



**In the matter of Winepros Limited
[2002] ATP 18**

Catchwords:

Association – whether facts support finding of association – voting intentions – disclosure of information concerning sub-participants – conference not warranted – substantial shareholder notice – insufficient support for conclusion of unacceptable circumstances

Corporations Act 2001 (Cth), sections 12(2), 606(1) and 636(1)(f)

ASIC Regulations, regulation 35

Online Advantage Limited [2002] ATP 12

These are our reasons for declining to make a declaration of unacceptable circumstances in response to an application under section 657C of the Corporations Act by Starmore Investments Pty Limited (The Application). The application was for a declaration of unacceptable circumstances and orders in relation to the acquisition by certain persons specified in the Application of approximately 16 million shares in Winepros Ltd (Winepros) between 4 and 14 October 2002 through various securities dealers (“the October 4-14 Acquisitions”).

INTRODUCTION

1. The sitting Panel comprised Teresa Handicott (sitting President), Nerolie Withnall (sitting Deputy President) and Scott Reid.
2. On 18 October 2002, Starmore Investments Pty Limited (**Starmore Investments**) applied to the Panel for a declaration of unacceptable circumstances in relation to the October 4-14 Acquisitions. The shares were largely sold by previous significant shareholders in Winepros. The shares constituted approximately 32% of Winepros’ issued shares.
3. On 20 October 2002, the Panel decided to conduct proceedings, pursuant to ASIC regulation 20.

SUMMARY

4. There were two takeovers bids for Winepros at the time of the Application. The first bid was made by Starmore Investments. It was a bid for 85% of Winepros and it was conditional on shareholder approval of certain resolutions. The second bid was made by Buysshop Limited (**Buysshop**) and it was an on market bid.
5. Starmore Investments alleged that:

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- (a) Greg Beirne, Beirne Trading Pty Ltd (**Beirne**), JRS Investments Pty Ltd (**JRS**), Trojan House Pty Ltd (**Trojan**), Troy Harry and John Harry, were associates of each other; and
 - (b) Beirne, JRS, Trojan, Troy Harry, John Harry and Greg Beirne and any of their respective associates (the **Acquirers**) had collectively acquired more than 20% of the total issued voting shares in Winepros in contravention of section 606(1) of the Corporations Act (**Act**).
6. Starmore Investments was unable to provide the Panel with any supporting material beyond its assertions and beliefs and its version of conversations discussed below at paragraph 20.
7. The Panel considered that there was insufficient material before it to support the allegations. On that basis the Panel made no finding of unacceptable circumstances.

THE APPLICATION

8. Starmore Investments applied to the Panel pursuant to section 657C of the Act for:
- (a) a declaration of unacceptable circumstances in relation to the affairs of Winepros.
 - (b) interim orders pursuant to section 657E of the Act that:
 - (i) the Acquirers be restrained from voting any shares held by them in Winepros in relation to any resolutions to be considered at a general meeting of shareholders of Winepros to be held on 30 October 2002 (or any adjournment thereof or freshly convened meeting for the same purpose) (**General Meeting**);
 - (ii) the Acquirers be restrained from acquiring any further Winepros shares;
 - (iii) a request for production of documents be issued in respect of any correspondence between any Acquirers relating to the affairs of Winepros or the acquisition of securities in Winepros; and
 - (iv) the Panel issue a summons under Section 192 of the ASIC Act for the Acquirers to appear and produce all relevant documents relating to Winepros and the acquisition of securities in Winepros by any of the Acquirers or any of the parties materially affected by this application;
 - (c) final orders pursuant to section 657D of the Act that:

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- (i) the Winepros shares held by the Acquirers be vested in the ASIC for sale by the ASIC to Starmore Investments or the highest bidder, subject to compliance by the bidder with Chapter 6 of the Corporations Act with any profit obtained by the Acquirers on the disposal to be paid to Starmore or otherwise as directed by the Panel; and
- (ii) such further or other orders as the Panel considers appropriate.

