



Australian Government

Takeovers Panel

**Reasons for Decision
Indiana Resources Limited
[2017] ATP 8**

Catchwords:

Association – relevant agreement – understanding – acting in concert – board spill – shareholder requisition – nominee directors – collective action – placement – voting power – relevant interest – substantial holding notices – declaration – undertaking

Corporations Act 2001 (Cth), sections 12, 16(1)(a), 249D, 602, 606, 671B

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
No	Yes	Yes	Yes	No	Yes

INTRODUCTION

1. The Panel, James Dickson (sitting President), Bill Koeck and Sarah Rennie, made a declaration of unacceptable circumstances in relation to the affairs of Indiana Resources Limited. The application concerned a meeting of Indiana requisitioned by BPM Capital Limited to remove and replace two Indiana directors. The Panel considered that BPM was associated with the persons it nominated for appointment to the Indiana board. The Panel declared the circumstances unacceptable and accepted undertakings from BPM to make an announcement in lieu of making orders.

2. In these reasons, the following definitions apply.

Associated Parties	BPM, Montgomery Parties and Ms Heidi Brown
BPM	BPM Capital Limited
Cosmopolitan	Cosmopolitan Minerals Limited
Cosmopolitan Transaction	A proposed transaction between Indiana and Cosmopolitan
Gerise	Gerise Pty Ltd
Indiana	Indiana Resources Limited
Meeting	The general meeting of Indiana convened to be held on 13 April 2017
Montgomery Parties	Mr Brett Montgomery (including Mr Montgomery acting as trustee of the Tollafield Super Fund) and Gerise
Requisition	The s249D notice referred to in Indiana’s ASX announcement on 24 February 2017

FACTS

3. Indiana is an ASX listed minerals exploration company (ASX code: IDA).
4. In late 2016 and early 2017 Indiana had discussions about a proposed transaction with Cosmopolitan in which Mr Brett Montgomery and Ms Heidi Brown would be appointed as directors of Indiana at completion. However, on or about 14 February 2017 Indiana advised Mr Joseph El-Raghy, a representative of Cosmopolitan, that Indiana did not wish to proceed with the transaction.
5. On 20 February 2017, BPM, Mr Jamie Phillip Boyton and Mr Joseph El-Raghy gave a notice of change of interest of substantial holder disclosing voting power of 13.84% in Indiana.
6. On 22 February 2017, BPM gave the Requisition to Indiana setting out proposed resolutions to remove two directors and elect Mr Brett Montgomery and Ms Heidi Brown as directors of Indiana.
7. Between mid-February and 4 April 2017, numerous emails concerning Indiana were exchanged between two or more of Ms Heidi Brown, Mr Brett Montgomery, Mr Joseph El-Raghy and a BPM employee, including:
 - (a) An email from Mr Brett Montgomery to Ms Heidi Brown on 28 February 2017 providing draft statements intended to form part of a letter from BPM to Indiana shareholders explaining the reasons for the Requisition.
 - (b) An email from Ms Heidi Brown on 3 March 2017, copied to Mr Brett Montgomery, attaching “Brett’s changes” to a draft letter from BPM to Indiana shareholders explaining the reasons for the Requisition.
 - (c) An email from Mr Brett Montgomery to Mr Joseph El-Raghy, and copied to Ms Heidi Brown, on 16 March 2017 detailing conversations between Mr Brett Montgomery and Indiana shareholders.
 - (d) Emails exchanged on 30 March 2017 between Mr Brett Montgomery and Mr Joseph El-Raghy, and copied to Ms Heidi Brown, concerning the acquisition of Indiana shares by Ms Heidi Brown and outstanding orders “in screen”.
 - (e) Emails exchanged in early April 2017 between Ms Heidi Brown and a BPM employee regarding BPM’s voting confirmation appointing Mr Brett Montgomery as BPM’s proxy.
 - (f) An email from Ms Heidi Brown to Mr Brett Montgomery on 2 April 2017 attaching a draft notice of becoming a substantial holder in Indiana in relation to Mr Brett Montgomery.
 - (g) An email from Mr Brett Montgomery to Ms Heidi Brown on 4 April 2017 forwarding voting confirmation of Gerise appointing Ms Heidi Brown as Gerise’s proxy. Mr Brett Montgomery is the sole shareholder and director of Gerise.
8. Between 9 March 2017 and 27 March 2017, BPM acquired approximately an additional 2.48% of Indiana shares. These acquisitions were disclosed in change of substantial holder notices given by BPM, Mr Jamie Phillip Boyton and Mr

Joseph El-Raghy on 15 March 2017 and 28 March 2017 which indicated that their voting power had increased to 18.27%.

