



In the matter of Arrow Tax Services Limited 02

[2007] ATP 11

Catchwords:

Class of shares – bid class shares – offer not for all the shares in the bid class – loyalty entitlement – whether loyalty payment part of bid consideration if paid to accepting and non-accepting shareholders – different payments to shareholders depending on period of shareholding – depot fees – cancellation of shares – reasonable and equal opportunity principle – disclosure – valuation statements – unsubstantiated and misleading statements – costs order – unlisted company – interim order – gateway to costs order

Corporations Act (Cth) 2001 – 602(a), 602(b), 602(c), 670F(b)

Australian Pipeline Limited v Alinta Limited [2007] FCAFC 55

El-Fahkri v Arrow Tax Services Limited [2007] SCV 67

Arrow Tax Services Limited, Kangaroo Petroleum Co Pty Ltd, Cabcharge Australia Limited

These are the Panel's reasons for declining to make a declaration of unacceptable circumstances in relation to the affairs of Arrow Tax Services Limited.

THE PROCEEDINGS

1. These reasons relate to an application (the **Application**) to the Panel from Arrow Tax Services Limited (**Arrow Tax**) on 1 May 2007 in relation to the affairs of Arrow Tax and the takeover bid by Kangaroo Petroleum Co Pty Ltd (**Kangaroo Petroleum and Bid**).

SUMMARY

2. At the time of the Application, Arrow Tax was an unlisted public company which had on issue 147 ordinary shares, 83 of which were held by individual shareholders and a further 64 held by a trustee. The Application related to an off-market takeover bid which Kangaroo Petroleum proposed to make for the 83 shares in Arrow Tax held by the individual shareholders but not the for 64 shares held by the trustee.
3. Arrow Tax submitted in the Application that Arrow Tax shareholders:
 - (a) did not all have a reasonable and equal opportunity to participate in any benefits accruing to shareholders through the Bid; and
 - (b) were not provided with enough information to enable them to assess the merits of the Bid.
4. On 11 May 2007 the Supreme Court of Victoria, in the matter of *El-Fahkri v Arrow Tax Services Limited* (no. 67 of 2007), determined that all of the shares in Arrow Tax were voting shares and of the same class.
5. The Panel was advised by Kangaroo Petroleum on 14 May 2007 that in light of the decision of the Supreme Court of Victoria, and in reliance on section 670F(b) of the

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Corporations Act (*Cth*) 2001¹, it did not intend to proceed with the Bid and would not be dispatching its bidder's statement to Arrow Taxi shareholders.

6. The Panel considered that there were issues in relation to the structure of, and disclosure in, the Bid that would have needed to be addressed had the Bid proceeded, although it had not finally determined the matter. However, the Panel considered that it did not have any evidence that the circumstances created by the bid had any on-going effect on the control or potential control of Arrow Taxi or on the acquisition or proposed acquisition of a substantial interest in Arrow Taxi, nor on the market for shares in Arrow Taxi. On that basis it considered that there were no longer unacceptable circumstances in existence. Therefore, in light of the events which occurred subsequent to receiving the Application, the only remaining issue was whether a costs order should be made. The Panel declined to make a declaration of unacceptable circumstances in relation to the Application. As the Panel declined to make a declaration, it did not make any final orders (including any costs orders).

THE PANEL & PROCESS

7. The President of the Panel appointed Irene Lee, Rodd Levy and Chris Photakis (sitting President), as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the Application.
8. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.
9. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

APPLICATION

Background

10. Arrow Taxi made an the application to the Panel dated 4 April 2007 (**Arrow Taxi 01 Application**) in relation to a proposed off-market takeover bid by Kangaroo Petroleum. The issues in the Arrow Taxi 01 Application were based on similar facts to those set out in the Application.
11. At the time of the Application, Arrow Taxi was an unlisted public company which had on issue 147 ordinary shares, 83 of which were held by individual shareholders and a further 64 held by a trustee, ATSLT Pty Ltd (**ATSLT**), on trust for the members of Arrow Taxi. Under article 12A(ii) of Arrow Taxi's articles of association, the voting rights attached to the shares held by ATSLT were suspended during any period that the shares were held by ATSLT.
12. Kangaroo Petroleum is a proprietary limited company, with 6 issued ordinary shares held by persons associated with the El-Fahkri family.
13. On 31 January 2007, Kangaroo Petroleum sent to a number of Arrow Taxi shareholders offers to acquire their Arrow Taxi shares.

¹ All statutory references are to the Corporations Act, unless otherwise indicated.

