Australian Government

Takeovers Panel

Reasons for Decision
Webster Limited
[2020] ATP 13

Catchwords:

Decline to make a declaration – compulsory acquisition – objection form – jurisdiction – substantial interest – voting shares – interim order

Corporations Act 2001 (Cth), sections 9 (definition of voting share), 602, 657A, Part 6A.2, 664A, 664C, 664E, 664F, 666A, 667A

Acts Interpretation Act 1901 (Cth), section 29

Attorney-General (Cth) v Alinta Ltd [2008] HCA 2, Resource Surveys v Harmony Gold (Aust) Pty Ltd (2002) 121 FCR 452, Elders IXL Ltd v NCSC [1987] VR 1

Guidance Note 4: Remedies General

Strategic Minerals Corporation NL 06 [2020] ATP 8, Echo Resources Limited [2015] ATP 6, Austral Coal Limited 02 (RR) [2005] ATP 20

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

INTRODUCTION

1. The Panel, Bruce Cowley (sitting President), John McGlue and David Williamson, declined to make a declaration of unacceptable circumstances on an application by a preference shareholder of Webster Limited in relation to its affairs. The application concerned whether the preference shareholder had validly objected to Henslow Acquisitionco Pty Ltd's proposed compulsory acquisition of Webster's preference shares pursuant to Part 6A.2.[1] The Panel considered (among other things) that, having regard to the underlying policy of the compulsory acquisition provisions in Part 6A.2, Henslow proposing to proceed with the compulsory acquisition without Court approval was not unacceptable.

2. In these reasons, the following definitions apply.

15 May Letter	has the meaning given in paragraph 7
Compulsory Acquisition	has the meaning given in paragraph 7
Computershare	Computershare Investor Services Pty Ltd
Henslow	Henslow Acquisitionco Pty Ltd

[1] 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)

Objection Form	has the meaning given in paragraph 8(c)
Objection Period	has the meaning given in paragraph 9
Ordinary Scheme	has the meaning given in paragraph 4
Preference Scheme	has the meaning given in paragraph 4
SRN	has the meaning given in paragraph 10
Webster	Webster Limited
Winpar	Winpar Holdings Limited

FACTS

3. Webster is an unlisted public company with more than 50 members.

4. On 3 October 2019, Webster (which was ASX-listed at the time) proposed two schemes of arrangement with Henslow, one being an ordinary share scheme under which Henslow was to acquire all of the ordinary shares in Webster for $2.00 per ordinary share (**Ordinary Scheme**), and the other being a preference share scheme under which Henslow was to acquire all of the preference shares in Webster for $2.00 per preference share (**Preference Scheme**).

5. At the Webster scheme meetings held on 3 February 2020, the Ordinary Scheme was approved by Webster ordinary shareholders but the Preference Scheme was not approved by Webster preference shareholders. The Court subsequently approved the Ordinary Scheme on 6 February 2020.

6. On 18 February 2020, the Ordinary Scheme was implemented and Henslow acquired all of Webster's ordinary shares. Subsequently, Webster was removed from the official list of ASX on 21 February 2020.

7. On or around 15 May 2020, Henslow sent a letter to Webster preference shareholders (**15 May Letter**) advising them that Henslow intended to compulsorily acquire all of their Preference Shares under Chapter 6A for $2.27 per share (**Compulsory Acquisition**).

8. The 15 May Letter enclosed:

   (a) a compulsory acquisition notice in the prescribed form pursuant to section 664C

   (b) a copy of the independent expert's report prepared by Lonergan Edwards & Associates in respect of the Compulsory Acquisition pursuant to section 667A and

   (c) a copy of an objection form pursuant to which Webster preference shareholders could object to the Compulsory Acquisition pursuant to section 664E (**Objection Form**).

9. The 15 May Letter specified that in respect of the Objection Form, Webster preference shareholders "*may object to the Compulsory Acquisition within one month of deemed receipt hereof (i.e. by returning by no later than 19 June 2020")* (**Objection Period**) and stated (among other things) that "*If you wish to object to the Compulsory Acquisition, you*

must complete and return the Objection Form within one month".

