Takeovers Panel

Reasons for Decision
Citect Corporation Limited

In the matter of Citect Corporation Limited
[2006] ATP 6

Catchwords:
Collateral benefits;
Citect Corporation Limited; Schneider Electric Australia Holdings Pty Ltd; TCEP Australia LLC; TCEP Australia Pty Ltd
Corporations Act 2001 (Cth), sections 602(c), 657A, 657C, 657D, 623
Australia Securities & Investments Commission Act 2001 (Cth), section 201A

These are the Panel's reasons for deciding to make a declaration of unacceptable circumstances in relation to the affairs of Citect Corporation Limited.

SUMMARY

1. These reasons relate to an application to the Panel dated 15 February 2006 by Schneider Electric Australia Holdings Pty Ltd (**SEAH**) in relation to the affairs of Citect Corporation Limited (**Citect**) (**Application**) under section 657C[1].

2. The Panel considered that in acquiring Citect shares unconditionally in off-market transactions on 9 February 2006, TCEP Australia LLC (**TCEP LLC**) (the indirect parent of TCEP Australia Pty Ltd (**TCEP**)) gave benefits to institutional shareholders which were likely to induce them to dispose of shares in Citect, and which were not offered to all holders of securities in the bid class under the TCEP bid. The Panel considered that this constituted or gave rise to a contravention of section 623 and therefore to unacceptable circumstances.

3. The Panel also considered that TCEP or TCEP LLC not giving a substantial holding notice by 9.30 am on Friday 10 February 2006 in relation to the acquisitions by TCEP LLC the previous day constituted or gave rise to a contravention of section 671B and therefore to unacceptable circumstances.

4. The Panel made a declaration of unacceptable circumstances under section 657A and orders under section 657D.

THE PANEL & PROCESS

5. The President of the Panel appointed Graham Bradley, Marie McDonald (sitting President) and Jennifer Seabrook (sitting Deputy President) as the sitting Panel (**Panel**) for the proceedings (**Proceedings**) arising from the Application.

6. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.

7. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

[1] Statutory references in this letter are to the Corporations Act, unless expressly stated.

THE APPLICATION

Background

Citect

8. Citect, a company listed on the Australian Stock Exchange (**ASX**), has 53,319,800 ordinary shares on issue.

TCEP

9. TCEP is a wholly owned subsidiary of TCEP Australia Holdings Pty Limited. The sole shareholder of TCEP Australia Holdings Pty Limited is TCEP LLC, a US corporation whose principal shareholder is Thoma Cressey Fund VII, LP which is a limited partnership. The general partner of Thoma Cressey Fund VII, LP is TC Partners VII, LP and its general partner is Thoma Cressey Equity Partners, Inc. Thoma Cressey Equity Partners, Inc. is a US private equity firm.

The SEAH Scheme and the TCEP bid

10. On 19 October 2005, Citect and SEAH announced that they had entered into a Merger Implementation Agreement for the proposed acquisition by SEAH of all of the shares in Citect under a scheme of arrangement for $1.50 cash per share plus a fully franked special dividend of $0.05 per share to be declared by Citect.

11. Also on 19 October 2005, SEAH acquired options over 4,366,825 issued shares in Citect (8.35%). A Form 603 "Notice of initial substantial holder" was lodged.

12. On 5 December 2005, the Supreme Court of New South Wales ordered the scheme meetings to be convened for 12 January 2006.

13. On 6 January 2006, TCEP announced a conditional takeover bid for all of the issued shares (and options) in Citect for $1.70 per share. Citect had agreed to declare a fully franked dividend of $0.05 per share if acceptances under the offer exceeded 50.1% and the offers became unconditional. If the dividend was paid, TCEP would deduct the amount of the dividend from the offer price and Citect shareholders would receive $1.65 per share in cash under the offer and $0.05 per share as a fully franked dividend from Citect. The TCEP bid was subject to conditions including a 50.1% minimum acceptance condition, a no material adverse change condition and a condition that the "*SEAH Proposal does not proceed*".

14. On 12 January 2006, the meetings were adjourned to 9 February 2006 or such later date as directed by the Court (subsequently set for 16 February 2006).

15. On 25 January 2006, the consideration offered by SEAH under the scheme of arrangement was increased to $1.85 cash per share plus the fully franked special dividend of $0.05.

16. On 2 February 2006 Citect released its target's statement to ASX. The board unanimously recommended that shareholders and option holders not accept TCEP's then inferior offer before Citect shareholders knew the outcome of the SEAH scheme meetings.

17. On 10 February 2006, TCEP varied its takeover offers. It increased the bid price to $2.00 per share ($0.05 per share of which would take the form of a fully franked

dividend if acceptances under the TCEP bid exceeded 50.1% and the TCEP bid was unconditional) and reduced the time for payment of the consideration to three business days after the takeover offer became unconditional.

18. On 10 February 2006, Citect's board unanimously recommended the increased TCEP offer, in the absence of a higher offer.

19. On 15 February 2006, SEAH raised the consideration offered under the scheme of arrangement to $2.20 per Citect share ($2.15 cash per share plus a fully franked special dividend of $0.05 per share). The Citect board unanimously recommended the increased SEAH proposal, in the absence of a superior proposal.

