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The Takeovers Panel

Reasons for Decision Australian Liquor Group Ltd (Interim Orders)

In the matter of Australian Liquor Group Ltd (Interim Orders) [2001] ATP 18

Catchwords

Takeover bid – failure of target to disclose information to market – target not making proper releases to market – uninformed market – application for interim orders – delaying payment of consideration for acceptances – jurisdiction of Panel – protection of rights

Corporations Act 2001 (Cth), *sections 602, 620, 657D, 657E, 659B and 659C*

On 17 July 2001, we made an interim order restraining, for 14 days, the payment by Liquorland to the ex-directors of Australian Liquor Group Ltd (ALQ), and their associates, of consideration for ALQ shares sold into Liquorland's takeover bid. It made no order concerning the payments to other ALQ shareholders, which were due to commence on 18 July, 2001.

REASONS FOR DECISION

These are our reasons for our decision to make an interim order requiring Liquorland Pty Ltd to delay payment of the consideration for some of the shares in Australian Liquor Group Ltd for which it received acceptances, but not delaying payment to other shareholders.

Background

1. The Panel in this matter is constituted by Alice McCleary (sitting President), David Gonski (sitting Deputy President) and Carol Buys.

2. Liquorland Pty Ltd is a subsidiary of Coles Myer Limited. It applied on 12 July 2001 for interim and final orders and a declaration concerning its bid for Australian Liquor Group Limited (ALQ).[1] The application related to ALQ's financial position and operating result for the financial year 2000-2001. Liquorland alleges they were substantially worse than it was led to believe by public and private statements by ALQ.[2]

Australian Liquor Group

3. ALQ was floated and listed in June 2000, to operate a chain of 35 bottleshops, expanding to 42 and with plans to expand further. The bottleshops had previously been several separate chains and some independent retailers. The float raised $20 million, much of it for the

[1] The application was made under the Corporations Law, but decided under the Corporations Act 2001. Statutory references are to those statutes.

[2] Except where otherwise indicated, findings of fact are based on announcements and notices lodged with Australian Stock Exchange Ltd and on the bidder's and target's statements and annexures.

purchase of bottleshops and chains. The prospectus forecast a profit of $6.1 million after tax for the financial year to 30 June 2001, on revenue of $153 million. ALQ did not buy as many additional bottleshops as it had planned.

4. ALQ on 16 March 2001 issued its half-yearly results to 31 December 2000. These showed a trading profit of $3.95 million before tax ($1.72 million after tax) on revenue of $57.7 million ($36.4 million in the quarter to 31 December 2000). The board revised their revenue forecast for the full year to $130 million and their profit forecast to $5.0 million before tax, citing difficulty in acquiring as many bottleshops as they had planned. The auditors' review stated that they had not become aware of any matter that made them believe that the accounts were not in accordance with the Corporations Law, including the requirement to provide a true and fair view of ALQ's financial performance and position.

5. ALQ shares always traded below its issue price, which was $1.00, and they were trading at about 65c when Liquorland commenced its bid.

Liquorland's Bid

6. Liquorland states that at a meeting with two of the directors of ALQ on 13 April ALQ said that it could not provide to Liquorland information which it had not provided to the market, but assured Liquorland that ALQ's revised forecasts could be relied on and that ALQ complied and would continue to comply with its obligations under ASX Listing Rule 3.1.

7. On 17 April 2001 Liquorland bought 18% of the shares in ALQ for $1.20 each from Quadrant Capital Fund No. 2, which is managed by Westpac Development Capital Pty Ltd.[3] It then announced a bid for all of the shares in ALQ it did not then hold. That bid was at $1.20 cash, conditional on 90% acceptances, prescribed occurrences and material adverse changes.

8. In the target's statement dated 4 May, ALQ's directors noted the revised profit forecast but did not qualify it. The ALQ's directors recommended acceptance of the bid.

9. On 19 June 2001, Liquorland waived all of the conditions in its bid and announced that it would commence compulsory acquisition of the outstanding shares in ALQ. At that stage, it had relevant interests in 91.5% of the shares in ALQ. On the same day, the ALQ directors appointed Liquorland's nominees to the board and resigned.

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[3] Quadrant had a director on the ALQ board until 16 February: Chris Hadley who is copied in on some of the minutes.