10. The Objection Form had a space for the holder to insert the identification number or security reference number (**SRN**) attaching to the objector's shareholding and the instructions to the Objection Form specified that the form must be returned *"to the address specified above"* (in this case, the GPO Box of Computershare, being Henslow's share registry).

11. On or around 19 May 2020, Winpar (being the holder of approximately 14% of Webster's preference share capital) received a copy of the 15 May Letter. The letter did not include Winpar's SRN.[2] On 9 June 2020, Winpar contacted Computershare via telephone requesting its SRN details in order to complete the Objection Form.

12. On 11 June 2020, Winpar received a second copy of the 15 May Letter from Computershare which included Winpar's SRN. Winpar completed the enclosed Objection Form and posted it back to Computershare by registered mail the same day.

13. On 24 June 2020, Henslow's solicitors delivered a letter to Winpar stating that its Objection Form posted on 11 June 2020 had not been received until 22 June 2020, which Henslow contended was out-of-time (as the Objection Period ended on 19 June 2020). Accordingly, Henslow advised that it intended to disregard Winpar's Objection Form and proceed to complete the Compulsory Acquisition on 29 June 2020.

APPLICATION

Declaration sought

14. By application dated 28 June 2020, Winpar sought a declaration of unacceptable circumstances. Winpar submitted (among other things) that:

    (a) Henslow was required to apply to the Court for approval of the Compulsory Acquisition in accordance with section 664F(1) as Winpar had *"properly objected to it"*

    (b) Henslow had "*sought to justify its rejection of the [objection] form by conflating the meanings of the words 'return' and 'receipt'*" in section 664C. In Winpar's view, the relevant criterion in section 664C is not the date of receipt of the objection form but rather, the date of its return

    (c) Henslow had *"disregarded other matters relating to the [objection] form itself, including the requirement in the form that an objector supply an SRN"*, which Winpar submitted was not provided until Winpar requested it from Computershare and

    (d) Henslow had not given any regard to the changes in the ordinary course of post resulting from the coronavirus.

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[2] Winpar had been a CHESS sponsored holder until the Webster preference shares were delisted from ASX but submitted that no issuer sponsored holding statement or SRN had been issued to Winpar after delisting

15. Accordingly, Winpar submitted that the rejection of its Objection Form in these circumstances, and the reasons given for the rejection by Henslow, gave rise to unacceptable circumstances and contraventions of sections 664E and 664F.

Interim and final orders sought

16. Winpar sought an interim order that the Compulsory Acquisition not proceed pending determination of its application.

17. Winpar sought a final order that its Objection Form returned on 11 June 2020 not be rejected by Henslow, such that Henslow be required to apply to the Court for approval of the Compulsory Acquisition in accordance with section 664F(1).

DISCUSSION

Interim order

18. Henslow intended to proceed to complete the Compulsory Acquisition on 29 June 2020, being the day after Winpar had made its application. In light of this, the Panel executive put Winpar's interim order request to the substantive President of the Panel on an urgent basis.

19. The President sought submissions from the parties on Winpar's interim order request. In the interim, Henslow provided an undertaking not to complete the Compulsory Acquisition on 29 June 2020.

20. Henslow submitted (among other things) that:

    (a) the interim order was not appropriate and would materially prejudice the rights and interests of Henslow given the Objection Period was set in accordance with section 664C(1)(b) and only one Objection Form relating to approximately 3.64% of Webster's preference share capital was received within that time. Accordingly, Henslow considered it was not only entitled to complete the Compulsory Acquisition,[3] but obliged to do so within 14 days of the Objection Period ending[4] (i.e. by 3 July 2020). It submitted that failure to do so would be a criminal offence for which strict liability applies.[5]

    (b) the interim order would not in fact maintain the status quo as it did not have the effect of preserving Henslow's right to complete the Compulsory Acquisition after 3 July 2020. Therefore, Henslow submitted that the granting of the interim order must be conditional upon ASIC relief to extend the statutory time periods to complete the Compulsory Acquisition after 3 July 2020.

