



Australian Government

Takeovers Panel

**Reasons for Decision
ABM Resources NL 01R
[2016] ATP 7**

Catchwords:

Review application – affirm decision – rights issue – potential control impact – steps to minimise control impact – underwriting – sub-underwriting – de novo review

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

Procedural Rule 3.3.1

Aberfoyle Ltd v Western Metals Ltd (1998) 28 ACSR 187

Guidance Note 2 – Reviewing Decisions, Guidance Note 17 – Rights Issues

ASIC Regulatory Guide 6 – Takeovers: Exceptions to the general prohibition

ABM Resources NL [2016] ATP 5; Resource Generation Limited 01R [2015] ATP 13; Mungana Goldmines Limited 01R [2015] ATP 7; Bentley Capital Limited 01R [2011] ATP 13

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

INTRODUCTION

1. The review Panel, Richard Hunt (sitting President), Ian Jackman SC and Sophie Mitchell, affirmed the decision of the initial Panel in *ABM Resources NL*.¹ The review application was brought by ABM Resources NL in relation to its affairs. The review Panel agreed with the initial Panel that the circumstances of ABM’s announced rights issue were unacceptable.
2. In these reasons, the following definitions apply:

ABM	ABM Resources NL
APAC	APAC Resources Capital Limited, a wholly owned subsidiary of APAC Resources Limited
Board	the board of ABM
Debt Facility	the \$3.8 million debt facility between ABM and PRCM
Key Pacific	Key Pacific Advisory Partners Pty Ltd
Patersons	Patersons Securities Limited
PRCM	Pacific Road Capital Management Pty Ltd as trustee for Pacific Road Fund II Managed Investment Trust
Rights Issue	the 3 for 5 non-renounceable rights issue announced by ABM on 9 March 2016

¹ [2016] ATP 5

FACTS

3. The facts are set out in detail in *ABM Resources NL*.² In brief:
 - (a) On 9 March 2016, ABM announced (among other things):
 - (i) 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
 - (ii) entry into a \$3.8 million debt facility with PRCM. The Debt Facility was subject to a number of conditions, including the Rights Issue occurring with PRCM as sole sub-underwriter and ABM granting a first ranking security interest over its assets in favour of PRCM.
 - (b) PRCM currently holds 19.85% of ABM. If no other shareholders took up their rights under the Rights Issue, PRCM would obtain voting power of up to 49.91% of ABM.
 - (c) On 18 February 2016, and again on 9 March 2016, APAC's custodian (BNP) served on ABM s249D³ notices requisitioning 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 notices (except APAC's existing director nominee, Mr Ferguson).
4. 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 and
 - (b) PRCM, together with the incumbent Board and senior management, had sought to enable PRCM to obtain effective control of ABM.
5. The initial Panel made a declaration of unacceptable circumstances because (among other reasons):
 - (a) all reasonable steps to minimise the likely control effect of the Rights Issue had not been taken - for example no attempt, or no genuine attempt, was made to find additional sub-underwriters or accommodate an institution that could do so and
 - (b) the linking of the Debt Facility with the Rights Issue, particularly given the sub-underwriting arrangement, had the potential to exacerbate the control effect.
6. The initial Panel made an order that ABM not proceed with the Rights Issue. The initial Panel considered that an order ending the Rights Issue, which allowed ABM flexibility in structuring a new rights issue or other funding transaction, would be simpler and would likely be less confusing for shareholders. The initial Panel advised the parties that it would consider a variation of the final order to allow a restructure of the Rights Issue that addressed the Panel's concerns.

² [2016] ATP 5

³ Legislative references are to the *Corporations Act 2001* (Cth)

APPLICATION

Review application and initial orders sought

7. By application dated 11 April 2016, ABM sought a review of the initial Panel's decision. ABM submitted the initial Panel erred in findings of fact and approach, in that (among other things):
 - (a) ABM had taken all reasonable steps that are appropriate for a company of the size and nature of ABM to find additional sub-underwriters or accommodate an institution that could do so and
 - (b) the linking of the Debt Facility with the Rights Issue would not have the potential to exacerbate the control effect.
8. ABM sought "*a declaration from the review Panel to set aside the initial Panel's declaration of unacceptable circumstances so that ABM can proceed with the Rights Issue and the Debt Facility in their original terms*" or, if the review Panel affirmed the initial Panel's declaration of unacceptable circumstances, ABM sought a substitute for the initial Panel's order of either:
 - (a) no order or
 - (b) orders (or undertakings) for ABM to proceed with the Rights Issue with some modifications set out by ABM in the review application.
9. The proposed modifications to the Rights Issue set out in the review application were superseded by the events described below.

