



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Regal Resources Limited  
[2016] ATP 17**

**Catchwords:**

*Item 7 shareholder approval – entitlement offer – underwriting – dispersion strategy – shortfall shares – notice of meeting – prospectus disclosure – section 602 principles – disclosure – efficient, competitive and informed market – effect on control – concurrent proceedings – extension of time for making application – declaration – orders*

*Corporations Act 2001 (Cth), sections 602, 606, 611 (items 7, 10 and 13), 657A, 657C, 657D, 707, 713*

*ASX Listing Rule 7.4*

*Palmer Leisure Coolum Pty Ltd v Takeovers Panel [2015] FCA 1498, London Scottish Benefit Society v Chorley, Crawford and Chester [1884] 13 QBD 872*

*Guidance Note 4 Remedies General, Guidance Note 17 Rights Issues, ASIC Regulatory Guide 6 Takeovers: Exceptions to the general prohibition, ASIC Regulatory Guide 74 Acquisitions approved by members*

*The President’s Club Limited 02 [2016] ATP 1, Celamin Holdings NL [2014] ATP 22, Altius Mining Limited [2012] ATP 17, MacarthurCook Property Securities Fund 01 & 02 [2012] ATP 7, Powerlan Limited [2010] ATP 2, Reflex Holdings Limited [2009] ATP 17, Dromana Estate Limited 01 [2006] ATP 4, Emperor Mines Limited 01R [2004] ATP 27, Emperor Mines Limited 01 [2004] ATP 24, InvestorInfo Limited [2004] ATP 6, AMP Shopping Centre Trust 02 [2003] ATP 24, Focus Technologies Limited [2002] ATP 8, Pinnacle VRB Ltd 11 [2001] ATP 23*

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

**INTRODUCTION**

1. The Panel, Michelle Jablko (sitting President), Denise McComish and Robert McKenzie, made a declaration of unacceptable circumstances in relation to the affairs of Regal Resources Limited. The application concerned Regal scaling back applications for shortfall shares under its entitlement offer and instead issuing the shares to the underwriter. The Panel considered that the scaling back of shortfall shares by Regal was inconsistent with disclosure in Regal’s notice of meeting and prospectus. The Panel made a declaration and orders, including requiring Regal to offer shares to shareholders that were scaled back under the entitlement offer.

2. In these reasons, the following definitions apply.

applicant	Mr Warwick Sauer
NCAT	New South Wales Civil & Administrative Tribunal
Ndovu	Ndovu Capital VI B.V.
Regal	Regal Resources Limited

## FACTS

3. Regal is an ASX listed company (ASX code: RER). It is a mining company involved in identifying, acquiring and developing mining opportunities in the Democratic Republic of the Congo.
4. On 20 April 2016, Regal announced that it had entered into a series of transactions which provided for (among other things):
  - (a) the acquisition by Regal of additional interests in the Kalongwe Project
  - (b) a placement to Ndovu to fund the cash portion of the acquisition
  - (c) the conversion of an existing convertible loan by Ndovu and another party into Regal shares
  - (d) the settlement and release of potential claims by two parties, through the issue of shares and a cash payment and
  - (e) Ndovu to underwrite an entitlement offer,(collectively, the **Transactions**).
5. Regal obtained shareholder approval for the Transactions, including approvals for the purposes of item 7 of s611<sup>1</sup> for Ndovu to increase its voting power in Regal from 13.23% to a maximum of 68.03% as a result of the placement, conversion of convertible loan and underwriting the entitlement offer.<sup>2</sup>
6. Regal’s notice of meeting described the Transactions as inter-conditional.<sup>3</sup>
7. On 4 July 2016, Regal announced a 1-for-2 non-renounceable entitlement offer at \$0.01 per share to raise approximately \$9 million, fully underwritten by Ndovu.
8. The entitlement offer included a shortfall facility permitting eligible shareholders to apply for shares in excess of their entitlements. Regal’s disclosure concerning the shortfall facility in its notice of meeting for the Transactions and its subsequent prospectus for the entitlement offer is described below.<sup>4</sup> Regal accepted applications for less than two thirds of the number of shortfall shares applied for, and issued the remaining shortfall shares to Ndovu as underwriter.

## APPLICATION

### Declaration sought

9. By application dated 22 September 2016, the applicant sought a declaration of unacceptable circumstances. The applicant submitted that:
  - (a) Regal rejected applications for shortfall shares in a manner that was inconsistent with the disclosures in the entitlement offer prospectus and

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<sup>1</sup> References are to the *Corporations Act 2001* (Cth), unless otherwise stated

<sup>2</sup> Shareholders also approved the exercise of options held by Ndovu which could further increase Ndovu’s voting power

<sup>3</sup> With the exception of one aspect of the Transactions, relating to Regal acquiring an additional interest in the Kalongwe Project, which was not inter-conditional with the other aspects of the Transactions

<sup>4</sup> See paragraphs 20-21, 29-30

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- (b) the structure of the entitlement offer was designed to increase substantially Ndovu's stake in Regal, at a material discount to Regal's prevailing share price.
10. The applicant submitted that the effect of the circumstances was that:
- (a) Ndovu took control of nearly 9% of Regal (being the shortfall shares) other than in an efficient, competitive and informed market and
  - (b) the holders of Regal shares have not all had a reasonable and equal opportunity to participate in any benefits accruing through any proposal under which a person (Ndovu) would acquire a substantial interest in Regal.