21. ASIC also noted that Winpar's interim order request could potentially impact the ability of Henslow to complete the Compulsory Acquisition within the prescribed time period.[6] Accordingly, ASIC submitted that if the Panel was minded to make the

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[3] Under section 664A(3)(a)
[4] Under section 666A(3)(a)
[5] Under section 666A(1A)
[6] Under section 666A(3)(a)

interim order, it may be necessary for the Panel to make a further interim order to alleviate this timing issue. If the Panel declined to make such an interim order, ASIC submitted that it was open for Henslow to seek urgent relief from ASIC.

22. Following consideration of submissions from the parties, the President made the interim order requested by Winpar on 30 June 2020 (see **Annexure A**). To ensure that the interim order would preserve the status quo pending completion of proceedings,[7] it was communicated to the parties that if ASIC relief to alleviate the timing issue was not granted to Henslow before 3 July 2020, the President or sitting Panel (to be appointed) would be willing to reconsider the interim order on application.

23. On 1 July 2020, ASIC relief extending the relevant statutory time periods under sections 666A(3), 664E(4) and 664F(2) was granted to Henslow to allow it to complete the Compulsory Acquisition or apply to the Court for approval of the Compulsory Acquisition within 1 month after determination of these proceedings. Accordingly, Henslow's right to proceed to Compulsory Acquisition after 3 July 2020 was preserved, alleviating any timing issues associated with the interim order made.

Decision to conduct proceedings

24. We have considered all the material, but address specifically only that part of the material we consider necessary to explain our reasoning.

25. Henslow made a preliminary submission, submitting (among other things) that:

    (a) to find that a contravention has or will occur under section 657A(2)(c)(ii) as a result of Henslow proceeding to complete the Compulsory Acquisition would require the Panel to find that Winpar's interpretation of 'return' in the context of section 664E is correct. As this is a matter of statutory construction, Henslow submitted that the Panel does not have jurisdiction to make such a determination, adding that "*the Panel has recently declined to extend its jurisdiction to matters concerning the compulsory acquisition provisions of Part 6A.2 on the basis that the Court has more appropriate jurisdiction to determine such matters*" citing *Strategic Minerals Corporation NL 06*[8]

    (b) Winpar's application lacked any merit as it is "*founded on a flawed interpretation of what it means to 'return' an objection form under section 664E. Winpar's interpretation seeks to establish that a form be treated as returned within an objection period irrespective of when or whether or not it is actually received by the 90% holder undertaking the compulsory acquisition. This interpretation is entirely inconsistent with the other provisions in and the context of Part 6A.2*" and

    (c) even if there was legal merit in Winpar's argument, this is not a matter that would justify the Panel making a declaration of unacceptable circumstances when having regard to the purposes of the Panel and its powers.

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[7] Guidance Note 4: *Remedies General* at [10]
[8] [2020] ATP 8

26. In the circumstances of this matter, it is not clear from Henslow's preliminary submission that the Panel should not conduct proceedings. While Winpar has sought a declaration of unacceptable circumstances under section 657A(2)(c)(ii), it remains open to us to also consider whether there was an acquisition of a 'substantial interest' on which section 657A(2)(a)(ii) operates, or whether the circumstances might be *"otherwise unacceptable… having regard to the purposes of this Chapter set out in section 602…"* on which section 657A(2)(b) operates.

