> *Multiplex Prime Property Fund 03* [2009] ATP 22

regarding how the issue price was determined (see paragraph 38), we were not satisfied that the bookbuild proposed in the Revised Rights Issue would mitigate the potential control effect of the Rights Issue. We were also not told who would run the bookbuild.

87. In respect of the sub-underwriting fee, APAC submitted that the maximum aggregate savings as a result of its negotiations with PRCM amounted to \$32,752 and therefore, it was misleading of ABM to suggest (as it had) that it successfully negotiated with PRCM to reduce the fee.<sup>26</sup> We agree and the reinstatement of the old fee was not a genuine attempt to address our concerns.
88. The Revised Rights Issue failed to alleviate our concerns with the Rights Issue.

### Caretaker Board

89. APAC submitted that, in light of the pending s249D meeting, the incumbent Board was effectively in 'caretaker' mode and should generally be refraining from making major decisions such as approving the Rights Issue.
90. We are not prepared to decide this issue. In *Sherwin Iron Limited*<sup>27</sup> the Panel stated that: "[t]he doctrine of caretaker director is not settled in Australia,<sup>28</sup> something the Panel has previously noted.<sup>29</sup> In any event, the Panel is reluctant to get involved in questions about whether the actions of directors (in this case, in conducting the rights issue and share purchase plan) might breach directors' duties.<sup>30</sup>" In *Sherwin* the Panel confined its consideration to the effect of the rights issue (and share purchase plan). We see no reason to take a different approach here.

## DECISION

### Declaration

91. It appears to us that the circumstances are unacceptable:
- (a) having regard to the effect that we are satisfied they will have or are likely to have on:
    - (i) the control, or potential control, of ABM or
    - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in ABM
  - (b) in the alternative, having regard to the purposes of Chapter 6 set out in s602.

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<sup>26</sup> Being the difference between \$495,000 (6% of \$8.2 million) and \$462,248 (the sum of 6% of 80.15% of \$8.2 million and 4% of 19.85% of \$8.2 million)

<sup>27</sup> *Sherwin Iron Limited* [2014] ATP 12 at [21]-[22]. See also *Rivkin Financial Services Limited* 02 [2005] ATP 1 at [44]

<sup>28</sup> *Ford's Principles Of Corporations Law*, Lexis Nexis Butterworths, 2000 at [7.41.6]

<sup>29</sup> *Bigshop.com.au Limited* 01 [2001] ATP 20 at [80(j)]

<sup>30</sup> *Magna Pacific (Holdings) Limited* 05 [2007] ATP 16. See also *Multiplex Prime Property Fund* 04 [2009] ATP 21, *International All Sports Ltd* 01R [2009] ATP 5 and *Bowen Energy Ltd* [2007] ATP 22



92. Accordingly, we made the declaration set out in Annexure A<sup>31</sup> and consider that it is not against the public interest to do so. We had regard to the matters in s657A(3).

**Order**

93. Following the declaration, we made the final order set out in Annexure B. We were not asked to, and did not, make any costs orders. Under s657D the Panel's power to make orders is very wide. The Panel is empowered to make 'any order'<sup>32</sup> if 4 tests are met:
- (a) it has made a declaration under s657A. This was done on 7 April 2016.
  - (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. For the reasons below, we are satisfied that our order does 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 4 April 2016. APAC, ABM, PRCM and ASIC each made submissions and rebuttals.
  - (d) it considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons. The orders do this by requiring the Rights Issue not to proceed thereby removing the unacceptable control effect and ensuring that PRCM does not accrue any benefits not reasonably and equally available to all shareholders.
94. ABM submitted that our order would create significant hardship for ABM by preventing it from obtaining funds that it requires and that the requirement for funds would become more urgent as a result of requiring ABM to restart its funding process. It submitted that its financial position was dire and that effectively ABM would be forced to do a capital raising that was more dilutive to shareholders. For these reasons, ABM submitted that the order unfairly prejudiced ABM and its shareholders. PRCM also made a submission that ABM's financial position was "*parlous*".
95. We had previously been told by ABM that it expected to have available cash in the near term. An urgent need for funds was not relied on here to explain ABM's actions and was not reflected in the Revised Rights Issue.
96. ABM submitted that to mitigate the adverse effects of the order we should allow the Revised Rights Issue to proceed or the Revised Rights Issue at a lower price as determined by us to proceed.
97. PRCM submitted a list of alternative orders that could be made to remedy the unacceptable circumstances, including ordering that the Rights Issue be

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<sup>31</sup> The final decision to make a declaration was made by quorum of two, one of the members of the Panel being unavailable for the last meeting

<sup>32</sup> Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

renounceable, be at a lower price, include a shortfall bookbuild, that APAC be offered a sub-underwriting allocation pro rata to its shareholdings and PRCM not charge a sub-underwriting fee on its entitlement.

