



Australian Government

Takeovers Panel

**Reasons for Decision
PaperlinX SPS Trust
[2014] ATP 1**

Catchwords:

Decline to conduct proceedings – intentions – coercive bid – disclosure – continuous disclosure – imbalance of rights – buy-back – SPS Trust – hybrid securities – step-up preference securities – ordinary securities – market price of securities – veto rights

Corporations Act 2001 (Cth), section 602

Keybridge Capital Limited [2013] ATP 17, Careers Australia Group Limited 02 [2013] ATP 5

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

INTRODUCTION

1. The Panel, Robin Bishop, Ewen Crouch AM and Sophie Mitchell (sitting President), declined to conduct proceedings on an application by Coastal Capital International, Ltd. in relation to the affairs of the PaperlinX SPS Trust. The application primarily concerned allegations that the bid by PaperlinX Limited for the SPS Trust was coercive to holders of step-up preference securities and was prohibited by the SPS terms. The Panel considers that the circumstances complained of existed from the SPS Trust’s inception or were the ordinary outcome of a change of ownership proposal and there were no grounds for interfering with the bid.

2. In these reasons, the following definitions apply.

2007 PDS	the product disclosure statement issued by the Responsible Entity in 2007 relating to the issue of SPSs
Coastal Capital	Coastal Capital International, Ltd.
PaperlinX	PaperlinX Limited
Responsible Entity	The Trust Company (RE Services) Limited
SPS	step-up preference securities
SPS Trust	PaperlinX SPS Trust

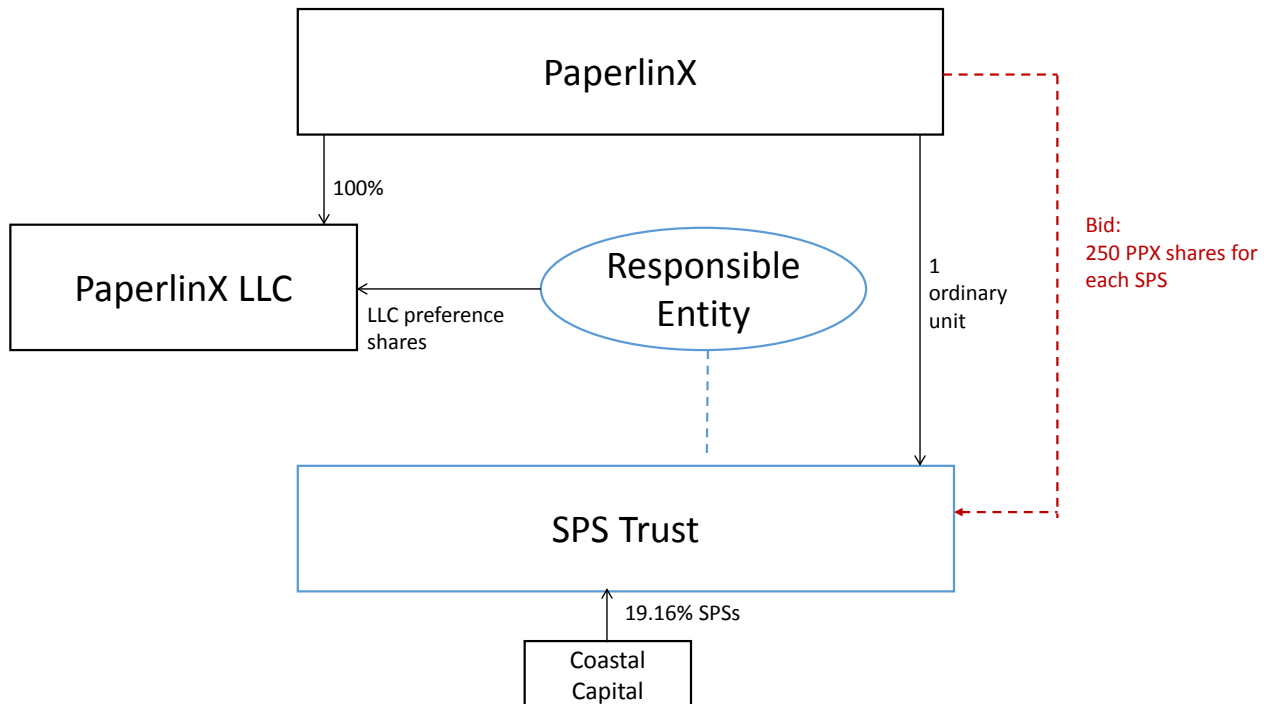
FACTS

3. The SPS Trust is a registered managed investment scheme listed on ASX (ASX code: PXU).
4. Coastal Capital is a 19.16% holder of SPSs.