27. We also wish to address Henslow's preliminary submission that the Panel *"declined to extend its jurisdiction"* in relation to matters in Part 6A.2 in *Strategic Minerals Corporation NL 06* (see paragraph 25(a)). The Panel in that matter also stated at [43] that:

> *We also note the protections in place under Part 6A.2 if QGold proceeds to compulsory acquisition. Those protections include the potential for Court challenge. A Court is better placed than the Panel to adjudicate on some of the factual matters of the kind raised in the application.*

28. We note that the factual issues raised in *Strategic Minerals Corporation NL 06* concerned whether the company's directors had delayed the progress of precursor studies necessary to undertake a preliminary feasibility study of a gold deposit, in effect ensuring a lower fair valuation of the company's assets in compulsory acquisition. This was in the context of an entitlement offer which was likely to result in the company's major shareholder going over the 90% threshold. The matter did not address the compulsory acquisition process in Part 6A.2 or the legal interpretation of those provisions and therefore, should not be understood as suggesting that the Panel does not have jurisdiction in relation to matters concerning compulsory acquisitions under Part 6A.2.

29. Returning to the matter at hand, on reading the material, we were concerned about (among other things) Henslow's treatment towards Winpar, in particular, that Henslow intended to treat Winpar's Objection Form as out-of-time when the Objection Form had been received only one business day after the Objection Period had ended.[9] We decided to conduct proceedings, and in doing so, sought submissions from the parties on the jurisdictional question concerning statutory construction.[10]

Relevant provisions under Chapter 6A

30. It is helpful to outline the key provisions of Chapter 6A the subject of this proceeding (found in Part 6A.2).

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[9] The end of the Objection Period was Friday, 19 June 2020 and Winpar's Objection Form was received on Monday, 22 June 2020

[10] Consistent with the approach the Panel would have taken in *Echo Resources Limited* [2015] ATP 6 had it decided to conduct proceedings – see at [46]

31. A person (in this case, Henslow) who is a '90% holder' in relation to a class of securities is permitted to compulsorily acquire the remaining securities: section 664A(3). To bring about the compulsory acquisition, section 664C(1) requires the person to prepare a notice in the prescribed form that:

> *(b) specifies a period of at least 1 month during which the holders may return the objection forms; and*
>
> *(c) informs the holders about the compulsory acquisition procedure under this Part, including:*
>
> *(i) …*
>
> *(ii) their right to object to the acquisition by returning the objection form that accompanies the notice within the period specified in the notice; and…*
>
> (emphasis added)

32. The notice may be given personally or by sending it by post. If sent by post, the notice is "*taken to be given 3 days after it is posted*": section 664C(4).

33. The holder's right to object to the compulsory acquisition is set out in section 664E(1) which provides that an objection must be made "*by signing an objection form and returning it to the 90% holder*" (emphasis added). It is noted that the deeming provision in section 664C(4) which applies to a compulsory acquisition notice sent by post is not expressed to apply to the return of an objection form under section 664E(1).

34. If persons who hold at least 10% of the securities to be acquired object to the compulsory acquisition, it will not proceed unless the acquisition is approved by the Court: section 664F(1). If Court approval is given, the acquisition must be completed within 14 days of that approval: section 666A(3)(b).

35. However, if the 10% objection threshold is not met, the 90% holder is obliged to complete the compulsory acquisition within 14 days after the end of the objection period: sections 666A(1) and (3)(a). Failure to do so is a strict liability offence: section 666A(1A).

Unacceptability under section 657A(2)(c)?

36. The declaration of unacceptable circumstances was sought by Winpar under section 657A(2)(c)(ii) which provides that circumstances may be unacceptable because they "*gave or give rise to, or will or are likely to give rise to, a contravention of a provision of this Chapter or of Chapter 6A...*".

37. We note the issue of the Panel's jurisdiction raised by Henslow in its preliminary submissions (see paragraph 25(a)) and asked parties whether, even accepting that it is for the Court, not the Panel, to determinatively answer questions of statutory construction, this means that the Panel has no jurisdiction to decide whether

unacceptable circumstances exist.

38. ASIC submitted *"the Panel's jurisdiction is not invalidated as a result of the Court's jurisdiction in relation to matters of statutory construction. The question of unacceptable circumstances may be answered with reference to each of the limbs in section 657A(2)"*.

