Takeovers Panel

Reasons for Decision
BigAir Group Limited

In the matter of BigAir Group Limited

[2008] ATP 12

Catchwords:

Association - appointment and removal of directors - board control – association – requisition of meeting – decline to commence proceedings

BigAir Group Limited – Vorpal Pty Limited – Mr Vivian Stewart – JMAS Pty Limited – Mr Jason Ashton – Mr Patrick Choi

Corporations Act 2001 (Cth) sections 12(2), 249D, 602, 606, 657A, 657C, 657E, 671B

ASIC Act 2001 (Cth) section 192

INTRODUCTION

1. The Panel, Diana Chang, Marie McDonald (sitting President) and Peter Scott, declined to commence proceedings on an application concerning alleged association between certain director/shareholders and other shareholders regarding changes to the composition of the board of BigAir.

2. In these reasons the following definitions apply:

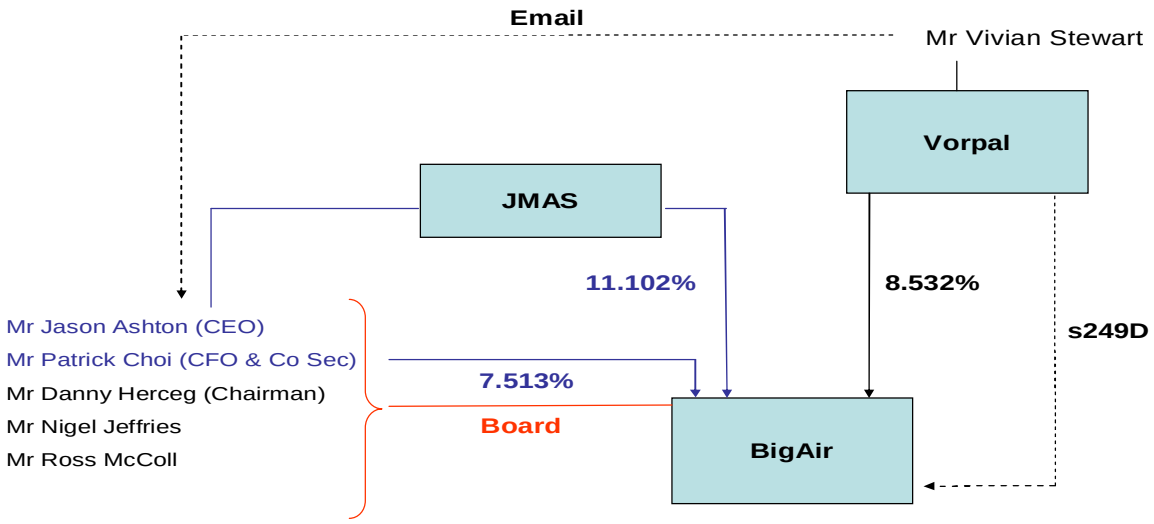
Term	Meaning
BigAir	BigAir Group Limited
JMAS	JMAS Pty Limited
Shareholders	29 BigAir shareholders identified in the application and alleged to be associated in relation to changes to the composition of the BigAir board
Vorpal	Vorpal Pty Limited

DISCUSSION

Facts

3. BigAir is listed on ASX (ASX code: BGL) and has 86,284,714 ordinary shares on issue.

4. Various relationships between the parties are described in the following diagram:



On 9 April 2008, Vorpal, a company wholly owned by Mr Vivian Stewart, acquired 6,416,256 ordinary shares in BigAir (7.436%), increasing its holding in BigAir to 7,361,704 ordinary shares (8.532%).

5. On 23 April 2008, Mr Stewart emailed Mr Jason Ashton, CEO of BigAir, stating that he was a founding shareholder and was "interested to participate at Board level with [BigAir]".

6. On 24 April 2008, Mr Ashton forwarded Mr Stewart's email to BigAir directors (other than Mr Ross McColl) and a Mr Catelan, whose role was unclear. Mr Ashton proposed that Mr Stewart replace Mr McColl, saying:

   "I have spoken to shareholders representing more than 48% of the issued capital in [BigAir] … and they are fully supportive of this change. They wish to notify you that if the board composition is not agreed and resolved by 27th April then we shall be lodging a notice of intention to call a shareholders meeting on Monday 28th April 2008. If you would like to speak directly with any of these shareholders I can provide the contact details."

