ASIC COMMENCES CRIMINAL PROCEEDINGS IN CONNECTION WITH TWO TAKEOVERS

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Legal Briefings – By **Andrew Rich**

ASIC has brought criminal charges against two individuals - Ms Jennifer Hutson and Mr Clive Palmer - as a result of circumstances during the takeover bids involving Affinity Education Group Limited and The President's Club Limited respectively. In this article, we discuss these two matters.

IN BRIEF

- ASIC has brought criminal charges against two individuals - Ms Jennifer Hutson and Mr Clive Palmer - as a result of circumstances during the takeover bids involving Affinity Education Group Limited and The President's Club Limited respectively.
- The Hutson and Palmer proceedings should serve as a sobering reminder for anyone thinking of disregarding and / or breaching Australia's takeover laws.

BACKGROUND TO THE CHARGES

With most takeover disputes being resolved by the Takeovers Panel on policy grounds, and (in necessary cases) through the making of remedial orders or undertakings which are generally designed by the Panel to get a takeover bid 'back on track', it is easy to forget that breaches of the takeover provisions in Chapter 6 of the *Corporations Act 2001* (Cth) can constitute criminal offences.

ASIC's recent enforcement activities in pursuing criminal charges against Jennifer Hutson and Clive Palmer serve as a timely reminder and warning to market participants that a breach of Chapter 6 can give rise to very serious consequences.

In this article, we discuss the background to the charges brought by ASIC against Jennifer Hutson and Clive Palmer. The charges stemmed from circumstances relating to the takeover bids for Affinity Education Group Limited and The President's Club Limited respectively.

We discuss these matters below.

AFFINITY EDUCATION GROUP LIMITED

BACKGROUND FACTS

On 3 July 2015, G8 Education Limited (**G8**) announced an intention to make a scrip takeover bid for Affinity Education Group Limited (**Affinity**), shortly following the acquisition of a 19.89% pre-bid stake. Ms Jennifer Hutson was a director, and also the chairperson, of G8.

On 6 July 2015, JB Super Fund Pty Ltd (**JB Super**) acquired 0.04% of the Affinity shares (the sole director and shareholder of JB Super was Dr Jane Hutson, Ms Jennifer Hutson's sister).

On 9 and 10 July 2015, Taxonomy Pty Ltd (**Taxonomy**) acquired 4.54% of the Affinity shares.

Between 13 July and 28 July 2015, West Bridge Holdings Pty Ltd (**West Bridge**) acquired 4.88% of the Affinity shares.

On 21 August 2015, offers under the scrip bid opened.

On 24 August 2015, G8 announced it had acquired a relevant interest in 4.58% of Affinity shares through acceptances of the bid by Taxonomy and JB Super, taking it to 24.48%.

Affinity commenced Takeovers Panel proceedings, alleging various breaches of the takeover rules.

The Takeovers Panel found that G8 was associated with each of Taxonomy, JB Super and West Bridge and that G8 had a relevant agreement, or was acting in concert, in connection with the acquisition of Affinity shares and acceptance of those shares into G8's scrip bid. This resulted in a breach of the 20% rule and various disclosure provisions.

The Panel found there were, or had been, structural links and common investments and dealings between Ms Jennifer Hutson and Mr Peffer (the director, secretary and shareholder of Taxonomy). Funding for Taxonomy's acquisition of Affinity shares was provided by a company whose principal had structural links to Ms Jennifer Hutson. Further, Taxonomy's acquisition was facilitated through intermediaries who had structural links with Ms Jennifer Hutson. These same intermediaries acted for both West Bridge and Taxonomy, with one of the intermediaries acting for G8, West Bridge and Taxonomy on the acquisition of shares.

The Panel further found there were structural links and common investments and dealings between Ms Jennifer Hutson and Mr Elias (the sole director and shareholder of West Bridge). The funds for West Bridge’s acquisition of Affinity shares were paid through an intermediary that had links to Ms Hutson. Further, West Bridge’s acquisition was facilitated through intermediaries who had structural links with Ms Jennifer Hutson. These same intermediaries acted for both West Bridge and Taxonomy, with one of the intermediaries acting for G8, West Bridge and Taxonomy on the acquisition of shares.

The Panel also found that there were structural and family links and common investments and dealings between Ms Jennifer Hutson and Dr Hutson.

The Takeovers Panel made a declaration of unacceptable circumstances and made orders which included requiring:

- G8 to divest the shares in Affinity that it acquired from Taxonomy and JB Super through a supervised sale process;
- all other acceptances under the bid to be voidable and able to be withdrawn at the election of the accepting shareholders; and
- corrective disclosure.

