



Australian Government

Takeovers Panel

**Reasons for Decision
Finders Resources Limited 02
[2018] ATP 9**

Catchwords:

Declaration of unacceptable circumstances – orders – truth in takeovers – intention statements by substantial holders – rejection statements – aggregation of intention statements – departure from intention statements – efficient, competitive and informed market – extension of time to make an application

Corporations Act 2001 (Cth), sections 602, 611, 657A, 657C(3), 657D, 662A, 1041H

Cemex Australia Pty Ltd v Takeovers Panel [2009] FCAFC 78, Glencore International AG v Takeovers Panel [2006] FCA 274, Glencore International AG & Anor v Takeovers Panel & Ors [2005] FCA 1290, Australian Securities and Investments Commission v Yandal Gold Pty Ltd (1999) 32 ACSR 317, Gjergja & Ors v Cooper & Ors (1986) 10 ACLR 577

ASIC Regulatory Guide 25 – Takeovers: false and misleading statements, Guidance Note 4 – Remedies General, Guidance Note 23 – Shareholder intention statements

Finders Resources Limited 01 [2018] ATP 6, Molopo Energy Limited 01 & 02 [2017] ATP 10, Gulf Alumina Limited [2016] ATP 4, The President's Club Limited 02 [2016] ATP 1, Bullabulling Gold Limited [2014] ATP 8, Ludowici Limited [2012] ATP 3, Rinker Group Limited 02R [2007] ATP 19, Rinker Group Limited 02 [2007] ATP 17, Summit Resources Limited [2007] ATP 9, BreakFree Limited 04R [2003] ATP 42, BreakFree Limited 03 and 04 [2003] ATP 38 & 39, Taipan Resources NL 06 [2000] ATP 15

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

INTRODUCTION

1. The Panel, Yasmin Allen, Stephanie Charles and Karen Evans-Cullen (sitting President), made a declaration of unacceptable circumstances in relation to the affairs of Finders Resources Limited. Finders was subject to an off market takeover bid by Eastern Field Developments Limited. The application concerned Finders making a statement that Taurus Funds Management Pty Ltd (a manager of two vehicles who, together, hold a substantial holding in Finders) would not accept the bid and aggregating Taurus’s statement with rejection statements made by two of the independent directors of Finders and other Finders shareholders. Subsequently Taurus and the two independent directors accepted the bid. The Panel declared the circumstances involving Taurus’s acceptance of the bid and Finders authorising the solicitation of other rejection statements unacceptable. The Panel made orders including cancelling Taurus’s acceptance of the bid and providing withdrawal rights for Finders shareholders who accepted the bid on or after 20 March 2018.

2. In these reasons, the following definitions apply.

- Eastern Field** Eastern Field Developments Limited
- Euroz** Euroz Securities Limited
- Finders** Finders Resources Limited

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Independent Directors	Messrs Gary Comb, Barry Cahill and Gordon Galt
RG 25	ASIC Regulatory Guide 25 – Takeovers: false and misleading statements
Takeover Bid	Eastern Field’s off market takeover offer to acquire all the ordinary shares in Finders at \$0.23 per share
Taurus	Taurus Funds Management Pty Ltd

FACTS

- Finders is an ASX listed company (ASX code: FND). Its principal activity is the exploration, development and mining of copper and other minerals in Indonesia.
- On 23 October 2017, Eastern Field lodged a bidder’s statement in relation to the Takeover Bid. The Takeover Bid was subject to a number of conditions including a 50% minimum acceptance condition.
- On 5 December 2017, Finders issued its target’s statement, which disclosed that:
 - each of the Independent Directors recommended that Finders shareholders reject the Takeover Bid and
 - Messrs Comb and Cahill, the two independent directors who owned or controlled Finders shares, intended to reject the Takeover Bid.
- Taurus is manager of two vehicles who, together, hold a substantial holding in Finders. Mr Galt, a director of Finders, is a principal of Taurus. On 7 December 2017, Finders made an ASX announcement that contained the following statement:

Finders’ second largest shareholder, Taurus Funds Management, does not intend to accept the Offer

Taurus Funds Management Pty Ltd (“Taurus”) currently manages 87,339,525 Finders shares, being equal to 11.31% of the Finders shares currently on issue, making it the second largest Finders shareholder after the bidder consortium that owns Eastern Field.

Taurus has notified Finders that it does not intend to accept the Offer at the Offer Price of \$0.23 per Finders share in respect of the Finders shares that Taurus owns or controls, on the basis that Taurus considers that the Offer Price does not reflect the fair value of Finders shares.

- On each of 12, 13 and 15 December 2017, Finders released an announcement stating that shareholders representing 33.19%, 37.58% and 38.21% respectively of Finders shares in aggregate had notified Finders that they did not intend to accept the offer at the offer price of \$0.23 per Finders share. In each case, the holding of the two independent directors was included in the aggregated figure, along with the shares managed by Taurus.

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8. On 12 December 2017, after Finders' first announcement referred to in paragraph 7, Eastern Field declared the Takeover Bid free from the 50% minimum acceptance condition.
9. On 14 February 2018, Eastern Field declared the Takeover Bid unconditional. On 8 March 2018, Eastern Field had voting power of 33.76% in Finders. On 12 March 2018, Eastern Field gave notice that it would not increase the consideration offered under the Takeover Bid. On 16 March 2018, Eastern Field had voting power of 48.40% in Finders.
10. On 19 March 2018, Taurus accepted the Takeover Bid for all its shares. As a result of Taurus's acceptance, Eastern Field's voting power in Finders increased over 50% to 60.22%.
11. Also on 19 March 2018, Finders made an ASX announcement advising that:
 - (a) The Independent Directors continued to believe that the Takeover Bid does not reflect fair value for Finders shares.
 - (b) However, Eastern Field had now acquired a relevant interest in more than 60% of Finders shares and therefore had a controlling interest in Finders.
 - (c) *"In light of these developments, the Independent Directors now urge shareholders to quickly consider ACCEPTING the Offer, to avoid the risks of being left as a minority shareholder in Finders when it is controlled by Eastern Field"*.
 - (d) The Independent Directors intended to accept the Takeover Bid for any Finders shares they owned or controlled.
12. On 20 March 2018, Mr Comb accepted the Takeover Bid in relation to 1,566,667 shares and Mr Cahill accepted the Takeover Bid in relation to 450,000 shares.
13. On 21 March 2018, Eastern Field issued its second supplementary bidder's statement, noting Taurus's acceptance of the Takeover Bid and stating that:

