



Australian Government

Takeovers Panel

**Reasons for Decision
Excelsior Capital Limited
[2020] ATP 25**

Catchwords:

Decline to make a declaration – extension of time to make an application – substantial holding – insider trading – efficient, competitive and informed market

Corporations Act 2001 (Cth), sections 249D, 249N, item 9 of 611, 657C(3), 671B

ASX Listing Rules, Appendix 3Y

*Guidance Note 1: Unacceptable Circumstances, National Companies and Securities Commission, Policy Statement 105
“Discretions vested in the Commission”*

The President’s Club Limited 02 [2016] ATP 1, Austral Coal Limited 03 [2005] ATP 14, Skywest Limited 03 [2004] ATP 17, Pinnacle VRB Limited 08 [2001] ATP 17, Pinnacle VRB Limited 05 [2001] ATP 14, Advance Property Fund [2000] ATP 7

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

INTRODUCTION

1. The Panel, Kelvin Barry, Elizabeth Hallett (sitting President) and Kristen Jung declined to make a declaration of unacceptable circumstances in relation to the affairs of Excelsior Capital Limited. The application concerned acquisitions of Excelsior shares resulting in Ms Leanne Catelan’s relevant interest in Excelsior increasing from 47.8% to 50.2%. The Panel was not satisfied the market was uninformed to any material extent when the acquisitions occurred and considered that, while Ms Catelan should have ensured she complied with the substantial holding requirements in a timely manner, further action was not necessary or appropriate.

2. In these reasons, the following definitions apply.

- Applicant Mr Warwick Sauer
- Catelan Parties Leanne Catelan Superannuation Fund Pty Ltd ATF Leanne Catelan Superannuation Fund and Ms Catelan
- Excelsior Excelsior Capital Limited
- June 2020 Seller has the meaning given in paragraph 25
- Requisition Notice has the meaning given in paragraph 5
- Shareholder has the meaning given in paragraph 6
- Update

FACTS

3. Excelsior is an ASX listed company (ASX code: ECL). Excelsior’s directors are Mr Danny Herceg (Chairman), Ms Catelan and Mr Oliver Schweizer.

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4. On 13 November 2018, the Catelan Parties lodged a change of substantial holder notice disclosing that they had voting power of 47.7% in Excelsior. Subsequently, the Catelan Parties made the following acquisitions of Excelsior shares as disclosed in Appendix 3Y¹ notices lodged with the company:

Date of acquisition	Number of shares acquired	Voting power ²
14/10/19	50,000	47.87%
10/03/20 and 12/03/20	309,912	48.94%
16/03/20 and 17/03/20	249,944	49.80%
18/03/20	15,000	49.85%
25/03/20	7,772	49.88%
03/06/20	98,674	50.22%

5. On 17 August 2020, the Applicant and 5 other shareholders³ lodged a notice of initial substantial holder disclosing a combined interest of 5.52% in Excelsior, and that they had “jointly requested the directors of Excelsior Capital Ltd to call and arrange to hold a meeting of the members of” Excelsior (**Requisition Notice**⁴) to consider and vote on the following resolutions:

“That the directors of the company (“ECL”), promptly after the passing of the resolution, and subject always to their legal duties as directors, take all steps reasonably required to do the following in the following order:

- 1. obtain professional advice on maximising the saleability and near term market value of ECL’s “CMI Operations” business;*
- 2. promptly act on the advice received;*
- 3. promptly obtain a valuation of the “CMI Operations” business;*
- 4. promptly and actively market the “CMI Operations” business for sale and engage with potential purchasers of it in the manner of a willing but not desperate vendor;*
- 5. provided an offer to purchase the “CMI Operations” business is received, and the offer is on reasonable commercial terms (with consideration being given to, inter alia, the procured valuation), accept the offer and effect the sale of the “CMI Operations” business; and*

¹ ASX Change of Director’s Interest Notice

² Voting power is calculated on the basis of information in the Appendix 3Y notices and total number of Excelsior shares on issue

³ Vera Kalabric, Kalabric Family Super Pty Ltd atf the Kalabric Super Fund, Benjamin Graham and Katerina Graham atf the FKR Super Fund, Whiley Close Investment Pty Ltd atf the Sims Family Super Fund and BAVARIA Industries Group AG

⁴ On 18 August 2020, Excelsior announced that it had received the Requisition Notice, made under ss249D and 249N. 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)

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6. upon the sale being completed and sale proceeds being received by ECL, distribute to ECL's shareholders the net sale proceeds as:

- a. a fully franked dividend, to the maximum extent possible;
- b. (insofar as that does not wholly account for the net sale proceeds) a capital return, to the maximum extent possible;
- c. (insofar as that does not wholly account for the balance of the net sale proceeds) an unfranked dividend, to the maximum extent possible."