39. Winpar submitted that the powers of the Panel are very wide and should not be artificially read down by requiring questions of statutory construction to be determined by the Court.

40. Henslow submitted that given the tracking details from Australia Post confirm that Winpar's Objection Form was delivered on 22 June 2020 at approximately 7.00am, the Panel should decline to exercise jurisdiction given "*the existence of its jurisdiction depends wholly on disputed questions of statutory interpretation* (i.e. whether the "return" of the objection form for the purposes of Part 6A.2 means the delivery of the form or merely the posting of the form). *The appropriate forum for such disputes is the court."*

41. We agree with ASIC's submission. In determining whether unacceptable circumstances exist, there will be instances in which the Panel will be tasked to consider whether there has been (or will be) contraventions of provisions of the kind found in Chapters 6, 6A, 6B and 6C. This will, from time to time, require the Panel to take a view on the interpretation of the provisions in those Chapters. Indeed, the High Court in *Attorney-General (Cth) v Alinta Ltd*[11] recognised that if section 657A(2)(c)[12] is engaged "*the Panel must decide, along the way, whether there has been a contravention of a relevant provision"* and "*if it does decide that there has been a contravention, the conclusion to which the Panel must ultimately come is whether identified circumstances should be declared unacceptable."*[13] The High Court ruled that the power of the Panel to declare circumstances unacceptable because they involved a breach of the takeovers provisions was valid as it did not involve a conferral of judicial power on the Panel.

42. Turning to the question of whether there "*will"* or is "*likely"* to be a contravention of Chapter 6A for the purposes of section 657A(2)(c), both Winpar and Henslow made submissions, in effect, that if Winpar's Objection Form was in fact out-of-time, Henslow would be required by law to complete the Compulsory Acquisition and accordingly, there would be no contravention of Chapter 6A that could give rise to unacceptable circumstances.

43. In considering whether or not Winpar's Objection Form was out-of-time, Henslow submitted that "*… the only sensible construction of "returning" an objection form in the context of s664E is that it is when the 90% holder receives the form and not when the form is sent by the security holder."* What is meant by the 'return' of the objection form under Part 6A.2 "*must be determined having regard to the purpose of the notification and the*

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[11] [2008] HCA 2
[12] Noting that *Alinta* was dealing with a predecessor provision to section 657A(2)(c)
[13] At [96]

operation of the wider objection process under the statutory scheme."

44. ASIC also submitted that "*the construction of s664E(1) should be read in light of the obligations of the 90% holder under s664E(2)-(4) and s666A. This means that any interpretation must result in the objection period comprising a finite period of time, able to be assessed by the 90% holder."*

45. Winpar submitted that "*Section 664C(1)(b) requires a compulsory notice to specify a period of "at least 1 month" during which the holder can return the objection form. An offeror should not be able to shorten the period of "at least 1 month" by specifying that the holder return the form to a post office box. That would be to transfer the risk of delays in the mail from the offeror to the objector, and this cannot be right, especially now when the ordinary course of post has been severely affected by the coronavirus."*

46. We agree with the submissions from Henslow and ASIC that in considering whether there will (or is likely to be) a contravention of Chapter 6A, it is important to consider the underlying policy of the compulsory acquisition provisions in Part 6A.2. In this respect, we note the view of Finklestein J in *Resource Surveys v Harmony Gold (Aust) Pty Ltd*[14] who stated at [26] in relation to the operation of the deeming provision in section 664C(4):

> "*It is essential to have some finite end date for the compulsory acquisition process. If the recipient of a notice has a period of time from actual receipt in which to object, the 90% holder will not know when the compulsory acquisition takes place, and other dates in a takeover timetable that follow on from the objection date (eg s664E(4)) will have no definite starting date. Given the importance of the compulsory acquisition right to the 90% holder, the provisions must be read strictly so as to facilitate the process."* (emphasis added)

47. It is noted that the return of an objection form triggers a number of obligations on the 90% holder under Part 6A.2, including under:

