



Australian Government

Takeovers Panel

**Reasons for Decision
Strategic Minerals Corporation NL 06
[2020] ATP 8**

Catchwords:

Decline to conduct proceedings – entitlement issue – compulsory acquisition – disclosure – intentions – use of funds – interim order

Corporations Act 2001 (Cth), sections 602, 611 (item 9), Part 6A.2, 664C

Guidance Note 17 – Rights Issues

Energy Resources of Australia Limited 02R [2020] ATP 3, Energy Resources of Australia Limited [2019] ATP 25

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

INTRODUCTION

1. The Panel, Rebecca Maslen-Stannage, Tony Osmond (sitting President) and Nicola Wakefield Evans, declined to conduct proceedings on an application by Ms Veronica Oma in relation to the affairs of Strategic Minerals Corporation NL. The application concerned a proposed renounceable entitlement issue by Strategic Minerals likely to result in Strategic Minerals’ controlling shareholder increasing its shareholding above 90% and proceeding to compulsory acquisition. The Panel considered that the process undertaken by Strategic Minerals to explore its funding options appeared prima facie to be appropriate in the circumstances and there was no reasonable prospect that it would declare the circumstances unacceptable.
2. In these reasons, the following definitions apply.

Applicant	Ms Veronica Oma
Board	the board of directors of Strategic Minerals
BVS deposit	has the meaning given in paragraph 10(b)
Entitlement Issue	Strategic Minerals’ renounceable entitlement issue of 2 shares for every 15 shares at an issue price of \$0.36 per share to raise up to \$4,122,818
PFS	has the meaning given in paragraph 10(b)
Prospectus	Strategic Minerals’ Entitlement Issue Prospectus dated 3 April 2020
QGold	QGold Pty Ltd
Strategic Minerals or SMC	Strategic Minerals Corporation NL

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FACTS

3. Strategic Minerals is an ASX listed company (ASX code: SMC).
4. As of 29 June 2018, following the close of an on-market takeover bid for Strategic Minerals by QGold at \$0.40 per share, QGold had a relevant interest in 86.75% of Strategic Minerals. QGold is controlled by Mr Christopher Wallin.
5. On 20 August 2018, Strategic Minerals closed a 1 for 8 renounceable entitlement offer at \$0.36 per share. Upon the allotment of shares, QGold increased its relevant interest from 86.75% to 87.91% of Strategic Minerals.
6. On 2 May 2019, Strategic Minerals closed a 1 for 9 renounceable entitlement offer at \$0.34 per share. Upon the allotment of shares and a small number of on-market purchases prior to the allotment date, QGold increased its relevant interest from 87.91% to 88.96% of Strategic Minerals.
7. On 6 April 2020, Strategic Minerals announced the proposed Entitlement Issue which included a shortfall facility.
8. The Prospectus disclosed that QGold’s relevant interest in Strategic Minerals at the date of the Prospectus was 89.59% and that the potential maximum voting power of QGold after the offer would be 90.70% (assuming QGold took up its full entitlement, no other shareholders took up their entitlements and no other shareholders sold their rights).¹ The Prospectus disclosed that QGold intended to take up its full entitlement² and, to the extent its voting power increased as a result of the offer, QGold intended to rely on the 3% creep exception.³
9. The Prospectus further stated that:

It is likely that, immediately after the Offer, QGold will have a beneficial interest in 90% or more of all SMC Shares...

and

SMC has been informed by QGold that it will exercise its right of compulsory acquisition if it is entitled to do so⁴

and

If QGold does proceed to compulsory acquisition, it intends to propose a compulsory acquisition price of \$0.36 per Share (being an amount equal to the offer price under the Offer).⁵

¹ If QGold purchased 100% of all available rights on market, its maximum voting power would be 90.81%

² No shortfall shares were to be placed to QGold

³ Item 9 of section 611. 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)

⁴ Pursuant to Part 6A.2

⁵ The Prospectus also stated that: “If the independent expert concludes that the proposed price of \$0.36 does not represent fair value for the securities, QGold could either (i) elect to proceed with compulsory acquisition at the proposed price, (ii) elect to increase its proposed compulsory acquisition price, or (iii) elect not to proceed with compulsory acquisition.”