10. Liquorland's bid closed on 29 June 2001, when Liquorland had acquired 97.6% of the shares in ALQ. Under paragraph 620(2)(a)(i), payment for shares for which acceptances were received on or before 19 June (about 74% of the shares in ALQ) was due to be made no later than 18 July.

11. Since Liquorland's application was made on 12 July, the Panel was required to make a quick decision whether to make interim orders holding back payment of part or all of that consideration.

ALQ's Books

12. Upon taking control, Liquorland commenced a review of ALQ's finances and operations. Liquorland say that ALQ staff explained to them that ALQ's sales had been below budget, that its accounting systems had not been providing reliable information, that its profit for the half-year to 31 December 2000 had been overstated and might actually be a loss, as might the result for the full year. Liquorland then brought in its own accountants, who have been reconstructing ALQ's books and accounts. Although that exercise is still not complete, Liquorland's view is that the full year result will be a loss, which may be as high as $6 million before interest and tax.

13. Liquorland has submitted copies of certain ALQ internal memoranda, board minutes and other papers and statutory declarations by the chief financial officer of ALQ and the managing director of Liquorland. The evidentiary worth and meaning of those papers have not been tested, and we make no concluded findings on them. If they are fully to be relied upon, however, they show that from March to June 2001, the accounting staff of ALQ were addressing serious deficiencies in the company's bookkeeping, stocktaking, past accounts, and information systems and that these problems were brought to the attention of the board, as early as 18 December 2000.

14. If we take these papers at face value, ALQ's accounts for the half-year to 31 December 2000 were probably seriously in error, and ALQ appeared to have made a loss instead of the reported profit. We say "probably" and "appeared", as the papers indicate that the problems had not been sufficiently resolved to allow the result to be restated with confidence. ALQ's chief financial officer and managing director appear to have taken widely different views on material items as late as 19 June. By June, however, these papers state that sufficient of the current problems had been resolved that current sales revenue could be determined with fair confidence: it was materially below budget and published forecasts. In addition, they say that the current year's loss could be estimated, and the chief financial officer estimated it at nearly $5 million (before tax), as against a revised forecast profit of $5 million. (Between the chief financial officer and the managing director of ALQ, however, there was approximately $2 to $4 million worth of items in dispute.)

Application

15. Liquorland applied for the following relief:

> "1.2 Interim remedy and orders sought:
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> *(a) The time for payment by Liquorland to shareholders of ALG under the takeover contracts be extended to 7 days after the determination and publication of reasons by the Panel of Liquorland's application for final orders as set out below;*
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> *(b) A letter be written by Liquorland by 18 July 2001 to shareholders to whom it is obliged to make payment informing them that an application has been made to the Panel for the variation of the terms of the takeover contracts, the granting of an interim order and the future conduct of Liquorland's application before the Panel;*
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> *(c) An order under section 194 of the* Australian Securities and Investments Commission Act 1989 *(Cth) (ASIC Act) granting leave to Liquorland to be legally represented in proceedings before the Panel;*
>
> *(d) An order under section 192(1) of the ASIC Act and Corporations and Securities Panel Draft Rule 7.5 for the issue of each of the Summons to Witness contained in Annexure "A" to this Application;*
>
> *(e) Alternatively to paragraphs (a) and (b) an interim order that the former directors of the ALG (excluding Mr Oakley) and their related entities (referred to in paragraph 1.5 below) pay the proceeds of the sale of shares of ALG (**the Proceeds**) to the credit of an interest bearing account to be established or operated in the joint names of Liquorland and the former directors of ALG (excluding Mr Oakley) until the determination by the Panel of a hearing of Liquorland's application for a declaration of unacceptable circumstances pursuant to s.657A of the* Corporations Law*;*
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> Liquorland undertakes that if interim order 1.2(a) is made:
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> - it will apply to ASIC for relief to suspend the compulsory acquisition procedure currently under way so that all shareholders are treated equally or alternatively Liquorland invites the Panel to make an order suspending the compulsory acquisition process;
> - it will pay interest at the rate of 5.05% on the amounts payable under the takeover contracts (either at $1.20 or as varied).

