Takeovers Panel

Reasons for Decision Anzoil NL 01

In the matter of Anzoil NL 01
[2002] ATP 19

Catchwords:

Contravention of section 606 – share sale agreement – breach by ancillary provision in agreement – cancellation of agreement – voting control through best endeavours clause – creation of voting block – meaning of "acting or proposing to act in concert" – declaration of unacceptable circumstances – unfair prejudice

Corporations Act 2001 (Cth), sections 12(2), 606(4), 608(1), 657A and 657D(1)

Bank of Western Australia v Ocean Trawlers Pty Ltd (1995) 16 ACSR 501
Elders IXL Ltd v NCSC [1987] VR 1

These are our reasons for our decision to make a declaration of unacceptable circumstances in relation to the affairs of Anzoil NL (*Anzoil*) and orders under sections 657A and 657D of the Corporations Act 2001, respectively.

Preliminary

1. The sitting Panel is made up of Carol Buys (sitting President), Kevin McCann (sitting Deputy President) and Celia Searle.

Relevant Persons

2. Anzoil is a listed Australian company. Its business is exploration for oil and gas in Australia and overseas. Its directors are The Hon. Ian Viner AO QC and Messrs Andrew Dodman and Rodney Bresnehan. From 26 September until 7 November 2002, Mr Ian Middlemas was also a director. Mr Sin Chong Wong is also a past director of Anzoil.

3. IGM Group Limited (***IGM***) is another listed Australian company involved in mineral exploration. Its directors are Rodney Hare, Sin Jen Hwang, Mark Smith, Kyle Haynes and Robert Arrigoni (alternate for Mr Hwang). IGM obtained a substantial shareholding in Anzoil as consideration for accepting Anzoil's bid for Castle Energy NL (***Castle***) in 2000. Mr Haynes is a stockbroker who has acted on behalf of IGM in its attempts to sell those shares. Messrs Hare and Hwang have in the past been directors of Anzoil.

4. Capersia Pte Ltd (***Capersia***) is a company incorporated in Singapore. Its directors and shareholders are Mr Frank Jacobs and Mrs Anne Jacobs. Mr Jacobs was from April 2001 until 12 October 2001 a director of Anzoil.

5. Dormley Pty Ltd (***Dormley***) is a company controlled by Dr Jaap Poll, who is a petroleum geologist and was a director of Anzoil from October 1993 until 12 October 2001. The Poll Superfund is also associated with Dr Poll.

6. Mr Peter Wilson is a Canadian businessman and financier. Mr Adam Wheatley is a director of an Australian resources company and also has investment banking experience. Messrs Wilson and Wheatley are described by IGM and Capersia as independent experts on matters relevant to Anzoil's business. Neither of them appears to be closely connected with IGM or Capersia.

7. On 15 October 2001, Anzoil announced to ASX that Anzoil had agreed to assign 90% of its subsidiary Anzoil (Thailand) Pty Ltd to Pacific Energy 2000 Pty Ltd (***PETT***), that Anzoil (Thailand) Pty Ltd had agreed to acquire Devon Energy (Thailand) Limited, a company holding 100% of offshore Thailand petroleum exploration permit B7/38, and that PETT would acquire 80% of Anzoil's interest in the Lembak LPG project in Indonesia. PETT is owned by Capersia (60%) and Dormley (40%). The Lembak project was partly owned by Castle, which Anzoil took over in December 2000.

8. At that stage, Dr Poll and Mr Jacobs resigned as directors of Anzoil, Messrs Viner and Hare continued as directors and Mr Dodman was appointed to the board.

9. Later announcements by Anzoil indicate that "PETTwas unable to bring the Lembak LPG project to fruition" and "would not be extending its agreement to acquire an interest in the Lembak project beyond 30 June 2002". Anzoil directors decided that the risks of th eproject were too great to justify further expenditure pursuing the project.

Shareholdings

10. At all relevant times, the following shareholdings have existed:[1]

Holder	No.	% on 97M	% on 112M
IGM	21,578,336	22.25%	19.35%
Sale Parcel[2]	9,178,336	9.46%	8.2%
Dormley	4,551,724	4.7%	4.1%
Capersia	3,250,608	3.35%	2.9%
Jacobs[3]	973,238	1%	0.9%
Hwang[4]	2,214,000	2.3%	2%

[1] Except as noted, these numbers are taken from the list of the top 20 shareholders as at 26 September 2002 on page 47 of Anzoil's Annual Report for the year to 30 June 2002. The number for Mr Wong was arrived at by adding two numbers in that list, under substantially identical names.

[2] Part of the IGM parcel in the previous line, included again for ease of reference.

[3] Mr Jacobs controls Capersia, and other entities connected with him hold the additional 973,238 shares. This number is taken from his substantial shareholding notice of 26 August.

[4] The draft agreement between Mr Hwang and Capersia says 2,314,000 shares.

Wong	2,500,000	2.6%	2.2%

Anzoil issued 14,540,000 shares to Arredo Pty Ltd, a company connected with Mr Middlemas, on 18 October for 2.5 cents each, increasing the number of fully paid shares on issue from 96,991,788 to 111,531,788. The percentage holdings are given above on both bases. Those shares were sold on 6 November, for about 2.5 cents each. [5]

The Agreement

11. The Share Purchase Agreement (the ***Agreement***) is dated 23 August 2002. Under it, IGM agreed to sell to Capersia 9,178,336 fully paid ordinary shares (9.46% of 96,991,788) for 4.5 cents/share. There was to be a bonus of 0.5 cents/share conditional on another transaction.[6] This additional amount was liable to be adjusted up or down according to Anzoil's cash position as at 1 August 2002.[7]

12. Clauses 2.1 and 2.2 of the Agreement[8] provide *inter alia* that:

    2.1 Completion will not proceed until:

    (a) … an invitation is received for a Board Appointment or a Board Appointment is otherwise obtained …"

    2.2 (a) [Capersia] and [IGM] must use their best endeavours to satisfy the conditions for Completion set out in clause 2.1.