9. On 3 April 2017, Mr Brett Montgomery gave a notice of the Montgomery Parties becoming a substantial holder in Indiana, disclosing voting power of 5.275% as a result of acquisitions made between 14 March 2017 and 31 March 2017.
10. On 6 April 2017, BPM, Mr Jamie Phillip Boyton, Mr Joseph El-Raghy and Ms Heidi Brown gave a notice of change of interest of substantial holder disclosing that Ms Heidi Brown was an associate of BPM in relation to Indiana under s12(2)(c) and disclosing combined voting power in Indiana (including 71,575 shares purchased by Ms Brown on 30 March 2017) of 18.43%. The combined voting power of the Associated Parties in Indiana at that time was approximately 23.71%.
11. On 11 April 2017, Indiana announced a placement of Indiana shares which had the effect of reducing the combined voting power of the Associated Parties in Indiana below 20%.

APPLICATION

Declaration sought

12. By application dated 4 April 2017 and received on 5 April 2017, Indiana sought a declaration of unacceptable circumstances. Indiana submitted that BPM, Mr Montgomery and Ms Brown were associates and had contravened s606 and s671B.

Interim orders sought

13. Indiana sought interim orders restraining Mr Montgomery and Ms Brown from voting or disposing of their Indiana shares.
14. In view of the proximity of the Meeting, Mr Montgomery offered an undertaking to the effect that no more than 20% of Indiana shares would be voted at the Meeting by Mr Montgomery (except as a proxy for unrelated third party Indiana shareholders), BPM and their respective associates. Having accepted this undertaking (Annexure A), we did not consider it necessary to make interim orders.

Final orders sought

15. Indiana sought final orders:
 - (a) vesting the Indiana shares acquired by the Montgomery Parties and Ms Heidi Brown in the Commonwealth for sale and
 - (b) requiring corrective disclosure by the Associated Parties of their association in relation to the affairs of Indiana.

DISCUSSION

16. In response to the Application, Ms Brown indicated that she considered herself to be an associate of Mr Joseph El-Raghy and voluntarily gave, with BPM and others, the corrected substantial holder notice referred to in paragraph 10.

Effect of nomination for appointment to the board

17. Indiana submitted that Mr Montgomery’s acceptance of BPM’s invitation to be nominated for appointment to the board at the Meeting it had requisitioned gave rise to irrefutable association under s12(2)(b).
18. BPM and Mr Montgomery each submitted that it was intended that, if elected, Mr Montgomery would be an independent director of Indiana, not a nominee of BPM, and therefore it did not follow that they were associates.
19. We accepted that a person who agrees to stand for election as a director is not necessarily an associate of a shareholder who nominates that person. However, that does not mean that association can never arise in such circumstances,¹ or that parties can ignore circumstances giving rise to association between one another, simply because one party has been nominated as a director by the other.
20. We considered that a number of factors distinguished Mr Montgomery’s actions from what might ordinarily be expected where a person merely agrees to be nominated for election as an independent director, including:
 - (a) Mr Montgomery’s extensive involvement in the Cosmopolitan Transaction.² Before the Cosmopolitan Transaction failed, Mr Montgomery was described as one of Cosmopolitan’s “Key Personnel”. The failure of the Cosmopolitan Transaction provided the immediate context for the Requisition and was referenced in an early draft of text (apparently prepared by Mr Montgomery) for a letter to Indiana shareholders to explain the reasons for BPM requisitioning the Meeting. We considered that Mr Montgomery’s role effectively evolved, with him becoming a member of BPM’s key personnel in relation to the Meeting.
 - (b) Mr Montgomery’s purchase of a substantial holding in Indiana before the Meeting, and his confirmation to Ms Brown that he had voted the shares in favour of the resolutions to be put to the Meeting.
 - (c) Mr Montgomery’s extensive correspondence with Ms Brown, Mr Joseph El-Raghy and others on a range of matters bearing on the success of the Requisition.
21. We considered that these factors, supported by the email correspondence detailed in paragraph 7 (among other correspondence), established that Mr Brett Montgomery, BPM and Ms Heidi Brown had an understanding and were acting or proposing to act in concert in relation to the Requisition and the Meeting from at least mid-February until at least 4 April 2017.

