Australian Government

Takeovers Panel

Reasons for Decision
oOh!media Group Limited
[2011] ATP 9

Catchwords:

Undertakings - decline to make a declaration - call option deed – arm's-length terms – association - placement – warehousing - contravention of s606 - substantial holding disclosure - relevant interest – efficient competitive and informed market - Eggleston principles - extension of time for making application – FIRB approval – shareholder approval

Corporations Act 2001 (Cth), sections 602, 606, 608, 609(7), item 7 of s611, 657A, 657C(3), 671B

Guidance Notes 1, 4

ASIC RG 48

Australian Securities Commission and John Fairfax Holdings Ltd, CSP, 29 September 1997 (1997) 25 ACSR 441, Taipan Resources NL (No 9) [2001] ATP 4, Trysoft Corporation Ltd [2003] ATP 26, Austral Coal Limited 02 [2005] ATP 13, Austral Coal Limited 03 [2005] ATP 14, Austral Coal Limited 02R [2005] ATP 15, Austral Coal Limited 02RR [2005] ATP 20, Australian Pipeline Trust 01R [2006] ATP 29, Mount Gibson Iron Limited [2008] ATP 4

INTRODUCTION

1. The Panel, Paula Dwyer (sitting President), David Friedlander and Mike Roche, accepted undertakings intended to remedy, as best they can, the unacceptable circumstances alleged in the application.[1] The Panel considered that the undertakings addressed the unacceptable circumstances and declined to make a declaration of unacceptable circumstances in relation to the affairs of oOh!media Group Limited.

2. In these reasons, the following definitions apply.

call option deed 1	Call Option (low exercise price option) over shares, between PFG as trustee for The PFG Investment Trust and QMS, dated 22 August 2010 and released to ASX on 22 March 2011
call option deed 2	Call Option (low exercise price option) over shares, between WSC, QMS, Immunotherapies Pty Ltd, Shawn Uldridge and Hayden Kerr, dated 21 April 2011 and released to ASX on 21 April 2011
circumstance 1	the non-disclosure of call option deed 1
circumstance 2	the entry into call option deed 2 where no steps had been

[1] The undertakings include to rescind a call option (which could have taken QMS to approximately 28% of oOh!media Group Limited) sell down the holding of QMS from 19.9% to less than 15% with voting and other restrictions, sell down WSC's holding of approximately 9% of OOH and to provide compensation for OOH's recent placement

	taken to fulfil a condition
FIRB	Foreign Investment Review Board
OOH	oOh!media Group Limited
PFG	PFG Investments Pty Limited (in voluntary liquidation)
QMS	QMS Asia Pacific Outdoor Pte Ltd
WSC	William Shaw Capital Pty Ltd

FACTS

3. OOH is an ASX listed company (ASX code: OOH).

4. In August 2010, QMS and PFG entered into call option deed 1, one counterpart dated 22 August 2010 and one dated 26 August 2010, giving QMS a call option over shares in OOH. The terms of the call option included the following:

   (a) the call option covered 75,000,000 shares

   (b) QMS paid a call option fee of $16,650,000 (ie, 22.2 cents per share) in two payments and, on exercise, would pay an exercise fee of 7.8 cents per share (ie, in total for 75,000,000 shares the price equated to 30 cents per share). The option involved a significant up-front premium and a low exercise price

   (c) if PFG failed to transfer a minimum number of shares (67,500,000), it had to repay the call option fee and exercise fee, and pay a break fee of $337,500

   (d) a requirement for FIRB approval in the following clause –

   *3. **FIRB APPROVAL***

   (2) The parties agree that:

   (a) clauses 1, 2(2), 3, 4(1), 5(1), 5(3) to 5(9), 6, 7, 8, 10, 11(1), 12, 13, 14 and 15[2] *are legally binding and create legally binding obligations upon execution of this deed by both the Grantor [PFG] and the Grantee [QMS]; and*

   (b) no provision of this deed other than the clauses specified in clause 3(2)(a) creates any legally binding right or imposes any legally binding obligation on a party until FIRB Approval[3] *has been granted.*

   (e) if the call option was terminated by QMS before 15 October 2010, PFG was entitled to the first payment under the call option fee. If it was terminated by

[2] These clauses addressed Interpretation, Fees, Payment, Warranties, Break Fee, Assurances, Assignment, Confidentiality, etc

[3] Defined in the deed. Essentially it meant approval under the *Foreign Acquisition and Takeovers Act*, the notice period after giving notice under that Act expiring without any interim or permanent prohibition order, or formal advice that there is no objection under that Act or the foreign investment policy of the Federal government

QMS after that date, PFG was entitled to the entire call option fee. If QMS terminated for a breach by PFG of the confidentiality provision, PFG was not entitled to any of the call option fee and

(f) the call option deed was to be kept confidential, subject to the usual type of exceptions[4] and the following provision:

(5) The Grantee [QMS] acknowledges that the Grantor [PFG] has, prior to the date of this deed, disclosed the existence or proposed existence of this deed (without disclosing the terms or the name of the Grantee) to a number of entities from whom the Grantor has obtained rights to acquire shares in the Company ("Prior Disclosure"), and that the Prior Disclosure is not a breach by the Grantor of this clause 10 (emphasis added).

5. At the time, PFG did not hold all the shares the subject of the call option.

6. In December 2010, OOH issued 57,142,857 shares and in January 2011, issued 42,105,263 shares. The shares were placed to WSC, Evans & Partners Nominees and Macquarie Group Limited.