    (b) [IGM] must use its best endeavours to ensure that [Anzoil] does all things necessary to ensure that the conditions set out in clause 2.1 are satisfied.

    In the Agreement, ***Board Appointment*** is defined as "the appointment of Mr Peter Wilson or another representative of Capersia to the Board of Directors of Anzoil NL".

13. On 26 August 2002, Capersia and Mr and Mrs Jacobs lodged a substantial shareholding notice with Anzoil and ASX, showing Mr Jacobs as having a relevant interest in 13,402,380 voting shares in Anzoil or 13.82%.[9] The Agreement was lodged on 30 August.

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[5] The fully paid ordinary shares are the only shares now material to control of Anzoil or to calculations of voting power, although Anzoil also has 7,433,500 partly paid shares on issue.

[6] This transaction was the acquisition of a petroleum licence referred to as the Devon Thailand Property by Anzoil Thailand under an agreement with Anzoil and Devon Energy (Delaware) Limited.

[7] The Agreement also provided for a loan of $240,000 made on 21 August 2002 to be repaid to Mr Frank Jacobs, a director of Capersia. The Agreement says the repayment is to be made by Capersia, but this is a mistake for IGM. Other material shows that Mr Jacobs lent IGM $240,000 on 21 August 2002.

[8] Substituting the appropriate names for defined terms used in the Agreement.

[9] The shares Capersia held before entry into the Agreement, the shares it purchased under the Agreement and 973,238 shares held by other entities connected with Mr Jacobs.

Proposed Purchases

14. On 23 August, Capersia also offered to acquire the shares in Anzoil held by Messrs Hwang and Wong. We have seen an unexecuted agreement for the purchase by Capersia of Mr Hwang's shares, at the same price and otherwise in terms similar to those of the Agreement. Clause 2 requires both buyer and seller to use their best endeavours to ensure that Mr Wilson is invited to join the Anzoil board, but does not contemplate Mr Wilson being appointed to the Anzoil board otherwise than by invitation.

15. We were also given copies of proposed agreements between IGM as seller and Dormley and the Poll Superfund as buyers of all of the shares IGM held in Anzoil, other than those subject to the Agreement with Capersia. The drafts are on much the same terms as the Agreement, except that clause 2 requires that Dr Poll or another representative of Dormley be appointed to the board of Anzoil, and expressly contemplates that the representative will be elected at a general meeting. The price in the draft agreements is 4.5 cents/share with 0.5 cents bonus, related to a different contingency from the bonus in the Agreement.

16. Except as noted, these draft agreements are essentially uniform with the Agreement. They appear to have been derived from the same template, which included terms relevant to the IGM sale.

Requisitions and Nominations

17. On 30 August, IGM gave Anzoil a notice under section 249D of the Corporations Act, requisitioning the holding of a general meeting by Anzoil to consider resolutions to remove Messrs Viner and Dodman as directors and to appoint Messrs Peter Wilson and Adam Wheatley as directors.

18. On 2 October, IGM lodged a further requisition, this time proposing resolutions to remove all of the then current directors and appoint as directors Messrs Wilson, Wheatley, Arrigoni and Haynes. Messrs Wilson's and Wheatley's appointments were proposed by Capersia and were acceptable to IGM. Messrs Arrigoni and Haynes are directors of IGM.

19. Between 7 and 9 October, Capersia nominated Mr Wilson for election to the board of Anzoil, IGM nominated Messrs Arrigoni and Haynes and Dormley nominated Dr Poll.[10] All of these nominations were in time to be voted on at Anzoil's annual general meeting for 2002, due to be held by the end of October 2002.

[10] Dr Poll nominated himself on 8 October. This nomination was invalid, as Dr Poll does not hold Anzoil shares directly, and it seems to have been replaced immediately with a nomination by Dormley.

Anzoil's Response

20. On 17 October, Anzoil wrote to IGM and Capersia that the Agreement appeared to contravene section 606 of the *Corporations Act 2001*. On 18 October, it made a similar announcement to ASX.

21. Anzoil advised ASX that the requisitions and nominations were illegal and void, as having been made pursuant to the Agreement. ASX replied that the Listing Rules required the company to allow the nominations to be voted on. Anzoil and ASX do not appear to have agreed about the company's obligations. Anzoil's annual general meeting for 2002 has been convened for 31 December 2002. In accordance with the Panel's orders, the notice of that meeting does not include resolutions to appoint as directors those persons who had been nominated by IGM, Capersia or Dormley.

22. On 22 October, Capersia and IGM agreed to cancel the Agreement. Capersia also agreed with Messrs Hwang and Wong to withdraw the offers it had made to them on 23 August to purchase the shares they held in Anzoil.[11]

The Application

23. The application was made by Anzoil and relates to the Agreement between IGM and Capersia, the requisitions by IGM under section 249D of the *Corporations Act 2001* for meetings to consider motions to remove some directors and appoint others, the nominations by IGM, Capersia and Dormley of directors for election at Anzoil's annual general meeting for 2002 and related matters.

24. Anzoil applied for a declaration that the following were unacceptable circumstances:

    a) the actions of IGM and Capersia in entering into the Agreement, alone or together with:

        i) the issue of the section 249D notices and IGM's and Capersia's nominations; or

        ii) the obligation to use best efforts to obtain the appointment of a nominee of Capersia to the Anzoil Board;

    b) the Dormley nomination, because of its possible interaction with the effects of IGM's and Capersia's nominations, particularly in relation to Anzoil Thailand; and

    c) the nomination of Mr Haynes, in the light of the breach of section 606 by IGM.

25. Anzoil sought interim orders to:

    a) defer Anzoil's annual general meeting for 2002 until 35 days after the close of proceedings; and

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[11] We have not seen both counterparts of these agreements.

b) restrain IGM, Capersia, Dormley and Mr Haynes from requisitioning or voting at any meeting of Anzoil.

