Australian Government

Takeovers Panel

# Reasons for Decision
# Innate Immunotherapeutics Limited
# [2017] ATP 2

**Catchwords:**

*Association – association hurdle - decline to conduct proceedings – disclosure of association - family relationships – timing of application – standing – collateral purpose*

*Corporations Act 2001 (Cth), sections 9, 12, 602, 606, item 7 of 611, 657C, 657C(2)(d), 657C(3), 658A, 1322, 1325D*

*Palmer Leisure Coolum Pty Ltd v Takeovers Panel* [2015] FCA 1498

*ASIC Regulatory Guide 5, ASX Listing Rule 10.11*

*Merlin Diamonds Limited* [2016] ATP 18, *Sovereign Gold Company Limited* [2016] ATP 12, *Ainsworth Game Technology Limited 01 & 02* [2016] ATP 9, *The President's Club Limited 02* [2016] ATP 1, *Dragon Mining Limited* [2014] ATP 5, *CMI Limited* [2011] ATP 4, *Mount Gibson Iron Limited* [2008] ATP 4, *Austral Coal 03* [2005] ATP 14, *Village Roadshow Limited 02* [2004] ATP 12, *Austar United Communications Limited* [2003] ATP 16

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

## INTRODUCTION

1. The Panel, Bruce Cowley, Rodd Levy (sitting President) and Ron Malek declined to conduct proceedings on an application by Mr James Wheeldon in relation to the affairs of Innate Immunotherapeutics Limited. The Application submitted, based on publicly available information, that there was an available inference that a director and shareholder of Innate may be associated with family members and other shareholders and may have obtained effective control of Innate in contravention of section 606 of the *Corporations Act 2001* (Cth). The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

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|---|---|
| applicant | Mr James Wheeldon |
| Innate | Innate Immunotherapeutics Limited |

## FACTS

3. Innate is an ASX listed biotechnology company (ASX code: IIL).

4. Mr Christopher Collins is a director and the largest shareholder of Innate (holding 17.06%). Mr Collins' 26-year-old daughter, Caitlin Collins, holds 2.34% in Innate. His 24-year-old son, Cameron Collins, also holds 2.34% in Innate.

5. On 10 June 2016, Innate announced it would undertake:

   (a) a placement of 10,009,032 ordinary shares at US$0.18 per share to sophisticated U.S. investors to raise approximately A$2.4 million (**Placement 1**) and

(b) a non-renounceable 1 for 9 rights issue at A$0.25 to raise, if fully subscribed, A$3,025,000.

6. On 29 July 2016, Innate issued a Notice of Annual General Meeting and Explanatory Statement which, among other things, sought various ASX listing rule approvals for Placement 1 and a further placement of 3,542,925 ordinary shares at A$0.34 per share (**Placement 2**). Mr Collins participated in Placement 1 and was issued 4 million shares.

# APPLICATION

### Declaration sought

7. By application dated 14 February 2017, the applicant sought a declaration of unacceptable circumstances. He submitted (among other things) that, based entirely on his assessment of publicly available information:

   (a) there was an available inference that Caitlin and Cameron Collins acquired their shares in Innate using funds provided by Mr Collins, and on his advice or instruction

   (b) a number of the recipients of shares under Placement 1 and Placement 2 have business, financial or political relationships with Mr Collins

   (c) if Mr Collins is not associated with the persons referred to in paragraphs (a) and (b) above, "*the market is not appropriately informed about his relationships with other significant shareholders in the Company, such that the market for shares in the Company is not competitive and informed*".

8. The applicant submitted that the effect of the circumstances was that Mr Collins may have obtained effective control of Innate.

### Interim order sought

9. The applicant sought an interim order to the effect that Mr Collins disclose details of any associations he has with any Innate shareholders and any relevant interest he has in Innate shares held by other shareholders.

### Final orders sought

10. The applicant sought final orders including an order that Mr Collins divest "*such number of shares as would cause him to cease to be in contravention of section 606*".

