

THE TAKEOVER PANEL

BUMI PLC ("BUMI")

RULING OF THE HEARINGS COMMITTEE (THE "COMMITTEE")

The Question

1. This appeal relates to a ruling of the Executive that, when determining the voting rights of a company for the purposes of applying the Code, no account should be taken of any restrictions on the exercise of voting rights attaching to the shares in which a person and persons acting in concert with that person are interested where those restrictions have been imposed by the Panel in accordance with Rule 9.7.

Background

2. The appellant in this hearing, Borneo Bumi Energi & Metal Pte Ltd (the "Appellant"), is a joint venture company whose shareholders are PT Bakrie & Brothers Tbk ("B&BR"), Long Haul Holdings Limited (together with B&BR, the "Bakrie Group") and PT Borneo Lumbang Energi and Metal Tbk ("Borneo"). As a result of their joint venture arrangements, the Appellant, the Bakrie Group and Borneo are presumed to be acting in concert with one another under the Code.
3. On 19 December 2012, the Executive issued Panel Statement 2012/9 in relation to Bumi. Panel Statement 2012/9 described certain rulings of the Executive, also dated 19 December 2012 (the "19 December Rulings"), that:
 - (i) the Bakrie Group should be regarded as acting in concert with PT Bukit Mutiara ("Bukit Mutiara");

- (ii) the aggregate voting interests of the Bakrie Group and Bukit Mutiara, and any persons acting in concert with either of them, must be reduced to less than 30% of the voting rights of Bumi by way of the disposal of a sufficient number of shares in Bumi; and
 - (iii) pending the disposal of shares referred to in (ii) above, and in accordance with Rule 9.7, the aggregate number of voting rights that may be exercised at any general meeting of Bumi by the Bakrie Group and Bukit Mutiara, and any persons acting in concert with either of them (including the Appellant and, together, the “Concert Party”), must not exceed 29.9% of all of the voting rights exercisable at any such meeting.
- 4. A consequence of the ruling referred to in paragraph 3(i) above was prima facie to oblige the Concert Party to make a mandatory offer for Bumi under Rule 9.1.
- 5. The effect of the ruling referred to in paragraph 3(ii) above was, however, to allow the Concert Party to avoid having to make a mandatory offer for Bumi under Rule 9.1 provided it disposed of sufficient of its voting interests so as to reduce its aggregate voting interests to less than 30% of the voting rights of Bumi by way of the disposal of a sufficient number of shares. The Executive did not stipulate a time limit for this disposal.
- 6. The effect of the further ruling referred to in paragraph 3(iii) above was to require that, pending the disposal of shares referred to in paragraph 3(ii) above, the voting rights of the Concert Party would be restricted on the basis described in Rule 9.7. Rule 9.7 and the Note on Rule 9.7 are summarised in paragraphs 16 to 18 below.
- 7. As was explained in Panel Statement 2012/9, each of the Bakrie Group, Bukit Mutiara and Bumi accepted the 19 December Rulings, as did Mr. Nathaniel Rothschild, another shareholder in Bumi to whom the Rulings had been communicated.

8. Before indicating their client's acceptance of the 19 December Rulings, Mr. Rothschild's legal advisers sought confirmation from the Executive that the application of Rule 9.7 to the Concert Party would not result in the voting rights of Bumi being adjusted more generally. The Executive provided oral guidance to this effect.
9. Subsequent to the Executive making the 19 December Rulings:
 - (i) on 8 January 2013, the directors of Bumi received a notice from Forest Nominees Limited, a nominee shareholder for Artemis Trustees Limited for NR Investments Limited (an investment vehicle of Mr. Rothschild), requisitioning a general meeting of the company to consider various resolutions. A meeting to consider these resolutions was convened by Bumi and is due to be held at 11.00 a.m. on Thursday 21 February. If all of these resolutions are passed, they will result in all of the current directors of Bumi ceasing to hold office, and new directors being appointed;
 - (ii) on 11 January, the Executive wrote to the legal advisers to each of the Bakrie Group and Bukit Mutiara setting out the Executive's calculations in relation to the number of shares in which the Concert Party is interested and to which voting restrictions would be applied in accordance with Rule 9.7;
 - (iii) on 22 January, and in response to a request from Bumi's financial adviser, NM Rothschild & Sons ("NM Rothschild"), the Executive issued an oral ruling in the terms described in paragraph 1 above to NM Rothschild. NM Rothschild subsequently reserved its client's right to appeal this ruling to the Committee; and
 - (iv) on 14 February, and in response to a request from Borneo's and the Bakrie Group's respective legal advisers, the Executive repeated its oral ruling in the terms described in paragraph 1 above to those legal advisers. Representatives of NM Rothschild were also in attendance on the relevant telephone call. Borneo's and the Bakrie Group's

