



In the matter of Qantas 02R

[2007] ATP 07

Catchwords:

Eggleston principles; 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; role of media; sophisticated shareholder; commercial consequences of decisions; no harm in orders; whether orders provide choice for shareholders; 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; ASIC modification.

Corporations Act 2001: 624(2)(b)

Australian Pipeline Ltd v Alinta Ltd [2007] FCAFC 55; Pinnacle VRB Limited No 08 [2001] ATP 17

Airline Partners Australia Limited, Qantas Airways Limited

These are the Panel's reasons for deciding not to commence proceedings in relation to a review application from Airline Partners Australia Limited dated 6 May 2007 regarding the affairs of Qantas Airways Limited (see [TP07/24](#)). The Panel did not consider that the submissions in APA's application for review provided a sufficient basis for the Panel to commence proceedings

THE PROCEEDINGS

1. These reasons relate to an application (the **Application**) to the Panel from Airline Partners Australia Limited (**APA**) dated 6 May 2007, under s657EA of the Corporations Act¹, for a review of the Takeovers Panel's decision in relation to an initial application from APA dated 5 May 2007 (**initial Panel**). The initial application was in relation to the affairs of Qantas Airways Ltd (**Qantas**).

THE PANEL & PROCESS

2. The President of the Panel appointed Stephen Creese (sitting President), John O'Sullivan and Chris Photakis (sitting Deputy President) as the sitting Panel (the **review Panel**) to consider APA's application for review.
3. The review Panel adopted the Panel's published procedural rules, and consented to the parties being legally represented by their commercial lawyers, for the purposes of considering the Application.

SUMMARY

4. On Friday 4 May 2007 at 7pm, APA's off market takeover bid for Qantas ended, APA having advised the media that it appeared (subject to confirmation) that its bid had closed with the minimum acceptance defeating condition not being satisfied. Approximately 5 hours later, a purported acceptance was received that would, if accepted, have taken the bid acceptances over 50% and triggered a statutory extension of the bid for two weeks.

¹ Unless otherwise stated, statutory references are to provisions of the Corporations Act.

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5. On Saturday 5 May 2007, APA made an application for a declaration of unacceptable circumstances and orders that would have allowed the bid to proceed as if the purported acceptance had been received before the bid ended. The initial Panel declined to commence proceedings on the application. Accordingly, it did not make a declaration or orders. APA sought a review of that decision.
6. On Sunday 6 May 2007 the review Panel affirmed the decision of the initial Panel and declined to commence proceedings. Accordingly, it did not make a declaration or orders.
7. The review Panel did not consider that there was any real likelihood that APA could provide evidence to establish that the APA bid for Qantas ending according to its terms, the information in the market as to the likelihood and level of acceptances, and the fact of a purported late acceptance that would have triggered an extension of the bid under section 624 of the Corporations Act, would give rise to unacceptable circumstances. Therefore, it declined to commence proceedings.

APPLICATION

Background

8. APA had made off-market offers for all of the shares in Qantas and its offers were due to expire at 7pm (AEST) on Friday 4 May 2007. The offers were subject to a 90% minimum acceptance defeating condition that APA had indicated would be waived if APA received acceptances of 70% or more of Qantas shares. Had APA received acceptances for more than 50% of Qantas shares, its bid would have been extended for 14 days under section 624(2)(b). If APA did not receive acceptances for more than 50% of Qantas shares, its bid would end with the minimum acceptance condition unsatisfied, and the acceptances would lapse.
9. On 30 April 2007, APA had made an announcement, which was released to ASX by Qantas, which included the following statement:
"However APA warned that its offer will close unsuccessfully unless acceptances representing at least 50% of Qantas shares are received by 7.00 p.m. this Friday (4 May 2007)." (footnote omitted)
10. On 4 May 2007, APA announced to the media that it appeared that it had not received acceptances representing at least 50% of Qantas shares by the 7 p.m. deadline and, if that was confirmed, the APA offer could not proceed.
11. Approximately 5 hours after the end of the bid, and subsequent to APA's announcement, an investor holding Qantas shares sent its acceptance form to APA for 98,445,907 Qantas shares, amounting to 4.96% of Qantas' issued share capital. The purported acceptance, if accepted, would have taken the acceptance level of APA's bid for Qantas above 50%.