7. Between approximately 13 August 2010 and 21 January 2011, PFG disclosed that its voting power in OOH changed, as follows:

Date	Notice	Date of change	Position	How
13/8/10	Initial holding	16/11/09	5.75%	
14/12/10	Change of holding	10/12/10	16.12%	On market and off market purchases
20/12/10	Change of holding	16/12/10	17.46%	Off market purchases
21/1/11	Change of holding	19/1/11	16.12%(1)	Off market purchases
22/3/11	Ceasing sub holding	21/3/11	< 5%	Off market sales

(1) Diluted capital following Placement

8. The off market sales on or about 21 March 2011 were pursuant to the exercise of the call option. Two transfers were executed for a total of 75,800,000 shares:

(a) 6,250,000 shares and

(b) 69,550,000 shares

9. In the notice of ceasing to be a substantial holder lodged on 22 March 2011, PFG disclosed call option deed 1 with QMS.

10. QMS disclosed that its voting power in OOH changed, as follows:

Date	Notice	Date of change	Position	How

[4] For example, information disclosed with consent, information required by law to be disclosed or information in the public domain (without default of the party)

21/3/11	Initial holding	18/3/11	15.12%	Off market purchase(1)
20/4/11	Change of holding	20/4/11	18.51%	On market purchases
21/4/11	Change of holding	21/4/11	19.9%	Off market purchase(2)

(1) 75,800,000 shares from PFG (pursuant to the call option, which it also disclosed)

(2) 6,943,380 shares from WSC (also disclosing call option deed 2 with WSC)

11. On 21 April 2011, QMS disclosed that it and WSC, Immunotherapies Pty Ltd, Shawn Uldridge and Hayden Kerr had entered into call option deed 2, dated 21 April 2011, giving QMS a call option over shares in OOH.

12. The terms of call option deed 2 were substantially the same as call option deed 1. They included the following:

(a) the call option was operative for 13 months

(b) the call option covered at least 45,161,432 shares (ie, the balance of WSC's holding)[5]

(c) QMS paid a call option fee of $9,935,515 (ie, 22 cents per share), and on exercise, would pay an exercise fee of 8 cents per share (ie, the price equated to 30 cents per share)

(d) if WSC failed to transfer at least 45,161,432 shares, it had to repay the call option fee and exercise fee, and pay a break fee of $150,000

(e) requirements for FIRB and shareholder approval in the following clauses –

*3. **FIRB APPROVAL AND SHAREHOLDER APPROVAL***

…

3.2 The parties agree that:

3.2.1 clauses 1, 2.2, 3, 4.1, 5.1, 5.3 to 5.9, 6, 7 ,8, 10, 11.1, 12, 13, 14 and 15[6] *are legally binding and create legally binding obligations upon execution of this deed by both the Grantor [WSC] and the Grantee [QMS]; and*

3.2.2 no provision of this deed other than the clauses specified in clause 3.2.1 becomes effective or binding on any party, and the parties to this deed will not be taken to have entered into or agreed to enter into this deed, until the fulfillment of each of the following conditions precedent:

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[5] In fact WSC held one extra share – ie, 45,161,433 shares

[6] These clauses addressed Interpretation, Fees, Payment, Warranties, Break Fee, Assurances, Assignment, Confidentiality, etc

> *(a) FIRB Approval[7] has been granted;*
> *(b) the Company [OOH] has obtained:*
> *(i) any Shareholder Approval[8] required and such Shareholder Approval as is obtained is not withdrawn, cancelled or revoked prior to the Completion Date; and/or*
> *(ii) a relevant exemption from ASIC under section 655A of the Corporations Act from the provisions of Chapter 6 of the Corporations Act in relation to the grant of the Call Option to the Grantee and to the acquisition of the WSS Shares [at least 45,161,432 shares] by the Grantee upon exercise of the Call Option.*

(f) an item 9 of s611[9] provision in the following clause –

> *3.3 Notwithstanding clause 3.2.2(b) of this deed, if in respect of some or all of WSS Shares the Grantee is permitted to acquire those shares under the Corporations Act, including without limitation as permitted under item 9 of section 611 of the Corporations Act, without seeking the Shareholder Approval, then provided FIRB Approval has been obtained, the Grantee may exercise the Call Option in part or in full (as the case may be) in respect of that many shares as the Grantee is able to acquire without the Shareholder Approval pursuant to the Corporations Act.*

(g) the call option deed was to be kept confidential, subject to the usual type of exceptions,[10] similar to call option deed 1.

13. The following diagram shows the relationships:

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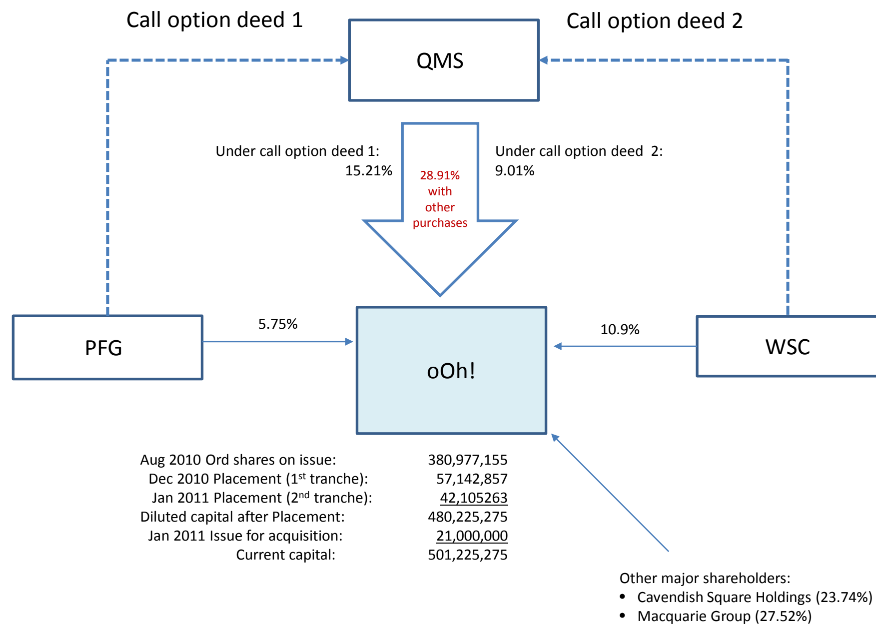
[7] FIRB approval was defined in the same way as in call option deed 1

