



Australian Government

Takeovers Panel

**Reasons for Decision
MEC Resources Limited 02
[2019] ATP 26**

Catchwords:

Decline to make a declaration - rights issue - shortfall shares - need for funds - association - referral to ASIC

Corporations Act 2001 (Cth), sections 173, 177

Corporations Regulations 2001 (Cth), regulation 2C.1.03

Australian Securities and Investments Commission Regulations 2001 (Cth), regulation 18

Guidance Note 17 - Rights Issues

Scantech Limited [2014] ATP 20

Ford, Austin & Ramsay's Principles of Corporations Law, LexisNexis, paragraph [21.030]

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

INTRODUCTION

1. The Panel, Chelsey Drake (sitting President), Marissa Freund and Philippa Stone, declined to make a declaration of unacceptable circumstances on an application by a group of shareholders in MEC Resources Ltd in relation to its affairs. The application concerned the placement of shortfall shares following a rights issue and whether there had been a change of control in unacceptable circumstances. The Panel considered that there was insufficient material to establish a control effect in relation to MEC's fundraising, but had a number of concerns that led it to refer the matter to ASIC.

2. In these reasons, the following definitions apply.

- Applicants** Anstey Super Fund (Harry Anstey), Davenport Family Trust (Roger & Frances Davenport), Durnin Family Super (Valentine & Pauline Durnin), Andrew Wilson, and David & Tracy Booth
- MEC** MEC Resources Limited
- Here Capital** Here Capital Pty Ltd (formerly MVP Capital Pty Ltd)
- Here Group**
 - (a) MVP Financial Pty Ltd as trustee for MVP Unit Trust (trading as Here Business and Wealth)
 - (b) Here Capital Pty Ltd (formerly MVP Capital Pty Ltd), wholly owned by MVP Unit Trust
 - (c) Here Accountants & Advisors Pty Ltd (formerly MVP Accountants & Advisors Pty Ltd), wholly owned by MVP Unit Trust and

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	(d) Here Wealth Pty Ltd (formerly MVP Wealth Pty Ltd), wholly owned by MVP Unit Trust
Term Sheet	The rights issue shortfall capital raising indicative term sheet issued by Here Capital for sophisticated and professional investors
places	The persons to whom Shortfall Shares were issued
rights issue	The rights issue referred to in paragraph 4
Shortfall Shares	224,680,600 MEC shares issued, out of the 269,157,716 shares left, after the close of the rights issue
Subsequent Shares	15,792,200 MEC shares issued on 4 October 2019

FACTS

- MEC is an ASX listed company (ASX code: MMR). It is a pooled development fund, invested primarily in the energy and mineral resources sector.
- On 9 April 2019, MEC announced a 1:1 pro rata non-renounceable rights issue to raise up to \$1,709,340 by the issue of up to 341,868,046 shares. The offer price was 0.5 cents per share against a last trade price of 0.9 cents per share. The prospectus for the rights issue was dated 9 April 2019.
- The prospectus stated that the funds raised “*may be used primarily:*”
 - to expand and diversify the Company’s asset base in accordance with its approved investment mandate, and/or as modified from time to time following any necessary approval from AusIndustry, ASX or Shareholders*
 - to support MEC investee, Advent Energy, in any additional costs it may incur toward planned exploration works within its petroleum titles; and*
 - for working capital purposes.”*
- The offer closed on 3 May 2019. There was a shortfall of applications for shares of 269,157,716 shares.
- On or about 8 May 2019, Here Capital (formerly MVP Capital Pty Ltd) acting as a placement agent for MEC Resources, sought to place the shortfall and issued the Term Sheet seeking to raise up to \$1,345,789 by the issue of up to 269,157,716 shares for 0.5 cents per share. The Term Sheet sought “*indicative bids of interest*” from sophisticated and professional investors.
- The Term Sheet stated (among other things):

“MEC will be looking to divest its oil and gas assets, recapitalise the share register and start investing in exciting up and coming companies that are looking to list....” and

“MEC will be looking to maximise the potential of its oil and gas assets to make way for new investments.”