#### **Interim order sought**

11. The applicant sought an interim order that Ndovu not deal with its interests in Regal until the Panel makes its final determination.
12. Ndovu provided an undertaking, in effect, not to deal with the shortfall shares issued to it as underwriter to the entitlement offer (Annexure A).

#### **Final orders sought**

13. The applicant sought final orders that:
- (a) within a reasonable period of time from the making of the Panel's order, as agent for Ndovu, Regal make an offer to each shareholder that applied for shortfall shares but was not allocated every shortfall share they applied for on the following terms:
    - (i) that Ndovu will, upon the shareholder's acceptance of the offer via payment to Regal (as agent for Ndovu) of \$0.01 per share, unconditionally transfer to the shareholder a number of shares up to the number that the shareholder applied for under the relevant prospectus but was not allocated and
    - (ii) that the offer will remain open for acceptance for a period of 28 days from its being made and
  - (b) Ndovu transfer to each accepting shareholder, within seven days of the shareholder's acceptance of the offer, the number of shares in respect of which the shareholder accepted the offer.

## **DISCUSSION**

14. We have considered all the material, but address specifically only those things that we consider necessary to explain our reasoning.

#### **The entitlement offer and shareholder approval**

15. The applicant submitted in effect that Regal failed to take steps to mitigate the control effects of the entitlement offer, because:
- (a) the offer was solely underwritten by a major shareholder and Regal did not attempt to secure third party underwriting or sub-underwriting

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- (b) the offer was non-renounceable which increased the potential control effect of the offer and
  - (c) the shortfall facility, as implemented, involved scaling back. The applicant referred to a line of authorities where the Panel has criticised shortfall facilities that incorporate substantial discretion in relation to allocation.<sup>5</sup>
16. Regal submitted that by obtaining shareholder approval in accordance with item 7, it addressed any potential concerns that the acquisition of voting power by Ndovu may give rise to an unacceptable control effect. It submitted that the item 7 approval was, in effect, a complete answer to this application. Ndovu made submissions to the same effect.
17. ASIC submitted that the mere fact the item 7 approvals were obtained with respect to the acquisitions by Ndovu does not mean that unacceptable circumstances cannot occur where reliance is placed on that approval in circumstances that differ from those contemplated by approving shareholders at the time the item 7 approval was considered.
18. The Panel recognises that one way to mitigate the potential control effects of a rights issue or underwriting arrangement is to obtain informed approval by non-associated shareholders pursuant to item 7.<sup>6</sup> We consider that if a company obtains fully informed approval for a proposed underwriter to acquire shares under item 7, it is less likely that any control effect of that underwriting would constitute unacceptable circumstances.<sup>7</sup>
19. However, unacceptable circumstances may still arise if an acquisition by an underwriter does not occur in accordance with the terms of the shareholder approval and s602 principles.<sup>8</sup>

#### *Information provided to Regal shareholders in the notice of meeting*

20. Regal dispatched a notice of meeting to shareholders on or around 30 May 2016 which contained a number of inter-conditional resolutions to approve various share issues to Ndovu. Resolution 9 provided:

*That, subject to and conditional on the passing of each of the other Inter-Conditional Resolutions, pursuant to and in accordance with item 7 of section 611 of the Corporations Act and for all other purposes, Shareholders approve the issue of up to 938,380,252 Shares to Ndovu (or its nominees) pursuant to the Underwriting Agreement, on the terms and conditions in the Explanatory Memorandum.*

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<sup>5</sup> *Celamin Holdings NL* [2014] ATP 22, *Altius Mining Limited* [2012] ATP 17, *Powerlan Limited* [2010] ATP 2, *Redflex Holdings Limited* [2009] ATP 17 and *Dromana Estate Limited 01* [2006] ATP 4

<sup>6</sup> Guidance Note 17 *Rights Issues* at [22]. ASIC similarly recognises this: see ASIC Regulatory Guide 6 *Takeovers: Exceptions to the general prohibition* at [6.97]

<sup>7</sup> See *InvestorInfo Limited* [2004] ATP 6 at [58]-[59]

<sup>8</sup> See *Focus Technologies Limited* [2002] ATP 8 at [30] and ASIC Regulatory Guide 74 *Acquisitions approved by members* at [74.11]-[74.12]

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21. The notice of meeting disclosed, in relation to the entitlement offer, that eligible shareholders could apply for shortfall shares in addition to their entitlement.

Relevantly, the explanatory memorandum provided:

- (a) in the summary of the underwriting agreement:

*The Company entered into the Underwriting Agreement with Ndovu, a substantial Shareholder, rather than an independent underwriter on the basis that:*

...

