



Australian Government

Takeovers Panel

MEDIA RELEASE

No: TP17/24

Thursday, 4 May 2017

Indiana Resources Limited – Declaration of Unacceptable Circumstances

The Panel has made a declaration of unacceptable circumstances (Annexure A) in relation to an application made on 5 April 2017 by Indiana Resources Limited in relation to its affairs (see [TP17/12](#)). The Panel has accepted an undertaking from BPM Capital Limited (Annexure B) in lieu of making orders.

Background

In late 2016 and early 2017 Indiana had discussions concerning a proposed transaction in which Mr Brett Montgomery and Ms Heidi Brown would be appointed as directors of Indiana at completion. However, in mid-February 2017, Indiana advised Mr Joseph El-Raghy, a representative of the other party, that Indiana did not wish to proceed with the transaction.

On 22 February 2017, BPM requisitioned a meeting of Indiana to remove two directors and elect Mr Brett Montgomery and Ms Heidi Brown as Indiana directors. Between mid-February and early April 2017:

- BPM acquired shares increasing the voting power of Mr Joseph El-Raghy by more than 4%, and Mr Brett Montgomery acquired a substantial holding in Indiana and
- Numerous emails were exchanged between 2 or more of Mr Brett Montgomery, Mr Joseph El-Raghy and Ms Heidi Brown on matters including: drafts of a letter by BPM to Indiana shareholders explaining the reasons for its requisition, conversations with other Indiana shareholders, acquisition of Indiana shares and voting at the requisitioned meeting.

Declaration

The Panel considered that:

- Mr Brett Montgomery, BPM and Ms Heidi Brown (the associated parties) had an understanding and were acting or proposing to act in concert in relation to the requisitioned meeting, and

- this resulted in contraventions of the 20% threshold and the substantial holding disclosure requirements.

The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in s657A(3).

Undertaking

After the application was made: (i) a placement of shares by Indiana diluted the combined holding of the associated parties below 20% and (ii) BPM withdrew its requisition and Ms Brown and Mr Montgomery withdrew their respective consents to act as a director of Indiana.

In addition, after the Panel indicated it was minded to make a declaration, BPM offered an undertaking that it disclose the above circumstances and, if BPM and Mr Montgomery are of the view that they are no longer associated with one another in relation to Indiana, provide a clear statement to that effect and when and how their association concluded.

Given these further developments and BPM's undertaking, the Panel considered it was not necessary to make orders. The Panel makes no comment regarding any continued association between Mr Montgomery, BPM and Ms Brown.

The sitting Panel was James Dickson (sitting President), Bill Koeck and Sarah Rennie.

The Panel will publish its reasons for the decision in due course on its website www.takeovers.gov.au.

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Annexure A

**CORPORATIONS ACT
SECTION 657A
DECLARATION OF UNACCEPTABLE CIRCUMSTANCES**

INDIANA RESOURCES LIMITED

CIRCUMSTANCES

1. On or about 14 February 2017, the CEO of Indiana Resources Limited (**Indiana**) advised Mr Joseph El-Raghy, a representative of Cosmopolitan Minerals Limited (**Cosmopolitan**), that Indiana did not wish to proceed with a proposed transaction involving the acquisition of assets by Indiana from Cosmopolitan. It had been proposed that Mr Brett Montgomery and Ms Heidi Brown would be appointed as directors of Indiana at completion of the proposed transaction.
2. On 20 February 2017, BPM Capital Limited (**BPM**), Mr Jamie Phillip Boyton and Mr Joseph El-Raghy gave a notice of change of interest of substantial holder disclosing voting power of 13.84% in Indiana.
3. On 22 February 2017, BPM gave notice under s249D¹ (**s249D requisition**) to requisition a meeting of Indiana to consider resolutions to remove two directors and elect Mr Brett Montgomery and Ms Heidi Brown as directors of Indiana.
4. Numerous emails concerning Indiana were exchanged between two or more of Ms Heidi Brown, Mr Brett Montgomery, Mr Joseph El-Raghy and a BPM employee between mid-February and 4 April 2017. They included:
 - (a) An email from Mr Brett Montgomery to Ms Heidi Brown on 28 February 2017 providing draft statements intended to form part of a letter from BPM to Indiana shareholders explaining the reasons for the s249D requisition.
 - (b) An email from Ms Heidi Brown on 3 March 2017, copied to Mr Brett Montgomery, attaching "Brett's changes" to a draft letter from BPM to Indiana shareholders explaining the reasons for the s249D requisition.
 - (c) An email from Mr Brett Montgomery to Mr Joseph El-Raghy, and copied to Ms Heidi Brown, on 16 March 2017 detailing conversations between Mr Brett Montgomery and Indiana shareholders.
 - (d) Emails exchanged on 30 March 2017 between Mr Brett Montgomery and Mr Joseph El-Raghy, and copied to Ms Heidi Brown, concerning the

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

acquisition of Indiana shares by Ms Heidi Brown and outstanding orders in screen.