Eastern Field considers that the effect of Taurus' statement (that it would not accept the offer at the Offer Price of \$0.23) may be that Taurus is prevented from accepting the Offer for the reasons set out in ASIC's Regulatory Guide 25 (Takeovers: false and misleading statements). Eastern Field has raised this matter with ASIC. This issue may also apply to other acceptances received.
14. On 28 March 2018, Messrs Comb and Cahill accepted the Takeover Bid for their remaining shares.

APPLICATION

Declaration sought

15. By application dated 28 March 2018, ASIC sought a declaration of unacceptable circumstances. ASIC submitted that the following circumstances were unacceptable:
- (a) the departure by Taurus and Messrs Comb and Cahill from their 'last and final statements' and
 - (b) the circumstances in which the intention statements of the other shareholders disclosed in the announcements between 12 and 15 December 2017 were solicited and made.
16. ASIC submitted that the effects of the circumstances included that investors in Finders had potentially suffered losses in connection with trading Finders shares in reliance on the statements and acceptances of Eastern Field's bid had potentially occurred in circumstances in which they would not have if the departure from the 'last and final statements' had not happened.

Final orders sought

17. ASIC did not seek any interim orders.¹ It sought final orders including that:
- (a) the acceptances of Taurus and Messrs Comb and Cahill be cancelled
 - (b) withdrawal rights be offered to Finders shareholders in respect of whom an acceptance was received by Eastern Field on or after 20 March 2018
 - (c) Eastern Field must not take into account voting power in shares that are the subject of the acceptances cancelled or withdrawn for purposes of item 9 of s611² and
 - (d) for the duration of the Takeover Bid, that Taurus and Messrs Comb and Cahill not accept the Takeover Bid or sell at a price at or below \$0.23 per Finders share, and must give notice to ASIC of any proposal or arrangement to sell at a price more than \$0.23 per Finders share.

DISCUSSION

18. We have considered all the material, but address specifically only that part of the material we consider necessary to explain our reasoning.

Truth in takeovers

19. RG 25 states, as an underlying principle, that market participants (bidders, targets and substantial holders) who "*make a last and final statement should be held to it, as with a promise*".³ RG 25 states that compensation is not an adequate remedy in the

¹ Eastern Field provided an undertaking by email that it would give two business days' notice of its intention to pay consideration under the Takeover Bid to Taurus and Messrs Comb and Cahill

² 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)

³ RG 25 at [25.9]

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cases where bidders depart from no increase and no extension statements.⁴ By way of contrast, in relation to intention statements by substantial holders, RG 25 does not specify that compensation is not an adequate remedy, rather it states that:

We have seen statements by substantial holders that they will not accept into the bid, or that they will not accept unless the bidder improves the consideration. The substantial holder may risk regulatory action by us for contravention of s1041H or an application by us or another party for a declaration of unacceptable circumstances where the substantial holder departs from such a statement.

20. The Panel has endorsed ASIC's 'truth in takeovers' policy contained in RG 25 as a "fundamental tenet" of Australia's takeover regime in a number of decisions.⁵ However RG 25 is a statement of ASIC's enforcement policy. While we have had regard to it, the question of whether circumstances are unacceptable is "a matter for the decision by the Panel, not ASIC".⁶ We agree with the Panel's general proposition in *BreakFree Limited 03 and 04*, that requiring "persons to act in accordance with statements that they have made to the market concerning their intentions in the context of a takeover bid under Chapter 6 promotes the principle set out in section 602(a)".⁷

Taurus's intention statement

21. On 6 December 2017, Mr Comb representing Finders provided a draft letter and announcement to Mr Galt for Taurus to consider which stated, among other things, that Taurus consented to Finders releasing an announcement on the ASX containing the intention statement referred to in paragraph 6.
22. The draft letter also stated that "*Taurus confirms that it will notify Finders as soon as reasonably practicable if Taurus' intentions with respect to accepting the Offer change*", however this was not included in the statement which Taurus consented to being included in the announcement (or in the draft announcement).
23. Later that day, a representative of Taurus signed the final form of that letter. Taurus made a change to the draft letter and commented on the announcement. However it did not comment on the omission of the statement referred to in paragraph 22.
24. Taurus submitted that an ordinary reading of the statement referred to in paragraph 22 would cause any reasonable person to assume that a change of intention was open to Taurus. Taurus also submitted that it did not take legal advice on the statement or the letter and was of the view that the statement "*gave it the ability to change its intentions if it determined to do so in the future*".
25. Taurus also submitted that while ASIC's 'truth in takeovers policy' as applied to bidders and targets has been accepted for some time as a fundamental part of takeover regulation in Australia, its application to substantial holders is

⁴ RG 25 at [25.23] and [25.26]

⁵ See *Ludowici Limited* [2012] ATP 3 at [38] citing *Taipan Resources NL 06* [2000] ATP 15, *Summit Resources Limited* [2007] ATP 9, *Rinker Group Limited 02* [2007] ATP 17, *Rinker Group Limited 02R* [2007] ATP 19

⁶ *BreakFree Limited 04R* [2003] ATP 42 at [65(d)]

⁷ *BreakFree Limited 03 and 04* [2003] ATP 38 & 39 at [110]-[111]. The review Panel agreed with this statement, see *BreakFree Limited 04R* [2003] ATP 42 at [67] and [69]

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controversial, in “*particular, bidders and targets are usually fully informed and fully advised during takeover bids. Not so, substantial holders*”.