BACKGROUND

9. The following is a description of the facts underlying the Application, which has largely been taken from the Application.
10. Pursuant to a bidder's statement dated 17 September 2002, Starmore Investments made a proportional takeover offer for 85% of the fully paid ordinary shares in the capital of Winepros at a cash price of 2.1 cents per Winepros share. Starmore Investments subsequently increased the cash price of its takeover offer to 2.6 cents per share and also extended the offer period for the takeover bid so that the offer period was to expire on 14 November 2002.
11. One of the conditions of Starmore Investments' bid was the approval of certain resolutions proposed at the General Meeting. The resolutions were to approve, among other things:
 - (i) the issue of 30 million shares to Starmore Investments at 1.3 cents per share;
 - (ii) the issue of 15 million options to Starmore Investments with each option having an exercise price of 2.1 cents; and
 - (iii) Southern Cross Equities Limited acquiring Winepros shares as discussed below at paragraph 12.
12. The Starmore Investments bid was to be funded by Southern Cross Equities Limited (**Southern Cross**). If it were successful, Starmore Investments was to reimburse Southern Cross through the transfer to Southern Cross of Winepros shares acquired by Starmore Investments pursuant to the Starmore Investments bid. Shareholder approval for this transfer of shares to Southern Cross was sought at the General Meeting in accordance with Item 7 of Section 611 of the Corporations Act.
13. On 2 October 2002, Buyshop Limited (Buyshop) announced an on market takeover bid for 100% of the fully paid ordinary shares in the capital of Winepros at a price of 2.2 cents per Winepros share.

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14. Between 4 October 2002 and 14 October 2002, Greg Beirne, Beirne, JRS and Trojan lodged various Forms 603 and Forms 604 with ASX. A summary of the information contained within those forms is set out in the table below:

Name	Date of Acquisition	Total Shares	Cumulative Voting Power
Beirne Trading Pty Ltd	11/08/02 to 04/10/02	4,208,062	8.4%
JRS Investments Pty Ltd ATF The Trojan Family Trust	08/10/02	5,203,150	10.41%
Trojan House Pty Ltd	11/10/02	4,796,849 (acquired 1,921,759)	9.59%
Greg Beirne Klip Pty Ltd J Toll C Pearse C Gould	14/10/02	8,708,062 (acquired 4,500,000) 1,000,000 1,250,000 1,750,000 500,000	17.4% (increased from 8.4%)

15. The combined voting power of JRS and Trojan in Winepros was equal to 19.99%. The total voting power of Beirne and associates was equal to 17.4%.
16. JRS is controlled by John Harry and Trojan is controlled by Troy Harry. John Harry is Troy Harry's father.
17. Troy Harry is a stockbroker at ABN Amro. Troy Harry is one of the brokers that Beirne uses.
18. The acquisitions by the Acquirers resulted in approximately 15,832,971 Winepros shares changing hands (or approximately 31.7% of the fully paid shares on issue in Winepros).
19. In total, the Acquirers held or controlled the voting rights attached to approximately 18,708,061 Winepros shares (or approximately 37.42% of the fully paid ordinary shares on issue in Winepros).

DISCUSSION AND DECISION

Submissions

20. Starmore Investments narrated to us two conversations which Mr. Troy Harry had with Mr. Cunningham of Buyshop (on or about 2 October) and with Mr.

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Poole of Starmore (on or about 14 October). In each of these conversations, they alleged that Mr. Harry stated that the Beirne interests and the Harry interests would both vote against those resolutions.

