Australian Government

Takeovers Panel

Reasons for Decision

Cape Lambert MinSec Pty Ltd

[2009] ATP 12

Catchwords:

Review of ASIC decision – downstream acquisitions – affirm decision – unrestricted relief – restricted relief – item 14 - canvassing in the media of application – Mineral Securities – Cape Lambert - CopperCo

Corporations Act 2001 (Cth), sections 656A, 611 item 9, 611 item 14, 602

Administrative Appeals Tribunal Act (Cth) 1975

CASAC, Anomalies in the Takeovers Provisions of the Corporations Law (March 1994)

ASIC RG 71

Guidance Note 2 – Reviewing Decisions

Gloucester Coal Ltd 01R [2009] ATP 9, *In the matter of Selwyn Mines Ltd* [2003] ATP 33, *In the matter of Pasminco Ltd (Administrators appointed)* [2002] ATP 6, *Magellan Petroleum Australia Ltd v ASIC & Anor* (1993) 11 ACSR 306, *North Flinders Miners Ltd v Hartogen Energy Ltd & Ors* (1988) 14 ACLR 609, *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* [1970] HCA 8, *Attorney-General (Cth) v Alinta Limited* (2008) 26 ACLC 1

INTRODUCTION

1. The Panel, Byron Koster, John O'Sullivan (sitting President) and Simon Withers, affirmed under s656A[1] the decision of ASIC not to grant restricted relief to Cape Lambert to allow it to acquire relevant interests in shares in three Australian listed companies as part of the acquisition of assets from CopperCo. The Panel indicated that it would not have been minded to grant restricted relief in respect of one further Australian listed company that ASIC had indicated it would be prepared to grant restricted relief for. The Panel also indicated that it would not grant unrestricted relief in respect of any of the four companies.

2. In these reasons, the following definitions apply:

ASIC	Australian Securities and Investments Commission
Buka Gold	Buka Gold Ltd
Cape Lambert	Cape Lambert MinSec Pty Ltd
CopperCo	CopperCo Ltd (Administrators Appointed) (Receivers and Managers Appointed)
Corvette	Corvette Resources Ltd
downstream companies	Buka Gold, Corvette, NiPlats and Tianshan
Mineral Securities	Mineral Securities Ltd, a wholly owned subsidiary of CopperCo
Minsec assets	assets of Mineral Securities, including the downstream companies

[1] References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

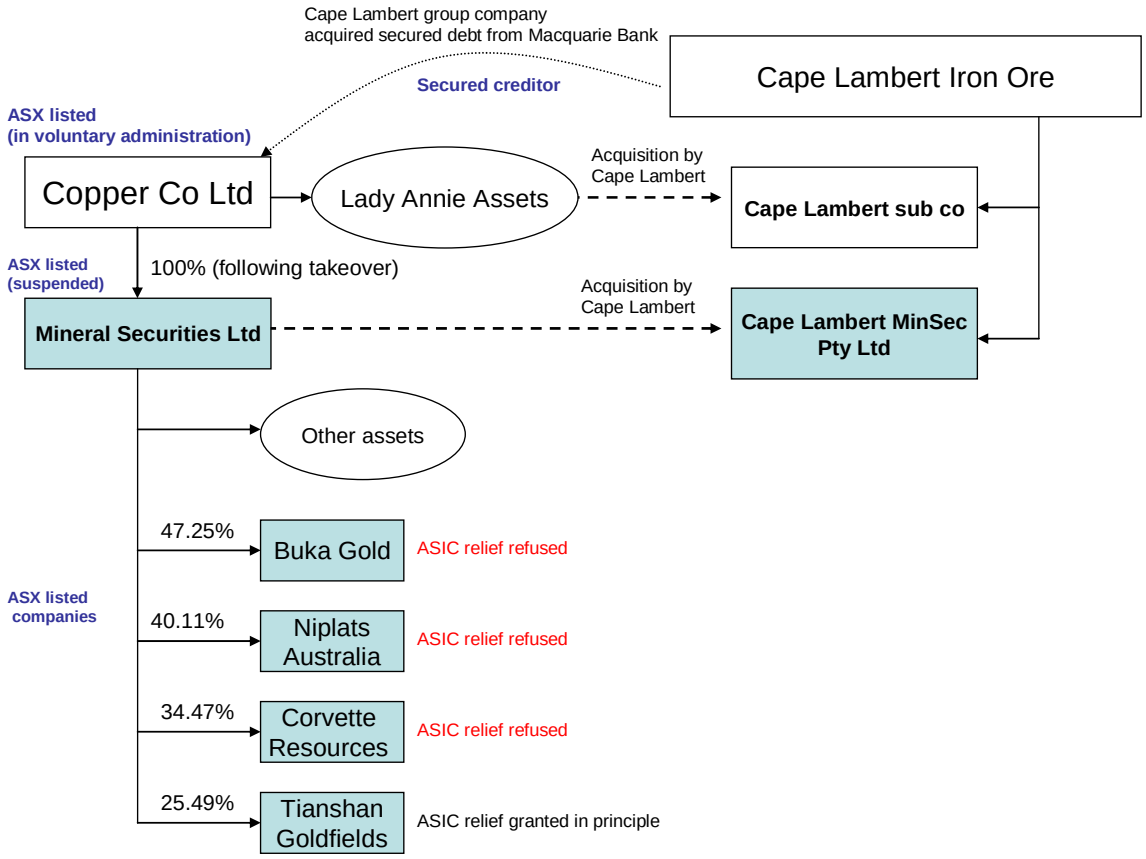
NiPlats	NiPlats Australia Ltd
Tianshan	Tianshan Goldfields Ltd

