

Press Release

Decision Letter from ASIC available

HOCHTIEF has now received the Decision Letter in response to the application we submitted to ASIC. We hereby make this document available to you.

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Please take note of item B on page 3: Here it is set out that the Takeovers Panel is the decisive body for questions of this type.



ASIC

Australian Securities & Investments Commission

20 October 2010

By email and post

Dear [REDACTED]

HOCHTIEF Aktiengesellschaft (Hochtief AG) – Application for relief

We refer to the application dated 6 October 2010 (**Application**) seeking relief from Chapter 6 of the *Corporations Act 2001* (**Act**) on behalf of Hochtief AG (**Hochtief**).

1. The Application

The Application sought the notional insertion of the following two new provisions in Chapter 6 of the Act by way of declarations under s655A(1)(b) (**Modifications**):

- (a) “item 14A” of the table in s611, requiring a downstream bid by Actividades de Construcción y Servicios, S.A. (**ACS**) for Leighton Holdings Limited (**Leighton**) where:
 - (i) there is an acquisition of relevant interests in the voting shares in Hochtief by ACS and the shares in Leighton comprise a substantial part of the assets of Hochtief; or
 - (ii) control of Leighton is one of the main purposes of the acquisition of relevant interests in the voting shares in Hochtief,and:
 - (iii) the downstream bid be made on terms and subject to conditions approved by ASIC; and
 - (iv) the consideration offered under the downstream bid be cash or include a cash alternative,and
- (b) “subsection 610(3A)” that modifies the application of s606 with respect to an acquisition or transaction attracting the operation of the deeming provisions in s608(3), such that:
 - (i) where a person who does not have control of Hochtief has relevant interest in Leighton shares under s608(3)(a) because its voting power in Hochtief exceeds 20%; and
 - (ii) that person then acquires control of Hochtief as defined in s608(4) of the Act,

the increase in that person’s voting power in Leighton is assessed from the point *immediately before it was taken to have a relevant interest in the Leighton shares* held by Hochtief by virtue of its acquisition of more than 20% of the voting power in Hochtief.

2. ASIC's decision

After consideration of the submissions made in the Application, we have decided not to grant the relief sought.

3. Reasons for the decision

A. Relief will not be given to reverse the usual and intended effect of the Act

In general, we will not use our discretionary powers to effect law reform, i.e. relief will not be given to reverse the usual and intended effect of the Act (see ASIC Regulatory Guide 51 *Applications for relief (RG 51)* at RG 51.49).

The Modifications sought in the Application result in outcomes where:

- (a) by operation of the notional item 14A of the table in s611, a bidder in an upstream bid would be required in defined circumstances to make a follow-on downstream bid; and
- (b) by operation of the notional subsection 610(3A), the exception under item 14, s611 (the **Downstream Exception**), excluding certain downstream acquisition of relevant interests under s608(3)(a), would become very limited in its application.

The Downstream Exception was framed in its current form as a result of a recommendation of the Legal Committee of the Companies and Securities Advisory Committee in its March 1994 Report *Anomalies in the Takeover Provisions of the Corporations Law (CASAC Report)* (as referred to in the Application). It was specifically noted in the CASAC Report that there should be a clear exemption where the upstream acquisition is in a listed company rather than articulating an exemption in an uncertain manner, for example, by having reference to the "object" of a particular acquisition of relevant interests. The relevant Explanatory Memorandum indicates that the significant changes in that Bill relevantly include "liberalising the current exemption for downstream acquisitions that occur as a result of an acquisition of shares in an Australian listed company (the upstream acquisition), by allowing the upstream acquisition to fall under any of the exemptions from the 20 per cent threshold and extending the exemption to foreign bodies approved by ASIC."¹

Class Order (CO 02/259) *Downstream acquisitions: foreign stock markets* was issued by ASIC to further this legislative intention by giving content to the new item 14, s611 exemption and thereby promote international certainty. At the time of the acquisition of ACS's relevant interest in Leighton in 2007 acquisitions in upstream entities listed on the Frankfurt Stock Exchange were covered by item 14, s611.

In light of this, we consider the above outcomes (a) and (b) amount to a reversal of the usual and intended effect of the Act. Our policy of not giving relief to bring about such a result is all the more significant in a case where the effect of the modification sought is that obligations more onerous than those imposed under the Act are placed upon a person without their consent in circumstances where the person has already acted in reliance of the existing relevant statutory provisions.

¹ Explanatory memorandum to the *Corporate Law Economic Reform Program Bill 1998*, paragraph 7.17.

B. The Takeovers Panel is the appropriate forum

As you would be aware, the legislation does contemplate the possibility of the creation of new rights and obligations being created by the Takeovers Panel after that Panel has made a declaration of unacceptable circumstances. Such a declaration may be made even where there has been strict compliance with the requirements of Chapter 6 of the Act.