# DISCUSSION

### Potential association between Mr Collins and other investors

11. Mr Collins, a former businessman, is a member of the U.S. House of Representatives. The applicant submitted that eighteen of the identified recipients of Placement 1 and Placement 2 shares were either employees of, financial donors to or otherwise had close ties to Mr Collins. Many of these investors were said to have businesses based in Buffalo, New York which lies within Mr Collins' congressional district.

12. The applicant submitted that "*it strains credulity to suggest that these intimate allies would not accede to Mr Collins' wishes and instructions should a matter be put to a vote of*

*the shareholders of this company located on the other side of the world"*, particularly given that the investors acquired the discounted shares at his invitation.

13. In our view, the applicant has not provided sufficient material to justify us making further enquiries as to the alleged association between Mr Collins and these investors. In *Dragon Mining Limited*,[1] the Panel stated that, in considering whether to conduct proceedings:

> *...there must be a sufficient body of material demonstrated by the applicant, which together with inferences (for example from partial evidence, patterns of behaviour and a lack of a commercially viable explanation) support the Panel conducting proceedings.*

14. It may be that these investors have business or political ties to Mr Collins, but this falls short of establishing an association.[2] The applicant also presented no material to support his submission that any of the investors would *"accede"* to Mr Collins' instructions should a matter be put to a vote. We view this as supposition.

**Family members**

15. Family relationships are a possible indicator of association, depending on the context. The Panel has acknowledged that the spousal relationship is a strong indicator of association; relationships between siblings less so.[3] The relationship between parent and child may also be a strong indicator of association depending on the age of the child and other circumstances.[4]

16. In this case there is material suggesting that Caitlin and Cameron Collins have some independence from their father. Innate submitted that Mr Collins had informed Innate that:

    (a) *"my adult children own their Innate shares free and clear of any control or involvement by me. They can buy and/or sell at their own discretion"* and

    (b) neither Caitlin or Cameron Collins *"have lived at home for over 6 years"*.

17. The applicant submitted that, to his knowledge, Innate had never told the market that Caitlin and Cameron Collins are the children of Mr Collins. However, the fact that Caitlin and Cameron are the children of Mr Collins was disclosed in Innate's prospectus dated 25 November 2013. It was also disclosed in the Notice of Annual General Meeting convening the meeting on 30 October 2015 at which the placement of ordinary shares to (among others) each of Mr Collins, Caitlin Collins and Cameron Collins was approved for the purposes of ASX Listing Rule 10.11 and all other purposes (**October 2015 Placement**).[5]

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[1] [2014] ATP 5 at [27] (footnote omitted), quoting *Mount Gibson Iron Limited* [2008] ATP 4 at [15]
[2] See, for example, *Sovereign Gold Company Limited* [2016] ATP 12 at [28]
[3] *Ainsworth Game Technology Limited 01 & 02* [2016] ATP 9 at [53]-[57]
[4] See *Merlin Diamonds Limited* [2016] ATP 18 at [47], *Ainsworth Game Technology Limited 01 & 02* [2016] ATP 9 at [57], [105]-[107] and *CMI Limited* [2011] ATP 4
[5] Resolutions 3 and 4 related to placements to Caitlin Collins and Cameron Collins, and were subject to voting exclusion statements to the effect that Mr Collins would not vote on those resolutions.

18. Mr Collins was issued 8 million shares in the October 2015 Placement, and each of Caitlin Collins and Cameron Collins was issued 2 million shares. Following the October 2015 Placement, the collective shareholding of Mr Collins, Caitlin Collins and Cameron Collins in Innate was 22.66%. That collective shareholding was subsequently diluted[6] by Placement 1 and Placement 2 to 21.80%.

19. The October 2015 Placement was not approved for the purposes of item 7 of s611, as would be necessary if, as submitted by the applicant, Mr Collins and his children were associated. Nevertheless, the shareholders of Innate were informed of the relationship between Mr Collins and his children. The fact that the October 2015 Placement was passed on a show of hands, without any call for a poll, may suggest that shareholders did not think it likely Mr Collins and his children would act as associates. Alternatively, it might suggest that shareholders would have passed an item 7 approval had it been put.[7] Either way, given the fact of this disclosure, together with the time that has elapsed since and the relatively small amount by which the collective shareholding of Mr Collins and his children exceeds 20%, we consider that the justification for investigating further the concerns raised by the Application is greatly reduced.