26. ASIC submitted that as a substantial holder, Taurus’s statement was binding under the terms of RG 25 and:
- Its statement has additional significance in this context as its holding alone is sufficient to block compulsory acquisition. Moreover it is a sophisticated investor and is expected to be well versed in weighing up risks in making investment decisions.*⁸
27. Finders submitted that it considered that “*Taurus was a sophisticated shareholder who should have understood the significance of making intention statements and the effect of consenting to Finders publicly disclosing its intention statement in the form that was proposed to Taurus (this was the basis on which Finders announced Taurus’s intention)*”. Eastern Field submitted that Taurus was clearly a ‘market participant’ for the purposes of RG 25, could as a holder of more than 10% of Finders shares single-handedly prevent compulsory acquisition from occurring and, as a sophisticated and experienced market participant, is expected to have a broad knowledge of the rules that apply in respect of takeovers.
28. We do not need to resolve definitively the question of whether ‘truth in takeovers’ applies to substantial holders in exactly the same way as it applies to bidders and targets. In *BreakFree Limited 03 and 04*,⁹ the Panel discussed generally the issue of truth in takeovers by target shareholders in considering rejection statements from shareholders procured through a survey by BreakFree’s adviser. The statements in that case were from shareholders who were not substantial holders and we consider the Panel and review Panel were correct in deciding that those shareholders should not be bound by their statements.
29. However the Panel also stated in that case that, depending on the circumstances, it may be reasonable to hold substantial holders to intention statements they make, noting that they “*have attracted obligations to provide notices about their holdings and are likely to be people of commerce and substance, who have reasonable access to legal advice, so that it would be reasonable to expect a substantial shareholder to publicly correct a misstatement by a Declarant about their intentions once they become aware of the statement*”.¹⁰ We agree and consider that Taurus fits this description. It is obliged to lodge substantial holder notices, is a fund manager of substance and could be assumed to have reasonable access to legal advice. Therefore it would be reasonable to expect Taurus to correct publicly a misstatement by Finders of Taurus’s intentions.
30. Taurus submitted that, prior to the announcement by Finders containing Taurus’s intention statement, it had been informed that Finders was in the process of procuring other intention statements from clients of Euroz and that “*it considered*

⁸ ASIC also submitted that Taurus, and the entities and trusts on whose behalf it makes investment decisions, are frequently involved in takeovers and receive advice from M&A lawyers; noting that an entity controlled or managed by Taurus recently made a takeover bid for one company (and another such entity is currently involved in a live takeover bid)

⁹ [2003] ATP 38 & 39

¹⁰ *BreakFree Limited 03 and 04* [2003] ATP 38 & 39 at [124]

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that at least 31% of the shares in Finders would not be accepting into the bid or sold on market at the offer price". Taurus submitted that it could see no justification for treating other shareholders who made intention statements differently to Taurus, especially given the block of holders held more than double the shares that Taurus held.

31. We disagree. Taurus had consented to the making of its intention statement before any of the intention statements from clients of Euroz had been obtained. We consider that the market would have relied on Taurus's intention statement because Taurus had a shareholding that could block compulsory acquisition. In addition, RG 25 is expressed only to apply to substantial holders.¹¹
32. We consider, drawing on our experience,¹² that the market would have expected Taurus, as a manager of 11.31% shares who could block compulsory acquisition, to be bound by its statement and departure from that statement resulted in the acquisition of control over Finders shares not taking place in an efficient, competitive and informed market.
33. Finders submitted that an ordinary investor would expect Taurus to reconsider and potentially depart from an intention statement to reject a takeover bid in circumstances where:
 - (a) more than three months had elapsed since the statement was made
 - (b) the offer had subsequently become unconditional
 - (c) notwithstanding the intention statement, control of Finders had passed to Eastern Field because other shareholders had accepted the offer and sold shares on-market to the bidder, or sold to persons who themselves have accepted or would be expected to accept the offer
 - (d) no superior proposal emerged, and supervening events had made it almost certain that no superior proposal would emerge
 - (e) the target board had changed its recommendation to shareholders and
 - (f) the offer was shortly due to close.
34. Finders also submitted that Eastern Field declaring its price final and its conduct in directly persuading shareholders who provided intention statements (other than Taurus) to accept the Takeover Bid, justified departure from Taurus's intention statement.
35. Eastern Field submitted Taurus¹³ had ample opportunity to qualify its statement as contemplated by RG 25 and the fact that the Takeover Bid did not play out the way Taurus anticipated did not give it free reign to ignore its intention statement. ASIC made a similar submission.
36. We consider that the matters referred to above were matters which could be foreseen by market participants and do not provide a justification for Taurus

¹¹ As noted in *BreakFree Limited 03 and 04* [2003] ATP 38 & 39 at [122]-[127]

¹² See *Cemex Australia Pty Ltd v Takeovers Panel* [2009] FCAFC 78 at [81]-[89] and [134]-[136]

¹³ And Messrs Comb and Cahill

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departing from its statement. If Taurus had wanted to retain the flexibility to change its intention statement in any of these circumstances, it should have qualified its statement accordingly.

37. In conclusion, we consider that for the period between 7 December 2017 and 19 March 2018, as a result of Finders making Taurus’s intention statement public (which Taurus consented to):
- (a) Finders shareholders and market participants could reasonably assume that Taurus would not accept the Takeover Bid in the circumstances that existed on 19 March 2018
 - (b) Taurus’s acceptance of the Takeover Bid was inconsistent with those assumptions and those assumptions had the potential to affect assessment of whether to accept the Takeover Bid and decisions whether to acquire or dispose of Finders shares and
 - (c) the acquisition of control over Finders shares did not take place in an efficient, competitive and informed market.

