

RAISING THE TITANIC? AN ASPECT OF THE PRESIDENT'S CLUB JUDICIAL REVIEW APPEAL IS UPHELD

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Legal Briefings - By **Tony Damian** and **Stacia Super**

SUMMARY

- In 2014, the Federal Court dismissed an application for judicial review by Clive Palmer and his associated entities (together, the **Palmer Entities**) of the Takeovers Panel's (the **Panel**) declaration of unacceptable circumstances in relation to their acquisition of over 40% of The President's Club Limited.
- The Full Federal Court allowed an appeal of the dismissal on a technical ground relating to the expiration of time periods in which an application to the Panel, and a declaration by the Panel, may be made.
- The matter will now be remitted to the Panel for reconsideration and determination. Whether to grant a time extension to the period by which an application should have been made will be considered in light of submissions of the Palmer Entities.

In June 2014, the Federal Court of Australia dismissed the judicial review application lodged by the Palmer Entities relating to the Panel's 2012 declaration of unacceptable circumstances regarding the affairs of The President's Club (**TPC**). Last week, the Full Federal Court upheld the appeal of that dismissal and intends to remit the matter to the Panel for reconsideration and determination.

This judgement ensures the lengthy battle for control of TPC, the company that operates the Palmer Coolum Resort timeshare scheme, is protracted even further.

BACKGROUND IN BRIEF

Coeur de Lion Investments Pty Limited (**CDLI**) has been TPC's largest shareholder, holding 41.4% of the company's shares, for many years. The Palmer Entities acquired the sole shareholder of CDLI in July 2011, giving them an indirect interest in CDLI's 41.4% stake in TPC (**2011 Acquisition**).

As an unlisted public company with more than 50 shareholders, the Chapter 6 takeover provisions of the Corporations Act 2001 (the **Act**) apply to TPC. An acquisition of relevant interests in TPC's voting shares that increases a person's voting power in TPC to more than 20% may only take place through one of the permitted gateways in section 606 of the Act. The 2011 Acquisition did not occur through such a gateway.

In September 2011, CDLI gave notice to the Australian Securities and Investments Commission (**ASIC**) and TPC that it intended to revoke a January 2005 deed poll (**Deed Poll**) under which CDLI undertook not to exercise more than 10% of its voting rights on any resolution unless ASIC consented in writing or the resolution involved winding up the scheme. The Deed Poll existed to exempt TPC and CDLI from registering as managed investment schemes and was revokable on 180 days' written notice. The revocation became effective on 13 March 2012 and from that date the Palmer Entities could vote their full stake on any resolution.

In March 2012, a Palmer Entity acquired a further 2.9% of TPC shares, taking the Palmer Entities direct and indirect interests in TPC to 44.3% (**2012 Acquisition**).

In April 2012, a Palmer Entity made, and purported to withdraw, a takeover bid for TPC. Protracted discussions with ASIC concerning disclosures in the bidder's statement and replacement bidder's statement followed, until TPC commenced proceedings in the Panel in June 2012.

In July 2012, the Panel found that both the 2011 Acquisition and the 2012 Acquisition constituted ongoing unacceptable circumstances. The Panel found the 2011 Acquisition was made in contravention of section 606 of the Act and noted the 2012 Acquisition was made in purported reliance on the 'creep exception' but, to the extent the requirements of the creep exception were met, it was only by reason of the 2011 Acquisition which contravened section 606.

Relevantly to the judicial challenge, the Act provides that:

- an application to the Panel can be made only within 2 months after the circumstances occurred or a longer period determined by the Panel, and
- the Panel can only make a declaration of unacceptable circumstances within the later of

3 months after the circumstances occur or 1 month after the application to the Panel was made (with the Court able to extend this period on application by the Panel).

APPLICATION FOR JUDICIAL REVIEW

The Palmer Entities raised 17 grounds of application for judicial review of the Panel's declaration of unacceptable circumstances and its reasoning in the Federal Court. Each was dismissed by the primary judge.

Three conclusions of the primary judge particularly relevant to the appeal court decision were:

- **time-bar** – the conclusion that the Panel's declaration of unacceptable circumstances was not confined to the 2011 Acquisition and the 2012 Acquisition, and that an acquisition of shares can lead to 'ongoing' circumstances (which need not be limited to a single event or a specific transaction) which may be held to be unacceptable. This conclusion led the judge to determine that the application to the Panel was not out of time as the relevant state of affairs was continuing. It was therefore unnecessary for the Panel to grant TPC an extension of time to make its application.

