



Australian Government

Takeovers Panel

**Reasons for Decision
Lantern Hotel Group
[2014] ATP 6**

Catchwords:

Decline to conduct proceedings - buy-back - stapled securities - shareholder approval - security holder approval - irrevocable offer - call option - concurrent court proceedings - standing

Corporations Act 2001 (Cth), sections 606, 608(8), 609(7), item 7 of s611, item 19 of s611

Village Roadshow Limited 03 [2004] ATP 22, Richfield Group Limited [2003] ATP 41

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

INTRODUCTION

1. The Panel, Richard Hunt, Rodd Levy (sitting President) and Denise McComish declined to conduct proceedings on an application by Totem Holdings Pty Ltd in relation to the affairs of Lantern Hotel Group. The application concerned an offer to Lantern to buy-back 24.3% of its stapled securities on issue and the potential resulting increase in Torchlight GP Limited's relevant interest from approximately 30.2% to 40.3% if the buy-back were effected. The Panel considered that the buy-back offer was unlikely to give rise to unacceptable circumstances and other aspects of the application were premature.

2. In these reasons, the following definitions apply.

CVC	CVC Limited
Lantern	Lantern Hotel Group
Millinium	Millinium Asset Services Pty Limited, as trustee for the Borg Fund
Three Pillars	Three Pillars Portfolio Managers Pty Limited
Torchlight	Torchlight GP Limited
Totem	Totem Holdings Pty Ltd

FACTS

3. Lantern is an ASX listed stapled entity (ASX code: LTN).
4. Lantern stapled securities comprise one ordinary share in Lantern Hotel Group Limited and one unit in the Lantern Real Estate Trust.
5. Torchlight holds approximately 30.2% of Lantern and is the largest holder of stapled securities.

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6. Millinium, as trustee for the Borg Fund, holds approximately 24.3% of Lantern and is the second largest holder of stapled securities. Three Pillars is the investment manager of the Borg Fund.
7. On 4 February 2014, Three Pillars made an offer to Lantern to sell to Lantern (via a buy-back) Millinium's entire 24.3% interest. The terms of the buy-back offer included that:
 - (a) Millinium's stapled securities would be bought back in three equal tranches
 - (b) the buy-back price would be calculated by reference to the 20 day volume weighted average price for the stapled securities up to and including the settlement dates for each relevant tranche, with a minimum price floor and maximum price cap of 6.5c and 7.5c respectively
 - (c) the proceeds of any sale or settlement of Lantern's New Zealand assets would be used predominately to fund the buy-back
 - (d) the offer was "irrevocable" and was open for acceptance until 21 March 2014 and
 - (e) Lantern's acceptance of the offer was "conditional upon ... security holder approval and any necessary regulatory relief being obtained".
8. Under a deed dated 28 February 2014, Millinium granted a call option to Totem (the applicant) in respect of 111 million stapled securities (representing 12.6% of the stapled securities on issue).
9. Under a deed dated 5 March 2014, Millinium granted a call option to CVC in respect of 103,724,222 stapled securities (11.7%).
10. These two call options deeds, relating to all the stapled securities held by Millinium, were exercisable from the date each deed was executed until 30 September 2014 (unless extended).
11. On 7 March 2014, Lantern filed proceedings in the Equity Division of the Supreme Court of New South Wales seeking orders to, among other things, restrain Millinium from transferring its stapled securities to Totem and CVC in accordance with the call option deeds.

APPLICATION

Declaration sought

12. By application dated 11 March 2014, Totem sought a declaration of unacceptable circumstances. Totem submitted (among other things) that:
 - (a) Lantern had acquired a relevant interest in Millinium's 24.3% interest in contravention of s606¹ as a result of the buy-back offer and
 - (b) if Lantern was permitted to proceed with the buy-back, Torchlight's relevant interest would increase from 30.2% to 40.3% without paying a control premium and it would be unacceptable for Torchlight to vote in favour of a buy-back

¹ References are to the *Corporations Act 2001 (Cth)* unless otherwise specified

resolution that would result in it approving an increase in its own level of control over Lantern.

Interim order sought

13. Totem sought an interim order that Lantern be restrained from accepting the buy-back offer.

Final orders sought

14. Totem sought final orders that:
- (a) Lantern be restrained from accepting the buy-back offer or seeking to restrain Millinium from performing its obligations under either of the call option deeds
 - (b) Millinium be released from any obligation under or in respect of the buy-back offer and, in particular, be entitled to sell the relevant stapled securities to Totem under the call option deed
 - (c) if Lantern had purported to accept the buy-back offer, Lantern be restrained from seeking to enforce its rights under the buy-back offer and
 - (d) Torchlight not be permitted to vote its stapled securities in favour of any resolution to approve the buy-back offer.

DISCUSSION

Standing

15. Totem’s interest in Lantern stapled securities appears to arise solely by virtue of its call option deed with Millinium. While Totem does not appear to hold any stapled securities directly, we consider that Totem has standing to make the application.