*(d) Shareholders will be provided with the option for subscribing for shortfall shares in excess of their entitlement, on the terms and conditions to be disclosed in the Prospectus.*

- (b) as a reason for shareholders to vote in favour of the Transaction resolutions:

***Shareholders have ability to reduce Ndovu's voting power by participating in the Rights Issue***

*The offer period for the Rights Issue will be open for at least the minimum period required by the Listing Rules. Shareholders will therefore have a reasonable opportunity to accept their entitlement under the Rights Issue, and reduce Ndovu's subscription pursuant to the Underwriting Agreement accordingly.*

*Shareholders will also be provided with the option for subscribing for Shortfall Shares in excess of their entitlement, on the terms and conditions to be disclosed in the Prospectus. The issue of any Shortfall Shares will be at the discretion of the Directors, in conjunction with Ndovu (in Ndovu's capacity as underwriter)...*

- (c) in a summary of material terms of the underwriting agreement:

***Shortfall***

*Eligible Shareholders may nominate to subscribe for additional Shares not subscribed for by other eligible Shareholders in the Rights Issue.*

*The Company must calculate the number of Underwritten Shares for which valid applications have not been received by the closing date of the Rights Issue (**Shortfall**). The Company must notify the Underwriter of the Shortfall within 3 business days of the closing date of the Rights Issue (or such later date as agreed). The Underwriter must apply for the Shortfall within 6 business days of receiving this shortfall notice from the Company.*

22. ASIC submitted that the “overall impression created by the disclosures made in the EM is that Regal shareholders would be approving Ndovu’s acquisition on the basis, at least in part, that a shortfall facility of the kind commonly utilised in a rights issue in order to mitigate the potential control effects of the fundraising would be made available. In other words, the shortfall facility... offered would be one that is designed to, and generally achieves, the purpose of such facilities as set out in [GN17] and RG 6.”
23. To this end ASIC submitted that where a rights issue shortfall facility has a control mitigation purpose, it is generally expected and implied that any director discretions retained will be exercised sparingly and consistent with that mitigation purpose.

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24. The applicant submitted it was a necessary implication from the text referred to in paragraph 21(c) above that all valid applications that were received by the closing date of the entitlement offer would be accepted by Regal.
25. Regal and Ndovu submitted it is clear from the disclosures in the notice of meeting that the issue of shortfall shares would be subject to the directors' unrestricted discretion. Moreover, Regal submitted that the principle suggested by ASIC that directors' should only sparingly exercise that discretion is not relevant in the present case as item 7 approval was obtained for Ndovu's increase in voting power.
26. We consider that the language and context of the disclosures in the notice of meeting conveyed that the shortfall facility was being made available as a mechanism for shareholders to mitigate the extent of Ndovu's increase in voting power as a result of the Transactions. In particular, the ability to participate in the entitlement offer (which included the shortfall facility) was held out as a reason to vote in favour of the Transaction resolutions because it gave shareholders the ability to reduce Ndovu's voting power.
27. The Panel has on a number of occasions been critical of shortfall facilities that provide discretion in relation to the allocation of shortfall and has expressed a view that shareholders should in general participate in the shortfall in priority to underwriters and sub-underwriters.<sup>9</sup> Those decisions relate to rights issues relying on items 10 or 13 of s611, however we think they have shaped the market's expectations regarding shortfall facilities and accordingly should also apply in this case where the shortfall facility was held out as a control mitigation mechanism.
28. We consider that the discretion reserved by Regal in general terms does not overcome the impression created by Regal's disclosures. If Regal wanted to reserve a broader discretion not to allocate shortfall shares to applicants and instead issue the shortfall to the underwriter, it should have included clear and specific language to that effect. As was said in *Celamin Holdings NL*: "While a general discretion may be required for listing rule purposes, there can, and should, be disclosure of the manner in which directors propose to exercise that discretion."<sup>10</sup>

#### *Disclosure in the prospectus*

29. The prospectus stated that "*Shortfall Shares will be allocated firstly to Eligible Shareholders who apply for Shortfall Shares, then to Ndovu in its capacity as Underwriter.*"<sup>11</sup>
30. The prospectus also stated that:  
*Shortfall Shares will only be issued if the Entitlement Offer is undersubscribed and will only be issued to the extent necessary to make up any shortfall in subscriptions. Eligible Shareholders applying for Shortfall Shares in excess of their full Entitlement will have*

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<sup>9</sup> *Emperor Mines Limited 01* [2004] ATP 24 at [87]-[88] and [133]-[136], *Emperor Mines Limited 01R* [2004] ATP 27 at [21]-[22], *MacarthurCook Property Securities Fund 01 & 02* [2012] ATP 7 at [48]-[52] and Guidance Note 17 *Rights Issues* at footnote 17

<sup>10</sup> *Celamin Holdings NL* [2014] ATP 22 at [49]

<sup>11</sup> A similar statement was made in a letter to eligible shareholders dated 12 July 2016

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*priority under the Shortfall Offer subject to applications being received by the Closing Date. In the event of oversubscription from these applications they will be scaled back.*

*Any remaining Shortfall Shares will be subscribed for by the Underwriter in satisfaction of its commitment under the Underwriting Agreement.*

*No New Shares will be issued under the Shortfall Offer if their issue would contravene the takeover prohibition in section 606 of the Corporations Act. In addition, no New Shares will be issued under the Shortfall Offer to any related parties of the Company.*

*The Shortfall Shares are to be issued at the discretion of the Company and as such there is no guarantee that any Shortfall Shares will be issued to Eligible Shareholders or other third parties. Excess Application Monies for the Shortfall Offer will be refunded without interest.*

31. We consider that the context of the reference to Regal's discretion in the last paragraph of this passage implies that it is a limited discretion of the kind necessary to give effect to the statements in the previous paragraph regarding contravention of the takeovers threshold and related parties. It should not be treated as negating the very clear statement in the first paragraph as to the priority to be given to applications by eligible shareholders. This is consistent with the view we have expressed above as to the market's expectations regarding shortfall facilities. Indeed, it suggests that Regal and Ndovu had a similar understanding themselves.

