

IMPLIED TERMS AND THE TERMINATION OF M&A CONTRACTS

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Legal Briefings - By **Adam Charles and JX Zheng**

Two recent court decisions provide important reminders of the need for careful drafting in control transaction documentation and emphasise that implied rights and obligations are no substitute for express provisions.

IN BRIEF

- In each case, the court found that there was no implied obligation of good faith that would fetter an express termination right.
- The cases underscore the importance of carefully considered drafting in contracts governing the control transactions.
- Market participants in Australian public M&A should also be mindful of the role of the Corporations Act and the Takeovers Panel in regulating reliance on termination mechanisms.

DAVID A HARRIS PTY LTD V AMP FINANCIAL PLANNING PTY LTD

This Supreme Court of Victoria case considers the question of when, where a contract contains an express right to terminate, there will be an implied term to act in good faith in exercising that right.

The dispute was between AMP Financial Planning Pty Ltd and a financial adviser who acted as an authorised representative of AMP for some 30 years.

Over a four year period, the financial planner and AMP had various discussions with a view to finding a way for the financial planner to manage his debts. In the course of those discussions, AMP became increasingly concerned about his solvency.

In March 2018, AMP sent a notice to the financial planner advising that it had decided to terminate its authorised representative agreements with him. After the parties had negotiated for a period of time, in January 2019, the financial planner sought an injunction restraining AMP from relying on the notice to terminate.

AMP argued that it was entitled to terminate the authorised representative agreements, relying on its express and unqualified right of termination on 90 days' notice (as well as a separate right of termination 'immediately' on the happening of certain events).

The financial planner argued that those express termination rights were fettered by an implied term of good faith, requiring AMP to act fairly and in good faith when deciding whether to terminate.

The Court found that there was no implied term of good faith, for three reasons:

- first, there is no generally accepted term implied in law that parties must act in good faith in the performance of their contract, leaving the financial planner to argue that such a term was implied in fact;
- second, the implied term argued for by the financial planner could not be implied, in that it was not so obvious that it goes without saying, necessary to give business efficacy to the contract, and capable of clear expression; and
- third, the implied term argued for was inconsistent with the comprehensive and carefully articulated regime established by the parties to regulate their termination rights.

VINTAGE RODEO V RENT-A-CENTER

This Delaware Court of Chancery case also considered the implication of terms in relation to a termination mechanism.

The dispute was between Vintage Capital Management LLC, a US 'rent-to-own' retailer, and Rent-A-Center Inc, another (bigger) player in the rent-to-own market.

Vintage and Rent-A-Center had entered into a merger agreement for the acquisition of Rent-A-Center.

Given the overlap of the businesses, the transaction required the approval of the Federal Trade Commission.

The merger agreement provided that:

- the end date by which Federal Trade Commission approval had to be received was six months after signing of the merger agreement;
- either party could unilaterally extend that date by giving the other party written notice of its election before the end date; and
- if neither party chose to extend the end date, the parties would still be bound by the merger agreement, but either could terminate by giving notice.

The Federal Trade Commission approval process took longer than expected.

Shortly before the end date, Rent-A-Center determined that it would not unilaterally extend the end date and that, if Vintage did not extend, Rent-A-Center would elect to terminate the merger agreement.

To Rent-A-Center's surprise, Vintage did not extend the end date and, a few hours after the deadline passed, Rent-A-Center delivered a termination notice to Vintage.

The Court held that Rent-A-Center's termination was valid and effective.

The Court held that the provisions of the merger agreement were clear and unambiguous.

The Court rejected Vintage's argument that an implied obligation of good faith and fair dealing should prevent the termination.

The Court stated that 'contracts are to be interpreted as written' and judicial review will generally stop if the terms are clear and unambiguous.

COMMENTARY

These two situations should underscore the importance of carefully considered drafting in implementation agreements and other contracts governing the control of Australian companies.

In particular, *Harris v AMP* provides a good illustration of the principle that the process of finding an implied contractual term must give way to any express terms in the parties' agreement. Further, there is no general obligation on parties to exercise a right to terminate in good faith.

However, in the context of Australian public M&A, market participants should also be mindful of the role of the Corporations Act and the Australian Takeovers Panel in regulating reliance on defeating conditions.

The Panel has recognised “a policy of certainty inherent in the requirements of Chapter 6”.¹

This is reflected, amongst other things, in section 629 of the Corporations Act, which provides that defeating conditions that depend on a bidder's opinion, or are within the control of a bidder, will be void.

However, the Panel has also expressed the view that, even if a bidder does not have control over a condition (so as not to breach section 629), a condition that is vague or uncertain may contravene the policy of certainty.²

This legislative overlay places further emphasis on the need for a thoughtful approach to the drafting of termination mechanisms.

ENDNOTES

1. *NGM Resources Ltd* [2010] ATP 11.

2. *Goodman Fielder Ltd 01* [2003] ATP 1.

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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