Australian Government

Takeovers Panel

Reasons for Decision
The President's Club Limited
[2012] ATP 10

Catchwords:

Time share – stapled securities – unlisted company – more than 50 members – downstream acquisition – voting shares – deed poll restricting voting – acquisition of a relevant interest – item 9 – item 15 - unacceptable circumstances - declaration – orders – voting freeze – acquisition and disposal freeze – freeze lifted if bid made

Corporations Act 2001 (Cth), sections 9, 602, 606, 608, 609, 611 item 9, 611 item 15, 617, 621(3), 631(1), 657A, 657B, 657C, 657D

ASIC Act s 127, 184, 185, 186

ASIC regulation 13(c)

Guidance Note 1 "Unacceptable Circumstances"

(Cth) v Alinta Limited [2008] HCA 2; Edensor Nominees Pty Ltd v ASIC (2002) 41 ACSR 325; C P Ventures Pty Ltd v McKeon [1999] FCA 1272; ASIC v Yandal Gold (1999) 32 ACSR 317; Brierley Investments Limited v ASC (1997) 15 ACLC 1341, Otter Gold Mines Ltd v Deputy President GL McDonald of the Administrative Appeals Tribunal [1997] FCA 694; Andco Nominees Pty Ltd v Lestato Pty Ltd (1995) 17 ACSR 239; Attorney−General Re Fernlake Pty Ltd (1994) 13 ACSR 600; Johns v ASC (1993) 178 CLR 408; Cumbrian Newspapers Group Ltd v Cumberland and Westmorland Newspaper and Printing Co Ltd [1987] Ch 1

Just Group Limited [2008] ATP 22

INTRODUCTION

1. The Panel, Ewen Crouch (sitting President), Ron Malek and Julie McPherson, made a declaration of unacceptable circumstances in relation to the affairs of The President's Club Limited. The application concerned two acquisitions of shares (and associated villa interests) in a time share scheme. The first acquisition contravened section 606. The second acquisition purported to rely on item 9 of section 611. The Panel declared the circumstances unacceptable and ordered a voting, acquisition and disposal freeze on all the acquired shares. The Panel also ordered that the freeze would be lifted if an unconditional bid was made that obtained more than half the outstanding shares.

2. In these reasons, the following definitions apply.

CDLH	Coeur de Lion Holdings Pty Ltd
CDLI	Coeur de Lion Investments Pty Ltd
Closeridge	Closeridge Pty Ltd
QNA	Queensland North Australia Pty Ltd
TPC	The President's Club Limited
villa interest	A Tennis Title in the President's Club Tennis Community Titles Scheme or a Golf Title in the President's Club Golf Community Titles Scheme

FACTS

3. TPC is an unlisted company with more than 50 members. Its capital is divided into 7,488 ordinary shares and 5 subscriber shares (the latter having no right to vote, to dividends or to participate in the net assets of the company on a winding up).

4. CDLH owns all the shares in CDLI, which holds 3,107 shares in TPC (approximately 41.4%).

5. CDLI, when previously controlled by Lend Lease, developed the Coolum Resort (now Palmer Coolum Resort). The development included a hotel, spa, golf and tennis facilities and a time sharing scheme.

6. TPC operates a time sharing scheme. The definition of "managed investment scheme"[1] includes a time sharing scheme. The definition of "time sharing scheme" is:

   a scheme, undertaking or enterprise, whether in Australia or elsewhere:

   (a) participants in which are, or may become, entitled to use, occupy or possess, for 2 or more periods during the period for which the scheme, undertaking or enterprise is to operate, property to which the scheme, undertaking or enterprise relates; and

   (b) that is to operate for a period of not less than 3 years.[2]

7. At the time of the application, each shareholder in TPC owned a parcel of 13 ordinary shares and a corresponding one-quarter interest, as tenant in common, in a lot in either "The President's Club Golf Community Titles Scheme" or "The President's Club Tennis Community Titles Scheme" (each a "villa interest").

8. A shareholder may own more than one parcel of shares and corresponding villa interest.

9. The constitution of TPC provides, in clause 6(a):

   The qualification for membership of the Company shall be that the applicant is a Co-Owner and shall at all times whilst he or she desires to remain a Member be a Co-Owner.

10. Co-Owner means tenant in common of a lot on the Plan.

11. By a complicated set of interlocking agreements, a purchaser of one timeshare interest must become both:

    (a) a member of TPC, holding 13 shares and

    (b) the registered proprietor of a corresponding one-quarter interest in a Golf Title or Tennis Title (ie in a particular villa).

12. A purchaser is also required to execute two further documents:

    (a) a deed poll, which binds them, if selling their villa interest, to sell the corresponding shares in TPC to the same person and

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[1] Section 9 of the *Corporations Act 2001* (Cth). References are to the Corporations Act unless otherwise indicated

[2] Section 9

(b) an assignment of a letting pool agreement, under which their villa interest is made available with others as part of a pool.

13. TPC is the tenant under two leases for 80 years (with additional 80 year options) covering all the villa interests and all the common property in the particular development. Administration of the timeshare rights, and the letting pool, is provided for under a Resort Administration Agreement. Under TPC's constitution members agree to comply with lawful commands, directions, rulings etc of the resort administrator made under the Resort Administration Agreement. The leases were granted by CDLI before any sales, and the villa interests are interests in the reversion on the leases of the lots.

14. The right to the timeshare derives from the TPC shareholding, since the constitution of TPC includes at clause 8:

… The holder for the time being of a share in the capital of the Company shall be entitled to exercise his or her Entitlement during the period specified in Schedule 1….[3]

15. "Entitlement" is defined to mean:

the entitlement of a Member to occupy one Residential Apartment including all fixtures, fittings and equipment therein, in the Presidents Site for a (sic) Entitlement Week to which his or her share relates and to use the Resort Facilities of the Resort.

16. TPC may decline a transfer of shares unless (among other things) the transferee complies with the qualifications for membership (clause 92 of the constitution). These include that the applicant is a Co-Owner (clause 6).

17. In 2005, ASIC granted TPC and CDLI, as operator and developer of the resort, a conditional exemption from registration as a managed investment scheme. The exemption applied when members not associated with any operator, manager, promoter or developer in relation to the scheme held either 90% of the votes that may be cast on a resolution, or 90% by value or number of all interests in the scheme. In the alternative, the exemption allowed for CDLI to enter covenants with ASIC. The covenants were, in brief, that CDLI would not sell or issue interests without complying with certain provisions of the Act relating to financial product disclosure and licensing, not vote more than 10% of the interests, and not sell interests to non-retail buyers that were to be on-sold unless the same covenants applied.

18. As CDLI held 41.4% of TPC that had not been sold down to the public, CDLI executed a deed poll in favour of ASIC. The deed poll supported an exemption by ASIC so that CDLI (and others) did not have to register the scheme under Chapter 5C as a managed investment scheme. Under the deed poll, CDLI covenanted:

(a) essentially to comply with chapter 5C as if it were a registered scheme and

(b) not to exercise more than 10% of the votes that may be cast (after deducting any votes not cast by any one or more members) on a resolution except with ASIC consent or in relation to a winding up of the scheme.

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[3] Schedule 1 sets out the time usage available to each Co-owner

19. The deed poll provided:

    Where [CDLI] and its associates are not disqualified and excluded from voting their interests at a meeting, [CDLI] covenants that any voting rights held by [CDLI] and its associates or any operator, manager, promoter in relation to each Scheme, must not be exercised in excess of 10% of the votes that may be cast (after deducting any votes not cast by any one or more members) on a resolution by members of the relevant Club other than:

    (a) in circumstances consented to in writing by the ASIC; or

    (b) in relation to a resolution to wind up the relevant Scheme.