20. On 20 February 2006, the Supreme Court of New South Wales ordered the scheme of arrangement meetings to be held on 9 March 2006.

The Acquisitions

21. On Friday 10 February 2006, TCEP announced to ASX that its indirect parent company, TCEP LLC, had unconditionally acquired a 15.1% interest in Citect for $2.00 cash off-market from a number of institutional shareholders of Citect (**Acquisitions**). In the announcement TCEP stated:

    "The acquisitions made today mean that the offer price under TCEP's takeover offer for Citect is now automatically increased to $2.00 per share. Those shareholders who have already accepted TCEP's takeover offer will also receive the increased offer price.

    TCEP has also committed to pay shareholders who accept the takeover offer 3 business days after the takeover offer becomes unconditional…

    …TCEP Australia LLC intends to vote against the Schneider proposal at the Citect scheme meeting on Thursday, 16 February 2006."

22. The TCEP announcement was made after ASX placed Citect into pre-opening phase at approximately 10.42 am pending the release of an announcement by Citect. Between the opening of trade on 10 February 2006 and the time ASX placed Citect into pre-opening, the ASX Register of Sales for Citect indicated that 4,450 Citect shares were sold on-market at a price of $1.92 per Citect share.

23. From the opening of trade on Monday 13 February 2006 to the end of trade on 15 February 2006 Citect shares did not trade at a price lower than $2.01.

24. On 10 February 2006, TCEP lodged a notice under section 650D with ASX. In that notice it stated that:

    "…it is varying its offers as set out in this notice…"

    The notice increased the offer price for the Citect shares to:

    "$1.95 cash from TCEP; and

    $0.05 as a fully franked dividend from Citect for each Share held on the Dividend Record Date"

    and shortened the period in which TCEP was to pay the offer price.

25. On 13 February 2006, TCEP published on ASX the Share Sale and Purchase Agreements between TCEP LLC (as buyer) and the following counterparties (as sellers):

(a) Challenger Financial Services Group Limited (**Challenger**);

(b) Citicorp Nominees Pty Limited ('UBS AG London Branch' and 'IBP segregated client account: Austral Opportunities Fund');[2]

(c) UBS Securities Australia Limited ('Austral Equity Fund A/C');[2] and

(d) Fortitude Capital.

26. Each of the Share Sale and Purchase Agreements was dated 9 February 2006 and was executed by the seller. A Standard Transfer Form was published on ASX regarding MM&E Capital Pty Ltd (**MM&E**). The purchase date on the Standard Transfer Form was 9 February 2006 and the form was executed by MM&E.

27. Each of the Share Sale and Purchase Agreements provided that the buyer (TCEP LLC):

(a) was entitled to receive all dividends and distributions declared, paid or made by Citect in respect of the shares being sold on or after the date of the document; and

(b) would pay the purchase price for the shares to the seller by the end of the third trading day after the date of the document.

Substantial holding notices

28. On Friday 10 February 2006, MM&E gave a Form 605 (Notice of ceasing to be a substantial holder) indicating that it had ceased to hold a relevant interest in 4,454,354 Citect shares (8.35%) through off-market transactions on 9 February 2006.

29. On Monday 13 February 2006:

(a) Millenium Partners LP gave a Form 605 indicating that it had ceased to hold a relevant interest in 2,197,773 Citect shares (4.12%) through an off-market transaction on 9 February 2006;

(b) TCEP, on behalf of itself and TCEP LLC, gave a Form 604 to ASX regarding the Acquisitions notifying that TCEP acquired a relevant interest in 468,105 Citect shares (0.88%) through bid acceptances and that its associate (TCEP LLC) had acquired a relevant interest in 8,029,200 Citect Shares (15.1%) through off-market transactions on 10 February 2006;

(c) Challenger gave a Form 604 indicating that it (and its associates) had ceased to hold a relevant interest in 1,529,846 Citect shares (2.87%) on 10 February 2006.

Application

30. In the Application, SEAH submitted that unacceptable circumstances arose from:

(a) the unequal treatment of shareholders by TCEP and its parent as a result of the Acquisitions;

[2] Although Citicorp and UBS were the holders of record, TCEP dealt directly with the Austral fund manager.

(b) TCEP potentially benefiting from the Acquisitions if it voted against the SEAH scheme and by doing so denied shareholders a reasonable and equal opportunity to participate in the SEAH scheme; and

(c) the failure of TCEP and its parent to disclose the terms of the Acquisitions on a timely and complete basis resulting in the market for control of Citect shares not being efficient, competitive and informed.

31. SEAH requested a declaration of unacceptable circumstances under subsection 657A(2) in relation to the affairs of Citect.

32. SEAH sought the following final orders under subsection 657D(2):

(a) that the Acquisitions be unwound; alternatively

(b) TCEP LLC be precluded from exercising any votes attaching to the 8,029,200 shares comprising the Acquisitions in relation to any resolution considered at any meeting of Citect shareholders until the earlier of the date on which the scheme of arrangement is approved by the court or the Merger Implementation Agreement is terminated.

DISCUSSION

33. While the Panel will not normally conduct proceedings directly concerning a scheme of arrangement where the issue has been taken up by the court,[3] in this matter the Panel considered that the mischief before it related directly to the purposes of Chapter 6 because it was only considering the Acquisitions and how they related to the TCEP bid.

