Australian Government

Takeovers Panel

Reasons for Decision
McAleese Limited
[2016] ATP 13

Catchwords:

Recapitalisation – coercive effect – association – entitlement offer – underwriting – shareholder approval – effect on control – premature application – decline to conduct proceedings

Corporations Act 2001 (Cth), sections 12(2)(b), 12(2)(c), 602(a)(ii), item 7 of 611

Australian Securities and Investments Commission Regulations 2001 (Cth), reg 20

Billabong International Ltd [2013] ATP 9, Mount Gibson Iron Limited [2008] ATP 4, Pasminco Ltd (Administrators Appointed) [2002] ATP 6

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

INTRODUCTION

1. The Panel, Alex Cartel, Rod Halstead and Sophie Mitchell (sitting President) declined to conduct proceedings on an application by Havenfresh Pty Ltd. The application concerned the proposed recapitalisation of McAleese Limited announced on 7 June 2016. The Panel considered it was premature to conduct proceedings in relation to potential control issues that may arise out of the entitlement offer aspect of the recapitalisation or disclosure of information (as the notice of meeting had not been made public), or association at this stage.

2. In these reasons, the following definitions apply.

Havenfresh	Havenfresh Pty Ltd
McAleese	McAleese Limited
Rowsthorn Interests	Entities associated with Mr Mark Rowsthorn (McAleese's managing director)
SC Lowy Consortium	Consortium led by SC Lowy Primary Investments Ltd

FACTS

3. McAleese is an ASX listed company (ASX code: MCS).

4. On 7 June 2016, McAleese announced it had entered into a binding heads of agreement with its existing financiers and the SC Lowy Consortium for a proposed conditional recapitalisation of McAleese. The announcement stated that, in overview, the recapitalisation involved:

   - *Extinguishment of all Existing Financier claims (Senior Debt) [$196 million] in exchange for $112.3 million, comprising:*

  - *$16 million to be repaid by the Company from cash ($1 million) on its balance sheet and drawings ($15 million) under a new $25 million working capital facility (New Working Capital Facility)…;*
  - *the acquisition by the SC Lowy Consortium of McAleese's remaining Senior Debt for $91.3 million (Senior Debt Acquisition); and*
  - *$5 million payable by the Company, which is deferred for up to 12 months after the date of the Senior Debt Acquisition.*
- *the Senior Debt acquired by the SC Lowy consortium will, following shareholder approval of the Recapitalisation, be replaced by a new senior debt facility (New Senior Debt Facility) totalling $91.3 million plus fees and interest accrued from the time of the Senior Debt Acquisition...*
- *in part consideration of the compromise of the Senior Debt acquired by the SC Lowy Consortium, the Company will issue to the SC Lowy Consortium options over McAleese ordinary shares with a zero strike price (Options) in such number that the SC Lowy Consortium will hold 35% of the McAleese shares on issue post-exercise of the Options and post-Recapitalisation...*
- *an underwritten, $26 million, pro-rata entitlement offer of subordinated, secured convertible notes (Notes) to McAleese shareholders. The Notes will be issued in such number that the Note holders will, on conversion of the Notes, hold 60% of the McAleese shares on issue post-Recapitalisation (assuming the exercise of the Options) (Notes Issue). If McAleese shareholders do not subscribe for their entitlement of Notes under the Notes Issue, then they will be materially diluted by the conversion of the Notes... and*
- *the proposed delisting of McAleese from the official list of ASX.*

5. The entitlement offer is to be underwritten by Rowsthorn Interests.

6. Subject to shareholder approval, Rowsthorn Interests will receive an underwriting fee of notes convertible into 5% of McAleese, post-recapitalisation.[1]

7. Pursuant to the underwriting, if no shareholders take up their entitlements, Rowsthorn Interests may increase their holding in McAleese to approximately 65% post-recapitalisation (from their existing 29.34% pre-recapitalisation). This increase assumes that shareholders approve the issue of the options referred to in the 7 June announcement to the SC Lowy Consortium, the exercise of which will result in the SC Lowy Consortium holding approximately 35%.[2]

[1] If shareholder approval is not obtained, the fee is payable in cash
[2] If shareholders do not approve the exercise of the options to the SC Lowy Consortium, then the recapitalisation including the issue of notes will not proceed

8. A general meeting will be held at which shareholders will vote on the recapitalisation, including resolutions to approve:

   (a) the issue of options to the SC Lowy Consortium for the purposes of Listing Rule 7.1 and issue of shares on the future exercise of those options for the purposes of item 7 of s611[3]

   (b) the issue of shares to Rowsthorn Interests upon the conversion of notes issued to it under the entitlement offer for the purposes of item 7 of s611 and

   (c) the payment of the underwriting fee to Rowsthorn Interests in notes rather than cash.

9. The senior debt acquisition is scheduled to occur on 19 July 2016.

10. McAleese's 7 June announcement indicates that, if McAleese shareholders do not approve the recapitalisation, the SC Lowy Consortium may withdraw its support as lender, and may seek to acquire its equity interest in McAleese by way of an alternative transaction which otherwise reflects, in substance, the transaction contemplated by the recapitalisation.