#### *Shortfall allocation policy*

32. The entitlement offer closed on 4 August 2016. Regal received applications for 184,166,015 shortfall shares. Regal issued 118,907,986 shortfall shares to applicants. The remaining shortfall shares were issued to Ndovu as part of its underwriting commitment.<sup>12</sup>
33. The applicant was scaled back in respect of his application for shortfall shares. A letter from Regal to the applicant advising of the scale back stated:
- In accordance with the disclosures in the Prospectus, the shortfall shares were issued at the discretion of the Company and as such there could be no guarantee that any shortfall shares would be issued. Current shareholders were given priority with no shares placed to non-shareholders. Shortfall shares were allotted where considered reasonable in the context of the eligible shareholder's existing shareholding. The company instituted a policy in good faith to ensure that eligible shareholders who applied for shares well in excess of their entitlement were treated reasonably.*
34. Ndovu held 63.16% of Regal following completion of the entitlement offer. Had all the applications for shortfall shares been filled, Ndovu's voting power following the entitlement offer would have been 60.81% rather than 63.16%.
35. Regal submitted that the shortfall facility, as implemented, had a mitigation effect as the issue of shortfall shares to shareholders other than Ndovu reduced Ndovu's potential voting power by 4.28%.

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<sup>12</sup> The total shortfall issued to Ndovu as underwriter comprised 244,051,820 shares

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36. It also submitted that, even if the discretion of the Regal directors in scaling back the issue of the shortfall shares should be subject to the same restrictions as typically applicable in rights issues seeking to rely on items 10 or 13, the allocation policy adopted was reasonable as:
- (a) the scaling back of shortfall shares was not material and
  - (b) the discretion was exercised sparingly and in the interests of Regal as whole, and was not being used as an avenue for increasing Ndovu’s voting power.
37. In support of its submission that the allocation policy adopted was reasonable, Regal pointed to an allocation process adopted by the board by which it vetted the applications for shortfall shares to determine who were not, in effect, supporters or long term shareholders of Regal and who applied for a disproportionate number of shortfall shares.<sup>13</sup> Regal submitted that the board resolved as follows in respect of those shareholders:
- ...rather than completely ignore any individuals [sic] application, an amount of two times original Entitlement Offer amount would be considered a more reasonable and fairer approach i.e. individual would receive Entitlement Offer plus an additional amount of 2 x Entitlement Offer where that individual had applied for shortfall shares as part of the Shortfall Offer.*
38. There may be circumstances in which a board will be justified in scaling back shortfall applications, even when a shortfall facility is required to mitigate potential control effects. However, they will not ordinarily extend far beyond those noted in paragraph 31.
39. In this case, given Regal’s disclosure, the allocation policy adopted by Regal was a material departure from what Regal shareholders and market participants were entitled to expect, contrary to the requirements of s602(a) and s602(b)(iii). Accordingly, Regal’s reasons for scaling back shortfall applications were not justified in the circumstances.

#### Public interest considerations

40. Regal submitted that it would be against the public interest to compel directors to issue shares where it is considered to be contrary to the best interests of the company as a whole and contrary to the exercise of their directors’ duties.<sup>14</sup>
41. Ndovu similarly submitted that:

*Given the disclosures to shareholders, Ndovu sees no reason why the Regal directors should not have been entitled to exercise their discretion, acting in the proper discharge of their duties to the company, to determine the allocation of issued equity in the company in a way which was, in all the circumstances, as close as practical to the way in which the general*

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<sup>13</sup> Information provided to the Panel in rebuttals, which Regal admitted the board was not previously aware of, may have raised concerns bearing on the formulation and application of the board’s allocation policy. The Panel did not find it necessary to explore this further. See also footnote 14

<sup>14</sup> This submission was made before the development noted in footnote 13. It is unclear whether Regal continued to hold that view



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*body of shareholders would have expected that allocation to be made when they voted to approve it.*

42. As explained already, we do not consider that the allocation was made in a way that was at all close to what shareholders or the market would have expected. Furthermore, our role is to consider whether unacceptable circumstances exist in relation to circumstances affecting the control of a company. As to this the Panel in *Pinnacle VRB Ltd 11* said:

*While the directors...may be required to act in the best interests of their corporation, if unacceptable circumstances exist, the Panel may make appropriate orders to address those circumstances. As a consequence...directors may need to consider whether their actions will contribute to the existence of unacceptable circumstances in determining whether those actions are indeed in the best interests of the company. Accordingly, we do not consider that Vantech's argument in relation to directors' duties carries much weight in these circumstances.<sup>15</sup>*

