Australian Government

Takeovers Panel

Reasons for Decision
Careers Australia Group Limited
[2012] ATP 5

Catchwords:

Decline to make a declaration – undertaking – public unlisted company with more than 50 members – option over shares – effect on control – reducing company to less than 50 members – intentions – Eggleston principles – relevant interest – convertible note – item 7 approval

Corporations Act 2001 (Cth), sections 602, 606, 611, 657A, 657C

Guidance Note 1: Unacceptable Circumstances

Attorney-General (Cth) v Alinta Limited [2008] HCA 2

InvestorInfo Limited [2004] ATP 6

INTRODUCTION

1. The Panel, Paula Dwyer, John Keeves (sitting President) and Anthony Sweetman declined to make a declaration of unacceptable circumstances, given performance of an undertaking offered by Cirrus, in relation to the affairs of Careers Australia. The application concerned option deeds entered into by Cirrus with some Careers Australia shareholders, the original effect of which would have been[1] to reduce the number of Careers Australia shareholders to 50 or less, thus removing the company from Chapter 6 of the *Corporations Act 2001* (Cth).[2]

2. In these reasons, the following definitions apply.

Applicants	Jiggi Investments Pty Ltd and others[3]
Careers Australia	Careers Australia Group Limited
Cirrus	Cirrus Business Investments Limited
Option Deed	The option deeds sent to some Careers Australia shareholders on or about 30 November 2011 pursuant to which Careers Australia shareholders would grant to Cirrus an option to buy all of their shares for $0.66 per share
White Cloud	White Cloud Capital Advisors Limited (in its capacity as advisor of White Cloud Capital Fund Limited)

[1] Assuming the exercise of all or a substantial proportion of the options

[2] Unless otherwise indicated, references are to the *Corporations Act 2001* (Cth)

[3] The applicants hold more than 10% of Careers Australia. They are: Jiggi Investments Pty Ltd ATF Graham and Company Executive Superannuation Fund, Wayburn Holdings Pty Ltd, Vernon and Jillaine Wills ATF the Wills Family Super Fund, Vernon Wills and Jillaine Wills, D & E Somerville ATF Somerfam Super Fund, Ganbros Pty Ltd, Fernlobe Pty Ltd ATF the Elder Investment Trust, Orbit Capital Pty Ltd, Devine Superannuation Pty Ltd ATF Devine Executive Super Fund, Depofo Pty Ltd ATF Super account, Depofo Pty Ltd ATF Depofo TT account, Mr G P Yeatman (formerly Merrill Lynch Noms), Pinbrook Pty Ltd, Onmell Pty Ltd ATF Brent Potts Super Fund A/C, Myall Resources Pty Ltd ATF Myall Unit A/C, Myall Resources Pty Ltd ATF Myall Super A/C, RASK Pty Ltd ATF The Granger Super Fund A/C

FACTS

3. Careers Australia is an unlisted public company, limited by shares. At the date of the application it had 88 shareholders.

4. On 12 July 2011, further to a heads of agreement dated 12 May 2011 (as varied by a deed of variation dated 2 June 2011), Careers Australia entered into a convertible note deed with Cirrus (a nominee of White Cloud), pursuant to which Careers Australia agreed to issue up to 60,606,060 convertible notes with a face value of $0.66 each (convertible into 60,606,060 shares, which would represent a relevant interest of 45.29% in the expanded number of voting shares in Careers Australia).

5. On 13 July 2011, Careers Australia obtained shareholder approval under item 7 of section 611 to allow for Cirrus to convert the notes and receive up to a total relevant interest of 45.29% in Careers Australia.