1.3 Final remedy and orders sought:

(a) A declaration that ALG and its former directors, Messrs Oakley, Murphy, Anghie, Pelly and Higgs engaged in conduct or caused circumstances to exist in relation to the affairs of ALG that were unacceptable circumstances (the details of which are set out in section 4);

(b) Restorative orders to vary the term of the takeovers contracts in terms to be ordered by the Panel. For example, a restorative order to vary the price Liquorland pays for ALG shares;

(c) Alternatively to paragraphs (a) and (b), and if the Panel grants interim relief in the terms of paragraph 1.2(e), an order under s.657D(2) that the Proceeds and any interest on the Proceeds be held in an interest bearing account until:

(i) further order by the Panel;

(ii) the determination of a proposed proceeding by Liquorland against the former directors of ALG and their related entities (which Liquorland undertakes to commence in the Supreme Court of Victoria within 30 days and prosecute with reasonable expedition); or

(iii) further order by the Supreme Court of Victoria."

16. Liquorland subsequently offered to pay 65c per share (the price of ALQ shares immediately before Liquorland's purchase of the Quadrant parcel) of the consideration to all of the accepting shareholders on the due dates, but sought to hold back the remainder.

Proceedings

17. The Panel met on 15 July. It decided to conduct proceedings in relation to the application for interim orders, at least. We issued a brief that day under regulation 20 which was confined to the issues concerning interim relief and which sought submissions on 16 July and rebuttals on the morning of 17 July. That brief was provided to ASIC, Liquorland, ALQ itself, the previous directors of ALQ and several persons who had accepted the Liquorland bid for large parcels of ALQ shares. We received submissions and rebuttals from all of those parties (other than ALQ itself) and from several accepting shareholders who had read of the application in the press (we accepted these submissions under regulation 24). We met again on 17 July and made the present decision.

Jurisdiction

18. Liquorland sought interim relief, essentially to preserve aspects of the *status quo*, so that final relief might be effective, when and if it was granted. Accordingly, in assessing the application for interim relief, we

looked forward to see what were the possible outcomes of the application for final relief. Submissions from the former directors and from shareholders were confined to this issue and were provided in less than two business days. The former directors denied the facts alleged in Liquorland's application. We make no finding that those facts are made out, or that unacceptable circumstances existed in relation to Liquorland's bid for ALQ. In the following paragraphs, however, we explore the consequences which would follow if we were satisfied of those conclusions.

19. Liquorland has made out a *prima facie* case that unacceptable circumstances existed. That is, if Liquorland proved its allegations and if no offsetting facts were made out, Liquorland would have shown that unacceptable circumstances existed in relation to the acquisition of control of ALQ, because it happened in a market which was not efficient, competitive and informed.[4]

20. This application is unusual, in that the party which claims to have suffered because a bid took place in an uninformed market is the bidder, but we have power to make a declaration and orders in relation to these circumstances. Our powers are not limited to protecting shareholders other than a bidder, and unacceptable circumstances may exist, although the only person adversely affected by a lack of information in relation to a bid is the bidder. The issue is whether the market is informed, not whether any particular participant is informed. Under paragraph 657D(2)(a), we are empowered to make an order to protect the rights of *any* person affected by unacceptable circumstances. Equality of opportunity to participate in benefit must be a two-way street.

21. The Panel's jurisdiction is not limited to bids which are still current[5] and it extends to setting aside contracts[6]. It can also be invoked up to 2 months after unacceptable circumstances have occurred[7]. Given the view we have taken of the merits of the matter, we may have the power to amend the contracts which resulted from acceptances of Liquorland's bid, despite the seriousness of such orders and the fact that the bid has closed. However, it has not been necessary to decide to use that power.

22. In these circumstances, we are justified in making interim orders if:

    (a) the orders prevent some of the harm which might result from unacceptable circumstances, while it is determined whether such

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[4] The statement in our media release of 17 July that it was probable that unacceptable circumstances had occurred should be read in the light of this fuller explanation.

[5] Paragraph 657D(2)(a).

[6] Paragraph (k) of the definition of a remedial order in section 9.

[7] Subsection 657C(3).

circumstances exist and what relief (if any) should be given in relation to the circumstances;

(b) the detriment suffered by those adversely affected by the orders is less than the detriment which would be suffered if no orders were made; and

(c) reasonable precautions are taken to reduce or eliminate the detriment to those adversely affected by the orders.

Balance of Convenience

23. If Liquorland is entitled to the final relief it seeks against the previous directors of ALQ, it might be very adversely affected by the payment out of the consideration owing to them, in the absence of any alternative security. No alternative security has been suggested. The detriment to the directors of the interim order is that their funds are inaccessible to them. When we made the interim order, we had received no submission that suggested that directors would suffer any special detriment from the funds being held back for a short period. That detriment can be adequately covered by interest on the consideration, to offset the cost of any borrowings the directors might need to make in the short period. Liquorland volunteered suitable arrangements to secure the consideration and interest, which we have adopted.

