



Australian Government

Takeovers Panel

**Reasons for Decision
Condor Blanco Mines Limited
[2016] ATP 8**

Catchwords:

Share issue – escrow arrangement – contravention of s606 – relevant interest – voting shares – bare trustee – substantial holding – association – extension of time for making application – interim orders – efficient, competitive and informed market – unacceptable circumstances – declaration – orders – cancellation of shares – referral to ASIC – voting restriction – costs

Corporations Act 2001 (Cth), sections 9, 256B, 259A, 606(1), 606(2), 606(5), 608(1), 608(3), 608(8), 609(2), 610(2), 657A, 657C(3), 657D, 671B

Australian Securities and Investments Commission Regulations 2001, regulation 18

Queensland North Australia Pty Ltd v Takeovers Panel [2015] FCAFC 68

Panel Guidance Note 4 – Remedies General

ASIC Regulatory Guide 5: Relevant interests and substantial holding notices

The President’s Club Limited 02 [2016] ATP 1, The President’s Club Limited [2012] ATP 10, Austral Coal 02 RR [2005] ATP 20, Austral Coal 03 [2005] ATP 14, LV Living Limited [2005] ATP 5, Aulron Energy Ltd [2003] ATP 31

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

INTRODUCTION

1. The Panel, James Dickson, Michelle Jablko (sitting President) and Nicola Wakefield Evans made a declaration of unacceptable circumstances in relation to the affairs of Condor Blanco Mines Limited. The application concerned two issues of Condor shares being placed in escrow which resulted in Condor and the escrow agent each (in relation to both issues) acquiring a relevant interest in voting shares in Condor in contravention of s606.¹ They also failed to make disclosure in contravention of s671B. A transferee of some of the escrow shares also failed to comply with s671B. The Panel declared the circumstances unacceptable and ordered the cancellation of escrow shares not transferred to other parties, further disclosure, a voting and disposal restriction on the shares held by the transferee, and costs.

2. In these reasons, the following definitions apply.

Assignment Agreement	Assignment, Indemnity and Put Option Agreement, dated 22 September 2015, among Condor, Minesweeper, Monclar Pty Ltd and Tierra Amarilla SCM
Condor	Condor Blanco Mines Limited

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

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EMC	EMC (Nominees) Pty Ltd ACN 098 743 983, a service company of Eakin McCaffery Cox ²
Escrow Deed	Escrow Deed, dated 25 September 2015, between Condor and EMC
Minesweeper	Minesweeper Limited
Transferees	Persons to whom 27,937,360 Condor shares were transferred pursuant to a direction dated 26 November 2015 from Condor to EMC

FACTS

3. Condor Blanco Mines Limited is a mining and exploration company listed on ASX (ASX code: CDB).
4. On 22 July 2015, Condor announced completion of a 1-for-30 capital consolidation following which the issued capital of Condor was 42,967,361 shares.
5. Between 25 August 2015 and 23 September 2015, Condor announced several share issues totalling 47,428,353 shares.
6. On 25 September 2015, Condor announced that it had placed 45,000,000 shares (or 33.2% of the then current capital) “each at \$0.025” in escrow held by “ECM (Nominees) Pty Ltd” pending the finalisation of confidential agreements on funding, project acquisitions and/or vendor consideration to unrelated and unassociated parties. The issue was said to be made pursuant to shareholder approval obtained at a meeting held on 26 June 2015.
7. On 1 March 2016, Condor announced that 17,062,640 of the 45 million shares had been cancelled.
8. Also on 1 March 2016, Condor announced that it had placed 50,000,000 shares (or 29.1% of the then current capital after the purported cancellation of 17,062,640 shares) “each at \$0.01” in escrow held by “ECM (Nominees) Pty Ltd” pending the finalisation of confidential agreements on funding, project acquisitions and/or vendor consideration to unrelated and unassociated parties. The issue was said to be made pursuant to shareholder approval obtained at a meeting held on 27 November 2015.
9. No information was given regarding the terms of the escrow for either holding of escrow shares and no substantial holder notices were lodged in respect of the escrow shares.
10. As at 22 April 2016, Condor’s register of shareholders provided that the largest shareholder of Condor was “ECM (Nominees) Pty Ltd” with 50,000,000 shares.

² Eakin McCaffery Cox initially represented Condor in the matter. During the course of the matter, Eakin McCaffery Cox indicated that EMC would become a party to the proceeding and that it would represent EMC

APPLICATION

Declaration sought

11. By application dated 1 May 2016, a shareholder of Condor, Mr Joshua Farquhar, sought a declaration of unacceptable circumstances. Mr Farquhar submitted (among other things) that:
 - (a) the 45 million share issue and 50 million share issue may constitute contraventions of ss606 and 671B
 - (b) Condor had repeatedly disclosed that the escrow agent was “ECM (Nominees) Pty Ltd”. Mr Farquhar submitted that there was no company registered in Australia with that exact name. However, the address given for that company on Condor’s share register was the address of Condor’s lawyers, Eakin McCaffery Cox, which was also the registered address for EMC
 - (c) Condor had made misleading disclosures, including in relation to the number of shares on issue, the terms of issue of the shares, the identity of persons to whom new shares were issued and the amounts paid and unpaid on the shares held in escrow
 - (d) the purported cancellation of 17,062,640 shares was not authorised by shareholders as required by Chapter 2J and had not been registered with ASIC and
 - (e) there was no disclosure regarding the release from escrow of the un-cancelled shares from the issue of the 45 million shares.
12. Mr Farquhar submitted that the effect of the circumstances (among other things) was shareholders did not know the number of shares on issue, the rights attaching to issued shares or the identity of controlling shareholders.