26. Anzoil applied for final orders to:

a) avoid the Agreement;

b) direct Anzoil not to comply with either of the requisitions or any of Dormley's, Capersia's and IGM's nominations;

c) restrain IGM and Capersia (but not Dormley) from voting their shares in Anzoil; and

d) require IGM and Capersia (but not Dormley) to dispose of their shares in Anzoil.

27. In its application, Anzoil argued that Capersia and IGM had breached section 606 by entry into the Agreement, because they became associated and thereby increased their voting power in Anzoil to 25.6%.

The Parties' Email Correspondence

28. The parties have produced copies of a number of email messages which passed between Messrs Jacobs, Haynes, Hare and Poll. The people between whom the messages were passed have seen the copies in the course of these proceedings, without suggesting that they are anything but an accurate record of messages that were actually exchanged.[12]

a) 12 July Mr Jacobs to Mr Haynes "I understand that you have been given the task to sell the block of AZL shares held by IGM. I am an interested party (have been for some time) …".

b) 12 July Mr Haynes to Mr Jacobs "There is 26,392,336 shares available for sale at a price of 5 cents or greater. I will be actively marketing the stock from Monday, seeking bids of 5c or above for the entire line of stock."[13]

c) 26 July, Mr Jacobs to James Kiernan (an adviser to IGM) "In broad terms, at 5 cents I would be a seller and at 4 cents I am a buyer. Anybody that offers more than 5 cents might want more than the shares on offer to ensure control, as 27.2% does not quite do it with a potentially hostile block of 9.5%. I would have for sale 4 mil shares.[14] … Pending the clarification of some issues I am prepared to negotiate a 25% premium to the NTA. Maybe we could buy Hwang's shares and part of IGM's up to 19.9% of issued capital and leave IGM with the balance in the first instance.

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[12] We have reproduced the e-mails as accurately as possible, including some minor errors of syntax and punctuation, which do not affect the sense.

[13] This number is equal to the total of the holdings of IGM and Messrs Hwang and Wong, assuming the larger number for Mr Hwang's shares in the footnote to the table of shareholdings.

[14] The number of shares Mr Haynes was offering to sell (26,392,336) is 27.2% of the number of shares Anzoil then had on issue (96,991,788). Mr Jacobs' and Dr Poll's aggregate voting power was then 9%.

We can device strategy for the remaining parcel. We would need two resignations and two appointments to the Board."

d) 2 August, Mr Jacobs to Mr Hare, in relation to negotiations for the Agreement, "Speed is of the essence. We are talking to Viner about a deal on Thailand and Castle[15] and if we reach an agreement we might not have to buy control of AZL itself."

e) 29 August Mr Hare to Mr Jacobs "re Anzoil the sequence is that I have asked Mark to make the announcement of the condition tonight for morning release. I will then see that it is circulated and call Andrew Dodman. I seriously doubt that he is fully informed or educated on the facts. I will advise him to act to appoint Peter now, failing which we will have no option but to lodge the 249D which will be to remove both Ian and him … the decision will then be his to act or get pulled into it." [On 30 August, IGM's secretary, Mr Mark Smith, released the Agreement to ASX.]

f) 30 August Mr Jacobs to Mr Hare: "… when Messrs Hwang and Wong accept my offer for their shares, fax me the executed agreement … as I would have to amend my SSN."

g) 5 September Mr Jacobs to Mr Viner, discussing preferred composition of the board.

h) 9 October Dr Poll to Messrs Haynes, Hare and Jacobs "… I lodged another nomination for myself (nominated by Dormley) to overcome the ambiguous language in S66 of the AZL constitution (whether the nominator needs to be a member."

i) 10 October Mr Jacobs to Messrs Poll, Haynes and Hare "Why is the GM not scheduled before the end of Oct. AZL received a valid notice late August. I have, and you all should, pressure the ASX for an early meeting. Where is the injunction against the placement?"

j) 9 October Mr Haynes to Mr Jacobs Explains why no injunction. "We simply have to wait for the AGM and see how we go with the votes."

k) 15 October, Mr Haynes to Mr Jacobs "Why don't we break the agreement then."

l) 16 October Mr Jacobs to Mr Haynes "Do you still want to sell to me if we break? What is our understanding? Also keep in mind, if I were Viner, I would declare the IGM vote and the Hwang vote invalid, as there is a clear breach of the corps law. I also still would declare the Jacobs vote invalid, as they did in the Cue case, just to stay in power and allege that we are all 'associated'."

m) 15 October Mr Haynes to Mr Jacobs "We have to break the agreement – it is our only chance. Jaap should look at nominating other to the board.[16] I have seen their

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[15] See paragraph 7.

[16] This sentence is reproduced exactly.

legal advice and it says that IGM and Capersia are deemed associated under the corps law, so therefore we cannot vote in together."

n) 16 October, Mr Jacobs to Mr Haynes "Are you still going to sell to me or not?"

o) 16 October Mr Haynes to Mr Jacobs "I am having a meeting with the board today at 10.00. What do you want me to tell them your position is? Are you at all interested in buying these shares on the market at a price between 4 – 4.5 cents with no bonus payment. It is the only way that I can see you will be able to buy control, as Ian Viner has linked IGM and Capersia via the share sale agreement, with the specific clause that we have to vote as directed by Capersia, and therefore >20% combined means we potentially breach the takeover provisions of the corps act. I have done my numbers and if you and Jaap were to take IGM's parcel off us on market, then I believe that you would then have approximately 36 million shares that would vote for you. I believe that this could be enough to gain control.

p) 17 October Mr Jacobs to Mr Haynes "I am not interested in buying those shares on market or in any manner without control of the Board. As soon as I and Jaap buy these shares, Viner is going to allege that he and I are in breach of the corps law. My position is, lets cancel the agreement with IGM and Capersia as well as the agreements I signed with SJ. We all vote our own shares and if we get board rep we will purchase the shares from IGM and Hwang."

q) 23 October Dr Poll to Mr Jacobs, notifying him of an approach by an broker to purchase Dormley's shares at 3.0 cents; Dr Poll said that at that price, he was a buyer.