20. The deed poll was revocable on giving ASIC 180 days' notice.

21. In or around July 2011, QNA acquired 98% of the shares in CDLH. The remaining 2% of the shares in CDLH were acquired by Closeridge. QNA and Closeridge are companies associated with Mr Clive Palmer.

22. In September 2011, CDLI gave ASIC notice that it intended to revoke the deed poll. The revocation took effect on or about 13 March 2012,[4] and the ASIC exemption then ceased to apply.

23. At various times in or about March 2012, QNA bought 221 additional shares in TPC (2.9%) and corresponding villa interests, taking its relevant interest in TPC to approximately 44.3%. Of the 17 parcels of shares and villa interests bought, 8 were at prices up to $60,000 and 9 were at $65,000.

24. CDLI's covenant in the deed poll limiting it to casting 10% of the votes at a meeting was not replicated in TPC's Constitution. On 14 March 2012, TPC held an extraordinary general meeting to consider amending its constitution effectively to replicate that covenant. The resolutions were not carried. The votes cast were 1,456 (63.8%) in favour of the restriction and 826 (36.2%) against.

25. On 12 April 2012, QNA lodged a bidder's statement with ASIC. Its proposed bid was for all the shares in TPC and corresponding villa interests and was unconditional.

26. On 24 April 2012, QNA withdrew the bidder's statement.

27. On 11 May 2012, ASIC extended the time for QNA to make a bid.

28. On 21 May 2012, it lodged a replacement bidder's statement. Under its replacement bidder's statement, QNA proposed to make an offer to purchase all the shares in TPC and all villa interests. The bidder's statement said on the front page:

    The bid is being made for both your shares and your Villa Interest. It is not possible to accept the bid in relation to your shares only or in relation to your Villa Interest only.

29. On page 1 the following statement appeared:

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[4] QNA submitted that it "*was of the view that the revocation took effect on or about 17 March (when in fact 180 days from the date it was given on the 15 September 2011, was 13 March 2012)*"

While there is no formal stapling of your President's Club Shares to your Villa Interest, it is likely that you have executed a deed poll which obliges you to sell your shares if you sell your Villa Interest to the same person. Also, clauses 6(b) and 6(c) of the Constitution require that a member of President's Club must own a Villa Interest and a member's shareholding is limited to the number of Villa Interests owned.

30. At the time of the application, QNA had not dispatched offers to shareholders. It has since indicated that it will not do so.

APPLICATION

31. By application dated 26 June 2012, TPC sought a declaration of unacceptable circumstances. It submitted that QNA (together with its associates) appeared to have breached s606, had not lodged a bidder's statement that complied with s621(3) (minimum bid price) and the bidder's statement contained material information deficiencies.

32. It also submitted that QNA appeared to be in breach of s631 as the time for making a complying bid had passed.

33. TPC submitted that the effect of the circumstances was to:

    (a) inhibit or likely inhibit an efficient, competitive and informed market

    (b) prevent or likely prevent TPC members getting necessary information to assess the merits of the offer and

    (c) contravene sections 606, 621(3), 631(1) and 636.[5]

Interim orders sought

34. TPC sought interim orders to the effect that QNA be restrained until the Panel determined its application from:

    (a) dispatching a second bidder's statement and

    (b) voting (with its associates) more than 20% of TPC.

35. We did not make either interim order.

Final orders sought

36. TPC sought final orders to the effect that:

    (a) QNA and its associates not vote more than 20% of TPC

    (b) QNA proceed with its takeover bid for TPC on terms no less favourable than in the original bidder's statement

[5] Section 606 prohibits acquisitions of relevant interests above 20%. Section 621(3) requires the bidder to pay all shareholders no less than it paid for shares during the 4 months before the date of the bid. Section 631(1) makes it an offence for a person who has proposed to make a takeover not to proceed with making of offers within 2 months of the proposal. Section 636 requires a bidder's statement to include all information material to the making of a decision whether to accept the bid

(c) QNA raise the offer price per TPC share to $1 and the price per villa interest to $65,000, being the highest price paid in the preceding 4 months and

(d) QNA remedy the information deficiencies in a second replacement bidder's statement.

37. During the proceedings, CDLI requisitioned a meeting of shareholders of TPC under section 249D to replace the TPC board (among other things). TPC therefore sought an additional order that CDLI and its associates be restrained from voting its shares at the general meeting.

DISCUSSION

Conduct proceedings?

38. Section 657B says:

The Panel can only make a declaration under section 657A within:
(a) 3 months after the circumstances occur; or
(b) 1 month after the application under section 657C for the declaration was made;
whichever ends last. The Court may extend the period on application by the Panel.

39. Section 657C(3) says:

An application for a declaration under section 657A can be made only within:
(a) two months after the circumstances have occurred; or
(b) a longer period determined by the Panel.

40. In our view, there are alleged in the application contraventions of the Corporations Act which are ongoing circumstances. Alternatively, in case it should be necessary we extended the time for making the application to the date on which it was made (26 June 2012). On the alternative basis, we had one month within which to make a declaration, if one was to be made.

41. Before we had decided whether we should conduct proceedings, we were asked to defer our decision as discussions were underway as to a possible resolution of the matter. We did so twice. The discussions came to nought.

42. On the first occasion that we deferred our consideration, to assist us to consider whether we should further defer the proceedings, we asked:

(a) how an undertaking by QNA to proceed with the bid would remedy a breach of section 606?

(b) whether QNA intended to pay a "top up" amount to the sellers of the March 2012 villa interests (some of whom had received less in total than was proposed under the bid)?

(c) Whether QNA should be limited to 20% voting rights if it failed to achieve 100% ownership under the bid?

43. ASIC submitted that there was a breach of section 606 when QNA acquired CDLH. It submitted that, at that time, QNA acquired a relevant interest in voting shares to which were attached 41.4% of the votes in TPC. It said:

    Section 610 determines a person's voting power based on the maximum number of votes that can be cast in respect of the share (sic) on a poll. The TPC constitution does not restrict the number of votes that may be cast in respect of the shares in which QNA has a relevant interest. Rather, a voting restriction applied to CDLI personally by virtue of a private deed. Following the acquisition of the interests in CDLI by QNA, TPC was notified that the deed was to be terminated.

44. ASIC further submitted that, in the alternative, the application of section 606(6) would result in a contravention of section 606 at the time the deed ceased to have this effect.

45. ASIC further submitted that QNA should not be permitted to rely on the 'creep' exception in item 9 of section 611 because the acquisition which triggered the exception was itself made in contravention of section 606.

46. TPC submitted that if QNA achieved 100% ownership there would be no need for an ongoing voting restriction. Otherwise, it submitted, the position depended on proposals for the ongoing management and conduct of the scheme.

47. QNA denied there had been a breach of section 606. This was because CDLI had entered the deed poll with ASIC and was not able to exercise voting rights in respect of more than 10% of TPC. This situation was not altered by the change of control of CDLI. Termination of the deed poll allowed CDLI to acquire further voting rights "through the operation of law" (ie, under section 611 item 15) without breach of section 606. We disagree, for the reasons below.

48. QNA further submitted that, if there was a breach of section 606, which QNA denied, it was inadvertent within the meaning of that term in section 606(5)(a). We are concerned with unacceptable circumstances rather than with a prosecution.[6] See also the discussion at paragraph 121 and following.