The primary judge noted that the Panel had granted TPC an extension of time to commence proceedings, in case the application had been out of time but that, in doing so, it had not complied with the rules of natural justice by not allowing the Palmer Entities to make submissions on the decision to extend time.

- **section 606** – the conclusion that, in assessing a person's voting power, it is necessary to consider only the rights and limitations attaching to the securities which are found in the applicable constitution and reference should not be had to extraneous contractual arrangements that may be in place. This conclusion dismissed the Palmer Entities' argument that the Deed Poll limited CDLI's voting power in TPC to 10%, and
- **adequacy of reasons** – the conclusion that there was sufficient evidentiary support for each conclusion reached by the Panel as set out in its reasons for decision. The primary judge noted that the role, terms of reference and powers of the Panel may require it to make findings of fact where such findings are "closely intertwined with value judgements and opinions reached by the Panel as an expert body in relation to the legal rights and obligations of parties".

APPEAL AGAINST THE DISMISSAL OF THE JUDICIAL REVIEW APPLICATION

The Palmer Entities argued their appeal of the primary judge's ruling should be allowed on the basis the primary judge erred in failing to find that the application to the Panel, and the Panel's declaration of unacceptable circumstances, were out of time.

If this was not accepted, the Palmer Entities argued the appeal should be allowed as the primary judge erred in various other respects including failing to find the 2011 Acquisition was not a breach of section 606 of the Act.

In its judgement the Full Federal Court noted that:

- **time-bar** - 'circumstances' may be found to be unacceptable under section 657A(2)(a) of the Act having regard to their effect (past or present effect or likely effects). Accordingly, the effect (or likely effects) of the circumstances do not constitute part of the circumstances capable of being declared unacceptable circumstances. The Full Federal Court held there is a clear delineation between circumstances and their effect on the control of, or the acquisition of a substantial interest in, a company. The judges held that the 'circumstances' in question were those the subject of the declaration of unacceptable circumstances, namely the 2011 Acquisition and the 2012 Acquisition. They emphasised the fact that the effects of the circumstances (ie, the Acquisitions in breach of section 606) are continuing, does not deem the circumstances themselves to be continuing to occur.

Therefore the time limits in the Act for an application to the Panel, and for the Panel's declaration of unacceptable circumstances, are not extended by virtue of the ongoing effects of the circumstances. The Full Federal Court concluded the primary judge erred in not finding the application to the Panel and the Panel's declaration were each made out of time. The Court reiterated the primary judge's comment that any decision of the Panel to extend time was contrary to the rules of natural justice. On this ground, the appeal was allowed.

- **section 606** - the Deed Poll, containing CDLI's undertaking not to exercise more than 10% of its voting rights other than in limited circumstances, did not affect the number of votes attached to the voting shares under TPC's constitution. It therefore had no impact on the Palmer Entities' voting power, which increased to over 40% as a direct result of the 2011 Acquisition. In this regard, the Full Federal Court concurred with the primary judge's conclusions.

The Panel had referred to CDLI's power both to exercise (or control the exercise of) the voting rights attached to the 2011 Acquisition and the 2012 Acquisition shares and to dispose of (or control the exercise of a power to dispose of) those shares. The Full Court noted that even if the Deed Poll deprived CDLI of its power to exercise the voting rights attached to its TPC shares, it was not deprived of its power to dispose of the shares, including to an acquirer who would obtain the shares with voting rights. Therefore at all material times, CDLI (and the Palmer Entities) had the power to exercise or control the voting rights, and

- **adequacy of reasons** – the Full Federal Court concurred with the primary judge's conclusions that the reasons for the Panel's decisions adequately disclosed the facts upon which its declaration of unacceptable circumstances was based, that adequate reasons were provided for the Panel's conclusion that the 2011 Acquisition contravened section 606, and that the Panel had identified in its reasons the effect the 2012 Acquisition had on the extent of control exercised by the Palmer Entities over TPC.

Based on its decision in relation to the time limitations of the application to the Panel and the Panel's declaration, the Full Federal Court found it appropriate that the appeal be allowed, the orders of the primary judge and the decision of the Panel be set aside, and the matter be remitted to the Panel to be heard and determined according to law.

WHERE TO FROM HERE?

In the absence of a successful appeal by the Panel to the High Court, the Panel will have to consider whether an extension of time to bring TPC's application should be granted. This will be considered in light of the Court's conclusions on the contraventions of section 606.

As natural justice dictates, the Palmer Entities will be entitled to make submissions on the Panel's decision to extend this time period.

For the other TPC shareholders, despite the passing of nearly three years since the Panel's 2012 declaration, there will continue to be a lack of certainty around the control of the TPC for some time.

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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