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APPLICATION

Declaration sought

10. By application dated 20 April 2020, Ms Veronica Oma sought a declaration of unacceptable circumstances. The Applicant submitted, among other things, that:
 - (a) as a result of the Entitlement Issue, QGold could not fail in its aim of reaching more than 90% of Strategic Minerals
 - (b) the Board had managed the affairs of Strategic Minerals *“in ways designed to slow down as much as possible”* the progress of the precursor studies necessary to undertake the preliminary feasibility study (PFS) of Strategic Minerals’ Big Vein South deposit located within its Woolgar Gold Project (**BVS deposit**)
 - (c) while the Entitlement Issue commits to funding the PFS, the PFS would not be completed prior to compulsory acquisition and
 - (d) therefore, in effect, the Entitlement Issue has been *“inappropriately used and has been knowingly designed (together with the structure of [rights issues] in 2018 and 2019) by SMC’s highly conflicted Board as an ‘alternative takeover mechanism’ to enable QGold to proceed to compulsory acquisition of the remaining SMC shares; and to set up the [compulsory acquisition] process to proceed under terms highly favourable to QGold through the Board’s actions stymieing the development and public release of a pre feasibility study”*.
11. The Applicant further submitted that statements in the Prospectus regarding QGold’s intentions if it proceeds to compulsory acquisition were misleading and coercive.
12. The Applicant submitted that the circumstances were contrary to the policy objectives under section 602.

Interim order sought

13. The Applicant sought an urgent interim order to halt the Entitlement Issue proceeding pending determination of the application.
14. On 20 April 2020, after receiving submissions from the parties, the substantive President of the Panel (Mr Alex Cartel) made interim orders (see **Annexure A**) requiring Strategic Minerals to take all action necessary to suspend trading in new shares on a deferred settlement basis for not less than five business days from 21 April 2020 and postpone the closing date and all subsequent dates in the Entitlement Issue timetable by not less than five business days.
15. The President considered that the interim orders maintained the status quo pending determination of the application by a sitting Panel.

Final orders sought

16. The Applicant sought final orders:

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- (a) to the effect that the Board be required to investigate the sale of a non-core asset as an alternative to the Entitlement Issue or to restructure the Entitlement Issue and obtain shareholder approval under item 7 of section 611
- (b) to freeze QGold's equity to less than 90% pending the completion of the PFS
- (c) to require the preparation of the PFS by an independent expert selected by ASIC and overseen by ASIC and the Panel so that it can be used as a basis of the valuation under Part 6A.4 and
- (d) to prevent the delisting of Strategic Minerals until the completion of the compulsory acquisition process.

DISCUSSION

Preliminary submissions

- 17. Strategic Minerals and QGold each made preliminary submissions that the Panel should not conduct proceedings.
- 18. In considering the matter, we decided to receive two out of process submissions from the Applicant in response to the preliminary submissions. We also agreed to receive a further submission from the Applicant requesting that we receive a valuation opinion report which was commissioned by the Applicant and other Strategic Minerals shareholders in November 2017. The Applicant submitted that the report was relevant because it detailed key data requirements to populate the PFS. We decided not to receive the report; we did not consider it materially relevant given the reasoning behind our decision.

Control effect of the Entitlement Issue

- 19. The Applicant submitted that the Entitlement Issue could not fail to deliver more than 90% equity in Strategic Minerals to QGold because at least 49% of minority shares were held by overseas shareholders who were ineligible to take part in the Entitlement Issue.
- 20. Strategic Minerals disputed this submission. It submitted that the number of overseas shareholders represented 9.57% of the minority shares and, in addition, the offer was renounceable and a nominee had been appointed to sell the entitlements to which ineligible shareholders were entitled. The Applicant subsequently accepted that this was the case.
- 21. While it is likely that QGold will reach 90%, even though ineligible shareholders account for just under 10% of minority shareholders, it is possible that QGold may fail to reach the 90% compulsory acquisition threshold. It may have been preferable for Strategic Minerals to seek to prevent QGold from purchasing rights on market to reduce the control effect, however, 100% of all available rights represents only 0.11% of Strategic Minerals and, in any event, QGold is entitled to acquire more than 90% using the 3% creep exception in item 9 of section 611.