We note the CASAC Report foreshadowed issues relating to whether the acquisition of an upstream company 'were used as an artifice to acquire another company' should be considered by the Panel in the context of declaring whether unacceptable circumstances are or may be present. The Panel has previously indicated that it would assume this role in part and protect the interests of the shareholders of the downstream company where appropriate (see for example, *Australian Pipeline Trust 01R* [2006] ATP 29 at [106]).

We also note ASIC's policy as set out in Part G of ASIC Information Release (**IR 01/03**) *ASIC approves overseas exchanges: Safe harbour for downstream acquisitions* is that an acquirer may risk a declaration of unacceptable circumstances by the Panel where the shares in the downstream company is considered to comprise a substantial part of the assets of the upstream body corporate, or control of the downstream company is a main purpose of the upstream acquisition.

In view of the above, we consider the Panel is the appropriate forum for consideration of these issues.

4. Consultation with third parties

ASIC's obligation to afford procedural fairness arises where it proposes to make a decision which may adversely affect a person's rights, interests or legitimate expectations in a material way (see ASIC Regulatory Guide 92 *Procedural fairness to third parties* (**RG 92**) at RG 92.11-13).

As you may be aware, we have consulted with the following third parties whose interests may be affected by the relief sought in this Application:

- Leighton; and
- ACS.

5. Application by ASIC to the Takeovers Panel

We note nothing in this letter restricts ASIC's ability to make an application to the Panel for a declaration of unacceptable circumstances under s657A of the Act, and ASIC reserves all rights to do so.

6. Right to review

You may have certain rights connected with this decision. Information on these rights is set out in the enclosed information sheet "ASIC Decisions – your rights".

7. Enquiries

Yours sincerely



ASIC decisions - your rights

ASIC makes many decisions about corporations, securities and financial products and services provided to consumers. If we have made a decision that directly affects you, you may have rights connected with the decision. This information sheet sets out an overview of your rights and how to exercise them. You may have other rights in addition to those discussed here.

What can you find out from us?

Talk to us about the decision	<p>ASIC decision maker—If you need to clarify anything relating to the decision, you may find it helpful to discuss it with the ASIC staff member who made the decision.</p> <p>Administrative Law Coordinator—You can contact the Administrative Law Coordinator in the ASIC office you have been dealing with. He or she can explain how to exercise the rights set out in this information sheet. It would be best to do this promptly because there is a 28-day time limit on some applications.</p>
Get our reasons in writing	<p>If we have not told you why we made the decision when we notified you about it, you may be entitled to ask for a written statement of reasons.</p> <p>How to apply You must write to the person who made the decision within 28 days of being told about the decision.</p>
Ask for access to other documents	<p>You may seek access to documents about the decision under the <i>Freedom of Information Act 1982</i>.</p> <p>How to apply You must apply to ASIC in writing:</p> <ul style="list-style-type: none">• stating which documents you want to obtain.• addressing the letter to the Administrative Law Coordinator in the ASIC office with which you have been dealing.• enclosing the \$30.00 application fee with your application. <p>Please note that as well as the initial application fee, there may be other charges. For more information contact the Administrative Law Coordinator in the ASIC office with which you have been dealing.</p>

We have also published [Regulatory Guide 57 Notification of rights of review](#) which gives more detail about your rights of review.

Can you get an independent review?

You may have a right to seek review of the decision by the Administrative Appeals Tribunal (AAT). The AAT is an independent body which can review some of ASIC's decisions. The AAT can, among other things:

- confirm ASIC's decision;
- vary our decision; or
- set our decision aside and replace it with its own decision.

How to apply to the AAT

In writing	You must apply to the AAT for review in writing. The AAT has a form for this purpose which you can use if you prefer.
In time	You must apply for the review within 28 days of being told why the decision was made.
Pay the fee	You must enclose the \$777.00 application fee with your application. If you want to apply for the application fee to be waived you can obtain the application form for this from the AAT.

The AAT website has more information at [REDACTED]. If you have any questions about the AAT's procedures and requirements, please contact the AAT. You can call the AAT on [REDACTED] for the cost of a local call. The postal address for the AAT is GPO Box 9955 in each capital city.

If you are unhappy with how we handled your matter

Talk to us	If you have a complaint about the way ASIC handled a matter, you may wish to bring your concerns to the attention of a more senior ASIC staff member than the officer with whom you have been dealing.
Take it further	You may also have the right to complain to the Commonwealth Ombudsman. However, the Ombudsman usually prefers you to discuss your complaint with ASIC first. There is an office of the Ombudsman in each capital city. You can contact the Ombudsman on [REDACTED]. The street address of the nearest office can be found in the White Pages of your telephone book or you can look on the Ombudsman website at [REDACTED].

This is **Information Sheet 9 (INFO 9)**. Information sheets provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.