Mr Jacobs' Evidence

29. In a submission dated 7 November, Mr Jacobs says that he had wanted Dr Poll appointed to the board, and that he and Dr Poll "agreed that Peter Wilson and Adam Wheatley would make good directors and I indicated to him that I would support his nomination but no agreement, arrangement, correspondence or understanding was entered into."

30. In a submission dated 5 November, Mr Jacobs said that his reason for requiring clauses 2.1 and 2.2 in the Agreement was "that if Capersia was to increase its holding in Anzoil, I felt it necessary to have a board member for whom I have professional respect, on the Board of Anzoil", because he was dissatisfied with the performance of the Anzoil board. Mr Wilson would also bring Anzoil access to venture capital in North America. In a copy of an email dated 5 September to Mr Viner attached to that submission, Mr Jacobs states that Messrs Wilson and Wheatley are his nominees, not his representatives: both would act as independent directors.

31. The same email discusses negotiations between Dr Poll and Anzoil over the Lembak project, but there was some confusion whether he was speaking on behalf of Capersia, as well as Dormley. In that context, the statement quoted above that "We are talking to Viner about a deal on Thailand and castle and if we reach an agreement we might not have to buy control of AZL itself" must be understood to say that Dr

Poll and Mr Jacobs were talking to Mr Viner about Anzoil Thailand and Castle Energy and that if they reached agreement, Dr Poll and Mr Jacobs might not have to buy control of AZL itself.

32. On 5 November, Mr Jacobs advised us by email that "Jaap [Poll] intended to buy only if we got Board cooperation, we didn't get that."

Dr Poll's Evidence

33. In a submission dated 5 November, Anzoil asserted that Dr Poll told Mr Viner on or about 21 August that he and Mr Jacobs were going to buy all of IGM's shares in Anzoil. In a rebuttal submission dated 6 November, Dr Poll stated that he merely said that he and Mr Jacobs were considering doing so.

34. In a submission dated 13 November, Dr Poll's solicitors state that he:

> "recalls discussions with Mr Jacobs regarding the nominations of Mr Wilson and Mr Wheatley and his own nomination in the context of whether such nominations would be good for Anzoil and whether they would attract the support of major shareholders of Anzoil. Similar conversations were held with Mr Hare of IGM and Mr Haynes regarding these nominations. No discussions were held regarding the nominations of Mr Haynes and Mr Arrigoni. Dr Poll was notified of these nominations after they were made",

and that his:

> "preliminary negotiations with IGM resulted in Dormley and IGM negotiating in relation to the acquisition by Dormley and the Poll Superfund acquiring respectively 6 million and 6.4 million Anzoil shares on terms and conditions documented in the agreements enclosed [but] … the agreements were never consummated. In the end, Dr Poll considered the entry price simply too high, coupled with his concerns that what was meant to be a 'friendly' investment in the company of which he was the inaugural Chairman was becoming a potential battle for control of Anzoil into which he could be drawn if the agreements were consummated."

35. We mention above the proposed agreements for Dormley and the Poll Superfund to buy from IGM all of the shares IGM held in Anzoil, other than those subject to the Agreement with Capersia, for the same price and otherwise on terms very similar to those of the Agreement. The drafts are undated, but we infer from Dr Poll's statements above that they date from the same period as the Agreement.

Inferences from the Evidence

36. Mr Jacobs was discussing with Messrs Hare and Haynes of IGM the purchase of enough shares in Anzoil to confer control over that company. He agreed to buy some shares from IGM and also offered to buy the shares held by Messrs Hwang and Wong. We mention above the draft agreement for the purchase by Capersia of Mr Hwang's shares.

37. On 17 October, Mr Jacobs told Mr Haynes that he proposed to cancel agreements he has signed with "SJ", which appears to refer to Mr Hwang, as well as the Agreement with IGM. On 16 October he anticipates objections by Anzoil directors to voting Mr Hwang's shares, in the context of the board disallowing votes they take to be affected by breaches of section 606. However, Mr Jacobs denied that those offers were accepted and produced letter agreements of 22 October with Messrs Hwang and Wong, under which Capersia withdraws offers dated 23 August to buy the Anzoil shares held by them and the parties acknowledge that the offers were not accepted.

38. Capersia and IGM agreed to cancel the Agreement once Anzoil obtained advice that the Agreement contravened section 606, but Messrs Jacobs and Haynes contemplated going ahead with the purchase of the IGM shares anyway, after they had obtained representation on the board.

39. Both Messrs Jacobs and Haynes expected that Dr Poll would buy the remainder of IGM's shares in Anzoil. Dr Poll and IGM negotiated about this purchase and agreements for the purchase were prepared, but apparently not executed. Dr Poll kept Mr Jacobs and IGM informed about his candidature and discussed it with Mr Jacobs, obtaining his support.

40. Apart from specific inferences as to acquisitions and intentions, the cumulative effect of the correspondence and the uniform sale agreements strongly implies that IGM sought to sell the shares it and its directors held by related transactions at a price which included a control premium, and that it succeeded to the extent that Capersia agreed to buy some of the shares and offered to buy more and that Dormley expressed interest in buying the remainder.

41. The cumulative effect of the emails supports a finding that IGM and Capersia over a period of months planned to use their combined voting power to obtain control over the board of Anzoil, that Capersia would reward IGM for its support and entrench its own position by buying IGM's shares or causing them to be bought (before or after obtaining board control), and that these proposals were disclosed to Dormley, which approved them, accepted Capersia's support in its own dealings with Anzoil and negotiated with IGM with a view to taking an active part in them, by buying the balance of IGM's shares.