[8] Shareholder approval was defined as item 7 of s611 approval that was unconditional or subject only to conditions that QMS considered acceptable

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

[10] See fn 4



APPLICATION

14. By application dated 4 May 2011, OOH sought a declaration of unacceptable circumstances in relation to its affairs. It submitted that there were two sets of circumstances.

Circumstances 1 – call option deed 1

15. PFG had increased its holding in OOH at a time when call option deed 1 was undisclosed. Therefore, PFG's purchases were:

- made in an uninformed market and
- likely made with the benefit of inside information.

16. It submitted that, from at least 22 August 2010 to 22 March 2011, because of the failure to disclose call option deed 1:
    (a) there was an inefficient, uncompetitive and uninformed market
    (b) sellers to PFG did not:
        i. know that QMS intended to acquire a substantial holding or
        ii. have a reasonable and equal opportunity to participate in benefits that would arise under the option arrangement and
    (c) OOH made a placement at materially lower prices than it would have otherwise.

Circumstances 2 – call option deed 2

17. QMS increased its holding pursuant to the partial exercise of call option deed 2, where:
    - the terms of that deed would not be expected between parties acting at arm's length and
    - no efforts have been made to fulfil the shareholder approval condition of that call option deed.

18. It submitted that, by not seeking to obtain shareholder approval and meeting the other conditions of call option deed 2, QMS had abused s609(7) and was effectively controlling the 9% parcel held by WSC. It also submitted that the market was uncertain.

Final orders sought

19. OOH sought final orders to the effect that:

    (a) Sellers to PFG on or after the date of the call option between PFG and QMS had a right to affirm their contracts, terminate them, or affirm them subject to payment of the difference between 30 cents and the consideration received

    (b) QMS pay OOH $9,774,436 - being the difference between 30 cents per share and the placement price and

    (c) QMS and WSC pay OOH $180,000 - being the anticipated cost of the shareholders' approval meeting, plus other costs, and also provide information for the purposes of the meeting.

DISCUSSION

Extension of time

20. OOH sought an extension of time in relation to circumstances 1. Some of those circumstances occurred more than 2 months prior to the application but, OOH submitted, they related to the failure of QMS and PFG to make public disclosure of call option deed 1 as they were required to do by s671B.

21. The principles for an extension of time were expressed in *Austral Coal Limited 03*:

    (a) essential matters supporting the case first come to light during the 2 month period preceding the application and

    (b) the application makes credible allegations of clear, serious and ongoing unacceptable circumstances.[11]

22. In our view, an extension of time is not needed. In *Trysoft Corporation Ltd*,[12] the Panel took the view that the circumstances of a continuing agreement and its non-disclosure were continuing.

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[11] [2005] ATP 14 at [19]
[12] [2003] ATP 26 at [95]-[99]

23. Call option deed 1 was disclosed on 22 March 2011. The application was made within 2 months of that date.

24. Section 657C(3) says:

    An application for a declaration under section 657A can be made only within:

    (a) 2 months after the circumstances have occurred; or

    (b) a longer period determined by the Panel.

25. The application relates to clear, serious and ongoing unacceptable circumstances. Therefore, if necessary because we are incorrect that an extension is not needed, we extend the time for making the application to the date on which it was made.

Preliminary submissions

26. QMS made a preliminary submission denying that it was associated with PFG or WSC. It submitted that it had disclosed its relevant interest in PFG's shares as soon as that interest arose, which was following receipt of FIRB approval. It further submitted that it did not have a relevant interest in WSC's shares, in essence because it did not yet have FIRB approval.

27. It further submitted that it was not appropriate to seek shareholder approval in relation to call option deed 2 until it had received FIRB approval.

28. QMS submitted that:

    QMS believes it has made clear its interest in being a significant shareholder in the Applicant. QMS has made clear that it does not presently intend to take steps to acquire 100% of the shares of the Applicant (by means of a takeover bid or any other means). QMS wishes to reserve its rights to acquire more Applicant shares so it can acquire a shareholding in the Applicant of approximately 30%.

29. Accordingly, it submitted, "*we query whether the commencement of proceedings is necessary, or the best use of the resources of the relevant parties*."

30. In our view, the information in the application warranted us conducting proceedings.

Brief

31. In preliminary submissions, QMS initially offered undertakings, subject to FIRB approval, to:

    (a) subscribe for additional shares at 30 cents per share

    (b) seek a meeting of OOH shareholders under item 7 of s611, provide information about QMS and its intentions, and contribute to the reasonable costs of the notice of meeting.

32. QMS also submitted that it would be prepared to consider the matters that OOH had raised in the proposed orders, namely that sellers of shares to PFG have certain rights.

