



**Australian Government**

**Takeovers Panel**

**Reasons for Decision**

**Lepidico Limited 02**

**[2017] ATP 13**

**Catchwords:**

*Decline to conduct proceedings – disclosure – bidder's statement – target's statement – application not timely*

*Corporations Act 2001 (Cth), sections 602, 657A, 657C(3)*

*Lepidico Limited [2017] ATP 11; Warrnambool Cheese and Butter Factory Company Holdings Limited 02 [2016] ATP 11; Aspen Parks Property Fund 01 and 02 [2014] ATP 19; Austral Coal Limited 03 [2005] ATP 14; Queensland North Australia Pty Ltd v Takeovers Panel [2014] FCA 59; Palmer Leisure Coolum Pty Ltd v Takeovers Panel [2015] FCA 1498*

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

**INTRODUCTION**

1. The Panel, Alex Cartel, Elizabeth Hallett (sitting President) and Rebecca Maslen-Stannage, declined to conduct proceedings on an application by Lepidico Limited in relation to its affairs. Lepidico was the subject of an off-market takeover bid by Lithium Australia NL. The application concerned statements made by Lithium in announcements relating to Lithium's proprietary Sileach™ process, which Lepidico submitted were misleading. Given the timing and basis of the application, the Panel concluded there was no reasonable prospect that it would declare the circumstances unacceptable.
2. In these reasons, the following definitions apply.

<b>Bid</b>	Lithium's off-market bid for Lepidico offering one fully paid Lithium share for every 13.25 fully paid Lepidico shares
<b>Lepidico</b>	Lepidico Limited
<b>Lithium</b>	Lithium Australia NL
<b>Sileach</b>	Lithium's proprietary Sileach™ process

**FACTS**

3. Both Lepidico (ASX code: LPD) and Lithium (ASX code: LIT) are ASX-listed lithium explorers and developers.
4. On 6 February 2017, Lithium announced the Bid. Lithium also announced that it had entered into agreements with six Lepidico shareholders representing 17.87% of Lepidico who had agreed to accept the Bid in the absence of a higher offer.
5. On 1 March 2017, Lepidico raised concerns regarding Sileach in a letter to Lepidico shareholders and in an ASX announcement. Lepidico said it had "considerable

*concern*” that Lithium’s process utilised fluoride-based reagents and stated that Lithium needed to provide further clarity on Sileach and Lithium’s commercialisation plans.

6. On 10 March 2017, a further letter and announcement by Lepidico stated that its concerns “*that Sileach™ uses reagents containing fluorine have been confirmed*”. Lepidico requested further information about Lithium’s business model, the reagents used by Sileach, and the risks associated with the process.
7. On 13 March 2017, Lithium made an announcement in response to the letter and announcement stating “*Lithium Australia advises that Sileach™ does not use hydrofluoric acid*” (original emphasis).
8. On 16 March 2017, the Bid opened.
9. On 28 March 2017, Lepidico released its target’s statement. The directors recommended that Lepidico’s shareholders reject the Bid. Lepidico engaged an independent expert, who opined that the Bid was “*neither fair nor reasonable*”.
10. On 2 May 2017, Lepidico released its third supplementary target’s statement, which enclosed an independent report from a geochemist. Lepidico indicated that it understood from the independent report that, contrary to Lithium’s public statements, the generation of hydrofluoric acid was an integral part of Sileach.
11. On 11 May 2017, Lithium lodged a third supplementary bidder’s statement. The statement said, amongst other things, that “*Sileach™ does not use hydrofluoric acid as a reagent*” and included a letter from ANSTO Minerals<sup>1</sup> and an independent expert confirming the safety of Sileach.
12. Following the independent report included in Lepidico’s third supplementary target’s statement, Lepidico commissioned a further independent report from the same geochemist. A draft of that further report, dated 6 June 2017, accompanied Lepidico’s application. Lithium was not provided with a copy of this draft report prior to the close of its Bid, and the report has not been finalised and released to Lepidico shareholders.
13. On 19 June 2017, Lithium’s Bid closed. Excluding shares the subject of pre-bid acceptance agreements, Lithium obtained a relevant interest in only 0.55% of Lepidico shares during the Bid. As a result of the acceptances it received, and an entitlement offer announced by Lepidico during the Bid, Lithium currently holds a relevant interest in 15.82% of Lepidico shares.<sup>2</sup>

## APPLICATION

### Declaration sought

14. By application dated 30 June 2017, Lepidico sought a declaration of unacceptable circumstances. Lepidico submitted that Lithium had made misleading statements to the market in relation to the Bid regarding Sileach.