    (a) section 664E(2), which requires the 90% holder to lodge an objection form with ASIC as soon as practicable after it is returned

    (b) section 664E(3), which requires the 90% holder to prepare a list that sets out the names of the holders who have objected to the compulsory acquisition and to provide that list to ASIC, the target company and ASX (if the company is ASX-listed) as soon as practicable following the end of objection period

    (c) section 664E(4), which provides that if holders of at least 10% of the securities object before the end of the objection period, the 90% holder is required to notify all holders either that the proposed acquisition will not occur or that the 90% holder will apply to the Court for approval of the acquisition under section

[14] (2002) 121 FCR 452

664F and

(d) section 666A(3)(a), which provides that where holders of at least 10% of the securities did not object before the end of the objection period, the 90% holder is obliged to complete the compulsory acquisition within 14 days of the end of the objection period.

48. In respect of these obligations on the 90% holder, Henslow submitted that "*none of these provisions are workable and capable of definitive compliance by a 90% holder unless an objection is treated as returned within the objection period where it has been actually received by the 90% holder. If Winpar's interpretation was correct, an objection form which was lost in the mail and was never received by the 90% holder would nevertheless count towards the requisite 10% objection threshold under Part 6A.2 and render, for example, completion of a compulsory acquisition within 14 days after the objection period unlawful.*"

49. In light of the comments made by Finklestein J in *Resource Surveys v Harmony Gold (Aust) Pty Ltd*, we consider Henslow's submission to be persuasive.[15] Having regard to the underlying policy of the compulsory acquisition provisions in Part 6A.2 and the need to have a clear and finite objection period that is able to be assessed by the 90% holder in order for it to meet its statutory obligations, Henslow proposing to proceed with the Compulsory Acquisition without Court approval is not unacceptable. Henslow was entitled to move to completion of the Compulsory Acquisition following the Objection Period ending on 19 June 2020 (indeed, on our construction, it is required to do so).

50. We also note that the Objection Period set by Henslow appears to be appropriately set in accordance with the compulsory acquisition provisions, given that:

(a) the 15 May Letter which enclosed the compulsory acquisition notice was sent by post on 15 May 2020

(b) applying the deeming provision in section 664C(4), the 15 May Letter was taken to be given to Webster preference shareholders on 18 May 2020 and

(c) the Objection Period ending on 19 June 2020, as specified in the 15 May Letter, has given Webster preference shareholders "*a period of at least 1 month*" to object to the Compulsory Acquisition.

51. Some of Henslow's actions did not assist Webster preference shareholders in

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[15] Henslow also submitted that section 29(1) of the *Acts Interpretation Act 1901* (Cth) applies when considering the meaning of 'returning' in section 664E(1), which deems service to be effected in the ordinary course of post unless the contrary is proved. The effect of this submission, if it was accepted, is that circumstances could conceivably exist where actual receipt does not occur. However, we did not need to reconcile these submissions from Henslow as Henslow provided evidence establishing that Winpar's Objection Form was received out-of-time on 22 June 2020, thereby falling within the exception to deemed service

returning the Objection Forms within the Objection Period, including by not providing the SRN details which were required to complete the Objection Form as part of its 15 May Letter[16] and only providing a GPO Box address for the return of the Objection Form where there were known delays with regular mail due to the coronavirus.

52. On the other hand, Winpar did have options to ensure that its Objection Form was received in-time, which it did not pursue. We note that Winpar had sent its Objection Form by registered mail and therefore had the opportunity to track the progress of the delivery of its Objection Form, but did not appear to do so. It also took Winpar nearly 3 weeks from receiving the original 15 May Letter to make enquiries about its SRN details and there was no material provided to show that Winpar had communicated to Henslow. While Winpar had contacted Computershare in relation to its Objection Notice, there was no material before the Panel to suggest that this information was passed on to its client, Henslow, or that Henslow had notice that an objection was forthcoming. While Winpar submits that it did not have an email address or fax number for Henslow, we do not think these details would have been difficult to obtain given that Winpar had been in direct contact with Computershare and Henslow's solicitors were named on the bottom of the 15 May Letter. Whether these self-help steps would have ensured that Winpar's Objection Form was received in-time or would have changed the actions of Henslow if the Objection Form was still received out-of-time is unknown. While we have not found there to be a contravention of Chapter 6A and therefore do not need to decide if a contravention is unacceptable, on balance, given the underlying policy position of Part 6A.2 expressed above, we do not consider that Henslow's actions are unacceptable.