Initial application

12. On Saturday 5 May 2007, APA applied to the Panel under section 657C for a declaration under section 657A. It submitted that the circumstances it described (essentially closing of the APA offer, information in the market about the likelihood and level of acceptances under the offer, and loss of opportunity to Qantas

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shareholders because an extension could not occur due to the purported acceptance by the investor after the bid had closed) were unacceptable. It sought orders under section 657D(2) to the following effect:

- (a) that APA be required to continue its bid as if the investor's acceptance had been received prior to 7.00 pm on 4 May 2007, and otherwise in accordance with Chapter 6, and
- (b) that APA inform Qantas shareholders of the bid's extension 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. On the same day, the initial Panel considered the application but did not consider that the application provided a sufficient basis for the Panel to commence proceedings. It advised APA of its decision on the morning of Sunday 6 May 2007.

Review application

14. On Sunday 6 May 2007 APA sought a review of the initial Panel's decision not to commence proceedings. APA requested that the review Panel make the declaration of unacceptable circumstances and orders as sought in the initial application.
15. Under section 657EA(2), the president of the Panel consented to the application for review.

DISCUSSION

Introduction

16. The review Panel met late on the evening of Sunday 6 May 2007 to consider the review application. In reaching its decision, the Review Panel considered the arguments and submissions of APA in the initial application and in the review application and also noted the reasons for the decision of the initial Panel as set out in its decision letter of 6 May 2007.
17. The review Panel affirmed the decision of the initial Panel and declined to commence proceedings.
18. Given the urgency of the Application, and the desirability of providing a decision to the applicant and other interested parties before the market opened on Monday 7 May 2007, the review Panel provided APA with a short statement of its decision. These reasons expand on that statement to explain it.
19. The review Panel considered whether the orders that were being sought had the character of deeming a past event to have taken place differently (i.e., were retrospective), and whether this would be "to decide existing inter-partes disputes about the application of the law to the facts and then make remedial orders" (*Australian Pipeline Ltd v Alinta Ltd* [2007] FCAFC 55 at [428]). The review Panel did not consider that it would be deciding an inter-partes dispute, by analogy with *Pinnacle 08*, in which the Panel was asked to deal with the matter by applying the law on directors' duties, or a policy which approximated to that branch of the law:
As a Panel, our functions are limited to applying the updated, enacted Eggleston principles set out in section 602 as essential elements in a wider public interest discretion. We are not

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empowered to enforce compliance with the law or to set aside contracts on equitable grounds or for non-compliance with Chapter 2D or 2E of the Corporations Law.

20. Because the review Panel considered that it would not be deciding an inter-partes dispute, and because circumstances may have existed that would have entitled it to declare those circumstances to be unacceptable even if the bid had closed, and to make orders that might include allowing further acceptances, the review Panel was prepared to assume that it had jurisdiction in this case.

Submissions

21. The review Panel considered APA's submissions based on the initial application, supplemented by the review application. APA said that its bid ended prematurely as a result of (it believed) one shareholder's miscalculation or mistake, and that "the contest for control of Qantas including in particular the media coverage of the transaction, the role of hedge funds and the ongoing market and media speculation of their role", had meant that the market for shares in Qantas had not been competitive, efficient and informed. APA made 3 submissions:
- (a) No Qantas shareholder would be detrimentally affected by the granting of the requested orders, but rather would have their options preserved and would have more time to consider those options.
 - (b) There were potentially misleading circumstances arising from media coverage as to the prospect of the bid succeeding, affecting the decisions of shareholders to accept in time; and
 - (c) The Eggleston principles² did not support the offer period ending on 4 May 2007.

Detriment

22. APA submitted that no-one would suffer any detriment as a result of the offer period being extended by 14 days. It said that the bid was still conditional, withdrawal rights were still available³, and the extension did not operate to deny any Qantas shareholders any choices in relation to their shares.
23. In considering the effect of the circumstances, the review Panel considered whether the circumstances would be likely to cause harm to any Qantas shareholders, or would deprive any of them of any rights or interests. In this respect, almost 60% by number of Qantas shareholders (and if the late acceptance were included, more than 50% of the shares) had accepted the bid, and (it was argued) that it was in the interests of those shareholders to allow the bid to continue.
24. The review Panel considered that Qantas shareholders were not harmed or deprived of any rights or interests by the bid closing in the circumstances that it did. It noted that the initial Panel did not accept that Qantas shareholders were so harmed or deprived. The review Panel considered that Qantas shareholders were not deprived of information or any rights or interests, and might reasonably have expected the bid to close according to its terms, as APA had said publicly it would.