11. If the senior debt acquisition does not occur, McAleese's senior debt with the existing financiers will remain outstanding and the recapitalisation will not occur.

12. Between 21 June 2016 and 27 June 2016, Havenfresh submitted s249D notices seeking to remove the incumbent McAleese board (other than Havenfresh's nominee director) and appoint further nominees.

APPLICATION

Declaration sought

13. By application dated 15 July 2016, Havenfresh, which has voting power of 14.09% in McAleese, sought a declaration of unacceptable circumstances. Havenfresh submitted that:

   (a) the recapitalisation, in particular the timing of the senior debt acquisition, resulted in unacceptable coercive pressure being applied to existing shareholders to approve the issue of the options to the SC Lowy Consortium

   (b) the entitlement offer and underwriting arrangements had been structured to deliver control of McAleese to the Rowsthorn Interests (underwriter) without shareholder approval and

   (c) the SC Lowy Consortium and Rowsthorn Interests are associates.

14. Havenfresh submitted that the effect of the circumstances was that the acquisition of a substantial interest or control over voting shares in McAleese would not take place in an efficient, competitive and informed market (section 602(a)(ii)).

[3] References are to the *Corporations Act 2001* (Cth), unless stated otherwise

Interim orders sought

15. Havenfresh sought an interim order that the senior debt acquisition and entitlement offer not proceed until the Panel had concluded its proceedings.

Final orders sought

16. Havenfresh sought final orders that:

    (a) the senior debt acquisition be delayed until after the general meeting and McAleese shareholders have approved the recapitalisation resolutions

    (b) shareholder approval be obtained for the underwriting arrangements, and the Rowsthorn Interests be precluded from voting and

    (c) the SC Lowy Consortium lodge a substantial holding notice disclosing its association with the Rowsthorn Interests.

DISCUSSION

Senior debt acquisition

17. Havenfresh submitted that the timing of the senior debt acquisition resulted in unacceptable coercive pressure being applied to shareholders to approve the proposed issue of options to the SC Lowy Consortium. It submitted that, given McAleese's current financial position and the SC Lowy Consortium's intentions should the recapitalisation (including options issue) not be approved, shareholders would be under coercive pressure once the senior debt acquisition has taken place. Thus, it submitted:

    …it is inevitable that existing shareholders will feel a coercive force to approve the issue of the Options if that approval is sought after the Senior Debt Acquisition occurs, given the influence and control the SC Lowy Consortium will have in relation to McAleese as its senior lender.

18. Havenfresh submitted that shareholders would not be subject to the same pressure if the SC Lowy Consortium was not, at the time of the vote, the senior lender to McAleese.

19. McAleese made a preliminary submission that the Panel should decline to conduct proceedings. It submitted, among other things, that:

    (a) McAleese was experiencing significant financial duress and operational challenges

    (b) McAleese was relying upon the forbearance of its existing financiers, which ends on 19 July 2016 as does the heads of agreement under which the recapitalisation is to be implemented and

    (c) the Board, other than Mr Rowsthorn and Mr Maggiolo (also a director of Havenfresh), had determined that the recapitalisation was the best and only alternative available.

20. McAleese also submitted that there was no coercive force on shareholders by reason of the senior debt acquisition occurring before shareholder approval.

21. The Panel has recognised that "*Chapter 6 is designed to prevent people getting control of companies by coercion, or rushed, uninformed or selective dealing*".[4] It has also recognised in the same decision that shareholders have few, if any, rights when there is no equity left and control of the company has passed to creditors.[5] In *Billabong International* the Panel said, in the context of lock-up devices:

    Where a company is in financial distress it is likely that shareholders may feel commercial pressure to approve a transaction, however, the Panel has stated that it is a matter of degree as to whether the magnitude of the pressure applied by the specific terms of the transaction is unacceptable.[6]

22. Looking at the senior debt acquisition, we do not think there is evidence of unacceptable coercion. We agree with McAleese's submissions that the timing of the senior debt acquisition relative to the shareholder vote was unlikely to change the position of shareholders and the commercial pressure to approve the recapitalisation is more likely to arise from the financial distress McAleese finds itself in.

23. Moreover, based on the information presented, it appears that the senior debt acquisition is part of a legitimate commercial transaction. We note McAleese's submissions that:

    (a) a thorough strategic process, which had run since August 2015 and in which over 65 parties were approached, was undertaken to seek alternative transactions to the recapitalisation, however no superior transaction was put forward and

    (b) the recapitalisation process demonstrated that no party was willing to value McAleese at more than approximately 60 cents in the dollar of the existing senior debt.

24. The notice of meeting and independent expert report setting out details of the options issue have not yet been released. In our view it is premature to assess whether the options issue may give rise to any unacceptable control effect. In this respect we note that the parties have clearly considered the prospect that they may not get the options or notes.