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9. Below is a list of share issues since the announcement of the rights issue in April 2019.¹

Event	Date	Shortfall	Share issues	Diluted capital
Pre rights issue				341,868,046
Acceptances	10/05/2019		65,592,243	
Shortfall subscriptions	10/05/2019		<u>7,118,087</u>	
Shares issued	14/05/2019		72,710,330	
Post rights issue				414,578,376
Shortfall left		269,157,716		
Placement of shortfall	22/07/2019		<u>160,000,000</u>	
Shortfall left		109,157,716		574,578,376
Placement of shortfall	6/08/2019		<u>43,660,640</u>	
Shortfall left		65,497,076		618,239,016
Placement of shortfall	14/08/2019		<u>21,019,960</u>	
Shortfall left		44,477,116	(not issued)	639,258,976
Total Shortfall Shares issued			224,680,600	
Subsequent Shares issued	4/10/2019	15,792,200	(escrowed)	655,051,176
Total number of shares issued since RI			313,183,130	
% Change in capital from pre-RI position			91.61	
% change in capital on fully diluted			34.30	

10. MEC's annual general meeting was held on 25 November 2019. The notice of meeting proposed a resolution (resolution 3) to ratify the prior issue of the Shortfall Shares. On 25 November 2015, MEC issued an announcement on ASX that it had withdrawn resolution 3.
11. On a number of occasions since at least June 2018, shareholders have sought access to, and a copy of, MEC's register.
12. By letter dated 20 September 2019 addressed to one of the Applicants,² MEC advised, in response to a request for a copy of the register, that it was available for inspection. This letter was not received.
13. By letter dated 25 November 2019, after the date of the application, the letter dated 20 September 2019 was resent to that Applicant under cover of a letter that stated that

¹ Excluding 29,400,000 shares issued on 27 November 2019 after MEC's annual general meeting

² The letters dated 20 September 2019 and 25 November 2019 (described in paragraph 13) were provided by MEC in its submissions

he needed to comply with section 173 of the Corporations Act 2001 if he was to be given a copy of the register.

APPLICATION

Declaration sought

14. By application dated 21 November 2019 (received on 22 November 2019), the Applicants sought a declaration of unacceptable circumstances. They submitted that *“an alleged takeover occurred following the placement of shortfall of the Prospectus issue... to parties associated with MVP and/or its Director(s)”*.
15. They submitted, in effect, that there was no requirement or urgency to raise funds, shareholders had shown that they did not support the rights issue (by their lack of take up) and the structure of the issue of Shortfall Shares was unacceptable and *“intended as an opportunity to change control”*.
16. They submitted that *“the structure of the rights issue was unacceptable – clearly intended as an opportunity to change control etc. at the expense of existing shareholders.”*
17. They also submitted that they had been denied access to a copy of the share register of MEC, despite having paid a fee as requested. This, they submitted, prevented assessment of the placement of shortfall shares and communication with shareholders.

Interim and final orders sought

18. The Applicants sought a number of interim orders and final orders including orders to the effect that:
 - (a) MEC’s annual general meeting to be held on 25 November 2019 be adjourned until the Panel completed its investigations
 - (b) the Here Group, MEC directors and their associates and any persons who received Shortfall Shares be restrained from voting at the annual general meeting or their votes be disregarded at the annual general meeting and subsequent meetings
 - (c) shares issued after 13 May 2019 be prevented from participating in the in-specie distribution of shares to be completed by MEC
 - (d) associated parties:
 - (i) be restrained from acquiring further securities in MEC
 - (ii) reduce their joint interest in MEC to 19%
 - (iii) pay all profits on such sales to the Applicants or ASIC
 - (e) alternatively, such shares be vested in ASIC
 - (f) associated parties give the names of beneficial owners of all their securities and
 - (g) MEC be restrained from issuing any securities to associated parties.

DISCUSSION

Interim order on holding of the AGM

19. The application was made only one business day before the annual general meeting. The substantive President considered the request for an interim order. He considered that any unacceptable circumstances could be adequately remedied by final orders. In relation to the request for an interim order to adjourn MEC's annual general meeting, the relevant resolution was to ratify the issue of the Shortfall Shares, the majority of which were issued in late July 2019. The President considered it was not necessary to adjourn the annual general meeting because if necessary the Panel could conceivably make a final order requiring further ratification of the Shortfall Shares.
20. We did not think the question of interim orders needed to be considered again.
21. The annual general meeting was held on 25 November 2019.

Extension of time

22. The application was made regarding circumstances that first arose on 22 July 2019 with the first placement of Shortfall Shares after the rights issue. The application did not address whether it was made out of time and did not request an extension of time. Nor was this addressed in the Applicant's response to the brief, although the Applicants were asked - "*if the Panel determines that the application was made out of time do you seek an extension of time?*"
23. In its preliminary submissions, MEC submitted that the last of the Shortfall Shares were issued on 6 August 2019 and additional shares on the same terms as the Shortfall Shares were issued on 14 August 2019 so the Applicants "*have had an opportunity to make an application to the Panel regarding the Offer since at least 9 April 2019 and regarding the placement of shortfall shares since at least 6 August 2019, but did not do so until 21 November 2019*". It submitted that the Applicants were making the application well in excess of two months after the relevant circumstances occurred without providing any justification for doing so.
24. As we concluded that there was no control effect, and so declined to make a declaration of unacceptable circumstances, we did not need to consider this question further.
25. However we point out that, while the application suggests a concern about the structure of the rights issue itself, the real issue raised appears to be the placement of Shortfall Shares and Subsequent Shares, so it is too strong to submit that the application could have been made as early as 9 April 2019. While that was the date of the prospectus for the rights issue, the outcome was not known until later (and indeed the Applicants submit is still not clearly disclosed) and steps in relation to the shortfall, which underpinned many of the Applicants' objections, were also not taken until later.