² The review Panel assumed the reference in the application to Eggleston Principles was intended to be a reference to the purposes of chapter 6 in section 602 (which are broader).

³ Offered under the 8th Supplementary Bidder's Statement.

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25. The review Panel considered that Qantas shareholders were well aware of the deadline and its implications. It was a commercial decision on the part of APA to put conditions on its bid. Qantas shareholders had a reasonable opportunity to participate. A single shareholder failing to deliver an acceptance by the close does not deny them that. The review Panel agreed with the initial Panel on this. There was no loss of opportunity in the relevant sense.

Misleading circumstances

26. APA submitted to the review Panel that the market was adequately informed of the relevant deadlines and consequences, but that “the market was misinformed as to the prospects of the bid succeeding and as to the likelihood or not of the 50% threshold being met” (original emphasis). It said that it was “this misinformation” that “induced Qantas shareholders into a false sense that they would have more time to accept the Offer than they actually did.”

27. The review Panel did not accept this. It noted the media release of APA on 30 April 2007, on which Qantas shareholders would be expected to have relied, which advised:

“Remaining shareholders who wish to accept the offer should do so immediately”.

28. The relevant deadline for the close of the APA bid was well known and had been emphasised to Qantas shareholders by APA. The consequences of APA receiving (or not receiving) acceptances which would give it voting power in Qantas of more than 50% in the last week of its offer period (50% threshold) were well known. The prospects of APA reaching the 50% threshold were widely canvassed, and indeed the media had speculated on the motives and strategies of some Qantas shareholders in relation to Qantas reaching the 50% threshold. There is a sound statutory regime for disclosure of holdings during a bid and APA had disclosed its voting power to the market⁴. The review Panel considered that the circumstances had the effect of the bid ending according to its terms. The review Panel did not consider, having regard to that effect, that the circumstances could be regarded as unacceptable.
29. The review Panel did not consider, as APA had submitted, that the media speculation had misinformed shareholders.

Qantas shareholders unaware that not accepting may affect success of APA offer

30. APA submitted:

“Indeed, the evidence is that there was intense media speculation, based on the conduct or likely conduct of hedge funds and arbitrageurs, which likely distorted market behaviour. There is also evidence that this has created a secondary market in delay, i.e. that hedge funds and arbitrageurs are better placed if other Qantas shareholders take the Offer to 50% acceptances and then take advantage of the 14 day statutory extension under section 624 of the Act. The Panel should not allow these distorting effects to adversely affect the market for Qantas Shares. Further, the combined effect of this intense and erroneous media speculation, together with the secondary market in delay, is to create an inefficient, misinformed, uncompetitive market in Qantas shares which disadvantages retail Qantas shareholders and means many

⁴ Putting to one side clause 7.3 of the Offer.

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Qantas shareholders who would otherwise have accepted the Offer, delayed in the (incorrect) belief that the 50% threshold would be achieved.

31. APA further submitted that media reports suggesting that the bid would reach the 50% threshold left shareholders generally unaware that the threshold would not be met without their support. Thus they did not fully appreciate the prospects of the bid not succeeding. The review Panel has difficulty with this line of reasoning, which amounts to saying that, because the media thought the bid would succeed, shareholders would think that they didn't need to accept. The review Panel rejected the submission.
32. APA further submitted the market was deprived of (or misled about) information that an insufficient number of Qantas shareholders intended to accept. APA said that it had received feedback from "a number of Qantas shareholders" on Friday night after the bid ended to the effect that they would have accepted the Offer, or accepted for a larger proportion of their shareholding, had they known that the 50% threshold would not be satisfied.⁵ The review Panel does not accept, as APA submitted, that this establishes a mistaken assumption on the part of shareholders leading to a lost opportunity that prevents the operation of an "an efficient, competitive and informed market". The initial Panel did not accept that Qantas shareholders had not had a reasonable opportunity to participate. The review Panel agrees.
33. The review Panel considered that Qantas shareholders who did not accept (or who accepted for only part of their holdings) would have understood that this increased the risk that the offer would close without reaching the 50% threshold and the APA offer would fail. The commercial consequences of their decisions is not a basis for unacceptable circumstances.
34. APA submitted that Qantas shareholders were deprived of information about the intentions of other shareholders regarding whether they would accept the offer or not. The review Panel accepts that false information about the intention of another shareholder would normally give rise to unacceptable circumstances, but does not think that the current situation is one of those. Here, there was no suggestion that another shareholder had made any statement about its intention that might be apt to prejudicially influence other shareholders. There was no evidence produced to the review Panel on which it could rely to substantiate that shareholders were deprived of accurate information to their prejudice.
35. While Qantas shareholders may have preferred to have information about the intentions of other shareholders, the review Panel did not consider that there was any reasonable basis for Qantas shareholders to expect to be told of the intentions of other Qantas shareholders. The Panel saw no basis for the lack of such information giving rise to unacceptable circumstances.