Intention statements by Messrs Comb and Cahill and other shareholders

38. Between 11 and 13 December 2017, Euroz obtained letters (on Finders’ behalf) from other Finders shareholders who were not substantial holders consenting to Finders making an announcement which disclosed the relevant shareholder’s name, the number of Finders shares that the shareholder owned or controlled and the fact that the shareholder has notified Finders that the shareholder does not intend to accept the Takeover Bid at the bid price in respect of those shares. The intention statements were unqualified. As mentioned in paragraph 7, in announcements on 12, 13 and 15 December 2017 Finders aggregated these intention statements with the statements made by Messrs Comb and Cahill and Taurus.
39. Euroz subsequently advised Finders (in response to Finders’ query to Euroz following receipt of correspondence from ASIC) that Euroz did not inform these shareholders that RG 25 may apply to these statements.
40. ASIC submitted that Messrs Comb and Cahill as directors of Finders were ‘market participants’ for the purposes of RG 25, or *“their position is so closely analogous that they would be expected to be, and should be, held to the ‘last and final’ statements they have made”*. ASIC acknowledged that it was not uncommon for directors to make intention statements in relation to the shares they hold at the time of making a recommendation to shareholders. However ASIC submitted that the independent directors repeated their intention statements in subsequent announcements aggregating them with other intention statements and the *“contribution of the Independent Directors of Finders in knowingly presenting their statements in aggregation with a substantial bloc of other shareholders, in ASIC’s view makes this case one which justifies holding the Independent Directors to their statements”*.

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41. ASIC submitted in relation to the shareholders other than Taurus and Messrs Comb and Cahill who made intention statements that they did not strictly fall within the definition of ‘market participant’ in RG 25. Nonetheless, ASIC submitted that the aggregation of statements of this kind have a similar potential to affect investor decision making in response to a bid and the market. ASIC submitted that accordingly this may give rise to material uncertainty of the kind RG 25 seeks to address, particularly as intention statements that are not intended to attract RG 25 raise relevance and reliability issues.
42. Messrs Comb and Cahill submitted that RG 25 should not apply to target director intention statements. They submitted (among other things) that target directors are under a legal obligation to provide a recommendation and to change that recommendation if the circumstances so dictate. They also submitted that it was rare (and not the case here) that target directors would have shareholdings that are material enough to have an effect (for example) of preventing compulsory acquisition occurring or seriously impacting whether or not it is achieved. Finders made a similar submission, noting some recent examples of target directors making intention statements with a recommendation to reject a bid and subsequently accepting the bid after they changed their recommendation.
43. We consider that in most circumstances statements by directors in a target’s statement that they do not intend to accept a bid in relation to their shares should not attract the operation of RG 25 unless a director is a substantial holder. The market is likely to interpret any statements made by such directors to move with the board recommendation.
44. We have significant concerns about the way Euroz obtained intention statements from other shareholders and the way Finders aggregated those statements with the statements made by Taurus and other shareholders in market announcements. The Panel has previously found aggregated intention statements by non-substantial target shareholders to have led to market confusion.¹⁴ Finders and Euroz complied with some of the aspects of Guidance Note 23 – *Shareholder intention statements*, in relation to soliciting intention statements from shareholders. The identity of the shareholders and details of their shareholdings were disclosed.¹⁵ However in obtaining consent to make these intention statements in an announcement, these shareholders were not warned that they may be bound by their statements under RG 25.
45. Given RG 25 is not said to apply to such statements, Finders should have made it clear in their announcements dated 12, 13 and 15 December 2017 that these shareholders effectively reserved their rights to accept the bid and were not bound by truth in takeovers.
46. We consider that, as a result of Finders authorising the solicitation of statements from shareholders other than Taurus that they will not accept the Takeover Bid and aggregating those intention statements with statements made by Taurus and

¹⁴ *BreakFree Limited 03 and 04* [2003] ATP 38 & 39, *BreakFree Limited 04R* [2003] ATP 42, *Bullabulling Gold Limited* [2014] ATP 8 and *Gulf Alumina Limited* [2016] ATP 4

¹⁵ Guidance Note 23 – *Shareholder intention statements* at [11]

Messrs Comb and Cahill, and noting these shareholders were not informed of the possible application of RG 25, Finders shareholders (including shareholders who made intention statements) and the market did not have sufficient information to assess whether and in what circumstances persons making the statements may change their intentions or act inconsistently with their statements. Accordingly, the market and Finders shareholders were not in a position to properly assess the likelihood that, or circumstances in which, 38.21% of Finders shares could be accepted into the Takeover Bid.

DECISION

Declaration

47. It appears to us that the circumstances are unacceptable:

(a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:

(i) the control, or potential control, of Finders or

(ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Finders

(b) in the alternative, having regard to the purposes of Chapter 6 set out in s602.

48. Accordingly, we made the declaration set out in Annexure A and consider that it is not against the public interest to do so. We had regard to the matters in s657A(3).

Extension of time

49. ASIC sought an extension of time under s657C(3) to make its application to the extent that some of the circumstances involved the announcements made by Finders in relation to the intention statements by Taurus and the other shareholders. ASIC submitted that:

(a) the circumstances related to conduct in a takeover that was still on foot

(b) the departure of the intention statements only occurred a short time before ASIC made its application

(c) it had not unreasonably delayed in making its application and

(d) it is not aware of any reason why other parties might be prejudiced by the timing of the application.

50. Only Messrs Comb and Cahill made submissions stating that we should not grant the extension.¹⁶ They submitted that Finders' announcements in relation to the intention statements were made more than 3 months ago and at some point statements of 'intention' must go stale, such that market participants cease to place weight on those statements. They submitted that ASIC's delay in making its application had the effect that Eastern Field now held in excess of 90% of Finders shares and if the Panel makes orders cancelling Taurus and their acceptances, the

¹⁶ Taurus submitted it had no objections with the Panel extending time and Finders submitted that it had no submission to make on the point

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delay in bringing the application would be unfairly prejudicial to each of Taurus and them as it would materially impact the market for Finders shares.