New Proposal and revised orders sought

10. On 18 April 2016⁴ ABM submitted a further restructured proposal for a rights issue (**New Proposal**).
11. The indicative terms of the New Proposal were as follows:
 - (a) issue price of around 3.6 cents, representing a 25% discount to the volume weighted average price of ABM shares during the 15 days before the lead manager and underwriter mandate (see below)
 - (b) quantum of between \$10.0 million and \$12.3 million
 - (c) the rights issue to be renounceable
 - (d) the rights issue to be managed and fully underwritten by Patersons
 - (e) Patersons would arrange sub-underwriting by:
 - (i) giving first priority allocations to general sub-underwriters identified by Patersons who were unrelated to the substantial shareholders of ABM (being PRCM, APAC and Craton)
 - (ii) PRCM, APAC and Craton being invited to act as sub-underwriters for the residual amount on a *pro rata* basis to their relative shareholdings

⁴ Following receipt of the review application and issue of the review Panel's brief

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- (f) shortfall facility under which ABM shareholders (other than those substantial shareholders who agreed to sub-underwrite) would be able to apply for shares in addition to their rights. Shares would be allocated under the shortfall facility in priority to allocations to the underwriter (and sub-underwriters)
 - (g) no underwriting or sub-underwriting fees would be payable on the take up of rights that a shareholder had given a firm commitment to take up and
 - (h) no Debt Facility.
12. We were also provided with a mandate for Patersons to act as lead manager and underwriter to the New Proposal (initially unsigned but subsequently signed by ABM). Patersons' participation and assistance as lead manager and underwriter is subject to a number of conditions including:
- (a) a satisfactory outcome of this review proceeding
 - (b) the resolutions to be put to the general meeting of ABM shareholders on 9 May 2016 being defeated and
 - (c) sub-underwriting support, as to quantum and quality to the satisfaction of Patersons, being secured for all of the amount to be underwritten.
13. ABM sought an order setting aside the initial Panel's order on the basis that ABM would undertake the New Proposal, which did not give rise to unacceptable circumstances.

DISCUSSION

Nature of review

14. ABM submitted that the review Panel has jurisdiction to consider the New Proposal, as the New Proposal has a clear logical connection to the facts and matters raised in the initial application by APAC. It submitted that the review Panel was entitled to take account of developments that overcame the unacceptable effects of a proposal and should consider the New Proposal as a way to resolve the difficulties in the Rights Issue that concerned the initial Panel.
15. APAC submitted, among other things, that the differences in the nature and substance of the New Proposal compared to the Rights Issue make it obvious that the initial Panel's declaration was justified. This meant there was no reasonable basis in fact or law for the review Panel to disagree with the process, reasoning or outcome of the original proceedings. Accordingly, the review Panel should uphold the decision of the initial Panel.
16. APAC also submitted that the New Proposal was, by all measures, an entirely new fundraising proposal which was never considered by the initial Panel.
17. It is unclear what form the New Proposal will ultimately take, however this does not, in our view, preclude us from considering the New Proposal; nor does the fact that the New Proposal may be something more than an amendment of the Rights Issue (something that we think we do not need to decide). Our review is a *de novo* hearing

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on its merits.⁵ This means that we have considered the matter on the facts found at the time of the review,⁶ which includes the New Proposal.

18. We are also mindful of ABM's submission that there are potential commercial benefits in us opining on the New Proposal (see paragraph 25).
19. In determining this matter, we have been provided with, and have considered, the following materials:
 - (a) all the material before the initial Panel
 - (b) the initial Panel's decision email and reasons for decision
 - (c) the review application and
 - (d) the submissions and rebuttals of the parties in the review.

Control effects of New Proposal

20. ABM submitted:
 - (a) the New Proposal would raise the funds it required and
 - (b) the features of the New Proposal were adequate to mitigate any potential control impacts and address the concerns of the initial Panel.
21. APAC submitted that it was agreeable to each of the material terms of the New Proposal but:
 - (a) the sufficiency of the quantum of the capital raising needed to be confirmed
 - (b) the offer price needed to be finalised and
 - (c) there were corporate governance matters that ABM needed to resolve in connection with the proposed capital raising, including confirming the identity of the proposed chairman of ABM and agreeing the terms upon which Mr Lambert remained as CEO of ABM.
22. ASIC acknowledged that ABM, in restructuring the terms of the Rights Issue following its engagement with Patersons, appeared to have taken reasonable and appropriate steps to ensure that there will be proper dispersion strategies in place to deal with any shortfall risk in order to mitigate potential control effects. ASIC did however express some concerns regarding the underwriting arrangements (see paragraphs 39 to 44).
23. On the material provided, we consider the terms of the New Proposal, assuming they remain materially as presented, are unlikely to be unacceptable.

⁵ Panel's Procedural Rule 3.3.1; Guidance Note 2 *Reviewing decisions* at [31]

⁶ See for example, *Bentley Capital Limited 01R* [2011] ATP 13 at [24], *Mungana Goldmines Limited 01R* [2015] ATP 7 at [11] and *Resource Generation Limited 01R* [2015] ATP 13 at [12]

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24. The New Proposal is however a preliminary proposal. For example:
- (a) ABM has not determined final pricing or quantum for the capital raising
 - (b) ABM has not formally appointed Patersons as lead manager or underwriter
 - (c) Patersons has not commenced marketing the New Proposal and
 - (d) the New Proposal remains subject to Board approval at a meeting scheduled for 19 April 2016.