20. Currently there is no control transaction or proposed changes to the board in relation to Innate. The applicant did not point to any specific circumstance in which Mr Collins and his children would have been likely to want or need to act together as associates. Rather, the applicant's concern appeared to be that they are likely to act as associates, should the need arise. If they do so, of course, it will be open to any person affected to make a further application to the Panel at that time.

21. In our view, for the reasons above, the applicant has not provided sufficient material to justify us making further enquiries in relation to Mr Collins and his children. In any event, if Mr Collins and his children were associated as suggested in the Application, any contravention of s606 would have occurred at the time of the October 2015 Placement. Under s657C(3), a Panel application can only be made within two months after the circumstances have occurred, or a longer period determined by the Panel. The applicant did not expressly seek an extension of time under s657C(3)(b).[8] Even if he had, we find it difficult to see how such an extension could be justified in the light of the factors discussed in previous Panel and Court decisions,[9] given:

    (a) all the matters supporting the applicant's concerns have been public since before the October 2015 Placement occurred and

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[6] on 12 September 2016

[7] or that there could be validation under s1322 or s1325D

[8] If there was undisclosed association between Mr Collins and his children, it might be argued that there are continuing contraventions of the substantial holding notice requirements that would not require an extension under s657C(3)(b). However, for the reasons given above we do not consider that the applicant has provided a sufficient body of material to justify us making further enquiries as to this.

[9] See *Austral Coal 03* [2005] ATP 14 at [18] to [21]; *The President's Club Limited 02* [2016] ATP 1 at [106]-[160] and *Palmer Leisure Coolum Pty Ltd v Takeovers Panel* [2015] FCA 1498

(b) the applicant's submissions, for the reasons above, fall well short of credible allegations of clear and serious unacceptable circumstances.

**Standing and collateral purpose**

22. Innate queried whether the applicant was acting as a "proxy" and using the Panel's process to further a political agenda. Innate submitted that the applicant:

    (a) held only 511 shares in Innate, having become a shareholder on 2 February 2017

    (b) sent an email raising his concerns to Innate late the following day, Friday 3 February 2017 and

    (c) briefed a journalist on his accusations on Sunday 5 February 2017.

23. The applicant stated that he had not "briefed" a journalist but had given a copy of his 3 February 2017 correspondence to one on the same day. He denied that he was acting as a "proxy" or that his application was not the result of a bona fide concern regarding governance issues.

24. We consider that Innate's submissions raised serious questions as to:

    (a) whether the applicant had standing under s657C(2)(d) and

    (b) if so, whether we should examine the purpose of the Application in deciding whether to conduct proceedings.

25. In relation to the first issue, s657C(2)(d) gives standing to '*any other person whose interests are affected by the relevant circumstances*.' If a person buys shares in a company (particularly where, as here, the shares have nominal value) and makes an application about existing circumstances where all the relevant facts are in the public domain, that may raise questions as to whether such a person has any '*interests affected*' within the meaning of s657C(2)(d) in the absence of other stated interests in the company or its affairs.

26. In relation to the second issue, even where an applicant has standing, it remains open to the Panel to decline to conduct proceedings. This may be appropriate, for example, if the application is vexatious or frivolous or has been made for a collateral purpose.[10]

27. However, given our conclusions above, we did not need to seek submissions or reach a concluded view on either question.

## DECISION

28. 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).

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[10] See, for example, s658A and the Panel's comments in *Austar United Communications Limited* [2003] ATP 16 at [56] and *Village Roadshow Limited 02* [2004] ATP 12 at [49]-[51].

**Orders**

29. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any interim or final orders.

**Rodd Ashton Levy**
**President of the sitting Panel**
**Decision dated 19 February 2017**
**Reasons given to parties 19 February 2017**
**Reasons published 21 February 2017**

**Advisers**

| Party | Advisers |
|---|---|
| Applicant | NA |
| Innate | NA |