49. QNA further submitted that the continuation of its bid provided an effective commercial remedy. It has not made a bid.

50. QNA also submitted that there was no obligation to pay any "top-up" amount because, it submitted, there were two different offers contained in its bidder's statement, albeit in a single offer document, being an offer for shares and a separate offer for villa interests. In other words, we infer from that submission, the March purchases were of shares for $1 each, and of real estate interests separately for various amounts, and that section 621 does not apply to acquisitions of real estate. It indicated that it did not intend to pay a top up, and further that it had decided not to make any offer to purchase the villa interests but would seek to proceed with a bid for TPC shares only. This did not eventuate.

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[6] Guidance Note 1 "Unacceptable Circumstances" at paragraphs [24]-[25]

51. QNA submitted that the villa interests were not covered by Chapter 6, and the Panel did not have jurisdiction to make a determination in respect of them. We disagree. In our view, for the reasons below, the shares and villa interests are indivisible. In any event, there are policy bases that give us jurisdiction to make a determination that would cover them.

52. Lastly, QNA submitted that it was inappropriate to restrict its voting rights as the directors of TPC were seeking to entrench their positions. To allay any fears we may have had, QNA submitted it would agree with the directors that no general meetings of TPC would be called during the offer period.[7]

53. We decided to conduct proceedings.

Parties

54. TPC and ASIC filed notices of appearance and became parties. QNA refused to file a notice of appearance.

55. QNA submitted that the Panel's procedures denied it and CDLI natural justice. It submitted that because they were respondents, not applicants, they had a right to be heard without restrictions as to who may represent them, and without preconditions being imposed on them to provide the confidentiality and media canvassing undertakings in the form required by the Panel. We disagree.

56. QNA and CDLI have a right to receive natural justice. The Panel's procedures do not deny them that right. The procedures are clear and are set out in the *Australian Securities and Investments Commission Act* 2001 (Cth), the *Australian Securities and Investments Commission Regulations*, and the Panel's Procedural Rules, which are made under section 195 of the ASIC Act and are registered as a legislative instrument under the *Legislative Instruments Act 2003* (Cth).

57. They require the Panel to comply with the obligation to give natural justice to persons involved in proceedings; that is, to ensure procedural fairness. Section 195(4) of the ASIC Act says "*The rules of procedural fairness, to the extent that they are not inconsistent with the provisions of this Act or the regulations, apply to Panel proceedings.*"

58. The Panel's Procedural Rules apply to proceedings and require a notice of appearance. And under section 194 of the ASIC Act, leave of the Panel is required for a party to be legally represented in Panel proceedings. Such leave was not requested.

59. There are good reasons for the Panel to require undertakings as part of the notice of appearance. It has been Panel practice for at least 10 years. The Panel requires two interrelated undertakings.

60. Firstly, the Panel requires parties to undertake not to use for other purposes, or publish, confidential information given to them for the purposes of the

[7] As noted, the offers were not made. CDLI has requisitioned a meeting

proceedings.[8] The reason for the requirement is to enable parties to disclose sensitive commercial information in connection with the Panel proceedings without that information being used for other purposes. Although the information is not usually provided under compulsion,[9] it is often commercially necessary to provide it. Moreover, the Panel is obliged to respect the confidentiality of the information, whether or not it is provided under compulsion.[10]

61. Secondly, parties must undertake not to canvass issues in the media which relate to the matter before the Panel. The media canvassing undertaking is required because the Panel considers that matters are more likely to be resolved more quickly if parties refrain from canvassing their arguments in the media during proceedings. This supports the requirement for the Panel to act in as timely a manner as proper consideration of the matter requires.[11] As the Panel said in *Just Group*:

… Panel proceedings are assisted if parties refrain from publicly debating issues that are before the Panel. The Panel seeks to encourage this restraint by its prohibition on "media canvassing".[12]

62. By the combination of these undertakings, Panel matters are conducted privately. This benefits all parties and allows for frankness that assists the prompt and appropriate resolution of disputes, not least by removing some potential inhibitions on parties that might limit their ability to fully articulate their case.

63. QNA and CDLI have been provided with all the material and have been invited to make submissions and rebuttals. They did so. They have not, in our view, been denied natural justice. In providing the material to them, however, we directed, pursuant to section 190 of the ASIC Act, that:

.. these proceedings before the Panel are confidential, and no person who has access to any material provided in these proceedings, that is not public (other than by a breach of confidentiality), may cause or authorise the publication of any of that material or of any report in which such material forms part. The Panel further directs that this does not prevent a statement that mentions any or all of the following, but no other, matters:

(a) that proceedings have been initiated

(b) the parties to the proceedings

(c) the matter to which they relate and

(d) the broad nature of the unacceptable circumstances alleged and the orders being sought, without arguing the merits of the case.[13]

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[8] A similar undertaking is implied where confidential information is disclosed under compulsion for the purposes of proceedings in a court or tribunal: *Otter Gold Mines Ltd v Deputy President GL McDonald of the Administrative Appeals Tribunal* [1997] FCA 694

[9] See also *Johns v ASC* (1993) 178 CLR 408, in which the High Court held that a statute giving a power to a public body to obtain information (including personal information) defines the purpose for which it can be used, expressly or impliedly, so that any other use is a breach of a statutory duty of confidence

[10] Sections 127, 186 of the *ASIC Act*

[11] ASIC Regulation 13(c)

[12] *Just Group Limited* [2008] ATP 22 at [32]

Jurisdiction

64. QNA submitted that the Panel did not have jurisdiction to hear matters arising out of its offer for the villa interests. QNA recently bought shares and villa interests at prices up to $65,013, of which $13 was in each case designated as the price of the related parcel of shares.

65. Villa interests are subject to a lease to TPC. A shareholder in TPC has certain time share rights of use and occupation. The constitution of TPC makes it clear that a parcel of shares and the corresponding villa interest must be transferred to the same person. This arrangement is supported by various interlocking agreements and arrangements, including a deed poll.[14]

66. While complicated, in our view the arrangement is in effect a 'stapling' of the shares and corresponding villa interests. The shares can only be transferred together with the corresponding villa interests.[15] The right to use the villa is conferred by rights attached to the shares. Indeed, the way the rights are enjoyed is by a 'stapled entitlement'. It is clear that this was the intention of the development.

67. Thus, the allocation of the price between a villa interest and the related shares is arbitrary. It is commercially unrealistic to treat the shares and villa interests separately. The acquisitions to which this matter relates were of both shares and villa interests. Any bid for TPC would also have to relate to the villa interests as well as the shares.