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5. The SPS Trust is a single purpose, non-operating trust. It was established in 2007 with two classes of securities on issue – SPSs (a hybrid security, listed on ASX) and one ordinary unit. The ordinary unit is held by PaperlinX.¹
6. The funds raised from the issue of SPSs were used to subscribe for preference shares in PaperlinX LLC,² a subsidiary of PaperlinX. PaperlinX LLC used the funds to retire debt within the PaperlinX group.
7. A simplified structure is shown in the diagram below.



Terms of SPSs

8. The full terms of the SPSs are set out in the SPS Trust constitution and the 2007 PDS.
9. The SPS terms provide that realisation of SPSs will occur:
 - (a) if the Responsible Entity elects to realise SPSs
 - (b) if there is a change of control of PaperlinX (the only circumstance where realisation is at a SPS holder's election) or
 - (c) if PaperlinX breaches any of the undertakings it has given to the Responsible Entity under the SPS Trust constitution.
10. The SPS terms also provide that SPSs may be realised by one of the following three methods (at PaperlinX's discretion):
 - (a) redemption for cash (at face value plus unpaid distributions)

¹ The 2007 PDS states that the ordinary unit is held by PaperlinX and "carries a voting right, limited rights to a distribution and rights on winding up of the [SPS Trust] that rank behind the [SPSs]. The ordinary unit confers no right of exchange or redemption, while the [SPSs] are on issue".

² PaperlinX LLC preference shares entitle the Responsible Entity to distributions on terms similar to SPSs. Distributions on SPSs are only made by the Responsible Entity if it has received distributions on its PaperlinX LLC preference shares

- (b) exchange for PaperlinX ordinary shares (with the exchange ratio calculated having regard to the face value of \$100 of SPSs as adjusted for any unpaid distributions in the preceding 12 months)
 - (c) resale to a third party as arranged by PaperlinX (for a price not less than the redemption price).
11. Under the SPS Trust constitution, SPS holders have agreed not to amend the constitution or rights attaching to SPS Trust securities in a manner that PaperlinX (as the ordinary unit holder) reasonably considers may adversely affect its interests, without PaperlinX's consent.
 12. In November 2013, the Responsible Entity requisitioned a meeting of SPS Trust security holders at which amendments to the SPS Trust constitution were proposed. Even though PaperlinX had previously announced that it considered the proposed amendments to adversely affect its interests, the Responsible Entity requisitioned the meeting because it considered it was obliged to under the *Corporations Act 2001*.³ The meeting was held in December 2013. PaperlinX voted against,⁴ and accordingly prevented, the proposed amendments. Despite the apparent inconsistencies between the process for amending the constitution under the SPS Trust constitution and the *Corporations Act*, the intended outcome was achieved as PaperlinX effectively vetoed the proposed amendments.
 13. Also under the SPS Trust constitution, PaperlinX has undertaken not to breach any of the SPS terms. Clause 4 of the SPS terms provides that PaperlinX must not “redeem, reduce, cancel, buy-back or acquire for any consideration any share capital of PaperlinX” in circumstances where, among other things, distributions have not been paid to SPS holders in respect of the previous 12 month period. A breach of clause 4 would amount to a breach of the undertaking and therefore oblige PaperlinX to exchange all SPSs for PaperlinX preference shares (on a one for one basis) that are immediately redeemable (at \$100 plus unpaid distributions in the previous 12 months).
 14. Distributions on SPSs are discretionary and non-cumulative. The Responsible Entity has not paid a distribution to holders since 30 June 2011.

Takeover bid

15. On 18 October 2013, PaperlinX announced its intention to make an off-market bid for all SPSs, offering 250 PaperlinX ordinary shares for each SPS.
16. PaperlinX's bidder's statement was lodged with ASIC on 5 December 2013. The bidder's statement described PaperlinX's intentions, as follows:
 - (a) if it becomes entitled to compulsorily acquire all SPSs, PaperlinX intends to delist and cancel the SPSs and wind up the SPS Trust
 - (b) if it achieves a greater than 50.1% interest, PaperlinX intends to retain the Responsible Entity, amend any provisions of the SPS Trust constitution that give rise to uncertainty or adversely affect the confidence of PaperlinX's

³ See the SPS Trust notice of meeting and unitholder booklet dated 20 November 2013

⁴ PaperlinX voted in a separate class to SPS holders

stakeholders, review the SPS Trust's distribution policy and may seek de-listing of the SPSs and

- (c) if it achieves a 50% or lower interest, PaperlinX intends to hold its SPSs and exercise its rights in the best interests of PaperlinX shareholders.
17. PaperlinX also stated that it is unlikely to elect to carry out a realisation of SPSs for cash (due to funding constraints) or for PaperlinX ordinary shares (due to the unlikelihood of obtaining the necessary PaperlinX shareholder approval).
18. At the time of the application, PaperlinX had a disclosed relevant interest of 1.2% in the SPSs.