3. In these proceedings, the Panel:
   (a) adopted the Panel's published procedural rules and
   (b) consented to parties being represented by their commercial lawyers.
4. In accordance with GN 2,[2] the Panel did not initially publish a media release advising of the application for review. However, after consultation with the parties, it did so when it decided to invite shareholders in the downstream companies to make submissions. Two shareholders took up that invitation.

FACTS

5. The downstream companies are all ASX listed:
   (a) Buka Gold (ASX code: BKG)
   (b) Corvette (ASX code: COV)
   (c) NiPlats (ASX code: NIP) and
   (d) Tianshan (ASX code: TGF)
6. CopperCo is an ASX listed company (ASX code: CUO).
7. Following a takeover, Mineral Securities is wholly owned by CopperCo. It is listed. It has not yet been removed from the ASX Official List although its shares are suspended from quotation (ASX code: MXX). It is a foreign company (incorporated in the British Virgin Islands), although its predecessor started life as an Australian company.[3]
8. The relationships between the parties involved are set out in the following diagram.

[2] Guidance note 2 - Reviewing Decisions, para 20
[3] Shares in the original Mineral Securities Ltd were exchanged for shares in Minsec (BVI) Ltd, which then changed its name to Mineral Securities Ltd



9. On 26 November 2008, CopperCo and some of its subsidiaries entered voluntary administration. Subsequently receivers and managers were appointed by Macquarie Bank Ltd as security trustee.

10. On 6 February 2009, a subsidiary of Cape Lambert Iron Ore Limited acquired the secured debt owed by CopperCo to Macquarie Bank and LinQ Capital Limited from those entities. An outcome of this transaction was that the existing receivers and managers retired and new receivers and managers were appointed in their place. These receivers and managers conducted a sale of the Lady Annie assets and the Minsec assets owned by CopperCo through separate tenders.

11. Cape Lambert Iron Ore Limited, the parent company of Cape Lambert, successfully tendered to acquire:

    (a) the Lady Annie assets on an asset by asset basis and

    (b) the Minsec assets by acquiring all the shares in Mineral Securities. This is the relevant acquisition for the purposes of the ASIC relief.

12. On 7 May 2009, agreements were executed to effect the acquisitions. Completion of the agreements is inter-conditional. Completion of the acquisition of Mineral Securities was conditional, among other things, on ASIC either:

    (a) confirming that item 14 of s611 applied to allow the acquisition of the interests in the downstream companies or

(b) granting relief in respect of the acquisition of relevant interests in the downstream companies.

13. Cape Lambert has indicated that it currently has no relevant interest in any of the downstream companies.

14. On 9 April 2009, Cape Lambert made 4 applications to ASIC for unrestricted relief (as set out in Regulatory Guide 71). Such relief would allow the acquisition of the interests in the downstream companies without any conditions.

15. ASIC indicated that it would be unlikely to grant unrestricted relief.

16. Accordingly, on 28 April 2009 Cape Lambert amended its applications to request restricted relief. Such relief would allow the acquisition of the interests in the downstream companies on conditions. Cape Lambert proposed conditions that, except as allowed under s611 item 9,[4] it would not:

    (a) exercise voting power exceeding 20% in each downstream company and

    (b) acquire more shares in a downstream company.