Collateral benefits – section 623

34. Section 623(1) says:

"A bidder, or an associate, must not, during the offer period for a takeover bid, give, offer to give or agree to give a benefit to a person if:

(a) the benefit is likely to induce the person or an associate to:

(i) accept an offer under the bid; or

(ii) dispose of securities in the bid class; and

(b) the benefit is not offered to all holders of securities in the bid class under the bid."

35. Section 623(3) says:

"This section does not prohibit:

(a) the variation of a takeover offer as provided by sections 649A to 650D; or

(b) an acquisition of securities through an on-market transaction; or

(c) simultaneous takeover bids for different classes of securities in the target."

36. The primary object of these provisions is to ensure that all shareholders have a reasonable and equal opportunity to participate in the benefits offered under a takeover.

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[3] *St Barbara Mines Ltd* [2000] ATP 10.

SEAH Submissions

37. SEAH submitted that:

    (a) TCEP's associate TCEP LLC had given the institutional shareholders a benefit which was likely to induce them to dispose of their Citect securities;

    (b) a contravention of section 623(1) had occurred; and

    (c) unacceptable circumstances existed.

38. SEAH submitted that the following three benefits were given by TCEP's associate TCEP LLC to the institutional shareholders:

    (a) immediate and unconditional disposal;

    (b) payment of a price higher than the bid price at the time of the Acquisitions; and

    (c) immediate (or early) payment.

Unconditionality

39. SEAH submitted that the key benefit given to the institutional shareholders by TCEP LLC was the unconditional disposal of their Citect shares. SEAH provided the following comments by Finkelstein J in *Aberfoyle v Western Metals* (1998) 28 ACSR 187 as an example of the case law which has recognised that conditional benefits under takeover bids are less valuable than the benefits of unconditional disposal:

    "A very real commercial advantage (perhaps measurable in money) is to be gained by a person who has a committed purchaser compared with a person who enters into a conditional contract and whose ability to sell his shares is contingent on a range of events none of which he has any ability to control."

Higher price and early payment

40. SEAH submitted that the institutional shareholders were also given additional benefits of a higher price and immediate (or early) payment before these benefits were given to the remaining Citect shareholders. SEAH submitted that TCEP's actions were inconsistent with the equal opportunity principle in section 602 and gave rise to unacceptable circumstances whether or not they gave rise to a contravention of section 623.

41. SEAH submitted (among other matters) that:

    (a) TCEP had illegally obtained a stake in Citect that could be used to block the remaining Citect shareholders from having the opportunity to benefit from superior rival transactions and that could be used to further its own transaction;

    (b) TCEP's failure to comply with the market's rules undermined the integrity and efficiency of the market for Citect shares;

    (c) there is no exception to section 623 for off-market purchases;

    (d) the contravention of section 623 was not mitigated by the fact that TCEP's associate TCEP LLC had acquired less than 20% of the voting power in Citect.

Net benefit

42. TCEP submitted that, in assessing whether a breach of section 623 had occurred, any benefit found to have been given to the institutional shareholders should be weighed against the advantages forfeited by those shareholders. Specifically, TCEP submitted that the institutional shareholders:

    (a) forfeited the chance to receive the benefit of any higher price offered by:

        (i) TCEP under its bid; or

        (ii) a rival bidder for control of Citect,

        in the future;

    (b) forfeited the right to receive franking credits from the $0.05 fully franked dividend that was to be paid by Citect under the TCEP bid if:

        (i) acceptances under the TCEP bid exceeded 50.1%; and

        (ii) the TCEP bid was declared free from all defeating conditions; and

    (c) attributed no value to unconditionality because some of the institutional shareholders only sold some of their Citect shares.

43. TCEP submitted that unconditionality was not a benefit which induced the institutional shareholders to sell. Rather, it submitted that the prospect of encouraging TCEP to stay in the bidding race with SEAH, and the prospect of a yet higher bid for the rest of their shares was the motivation for the institutional shareholders to sell to TCEP. As above, TCEP cited the unwillingness of the institutional shareholders to sell all of their shares as support for this submission.

44. TCEP also submitted that if a benefit was given it was immaterial.

45. SEAH submitted that the benefit of unconditional disposal was a significant benefit and was not, in this case, outweighed by any advantage the institutional shareholders may have forfeited. Specifically, SEAH submitted that the possibility that by selling to TCEP the institutional shareholders may have forfeited the chance to receive any higher price that may in the future be offered by TCEP or by a rival bidder was inherently speculative, and would not outweigh the benefit of certainty of payment gained by institutional shareholders.

The Panel's findings

46. The Panel found that during the offer period of TCEP's takeover bid its associate, TCEP LLC, gave the institutional shareholders a benefit that was prohibited by section 623.

Unconditionality

47. When looking at the unconditionality of the Acquisitions, at the time TCEP's bid was conditional, the Panel took into account:

(a) case law that considered the meaning of a benefit under the predecessors of section 623[4];

(b) a net benefit analysis; and

(c) the equality of opportunity principle in section 602(c).