43. Given Regal's disclosures, it is not a sufficient answer that the board may have decided to scale back shortfall applications in good faith or in a manner they perceived to be in the company's best interests.
44. Regal also submitted that a declaration of unacceptable circumstances in the present matter would be against the public interest as it may discourage companies from offering a shortfall facility in the context of an entitlement offer (and an underwriting) which has been approved by shareholders in accordance with item 7.
45. We do not consider that making a declaration will have that effect. Rather, we think it will encourage companies seeking shareholder approval under item 7 to:
- (a) provide clear disclosure to shareholders, including clear and specific language regarding the material terms of the acquisition proposal and
  - (b) comply with the import of that disclosure and the terms of the approval.

## DECISION

### Declaration

46. It appears to us that the circumstances are unacceptable having regard to:
- (a) the effect we are satisfied the circumstances have had on:
    - (i) the control, or potential control, of Regal or
    - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Regal and/or
  - (b) the purposes of Chapter 6 set out in s602, in particular s602(a) and s602(b)(iii).
47. Accordingly, we made the declaration set out 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).

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<sup>15</sup> *Pinnacle VRB Ltd 11* [2001] ATP 23 at [46]

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48. The circumstances that we are concerned with relate to Regal's disclosure to shareholders in connection with voting on a series of Transactions, and Regal's subsequent conduct of the entitlement offer (being in effect one part of those Transactions). Regal shareholders were being asked to approve a series of inter-conditional resolutions to give effect to (among other things) the Transactions. The Transactions would have the effect of increasing Ndovu's voting power from 13.23% to:

- (a) 54.38%, pursuant to the placement and conversion of convertible loan, and
- (b) a maximum of 68.03%, pursuant to the underwriting arrangements.

Given the take up under the offer, Ndovu's voting power in Regal immediately following the offer was 63.16%.

49. The Transactions, including Ndovu's underwriting, have clearly resulted in the acquisition of a substantial interest, and also control. In our view, the circumstances discussed above are unacceptable having regard to the effect they had on that acquisition.

#### Orders

50. Following the declaration, we made the final orders set out in Annexure C. Under s657D the Panel's power to make orders is very wide. The Panel is empowered to make 'any order'<sup>16</sup> if 4 tests are met:

- (a) it has made a declaration under s657A. This was done on 14 October 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 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 5 October 2016 and 12 October 2016.
- (d) it considers the orders appropriate to achieve the outcomes in one or more of the paragraphs in s657D(2), which relevantly include protecting the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons. We are satisfied that the rights or interests of Regal shareholders who applied for shortfall shares have been affected. We are also satisfied that the interests of other Regal shareholders have been affected by the increase in Ndovu's voting power that resulted from Regal scaling back applications. We consider that our orders are appropriate to protect those rights or interests.

51. The applicant sought an order that Ndovu offer shares to shareholders who were scaled back by Regal under the shortfall offer, so that those shareholders and

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<sup>16</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

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Ndovu are returned to the position they would have been in had Regal not scaled back any shortfall applications.

52. We sought submissions from the parties on (among other things) whether any person might be unfairly prejudiced by the applicant's proposed orders and whether there was a more appropriate alternative order. We asked whether an order directing Regal to make an offer of new shares to scaled back shareholders might be a more appropriate order.
53. Ndovu submitted the applicant's proposed orders were unfairly prejudicial to it because:
  - (a) Ndovu was not involved in bringing about the circumstances found by the Panel to be unacceptable, as it was not involved in the decisions on the determination of which shareholders' applications for shortfall shares would be accepted
  - (b) the orders would require Ndovu to sell shares at a loss against current market prices and
  - (c) the orders may require Ndovu to issue a prospectus or other disclosure document to facilitate the sale, due to the requirements of Chapter 6D relating to off-market sales by a controller,<sup>17</sup> which would involve time and cost.
54. Ndovu submitted that the Panel should instead order Regal to make a new offer of shares to those shareholders who were scaled back. Ndovu submitted the difference in Ndovu's voting power resulting from such an order (60.40%), compared with that if Ndovu was to transfer the shares to accepting scaled back shareholders (59.50%), is not material to control of Regal.
55. Regal submitted that an issue of new shares would likely require Regal to issue a new disclosure document. It submitted this would be unfairly prejudicial to Regal because:
  - (a) of the expense and diversion of management attention required for the lodgement of a disclosure document
  - (b) it would submit Regal to the enhanced disclosure obligations under section 713(5) for the duration of the offer period and
  - (c) it would be unlikely that the shares would be issued in time to be ratified (presumably for the purposes of ASX Listing Rule 7.4) at its annual general meeting.
56. Regal also submitted that an issue of new shares would be unfairly prejudicial to Regal shareholders as a result of the additional dilution they would suffer.
57. ASIC submitted: *"Given the contribution of Regal, and its agents, to the unacceptable circumstances in this matter, ASIC does not consider that the costs associated with remedying the unacceptable circumstances in the manner proposed (regardless of whether they ultimately include the cost of reopening its offers and preparing a s713 prospectus), and the need to make 'enhanced disclosure' is 'unfairly' prejudicial."*