Indiana’s placement and BPM’s withdrawal of Requisition

22. On 11 April 2017, Indiana announced a placement of Indiana shares to a new cornerstone investor. This had the effect of reducing the combined voting power of the Associated Parties in Indiana to below 20%. On 5 April 2017 Indiana

¹ In some cases it may be arguable that s16(1)(a) could apply, preventing association arising, although its effect would appear limited, at best.

² This was evident from numerous documents relating to the Cosmopolitan Transaction which were provided at the Panel’s request.

announced the appointment of a new Chair of the board of Indiana. Having regard to this, on 12 April 2017 BPM advised Indiana that it was withdrawing its Requisition, and Mr Montgomery and Ms Brown withdrew their respective consents to act as directors of Indiana.

23. In the light of these developments, we sought submissions from the parties as to how to proceed. Indiana, the applicant, indicated that given the withdrawals it made no further submissions and we should proceed as we saw fit.
24. We were, nevertheless, minded to make a declaration of unacceptable circumstances and invited further submissions on a proposed declaration and proposed orders. BPM indicated in response that it would not make submissions but was prepared to offer an undertaking to the same effect as the proposed orders.
25. Where there is a contravention of the 20% prohibition, as here, we would ordinarily be likely to vest shares acquired in breach in ASIC for sale. The contravention in this case was serious. However, the object of the Panel's orders in such circumstances is to protect the interests of those affected by the unacceptable circumstances. In this case, the effects of the contravention had been effectively reversed by Indiana's placement. Importantly also, neither the applicant nor anyone else was actively seeking any orders. In these highly unusual circumstances, we considered that it was sufficient to make a declaration and accept an undertaking from BPM in lieu of making orders.

DECISION

Declaration

26. It appears to us that the circumstances are unacceptable:
 - (a) having regard to the effect that we are satisfied they have had on:
 - (i) the control, or potential control, of Indiana or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Indiana
 - (b) in the alternative, having regard to the purposes of Chapter 6 set out in s602 and
 - (c) in the further alternative, because they constituted a contravention of a provision of Chapter 6 or of Chapter 6C of the Act.
27. 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).

Undertaking

28. BPM offered an undertaking to the effect that it would make an announcement to Indiana's ASX platform, in a form approved by the Panel:
 - (a) describing the circumstances relating to the Associated Parties that the Panel found gave rise to association in relation to Indiana and

- (b) if BPM and Mr Montgomery were of the view that they are no longer associated in relation to Indiana, providing a clear statement to that effect indicating and when and how their association concluded.
29. We considered it important that the undertaking required a clear statement to the market as to when and how the association ended. Ordinarily, we would also require corrected substantial holder notices (even though Chapter 6C itself already requires that). However, given the exceptional circumstances discussed in paragraphs 22 to 25 we considered that it was not appropriate to make orders and accepted BPM’s undertaking (Annexure C) instead.

James Dickson
President of the sitting Panel
Decision dated 3 May 2017
Reasons given to parties 30 May 2017
Reasons published 1 June 2017

Advisers

Party	Advisers
Indiana	Dentons Australia
BPM	DLA Piper
Mr Brett Montgomery	Steinepreis Paganin
Ms Heidi Brown	Bennett + Co



Australian Government

Takeovers Panel

Annexure A

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

INDIANA RESOURCES LIMITED

Mr Brett Montgomery undertakes to the Panel that he:

- (a) will not vote or cause to be voted and
- (b) will procure that Gerise does not vote or cause to be voted

an aggregate number of Indiana shares at the Meeting that exceeds the Permitted Number.