respective legal advisers then immediately orally notified the Executive of their clients' wish to appeal this Ruling. The Executive then orally notified Mr. Rothschild's financial adviser, Morgan Stanley, of the appeal.

THE HEARING

10. The Hearings Committee of the Panel was convened for Monday 18 February 2013 to hear the appeal of the Appellant. The members of the Committee who were present are named in the Appendix to this Statement.
11. Bumi and Mr. Rothschild/NR Investments ("NRI") requested to be present at the hearing and to make submissions to the Committee. The Chairman, with the consent of the Appellant and the Executive, granted these requests and both NRI and Bumi made submissions to the Committee.
12. At the hearing, the submissions of the Executive were presented by the Director General. The submissions of the Appellant were made by Mrs. Nilufer von Bismarck of Slaughter and May and Mr. Graham Shear of Berwin Leighton Paisner. The submissions of NRI were made by Ms. Selina Sagayam of Gibson Dunn & Crutcher and Mr. Dieter Turowski of Morgan Stanley and the submissions of Bumi were made by Mr. Roger Ewart Smith of NM Rothschild. All four participants made written submissions prior to the hearing.

RELEVANT PROVISIONS OF THE CODE

Rule 9.1

13. Rule 9.1 requires that, where a person acquires an interest in shares which, when taken together with the shares in which persons acting in concert with him are interested, give that person control of a company, that person should be required to make an offer in cash at the highest price paid by him, or by any person acting in concert with him, during the preceding 12 months. Control for the purposes of the Code means an interest, or interests, in shares carrying in aggregate 30% or more of the voting rights of a company. This

requirement is commonly referred to as the mandatory bid requirement and is provided for in Rule 9.1.

14. The Executive may, however, dispense with the requirement for a person to make a mandatory offer in certain circumstances, despite that person having acquired shares in such a manner so as to give rise to a prima facie requirement under Rule 9.1. In particular, the Executive may (and did in this case) dispense with the requirement for a mandatory offer where control has passed not as a result of shares being acquired from independent shareholders but as a result of the issue of new shares by the company in question.
15. Rule 9.1 has its genesis within General Principle 1 which provides that:

“1. All holders of the securities of an offeree company of the same class must be afforded equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities must be protected.”

Rule 9.7

16. Rule 9.7 in its current form was introduced into the Code on 30 March 2009, following the consultation set out in PCP 2008/2. It provides as follows:

“9.7 VOTING RESTRICTIONS AND DISPOSAL OF INTERESTS

Where the Panel agrees to the disposal of interests in shares by a person as an alternative to making an offer pursuant to Rule 9.1, the Panel must be consulted as to the interests required to be disposed of and the application, pending completion of the disposal, of restrictions on the exercise of the voting rights (or the procurement of the exercise of the voting rights) attaching to the shares in which that person and persons acting in concert with that person are interested. Similarly, where an offer made pursuant to Rule 9.1 lapses for a reason other than the acceptance condition not being satisfied, or where a new offer is required

pursuant to Note 2 on Rule 9.3, the Panel must be consulted regarding the ability of the offeror and any persons acting in concert with it to exercise, or procure the exercise of, the voting rights attaching to the shares of the offeree company in which they are interested.