Relation to Final Orders

24. Accordingly, we need to look forward to the possible final outcomes of these proceedings. The principal final orders which it would be open for the Panel on the application are:

- orders reducing the consideration payable under the bid to all accepting shareholders and possibly requiring Liquorland to allow accepting offerees to rescind their acceptances of the bid;
- orders reducing the consideration payable to directors who accepted the bid (and their related parties mentioned in the application, referred to here as "associates");
- orders cancelling bid contracts.

25. We do not think that orders cancelling bid contracts or requiring Liquorland to allow accepting offerees to rescind their acceptances would be viable. ALQ has ceased to exist as an independent entity:

- compulsory acquisition notices have been issued,
- ALQ shares are suspended from trading,
- the previous board has resigned and
- suppliers are relying on letters of comfort issued by Liquorland or its parent.

These events appear to be irreversible. At present our view is that it would not be practicable to give ALQ back to its previous shareholders, and Liquorland did not suggest that we should do so.

26. If Liquorland proved all it alleges, both Liquorland and the other shareholders (some of whom bought shares during the bid) would have dealt in the shares in an uninformed market, and both were affected by unacceptable circumstances. It appears to us that in this case it would be inappropriate to make an order reducing the consideration to be paid to shareholders other than directors and their associates. If there is any difference in degree, Liquorland had better opportunities than other shareholders to assess ALQ's performance, because it has expert knowledge of the retail liquor trade. ALQ also provided Liquorland with private confirmation of the published forecasts prior to its bid. Liquorland says it was given no confidential financial information and was in fact further misled by assertions made by ALQ that the profit forecasts remained valid.

27. By choosing to waive its conditions, Liquorland accepted the risk that a material adverse change in relation to ALQ might occur between that point and the end of the bid. It also voluntarily assumed from the accepting shareholders the risk that such a change had already occurred but had not been disclosed by ALQ. Assuming without deciding that such a change in fact occurred, unless we or the Court make orders with the effect of shifting the burden of that adverse change, it will remain with Liquorland. For the reasons set out below we do not see a sufficient basis to shift the burden of that change to shareholders (other than the directors and their associates, who are discussed separately).

28. We do not believe that Liquorland would have any civil remedy at law or in equity against shareholders other than the directors and their associates, unless it sought to set aside the bid contracts for mistake or misrepresentation. Liquorland has informed us it has no interest in doing so.

29. Liquorland's argument to us for a reduction in the bid price was that the shareholders of ALQ should not receive a windfall gain from the false statements of its directors, and at Liquorland's expense. There may be some merit in this argument, but we see no practical way of giving effect to it in the facts of this matter. The fact that Liquorland chose to waive its conditions did not deter us from making interim orders, as we have the power to set aside bid contracts, even after the bid has closed and they have become unconditional.

30. An order reducing the bid price would need to be founded on paragraph 657D(2)(b): ensuring that a bid proceeds (as far as possible) in a way that it would have proceeded if unacceptable circumstances had not occurred. If we were unable to ascertain that price with confidence, it would be unfair to impose a price reduction on ALQ shareholders

without offering them the choice of withdrawing their acceptances of the bid. However, as we have noted before, returning the shares to the previous holders does not appear to be a viable option.

31. In addition, it would be difficult or impossible to decide what price Liquorland would have offered, and the ALQ shareholders would have accepted, had the market been adequately informed. While ALQ's profit and turnover would have been relevant to the price, so would its strategic value to Liquorland or a competitor as an opportunity to secure part of the retail liquor market.

Conclusion as regards Non-Associated Shareholders

32. We have decided to make no final orders with the effect of reducing the price payable by Liquorland to the *non-associated shareholders* i.e. the shareholders other than the directors and their associates. There is no point in requiring the consideration payable to the non-associated shareholders to be held back to be available to satisfy a Court order: as mentioned above, there is no prospect of Liquorland suing the non-associated shareholders. Accordingly, we make no interim order restraining payment of the consideration payable by Liquorland to non-associated shareholders. The interim orders leave in place the obligation to pay that consideration on the due dates under the bid contracts, the first of which is on 18 July.

