



**In the matter of Qantas Airways Limited 02
[2007] ATP 6**

Catchwords:

Decline to commence proceedings; closing date, late acceptance, lapse of offer, defeating condition; 50% threshold; majority acceptances; hedge fund; opportunity to participate denied because of actions of one shareholder; sophisticated shareholder; no harm in orders; whether orders provide choice for shareholders; whole of shareholding provision in bid terms; jurisdiction; lack of submissions from relevant shareholder; lack of submissions from target (Qantas); persons affected by application and orders; treat a bid as if an acceptance had been received before the close of the offer;

Corporations Act 2001: 624(2)(b)

Airline Partners Australia Limited, Qantas Airways Limited

These are the Panel's reasons for deciding not to commence proceedings in relation to an application from Airline Partners Australia Limited regarding the affairs of Qantas Airways Limited (see [TP07/23](#)). The Panel did not consider that the submissions in APA's application provided a sufficient basis for the Panel to commence proceedings

THE PROCEEDINGS

1. These reasons relate to an application to the Panel dated 5 May 2007 from Airline Partners Australia Limited (APA), in relation to an off-market cash takeover bid for Qantas Airways Limited (**Qantas**) by APA.

THE PANEL

2. The President of the Panel appointed Andrew Lumsden, Jennifer Seabrook and Nerolie Withnall (sitting President) as the sitting Panel (the **Panel**) to consider APA's application.

SUMMARY

3. APA sought a declaration of unacceptable circumstances, and orders, from the Panel to cause APA's offer for Qantas to continue as if the late acceptance of a large shareholder in Qantas had been received prior to the 7.00 p.m. close of the offer on Friday 4 May 2007.
4. APA submitted that no person would be adversely affected, granting the orders would maintain the choices of Qantas shareholders, more than 50% by number of shareholders had accepted and the holders of more than 50% of Qantas shares had either accepted or now indicated that they wished to accept or had intended to accept the APA offer.
5. On the basis of the application and APA's submissions, the Panel did not consider that there was any real likelihood of APA providing evidence to establish that the APA offer closing according to its terms would give rise to unacceptable circumstances.

APPLICATION

Background

6. Pursuant to APA's 8th Supplementary Bidder's Statement dated 23 April 2007 that its offer for Qantas shares (**Offer**) would close at 7.00 pm on Friday 4 May 2007, and APA's public statements that the Offer would not be extended past that time and date, the Offer closed at 7.00 pm on Friday 4 May 2007.

7. APA submitted that as at that time, it did not appear that APA had voting power in Qantas of more than 50%, the threshold which would have triggered an automatic extension of the Offer period of 14 days pursuant to section 624(2)(b) of the Corporations Act. In a media release late on Friday 4 May 2007. APA announced that:

"as at 7 pm AEST on 4 May 2007 it appears that acceptances have not reached the 50% level required to extend the offer. If this is confirmed, APA's offer for Qantas Airways Limited will not proceed.

APA remains firm in the view that its ownership of and plans for Qantas would have significantly enhanced the airline, guaranteed strong growth and been beneficial for employees and customers.

The consortium partners also believe that the price offered for Qantas shares was fair and reasonable and remains so.

Qantas is an outstanding organisation with a first rate management team and board.

APA understands that the bid process has been challenging for many of those involved and thanks Qantas management, Board and employees for their professionalism during the process. APA wishes Qantas every success for the future"

8. APA submitted that approximately 5 hours after the close of the Offer, and subsequent to APA's 4 May media release, an offshore arbitrage and special situation investor (**Late Investor**) holding Qantas shares, contacted APA and sent its acceptance form to APA for 98,445,907 Qantas shares, amounting to 4.96% of Qantas' issued share capital.¹ APA submitted that had this acceptance been received within the Offer period, the Offer period would have automatically been extended for 14 days.

9. In a media release dated 5 May, APA announced that it was seeking to continue its offer for Qantas and that:

"APA intends to make submissions to the Takeovers Panel to allow its offer for Qantas to continue.

On Friday evening, APA announced that, subject to confirmation, it appeared that the offer had failed to reach the 50% level required for the offer to proceed.

However, subsequently on Friday, APA received an acceptance from a large investor, which would be sufficient to take acceptances for Qantas shares to more than 50%.