6. On 19 August 2020, Excelsior announced a "Shareholder Update" (**Shareholder Update**) stating, among other things, that:

"Excelsior Capital Limited is a Listed Investment Entity, the board is continually reviewing all the investments within the group.

Considering the current economic conditions, the board has been actively engaged in an internal and external review of the Company's investments since the first quarter of 2020.

The review is ongoing and includes consideration of ECL's position in the current market in respect of both the electrical business and the investment portfolio. As part of the review, the Company has appointed external advisors for both divestment and growth opportunities.

The Company will update the market with any material outcomes as a result of the review in accordance with its continuous disclosure obligations...."

7. Also on 19 August 2020, Excelsior announced that, following receipt of legal advice, it considered that the Requisition Notice was invalid.

APPLICATION

Declaration sought

8. By application dated 29 October 2020, the Applicant sought a declaration of unacceptable circumstances, submitting that the Catelan Parties "*acquired up to 2.4% of Excelsior, and acquired actual control of Excelsior, whilst in possession of inside information, that being information that when made public resulted in Excelsior's share price increasing by 22.5%*" (footnotes omitted).
9. The Applicant submitted that while the application was made more than two months after the relevant circumstances had first occurred (and accordingly out of time for the purposes of s657C(3)), the Panel should commence proceedings because, among other things, the relevant circumstances had not been made known until the Shareholder Update (which was made two months and ten days before the date of the application).

Orders sought

10. The Applicant did not seek any interim orders. The Applicant sought final orders to the effect that the shares acquired by the Catelan Parties the subject of the application be vested in ASIC for sale, with any profits from the sale to be retained by ASIC.

DISCUSSION

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

Decision to conduct proceedings

12. The Catelan Parties made a preliminary submission stating, among other things, that:

- (a) Each of the trades made by the Catelan Parties were outside the ‘block out periods’ in accordance with Excelsior’s trading policy.
- (b) The Shareholder Update was not price sensitive. Any share price movement on or about 19 August 2020 was not in response to the Shareholder Update, rather it was more likely to be in response to the Applicant’s disclosure to the market dated 17 August 2020, which contained the following statement:

*“Based on recent sales, we think ECL’s electrical business is worth \$50m at an absolute minimum, and perhaps even \$70m or more – **ie \$1.75 to \$2.40+ per ECL share.** That is in addition to the ‘investment portfolio’ worth ~65c per share.”* (emphasis in the original)

- (c) The Catelan Parties already had practical control of Excelsior.
- (d) The allegations in the application *“involve general regulatory issues under Chapter 7 of the Corporations Act and are not matters to which section 657A applies”*.
- (e) For the purposes of s657C(3), the application was almost 4 months out of time (not 10 days), because *“the acts or events alleged to constitute unacceptable circumstances occurred in March 2020 and, 3 June 2020”*.

13. We also received a submission from an Excelsior shareholder who submitted, among other things, that the Catelan Parties had not complied with the substantial holder notice provisions.

14. The Panel in *Austral Coal Limited 03* stated that it should not exercise its discretion to extend time under s657C(3)(a) lightly.⁵ The Panel in that case also considered that it would be undesirable for the application to go unheard because it was lodged outside the 2 month time limit, if:

- (a) essential matters supporting the application first came to light during the 2 month period preceding the application and
- (b) the application made credible allegations of clear, serious and ongoing unacceptable circumstances.⁶

15. Here an essential fact supporting the application, being the Shareholder Update, came to light only 10 days outside the 2 month period. We also considered that the Catelan Parties did not appear to have complied with the substantial holder

⁵ [2005] ATP 14 at [18]

⁶ [2005] ATP 14 at [19]. In that case the Panel considered that the application had not presented a reasonable basis for a finding that the unacceptable circumstances alleged might exist. See also *The President’s Club Limited 02* [2016] ATP 1 at [106] to [160]

provisions in circumstances where the creep exception in item 9 of s611 was used to take a shareholder over 50% and that the Applicant's submission that the Catelan Parties acquired shares while in possession of price sensitive information could not be dismissed out of hand.