48. The Panel considered the finding of Santow J in *Boral Energy Resources Ltd v TU Australia (Queensland) Pty Ltd* (1998) 28 ACSR 1 (although talking about the meaning of benefit in the predecessor to section 623):

""Benefit" is to be construed broadly but so as to exclude merely speculative benefits or ones which do not constitute a profit, benefit or advantage. The term does include non-pecuniary benefit, such as the right to immediate, unconditional payment, as compared to a bid providing for merely conditional payment, deferred until an extendable closing date for the offer, and where the conditions…are by no means certain of fulfilment."

49. Clearly a benefit of this nature had been given to the institutional shareholders and not the remaining Citect shareholders by TCEP's associate, TCEP LLC. For the remaining Citect shareholders, there was uncertainty of payment ever being received under the TCEP bid and there was also uncertainty as to how long the TCEP bid may be extended for, and therefore for how long their shares might be tied up.

A benefit likely to induce the person to dispose of securities – Materiality and Net benefit

50. The Panel decided above that unconditionality was a benefit, and one that the remaining Citect shareholders were not offered. The Panel then considered whether, objectively considered, the benefit was likely to induce the institutional shareholders to sell, some or all of, their Citect shares to TCEP. When properly considered, this test has two elements, a materiality element and a net benefit element.

51. The materiality element of this test is whether the benefit that the institutional shareholders were offered, or received, was sufficiently material in size to induce them to dispose of their shares. If the benefit was immaterial in size it would not be likely to induce any action by the institutional shareholders. The Panel decided that on its own, the benefit of unconditionality was likely to induce the institutional shareholders to sell, some or all of, their Citect shares to TCEP. The Panel did not consider it was feasible to attempt to reduce the benefit to a numerical value in these considerations.

52. The net benefit element of the section 623 test is whether the institutional shareholders were offered, or received, a benefit which, balancing the rights or benefits that the institutional shareholders received against whatever rights and benefits they gave up at the date on which the Acquisitions occurred[5], would be likely to induce them to dispose of their shares.

53. TCEP submitted that the institutional shareholders gave up the right to receive a higher price from SEAH or to accept an offer from a third party and they also gave up the value of franking credits associated with the five cent dividend. No evidence was provided as to the value of these rights to the institutional shareholders. The

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[4] *Boral Energy Resources Ltd v TU Australia (Queensland) Pty Ltd* (1998) 28 ACSR 1; *Aberfoyle v Western Metals* (1998) 28 ACSR 187 at 216.

[5] *Boral Energy Resources Ltd v TU Australia (Queensland) Pty Ltd* (1998) 28 ACSR 1

Panel considered that the "rights" to receive a higher price under the bid or to receive a higher offer were speculative and, in the absence of any contrary evidence, the Panel should discount the value attributed to them, at least in part. Although each case will depend on its own facts, the Panel notes that this position is consistent with the finding of Santow J in *Boral Energy Resources Limited v TU Australia (Queensland) Pty Limited 1998* (28 ACSR) 1. Likewise, the value of franking credits would depend on each shareholder's own tax position and no evidence was provided as to the value of those franking credits to each institutional shareholder.

54. Because of the size, and the uncertainty, of the benefits which TCEP submitted that the institutional shareholders gave up, the Panel was not convinced that, objectively considered, those benefits were sufficient to offset the benefit of unconditionality which the institutional shareholders received. Thus, the Panel considered that unconditionality was a net benefit to the institutional shareholders, it was material, and was likely to induce them to dispose of some or all of their Citect shares.

Acquisitions of less than 20%

55. TCEP submitted that because TCEP LLC acquired less than 20% under the Acquisitions this mitigated the contravention of section 623. The Panel rejected this argument on the basis that section 623 applied to all relevant benefits during TCEP's bid[6]. Therefore the Panel did not consider it relevant that the institutional shareholders disposed of parcels of shares to TCEP LLC that in aggregate did not exceed 20%.

Higher price and early payment

56. At the time of the Acquisitions, the price paid was higher than the price offered under the TCEP bid. SEAH submitted that this constituted a breach of section 623.

57. SEAH conceded that the High Court had decided that mere early payment was not a benefit for the purposes of section 698, the predecessor to section 623[7].

58. Having already found that the Acquisitions gave rise to a breach of section 623, the Panel did not consider that it was necessary to decide whether this ground gave rise to a breach as well.

Encouraging TCEP to continue contest

59. The Panel also rejected TCEP's submissions that the reason for selling shares to TCEP was to encourage TCEP to stay in the bidding race with SEAH. This submission was not supported by evidence, such as submissions from the institutional shareholders. However, the Panel rejected the submission insofar as it related to section 623, because the test in section 623 is an objective test. It requires the Panel to look, objectively, at whether or not the benefit offered was likely to induce the institutional shareholders to dispose of their shares, not what the motives of TCEP or the institutional shareholders were. Thus, even if the motivation of the institutions was to encourage an auction for Citect, the direct effect of the Acquisitions was nonetheless to confer on the institutions a benefit which was not then available to

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[6] *Boral Energy Resources Ltd v TU Australia (Queensland) Pty Ltd* (1998) 28 ACSR 1

[7] *Sagasco Amadeus Pty Ltd v Magellan Petroleum Australia Ltd* (1993) 177 CLR 508 at 518.

other shareholders in Citect, and, objectively, would be likely to induce the institutional shareholders to dispose of their shares to TCEP. In any event, the Panel noted that at least one institutional shareholder elected to sell all of its shares to TCEP, which undermined the basis for any argument which TCEP might have had.