Court proceedings

16. We were provided with some information concerning the Court proceedings initiated by Lantern. Even though we did not have the benefit of the full particulars of Lantern’s claim, it appeared from the orders sought by Lantern in its originating summons that there was a risk that some of the issues raised by Totem in its application may overlap with the Court proceedings.
17. The Panel will generally not conduct proceedings on an issue on which the Court has jurisdiction and has already commenced proceedings.² This is on the basis that the Panel is keen to avoid duplicative proceedings.
18. The potential for the issues before the Panel and the Court to overlap was a factor we took into account in making our decision.

Breach of s606

19. Totem submitted that Lantern had contravened s606 because:

² See *Richfield Group Limited* [2003] ATP 41 at [9]

- (a) the buy-back offer was irrevocable and conferred an enforceable right on Lantern. Therefore the accelerator provision in s608(8)(b)(ii) applied
 - (b) section 609(4), which provides that a person does not have a relevant interest in shares because a company has entered into a buy-back agreement, did not apply because the buy-back offer was not an ‘agreement’ for the purposes of this exception and
 - (c) in any event, s609(4) and item 19 of s611 (which provides an exception to s606 for buy-backs) only apply in relation to shares, not units in a listed managed investment scheme (as part of a stapled security structure).
20. Lantern submitted that it had not breached s606 as it had not accepted the buy-back offer and there was no agreement giving rise to a relevant interest under s608(8). Lantern submitted that it was simply the beneficiary of an irrevocable offer from Three Pillars under which it may elect to buy-back Millinium’s stapled securities.
21. Lantern also submitted that, in the event that it accepted the buy-back offer, it would consider applying to ASIC for a modification of s609(4) and item 19 of s611 to extend these provisions to a buy-back of Lantern stapled securities. Lantern submitted that ASIC had previously granted relief in similar situations.
22. Under clause 8 of Three Pillars’ buy-back offer, Three Pillars acknowledged that Lantern was unable to implement the buy-back without security holder approval and that Lantern was considering whether ASIC or ASX relief was required. Clause 8 also provided that Lantern’s acceptance of the offer was necessarily “*conditional upon ... security holder approval and any necessary regulatory relief being obtained*”.
23. Even if the buy-back offer attracts the operation of s608(8), we consider that it would be unlikely that we would find the buy-back offer unacceptable. Section 609(7) prevents a relevant interest arising by reason of an agreement that (among other things) is conditional on either shareholder approval under item 7 of s611 or ASIC exemption. The buy-back offer refers to the possibility that ASIC relief would be required. We consider therefore that either the exception in s609(7) applies to prevent the acquisition of a relevant interest or the policy of s609(7) means that any breach would not be unacceptable.

Effect of the buy-back on Torchlight

24. If Lantern accepts the buy-back offer and the buy-back is implemented, Torchlight’s relevant interest in Lantern would increase from approximately 30.2% to 40.3%. Totem submitted that this increase would be unacceptable given that Torchlight would not pay a premium for its increased control over Lantern. Totem also submitted that it would be unacceptable if Torchlight was permitted to vote in favour of approving the buy-back as it would, in effect, be approving an increase in its own level of control over Lantern.
25. Lantern submitted that the buy-back would require security holder approval under s257A and that, in connection with such approval, security holders would receive a notice of meeting and explanatory memorandum. Lantern submitted that an independent expert’s report would be provided and security holders would be able

to assess whether they consider the price payable under the buy-back was appropriate.

26. Lantern also submitted that there was no policy reason why Torchlight should not be permitted to vote on a resolution to approve the buy-back because (among other reasons) Torchlight was in the same position as all security holders, whose respective interests would increase as a result of the selective buy-back. Therefore it would be unfair to single out Torchlight and exclude it from voting.
27. We consider that in the case of a selective buy-back, the issue of whether a control premium is being offered is a matter for the security holders to determine in considering whether to approve the buy-back.
28. However, there is a potential issue if the buy-back proceeds and Torchlight is permitted to vote in favour of the buy-back. In *Village Roadshow Limited 03*,³ Village Roadshow Limited put forward a buy-back resolution. If Village Roadshow Corporation Limited did not participate in the buy-back, its voting power would increase from 56% to 70%. The Panel considered that the potential effect on Village Roadshow Corporation Limited's voting power in Village Roadshow Limited was different from the potential effect on the voting power of other shareholders, as Village Roadshow Corporation Limited was the only shareholder whose control of Village Roadshow Limited may have been consolidated by the buy-back.⁴
29. Lantern had not yet accepted the buy-back offer and it is unclear, in the light of the Supreme Court action, whether Lantern will be able to proceed with the buy-back. Therefore it is premature to determine whether it would be unacceptable for Torchlight to vote in favour of the buy-back. However if the buy-back does proceed and Torchlight is permitted to vote in favour of the buy-back, ASIC or a person interested could make a new application. We consider this issue is one that should be ventilated at the appropriate time, if necessary.

DECISION

30. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances at present. 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

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

Rodd Ashton Levy
President of the sitting Panel
Decision dated 17 March 2014
Reasons published 25 March 2014

³ [2004] ATP 22

⁴ [2004] ATP 22, at [34]

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Advisers

Party	Advisers
CVC	N/A
Lantern	Baker & McKenzie
Millinium	Russells Law
Totem	Henry Davis York