Takeovers Panel

In the matter of Grand Hotel Group
[2003] ATP 34

Catchwords: *Agreement contributing to need to give substantial holding notice - substantial holding – voting power– relevant interest - association – efficient market – other material information – general meeting of security holders --- Decline to commence proceedings - inappropriate forum*

Corporations Act 2001 (Cth), sections 12, 602, 606, 657A, 657C, 657D, 657E, 671B

Online Advantage Limited [2002] ATP 14, refd
Winepros Limited [2002] ATP 18, 43 ACSR 566, refd

These are our reasons for declining to commence proceedings in relation to an Application by Grand Hotel Group under section 657C of the Corporations Act 2001 (Cth) for a declaration of unacceptable circumstances under section 657A and associated interim and final orders respectively under sections 657E and 657D.

THE APPLICATION

1. These reasons relate to an application (the **Application**) by Grand Hotel Group (**GHG**) under section 657C of the *Corporations Act 2001* (Cth) (the **Act**) dated 30 September 2003. The Application concerned various alleged deficiencies in relation to, first, several substantial shareholder notices provided in relation to GHG and, second, information provided to security holders of the Grand Hotel Trust (**GHT**) for the purposes of a general meeting at which security holders would be required to decide whether to replace the current responsible entity of the GHT.

THE PANEL & PROCESS

2. The President of the Panel appointed Peter Scott (sitting President), Ian Ramsay (sitting Deputy President) and Scott Reid as the sitting Panel (the **Panel**) for the Application.

3. We decided not to conduct proceedings in relation to the Application and made no declaration or interim or final order in relation to it.

SUMMARY

4. GHG's first complaint was that various substantial holding notices (**Substantial Holding Notices**) lodged by Hotel Capital Partners Ltd (**HCP**) and Touraust Corporation Pty Ltd (**Touraust**) (the entity which operates most of the hotels owned by GHT) under Chapter 6C were defective. Specifically, GHG submitted that the Substantial Holding Notices provided insufficient information about the nature of each entity's relationship with Parker Global Strategies LLC (**PGS**).

5. GHG also complained that there were deficiencies in a Notice of Meeting given to members of GHT for the purposes of a meeting called by PGS for 22 October 2003. The purpose of that meeting was to remove the responsible entity of GHT and appoint HCP in its place.
6. We were initially inclined to commence proceedings in relation to the Substantial Holder Notices. We had concerns because of the limited information provided by each of HCP and Touraust about their relationship with PGS. However, in the course of deciding whether to conduct proceedings we were provided with additional information from HCP and Touraust. When that information was given by each of HCP and Touraust to GHG (who then gave it to Australian Stock Exchange Limited (**ASX**)), we considered that it adequately supplemented the information provided in the Substantial Holder Notices.
7. We decided not to commence proceedings on the Notice of Meeting issue. We considered that in the circumstances, the Notice of Meeting (and more generally the meeting to which it related) did not relate to a control transaction for the purposes of Chapter 6 of the Act. Chapter 6 is not designed to prevent members from using their votes to replace the management of companies and trusts, unless they contravene section 606 (*the 20% threshold*). The Application did not allege or suggest that the meeting of GHT members involved either a change in the voting power of any security holder, or the acquisition of relevant interests in securities.
8. Once the information referred to in paragraph 6 was provided to ASX, there were no further issues for us to address, and we decided not to conduct any proceedings on the Application.

APPLICATION

Declaration and orders sought in the Application

9. GHG applied to us for a declaration of unacceptable circumstances under section 657A of the Act.
10. GHG sought various interim and final orders under sections 657E and 657D of the Act. The two broad categories of orders sought related, first, to Touraust and HCP providing further information about the nature of their association with PGS and, secondly, to their correcting alleged information deficiencies in the Notice of Meeting.

DISCUSSION

Factual background leading up to Application

GHG

11. GHG is an entity listed on the ASX. Its principal activity at all relevant times has been investment in 23 hotels under three brands: 'Hyatt', 'Chifley' and 'Country Comfort'.

12. GHG is a stapled structure whose securities consist of ordinary shares in Grand Hotel Company Limited (**GHC**) stapled to ordinary units in the GHT and of converting preference stapled securities.