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<sup>17</sup> Section 707(2)

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58. We decided to make orders requiring Regal to make a new offer of shares to those shareholders whose shortfall applications were scaled back. ASIC submitted that an order directing Regal to make an offer of new shares to scaled back shareholders should be accompanied by an order cancelling shares held by Ndovu in such number equivalent to the number of shares issued by Regal pursuant to the new offer, and an order that Regal must pay Ndovu \$0.01 for each share cancelled. We decided to make orders to that effect.
59. We consider our orders remedy the unacceptable circumstances. The orders achieve the same effect as those sought by the applicant, but ensure that it is Regal, rather than Ndovu, that assumes any regulatory burden associated with the offer. Given the respective roles of Regal and Ndovu, we think this is appropriate.
60. Our orders cancelling an equivalent number of shares held by Ndovu also prevent any additional dilution to other Regal shareholders, by ensuring there is no net increase in the number of Regal shares on issue. While Ndovu will lose any potential benefit of being able to sell the shares at a higher price than the subscription price it paid, we do not consider this order to be unfairly prejudicial,<sup>18</sup> given it puts Ndovu in the position it would have been in had the unacceptable circumstances not arisen. We consider that any prejudice or potential prejudice to Ndovu is not unfair in view of its involvement in the Transactions.

#### *NCAT application*

61. Early in the proceedings it became apparent that the applicant had, on 5 September 2016, lodged an application with the NCAT in respect of Regal's rejection of his application for shortfall shares. The NCAT application seeks that Regal pay the applicant damages for an alleged breach of contract resulting from Regal's failure to meet its promise to allocate shortfall shares to the applicant before delivering any to the underwriter.
62. Regal submitted it is inappropriate for the Panel to conduct proceedings while the NCAT application remains on foot. It submitted there was a risk that the applicant would be compensated twice for any alleged loss.
63. The applicant submitted that the NCAT application and the application to the Panel do not make the same claim, as the former seeks damages for a breach of contract whereas the latter seeks to have remedied unacceptable control effects. The applicant nonetheless offered an undertaking to the Panel to address this concern.
64. As a general principle, we consider that we should not decline to consider an application or make orders merely because the applicant may be concurrently pursuing other avenues of relief in connection with the same circumstances, unless there is a clear overlap in the nature of the proceedings (such as a scheme of arrangement where the court has commenced scrutiny of the scheme).

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<sup>18</sup> See *AMP Shopping Centre Trust 02* [2003] ATP 24 at [54]-[59]

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65. The applicant submitted that “*Regal has already raised with NCAT the issue of potential “double recovery”<sup>19</sup>, and as Regal knows, NCAT has expressly acknowledged<sup>20</sup> that if the Panel Application was first resolved and the Applicant benefited from that, that would be taken into account by NCAT in calculation of any damages due to the Applicant for the contractual breach complained of in the NCAT proceedings.*”
66. Having regard to the above, we are satisfied that it is not necessary or appropriate for the Panel to attempt to pre-empt any possible decision by NCAT.

#### Costs

67. The applicant sought an order that Regal pay his costs, in the amount of \$16,350 comprising the applicant’s filing fee and legal costs.<sup>21</sup> He submitted that “*Regal’s case was not of reasonable merit, and its resistance to the application was not businesslike.*”
68. The applicant submitted that he wrote to Regal’s company secretary on 19 September 2016 (three days before the application date) attaching a draft of the Panel application and inviting Regal to seek to resolve the concerns the draft application raised without the need for the application to be filed. He submitted that Regal did not engage with him to address his concerns.
69. Regal submitted that its case had reasonable merit and was presented in a businesslike way, and as such it should not be exposed to a costs order consistent with the Panel’s guidance on costs.<sup>22</sup> Regal submitted that the present circumstances do not fall into one of the categories in which the Panel would usually award costs against a party under its costs policy.<sup>23</sup>
70. The Panel acknowledges that costs orders are the exception not the rule and that a party is entitled to make, or resist, an application once without exposure to a costs order, provided it presents a case of reasonable merit in a businesslike way.<sup>24</sup>
71. We are satisfied that Regal conducted itself in a businesslike way and did not:
- (a) present a case that was not arguable or make unsubstantiated assertions
  - (b) delay or obstruct proceedings, abuse the process or unreasonably refuse to negotiate or
  - (c) waste time on a particular issue or elongate proceedings.
72. In these circumstances, we do not consider that an order for costs should be made against Regal.