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14. On 26 February 2007, Kangaroo Petroleum lodged with ASIC a bidder's statement in respect of its Bid for the 83 shares held by the individual shareholders. No takeover bid was made in respect of the shares held by ATSLT.
15. On 26 March 2007, Kangaroo Petroleum lodged a replacement bidder's statement with ASIC in relation to the Bid (**Bidder's Statement**).
16. On 23 February 2007, Cabcharge Australia Ltd (**Cabcharge**) announced that it intended to make an offer for all the issued shares in Arrow Taxi. Cabcharge issued an updated announcement setting out the material terms of its proposed offer on 23 April 2007.
17. On 17 April 2007, the directors of Arrow Taxi convened an extraordinary general meeting of Arrow Taxi shareholders to be held on 12 May 2007 to consider amendments to the Arrow Taxi Constitution. Arrow Taxi submitted that the proposed amendments would have the effect that, upon the making of a takeover bid for Arrow Taxi shares or a scheme or arrangement proposal:
 - (a) the shares held by ATSLT would resume their voting rights; and
 - (b) the proceeds of sale of shares held by ATSLT would be held in trust for the Arrow Taxi shareholders (other than ATSLT) as at the date of the takeover offer or scheme of arrangement.
18. The full Federal Court handed down its decision in *Australian Pipeline Limited v Alinta Limited* [2007] FCAFC 55 on 20 April 2007. In light of this decision and the considerations set out in the Panel's media release of 30 April 2007 ([TP 07/19](#)), the Panel did not consider that it had jurisdiction to consider the Arrow Taxi 01 Application.
19. The Panel advised Arrow Taxi of its views following the *Australian Pipeline Limited* decision and invited Arrow Taxi to submit a new application, if it wished. The Panel advised Arrow Taxi that any new application should be framed solely in terms of section 657A(2)(a) and should explain why the circumstances complained of gave rise to unacceptable circumstances by reference to the terms of section 657A(2)(a) and the purposes of the Chapter 6 of the Act set out in section 602. Arrow Taxi subsequently lodged a revised application (ie, the Application) and the Panel accepted that the Application was within its jurisdiction.

Application

20. Arrow Taxi submitted in the Application that Arrow Taxi shareholders:
 - (a) did not all have a reasonable and equal opportunity to participate in any benefits accruing to shareholders through the Bid in that:
 - (i) the Bid was not for all the securities in the bid class because no offer was to be made to ATSLT; and
 - (ii) Arrow Taxi shareholders who were to receive an offer would not each be offered the same consideration under the Bid; and
 - (b) were not provided with enough information to enable them to assess the merits of the Bid in that Kangaroo Petroleum's bidder's statement contained a number of disclosure deficiencies, including insufficient information about Kangaroo

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Petroleum and its proposed conduct of the Arrow Taxi business, the valuation of Arrow Taxi and a proposed competing offer by Cabcharge for Arrow Taxi.

Declaration and orders sought

21. Arrow Taxi sought a declaration that the circumstances identified in the Application constituted unacceptable circumstances under section 657A(2)(a).
22. Arrow Taxi sought an interim order that Kangaroo Petroleum be prevented from despatching its bidder's statement to Arrow Taxi shareholders. Kangaroo Petroleum had indicated its willingness to undertake to withhold dispatch of its bidder's statement until the Panel's decision. However, on 2 May 2007, the President of the sitting Panel decided to make an interim order under section 657E of the Act that Kangaroo Petroleum not despatch its bidder's statement to Arrow Taxi shareholders until the first to occur of the Panel issuing its final decision in relation to the Application, making a further order, or 1 July 2007.
23. Arrow Taxi sought final orders under section 657D that Kangaroo Petroleum be prevented from dispatching its offer and bidder's statement to Arrow Taxi shareholders.

Events subsequent to receiving Application

24. On 11 May 2007 the Supreme Court of Victoria, in the matter of *El-Fahkri v Arrow Taxi Services Limited* (no. 67 of 2007), determined that all of the shares in Arrow Taxi were voting shares and of the same class. The action took place in relation to the proposed shareholders' meeting and the issue it resolved was relevant to one of the circumstances addressed in the Arrow Taxi 02 Application, being that the Bid was only for 83 shares held by individual shareholders.
25. Kangaroo Petroleum advised the Panel on 14 May 2007 that in light of the decision of the Supreme Court of Victoria, and in reliance on section 670F(b), it did not intend to proceed with the Bid and would not be dispatching its bidder's statement to Arrow Taxi shareholders.
26. Arrow Taxi subsequently advised that in view of Kangaroo Petroleum's decision not to proceed with its Bid, there was no need for the Panel to deal with the substantive issues raised in the Application. However, Arrow Taxi nevertheless sought a declaration, if the Panel determined that it was appropriate, as a "gateway" to an order for costs against Kangaroo Petroleum. Arrow Taxi submitted that the issues before the Panel had been fully argued in submissions prior to Kangaroo Petroleum's withdrawal of its bid, and that its principal objection to the Bid, that it was an offer for only some of the shares in the Arrow Taxi bid class, had been upheld by the Supreme Court decision.
27. The Panel considered that there were issues in relation to the structure of, and disclosure in, the Bid that would have needed to be addressed had the Bid proceeded, although it had not finally determined the matter. However, the Panel considered that it did not have any evidence that the circumstances created by the bid had any on-going effect on the control or potential control of Arrow Taxi or on the acquisition or proposed acquisition of a substantial interest in Arrow Taxi, nor on the market for shares in Arrow Taxi. On that basis it considered that there were no

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longer unacceptable circumstances in existence. Therefore, in light of the events which occurred subsequent to receiving the Application, the only remaining issue was whether a costs order should be made. The Panel declined to make a declaration of unacceptable circumstances in relation to the Application. The Panel considered that it was not against the public interest to decline to make the declaration. As the Panel declined to make a declaration, it did not make any final orders, including any costs orders.