13. Grand Hotel Management Limited (**GHRE**) is the responsible entity for GHT. GHRE is a wholly owned subsidiary of GHC and therefore forms part of GHG.

Touraust

14. Touraust operates 19 out of the 23 hotels (the Chifley and Country Comfort hotels) owned by GHT (**CCC hotels**). Under the terms of lease agreements between Touraust and GHRE, Touraust is entitled to the income from operating those hotels. Touraust is required to pay rent to GHT which is linked to net hotel earnings, gross group revenue and gross operating profit.

15. The Application stated that GHRE has recently queried Touraust's operation of the CCC hotels in certain respects. In particular, GHRE is currently undertaking an audit of some of the expenses which Touraust has claimed under the lease agreements.

16. GHRE has recently sold some underperforming CCC hotels and identified some further underperforming CCC hotels for sale. Sale was accompanied by vacant possession of the properties (ie surrender of the lease agreements by Touraust). Touraust is entitled under the lease agreements to compensation for the loss of its operating rights. However, the Application states that Touraust would prefer that the CCC hotels not be sold and for its operating rights to continue.

Parker Global Strategies

17. PGS is a US-based investment manager firm. PGS acts as investment adviser to a number of trusts, including relevantly the PGS Gamma Edge Trust.

Hotel Capital Partners

18. HCP is a specialist hotel investment fund manager and the responsible entity for another ASX-listed hotel trust. HCP is 50% owned by the James Fielding Group (**JFG**) and 50% owned by its managers and directors. JFG is a diversified property group focusing on property investment, development, funds management and property services listed on ASX.

Substantial shareholder notices from PGS and Touraust

19. GHG first learnt of the acquisition of a relevant interest in GHG securities by interests associated with PGS on or around 31 March 2003 when it received a "Notice of Initial Substantial Holder" under section 671B of the Act from PGS in respect of a relevant interest in 17,944,067 GHG ordinary securities (ie voting power of 8.07%).

20. Between 1 April 2003 and 29 August 2003, further substantial holding notices were lodged on behalf of PGS and its related entities.

21. On 23 July 2003, GHRE received a "Notice of Initial Substantial Holder" (**First Touraust Notice**) from Touraust. Touraust's substantial holding in GHG arose because it had become associated with PGS. The First Touraust Notice stated that the association arose because Touraust "proposed to act in concert" with PGS in relation to the affairs of GHG as set out in section 12(2)(c) of the Act.[1] No further details of the association were provided.

22. On 24 July and 25 July 2003, GHRE wrote to Touraust seeking copies of, or details of, any relevant agreement, arrangement or understanding between Touraust and PGS.[2]

23. On 25 July 2003 Touraust's lawyers wrote to GHRE confirming that Touraust was an associate of PGS 'by virtue of the breadth of sections 12(2)(c) … of the Act'. Touraust's lawyers stated that there was no document that set out the terms of any relevant agreement and that there was no unwritten contract, scheme or arrangement that contributed to the situation giving rise to the need for Touraust to give the First Touraust Notice.

24. Several substantial holding notices were lodged separately by PGS and Touraust over late August and September 2003. No further details of the association were provided. According to the most recent notice at the time of Application they each had voting power of 11.79%.

Notice of meeting

25. On 18 September 2003, PGS informed GHG that it had instructed the sub-custodian of Gamma Edge, Permanent Nominees (Aust) Limited (**Permanent**), to call a meeting of GHT's security holders to consider the removal of GHRE as the responsible entity of GHT, and the appointment of HCP in its place. PGS also gave GHRE:

    (a) a notice under sections 252D and 601FM of the Act calling a meeting of GHT security holders to be held on 22 October 2003 (**General Meeting**), together with an information booklet (**Notice of Meeting**); and

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[1] Section 12(2)(c) of the Act provides that two people are associated if the two are acting, or proposing to act, in concert in relation to a body's affairs.

[2] Section 671B(4)(a) provides that a Notice of Initial Substantial Holding must be accompanied by:

(a) a copy of any document setting out the terms of any relevant agreement that:
    (i) contributed to the situation giving rise to the person needing to provide the information; and
    (ii) is in writing and readily available to the person; and

(b) a statement by the person giving full and accurate details of any contract, scheme or arrangement that:
    (i) contributed to the situation giving rise to the person needing to provide the information; and
    (ii) is not both in writing and readily available to the person.