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<sup>19</sup> By a letter dated 30 September 2016 from Regal’s lawyers in the NCAT proceedings to NCAT

<sup>20</sup> Orally in hearing held on 4 October 2016, as attended on Regal’s behalf by its lawyers and company secretary

<sup>21</sup> The applicant is a practising solicitor in Australia and was self-represented in these proceedings. The applicant argued that, while he has not expended money on third party legal services, he should be awarded costs for his personal exertions under *London Scottish Benefit Society v Chorley, Crawford and Chester* [1884] 13 QBD 872

<sup>22</sup> Guidance Note 4 *Remedies General* at [28(d)]

<sup>23</sup> Guidance Note 4 *Remedies General* at [29]

<sup>24</sup> Guidance Note 4 *Remedies General* at [28(c)]-[28(d)]

**Extension of time**

73. Section 657C(3) provides that a Panel application can only be made within two months after the circumstances have occurred, or a longer period determined by the Panel.
74. Regal’s notice of meeting, which set out the terms of the Transactions, including the key terms of the entitlement offer and underwriting arrangements, was released to ASX on 30 May 2016.
75. The entitlement offer closed on 4 August 2016. The Board resolved its shortfall allocation policy on 9 August 2016 and issued shares pursuant to the entitlement offer and shortfall offer on 10 August 2016.
76. We invited submissions on whether the application was made out of time and, if so, whether we should grant an extension of time under s657C(3)(b).
77. Regal submitted that *“The aspect of the application concerning the structure of the Offer, concerns matters which were first disclosed in detail in the Notice of Meeting, which was announced on 30 May 2016”* and that this aspect of the application is out of time.
78. ASIC submitted that the application, while referring to the appropriateness of the underwriting arrangements, is concerned with the manner in which the shortfall shares were allocated by Regal. ASIC’s view is that *“unacceptable circumstances did not arise until the allocation of Shortfall Shares by Regal in a manner inconsistent with the impression created by the Notice of Meeting and the Prospectus. According to the application, this allocation occurred on 10 August 2016 and is therefore within 2 months.”* ASIC also submitted that, at worst, the unacceptable circumstances arose on 5 August 2016 when the Regal board determined the allocation of shortfall shares.
79. The applicant submitted the relevant circumstances arose on 23 August 2016, when he received a letter from Regal notifying him of the scale back, or, if the circumstances arose upon the scaling taking place, that occurred on or about 9 August 2016.
80. We are inclined to think that the principal circumstances arose on either 10 August 2016 when Regal issued the shares, or a later date when Regal notified shareholders of any scale back (which in the case of the applicant occurred pursuant to a letter dated 17 August 2016).
81. However, to the extent that the circumstances encompass earlier inadequate disclosure on or after 30 May 2016, we think there is a clear basis for extending time, having weighed the relevant factors including the public interest.<sup>25</sup> Namely:
  - (a) essential matters supporting the applicant’s case first came to light during the 2 month period preceding the application and
  - (b) the applicant’s application has made credible allegations of clear and serious unacceptable circumstances with ongoing effect.

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<sup>25</sup> See *The President’s Club Limited 02* [2016] ATP 1 at [106]-[160] and *Palmer Leisure Coolum Pty Ltd v Takeovers Panel* [2015] FCA 1498

## Takeovers Panel

### Reasons - Regal Resources Limited [2016] ATP 17

82. It would be undesirable for this matter to go unheard and unremedied merely because the existence of the circumstances has been able to be hidden for more than 2 months.
83. We extend the time under s657C(3)(b) for the making of the application to the date it was made.

**Michelle Jablko**  
**President of the sitting Panel**  
**Decision dated 14 October 2016**  
**Reasons published 27 October 2016**

#### Advisers

Party	Advisers
Ndovu Capital VI B.V.	Herbert Smith Freehills
Regal Resources Limited	Bellanhouse Legal



**Australian Government**

**Takeovers Panel**

## **Annexure A**

# **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT 2001 (CTH) SECTION 201A UNDERTAKING**

### **REGAL RESOURCES LIMITED**

Ndovu Capital VI B.V. (**Ndovu**) undertakes to the Panel that it and each of its associates will not dispose of, transfer, charge or otherwise deal with 244,051,820 shares of Regal Resources Limited (**Regal**), being the number of shares issued to Ndovu in connection with the underwriting agreement between Regal and Ndovu entered as part of Regal's entitlement offer announced on 4 July 2016.

Ndovu agrees to confirm in writing to the Panel when it has satisfied its obligations under this undertaking.

**Signed by M.J. Vroom and H.L Jewitt of Augentius (Netherlands) B.V.**

**With the authority, and on behalf, of**

**Ndovu Capital VI B.V.**

**Dated: 22 September 2016**





**Australian Government**

**Takeovers Panel**

**Annexure B**

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

**REGAL RESOURCES LIMITED**

**CIRCUMSTANCES**

1. Regal Resources Limited (**Regal**) is an ASX listed company (ASX: RER).
2. On 30 June 2016, Regal shareholders approved a series of resolutions, including for the purposes of item 7 of section 611<sup>1</sup> which (among other things) would increase the voting power of Ndovu Capital VI B.V. (**Ndovu**) in Regal from 13.23% to between 54.38% and 68.03% through the issue of Regal shares under a placement, conversion of a convertible loan and underwriting of a proposed entitlement offer (**the Transaction**).<sup>2</sup>
3. The notice of meeting for the Transaction:
  - (a) Referred to Regal shareholders' ability to reduce Ndovu's voting power by participating in the entitlement offer as a reason to vote in favour of the Transaction resolutions, and stated that:

