Australian Government
Takeovers Panel

Reasons for Decision
Resource Generation Limited 01R
[2015] ATP 13

Catchwords

Review application – decline to conduct proceedings – association – acting in concert – agreement or understanding – board spill – commercially logical inference – debt club – legal professional privilege – nominee directors' consents – relevant interest – substantial holding notices – voting agreement – voting power – voting restriction order – voting understanding

Corporations Act 2001 (Cth), sections 12, 201D, 249D, 657C, 657EA

ASIC Regulations 2001 (Cth), regulations 16(1)(a), 20

ASIC Regulatory Guide 128 Collective action by investors

Guidance Note 2 Reviewing decisions, Guidance Note 4 Remedies general

Resource Generation Limited [2015] ATP 12, Minemakers Limited 02R [2012] ATP 16, Gloucester Coal Limited 01R [2009] ATP 9, Breakfree Limited 04R [2003] ATP 42, National Can Industries Limited 01R [2003] ATP 40, Anaconda Nickel Limited 16 & 17 [2003] ATP 15, Anzoil NL 02 [2002] ATP 21

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

INTRODUCTION

1. The review Panel, Richard Hunt, Vickki McFadden (sitting President) and John Sheahan QC declined to conduct proceedings on a review application by Resource Generation Limited in relation to its affairs. The review Panel considered that there was no reasonable likelihood that it would make any finding more favourable to the applicant than was made by the initial Panel, and did not consider that it had sufficient evidence in relation to the allegations regarding a voting agreement to justify conducting proceedings.

2. In these reasons, the following definitions apply.

Altius	Altius Investment Holdings (Pty) Limited
EGM	Extraordinary general meeting to be held on 26 November 2015 following a requisition under s249D[1] by Shinto
Ledjadja	Ledjadja Coal (Pty) Ltd, owned 74% by RES and 26% by Fairy Wing
Noble	Noble Group Limited
PIC	Public Investment Corporation SOC Limited
Project	Boikarabelo coal project in the Waterberg region of South Africa

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

RES	Resource Generation Limited
Shinto	Shinto Torii Inc., a subsidiary of Altius

3. In these reasons, references to Altius and Noble being associates include their respective subsidiaries, Shinto and Noble Resources International Pte Ltd.

FACTS

4. The facts are set out in detail in *Resource Generation Limited 01*.[2] In brief:

   (a) RES is a company listed on the ASX (ASX code: RES) and Johannesburg Stock Exchange (JSE code: RSG), with the following substantial holders:

      (i) PIC – 19.49%

      (ii) Noble – 13.69% and

      (iii) Shinto – 10.69%.

   (b) RES has been seeking funding for the Project based on an owner/operator model over the last 4 years. In 2013 RES entered into a strategic partnership with Noble. Noble has provided loan funds for RES and to Ledjadja, has entered into coal offtake agreements and has been appointed supply chain manager and marketing agent for the Project. At that time, Noble sought a seat on the RES board but this was not agreed.

   (c) During 2013, Noble (an existing shareholder of RES) and Altius participated in issues of securities in RES including taking up the shortfall of an entitlement offer for which acceptances of only 16.7% were received. PIC also participated after being introduced to RES by Altius and subsequently joined the debt club.

   (d) Since 10 March 2014, Noble has been a member of a 'debt club' established with the aim of funding the Project. The debt club process was managed by Altius.[3] Debt club negotiations with RES about the terms of the debt have continued without agreement.

   (e) Noble has also been pursuing establishment of contract mining for the Project rather than owner-operated mining, purportedly to reduce the total funding required. Discussions regarding the contract mining option occurred between RES, Noble and Altius from about 21 July 2015. In June and July 2015, Noble and Altius commenced discussions regarding the composition and performance of the RES board and the direction of RES's management.

   (f) On 21 July 2015, Will Randall, Executive Director of Noble, sent RES a letter with the debt club's "*final offer*". The term sheet was signed by Noble, PIC and another member of the debt club. The financial model included a contract mining option. RES responded the next day with its preliminary view that it would not sign this term sheet. Later RES put forward an alternative owner/operator model.

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[2] [2015] ATP 12

[3] Noble may have had a role regarding the debt club other than as a member, but there was conflicting evidence on this.