25. Lastly, we note that shareholders currently have (limited) choices – they can decide that they will subscribe for notes and wait to see if they get value in the future (in which case they can convert into shares) or they can sell their existing shares on ASX now.[7] In respect of McAleese's ASX listing, an aspect of the proposal that did strike us was the proposed delisting, but we do not need to consider this further at this time.

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[4] *Pasminco Ltd (Administrators Appointed)* [2002] ATP 6 at [98]
[5] As above
[6] *Billabong International Ltd* [2013] ATP 9 at [44]
[7] Noting the relative illiquidity in trading in McAleese shares on ASX

Entitlement offer

26. Havenfresh submitted the entitlement offer has features which make it unacceptable, including:

    (a) the offer is underwritten by the Rowsthorn Interests and is likely to deliver control of McAleese to the Rowsthorn Interests

    (b) the offer is highly dilutive resulting in existing shareholders aggregate interests being diluted to only slightly greater than 0%

    (c) the notes are unlikely to be an attractive instrument for shareholders, particularly given the proposed delisting of McAleese and resulting illiquidity for trading in McAleese securities and

    (d) to maintain an interest in McAleese, existing shareholders would need to contribute approximately 4.6 times the value of their existing investment in McAleese.

27. Havenfresh submitted that the capital raising had been structured as a pro-rata issue for the primary purpose of ensuring that Rowsthorn Interests can acquire control of McAleese without the need for shareholder approval, by relying on the exceptions in either item 10 or 13 of s611 and exception 2 of Listing Rule 10.11.

28. Havenfresh submitted that "*McAleese's announcement on 7 June 2016 does not indicate that shareholder approval will be sought for the acquisition of Notes by the Rowsthorn Interests pursuant to the underwriting*" and shareholder approval for the underwriting is required.[8]

29. Certain features of the entitlement offer are disclosed in McAleese's ASX announcement. However, McAleese has not:

    (a) launched the entitlement offer or released the prospectus or

    (b) released the notice of meeting and independent expert report for the purpose of the resolutions to approve (among other things) the issue of shares to the Rowsthorn Interests on conversion of the underwritten notes.

30. As a result, we are not in a position to assess whether the entitlement offer, underwriting arrangements or notice of meeting may give rise to unacceptable circumstances because of a structural issue, disclosure deficiency or other feature.

31. In these circumstances, we consider it premature to conduct proceedings in relation to the entitlement offer and underwriting arrangements. Havenfresh, or any other shareholder, is free to make an application if they consider that the entitlement offer, underwriting arrangements or notice of meeting gives rise to unacceptable circumstances when those details become available.

[8] McAleese submitted that it will be seeking shareholder approval for the purposes of item 7 of s611 for the issue of shares to the Rowsthorn Interests on conversion of the underwritten notes

Association

32. Havenfresh submitted that McAleese's 7 June announcement "*indicates that both the SC Lowy Consortium and Mark Rowsthorn agree to the proposed Delisting.*" Therefore, it is reasonable to infer that the SC Lowy Consortium and Rowsthorn Interests are associates under ss12(2)(b) or (c) *"based on their common goal and agreement in relation to the Delisting of McAleese.*"

33. Havenfresh further submitted that, as a result of the association, the SC Lowy Consortium had voting power of 29.34% in McAleese and had failed to disclose it.

34. McAleese submitted that, while a matter for the SC Lowy Consortium, it did not consider the proposed delisting of McAleese created an association between Rowsthorn Interests and the SC Lowy Consortium. It also submitted that, even if there was an association, that did not warrant any delay to the senior debt acquisition or the recapitalisation more generally.

35. If there is an association this would have implications for substantial holder notice disclosure, as Havenfresh submitted, and also potentially for the exercise of the options, conversion of notes and voting on the item 7 resolutions.

36. The application was made on Friday, 15 July and the senior debt acquisition was due to complete on the following Tuesday morning. We met on the Monday evening. We note the time usually involved in an association proceeding before the Panel and we agree with McAleese's submission that establishing association would not necessarily delay the senior debt acquisition.

37. In view of the timing, we have not undertaken a consideration of this aspect of the application, including whether Havenfresh has demonstrated "*a sufficient body of evidence of association to convince the Panel as to that association, albeit with proper inferences being drawn*".[9] This aspect of the application, too, could be the subject of a fresh application should it become relevant to aspects of the recapitalisation.

DECISION

38. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

Orders

39. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any final orders including as to costs.

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[9] See *Mount Gibson Iron Limited* [2008] ATP 4 at [15]

40. We considered whether to grant the interim order requested by Havenfresh. Given our decision not to conduct proceedings, we decline to make the interim order.

Sophie Mitchell
President of the sitting Panel
Decision dated 19 July 2016
Reasons published 25 July 2016

Advisers

Party	**Advisers**
Havenfresh Pty Ltd	McCullough Robertson Lawyers
McAleese Limited	Herbert Smith Freehills
Rowsthorn Interests	Johnson Winter & Slattery