17. ASIC offered to consider an alternative form of relief concurrently with the amended application. This involved relief conditional on Cape Lambert:

    (a) selling down its relevant interests in the downstream companies to less than 20% within a set time

    (b) not voting shares in excess of 20% during that time and

    (c) committing to a follow-up bid if the sell down does not occur in the time.

18. In response, Cape Lambert indicated that it was not prepared to accept the alternative form of relief and ASIC did not further consider this form of relief.

19. On 18 May 2009 ASIC confirmed its refusal of Cape Lambert's applications for restricted relief in respect of Buka Gold, Corvette and NiPlats. ASIC was, in principle, prepared to either grant restricted relief or "provide comfort" on equivalent conditions, in respect of Tianshan.

APPLICATION

20. By application dated 28 May 2009, Cape Lambert sought a review of the ASIC decisions. The review application includes a review of ASIC's in-principle decision in respect of Tianshan. Cape Lambert submitted that it is appropriate to deal with all the downstream companies together.

21. Cape Lambert submitted that:

    (a) the acquisitions in the downstream companies would come within s611 item 14. This was because Mineral Securities is listed and the exception should be given full weight (*Gloucester Coal*[5])

    (b) alternatively, granting unrestricted relief (alternatively restricted relief) in respect of all the downstream companies is consistent with RG 71. The interests

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[4] 3% creep provision

[5] *Gloucester Coal Ltd 01R* [2009] ATP 9 at [23] and [26] to [28]

do not comprise a substantial portion of the assets being acquired and are incidental to the acquisition of other assets. Moreover, obtaining control of the downstream companies was not one of the main purposes of the upstream acquisition and the upstream acquisition (ie, Mineral Securities) by way of a bid or other chapter 6 process was inappropriate given CopperCo's administration and receivership. Cape Lambert submitted that the tender sale process conducted by the receiver and manager was akin to a public auction for the shares in Mineral Securities and

(c) alternatively, there are cogent policy and commercial reasons why ASIC's policy should not be applied and unrestricted relief (alternatively restricted relief) should be granted and would serve the legislative policy of chapter 6.[6]

22. Cape Lambert sought the following orders:

(a) an order setting aside ASIC's decision (which it defined as the refusal of restricted relief in respect of three downstream companies and the in-principle grant of restricted relief in respect of Tianshan) and

(b) an order substituting the following:

(i) the Panel concurs with Cape Lambert's view that it can acquire the downstream interests under item 14

(ii) alternatively, unrestricted relief be granted

(iii) alternatively, restricted relief be granted.

DISCUSSION

Outcome

23. We decline to declare that Cape Lambert is permitted by Section 611, item 14 to acquire the downstream interests.

24. Cape Lambert requested unrestricted relief in its application for review, although it had substituted a request for restricted relief with ASIC. We would not grant unrestricted relief in respect of any of the downstream companies.

25. Cape Lambert alternatively requested restricted relief in its application for review. In respect of Corvette, NiPlats and Buka Gold, ASIC was not prepared to grant restricted relief. We affirm that decision. ASIC was prepared to grant a form of relief that was not acceptable to the applicant. Whether the applicant and ASIC wish to pursue that form of relief is for the applicant.

26. Cape Lambert included Tianshan in its application for review, although ASIC had not made a formal decision on it. ASIC had indicated that, in principle, it would grant restricted relief. Had ASIC made a formal decision that was reviewed, we would not have granted restricted relief.

27. We formed these conclusions for the following reasons.

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[6] These are factors the Panel should take into account in reviewing ASIC's decision: see Guidance Note 2, paragraph 10

What was under review?

28. Clearly the question of restricted relief is before the Panel, and we affirm ASIC's decision in respect of the three companies it decided upon.

29. Cape Lambert submitted that, although ASIC's decision related to restricted relief, the Panel's powers under s656A were broad enough to allow it to make orders as if it were reviewing a decision in relation to unrestricted relief. To require Cape Lambert to apply to ASIC for a formal refusal would be overly bureaucratic.

30. Cape Lambert also included Tianshan in its application on the basis that "*it is appropriate to deal with all of the Downstream Interests together*".