51. Previous decisions have highlighted the following relevant factors for the Panel in exercising its discretion under s657C(3):¹⁷
 - (a) The Panel should determine what “circumstances” are relevant in this matter for the purposes of s657C(3)(a). We identified the circumstances and sent a draft declaration of unacceptable circumstances to the parties on 11 April 2018.
 - (b) The discretion to extend time should not be exercised lightly. We carefully considered Messrs Comb and Cahill’s submissions, noting that many of them relate more to the question of the merits of ASIC’s application.
 - (c) It would be undesirable for a matter to go unheard, because it was lodged outside the 2 month limit, if essential matters supporting it first came to light during the 2 months preceding the application. Taurus’s and Messrs Comb and Cahill’s acceptance of the bid occurred within the 2 months preceding the application and we consider that this is a relevant consideration and it was appropriate to consider these events with intention statements given by them and by other shareholders outside the 2 month limit.
52. Other relevant considerations include whether there is an adequate explanation for any delay, and whether parties to the application or third parties will be prejudiced by the delay. We do not consider that ASIC materially or unreasonably delayed in making its application; particularly in the light of what it considered was its obligation to consult with parties to attempt to seek a resolution. At 7.56pm Melbourne time on Monday, 19 March 2018, Finders made its announcement stating that the Independent Directors had changed their recommendation and Messrs Comb and Cahill now intended to accept the bid. ASIC contacted Finders the next day at approximately 3.30pm Melbourne time. On Friday, 23 March 2018 ASIC informed Finders, Eastern Field and Taurus that it was of the view that Taurus and the Independent Directors should be held to their statements. ASIC made its application on the following Wednesday.
53. We consider that granting an extension does not unreasonably prejudice any third party. In particular, we do not accept that ASIC needs to query every truth in takeovers statement that is made, which is an implicit assumption in Messrs Comb and Cahill’s submission. We therefore extend the time for ASIC to make its application.

Orders

54. Following the declaration, we made the final orders set out in Annexure B. Under s657D the Panel’s power to make orders is very wide. The Panel is empowered to make ‘any order’¹⁸ if 4 tests are met:

¹⁷ See *Molopo Energy Limited 01 & 02* [2017] ATP 10 at [244]-[253] and *The President’s Club Limited 02* [2016] ATP 1 at [106]-[160]

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- (a) it has made a declaration under s657A. This was done on 26 April 2018.
 - (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 11 April 2018. Each party made submissions and rebuttals.
 - (d) it considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons, or ensure that a takeover or proposed takeover proceeds as it would have if the circumstances had not occurred. We were satisfied that our orders do this. We made orders which cancelled Taurus's acceptance, required Eastern Field to make offers to Finders shareholders who accepted the bid after 20 March 2018 to withdraw their acceptances and other orders.
55. Emmett J in both *Glencore* decisions stated that in considering the question of unfair prejudice, the Panel must weigh the object of protecting rights or interests affected by the unacceptable circumstances against the prejudice that would flow to any person from the making of an order.¹⁹ Another way to put this is that the Panel must have “*regard to the various interests to be reconciled and the considerations relevant to the exercise of the discretion*”.²⁰
56. Taurus submitted that the orders sought by ASIC, including an order cancelling Taurus's acceptance of the Takeover Bid would be “*incredibly unfairly prejudicial*” to Taurus and certain minority shareholders, locking Taurus in “*as the most substantial holder out of only a very slim minority left in Finders*”.
57. Taurus acknowledged it was to some extent at fault in making the intention statement and subsequently accepting the Takeover Bid. However Taurus submitted it felt it was not the only party at fault and further felt aggrieved that ASIC did not contact Taurus at the time it made the statement (which is envisaged in RG 25) but instead made an application seeking to cancel Taurus's acceptance. Taurus submitted that if the Panel were to make orders at all, it should make an order requiring compensation to those Finders shareholders (other than those shareholders who had provided intention statements to Finders) who bought shares on market at more than the bid price between 7 December 2017 (when Taurus's intention statement was made) and 12 March 2018 (when Eastern Field declared its offer price final).
58. ASIC submitted that requiring Taurus to comply with its intention statement to address the unacceptable circumstances meets the objectives referred to in

¹⁸ Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

¹⁹ *Glencore International AG & Anor v Takeovers Panel & Ors* [2005] FCA 1290 at [51] and *Glencore International AG v Takeovers Panel* [2006] FCA 274 at [124]

²⁰ *Gjergja & Ors v Cooper & Ors* (1986) 10 ACLR 577 at 581

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s657D(2)(a) and (b) (referred to in paragraph 54(d)). ASIC submitted that *“Taurus, for its own commercial purposes, consented to the making of the unqualified intention statements in the form and context in which they were published. The statement was intended to influence market behaviour and likely had that effect”*.