68. Accordingly, any offer for a parcel of shares would have to be made together with an offer for the corresponding villa interest. We did not accept QNA's submission as to jurisdiction.[16]

69. While this arrangement was made more complicated by CDLI, as developer of the time share scheme, not having entered into all the agreements and arrangements (including the deed poll) that buyers entered, and entering into a different deed poll in favour of ASIC, this does not change the position in our view. It is clear that it was intended for all the time shares to be sold off and therefore every owner to be in the same position. Indeed, QNA submitted that:

> *… The deed polls were only intended to regulate* ***secondary sales*** *of the Timeshare Scheme, and there would have been no commercial purpose in the developer (the vehicle for which was CDLI) to have bound itself through such arrangements.* (Original emphasis)

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[13] This direction broadly corresponds to the confidentiality undertaking that QNA and CDLI would have given had they submitted notices of appearance

[14] TPC's submission on 11 July 2012 set out in detail why "*a person is not permitted to sell their President's Club shares without also selling their corresponding villa interest (or vice versa)*"

[15] CDLI has recently transferred a villa interest to Mr Clive Palmer, without the related shares, but this has in effect made those shares unsaleable, except to Mr Palmer

[16] QNA's replacement bidder's statement proposed an offer for both. It referred to ASIC relief only to allow the bidder's statement to be sent to shareholders outside the time required under section 636(1)

70. There are two other bases on which we did not accept QNA's submission as to jurisdiction:

    (a) Value. QNA submitted that it allocated shares in TPC a value of $1. It submitted that villa interests were worth up to $65,000. However, it is the rights attaching to the shares that give the owner of the corresponding villa interest the right to use their time share interest. It is incorrect to ignore the rights attaching to the shares and simply allocate the shares a value of a nominal $1. Section 621(3) provides that the consideration offered for securities in a bid class must equal or exceed the maximum that the bidder or an associate provided or agreed to provide in the previous four months. Both the principle underpinning section 621(3) and the purpose of Chapter 6 set out in section 602(c) are brought into play by the offers for shares and corresponding villa interests.

    (b) Collateral benefit. Shareholders in TPC were to be invited to sell their corresponding villa interests to the bidder. Section 623 provides, among other things, that a bidder or its associates must not during the offer period give or agree to give a benefit to a person if the benefit is likely to induce the person to accept the bid, unless the same benefit is offered to every offeree under the bid. If QNA offered different prices for villa interests, as happened in March 2012, there may be a collateral benefits issue. Furthermore, economically and by reason of the agreements that purchasers were required to execute, the parcel of shares and the corresponding villa interests are united.

71. QNA submitted that the quote above (paragraph 69) supported the view that the shares and villa interests were not stapled and could be transferred separately. But QNA's acquisition of control over CDLI did not involve the stapling arrangements, whereas all the other actual and proposed transactions under discussion are secondary sales.

72. Moreover, QNA pointed out that there had been such a transfer. This was a transfer during the Panel proceedings of a villa interest from CDLI to Mr Palmer himself, the shares remaining with CDLI, which he controls. This transfer was possible because the stapling does not bind the Land Titles Office. It does not show that a parcel of shares could be transferred without the corresponding villa interest.

73. TPC submitted:

    Co-owners grant an 80 year lease (with an 80 year option to renew) to [TPC], appoint [TPC] as their agent (pursuant to article 112), waive their rights under Part V of the Property Law Act 1974 (Qld) (article 102) and commit to adhering to the Resort Administration Agreement (article 114). Accordingly, Co-owners have no substantive rights to the villas except as derived from their "Entitlement" as a [TPC] shareholder. It is simply not correct to assert that the rights of an owner of a villa interest can be enjoyed independently of any rights accruing to a holder of [TPC] shares.

74. We agree. For this reason as well we consider the shares and villa interests to be effectively stapled. Accordingly we consider that we have jurisdiction to make orders which extend to the villa interests as well as the related shares.

Acquisition

75. A person must not acquire a relevant interest in issued voting shares in a Chapter 6 company if, as a result of a transaction in relation to securities, the person's or someone else's voting power in the company increases either from below to above 20%, or from above 20% and to below 90%.[17]

76. TPC is a company to which Chapter 6 applies, as acknowledged in QNA's replacement bidder's statement.

Voting shares

77. TPC's ordinary shares are voting shares. Section 9 defines voting shares as:

> *"voting share" in a body corporate means an issued share in the body that carries any voting rights beyond the following:*
>
> *(a) a right to vote while a dividend (or part of a dividend) in respect of the share is unpaid;*
>
> *(b) a right to vote on a proposal to reduce the body's share capital;*
>
> *(c) a right to vote on a resolution to approve the terms of a buy-back agreement;*
>
> *(d) a right to vote on a proposal that affects the rights attached to the share;*
>
> *(e) a right to vote on a proposal to wind the body up;*
>
> *(f) a right to vote on a proposal for the disposal of the whole of the body's property, business and undertaking;*
>
> *(g) a right to vote during the body's winding up.*

78. The ordinary shares in TPC held by CDLI carry voting rights beyond those in the definition and accordingly they are voting shares. This is not changed by a deed poll entered by CDLI with ASIC, revocable on 180 days' notice.

79. In *Cumbrian Newspapers Group Ltd*[18] it was held that a provision in the constitution of the defendant company granting the plaintiff company (a shareholder) a right of pre-emption over other ordinary shares, and other rights, did not create a separate class of shares held by the plaintiff company because the rights were not attached to any particular shares. By analogy, the ASIC deed poll limited CDLI to casting 10% of the votes cast on any particular resolution, but the restriction applied to the holder, namely CDLI, not to particular shares. Thus, it did not render any of the shares non-voting. Moreover, the number of voting shares that CDLI could vote would be further reduced if more voting shares were acquired by it or an associate (as happened).

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[17] Section 606

[18] *Cumbrian Newspapers Group Ltd v Cumberland and Westmorland Newspaper and Printing Co Ltd* [1987] Ch 1 at [15] ff

Relevant interest

80. In its replacement bidder's statement, QNA said:

> *Because the ASIC Deed Poll was still current at the time of the Acquisition and therefore QNA's voting power was limited to 10% of persons who actually vote, QNA did not acquire voting power of more than 20% at the time of the Acquisition. Accordingly, QNA was not required to make a takeover offer for the remaining shares in President's Club or otherwise comply with the takeover provisions of the Corporations Act.*
>
> *As CDLI has revoked the ASIC Deed Poll (and the revocation became effective on 19 March 2012) QNA's voting power is no longer restricted….*

81. QNA submitted that, because of the covenant in the ASIC deed poll, neither CDLI nor QNA had a relevant interest in the shares which CDLI had covenanted not to vote and that, even if they did have relevant interests in those shares, they did not have commensurate voting power.

82. We do not agree. A person has a relevant interest in securities if that person is the holder of the securities, has power to exercise or control the exercise of a right to vote attached to the securities, or has power to dispose of or exercise control over the disposal of the securities. The term 'control' has its natural meaning.[19]

83. In our view, CDLI has a relevant interest constituted by power to exercise the right to vote the shares. The fetter on voting arose entirely from the covenant in the deed poll, and not at all from TPC's constitution. The rights attached to the shares as set out in TPC's constitution are the same as for all voting shares (in contrast to the 5 Subscriber Shares).

84. By section 608(2)(b), power includes power that can be exercised by the revocation or breach of an agreement. By section 608(3)(c), power includes power that is subject to restraint or restriction. CDLI had power to vote the shares in breach of the deed,[20] after revoking the deed (as happened), or with ASIC's consent.

85. In our view, CDLI also has a relevant interest constituted by power to dispose of the shares.

86. Regardless of the effect of the covenant that CDLI made in the ASIC deed poll concerning voting the shares, CDLI had at all relevant times a relevant interest in 41.4% of the shares in TPC, because it was the registered holder of the shares, it had an unfettered power to dispose of those shares and none of the exclusions in section 609 applied to its interest in those shares.

