



Australian Government

Takeovers Panel

**Reasons for Decision
Knights Capital Group Limited
[2012] ATP 22**

Catchwords:

Relevant interest – bare trust – board dispute – timeliness of application – undertaking – decline to conduct proceedings

Corporations Act 2001 (Cth), sections 606, 609(2) and 657C(3)

Old Papa's Franchise Systems Pty Ltd v Camisa Nominees Pty Ltd [2003] WASCA 11

Transurban Group [2010] ATP 5, Blue Energy Limited [2009] ATP 15, Golden Circle Ltd 02 [2007] ATP 24, Aulron Energy Limited [2003] ATP 31

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
NO	NO	NO	NO	NO	YES

INTRODUCTION

1. The Panel, Diana Chang, Mark Darras and Anthony Sweetman (sitting President), declined to conduct proceedings on an application by Knights Capital Group Limited in relation to its affairs. The application concerned whether a registered holder of shares in Knights was a bare trustee under s609(2)¹ and, if not, whether acquisitions of shares in Knights contravened s606. The issue arose in the context of resolutions to be put at Knights’ 2012 annual general meeting involving the replacement of two non-executive directors with three new directors. The Panel accepted an undertaking offered by the registered holder and decided there was no reasonable prospect that it would declare the circumstances unacceptable. The Panel also considered that the application was not timely.

2. In these reasons, the following definitions apply.

- AET** Australian Executor Trustees Limited
- board resolutions** the resolutions to be put at Knights’ 2012 annual general meeting involving the replacement of two non-executive directors with three new directors
- Funds** the funds on behalf of which AET holds the Knights shares in respect of which it is the registered holder as trustee or custodian
- Knights** Knights Capital Group Limited

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

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FACTS

3. Knights is an unlisted public company with more than 50 shareholders.
4. AET is the registered holder of approximately 70.7% of the issued share capital of Knights.
5. AET holds the shares as trustee or custodian for various beneficial owners across the following 4 categories of funds:
 - (a) Kingston Superannuation Trust – AET in its capacity as trustee has full discretion on decisions relating to corporate actions²
 - (b) AET Small APRA Fund – AET in its capacity as trustee must act as directed by the financial advisers of the beneficiaries³
 - (c) Portfolio Management Service – AET in its capacity as custodian must act as directed by the beneficiaries and their financial advisers including voting the Knights shares at any meeting of Knights as so directed⁴ and
 - (d) AET Self Managed Super Fund – AET as custodian must act as directed by the beneficial holders or their financial advisers.⁵
6. A summary of the available history of AET's registered holdings in Knights is as follows:
 - (a) on 30 June 2001, AET held approximately 54.17% of Knights shares on issue
 - (b) between 30 June 2002 to 30 June 2004, AET's shareholding in Knights ranged from approximately 40.33%⁶ to 39.45% of Knights shares on issue
 - (c) on 30 June 2005, AET's shareholding in Knights increased to approximately 67.68% of Knights shares on issue as a result of AET participating in a non-renounceable rights issue on behalf of the underlying beneficial owners of the Knights shares
 - (d) between 30 June 2006 to 30 June 2008, AET's shareholding in Knights ranged from 67.28% to 65.58% of Knights shares on issue
 - (e) by 30 June 2011, AET's shareholding in Knights had fallen to 30.84% of Knights shares on issue predominately as a result of some financial advisers moving a number of their clients who were underlying beneficial owners of the Knights shares out of the AET Small APRA Fund (where the registered title of Knights shares was in AET's name) and into a fund of Kingston Capital Limited, which at that time was, and is, an entity unrelated to AET

² Based on information in the Kingston Superannuation Trust product disclosure statement dated 4 July 2011 and supplementary product disclosure statement dated 21 May 2012

³ Based on information in the AET Small APRA Fund product disclosure statement dated 14 September 2012

⁴ Based on information in the Portfolio Management Service disclosure document dated 30 April 2012