Unacceptable circumstances?

26. The Applicants became concerned after seeing a very significant number of shares being issued without much, if any, information being made available. Combined

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with an apparent blocking of attempts to secure a copy of MEC's register, and following a series of legal disputes between MEC and its former managing director, the Applicants became sufficiently concerned to make this application. The Applicants had also been in correspondence with ASIC.

27. We decided to conduct proceedings to establish if the issues of Shortfall Shares and Subsequent Shares had a control effect on the company, and if so whether there was anything unacceptable.
28. The Applicants submitted that no clear, pressing requirement or urgency for funds had been demonstrated. MEC submitted that it did need funds. It submitted that “[b]y the time that MEC proceeded with the rights issue in April 2019, it had less than six months of forecast funds available.” It also submitted that an application to wind it up had been made.
29. We are satisfied that in April 2019, when it launched its rights issue, MEC did need funds. While there appeared to be a need for funds, the fundraising was significantly dilutive, evidenced by limited take up of rights or shortfall shares by shareholders and the consequent significant shortfall. And, as Guidance Note 17 points out, need for funds is not a safe harbour.³
30. The Applicants also submitted that shareholders did not support the rights issue and that the “*structure of the issue of the shortfall shares was unacceptable - clearly intended as an opportunity to change control, etc. at the expense of existing shareholders.*”
31. Guidance Note 17 addresses potential control effect, suggesting that ways to mitigate it include:
 - (a) if a market is likely, making the rights issue renounceable. The offer was non-renounceable.
 - (b) offering a shortfall facility (which was done here) and
 - (c) underwriting, and using several sub-underwriters.⁴ The rights issue was not underwritten.
32. In this case, shareholders could apply to take extra shares, although not many did. MEC submitted that all the shareholders who applied for Shortfall Shares had their applications filled.
33. MEC submitted that Shortfall Shares were issued to 40 investors, 10% of whom were existing shareholders of MEC.
34. It submitted that it did not refuse any application for Shortfall Shares or seek to place Shortfall Shares in a manner that would cause a person to have a substantial holding and that “*there were no significant individual applications that would have any control impact, noting in this context that no one person, as a result of the rights issue or the issue of the Shortfall shares and Subsequent shares, increased their shareholding in MEC to above 5%*”

³ Guidance Note 17 – Rights Issues at [12]

⁴ Guidance Note 17 – Rights Issues at [7] and [8]

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of the total shareholding (nor did any person who had a substantial holding before the rights issue increase their voting power)."

35. As explained in paragraph 58 and following, this does not appear to be quite right.
36. MEC also submitted in rebuttals that "... *the rights issue, as well as the issue of Shortfall shares, did not result in a person acquiring a relevant interest in MEC greater than the threshold set out in section 606...*" and the Applicants "*have still not identified any circumstances that effect [sic] the control, or potential control, of MEC, nor ... identified a contravention of a provision of Chapter 6...*"
37. The Applicants were also concerned about the withdrawal of the proposed resolution (resolution 3) to ratify the issue of Shortfall Shares from the annual general meeting.
38. MEC, by ASX announcement dated 25 November 2019, withdrew the resolution. This was the same day as the meeting was to be held. We asked MEC to inform us of the proxy position on the resolution. It submitted that 76.05% of votes were in favour of ratifying the issues, although the Applicants queried in rebuttal whether the number of shares voted in favour included any that should have been excluded according to the voting exclusion statement.
39. MEC submitted that "*the resolution was only withdrawn because MEC was made aware that it did not need to obtain ratification for the issue of the shares for the purposes of ASX listing rule 7.4 as the issue of shares was already covered by exception 3 of ASX listing rule 7.2.*"
40. ASIC pointed to a number of curiosities in relation to applications for Shortfall Shares including:
 - (a) applicants who appeared to be employed or associated with the Here Group
 - (b) an applicant, whose address corresponded with that of shareholders connected to Here Business & Wealth (suggesting a family connection), who received 22 million shares on an application for 4 million shares and
 - (c) another applicant, whose address corresponds with that of other shareholders (suggesting a family connection).
41. After considering the parties' submissions we had a number of concerns in relation to:
 - (a) transparency of the fundraising
 - (b) transparency of MEC's ownership
 - (c) transparency of the placement of Shortfall Shares and Subsequent Shares and
 - (d) some of the statements made to potential placees.
42. However, while we had a number of concerns, there was not sufficient material to establish that there was a control effect in relation to MEC's fundraising and any unacceptable circumstances.