Interim orders sought

13. Mr Farquhar sought interim orders restraining Condor from issuing any further shares or registering any transfer of the 50 million shares, EMC from dealing with the 50 million shares and the directors of Condor from taking further oppressive action against shareholders (such as placing Condor into voluntary administration as a defensive measure), in each case pending determination of his application.
14. On 2 May 2016, the President of the Panel issued an interim order (Annexure A) restraining the registration of any transfer of any of the 50 million shares, to maintain the status quo pending determination of the application.
15. After deciding to conduct proceedings, we considered that the interim order should remain in place pending determination of the application.

Final orders sought

16. Mr Farquhar sought final orders to the effect that Condor make corrective disclosure (including to provide the terms of issue of all shares in Condor and the details of any arrangements with EMC in respect of shares issued to it) and Condor convene a general meeting of shareholders at which all current directors offer

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themselves for re-election (excluding the 50 million shares for quorum or any other purpose).

Preliminary submissions

17. Condor made preliminary submissions that the Panel should not conduct proceedings because there was no evidence of unacceptable circumstances and the application was frivolous or vexatious. Among other things, Condor submitted that the escrow shares were held on trust by EMC pursuant to an escrow deed and therefore EMC did not obtain a relevant interest in the shares due to the operation of s609(2) or, if a relevant interest was made out, it was not unacceptable. It also undertook to correct the error between Condor's register and the ASIC register and to liaise with ASX regarding its disclosure. It also submitted that a number of issues raised by the applicant were not matters for the Panel.
18. We initially decided to conduct proceedings on whether the 45 million share issue and 50 million share issue constituted, or gave rise to, a contravention of s606 or were otherwise unacceptable, and whether contraventions of s671B have occurred.
19. Following parties' submissions on the brief, we asked questions regarding whether any of the Transferees and/or Condor were associated, but decided to refer this matter to ASIC, together with a number of issues raised by the application that were not directly matters for us.

DISCUSSION

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

Extending time for application

21. Section 657C(3)(a) provides that a Panel application can only be made within two months after the circumstances have occurred. The application was made more than two months after the issue of the 45 million shares. The application was made within two months of the announcement of the issue of the 50 million shares on 1 March 2016, but more than 2 months after the issue of those shares on 26 February 2016. Therefore, we requested submissions on whether we should extend time under s657C(3)(b).
22. Condor submitted that the issues raised by Mr Farquhar arose in respect of information that was in the market from 25 September 2015 and that the timing of the application was chosen by Mr Farquhar "*to assist him in his course of seeking to take control*" of Condor (see paragraph 71). ASIC submitted that it was appropriate for the Panel to extend time. We agree with ASIC's submission. We have considered the factors in *Austral Coal 03*³ as well as the public interest.⁴ The application made credible allegations of clear and serious unacceptable circumstances and the effect of the circumstances is ongoing. We extend the time to make the application to the date it was made.

³ [2005] ATP 14 at [18] to [21]

⁴ See *The President's Club Limited 02* [2016] ATP 1 at [106] to [160]

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Escrow arrangements and transfers

23. In response to our brief, Condor provided a copy of the Escrow Deed which required EMC, as escrow agent, to hold the 45 million shares in escrow for the “Escrow Parties” in accordance with the provisions of the “Transaction Documents”. The Escrow Parties were defined as parties to a “Commercial Agreement”. Commercial Agreements were defined as funding or acquisition agreements that Condor was then finalising and under which it proposed to issue the shares. The Transaction Documents meant the Escrow Deed, a Commercial Agreement and any other document the parties determine to be such a document.
24. Pursuant to the Escrow Deed, Condor and EMC agreed that all rights that may attach to the 45 million shares were suspended while held in escrow. EMC was to release the shares only upon a written direction from Condor. The Escrow Deed was to terminate on the End Date of 30 November 2015. Any shares remaining in escrow and not subject to a direction at the End Date were deemed released from escrow and delivered to Condor to be dealt with by it at its sole discretion.
25. Condor submitted that one of the agreements Condor had in mind for the purposes of the Escrow Deed in respect of the 45 million shares was the Assignment Agreement between Condor, Minesweeper, Monclar Pty Ltd and Tierra Amarilla SCM, which contemplated the issue of Condor shares in consideration for the assignment to, and assumption by, Minesweeper of certain debts. Condor submitted that the Assignment Agreement was entered into in order to deal with the debt in its Chilean subsidiary which was causing Condor to be subject to a qualified audit opinion. Condor submitted that it only had three months to issue the shares from the date of the relevant shareholder approval for such shares (26 June 2015) stating that “[p]lacing them in escrow provided Condor with limited breathing space to perform its obligations under the [Assignment Agreement] in a timely manner”.
26. Condor issued a direction dated 26 November 2015 to EMC to release a total of 27,937,360 of the 45 million shares to certain parties to complete the proposed transaction contemplated by the Assignment Agreement. Listed below are details of the transfers that took place:

<u>Date of Transfer</u>	<u>Transferee</u>	<u>Number of Shares</u>
27 November 2015	Minesweeper Limited	5,779,551
27 November 2015	Nicola Philip	5,504,335
27 November 2015	IPS Nominees Limited	5,504,335
27 November 2015	Monclar Pty Ltd	4,517,628
27 November 2015	Pierre Jules Richard	831,428
16 February 2016	Beaufort Securities Limited	5,800,083

