



Australian Government

Takeovers Panel

Reasons for Decision

Atlas Iron Limited

[2018] ATP 14

Catchwords:

decline to conduct proceedings – offer terms – conditions – prescribed occurrences – intentions – supplementary bidder’s statement – replacement bidder’s statement

Corporations Act 2001 (Cth), sections 633(1), 652C, 650F, 650G, 657D

Companies and Securities Advisory Committee (CASAC) “Anomalies in the Takeovers Provisions of the Corporations Law” (1994)

Australian Leisure & Hospitality Group Limited 01 [2004] ATP 19

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

INTRODUCTION

1. The Panel, Peter Day (sitting President), Diana Nicholson and Karen Phin declined to conduct proceedings on an application by NCZ Investments Pty Ltd in relation to the affairs of Atlas Iron Limited. Atlas is the subject of an off-market takeover bid from Redstone Corporation Pty Ltd (a subsidiary of Hancock Prospecting Pty Ltd). Following discussions with the Panel and ASIC, Redstone agreed to incorporate disclosures from its supplementary bidder's statement in a replacement bidder's statement (including further information in relation to its intentions) and clarify the operation of the bid's conditions. Given that, the Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.
2. In these reasons, the following definitions apply.

Atlas Atlas Iron Limited

Bidder’s Statement Redstone’s bidder’s statement lodged on 18 June 2018 in respect of its offer to acquire all ordinary shares in Atlas in which it does not have a relevant interest at \$0.042 per share

Hancock Prospecting Hancock Prospecting Pty Ltd

NCZ Investments NCZ Investments Pty Ltd, a wholly owned subsidiary of Fortescue Metals Group Ltd

Redstone Redstone Corporation Pty Ltd, a wholly owned subsidiary of Hancock Prospecting

FACTS

3. Atlas is an ASX listed (ASX code: AGO) iron ore company, mining and exporting ore from its operations in the Northern Pilbara region of Western Australia.¹ Redstone had voting power of 19.96% of Atlas. NCZ Investments had voting power in 15% of Atlas and a further 4.9% economic interest.
4. On 18 June 2018 Redstone lodged the Bidder's Statement with ASX.

APPLICATION

Declaration sought

5. By application dated 25 June 2018, NCZ Investments sought a declaration of unacceptable circumstances. NCZ Investments submitted that there were material omissions in the Bidder's Statement regarding Redstone's intentions² in respect of Atlas's business, assets and employees. In particular NCZ Investments submitted that:
 - (a) the disclosure around undertaking a strategic review and potentially integrating Atlas's operations with Hancock Prospecting was *"vague and indeterminate"*
 - (b) Redstone should be able to provide more detailed disclosure regarding its intentions in light of the level of public disclosure of Atlas's operations, Hancock Prospecting's significant experience in the Western Australian iron ore mining industry and the significant overlap in Hancock Prospecting's and Atlas's *"operations in respect of geography, commodity type, stage of development, infrastructure usage, and customer base"*³
 - (c) there were material omissions regarding the implications of Redstone's takeover bid for Atlas's Term Loan B Facility and Hancock Prospecting's intentions in respect of financing the repayment of that facility and
 - (d) there was insufficient disclosure in relation to Redstone's intentions if it did not achieve 100% control of Atlas,⁴ including in relation Hancock Prospecting's *"business track record and the qualification of its management team"*.
6. NCZ Investments also submitted that the Bidder's Statement contained confusing and misleading statements about the bid conditions, when the offer would become unconditional and when accepting shareholders would be paid the bid consideration.

¹ Its Pilbara landholding is also prospective for other minerals including lithium, copper and gold

² NCZ Investments at times referred to the intentions of Hancock Prospecting as well

³ referring in particular to matters including which assets Hancock Prospecting would consider to have strategic value (and be likely to retain) and how Hancock Prospecting intended to deploy Atlas's port access and development rights at Port Hedland

⁴ Noting that NCZ Investments, or a group of other shareholders, could prevent Redstone from achieving the compulsory acquisition threshold

Interim orders sought

7. NCZ Investments sought interim orders (in effect):
- (a) restraining Redstone from dispatching the Bidder's Statement and releasing any other information regarding the bid until the Panel had determined the application and
 - (b) precluding Hancock Prospecting and Redstone from acquiring, directly or indirectly, any further shares or increasing their voting power in Atlas until corrective disclosure is released.⁵

Final orders sought

8. NCZ Investments sought final orders, including that Redstone prepare and lodge with ASIC a replacement bidder's statement.