31. ASIC made three submissions:

    (a) confirmation in respect of item 14 was not the exercise of a power or discretion conferred on ASIC

    (b) the Panel can consider granting unrestricted relief and

    (c) ASIC's in-principle advice given in respect of Tianshan does not reflect a decision under s655A(1).

32. We agree with Cape Lambert that to require it to apply to ASIC for a formal refusal of unrestricted relief would be overly bureaucratic. The informal 'refusal' may be characterised as a 'decision' within the meaning of the *Administrative Appeals Tribunal Act (Cth)* 1975.[7] Moreover, under s656A the Panel's powers are to affirm, vary or set aside an ASIC decision (and if the last, make a new decision or remit the matter to ASIC). Because the Panel can vary ASIC's decision or substitute its own decision for ASIC's, the review is *de novo*, so the Panel can make its decision on the facts as it finds them as if that decision was open to ASIC on the application before it. We think the question of unrestricted relief is proximately and logically connected to the application for relief that was before ASIC. Indeed, it was the initial application to ASIC before being replaced. Accordingly, we considered whether unrestricted relief was available.

33. We also comment on the in-principle advice in relation to Tianshan. Dealing with the entirety of the matter, as the applicant requested, will assist the parties and provide commercial certainty so far as we are able to. But we do not finally decide it because we accept that ASIC has made only an in-principle decision.

Item 14

34. Section 611 item 14 creates an exception from the prohibition in s606 for downstream acquisitions.[8]

35. Cape Lambert asked us to declare that item 14 applies. Both Cape Lambert and ASIC say that item 14 applies in this case on a literal reading. CopperCo also submitted that item 14 applies.

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[7] See Section 656A(1)

[8] Item 14 provides: "*An acquisition that results from another acquisition of relevant interests in voting shares in a body corporate included in the official list of (a) a prescribed financial market, or (b) a foreign body conducting a financial market that is a body approved in writing by ASIC for the purpose of this item.*"

36. We do not consider that we have power to make a binding declaration as to the application of the law. There are a number of reasons.

37. First, Cape Lambert asked for a review of ASIC's decision. ASIC did not definitively confirm to Cape Lambert its view as to the application of the law. ASIC has said that it does not have the power to confirm the operation of existing law in a way that is binding on third parties. This is consistent with ASIC's regulatory guides.[9]

38. Second, under s656A(3),[10] the Panel has the same powers as ASIC when asked to review an ASIC decision. No submissions addressed what additional powers we might have and it is not necessary in this case for us to venture into this.

39. Third, the Panel cannot exercise the judicial power of the Commonwealth, which it appears to us we would be purporting to exercise if we were to make a declaration as to the operation of the law.[11] It would involve "an inquiry concerning the law as it is and the facts as they are."[12] The Panel's role is to create new rights and obligations, and not to determine existing rights. A declaration as to the law is not the creation of new rights. The Panel under s656A can no more exercise a judicial power than it can under s657C.

40. For these reasons, we decline to make a declaration as to the operation of the law. In any event, even though, on a literal reading, item 14 does seem to apply to the transaction (and therefore relief would appear to be unnecessary), this does not persuade us to overrule ASIC and provide 'comfort relief' to remove doubt as to the application of item 14. We would not grant relief if the transaction would be contrary to the policy of both item 14 and chapter 6 generally. We think it is contrary to those policies. Relevant factors include:

    (a) Mineral Securities is listed in name only. We note that the initial application to ASIC[13] referred to Mineral Securities as not listed on ASX or any other exchange

    (b) the transaction does not meet the policy basis of item 14

    (c) item 14 was not designed to facilitate the sale of assets by a receiver and manager in an upstream entity

    (d) because Mineral Securities is wholly owned and suspended from trading, there is no free transfer of its shares that can be interfered with by the operation of chapter 6 on the downstream interests

    (e) if CopperCo owned the downstream interests directly, it could not transfer those interests without using one of the mechanisms in chapter 6. It should not be given relief to facilitate this simply because the interests are held by its wholly owned subsidiary.

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[9] See for example RG108.12 – *"It is not part of our function to provide legal advice on the interpretation and application of the law."*

[10] *"For the purpose of reviewing the decision, the Panel may exercise all of the powers and discretions conferred on ASIC by [Chapter 6] or Chapter 6C. "*

[11] This was the question before the High Court in *Attorney-General (Cth) v Alinta Limited* (2008) 26 ACLC 1

[12] *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* [1970] HCA 8, Kitto J defining judicial power at 374

[13] 9 April 2009 by Cape Lambert Iron Ore Limited, not the applicant for review

(f) there is an effect of the upstream acquisition on the control of the downstream companies and

(g) the policy of chapter 6 set out in s602, particularly the information and opportunity Eggleston principles, has not been satisfied.

