



Australian Government

Takeovers Panel

**Reasons for Decision
Bulletproof Group Limited
[2018] ATP 3**

Catchwords:

Disclosure – target’s statement – independent expert’s report – efficient, competitive and informed market – decline to make a declaration

Corporations Act 2001 (Cth), section 638

Guidance Note 19: Insider Participation in Control Transactions

Mungana Goldmines Limited 01R [2015] ATP 7; Tranzact Financial Services Limited [2014] ATP 3; Minemakers Limited 02R [2012] ATP 16

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

INTRODUCTION

1. The Panel, Shirley In’t Veld, Jeremy Leibler and Karen Phin (sitting President), declined to make a declaration of unacceptable circumstances in relation to the affairs of Bulletproof Group Limited. The application concerned Bulletproof Group Limited’s disclosure in its target’s statement (and accompanying independent expert report) in relation to Macquarie Cloud Services Pty Ltd’s bid for Bulletproof Group Limited. The Panel was not satisfied that the circumstances were unacceptable.

2. In these reasons, the following definitions apply.

BDO	BDO Corporate Finance (East Coast) Pty Ltd
Bulletproof	Bulletproof Group Limited
Call Option Deed	Call option deed dated 19 November 2017 entered into between the Woodward Entity and Macquarie
IER	The independent expert’s report prepared by BDO included in the Target’s Statement
Macquarie	Macquarie Cloud Services Pty Ltd
Woodward Entity	Woodward Family Company Pty Limited as trustee for the Woodward Family Trust
Target’s Statement	Bulletproof’s target’s statement dated 22 December 2017

FACTS

3. Bulletproof is an ASX listed company (ASX code: BPF).

4. On 19 November 2017, Macquarie entered into the Call Option Deed with the Woodward Entity (an entity controlled by Mr Anthony Woodward). Mr Woodward is the CEO, executive director and a co-founder of Bulletproof.

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5. Pursuant to the Call Option Deed, the Woodward Entity granted Macquarie a call option over the 26,188,349 shares (approximately 16.49% of Bulletproof shares as at the date of the Call Option Deed) owned by the Woodward Entity (with a purchase price of A\$0.11 per share). The option could be exercised by Macquarie if (relevantly) Macquarie made a takeover offer for Bulletproof and the offer was freed of all conditions. If the option was exercised, the Woodward Entity was required to accept the takeover offer in respect of all 26,188,349 shares owned by the Woodward Entity.
6. On 21 November 2017, Macquarie announced its intention to make a conditional off-market takeover bid to acquire all of the ordinary shares in Bulletproof for A\$0.11 cash per share.
7. On 7 December 2017, Macquarie dispatched its bidder's statement for its conditional takeover bid.
8. On 22 December 2017, Bulletproof issued its Target's Statement, which recommended that shareholders reject the offer and annexed the IER concluding that the offer was neither fair nor reasonable to shareholders. The Target's Statement also advised that shareholders with aggregate relevant interests in 19.86% of Bulletproof shares had advised that their current intention was to reject Macquarie's offer subject to receipt of a superior proposal.

APPLICATION

Declaration sought

9. By application dated 19 January 2018, Macquarie sought a declaration of unacceptable circumstances. Macquarie submitted that the Target's Statement and the IER were deficient and were misleading and deceptive.
10. Macquarie submitted that the effect of the circumstances was that the potential acquisition of control over voting shares in Bulletproof was not taking place, or would not take place, in an efficient and informed market and that Bulletproof shareholders were not being given enough information to enable them to assess the merits of Macquarie's takeover offer.

Final orders sought

11. Macquarie sought final orders to the effect that Bulletproof prepare and lodge a replacement or supplementary target's statement, and commission a replacement or supplementary independent expert's report, addressing the deficiencies of the Target's Statement and IER (respectively).

DISCUSSION

Mr Woodward

12. Macquarie submitted in its application that there were deficiencies and misleading and deceptive statements in the Target's Statement arising from:
 - (a) Mr Woodward not being involved in assessing the offer, preparing the Target's Statement or liaising with the independent expert and

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- (b) Mr Woodward’s position not having been fully disclosed, or a more fulsome statement regarding the reasons why the Woodward Entity entered into the Call Option Deed included, in the Target’s Statement.
13. Macquarie provided to the Panel, as an annexure to its application, a draft statement by Mr Woodward discussing the background for the Woodward Entity entering into the Call Option Deed (**Draft Woodward Statement**). The Draft Woodward Statement set out factors taken into account in making the decision to enter into the Call Option Deed, including specific problems the business was facing under the headings “business and market fundamentals” and “current financial position and capital needs”.
 14. Macquarie submitted that the Woodward Entity’s reasons for entering into the Call Option Deed were, by their nature, information that would be reasonably required by shareholders and their professional advisors to make an informed assessment whether to accept the offer under a bid. Such reasons in our view would not necessarily form material information that is required to be disclosed in a target’s statement – a shareholder may have different commercial objectives and different reasons for supporting a bid, compared to the basis for a recommendation by a director, even if the shareholder and director are related entities.
 15. However, we were concerned that Mr Woodward believed the Target’s Statement did not include all information that holders of Bulletproof shares and their professional advisers would reasonably require to make an informed assessment whether to accept Macquarie’s takeover bid. We therefore decided to conduct proceedings¹ in relation to whether there was information known to Mr Woodward that should be included in a supplementary target’s statement. These concerns were heightened by the fact that Mr Woodward was the only executive director on the board of Bulletproof and the other two directors had been appointed only relatively recently.²
 16. Bulletproof and Mr Woodward submitted that Bulletproof had formed an independent board committee to consider Macquarie’s takeover bid, excluding Mr Woodward from this committee and its deliberations. While it is not clear from the material provided to us that Mr Woodward was a “participating insider”³ for the purposes of Guidance Note 19: *Insider Participation in Control Transactions*, we consider that it was open to Bulletproof to form such a committee to assuage any perception of a conflict of interest or lack of independence on Mr Woodward’s part (arising from the Woodward Entity having entered into the Call Option Deed with Macquarie).
 17. Where a target director is excluded from the independent board committee, the target’s protocols should still seek to ensure that the target’s statement includes all