Unacceptable circumstances if contravention of s623 found

60. As noted above, TCEP submitted that the reason for the institutional shareholders selling shares to TCEP was to encourage TCEP to stay in the bidding race with SEAH. TCEP submitted that the remaining shareholders would gain a benefit from the auction being continued and that this should be offset against the benefit received by the institutional shareholders. As noted above, the Panel rejected the submission in relation to whether or not a contravention of section 623 existed.

61. The Panel rejected the submission as a basis for not making a declaration of unacceptable circumstances in relation to its finding of a breach of section 623.

62. The Panel considered that if encouraging TCEP to stay in the auction had been their sole or primary motive, the institutional shareholders could have given TCEP the encouragement it needed in other ways without contravening section 623. For example, the institutional shareholders could have given TCEP the same assurance by committing to accept the same number of shares into TCEP's offer if TCEP increased its takeover offer to $2.00. This would have achieved the same end, without gaining any benefit for the institutional shareholders that the remaining Citect shareholders did not receive.

63. While the effect on the remaining shareholders was an element that the Panel considered when considering whether or not to make a declaration of unacceptable circumstances, it was not a basis for saying that a benefit had not been offered by TCEP to the institutional shareholders, and in the circumstances before the Panel it was insufficient to convince the Panel that it should not make a declaration of unacceptable circumstances. The Panel considers this issue at paragraph 87 below in considering orders it might make.

Summary

64. In summary, the Panel found that:

    (a) the unconditional nature of the Acquisitions was:

        (i) a benefit of the type contemplated by section 623, and

        (ii) likely to induce the institutions to sell their shares,

        because

        (i) they had a committed purchaser in TCEP LLC; and

        (ii) they did not have to wait for conditions outside of their control to be met before they could sell their shares in Citect; and

    (b) none of the exceptions to the prohibition in section 623 applied.

65. As the Panel found a contravention of section 623 that the Panel considered constituted unacceptable circumstances, the Panel did not consider that it was necessary to consider whether the Acquisitions were also unacceptable having

regard to the effect of the Acquisitions on the control, or potential control of Citect or the acquisition, or proposed acquisition, by a person of a substantial interest in Citect[8].

Substantial holding notices – section 671B

66. Section 671B requires a person who acquires a substantial holding in a listed company to notify the company and ASX of that fact and details of their interest. A person has a substantial holding if the shares in the company in which they have a relevant interest, together with the shares in the company in which their associates have relevant interests, represent 5% or more of the issued voting shares in the company. During a bid period the notice must be given by 9.30 am on the next trading day.

67. The object of the substantial holding notice provisions is to ensure that shareholders and directors of a company are provided with sufficient information to enable them to identify controllers of substantial blocks of voting shares or interests and their associates, to know the details of any special benefits a person may have received for disposing of his or her interest and to know the existence of any agreements or special conditions or restrictions which may affect the disposal of shares or interests or the way in which they are voted.[9] The legislature has indicated that during a takeover timely disclosure of information about substantial holdings is more important than during non "control" periods, by reducing the disclosure time periods from two business days to prior to 9.30 am on the next trading day.

Submissions

68. SEAH submitted that the failure by TCEP or TCEP LLC to lodge a substantial holding notice by 9.30 am on 10 February 2006 resulted in a contravention of section 671B and meant that the market for Citect shares was uninformed and inefficient. The Panel found a contravention of section 671B.

69. TCEP did not lodge a Form 604 with ASX by 9.30 am on 13 February 2006. TCEP submitted that it released a Form 604 at 10.41 am and that the delay on that day was because of "difficulties using the 1900 fax number of ASX".

70. The Panel was provided with the following evidence:

    (a) a Form 605 released on ASX on 10 February 2006 by MM&E stating that MM&E ceased to be substantial shareholder on 9 February 2006 (8.35%);

    (b) copies of Share Sale and Purchase Agreements and Standard Transfer Forms, all signed by the sellers and dated 9 February 2006, regarding sales to TCEP LLC by:

        (i) Citicorp Nominees Pty Ltd of 160,000 Citect shares;

        (ii) MM&E of 4,454,354 Citect shares;

        (iii) Fortitude Capital of 1,000,000 Citect shares; and

        (iv) Challenger of 1,529,846 Citect shares; and

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[8] Section 657A(2)(a).

[9] NCSC Policy Statement 110.

(c) none of the Share Sale and Purchase Agreements and Standard Transfer Forms provided to the Panel were signed (or dated) by the buyer.

71. TCEP submitted that it did not have a relevant interest in the Citect shares the subject of the Acquisitions until 10 February 2006 and therefore was only required to lodge a substantial holding notice by 9.30 am on 13 February 2006 because:

(a) on 9 February 2006 all the agreements were incomplete in some particular – "*whether it was the absence of a share transfer, incorrect completion of the share transfer, an inconsistency in share numbers between the share transfer or the incorrect completion of the name of the legal entity that was the seller* ";

(b) the agreements were reviewed at a meeting on 10 February 2006 and TCEP LLC agreed to purchase the shares and countersign the agreements;

(c) on 10 February 2006, it announced on the ASX it had "*today acquired a 15.1% interest in Citect*".