Appropriate course of action

25. ABM submitted that the proposed order would provide it with the commercial certainty to proceed and that, without an order from the review Panel, it would be very difficult for it to involve a professional underwriter in a capital raising. ABM also requested flexibility in determining the issue price.
26. Therefore we sought submissions on whether we should vary the order made by the initial Panel, and indicated that we were providing the parties with a longer than usual time to make submissions, to allow ABM to finalise the terms of the New Proposal.
27. During this period ABM advanced the New Proposal in some respects. For example:
- (a) ABM finalised and signed the Patersons mandate
 - (b) Patersons commenced due diligence and
 - (c) Patersons commenced canvassing participation and sub-underwriting interest from ABM's substantial shareholders, had a preliminary discussion with PRCM and Craton, and spoke with and emailed Hartleys to invite it to offer general sub-underwriting positions for the New Proposal to its clients.
28. APAC submitted it would be prejudicial to make the proposed order because the New Proposal remained highly conditional, uncertain and incomplete. APAC also submitted it would be inappropriate to make the proposed order given that ABM had not made any meaningful attempt to finalise the terms of the New Proposal within the time provided by the Panel and in particular:
- (a) the conditionality and resultant uncertainty of the Patersons mandate meant the mandate could not be regarded as constituting any form of meaningful commitment and
 - (b) ABM's engagement with APAC in connection with its involvement in the New Proposal had been inadequate. The Panel received conflicting submissions regarding the timing of ABM's and/or Patersons' approaches to APAC and PRCM regarding participation in and sub-underwriting of the New Proposal. We did not consider it necessary to explore this further.
29. We are not prepared to accept that ABM has not made any meaningful attempt to finalise the terms of the New Proposal. However, while ABM has advanced aspects of the New Proposal, the key commercial terms remain incomplete, including

pricing, size and the quantum and terms of any underwriting or sub-underwriting arrangements.

30. We appreciate that ABM wants commercial certainty to proceed with the New Proposal, and, while that is not necessarily the role of the Panel, it may have been appropriate in this case. We have attempted to facilitate ABM's objectives.
31. However, ABM has not presented a sufficiently complete proposal to us, and the parties (including APAC) have only had an opportunity to make submissions on an indicative and incomplete proposal.
32. In these circumstances, we do not consider it appropriate to make orders in respect of the New Proposal.
33. Given the uncertainty, we are, in effect, left with the Rights Issue.
34. We reach the same conclusion on the Rights Issue as the initial Panel, and therefore agree with both the decision that the circumstances of the Rights Issue are unacceptable and the order that the Rights Issue not proceed. We have had the benefit of the initial Panel's draft reasons⁷ and agree with them. We do not consider that the initial Panel erred in its decision, as was submitted by ABM in its review application.
35. Accordingly, we would not interfere with the initial Panel's declaration or order.
36. Our decision does not prevent ABM proceeding with the New Proposal. ABM may either announce a new rights issue or seek to amend the original Rights Issue (for which a variation of the initial Panel's orders would need to be sought from the initial Panel should ABM wish to do so once the proposal is finalised).

DECISION

37. For the reasons above, we agree with the initial Panel's decision and affirm that decision.
38. We make no orders, including as to costs.

Other matters

Genuine underwriting

39. It was a condition to Patersons' participation as lead manager and underwriter under the Patersons mandate that:
*Sub-underwriting support, as to quantum and quality to the satisfaction of [Patersons], is secured for all the amount to be underwritten.*⁸
40. ASIC expressed concerns that the effect of the sub-underwriting condition was that Patersons' underwriting was contingent on sub-underwriting and therefore was not a genuine underwriting arrangement in accordance with ASIC's view of the operation of item 10 of s611 as set out in *ASIC Regulatory Guide 6 – Takeovers: Exceptions to the general prohibition (RG 6)*.

⁷ and later, the final reasons

⁸ Patersons could also terminate the mandate if all of the conditions were not satisfied by a specified date

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41. ABM submitted that the Patersons mandate was not an underwriting commitment and that the appointment as underwriter was conditional on:
 - (a) securing sub-underwriting commitments on terms and conditions, quantum and quality satisfactory to Patersons and
 - (b) Patersons entering into a formal underwriting agreement with ABM on mutually acceptable terms and conditions.
42. ABM submitted that it fully expected that the underwriting and sub-underwriting agreements, once finalised, would be genuine underwriting arrangements that will allow the relevant parties to rely on item 10 of s611.
43. Insofar as the underwriting arrangements, when entered, allow Patersons to avoid its underwriting obligations if a sub-underwriter defaults on its obligations, we share ASIC's concerns. This is consistent with the position in RG 6, endorsed by the Panel, that an underwriting arrangement involves an assumption of risk.⁹ However, the mandate is not an underwriting agreement.
44. Subject to this, there is nothing before us that suggests the underwriting arrangements will be unacceptable.

Richard Hunt
President of the review Panel
Decision dated 28 April 2016
Reasons published 11 May 2016

⁹ See also *Aberfoyle Ltd v Western Metals Ltd* (1998) 28 ACSR 187 at [205]

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Advisers

Party	Advisers
ABM Resources NL	Herbert Smith Freehills
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