16. We decided to conduct proceedings.

Insider trading and unacceptable circumstances

17. The Catelan Parties submitted that:

"Not only does the Panel not have the jurisdiction to determine whether a party has contravened the insider trading provisions, the Panel does not have the processes, protections, rules of evidence or tools to allow it to even speculate on a matter that would require proof beyond a reasonable doubt. As the Panel stated in Pinnacle VRB Limited (No. 8):

"We do not have the powers which a court of law has to perform any of those functions (including for example, the powers to order discovery between parties and to punish for contempt, like a court); parties and witnesses do not have the protections which they would have in court proceedings."

It is also an unfortunate and potentially dangerous precedent to put a party (such as the Catelan Parties) in a position where, in spite of the Applicant's failure to demonstrate a reasonable likelihood that the circumstances were unacceptable, they are required to disprove what appears to be a rebuttable presumption that a share price movement in August means they had an information advantage in March, especially in the context of markets and the unprecedented state of global uncertainty during this period."

18. *Pinnacle VRB Limited 08*⁷ (and the initial decision in *Pinnacle VRB Limited 05*⁸) were early decisions of the Panel relating to frustrating action. The statement quoted by the Catelan Parties from *Pinnacle VRB Limited 08* was made in response to a submission by two of the parties urging the Panel to deal with that matter "simply by applying the law on directors' duties, or a policy which approximated to that branch of the law"⁹ and is only a portion of the following paragraph¹⁰, which provides context:

"This submission mistakes the nature of these proceedings and of the Panel's function, which we have discussed above. As a Panel, our functions are limited to applying the updated, enacted Eggleston principles set out in section 602 as essential elements in a wider public interest discretion. We are not empowered to enforce compliance with the law or to set aside contracts on equitable grounds or for non-compliance with Chapter 2D or 2E of the Corporations Law. We do not have the powers which a court of law has to perform any of those functions (including for example, the powers to order discovery between parties and to punish for contempt, like a court); parties and witnesses do not have the protections which they would have in court proceedings."

⁷ [2001] ATP 17

⁸ [2001] ATP 14

⁹ [2001] ATP 17, at [51]

¹⁰ At [52]

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19. The review Panel in that matter went on to provide useful guidance on the Panel's role including the following¹¹:

"The commercial community is seeking in the Panel, not for a second-rate court, but for a first-rate commercial Panel. It should not therefore fall between two stools and attempt to replicate court processes, thereby unduly delaying fast-moving transactions and the bid itself."

"And to what end would we conduct this inquiry? Our decision can only be based on the existence, prevention, removal and remediation of unacceptable circumstances which impact on Reliable's bid. Legal consequences of people's behaviour can obviously be circumstances. But even assuming such consequences can be established fairly and reliably, they are only relevant insofar as they impact on the bid by creating unacceptable circumstances, or bear upon the public interest..."

20. ASIC submitted that:

"...an alleged contravention of the insider trading provisions is relevant to determining whether the circumstances giving rise to the alleged contravention, and the effect of those circumstances, impinges on the principles set out in s602 of the Act or otherwise has an unacceptable effect on the control or potential control of the company or the acquisition or proposed acquisition of a substantial interest in the company. ASIC submits that the Panel may consider these matters without determining whether a contravention or breach of those provisions has occurred."¹²

21. We agree with ASIC's submission. Guidance Note 1: Unacceptable Circumstances lists as a possible unacceptable circumstance *"use of "inside" information (which may also breach the insider trading provisions)"¹³*. It could be contrary to an efficient, competitive and informed market for a person to acquire securities and increase the person's voting power from under 50% to over 50% in reliance on the creep exception in item 9 of s611 while in the possession of non-public price sensitive information, irrespective of whether such acquisitions contravene the insider trading provisions. Accordingly we do not consider that making inquiries as to what non-public information the Catelan Parties may have had when they acquired Excelsior shares in March and June 2020 sets (in the words of the Catelan Parties' submission) *"an unfortunate and potentially dangerous precedent"*.

Shareholder Update

22. The Shareholder Update stated that the board had been actively engaged in an internal and external review of Excelsior's investments since the first quarter of 2020. In determining whether the Catelan Parties acquired Excelsior shares while in the possession of non-public price sensitive information, we made enquiries as to the nature of this internal and external review.

