

TITANIC IV: STILL SINKING

24 March 2016 | Australia, Brisbane, Melbourne, Perth, Sydney
Legal Briefings - By **Tony Damian** and **Nicole Backhouse**

The Takeovers Panel (**Panel**) has delivered its latest set of reasons in The President's Club matter (almost four years after the initial application was made in 2012).

While the Panel, affirmed the decision of the first Panel, the reasons restate the approach of the Panel to extending time to commence proceedings.

SUMMARY

- Following an appeal in the Full Federal Court of Australia, the matter of The President's Club was remitted back to the Takeovers Panel for a new hearing.
- The Panel heard the matter afresh and found that various acquisitions by the major shareholder were in contravention of the Corporations Act and constituted unacceptable circumstances and made orders capping the voting rights of the major shareholder to 20%, subject to permitted creep acquisitions.
- Unlike the first Panel in this matter in 2012, on this occasion the Takeovers Panel heard submissions in respect of, and made a determination, that it was appropriate to exercise its discretion to extend time to commence proceedings.

TITANIC IV: STILL SINKING**

On 24 February 2016, the Takeovers Panel published reasons for making a declaration of unacceptable circumstances in relation to the affairs of The President's Club (**TPC**) and orders in respect of the exercise of voting rights by the major shareholder of TPC. These reasons were delivered over three years after the application was first lodged with the Panel and more than 4 years after the initial occurrence of the events that lead to the proceedings.

In May 2015, the Full Federal Court held that the decision of the Panel should be set aside and the matter remitted for determination as the Panel had failed to accord certain companies that owned shares in TPC and are associated with Clive Palmer (the **Palmer Entities**) the opportunity to make submissions as to whether the Panel should have allowed the initial application to be made out of time. Accordingly, in these reasons, the Panel carefully sets out the required tests and the submissions from the parties, such that we have a clear statement of the process to be followed where the Panel exercises its discretion to commence proceedings more than 2 months after the occurrence of the relevant events.

This matter clearly demonstrates that, despite the Panel's over-riding objective and commitment to the timely resolution of matters before it, some proceedings, particularly involving unlisted public companies and managed investment schemes, will not be resolved within commonly expected timeframes for Panel proceedings. It also raises the issue of the suitability of Panel proceedings and the usual types of orders that the Panel can give in seeking to redress unacceptable circumstances in respect of unlisted entities with illiquid securities.

Since the initial application to the Panel relating to TPC on 26 June 2012, there have been numerous Panel proceedings and court applications. For background, please refer to our legal briefings in relation to the earlier proceedings, *Tinkerbell goes the way of the Titanic* (November 2012),¹ *Titanic II: sinking slowly* (June 2014)² and *Raising the Titanic? An aspect of the President's Club judicial review appeal is upheld* (May 2015).³

RECAP OF FACTS

TPC is an unlisted public company that operates a timeshare scheme for the Palmer Coolum Resort. The constitution and related arrangements of TPC contemplated that a shareholder in TPC would also own an interest in part of the leases for the land from which the time share scheme operates such that the shares in TPC are stapled to the property interests.

TPC has one larger shareholder, Coeur de Lion Investments Pty Limited (**CDLI**), that holds 41.4% of the shares and which prior to the involvement of other Palmer Entities at the resort was a wholly owned subsidiary of the resort's developer. The remaining shares are widely held.

In July 2011, the Palmer Entities acquired the holding company of CDLI which gave them an indirect ownership of the 41.4% stake in TPC that was held by CDLI. As TPC has more than 50 members, this upstream transaction was subject to Chapter 6 of the Act and needed to be structured to use one of the gateways permitted in section 606 of the Act, such as a takeover bid or a shareholder approved acquisition. The transaction was not so structured.

In March 2012, one of the Palmer Entities directly acquired a further 2.9% of TPC shares.

Following on from these acquisitions, in April 2012 a Palmer Entity made a takeover bid for TPC and then purported to withdraw its bid after it had been lodged with ASIC. Negotiations with ASIC about the content of the disclosures in the bidder's statement (and replacement bidder's statements) and about contraventions of Chapter 6 of the Act continued for an extended period time, until TPC commenced proceedings in the Panel in June 2012, approximately 11 months after the acquisition of CDLI took place.