59. ASIC submitted that compensation orders do not achieve the objectives in s657D(2)(a) and (b) as well as an order requiring Taurus to comply with its intention statement and, in addition, would:
- (a) involve a significant logistical and administrative undertaking
 - (b) risk not addressing harm to some shareholders due to the difficulty in locating and identifying them
 - (c) fail to deal with any loss by Eastern Field and
 - (d) not protect the rights of shareholders who may seek to resist compulsory acquisition.
60. Eastern Field submitted that it would be commercially prejudiced if Taurus and Messrs Comb and Cahill were allowed to depart from their intention statements. Eastern Field submitted it was a market participant and the intention statements were aimed at it *“as much as any other market participant”*. Eastern Field also submitted that during the course of the offer it obtained a bank facility to fund the bid, to avoid the need for one of the consortium members of Eastern Field providing a contribution which would have required shareholder approval. Eastern Field submitted that the amount it obtained under the bank facility was determined based on the contribution required without Taurus’s acceptance. If Eastern Field had to pay consideration for Taurus’s acceptance, it would need to modify these arrangements at some cost.
61. Taurus submitted in response that in its view the Panel did not have sufficient material to form a view that there was any prejudice to Eastern Field associated with its financing arrangements. It also submitted that *“it sets a very dangerous precedent for the Panel to find that bidders can take into account shareholder intention statements in determining their funding arrangements in circumstances where there is an active market for trading in target shares (including trading above the bid price)”*.
62. We consider that it is not illegitimate for a bidder to rely, like any other market participant, on intention statements made by substantial holders. We acknowledge, as submitted by Finders, Messrs Comb and Cahill and Taurus that Eastern Field made a bid for 100% of Finders. However the Takeover Bid was conditional when Taurus made its intention statement. Eastern Field decided to waive its minimum acceptance condition (on 12 December 2017) and declare the Takeover Bid free of all conditions (on 14 February 2017) after Taurus made its intention statement and before Taurus accepted the bid. We consider it was not illegitimate for Eastern Field to consider Taurus’s intention statement when making those decisions. We also consider that, while Eastern Field had an obligation to fund its bid and consider any disclosure issues which may arise if it changed its funding arrangements, it was not illegitimate for Eastern Field to consider Taurus’s intention statement when organising changes to those

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arrangements. Therefore in our view it is appropriate to consider whether any orders protect the rights and interests of Eastern Field.

63. Taurus submitted that Eastern Field's submissions that it relied on Taurus's intention statement were inconsistent with the order it sought as late as 1 March 2018 in *Finders Resources Limited 01* that "persons who had given non-acceptance statements in relation to the Takeover Bid be released from such statements".²¹ We consider it is difficult to infer Eastern Field's intentions in relation to this proposed order. It was not considered as a potential order by the Panel in *Finders Resources Limited 01* and we do not know whether, if the Panel had done so, Eastern Field would have made further submissions seeking an order releasing Taurus from its intention statement.
64. Finders submitted that making an order cancelling Taurus's acceptance would unfairly prejudice Finders shareholders who have not accepted the Takeover Bid or who held shares that were not subject to offers under the Takeover Bid,²² because they would be denied the right to receive compulsory buyout offers from Eastern Field under s662A. Eastern Field submitted that these shareholders would not be unfairly prejudiced because:

Affording these shareholders an offer under section 662A would give them a right they should never have had. This is because any acquisition of a 90% relevant interest by Eastern Field is illusory – it should never have arisen and has only done so as a result of a clear departure by Taurus (amongst others) of its last and final statement in circumstances that the Panel proposes to declare "unacceptable". These shareholders are in precisely the same position they would have been in if the unacceptable circumstances had not occurred.

65. We consider that these shareholders are not unfairly prejudiced. As at the date of our decision, the Takeover Bid is still open for acceptance for those holders of Finders shares subject to the Takeover Bid. Holders of shares not the subject of the Takeover Bid for most of the bid period would not have had an expectation that they would receive any offer from Eastern Field.
66. As noted above (see paragraphs 38 to 46) we consider that, as a result of Finders authorising the solicitation of intention statements from shareholders and aggregating those statements with the statements made by Taurus and the independent directors, the market and Finders shareholders were not in a position to properly assess the likelihood that, or circumstances in which, 38.21% of Finders shares could be accepted into the Takeover Bid. However we do not accept ASIC's submission that Messrs Comb and Cahill should be held to their statements because they repeated those statements in the knowledge that they would be collated and aggregated with other intention statements. The unacceptable circumstances are not logically remedied by cancelling Messrs Comb and Cahill's

²¹ *Finders Resources Limited 01* [2018] ATP 6 at [13]

²² The Takeover Bid was only in relation to fully paid ordinary shares in the capital of Finders which exist at 24 October 2017. The Takeover Bid did not extend to Finders shares issued after that date, including those that were issued as a result of the exercise of existing options over unissued Finders shares

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Takeover Bid acceptances; on the contrary, given their relatively small shareholding, we consider that such order is more punitive than remedial.

67. We consider that while an order cancelling Taurus's acceptance prejudices Taurus, such prejudice is not unfair when that prejudice is considered with the detriment to Eastern Field and the market if such an order is not made. Taurus had a holding in Finders that could block compulsory acquisition. We consider, drawing on our experience, that this would have a greater market impact than intention statements made by other shareholders which are not covered by RG 25. Taurus in making an intention statement should have known that there was a risk that it would be held to that statement.²³
68. While we do not accept ASIC's submission regarding the impracticalities of ordering compensation,²⁴ we consider that a compensation order is not appropriate in this case. It is difficult to ascertain who relied on the intention statements given by Taurus and other shareholders. We think there is a risk that a compensation order would give some shareholders an unjustified windfall. It is also difficult to determine what compensation should be paid to Eastern Field.
69. ASIC submitted that Eastern Field should offer withdrawal rights to shareholders who accepted the Takeover Bid after 20 March 2018. Finders submitted that such an order would be of limited utility because it was unlikely that any shareholder would seek to withdraw their acceptance.²⁵ We consider that this submission is in part speculative. We cannot know for certain what the attitude of the recipients of the withdrawal right might be when they receive it. In addition, this order assists ameliorating the prejudice to Taurus. Therefore we decided to make this order as well as an order prohibiting Eastern Field from relying on Taurus's acceptance and any acceptances that are subsequently withdrawn, for the purposes of the creep exception in item 9 of s611.
70. Lastly, Eastern Field submitted that Taurus and Messrs Comb and Cahill pay the reasonable costs of ASIC, Finders and Eastern Field. We considered that all the parties presented their cases well and in a businesslike way.²⁶ Therefore we make no order for costs.