27. Condor purported to cancel the remaining 17,062,640 of the 45 million shares on 26 February 2016.

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28. By letter dated 26 February 2016 from Condor to EMC, Condor referred to the Escrow Deed and advised that it wished to place an additional 50 million shares into escrow pursuant to the Escrow Deed, pending the finalisation of confidential agreements on funding, project acquisition and/or vendor consideration to unrelated and unassociated parties. Condor also stated in the letter that the shares would be cancelled if a transaction did not proceed, no party connected to the allocation would hold greater than 19.9% and the sunset date for the shares to be transferred would be 31 May 2016.
29. In respect of the 50 million shares, Condor referred in submissions to an acquisition transaction it was negotiating with a third party for which it was contemplating issuing Condor shares as part of the consideration. Again, Condor submitted that it only had three months to issue the shares from the date of the relevant shareholder approval (27 November 2015) stating that “[b]y placing these shares in escrow, Condor sought to extend the time, for a limited time, to issue the shares...should a transaction be signed”.
30. Condor submitted that all references (including in market announcements and on its register) to “ECM (Nominees) Pty Ltd” were typographical errors and should have read “EMC (Nominees) Pty Ltd”. It offered an undertaking to issue a statement to the market correcting the errors.

Relevant interest of Condor

31. Condor submitted that the purpose and effect of the Escrow Deed was to constitute EMC the agent of Condor to allot shares on behalf of Condor. It submitted, in respect of the 45 million shares, that there were no voting rights, substantial holding or power of disposal until the investors sourced by Minesweeper under the Assignment Agreement became holders of the shares.
32. ASIC submitted (and Condor acknowledged) that, under the Escrow Deed, Condor had the power to control EMC’s ability, as registered holder, to dispose of the 45 million shares while they were held by EMC in escrow and Condor continued to have the power to restrict the disposal of the 50 million shares still held by EMC. In addition, because of the agreement in the Escrow Deed to suspend all rights that may attach to the escrowed shares, ASIC submitted that Condor had the power to control the exercise of EMC’s power to vote the 45 million shares while they were held by EMC in escrow and continued to have that power in respect of the 50 million shares still held by EMC. ASIC submitted that Condor had (or has) the power to control the exercise of a power to dispose of, or vote, shares notwithstanding that the power in question is a power to prevent rather than direct voting and disposal.⁵
33. We agree with ASIC’s submissions. Moreover, as the shares were ordinary shares, Condor could require the shares to be voted in breach of the agreement. We consider that, pursuant to the escrow arrangements, Condor had (in respect of the 45 million shares) and has (in respect of the 50 million shares) the power to exercise, or control the exercise of, the right to vote and power to dispose of the

⁵ See ASIC Regulatory Guide 5: Relevant interests and substantial holding notices at [RG 5.34] – [RG 5.36]

escrow shares. Accordingly, under s608(1)(b) and (c), Condor acquired a relevant interest in those shares.

Voting shares

34. In respect of the 45 million shares, Condor submitted that the shares were not voting shares until investors sourced by Minesweeper became the holders of the shares. Referring to s9 which defines a “voting share” in a body corporate as “*an issued share in the body that carries any voting rights...*”, Condor submitted that a share in respect of which voting rights cannot be exercised does not carry voting rights. Accordingly, it submitted that until the shares were released from escrow, they were not voting shares and therefore, there had been no contravention of s606. It also submitted that s610(2) confirmed that view by defining “attached to a voting share” as “*the maximum number of votes that can be cast in respect of the share on a poll*” noting that the voting rights that would otherwise attach to an escrow share cannot be exercised and, therefore, there are no voting rights so long as the suspension was in force. Condor submitted that on the same basis the 50 million escrow shares were not voting shares and there was no contravention of s606 in relation to their issue.
35. The definition of “attached” was considered by the Full Court of the Federal Court in *Queensland North Australia Pty Ltd v Takeovers Panel*.⁶ The Court disagreed with the appellants argument in that case that s610(2) defined the word “attached” stating that:
- “88. ...Subsection 610(2) simply refers to the maximum number of votes which a person is entitled to in respect of the share, which is the relevant number for the counting of votes “attached to all voting shares” in the calculation of “voting power” under s 610(1).*
- 89. The words “attached to” in s 610(2) (and ss 606 and 608) are to be understood, in their natural meaning, by reference to the corporate compact made under the company’s constitution.”*
36. We consider the escrow shares are voting shares for Chapter 6 purposes. Although Condor and EMC agreed to suspend all rights including voting rights attached to the escrow shares, those voting rights remained attached to the shares. The restriction arose from a contractual agreement between the parties. It was not an inherent feature of the shares, as it would be if the terms were encapsulated in Condor’s constitution. At any time, the contractual agreement could be varied or the restriction could be breached.
37. It is worth noting that, at all relevant times, Condor represented to the market in its ASX announcements (including in relation to the shareholder approvals obtained for the issue of the shares) and in its register that the shares were fully paid ordinary shares in the same class as those quoted on ASX. It also acted as if the shares were voting shares. Evidence was presented that, following the issue of the 45 million shares, Condor determined that a shareholder no longer had a substantial holding in Condor in the context of a notice to convene a shareholders

⁶ [2015] FCAFC 68

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meeting under s249F.⁷ As ASIC submitted, if the 45 million shares had carried no right to cast votes at a general meeting then their issue would not have resulted in the percentage of votes that may be cast by the shareholder falling below 5%.