DISCUSSION

28. As a result of events which occurred subsequent to receiving the Application, the Panel declined to make a declaration of unacceptable circumstances and final orders in respect of the Application. However, the Panel had considered the circumstances raised in the Application in some depth, prior to the subsequent events occurring, and considered that there were issues that would have needed to be addressed had the Bid proceeded. The Panel considered that, had the subsequent events not occurred, the Panel was likely to have made a declaration of unacceptable circumstances in respect of the Application.
29. Set out below is a brief discussion of the circumstances which the Panel was likely to have declared unacceptable, had the subsequent events not occurred.

Offer for shares in a bid class

30. Arrow Taxi submitted that the Bid was not in respect of all the shares in the bid class and accordingly the principle in section 602(c) was offended.
31. The Panel had concerns that the structure of the Bid, being only for the 83 shares held by individual shareholders and not for the 64 shares held by ATSLT, may have offended the principle that, as far as practicable, the holders of the relevant class of voting shares all have a reasonable and equal opportunity to participate in any benefits accruing to holders through any proposal under which a person would acquire a substantial interest in the company (section 602(c)).
32. The Panel, however, considered that the issue regarding classes of shares was technical, because commercially and economically Arrow Taxi shareholders would receive the same total consideration whether the Kangaroo Petroleum Offer was made for 83 shares, or 147 shares. The Kangaroo Petroleum Offer consideration was to be adjusted if the offer was required to be made for all 147 shares (subject to Kangaroo Petroleum's proposed mechanism for dealing with the ATSLT shares being workable).
33. However, the Panel ultimately did not need to decide this issue as it was determined by the decision of the Supreme Court of Victoria.

Loyalty entitlement

34. Kangaroo Petroleum's bidder's statement stated that if Kangaroo Petroleum gained control of Arrow Taxi, then Arrow Taxi shareholders would be entitled to a loyalty entitlement based on the number of years that shareholders paid depot fees to Arrow Taxi. The loyalty entitlement was dependent on Kangaroo Petroleum securing control of Arrow Taxi and on the shares in ATSLT being cancelled for no

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consideration. The loyalty entitlement was proposed to be available to all shareholders, whether or not they accepted the Bid.

35. Arrow Taxi had submitted that the loyalty entitlement formed part of the Bid consideration and that shareholders would not obtain equal consideration under the Bid as the amount of the loyalty entitlement would differ depending on the number of years that the shareholder had paid depot fees to Arrow Taxi.
36. While it appeared to the Panel that the loyalty payment may not have formed part of the Bid consideration, the Panel had some concerns about the proposed mechanism for payment of the loyalty entitlement and about the tax and corporate law consequences for the Arrow Taxi shareholders (whether or not they accepted the Bid) who received the loyalty entitlement. The Panel also had some concerns about the proposed mechanism for cancelling the shares held by ATSLT, as proposed by Kangaroo Petroleum, which was a condition to the payment of the loyalty entitlement.
37. However, the Panel ultimately did not need to decide on these issues.

Disclosure Issues

38. Arrow Taxi submitted that there were a large number of disclosure deficiencies in the Bidder's Statement.
39. The Bidder's Statement included a number of statements as to the value of Arrow Taxi and the Bid, for example, that the offer consideration was "generous", a "full and fair" and "substantial" offer. The Bidder's Statement did not include accompanying reasons or explanations as to how the value statements were derived.
40. The Panel was concerned that the statements as to valuations may have offended the principles in section 602(a) and (b).
41. Arrow Taxi also submitted that there were a number of unsubstantiated and misleading statements in the Bidder's Statement. The Panel similarly had concerns about these statements and considered that Kangaroo Petroleum needed to substantiate those statements or withdraw them for the Bidder's Statement.
42. However, the Panel ultimately did not decide on these issues.

DECISION

43. As a result of the subsequent events, the Panel declined to make a declaration of unacceptable circumstances in relation to the Application. The Panel considered that it is not against the public interest to decline to make the declaration. As the Panel declined to make a declaration, it did not make any final orders, including any costs orders.

Chris Photakis

President of the Sitting Panel

Decision dated 28 May 2007

Reasons published 25 July 2007