



Australian Government

Takeovers Panel

**Reasons for Decision
Donaco International Limited 03R
[2019] ATP 24**

Catchwords:

Review – decline to conduct proceedings – board spill – association – association hurdle – inferences

Corporations Act 2001 (Cth), sections 203D, 249D

Eastern Field Developments Limited v Takeovers Panel [2019] FCA 311

Donaco International Limited 02 [2019] ATP 23

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

INTRODUCTION

1. The Panel, Tracey Horton AO (sitting President), Christian Johnston and Rebecca Maslen-Stannage declined to conduct proceedings on an application by Donaco International Limited to review the decision of the initial Panel in *Donaco International Limited 02*.¹ The review Panel agreed with the initial Panel and considered that there was no reasonable prospect of the review Panel coming to a different conclusion.

2. In these reasons, the following definitions apply.

Donaco	Donaco International Limited
Management Agreement	has the meaning given in paragraph 3(a)
Mr Gerald Tan	Mr Gerald Nicholas Tan Eng Hoe
Mr Patrick Tan	Mr Tan Teck Lee Patrick
Mr Somboon	Mr Somboon Sukcharoenkraisri (also known as Mr Lee Bug Leng)
On Nut Road	On Nut Road Limited
Share Sale Agreement	has the meaning given in paragraph 3(a)
Somboon Family	Mr Somboon, Mr Lee Bug Tong and Mr Lee Bug Huy
Somboon Family Associates	Mr Somboon, Mr Lee Bug Tong, Mr Lee Bug Huy and Highest Point Investments Limited
Star Vegas Casino	Star Vegas Resort & Club in Poipet, Cambodia

¹ [2019] ATP 23

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FACTS

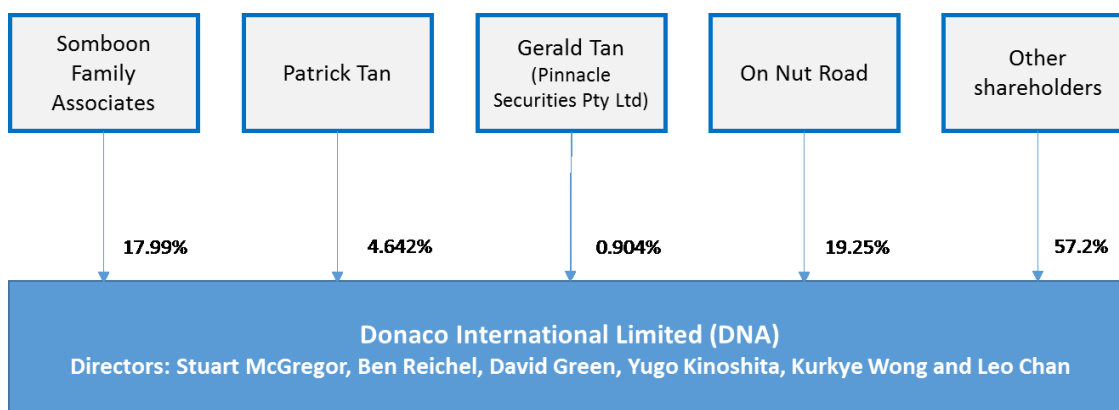
3. The facts are set out in *Donaco International Limited 02*. In summary:
- (a) On 1 July 2015, Donaco acquired the Star Vegas Casino from Mr Somboon and his son, Mr Lee Bug Tong, under the terms of a share sale agreement dated 23 January 2015 (as amended and restated on 18 June 2015, the **Share Sale Agreement**). At closing, Donaco entered into a management agreement with Mr Somboon and another of Mr Somboon's sons, Mr Lee Bug Huy for them to manage and operate the Star Vegas Casino (**Management Agreement**).
 - (b) On 18 January 2018, Donaco and certain of its subsidiaries commenced arbitrations in Singapore against the Somboon family for breach of the Share Sale Agreement and Management Agreement.
 - (c) On 15 August 2019, Donaco received from Messrs Gerald Tan and Patrick Tan a notice of intention to move a resolution to remove directors pursuant to section 203D.²
 - (d) On 21 August 2019, Messrs Gerald Tan and Patrick Tan requested by notice under section 249D that Donaco hold a general meeting to consider the removal of all existing directors and the election of themselves and three other nominees. On 21 September 2019, Messrs Gerald Tan and Patrick Tan again requested by notice under section 249D that Donaco hold a general meeting to consider the removal of all existing directors and the election of themselves and three other nominees (including one substituted nominee). Donaco advised that both notices were invalid.
 - (e) On 10 October 2019, Donaco received a notice requisitioning a general meeting under section 249D from On Nut Road to consider (among other things) the resolutions proposed by Messrs Gerald Tan and Patrick Tan on 21 August 2019.³
 - (f) On 16 October 2019, the Donaco board determined, in order to minimise Donaco's expenses, that it would add the resolutions proposed by On Nut Road to the agenda for Donaco's annual general meeting to be held on 29 November 2019.
4. Below is a diagram of the relevant shareholdings as provided by Donaco:

² Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth), and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC).

³ On 11 October 2019, On Nut Road provided a revised notice that was aligned with the resolutions in the 21 September 2019 notice.

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APPLICATION

Declaration sought

- By application dated 14 November 2019, Donaco sought a review of the initial Panel's decision not to conduct proceedings.⁴ Donaco submitted that the initial Panel's conclusion, that Donaco had not provided a sufficient body of material to justify the initial Panel making further enquiries in relation to an association between Messrs Gerald Tan and Mr Patrick Tan and the Somboon Family Associates, was in error.

DISCUSSION

- The powers of a review Panel are set out in section 657EA. Our role is to conduct a *de novo review*.⁵ Subsection (4) provides that a review Panel has the same powers to make a declaration or orders as the initial Panel and may vary or set aside the decision reviewed or substitute a new decision. It may also affirm the decision reviewed after conducting proceedings or decline to conduct proceedings and allow the initial Panel's decision to stand.
- We received all the material that was before the initial Panel, the review application and a preliminary submission from Messrs Gerald Tan and Mr Patrick Tan. We subsequently received the initial Panel's reasons.
- We invited parties to make any new submissions based on the initial Panel's reasons. The Somboon Family Associates stated that they did not intend to make submissions and:
 - stated that their "*substantial shareholding notice dated 7 November 2019 is an accurate statement of their voting power, including in connection with the general meeting to be held 29 November 2019*"⁶ and

⁴ Consent was given under s657EA(2)

⁵ *Eastern Field Developments Limited v Takeovers Panel* [2019] FCA 311 at [187]

⁶ See *Donaco International Limited* [2019] ATP 23 at [34]-[35]

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- (b) provided online voting forms for the 29 November 2019 meeting, stating that those forms show that they did not support the new director appointments proposed by Messrs Gerald Tan and Patrick Tan.⁷
9. Donaco stated that it did not propose to make any submissions in relation to the initial Panel's reasons. Donaco stated in response to the online voting forms that it appeared the Somboon Family Associates had appointed a corporate representative to attend the annual general meeting on their behalf. Donaco stated that:
- Under Donaco's constitution (clause 11.7), a proxy's powers at a meeting are suspended if the member is present in person or by a corporate representative. We trust that if a corporate representative attends Donaco's AGM on behalf of the Somboon Family Associates, they will vote consistently with the voting instructions in the proxy forms.*
10. Having considered the material we agree with the initial Panel's reasons. The matters that Donaco referred to in its review application in support of its submission that Messrs Gerald Tan and Patrick Tan and the Somboon Family Associates are associates was substantially a restatement of the matters Donaco submitted in the initial proceedings, as summarised in paragraph 39 of the initial Panel's reasons. Donaco provided no further information in response to the initial Panel's reasons when invited to do so. The subsequent material provided by the Somboon Family Associates in relation to voting at the annual general meeting and Donaco's response does not change our view.

DECISION

11. 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

12. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any interim or final orders.

Tracey Horton AO

President of the sitting Panel

Decision dated 26 November 2019

Reasons given to parties 24 December 2019

Reasons published 9 January 2020

⁷ The Somboon Family Associates' online voting forms also showed that they voted against the re-election, and supported resolutions to remove, Donaco's existing directors

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Advisers

Party	Advisers
Donaco	Addisons
Requisitionists	Steinepreis Paganin
Somboon Family Associates	Ashurst