(g) On 25 August 2015, Altius, with Noble's support, sought PIC's support for each of them to appoint a non-executive director to the RES board. Then, on 8 September 2015, Altius delivered a presentation to PIC, with Noble in attendance, proposing to "*South Africanise*" the Project and the RES board with a slide which showed Noble, Altius and PIC holding a "*voting block*" of 47.77% (assuming that Altius's stake increased to 14.59% on the basis that it would purchase a block of shares that had come on the market). This was followed by approaches to RES to secure representation on the boards of RES and Ledjadja for Noble and Altius.

(h) Altius appointed Clayton Utz (also Noble's adviser) to advise it on, among other things, director appointments.

(i) On 17 September 2015, Clayton Utz (on behalf of Noble) sent RES a letter requesting the appointment of additional directors to the RES board. RES declined to make the appointments and released to ASX and JSE Noble's request and RES's response. Noble then emailed Altius saying "*[a]s expected…I think it is now important to send your letter noting the reason why Noble not appropriate*".

(j) On 29 September 2015, Shinto requisitioned a shareholders' meeting under s249D to replace the existing RES board.

(k) On 9 October 2015, PIC, Noble and Altius met to discuss Altius's proposals for changes to management if Shinto's resolutions were passed.

5. The initial Panel found that Noble and Altius were associated under s12(2)(b) in respect of controlling or influencing the composition of RES's board, and s12(2)(c) in relation to the affairs of RES, and made a declaration of unacceptable circumstances and orders for disclosure of the association. The initial Panel considered it did not have sufficient evidence to find that there was a voting agreement between Noble and Altius.

APPLICATION

Declaration sought

6. By application dated 18 November 2015, RES sought a review of the initial Panel's decision. RES submitted that PIC was an associate of Noble and Altius and all were parties to a "*voting block unwritten understanding*". In the alternative, it submitted that Noble and Altius must have a voting agreement if they were associated in relation to the composition of the RES board as this was the only commercially logical inference to draw.

7. RES sought urgent interim orders that the EGM be deferred until five business days after the review Panel made its final decision and that PIC, Noble and Shinto not exercise any voting or meeting requisition rights attached to their RES shares until the review Panel made its final decision.

8. RES sought final orders that:

   (a) Noble, Shinto and PIC disclose their association and be restrained from exercising any voting rights at the EGM and on any resolutions to remove or appoint directors at any RES general meeting for a period of 12 months or

   (b) in the alternative, Noble and Shinto be restrained as above.

9. Noble made preliminary submissions. It submitted that the review Panel should decline to conduct proceedings because, among other things, the application did not disclose any new or relevant information which had not been considered by the initial Panel and it put forward propositions for which there was no evidence. Moreover, Noble submitted that the review application requested the review Panel to draw negative inferences from non-production or redaction of material due to legal professional privilege, which Noble submitted the Panel should not do. Noble further submitted that the review Panel should not make the interim orders sought by RES as, among other things, they were unnecessary given the in-depth process undertaken by the initial Panel and the lack of new information in the review application. Noble also submitted that if the review Panel made interim orders, it should also make orders restricting the RES board from, for example, entering into material contracts or disposing of RES's property.

10. Altius made preliminary submissions regarding interim orders and submitted that the review Panel should not interfere with the statutory right of a minority shareholder. Altius made separate preliminary submissions regarding whether the review Panel should conduct proceedings, agreeing with Noble's preliminary submissions.

DISCUSSION

Review application

11. In determining this matter, we have been provided with and have considered the following materials:

   (a) all the material before the initial Panel

   (b) the initial Panel's preliminary findings and decision email

   (c) the review application and

   (d) preliminary submissions to the review application.

12. Our review is a *de novo* hearing.[4] This means that we have considered the matter on the information now available and exercised our own discretion.[5] The fact that there is no additional information in the review application does not determine the matter.

13. We did not have a draft of the initial Panel's reasons as they were not available by the time we had to consider whether to conduct proceedings. The EGM was to be held on 26 November 2015 and we received the application on 18 November 2015.