¹ After considering responses to preliminary questions

² One director was appointed on 24 August 2016 and the other director was appointed on 1 September 2017

³ A participating insider includes a director of a target who is given an understanding by, or enter or propose to enter into an agreement with, a potential bidder that they will gain or benefit from the bidder making a successful bid – see Guidance Note 19 at [10]-[13]

material information required under s638⁴ that is known to that director. Guidance Note 19 does not suggest otherwise.⁵ This is particularly important in the case of an executive director. Ordinarily, if the only reason a director has been excluded from the independent board committee is the existence of a properly disclosed agreement for the sale of that director's shares to the bidder, we see no reason why that director should not have a sufficient opportunity to review a draft of the target's statement (redacted to the extent necessary).

18. However, in this matter, Mr Woodward ultimately accepted that the process undertaken to prepare the Target's Statement, and the resultant disclosure, was adequate. We were satisfied that the factual information included under the headings "business and market fundamentals" and "current financial position and capital needs" in the Draft Woodward Statement had been addressed in some form in the Target's Statement, although we note that the information in the Target's Statement was not given the same emphasis or explanation as it was in the Draft Woodward Statement. If Mr Woodward had instead maintained the information in the Draft Woodward Statement was not adequately addressed in the Target's Statement, our decision may have been different.

Independent expert's report

19. Macquarie also submitted in its application that there were deficiencies in the IER including because:
- (a) the capitalisation multiples had been overstated because "*the implied enterprise values upon which the reference transaction multiples are based include "at-risk" earn out amounts*", and earnings had been overstated by "*making inadequate allowance for Bulletproof's higher capital expenditure requirements than the referenced listed companies in the assessment of earnings*", leading to an overstatement of the value of Bulletproof shares when assessing whether the offer was "fair" and
 - (b) in considering whether the offer was "reasonable", the IER inappropriately referenced BDO's view that the offer is not "fair" and cited other "disadvantages" that are either trivial or speculative.
20. In support of these submissions Macquarie provided to the Panel a confidential report addressed to Macquarie setting out an independent opinion as to the deficiencies of the IER.
21. Bulletproof made preliminary submissions that it considered the alleged deficiencies to be either immaterial, or matters on which experts may reasonably disagree, and thus not to give rise to unacceptable circumstances.⁶
22. In *Mungana Goldmines Limited 01R* [2015] ATP 7, the Panel considered its role in relation to the correctness of an independent expert's report and noted the high threshold set for the Panel to question the correctness of an expert report.⁷

⁴ Unless otherwise specified, all statutory references are to the *Corporations Act 2001* (Cth) (as modified by ASIC) and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter

⁵ Note in particular [29] and the words in brackets in [18(b)]

⁶ The independent expert became a party to the proceedings, however did not make any submissions or otherwise play an active role in the proceedings

23. We considered that there might be merit in Macquarie’s argument that the IER overstated capitalisation multiples by including transactions multiples that included “at-risk” earn out amounts (noting that we did not have the benefit of a response on this issue from BDO). However we were satisfied that this, and the other matters raised by Macquarie in relation to the IER, were not likely to go beyond matters of judgement in respect of which experts might reasonably disagree. Given that, and noting that it was open to Macquarie to issue a supplementary bidder’s statement setting out its critique of the IER,⁸ we decided not to conduct proceedings in relation to this aspect of the application.

Other issues

24. Macquarie also submitted that the Target’s Statement contained (i) inadequate and selective financial disclosure and (ii) a number of statements regarding the reasons for rejecting Macquarie’s bid, which were “*emotive, misleading and unbalanced in several respects*”. We did not consider that there was any reasonable prospect that we would make a declaration of unacceptable circumstances in relation to these issues and therefore we decided not to conduct proceedings in relation to these issues.

DECISION

25. For the reasons above, we declined to make a declaration of unacceptable circumstances. We consider that it is not against the public interest to decline to make a declaration and we had regard to the matters in s657A(3).

Orders

26. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

Karen Phin

President of the sitting Panel

Decision dated 8 February 2018

Reasons given to parties 21 February 2018

Reasons published 22 February 2018

⁷ At [50], citing *Minemakers Limited* 02R [2012] ATP 16 at [10]-[11]. See also *Tranzact Financial Services Limited* [2014] ATP 3 at [29]

⁸ On 14 February 2018, Macquarie issued a supplementary bidder’s statement commenting on the Target’s Statement and IER

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Advisers

Party	Advisers
Macquarie Cloud Services Pty Ltd	PricewaterhouseCoopers J.B. North & Co Pty Ltd
Bulletproof Group Limited	Allens Linklaters TMT Partners
BDO Corporate Finance (East Coast) Pty Ltd	Stephen Newman, General Counsel
Mr Anthony Woodward	McCabes Lawyers