*Shareholders will also be provided with the option for subscribing for Shortfall Shares in excess of their entitlement, on the terms and conditions to be disclosed in the Prospectus. The issue of any Shortfall Shares will be at the discretion of the Directors, in conjunction with Ndovu (in Ndovu's capacity as underwriter).*
  - (b) Described the shortfall, in a summary of material terms of the underwriting agreement as:

*Eligible Shareholders may nominate to subscribe for additional Shares not subscribed for by other eligible Shareholders in the Rights Issue.*

*The Company must calculate the number of Underwritten Shares for which valid applications have not been received by the closing date of the Rights Issue (Shortfall). The Company must notify the Underwriter of the Shortfall within 3 business days of the closing date of the Rights Issue (or such later date as agreed). The Underwriter must apply for the Shortfall within 6 business days of receiving this Shortfall notice from the Company.*

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<sup>1</sup> References are to the *Corporations Act 2001* (Cth)

<sup>2</sup> Shareholders also approved the exercise of options held by Ndovu which could further increase Ndovu's voting power

4. On 4 July 2016, Regal issued a prospectus which stated *“Eligible Shareholders applying for Shortfall Shares in excess of their full Entitlement will have priority under the Shortfall Offer...In the event of oversubscription from these applications they will be scaled back. Any remaining Shortfall Shares will be subscribed for by the Underwriter in satisfaction of its commitment under the Underwriting Agreement.”* The prospectus also indicated that shortfall shares would be issued at the discretion of Regal and there was no guarantee that any shortfall shares would be issued.
5. The entitlement offer closed on 4 August 2016. Regal received applications for 184,166,015 shortfall shares. Of these, Regal issued 118,907,986 shares to applicants. The remaining shares were issued to Ndovu as part of its underwriting commitment.<sup>3</sup>
6. Regal’s treatment of applications for shortfall shares was not consistent with its disclosure in the notice of meeting and prospectus.
7. By reason of Regal’s disclosure and subsequent approach in dealing with applications for shortfall shares:
  - (a) Regal shareholders were not given sufficient information to assess the Transaction and
  - (b) the acquisition of control over voting shares in Regal has not taken place in an efficient, competitive and informed market.
8. It appears to the Panel that the circumstances are unacceptable having regard to:
  - (a) the effect that the Panel is satisfied the circumstances have had on:
    - (i) the control, or potential control, of Regal or
    - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Regal and/or
  - (b) the purposes of Chapter 6 set out in section 602.
9. 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 Regal.

**Bruce Dyer**  
**Counsel**  
**with authority of Michelle Jablko**  
**President of the sitting Panel**  
**Dated 14 October 2016**

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<sup>3</sup> The total shortfall issued to Ndovu as underwriter comprised 244,051,820 shares



**Australian Government**

**Takeovers Panel**

**Annexure C**

**CORPORATIONS ACT  
SECTION 657D  
ORDERS**

**REGAL RESOURCES LIMITED**

The Panel made a declaration of unacceptable circumstances on 14 October 2016.

**THE PANEL ORDERS**

**Orders**

1. Within 20 business days of the date of these orders, Regal must make an offer (in a form approved by the Panel) to Scaled-back Shareholders on material terms to the following effect:
  - (a) each Scaled-back Shareholder is invited to apply for such number of ordinary shares that the shareholder applied for under the Shortfall Offer but was not issued
  - (b) the offer price is \$0.01 per share
  - (c) the offer is open for no less than 21 days from the date the offers are sent to Scaled-back Shareholders
  - (d) Scaled-back Shareholders can apply for some or all of the shares offered to them, by following the instructions given by Regal (acting reasonably) including as to payment of application monies and
  - (e) Regal must apply for quotation of the shares on ASX.
2. Within 5 business days of the close of the offer, Regal must issue shares validly applied for by Scaled-back Shareholders pursuant to the offer. Regal may scale back an application for shares if it considers (acting reasonably) that the issue of shares would result in a contravention of section 606 of the *Corporations Act 2001* (Cth) or the related party provisions of Chapter 2E of the Corporations Act or ASX Listing Rule 10.11.
3. On the date which is one business day after the issue of shares to Scaled-back Shareholders pursuant to the offer:
  - (a) Regal shares held by Ndovu, in such number equivalent to the number of shares issued by Regal to Scaled-back Shareholders pursuant to the offer made under order 1, are cancelled

- (b) Regal must pay to Ndovu \$0.01 for each share cancelled pursuant to order 3(a) and
- (c) Ndovu is released from the undertaking given to the Panel on 22 September 2016.

4. Regal must do all other things reasonably necessary to give effect to these orders.

**Interpretation**

5. In these orders the following terms apply:

<b>Ndovu</b>	Ndovu Capital VI B.V.
<b>Regal</b>	Regal Resources Limited
<b>Scaled-back Shareholder</b>	A Regal shareholder who applied for shares pursuant to the Shortfall Offer but was not issued all of the shares applied for
<b>Shortfall Offer</b>	The meaning given to that term in Regal's prospectus released to ASX on 4 July 2016

**Bruce Dyer**  
**Counsel**  
**with authority of Michelle Jablko**  
**President of the sitting Panel**  
**Dated 14 October 2016**