The application of RG 71

41. RG 71 sets out ASIC's policy on when it will give relief from s606 to facilitate downstream acquisitions. It contemplates two types of relief - unrestricted relief and restricted relief.

42. Unrestricted relief does not have any conditions attached. It is available in respect of downstream acquisitions that result from a takeover or merger involving a foreign listed body corporate if:

(a) the applicant does not [seek restricted relief]

(b) the shares in the downstream company do not comprise a substantial part of the assets of the upstream body corporate

(c) control of the downstream company is not one of the main purposes of the takeover or merger of the upstream body corporate

(d) the upstream acquisition is by way of a takeover or merger which is legal in the jurisdiction in which it takes place and

(e) the jurisdiction in which the upstream takeover or merger is made, or the stock exchange on which it is made, affords a comparable level of investor protection to that under the Law and the rules of ASX.[14]

43. Restricted relief may be available if unrestricted relief is not suitable - for example, if the shares acquired in the downstream company exceed 50% of the market value of the upstream company, ASIC generally considers that the shares comprise a substantial part of the assets of the upstream company.

44. Restricted relief is typically conditional on either:

(a) a 'voting and disposal standstill', if the downstream shares constitute less than 50% of the voting shares in the downstream company. The standstills are gradually lifted as s611 item 9 would allow the 'creep' acquisition of those shares or

(b) a 'downstream bid', if the downstream shares constitute more than 50% of the voting shares in the downstream company. Requirements include that the bid is made at 'fair value'.[15]

45. However, where it appears to ASIC that effective control over the downstream company may be exercised at less than 50%, it will choose a lower figure as the test for requiring a downstream bid.[16] That was the case here.

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[14] RG 71 at 71.13
[15] For example, see RG 71 at 71.25
[16] RG 71 at 71.24

46. RG 71 was issued in November 1993 and was updated in July 1996. It thus addresses the law as it stood at July 1996. It was intended to apply primarily to allow transactions in shares of foreign companies listed on foreign exchanges. It appears to be based on the following broad considerations:

    (a) A listed upstream entity may experience difficulties in restructuring transactions because of listing requirements. This may make it difficult or impossible to do business. This consideration is a strong factor in our decision. Foreign listing is now covered by item 14. But the policy reasons for requiring listing in order to get ASIC relief remain valid. Reorganisation of downstream assets may be difficult or impossible to achieve in a way that permits an upstream acquisition to occur in compliance with all applicable laws. That is not necessarily the case for unlisted entities[17] and it is not necessarily the case here.

    (b) A regulated upstream bid or other chapter 6 protection will help ensure that the upstream acquisition is not an artifice for gaining control of the downstream entity.[18] This consideration retains validity for an unlisted entity.[19] It is likely to have been incorporated in RG 71 initially because RG 71 was looking to replicate for foreign entities the exemption available for Australian entities.

    (c) Downstream holdings should not operate as a protection against acquisitions in listed upstream entities, that is, they should not prevent the free flow of upstream shares.[20] Mineral Securities is wholly owned, so this consideration does not apply.

    (d) International comity. This consideration also derives from the way s629 changed the previous law.[21] While Mineral Securities is a foreign company, it and the downstream companies are listed in Australia. To the extent that it applies, it is of limited relevance in this application.

47. CopperCo submitted that, if item 14 was designed to facilitate upstream acquisitions where the downstream acquisition was merely incidental, ASIC policy should not require a regulated upstream bid or comparable level of investor protection. We do not agree. Requiring this helps ensure there is no artifice and assists to ensure downstream acquisitions are exempt from regulation only where the upstream acquisition attracts regulation of an appropriate kind.

48. Cape Lambert submitted that the acquisition of shares in the downstream companies was merely incidental, although it was not willing to dispose of them in a sell down. Perhaps they are less valuable than other assets being acquired, but that does not diminish the importance of chapter 6 protection of shareholders in those companies. The shares proposed to be acquired are significant holdings in the downstream companies - up to approximately 47% in Buka Gold's case.