38. Condor also submitted that the shares placed in escrow had no rights “*as no monetary amount was paid up on them*”. While Condor’s constitution provided voting restrictions in respect of shares on which calls were outstanding and on partly paid shares, these restrictions are not applicable to the escrow shares. This submission is also in contradiction to the announcement of the issues.
39. Accordingly, we consider that:
 - (a) upon the issue of the 45 million shares on 25 September 2015, Condor’s voting power in Condor increased from below 20% to more than 20% in contravention of s606(1) and
 - (b) upon the issue of the 50 million shares on 26 February 2016, Condor’s voting power in Condor again increased from below 20% (following the transfer of a portion of the 45 million shares) to more than 20% in contravention of s606(1).
40. Condor failed to lodge a substantial holder notice in respect of any of the escrow shares, in contravention of s671B(1).

Relevant interest of EMC

41. EMC submitted that it had not obtained a relevant interest in the escrow shares for the purposes of s608(1) because it satisfied the bare trustee exception in s609(2). Section 609(2) provides that a bare trustee does not have a relevant interest in securities if a beneficiary has a relevant interest in the securities because of a presently enforceable and unconditional right of a kind referred to in s608(8), ie., to take the shares.
42. ASIC submitted that it was not clear that there was a trust or trust arrangement, but if there was, it was unclear who the beneficiaries were at the time the relevant interests were acquired. It further submitted that if the Transferees were “Escrow Parties” and beneficiaries under the trust, it was unclear whether any of these persons had presently enforceable and unconditional rights to the escrow shares noting:
 - (a) given that the definition of Commercial Agreement in the Escrow Deed referred to agreements “*currently being finalised*”, it was unclear whether any agreement giving a presently exercisable and unconditional right was in existence
 - (b) it was unclear whether the Assignment Agreement was captured by the definition of Commercial Agreement or whether it gave rise to a presently enforceable and unconditional right over Condor shares and

⁷ Condor’s 2015 Annual Report stated that on 1 September 2015 Condor had received a notice from a shareholder under s203D of his intention to move resolutions at a meeting of Condor shareholders convened under s249F and as at 29 September 2015 he was no longer a substantial shareholder and not entitled to call this meeting. ASIC submitted that it was the issue of the 45 million shares that had the effect of reducing the shareholder’s holding to below the 5% threshold.

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- (c) only two of the Transferees were party to the Assignment Agreement.
43. Condor submitted that on 25 September 2015 (the day it placed the 45 million shares with EMC) it was not aware of the identity of the Transferees.
44. EMC submitted that it had no active duties⁸ to perform under the Escrow Deed given that all rights that may attach to the shares were suspended and save for releasing the shares following a direction from Condor. It submitted that both Condor and the Escrow Parties were beneficiaries and that Condor had an enforceable right over, and a relevant interest in, the shares.
45. We do not consider that EMC meets the bare trustee exception in s609(2) for the reasons expressed by ASIC. It is unclear whether the Transferees were Escrow Parties in respect of the portion of the 45 million shares transferred to them and no Escrow Parties were identified for the remaining shares that were cancelled or any of the 50 million shares. This is not dissimilar to the situation in *LV Living Limited*.⁹ In our view, EMC was more than a bare trustee.
46. Moreover, by its own admission, EMC had never provided the service of holding shares in a listed company for clients of Eakin McCaffery Cox or for others and it only provided the service here to assist Condor to achieve a commercial outcome for its shareholders. This is not determinative of a bare trust arrangement, but supports our finding that there was not one here.
47. Accordingly, EMC had a relevant interest in respect of the 45 million shares and has a relevant interest in respect of the 50 million shares under s608(1)(a) and we consider that:
- (a) upon the issue of the 45 million shares on 25 September 2015, EMC's voting power in Condor increased from below 20% to more than 20% in contravention of s606(1) and
 - (b) upon the issue of the 50 million shares on 26 February 2016, EMC's voting power in Condor again increased from below 20% (following the transfer of a portion of the 45 million shares) to more than 20% in contravention of s606(1).
48. EMC failed to lodge a substantial holder notice in respect of any of the escrow shares, in contravention of s671B(1).
49. ASIC submitted that, even if EMC could rely on the bare trustee exception, it nonetheless contravened the prohibition in s606(2) because, as a result of acquiring the legal interest in the shares, Condor's voting power increased to a point greater than 20% on account of the relevant interest Condor had in the shares pursuant to the terms of the Escrow Deed. We agree.
50. Condor also contravened the prohibition in s606(2) because, upon its acquisition of an equitable interest in the 45 million and 50 million escrow shares, EMC acquired a relevant interest in Condor shares and its voting power increased to a point greater than 20%.

⁸ Noting *Aulron Energy Ltd* [2003] ATP 31 at [96]: "a bare trustee is a trustee with no active duties to perform, ie one whose only duties are to maintain the trust property and transfer it to the beneficiary on demand"

⁹ [2005] ATP 5 at [69]

Defence

51. Both Condor and EMC submitted that, if there was a breach of s606, which both denied, it was inadvertent or a mistake or they were not aware of a relevant fact within the meaning of s606(5). EMC submitted that it was not advised what percentages of issued capital the escrow shares represented, and relied on warranties provided by Condor in the Escrow Deed regarding compliance with law. Condor submitted that it did not know that Eakin McCaffery Cox or EMC was not aware of Condor's share structure and the potential breach of the takeover provisions.
52. ASIC submitted that the availability of the defence was not relevant to the Panel's deliberation because it was open to the Panel to make a declaration of unacceptable circumstances even where a breach was inadvertent or there had not been a breach.
53. We agree that s606(5) is not relevant because Panel proceedings are not criminal proceedings. As the Panel noted in *The President's Club Limited*: "We are concerned with unacceptable circumstances rather than with a prosecution."¹⁰