Karen Evans-Cullen
President of the sitting Panel
Decision dated 26 April 2018
Reasons given to parties 4 May 2018
Reasons published 9 May 2018

²³ See *Australian Securities and Investments Commission v Yandal Gold Pty Ltd* (1999) 32 ACSR 317 at [142]

²⁴ Noting that the Panel has made compensation orders in *Rinker Group Limited 02* [2007] ATP 17, *Rinker Group Limited 02R* [2007] ATP 19 and *Ludowici Limited* [2012] ATP 3

²⁵ Eastern Field, while not objecting to this order, made a similar submission

²⁶ See Guidance Note 4 – *Remedies General* at [28(d)]

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Advisers

Party	Advisers
Eastern Field	Johnson Winter & Slattery
Finders	Ashurst Australia
Messrs Comb and Cahill	Corrs Chambers Westgarth
Taurus	King & Wood Mallesons



Australian Government

Takeovers Panel

Annexure A

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

FINDERS RESOURCES LIMITED 02

CIRCUMSTANCES

1. Finders Resources Limited (**Finders**) is an ASX listed company.
2. On 23 October 2017, Eastern Field Developments Limited (**Eastern Field**) lodged a bidder's statement in relation to an off market takeover bid for all the shares of Finders at \$0.23 cash per share (**Takeover Bid**). The Takeover Bid was subject to a number of conditions including that, before expiration of the bid period, Eastern Field has received valid acceptances so that Eastern Field has a relevant interest in more than 50% of the Finders shares at that time (**Minimum Acceptance Condition**).
3. On 5 December 2017, Finders issued its target's statement (**Target's Statement**), which disclosed that:
 - (a) for the purposes of the Target's Statement, the independent directors were Messrs Gary Comb, Barry Cahill and Gordon Galt (**Independent Directors**)
 - (b) each of the Independent Directors recommended that Finders shareholders reject the Takeover Bid and
 - (c) the Independent Directors (relevantly Messrs Comb and Cahill)¹ intended to reject the Takeover Bid for any Finders shares they own or control.
4. Taurus Funds Management Pty Limited (**Taurus**) is manager of two vehicles who, together, hold a substantial holding in Finders. On 6 December 2017, Finders provided a draft letter and announcement to Taurus. Later that day, a representative of Taurus signed the final form of that letter which stated, among other things, that Taurus consented to Finders releasing an announcement on the ASX containing the following statement:

Finders' second largest shareholder, Taurus Funds Management, does not intend to accept the Offer

¹ Noting that Mr Galt did not own or control any Finders shares

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Taurus Funds Management Pty Ltd (“Taurus”) currently manages 87,339,525 Finders shares, being equal to 11.31% of the Finders shares currently on issue, making it the second largest Finders shareholder after the bidder consortium that owns Eastern Field.

Taurus has notified Finders that it does not intend to accept the Offer at the Offer Price of \$0.23 per Finders share in respect of the Finders shares that Taurus owns or controls, on the basis that Taurus considers that the Offer Price does not reflect the fair value of Finders shares.

5. The draft letter and final form of the letter referred to in paragraph 4 also stated that *“Taurus confirms that it will notify Finders as soon as reasonably practicable if Taurus’ intentions with respect to accepting the Offer change”*. This statement was not a part of the disclosure which Taurus consented to being in a Finders’ announcement.
6. On 7 December 2017, Finders made an ASX announcement that contained the statement referred to in paragraph 4 but not the statement referred to in paragraph 5. Taurus was provided an opportunity to comment on the draft letter and the announcement before its release. Taurus made a change to the draft letter and commented on the announcement. However it did not comment on the omission of the statement referred to in paragraph 5 in the announcement.
7. Between 11 and 13 December 2017, Euroz Securities Limited (**Euroz**) obtained letters from other Finders shareholders who were not substantial holders (on Finders’ behalf) consenting to Finders making an announcement which disclosed the relevant shareholder’s name, the number of Finders shares that the shareholder owned or controlled and the fact that the shareholder has notified Finders that the shareholder does not intend to accept the Takeover Bid at the bid price in respect of those shares. The letters did not include the statement referred to in paragraph 5. Euroz subsequently advised Finders (in response to Finders’ query to Euroz following receipt of correspondence from ASIC) that Euroz did not inform these shareholders that ASIC Regulatory Guide 25 – *Takeovers: false and misleading statements (ASIC RG 25)* may apply to these statements.
8. On 12 December 2017, Finders made an ASX announcement that stated that shareholders who in aggregate own or control 20.15% of the Finders shares on issue had notified Finders that they do not intend to accept the Takeover Bid and, when aggregated with Taurus and Messrs Comb and Cahill, statements by shareholders that they do not intend to accept the Takeover Bid amounted to 33.19% of the Finders shares on issue.
9. On 12 December 2017, Eastern Field declared the Takeover Bid free from the Minimum Acceptance Condition.
10. On 13 December 2017, Finders made an ASX announcement stating that additional shareholders who in aggregate own or control 4.39% of Finders shares had informed Finders that they do not intend to accept the Takeover Bid. On 15 December 2017, Finders made an ASX announcement stating that additional shareholders who in aggregate own or control 0.63% of Finders shares had informed Finders that they do

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not intend to accept the Takeover Bid. Both announcements aggregated these intention statements with previous statements made by Finders shareholders, including Taurus and Messrs Comb and Cahill. The 15 December 2017 ASX announcement noted that Finders shareholders representing 38.21% of Finders shares in aggregate had notified Finders that they do not intend to accept the Takeover Bid at the bid price of \$0.23 per Finders share in respect of the Finders shares which each of them own or control.