6. On 30 November 2011, Cirrus wrote to 40 Careers Australia shareholders (holding a collective relevant interest of 5.52%[4] in the existing number of voting shares in Careers Australia) offering them an "*exit opportunity*", to buy all of their Careers Australia shares for $0.66 per share (noted in the offer as being the same price as offered by Careers Australia to shareholders in an equal access buy-back conducted in early August 2011). The letter stated:

> *Following legal advice, in order to implement this without inadvertently breaching applicable regulations or adversely affecting Cirrus' ability to convert its convertible notes into shares, sufficient shareholders have to sell their shares to reduce the total number of Careers Australia shareholders to below 50.*

7. Each letter enclosed a personalised Option Deed which Careers Australia shareholders were asked to execute and return to Cirrus prior to the close of business on 31 January 2012. The options expired on 29 February 2012. The letters also stated:

> *Cirrus will only exercise this option and pay cash for your shares if enough other shareholders also enter into Option Deeds, such that the total number of shareholders will fall below 50 once Cirrus exercises its options under the relevant Option Deeds.*

8. On 16 January 2012, Cirrus followed up the Careers Australia shareholders who had not accepted.

9. On 23 February 2012, the Applicants sought an undertaking from Cirrus' legal advisers that Cirrus would not exercise any of the options pursuant to the Option Deeds and, if Cirrus did exercise any of the options, there would be no exercise that would result in shareholders being excluded from Chapter 6 protection. Cirrus' legal advisers responded that, while the undertaking requested could not be given, Cirrus would not reduce the number of Careers Australia shareholders below 50 pursuant to the exercise of the options. They also said that, while the Applicants continued to hold shares, they would provide reasonable notice before

[4] The convertible notes have not yet been converted and Cirrus did not have a relevant interest in any voting shares prior to entering into the options

making any acquisitions that would reduce the number of shareholders in Careers Australia to below 50.

APPLICATION

Declaration sought

10. By application dated 24 February 2012, the Applicants sought a declaration of unacceptable circumstances. The Applicants submitted that Cirrus had entered into Option Deeds that were not offered to all Careers Australia shareholders and which were structured to avoid the requirements of Chapter 6. They submitted that this gave rise to unacceptable circumstances.

11. The Applicants submitted that, if Cirrus and White Cloud were able to increase their voting power to beyond 45.29% in these circumstances, the effect would be that Careers Australia shareholders:

    (a) would have their rights to ensure that an increase in control of Careers Australia is undertaken in accordance with section 602(a) removed, without due consideration or prior disclosure and

    (b) would not have been afforded a reasonable and equal opportunity to participate in the benefits offered to certain shareholders, *"in breach of the principle described in section 602(c)"*.

Interim order sought

12. The Applicants sought an interim order restraining exercise of any of the options by Cirrus, pending final determination by the Panel.

13. On 28 February 2012 the Acting President accepted an undertaking from Cirrus (Annexure A), under which Cirrus would:

    (a) delay completion of any share transfers pursuant to exercise of the options until 5 business days after the determination of the Panel proceedings or order and

    (b) inform shareholders that they were released from their obligations under the Option Deed if they did not agree to delaying completion.

14. On 29 February 2012, Cirrus wrote to Careers Australia shareholders who had entered into Option Deeds to inform them that, as a result of the application to the Panel, Cirrus had decided not to exercise the options. Instead, Cirrus sought their agreement to extend the option period until 2 business days after the Panel had made a determination in relation to the application.

Final orders sought

15. The Applicants sought final orders that Cirrus (and White Cloud) be prevented from acquiring a relevant interest in any Careers Australia shares which would, other than as a result of an exception in section 611, have the effect of either:

    (a) Cirrus or White Cloud obtaining a relevant interest in more than 45.29% of Careers Australia shares or

(b) causing Careers Australia to have 50 or fewer shareholders.

DISCUSSION

16. Cirrus submitted that the Panel should decline to conduct proceedings on the basis that the application was trivial, frivolous and vexatious. Cirrus noted that the Applicants had not identified a breach of Chapter 6 and that Cirrus did not have a relevant interest in Careers Australia's issued voting shares (beyond the interest it held by virtue of the Option Deeds). It is clear that the Panel can declare unacceptable circumstances even where an act may not contravene Chapter 6.[5] We decided to conduct proceedings.