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[17] For example see RG 71 at 71.40
[18] RG 71.36
[19] RG 71 at 71.44
[20] For example, see RG 71 at 71.8
[21] See for example, AAT decision in *Magellan Petroleum Australia Ltd v ASIC & Anor* (1993) 11 ACSR 306 at para 51

49. ASIC's reasons for refusing relief, in summary, are:

    (a) it has only once given relief where an unlisted upstream transaction did not involve a regulated takeover or merger, and then only with a follow-on bid condition. The acquisition of Mineral Securities did not involve a regulated bid or merger, so fell outside the policy for relief. While that alone would not be enough, it is when combined with the reasons below

    (b) in its view control may be exercised for the three downstream companies, notwithstanding that the holdings would be less than 50%. Thus, standstill relief was not appropriate and would lock up the holdings for a long time and

    (c) appropriate conditions could not be agreed with the applicant.

50. ASIC also looked at the commerciality of the situation, but felt that there were alternative methods of sale of Mineral Securities and its assets available to the receiver and manager, including obtaining shareholder approval in the downstream companies. Chapter 5 did not take precedence over chapter 6 in ASIC's view.

51. ASIC applied RG 71, a long-standing policy which is in key respects out of date and which would benefit from updating and clarification. To the extent that RG 71 applies, we think Cape Lambert does not qualify for unrestricted relief or restricted relief of the kind foreshadowed in RG 71. We think this is so in relation to all four downstream companies.

52. We note that CopperCo is also listed. This may have raised an issue regarding its ability to reorganise its assets, but the application focuses on the acquisition of shares in Mineral Securities (as the listed company) and no basis this for concern was presented to us regarding CopperCo.

The application of policy

53. We also considered the circumstances and the underlying policy of chapter 6, including section 611, item 14.

Chapter 6 policy

54. Section 602 and the detailed provisions of chapter 6 evidence a policy of protection for shareholders in various ways – information, time to consider a proposal and opportunity to participate are the original Eggleston principles.

55. The applications for relief involved the acquisition of substantial interests in each of the downstream companies. The proposed transaction would not give shareholders enough information in relation to, and an opportunity to participate in, control transactions that affect their company. We do not consider it appropriate to modify the law as requested in this case to accommodate a transaction structure that does not fit with the policy of chapter 6 when there are alternative transaction structures open to the applicant, and the receiver and manager, that would either not require relief or would require relief only within the existing relief policy framework.

56. One possibility, which ASIC noted, was a follow-on bid.

57. Cape Lambert had constructed an internal allocation of value for each aspect of the total transaction. Cape Lambert submitted that, relying on that allocation, no

premium would be payable in any downstream bid. Accordingly, Cape Lambert submitted that it would not offer a 'control premium' to downstream shareholders if forced to make a follow-on bid.

58. Corvette and NiPlats commented on whether a bid would be appropriate. They each submitted that conditional relief involving a standstill (see paragraph 44(a)) was preferable to a below-market bid. A shareholder in Corvette submitted that a bid was not currently in the best interests of its shareholders.

59. There are a number of responses to Cape Lambert's submission that its internal allocation is the appropriate price:

    (a) ASIC's follow-on bid policy contains a mechanism to establish a price

    (b) shareholders may well have different views about the price at which they would sell and

    (c) another bid may come along at a higher price once the company is in play (although this may be less likely for a follow-on bid than otherwise).

60. Another possibility is that the downstream companies could be removed from the sale of the assets and sold separately by the receiver and manager under ASIC's tender sale policy.

61. We are not persuaded by the submission of Cape Lambert that a "fire sale" of assets (ie the shares that Mineral Securities holds in the downstream companies) may result if relief is not granted. The chapter 6 policy we are dealing with in this matter concerns opportunity to participate in control transactions rather than the pricing of the transactions.

62. Cape Lambert also submitted that the asset sale process was regulated and should not be distinguished from a bid or other chapter 6 process. CopperCo made a similar submission. We disagree. It may have been regulated, but it was not analogous to a chapter 6 bid or other chapter 6 process. It did not provide the downstream or upstream shareholders with the relevant protections that the policy of chapter 6 requires. If the shares in the downstream companies were sold directly, for example by tender sale, ASIC's tender sale policy described in RG 102 would require the successful tenderer to make a follow-on bid.

Creditors vs shareholders?