⁵ Although APA based a submission on contact by "a number of Qantas shareholders" with it, APA also submitted that contact by shareholders with the Panel was not relevant to the Panel's consideration unless it could be shown to be representative of Qantas shareholders as a whole. The review Panel was inclined not to accept APA's submission on this, but did not need to decide because the raised issues were already before the review Panel.

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36. Moreover, the media speculation in this case, which was not unusual for such a large, high profile offer, must have been understood as something on which the shareholders could not, or should not, safely rely.
37. APA submitted that its application was not to benefit the investor who was late in accepting (about whose intentions it has no knowledge), but Qantas shareholders as a whole. The review Panel has considered the benefit of Qantas shareholders as a whole.

Sophisticated investor

38. The review Panel noted the initial Panel's view that the investor was a sophisticated shareholder with a substantial interest (4.96%) who should have been well aware of the end of the bid and its implications. APA submitted that whether or not an investor is a sophisticated investor is irrelevant to the question of whether and why the acceptance was late.
39. The review Panel does not agree that it is irrelevant whether a shareholder is a sophisticated investor or not. While it may make no difference in some cases, it must be a relevant factor that a shareholder is a sophisticated investor who, it can be assumed, well understands the rules for takeovers and is able to sort and understand the information that circulates. The review Panel notes also that there is no evidence in this case as to why the acceptance was late.

Wishes of Qantas shareholders vs technical failure

40. The review Panel was conscious that over 60% in number of Qantas shareholders had accepted the APA offer, that the offer had consumed a large amount of time and resources for Qantas management and a further bid (if made) would consume even more, and that it appeared that the holders of more than 50% of the Qantas shares wished the APA offer to succeed (or at least be extended).
41. The review Panel did not consider that these factors tipped the scales sufficiently in favour of the making of a declaration.

Eggleston principles

42. APA made submissions in the initial application that the Panel's decision should be determined in accordance with the Chapter 6 Purposes.
43. The review Panel considered that there is nothing in the Chapter 6 Purposes that required it to find that the circumstances complained of were unacceptable circumstances. It did not appear to the review Panel that the circumstances complained of were unacceptable having regard to their effect on control or potential control, or their effect on the acquisition or proposed acquisition of a substantial interest.
44. The review Panel found that the Chapter 6 Purposes in section 602 did not support extending the bid.⁶

⁶ See further para 53.

Section 624

45. APA's bidder's statement said on the front cover that it was an "Offer ... to purchase all your shares...." The offer contained a term (clause 7.3(f)(i) on page 72) as follows:

7.3 Your Agreement

By signing and returning, faxing or e-mailing the Acceptance Form, or otherwise accepting this Offer in accordance with these Offer Terms, you will be deemed to have:

(f) including where this Offer is caused to be accepted in accordance with the ASTC Settlement Rules:

(i) irrevocably accepted this Offer in respect of all your Qantas Shares despite any difference between that number and the number of Qantas Shares shown on the Acceptance Form;

46. Clause 7.3 (a) authorised APA to alter the Acceptance Form by inserting correct details of the shareholder's Qantas shares.
47. APA submitted that the initial Panel had erred because it had given little or no weight to the fact that "APA may well have exceeded the 50% threshold in any event, by reason of the operation of clause 7.3(f)(i) of the Offer Terms", and thus the bid may have been extended by the operation of s624(2). This submission was made without APA clarifying whether it intended to rely on that clause.
48. If APA had met the 50% threshold, the bid had not closed and the circumstances described in the application could not give rise to unacceptable circumstances. If APA had not met the 50% threshold, the circumstances complained of by APA remain the same as considered by the review Panel, and its decision not to commence proceedings remains, in the review Panel's opinion, appropriate. It was for APA, not the Panel, to determine in the first instance whether clause 7.3(f)(i) applied and to make submissions in the light of that determination. It was not clear to the review Panel why the situation with clause 7.3(f)(i) had not been clarified already by APA.⁷