APA intends to make submissions to the Takeovers Panel to allow the offer to continue.

¹The Panel notes that it is not aware of, and was provided no evidence concerning, the circumstances surrounding the late acceptance. For the purpose of reaching its decision the Panel did not consider it relevant whether the late acceptance was inadvertent or deliberate.

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All the acceptances received to date, including the late acceptance, constitute a majority of 50.6% of Qantas shares having been accepted on behalf of 58% of all Qantas shareholders.”

10. The Panel notes that Qantas made no submissions to the Panel as to whether or not the Panel should commence proceedings, despite being contacted on the morning of the application and being informed of the application and the issues before the Panel.
11. The Panel notes that the Late Investor made no submissions to the Panel as to whether or not the Panel should commence proceedings and did not contact the Panel’s Executive during or before the Panel’s consideration of the application.

Application

12. APA sought a declaration under section 657A that the closing of the APA offer and subsequent acceptance by the Late Investor constituted unacceptable circumstances. APA sought orders to the effect that;
 - (a) APA be required to continue the Offer as if the acceptance of the Late Investor was received prior to 7.00 pm on 4 May 2007, and otherwise in accordance with Chapter 6 of the Corporations Act; and
 - (b) APA inform shareholders of the extension of its Offer under section 624(2) as if the reference to “3 days after that event” was a reference to “3 days after an order of the Panel”.
13. In its application, APA submitted that:
 - (a) the Offer should not be allowed to close as a result of one shareholder not getting his acceptance in on time;
 - (b) as far as APA was aware the only person who may have been materially affected by the grant of the orders was Qantas, no Qantas shareholder would have been be detrimentally affected by the granting of the order requested and no-one would have suffered any detriment by letting the Offer continue;
 - (c) there had been potentially misleading circumstances arising from media coverage;
 - (d) it could not be said that having the Offer close on 4 May 2007 caused the acquisition of control over Qantas shares to take place in a efficient, competitive or informed market;
 - (e) extending the Offer period would not deprive shareholders of information concerning the bidder or the merits of the Offer (in the terms of section 602(b)(i) and (iii));
 - (f) shareholders had not had a reasonable opportunity to participate in the Offer because that opportunity was denied to them as a consequence of a single foreign shareholder accepting late;
 - (g) the Panel has, in past matters, taken action to promote the interests of shareholders in receiving and being able to participate in takeover bids; and

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- (h) notwithstanding the late acceptance lodged by the Late Investor, there was a likelihood that APA had over 50% when the Offer closed in any event (through the operation of clause 7.3 of the Offer terms providing a relevant interest in all of the shares held by those holders who purported to accept for only part of their holdings).

DISCUSSION

Jurisdiction

14. The Panel considered that it was open for the Panel to commence proceedings in relation to APA's application. The Panel's decision not to commence proceedings was not based on any view that it did not have jurisdiction to consider the application.

Shareholders aware of deadline

15. There had been extensive coverage by Qantas, APA and the media of the deadlines in relation to the Qantas bid. The Panel considered that the market was extremely well informed of the fact that:
- (a) the Qantas bid was due to close by 7pm 4 May 2007;
 - (b) if 50% acceptances were received by the deadline the Offer period would be extended; and
 - (c) if the 50% threshold was not obtained by the deadline the bid would close, and all acceptances would lapse.
16. The circumstances of which APA complained were in relation to a single sophisticated shareholder, with a significant interest (4.96%) in Qantas, who should have been well aware of the closing time and date for the Offer and of the implications of not meeting that deadline.
17. The Panel did not accept that misleading circumstances arose from media coverage of the Qantas bid that would have been likely to cause the Late Investor or other investors not to be aware of the deadline and of the implications of not meeting that deadline. The Panel did not consider that acceptance strategies of investors were relevant in considering whether to commence proceedings.
18. The Panel did not consider that Qantas shareholders were likely to have been misled by media reports to believe that the 50% threshold was so likely to be achieved that they need not accept for their shares prior to the 7.00 p.m. deadline. Indeed, the opposite appeared to be the case. The media coverage presented to the Panel indicated that although likely to be achieved, meeting the 50% test before the scheduled closing time and date was likely to be very close.

