



**In the matter of Lake Technology Limited
[2004] ATP 18**

Catchwords:

compulsory acquisition – communications to shareholders during offer period – disclosure in bidder’s statement and target’s statement – misleading and deceptive conduct – telephone canvassing – Panel declining to commence proceedings

Corporations Act 2001 (Cth) Parts 6A.1 and 6A.2

These are the Panel’s reasons for declining to commence proceedings in relation to an application by Mr Robert Catto in relation to the affairs of Lake Technology Limited. On 4 August 2004, the Panel issued a media release substantially to the following effect concerning the application.

THE PROCEEDINGS

1. The Panel considered the application by Mr Robert Catto dated 22 July 2004 alleging unacceptable circumstances in relation to the affairs of Lake Technology Limited (**Lake**). The Panel’s Media Release TP04/66 provides further details concerning the application.
2. The Panel decided not to conduct proceedings in relation to the application.

THE PANEL

3. The President of the Panel appointed Marie McDonald (sitting President), Alice McCleary (sitting Deputy President) and Peter Scott to be the sitting Panel to consider the application.

BACKGROUND

The Application

4. Mr Catto, a shareholder of Lake, alleged that unacceptable circumstances exist in relation to the takeover bid by Dolby Australia Pty Ltd (**Dolby**) for Lake. The application focussed on communications with Lake shareholders by the shareholder relations firm engaged by Dolby, Georgeson Shareholder Communications Australia Pty Ltd (**Georgeson**).
5. Mr Catto submitted that, for the period from at least 8 July 2004 to 16 July 2004, Lake shareholders contacted by Georgeson representatives were misled, either directly or by omission, by representations made as to the price at which Dolby could compulsorily acquire their Lake shares and the rights of Lake shareholders to object to the acquisition under Part 6A.2 of the *Corporations Act 2001 (Cth)* (the **Act**).
6. In support of the allegations made in the application, Mr Catto referred to statements allegedly made to him during a phone call instigated by a Georgeson representative. Dolby provided a transcript and audio recording of the conversation between Mr

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Catto and the Georgeson representative, the contents of which were not disputed by Mr Catto.

Information regarding compulsory acquisition

7. The Panel reviewed Mr Catto's application in light of the existing information on the issues that was before Lake shareholders. It also considered the further information given to Lake shareholders subsequently explaining the two relevant compulsory acquisition procedures that were at the heart of the application.
8. Lake's target's statement dated 25 June 2004 was sent to shareholders at the same time as Dolby's bidder's statement. Clause 12.4 of the target's statement describes in some detail the two separate methods (under Parts 6A.1 and 6A.2 of the Act) under which Dolby may become entitled to compulsorily acquire Lake shares.
9. Dolby's bidder's statement mentions (at clause 5.2) that there are two compulsory acquisition methods that may apply, without providing any meaningful explanation of those distinct mechanisms.
10. Dolby sent a letter to Lake shareholders dated 12 July 2004, advising them that Dolby held full beneficial interests in more than 90% of the shares in Lake and that Dolby intended to proceed to compulsorily acquire their Lake shares. The letter did not distinguish between the two different forms of compulsory acquisition in the same helpful way as the target's statement.
11. None of the target's statement, the bidder's statement or Dolby's letter of 12 July 2004 stated that in order to be entitled to use the compulsory acquisition mechanism in Part 6A.1 of the Act, Dolby needed to receive enough acceptances to hold 96.1% of the Lake shares. This fact could be determined by a shareholder who applied the information set out in clause 12.4 of Lake's target's statement with the information concerning Dolby's voting power in Lake set out in Dolby's bidder's statement. During the period in which Georgeson initiated the relevant communications with Lake shareholders, Dolby held a beneficial interest in less than 92% of the Lake shares, at least 4% short of the 96.1% threshold.
12. Dolby lodged two supplementary bidder's statements dated 16 July 2004 and 29 July 2004. The annexures to both of those supplementary bidder's statements distinguished between the two forms of compulsory acquisition and set out the 96.1% threshold which applies (in relation to Dolby's bid) to the compulsory acquisition mechanism under Part 6A.1 of the Act. Unlike the letter of 12 July 2004, Dolby did not send either of the supplementary bidder's statements, or the ASX announcement annexed to the 16 July statement, directly to Lake shareholders. However, the 29 July supplementary bidder's statement states that the letter annexed to it was distributed to all Lake shareholders.