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[4] Panel's Procedural Rule 3.3.1; Guidance Note 2 *Reviewing decisions* at [28]; *National Can Industries Limited 01R* [2003] ATP 40 at [21], *Breakfree Limited 04R* [2003] ATP 42 at [35], [39]-[50] and *Minemakers Limited 02R* [2012] ATP 16 at [8]

[5] See for example, *Anzoil NL 02* [2002] ATP 21; *Gloucester Coal Limited 01R* [2009] ATP 9

Given the urgency, we made our decision based on the materials above. Although reasons from the initial proceedings are useful, it is not necessary for a review Panel to consider them before coming to a decision.[6]

14. We consider that there is no reasonable prospect that we would make a finding more favourable to the applicant than the initial Panel made.

Association and relevant interest between PIC, Noble and Altius

15. The initial Panel did not find that PIC was associated with Noble and Altius or that there was any agreement in relation to voting at the EGM between any of Noble, Altius or PIC.

16. At the outset we note that RES based many of its submissions on the close working relationship between the parties alleged to be associates. Whilst this is a contextual factor, it has existed for some time and was known to RES.

17. RES submitted that the initial Panel should have focused its attention on the role of PIC's Chief Executive Officer, Daniel Matjila. It submitted that Dr Matjila had a close relationship with Mr Randall and Rob Lowe, CEO of Altius, and it would have been Dr Matjila, and not the PIC officers considered by the initial Panel, who was involved in the voting block understanding concerning RES. Altius submitted that RES had not provided any new evidence to suggest the existence of a 'voting block' between Dr Matjila, Mr Randall and Mr Lowe.

18. On the material provided, we are not satisfied that Dr Matjila rather than the officers involved from PIC were the persons Noble and Altius were trying to convince.

19. Paul Jury, Managing Director of RES, provided the initial Panel with a statutory declaration which described a phone conversation with Mr Randall on 30 July 2015. This conversation related to Noble's disagreement with RES about mining methods in which Mr Randall said that he had "*the numbers in his pocket to make it happen*". Mr Jury stated that he had taken this statement to indicate that Mr Randall had enough votes, close to 50%, to remove the RES board and appoint a new board which would accept the Noble proposal for mining. Mr Jury explained that this was the only way Noble could "*make it happen*".

20. Noble made submissions to the initial Panel in response that Mr Randall did not recall this conversation with Mr Jury or making the "*in his pocket*" statement. In its review application, RES stated that the "*in his pocket*" statement was a significant statement and the initial Panel erred by dismissing it. We know from the submissions to the initial Panel's brief that RES conceded this statement was made in relation to contract mining.

21. RES also submitted that PIC signing the term sheet on 21 July 2015 was a significant event as no correspondence around how it came to be signed was provided to the initial Panel. RES submitted that the lack of correspondence was "*telling*" and questioned what PIC was "*seeking to achieve in agreeing to sign*". We do not agree. As PIC was a member of the debt club (which was known to RES), and the debt club

[6] GN 2 at [36]

was focused on securing funding for the Project, it is not unusual that PIC would sign the term sheet to confirm its support for the proposed terms.

22. We agree with the outcome found by the initial Panel, that there is insufficient evidence that PIC was associated with Noble and Altius or that there was a voting agreement between the three entities.

23. RES submitted that communications by Altius changed after seeking legal advice on 18 September 2015 and that it appeared that *"Altius had altered its usual way of corresponding in light of legal advice as to the risks of continuing to correspond with PIC and Noble in the same manner it had previously"*. It submitted that therefore the communications after 18 September should be given little weight as "*it can be inferred that Altius had altered its usual way of corresponding in light of legal advice as to the risks of continuing to correspond with PIC and Noble in the same manner it had previously."* We agree that Altius's communication seems to have changed when it engaged Clayton Utz but this is not enough for us to draw an inference that there was a voting agreement in place between PIC, Noble and Altius before Altius engaged Clayton Utz.

Voting understanding between Noble and Altius

24. RES submitted that, if the review Panel did not find an association and voting agreement between PIC, Noble and Altius, it should make a finding in relation to a voting agreement between Noble and Altius which may have contravened s606. RES submitted the review Panel should *"apply commercial logic to draw the inference that there is a voting understanding between Altius and Noble given the association finding."* RES referred to the fact that Altius had worked with Noble on the debt club and attended meetings with Noble. RES submitted that the separation between these two parties occurred after legal advice was obtained and after the *"in his pocket"* statement had been made. We have considered the issue of the change of behaviour by Altius after seeking legal advice above.