Substantial holding of Transferees

54. Mr Farquhar submitted that there were undisclosed associations among the Transferees and that the Transferees collectively held voting power in Condor of 24.57% (calculated disregarding the 50 million shares).¹¹
55. Mr Farquhar provided information that indicated that Ms Nicola Philip had a relevant interest in the shares held by Minesweeper, irrespective of any association between Ms Philip and Minesweeper. Both Mr Farquhar and ASIC also submitted information upon which they said it was open for us to draw inferences of an association between Ms Philip and Beaufort Securities Limited (**Beaufort**) and between Mr Pierre Jules Richard and Monclar Pty Ltd (**Monclar**).
56. In a supplementary brief, we asked Condor questions regarding current and prior arrangements and dealings between Condor and any of the Transferees (or between the Transferees), including circumstances surrounding the Assignment Agreement and the subsequent transfers to the Transferees. Condor submitted that, in respect of the Assignment Agreement, it used Minesweeper as debt funder because Minesweeper had handled previous financings for Condor and it used Monclar as debt manager because Monclar was known to Condor for its expertise in this area.
57. We also asked Ms Philip (who was not a party in these proceedings) questions regarding the Condor shares she holds and the Condor shares held by Minesweeper and Beaufort. She submitted that she was the sole shareholder of Minesweeper and no other person had any rights over the Condor shares held by her or Minesweeper. She also submitted that she had no rights in the shares held by Beaufort. She submitted that the shares held by Beaufort are owned by King Spirit International Ltd, a Hong Kong registered company (**King Spirit**). She

¹⁰ [2012] ATP 10 at [48]. See also at [121]-[124] and *The President's Club Limited 02* [2016] ATP 1 at [177]

¹¹ This included shares transferred to Mr Pierre Jules Richard pursuant to the Assignment Agreement and other shares held by him

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provided a copy of a Share Issue Assignment Agreement, dated 21 October 2015, between Minesweeper and King Spirit pursuant to which King Spirit acquired from Minesweeper the right to be issued 5,800,083 shares in Condor for \$0.025 per share. King Spirit nominated Beaufort as its nominee holder.

58. We consider Ms Philip, as sole shareholder of Minesweeper, has a relevant interest in the Condor shares held by Minesweeper under s608(3). Following the transfer of Condor shares to Ms Philip and Minesweeper on 27 November 2015, Ms Philip acquired voting power greater than 5% and failed to lodge a substantial holder notice, in contravention of s671B.
59. Following our enquiries, Ms Philip subsequently lodged a form 603 (notice of initial substantial holder) and a form 604 (notice of change of interest of substantial holder), both dated 16 May 2016, the latter disclosing a current holding of 6.57% of Condor in respect of the shares held by her and Minesweeper. The form 603 failed to attach a copy of the Assignment Agreement (and any other relevant agreement through which Ms Philip obtained a relevant interest in Condor) and, therefore, does not comply with s671B(4).
60. We are concerned that the Transferees may be associated with each other and/or Condor in relation to the 27,937,360 Condor shares transferred to them. Our concern relates not only to the issue and transfer of the shares, but queries over whether any consideration has passed to Condor for the shares under the Assignment Agreement. We have referred this matter to ASIC under Regulation 18 of the *Australian Securities and Investments Commission Regulations 2001*¹² for ASIC to investigate and consider whether to make an application to the Panel.

Unacceptable circumstances

61. EMC submitted that while there may have been technical contraventions of the takeover provisions, they did not amount to unacceptable circumstances because, among other things, neither EMC nor Condor sought to exert influence or control over Condor, no shareholder had been adversely affected (as far as EMC was aware) and Condor was seeking to best serve its shareholders to enable deals to be done for the benefit of Condor without having to go to the cost of reconvening general meetings (to obtain approvals to issue shares).
62. In response, Mr Farquhar submitted that there was evidence that a shareholder had been disadvantaged because the issue of the 45 million shares defeated the shareholder's attempt to call a meeting to replace Condor's directors (see paragraph 37).
63. ASIC submitted, among other things, that Condor had engaged in an unacceptable practice of issuing shares under a temporary warehousing arrangement in

¹² Regulation 18 provides:

- (1) *The Panel may refer a matter to the Commission for the Commission to consider with a view to making an application.*
- (2) *If the Panel refers a matter to the Commission, the reference must be made:*
 - (a) *in writing; and*
 - (b) *in sufficient detail to allow the Commission to make a decision about the matter.*

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circumstances where it appeared that it was still in the process of negotiating funding agreements and there was no certainty as to who the recipients of the escrow shares would be. ASIC submitted that the escrow arrangement was not only contrary to the prohibitions in Chapter 6, but as a mechanism to avoid the need to obtain further shareholder approval, was inconsistent with the spirit and intent of the ASX Listing Rules (specifically, LR 7.1 and 7.1A). ASIC also submitted that Condor's right to control disposal of the escrow shares had a potential defensive effect and may deter a potential bidder for Condor.

64. In our view, Condor shareholders and the market were not aware of Condor's or EMC's relevant interest in the Condor shares held by EMC, or the nature of the interest or the circumstances of the acquisition. Moreover, the issue of the shares improperly diluted shareholders. Condor shareholders and the market were also not aware of Ms Philip's substantial holding and the agreement giving rise to it.
65. By reason of the foregoing, the acquisition of control over voting shares in Condor did not take place in an efficient, competitive and informed market.
66. The shares issued by Condor into escrow were akin to "treasury shares". Generally speaking, treasury shares are shares that a company has bought back from its shareholders and holds in its own name for future transfers.¹³ However, there is no general concept of treasury shares in Australia. The escrow arrangements employed by Condor and EMC not only contravened Chapters 6 and 6C but presented a number of market integrity issues¹⁴ and, while not an issue for us, we agree with ASIC that they appeared designed to circumvent the ASX Listing Rules.