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[19] R Levy and N Pathak, *Takeovers Law and Strategy*, third edition, para [3.5]: "*The ordinary meaning of 'control' is the positive ability to bring about the result of one's choosing. This would cover an ability to cause securities to be voted or transferred in a particular way*." The authors note that the courts have gone a step further to include an ability to prevent some action as potentially sufficient to constitute 'control'

[20] TPC could not have disregarded such a vote on the basis that it was cast in breach of an obligation owed to ASIC: *Re Fernlake Pty Ltd* (1994) 13 ACSR 600

87. When QNA acquired control of CDLI, QNA acquired the same relevant interest in the shares in TPC held by CDLI. This is because section 608(3) extends relevant interests to those held through bodies corporate.[21] QNA holds 98% of CDLH, which holds 100% of CDLI, which holds approximately 41.4% of TPC.[22]

88. We agree with ASIC's submission that:

> *Under subsection 608(3), QNA is taken to have the same relevant interests that any body corporate it controls, or any body corporate that it has voting power of greater than 20% in, has in TPC shares. Accordingly QNA has the same relevant interests in TPC shares that the following have:*
>
> *(a) CDLH (QNA controls CDLH and has voting power of greater than 20% in CDLH); and*
>
> *(b) CDLI (QNA may in fact control CDLI and QNA has voting power of greater than 20% in CDLI).*
>
> *CDLH also has the same relevant interests in TPC shares that CDLI has because it controls CDLI. QNA therefore also has the relevant interest in TPC shares that CDLI has because CDLH has a relevant interest in those shares and it has the relevant interests that CDLH has through successive application of s608(3)(b).* (footnotes omitted)

89. QNA submitted in effect that it did not acquire a relevant interest in voting shares in TPC through a transaction in breach of section 606. This was by reason of the ASIC deed poll limiting its voting power to 10%. It submitted that it obtained additional voting power on revocation of that deed poll by CDLI.[23]

90. ASIC submitted, quoting *Yandal Gold*[24] and *Edensor Nominees*,[25] that a person "acquires" a relevant interest if they "obtain" a relevant interest, even if the relevant interest they obtain arises under the deeming provisions in subsections 608(3). We agree.

Voting Power

91. "Voting power" is a concept defined by section 610. It looks only at the number of votes attached to the shares in which a person or their associate has a relevant interest. It is not concerned with the practicalities of whether the person can in fact cast those votes.

92. A person's voting power in a company is the percentage of the votes attached to voting shares in that company in which the person (with their associates) has relevant interests. Although CDLI's covenant to ASIC largely prevented it from exercising the votes attached to approximately 31.4% or more of the shares it held (because it could vote only 10%), those votes remained attached to the shares.

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[21] There is an exception in item 14 of section 611 for acquisitions through listed entities, not applicable here

[22] Section 608(3)(b)

[23] When controlled by QNA

[24] *ASIC v Yandal Gold* (1999) 32 ACSR 317 at [82]-[100]

[25] *Edensor Nominees Pty Ltd v ASIC* (2002) 41ACSR 325 at [34]-[39]

93. Therefore, in our view, at all relevant times CDLI's relevant interest in those shares constituted 41.4% of the voting power in TPC, despite the covenant in the deed poll.

Operation of Law Exception

94. QNA submitted that because CDLI became free to exercise the votes attached to all the shares it held in TPC on expiry of the notice it gave ASIC of the revocation of the deed poll containing the covenant, it acquired its relevant interest in 31.4% of those shares by operation of law, namely within the exception from section 606 in item 15 of section 611.

95. Item 15 provides:

Wills etc

An acquisition through a will or through operation of law.

96. We do not agree with QNA. For one thing, as discussed above, CDLI and QNA had relevant interests in those shares while the covenant was still on foot. For another, the lapse of CDLI's obligations under the deed was merely a deferred result of a voluntary act on the part of CDLI,[26] not the result of the operation of statute or other law, or of the act of another person.

Other exceptions

97. Section 611 set out exceptions to the prohibition in section 606. None of them applied in this case.

98. Accordingly, we consider that QNA's acquisition of a relevant interest in approximately 41.4% of TPC in July 2011 as a result of QNA acquiring 98% of the shares in CDLH, contravened section 606.

March 2012 Purchases

99. In March 2012, QNA purchased an additional 2.9% of the shares in TPC, and the corresponding villa interests, by private treaty. Since these purchases took place more than 6 months after QNA's acquisition of relevant interests in the TPC shares held by CDLI, item 9 of section 611 (the 3% creep rule) appears to apply to them.

100. ASIC submitted that QNA should not be permitted to rely on item 9 in relation to these purchases, as QNA would be taking advantage of its own contravention and that such conduct would be contrary to the principle underlying the 3% creep rule which permits increases in voting power only through a gradual and open process. We take this to mean that while the purchases may not have contravened section 606, they nonetheless constituted unacceptable circumstances.

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[26] *Andco Nominees Pty Ltd v Lestato Pty Ltd* (1995) 17 ACSR 239. Section 606(6) extends section 606 to various deferred results of the original acquisition, where non-voting securities subsequently become voting shares, or the votes attached to shares are increased, without any additional act of the acquirer

101. We agree. On the view we have taken, QNA contravened section 606 when it acquired 98% of the shares in CDLH and therefore acquired control of CDLI. The March purchases could be lawful only because of that prior contravention.

102. On QNA's own preferred view (with which we do not agree), it obtained the additional voting power only on revocation of the ASIC deed poll. However, this meant that QNA had voting power in TPC of only 10% from July 2011 until early March 2012, and could not rely on item 9 in March 2012.

DECISION

Declaration

103. It appears to us that the circumstances of the acquisition of TPC shares in July 2011 are unacceptable having regard to:

(a) the effect that we are satisfied the circumstances have had, are having, will have or are likely to have on:

(i) the control, or potential control, of TPC or

(ii) the acquisition, or proposed acquisition, by a person of a substantial interest in TPC and

(b) the purposes of Chapter 6 set out in section 602 and

(c) because they constituted, constitute, will constitute or are likely to constitute a contravention of a provision of Chapter 6.

104. In *Alinta*, Kirby J said:[27]

In every case it remains for the Panel to conclude whether or not the circumstances are "unacceptable". For that conclusion to be reached, more is required than proof of a contravention of the Act, although in particular cases such proof may, in practice, be sufficient to result, without much more, in a conclusion of unacceptability.

105. Similarly, Hayne J said:[28]

Contravention of a provision of one of the specified Chapters of the Corporations Act may provide the footing for that conclusion but it must appear to the Panel that the circumstances merit the description "unacceptable" ...

It may be accepted that the word "unacceptable" may readily be applied to most, perhaps all, contraventions of provisions of the kind found in Chs 6, 6A, 6B and 6C of the Corporations Act. The first observation, that the Panel must conclude that the word "unacceptable" can properly be attached to a contravention, may therefore be of little moment. But even if that is so, the second and third observations reveal that the Panel's task is not completed by deciding that there has been a contravention of one of the relevant provisions. The Panel must make a declaration or decline to do so if it considers that doing

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[27] [2008] HCA 2 at [43], footnote omitted
[28] Ibid at [81]-[82]

that is not against the public interest ***after taking into account any policy considerations that the Panel considers relevant*** *(s 657A(2)), and in exercising its powers under s 657A the Panel may have regard to any matters (in addition to those specified in s 657A(3)(a)) that it considers relevant.* (original emphasis)

106. Crennan and Kiefel JJ put it slightly more strongly:[29]

Sub−section (1) of s 657A provides a power, expressed in non−obligatory terms ("may declare"), to make a declaration that the affairs of a company are unacceptable. The purpose of sub-s(2) is to provide for the occurrences which may constitute unacceptable circumstances. Paragraph (a) requires an opinion, on the part of the Panel, about the effect of the circumstances on the company. Paragraph (b) requires only that the Panel be satisfied that there has been a contravention. The paragraph treats a contravention as synonymous with unacceptable circumstances. The circumstances are unacceptable "because" they constitute or give rise to a contravention of the Chapters.