Panel's conclusions

72. The Panel rejected this submission, on the basis that TCEP acknowledged that relevant agreements had been made on 9 February for the Acquisitions, albeit they were imperfect. A relevant interest can arise from an arrangement, agreement or understanding, even if it is unenforceable. In addition, at least some of the institutional shareholders considered that they had disposed of their shares to TCEP on Thursday 9 February, 2006. The Panel finds that this is the much more likely description of the circumstances.

73. Therefore, a substantial holding notice should have been given by 9.30 am on 10 February 2006 and accordingly there was a contravention of section 671B by TCEP and TCEP LLC.

74. The effect of the failure by TCEP and TCEP LLC to lodge a substantial holding notice by 9.30 am on 10 February 2006 was mitigated by the following factors:

(a) Citect caused its shares to be placed in a trading halt from approximately 10.42 am on 10 February 2006 until the commencement of trading on Monday, 13 February 2006; and

(b) following the commencement of the trading halt, at approximately 11.53 am on 10 February 2006 TCEP announced some of the information that its Form 604 contained.

75. The Panel considered that shareholders who sold on-market on 10 February 2006 prior to the trading halt had traded in an uninformed and inefficient market due to the failure by TCEP and TCEP LLC to lodge a timely substantial holder notice. Indicative of an uninformed and inefficient market during that period was the price paid for Citect shares on market (ie $1.92) compared to the price at which Citect shares traded after the release of the TCEP 10 February 2006 announcement (ie $2.01).

76. While the market was not trading on an informed basis until TCEP lodged its Form 604 on 13 February 2006, there did not appear to be an adverse impact on the market because on 13 February 2006 the market in Citect shares did not drop below $2.01 per

share. This is because the market appears to have priced Citect shares on the basis of the announcement made by TCEP on Friday, 10 February 2006.

DECISION

Declaration

Collateral benefit – s623

77. The Panel decided that during the offer period of TCEP's takeover bid its associate (TCEP LLC) gave the institutional shareholders a benefit that was:

    (a) likely to induce the institutional shareholders to dispose of securities in the bid class; and

    (b) not offered to all holders of securities in the bid class under the bid.

78. Being off-market transactions, the Acquisitions were not covered by the exception in section 623(3). Accordingly the Acquisitions constituted or gave rise to a contravention of a provision of Chapter 6 and therefore unacceptable circumstances. The Panel found that this contravention was not merely technical or trivial.

79. TCEP conceded that on-market transactions would have been exempt from section 623(1) by way of section 623(3)(b). The Panel considered that on-market transactions by TCEP or TCEP LLC were unlikely to have been unacceptable because of the legislative exemption under section 623(3)(b). In addition, on-market transactions are anonymous and conducted on a "first come first served" basis and therefore no individual shareholder has an advantage over another to dispose of their shares to a bidder. Making the offers on-market would also have allowed all Citect shareholders the possibility to sell their shares at the higher price to TCEP LLC, and would have allowed the market to assess its position in the circumstances of TCEP LLC's offer. This was especially significant in the context of TCEP increasing its offer price, which under ASX market rules would have required Citect shares to be placed into a trading halt for one hour for the market to digest the price increase prior to TCEP completing the order. This would have also given SEAH the opportunity to increase its offer price for Citect shares.

Substantial holding notice

80. The Panel decided that a substantial holding by TCEP and TCEP LLC arose on 9 February 2006 and therefore to comply with section 671B(6) TCEP and TCEP LLC should have given a substantial holding notice by 9.30 am on 10 February 2006. The failure to give the substantial holding notice until 13 February 2006 constituted or gave rise to a contravention of a provision of Chapter 6C and therefore unacceptable circumstances.

81. The Panel found that, during the course of a takeover transaction, market participants count on receiving prompt news of substantial purchases or sales of securities and other relevant market activity, and should expect that all market participants will comply with all relevant rules so that contests for corporate control are conducted in a fully and continuously informed and efficient marketplace. Accordingly, the Panel found that this contravention was not merely technical or trivial.

Declaration – s657A(2) & (3)

82. When deciding whether or not to make a declaration of unacceptable circumstances, the Panel took account of the policy in section 602 that (among other things):

    (a) the acquisition of control over voting shares in a listed company takes place in an efficient, competitive and informed market;

    (b) holders of shares, and the directors of the company, know the identity of any person who proposes to acquire a substantial interest ; and

    (c) as far as practicable, the holders of the relevant class of voting shares all have reasonable and equal opportunity to participate in any benefits accruing to shareholders under a bid or other substantial acquisition.

83. The Panel considered that it was not against the public interest to make a declaration of unacceptable circumstances in relation to the benefit given to the institutional shareholders under the Acquisitions and the failure by TCEP and TCEP LLC to give a timely substantial holding notice.