33. We were not satisfied that these undertakings would resolve the potential unacceptable circumstances, at least until those circumstances had been considered

more thoroughly. Therefore we declined to accept these undertakings and issued a brief.

34. We were then approached by QMS, WSC and OOH regarding a further proposal to resolve the matter. We considered that this proposal may resolve the matter and deferred the receipt of submissions and rebuttals on the brief.

35. Ultimately the further proposal was accepted by us, as set out below, and we advised the parties that we did not require submissions and rebuttals on the brief.

Association

36. It was submitted by the applicant that, as a result of call option deed 1, QMS obtained a relevant interest in OOH, from PFG, of 15.12%. PFG had disclosed voting power of 5.75% at the time the deed was entered into. The manner and timing of PFG's path toward having voting power sufficient to cover the exercise of the option is unclear.

37. QMS exercised call option deed 1 on 18 March 2011 and lodged a notice of initial substantial holder on 21 March 2011 indicating that it became a substantial holder in OOH with a relevant interest of 15.12% on 18 March 2011, being the date the transfer took place.

38. OOH submitted that PFG and QMS became associates at the date call option deed 1 was entered (which we think was no later than 23 August 2010) because they were acting in concert in relation to either the ownership of shares or the acquisition or disposal of shares. It submitted that the option terms were unusual. It submitted that:

    (a) PFG was effectively being funded by QMS

    (b) there were other arrangements in place, such as that PFG was guaranteed a profit by buying the shares on market below the exercise price under the option and

    (c) the arrangement amounted to warehousing of shares for QMS.

39. Call option deed 1 contained a number of unusual features, including the call option fee and it is potential for repayment, the fact that PFG did not own all the shares the subject of the deed and the "back-to-back" arrangements to obtain shares that PFG had in place when it entered the deed. In our view the terms of the option, combined with its non-disclosure, raised enough material to justify conducting proceedings on the question of association.[13]

40. In view of the settlement, which we have accepted as remedying the potential unacceptable circumstances, as best they can be, we did not consider this further.

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[13] *Mount Gibson Iron Limited* [2008] ATP 4

Relevant interest

41. It was submitted by the applicant that call option deed 1 gave QMS a relevant interest in the shares in OOH the subject of the option in which PFG had a relevant interest. This is because s608(8)[14] accelerates the acquisition of a relevant interest.

42. Similarly, it was submitted that call option deed 2 gave QMS a relevant interest in the shares in OOH the subject of the option in which WSC had a relevant interest. OOH submitted that this option took QMS over 20% in breach of s606.

43. ASIC RG 48[15] sets out ASIC's policy on the predecessor to section 608(8),[16] which is in similar terms to s608(8). It says:

    If the call writer has an existing relevant interest in the shares to which the options relate, the call taker is deemed to acquire a relevant interest in the underlying shares before the options are exercised (s34(a)-(c)). Section 34, brings back to the earliest possible point in time (ie when the option itself is acquired) the moment at which a person is treated as having a relevant interest in the underlying shares (*Re Adelaide Holdings Ltd and the Companies Act* [1982] 1 NSWLR 167 at 170)[17]

44. When lodging its initial substantial holder notice on 22 March 2011, QMS stated "*under the terms of [call option deed 1], no call option was granted and QMS did not acquire any interest in [OOH's] shares until FIRB approval (as defined in the Deed) was obtained by QMS. FIRB approval was obtained on 18 March 2011.*"

45. Section 609(7)[18] prevents a relevant interest arising by reason of a conditional agreement. However, it applies only to agreements that are conditional on either

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[14] Section 608(8) says:

If at a particular time all the following conditions are satisfied:

(a) a person has a relevant interest in issued securities;

(b) the person (whether before or after acquiring the relevant interest):

(i) has entered or enters into an agreement with another person with respect to the securities; or

(ii) has given or gives another person an enforceable right, or has been or is given an enforceable right by another person, in relation to the securities (whether the right is enforceable presently or in the future and whether or not on the fulfilment of a condition); or

(iii) has granted or grants an option to, or has been or is granted an option by, another person with respect to the securities;

(c) the other person would have a relevant interest in the securities if the agreement were performed, the right enforced or the option exercised;

the other person is taken to already have a relevant interest in the securities.

Note: Subsections 609(6) and (7) deal with specific situations in which the agreement will not give rise to a relevant interest.

[15] ASIC Regulatory Guide 48: *Takeovers aspects of options over shares,* issued 5 April 1994

[16] Section 34 of the Corporations Law

[17] RG 48 at [48.11]

[18] Section 609(7) says:

A person does not have a relevant interest in securities merely because of an agreement if the agreement:

(a) is conditional on:

(i) a resolution under item 7 in the table in section 611 being passed; or

(ii) ASIC exempting the acquisition under the agreement from the provisions of this Chapter under section 655A; and

shareholder approval or ASIC exemption. Call option deed 1 was not conditional on either of these. It had been drafted in a way that sought not to create "*any legally binding right or [impose] any legally binding obligation on a party until FIRB Approval has been granted*." In other words, it was drafted so as to fall outside s608(8)(b) on the basis that it was neither an "enforceable right" nor an effective grant of an option until FIRB had given approval.

46. We have some doubts that this was effective, and also note s608(2),[19] which concerns extension to control exercisable through a trust, agreement or practice. Moreover, in our view the low exercise price option structure was a significant commercial indicator that effective control over underlying OOH shares existed. However, in view of the settlement, we did not need to consider the acquisition of a relevant interest further.