Transparency of the fundraising

43. In our view, the transparency of the fundraising was less than ideal. There were potential inconsistencies in some of the details regarding MEC's need for funds, use of funds, future capital requirements and future direction.
44. For example, the prospectus stated that the funds may be used primarily to expand and diversify MEC's asset base, to support MEC's interest in energy explorer Advent Energy Ltd and for working capital, but the Term Sheet stated that MEC would be looking to divest its oil and gas assets, recapitalise the share register and start investing in exciting up and coming companies that were looking to list. It also stated that MEC will be looking to maximise the potential of its oil and gas assets to make way for new investments.
45. MEC submitted that it had stated in the prospectus that its listed use of funds (see paragraph 5) "*is indicative only and is subject to change by the Directors in their discretion*" having regard to how the funds will best be applied for MEC's business.
46. MEC also submitted that it did not consider that the statements were inconsistent, and that its future investment strategy included a partial divestment of its oil and gas interests, which had been disclosed to the market.
47. There was, however a reasonably significant typographical error in the Term Sheet. Here Capital submitted that:

"On subsequent review of the "Key Highlights" section [of the Term Sheet] Here Capital notes a minor typographical error in the statement that reads "MEC will be looking to maximise the potential of its oil & gas assets to make way for new investments" which should have read "MEC will be looking to maximise the potential of its oil & gas assets and make way for new investments" (original emphasis).

Transparency of the company's ownership

48. In our view, the transparency of the company's ownership was also less than ideal. There was considerable difficulty experienced by at least one of the Applicants obtaining a copy of the company's register of members.
49. The Corporations Act⁵ sets out clearly the rights of shareholders to access a company's register. Section 173 allows inspection without charge, and provides that on application in proper form and payment of the fee a member is entitled to be given a copy of the register. The allowable uses of the register are set out⁶ and the purpose for obtaining a copy cannot be a purpose prescribed in the regulations.⁷
50. One of the Applicants made an application on 5 September 2019 using the form provided by MEC's registry and paid the requested fee. While the purpose does not appear to have been stated in the request, the Applicants submitted that MEC had

⁵ 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)

⁶ Section 177 prohibits (among other things) using the register to send material to a person but not if the material is relevant to the holding or is approved by the company

⁷ See *Corporations Regulations 2001* (Cth), regulation 2C.1.03 – for example soliciting donations, gathering information about personal wealth or proposing to make an off-market offer under Division 5A of Part 7.9

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withheld releasing a copy of the share register to shareholders, preventing assessment of the placement of the shortfall and communication with shareholders. Given the history, it seems likely that MEC knew why the Applicants had made their request.

51. MEC wrote to that Applicant on 20 September 2019 advising that the register could be inspected. The letter was not received until it was resent on 25 November 2019.⁸
52. MEC submitted that the letter was sent to the relevant address listed in the register and that, following receipt of the Panel application, it became aware that the letter may not have been received so resent it.
53. MEC also submitted that the Applicant was provided guidance on how he could make application for a copy of MEC's register but, other than saying "*the company has not received a request ... that complies with section 173...*", in our view no useful assistance was given as to what more was required to comply with section 173.
54. As stated in Ford et al "*...access by members to the register of members is thought to facilitate good corporate governance through member engagement and participation.*"⁹
55. We agree with ASIC's rebuttal submission that companies should make all reasonable efforts to assist their shareholders with respect to register inquiries without unreasonable delay or procedural complication, and further:

"In circumstances where MEC (and/or its agents):

- (a) were likely aware, or should have been aware, that the request was for a copy of the register;*
- (b) appears to charge the Applicant likely for this same reason; and*
- (c) provided the Applicant with the incorrect form to complete,*

ASIC submits MEC's claims maybe of significantly diminished force."

56. MEC submitted that:

The Applicants seek an order directing the "Associated Parties" to give the names and beneficial owners of all their securities in MEC Resources. Given that such information could be obtained by the Applicants through mechanisms in the Corporations Act, namely by requesting a copy of the register of members and by requesting that ASIC provide beneficial tracing notices to particular shareholders, the Applicants should not seek this information from the Panel.