DECISION

Declaration

67. It appears to us that the circumstances are unacceptable:
 - (a) having regard to the effect that we are satisfied the 45 million share issue had, and the 50 million share issue is having or is likely to have on:
 - (i) the control, or potential control, of Condor or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Condor
 - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602
 - (c) in the further alternative, because they constituted, constitute, will constitute or are likely to constitute a contravention of a provision of Chapter 6 and of Chapter 6C.

¹³ Treasury shares are available in a number of jurisdictions including in the United Kingdom and the United States

¹⁴ For example, treasury shares typically do not carry voting rights. Here, the escrow shares were voting shares.

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68. Accordingly, we made the declaration in Annexure B and consider that it is not against the public interest to do so. We had regard to the matters in s657A(3).

Orders

69. Following the declaration, we made the final orders set out in Annexure C.

70. Under s657D the Panel's power to make orders is very wide. The Panel is empowered to make 'any order'¹⁵ if 4 tests are met:

- (a) it has made a declaration under s657A. This was done on 27 May 2016.
- (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. We are satisfied that our orders do not unfairly prejudice any person.
- (c) it gives any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. This was done on 23 May 2016. Mr Farquhar and ASIC made submissions and Condor made rebuttal submissions. No submissions or rebuttals were received from Ms Philip.
- (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 cancelling the 50 million shares (and, for the avoidance of doubt, the 17,062,640 shares purported to have been cancelled on 26 February 2016) which were improperly issued. The orders also require Condor to disclose the circumstances around and effects of the two share issues into escrow and the transfer of a portion of the 45 million shares to the Transferees so that Condor shareholders and the market are aware, among other things, of the relevant interests that Condor and EMC had in the escrow shares. We also ordered that Condor disclose the number of Condor shares on issue subsequent to the orders. We also ordered Ms Philip to lodge an amended notice of initial substantial holder attaching any agreement giving rise to her interest. We also ordered a limited voting freeze (see below).

71. On 9 May 2016, Condor announced that it had received a notice from Mr Farquhar and other shareholders requisitioning a meeting to consider removing and replacing all the directors of Condor under ss203D and 249D. In considering orders, Condor asked that we consider Mr Farquhar's credibility in light of the discrepancy between a statement made by him in his application that he had no agreement or understanding with others regarding the governance of Condor, on the one hand, and his later notice to Condor to requisition a meeting with other shareholders, on the other. We did not take this matter into consideration when making orders because the circumstances around the meeting requisitioned by Mr Farquhar and other shareholders are not before the Panel.

¹⁵ Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

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Reasons – Condor Blanco Mines Limited [2016] ATP 8

72. During the proceeding, Condor offered an undertaking to cancel the 50 million shares held by EMC. It submitted that it could cancel the shares by book entry because no consideration had been paid or given for the shares and, therefore, the cancellation would not be a reduction of capital.
73. ASIC submitted that s256B(1) provides that a cancellation of shares for no consideration is a reduction of capital and such cancellation must comply with that provision. It submitted that it did not matter whether any consideration was paid for the issue of those shares.
74. We do not need to decide this issue, and simply prefer to order the cancellation of those shares. Given the validity of the cancellation of 17,062,640 shares on 26 February 2016 may be in doubt, we also order the cancellation of those shares to the extent they were not cancelled.
75. Mr Farquhar submitted that additional orders were necessary including an order restricting the voting and disposal of the shares transferred to the Transferees until a forensic audit was completed by an independent party of all actions related to the issue of the 45 million shares. Among other things, he submitted that this order was necessary given the uncertainty around the consideration received by Condor for the transferred shares and the arrangements between and among the Transferees and/or Condor.
76. This goes too far on the basis of the application and material before us. We do not consider that we currently have sufficient evidence warranting us to seek submissions on any potential order preventing the Transferees (other than Ms Philip and Minesweeper) from voting their shares. If the transfers resulted from a bona fide transaction and Condor received value for the shares, such Transferees (or others) may be unfairly prejudiced by any such order. As noted above (see paragraph 60), we have referred to ASIC the question of whether the Transferees are associated with each other and/or Condor for the purposes of ASIC potentially making an application to the Panel.
77. However, we consider that an order restraining Ms Philip from voting the Condor shares in which she has a relevant interest on the resolutions to be put at the meeting requisitioned by Mr Farquhar and other shareholders to be appropriate. This is because the requisitioning parties would not have been aware of the existence of her substantial holding when the meeting was requisitioned because notice under s671B had not been given.
78. On 27 May 2016, we gave Ms Philip, the parties and ASIC an opportunity to make submissions on this proposed order. No submissions were received from Ms Philip. ASIC submitted that the order was appropriate to assist in remedying the effect of the contravention of s671B. Among other things, it submitted that the failure to disclose the substantial holding resulted in an adverse effect on the market, for example, on the ability of shareholders to assess the merits and likelihood of success of any attempt to seek changes to the company's board.¹⁶ In the alternative, ASIC submitted that the Panel could order a voting restriction only

¹⁶ Citing *Austral Coal Limited 02 RR* [2005] ATP 20 at [148]

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on those shares held above the substantial holding threshold of 5%. We consider that the contravention of s671B occurred in connection with acquisitions that related to the one transaction under the Assignment Agreement and see no reason to limit the voting restriction.