17. The prohibition in section 606 does not apply to acquisitions of relevant interests in issued voting shares of an unlisted company having 50 or fewer members. The 50 member threshold was introduced by the *Corporate Law Economic Reform Program Act 1999*, raising the number from 15 in previous legislation, because of the costs of compliance with the requirements of Chapter 6.[6]

18. The Applicants submitted that Cirrus (and White Cloud) had intentionally undertaken a strategy of reducing the number of Careers Australia shareholders to below 50 to avoid the requirements of Chapter 6. Cirrus submitted that it was attempting to avoid an inadvertent breach of Chapter 6 that could have arisen on conversion of the convertible notes. ASIC submitted that *the purpose of the person or persons causing, or participating in, the reduction in shareholders numbers will generally be a relevant factor in determining whether there are unacceptable circumstances.*

19. While Cirrus could enter into the Option Deeds prior to converting the convertible notes without breaching Chapter 6, it sought to do so while having approval to increase its holding to 45.29%. By exercising the options and subsequently converting the convertible notes without otherwise having disposed of the shares acquired by exercise of the options, Cirrus would have acquired an interest of approximately 49%, on a fully diluted basis, in Careers Australia without requiring any further shareholder approval or otherwise having to comply with the provisions of Chapter 6.

20. If Cirrus had first converted all of the convertible notes (assuming Careers Australia remained a Chapter 6 company at that time), it could not have increased its interest without meeting one of the exceptions in section 611.

21. While we were initially concerned with certain aspects of this matter, our concerns were addressed by the performance of the undertaking offered by Cirrus (Annexure B). We accept there will be circumstances in which removal of a company from the ambit of Chapter 6 will clearly not be unacceptable, for instance, if a company ends up with 50 or fewer shareholders by coincidence; that is, as an ancillary result of some other act. Where there is a plan or proposal designed to cause a company to be taken outside the ambit of Chapter 6, unacceptable circumstances may, in our view, arise.

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[5] *InvestorInfo Limited* [2004] ATP 6, *Attorney-General (Cth) v Alinta Limited* [2008] HCA 2, Guidance Note 1: Unacceptable Circumstances at [25]

[6] *Corporate Law Economic Reform Program Act 1999*, Explanatory Memorandum, paragraph 7.17

22. The Applicants submitted that the selective offers made by Cirrus to only some Careers Australia shareholders would have the effect of disenfranchising certain shareholders, by not giving them the opportunity to consider changes to the control of their company or the acquisition of a substantial interest (once Careers Australia had been removed from the ambit of Chapter 6).

23. Cirrus submitted that the offers were not selective and that they were made to those Careers Australia shareholders who had sought to sell more of their shares than was possible in the buy-back (conducted by Careers Australia in August 2011) and who had the smallest holdings in Careers Australia. It submitted:

> *The sole purpose of Cirrus entering into the Options was to facilitate an exit for minor shareholders who had tendered shares in the Buy-Back, many of whom had expressed an interest in selling the remainder of their shareholding.*

24. Irrespective of how Cirrus determined which Careers Australia shareholders it would make offers to, Cirrus did not extend the offers to all shareholders. We would have been less inclined to share the concern raised by the Applicants if there had been a general offer to all Careers Australia shareholders.[7]

25. The Applicants submitted that in circumstances where Cirrus got shareholder approval to obtain voting power of up to 45.29% in Careers Australia on conversion of the convertible notes, Careers Australia shareholders had a legitimate expectation that any further acquisition would occur pursuant to a takeover bid or as otherwise authorised under Chapter 6. We were inclined to agree with this.