NOTE ON RULE 9.7

Calculation of number of shares to which voting restrictions will be applied and the number of interests to be disposed of

Where an obligation under Rule 9.1 has arisen by virtue of:

(a) Rule 9.1(a), the number of shares in relation to which voting restrictions, if any, will be applied will normally be such number of shares as results in the person to whom Rule 9.1(a) applies (together with persons acting in concert with that person) being able to vote less than 30% of the shares in the offeree company; or

(b) Rule 9.1(b), the number of shares in relation to which voting restrictions, if any, will be applied will normally be such number of shares as results in the person to whom Rule 9.1(b) applies (together with persons acting in concert with that person) being able to vote no more than the percentage of interests in the offeree company held by those persons prior to the triggering acquisition being made.

In each case the calculation will be made by reference to the reduced maximum number of shares entitled to be voted.

Where a disposal of interests in shares is permitted as an alternative to making an offer, the interests in shares required to be disposed of must be sufficient to take the total number of shares carrying voting rights in which the offeror and persons acting in concert with it are interested either, if Rule 9.1(a) applies, to below 30% or, if Rule 9.1(b) applies, to the percentage in which they were interested prior to the triggering acquisition being made.”.

17. It is a mathematical function of the Note on Rule 9.7 that any restrictions imposed on a person under Rule 9.7 will necessarily result in a proportionate increase in the percentage of voting rights exercisable by independent shareholders that are not subject to such restrictions.
18. A consequence of this is that a person who is not subject to restrictions imposed under Rule 9.7 could potentially exercise in excess of 30% of the votes cast at any given general meeting of the company without necessarily being interested in shares carrying in excess of 30% of the voting rights of that company.

The definition of the term “voting rights”

19. The definition of “voting rights” provides as follows:

“Voting rights

Except for the purpose of Rule 11, voting rights means all the voting rights attributable to the capital of a company which are currently exercisable at a general meeting.”.

20. The definition refers to voting rights which are “currently exercisable at a general meeting” in order to capture a class of shares which does not normally entitle the holder to vote in a general meeting, but which has become enfranchised – for example, preference shares which have become enfranchised as a result of the coupon being in arrears.
21. The term “voting rights” is used in a number of places in the Code.

THE RULING OF THE EXECUTIVE

22. As stated in Panel Statement 2012/9, the Bakrie Group and Bukit Mutiara acquired, by a series of transactions in 2011, shares which carry more than 30% of the voting rights of Bumi.
23. Having ruled as part of the 19 December Rulings that the Bakrie Group and Bukit Mutiara were acting in concert, it was necessary for the Executive to

consider whether to enforce a mandatory offer requirement under Rule 9.1. In the event, the Executive did not enforce a mandatory bid requirement, and instead ruled in the terms described in paragraph 3 above.

24. As at the dates of the Ruling on 22 January and 14 February, the Concert Party had not disposed of shares such as to take its overall interests in voting rights of Bumi to below 30%. Accordingly, it had been necessary, pending completion of such disposal, for the Executive to consider the application of Rule 9.7 to the voting rights attaching to the shares in which the Concert Party was interested.
25. In accordance with the 19 December Rulings, the Executive had applied Rule 9.7 on the basis that, assuming that the Concert Party had not, prior to the general meeting of Bumi on 21 February, disposed of sufficient shares so as to comply in full with the 19 December Rulings, the Executive would continue to apply restrictions under Rule 9.7.

SUBMISSIONS

The Appellant's Submission

26. The Appellant submitted that the Executive should have construed the term "voting rights" in the Code by reference to the reduced number of voting rights exercisable by the Appellant after taking into account the restrictions imposed by the Executive. It further submitted that the Ruling of the Executive was inconsistent with General Principle 1 and the mischief which Rule 9 was intended to prevent, in effect because it gave NRI an unfair advantage at the general meeting to be held on Thursday 21 February 2013 by restricting the Appellant's voting rights but not those of NRI.