¹¹ At [55] and [56]

¹² The Applicant made a similar submission

¹³ *Guidance Note 1: Unacceptable Circumstances*, at example 7 of [32(b)]. See also National Companies and Securities Commission, Policy Statement 105 *"Discretions vested in the Commission"* at [15], [18]-[22], *Advance Property Fund* [2000] ATP 7 at [39] to [41] and *Skywest Limited* 03 [2004] ATP 17 at [47]

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23. Excelsior submitted that in relation to this internal and external review that:
- (a) from March 2020 it had preliminary discussions with potential advisers and in *“the course of those discussions, ideas and suggestions were made by those potential advisers seeking to win the appointment”*
 - (b) it signed a non-disclosure agreement with a firm on or about 18 March 2020 and, after interviewing other possible candidates, appointed that firm to review its electrical business on 30 July 2020 and
 - (c) it appointed another adviser to consider growth opportunities who started work in July (in tandem with the adviser retained to review its electrical business).
24. Excelsior submitted in relation to the Catelan Parties’ acquisitions in March 2020:
- “...it has not been shown that Ms Catelan had any information at the time that would have been material to the market. The mere intention to undertake some sort of review of investments and opportunities is not material even in an orderly market. It is what the directors of an investment company are expected to do as part of their duties to maximise returns to shareholders. Whether they had discussions with potential advisers or not does not affect that position.*
- Further, at the time, stock markets around the world were in turmoil. Share prices of listed companies were subject to extreme volatility. According to the ASX website, the ASX All Ordinaries Index fell just over 28% from the end of January to the end of March (from 7121.2 to 5110.6).*
- For a listed investment company like Excelsior, the value of its investments and shares would be impossible to assess with any reliability given the uncertain global economic outlook at the time. Knowledge that the company intended to undertake a review of the operations would be inconsequential in the face of those factors (and would have been expected). The share price was driven by far more important factors outside the company’s control.”*
25. The Catelan Parties’ acquisition of Excelsior shares on 3 June 2020 was an off-market transfer with a shareholder who was a former director and current investment adviser of Excelsior (**June 2020 Seller**). Excelsior and the Catelan Parties both submitted in effect that the June 2020 Seller was aware of Excelsior’s affairs and accordingly, there was no material information imbalance between the parties.
26. Excelsior, in response to our questions in the brief, provided confidential documents to us (with the Applicant’s agreement) on the basis that they were not provided to the Applicant. These confidential documents taken as a whole, were consistent with the submissions of Excelsior and the Catelan Parties. Accordingly, we did not find it necessary otherwise to rely on them.
27. We consider that the material provided to us did not establish that the market was uninformed to any material extent when the Catelan Parties acquired Excelsior’s shares in March and June 2020.
28. We were not satisfied that the share price movements following the Shareholder Update established that the Catelan Parties had a material information advantage when the acquisitions occurred. We also accept the Catelan Parties’ submission that

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the thin trading of Excelsior's shares should be borne in mind in assessing the increase in its share price following release of the Requisition Notice and Shareholder Update.

Substantial holder notice disclosure

29. On 9 November 2020, the Catelan Parties lodged a notice of change of interest of substantial holder, disclosing an increase in their voting power from 47.7% on 13 November 2018 to 50.22% on 3 June 2020. Notices were required to be given within 2 business days after each increase of at least 1% (which occurred on or about 12 March 2020 and 3 June 2020).
30. The Catelan Parties submitted in effect that their failure to comply with the substantial holder notice provisions was inadvertent and that their trading had been disclosed in Ms Catelan's Appendix 3Y notices.
31. The Catelan Parties should have ensured they complied with the substantial holding notice requirements in a timely manner.¹⁴ Substantial holders (including those who are directors of a listed company whose interests are disclosed through Appendix 3Y notices) have an important obligation to comply with those requirements. We consider that market participants do not necessarily keep track of Appendix 3Y notices and substantial holder notices provide important information to the market, including changes to voting power or association. However, given that a notice has now been provided, and the market was not uninformed of the Catelan Parties' acquisitions, it is difficult to see any further action that would still be necessary or appropriate.

DECISION

32. For the reasons above, we declined to make a declaration of unacceptable circumstances. We consider that it is not against the public interest to decline to make a declaration and we had regard to the matters in s657A(3). As we have decided not to make a declaration, we do not extend time for the making of the application under s657C(3)(a).

Elizabeth Hallett

President of the sitting Panel

Decision dated 20 November 2020

Reasons given to parties 22 December 2020

Reasons published 24 December 2020

¹⁴ Noting also that the Catelan Parties lodged their substantial holding notice eleven days after the Applicant made his application

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Advisers

Party	Advisers
Applicant	-
Catelan Parties	Gilbert + Tobin
Excelsior	Herbert Smith Freehills