26. Cirrus acknowledged in its submissions that it was likely to require fresh shareholder approval if, as holder of convertible securities, it acquired additional Careers Australia shares before conversion and exceeded the maximum voting power already approved under item 7 of section 611. We believe this is correct. As a result of the undertaking, Cirrus will only exercise 27 options. Careers Australia will then have 62 shareholders and Cirrus will hold a relevant interest of 3.4% in the existing share capital of Careers Australia. Therefore, when Cirrus seeks to convert the convertible notes, it will only be able to increase its interest to a maximum of 45.29% under the existing shareholder approval.

Undertaking

27. In our view, performance of the undertaking by Cirrus adequately addresses the circumstances complained of.

28. While there is no current suggestion of any further proposal, we would be concerned if Cirrus (or any of its associated entities) sought, in the future, to implement a new transaction designed to remove Careers Australia from the ambit of Chapter 6 in similar circumstances to those here.

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[7] Such an offer would have to comply with Chapter 6

DECISION

29. Given the undertakings offered by Cirrus, we decline to make a declaration and are satisfied that it is not against the public interest to do so. We had regard to the matters in s657A(3).

Orders

30. We make no final orders, including as to costs.

John Keeves
President of the sitting Panel
Decision dated 15 March 2012
Reasons published 23 March 2012

Advisers

Party	Advisers
Applicants	HopgoodGanim Lawyers
Careers Australia	Freehills
Cirrus	Minter Ellison
White Cloud	Minter Ellison

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Annexure A

Australian Securities and Investments Commission Act (Cth) 2001 Section 201A Undertaking

CAREERS AUSTRALIA GROUP

Cirrus Business Investments Limited (**Cirrus**) undertakes to the Panel that, until determination of the proceedings or order of the Panel, it will:

1. Upon giving notice of exercise of an option, not take the necessary steps resulting in Completion (as defined in the option deed) under the option deed as set out in Clause 3 of that deed or otherwise.

2. Upon giving notice of exercise of an option, invite the shareholder to vary the option deed by delaying Completion until the earlier of:

   2.1. the determination of the Panel proceedings; and

   2.2. order of the Panel,

   (**Decision Time**),

   and unless the determination of the Panel proceedings or order of the Panel requires that Completion cannot take place, the time in Clause 3.1 is amended to be 5 business days after the Decision Time, but in all other respects the option deed remains on foot.

3. Inform the shareholder that:

   3.1. the shareholder is released from its obligation under the option deed if the shareholder does not agree to delaying Completion as set out above; and

   3.2. if the shareholder agrees to the variation and absent any decision of the Panel to the contrary, the shareholder will be notified further in writing when and where to forward the documents for Completion to take place.

Cirrus agrees to confirm in writing to the Panel when it has satisfied its obligations under this undertaking.

In this undertaking:

option means an option the subject of the application to the Panel by Jiggi Investments Pty Ltd and others dated 24 February 2012.

proceedings means proceedings (if any) commenced by the application to the Panel by Jiggi Investments Pty Ltd and others dated 24 February 2012.

Signed by Jeremy Blackshaw of Minter Ellison
with the authority, and on behalf, of
Cirrus
Dated 28 February 2012

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Annexure B

Australian Securities and Investments Commission Act (Cth) 2001
Section 201A
Undertaking

Careers Australia Group Limited (Careers Australia)

Pursuant to section 201A of the *Australian Securities and Investments Commission Act 2001* (Cth), Cirrus Business Investments Limited (**Cirrus**) undertakes to the Panel that it will:

1. not exercise any more than 27 options pursuant to any of the option deeds entered into with Careers Australia shareholders

2. promptly and no later than the date of this undertaking, send a letter withdrawing all of the invitations dated 29 February sent to Careers Australia shareholders (to extend the option period under their option deeds), that have not been accepted and notify them that the options have lapsed

3. within 5 business days after the date of this undertaking, notify Careers Australia of the lapse of the options which have not been exercised pursuant to the option deeds and

4. confirm in writing to the Panel when it has satisfied its obligations under this undertaking.

Signed by Jonas Martin-Löf
with the authority, and on behalf,
of Cirrus Business Investments Limited

Dated 15 March 2012