79. On 7 June 2016, we varied (Annexure D) our original orders to add this additional order. We also consider that an ancillary order to prevent the disposal of the shares that we have restricted from voting until after the vote is warranted, as requested by the applicant, to ensure that the voting restriction is not circumvented. We also considered it appropriate to include in the terms of the order that Ms Philip can seek Panel consent to a sale should she need to deal in the shares before the vote is taken.

Costs

80. ASIC submitted that we should consider awarding costs to ASIC and the applicant noting that Condor's actions had caused delay in the proceedings and Condor presented a case that was not arguable and made unsubstantiated assertions.
81. In response, Condor submitted, among other things, that the applicant had not asked for his costs, that there was no fault by Condor, Condor's submissions were arguable and Condor was disadvantaged by the withdrawal of its original lawyers (who had been Eakin McCaffery Cox).
82. We indicated to the parties that we were not inclined to make an order in respect of ASIC's costs but that we may reconsider our position if satisfactory fulfilment of our orders dated 27 May 2016 involved unnecessary work on the part of any other party. The disclosure required by our orders was settled promptly. Accordingly, we do not reconsider the question of costs for ASIC.
83. On 27 May 2016, we sought submissions on whether the applicant should be reimbursed the costs of making his application to the Panel (ie, the lodgement fee), assuming that he sought those costs.
84. The applicant sought costs for all reasonable expenses incurred in the matter. ASIC submitted that it was appropriate in the circumstances for the Panel to award costs having regard to the unacceptable conduct and the need for the applicant to make the application in order to remedy the unacceptable circumstances. Condor submitted, having regard to paragraph 28 of Guidance Note 4 – Remedies General, that there was no nexus between Condor paying the applicant's costs and remedying the unacceptable circumstances (as found by the Panel). Condor also submitted that the unacceptable circumstances (as found by the Panel) had not arisen from any misfeasance on the part of Condor but rather from inadvertence and its reliance on its legal advice.
85. While costs orders are the exception not the rule, paragraph 28 of Guidance Note 4 provides that *"a party is entitled to ... resist, an application once without exposure to a costs order, provided it presents a case of reasonable merit in a businesslike way"*. Condor did not present such a case. The applicant's case brought to light serious breaches of Chapters 6 and 6C and potential breaches of other provisions of the Corporations Act and the ASX Listing Rules. At no point did Condor seek to

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remedy the unacceptable circumstances, other than offering an undertaking to cancel the 50 million shares,¹⁷ but continued during the course of proceedings to make submissions that lacked reasonable merit. In addition, the applicant's request for costs was modest. Therefore, we think that the applicant should receive his costs against Condor. We consider that all of the costs claimed by Mr Farquhar represented costs actually, necessarily, properly and reasonably incurred in the course of the proceedings. On 7 June 2016, we made a variation (Annexure D) to our original orders to add this additional order.

Referral to ASIC

86. In addition to the association question discussed above (see paragraph 60), we have invited ASIC to investigate whether the issue of the 45 million and 50 million shares and disclosure of those issues may contravene provisions of the Corporations Act outside Chapter 6.

Michelle Jablko
President of the sitting Panel
Decision dated 27 May 2016
Reasons published 17 June 2016

¹⁷ The suggested method for cancellation of these shares was debatable, see paragraphs [72] to [74]

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Advisers

Party	Advisers
Mr Joshua Farquhar	NA
Condor Blanco Mines Limited	Mr Aleco Vrisakis
EMC Nominees Pty Ltd	Eakin McCaffery Cox



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Takeovers Panel

Annexure A
CORPORATIONS ACT
SECTION 657E
INTERIM ORDER

CONDOR BLANCO MINES LIMITED

Mr Joshua Farquhar made an application to the Panel dated 1 May 2016 in relation to the affairs of Condor Blanco Mines Limited.

The President ORDERS:

1. That Condor Blanco Mines Limited must not register any transfer in respect of any of the 50,000,000 ordinary shares referred to in its announcement dated 1 March 2016.
2. This interim order has effect until the earliest of:
 - (i) further order of the President or the Panel
 - (ii) the determination of the proceedings and
 - (iii) 2 months from the date of this interim order.

Alan Shaw
Counsel
with authority of Vickki McFadden
President
Dated 2 May 2016



Australian Government

Takeovers Panel

Annexure B

CORPORATIONS ACT

SECTION 657A

DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

CONDOR BLANCO MINES LIMITED

CIRCUMSTANCES

1. On 22 September 2015, Condor Blanco Mines Limited (**Condor**) entered into an assignment, indemnity and put option agreement (**Assignment Agreement**) with Minesweeper Limited (**Minesweeper**) and other parties. Minesweeper is wholly owned by Ms Nicola Philip.
2. On 25 September 2015, Condor entered into an escrow deed with EMC (Nominees) Pty Ltd (**EMC**) under which EMC agreed to hold 45 million ordinary shares in Condor in escrow pending the finalisation of funding or acquisition agreements.
3. The 45 million shares represented 33.24% of the then issued capital of Condor.
4. Pursuant to a direction dated 26 November 2015 from Condor to EMC, of the 45 million shares, 27,937,360 were transferred to six transferees purportedly in connection with the completion of the Assignment Agreement.
5. On 26 February 2016, Condor purported to cancel the remaining 17,062,640 shares.
6. Also on 26 February 2016, Condor issued 50 million ordinary shares and requested EMC to hold those shares in escrow pursuant to the escrow deed pending the finalisation of funding or acquisition agreements.
7. The 50 million shares represented 29.13% of the then issued capital of Condor (after the purported cancellation of 17,062,640 shares).
8. The 45 million shares and 50 million shares are voting shares.
9. Under the escrow deed, Condor had (in respect of the 45 million shares) and has (in respect of the 50 million shares) the power to exercise, or control the exercise of, the right to vote and dispose of the shares. Accordingly, under section 608(1)(b) and (c),¹⁸ Condor acquired a relevant interest in those shares.
10. EMC had a relevant interest in respect of the 45 million shares and has a relevant interest in respect of the 50 million shares under section 608(1)(a). EMC did not satisfy the exemption in section 609(2) in relation to either holding of Condor shares.
11. Accordingly:
 - (a) upon the issue of the 45 million shares on 25 September 2015, Condor's and EMC's voting power in Condor increased from below 20% to more than 20% in contravention of section 606(1) and (2) and

