

A Presidential Pardon? Extensions of time and the Takeovers Panel: The President's Club Limited 02

On 5 February 2016, the Takeovers Panel (**Panel**) issued a media release¹ stating that it had made a declaration of unacceptable circumstances in relation to Palmer Leisure Coolum Pty Ltd's (**PLC**) acquisition of a relevant interest in 44.3% of the shares in The President's Club Limited (**TPC**) in 2011 and 2012 (which occurred in contravention of the Corporations Act 2001 (Cth) (**Corporations Act**)). The case is part of a dispute spanning almost five years over an attempted buyout of 80 timeshare villas at the Palmer Coolum Resort in the Sunshine Coast by entities associated with Mr Clive Palmer. In December 2015, the Federal Court issued a judgment² which paved the way for the Panel to make the declaration, despite both the application made to the Panel and the timing of the Panel's declaration falling outside of the usual time frames.

Summary

The key takeaways from this series of decisions are that:

- It follows from the statutory time period for making an application to the Panel for a declaration of unacceptable circumstances that the circumstances in question must be capable of being identified as having arisen at a particular time (and be separated from the effects of those circumstances). That the effects of the circumstances are continuing does not render the circumstances themselves as continuing.
- The existence of a statutory time period does not necessarily preclude the relevant circumstances from being characterised as ongoing, or as continuing to occur. For example, in its decision in *Northern Iron*,³

the Panel said that the circumstances were "non-disclosure of information [in response to tracing notices and pursuant to the substantial holder provisions] that had not been remedied" and "our decision is not based simply on contravention". That approach would seem to remain open – in which case, the categorisation of the circumstances will be all important. Nevertheless, some limit on the ability to characterise circumstances as "ongoing" arises because the Corporations Act should not be construed to permit time periods to be reset on a daily basis solely on the basis of circumstances being characterised as ongoing.

- Notwithstanding the existence of a statutory time period, a failure to make an application within the prescribed time period is not fatal.

The Panel has power to extend time, although non-compliance with the pre-existing time limits is one consideration that the Panel will take into account in exercising its discretion.

- In circumstances where the Panel has received an application in time, and has failed to make a declaration within the further permitted time, the Court is able to grant the Panel an extension of time. Factors relevant to the Court's decision are likely to include whether the Court is satisfied that doing so would serve the legislative purposes of Chapter 6 of the Corporations Act and whether the Panel is an appropriate forum for considering these issues. Accordingly, the inability of the Panel to make a declaration within the permitted time period is not fatal.

The beginning – first Panel decision

In July 2011, PLC acquired a relevant interest in 41.4% of the issued shares in TPC, the entity which operates the timeshares in the Palmer Coolum Resort. PLC made a further acquisition of 2.9% of TPC shares in March 2012.

In June 2012, TPC made an application to the Panel seeking a declaration of unacceptable circumstances. It was contended that these acquisitions contravened section 606 of the Corporations Act (which prohibits acquisitions of relevant interests in issued voting shares in certain companies that exceed 20% subject to specified exceptions) and were therefore unacceptable. Section 657C(3)(a) of the Corporations Act requires an application for a declaration to be made within two months "after the circumstances occurred". However, section 657C(3)(b) of the Corporations Act confers a discretionary power upon the Panel to determine that such an application may be made within a "longer period".

The first Panel concluded that an application could be made under section 657C(3)(a), despite the acquisition occurring some three months earlier.⁴ The Panel reached this conclusion on the basis that the relevant circumstances were "ongoing" and so the period of two months had not expired. Following this decision, PLC commenced proceedings in the Federal Court before a primary judge seeking judicial review of the first Panel's decision.⁵ That decision was ultimately appealed to the Full Court of the Federal Court.

Full Court decision

In May 2015 the Panel's decision was set aside by the Full Court of the Federal Court (**Full Court**) on the basis of an error of law.⁶ The Full

Court remitted the case back to the Panel to determine whether an extension of time to bring the application should be granted.