57. In light of the above, we have sympathy with the Applicant's request for the names and beneficial owners of those shareholders which the Applicants' were concerned were associated, given the difficulty experienced in obtaining a copy of the MEC register. In the circumstances we consider MEC's submission above to be disingenuous.

⁸ See paragraphs 12 and 13

⁹ Ford, Austin & Ramsay's Principles of Corporations Law, LexisNexis, para [21.030]

The placement of Shortfall Shares and Subsequent Shares

58. In our view, the placement of Shortfall Shares and Subsequent Shares lacked transparency. This included what appear to be failings in lodging substantial shareholder notices.
59. In relation to the Subsequent Shares, MEC submitted that they were issued to Here Capital (previously MVP Capital Pty Ltd), the placement agent for the Shortfall Shares, *“in payment for company secretarial, accounting and office services provided to MEC.”*
60. Here Capital, in its submission on the brief, identified that the Here Group and persons connected to it held in aggregate 41,792,200 shares (or just over 5.75% of MEC).
61. MEC acknowledged that a substantial holder notice needed to be lodged. It submitted that:
- “Here Capital, to whom the Subsequent shares were issued, held 5,000,000 Shortfall shares at the time that the Subsequent shares were issued. Here Capital’s voting power before the issue of Subsequent shares was 3.44% (which includes 2,000,000 shares held by Douglas Verley and 15,000,000 shares held by Marusco Investments Pty Ltd as trustee for the Marusco Superannuation Fund¹⁰) and its voting power after the issue of the Subsequent shares was 5.77% (currently 5.52%). Whilst this is a substantial holding [sic] within the meaning of the Act and a substantial shareholding notice needs to be lodged by Here Capital, the substantial holding does not confer control.”*
62. However, if additional shares identified by ASIC as potentially also connected to the Here Group are added (see paragraph 40), the percentage increases to approximately 11%.
63. It appears that, to date, no substantial holder notice has been lodged by the Here Group. Given the size of the holdings, and the fact that the nature of any links with the holders of the additional shares identified by ASIC remained unclear, this lack of disclosure did not have a sufficient control impact to be unacceptable in the circumstances.

Statements to placees

64. Statements made to potential placees remain unexplained and the nature of the relationships of the placement agent to the company and to the placees is of potential concern.
65. In an email to one potential applicant for Shortfall Shares, Mr Verley, a director of Here Business & Wealth which is the parent company of the Here Group, said:
- “We are in the process of potentially securing a significant interest in ASX listed company (MEC), which will then invest in underlying private high-growth opportunities that are brought to us, and like those that we are currently promoting. Most of our future capital raisings for private companies will take place via this ASX listed entity”*

¹⁰ MEC understands that Robert Marusco holds 72% of the shares in Marusco Investments Pty Ltd, is one of four directors and has interests in the Marusco Superannuation Fund together with others.

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66. Perhaps more significantly, the email went on:

“There is a strong possibility that we (MVP) will have a material influence on the future direction of MEC.”

67. The Here Group was invited to make submissions in response to the brief. It was asked about the statements. Here Capital submitted that this was a reference to its shortfall mandate, and was *“a general statement made in the context and with the knowledge that MEC had an expanded approved PDF mandate which would allow the company to explore new investment opportunities over and above its current oil & gas investment.”*

68. However, Here Capital did not address adequately (or at all) what was meant by the statement *“a strong possibility that we (MVP) will have a material influence on the future direction of MEC.”* We are left uncomfortable by the non-response to this part of the question, and this is one of the reasons for our referral to ASIC.

Conclusion

69. We do not think that there is a control effect evident in the material before us.

70. However, because of the above concerns, we will refer the matter to ASIC¹¹ for ASIC to make such inquiries as it considers fit and to consider whether to make a further application to the Panel. As noted in *Scantech Limited*:

“In part, this will help resolve the difficulty that the applicant faces, namely that it has a limited ability to obtain further evidence.”¹²

DECISION

71. 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 section 657A(3).

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

Chelsey Drake

President of the sitting Panel

Decision dated 13 December 2019

Reasons given to parties 17 January 2020

Reasons published 22 January 2020

¹¹ Regulation 18 of the *Australian Securities and Investments Commission Regulations 2001* (Cth) provides:
(1) *The Panel may refer a matter to the Commission for the Commission to consider with a view to making an application.*

(2) *If the Panel refers a matter to the Commission, the reference must be made:*

(a) in writing; and

(b) in sufficient detail to allow the Commission to make a decision about the matter.

¹² [2014] ATP 20 at [40]

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Advisers

Party	Advisers
MEC	Piper Alderman