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Structure of the Entitlement Issue

22. The Applicant submitted that QGold had failed on two attempts to meet the requirements for compulsory acquisition under Part 6A.1 after closing takeover bids in 2014 and 2018. She submitted that as an alternative, after the second bid, QGold and the Board formed a strategy for QGold to acquire the remaining 3.25% needed to trigger compulsory acquisition under Part 6A.2 through a series of entitlement issues. In each of the 2018 and 2019 entitlement issues, QGold took up its full entitlement and the shortfall was not placed resulting in incremental increases in QGold's voting power. The Applicant submitted that these two previous entitlement issues and the Entitlement Issue were designed to enable QGold to "*cheaply and quickly*" reach the 90% threshold which it would have been unable to do via on market purchases (given the low buying prices set by QGold).⁶
23. The Applicant considered that three of four directors on the Board were not independent of Mr Wallin, including Strategic Minerals' executive chairman, Mr Laif McLoughlin, who is Mr Wallin's son in law. She submitted that an independent board would have investigated funding mechanisms that were less impactful on minority shareholders.
24. Strategic Minerals submitted that there had been "*no collusion whatsoever between the Board and QGold in relation to the Company's program of work during this period, or how it was funded*".
25. In its preliminary submissions, QGold submitted that neither it nor any of its directors or officers had any involvement in the decision to undertake the Entitlement Issue. It submitted that it was only contacted by Strategic Minerals shortly before the offer was announced and was asked whether it would take up its entitlement and if QGold's voting power reached 90% whether its intentions remained the same as previously disclosed to shareholders in the 2019 entitlement issue prospectus.
26. We find it somewhat surprising that QGold was not consulted earlier. One might expect that QGold would have required some time to consider whether it would propose a compulsory acquisition price after it was made aware of the proposed Entitlement Issue.⁷ On the other hand, given QGold's shareholding and familiarity with the company, perhaps Strategic Minerals could assume that QGold would know where it stood on such issues and be prepared to respond quickly.
27. We recognise the difficulty for the Applicant in providing us with material to support inferences of collaboration between QGold and the Board but in light of our conclusions below, we do not have sufficient material to justify further enquiries on this issue.
28. In respect of the Entitlement Issue, Strategic Minerals submitted that the Board resolved in February 2020 that it required circa \$4 million to satisfy its immediate

⁶ We note Strategic Minerals shares are thinly traded

⁷ Noting that the 2019 entitlement issue prospectus did not specify a compulsory acquisition price

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business objectives. It delegated decision making in relation to the method of funding to an independent funding committee that excluded Mr McLoughlin (on the basis of his perceived conflict with QGold).⁸ It submitted that the committee considered a range of funding alternatives and consulted independent third parties including PCF Capital, Canaccord Genuity (Australia) Limited and PAC Partners. Out of this process, Strategic Minerals submitted that only two viable options emerged of which funding by way of an entitlement issue was considered by the committee to be the superior option. The committee determined there was no appetite for underwriting unless QGold was prepared to sub-underwrite, but that was not pursued because of the potential dilutionary impact.

29. In circumstances where a company proposes a rights issue that is likely to lead to compulsory acquisition, we expect the company to consider the proposal very seriously.⁹
30. Based on Strategic Minerals' submissions, the process undertaken by Strategic Minerals to explore its funding options and in making the decision to undertake the Entitlement Issue appears prima facie to be appropriate in the circumstances. That process involved, among other things, obtaining independent advice from reputable brokers, considering closely the control implications of the transaction in light of the Panel's guidance and recent decisions, understanding the company's cashflow and funding needs and ensuring that the decision makers were free from any actual or perceived influence from the major shareholder in circumstances where that shareholder was likely to move to compulsory acquisition.
31. Guidance Note 17 provides that (footnotes excluded): *"In the Panel's experience, where there is a clear need for funds that has not been contrived, a rights issue resulting in a control effect will generally not be unacceptable (in the absence of other issues) provided the rights issue is structured appropriately and an appropriate dispersion strategy has been put in place"*.¹⁰
32. In our view, the structure of the Entitlement Issue is appropriate when viewed as a whole and in light of current market conditions and the circumstances of the company.¹¹ Strategic Minerals also appears to have a genuine need for funds, noting Strategic Minerals' submission that its current cash position was approximately \$260,536 and, based on projections, it would be in a negative cash position by the end of May 2020.