APPLICATION

Declaration sought

19. By application dated 13 January 2014, Coastal Capital sought a declaration of unacceptable circumstances. It submitted, among other things, that:
- (a) SPS holders may be coerced into accepting the bid because of the risk that their rights would be substantially diminished by PaperlinX carrying out its stated intentions and because of the imbalance of rights between PaperlinX and other SPS holders
 - (b) the acquisition of control of the SPS Trust was not taking place in an informed market as certain SPS Trust documentation (including the terms of the preference shares in PaperlinX LLC) had not been disclosed publicly and
 - (c) the links between PaperlinX and the SPS Trust were such that the SPSs should be considered "*quasi-securities*" of PaperlinX. Therefore, the bid is properly characterised as a buy-back of PaperlinX securities, which constitutes a breach of the SPS terms given that SPS distributions have not been paid in the previous 12 month period. Accordingly, PaperlinX is required to exchange the SPSs for redeemable preference shares.

Interim order sought

20. Coastal Capital sought an interim order that PaperlinX provide to all SPS holders:
- (a) all documents that are not publicly available that relate to the structure of the SPS Trust
 - (b) the various incorporation documents of entities relevant to the SPS Trust structure and
 - (c) the specific terms of any PaperlinX intercompany loans and all documents that relate to the re-domiciling of any such inter-company loans.

Final orders sought

21. Coastal Capital sought final orders that:
- (a) PaperlinX undertake that it will not exercise any rights in respect of any SPSs acquired under the bid and

- (b) a declaration that the takeover offer has the characteristics of a buy-back, constituting a breach of the SPS terms and PaperlinX accordingly exchange the SPSs for preference shares.

DISCUSSION

Coercion

22. Coastal Capital submitted that the bid was coercive. It submitted that SPS holders who did not accept would hold *“their [SPSs] in the knowledge that the entity which established the trust, and on whose statements they relied, will, if it gains control of the [SPS Trust], likely act in a way that is adverse to their interests”*. As a result, SPS holders may accept the bid *“out of fear that if they were to retain their holdings there would be substantial risk that PaperlinX would seek to diminish their legal rights and as a result their future return opportunities”*. In particular, Coastal Capital submitted that PaperlinX’s intentions not to elect to realise SPSs may be coercive particularly where SPSs were acquired on the basis that realisation would occur in accordance with the SPS terms.
23. Coastal Capital also submitted that an imbalance of rights between PaperlinX and other SPS holders would occur if PaperlinX acquired SPSs, because PaperlinX could exercise voting rights in respect of those SPSs and SPS holders’ rights are limited because of the ordinary unit held by PaperlinX. Coastal Capital submitted that the ordinary unit rights, together with the voting rights PaperlinX may acquire under the bid:
- (a) would effectively prevent other SPS holders from amending the constitution in a way that protected their rights and
- (b) would give PaperlinX an enhanced ability to oppress the other SPS holders.
24. Additionally, Coastal Capital submitted that the coercion *“may have driven down the market trading price of [SPSs] out of holder fear or driven up the market trading price of [PaperlinX shares], misleading some [SPS holders] into accepting PaperlinX’s offer on the faulty comparison of the current ‘Bidder Statement Influenced’ trading prices”*.
25. PaperlinX submitted that there was nothing in the 2007 PDS, the SPS Trust constitution, the SPS terms or the PaperlinX constitution that prohibited PaperlinX making a bid or that obligated it to facilitate the continued operation of the SPS Trust until there was a realisation of SPSs or the winding up of the SPS Trust. We agree. Nothing put before us expressly (or by necessary implication) prohibits PaperlinX making a bid for the SPS Trust.
26. PaperlinX further submitted that there was no unacceptable imbalance of rights between PaperlinX and SPS holders. In particular, the veto right of the ordinary unit holder (in the SPS Trust constitution) had been contractually agreed to by each SPS holder upon their subscription for SPSs. Presumably, the veto right and the SPS terms are also contractually agreed to by each SPS holder who has acquired their SPSs since the SPS Trust’s inception.
27. Finally, PaperlinX submitted that fluctuations in the trading price of target or bidder securities following a takeover bid are a normal market reaction to a bid and are not, without more, unacceptable. We agree.