53. We do, however, note that the combination of the minimum one month objection period in Part 6A.2 and 90% holders using mail to send out, and require the return of, objection forms may sometimes operate in a way which is disadvantageous to minority securityholders in light of reduced services by Australia Post, especially during the coronavirus pandemic. The Panel expects that shareholders who receive a compulsory acquisition notice will be afforded a reasonable opportunity to exercise their objection right. In this case, we considered the following in combination:

    (a) Henslow's failure to promptly provide an SRN to the affected shareholders

    (b) Henslow's failure to provide any means of objecting to the Compulsory Acquisition other than by mail addressed to a GPO Box

    (c) Henslow's apparent failure to consider, in the present environment where mail is significantly delayed, whether one month would be a sufficiently long period to enable affected shareholders to consider the Compulsory Acquisition, take advice if needed, and for any objection which they sent by mail to be received

[16] Or not providing replacement holding statements after Webster was delisted (see footnote 2 above)

by Henslow and

(d) whether it might have been appropriate, in all the circumstances, to accept an objection form received just one business day late.

54. Ultimately, in the circumstances of this case, we consider that despite these potential impediments to the effective lodgement of an objection, a reasonable opportunity had been provided by Henslow to affected shareholders to object, but the question was one which gave us pause to consider.

55. Given our concerns expressed above (in paragraph 53) regarding the potential disadvantage that may be experienced by minority securityholders, we would encourage alternative means to postal services be made available for the provision and return of objection forms and the like in future, particularly given the abundance of technology available to facilitate such processes. For example, objections could be lodged by email or in real-time through an online "click through" mechanism. We have asked the Panel executive to raise this issue with the Department of Treasury, noting that the postal service has become a less relied upon method of communication in recent times.

56. In coming to our decision, we also consider that Winpar has other avenues available to it, including applying to ASIC for relief or seeking orders from the Court under section 1322(4) to remedy the procedural defect.

Unacceptability under the other limbs of section 657A(2)?

57. Despite a declaration being sought by Winpar pursuant to section 657A(2)(c), it was open to us to consider whether the other limbs of section 657A(2) were applicable and during the course of proceedings sought submissions on the same. Given that we do not generally consider the circumstances to be unacceptable as discussed above, we did not need to reach a conclusion on whether the other limbs apply. However, we had formed the following preliminary views.

58. Relevantly for the purposes of this matter, circumstances can appear:

(a) under section 657A(2)(a)(ii), to be unacceptable "*having regard to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on the acquisition, or proposed acquisition, by a person of a substantial interest in the company...*" and

(b) under section 657A(2)(b), to be otherwise unacceptable "*having regard to the purposes of this Chapter set out in section 602…*". The purposes set out in section 602 include:

(i) in section 602(a)(i), "*the acquisition of control over the voting shares… tak[ing] place in an efficient, competitive and informed market*" and

(ii) in section 602(b)(iii), "*the holders of the shares… are given enough information to enable them to assess the merits of the proposal*"

(emphasis added).

59. In considering whether we had jurisdiction to make a declaration under these other limbs of section 657A(2), we asked parties:

(a) in respect of section 657A(2)(a)(ii), whether the Compulsory Acquisition was an acquisition of a 'substantial interest' in Webster and

(b) in respect of section 657A(2)(b), whether Webster's preference shares were 'voting shares' within the meaning of section 9.

