



Australian Government

Takeovers Panel

Reasons for Decision Transurban Group [2010] ATP 5

Catchwords:

decline to conduct proceedings - defeating conditions - disclosure - dispersion strategy - effect on control - frustrating action - interim order - misleading announcement - rights issue - scheme of arrangement

Corporations Act 2001 (Cth), sections 708AA

ASIC Regulation 20

Guidance Note 12 – Frustrating Action

Marcarpin Cook Limited [2008] ATP 20

INTRODUCTION

1. The Panel, James Dickson, Ian Ramsay (sitting President) and Jennifer Seabrook declined to conduct proceedings on an application by CP2 Limited in relation to the affairs of Transurban Group. The application concerned a proposal from a consortium for Transurban and an underwritten 1 for 11 renounceable rights issue announced by Transurban on 10 May 2010. The proposals did not constitute a genuine potential offer and, even if they did, the actions of the Transurban board did not constitute a frustrating action. The Panel also did not consider that the rights issue would have any material effect on the control of Transurban. Accordingly the Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.
2. In these reasons, the following definitions apply.

acquisition	Agreement to acquire the Lane Cove Tunnel in Sydney
Canadian Pension	Canadian Pension Plan Investment Board
consortium	CP2, Canadian Pension and Ontario Teachers
CP2	CP2 Limited
Ontario Teachers	Ontario Teachers Pension Plan
rights issue	Fully underwritten accelerated renounceable 1 for 11 entitlement offer, at an offer price of \$4.60 per security, announced by Transurban on 10 May 2010
Transurban	Transurban Group, a stapled structure comprising shares in Transurban Holdings Limited and Transurban International Limited and units in the Transurban Holding Trust

FACTS

3. On 5 November 2009, Transurban announced that its board had received and rejected a proposal from Canadian Pension and Ontario Teachers which, if implemented, would involve a change of control of Transurban via a scheme of arrangement.
4. On 8 May 2010 the consortium advised Transurban's chairman that it intended to submit a proposal to acquire control of Transurban by 11 or 12 May 2010.¹ On 9 May Transurban's chairman informed the consortium that it was entering into the acquisition, that this would be announced the next day and that Transurban was still considering how it would fund the acquisition.
5. On 10 May 2010 Transurban announced the acquisition and that it would be partly funded by the rights issue. On the same day Transurban also lodged with ASX an investor presentation in relation to the acquisition and rights issue and also a cleansing notice under s708AA.²
6. The institutional component of the rights issue was open from 10 am on 10 May 2010 and was scheduled to close at 11 am on 11 May 2010.
7. In the afternoon of 11 May, the consortium submitted a proposal to acquire Transurban by scheme of arrangement for cash (\$5.57 per security) - conditional on, among other things, the rights issue not proceeding. On 12 May, after discussions with Transurban, the consortium submitted another proposal (\$5.42 cash per security), which was not conditional on the rights issue not proceeding. Later on the same day Transurban announced that it had received and rejected both proposals.
8. On 17 May 2010 Ontario Teachers sold all (or nearly all) of its 13% stake in Transurban.

APPLICATION

9. By application dated 24 May 2010, CP2 sought a declaration of unacceptable circumstances. CP2 submitted that:
 - (a) the rights issue constituted a frustrating action in relation to the consortium's proposals
 - (b) Transurban announcements in relation to the rights issue were misleading and the rights issue was conducted in a misinformed market
 - (c) the timing and conduct of the rights issue precluded the consortium and offshore investors from participating

¹ CP2 submitted that the consortium had been in discussions with Transurban some time before 9 May 2010

² references are to the *Corporations Act 2001* unless otherwise indicated

- (d) the institutional bookbuild under the rights issue was closed 30 minutes early and
 - (e) the dispersion strategy under the rights issue may be ineffective.
10. CP2 submitted that the effect of the circumstances was to:
- (a) interfere with the reasonable and equal opportunity of security holders to participate in, and benefit from, the change of control transaction proposed by the consortium
 - (b) inhibit the efficient, competitive and informed market for control of Transurban securities and
 - (c) deny security holders a reasonable time to consider the proposed change of control transaction and prevented them from having enough information to enable them to assess the merits of the proposal.

Interim orders sought

11. CP2 sought interim orders, including that Transurban be restrained from proceeding with the rights issue in its current form and preventing the issue and allotment of any shares on exercise of rights.
12. The application was made on 24 May 2010. Settlement of the institutional offer and the initial retail offer was scheduled to occur on 25 May 2010 and the securities under those offers were scheduled to be issued on 26 May 2010, with trading commencing on that day.
13. Transurban submitted that the interim order would be prejudicial and that it was highly likely the underwriter would terminate the underwriting agreement, which would affect the acquisition.
14. CP2 submitted that the application had not been lodged too late because:
- (a) until Ontario Teachers sold its stake on 17 May 2010, it considered that any other action may hamper discussions aimed at progressing the proposal and
 - (b) CP2 had changed its legal advisors on 19 May 2010.
15. The President of the Panel declined to make the interim order. The President was not satisfied, given the timing of the application, that the risk that unacceptable circumstances would continue or worsen outweighed the potential adverse effects of orders.