Disclosure of QGold's intentions

33. The Applicant submitted that statements in the Prospectus regarding QGold's intentions if it proceeds to compulsory acquisition were misleading and *"could have potentially harmful coercive impacts on shareholders leading them to panic dispose of their*

⁸ Strategic Minerals submitted that it did so notwithstanding that it has always maintained that no actual conflict exists

⁹ See *Energy Resources of Australia Limited* [2019] ATP 25 at [71]

¹⁰ At [10]

¹¹ See GN17 at [13]

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stock on market prior to being properly advised of QGold's intentions directly through" the compulsory acquisition notice to be sent to shareholders under section 664C, particularly in relation to the acquisition price for their shares, which "will have to be substantially greater than that stated in the Prospectus".

34. Strategic Minerals submitted that the level of disclosure in relation to QGold's intentions was provided in line with Guidance Note 17.¹² It also considered recent guidance in *Energy Resources of Australia Limited 02R* where the Panel required the company's major shareholder to form intentions regarding compulsory acquisition in the event that it became a 90% holder as a result of an entitlement offer and underwriting agreement and for the company to provide further disclosure of the major shareholder's intentions.¹³ Strategic Minerals submitted that the disclosure was not misleading or coercive, rather it ensured compliance with the requirements of the fundraising and continuous disclosure provisions and the underlying principles of Chapter 6 as specified in section 602(a) and (b).¹⁴
35. We note that the review Panel in *Energy Resources of Australia Limited 02R* stated that "whether a person who is likely to obtain or increase control in a company as a result of a rights issue should disclose its intentions depends on the circumstances".¹⁵ There the review Panel cited as relevant to their conclusion that the major shareholder should have formed its intentions regarding compulsory acquisition: the fact that capital raised through the rights issue was not expected to generate any direct financial return, the issuer's solvency being at risk without support from its major shareholder and the compelling economic case for the major shareholder to compulsorily acquire if it was able to do so.
36. While the circumstances are different here, the decision to disclose QGold's intentions appears appropriate in light of previous disclosures of QGold's intentions and the likelihood of QGold reaching 90% given its shareholding at the date of the Prospectus. We do not consider this disclosure, including the disclosure of QGold's proposed compulsory acquisition price, to be misleading. QGold's proposed compulsory acquisition price was properly qualified. It may have discouraged participation but we do not consider it coercive in the circumstances. It informed minority shareholders of QGold's proposed view of fair value but did not derogate from the minority shareholder protections in place under Part 6A.2.

Strategic Minerals' actions in relation to the PFS

37. The Applicant submitted that Strategic Minerals had used a variety of tactics to delay the release of results of studies in the key areas required to prepare a PFS including by insisting on completing diamond drilling rather than relying on reverse circulation drilling that had already been completed and by undertaking additional tests or increasing the scope of existing testing programs. She submitted that since

¹² At [30] and [31]

¹³ [2020] ATP 3. See [34] to [39]

¹⁴ Referring to *Energy Resources of Australia Limited* [2019] ATP 25 at [200]-[201] and *Energy Resources of Australia Limited 02R* [2020] ATP 3 at [39]

¹⁵ At [38]

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2017, despite funds being earmarked for testing programs in the 2018 and 2019 entitlement issues, Strategic Minerals had made only three materially significant releases concerning the BVS deposit – a resource update in December 2018, a resource update in March 2020 and a JORC compliant metallurgical study report in March 2020.¹⁶ She submitted that reasons provided by the Board “*are no more than excuses to keep delaying*” the publication of important geotechnical and metallurgical results and therefore delaying a PFS which would provide proof of the high economic value and mineability of the BVS deposit.