47. Call option deed 2 included a condition of either shareholder approval or ASIC exemption. It also employed a similar drafting device to call option deed 1, in that *"no provision of this deed other than clauses specified in clause 3.2.1 becomes effective or binding on any party, and the parties to this deed will not be taken to have entered into or agreed to enter into this deed, until fulfilment of each of the following conditions precedent:*

    (a) FIRB approval has been granted;

    (b) the company has obtained [Shareholder Approval or a relevant exemption from ASIC]"

48. Even if this was effective, it would not preclude the Panel making orders where unacceptable circumstances exist. In view of the undertakings, we did not need to consider the acquisition of a relevant interest further.

(b) does not confer any control over, or power to substantially influence, the exercise of a voting right attached to the securities; and

(c) does not restrict disposal of the securities for more than 3 months from the date when the agreement is entered into.

The person acquires a relevant interest in the securities when the condition referred to in paragraph (a) is satisfied.

[19] Section 608(2) says:

In this section, power or control includes:

(a) power or control that is indirect; and

(b) power or control that is, or can be, exercised as a result of, by means of or by the revocation or breach of:

(i) a trust; or

(ii) an agreement; or

(iii) a practice; or

(iv) any combination of them;

whether or not they are enforceable; and

(c) power or control that is, or can be made, subject to restraint or restriction.

It does not matter whether the power or control is express or implied, formal or informal, exercisable alone or jointly with someone else. It does not matter that the power or control cannot be related to a particular security.

49. OOH submitted that QMS was not entitled to rely on s609(7) because the option did not meet the conditions of the section, although it did not clearly articulate how.

50. Section 609(7) is a legislative expression of policy, dating from the late 1980s, in which it was accepted that an acquirer would not agree to acquire a significant parcel of shares, and expend the time and cost of a shareholders' meeting, if the seller was free to walk away. Therefore, as long as the acquirer exercised no control prior to shareholders' approval, it was considered reasonable to allow a restraint on disposal of the shares ahead of the meeting. Three months was considered a reasonable time to get finance, reports and notices of meeting together. We note that call option deed 2 had a term of 13 months.

51. Before our brief was issued, QMS made a preliminary submission that it did not have a relevant interest in the shares the subject of call option deeds 1 or 2 and therefore did not need to make disclosure before it did. In relation to shareholder approval under call option deed 2, it submitted that it was not appropriate to approach OOH to seek shareholder approval until such time as FIRB approval for that acquisition had been granted.

52. QMS made no attempt to seek a shareholders' meeting prior to 4 May 2011 when OOH lodged its application. Even if the conditions of s609(7) were met and QMS was legally entitled to rely on it, we were concerned that the attempt to rely on it would have amounted to unacceptable circumstances, but in view of the settlement we did not need to consider this further. While not explored, it is unclear what incentive there might be for disinterested shareholders to approve the acquisitions under call option deed 2.

Disclosure

53. For the reasons given above, our view was that disclosure of call option deed 1 was required on and from around 23 August 2010. Call option deed 2 by contrast was disclosed to ASX promptly after it was entered into.

54. Even if there is no relevant interest for the purpose of s606 by reason of s609(7), a relevant interest is not disregarded for disclosure purposes under s671B. This is because s671B(7) says that a person has a relevant interest for the purpose of disclosure if they would have it but for (relevantly) s609(7).

55. OOH submitted that QMS had not disclosed its acquisition of the relevant interests as required under s671B.

56. QMS made preliminary submissions that a relevant interest had not arisen.

57. Disclosure has now been made of both call option deed 1 and call option deed 2. As part of the settlement, compensation will be paid by QMS to shareholders who sold on market and to shareholders who sold to PFG off market during the period that call option deed 1 was undisclosed, unless the seller was an associate of PFG or was aware of the arrangements.

58. Again, we have some doubts that no relevant interest under call option deed 1 arose, and therefore doubts that no disclosure was required, prior to receipt of

FIRB approval. However, because of the undertakings that were given we did not need to consider the question of whether unacceptable circumstances existed.

Warehousing

59. OOH submitted that the circumstances involved the 'warehousing' of the shares the subject of the call option deeds. We were concerned that failure to disclose call option deed 1 prior to 22 March 2011 appeared to raise that argument. In respect of call option deed 2, the agreement was disclosed but the terms of the option, particularly it being a low exercise price option, also raise that argument.

60. Circumstance 1 involves elements similar to *Glencore*,[20] in that there is an undisclosed derivative contract. In *Glencore* the Panel did not find a relevant interest existed. Circumstance 2 involves elements similar to *Fairfax,*[21] in that there is a contract with the potential for shares to be transferred as the 'creep' provision allows.

61. In view of the settlement we did not consider this further.

Undertakings

62. At the time of the application, call option deed 1 had been exercised. QMS had the shares and disclosure of the call option deed had been made. Call option deed 2, however, remained extant.

63. QMS and WSC offered undertakings which had the following effect:

    (a) call option deed 2 would be rescinded

    (b) OOH would be partly compensated for having placed shares at below 30 cents per share, being QMS's acquisition price

    (c) QMS would reduce its holding to less than 15% within 6 months and not increase it for 6 months. It would sell through an independent seller to unassociated parties, although provision is made for OOH to undertake a selective buyback or selective reduction of capital instead

    (d) QMS would not vote more than 4.9% of its shareholding before 31 January 2012

    (e) QMS would not seek any OOH board representation for 6 months

    (f) QMS would compensate shareholders who sold OOH shares on-market, and shareholders (not associated with PFG)who sold to PFG off-market and were unaware of call option deed 1

    (g) WSC would sell its entire holding within 6 months. It would sell through independent sellers to unassociated parties

    (h) WSC would not vote the sale shares during the sale period and

    (i) WSC would comply with its disclosure obligations.