The first Panel found that the acquisitions in 2011 and 2012 by the Palmer Entities constituted ongoing unacceptable circumstances and made orders that CDLI could not exercise any voting rights attached to CDLI's entire stake in TPC and must not dispose of those shares until a bid, broadly on terms no less favourable than those in the original takeover offer (including with an offer price of at least \$65,013 per share property interests), was made and offers in respect of no less than 50% of shares held by independent shareholders were accepted.

The Palmer Entities challenged the Panel's determination in the Federal Court. That challenge failed. The Palmer Entities then appealed the Federal Court judgment to the Full Federal Court on a number of grounds, with the only one ground of appeal being successful. That ground related to the first Panel's failure to hear the Palmer Entities on the need to have time extended for the application to be made. This resulted in the matter being referred back to the Takeovers Panel.

LATEST PANEL DECISION

In this latest decision by the Takeovers Panel, the Panel found the acquisition of the shares by the Palmers Entities constituted unacceptable circumstances. The reasoning underlying this conclusion was broadly consistent with the reasons outlined by the initial Panel and the judgments of the Federal Court of Australia (both at first instance and on appeal) on the substantive issues raised in the matter. However there are two matters worth noting.

First, the Panel affirmed the propositions set out in *Austral Coal 03* [2005] ATP 14 for the determination of whether or not to exercise its discretion to extend time for an application to be made. These propositions include:

- essential matters supporting the applicant's case came to light in the two months preceding the application,
- the application made credible allegations of clear, serious and ongoing unacceptable circumstances, and
- the unacceptable circumstances should not go unremedied merely because their existence was not known at the relevant time.

In this matter, the Panel heard submissions from the parties and ASIC, and determined that this was an appropriate case to extend time because:

- there was a clear breach of section 606 of the Corporations Act which gave rise to unacceptable circumstances that warranted a remedy – the seriousness of the contravention was considered a compelling reason for granting an extension,
- despite the considerable time that had elapsed since the first contravention and the application, the Panel noted that the applicant had tried to resolve the matter by other means and, while not a compelling reason, had not taken legal advice on the effect of the initial acquisition within 2 months of the acquisition occurring. The Panel also noted that the lengthy time period for the proceedings was not brought about by the action or inaction on the part of the applicant,
- it was necessary to weigh any prejudice to the Palmer Entities from extending time against the prejudice likely to other shareholders if the effect of the impugned transactions was permitted without consideration of whether it gave rise to unacceptable circumstances, and
- it was in the public interest to extend time.

The second matter worth noting is that, despite the Panel reaching a similar conclusion to the first Panel, it granted materially different orders in view of the fact that circumstances for TPC had changed. In particular, the orders from the first Panel included orders that restricted voting rights attached to the entire CDLI stake and a disposal restriction which prevented CDLI disposing of its shares until a bid broadly on terms no less favourable than those in the original takeover offer was made and no less than 50% of offers for shares of independent shareholders accept the bid.

In the second Panel, the Panel found that circumstances had changed so much in the previous 3 years, that it was no longer appropriate to have orders in the nature of those from the first Panel. Accordingly the Panel made orders capping its voting rights of CDLI to 20%, subject to permitted creep acquisitions. In view of the illiquid nature of the unlisted TPC shares, a disposal order was not considered to be appropriate.

While this latest instalment presents yet another victory for the independent shareholders in TPC, they must be feeling somewhat defeated and fatigued. Those shareholders remain holding stock in an illiquid investment that remains subject to ongoing differences and disputes with the management of the resort by the major shareholder with little hope of timely and satisfactory resolution.

***We first wrote on this matter in November 2012 – before Clive Palmer was elected to Parliament and when he was building Titanic II. Titanic II is slated for delivery in 2018 – hopefully the saga for the investors in Palmer Coolum Resort will be over by then.*

This article was written by [Tony Damian](#), Partner, Sydney and [Nicole Backhouse](#), Executive Counsel, Sydney.

ENDNOTES

1. [Tinkerbell goes the way of the Titanic](#) (November 2012).
2. [Titanic II: sinking slowly](#) (June 2014).
3. [Raising the Titanic? An aspect of the President's Club judicial review appeal is upheld](#) (May 2015).

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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