42. For his part, Dr Poll acknowledges having negotiated to buy the remainder of IGM's shares in Anzoil and having told Mr Viner that he and Mr Jacobs were considering buying all of IGM's holding. There is no evidence emanating from Dr Poll of his having agreed to buy shares in Anzoil from IGM or to co-operate with Mr Jacobs and IGM in obtaining control of Anzoil. However, he is implicated by Mr Jacobs' e-mails, and his own evidence corroborates enough of the contents of those e-mails that we are prepared to rely on them to support the inference that Dr Poll agreed to co-operate with Mr Jacobs and IGM in obtaining control of Anzoil.

Breach Established

43. In its application, Anzoil alleged that Capersia and IGM had contravened section 606 by entering into the Agreement. This allegation is made out.

44. The breach of section 606 arises from clauses 2.1 and 2.2, quoted above. Because clause 2.2 requires each of Capersia and IGM to "use their best endeavours" to, amongst other things, obtain the appointment of Mr Peter Wilson or another representative of Capersia to the Board of Anzoil, Capersia can require IGM to vote all of its shares in favour of Mr Wilson's appointment.

45. If the text of the Agreement was all there was to go on, it would be arguable that the promise to use best endeavours should be read down to exclude unlawful conduct, or more precisely that the promise should be read down to mean best endeavours, other than voting or disposing of shares, so that the giving of the promise would not offend against section 606. The emails between Mr Jacobs and the IGM directors exclude such a reading, however, as they establish a shared purpose of marshalling enough votes to obtain control of the Anzoil board.

46. It follows that under the Agreement Capersia had a degree of control over the exercise of the votes attached to all of IGM's shares in Anzoil i.e. a relevant interest in all of those shares (not just the shares which Capersia agreed to buy). That relevant interest was acquired by entry into the Agreement, which is a transaction in relation to shares, at the same time as Capersia's voting power in Anzoil increased to 25.6% and Mr Jacobs' voting power increased to 26.6%.

47. For the same reasons, *mutatis mutandis*, IGM also breached section 606 by entry into the Agreement. None of the provisions of sections 606(5), 609 or 611 overcomes either breach.

48. Capersia may also have breached subsection 606(4) of the Act by offering to acquire a further 5% of the shares in Anzoil from Messrs Hwang and Wong. That would depend on the order of events on 23 August.

Parties' Submissions

49. Capersia and IGM denied the breaches set out above and that unacceptable circumstances had occurred or still existed.

50. Capersia in submissions argued:

    (a) The Agreement did not require IGM and Capersia to act in concert or become associates, because clause 2.1 was a mere condition precedent to completion, and not an obligation of the parties.

        In the light of the positive obligation imposed by clause 2.2, quoted above, we are unable to agree.

(b) Entry into the Agreement did not constitute a contravention of section 606, as it brought Mr Jacobs' relevant interests to only 13,402,380 shares (13.82%).

For reasons set out above, we do not accept this analysis of the effect of the Agreement.

(c) The cancellation of the Agreement meant that there was no longer a relevant contravention, or any unacceptable circumstances.

We are unable to accept that the unacceptable circumstances ended after the cancellation of the Agreement. The evidence shows that the parties contemplated giving effect to the sale after the cancellation. Further, although it was contemplated by the Agreement that IGM and Capersia would co-operate to have one Capersia nominee appointed to the Anzoil board, the evidence shows that those parties had at some point expanded the scope of their agreement to co-operate to acquire control of the Anzoil board. This co-operation did not cease with the cancellation of the Agreement.

(d) Capersia had no input into the August section 249D notice, which IGM lodged after it was unable to persuade the board to appoint Mr Wilson. It provided a copy of an email of 5 September 2002 from Mr Jacobs to Mr Viner, in which Mr Jacobs proposed that Messrs Viner and Bresnehan remain on the board,[17] but that Messrs Wilson and Wheatley be appointed as well, with a view to obtaining the co-operation of Anzoil in relation to Anzoil Thailand. It submitted that Messrs Wilson and Wheatley were independent of Capersia and that "the email offers a constructive and positive way forward with an independent Board of directors not controlled by any shareholder".

The evidence does not support a finding that Capersia supported the nominations of Messrs Haynes and Arrigoni. Otherwise, however, the requisition merely gives effect to Mr Jacobs' proposals, pursuant to the agreement between IGM and Capersia.

(e) Clauses 2.1 and 2.2 were included in the Agreement at Capersia's insistence, after the 21 August loan. It was reasonable for a 14% shareholder to require board representation, and he did not have confidence in the existing board. From its point of view, it may have been reasonable of Capersia to require that co-operation.

By doing so, however, Capersia determined that the Agreement could not be regarded as a lawful and acceptable purchase in the range below 20%.

(f) Mr Jacobs states in a submission of 7 November that the words "or a Board Appointment is otherwise obtained" were added at the suggestion of IGM, and that he always intended to work with Anzoil and did not intend any hostility

[17] The submission is equivocal on whether Capersia acquiesced in IGM's proposal to remove Mr Dodman.

leading to a vote for a board spill. Those words are not present in the draft agreements between Capersia and Mr Hwang, and between Dr Poll's interests and IGM.

This is not the point: the Agreement created the power, and what he meant to do with that power is another thing.

51. IGM argued that:

(a) It had not contravened section 606.

For reasons set out above, we do not agree.

(b) It is not within the Panel's functions to find that IGM had contravened section 606.

The Panel is required by paragraph 657A(2)(b) to decide whether unacceptable circumstances have occurred because a person has breached a provision of Chapter 6.

(c) IGM would not have had any occasion to exercise the power it obtained under the Agreement to control the exercise of the votes attached to Capersia's shares.

Section 606 is breached by acquiring the power, not by exercising it. And it is not fanciful to suppose that if Capersia sought to escape its obligation to complete by allowing the election of a director to fail, IGM might seek to compel it to vote for that director.

(d) The obligation to use best endeavours imposed by the Agreement would not extend to voting the shares in breach of section 606.

Section 606 is breached by acquiring the power, not by exercising it, and the intentions of the parties are clear from their correspondence.