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[20] *Austral Coal Limited 02* [2005] ATP 13, *Austral Coal Limited 02R* [2005] ATP 15, *Austral Coal Limited 02RR* [2005] ATP 20, and Federal Court reviews

[21] *Australian Securities Commission and John Fairfax Holdings Ltd*, CSP, 29 September 1997 (1997) 25 ACSR 441. The Corporations and Securities Panel declined to make a declaration of unacceptable circumstances

64. QMS also agreed to pay OOH's legal fees.

65. By unwinding call option deed 2, the possible contravention of s606 is remedied. By compensating shareholders, the consequences of any non-disclosure are remedied as best they can be.

66. QMS was entitled, if it had FIRB approval, to buy up to 20% of OOH provided it made appropriate disclosure. It obtained FIRB approval to acquire approximately 15% by exercising call option deed 1. It is returning its holding to that position. OOH submitted that requiring QMS to sell more would have a significant effect on its market price, which would be to the detriment of shareholders generally. Given the liquidity of the market in OOH shares, we think this position is reasonable. The provision for a selective buyback or selective capital reduction allows OOH to deal with any concerns about the effect of market overhang. The provision for limited voting and other rights for a period, and compensation, remedies our concerns about parties benefitting from any 'warehousing' of the shares.

67. At around the time of entry into call option deed 1, OOH was undertaking a placement and was assisted by WSC, among others. WSC entered into call option deed 2. Whatever concerns this raises, OOH accepts that the compensation QMS has offered remedies for it the alleged effect of non-disclosure of call option deed 1 and the entry into call option deed 2.

68. This left one matter outstanding, namely with whom it was that PFG had entered arrangements to obtain the shares the subject of call option deed 1 with QMS. We sought this information. PFG provided a list of names. There was nothing to suggest, and no party submitted, that we should take this any further.

69. The circumstances here looked very serious from the evidence available. They affected both the applicant and the market.

70. Section 606 is one of the cornerstone provisions of Chapter 6.[22] Non-compliance affects whether the acquisition of control over a listed company takes place in an efficient, competitive and informed market. Similarly, disclosure of the acquisition of voting power is fundamental to the operation of an efficient, competitive and informed market.

71. In Australian Pipeline Trust 01R, the Panel said:

    > *The Panel considered that compliance with the provisions of the Act is important for the confidence and efficiency of Australia's securities markets, especially where that compliance relates to significant control issues for major Australian listed entities….*[23]

72. The undertakings here address concerns regarding both the market and the applicant. They result in an outcome similar to one we may have imposed if the matter had gone to conclusion and the applicant's case had been made out.

73. We invited submissions on whether the undertakings sufficiently addressed the unacceptable circumstances. No party, including ASIC, had any objection to the Panel accepting the undertakings.

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[22] *Taipan Resources NL (No 9)* [2001] ATP 4 at [38]

[23] [2006] ATP 29 at [118]

74. In GN 4 the Panel says:

    An agreed resolution, such as by undertakings, can be more flexible and quicker than orders. The Panel considers that the public interest is generally served by accepting an undertaking that addresses unacceptable circumstances to the Panel's satisfaction….[24]

75. Accordingly, we considered that it was not against the public interest to accept the undertakings and decline to make a declaration of unacceptable circumstances.

DECISION

76. Given the undertakings offered by QMS and WSC, we decline to make a declaration and are satisfied that it is not against the public interest to do so. We have had regard to the matters in s657A(3).

Orders

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

Paula Dwyer
President of the sitting Panel
Decision dated 30 May 2011
Reasons published 7 June 2011

Party	**Advisers**
OOH	Gilbert + Tobin Macquarie Capital Finance (Australia) Pty Ltd
PFG	Freehills
QMS	Maddocks
WSC	Allen & Overy

[24] Guidance Note 4 "*Remedies – general*" at [38]

Australian Government

Takeovers Panel

Annexure A

Australian Securities and Investments Commission Act (Cth)
Section 201A
Undertaking

Pursuant to section 201A of the *Australian Securities and Investments Commission Act 2001* (Cth), QMS undertakes to the Panel that it will:

1. Within 2 business days after the date of this undertaking, rescind call option deed 2 by agreement between QMS and WSC by the parties entering into a deed in a form approved by the Panel.

2. Pay OOH $3,600,000, being the difference between 22c per share and the call option deed 2 price of 30c per share in relation to the OOH shares held by WSC immediately prior to the date of this undertaking, within 5 business days after the date of this undertaking.

3. Promptly notify:

    a. OOH and the ASX of the rescission of call option deed 2

    b. FIRB of the rescission of call option deed 2 and withdraw the application for approval in relation to call option deed 2 made to FIRB on 9 May 2011.