60. On the question of whether the Compulsory Acquisition amounted to an acquisition of a 'substantial interest':

(a) Henslow submitted that the meaning of 'substantial interest' in a particular case "*must attach to a step in the direction of take-over or change in corporate control*".[17] Accordingly, as Henslow already controls 99.89% of the voting power of Webster following implementation of the Ordinary Scheme, Henslow submitted that the Compulsory Acquisition would "*therefore have no impact on the "control" of Webster*" and "*on no view could it be said that the acquisition of 0.11% of the voting power of a company* (of which the preference shares represent)… *involve the acquisition of a 'substantial interest'*"[18]

(b) Winpar, in rebuttals, submitted that "*there are degrees of corporate control, and whilst it is true that Henslow has already obtained control of Webster in a general sense, it will not have complete control of Webster until it also acquires the preference shares. In this sense, the acquisition of the preference shares will form a step, and indeed the final step, in the direction of change of corporate control in Webster*" and

(c) ASIC submitted that it was open to the Panel to conclude that the Compulsory Acquisition constitutes the acquisition of a substantial interest on the basis that "*…the Preference Shares are the final minority holding preventing Henslow from obtaining full ownership of Webster. Notwithstanding that [Winpar's] Preference Shares represent a particularly small interest in Webster (by total value), their acquisition will arguably have a material impact on Henslow's control of Webster and the stability of that control.*"

61. While it may be open to us to find that the Compulsory Acquisition constitutes the acquisition of a substantial interest, on its face it is difficult to see how the particularly small interest in question could logically amount to a 'substantial

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[17] Citing Marks J in *Elders IXL Ltd v NCSC [1987] VR 1* and *Austral Coal Limited 02 (RR)* [2005] ATP 20

[18] Henslow submitted that following completion of the Ordinary Scheme, "*Henslow holds 100% of the ordinary shares in Webster, representing 99.89% of all shares on issue (the preference shares comprising approximately only 0.11% of the total share capital in Webster).*"

interest' in the relevant sense given our preliminary view immediately below in relation to the voting rights of those securities.

62. On the question of whether Webster's preference shares are 'voting shares', we note that Henslow provided an affidavit (and its annexures) filed with the Court in connection with the Ordinary Scheme. While there were some acknowledged minor gaps in the affidavit materials (the preference shares were issued in 1910), the affidavit materials provided a compelling case that Webster's preference shares are not voting shares within the meaning of section 9.

63. As noted above, we did not need to reach a conclusion on either the question of 'substantial interest' or 'voting shares' because, in the circumstances of this matter, we consider it unlikely that we would find the existence of unacceptable circumstances given the policy underlying the compulsory acquisition provisions in Part 6A.2 as discussed above.

DECISION

64. For the reasons above, we declined to make a declaration of unacceptable circumstances. We consider that it is not against the public interest to decline to make a declaration and we had regard to the matters in section 657A(3).

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

Bruce Cowley
President of the sitting Panel
Decision dated 14 July 2020
Reasons given to parties 13 August 2020
Reasons published 17 August 2020

Advisers

Party	Advisers
Henslow	King & Wood Mallesons
Winpar	N/A

Australian Government
Takeovers Panel

Annexure A

CORPORATIONS ACT
SECTION 657E
INTERIM ORDER

WEBSTER LIMITED

Winpar Holdings Limited made an application to the Panel dated 28 June 2020 in relation to the affairs of Webster Limited (**Webster**).

The President ORDERS:

1. Henslow Acquisitionco Pty Ltd must not take any further steps in relation to the process to compulsorily acquire all of Webster's preference shares pursuant to Part 6A.2 of the *Corporations Act 2001* (Cth).

2. This interim order has effect until the earliest of:

   (i) further order of the Panel or the President

   (ii) the determination of the proceedings and

   (iii) 2 months from the date of this interim order.

Tania Mattei
Counsel
with authority of Alex Cartel
President of the Panel
Dated 30 June 2020