

BENDING THE RULES TO FIX AN INADVERTENT BREACH OF TIMING REQUIREMENTS IN TAKEOVER BIDS

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Legal Briefings – By **Rodd Levy** and **Robert Prosser**

SUMMARY

- In order for acceptances of a takeover bid to be valid, all conditions must be satisfied or waived before the end of the offer period.
- In a recent takeover, a bidder closed an offer without realising that a particular condition (relating to ASX approval) had not been fulfilled.
- The bidder successfully applied to the Court to have this mistake rectified.

Viculus Ltd had made a recommended takeover bid for all the shares in Euro Petroleum Ltd. Viculus was suspended from trading on ASX because it no longer carried on any business activities. The bid was conditional on:

Viculus complying with the ASX admission requirements, being granted in-principle approval to re-list in ASX and raising a minimum subscription of \$3.5 million.

On the closing date of the offer, Viculus had received over 96% acceptances from Euro shareholders and believed that all conditions had been satisfied. However, despite Viculus raising the \$3.5 million minimum subscription, ASX did not grant the in-principle agreement to re-list Viculus until a week *after* the offer period had closed. ASIC then raised the timing issue with Viculus.

To remedy the problem, Viculus had no alternative but to apply for a court order to extend the time by which the ASX approval was required to a date after the offer period had closed. This application was made under s1322 of the *Corporations Act* which allows the court to make:

an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under this Act or in relation to a corporation (including an order extending a period where the period concerned ended before the application for the order was made).

The Court made the order to rescue the takeover bid. It said that there were 5 reasons for ordering that time should be extended:

1. ASX had confirmed that the securities of Viculus could be reinstated to official quotation. As a result, despite the initial breach, the substance of the bid condition could still be satisfied.
2. If the takeover bid was void, it would have far reaching consequences for Viculus, for its shareholders and for Euro. These consequences included the destruction of shareholder value, the lost opportunity to create value for shareholders and the likely insolvency of Viculus following a failed bid.
3. The board of Euro continued to support the takeover bid.
4. Making the order would not result in substantial injustice being caused to any person.
5. ASIC did not oppose the application.

COMMENTARY

Mistakes sometimes happen in takeovers. When they do, the Court may be able to fix any problems that arise by using the power under the slip rule in s1322.

This approach has been successfully used in previous cases to save a takeover where the bidder has failed to validly extend the offer period before its close and to extend time for a dissenting shareholder to object to compulsory acquisition. Section 1322 has also been successfully used in schemes of arrangement (for example, to overcome failures to comply with the full 28 day notice period the scheme meeting).

To rely on the Court's power, the applicant will need to show error or inadvertence. A blatant disregard for the rules may not be saved.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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