4. In respect of its legal and or beneficial interest in 99,743,830 OOH shares at the date of this undertaking, reduce its holding in OOH shares to a number of shares less than 15% by divesting OOH shares (**Divestment Shares**) as follows:

    a. Subject to paragraph 5, the Divestment Shares will comprise 24,560,100 OOH shares title in which must be transferred to LINWAR Securities Pty Limited ABN 91 103 183 606 or Evans and Partners Pty. Ltd ABN 85 125 338 785 or such other broker approved by the Panel and who can verify to the Panel's reasonable satisfaction that it is independent of each party named in the Application (**Nominee**) on trust for QMS within 5 business days after the date of this undertaking

    b. The Nominee must be directed by QMS to effect either:

        i. an orderly on-market sale of the Divestment Shares; or

ii. an off market sale of the Divestment Shares to sophisticated or professional investors (as defined in the Corporations Act) that are not associated with any of WSC, QMS or any associate of either of them,

on the basis that:

- the sell down must occur within 6 months of engagement of the Nominee (**Sell Down Period)**
- the Nominee must obtain from any prospective purchaser of Divestment Shares under paragraph 4(b)(ii) a statutory declaration that it is not associated with either WSC or QMS;
- none of QMS or any of its associates may purchase Divestment Shares
- the Nominee must account to QMS for the proceeds of sale, net of the costs, fees and expenses of the sale,

provided that OOH may direct QMS and notify the Nominee to cease selling any of the Divestment Shares during the Sell Down Period if it gives notice that it proposes to seek shareholder approval for a selective buy back or selective capital reduction in accordance with undertaking 5

c. At the end of the Sell Down Period, the Nominee must certify to the Panel that it has conducted the sale of the Divestment Shares in accordance with these undertakings.

d. QMS and its associates must do all things necessary to give effect to the undertaking in this paragraph 4 including doing all things necessary to ensure that the Nominee is registered with title in the Divestment Shares and complying with any request of the Nominee in relation to the Divestment Shares

e. QMS must not dispose of, transfer, charge, or vote any Divestment Shares (except as required under undertaking 4 or undertaking 5).

5. Notwithstanding paragraph 4, during the Sell Down Period, OOH may at its election seek shareholder approval to buy back or cancel some or all of the Divestment Shares by means of either a selective buy back or selective capital reduction as permitted by the Corporations Act (**Reduction**) at a buy back or cancellation price of not less than the volume weighted average price for OOH shares sold on the ASX during the 30 day period prior to the date of the Notice of Meeting to approve the Reduction, less 10%. If OOH so elects, QMS must, if required under section 256C(2) of the Corporations Act, vote in favour of that Reduction and QMS must execute such documents, including buy back agreements and offers, as are necessary to give effect to that Reduction if approved by OOH shareholders.

The number of Divestment Shares must be calculated by reference to the number of OOH shares which must be sold and/or cancelled, such that at the end of the sale and/or Reduction, QMS holds less than 15% of the then issued capital of OOH (**Remaining Holding**).

6. Subject to the operation of undertakings 4 and 5, at no time during the 6 month period commencing on the date of this undertaking (**Standstill Period**) have a relevant interest in 15% or more of the total number of OOH shares on issue.

7. Not seek any board representation on the OOH board during the Standstill Period.

8. In relation to OOH shares in respect of the Remaining Holding, not vote any more than that number of shares comprising the Remaining Holding which is equal to 4.9% of the issued capital of OOH at any meeting of OOH shareholders held on or before 31 January 2012.

9. Within 5 business days after receiving the Registry Information, pay to each Affected Seller, for each relevant Affected Market Transaction, the relevant Market Difference by sending to each Affected Seller the required amount by bank cheque to the postal address for that shareholder provided to QMS as part of the Registry Information

   where:

   Affected Market Transaction means each sale of OOH Shares on market during the period from 23 August 2010 up to and including 22 March 2011;

   Affected Seller means each OOH shareholder who sold any OOH shares on-market during the period from 23 August 2010 up to and including 22 March 2011 but does not include transactions where shares were sold by PFG, WSC or any associate of either of them;

   Market Difference means the difference between the price paid per OOH share in the relevant Affected Market Transaction and $0.30, multiplied by the number of shares sold by the Affected Seller in the relevant Affected Market Transaction; and

   Registry Information means information held by OOH's share registry services provider of: the identity of each Affected Seller and the postal address for that shareholder appearing on the register of shareholders at that time; the number of shares sold in each relevant Affected Market Transfer; the date of the sale; and the price paid for the OOH shares sold in the relevant Affected Market Transaction.

   QMS must give to OOH (to treat as unclaimed monies to be dealt with under Part 9.7 of the Corporations Act) any cheques returned, or not presented, for

which it cannot reasonably establish a forwarding address for the Affected Seller concerned.

10. Pay to each Affected Off Market Seller, the relevant Off Market Difference by sending to each Affected Off Market Seller the required amount by bank cheque to the postal address for that shareholder provided to QMS as part of the Relevant Information, within 5 business days after receiving the Relevant Information for that Affected Off Market Seller

    where:

    Affected Off Market Seller means each OOH shareholder who sold any OOH shares off-market to PFG or any of its associates during the period from 23 August 2010 up to and including 22 March 2011 but does not include transactions where PFG or any of its associates had a relevant interest in the shares transferred prior to 23 August 2010, or transactions where QMS establishes to the Panel's satisfaction that (a) the seller was aware of call option deed 1, or (b) was aware of the arrangements between PFG and QMS in relation to OOH shares the subject of call option deed 1;

    Off Market Difference means difference between the price paid per share in the relevant off market transaction and $0.30, multiplied by the number of shares sold by the Affected Off Market Seller in the relevant transaction; and

    Relevant Information means the identity of each Affected Off Market Seller and the postal address for that shareholder provided to QMS; the number of shares sold in each relevant off market transaction; the date of the sale; and the price paid for the OOH shares sold in the relevant off market transaction.

    QMS undertakes to pay any Affected Off Market Seller who can reasonably establish, within one month of the date of this Undertaking, that it is an Affected Off Market Seller (as defined in this paragraph), but is not required to pay any Affected Off Market Seller for the disposal of any shares to PFG which QMS reasonably establishes (at its cost), that the relevant person is not an Affected Off Market Seller (as defined in this paragraph);

    QMS undertakes to seek an undertaking from PFG to promptly provide to QMS the Relevant Information and, if it receives such an undertaking will: (i) disclose it to OOH; and (ii) enforce the rights granted to it under that undertaking, as required.