DISCUSSION

Redstone lodges its first supplementary bidder's statement

9. On 26 June 2018, Redstone lodged its first supplementary bidder's statement. On 27 June 2018, Redstone made a preliminary submission submitting (among other things) that the additional disclosure in its first supplementary bidder's statement addressed in substance all the concerns raised in the application in a manner which was "*both meaningful and clear*" and a replacement bidder's statement was not necessary.
10. We agree that nearly all the issues raised in the application had been dealt with in the first supplementary bidder's statement. However we had three residual concerns, the first of which in our view (after considering preliminary submissions from the parties) requires further disclosure.

Offer terms

11. The offer terms on page 29 of the Bidder's Statement stated that:

During the period beginning on the date the Bidder's Statement is given to Atlas and ending on the date three Business Days after the end of the Offer period (each inclusive), none of the following events occur...

12. We were concerned that this statement is inconsistent with ss652C and 650F⁶ and sought preliminary submissions on the issue. ASIC agreed with our concern and made the following helpful submission in relation to the history of these provisions:

The genesis of sections 652C and 650F can be found in the Report by the Companies and Securities Advisory Committee (CASAC) in March 1994 titled "Anomalies in the Takeovers Provisions of the Corporations Law". In the Report, it was noted at page 46 that "an offeror may, for good reason, want to retain the protection of 'prescribed occurrence' conditions

⁵ Redstone confirmed to the Panel that it would give the Panel notice if it proposed to acquire any further Atlas shares on market and (in effect) would not acquire Atlas shares on 27 June 2018 unless an Atlas shareholder holding over 10% lodged a substantial holder notice notifying an increase in its relevant interest or a rival takeover or scheme was announced

⁶ 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)

during the final seven days of the offer period. However, s 663(2)¹⁷ prevents the offeror from declaring offers free from such conditions in that seven day period. The takeover scheme will fail completely if any event covered by a remaining prescribed occurrence condition occurs in that period. The [Discussion Paper] therefore proposed that an offeror under a takeover scheme have up to three business days after the end of the offer period to declare the offer free of a prescribed occurrence defeating condition. This three day period would allow the offeror sufficient time to consider all relevant events concerning prescribed occurrences up to the end of the offer period."

In ASIC's view s652C does not permit an offer to be subject to a condition relating to events or circumstances that occur after the close of the offer. This is inconsistent with the operation of s650G(c). It follows that a condition of this kind is not one that meets the definition in s650F(1)(a).

13. Redstone agreed to clarify this issue⁸ in a further supplementary bidder's statement and dispatch a replacement bidder's statement which incorporated the changes in both supplementary bidder's statements.⁹ We consider that a replacement bidder's statement was appropriate to avoid confusion on matters such as when Redstone intended to declare its offer unconditional and when accepting shareholders would receive the bid consideration.

Other issues

14. We also sought preliminary submissions on the following issues:
 - (a) We considered whether further disclosure was required in relation to the identity and experience of the likely nominees to Atlas's board, noting that Redstone may not be in a position to proceed with compulsory acquisition following the close of its bid. After considering submissions from Redstone and NCZ Investments, we consider that given Hancock Prospecting's business and operations, further disclosure on this issue was not necessary at this stage.¹⁰
 - (b) We were aware of press speculation concerning Atlas's access to port facilities at South West Creek in the Port of Port Hedland¹¹ and considered whether Redstone's disclosure of this issue in its Bidder's Statement and first supplementary bidder's statement was sufficient. We accept Redstone's submission that neither it nor Hancock Prospecting can currently provide any further disclosure on this issue "without risking speculation that could mislead or confuse Atlas shareholders".

⁷ this refers to s663(2) of the *Corporations Law*, which was equivalent to s650F without s650F(a)

⁸ and confusing disclosure in paragraph 7.16(a) of the Bidder's Statement in relation to the circumstances when it would declare its bid unconditional

⁹ ASIC gave Redstone relief modifying item 6 of the table in s633(1) to allow Redstone to modify its offer terms to clarify this issue

¹⁰ we consider the context here is different to *Australian Leisure & Hospitality Group Limited 01* [2004] ATP 19 at [25] to [30] where the bidder had at least started the process of selecting its nominees and had sought necessary regulatory approvals for potential nominees

¹¹ which was specifically raised by the application: see footnote 3

DECISION

15. We have no further comments on Redstone’s replacement bidder’s statement and 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

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

Peter Day

President of the sitting Panel

Decision dated 29 June 2018

Reasons given to parties 6 July 2018

Reasons published 10 July 2018

Takeovers Panel

Reasons - Atlas Iron Limited
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Advisers

Party	Advisers
Atlas	DLA Piper Australia
NCZ Investments	Allen & Overy
Redstone	Ashurst