



Australian Government

Takeovers Panel

**Reasons for Decision
RCL Group Limited
[2012] ATP 2**

Catchwords:

Decline to conduct proceedings – appointment of directors – corporate control – shareholder approval – board spill – finance facilities – interim order withdrawn

Corporations Act 2001 (Cth), sections 50AA, 249D, 602, 602A, 657A

Australian Securities and Investments Commission Regulations 2001 (Cth), regulation 20

Bowen Energy Limited [2007] ATP 22, Rivokin Financial Services Limited 01 [2004] ATP 14, St Barbara Mines Limited 02 [2004] ATP 13, Village Roadshow Ltd 02 [2004] ATP 12, Grand Hotel Group [2003] ATP 34, AMP Shopping Centre Trust 02 [2003] ATP 24, Online Advantage Limited [2002] ATP 14

INTRODUCTION

1. The Panel, Peter Hay (sitting President), Rodd Levy and Nora Scheinkestel declined to conduct proceedings on an application concerning clauses in a financing agreement that gave rise to a ‘review event’ (or ‘event of default’) upon changes to RCL Group Limited’s board of directors (or key persons). The applicant submitted that these clauses entrenched the incumbent directors and certain management and acted as a ‘poison pill’. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.
2. In these reasons, the following definitions apply.

board spill resolutions	Resolutions seeking the removal of two directors and the appointment of two directors to be considered at a general meeting of RCL shareholders requisitioned under section 249D ¹
LTHC	LTHC Pty Ltd
Payce	Payce Industries Pty Ltd
RCL	RCL Group Limited
Relevant Clauses	Clauses 19.1(u) and 20.1(g) in a Corporate Facility Agreement between RCL and Torchlight, summarised in paragraph 9 below and similar clauses in related financing documents
Requisitioning Shareholders	Payce, LTHC and Lanox Pty Ltd (shareholders of RCL holding a combined interest of approximately 18.5%)
Torchlight	Torchlight Real Estate Fund Limited

¹ Unless otherwise indicated, references are to the *Corporations Act 2001 (Cth)*

FACTS

3. RCL is an ASX listed company (ASX code: RLG).
4. On 27 April 2011, RCL appointed Mr McTigue to its board, at the request of Payce.² Payce is a substantial shareholder of RCL and one of the Requisitioning Shareholders.
5. On 17 November 2011, RCL announced that it had been advised that its primary lenders, BOS International (Australia) Limited and Capital Finance Australia Limited, had entered into an agreement to novate and assign their project and corporate debt facilities to Torchlight.³
6. On 14 December 2011, the Requisitioning Shareholders requisitioned a general meeting of RCL shareholders to consider the board spill resolutions.
7. On 3 January 2012, RCL released to ASX a letter to shareholders stating that any proposed changes to the composition of the board can be subject to review by RCL's primary lender and, if it is not satisfied with the review, the primary lender can declare an 'event of default'.
8. On 24 January 2012, RCL announced that the assignment of its project and corporate debt facilities to Torchlight was complete.
9. On 8 February 2012, RCL released to the ASX a letter from Torchlight which confirmed that the changes to the board sought by the Requisitioning Shareholders, if approved, would result in a 'review event' and may trigger an 'event of default' under the Relevant Clauses. Under clause 20.1(g), any appointment, resignation or removal of a director of, among others, RCL or a group company triggers a 'review event'. Under clause 19.1(u), an 'event of default' occurs should certain named persons cease to be officers or key persons of RCL and not be replaced by persons approved by Torchlight.⁴
10. On 9 February 2012, Payce wrote to Torchlight seeking a waiver of the Relevant Clauses. Torchlight refused, noting that:
 - (a) as Mr McTigue was an appointee of Payce, if the board spill resolutions were passed, the board of RCL would be controlled by Payce and
 - (b) the proposed changes to the board would adversely affect the relationship between RCL and Torchlight.
11. On 15 February 2012, the general meeting at which the board spill resolutions were to be considered was adjourned until 4.00pm on 14 March 2012.

² Postscript – Mr McTigue resigned on 15 February 2012

³ The announcement also noted that RCL had been approached by Torchlight with a recapitalisation proposal, but that discussions were preliminary and incomplete. The Panel was not provided with, and did not seek, a copy of the recapitalisation proposal. The recapitalisation proposal is also referred to in RCL's letter to shareholders dated 3 January 2012

⁴ The Panel was not provided with, and did not seek, a copy of the Corporate Facility Agreement. The clause summaries are based on information provided in the application

APPLICATION

Declaration sought

12. By application dated 10 February 2012, Payce sought a declaration of unacceptable circumstances. Payce submitted that both the existence of, and Torchlight's refusal to consent to or waive, the Relevant Clauses in response to the board spill resolutions constituted unacceptable circumstances having regard to the effect:
 - (a) the Relevant Clauses were having on the control of RCL and
 - (b) the Relevant Clauses were likely to have on the potential control of RCL.
13. Payce submitted that the effect of the circumstances was to entrench the incumbent board and management, restrict shareholders' ability to exercise their voting power in an unfettered manner and prevent a takeover bid from ever being made without the consent of the RCL board and Torchlight.