    QMS must give to OOH (to treat as unclaimed monies to be dealt with under Part 9.7 of the Corporations Act) any cheques returned, or not presented, for which it cannot reasonably establish a forwarding address for the Affected Off Market Seller concerned.

11. If there is a claim for compensation, QMS will decide within 5 business days of receipt:

a. to pay or reject the claim or

b. to reasonably seek information in support of the claim.

12. If QMS seeks information, it will decide whether to pay the claim within 2 business days of receipt of the information. If QMS refuses the claim, it will advise the claimant that the claim may be referred to the Panel. If the claimant asks for its claim to be referred to the Panel, QMS will within 2 business days of receipt of the request for referral, send that claim and all supporting information and any submissions it wishes to make to the Panel, and the Panel may:

    a. accept the claim, in whole or in part, in which case QMS will pay that amount within 5 business days or

    b. reject the claim or

    c. seek further information or submissions before deciding the claim.

13. As soon as practicable following these undertakings being executed but by no later than 3 business days after the date of this undertaking, notify OOH and issue a Media Release in the form attached to this undertaking (**Announcement**)

14. Within 3 business days after the date of this undertaking, pay to OOH an amount equal to the lesser of its legal fees incurred in relation to the Application and $75,000 plus GST

15. Confirm in writing to the Panel when it has satisfied its obligations under this undertaking.

16. In this undertaking the following definitions apply:

call option deed 1	Call Option over shares, between PFG as trustee for The PFG Investment Trust and QMS, dated 22 August 2010 and released to ASX on 22 March 2011
call option deed 2	Call Option over shares, between WSC, QMS, Immunotherapies Pty Ltd, Shawn Uldridge and Hayden Kerr, dated 21 April 2011 and released to ASX on 21 April 2011
FIRB	Foreign Investment Review Board
OOH	oOh!media Group Limited
PFG	PFG Investments Pty Limited (in voluntary liquidation)

QMS	QMS Asia Pacific Outdoor Pte Ltd
WSC	William Shaw Capital Pty Ltd

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Signed by Hedi Smirani
with the authority, and on behalf, of QMS

Dated 27 May 2011

Australian Government

Takeovers Panel

Annexure B

Australian Securities and Investments Commission Act (Cth)

Section 201A

Undertaking

Pursuant to section 201A of the Australian Securities and Investments Commission Act 2001 (Cth), WSC undertakes to the Panel that it will:

1. Within 2 business days after the date of this undertaking, rescind call option deed 2 by agreement between QMS and WSC by the parties entering into a deed in a form approved by the Panel (**Option Rescission Deed**).

2. Retain LINWAR Securities Pty Limited ABN 91 103 183 606, Evans and Partners Pty. Ltd ABN 85 125 338 785, Patterson Securities Limited ABN 69 008 896 311 and any other investment banker or stock broker approved by the Panel, each of whom is independent of each of WSC, QMS and any associate of either of them (**Appointed Broker**), on market standard fees and commissions for institutions to conduct the sale of the 45,161,433 OOH shares held by WSC (**Sale Shares**) to get the best available sale price for the Sale Shares within 6 months from the date of this undertaking (**Sale Period**). The sale of Sale Shares is to be conducted on the following terms:

    a. The Appointed Broker must provide to the Panel a statutory declaration that, having made proper inquiries, the Appointed Broker is not aware of any interest, past, present or prospective which could conflict with the proper performance of the Appointed Broker's functions in relation to the disposal of Sale Shares.

    b. The Appointed Broker must be directed by WSC to effect either:

        i. an orderly on-market sale of the Sale Shares (provided any restriction on such sale has been consented to by OOH despite the terms to the contrary of any agreement between OOH and WSC); or

        ii. an off market sale of the Sale Shares to sophisticated or professional investors (as defined in the Corporations Act) that are not associated with any of WSC, QMS or any associate of either of them.

    c. The Appointed Broker must obtain from any prospective off-market purchaser of Sale Shares under paragraph 2(b)(ii) a statutory declaration that it is not associated with either WSC or QMS.

    d. All Sale Shares must be sold within the Sale Period.

e. At the end of the Sale Period, the Appointed Broker must certify to the Panel that it has conducted the sale of the Sale Shares in accordance with these undertakings.

3. Promptly notify OOH and the ASX of the rescission of call option deed 2 (attaching a copy of the Option Rescission Deed) and notify the ASX of the obligation to sell the Sale Shares.

4. Not exercise any right to vote attaching to any Sale Share during the Sale Period.

5. Comply with its obligations under section 671B of the Corporations Act within the time prescribed by the Corporations Act where a sale of Sale Shares results in a need to file a substantial holding notice and in each case attaching the relevant documents.

6. Confirm in writing to the Panel when it has satisfied its obligations under this undertaking.

7. In this undertaking the following definitions apply:

call option deed 2	Call Option over shares, between WSC, QMS, Immunotherapies Pty Ltd, Shawn Uldridge and Hayden Kerr, dated 21 April 2011 and released to ASX on 21 April 2011
OOH	oOh!media Group Limited
QMS	QMS Asia Pacific Outdoor Pte Ltd
WSC	William Shaw Capital Pty Ltd

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Signed by Shawn Uldridge
with the authority, and on behalf, of WSC

Dated 27 May 2011