28. In *Keybridge Capital Limited*,⁵ the Panel declined to conduct proceedings in response to submissions that a bid for Keybridge was coercive, stating that there was “no evidence of anything outside the normal incidence of a change of ownership that could reasonably be considered coercive such as to give rise to unacceptable circumstances”.
29. The same is the case here, in our view. To demonstrate that a bid is coercive there must be circumstances outside the normal incidence, or other than as an ordinary outcome, of a change of ownership proposal.
30. We do not consider the bid has a coercive effect on SPS holders. The circumstances identified by Coastal Capital as coercive either existed from the SPS Trust’s inception (ie the imbalance of rights between PaperlinX, as the holder of the one ordinary unit, and SPS holders) or are an ordinary outcome of a change of ownership proposal.

Disclosure of documents

31. Coastal Capital submitted that the market for SPSs was not fully informed because there were documents referred to in the SPS Trust constitution and SPS terms relating to the SPS Trust and its structure that had not been publicly disclosed. These documents included those relating to PaperlinX LLC and SPS Trust’s subscription for PaperlinX LLC preference shares, which, Coastal Capital submitted, “*may be relevant*”.
32. PaperlinX submitted that it had complied with its continuous disclosure obligations and the takeover provisions of the *Corporations Act*. It submitted that disclosure of the documentation was not required.
33. The documents requested by Coastal Capital were summarised or referred to in the 2007 PDS. Since listing, the SPS Trust has been subject to continuous disclosure obligations. It is not for us now to revisit disclosure made in and since 2007 where no regulatory concerns have been raised. Further, in the absence of Coastal Capital explaining how these documents may be relevant to the bid, it is not clear why these documents are now required to be disclosed.
34. Accordingly, we do not consider there is any reason to require the disclosure of the documents.

Buy-back

35. The Responsible Entity (which is not a PaperlinX group entity) issued the SPSs. While acknowledging this, Coastal Capital submitted that SPSs are “*quasi-securities*” of PaperlinX and that the bid should be characterised as a buy-back of PaperlinX securities having regard to:
 - (a) the purpose of the SPS issue, being to raise funds to retire PaperlinX group debt
 - (b) SPS holders only receiving distributions in circumstances where the SPS Trust received distributions on its PaperlinX LLC preference shares

⁵ [2013] ATP 17

- (c) the SPS Trust constitution prohibiting the Responsible Entity from acquiring any interests in assets other than PaperlinX LLC preference shares (and associated rights and benefits arising from those preference shares) and
 - (d) the trading price of SPSs largely tracking the trading price of PaperlinX.
36. Coastal Capital submitted that, as no SPS distribution had been paid in the previous 12 months, PaperlinX was under an obligation not to conduct a buy-back in accordance with clause 4 of the SPS terms and its undertaking in the SPS Trust constitution. Accordingly, PaperlinX had breached its undertaking and was obliged to undertake the exchange of SPSs for PaperlinX preference shares.
37. PaperlinX submitted that there was no legal relationship between PaperlinX and the SPS Trust that would support the conclusion that the bid was a buy-back. PaperlinX further submitted that none of the SPS Trust constitution, SPS terms or the 2007 PDS “remotely” suggested that it was the parties’ intention at the time of subscription of SPSs that a bid by PaperlinX would be deemed a buy-back for the purposes of clause 4 of the SPS terms.
38. It is apparent that one of the objectives of PaperlinX’s undertaking is to protect the interests of SPS holders. Clause 4 of the SPS terms expressly restricts a number of activities that PaperlinX could otherwise undertake to distribute cash to PaperlinX shareholders to the detriment of SPS holders. However, the SPS terms do not preclude a bid by PaperlinX for the SPS Trust.
39. A bid and a buy-back are not the same although they may have similar economic effects. However, even so, Coastal Capital suggests an interpretation of clause 4 that does not naturally arise from the words and nothing has been presented to us that might suggest that Coastal Capital’s interpretation should be preferred.
40. In *Careers Australia Group Limited 02*⁶ the Panel said that “*the making of an offer that complies with Chapter 6 and meets the purposes set out in s602 is not an event that we should ordinarily interfere with...It is the nature of a bid that all shareholders have their say, because each shareholder is free to accept or reject it. It is unclear why, in this case, that freedom should be curtailed*”.
41. We think this matter is similar to *Careers Australia 02*: an offer has been made that complies with Chapter 6 and apparently meets the purposes set out in s602. We do not consider there to be any basis shown on which we should interfere with it.

DECISION

42. 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).

Orders

43. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make an interim order.

⁶ [2013] ATP 5 at [36] and [37]

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[2014] ATP 1**

**Sophie Mitchell
President of the sitting Panel
Decision dated 17 January 2014
Reasons published 28 January 2014**

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Advisers

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