Interim order sought

14. An interim order was initially sought, to the effect that the Chairman of the requisitioned meeting be ordered to adjourn the meeting for one week, but was withdrawn by Payce on 13 February 2012.

Final orders sought

15. Payce sought final orders to the effect that Torchlight be prevented from exercising any rights in connection with the Relevant Clauses which may be triggered by the approval of the board spill resolutions.

DISCUSSION

16. Payce submitted that the Relevant Clauses entrenched the incumbent directors and certain management and acted as a 'poison pill', hindering an active market for corporate control. This was, it submitted, because no bidder would seek to acquire any influential shareholding in RCL if, as a practical matter, it could not vote freely on resolutions regarding composition of the board. This, it submitted, had an effect on the 'control' of RCL.
17. The board spill resolutions are a case of shareholders seeking to exercise their existing voting power. In our view, the exercise of the lender's contractual rights in this case in response to the approval of the board spill resolutions, does not change the circumstances into a control transaction in the relevant (Chapter 6) sense.⁵
18. Payce submitted that the Relevant Clauses were effectively a veto right (and thus a "power or right in relation to the company" pursuant to section 602A) which removed the ability of RCL shareholders to vote in an unfettered manner on board representations. We do not agree.

⁵ Compare section 50AA. *Bowen Energy Limited* [2007] ATP 22 at [29-32], *Riokin Financial Services Limited* 01 [2004] ATP 14 at [26], *St Barbara Mines Limited* 02 [2004] ATP 13 at [9-10], *Grand Hotel Group* [2003] ATP 34 at [7 and 51-53] and *Online Advantage Limited* [2002] ATP 14 at [53-56]

19. The Relevant Clauses do not affect the voting power of shareholders in RCL, or act as a fetter on their voting discretion. Torchlight cannot determine the outcome of any RCL shareholder vote, but has contractual rights that are enlivened upon a change to the composition of the board. We note that, under clause 20.1(g) of the Corporate Facility Agreement, a 'review event' only becomes an 'event of default' if it cannot be demonstrated to Torchlight's satisfaction that the change in the composition of the board will not have a material adverse effect.
20. There may be circumstances in which clauses like the Relevant Clauses could be unacceptable. For example, if the clauses were effectively a 'device' in an agreement between a company and, say, a substantial shareholder as lender designed to affect control, that may give rise to unacceptable circumstances. No device was evident here.
21. While the Relevant Clauses may have been, in our experience, somewhat unusual, the fact that a company enters into such arrangements in order to obtain finance is not, without more, a matter for the Panel. This is particularly the case when a significant sum of money has been lent and the ability of the company to continue as a going concern has been in doubt.⁶
22. Payce referred to the decision in *AMP Shopping Centre Trust 02* [2003] ATP 24 and compared the operation of the Relevant Clauses to the pre-emptive rights in that matter which the Panel suggested would entrench the existing responsible entity and "*would therefore constitute unacceptable circumstances, absent informed unitholder approval*".⁷ Torchlight submitted that the two matters were distinguishable. We agree. The unacceptable circumstances in *AMP Shopping Centre Trust 02* concerned pre-emptive rights which gave a related party a right to purchase a majority of assets of the target, which were "*irreplaceable and uniquely valuable*", in the event of a change of shareholding control. Here, in the event of a change to the board, Torchlight's ultimate right is to require repayment of any outstanding money lent. This right is generally consistent with the rights of all lenders.
23. Payce submitted that the Relevant Clauses were not disclosed to the market until 3 January 2012 and even then inadequately. We do not think this changes the position.
24. Payce submitted that the Relevant Clauses (including Torchlight's refusal to consider a consent or waiver application from anyone other than RCL) hinder an active market for the control of RCL. We do not agree. It is common for control transactions to be conditional on consent being given, or waivers being granted, by a company's major financier, or quite commonly for the acquirer to plan alternative financing for the target post-transaction.

DECISION

25. 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

⁶ RCL's annual report for the financial year ended 30 June 2011 noted a "*material uncertainty regarding RCL's continuation as a going concern*"

⁷ *AMP Shopping Centre Trust 02* [2003] ATP 24 at [21]

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decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

Orders

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

Peter Hay
President of the sitting Panel
Decision dated 17 February 2012
Reasons published 20 February 2012

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Advisers

Party	Advisers
Payce Industries Pty Ltd	Clifford Chance
LTHC Pty Limited	Clifford Chance
Lanox Pty Limited	Clifford Chance
Torchlight Real Estate Fund Limited	Baker & McKenzie
RCL Group Limited	Blake Dawson