107. The contravention of section 606 in this case gave effective control of TPC to QNA without other shareholders having an opportunity to decide if that should occur and without them having a reasonable and equal opportunity to participate in any benefits accruing to QNA through the proposal to acquire a substantial interest in TPC.[30] We note that now a follow-on bid will not occur. We also agree with the application by TPC that the effect of the circumstances was that they were likely to inhibit an efficient, competitive and informed market in TPC shares[31] since shareholders were not given information necessary for them to assess the merits of the proposal before it occurred. Further, in our view, based on our experience, any control premium for the shares of the remaining shareholders must now be considered unlikely, or at least significantly reduced in likelihood.

108. Further it appears to us that the circumstances of the acquisition of TPC shares in March 2012 are unacceptable having regard to:

(a) the effect that we are satisfied the circumstances have had, are having, will have or are likely to have on:

(i) the control, or potential control, of TPC or

(ii) the acquisition, or proposed acquisition, by a person of a substantial interest in TPC and

(b) the purposes of Chapter 6 set out in section 602.

109. We note that Emmett J has held that an interest not greater than 3% is capable of being a substantial interest,[32] and that:

Having regard to the clear policy of [item 9 of section 611], arbitrary though it may be, the ASC and the Panel would be slow to make a declaration where an acquisition is made in

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[29] Ibid at [162]. Note references to paragraph (b) of subsection (2) have become paragraph (c) in the current s657A(2)

[30] Section 602(c)

[31] Section 602(a)

[32] *Brierley Investments Limited v ASC* (1997) 15 ACLC 1341 as 1349

accordance with [item 9] and relates to a small proportion of the issued shares in a company. Nevertheless, I do not consider that, simply because conduct is authorised by [item 9], it is not capable of constituting unacceptable circumstances.[33]

110. It appears to us that the circumstances of QNA's subsequent purchases in reliance on the 'creep' provision in item 9 of section 611 are unacceptable. While they may not have involved a contravention, reliance was, in our view, based on a contravention (namely, the initial acquisition). The subsequent acquisitions consolidated QNA's control of TPC. Moreover, had the initial acquisition been made by a takeover bid, the subsequent acquisitions would have occurred in circumstances in which the shareholders had information and a reasonable and equal opportunity to participate in any benefits. As it happened, the shareholders sold their shares (and villa interests) to QNA at different prices.[34]

111. For the reasons given, we made the declaration in Annexure A and consider that it is not against the public interest to do so. We had regard to the matters in s657A(3).

112. QNA submitted that the Panel should not "*taint QNA with suggestions of illegality*." It submitted that the Panel should not make a declaration of unacceptable circumstances as to do so would unfairly prejudice QNA's right to be presumed innocent until proven guilty of alleged breaches of section 606.

113. We do not accept QNA's submissions. Firstly, we agree with ASIC's submission that to accept QNA's proposition would deny section 657A(2)(c)(i) of most or all of its practical operation.

114. Secondly, our function is to consider whether circumstances are unacceptable.

115. Contravention of a provision of Chapter 6 is one basis for the declaration in respect of the acquisition of TPC shares in July 2011. However, while a contravention of a provision of Chapter 6 is one basis on which we can, and did, come to the conclusion we did, it must be borne in mind that:

… the Panel's task is not completed by deciding that there has been a contravention of one of the relevant provisions. The Panel must make a declaration or decline to do so if it considers that doing that is not against the public interest after taking into account any policy considerations that the Panel considers relevant (s 657A(2)), and in exercising its powers under s 657A the Panel may have regard to any matters (in addition to those specified in s 657A(3)(a)) that it considers relevant.[35]

116. In our view, it is not against the public interest to make a declaration. We note the observations of Crennan and Kiefel JJ in *Alinta* on this aspect of a declaration:[36]

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[33] Ibid at 1351

[34] Submissions that different villas were worth different amounts were made by QNA although we note that it proposed a bid (before withdrawing) at a single price for each parcel of shares and the corresponding villa interests that it did not already own

[35] *Attorney−General (Cth) v Alinta Limited* [2008] HCA 2 at [82] per Hayne J. See also Kirby J at [43] and Crennan & Kiefel JJ at [164]

[36] [2008] HCA 2 at [167]

Where a contravention is found to have occurred it may be thought that the making of a declaration is the only course consistent with the public interest. The public interest ordinarily requires the maintenance of standards set by statutes. It was pointed out in argument, however, that some contraventions may have less serious consequences than others. Even when that is not the case, considerations of interests other than those directly affected by the share acquisitions may lead the Panel to conclude that no action should be taken and that the takeover proposal should be permitted to proceed. In either case the point is that the public interest is to be taken into account in making the decision. This implies a process where the Panel weighs the contravention and its effects with other considerations in order to determine what is required.

117. In our view, the contravention here warrants the making of a declaration.

118. Chapter 6 applies to TPC. Its shareholders are entitled to the protections that the chapter provides. Control of TPC effectively passed without a reasonable and equal opportunity being provided to all shareholders to participate in any benefits accruing from a proposal under which QNA acquired control of, or a substantial interest in, TPC. Furthermore, the acquisition of control over voting shares occurred in contravention of section 606 and therefore not in an efficient competitive and informed market.

119. We took into account these policy considerations. We also considered that subsequent acquisitions in March 2012 gave rise to unacceptable circumstances on the basis that, if they were permitted by item 9 of section 611, it was only because of a prior contravention.

120. Thirdly, as TPC noted in its submission, QNA has been permitted to participate fully in the Panel's proceedings and has done so with legal representation throughout.

121. QNA also submitted that the breach was inadvertent or due to a mistake within the meaning of section 606(5). That section provides a defence for a prosecution if a person proves that they have contravened section 606 because of inadvertence or mistake or because the person was not aware of a relevant fact or occurrence. In determining whether the defence is available, the person's ignorance of, or mistake on their part concerning a matter of, law is disregarded. QNA did not supply evidence of its ignorance or mistake.

122. ASIC submitted that "*the circumstances occasioned by the contravention are unaffected by any mistake or inadvertence that may or may not be proven in defence by QNA. We note the Panel proceedings also do not involve a prosecution of QNA for the contravention of s606.*"

123. Both ASIC and TPC noted that the Panel's proceedings are not criminal proceedings. ASIC and TPC also submitted that section 606(5) is not available in relation to a person's ignorance of, or a mistake on the person's part concerning, a matter of law.

124. We agree that section 606(5) is not relevant because Panel proceedings are not criminal proceedings.

Orders

125. Following the declaration, we made the final orders set out in Annexure B. We were not asked to, and did not, make any costs orders.

126. Under s657D the Panel's power to make orders is very wide. The Panel is empowered to make 'any order'[37] if 4 tests are met:

(a) it has made a declaration under s657A. This was done on 24 July 2012.

(b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. For the reasons below, we are satisfied that our orders do not unfairly prejudice any person.

(c) it gives any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. This was done on 12 July 2012. Each of ASIC, QNA and TPC made submissions and rebuttals.

(d) it considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons, or ensure that a takeover or proposed takeover proceeds as it would have if the circumstances had not occurred. The proposed takeover is no longer proceeding. The orders protect the rights and interests of other shareholders in TPC.