25. RES submitted that for Altius to *"run off on its own and find 6 candidates for directors of RES"* should not be considered to be *"credible behaviour"*. RES invited the review Panel to draw an inference that Noble was aware of the six individuals nominated to the Board and had an understanding with Altius that it would vote for them and the resolutions for the removal of the existing directors. We have no evidence that Noble was aware of the nominee directors or the existence of such an understanding. We have considered the nominee directors below.

26. If an association in relation to the composition of the board is the starting point, it ordinarily would not take much for us to find a voting agreement, arrangement or understanding. In this regard, we agree with RES. However, in the circumstances of this matter we have found no such evidence. RES also submitted that even if we did not find that Noble and Altius acquired a relevant interest in each other's shares by way of a voting agreement, the initial Panel erred in not making a voting restriction order as, without such an order, the unacceptable circumstances remain un-remedied. However, the unacceptable circumstances found by the initial Panel related to the disclosure obligation under Chapter 6C for which the appropriate order determined by the initial Panel was disclosure. We agree that it was the

appropriate order in this case. In determining appropriate remedies, the Panel does not seek to punish.[7] In our view, restricting voting and requisition rights for 12 months, as RES sought, is unduly severe. We also consider such an order would be inappropriate because, in this case, it is unnecessary to interfere with a fundamental right of shareholders to be able to requisition a general meeting and exercise their voting rights.

27. As noted, the context included the close working relationship between Noble and Altius and others. However, this was not for us a factor that could lead to the drawing of an inference of a voting agreement in the absence of something more specific.[8]

28. We consider that based on the evidence provided, we would not be able to make a finding more favourable to the applicant in relation to the conduct of Noble and Altius.

Additional grounds

Nominee directors

29. RES submitted that the review Panel should look more closely at the six nominee directors of Shinto and how Shinto/Altius procured their services. It was submitted that the written director consents to act received by RES were dated 14 October 2015 but the requisition of the meeting which nominated the individuals was dated 28 September 2015. RES submitted that it was unusual that the proposed directors had been nominated before they had consented to act. Noble submitted that this was incorrect as the law only required nominee directors to provide consents to act before appointment, not nomination.[9] We do not consider it unusual or of any significance for the formal written consents to be obtained later than the nominations.

30. RES also submitted that the manner in which Shinto secured six individuals to be on the board of RES without these nominees knowing that Noble and/or PIC would vote for them or that funding would be forthcoming for the Project should be questioned. We have been provided with no evidence to suggest that the nominated directors were inappropriate for the roles or that the majority were not independent. Absent such information, this line of reasoning does not take us far. As provided in ASIC's Regulatory Guide 128 *Collective action by investors*, unacceptable circumstances are more likely to exist when the proposed directors are aligned with the requisitioning investors.[10]

Legal professional privilege

31. RES made a further submission that the initial Panel had allowed an *"improper common interest privilege claim"* on an email dated 22 September 2015 and that the redacted information *"may provide important evidence of which RES ha(d) been improperly deprived."* RES also questioned why PIC had redacted the material when it

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[7] GN 4 at [5]
[8] By analogy with *Anaconda Nickel Limited 16 & 17* [2003] ATP 15 at [37]
[9] s201D
[10] Table 2 following RG 128.45

was not itself claiming the privilege. RES referred to PIC's submissions to the initial Panel that it had redacted information in response to a request from Altius and Shinto and that it understood that "*Altius claim(ed) that the relevant sentences (were) subject to legal professional privilege and that Altius provided the redacted information to PIC subject to common interest privilege.*"

32. RES requested that we "*review this situation*", reject the privilege claim and require production of the full document. We did not receive any further information or evidence from RES. Additionally, we consider any inference we could draw regarding common interest privilege does not take us far without additional evidence.

DECISION

33. For the reasons above, we do not consider that there is any reasonable prospect that we would make a finding more favourable to the applicant than the initial Panel made. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

34. We make no interim or final orders, including as to costs.

Vickki McFadden
President of the review Panel
Decision dated 24 November 2015
Reasons published 10 December 2015

Advisers

Party	Advisers
Altius	Norton Rose Fulbright Australia
Noble	Clayton Utz
PIC	Herbert Smith Freehills
RES	Jones Day