(b) a notice under section 249P of the Act signed by Permanent requiring GHC to place on the agenda at the AGM scheduled for 24 November 2003 resolutions to remove four directors of GHC and to appoint five new directors associated with HCP, PGS and JFG in their place.

26. The Notice of Meeting was sent to GHT security holders on 25 September 2003.

27. PGS's broad platform was that it could manage GHG more profitably than the incumbent GHG management. It sought, amongst other things, to:

(a) replace the internally owned responsible entity (GHRE) with an externally managed responsible entity, which it believed would create better incentives for good management; and

(b) change the way the responsible entity of GHT was rewarded so that there were greater incentives for good performance.

28. On 19 September 2003, GHRE received a "Notice of Initial Substantial Holder" from HCP (**HCP Notice**). This stated that HCP had begun to have a substantial holding in GHG under section 671B of the Act by reason of having become an associate of PGS. The association was stated to arise as a result of a 'relevant agreement [between HCP and PGS] for influencing the composition of the board of GHC or for influencing whether HCP became GHT's responsible entity or for influencing the affairs of GHT, details of which are set out in the Notice of Meeting'.[3] The Notice of Meeting was incorporated in the HCP Notice.

The Application

29. The Application submitted that unacceptable circumstances arose, among other things, as a result of deficient information in the substantial holding notices filed by Touraust and HCP and in the Notice of Meeting.

30. GHG submitted that further information was required to ensure that:

(a) any associations between any of PGS, HCP, JFG and Touraust which may have, or could in the future, pose conflicts of interest should be adequately disclosed to security holders and the market; and

(b) all relevant information concerning the proposed resolutions was fully, fairly and accurately disclosed in the Notice of Meeting.

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[3] Section 12(2)(b) of the Act provides that two people are associated if the two have, or propose to, enter into a relevant agreement for the purpose of controlling or influencing the composition of the designated body's board or the conduct of the designated body's affairs. Section 12(3) makes clear that equivalent principles apply in respect of managed investment schemes.

31. GHG submitted that the Notice of Meeting and other relevant documentation contained insufficient information to enable GHT security holders to make an informed decision whether to remove the current responsible entity, GHRE, and replace it with HCP and that some of the contents of the Notice of Meeting were inaccurate. GHG submitted that this proposed change amounted to a change of control of GHG and that the deficient information meant that holders were being asked to vote on a change in control on the basis of defective information.

PANEL CONSIDERATIONS

32. On 8 October 2003 we wrote to the parties informing them that we:

    (a) were inclined to conduct proceedings in connection with the alleged deficiencies with the substantial holding notices lodged by Touraust and HCP (together, **Substantial Holding Notices**) unless sufficient supplementary information was provided to the market; and

    (b) had decided not to conduct proceedings in relation to issues relating to the Notice of Meeting.

Substantial Holding Notices

33. The predecessor of Chapter 6C (*Information about Ownership of Listed Companies and Managed Investment Schemes*) of the Act was introduced to the Uniform Companies Acts in 1972 based on recommendations in the Eggleston Committee Report that security holders of publicly traded entities should know who had, or may have, an influence over the future direction of the entity as a consequence of ownership of securities in that entity:

    shareholders are entitled to know whether there are in existence substantial holdings of shares which might enable a single individual or corporation, or a small group, to control the destinies of the company, and if such a situation does exist, to know who are the persons on whose exercise of voting power the future of the company may depend. [4]

34. Section 671B(3) goes further than requiring the disclosure of the identity of those persons and shareholdings suggested by the Eggleston Committee Report. It requires not only that the identity of persons with voting power of 5% or greater be disclosed publicly, but also disclosure of the reason why the

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[4] 'Disclosure of substantial shareholdings and takeover bids' - Parliamentary Paper No. 43 'Second Interim Report' February 1969 Company Law Advisory Committee to the Standing Committee of Attorneys-General. The UK Report of the Committee on Company Law Amendment (Cohen Report 1945) similarly stated that equivalent principles in UK legislation existed:
to enable a shareholder to know who his co-adventurers are and the public to find out who control the business in which they are contemplating investment or to which they are considering granting credit. Paragraph 77.

disclosing person has the disclosed level of voting power.· The following information must be provided by a person filing a substantial holding notice:

(a) the person's name and address; and

(b) details of their relevant interest in:

(i) voting shares in the company; or

(ii) interests in the scheme; and

(c) details of any relevant agreement through which they would have a relevant interest in:

(i) voting shares in the company; or

(ii) interests in the scheme; and

(d) the name of each associate who has a relevant interest in voting shares in the company or interests in the scheme, **together with details of:**

(i) **the nature of their association with the associate**; and

(ii) the relevant interest of the associate; and

(iii) any relevant agreement through which the associate has the relevant interest; and

(e) if the information is being given because of a movement in their holding—the size and date of that movement; and

(f) if the information is being given because a person has ceased to be an associate—the name of the person; and

(g) any other particulars that are prescribed (emphasis added).

35. Section 671B(4) makes it clear that all relevant agreements should accompany the substantial shareholder notice.[5]

36. We note that the disclosure requirements in Chapter 6C set relatively high standards and do not contain any confidentiality exceptions. The intention of the legislature as evidenced by Chapter 6C is that more rather than less information should be provided to the market.

[5] See footnote 2 above

37. We consider that the Substantial Holding Notices did not contain all the information required by subparagraph 671B(3)(d)(i) of the Act because they did not provide sufficient information about each entity's relationship with PGS.

38. The First Touraust Notices merely stated that Touraust was associated with PGS because their relationship came within the definition of the statutory test for determining whether one party is associated with another under paragraph 12(2)(c) of the Act. We do not consider that this was an informative description of the association. The breadth of the relationships that can be encompassed by the words of paragraph 12(2)(c) is such that a reference to that provision without further explanation does not satisfy the statutory requirement in sub-paragraph 671B(3)(d)(i) to "give details...of the nature of their association with the associate".

39. In particular GHG security holders would not have been able to determine what change in circumstances would entitle them to believe (assuming that the change would not require the giving of a new notice under section 671B) that the proposed acting in concert had become an actual acting in concert or what the scope of the "concert" might be. In the circumstances of this matter, it was impossible to determine whether the proposed "concert" between Touraust and PGS would mean that Touraust and PGS were proposing to act or were currently acting in concert in relation to PGS and HCP's plans for GHG, as those plans were disclosed in the Notice of Meeting.

40. Similarly the HCP Notice merely stated that an association arose because HCP's relationship with PGS came within the definition of the statutory test for determining whether one party was an associate of another under paragraph 12(2)(b) of the Act. The relevant details of that agreement should have been set out in greater detail. It was not acceptable for a general reference to be made to the Notice of Meeting as that was a lengthy document which contained much more information than that which related to the relevant agreement.

41. We consider that the principles underlying subsection 671B(3) will usually be frustrated where a notice is lodged which merely states that persons are associated because a paragraph of the definition of "associate" in section 12 of the Act has been triggered. Paragraphs 12(2)(b) and (c) of the Act are cast in very broad terms, and are capable of encompassing many different forms of relationship. Therefore, the provisions of Chapter 6C and the principles in section 602 will usually require a far more specific description of the nature of the association to be provided. [6]

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[6] We do not specifically comment whether the more specific relationships contained in paragraph 12(2)(a) of the Act would allow the use of a simple statutory cross-reference to provide the relevant details, although it appears likely that in many cases to refer simply to the relevant sub-paragraph of that paragraph would sufficiently particularise the relationship to satisfy the requirements of Chapter 6C and section 602.

42. The First Touraust Notice and HCP Notice either should have been accompanied by documentation of the association between each respective entity and PGS under subsection 671B(4) or should have described specifically the relationship between the two parties in the body of the notice.

43. Market participants should not have to speculate on the nature and extent of the agreement, arrangement or understanding between persons who state that they are associated. Permitting notices which lack this detail may frustrate the principle of efficient, competitive and informed markets.

44. We informed the parties of our views and invited each of HCP and Touraust to provide us by 9 October 2003 with additional information about the nature of their association with PGS by way of either:

    (a) a replacement substantial shareholder notice with supplementary information about the nature of the association between each of HCP and Touraust with PGS; or

    (b) a supplementary release to the market setting out equivalent information.

45. We informed the parties that we would meet after this time to consider any additional information presented to us by HCP and Touraust and to form a view about whether that information disclosed with sufficient specificity the nature of the association between the relevant parties.