Public interest

49. Even if the review Panel had considered that there was a real likelihood that APA could provide evidence to establish that the circumstances would give rise to unacceptable circumstances, it could only make a declaration if it considered that doing so was not against the public interest after taking into account policy considerations that it considered relevant. The review Panel considered that a relevant policy consideration would be the effect on future takeovers or applications to the Panel of a declaration in these circumstances.
50. The Panel considered that there would be difficulty, in future takeovers and applications to the Panel, both deciding at what point a late-received acceptance was simply too late, and at what point it could be regarded as simply too late to resurrect a bid that had ended.

⁷ On 8 May 2007 ASIC modified Part 6.4 of the Act in relation to this takeover. The modification inserted a new section 624A, for the avoidance of doubt, that the bidder's voting power in the target is taken not to have increased to more than 50% in the last 7 days of the offer period for the takeover bid.

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51. The review Panel considered that it would not be in the public interest for this sort of uncertainty to be introduced into future takeovers or applications. Therefore, for this reason as well, there was no real likelihood of the Panel deciding to make a declaration of unacceptable circumstances. This reinforced the review Panel's decision not to commence proceedings.

CONCLUSION

52. The review Panel considered that the arguments and submissions of APA did not demonstrate any reasonable likelihood that the circumstances raised in the initial application and review application (the **circumstances**) would appear to the Panel to be unacceptable having regard to the effect of the circumstances on:
- (a) the control or potential control of Qantas; or
 - (b) the acquisition, or proposed acquisition, by any person of a substantial interest in Qantas.⁸
53. Under section 657A(3)(a), if a Panel is declaring circumstances to be unacceptable it must have regard to, among other things, the purposes of Chapter 6 set out in section 602. While the review Panel decided not to commence proceedings, it nevertheless considered that it was appropriate to, and did, have regard to the items in section 657A(3)(a). Looking at section 602, the purposes of Chapter 6 are (briefly):
- (a) To ensure that the acquisition of control over voting shares takes place in an efficient, competitive and informed market (see section 602(a)). The review Panel did not consider that the circumstances prevented this.
 - (b) To ensure that holders of shares, and the directors of the company, know the identity of a person who proposes to acquire a substantial interest, have a reasonable time to consider the proposal, and are given enough information to assess the merits of the proposal (see section 602(b)). The review Panel did not consider that the circumstances prevented this.
 - (c) To ensure that as far as practicable holders of the relevant class of voting shares all have a reasonable and equal opportunity to participate in any benefits (see section 602(c)). The review Panel did not consider that the circumstances prevented this.
54. Section 602(d) is not relevant here.
55. The review Panel considered whether the orders sought by APA would be likely to cause or prevent harm to, or would preserve the rights or interests of, any Qantas shareholders. Should the Panel make a declaration, it would need to consider under section 657D whether any orders it might make would either:
- (a) protect the rights or interests of any person affected by the circumstances. The review Panel did not consider orders necessary to protect the rights or interests of persons affected; or
 - (b) ensure that the takeover bid proceeded as far as possible in a way that it would have proceeded if the circumstances had not occurred. In effect, APA sought an order that it be required to continue its bid as if the investor's acceptance had

⁸ See Emmett J in *Glencore International AG v Takeovers Panel* [2005] FCA 1290.

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been received in time. The review Panel considered that the bid had proceeded as it should.

56. The review Panel would also need to consider whether any orders it might make would be unfairly prejudicial to any person.
57. In considering the strength of the evidence for making a declaration and orders, the review Panel also took into account that Qantas has not made any submissions to either the initial Panel or it.
58. The review Panel decided not to commence proceedings. It noted that there were also other possible remedies available to APA, such as making an application to the Australian Securities and Investments Commission or perhaps to a court.
59. The review Panel considered it appropriate in this case to consider whether it would be against the public interest for it to decline to commence proceedings. The review Panel decided that it would not be against the public interest for it to decline to commence proceedings.

DECISION

60. The review Panel decided not to commence proceedings.

Orders

61. The review Panel did not make a declaration of unacceptable circumstances or orders.
62. Because the review Panel did not make a declaration or orders, it did not make any orders as to costs.

Stephen Creese
President of the Sitting Panel
Decision dated 7 May 2007
Reasons published 7 June 2007