Final orders sought

16. CP2 sought final orders including to the effect that:
- (a) Transurban be restrained from proceeding with the rights issue in its current form or

- (b) if the rights issue is allowed to proceed, the institutional component be reopened to allow further acceptances or withdrawals, corrective disclosure be made and the rights issue be made subject to security holder approval.

DISCUSSION

Frustrating action

17. CP2 submitted that, prior to announcing the acquisition and rights issue, Transurban was aware of the potential offer from the consortium. It submitted that Transurban knew that the consortium would be unlikely to proceed with the proposal if the acquisition funding structure involved an equity raising.
18. CP2 submitted that this constituted a frustrating action because, among other things, the consortium was now unable to undertake the proposed control transaction as the rights issue will significantly expand Transurban's issued capital and require more consideration.
19. The Panel's guidance on frustrating action applies to a 'potential bid', which is defined as "*a genuine potential bid communicated to target directors publicly or privately which is not yet a formal bid under Chapter 6*".³ The consortium's proposals were for the acquisition of Transurban by way of scheme of arrangement. These were subject to a number of conditions, including Transurban board support and (on the second proposal) financing. Both proposals were rejected. The proposals did not constitute potential bids because they were proposed schemes and they were rejected.
20. We consider the consortium's proposals to be different to AMP's proposal in *MacarthurCook Limited*⁴ which involved a proposal for a bid that could have been put to shareholders on a hostile basis. The Transurban board has been subject to at least 3 proposals⁵ for schemes of arrangement and rejected all of them. There is no suggestion that the consortium would consider making a takeover bid.
21. In any event, even if the proposals could be considered to be genuine potential offers, we do not consider that there is any prospect that the acquisition and rights issue would constitute a frustrating action. The consortium put a revised proposal to Transurban that was not conditional on the rights issue not proceeding. Moreover in our view the proposals were not frustrated by reason of the rights issue expanding Transurban's capital base.
22. We consider that the Transurban board was entitled to make the decisions it did.

Misleading announcements

23. In its investor presentation, Transurban:

³ GN12 paragraphs 5 and 6

⁴ [2008] ATP 20

⁵ CP2 was only party to two of the proposals

- (a) discussed the potential for the consortium to submit a change of control proposal. CP2 submitted that this was misleading because the consortium had indicated to Transurban that it 'would actually' submit a proposal and
 - (b) noted that the consortium had informed Transurban (among other matters) that they would need to consider how the acquisition funding structure would affect their ability to submit a proposal. CP2 submitted that this was misleading because it incorrectly suggested that the proposed offer by the consortium was contingent on the structure of the acquisition.
24. CP2 submitted, in support of its frustrating action claim, that the consortium indicated to Transurban that there was a 'strong chance' that there would be no proposal if Transurban sought to raise equity. We therefore do not think that Transurban's statements were misleading.
25. In the cleansing notice lodged on 10 May (see 5 above), Transurban disclosed:
- "the Rights Issue is not expected to have a material effect or consequence on the control of Transurban."*
26. CP2 submitted that this was misleading because discussions with the consortium made it clear to the board that the rights issue would 'likely thwart any offer for control'. As discussed above, we do not consider that the rights issue frustrated any genuine potential offer. Given that the rights issue is pro rata and made on a 1 for 11 ratio, we do not consider that it will have any material effect on control.
27. CP2 also submitted that this statement was misleading because the rights issue resulted in Ontario Teachers selling its stake in Transurban due to its investment mandate, which required that it not invest in listed infrastructure assets. We do not understand this submission, as the implication would seem to be that Ontario Teachers holding its stake in Transurban was in breach of that mandate, regardless of the rights issue. In the event, we did not need explore this submission further.

Timing and conduct of rights issue

28. CP2 submitted that the 'highly accelerated' timing of the rights issue prevented many institutional investors, particularly offshore investors in different time zones, having an opportunity to participate. Accelerated rights issues are a well accepted form of equity raising in Australia and foreign institutional investors are familiar with them and the time frames involved. We do not consider the rights issue in this case to be out of the ordinary. We also note Transurban's submission that over 90% of the entitlements of eligible foreign institutional holders (including all 4 of the 5 remaining Canadian holders, other than Ontario Teachers and Canadian Pension) were taken up within the time provided.
29. CP2 also submitted that, after the announcement of the Transurban board's rejection of the consortium's second proposal at 8.49 am on 12 May 2010, the institutional bookbuild, scheduled to close at 11 am, was closed 30 minutes early. CP2 submitted that this provided insufficient time for institutions to consider the new information and decide whether they wished to alter their subscriptions.

30. We do not consider in this case that closing the institutional book build 30 minutes early would constitute unacceptable circumstances. In any event the announcement of the rights issue referred to the timetable as 'indicative' and the investor presentation lodged on the same date specifically noted that the date and times may be subject to change without notice.

Dispersion strategy

31. CP2 submitted that the dispersion strategy under the rights issue 'may' be ineffective given a number of factors.
32. Given that we do not consider there to be any material control effect arising from the rights issue, we did not need to consider this (speculative) submission.

DECISION

33. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).
34. We had concerns about the timeliness of the application but did not need to take this any further.

Orders

35. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

Ian Ramsay
President of the sitting Panel
Decision dated 28 May 2010
Reasons published 31 May 2010