Orders

84. The Panel made a declaration of unacceptable circumstances[10] and provided the parties and ASIC with an opportunity to make submissions on proposed orders. The Panel then made orders[11] under section 657D to remedy the unacceptable circumstances. The orders required:

    (a) TCEP to declare its bid free of all conditions; and

    (b) TCEP, or TCEP LLC, to compensate those Citect shareholders who sold on-market during the period when TCEP had failed to lodge a substantial holding notice as required by section 671B(6) (ie between 9.30 am on 10 February 2006 until 13 February 2006). TCEP or TCEP LLC was to pay the difference between $2 per share (which represents the amount paid per share to the institutional shareholders by TCEP LLC) and any lesser amount which any person received who sold on–market between 9.30 am on 10 February 2006 and 13 February 2006.[12]

Unfair prejudice – balancing of harm, remedy and adverse effect

85. When determining whether or not the orders would unfairly prejudice any person, the Panel considered:

    (a) who would be prejudiced by the order and to what degree;

    (b) whose interests had been harmed by the unacceptable circumstances and to what degree;

    (c) how those interests were protected by the order and to what degree;

    (d) whether there was an effective way of protecting those interests which would cause less prejudice to TCEP; and

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[10] Annexure A sets out the declaration of unacceptable circumstances made by the Panel.

[11] Annexure B sets out the orders made by the Panel.

[12] In effect, between 9.30 and 10.41 am on 10 February, because of the trading halt.

(e) whether when balancing those matters in paragraphs (a), (b) and (c) the prejudice suffered by those identified under paragraph (a) would be unfair.

86. In particular, the Panel considered:

(a) the harm to the affected Citect shareholders caused by the unacceptable circumstances;

(b) the harm to TCEP caused by the orders; and

(c) the fact that TCEP and the institutional shareholders should have been aware of the relevant prohibitions and complied with them particularly given that market participants rely on such compliance.

87. The Panel considered TCEP's submission that the institutional shareholders' main motivation for selling under the Acquisitions was to *"engender a higher offer price for Citect shares"*. As discussed above:

(a) the only evidence before the Panel in the Proceedings was TCEP's submissions, because none of the institutional shareholders made any submissions or gave any evidence (and indeed at least one institutional shareholder had sold all of its shares to TCEP); and

(b) the Panel had rejected it on the basis that even if the motivation of some of the institutions was to encourage an auction for Citect, the direct effect of the transaction was nonetheless to confer on the institutions a benefit which was not then available to other shareholders in Citect.

However, the Panel was mindful, when deciding what type of orders would be most appropriate in the circumstances to protect the rights and interests of the other Citect shareholders, that the auction for control of Citect had not been taken away from the other Citect shareholders by the Acquisitions.

88. The Panel considered that the order requiring TCEP to declare its bid free of all conditions would protect the interests of the Citect shareholders by providing to all Citect shareholders the benefit of certainty of contract which TCEP LLC had given to the institutional shareholders.

89. The Panel considered that the order requiring TCEP or TCEP LLC to compensate those Citect shareholders who sold on-market between 9.30 am on 10 February 2006 and 13 February 2006 would protect the interests of those Citect shareholders and would most closely remedy the harm caused to those shareholders by the failure to lodge a substantial holding notice as required by section 671B(6).

90. In relation to the order requiring TCEP to declare its bid free of all conditions:

(a) the Panel took into account the fact that TCEP had not provided submissions on any unfair prejudice it would suffer, after being given an opportunity to do so;

(b) the Panel considered:

(i) the nature of the conditions that the TCEP bid remained subject to;

(ii) whether or not they were likely to be fulfilled; and

(iii) the effect on TCEP of declaring the offers to be free of them; and

(c) the Panel considered that the small number of shareholders who had already accepted the TCEP bid had, by accepting the bid, accepted the risk that the TCEP bid could be declared unconditional at any time even prior to the satisfaction of the defeating conditions of the bid and therefore any prejudice suffered (such as, the inability to participate in the SEAH scheme or any higher offer) could not be said to be unfair.

91. When deciding whether or not to make the orders the Panel was not satisfied that the orders would unfairly prejudice any person.

92. The Panel considered that the orders it decided to make (when taken together and in conjunction with the undertaking described below) ensured that the rights and interests of the Citect shareholders who were affected by the unacceptable circumstances were protected and therefore it was unnecessary to make an order to unwind the Acquisitions. The Panel also did not want to risk stifling the auction for control of Citect by unwinding the Acquisitions.

Undertaking

93. Pursuant to section 201A of the *Australian Securities & Investments Commission Act 2001* (Cth), the Panel accepted a written undertaking from TCEP LLC[13]. TCEP LLC undertook to the Panel not to vote the shares acquired under the Acquisitions against the SEAH scheme at any meeting of Citect shareholders unless at the time of the meeting the Citect board of directors did not recommend the SEAH scheme.

94. The Panel accepted this undertaking on the basis that the undertaking would protect the interests of SEAH (as a rival for control of Citect) and other Citect shareholders. The Panel considered that the undertaking would also remedy any unfair advantage which TCEP might be considered to have gained over SEAH in the competition for control of Citect by the Acquisitions. If TCEP gained a sufficient advantage over SEAH it would likely adversely affect the competition for control of Citect and thus adversely affect the remaining shareholders of Citect who would likely be harmed by receiving a lower price for their shares if one competitor was unfairly knocked out.