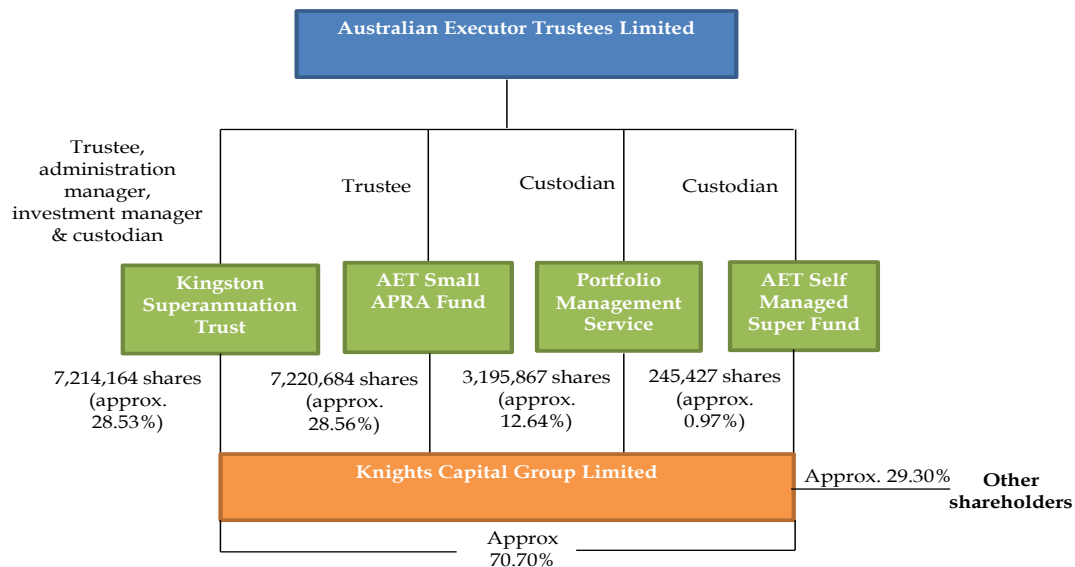
⁵ Based on information in the AET Self Managed Super Fund service guide dated 10 May 2011

⁶ The reduction in the percentage of AET's shareholding in Knights from 54.17% to 40.33% is because, in the 2002 financial year, Knights issued a large number of shares as part of a capital raising

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- (f) in December 2011:
- (i) Kingston Capital Limited came to AET requesting, and AET agreed, that AET would assume responsibility for Kingston Capital Limited’s funds and offering
 - (ii) Knights completed a share buy-back and
- (g) by 30 November 2012, AET’s shareholding in Knights had increased to 70.7% predominately as a result of the buy-back, AET becoming the trustee of Kingston Capital Limited’s fund (the Kingston Superannuation Trust), AET becoming custodian of Kingston Capital Limited’s platform service and the registered title of the Knights shares transferring back into AET’s name.
7. On 20 June 2012, AET sent a letter to Knights seeking the immediate removal of Mr Selwyn Bajada as a director. According to the letter, Knights’ constitution gave a shareholder holding more than 50% of the voting shares the power to remove directors. Knights did not comply. It said that it had concerns about the letter’s validity.
 8. On 31 July 2012, AET requisitioned a Knights shareholders’ meeting under s249D seeking to replace two non-executive directors with three new directors.
 9. On 23 August 2012, AET withdrew the requisition notice on the basis that Knights undertook to put the board resolutions forward at Knights’ 2012 annual general meeting.⁷
 10. On 30 November 2012, Knights’ 2012 annual general meeting was adjourned until 17 December 2012 before the board resolutions were considered.
 11. Various structural relationships between the parties identified in the application are described below.



⁷ AET agreed to Knights treating its requisition notice under s249D as if it were notice of a proposal to move a resolution at a general meeting under s249N. Knights provided the undertaking on the basis that AET had authority to give the s249N notice and Knights asked on a number of occasions for AET to demonstrate such authority

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APPLICATION

Declaration sought

12. By application dated 29 November 2012, Knights sought a declaration of unacceptable circumstances.
13. Knights submitted (among other things) that:
 - (a) AET may have breached, and continues to breach, s606 because AET may not hold the Knights shares as bare trustee under s609(2). Consequently, AET's acquisition of a relevant interest in Knights shares in excess of 19.99% would have constituted a prohibited acquisition under s606 and
 - (b) unacceptable circumstances existed in relation to the affairs of Knights because AET was seeking to exercise the voting rights attached to the Knights shares, which it said it held as bare trustee, without seeking the instructions of the underlying beneficial holders of those shares.
14. Knights submitted that the effect of the circumstances was (among other things) that:
 - (a) Knights shareholders were prejudiced as there was an existing and continuing unacceptable effect on the control of Knights and
 - (b) the acquisition of a relevant interest in Knights shares was not taking place in an efficient, competitive and informed market (by reason of AET's acquisition of Knights shares in contravention of s606).