- (e) Emails exchanged in early April 2017 between Ms Heidi Brown and a BPM employee regarding BPM's voting confirmation appointing Mr Brett Montgomery as BPM's proxy.
 - (f) An email from Ms Heidi Brown to Mr Brett Montgomery on 2 April 2017 attaching a draft notice of becoming a substantial holder in Indiana in relation to Mr Brett Montgomery.
 - (g) An email from Mr Brett Montgomery to Ms Heidi Brown on 4 April 2017 forwarding voting confirmation of Gerise Pty Ltd (**Gerise**) appointing Ms Heidi Brown as Gerise's proxy. Mr Brett Montgomery is the sole shareholder and director of Gerise.
- 5. The Panel considers that the email correspondence detailed in paragraph 4 (among others) establishes that Mr Brett Montgomery, BPM and Ms Heidi Brown had an understanding and were acting or proposing to act in concert in relation to the resolutions notified in the s249D requisition.
 - 6. On 15 March 2017, BPM, Mr Jamie Phillip Boyton and Mr Joseph El-Raghy gave a notice of change of interest of substantial holder disclosing voting power of 16.83% in Indiana as a result of acquisitions made between 9 March 2017 and 15 March 2017.
 - 7. On 28 March 2017, BPM, Mr Jamie Phillip Boyton and Mr Joseph El-Raghy gave a notice of change of interest of substantial holder disclosing voting power of 18.27% in Indiana as a result of acquisitions made between 16 March 2017 and 27 March 2017.
 - 8. On 3 April 2017 Mr Brett Montgomery gave a notice of becoming a substantial holder disclosing voting power of 5.275% in Indiana as a result of acquisitions made between 14 March 2017 and 31 March 2017 by Mr Montgomery, Gerise and Mr Montgomery as trustee of the Tollafield Super Fund.
 - 9. On 6 April 2017, BPM, Mr Jamie Phillip Boyton, Mr Joseph El-Raghy and Ms Heidi Brown gave a notice of change of interest of substantial holder disclosing voting power of 18.43% in Indiana and disclosing that Ms Heidi Brown is an associate of BPM in relation to Indiana under s12(2)(c).
 - 10. The Panel considers that from at least 28 February 2017 until at least 4 April 2017 Mr Brett Montgomery, Ms Heidi Brown and BPM had an agreement, arrangement or understanding for the purpose of controlling or influencing the composition of Indiana's board and the conduct of Indiana's affairs and were associated under s12(2)(b). In addition, they were acting in concert in relation to Indiana's affairs and were associated under s12(2)(c).

Contravention of s606

11. As a result of the acquisition of relevant interests in Indiana shares by Mr Brett Montgomery and BPM on or about 27 March 2017, their voting power in Indiana increased above 20%. None of the exceptions in s611 applied and accordingly s606 was contravened.

Contraventions of s671B

12. In contravention of s671B:
 - (a) No substantial holder notice has been given disclosing the total combined voting power in Indiana of Mr Brett Montgomery, Ms Heidi Brown and BPM and their association in relation to Indiana.
 - (b) The notices of change of interests of substantial holder given by BPM on 8 March 2017, 15 March 2017 and 28 March 2017 are deficient because, among other things, they do not disclose the association between Mr Brett Montgomery, Ms Heidi Brown and BPM in relation to Indiana.
 - (c) The notice of change of interests of substantial holder given by BPM and Ms Heidi Brown on 6 April 2017 is deficient because, among other things, it does not disclose their association with Mr Brett Montgomery in relation to Indiana.
 - (d) The notice of becoming a substantial holder given by Mr Brett Montgomery on 3 April 2017 is deficient because, among other things, it does not disclose his association with BPM and Ms Heidi Brown in relation to Indiana.

EFFECT

13. It appears to the Panel that:
 - (a) the acquisition of control over voting shares in Indiana has not taken place in an efficient, competitive and informed market and
 - (b) the holders of shares in Indiana do not know the identity of persons who have acquired a substantial interest in Indiana.

CONCLUSION

14. It appears to the Panel that the circumstances are unacceptable circumstances:
 - (a) having regard to the effect that the Panel is satisfied they have had on:
 - (i) the control, or potential control, of Indiana or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Indiana
 - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602

- (c) in the further alternative, because they constituted or constitute a contravention of a provision of Chapter 6 or of Chapter 6C of the Act.
15. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3).

DECLARATION

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of Indiana.

Allan Bulman
Director
with authority of James Dickson
President of the sitting Panel
Dated 3 May 2017