The Full Court held that the reference in section 657C(3)(a) to "the circumstances" is a reference to the circumstances which are the subject of a declaration of unacceptable circumstances, and does not extend to the effect of those circumstances. That the effect of the circumstances is continuing does not render the circumstances themselves as continuing to "occur" or as continuing to "have occurred". The Full Court found as a fact that the relevant circumstances (that were the subject of the declaration) were the acquisitions made in July 2011 and March 2012. The acquisitions occurred on identifiable dates and were not ongoing and did not constitute continuing circumstances. The circumstances did not extend to their effect or likely effect (which effect may have continued thereafter). Consequently, the application to the Panel was made out of time.

In addition, the Full Court concluded that there had been a contravention of section 606 of the Corporations Act through the indirect acquisition of a relevant interest in TLC, through an increase in voting power from 0% to more than 40%. Accordingly, the Full Court ordered that the Panel's decision be set aside and that the matter be remitted to the Panel to be considered and determined according to law.

It follows from the Full Court decision that the time limit set by section 657C(3) cannot be extended by relying on the ongoing effects of the circumstances found to exist. However, whether in practice this limits the ability of the Panel to identify ongoing facts or matters as "circumstances" and find them unacceptable remains to be seen. It is important to note that the Full Court

found as a fact that the relevant circumstances that were the subject of the declaration were acquisitions occurring on identified dates and it was these circumstances that the Panel concluded were not ongoing. The extent to which circumstances can properly be characterised as "ongoing" or "continuing" was not in issue before the Full Court. For example, in its decision in *Northern Iron*,⁷ the Panel said that the circumstances were "non-disclosure of information [in response to tracing notices and pursuant to the substantial holder provisions] that has not been remedied"⁸ and "our decision is not based simply on contravention"⁹. That approach would seem to remain open. Nevertheless, it would also not be surprising if the Full Court decision were, in future, to lead a more cautious Panel to more readily look to the Panel's discretionary power to extend time (in reliance on the ongoing effects of circumstances) rather than rely on arguments that circumstances are "ongoing" or "continuing".

Second Panel decision

In dealing with the remitted application, the Panel exercised its discretionary power under section 657C(3)(b) of the Corporations Act, and extended the deadline for applying to the date when TPC actually made the application (June 2012). Thus, TPC's application, which would otherwise have been out of time, was rendered valid.

PLC and a number of other entities associated with Mr Palmer appealed the decision. They contended that the Panel fell into a series of errors in law in reaching that decision.

Federal Court decision on extension of time to make application to the Panel

The trial judge concluded that the Panel did not take into account irrelevant considerations and did not

fall into error in reaching its decision to extend the time by which TLC could make an application. The judge concluded that the Panel did not err in exercising the discretion to extend time for the making of the application. The Panel recognised that the Corporations Act sets time limits for the making of a declaration by the Panel so that there will be a swift resolution of matters before the Panel, and that this consideration continues to be relevant. However, it noted that this consideration is not determinative in the exercise of the statutory discretion conferred upon the Panel. In weighing the relevant factors, the Panel was persuaded that there had been a demonstrated and serious contravention of section 606 of the Corporations Act, which had given rise to control implications and the effect or impact of those circumstances on the other shareholders continued.

The other factors that were considered by the Panel in exercising its discretion were that:

- it would be undesirable for a matter to go unheard simply because it was lodged outside the two month limit if essential matters first came to light during the two months preceding the application, and that an applicant should not be disadvantaged because it does not know (and it cannot be said that it ought to know) a relevant fact;
- the control effect of ownership of shares held by shareholders had been effectively suspended by reason of the earlier Panel orders;
- it was undesirable that TLC's application be allowed to go unheard even though lodged out of time in circumstances where an earlier Panel, a primary judge

of the Federal Court and the Full Court of the Federal Court had found facts giving rise to a serious contravention of section 606 of the Corporations Act;

- the potential prejudice to shareholders (other than PLC) if the control effect of ownership were permitted without a consideration of whether it gave rise to unacceptable circumstances; and
- whether it was plain to the Panel that granting an application for an extension would be rendered futile (because no order from the Court could be obtained for an extension of time for the making of a declaration of unacceptable circumstance, as the Panel still had to apply to the Court to extend the date for which the Panel could make a decision - see discussion below).