7. Presumably the proposed changes were not agreed because on 30 April 2008 Vorpal lodged a request that BigAir convene a general meeting of shareholders under s 249D of the Corporations Act.[1] Vorpal proposed the following resolution:

   1. That Mr Ross McColl be removed as a director of BigAir Group Limited, with immediate effect.

   2. That Mr Vivian Stewart be appointed as a director of BigAir Group Limited, with immediate effect.

[1] All references are to the ***Corporations Act 2001 (Cth)*** unless otherwise stated.

8. Mr Patrick Choi, CFO and company secretary of BigAir, forwarded the s 249D notice to the directors.

9. On 9 May 2008, Messrs Ashton and Choi received a letter from BigAir's lawyers, Freehills, copied to the Shareholders, raising concerns about a "collective agreement" between the 29 shareholders referred to in Mr Ashton's email of 24 April (see paragraph 6). Mr Stewart received a similar letter. The letter sought details of conversations and correspondence.

10. On 15 May 2008 Mr Ashton replied, denying the association and saying:

"It is part of my role as CEO of this company to ascertain the sense of the larger shareholders regarding corporate governance generally … it is certainly putting it too strongly to suggest that any of the shareholders agreed or committed themselves to vote in favour of the proposal.

It is also putting it too highly to suggest that there was some kind of collective action by the shareholders with whom I spoke....

For the most part, the shareholders listed in my email would not have been aware of the views of the other shareholders until you copied your 9 May email to them. Your suggestion that they should all have disclosed some kind of association between themselves is therefore unfounded.

… there are simply no agreements…."

11. Also on 15 May, Mr Stewart emailed Freehills to confirm:

"I have no agreements, arrangements or understanding with the Shareholders in respect of my share acquisition and my proposal to join the board."

12. On 23 May 2008, Mr Choi emailed the BigAir board and Freehills denying the association allegation.

Application

13. BigAir applied on 23 May 2008 for a declaration and orders, submitting that:

    (a) The Shareholders, or at least Messrs Stewart, Ashton and Choi, were associated

    (b) Mr Stewart's purchase of 7.436% of BigAir on 9 April 2008 breached s606 by reason of his association with Messrs Ashton and Choi (and possibly other Shareholders)

    (c) None of Messrs Stewart (Vorpal), Ashton (JMAS) and Choi nor any of the other Shareholders has complied with s671B and

    (d) the acquisition of control over the voting shares of BigAir had not taken place in an efficient, competitive and informed market and that non-associated shareholders have not had an equal opportunity to participate in any benefits that might result from the acquisition of a substantial interest in BigAir.

14. BigAir requested that the Panel use its power under s192 of the ASIC Act to summon people to appear and give evidence and produce documents, in order to ascertain the timing and extent of the association.

Interim Orders

15. BigAir sought interim orders that Messrs Stewart (Vorpal), Ashton (JMAS) and Choi and the other Shareholders not transfer, dispose of or otherwise deal with any of their BigAir shares in any respect, including exercising any voting rights.

Final Orders

16. BigAir sought final orders that Messrs Stewart (Vorpal), Ashton (JMAS) and Choi and any the other Shareholders found to be a party to the relevant agreement:

    (a) comply with the substantial holder provisions

    (b) either:

        (i) make a joint takeover offer for all the shares in BigAir not held by them or

        (ii) have any BigAir shares acquired by them in breach of s606 vested in ASIC

        with the associates being restrained from dealing with their BigAir shares until such order has been complied with

    (c) be restrained from voting their BigAir shares at the general meeting and

    (d) pay BigAir's costs of the application.

DECISION

17. It is not the role of the Panel to undertake investigations without first being provided with substantive allegations and reasons for, or evidence supporting, those allegations.[2] Recognising that issues of association are notoriously difficult for outsiders to prove,[3] the Panel's starting point is that it is for an applicant to demonstrate a sufficient body of material to convince the Panel that association can be established (albeit perhaps with inferences being drawn).[4]

18. The Panel was not satisfied in this case. In its view, there was not a sufficient body of material to warrant the Panel undertaking an investigation to establish an association. Even if an association were established, the Panel considered that there was no reasonable prospect that it would make a declaration of unacceptable circumstances.

Insufficient material

19. Critically, the applicant sought to rely on conversations suggesting that the Shareholders, holding up to 48% of the shares, were fully supportive of the change. The Panel would not regard as associates shareholders who were of a like mind concerning a proposal (such as with respect to the composition of a board), unless it was likely (by probative material or likely inferences) that

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[2] ***Rusina Mining NL*** [2006] ATP 13

[3] ***Dromana Estate Limited 01R*** [2006] ATP 8

[4] ***Mt Gibson Iron Ltd*** [2008] ATP 4

there was a relevant agreement or they were acting in concert. In the Panel's view, it is not sufficient that the persons separately will act in the same manner,[5] or that those intentions have been ascertained by canvassing the issue with them.

