



WELCOME TO DLA PIPER'S NEW TAKEOVERS PANEL DECISIONS BRIEFING NOTES PUBLICATION

These publications will cover the key decisions from the Takeovers Panel and break them down to highlight the key implications and learning points relevant to you.

The Briefing Notes will all feature practical takeaway points which will help to ensure you are complying with the law and the Takeovers Panel's published policies in any public takeover, merger or acquisition.

In this first edition we look at two recent cases, namely Billabong International Limited and Avalon Minerals Limited.

BILLABONG INTERNATIONAL LIMITED

21 AUGUST 2013

INTRODUCTION AND CONTEXT

Billabong International Limited's under performing business and increasing net debt are well documented. Over the past year and a half, Billabong has received a number of refinancing proposals, each of which appeared less favourable than the last. In July 2013, Billabong announced that it had accepted the Altamont-led consortium's refinancing proposal, which had the following interesting features:

- Termination fee of approximately 54% of Billabong's equity value, triggered by a change of control;
- Make-whole premium of approximately \$107 million, triggered by a change of control; and
- 35% pa interest rate on convertible note, which decreased to 12% pa, if shareholders approve conversion to redeemable preference shares.

SUMMARY

In the absence of rectifying action, the Takeovers Panel would have declared that the refinancing package proposed by Altamont (in particular the penalty payments in the refinancing package and their excessive coercive effect on Billabong shareholders) infringed on takeovers law by locking out other potential proposals therefore giving rise to unacceptable circumstances.

THE PANEL'S DECISION

The termination fee, make-whole premium and variable interest rate were lock-up devices, the effect of which was to discourage rival bids, and inhibit the acquisition of voting shares taking place in an efficient, competitive and informed market. In particular, the Panel found that:

- Both the termination fee and the make-whole premium amounted to a 'break fee', which should ordinarily not exceed 1% of the equity or enterprise value of the target.
- Trigger of the break fees by a change of control potentially hinders another actual or potential control transaction.

- Variable interest rate, triggered by the absence of shareholder approval, amounted to a "naked no vote" break fee.
- The magnitude of the break fee constituted a financial penalty on Billabong. As Billabong was in financial distress and the shareholders would feel pressured to approve the transaction, the trigger was deemed unreasonable.

OUTCOME

Billabong and Altamont revised the refinancing package by:

- Reducing the termination fee to under 1% of Billabong's enterprise value, and removing the change of control trigger.
- Reducing the make-whole premium to 1% of the principal amount.
- Removing the "naked no vote break fee".

As a result of the restructure, the underlying cost of the refinancing package increased. Interestingly, Oaktree and Centrebridge, who challenged Altamont's refinancing proposal, pitched a rival package which was accepted by Billabong in September 2013.

TAKEAWAY

There is no issue with "loan-to-own" transactions in the Australian market, which are usually begrudgingly approved by shareholders. However, refinancing terms that have the effect of "pre-packaging" the outcome before shareholders have the opportunity to vote, risks drawing the Panel's attention and action.

If you require assistance in negotiating a sale or purchase of interests in, or financing arrangements for, ASX listed entities, please contact us, using the contact details provided at the end of this document.

AVALON MINERALS LIMITED

7 OCTOBER 2013

INTRODUCTION AND CONTEXT

On 9 August 2013, Avalon Minerals Limited announced a 1 for 1 non-renounceable rights issue underwritten by its largest shareholder, Mr Tan Sri Abu, to raise \$5.89 million. Sidan Super Pty Ltd, as trustee for the Sidan Superannuation Fund, applied to the Takeovers Panel on the basis that the structure of, and disclosure in relation to, the rights issue was unacceptable, as a result of the following:

- Rights issue fully underwritten by Avalon's largest shareholder who held 19.9% (approx.) of Avalon;
- Non-disclosure of association between Mr Abu and Mr Dato Richard Lim (another substantial shareholder of Avalon);
- Mr Abu requested Mr Lim to subscribe for full entitlement under the rights issue (which was initially funded by Mr Abu) which increased his interest from 8.2% to 11.8% of Avalon;
- The underwriter's voting power in Avalon (together with Mr Lim) could increase to 60% (approx.) on the basis of the underwriting.

SUMMARY

The Takeovers Panel found that there was an inadequately disclosed fundraising purpose, a concentration of control in the underwriter and his associate and a failure by Avalon to explore other available options. The proposed underwriting of Avalon's non-renounceable rights issue and its shortfall facility infringed on takeovers law by unduly affecting the control of Avalon. The Panel therefore declared that the arrangements gave rise to unacceptable circumstances.

THE PANEL'S DECISION

The effect of the rights issue in circumstances where it was underwritten by the largest shareholder, was to improperly and unduly control or influence the conduct of Avalon. In particular, the Panel found that:

- Avalon had not taken all reasonable steps to minimise the potential control impact of the underwriting arrangement, including failure to explore other capital-raising alternatives.

- The offer contained material information deficiencies, including in respect of Avalon's need for, and use of, the funds and the association between Mr Abu and Mr Lim ("**association**").
- At all material times, Mr Abu and Mr Lim were associates for the purpose of controlling or influencing the conduct of Avalon, yet the association was not disclosed by them in accordance with section 671B of the *Corporations Act 2001* (Cth) ("**Act**").
- Due to the association, a previous share placement to Mr Abu and Mr Lim in August 2013 had increased their voting power otherwise than as permitted under Chapter 6 of the Act.

OUTCOME

The Panel made its final orders on 14 October 2013, which included the following:

- Mr Abu prevented from underwriting the Avalon rights issue.
- Mr Abu and Mr Lim required to disclose details of their association and substantial holding in Avalon in accordance with section 671B of the Act.
- Interests in Avalon acquired by Mr Abu and Mr Lim as a result of the rights issue (amounts in excess of 19.9% and 8.22% respectively) were vested in the Commonwealth for sale by ASIC.
- Mr Abu's voting power (taking into account the voting power of Mr Lim), be restricted to 20% for a period of 18 months following the decision.

TAKEAWAY

The Panel's decision reinforces its policies with respect to shareholders seeking to circumvent Chapter 6 of the Act using the underwriting exception in section 611 of the Act. The decision of the Panel to vest the excess shares accrued by the shareholders in ASIC for sale and the 18 month limitation on the voting power of the offending shareholder sends a message that the Panel will act swiftly and harshly in the face of blatant disregard of the Act and the Panel's policies in this respect.

If you require assistance with raising funds, or acquisition of interests in ASX-Listed companies, please contact us.



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