Interim orders sought

15. Knights initially sought interim orders that:
 - (a) AET disclose the basis on which it was authorised and instructed to control voting rights attaching to the Knights shares it holds and
 - (b) until determination of the Panel proceedings:
 - (i) the 's249N notice' was of no effect and the resolutions the subject of the s249N notice need not be considered by Knights or
 - (ii) in the event the Panel proceedings are not completed prior to Knights' 2012 annual general meeting, AET be restrained from exercising any voting power attaching to the Knights shares acquired in contravention of s606.
16. On 30 November 2012, Knights withdrew its request for interim orders as Knights' 2012 annual general meeting had been adjourned to 17 December 2012. This was to allow the Panel proceedings to conclude before the board resolutions were (if required) put to shareholders.

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Final orders sought

17. Knights sought final orders that:

- (a) if AET is taken to have a relevant interest in Knights shares in contravention of s606:
 - (i) the 's249N notice' is "*cancelled, void and of no force or effect*"
 - (ii) the board resolutions sought to be moved at Knights' 2012 annual general meeting be disregarded
 - (iii) the relevant interest in the Knights shares in respect of which AET acquired a relevant interest in contravention of s606 be divested
 - (iv) the Knights shares in respect of which AET acquired a relevant interest in contravention of s606 not be voted at any meeting of Knights pending divestment of AET's relevant interest and
- (b) AET pay Knights' costs of the proceedings.

DISCUSSION

Preliminary submissions

18. AET made preliminary submissions that the Panel should not conduct proceedings. In the preliminary submissions, AET also offered an undertaking to the effect that it would only vote the Knights shares it holds at the 2012 annual general meeting in accordance with directions given by the underlying beneficial owners. In volunteering the undertaking, AET submitted this was how it was going to vote in any event and it was not an admission that it had done anything wrong.

Unacceptable circumstances

19. Knights submitted that AET was not acting as a bare trustee in seeking to have the board resolutions put to Knights shareholders. It submitted that, in the absence of express instructions from the beneficial holders of the Knights shares, AET should not be taking active steps to take this action, and that this went beyond the scope of its powers as a bare trustee. It also submitted that, if AET did not hold these shares as bare trustee, AET's acquisition of a relevant interest in shares in excess of 19.99% may have constituted a prohibited acquisition under section 606.
20. AET submitted that there was no definitive statement on the limits of the powers of a bare trustee and that the Panel could make a determination "*on whether or not unacceptable circumstances exist without having to consider the application of the bare trustee exemption*". It submitted that there were no unacceptable circumstances because AET did not intend to, and would not, cast any votes for or against the resolutions at Knights' 2012 annual general meeting unless it held directions from the underlying beneficial owners of the shares. AET also submitted that it had genuine concerns in relation to the Knights shares and its role as trustee dictated that it take action to seek to protect this trust property.

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21. AET's role in relation to the Funds, and particularly the Kingston Superannuation Trust, may not meet the requirements of the bare trustee exemption in s609(2).
22. The functions of a bare trustee are discussed in *Old Papa's Franchise Systems Pty Ltd v Camisa Nominees Pty Ltd*:⁸

... The term "bare trustee" is often used in statutes where its meaning depends on its context: Corumo Holdings Pty Ltd v C Itoh Ltd (1991) 24 NSWLR 370 at 398; Thorpe v Bristile Ltd (1996) 16 WAR 500 at 505-506.

In the context of the companies legislation considered in Coruma Holdings (supra), the term was held to mean a trustee who was no more than a nominee or cypher in a common sense commercial view.

In Thorpe v Bristile Ltd (supra) Malcolm CJ (at 505), with whom Pidgeon and Owen JJ agreed (at 507), referred with approval to the statement in Jacob's Law of Trusts in Australia to the effect that:

"A 'bare trust' is simply a trust in which the trustee has no active duties to perform. In its classic form it occurs when a principal vests property in his agent as his nominee, but obviously can occur in other circumstances. There are only two circumstances in which it is relevant to consider whether or not a trust is a 'bare trust'. The first concerns the question of possession: a cestui que trust is entitled to the possession of the trust assets if a trust be a 'bare trust', but not otherwise. The second concerns the effect of the creation of a sub-trust. If A holds property on trust for B, and B declares himself a trustee of his interest for C, if the intermediate trust is a 'bare trust', but not otherwise, it is arguable (but not certain) that the effect of B's declaration of trust is to bring A and C into a direct relationship, so that A becomes a trustee for C."