Panel considerations on receipt of information

46. Touraust and HCP provided supplementary information to us in response to the information requests referred to in paragraph 45. We considered that the supplementary information provided by each of Touraust and HCP to us (and later released to ASX) adequately informed the market about the nature of each entity's relationship with PGS.

Touraust

47. Touraust's supplementary disclosure stated that when it lodged the First Touraust Notice, it was in discussions with PGS regarding various issues, including the loose possibility of investing in GHG and/or its assets. The details for that investment were never settled, formally or otherwise. Touraust formed the view that the discussions had progressed to a point that Touraust might be said to be "proposing to act in concert" with PGS in relation to "the affairs of" GHG (within the broadest meaning of those phrases under the Act[7]).

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[7] Especially bearing in mind the application of the definition of "affairs" in section 53 to the use of that term in paragraphs 12(2)(b) and (c) by Corporations Reg 1.0.18.

48. Touraust stated that subsequently, PGS independently decided upon its present proposal to have holders consider the replacement of the management of GHG and the discussions between Touraust and PGS were put on hold. Touraust stated that it remained interested in pursuing discussions with PGS concerning investment in the Australian leisure industry, including a possibility of investing in GHG and/or its assets, and considered that it was still associated with PGS for those purposes. However, there had not been (nor did Touraust propose there to be) any agreements or arrangements concerning HCP's management or administration of the GHT.

HCP

49. HCP provided further details of its relationship with PGS. These made clear that the association between the two entities merely related to the issues raised in the Notice of Meeting. No written agreement existed between the two entities.

Notice of Meeting issues

50. The Application submitted that the replacement of the responsible entity of GHT and other matters being considered in the Notice of Meeting amounted to a change of control of the GHT.

51. We believe that in the circumstances, the Notice of Meeting (and more generally the meeting to which it related) did not relate to a control transaction, as "control" is used to define the policy of Chapter 6 of the Act.

52. Chapter 6 is essentially concerned with situations in which control of the general meeting is changed, by acquiring relevant interests in securities or acquiring voting power by creating associations. Chapter 6 is not designed to prevent security holders from using their votes to replace the management of companies and trusts, unless they enter voting arrangements in relation to them which contravene section 606 (*the 20% threshold*) of the Act.[8] Removal of the responsible entity is analogous to removal of a director[9] and of itself involves an exercise of existing control, not a change of control as that term is used in Chapter 6.

53. We do not think that the interests of a efficient, competitive and informed market are served by further regulating what is merely the uncoordinated efforts of unassociated security holders to change the management of a company or managed investment scheme, unless those efforts involve an

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[8] Such arrangements may further require disclosure under Chapter 6C.

[9] This view is supported by the express provision in paragraph 604(1)(g) that in applying Chapter 6 to listed managed investment schemes, "the appointment of a responsible entity for the scheme [is to be treated as if it] were the election of a director of the company".

aggregation or acquisition of voting power in breach of the Act or otherwise create unacceptable circumstances.[10]

54. PGS's overall proposal merely consisted of asking security holders to remove the responsible entity and certain directors, and to appoint a new responsible entity and new directors in their place. The Application did not allege that the meeting of the GHT security holders to which it related involved either a change in the voting power of any holder, or the aggregation or acquisition of relevant interests in securities, directly or indirectly. Therefore, it appeared to us that the matters that security holders were being asked to vote on at the General Meeting did not involve matters affecting the control, or potential control of GHG, but rather that they involved control remaining with the security holders.

55. We take the view that if the directors of the GHG considered that the information provided to security holders in the Notice of Meeting was deficient, the directors should deal with the perceived deficiencies either by directly communicating with GHG security holders or by initiating court proceedings for appropriate relief. Most of the orders sought by GHG could be dealt with in this manner.

DECISION

56. We decided not to commence proceedings after further information was provided to the market regarding the nature of each of Touraust and HCP's association with PGS.

Orders

57. We made no interim or final orders.

Peter Scott
President of the Sitting Panel
Decision dated 13 October 2003
Reasons published 17 November 2003

[10] See, for example, *Online Advantage Limited* [2002] ATP 14 at [53] – [56]; *Winepros Limited* [2002] ATP 18, 43 ACSR 566 at [30] – [33]