Operation of cl 7.3

19. The Panel notes that APA submitted that there was a likelihood that APA had acquired over 50% of the voting power in Qantas when the Offer closed through the operation of clause 7.3 of the Offer terms. Despite this submission, APA announced to the market on 4 May 2007 that it appeared that acceptances had not reached the 50% level required to extend the Offer, and that if this was confirmed, the Offer would not proceed. However, the Panel did not consider this was an issue for the

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Panel to comment on, other than to note the submission, or determine and did not consider the issue any further. The Panel therefore accepted that the basis for the application by APA was that it did not have 50% voting power in Qantas.

20. If clause 7.3 had operated to give APA more than 50% voting power in Qantas prior to the 7.00 p.m. deadline, none of the circumstances described as unacceptable in fact had eventuated and there was no basis to commence proceedings. If APA had not acquired more than 50% voting power in Qantas prior to the 7.00 p.m. deadline, then the circumstances complained of would be as described to the Panel and the Panel would decide whether or not to commence proceedings on the basis of the circumstances before it.
21. Thus clause 7.3 was irrelevant to the Panel's considerations.

Persons affected by application

22. The Panel considered APA's submission that no person (other than Qantas) would be affected by the granting of the orders requested. The Panel also considered whether any persons would be affected by not granting the orders requested.
23. The Panel did not accept APA's submission that no person (other than Qantas) would be affected by the orders. It is clear that granting, or not granting, the order requested, would have a wide effect. The Panel notes in this context that, following APA's announcement of a Panel application, the Panel Executive received a number of comments from Qantas shareholders indicating their concern with the bid proceeding. The Panel did not consider that it needed to consider any submissions sent by Qantas shareholders, however the fact that the Executive had received comments cast doubt over APA's submission that "no" person would be affected.
24. The Panel considered that allowing the application would have affected the interests of those shareholders who did not wish the ownership and control of Qantas to change. Declining the application (or refusing to commence proceedings) may have affected the interests of those Qantas shareholders who wished to sell their shares into the APA offer.

Previous Panel decisions

25. APA submitted that the Panel has, in past matters, taken action to promote the interests of shareholders in being able to participate in takeover bids. On this basis APA submitted that the Panel should continue to apply this policy and grant the relief requested. APA cited Pinnacle 10, Brisbane Broncos 04, Bigshop, Normandy, Skywest, AMP Shopping Centre Trust and Goodman Fielder as examples of where the Panel has applied this policy².
26. The Panel did not accept that any of the cases cited were relevant to the Panel's consideration of APA's application. Contrary to APA's submissions, the Panel did not consider that declining to commence proceedings was against any policy to promote the interests of shareholders in being able to participate in takeover bids. As discussed below, the Panel did not consider that APA's offer closing in accordance

² The Panel notes that some references to cases were unclear given some of the cases cited came before the Panel on a number of occasions.

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with its terms had denied Qantas shareholders the opportunity to participate in the bid.

Eggleston principles

27. The Panel did not accept that the Offer period closing in accordance with the bid terms (i.e. 50% acceptances not achieved by 7pm, 4 May 2007) and APA's public statements that the Offer would not be extended past that closing time (except if the 50% threshold had been met), deprived Qantas shareholders of information concerning the bidder or the merits of the Offer.
28. The Panel did not accept that Qantas shareholders had not had a reasonable opportunity to participate in the Offer or that a single shareholder failing to deliver its acceptance by the close of the Offer denied shareholders a reasonable opportunity to participate in the Offer. Shareholders were well aware of the deadlines and the implications of not accepting by the deadlines.

DECISION

29. In the absence of clear evidence to the contrary, the Panel did not consider that there was any real likelihood that APA would be able to provide evidence that would establish that the Offer period closing in accordance with the bid terms and APA's public statements that the Offer would not be extended past the deadline, had an impact on the efficient, competitive or informed market for Qantas shares, or gave rise to unacceptable circumstances.
30. For the reasons outlined above, the Panel did not consider that the submissions in APA's application provided a sufficient basis for the Panel to commence proceedings in relation to the application.

Nerolie Withnall
President of the Sitting Panel
Decision dated 6 May 2007
Reasons published 22 May 2007