11. On 14 February 2018, Eastern Field declared the Takeover Bid unconditional. Eastern Field solicited acceptances from Finders shareholders, including shareholders who had given intention statements to Finders via Euroz. On 8 March 2018, Eastern Field had voting power of 33.76% in Finders. On 12 March 2018, Eastern Field gave notice that it would not increase the consideration offered under the Takeover Bid. On 16 March 2018, Eastern Field had voting power of 48.40% in Finders.
12. On 19 March 2018, Taurus accepted the Takeover Bid for all its shares. As a result of Taurus's acceptance, Eastern Field's voting power in Finders increased over 50% to 60.22%.
13. Also on 19 March 2018, Finders made an ASX announcement advising that:
 - (a) The Independent Directors continued to believe that the Takeover Bid does not reflect fair value for Finders shares.
 - (b) However, Eastern Field had now acquired a relevant interest in more than 60% of Finders shares and therefore had a controlling interest in Finders.
 - (c) *"In light of these developments, the Independent Directors now urge shareholders to quickly consider ACCEPTING the Offer, to avoid the risks of being left as a minority shareholder in Finders when it is controlled by Eastern Field"*.
 - (d) The Independent Directors intended to accept the Takeover Bid for any Finders shares they owned or controlled.
14. Later on 19 March 2018, Finders issued its second supplementary target's statement. None of the second supplementary target's statement, the Target's Statement or first supplementary target's statement dated 22 December 2017 discussed the intention statements by shareholders other than Messrs Comb and Cahill.
15. On 20 March 2018, Mr Comb accepted the Takeover Bid in relation to 1,566,667 shares and Mr Cahill accepted the Takeover Bid in relation to 450,000 shares.
16. On 21 March 2018, Eastern Field issued its second supplementary bidder's statement, noting Taurus's acceptance of the Takeover Bid and stating that:

Eastern Field considers that the effect of Taurus' statement (that it would not accept the offer at the Offer Price of \$0.23) may be that Taurus is prevented from accepting the Offer for the reasons set out in ASIC's Regulatory Guide 25 (Takeovers: false and misleading statements).

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[2018] ATP 9

Eastern Field has raised this matter with ASIC. This issue may also apply to other acceptances received.

17. On 28 March 2018, Messrs Comb and Cahill accepted the Takeover Bid for their remaining shares.

EFFECT

18. For the period between 7 December 2017 and 19 March 2018, as a result of Finders making (with the consent of Taurus) the statement by Taurus referred to in paragraph 4 which was not expressly qualified and made no reference to the statement referred to in paragraph 5:
- (a) Finders' shareholders and market participants could reasonably assume that Taurus would not accept the Takeover Bid in the circumstances that existed on 19 March 2018
 - (b) Taurus's acceptance of the Takeover Bid was inconsistent with those assumptions and those assumptions had the potential to affect assessment of whether to accept the Takeover Bid and decisions whether to acquire or dispose of Finders shares and
 - (c) the acquisition of control over Finders shares did not take place in an efficient, competitive and informed market.
19. As a result of Finders authorising the solicitation of statements from shareholders other than Taurus that they will not accept the Takeover Bid and aggregating those intention statements with statements made by Taurus and Messrs Comb and Cahill, and noting these shareholders were not informed of the possible application of ASIC RG 25; Finders shareholders (including shareholders who made intention statements) and the market did not have sufficient information to assess whether and in what circumstances persons making the statements may change their intentions or act inconsistently with their statements. Accordingly, the market and Finders shareholders were not in a position to properly assess the likelihood that, or circumstances in which, 38.21% of Finders shares could be accepted into the Takeover Bid.

CONCLUSION

20. 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, are having, will have or are likely to have on:
 - (i) the control, or potential control, of Finders or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Finders

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(b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602 of the *Corporations Act 2001* (Cth).

21. 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 Finders.

**Bruce Dyer
Counsel
with authority of Karen Evans-Cullen
President of the sitting Panel
Dated 26 April 2018**



Australian Government

Takeovers Panel

Annexure B
CORPORATIONS ACT
SECTION 657D
ORDERS

Finders Resources Limited 02

The Panel made a declaration of unacceptable circumstances on 26 April 2018.

THE PANEL ORDERS

1. Eastern Field not take any action to process an acceptance of the Takeover Bid in relation to shares managed by Taurus.
2. On the expiry of three business days after the relevant date, any acceptances of the Takeover Bid in relation to shares managed by Taurus are cancelled.
3. While the Takeover Bid remains open for acceptance, Taurus must not accept the Takeover Bid or sell any shares it manages for a price at or below \$0.23 per share.
4. Eastern Field must, within 14 days after the relevant date, send a letter to each Accepting Shareholder (in a form approved by ASIC and the Panel) that includes:
 - (a) a description of how an Accepting Shareholder has until 15 business days after dispatch of the letter a right to withdraw their acceptance, which is equivalent to the right conferred by section 650E of the *Corporations Act 2001* (Cth) (except to the extent contemplated by these orders)
 - (b) a summary of the Panel's declaration and orders
 - (c) Eastern Field's current intentions regarding the business of Finders, including its intentions as to whether it will keep Finders as a listed entity and
 - (d) any other information known to Eastern Field that is material to the making of the decision by an Accepting Shareholder whether to withdraw their acceptance.
5. Eastern Field must ensure that each Accepting Shareholder has, for a period of 15 business days after dispatch of the letter referred to in paragraph 4, a right to withdraw their acceptance which is equivalent to the right conferred by section 650E (except to the extent contemplated by these orders).
6. Eastern Field must not purport to rely on item 9 of section 611 in circumstances where it would not have been able to rely on that section if it had been taken to have never acquired voting power in shares that are the subject of the cancellation under paragraph 2 or the withdrawal under paragraph 5.

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7. In these orders the following terms apply.

Accepting Shareholder	A person who accepted the Takeover Bid on or after 20 March 2018
Eastern Field	Eastern Field Developments Limited
Finders	Finders Resources Limited
relevant date	The date being the later of: <ul style="list-style-type: none">• 26 April 2018 and• the date on which any stay or suspension of these orders ends
Takeover Bid	Eastern Field's off market takeover offer to acquire all the ordinary shares in Finders at \$0.23 per share
Taurus	Taurus Funds Management Pty Ltd

Bruce Dyer
Counsel
with authority of Karen Evans-Cullen
President of the sitting Panel
Dated 26 April 2018