Costs

95. The Panel did not receive any application for an award of costs, and made no order for costs.

Marie McDonald
President of the Sitting Panel
Decision dated 24 February 2006
Reasons published 5 June 2006

[13] Annexure C sets out the undertaking given by TCEP LLC to the Panel.

Annexure A – Declaration of Unacceptable Circumstances

Corporations Act
Section 657A
Declaration of Unacceptable Circumstances

In the matter of Citect Corporation Limited

WHEREAS

A. The Takeovers Panel (**Panel**) received an application from Schneider Electric Australia Holdings Pty Ltd (**SEAH**) in relation to the affairs of Citect Corporation Limited (**Citect**).

B. TCEP Australia Pty Ltd (**TCEP**) has made an offer to buy all of the shares of Citect (**TCEP Offer**). The TCEP Offer is made by way of a conditional off-market takeover bid.

C. TCEP Australia LLC (the indirect US parent of TCEP) acquired, in unconditional, off-market, transactions, 8,029,200 ordinary shares in Citect (approximately 15.1% of the voting power in Citect) at $2.00 per share (**Acquisitions**) from certain Citect institutional shareholders (**Selling Shareholders**).

D. At the time of the Acquisitions:

   (a) TCEP was the registered holder of approximately 0.88% of the voting power in Citect;

   (b) the TCEP Offer was conditional; and

   (c) the TCEP Offer price was $1.70 per share (including a special dividend of $0.05 to be declared by Citect).

E. The Acquisitions give rise to unacceptable circumstances because they involved an associate of TCEP (TCEP Australia LLC) providing a benefit to the Selling Shareholders, which was likely to induce the Selling Shareholders to dispose of securities in the class of securities subject to the TCEP Offer, and which was not offered to all of the Citect shareholders in the bid class under the TCEP Offer. The benefit was the unconditional nature of the Acquisitions. The giving of the benefit constituted or gave rise to a contravention of section 623 of the Corporations Act.

F. TCEP or TCEP Australia LLC failed to lodge a substantial holder notice in respect of acquisitions made on 9 February 2006 by 9.30 am on 10 February 2006. This constituted or gave rise to a contravention of section 671B(6) of the Corporations Act.

The Panel considers that it would not be against the public interest to make a declaration of unacceptable circumstances.

Under section 657A of the Corporations Act, the Panel declares that the:

   (a) Acquisitions; and

   (b) failure by either of TCEP or TCEP Australia LLC to lodge a substantial holder notice within the required time following the acquisitions made on 9 February 2006,

constitute unacceptable circumstances in relation to the affairs of Citect Corporation Limited.

Marie McDonald
President of the Sitting Panel
Dated 24 February 2006

Annexure B – Orders

Corporations Act
Section 657D
Orders

In the matter of Citect Corporations Limited

Pursuant to:

(a) section 657D of the *Corporations Act 2001* (Cth); and

(b) a declaration of unacceptable circumstances in relation to the affairs of Citect Corporation Limited (**Citect**) made by the Takeovers Panel (**Panel**) on 24 February 2006 under section 657A of the Corporations Act,

the Panel ORDERS:

(c) TCEP Australia Pty Ltd (**TCEP**) to, no later than the next business day following the date of this order, declare its off-market bid for Citect's shares (**TCEP Offer**) free from all defeating conditions in accordance with section 650F of the Corporations Act.

(d) Within 7 days after the date of this order, or such further period as the Panel may order on an application made within 7 days of this order, TCEP to pay or procure TCEP Australia LLC to pay to the Australian Securities and Investments Commission (**ASIC**) the sum of $356.

(e) ASIC is to hold this amount on trust to distribute it, not less than 14 days after TCEP pays the amount to ASIC, to each person who sold shares in Citect by a sale which was effected on the SEATS trading platform of ASX or reported to ASX on 10 February 2006 prior to the disclosure made by TCEP of the acquisition by TCEP Australia LLC of Citect shares at $2.00 per share, as an amount per share which is the difference between $2.00 and any price less than $2.00 per share at which the persons sold those Citect shares.

(f) TCEP to pay or procure TCEP Australia LLC to pay to ASIC the expenses reasonably incurred by it in giving effect to these orders, including staff time and disbursements.

(g) Any party to these proceedings may apply for further orders amending, supplementing or clarifying these orders, including without limitation orders about the distribution of the fund and the costs of the distribution.

Marie McDonald
President of the Sitting Panel
Dated 26 February 2006

Annexure C – Undertaking to the Takeovers Panel by TCEP Australia LLC

In the matter of Citect Corporation Limited

Pursuant to section 201A of the *Australian Securities & Investment Commissions Act 2001* (Cth), TCEP Australia LLC undertakes to the Takeovers Panel that it will not exercise (or enable to be exercised on its behalf) any votes attaching to the 8,029,200 Citect Corporation Limited (**Citect**) shares identified in the Form 604 Notice of change of interest of substantial holder by TCEP Australia Pty Limited on 13 February 2006 against any resolution in relation to approving the scheme of arrangement under which Schneider Electric Australia Holdings Pty Ltd is to acquire all of the shares and options in Citect (**SEAH Scheme**) considered at any meeting of Citect shareholders unless at the time of the meeting the Citect board of directors do not recommend the SEAH Scheme.