Although the beneficiary of a bare trust is "entitled to possession" of the trust property, it does not necessarily follow that it is in actual possession. Further, as Meagher JA observed in Corumo Holdings (at 398), in reality almost no situation can be postulated when a trustee cannot in some circumstances have active duties to perform. However, by no stretch of the imagination can it be said that a trustee carrying on a business would or could be a bare trustee.⁹

23. In *Aulron Energy Limited*, the Panel said:

A bare trustee is a trustee with no active duties to perform, i.e. one whose only duties are to maintain the trust property and transfer it to the beneficiary on demand. The existence of a bare trust is consistent with the trustee having power to vote shares, if the beneficial owner has declined to give instructions, but not of the trustee having power to vote independently of the beneficiary. An example might be a proposal to reduce capital by paying off the shares at a fraction of their worth, when the beneficial

⁸ [2003] WASCA 11. The case concerned, relevantly, whether lessees, by selling the business operated on the premises to Old Papa's and agreeing to hold it 'on bare trust', had parted with possession without consent, in breach of the lease. It was held that the trust effected an equitable assignment that was not parting with possession under the lease, since the trust was not a bare trust

⁹ [2003] WASCA 11 at [54]-[57]

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*owner is out of touch. Such a situation may enliven an active duty to vote against the reduction, to act to preserve the interest of the beneficiary.*¹⁰

24. We note that, for example, the product disclosure documents for the Kingston Superannuation Trust provide that AET in its capacity as trustee has full discretion on decisions relating to corporate actions. This implies that AET can vote the Knights shares it holds on behalf of Kingston Superannuation Trust independently of the beneficiaries. This may go beyond the role of a bare trustee. The product disclosure statement says:

... You will also have no entitlement to any voting rights which may be attached to your investments held within your investment portfolio.

When a corporate action, such as a takeover or restructure, is announced, the Trustee will make a decision on what action to take and will endeavour to act in the best interests of the members of the Trust. In relation to other types of corporate actions such as a rights issue and buy backs, we may contact you directly and seek your prior direction on whether or not you wish to take up the action.

*In all cases, the Trustee holds full discretion on decisions relating to corporate actions and will endeavour to act on behalf of all the members in the Trust. In many situations, the Trustee may not be able to treat members differently in respect of corporate actions.*¹¹

25. We do not need to resolve whether AET is a bare trustee as the undertaking offered by AET addresses the concerns regarding voting at the adjourned general meeting.
26. We do not have sufficient information to establish, as AET submitted, whether the risk to the Knights shares was imminent or whether AET had time to obtain the instructions of the underlying beneficial owners before taking the actions to have the board resolutions put to Knights shareholders. If the risk was not imminent or there was time, the actions of AET would appear to exceed what would be required of a bare trustee. Again, we do not need to resolve this.
27. The application essentially raises two issues:
- (a) If AET is not a bare trustee, its acquisition of shares may contravene s606, which may in turn lead to unacceptable circumstances. We consider that the investigations necessary to determine whether AET is a bare trustee or has contravened s606 are likely to take some time. This may result in a further delay to Knights' 2012 annual general meeting, which has been adjourned to 17 December 2012, which is not desirable. The question also raises broader issues of regulatory policy. For these reasons, we consider ASIC to be best placed to make further enquiries into the role of AET and the bare trustee exemption. We have referred this matter to it. If, following such investigations, a breach of s606 or other unacceptable circumstances are

¹⁰ [2003] ATP 31 at [95] (footnotes omitted)

¹¹ Kingston Superannuation Trust product disclosure statement dated 4 July 2011, pp25-26

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indicated, ASIC, Knights or any other affected party may then make a fresh application to the Panel.