127. The orders do this by freezing the votes attached to all the shares now held by CDLI and QNA. The orders also prevent further acquisitions and disposals,[38] subject to some exceptions including that there may be acquisitions pursuant to a takeover bid as set out in the orders. Further unrestricted acquisitions should not be allowed while the unacceptable circumstances have not been remedied. Unrestricted rights of disposal should not be allowed while the unacceptable circumstances have not been remedied because of the possibility of avoidance of the restriction on voting. We make it clear in the orders that acquisitions or disposals can occur with the Panel's consent, so it would be open to QNA to seek that consent for an appropriate transaction.

128. The restrictions cease if QNA makes an unconditional bid for all the other shares (and corresponding villa interests) at no less than the highest price it paid in March 2012 and it receives acceptances for at least 50.1% of the shares in which QNA does not have a relevant interest. Such bid must be on terms otherwise no less favourable than those of the bid which QNA proposed in April 2012, and ASIC must not have objected to the terms or documentation of the bid.

129. The orders do not unfairly prejudice QNA, and are consistent with protecting the interests of shareholders in TPC from a change of control without either a bid or

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[37] Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

[38] Including transfer or charge

shareholder approval. They are not unfair because QNA brought about the situation by the acquisition of CDLH (which owns CDLI), or contributed materially to the situation by having CDLI revoke the ASIC deed poll and by buying additional shares in TPC.

130. We accepted QNA's submission that our original proposed order - that the voting freeze would apply unless and until QNA made a bid as above and received acceptances for 100% of the shares - was unnecessary. QNA also submitted that the restriction would, as a practical matter, be impossible to overcome. Perhaps not, given that compulsory acquisition may have been available, but in any event we reduced the minimum acceptance requirement.

131. We also considered whether any conditions could be included in the bid. We decided that this was inappropriate for practical reasons, including managing the process, and because it would not then operate as a reasonable and equal opportunity for remaining shareholders to exit compared to those who have already sold out. Moreover, QNA's proposed bid was to have been unconditional.

132. TPC submitted that the Panel should require QNA to proceed with its announced takeover offer on terms no less favourable than those in the original bidder's statement and with an offer price of not less than $1 per share and $65,000 per villa interest. It submitted that this was consistent with (among other things) the policy in section 631(1), ASIC RG 59 in relation to withdrawing offers, and representations that had been made to members.

133. We are sympathetic to this argument, but decided not to require that a bid be made. We think our orders sufficiently remedy the unacceptable circumstances. Also, there are practical considerations we have to take into account when considering whether such an order could be made. For example, the person ordered to make a bid must have, and continue have, sufficient funding available. There may also be an issue around the conditions of such a bid (although not in this case, the proposed bid having been unconditional). Query also if an order that a person make a bid is an order directing a person to comply with a requirement of chapter 6[39] but we do not need to decide this.

134. The orders do not interfere with QNA's economic interest in the shares and villa interests which it and CDLI hold, or require QNA to make a bid, as QNA can accept the situation, or with Panel consent sell its interest (for example, by accepting a bid from someone else).

135. QNA submitted that if we were minded to impose a voting restriction, it should be limited to the limit in the takeovers provisions themselves, namely "*… a limit of voting power to 20%, subject to QNA fulfilling the requirements of section 611…*" QNA also put it another way. It said:

[39] See section 657D

QNA will agree to an order that QNI and its associates must not exercise voting rights in [TPC] shares in excess of 20% unless and until such time as QNA complies with one of the exceptions in section 611 … Or until such time as QNA and its associates acquired 50% of the issued share capital of [TPC]

136. We do not accept QNA's submission. ASIC submitted that an order restraining the exercise of all voting rights was the most appropriate because the initial acquisition was a single transaction and the subsequent acquisitions took advantage of the initial acquisition. We agree with ASIC.

137. The orders we have made do not affect the villa interests, but do contemplate offers being made to acquire the shares and the villa interests.

138. QNA submitted that shareholders had been given an opportunity to entrench the 10% limit on its voting rights and the resolutions did not pass. This is not to the point. Moreover, we agree with ASIC's submission that:

… the Panel should generally be very cautious in drawing inferences from the results of an ex post facto general meeting about the attitude of members to a situation potentially giving rise to unacceptable circumstances, or the apparent effect of the unacceptable circumstances on those members' rights and interests. Ex post facto meetings are not generally a satisfactory proxy for compliance with the spirit and letter of Chapter 6, especially when decision making in general meeting may be affected by the unacceptable circumstances themselves or changes in circumstances subsequent to the advent of the unacceptable circumstances or when collateral issues, considerations or incentives may impact on the voting of some or all members.

139. Section 611 provides in item 7 an exemption to the prohibition in section 606, namely a shareholder vote in favour of the acquisition. This has never been put to shareholders.

140. In any event, it appears that QNA voted on the resolution that TPC put up.

141. We also considered whether any orders would assist remaining shareholders in TPC because practical, if not legal, control of the Palmer Coolum Resort had passed and steps were being taken that affected the usage of members. This is not a matter for us. Focusing on Chapter 6, in our view orders are warranted to address the unacceptable circumstances.

Conflict

142. We made the declaration of unacceptable circumstances on 24 July 2012 and communicated it to the parties and QNA on 24 July 2012. We made final orders on 27 July 2012 and communicated them to the parties and QNA on 27 July 2012. Each was published by the Panel.

143. On 9 August 2012, QNA's solicitors wrote to the Panel (among other things) that:

… we have been made aware that Allens Arthur Robinson (sic), the firm of which Mr Crouch is the Chairman, has acted since 2011 on behalf of a member of the CITIC Group of

companies in an ongoing matter against Mineralogy, a company controlled by Professor Clive Palmer. We draw this to your attention as we note that Mr Crouch did not declare this matter at the time of his appointment to the Panel. We acknowledge that this is the first occasion on which we have drawn this to the Panel's attention, but in that respect we submit that it was for Mr Crouch to conduct a full conflict search within Allens Arthur Robinson and declare his position regarding the above matter before agreeing to his appointment. Accordingly, we submit that the statement in the Panel's Declaration of Interests dated 27 June 2012 that Mr Crouch "is not aware of any interest that could conflict with the proper performance of his functions in relation to this matter" may not have been accurate….

144. No information is available as to when QNA or Mr Palmer was first aware of this issue.

145. It is part of the Panel's procedure, before appointing a sitting Panel, to provide to potential Panel members the information supplied by the applicant as to parties known to the applicant to have an interest in the matter. The procedure was followed in this case. Mr Palmer and QNA, among others, were identified in the application, all of which information was forwarded to potential Panel members.

146. Mr Crouch conducted conflict searches at Allens in the usual way. Mr Crouch responded to the Panel that he had no conflict. This response was taken into account by the President when constituting the sitting Panel.[40] Mr Crouch also cleared his declaration of interests statement that *"Mr Crouch is not aware of any interest that could conflict with the proper performance of his functions in relation to this matter."*[41]

147. Following receipt of the letter of 9 August, Mr Crouch responded:

I confirm that the statement: "that I was not aware of any matter that could conflict with the proper performance of my functions in relation to this matter" was accurate when made and remained so for the duration of the proceeding concerning The President's Club Limited.

148. Under section 185(1) of the ASIC Act, when a member of the Panel has any interest, pecuniary or otherwise, that could conflict with the proper performance of the member's functions in relation to a matter, the member must disclose the interest to the President and to the parties involved in the matter. The member must be aware of the interest to be able to disclose it.

149. Under section 185(2), when the President[42] becomes aware that a member of the Panel has such an interest, the President must either revoke the direction appointing that member or cause that member's interest to be disclosed to the parties. The direction must be revoked unless the President believes on reasonable grounds that the member's interest is immaterial or indirect and will not prevent the member from acting impartially in relation to the matter.

