

# AN EDUCATION IN ASSOCIATION: THE PANEL'S DECISION IN AFFINITY EDUCATION

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Legal Briefings

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As with many association cases, the Takeovers Panel's decision in the Affinity Education matter show the degree to which the Panel is able to draw a range of inferences from the conduct of parties in the period preceding and during the course of Panel proceedings.

## SUMMARY

- Where there is an absence of information or the facts and explanations that are provided to the Takeovers Panel do not make sense, the Panel will draw inferences from its own commercial experience and common sense.
- Factors which can be used to establish association include structural and familial links between parties, use of common advisers, how acquisitions of stakes are funded and timing for acceptances of bids.

## FACTS

In early July 2015, G8 Education (**G8**) announced an intention to make a scrip takeover bid (at an implied value of \$0.703 per share) for Affinity Education (**Affinity**) following the acquisition of a pre bid stake of approximately 19.89%. Shortly following G8's intention announcement, three different parties, West Bridge (4.88%), Taxonomy (4.45%) and JB Super (0.04%) also started to build stakes in Affinity. When the bid was made, the chair of G8 was Jenny Hutson.

The bidder's statement for G8's scrip bid was issued on 30 July 2015 and a supplementary bidder's statement was lodged on 3 August 2015 which increased the scrip consideration offered under the takeover bid (to an implied value of \$0.80 per share), freed the offer from all conditions and announced that the scrip bid was final and would not be increased unless required by law. In addition, G8 announced an on market cash offer for G8 shares at \$0.80 per share.

The scrip off market bid was open for acceptance on 21 August 2015 and the offer period for the on market bid was from 26 August 2015.

On 3 August 2015, the Affinity board had announced that shareholders should take no action until they had received the target's statement and that Affinity was in discussions with an interested third party.

Before market open on 24 August 2015, Affinity lodged its target's statement with a reject recommendation for both G8 bids. Shortly following that, G8 released its substantial holder notice indicating that it had acquired relevant interests in a further 4.58% of Affinity shares through acceptance of the scrip bid (which included acceptances from Taxonomy and JB Super). This gave G8 a relevant interest in 24.48% of the Affinity shares.

Later that day, Affinity announced that it had entered into a conditional heads of agreement with Anchorage Capital Partners pursuant to which Anchorage would acquire the assets and business of Affinity and that there would be a resulting capital return to Affinity shareholders of \$0.90 per share.

Affinity sought a declaration of unacceptable circumstances from the Takeovers Panel in connection with, amongst other things, the acceptance of the scrip bid by Taxonomy and JB Super and the non-disclosure of the association between G8 and Taxonomy, JB Super and West Bridge.

## **ASSOCIATION**

The Panel commenced proceedings and ultimately decided that G8 was associated with each of Taxonomy, JB Super and West Bridge and that this had resulted in unacceptable circumstances as there were contraventions of Chapters 6 and 6C of the Corporations Act, the acquisition of control over Affinity shares did not take place in an efficient competitive and informed market and because Affinity shareholders had not been given sufficient information to assess the merits of G8's scrip bid.

The Panel found that there were structural, commercial and, in the case of JB Super, familial connections between each party and G8 and that Taxonomy and JB Super had acted in an uncommercial manner in preferring the commercial interest of G8 to their own. The Panel found that each of Taxonomy, West Bridge and JB Super (on the one hand) and G8 (on the other) had a relevant agreement (or alternatively were acting in concert) in connection with the acquisition of Affinity shares and acceptance of the scrip bid and were therefore associates.

Relevant circumstances that the Panel took into account in reaching this conclusion included:

- Funding of initial stakes: Taxonomy funded its acquisition of the Affinity stake (4.45%) through a loan – there were a number of unusual aspects to the loan including its documentation, the provision of the loan funds in advance of loan documentation being signed and that the funds actually provided differed from the amount specified in the loan document. It was also relevant that the sole director and sole shareholder of the company that provided the loan, Mr Wallace, had a number of connections to Ms Hutson through common directorships and he had other professional connections to other G8 officers. Mr Wallace had also been one of G8's top 20 shareholders between 2010 and 2012, following the acquisition by G8 of a childcare company owned by Mr Wallace.
- Early acceptance of the scrip bid: Acceptance of the scrip bid by Taxonomy on 21 and 24 August 2015 and by JB Super on 24 August 2015 (being the first days that the bid was capable of acceptance) was uncommercial in view of the Panel and neither Taxonomy nor JB Super provided any explanation as to why they took this course of action. The Panel was of the view that there were other courses of action open to them which would have enabled them to achieve a higher price for their Affinity shares or to purchase G8 scrip for a lower amount.
- Common business dealings: In addition to the business links between G8 and Mr Wallace referred to above, West Bridge also had structural links to G8. The sole director and shareholder of West Bridge and G8 officers (namely Ms Hutson and the G8's company secretary) had had a number of different business connections over a period of time.
- Familial links: The sole director and shareholder of JB Super and the sole beneficiary of the fund is Dr Jane Hutson, the sister of Ms Hutson. In addition to the familial connections the sisters also have a number of business connections. Evidence was also provided that there had been communication between G8 and Dr Hutson in relation to the early acceptance of the bid, despite both G8 and JB Super advising the Panel that there had been no discussions about the bid.
- Common advisers: In the proceedings it became clear that Taxonomy, West Bridge and JB Super used some of the same legal, commercial and broking advisers and there was overlap with G8's legal advisers and commercial advisers on the bid. Notably, an institutional broker and corporate adviser who gave assistance to G8 on the bid was involved in the acquisition of the Affinity stakes by Taxonomy and West Bridge. The chance of these overlaps of advisers being coincidental was discounted by the Panel. Although the Panel did not need to make findings as to whether these advisers acted in concert with the principal parties, it is implicit in its findings that several of them did so.
- Unusual activities: Additional to the above, were a number of other matters which appeared to the Panel to be unusual and inconsistent with any claim that the parties were not working together in relation to the bid. For example, Ms Hutson became personally involved in relation to the processing of acceptances for the bid and a

substantial holder notice was lodged incorporating the acceptance of JB Super before the relevant acceptance form had been received.

## **FAILING TO PROVIDE INFORMATION TO THE PANEL**

Taxonomy declined to become a party to the proceedings until the Panel's investigation of the facts was largely complete. In addition, a number of parties (or their advisers) either provided no responses to questions asked of them or provided inadequate answers to material questions. The Panel inferred that where a party (or adviser) did not provide an explanation or gave an inadequate explanation, although relevant information was readily available to them, the reason for doing so was that the answer would not have helped their position.

## **ORDERS**

The orders made by the Panel included:

- G8 needed to divest the shares in Affinity that it acquired from Taxonomy and JB Super through a supervised sale process,
- the acceptance of any other Affinity shareholder under the bids was voidable and could be withdrawn at the election of that shareholder, and
- G8 was required to make corrective disclosure.

With Panel consent, West Bridge was allowed to dispose of its Affinity shares in controlled circumstances while the Panel proceedings were on foot.

## **COMMENTARY**

This matter is a good example of the pragmatic approach that is open to the Panel when considering association matters. The Panel had no hesitation in drawing inferences from facts that were informed by practical experience and common sense. It was not prevented from doing so by parties who were concerned about adverse findings refraining from being involved in the proceedings or giving incomplete or inadequate submissions and responses to the Panel.

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## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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