Accordingly, the application by PLC to dismiss the Panel's decision to extend the time for making an application was set aside.

Extension of time for the Panel to make a decision

Section 657B of the Corporations Act provides that the Panel can only make a declaration of unacceptable circumstances within:

- (a) 3 months after the circumstances occur; or
- (b) 1 month after the application for the declaration is made;

whichever ends last. The Court may extend the period on application by the Panel.

Each of the time limits above had expired in 2012. Thus, the Panel could not make a declaration unless the Court, on application by the Panel, extended the time period.

The trial judge held that, notwithstanding that the period of time from which the Panel could make a declaration without the Court's granting an extension (over three and a half years) had long since passed, the statutory purpose could still be served by extending time. In addition, the trial judge concluded that the Panel was the appropriate forum for considering the question of whether unacceptable circumstances existed and orders should be made upon the remittal. Accordingly, the time within which the Panel may make a declaration should be extended.

The trial judge observed that the principal reason for the intervening delay was the course taken by the Panel, in characterising the circumstances found to be unacceptable as ongoing (so that there was no need for an extension of time to make an application). This had led to the earlier proceedings before the Full Court of the Federal Court. The judge noted that the conduct of parties is relevant in explaining why there is a period of delay and in a case where there is a substantial period of time between the relevant circumstances and the application before the Court, the delay must be properly explained. However, the exercise of discretion by the Court is not informed by notions of seeking to discipline a participant or by questions of general deterrence of conduct.

The trial judge stated that the real question to be addressed in considering an application to extend time for the Panel to make a declaration was whether the statutory purpose could be achieved.

In deciding to extend time, the trial judge was satisfied that:

- shareholders (other than PLC) were deprived of a relevant opportunity to engage at the time of the material events, and continued to be affected by an acquisition of a relevant interest in the voting shares of the TLC by PCL and the continuing assertion of control of the company through the voting shares, the subject of the relevant interest.
- the Panel has jurisdiction under section 657A of the Corporations Act in respect of "control acquisitions" and power to make remedial orders in respect of that matter if satisfied that persons or groups of persons are being relevantly effected. Accordingly, the Panel is an appropriate forum for addressing such questions.
- the remedial options open to the Panel under section 657D of the Corporations Act, could still serve the statutory purpose if an order

extending time under s657B was granted.

Accordingly, the time for the Panel to make a declaration was extended for six weeks from the date of judgement, facilitating the February 2016 declaration, almost five years after the initial acquisition in breach of the Corporations Act occurred.

¹ Media Release – The President's Club Limited 02 – Declaration and Orders TP16/06.

² *Palmer Leisure Coolum Pty Ltd v Takeovers Panel* [2015] FCA 1498.

³ *Northern Iron* [2014] ATP 11.

⁴ *The President's Club Limited* [2012] ATP 10.

⁵ *Queensland North Australia Pty Ltd v Takeovers Panel* [2014] FCA 591.

⁶ *Queensland North Australia Pty Ltd and Others v Takeovers Panel* [2015] FCAFC 68; (2015) FCR 150.

⁷ *Northern Iron* [2014] ATP 11.

⁸ At [29].

⁹ At [56].

Contacts

Justin Harris

Partner, M&A and Corporate
T: +61 8 9262 5503
E: justin.harris@cliffordchance.com

Lance Sacks

Partner, M&A and Corporate
T: +61 2 8922 8005
E: lance.sacks@CliffordChance.com

Shane Stewart

Senior Associate, M&A and Corporate
T: +61 8 9262 5507
E: shane.stewart@cliffordchance.com

Paul Vinci

Partner, M&A and Corporate
T: +61 8 9262 5504
E: paul.vinci@cliffordchance.com

Joni Henry

Counsel, M&A and Corporate
T: +61 2 8922 8090
E: joni.henry@CliffordChance.com

Almiro Clere

Law Graduate, M&A and Corporate
T: +61 8 9262 5508
E: almiro.clere@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

Clifford Chance, Level 7, 190 St Georges Terrace, Perth, WA 6000, Australia
© Clifford Chance 2016

Liability limited by a scheme approved under professional standards legislation
We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

www.cliffordchance.com

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta* ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.