38. The Applicant further submitted that only one line item of \$350,000 in the planned use of funds in the Prospectus was required to deliver the PFS and therefore, questioned the size of the Entitlement Issue. Strategic Minerals submitted that all the activities documented in the use of funds table were required to complete the PFS to the “*level of accuracy required by the Board and management of the Company*”. The Applicant submitted that a high level of accuracy was not required for producing a PFS and the “*company’s wish to have perfect information is just a further stalling tactic*”.
39. Strategic Minerals submitted that at all times the Board had sought to act in good faith in the best interests of the company and had sought to raise capital, in each case, when there had been a legitimate need for funds consistent with work programs constructed in the good faith business judgement of the Board. It provided an outline of the work undertaken in relation to the BVS deposit, the Board’s considerations of events since 2017 and the use of the funds to be raised by the Entitlement Issue.
40. It is very difficult for the Panel to second guess judgements that have been made by a board on such matters as the use of funds or on what is required to satisfy JORC Code standards. These judgements are subject to director’s duties and therefore, may be more appropriately assessed by other regulators or the courts. While this does not prevent us from exercising our jurisdiction, based on Strategic Minerals’ submissions, the actions of the Board appeared reasonable and we consider it unlikely we would find unacceptable circumstances in relation to this issue.
41. Here, the PFS is only one step along the way to determining whether the BVS deposit can be mined. If QGold exercises compulsory acquisition, the expert nominated by ASIC to prepare a report on the fair value for the securities to be acquired should be provided with, and take account of, all the work undertaken by Strategic Minerals in relation to the BVS deposit to date.

Conclusion

42. While we had some concerns given QGold may reach the 90% compulsory acquisition threshold as a result of the Entitlement Issue, on balance, we consider it unlikely we would find unacceptable circumstances based on the strength of the evidence and, if unacceptable circumstances were found, the availability of suitable

¹⁶ The Applicant submitted that Strategic Minerals initially released a two page summary of the metallurgical study in February 2020 and only released a JORC compliant report in March 2020 after she complained to the ASX

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remedies in the circumstances (particularly when balanced against the need for funds).

43. We also note the protections in place under Part 6A.2 if QGold proceeds to compulsory acquisition. Those protections include the potential for Court challenge. A Court is better placed than the Panel to adjudicate on some of the factual matters of the kind raised in the application.

DECISION

44. 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

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

Tony Osmond

President of the sitting Panel

Decision dated 27 April 2020

Reasons given to parties 4 June 2020

Reasons published 10 June 2020

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Advisers

Party	Advisers
Ms Veronica Oma	-
Strategic Minerals	Steinepreis Paganin
QGold	Arnold Bloch Leibler



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Annexure A

CORPORATIONS ACT SECTION 657E INTERIM ORDERS

STRATEGIC MINERALS CORPORATION NL 06

Ms Veronica Oma made an application to the Panel dated 20 April 2020 in relation to the affairs of Strategic Minerals Corporation NL (**Strategic Minerals**).

The President ORDERS:

1. Strategic Minerals must immediately take all actions necessary, in relation to its renounceable entitlement offer made under Strategic Minerals' prospectus dated 3 April 2020 (**Prospectus**), to:
 - (a) suspend trading in new shares on a deferred settlement basis for not less than 5 business days from 21 April 2020 and
 - (b) postpone by not less than 5 business days the following dates:
 - (i) the closing date of the entitlement offer and
 - (ii) all subsequent dates listed in the timetable on page 2 of the Prospectus.
2. Strategic Minerals must make an announcement on the Australian Securities Exchange as soon as possible regarding the adjustments to its entitlement offer timetable.
3. These interim orders have effect until the earliest of:
 - (i) further order of the President or the Panel
 - (ii) the determination of the proceedings and
 - (iii) 2 months from the date of these interim orders.

Tania Mattei
Counsel
with authority of Alex Cartel
President of the Panel
Dated 20 April 2020