

Has Australia's Takeovers Panel Turned the "Tap" On to More "Association" Proceedings?

IN SHORT

The Situation: A major shareholder of Tap Oil Limited, a company listed on ASX, gave notice of an intention to spill the board, to remove all but one of the current directors, through a general meeting of shareholders.

The Development: Tap Oil applied to the Australian Takeovers Panel for a declaration of unacceptable circumstances, alleging that its two major shareholders (who collectively held more than 40 percent of its shares) were acting in concert in relation to the board spill.

The Result: The Takeovers Panel decided to conduct proceedings but ultimately declined to make a declaration of unacceptable circumstances. This was a rare circumstance where the Panel conducted proceedings regarding an alleged association but declined to make a declaration.

The Background

Australian's shareholder disclosure rules require that shareholders aggregate their shareholding with their associates' shareholdings for the purpose of determining their "voting power" in Australian listed companies. That voting power, and the identity of their associates, must be disclosed to the market if their voting power exceeds 5 percent or changes by more than 1 percent if above that threshold.

Where a major shareholder seeks the removal of the current directors via general meeting, it is not uncommon for listed companies to apply to the Takeovers Panel for a declaration of unacceptable circumstances, alleging that the major shareholder is acting in concert with other shareholders without informing the market. To date, the Panel has been minded to intervene and make a declaration if sufficient evidence is presented to it in the application to show an undisclosed association.

The Issue

In applications of this type, the Panel has previously said that it will not conduct proceedings unless there is a "sufficient body of material" demonstrated by the applicant in its application, together with inferences that might be drawn, to support the Panel finding an association. A recent example of a Panel proceeding where this standard was restated was *Resource Generation Limited* in 2015. In that matter, the Panel decided to conduct proceedings, and made a declaration of unacceptable circumstances due to an undisclosed association between two major shareholders.



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In large part, this approach (relying on the applicant to show sufficient material in its application) is justified on the basis that the Panel is not a body well-equipped to carry out investigations and gather evidence of its own.

The practical effect of this approach is that if the applicant prima facie establishes an association in its application, which leads the Panel to decide to conduct proceedings, the onus then effectively shifts to the shareholders to rebut the allegation of an undisclosed association.

This has generally resulted in the Panel either declining to conduct proceedings in response to these types of applications or, if proceedings are conducted, then ultimately making a declaration of unacceptable circumstances in relation to the association.

There are very few instances where the Panel has decided to conduct proceedings in association matters but subsequently declined to make a declaration. This arises in large part from the practical difficulty for shareholders to "prove a negative" (i.e., that there is no association) once the Panel has decided that the applicant has demonstrated sufficient evidence to suggest an association.

In the reasons for its decision in the Tap Oil matter, the Panel may have lowered the standard previously applied in determining whether to conduct proceedings in matters such as this. The Panel's reasons state that it is "important for the Panel to examine allegations of such behaviour, which appear on the material provided to be credible". This seems to be a lower threshold than the "sufficient body of material"

previously applied. However, having decided to conduct proceedings, the Panel found insufficient evidence to support a finding of an association between the Tap Oil shareholders.

Jones Day acted for Resource Generation Limited in its 2015 Panel proceeding and for one of the major shareholders in the Tap Oil proceeding in 2017.

TWO KEY TAKEAWAYS

1. If the standard adopted by the Panel on whether to conduct proceedings in association matters is lowered going forward, it would likely have the effect of making these types of proceedings (once the Panel decides to conduct proceedings) less of a foregone conclusion than in the past. This is because the Panel will not have already decided that there is a sufficient body of evidence when it decides to conduct proceedings—but instead only that a credible allegation has been made of an undisclosed association between shareholders.
2. With "shareholder activism" increasingly front of mind, market participants should be aware of the possibility of Panel applications such as this, where directors are proposed to be removed through a general meeting requisitioned by a major shareholder.

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