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[40] Section 184 of the ASIC Act

[41] This was included in a declaration of interests letter that was sent to parties and others identified in the application, including QNA via its then solicitors. When QNA's current solicitors took over, the Panel was advised that the declaration of interests letter had been passed to them

[42] Taken to be a reference to the substantive or Acting President, not the President of the sitting Panel

150. The President of the Panel considered the state of knowledge of the member, the stage of the proceedings at which the issue was first raised, and the fact that (other than for completion of reasons) the Panel's performance of its functions and exercise of its powers had been completed, and decided not to revoke the direction appointing Mr Crouch. In all the circumstances, the President believed on reasonable grounds that the member's interest is immaterial or indirect and will not prevent the member from acting impartially in relation to the matter.

151. The parties and QNA were advised of the interest and the decision of the President, as was the sitting Panel.

152. The President also considered that, on the test of a fair-minded, objective bystander having all the factual information,[43] no reasonable apprehension of bias would arise.

Ewen Crouch
President of the sitting Panel
Decision dated 24 July 2012
Reasons published 24 August 2012

Advisers

	Advisers
TPC	King & Wood Mallesons
QNA (not a party)	HogoodGanim Lawyers

[43] *C P Ventures Pty Ltd v McKeon* [1999] FCA 1272

Australian Government

Takeovers Panel

Annexure A

CORPORATIONS ACT
SECTION 657A
DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

THE PRESIDENT'S CLUB LIMITED

CIRCUMSTANCES

1. The President's Club Ltd (**TPC**) is an unlisted company with more than 50 members. Its capital is divided into 7,488 ordinary shares and 5 subscriber shares (the latter having no right to vote, to dividends or to participate in the net assets of the company on a winding up).

2. Coeur de Lion Holdings Pty Ltd (**CDLH**) owns all the shares in Coeur de Lion Investments Pty Ltd (**CDLI**). CDLI owns 3,107 shares in TPC (approximately 41.4%).

3. Ordinary shares in TPC are voting shares. They carry voting rights beyond those in the definition of 'voting share' in section 9. This is not changed by a deed poll entered by CDLI, revocable on 6 months' notice and which has been revoked, in favour of the Australian Securities and Investments Commission as follows:

   Where [CDLI] and its associates are not disqualified and excluded from voting their interests at a meeting, [CDLI] covenants that any voting rights held by [CDLI] and its associates or any operator, manager, promoter in relation to each Scheme, must not be exercised in excess of 10% of the votes that may be cast (after deducting any votes not cast by anyone or more members) on a resolution by members of the relevant Club other than:

   (a) in circumstances consented to in writing by the ASIC; or

   (b) in relation to a resolution to wind up the relevant Scheme.

4. In or around July 2011, CDLI:

   (a) was the holder of the shares

   (b) had power to exercise, or control the exercise of, a right to vote attached to the shares and/ or

   (c) had power to dispose of, or control the exercise of a power to dispose of, the shares.

5. In or around July 2011, Queensland North Australia Pty Ltd (**QNA**) acquired 98% of the shares in CDLH. The remaining 2% of the shares in CDLH were acquired by Closeridge Pty Ltd.

6. By reason of section 608(3)(a), or alternatively section 608(3)(b), in or around July 2011 QNA acquired a relevant interest in the shares in TPC that CDLI had a relevant interest in (**first acquisition**).

7. None of the exceptions in section 611 applied to the first acquisition. The first acquisition occurred in contravention of section 606.

8. Further in March 2012, QNA acquired 221 additional shares in TPC (2.9%) taking its relevant interest in TPC shares to approximately 44.4% (collectively, s**econd acquisition).** The second acquisition was the acquisition of a substantial interest in TPC.

9. The second acquisition occurred in purported reliance on item 9 of section 611. However, to the extent that item 9 was met, it was only by reason of the first acquisition, which contravened section 606.

10. It appears to the Panel that the circumstances of the first acquisition are unacceptable having regard to:

    (a) the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:

        (i) the control, or potential control, of TPC or

        (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in TPC and

    (b) the purposes of Chapter 6 set out in section 602 and

    (c) because they constituted, constitute, will constitute or are likely to constitute a contravention of a provision of Chapter 6.

11. Further it appears to the Panel that the circumstances of the second acquisition are unacceptable having regard to:

    (a) the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:

        (i) the control, or potential control, of TPC or

        (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in TPC and

    (b) the purposes of Chapter 6 set out in section 602.

12. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3).

DECLARATION

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of The President's Club Limited.

Alan Shaw
Counsel
with authority of Ewen Crouch
President of the sitting Panel
Dated 24 July 2012

Australian Government

Takeovers Panel

Annexure B

CORPORATIONS ACT

SECTION 657D

ORDERS

THE PRESIDENT'S CLUB LIMITED

The Panel made a declaration of unacceptable circumstances on 24 July 2012.

THE PANEL ORDERS

1. The Associated Parties must not exercise any voting rights that attach to the Acquisition Shares.
2. The Associated Parties must not make any further acquisitions of a relevant interest in shares in TPC, except:
   (a) with the consent of the Panel or
   (b) pursuant to acceptances under a takeover offer referred to in Order 4 or
   (c) the acquisition by Mr Clive Palmer of the shares corresponding to Lot 64 on BUP 8874 recently acquired by Mr Palmer from CDLI.
3. The Associated Parties must not dispose of, transfer or charge any of the Acquisition Shares, except:
   (a) with the consent of the Panel or
   (b) for a disposal or transfer pursuant to the acquisition by Mr Clive Palmer of the shares corresponding to Lot 64 on BUP 8874 recently acquired by Mr Palmer from CDLI.
4. Orders 1, 2 and 3 cease if all of the following requirements are met:
   (a) QNA or an associate of it makes offers for all the shares in TPC under a takeover bid that complies with chapter 6 and which meets the following conditions:
      (i) the terms are no less favourable than those set out in the original Bidder's Statement lodged with ASIC on 12 April 2012
      (ii) the offer price is no less than $65,013 for each parcel of shares and the corresponding villa interest
      (iii) the offer period is no less than 2 months and
      (iv) ASIC has confirmed in writing to the proposed bidder that it is otherwise satisfied with the terms of the offer and the disclosure in the bidder's

statement. This confirmation is not to be construed as ASIC's approval of the bidder's statement and

(b) no less than 50% of the offers made for shares not already held by the Associated Parties are accepted and

(c) all the accepting shareholders have been paid.

5. If QNA or an associate proposes to make a takeover bid under Order 4:

(a) QNA and its associates must ensure that the proposed bidder provides ASIC with all reasonable assistance requested by ASIC and

(b) should ASIC be unable to settle the terms or disclosure with the proposed bidder, either ASIC or the proposed bidder may refer the issue to the Panel for determination.

6. In these orders the following terms have the corresponding meaning:

Acquisition Shares	3,328 shares in TPC held: (a) as to 3,107 shares, by CDLI or an associate and (b) as to 221 shares, by QNA or an associate
Associated Parties	CDLI, CDLH, Closeridge, QNA and each of their respective associates
CDLH	Coeur de Lion Holdings Pty Ltd
CDLI	Coeur de Lion Investments Pty Ltd
Closeridge	Closeridge Pty Ltd
QNA	Queensland North Australia Pty Ltd
TPC	The President's Club Limited

Alan Shaw
Counsel
with authority of Ewen Crouch
President of the sitting Panel
Dated 27 July 2012