The Panel had earlier consented to West Bridge disposing of its shares in controlled circumstances during the Panel proceedings.

ASIC INVESTIGATION

On 3 April 2018, ASIC announced that, following an investigation, Ms Hutson had appeared in the Brisbane Magistrate’s Court charged with, among other things:

- one count of dishonestly failing to exercise her powers and discharge her duties as a director under s184(1) of the Corporations Act (maximum sentence of imprisonment of five years);
- two counts of dishonest use of her position as a director under s184(2) of the Corporations Act (maximum sentence of imprisonment of five years);
- ten counts of authorising the giving of false or misleading information to an operator of a financial market (maximum sentence of imprisonment of 5 years);

- two counts of attempting to pervert the course of justice under s43 of the Crimes Act (maximum sentence of imprisonment of ten years); and
- fifteen counts of giving false or misleading information under s64 of the ASIC Act (maximum sentence of imprisonment of two years).

The charges have been listed for mention at the Brisbane Magistrate's Court on 8 June 2018.

THE PRESIDENT'S CLUB LIMITED

BACKGROUND

The President's Club Limited (**TPC**) operates a timeshare scheme for the Coolum Resort.

TPC had one larger shareholder, Coeur de Lion Investments Pty Limited (**CDLI**), that held 41.4% of the shares, with the remaining 58.6% of shares being widely held.

In 2005, CDLI executed a deed poll which provided that CDLI would not exercise more than 10% of its voting rights in TPC unless ASIC consented. CDLI could revoke the deed poll on 180 days' notice to ASIC and TPC.

In July 2011, companies associated with Mr Clive Palmer (**the Palmer Entities**) acquired the holding company of CDLI which gave them indirect ownership of the 41.4% stake in TPC that was held by CDLI. However, as this acquisition was not structured via a s606 gateway (such as a TPC shareholder approved acquisition or a takeover bid), this acquisition breached the 20% rule.

In September 2011, CDLI gave notice that it intended to revoke the deed poll, meaning that the Palmer Entities could vote the entire 41.4% stake on any resolution.

On 12 April 2012, one of the Palmer Entities (**the Palmer Bidder**) lodged a bidder's statement with ASIC, in connection with a proposed takeover bid for TPC.

On 26 June 2012, TPC applied to the Takeovers Panel for a declaration of unacceptable circumstances. TPC submitted that, in addition to breaching the 20% rule, the Palmer Bidder had breached s631(1) of the Corporations Act which requires bidders to make offers within 2 months after announcing a takeover bid. At the time of the application, the bidder had not made offers and it subsequently indicated that it would not do so.

The Takeovers Panel made a declaration of unacceptance circumstances in connection with this matter and ordered a divestiture of the shares but it did not force the Palmer Bidder to proceed with its takeover bid.

ASIC INVESTIGATION

On 6 April 2018, ASIC announced that, following an investigation, Mr Palmer had been charged with breaching the takeover laws.

ASIC is alleging that the Palmer Bidder breached s631(1) by publicly proposing to make a takeover bid for securities in TPC but not subsequently making offers for those securities within two months.

Mr Palmer, a director of the Palmer Bidder, has been charged with contravening s631(1) - through the operation of section 11.2 of the Criminal Code - for aiding, abetting, counselling or procuring the company to commit that offence. The charges carry a maximum penalty of two years' imprisonment and fine of $11,000 for an individual, and fines of $55,000 in respect of a corporation.

The matter has been listed for a pre-trial hearing before the Brisbane Magistrates’ Court on 13 June 2018.

COMMENTARY

So far as the author is aware, the Hutson and Palmer proceedings are the first occasions on which ASIC has caused civil or criminal court proceedings to be commenced in connection with a takeover bid since ASIC’s (unsuccessful) civil penalty proceedings in 2014 against Mariner Corporation Limited and its current and former directors. In the Mariner case ASIC had sought financial penalties and disqualification orders in connection with the bid funding aspects of Mariner’s takeover bid for Austock Group Limited (see our earlier article on this matter here).

The Hutson and Palmer proceedings serve as a sobering reminder for anyone thinking of disregarding and / or breaching Australia’s takeover laws in their dealings with shares in listed companies (or in unlisted public companies with more than 50 shareholders).

Through these proceedings, ASIC has announced loudly and clearly that it will not hesitate to use its enforcement powers to bring civil or criminal proceedings against any individual who it considers has caused a material breach of the takeover laws.

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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