20. Putting aside allegations of association among the Shareholders left allegations of association concerning only Messrs Stewart, Ashton and Choi. The Panel was not satisfied that it was likely to find an association between these three parties. It notes that Messrs Ashton and Choi denied any agreement. On the one hand this is not surprising. On the other, it does nothing to assist the applicant. It notes also that the submissions involving Mr Choi turned on his having been copied into Mr Ashton's email of 24 April and not then denying his involvement (which the Panel would not regard him as being required to do), and on acting as Mr Stewart's agent in relation to service of the s249D notice (which the Panel would not regard as unusual as he was company secretary).

No reasonable prospect of a declaration

21. The Panel considered it likely that the only real issue, assuming associations were established, would be contraventions of the substantial holding provisions. It did not consider the situation to be the same as in ***Flinders Diamonds,***[6] where a 29% shareholder gave another shareholder an irrevocable proxy pursuant to an understanding as to the means by which the parties proposed to achieve their common goal of spilling the board of Flinders Diamonds. The Full Court said:

"It is apparent from this review of the evidence that, from at least late June 2002, Barry and Campbell had resolved upon a plan to replace the board of Flinders. That of itself is not sufficient to constitute a breach of section 606. Something more than that each had a common intention to bring about the desired result is required. The evidence shows that, not only did they have a common intention, but that Barry had also agreed to give Campbell and irrevocable proxy to vote…."[7]

22. The Full Court went on to consider s609(5), which provides that a person does not have a relevant interest merely because they appoint someone as a proxy if the appointment is for one meeting only and the person has not given valuable consideration for the appointment. The court did not think that s609(5) applied because the proxy did not apply to one meeting only.

23. In this case, there is no evidence of a proxy, irrevocable or otherwise or anything else that could be characterised as a transaction. Accordingly, the question becomes whether there are likely to be unacceptable circumstances by reason of a failure to lodge a substantial holding notice.

24. Compliance with substantial holding disclosure obligations is important to ensure an efficient, competitive and informed market, and the Panel considers any material failure to comply with them is contrary to the policy objectives of

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[5] Cf ***Adsteam Building Industries v Qld Cement*** [1985] 1 Qd R 11

[6] ***Flinders Diamonds Ltd v Tiger International Resources Inc and Ors*** [2004] ACSR 199

[7] Ibid at [35].

s602.[8] However, in this case any contravention has more to do with a possible change in the composition of the Board than a control transaction. The Panel considers it unlikely that it would make a declaration or orders in respect of the notice in the present case.

25. The Panel notes that there might be a control transaction involving the acquisition by Vorpal of approximately 7.4% of BigAir on 9 April 2008. That acquisition would be the acquisition of a substantial interest. However, unless it was also established that (at least) Messrs Stewart, Ashton and Choi were associated before that acquisition, there would be no contravention of s606 by reason of that transaction. The Panel is not satisfied that it is likely that such an association would be established. And in this respect the applicant acknowledges that:

"[i]t is presently unclear when the relevant agreement was made (or when particular Associated Shareholders became parties to the agreement) and, accordingly, when these associations arose. The timing issue is important in making a determination with respect to:

- *when any failure to comply with subsection 671B(1) occurred; and*
- *whether there has been any breach of section 606…".*

26. Moreover, the circumstances that the applicant is complaining about relate to composition of the BigAir board, without affecting the distribution or exercise of voting power in BigAir.[9] Accordingly, on the material provided, the Panel did not consider there was any reasonable prospect it would conclude that the circumstances affected control, or potential control, of BigAir or the acquisition of a substantial interest in BigAir.

27. Accordingly, the Panel decided not to conduct proceedings in relation to the application under Regulation 20 of the ASIC Regulations.

Costs orders

28. As the Panel has made no declaration of unacceptable circumstances, it makes no orders as to costs or otherwise.

Marie McDonald
President of the Sitting Panel
Decision dated 29 May 2008
Reasons published 2 June 2008

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[8] See, for example, ***Village Roadshow Limited*** [2004] ATP 4 and ***Rivkin Financial Services Limited*** [2004] ATP 14

[9] By analogy, see ***GoldLink GrowthPlus Ltd*** [2007] ATP 23