Conclusion as regards Directors

33. The position as regards directors is less clear-cut. Again assuming without deciding that Liquorland's allegations are substantiated and that some or all of the directors of ALQ knew or should have known the information which was not provided to the market, it would be open to us to make a declaration and orders in favour of Liquorland and against such a director under paragraph 657D(2)(a).

34. On the same assumptions and on the further assumption that it can show that it suffered loss or damage as a result, however, it seems likely that Liquorland has remedies in damages against some or all of the directors for contraventions of some or all of sections 670A, 995, 999 and 1001A. The elements of those causes of action would largely overlap with the matters we would have to decide in order to be justified in making a declaration or orders against the directors. The bid having closed, section 659B no longer inhibits Liquorland from taking action against the directors.

35. The dispute between Liquorland and the previous directors of ALQ is likely to be prolonged and to involve the consideration of a great deal of documentary and oral evidence. It is most unlikely that it could be concluded within a period commensurate with the short time frames

contemplated in Part 6.10.[8] This dispute is best submitted to the Court, because of this time factor and the availability of precisely defined causes of action, measures of loss and procedural powers and remedies. Accordingly, our present view is that it would be preferable that the Panel declined to attempt to make those orders, leaving Liquorland to its remedies in the Courts.

36. While we believe that the Panel is not the appropriate forum for those remedies, we accept that if Liquorland's allegations are made out it may well have remedies against the directors. We also accept that those remedies would arise out of what we have identified as possible unacceptable circumstances and that a Court may be prepared to order that the consideration for shares beneficially owned or controlled by the directors should be held back, pending the outcome of such an action. Accordingly, we have ordered Liquorland to hold back payment of the consideration for shares sold under the bid by the directors, for fourteen days from 17 July 2001, to give Liquorland an opportunity to apply to the Court. After those fourteen days, our order will lapse. If no Court order has been made by then, Liquorland will have to pay the consideration to the directors.

37. We have dealt in the same way with the consideration for certain shareholders who appear to be associated with some of the directors. Those shareholders may apply for variations of the order to release those funds, if they show that the relevant directors have no interests in the shares.[9]

38. To minimise the prejudice which our order causes to the directors (and associates), we have ordered Liquorland (with its consent) to hold the consideration for their shares in a trust account, bearing interest at trading bank rates. When and if the consideration is paid to the directors, the interest will also be paid to them. In view of the protection afforded by this arrangement and the short time for which the orders will continue, we did not require Liquorland to give an undertaking for damages.

Matters not yet Resolved

39. To date, we have made no decisions whether to make a declaration of unacceptable circumstances or any final orders.

40. As we have indicated above, on the information we now have, we believe that the Panel is not a suitable forum for proceedings concerning

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[8] In particular, section 657B requires a declaration to be made within 3 months from the occurrence of unacceptable circumstances or one month from the application, whichever ends last, subject to extension by the Court.

[9] Some of that money has already been released, because we were satisfied that the relevant director did not control the relevant shares or have a beneficial interest in them.

the amounts to be paid by Liquorland to the directors, or *vice versa*. If Liquorland instead institutes proceedings in Court, we propose to dismiss its application for final orders adjusting the consideration.

41. In this context, a declaration is significant, not only as a basis for final orders, but also for its effect on the judicial remedies which are open to Liquorland. Briefly, under section 659C, if the Panel refuses to make a declaration in relation to conduct on Liquorland's application, Liquorland cannot obtain civil remedies under the Corporations Act in relation to that conduct, other than orders to pay amounts of money. A declaration may be justified in the public interest, but if the substantive action is to be conducted in the Court, it may be preferable that parallel proceedings in the Panel be discontinued.

42. Accordingly, we have invited the parties to indicate whether it would be in the public interest for these proceedings to be continued. It would be appropriate to wait until Liquorland has instituted (or decided not to institute) Court proceedings to make that decision.

Developments

43. Since the above paragraphs were written, we have amended our interim order:

    (a) so that it operates for a total of 21 days, from 17 July to 7 August. The Panel accepted submissions that 14 days did not allow Liquorland sufficient time to commence an action in court, and to reasonably seek interim orders from the Court extending the hold on the moneys held on account of the former ALQ directors and their associates;

    (b) to release from it money held on account of one of the former directors' associates, on receipt of submissions that the "associate" did not hold their shares on account of the relevant director; and

    (c) to require interest on part of the consideration to be paid to the director on whose account it was held, and an associated company.

Alice McCleary
President of the Sitting Panel
Decision dated 17 July 2001
Reasons published 30 July 2001