- (b) Whether the actions of AET are having an unacceptable impact on control of Knights. This is essentially a complaint about AET's proposed exercise of the voting rights attaching to the Knights shares it holds. In our view, this will be resolved if AET votes at Knights' 2012 annual general meeting only in accordance with the instructions of the underlying beneficial owners of the shares. AET has offered, and we have accepted, an undertaking (Annexure A) the effect of which is that the beneficial owners of the Knights shares (rather than AET) will determine the outcome of the board resolutions. Therefore, the most immediate concerns in relation to unacceptable circumstances have been dealt with. Implicit in this aspect of the application is a concern about the proposed resolutions having been brought on (ie, the s249D requisition which was then treated as a s249N notice). We can put this to one side as Knights gave an undertaking to put the board resolutions forward, which it has complied with.

Appropriate orders

28. Knights effectively sought two orders, if AET has contravened s606:
- (a) that the board resolutions not be put to Knights shareholders and
 - (b) that the relevant interest in any shares acquired in contravention of s606 be divested and not voted in the meantime.
29. Even if AET is not acting as a bare trustee, it is holding the shares on behalf of others. The orders sought by Knights would not appear to be appropriate to remedy the unacceptable circumstances, in our view, not least because they would, on the face of it, appear to unfairly prejudice the beneficial owners of the Knights shares.

Timing

30. Under s657C(3), an application for a declaration of unacceptable circumstances can be made only within 2 months after the circumstances have occurred or a longer period determined by the Panel.
31. AET's shareholding in Knights dates back over 10 years. If AET first acquired its shareholding in Knights in contravention of s606, it occurred some considerable time ago. AET subsequently re-acquired some of those holdings. That was agreed to over a year ago and has been given effect in the period from November 2011 to December 2012. It would seem that the application may be out of time, unless it can be shown the circumstances are continuing or we determine a longer period.
32. If we needed to extend time, a relevant consideration would be the timing of the application. Even though Knights was aware of AET's intention to have the board resolutions put to Knights Shareholders as early as 31 July 2012, it did not lodge the application until 5:00 pm (Perth time) on the day before Knights' 2012 annual general meeting (which was scheduled to commence at 9:00 am Perth time on 30

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November 2012). The Chairman of Knights then adjourned the annual general meeting on the basis of the pending Panel application.

33. We agree with the Panel in *Blue Energy Limited* that:

... it is in the public interest, and it is the clear intention of the legislature, that applicants bring applications to the Panel as soon as reasonably practicable after they become aware of potentially unacceptable circumstances. ...

... we have discretion not to conduct proceedings. Timeliness is a factor, an aspect of which is that an application may not be considered timely if the applicant has delayed bringing the application because it waited for, or has been selective in choosing, 'more serious' or 'more unacceptable' circumstances.¹²

34. Similar to the Panel in *Transurban Group*,¹³ we have concerns about the timeliness of this application but do not need to take this any further other than to note that Knights' delay in bringing the application is a factor in our decision not to conduct proceedings.

DECISION

35. 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).
36. As there is no takeover offer announced or on foot in relation to Knights, it is also open to Knights to raise its concerns in Court.

Orders

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

Anthony Sweetman
President of the sitting Panel
Decision dated 11 December 2012
Reasons published 13 December 2012

¹² [2009] ATP 15 at [29] and [30]. See also *Golden Circle Ltd 02* [2007] ATP 24 at [14d]

¹³ [2010] ATP 5

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Advisers

Party	Advisers
Australian Executor Trustees Limited	Herbert Smith Freehills
Knights Capital Group Limited	Clayton Utz



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Annexure A

**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT (CTH)
SECTION 201A UNDERTAKING**

Knights Capital Group Limited

Pursuant to section 201A of the *Australian Securities and Investments Commission Act 2001* (Cth), Australian Executors Trustees Ltd ACN 007 869 794 in its capacities set out below (**AET**), undertakes to the Takeovers Panel that, at the 2012 annual general meeting of Knights Capital Group Ltd ACN 072 769 174 (**KCG**), AET will, on resolutions 1, 2(a), 2(b), 2(c), 2(d), 2(e) and 3 (each as set out in KCG's notice of meeting dated 1 November 2012), exercise the voting rights attaching to the KCG shares in respect of which it is the registered holder only in accordance with any directions given to it by the underlying beneficial owners of those KCG shares.

Signed by Gary Riordan

General Manager, AET Trustee Services

for and on behalf of Australian Executors Trustees Ltd as trustee for the Kingston Superannuation Trust, as trustee for various small APRA funds collectively known as SAF, as custodian for Portfolio Management Services and as custodian for AET Self Manager Super Funds

Dated 10 December 2012