PANEL'S CONSIDERATION OF THE APPLICATION

13. The Panel recognised that unacceptable circumstances may have existed if Lake shareholders had been, or were likely to have been, misled by statements made to them by Georgeson representatives. The application alleged that some Lake shareholders were misled by representations made by Georgeson during the relevant period and accepted Dolby's offer on the basis of those representations.

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14. The Panel reviewed the transcript of Georgeson's call to Mr Catto and concluded that the material provided did not support the allegations in the application: i.e. the material did not support a conclusion that Georgeson had made misleading statements in the telephone conversation with Mr Catto. On that basis, the Panel considered that the onus lay with Mr Catto to establish a basis for the Panel to make further enquiries (taking into account the resources that are reasonable to expect from an individual shareholder). The Panel then gave Mr Catto an opportunity to provide supporting information from other Lake shareholders.
15. Mr Catto said that although he had contacted a number of Lake shareholders, he was unable to specifically identify any former Lake shareholders who accepted Dolby's offer on the basis of the canvassing telephone calls from Georgeson. Mr Catto provided the names of two Lake shareholders who had informed him that they considered telephone calls they received from Georgeson representatives misleading, although both had already accepted Dolby's offer prior to receiving the call from Georgeson. Mr Catto did not (or was not able to) provide any specific details of the conversations involving those shareholders.
16. The Panel notes that the actual call between Mr Catto and Georgeson was fairly short and may not have been representative of other calls to Lake shareholders. In addition, the shortness of the call may mean that more clarifying information may have been given in the ordinary course of those conversations. However, in the absence of evidence concerning the content of any other conversations, the Panel made its determination on the basis of the transcript of the conversation with Mr Catto.
17. In reaching its decision, the Panel drew some comfort from the clear disclosure made to Lake shareholders in the target's statement regarding compulsory acquisition.
18. The Panel did not review the script used by Georgeson representatives during calls to Lake shareholders in order to reach its decision.

COMMUNICATIONS WITH TARGET SHAREHOLDERS

19. The Panel recognises that bidders are entitled to communicate with target shareholders during a takeover bid through oral communications. Indeed, such communications can assist shareholders by ensuring that they do not miss an opportunity to participate in the benefits of a bid through oversight or accident.
20. However, the issues raised in the application highlight the difficulties shareholders can face in comprehending some of the complex legal issues that arise in relation to a takeover offer for their shares. In particular, the Panel notes that communicating clear, balanced and helpful information via telephone canvassing about complex legal issues can be especially difficult.
21. Bidders need to exercise particular caution when communicating to shareholders in relation to complex issues such as compulsory acquisition, and make every effort to ensure that those communications are helpful and informative, in addition to not being misleading. The Panel considers that where target shareholders have already been provided with helpful and clear information in the offer documents in relation

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to particular issues, it is sensible for persons canvassing shareholders by telephone to direct them to the relevant parts of the offer documents.

22. In relation to telephone canvassing, the immediate nature of the medium, while being very powerful in communicating with shareholders, also makes it susceptible to being misleading by omission or confusing shareholders. Persons canvassing shareholders need to ensure that the flow of these conversations (in response to enquiries of the shareholder during the conversation) do not lead to misapprehensions or confusion, by shareholders being told only some of the essential facts on topics covered by canvassers.

DECISION

Accordingly, under Regulation 20 of the ASIC Regulations, the sitting Panel decided not to conduct proceedings on the application.

Marie McDonald

President of the Sitting Panel

Decision dated 4 August 2004

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