



**In the matter of Tower Software Engineering Pty Ltd 02
[2006] ATP 26**

Catchwords:

common director between bidder and target; efficient, competitive and informed market; non-public information; opportunity to withdraw acceptances; uninformed market; withdrawal of application

Corporations Act 2001 (Cth), sections 657A, 657E, 657D

Tower Software Engineering Pty Ltd 01 [2006] ATP 20

Pendant Software Pty Ltd v Harwood [2006] FCA 717

McCann v Pendant Software Pty Ltd [2006] FCA 1129

Dixon Advisory Superannuation Services Pty Ltd, Equity Partners Pty Ltd, Pendant Software Pty Ltd, Quadrant Private Equity No.1, L.P., Tower Software Engineering Pty Ltd

These are the Panel's reasons for its decision to consent to Tower Software Engineering Pty Ltd withdrawing its application to the Panel dated 1 August 2006. The application was for a declaration of unacceptable circumstances in relation to the affairs of Tower, in particular concerning disclosure, or non-disclosure, of certain information during a takeover offer for all of the shares in Tower by Pendant Software Pty Ltd. It was made under section 657A¹ and associated interim and final orders respectively under sections 657E and 657D.

SUMMARY

1. These reasons relate to an application (**Application**) to the Panel for a declaration of unacceptable circumstances and orders from Tower Software Engineering Pty Ltd (**Tower**) dated 1 August 2006.
2. Tower submitted that Pendant Software Pty Ltd (**Pendant Software**) had acquired a parcel of shares in Tower, by way of an acceptance under Pendant Software's takeover offer for Tower, at a time when one of Pendant Software's directors (who was also a director of Tower) knew, in his capacity as a Tower director, additional, non-public information that was material to Tower shareholders which Pendant Software had not disclosed to Tower shareholders or to the market. Alternatively, Tower submitted, Pendant Software did not advise Tower shareholders not to accept its offer until the additional, non-public information was released by Tower.
3. Tower submitted that the acquisition by Pendant Software of the parcel resulted in it increasing its control of Tower and acquiring more than 50% of the voting power in Tower.
4. The consideration under the Pendant Software offer under which Pendant Software acquired the relevant Tower shares was \$1.60 per Tower share. Following the resolution of the Tower 01 proceedings, a number of events happened:

¹ Unless otherwise specified, all statutory references are to the Corporations Act.

Takeovers Panel

Reasons for Decision – Tower Software Engineering Pty Ltd 02

- (a) Quadrant Private Equity No.1, L.P. (**Quadrant**) increased the offer it had made for all of the shares in Tower from \$1.80 to \$1.87 per Tower share (subject to a number of conditions);
 - (b) Pendant Software agreed to accept the increased Quadrant offer for all of its Tower shares;
 - (c) Tower sought the Panel's consent to withdrawing its application; and
 - (d) the adviser for the persons who had accepted the Pendant Software offer at the relevant times advised that his clients did not wish to withdraw their acceptances, having had regard to the events set out above.
5. The Panel consented to Tower withdrawing the Application after concluding that it would not be in the public interest to continue the proceedings given that:
- (a) considering the events set out in paragraph 4 above, the market for control of shares in Tower appeared to have operated efficiently in the end result; and
 - (b) the persons said in the Application to have been affected by the relevant circumstances had no objection to withdrawal.

THE PANEL & PROCESS

6. The President of the Panel appointed John Keeves, Alastair Lucas (Deputy President) and Mark Paganin (Sitting President) as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the Application.
7. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.
8. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

BACKGROUND

9. The background to the Application is described in detail in:
 - (a) The judgment of Goldberg J in *Pendant Software Pty Ltd v Harwood* [2006] FCA 717;
 - (b) The decision of the Tower 01 Panel in *Tower Software Engineering Pty Ltd 01* [2006] ATP 20; and
 - (c) The judgment of Finkelstein J in *McCann v Pendant Software Pty Ltd* [2006] FCA 1129.
10. On 18 April 2006, Pendant Software Pty Ltd (**Pendant Software**) lodged a bidder's statement in respect of a takeover bid for all the shares in Tower at \$1.45 per share and sent the offers to Tower shareholders the next day (**Pendant Offer**).
11. On 30 June 2006, Quadrant Private Equity No.1, L.P. (**Quadrant**) lodged a bidder's statement in respect of a takeover bid for all the shares in Tower at \$1.60 per share and sent the offers to Tower shareholders on 14 July 2006 (**Quadrant Offer**).
12. On 21 July 2001, the Pendant Offer was increased to \$1.60 per Tower share and on the same day the Quadrant Offer was increased to \$1.80 per Tower share.

Takeovers Panel

Reasons for Decision – Tower Software Engineering Pty Ltd 02

13. On or around 21 July 2001, certain Tower shareholders (**Accepting Shareholders**) accepted the Pendant Offer in respect of their Tower shares (amounting to approximately 7.2% of Tower's shares). The Accepting Shareholders were all clients of, or companies associated with Mr Daryl Dixon, an investment adviser based in Canberra or Dixon Advisory Superannuation Services Pty Ltd. Mr Dixon is Executive Chairman, Responsible Officer and Authorised Representative of Dixon Advisory Superannuation Services Pty Ltd.
14. Following the decision of the Tower 01 Panel in *Tower Software Engineering Pty Ltd 01* [2006] ATP 20, and the judgment of Finkelstein J in *McCann v Pendant Software Pty Ltd* [2006] FCA 1129, Pendant Software and Quadrant reached a commercial settlement concerning their bids for the control of Tower. On 25 August 2006, Tower informed the Panel that several of the parties had reached an agreement under which Pendant Software (and its associates) would accept all of the Tower shares they held into the Quadrant Offer (including the shares Pendant Software acquired from Equity Partners Pty Ltd² and the Accepting Shareholders), subject to clearing those shares through Tower's pre-emptive rights regime and Quadrant increasing the consideration offered under its bid to \$1.87. Quadrant then advised Tower shareholders that it would increase the consideration offered under the Quadrant Offer to \$1.87 if it acquired more than 50% of the shares in Tower.