Mr Montgomery agrees to confirm in writing to the Panel when he has satisfied his obligations under this undertaking.

In these undertakings the following terms have the corresponding meaning:

Gerise	Gerise Pty Ltd
Indiana	Indiana Resources Limited
Meeting	the general meeting of Indiana convened to be held on 13 April 2017
Permitted Number	20% of the number of Indiana shares eligible to vote at the Meeting less the aggregate number of shares in which any of BPM Capital Limited, Mr Jamie Phillip Boyton, Mr Joseph El-Raghy or Ms Heidi Brown has a relevant interest

Signed by Mr Brett Montgomery

Dated: 12 April 2017



Australian Government

Takeovers Panel

Annexure B

CORPORATIONS ACT

SECTION 657A

DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

INDIANA RESOURCES LIMITED

CIRCUMSTANCES

1. On or about 14 February 2017, the CEO of Indiana Resources Limited (**Indiana**) advised Mr Joseph El-Raghy, a representative of Cosmopolitan Minerals Limited (**Cosmopolitan**), that Indiana did not wish to proceed with a proposed transaction involving the acquisition of assets by Indiana from Cosmopolitan. It had been proposed that Mr Brett Montgomery and Ms Heidi Brown would be appointed as directors of Indiana at completion of the proposed transaction.
2. On 20 February 2017, BPM Capital Limited (**BPM**), Mr Jamie Phillip Boyton and Mr Joseph El-Raghy gave a notice of change of interest of substantial holder disclosing voting power of 13.84% in Indiana.
3. On 22 February 2017, BPM gave notice under s249D³ (**s249D requisition**) to requisition a meeting of Indiana to consider resolutions to remove two directors and elect Mr Brett Montgomery and Ms Heidi Brown as directors of Indiana.
4. Numerous emails concerning Indiana were exchanged between two or more of Ms Heidi Brown, Mr Brett Montgomery, Mr Joseph El-Raghy and a BPM employee between mid-February and 4 April 2017. They included:
 - (a) An email from Mr Brett Montgomery to Ms Heidi Brown on 28 February 2017 providing draft statements intended to form part of a letter from BPM to Indiana shareholders explaining the reasons for the s249D requisition.
 - (b) An email from Ms Heidi Brown on 3 March 2017, copied to Mr Brett Montgomery, attaching "Brett's changes" to a draft letter from BPM to Indiana shareholders explaining the reasons for the s249D requisition.
 - (c) An email from Mr Brett Montgomery to Mr Joseph El-Raghy, and copied to Ms Heidi Brown, on 16 March 2017 detailing conversations between Mr Brett Montgomery and Indiana shareholders.
 - (d) Emails exchanged on 30 March 2017 between Mr Brett Montgomery and Mr Joseph El-Raghy, and copied to Ms Heidi Brown, concerning the acquisition of Indiana shares by Ms Heidi Brown and outstanding orders in screen.

³ References are to the *Corporations Act 2001* (Cth) unless otherwise indicated.