52. Dormley submitted that there was no evidence that it had proposed to act in concert with Capersia, citing *Bank of Western Australia v Ocean Trawlers Pty Ltd* (1995) 16 ACSR 501, where Owen J considered the meaning of the phrase "acting in concert". After setting out s 15(1)(a) his Honour said:

> "These provisions are of wide import and should be construed according to their tenor. However, that does not mean that they are to be interpreted in a vacuum. The meaning to be ascribed to the words used must be gleaned from the context to which they relate and from the scope and purpose of the instrument in which they appear. The phrase "acting in concert" connotes knowing conduct the result of communication between parties and not simultaneous actions occurring contemporaneously. Of course, the statutory definition expands that concept by including a proposal so to act. However, in the context of this case the allegation is of a bilateral arrangement. "Acting in concert" involves at least an understanding between the parties as to a common

purpose or object: see *Adsteam Building Industries Pty Ltd v Queensland Cement & Lime Co Ltd (No 4)* [1985] 1 Qd R 127; at 132. It is necessary that the understanding should be consensual and that there should be some adoption of it. However, it is not essential that the parties are committed to it or bound to support it. An arrangement or understanding can be informal as well as unenforceable and the parties may be free to withdraw from it or to act inconsistently with it notwithstanding their adoption of it: see *Commissioner of Taxation (Cth) v Lutovi Investments Pty Ltd* (1978) 140 CLR 434; at 443–44. Such an understanding may be proved by inference from the circumstances surrounding the impugned transaction and from what the parties have done as well as by direct evidence: see *Adsteam* (at 133)."

53. This passage is helpful on the question of association between IGM and Capersia, but does not assist with proposed associations involving Dormley. Other than the aside that "the statutory definition expands that concept by including a proposal so to act", it is about associations arising out of bilateral arrangements.

54. Perhaps more to the point, in *Elders IXL Ltd v NCSC* [1987] VR 1, Marks J held that parties do not propose to become associated merely because of a proposal which exists in the mind of one of them and has not been communicated to the other. Marks J said that:

a) the notion of association applies "to real combinations and real aggregations which, one way or another, truly exist. It is not concerned to fantasize combinations by adding to a holding that of another person, who has no real connection, potential or otherwise, with the first";

b) their "admittedly wide words … are to permit a finding, from the known facts and circumstances, that a combination as a matter of probability exists, notwithstanding it is hedged about with all manner of devices for concealment. It must be emphasized, however, that such a finding must be truly available and not the product of mere suspicion or prejudice";

c) "the words 'proposes to' … appear in the context of provisions about arrangements, understandings, contracts etc in relation to which there must be more than one party … [they] are to cover an agreement etc which may not be capable of being demonstrated as being yet in existence but which is destined to be";

d) "It is always open to conclude that the parties at a particular time, had not reached a firm understanding, arrangement, or agreement but at that time proposed to do so, that is, expected and acted as though they would.";

e) "The draftsman also envisaged that proof might fall short of establishing an existing agreement, arrangement etc but permit the conclusion that such was, or is, to be reached. Thus, evidence in a particular case might establish that the conduct of A and B against the background of particular facts and circumstances, past relationships and existing communications, no matter how

inchoate, permit a conclusion that they proposed to reach a particular agreement or to combine for an impugned purpose pursuant to an arrangement, the details of which were to be worked out. Further, facts and circumstances might reveal that A and B each purchased shares on a mutual expectation that they would use their joint voting power but defer reaching any specific arrangement, agreement or understanding pending the outcome of a particular event …".

55. The existence of arrangements concerning the affairs of Anzoil between Dormley, on the one hand, and IGM and Capersia, on the other hand, is established by the evidence of the emails and statements made by the parties in their submissions which are quoted above. It is not a matter of suspicion, prejudice or fantasy. We may infer from that evidence and those submissions how far those arrangements extended and how firm they were.

56. The issue concerning Dormley and Dr Poll is whether they had or have or proposed to enter into an agreement to co-operate with Mr Jacobs and IGM to use shares over which any of them acquired control under unacceptable circumstances (even if the acquisition of the shares is to be perfected after acquiring board control) to exercise control over the makeup and decisions of the Anzoil board.

57. We have found that Capersia acquired shares from IGM in breach of section 606 and under unacceptable circumstances, with a view to using the votes attached to those shares to change the board or Anzoil and the conduct of its affairs. We have not found that Dr Poll or Dormley contravened section 606 or contributed to those unacceptable circumstances. So the issue concerning Dr Poll and Dormley is whether they were so far willing to co-operate with IGM and Capersia in giving effect to the agreement between them as to require us to consider preventing Dr Poll and Dormley from engaging in conduct which might achieve the objectives of that agreement. On the whole, we think they were.

58. There is direct evidence of peripheral involvement by Dormley and Dr Poll in the concert between Capersia and IGM and hearsay evidence of central involvement:

    a) Dr Poll and Mr Jacobs approved one another's candidates for the board;

    b) there is direct evidence in the 10 October email that Dr Poll was copied in on discussions between Jacobs and IGM about using IGM's and Capersia's shares to take control of the Anzoil board;

    c) Mr Jacobs negotiated with Mr Haynes and Mr Viner on the express basis that Dr Poll would co-operate with him about control of Anzoil and the Anzoil Thailand transaction. That is second-hand evidence, but evidence nonetheless, of an association between Mr Jacobs and Dr Poll concerning the conduct of the affairs and the composition of the board of Anzoil;

    d) the 5 November email shows that Dr Poll led the negotiations with Anzoil over Anzoil Thailand, on his own account and to some degree on behalf of Mr Jacobs. The 2 August email seems to establish that Mr Jacobs and Dr Poll were

motivated to take a new interest in Anzoil by the prospect of getting agreement over Anzoil Thailand;

e) Dormley negotiated with IGM over a proposal to acquire the balance of its shares, on terms similar to those agreed with Capersia, including a price so high as to suggest a control premium, and abandoned the negotiations when it became apparent that there would be a contest for control.