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<sup>1</sup> a division of the Australian Nuclear Science and Technology Organisation

<sup>2</sup> ASX Announcement 28/6/17

**Final orders sought**

15. Lepidico sought final orders that:
- (a) Lithium provide withdrawal rights to all Lepidico shareholders who accepted the Bid between 16 March 2017 and midnight (AWST) on 19 June 2017 (other than those Lepidico shareholders to whom withdrawal rights have already been provided)<sup>3</sup> and
  - (b) Lithium provide all parties to the pre-bid acceptance agreements the opportunity to withdraw their acceptance of the Bid.

**DISCUSSION**

16. It is apparent from Lepidico’s disclosures during the Bid that it considered that the involvement of hydrofluoric acid in Sileach posed a risk for its commercialisation. The difference of opinion between experts engaged by Lepidico and Lithium on this has been in the market for most, if not all, of the Bid period.
17. Central to Lepidico’s application is that the draft report dated 6 June 2017 resolves, or at least materially adds to the state of knowledge regarding, this issue.
18. However, the report remains a draft. It has not been finalised and provided to Lepidico’s shareholders. We cannot be satisfied that the final report would remain the same. Even if it did, as some of the language is quite general (eg, “*I am not convinced ...*”, or “*statements ... lack depth to really convince...*”) we cannot be satisfied that the report will necessarily add to the state of knowledge for shareholders.
19. Lepidico’s application does not explain why the report remains a draft, or why it has not been finalised and provided to Lepidico shareholders.
20. The Bid has now closed. It closed on 19 June 2017.
21. If the draft report was as significant as the application suggests, we would have expected Lepidico to act promptly to have it finalised and provided to its shareholders, or if that was not possible, to explain why and apply to the Panel before the Bid closed.<sup>4</sup>
22. To the extent that the application complained of misleading statements made to the persons who entered into pre-bid acceptance agreements with Lithium, it is not clear that there was a lack of information available to them, and in any event the application relates to circumstances that occurred more than two months before it was made and requires an extension under s657C(3)(b).<sup>5</sup>

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<sup>3</sup> Lithium had already offered withdrawal rights to all Lepidico shareholders who accepted the Bid between 7 April 2017 and 15 June 2017 other than the shareholders who entered into pre-bid acceptance agreements: see ASX announcement 22 June 2017 and *Lepidico Limited* [2017] ATP 11

<sup>4</sup> See *Aspen Parks Property Fund 01 and 02* [2014] ATP 19 at [29]

<sup>5</sup> Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth) and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

23. Lepidico did not seek an extension and nothing in the application suggests a good reason for granting one.<sup>6</sup>
24. Moreover, Lepidico told its shareholders that its concerns had been “confirmed” on 10 March 2017, which suggests that essential matters supporting its case were known to it then. Despite that, Lepidico waited over two and a half months to make the application.
25. The lateness of the application, combined with the lack of any explanation for it, and the fact that the Bid is closed added to our reasons for not conducting proceedings.<sup>7</sup>

## DECISION

26. 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

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

**Elizabeth Hallett**

**President of the sitting Panel**

**Decision dated 5 July 2017**

**Reasons given to parties 21 July 2017**

**Reasons published 27 July 2017**

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<sup>6</sup> See eg *Austral Coal Limited 03* [2005] ATP 14 at [18]-[20], *Queensland North Australia Pty Ltd v Takeovers Panel* [2014] FCA 591 at [48] and *Palmer Leisure Coolum Pty Ltd v Takeovers Panel* [2015] FCA 1498

<sup>7</sup> *Warrnambool Cheese and Butter Factory Company Holdings Limited 02* [2016] ATP 11

## Takeovers Panel

Reasons - Lepidico Limited 02  
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### Advisers

Party	Advisers
Lepidico	Steinepreis Paganin
Lithium	Bennett + Co