63. Cape Lambert submitted that CopperCo shareholders have no interest in the transaction, only creditors.[22] Therefore, it submitted, upstream protection by a bid or other chapter 6 process was irrelevant. CopperCo submitted that the sale process was the consequence of a decision by a secured creditor. We note that the secured creditor was Cape Lambert, having purchased the secured debt from Macquarie Bank.[23]

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[22] CopperCo submitted that Mineral Securities' external unsecured creditors would be paid out in full and it was unclear what return to CopperCo's unsecured creditors there might be

[23] Completion of the asset sales will involve a set off arrangement

64. We do not think CopperCo's creditors or Mineral Securities' unsecured creditors should be preferred over the shareholders in the downstream companies.

65. There is no policy that the provisions of chapter 5 should prevail generally over the provisions of chapter 6. We agree with ASIC in this respect. To borrow from *Magellan*, "*… consideration of the protection of the interests of the downstream shareholders is integral to the decision whether or not to grant an exemption.*"[24] A receiver and manager is charged with delivering the highest value possible but must do so within the constraints of the law. It is not for the Panel to modify the law to increase the return to creditors in this case, where the underlying policy of chapter 6 is not served.

66. The Panel has previously considered the interests of creditors and shareholders in two applications. Both are distinguishable from the present application.

67. In *Pasminco*[25] creditors proposed to exchange debt for equity and become associated for the life of a debt 'work out'. ASIC refused relief because (among other things) alternative ways to implement the transaction were available, such as shareholder approval. The majority of the sitting Panel granted relief, recording that the decision was specific to the facts of the case. The majority preferred the interests of creditors to shareholders because control had already passed to the administrators so it was no longer appropriate for the takeover provisions to apply to the share issue. They were satisfied that there was no equity value left in the company. They said:

    … Because of the financial position of Pasminco, the Creditors are assured of losses, and control of the company has passed to the Administrators, we should allow the Administrators full use of every asset of Pasminco in order to reduce those losses. This is even to the point of using the listed shell of Pasminco and the existence of the current spread of shareholdings in Pasminco as an asset of the company, without any requirement to consult or consider the interests of the existing shareholders of Pasminco.[26]

68. In *Selwyn Mines*[27] a more pointed difference of interests arose but the decision turned on an unrelated point. While a receiver and manager was completing the sale of certain assets (ironically to Mineral Securities), a bid was made for Selwyn as a whole company (ie, if the sale did not proceed). Among other things, the bidder sought to forestall the sale. The Panel declined to conduct proceedings, saying that the sale was in the ordinary course of a receivership, was known to the bidder and was not a frustrating action.

69. In both cases the Panel considered the rights of creditors and shareholders of the same company. In *Pasminco* it was reasonable to balance the interest of creditors and shareholders. They were in the same company and shareholders had no value remaining. In Cape Lambert's case, the creditors and shareholders are in different companies. There is value in the downstream companies. We do not think it is reasonable here to prefer creditors of the upstream companies over shareholders of the downstream companies.

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[24] *Magellan Petroleum*, above at para 55
[25] *In the matter of Pasminco Ltd (Administrators appointed)* [2002] ATP 6, a split decision
[26] *Pasminco* at [112]
[27] *In the matter of Selwyn Mines Ltd* [2003] ATP 33

Item 14 policy

70. Item 14 has existed in various forms since the 1980s. Initially it was s12(k) of the *Companies (Acquisition of Shares) Act* and Codes, then s629 of the *Corporations Law*, and most recently item 14. Its current form was introduced by the *Corporate Law Economic Reform Program Act 1999* (**CLERP Act**) in March 2000, taking into account recommendations of CASAC.[28]

71. CASAC explained the policy basis for the exemption in this way:

> *The rationale for this type of exemption is that a downstream acquisition that is merely incidental to the main objective of acquiring the upstream company should not inhibit the upstream acquisition, especially where the upstream company is listed. Put another way, unless the upstream acquisition is a mere artifice, having as its true object the acquisition of the downstream company, the downstream acquisition should be exempt. Rather than articulate an exemption along these uncertain lines, the policy has been to provide a clear exemption where the upstream acquisition is in a listed company. In those circumstances, the upstream acquisition is likely to be a serious bid, involving the acquisition of a substantial company with a large number of shareholders, not an artifice to gain control of the downstream company. If the acquisition of a listed company were used as an artifice to acquire another company, the ASC could seek a declaration under s 733 that an unacceptable acquisition or unacceptable conduct had occurred.*
>
> *Without the exemption for downstream acquisitions, companies could make themselves takeover-proof by holding strategic parcels of shares in a series of other companies.*
>
> *A further reason for exempting downstream acquisitions that result from takeovers of listed companies is that, while the offer price for the securities in the upstream listed company is set by the market, the price that the bidder for the upstream company should pay for the shares in the downstream company (the `see through' price) has to be determined by an inevitably unsatisfactory process of calculation or valuation rather than by the market.*[29]