59. There is clear evidence that Dr Poll and IGM entertained a definite proposal for a transaction between them under which Dormley and the Poll Superfund would have acquired shares, in the draft agreements to buy all of the Anzoil shares held by IGM, other than those agreed to be sold to Capersia, on terms corresponding to those of the Agreement with Capersia. Mr Jacobs' emails are the basis for inferring that there was a proposal between Mr Jacobs and Dr Poll to use the votes attached to those shares in a joint effort to change the board and policies of Anzoil. The relatively high price at which Dr Poll contemplated buying the shares supports the inference that the proposal was to buy them for the purpose of exercising control.

60. There is evidence that Dr Poll remains a part of that coalition.

(a) The reasons for acting in concert remain: the Anzoil Thailand position is not resolved and IGM told us in submissions that it remains keen to sell the shares.

(b) There is evidence that Messrs Jacobs and Haynes proposed to proceed with Capersia's purchase of IGM's shares, after they had obtained board control, despite cancelling their contract and although Capersia could buy only part of the shares IGM and its directors wished to sell. Dr Poll was part of their plans for both board control and the dispersal of the IGM parcel.

(c) Dr Poll remains a candidate for election to the Anzoil board. Given that Dr Poll and Mr Jacobs consulted one another about, and supported, each other's candidates, and Dr Poll reported back to Messrs Haynes, Hare and Jacobs about having corrected his nomination (see paragraph 28(h) above), an inference may be drawn that Dr Poll was acting in concert with those persons in relation to the composition of the Anzoil board.

The Statutory Declarations

61. At one stage of the proceedings, we considered making less restrictive orders, allowing IGM, Capersia and their officers to nominate and stand for the Anzoil board, if they provided statutory declarations to the effect that they were no longer associated. Several declarations were provided in the terms we proposed, even before we made the relevant orders (in the event, we never did make those orders). Others were offered, and we have no doubt they would have been made and provided if we had accepted the offers.

62. The Panel did not take those declarations lightly, and does not suggest that the parties did so, but it was unable to put the weight on them that the parties would have preferred. Although the Panel had by then pointed out to the parties that both

IGM and Capersia had contravened section 606, with full knowledge of the relevant facts:

(a) IGM continued to assert that it did not breach section 606 of the Act by entering into the Agreement (although it did not contest that Capersia did so);

(b) Capersia continued to assert that the Agreement was not an arrangement in relation to voting of shares in Anzoil (and therefore that it did not breach section 606 by entering into the Agreement);

(c) neither IGM nor Capersia acknowledged that the Agreement constituted a serious breach which warranted a declaration of unacceptable circumstances;

(d) until the Panel made it clear that it regarded their persistence with them as causing continued unacceptable circumstances, neither IGM nor Capersia offered to withdraw the requisitions and nominations which were made while the Agreement was in place and binding on the parties;

(e) IGM proposed to renominate Messrs Haynes and Arrigoni as candidates for the Anzoil board;

(f) Capersia renominated Mr Wheatley (Mr Wilson withdrew his consent); and

(g) officers of both IGM and Capersia offered declarations, to clear the way for those companies to vote at the AGM.

63. Taken together, these matters implied that the parties did not sufficiently appreciate either the nature or the gravity of the contravention constituted by entry into the Agreement. The parties appear to have continued to co-operate, at least for the purposes of the nominations to the board which were to be considered at Anzoil's next annual general meeting. Accordingly, the Panel was not satisfied that the officers who made and offered the declarations fully understood what they entailed, or that it could rely on the declarations to establish that there had been an end of the conduct which led to the unacceptable circumstances in this matter.

Conclusions

64. We conclude that Capersia agreed to buy some of IGM's shares and offered to buy all of Messrs Hwang's and Wong's shares with a view to obtaining voting and board control over Anzoil, relying on obtaining the support of Dormley in relation to voting for the board and in the purchase of shares from IGM. Among Capersia's objectives was to secure Anzoil's co-operation in relation to Anzoil Thailand. Dr Poll and Mr Jacobs acted in concert in relation to negotiations with Anzoil concerning Anzoil Thailand i.e in relation to the conduct of Anzoil's affairs. Circumstantial evidence indicates that Dr Poll was also associated with Mr Jacobs in relation to the composition of the board of Anzoil.

65. The evidence establishes clear contraventions of section 606 by IGM and Capersia, involving the purchase of a substantial interest at an 80% premium to market and

offers to acquire more shares, which would have resulted in Capersia having voting power of not less than 30%, connected with proposals to change the board and intervene in the conduct of the company's affairs. We are satisfied that these breaches, the willingness of the parties to carry forward the purchase from IGM by means other than the Agreement and the continued acting in concert regarding the composition of the Anzoil board constitute ongoing unacceptable circumstances in relation to the affairs of Anzoil.

66. The evidence does not establish that Dormley or Dr Poll were involved in the contravention, but it does show that Dr Poll was so closely associated with Mr Jacobs in relation to the affairs of Anzoil and prepared to take the benefit of Mr Jacobs' support, as to make it preferable that his candidacy for the board be restrained, as well as those of IGM's and Capersia's nominees.

Unacceptable Circumstances

67. The events set out above constitute unacceptable circumstances in relation to the affairs of Anzoil. They involve an attempt to amass a block of shares carrying 36% or more of the votes in that company, acquiring most of those shares at a large premium to the market price, for the purpose of using those votes to take control of the company, change its board and intervene in its affairs in the interests of the parties who acquired the shares. That conduct involved actual and contemplated contraventions of Chapter 6. Other shareholders had no opportunity to sell at the prices offered to IGM and its directors, and their approval to the sales was not obtained.