98. The proposals addressed many of our concerns, but we did not consider it appropriate to negotiate the commercial terms of the Rights Issue, particularly as to pricing. We also considered the time that settling the details of any such amendments for inclusion in orders might take. We concluded that it may give ABM more flexibility, would be simpler and would likely be less confusing for shareholders if the Rights Issue ended, allowing ABM to start again.
99. However, we indicated to the parties that we would consider a variation of the final order to allow a restructure of the Rights Issue that addressed our concerns.
100. We also noted the proposal for an alternative of a shareholder vote on the PRCM underwriting arrangements in the submissions on orders by ASIC. We indicated that, should ABM wish to undertake that course instead of a new rights issue, we would be prepared to vary our order.
101. We considered an order to give APAC an opportunity to participate in the sub-underwriting of the Rights Issue. We asked whether APAC was willing to take up its entitlement, any of the shortfall or bookbuild, or participate in the sub-underwriting if the Rights Issue proceeded without the Debt Facility. APAC submitted that it would not do any of these things on the terms of the current Rights Issue. Accordingly, an order to this effect would not have been effective at addressing our concerns.

**Vicki McFadden  
President of the sitting Panel  
Decision dated 7 April 2016  
Reasons published 28 April 2016**

## Takeovers Panel

Reasons - ABM Resources NL  
[2016] ATP 5

### Advisers

Party	Advisers
ABM Resources NL	Piper Alderman
APAC Resources Capital Limited	Addisons
Key Pacific Advisory Partners Pty Ltd	Clayton Utz
Pacific Road Capital Management Pty Ltd as trustee for Pacific Road Fund II Managed Investment Trust	Ashurst Australia



**Australian Government**

**Takeovers Panel**

**Annexure A**

**CORPORATIONS ACT  
SECTION 657A  
DECLARATION OF UNACCEPTABLE CIRCUMSTANCES**

**ABM RESOURCES NL**

**CIRCUMSTANCES**

1. ABM Resources NL (**ABM**) is an ASX listed company.
2. Pacific Road Capital Management Pty Ltd (**PRCM**), as trustee for Pacific Road Fund II Managed Investment Trust, holds 19.85% of ABM.
3. On 9 March 2016, ABM announced:
  - (a) a 3 for 5 non-renounceable rights issue to raise a total of approximately \$8.2 million, fully sub-underwritten by PRCM and
  - (b) entry into a \$3.8 million debt facility with PRCM. The debt facility is conditional on (among other things):
    - (i) the rights issue occurring with PRCM as sole arranger and sub-underwriter and
    - (ii) ABM granting a first ranking security interest over its assets in favour of PRCM.
4. If no other shareholders take up their rights, PRCM will obtain voting power of up to 49.91% of ABM.
5. All reasonable steps to minimise the likely control effect of the rights issue on ABM have not been taken. In particular:
  - (a) the issue is structured such that it is unattractive for underwriters, other than the one approached by PRCM, to underwrite and
  - (b) no attempt, or no genuine attempt, was made to find additional sub-underwriters or to accommodate an institution that could do so.
6. The linking of the debt facility with the rights issue, particularly given the sub-underwriting arrangement, has the potential to exacerbate the control effect.
7. In addition, the sub-underwriting fee is payable even on shares the sub-underwriter takes up under the rights issue as a shareholder.

**EFFECT**

8. As a result of the foregoing, the potential acquisition of control over voting shares in ABM will not take place in an efficient, competitive and informed market and all shareholders will not have a reasonable and equal opportunity to participate in any benefits accruing to PRCM.

**CONCLUSION**

9. It appears to the Panel that the circumstances are unacceptable circumstances:
- (a) having regard to the effect that the Panel is satisfied they will have or are likely to have on:
    - (i) the control, or potential control, of ABM or
    - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in ABM
  - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602 of the *Corporations Act 2001* (Cth) (**Act**).
10. 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) of the Act.

**DECLARATION**

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

**Alan Shaw**  
**Counsel**  
**with authority of Vickki McFadden**  
**President of the sitting Panel**  
**Dated 7 April 2016**



**Australian Government**

**Takeovers Panel**

**Annexure B**

**CORPORATIONS ACT  
SECTION 657D  
ORDER**

**ABM RESOURCES NL**

The Panel made a declaration of unacceptable circumstances on 7 April 2016.

**THE PANEL ORDERS**

That ABM Resources NL must not proceed with the Rights Issue and must within 2 business days make an announcement to the market, in a form approved by the Panel, stating that it will not proceed with the Rights Issue.

In this order, "Rights Issue" means the 3 for 5 non-renounceable rights issue announced by ABM Resources NL on 9 March 2016.

**Alan Shaw  
Counsel  
with authority of Vickki McFadden  
President of the sitting Panel  
Dated 7 April 2016**