The Submission of the Executive

27. The Executive submitted in the terms of the Ruling that is the subject of this appeal that it should not change the Rule 9 threshold. Its reasons were as follows:

- (i) the restrictions on the Concert Party's ability to exercise its voting rights under Rule 9.7 flow directly from the Concert Party's acquisition of shares in circumstances which gave rise to a mandatory offer requirement under Rule 9.1. Had the Concert Party not become subject to this requirement, Rule 9.7 would not have applied. Equally, these restrictions will fall away once the Concert Party has complied in full with the requirement to dispose of shares in accordance with the 19 December Rulings;
- (ii) changing the Rule 9 threshold would have the effect of inhibiting the bona fide purchasing freedom of independent shareholders, since the number of voting rights that they could then acquire without giving rise to a mandatory offer requirement would be lower than that which they could have acquired were it not for the conduct of the Concert Party. In the view of the Executive, this would also operate against the legitimate expectations of those independent shareholders and the market generally;
- (iii) to the extent that the voting rights of independent shareholders carry more weight than the voting rights of the Concert Party, this is, again, a function of the Concert Party's conduct. Moreover, as between independent shareholders (including Mr. Rothschild), that weighting applies equally; and
- (iv) Rule 9.7 applies only where the Executive has exercised its discretion in granting a dispensation from the mandatory offer requirement in Rule 9.1. In reaching its decision in relation to the Ruling that is subject to this appeal, the Executive had been mindful of the issues identified in paragraph 18 above but, balancing the interests of the Concert Party against those of independent shareholders, concluded that to change the Rule 9 threshold would operate unfairly as regards the latter. Accordingly, the Executive concluded that the appropriate course of action was to apply the Code as it is written, noting that the Note on Rule 9.7 makes no reference to any adjustment to the Rule 9

threshold where Rule 9.7 restrictions are applied.

28. Whilst the Executive acknowledged that the drafting of the definition of "voting rights" could have been clearer, in context (and indeed in other contexts where it applies in the Code) it submitted that it was not a reference to whether or not a particular shareholder can exercise the voting rights attaching to the underlying security but to the rights attaching to the security itself. The voting rights in the relevant shares are only not exercisable whilst held by the Appellant.

THE DECISION OF THE COMMITTEE

29. Substantially for the reasons given by the Executive, the Committee has concluded unanimously that this appeal should be dismissed.
30. The practical effect of the submissions by the Appellant is that NRI should be treated no differently from the Appellant as regards voting rights of the shares in Bumi. Yet it is the Appellant which has brought about its own position and indeed been granted the indulgence of not having to make a mandatory bid for Bumi, but seeks to visit the sanction imposed upon it upon an innocent third party. Indeed the illogicality and unfairness of that result is also reflected in the effect upon independent shareholders in Bumi and the acknowledgment by the Appellant that NRI should not be prevented from acquiring up to 29.9% of the total shares in Bumi. The proper construction and application of the same provisions of the Code should not vary according to the context in which they fall to be applied, at least not without very good reason; and no such reason has been advanced here.
31. The reality which the Committee considers emerges from the submissions of the Appellant is that the Appellant is seeking to re-write the Code. The Appellant is also, in effect, seeking to amend or side-step the 19 December Rulings of the Executive. It is also on the basis of the Code and those Rulings that the market will have operated since 19 December 2012.

Appeal

32. The Appellant has notified the Secretary to the Committee and the Executive that it does not intend to appeal this dismissal of its appeal by the Committee to the Takeover Appeal Board and the time for the Appellant to do so has now expired.

19 February 2013

APPENDIX

HEARINGS COMMITTEE MEMBERS

The members of the Hearings Committee who constituted the Committee for the purpose of this hearing were:

Body Represented	Individual's Name	Position or Firm
	Sir Gordon Langley	Chairman, Hearings Committee
	David Challen	Deputy Chairman, Hearings Committee
	Lord Morris of Handsworth	Independent Member, Hearings Committee
	Sir Ian Robinson	Independent Member, Hearings Committee
Association of British Insurers	Jim Stride	AXA Investment Managers
Association of Investment Companies	Sarah Bates	Witan Pacific Investment Trust
British Bankers' Association	Sir Nigel Wicks	British Bankers' Association
Confederation of British Industry	Alan Porter	Prudential
Institute of Chartered Accountants	Mark Spofforth	Spofforths
Investment Management Association	Bob Yerbury	Invesco Perpetual
Secretary to the Committee	Charles Penney	Addleshaw Goddard LLP