Unfair Prejudice

68. Section 657D directs us not to make an order which unfairly prejudices any person. The orders we have made restrict for a time the ability of IGM, Capersia, Dormley and their respective associates to exercise some of the rights attached to their shares, and that restriction is undoubtedly prejudicial, to a modest degree. In view of the findings we have made that parties were acting in concert to change the composition of the Anzoil board at its next annual general meeting, however, those restraints are the minimum necessary to prevent further unacceptable circumstances resulting from further acts of those parties. The prejudice the orders occasion to those parties is not unfair.

69. The orders are precautionary, not punitive in intent. That is, we have not made them to punish the parties for past breaches, but because we are concerned that they will continue the course of conduct which led to those breaches, and should be prevented from doing so, in the interests of the holders of the majority of the shares in Anzoil.

70. If the parties resume their efforts to change the composition of the board, and it appears to the board that unacceptable circumstances continue to exist, Anzoil may bring a fresh application. If the parties have persisted in the course of conduct we have described, that persistence may be grounds for making orders more extensively restricting the use of the votes attached to the parties' shares or requiring those

shares to be sold. At this stage, however, we are not convinced that the evidence warrants making those orders.

Declaration and Orders

71. For the reasons set out above, we have made the declaration of unacceptable circumstances and orders which are attached. We consent to Anzoil, Dormley and IGM being represented by their solicitors. We have made no order for costs.

Carol Buys
President of the Sitting Panel
Decision dated 21 November 2002
Reasons published 24 December 2002

ATTACHMENT

Takeovers Panel

Corporations Act 2001

Sections 657A and 657D

Declaration and Order

WHEREAS:

A Anzoil NL (***Anzoil***) is a company incorporated under the *Corporations Act 2001* and listed on the Australian Stock Exchange Ltd;

B On 23 August 2002, IGM Group Limited (***IGM***) held shares to which were attached 22.25% of the votes attached to shares in Anzoil and Capersia Pte Ltd (***Capersia***) held shares to which were attached 3.35% of the votes attached to shares in Anzoil;

C On 23 August 2002, IGM agreed to sell to Capersia shares (the ***Share Sale Agreement***) to which were attached 9.46% of the votes attached to shares in Anzoil;

D It was a condition precedent to completion of the Share Sale Agreement that a representative of Capersia be appointed to the board of Anzoil, by invitation or otherwise, and IGM and Capersia agreed to use their best endeavours to have such an appointment made;

E Since 23 August 2002, IGM has twice requisitioned a general meeting of Anzoil, with a view to removing some or all of the directors then in office and appointing as directors two nominees of Capersia, and both IGM and Capersia have nominated one of those nominees for appointment to the board at Anzoil's Annual General Meeting;

F On 22 October 2002, IGM and Capersia agreed to cancel the Share Sale Agreement;

G The resolutions to which the requisitions and nominations relate have not been considered at a general meeting of Anzoil;

H The requisitions and nominations were not withdrawn when the Share Sale Agreement was cancelled, or until after proceedings were commenced in the Panel;

I While the Share Sale Agreement was on foot, Dormley Pty Ltd (***Dormley***) participated in discussions with IGM and Capersia about proposals:

(a) for Dormley to acquire the remainder of IGM's shares in Anzoil; and

(b) to change the composition of the board of Anzoil; and

J By a placement on 18 October 2002, IGM's holding in Anzoil was diluted to 19.35% of the votes in Anzoil, Capersia's holding was diluted to 2.91%, the parcel to which the Share Sale Agreement related was diluted to 8.23% and Dormley's holding was diluted from 4.7% to 4.1%,

The Panel finds that:

1. Under the Share Sale Agreement, IGM and Capersia were associates in relation to Anzoil, because they:

   (a) were parties to a relevant agreement; and

   (b) acted in concert,

   for the purpose of determining the composition of the Board of Anzoil by the exercise of their joint voting power in Anzoil;

2. By entering into the Share Sale Agreement, both IGM and Capersia breached section 606 of the *Corporations Act 2001*, because Capersia acquired relevant interests in shares in Anzoil by a transaction in relation to shares at the same moment as the voting power in Anzoil of both Capersia and IGM increased to a percentage between 20% and 90%;

3. In view of the association between IGM and Capersia, the Share Sale Agreement related to the acquisition of a substantial interest in Anzoil;

4. Other holders of shares in Anzoil had no opportunity to participate in the benefits proposed to accrue to IGM in relation to that acquisition;

5. Until the Share Sale Agreement had been entered into, neither the directors of Anzoil nor other shareholders in Anzoil:

   (a) knew that Capersia proposed to acquire a substantial interest in Anzoil; or

   (b) had any opportunity to consider the merits of that proposal, or information to enable them to assess the merits of that proposal;

6. The acquisition detracted from the achievement of an efficient, competitive and informed market in shares in Anzoil;

7. The association between IGM and Capersia did not end when the Share Sale Agreement was cancelled;

8. Dormley was associated with IGM, Capersia or both of them in relation to Anzoil, because they:

   (a) proposed to become parties to a relevant agreement; and

   (b) proposed to act in concert,

   for the purpose of determining the composition of the Board of Anzoil by the exercise of their joint voting power in Anzoil; and

9. The association between Dormley and IGM and/or Capersia has not ended,

Accordingly, the Panel DECLARES that the circumstances set out above are unacceptable circumstances in relation to the affairs of Anzoil and ORDERS Anzoil, its directors, other officers and members not to put before a general meeting of Anzoil any resolution:

(a) to remove or to appoint a director on the requisition or nomination of any of the Associated Parties unless the requisition or nomination is received after the Relevant Date; or

(b) to appoint as a director at or before the Relevant Date a person who has, at any time before the date of this order, been nominated for appointment as a director of Anzoil by any of the Associated Parties,

where a reference to:

- the ***Relevant Date*** is a reference to 20 December 2002 or the date of the Annual General Meeting of Anzoil held during the year 2002 (whichever is first); and

- the ***Associated Parties*** is a reference to IGM, Capersia, Dormley, their respective related bodies and the officers of all of those bodies.

Carol Buys
President of the Sitting Panel

Dated 24 December 2002