72. As s12(k), the exemption applied if the upstream acquisition occurred in an Australian company, or foreign company, listed on ASX. The purpose of the exemption was said to be "*to strike at undesirable defence tactics against a takeover.*"[30]

73. The explanatory memorandum said of s12(k), "*The exemption does not apply to other (ie unlisted) companies because they provide greater scope for the misuse of interposed companies to avoid the provisions of the Takeovers Code.*"[31]

74. As s629, the exemption applied if the upstream acquisition occurred in a listed Australian company and the acquisition occurred as a result of a takeover. Listing was an important consideration because "*An exemption for listed companies is necessary*

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[28] Legal Committee of the Companies and Securities Advisory Committee *Anomalies in the Takeovers Provisions of the Corporations Law* (March 1994)

[29] *Anomalies paper,* pp 28-29 (footnotes omitted)

[30] ASIC RG 71 at 71.8. See also *North Flinders Miners Ltd v Hartogen Energy Ltd & Ors* (1988) 14 ACLR 609 at 619

[31] *Explanatory memorandum to the Companies (Acquisition of Shares) Bill 1980*, cl 51(j)

to preserve the free market in their shares. There is not the same need in relation to unlisted companies."[32]

75. During the reign of s629, the exemption was not available for foreign companies or corporations listed on foreign exchanges. And there was an additional requirement of a takeover. RG 71 was written at this time to provide relief. It sought, in particular, to regain some of the ground lost in respect of foreign companies from s12(k) and companies listed only on overseas exchanges.

76. As item 14, the exemption applies if the upstream acquisition occurs in an Australian company or foreign company, which is listed on an Australian prescribed market or a foreign market approved in writing by ASIC. There is no requirement for a takeover. CASAC recommended this because "*effective participation by Australia in international capital markets requires greater certainty.*"[33]

77. Item 14 is a pragmatic solution to a concern that downstream holdings should not interfere with the free transfer of shares in a broadly-held upstream entity.

78. Mineral Securities is listed in name only. Perhaps it should have been delisted already. Thus, the policy basis for reliance on item 14 is missing. This raises the question of unacceptable circumstances, which is also a question for the granting of relief under RG 71.[34]

79. No application for a declaration of unacceptable circumstances has been made.

80. ASIC submitted that the Panel, in exercising its powers under s656B, should not give an opinion on whether unacceptable circumstances exist or would exist if the acquisition went ahead in reliance on item 14. Cape Lambert submitted that a decision on the current application must involve a consideration of the policies of chapter 6, which "*raises much the same issues as would a decision whether unacceptable circumstances will arise from the facts as they are currently known to the Panel if the transaction proceeds*". It noted that the Panel need not make a formal declaration about the existence of unacceptable circumstances but could indicate its view in its reasons.

81. We have not explored, and cannot decide, whether unacceptable circumstances may arise from completion of the proposed transaction in reliance on item 14. The transaction has not taken place and there is no application under s657C. There may be other factors relevant to a consideration of this question that have not been brought forward. Moreover, if a different Panel was constituted to consider the question, nothing we say could bind them. Having said that, we think it would be useful for parties to note our concerns above in relation to chapter 6 policy.

DECISION

82. For the above reasons we affirm the decision of ASIC not to grant restricted relief to Cape Lambert to allow it to acquire shares in Buka Gold, Corvette or NiPlats as part

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[32] *Anomalies Paper,* p 30

[33] Above

[34] In RG 71 at 71.19, ASIC says it "*will not modify s629 where it appears to [ASIC] that unacceptable circumstances (within the meaning of s732) may occur in relation to the proposed acquisition*"

of the acquisition of assets from CopperCo. We would not grant unrestricted relief either.

83. Had ASIC granted restricted relief in respect of Tianshan, we would not have affirmed that decision. We would not grant unrestricted or restricted relief for Tianshan either.

84. We have no power to make costs orders in applications under section 656A.

John O'Sullivan
President of the Sitting Panel
Decision dated 15 June 2009
Reasons published 3 July 2009