THRILLS AND (BOARD) SPILLS – THE TAKEOVERS PANEL AGAIN SHOWS IT IS RELUCTANT TO INTERFERE WITH SHAREHOLDER REQUISITIONED MEETINGS

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Legal Briefings – By **Sam Kings and Amber Kennedy**

The Takeovers Panel recently declined to conduct proceedings in relation to an application from Australian Whisky Holdings Limited[1] that alleged a number of its shareholders (including the major shareholder) were part of an undisclosed association in connection with a shareholder requisitioned meeting to remove and replace certain directors. By declining to conduct proceedings, the Panel showed the market that it is, quite rightly, reluctant to interfere with shareholders' rights in the absence of a timely application and sufficient evidence to substantiate the allegations.

IN BRIEF
- A sufficient body of evidence is needed to convince the Panel an association exists.
- Delaying an application is likely to be viewed poorly by the Panel.
- The Panel has affirmed that it will not undermine the exercise of legitimate shareholder rights.

BACKGROUND

On 14 March 2019, Australian Whisky Holdings received a notice under section 249D of the Corporations Act from Quality Life (a shareholder with approximately 10.65% of the shares) requesting that the directors call a general meeting to propose resolutions to remove certain directors and replace them with several new directors. The requisitioned meeting was convened for 21 May 2019.

On 14 May 2019, Australian Whisky Holdings applied to the Panel seeking a declaration of unacceptable circumstances. Australian Whisky Holdings' main allegations were that:

- an undisclosed association existed between Quality Life and a number of other shareholders (who together controlled approximately 40% of the shares) and that a relevant agreement was entered into to control the composition of Australian Whisky Holdings' board; and
- each of the associates acquired a relevant interest in the other associates' shares (because the relevant agreement became a voting agreement when the requisition notice was issued), increasing the voting power of each of them to more than 20% in contravention of section 606 of the Corporations Act.

Australian Whisky Holdings also sought interim orders that, amongst other things, the alleged associates be prevented from voting at the requisitioned meeting.

THE TAKEOVERS PANEL'S DECISION

After considering Australian Whisky Holdings' application, the Panel determined that the applicant had provided 'insufficient probative material' and therefore declined to conduct proceedings as there was no reasonable prospect it would make a declaration of unacceptable circumstances.

In particular, the Panel noted that 'there was no real evidence of a voting agreement' and recognised that the 'paucity of evidence pointing to association' was identified in a number of preliminary submissions the Panel received. The Panel reiterated that 'an applicant must do more than make allegations of association and rely on [the Panel] to substantiate them'.[2]

The Panel also had regard to the timing of Australian Whisky Holdings' application, which was made late on Tuesday 14 May 2019 (less than a week before the scheduled meeting (Tuesday 21 May 2019)). As the company was aware of the circumstances it alleges gave rise to the association several months earlier, the timing of the application was held against the applicant. In its reasons, the Panel noted that it asked Australian Whisky Holdings why the application was not made earlier, citing the Panel's guidance that 'applicants should not delay unreasonably in making an application',[3] and commented that the delay increased its reluctance to interfere with shareholders' legitimate right to vote at the meeting.

COMMENTARY

The Takeovers Panel's decision not to conduct proceedings shows a well-founded reluctance to intervene in validly requisitioned shareholder meetings. Here, as is often the case, to do so may have resulted in the Panel inappropriately affecting the outcome of the meeting and been unfairly prejudicial to Australian Whisky Holdings shareholders as a whole.

The Panel's approach here is consistent with its recent practice. In *Baraka Energy and Resources Limited*,[4] an application that also concerned allegations of association in connection with a shareholder requisitioned meeting, the Panel declined to intervene there too. As with this case, the Panel found that not only had the applicant failed to show a sufficient body of evidence to support the allegations of association, but that the application had not been made in a timely manner.

The message to the market should now be very clear. Absent real evidence of an association (or other impropriety), applicants cannot look to the Panel to take decision making power away from shareholders – the Panel will not undermine the exercise of legitimate shareholder rights. Even where applicants do have grounds to go to the Panel, there should be no illusion that delaying the application until closer to the requisitioned meeting will sway the Panel. It is likely to be a case of too little, too late.

ENDNOTES

1. *Australian Whisky Holdings Limited* [2019] ATP 12.
2. *Dragon Mining Limited* [2014] ATP 5 at [60].
3. Note 6 to Procedural Rule 3.1.1.
4. [2018] ATP 15.

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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