¹⁸ References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

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- (b) upon the issue of the 50 million shares on 26 February 2016, Condor's and EMC's voting power in Condor again increased from below 20%¹⁹ to more than 20% in contravention of section 606(1) and (2).
12. None of the exceptions in section 611 applied.
13. Neither Condor nor EMC lodged substantial holder notices in respect of any shares, in contravention of section 671B(1).
14. Ms Philip and Minesweeper were each transferred a portion of the 45 million shares on 27 November 2015 giving rise to substantial holder notice obligations. On 16 May 2016, Ms Philip lodged substantial holder notices disclosing a current holding of 6.57% of Condor in respect of the shares held by her and Minesweeper. The initial substantial holder notice failed to comply with the requirements of section 671B(4).

EFFECT

15. Condor shareholders and the market were not aware of Condor's or EMC's relevant interest in the Condor shares held by EMC, or the nature of the interest or the circumstances of the acquisition. Moreover, the issue of the shares improperly diluted shareholders. Condor shareholders and the market were also not aware of Ms Philip's substantial holding and the agreement giving rise to it.
16. By reason of the foregoing, the acquisition of control over voting shares in Condor did not take place in an efficient, competitive and informed market.

CONCLUSION

17. It appears to the Panel that the circumstances are unacceptable circumstances:
- (a) having regard to the effect that the Panel is satisfied the 45 million share issue had, and the 50 million share issue is having or is likely to have on:
- (i) the control, or potential control, of Condor or
- (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Condor
- (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602
- (c) in the further alternative, because they constituted, constitute, will constitute or are likely to constitute a contravention of a provision of Chapter 6 and of Chapter 6C.
18. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3).

DECLARATION

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

Alan Shaw
Counsel
with authority of Michelle Jablko
President of the sitting Panel
Dated 27 May 2016

¹⁹ Following the transfer of a portion of the 45 million shares



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Takeovers Panel

Annexure C

**CORPORATIONS ACT
SECTION 657D
ORDERS**

CONDOR BLANCO MINES LIMITED

The Panel made a declaration of unacceptable circumstances on 27 May 2016.

THE PANEL ORDERS

1. 50,000,000 ordinary shares in Condor Blanco Mines Limited (**Condor**) currently held by EMC (Nominees) Pty Ltd are cancelled.
2. To the extent 17,062,640 ordinary shares in Condor were not cancelled by Condor on 26 February 2016, such shares are cancelled.
3. Condor must as soon as practicable, and in any event within two business days after the date of these orders, provide a draft ASX announcement to the Panel, ASIC and the other parties in the matter that:
 - (a) describes the circumstances around and effects of:
 - (i) the issue of 45,000,000 ordinary shares on 25 September 2015
 - (ii) the transfer of a portion of the 45,000,000 shares in connection with the assignment, indemnity and put option agreement dated 22 September 2015 and
 - (iii) the issue of the 50,000,000 shares on 26 February 2016
 - (b) states that the 17,062,640 shares have been cancelled
 - (c) states that the 50,000,000 shares have been cancelled and
 - (d) specifies the number and class of Condor securities (including shares, options and all other securities) on issue subsequent to these orders.
4. Condor must release on ASX the announcement referred to in order 3, in a form approved by the Panel, forthwith after approval.
5. Within two business days after the date of these orders, Ms Nicola Philip lodge an amended notice of initial substantial holder, amending the notice dated 16 May 2016 and attaching all documents setting out the terms of any relevant agreement through which she obtained a relevant interest in Condor.

Alan Shaw
Counsel
with authority of Michelle Jablko
President of the sitting Panel
Dated 27 May 2016



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Annexure D

**CORPORATIONS ACT
SECTION 657D
VARIATION OF ORDERS**

CONDOR BLANCO MINES LIMITED

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

THE PANEL ORDERS

The variation of the final orders made on 27 May 2016 by inserting the following additional orders after paragraph 5:

- “6. The shares in Condor in which Ms Nicola Philip has a relevant interest, as disclosed in the notice of initial substantial holder dated 16 May 2016, must not be, or be allowed to be, voted on any resolution concerning the removal and replacement of the current directors of Condor as announced by Condor on 9 May 2016.
7. If, notwithstanding order 6, any voting rights in respect of the shares specified in order 6 are exercised, Condor must disregard those votes.
8. Except with the consent of the Panel, Ms Nicola Philip, Minesweeper Limited and each of their respective associates must not dispose of, transfer, grant a security interest over or otherwise deal with any of the shares, or interests in shares, specified in order 6 until after the date of the vote referred to in order 6.
9. Within 10 business days of the date of this order, Condor must pay to the applicant, Mr Joshua Farquhar, \$5,045.00 representing the costs actually, necessarily, properly and reasonably incurred in the course of the proceedings.”

Alan Shaw
Counsel
with authority of Michelle Jablko
President of the sitting Panel
Dated 7 June 2016