APPLICATION

15. Tower submitted in the Application that Pendant Software had acquired shares from the Accepting Shareholders, by way of acceptances under its takeover offer, at a time when, Tower submitted, non-public information existed that was material to Tower shareholders but which had not yet been disclosed to Tower shareholders or the market. Pendant Software rejected these submissions.

Interim Orders

16. Tower sought an interim order "*temporarily restraining Pendant Software from taking action to remove Tower directors in order to avoid Tower's prosecution of this matter*".
17. The Panel accepted the undertaking offered by Pendant Software and Pendant Properties Pty Ltd (an associate of Pendant Software and 30.54% shareholder in Tower) that:

"Pending the final hearing and determination of the application, neither Pendant Software Pty Ltd nor Pendant Properties Pty Ltd will, without giving Tower Software Engineering Pty Ltd 7 days notice of their intention to do so, exercise any voting rights in relation to the 2,251,400 shares in the issued share capital of Tower Software Engineering Pty Ltd (including any rights under section 27.2 of the Constitution of Tower Software Engineering Pty Ltd in respect of those shares), being the shares the subject of acceptances received by Pendant Software Pty Ltd on 21 July 2006 pursuant to its takeover offer for shares in Tower Software Engineering Pty Ltd, including for the purpose of seeking to appoint new directors to the board of directors of Tower Software Engineering Pty Ltd or for the purposes of removing directors from the board of directors of Tower Software Engineering Pty Ltd."

² See *Tower Software Engineering Pty Ltd 01* [2006] ATP 20.

Takeovers Panel

Reasons for Decision – Tower Software Engineering Pty Ltd 02

18. Accordingly the Panel considered that it was not necessary to make interim orders.

Final Orders

19. Tower sought final orders to cancel contracts arising as a result of acceptances by the Accepting Shareholders or, in the alternative, to give Accepting Shareholders the opportunity to withdraw their acceptances.

DISCUSSION

20. As a consequence of the commercial settlement reached on 25 August 2006, control of Tower passed to Quadrant at a price of \$1.87 per share³. All of the shareholders in Tower (apart from Equity Partners and the Accepting Shareholders⁴) received an opportunity to sell their shares at the highest price which a competitive and informed auction was able to achieve.
21. All of the Accepting Shareholders indicated (either directly or, in the case of two Accepting Shareholders whose directors included Mr Daryl Dixon, through their agent, Mr Dixon) that they did not support the Application and did not wish for any opportunity to withdraw their acceptances of the Pendant Offer. The Panel was concerned to ensure that the Accepting Shareholders were aware of the concerns raised in the Application, namely that it was alleged that Pendant Software had knowledge of non-public information at the time that it obtain their acceptances. Each of the Accepting Shareholders advised the Panel that they supported the decision of Mr Dixon to accept the Pendant Offer on their behalf and that they relied on Mr Dixon's advice, notwithstanding the allegations in the Application. Mr Dixon advised the Panel that one of the Accepting Shareholders was his family company and the other Accepting Shareholders had been advised in respect of their shareholdings in Tower by a company of which he was the executive chairman. Mr Dixon stated in an affidavit he provided to the Panel that each of the Accepting Shareholders had chosen to accept the Pendant Offer even though they realised at the time that they may forgo a higher price from another bidder. After the announcement of the commercial settlement of 25 August 2006, Mr Dixon indicated that the Accepting Shareholders had preferred to sell to Pendant Software.
22. Tower requested the Panel's consent to withdraw the Application, on the basis that no useful purpose would be served by continuing the Proceedings. Tower advised the Panel that the resolution agreed by the parties had provided it with some comfort that Quadrant had obtained control of Tower in a competitive, informed and efficient market. Tower advised that it believed that by bringing the Application it had provided the Accepting Shareholders with an opportunity to air any grievance they might have had.
23. The Panel invited submissions from parties and the Accepting Shareholders as to whether the Panel should consent to Tower withdrawing the Application. Tower's request to withdraw the Application was either supported, or not opposed, by all of the other parties to the proceedings. Mr Dixon indicated that the Accepting Shareholders were fully aware that there could be a higher offer at the time they

³ Quadrant acquired approximately 63% of the shares in Tower.

⁴ However, see paragraph 21 below for an explanation of the position of the Accepting Shareholders.

Takeovers Panel

Reasons for Decision – Tower Software Engineering Pty Ltd 02

accepted the Pendant Offer and accordingly the Accepting Shareholders did not want to receive the difference between the Pendant Offer and the increased Quadrant Offer, and did not oppose withdrawal of the Application.

DECISION

24. The Panel considered that it would not be in the public interest to continue the proceedings given that:
 - (a) overall, the market for control of shares in Tower appeared to have operated efficiently in that the Quadrant Offer, being the highest, unconditional offer for all of the shares in Tower, had succeeded;
 - (b) Quadrant had succeeded after a contest for control between Quadrant and Pendant Software which had operated within the framework which the legislature had set in order to promote the possibility of control of companies being acquired in an efficient competitive and informed manner; and
 - (c) Mr Dixon had indicated that the Accepting Shareholders (being the persons who, according to the submissions in the Application, were affected by any non-disclosure) had no objection to withdrawal. Accordingly, the Panel consented to Tower withdrawing the Application.
25. The Panel made no order for costs.

Mark Paganin

President of the Sitting Panel

Decision dated 1 September 2006

Reasons published 13 December 2006