- (e) Emails exchanged in early April 2017 between Ms Heidi Brown and a BPM employee regarding BPM's voting confirmation appointing Mr Brett Montgomery as BPM's proxy.
 - (f) An email from Ms Heidi Brown to Mr Brett Montgomery on 2 April 2017 attaching a draft notice of becoming a substantial holder in Indiana in relation to Mr Brett Montgomery.
 - (g) An email from Mr Brett Montgomery to Ms Heidi Brown on 4 April 2017 forwarding voting confirmation of Gerise Pty Ltd (**Gerise**) appointing Ms Heidi Brown as Gerise's proxy. Mr Brett Montgomery is the sole shareholder and director of Gerise.
5. The Panel considers that the email correspondence detailed in paragraph 4 (among others) establishes that Mr Brett Montgomery, BPM and Ms Heidi Brown had an understanding and were acting or proposing to act in concert in relation to the resolutions notified in the s249D requisition.
 6. On 15 March 2017, BPM, Mr Jamie Phillip Boyton and Mr Joseph El-Raghy gave a notice of change of interest of substantial holder disclosing voting power of 16.83% in Indiana as a result of acquisitions made between 9 March 2017 and 15 March 2017.
 7. On 28 March 2017, BPM, Mr Jamie Phillip Boyton and Mr Joseph El-Raghy gave a notice of change of interest of substantial holder disclosing voting power of 18.27% in Indiana as a result of acquisitions made between 16 March 2017 and 27 March 2017.
 8. On 3 April 2017 Mr Brett Montgomery gave a notice of becoming a substantial holder disclosing voting power of 5.275% in Indiana as a result of acquisitions made between 14 March 2017 and 31 March 2017 by Mr Montgomery, Gerise and Mr Montgomery as trustee of the Tollafield Super Fund.
 9. On 6 April 2017, BPM, Mr Jamie Phillip Boyton, Mr Joseph El-Raghy and Ms Heidi Brown gave a notice of change of interest of substantial holder disclosing voting power of 18.43% in Indiana and disclosing that Ms Heidi Brown is an associate of BPM in relation to Indiana under s12(2)(c).
 10. The Panel considers that from at least 28 February 2017 until at least 4 April 2017 Mr Brett Montgomery, Ms Heidi Brown and BPM had an agreement, arrangement or understanding for the purpose of controlling or influencing the composition of Indiana's board and the conduct of Indiana's affairs and were associated under s12(2)(b). In addition, they were acting in concert in relation to Indiana's affairs and were associated under s12(2)(c).

Contravention of s606

11. As a result of the acquisition of relevant interests in Indiana shares by Mr Brett Montgomery and BPM on or about 27 March 2017, their voting power in Indiana increased above 20%. None of the exceptions in s611 applied and accordingly s606 was contravened.

Contraventions of s671B

12. In contravention of s671B:
- (a) No substantial holder notice has been given disclosing the total combined voting power in Indiana of Mr Brett Montgomery, Ms Heidi Brown and BPM and their association in relation to Indiana.
 - (b) The notices of change of interests of substantial holder given by BPM on 8 March 2017, 15 March 2017 and 28 March 2017 are deficient because, among other things, they do not disclose the association between Mr Brett Montgomery, Ms Heidi Brown and BPM in relation to Indiana.
 - (c) The notice of change of interests of substantial holder given by BPM and Ms Heidi Brown on 6 April 2017 is deficient because, among other things, it does not disclose their association with Mr Brett Montgomery in relation to Indiana.
 - (d) The notice of becoming a substantial holder given by Mr Brett Montgomery on 3 April 2017 is deficient because, among other things, it does not disclose his association with BPM and Ms Heidi Brown in relation to Indiana.

EFFECT

13. It appears to the Panel that:
- (a) the acquisition of control over voting shares in Indiana has not taken place in an efficient, competitive and informed market and
 - (b) the holders of shares in Indiana do not know the identity of persons who have acquired a substantial interest in Indiana.

CONCLUSION

14. It appears to the Panel that the circumstances are unacceptable circumstances:
- (a) having regard to the effect that the Panel is satisfied they have had on:
 - (i) the control, or potential control, of Indiana or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Indiana
 - (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 or constitute a contravention of a provision of Chapter 6 or of Chapter 6C of the Act.
15. 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 Indiana.

Allan Bulman
Director
with authority of James Dickson
President of the sitting Panel
Dated 3 May 2017



Australian Government

Takeovers Panel

Annexure C

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

BPM undertakes to the Panel that it will, within 2 business days of the date the Panel makes a declaration, make an announcement to Indiana's ASX platform, in a form approved by the Panel:

- (a) describing the circumstances relating to BPM, Mr Brett Montgomery and Ms Heidi Brown that the Panel found to give rise to association in relation to Indiana; and
- (b) if BPM and Mr Montgomery are of the view that they are no longer associated with one another in relation to Indiana, providing a clear statement to this effect and when and how their association concluded.

In these undertakings the following terms have the corresponding meaning:

BPM	BPM Capital Limited
Indiana	Indiana Resources Limited

**Signed by BPM Capital Limited
Dated 3 May 2017**