21. Both Mr. Harry and Mr. Beirne denied that Mr. Harry knew of Mr. Beirne's voting intentions at the time of the conversations, and that Mr. Beirne had at any time authorised Mr. Harry to communicate his intentions. Mr. Beirne pointed out (and evidence from the company confirmed it) that at the time of the conversation he had lodged and not withdrawn a proxy directing votes in favour of the resolutions. This proxy was lodged on or about 30 September, and replaced with a contrary proxy on or about 23 October. It is of some evidentiary weight, notwithstanding that (a) it could be revoked at any time until 48 hours before the General Meeting and (b) it may not have been validly executed.
22. Mr. Harry agreed that he spoke with Messrs Poole and Cunningham about voting at the General Meeting, but denied having known Mr. Beirne's voting intentions, or having made representations about them. He stated that he told Mr. Cunningham that he would need to speak to Mr. Beirne direct, and that Mr. Cunningham later told him that he had spoken with Mr. Beirne. Given this conflict of evidence and the existence of Mr. Beirne's proxy at the relevant times, we are unable to place the heavy reliance on Messrs Poole and Cunningham's accounts of these conversations which is needed to base on them a finding of association between the Harry and the Beirne interests.
23. The Panel noted that there was conflicting evidence in relation to conversations about the voting intentions of the Acquirers. The Panel considered that the alleged conversations about voting intentions did not prove that the parties are associated.
24. Each of the major groups of Acquirers submitted strongly that they had not entered into any agreements with any of the other major groups of Acquirers concerning the acquisition or voting of shares in Winepros. They did acknowledge agreements and associations within their separate groups, but none which related to the allegations by Starmore Investments.

Conference

25. The Panel considered that a conference was not warranted as it would be unlikely to provide any further useful evidence. In essence, the Panel considered that all of the questions that it would be likely to put to parties in an oral conference had been put to the parties in the Brief. Asking the parties to repeat those statements orally was unlikely to produce a different understanding of the facts.

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Discussion

26. The Panel considered that insufficient material had been put before it to support the allegations by Starmore Investments that the Acquirers had entered into any relevant agreements in relation to the acquisition or voting of shares in Winepros. The Panel was unable to determine that unacceptable circumstances had occurred and considered that there was no basis to make any orders.
27. Allegations of association will, by their very nature, usually be very difficult to prove and it is very difficult to provide direct evidence of the existence of association or agreements. On that basis, the Panel will frequently be required to draw inferences from patterns of behaviour, commercial logic and other evidence suggestive of association. However, until there is a body of such material, the onus will normally remain on the person alleging the association. In this case, Starmore Investments was unable to provide the Panel with any supporting material beyond its assertions and beliefs and its version of the conversations discussed above at paragraph 20.
28. The Panel doubts that the material before it is a sufficient basis for further investigation. If later circumstances do provide evidence of association the parties may file a fresh application.
29. Beirne did use Troy Harry, and his firm, as brokers but said that their relationship was a typical broker/client relationship. Beirne also said that ABNAMRO Morgan (which is where Troy Harry is employed) was responsible for less than 10% of his trades and that he deals with a number of other brokers.

Analysis of facts and comparison to Online Advantage

30. For several reasons, these purchases and the evidence surrounding them did not raise the same concerns that the purchasers were associated as arose in Online Advantage. There was no evidence that the Acquirers had not acted separately from one another. There was no evidence suggesting pre-arrangement between one vendor and another, or between Acquirers and vendors. The Acquirers showed no intention of taking control of the company, altering the composition of the Board or interfering with the conduct of its affairs, other than that they intended to vote against the resolutions connected with Starmore Investments' bid.
31. The Panel considered three possible indications of association between the Acquirers, but the Panel were not persuaded by them.
 - (a) Each of the Acquirers had lodged a proxy directing a vote against the resolutions connected with Starmore Investments' bid for Winepros. That is not of itself evidence of association, as none of the Acquirers had accepted the Starmore Investments' bid and the passage of the

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resolution approving the share issue would be materially adverse to the interests of shareholders who did not accept the Starmore Investments' bid. Both the asset backing of their shares and their relative voting power would be reduced. Furthermore, the share issue was not conditional on the success of Starmore Investments' bid.

- (b) Mr. Harry had acted as Mr. Beirne's broker in various share purchases and sales, including a purchase of shares in Winepros on 11 January 2002. Messrs Harry and Beirne agreed with this, but pointed out that Mr. Beirne used other brokers and placed only a small proportion of his orders with Mr. Harry and that all of his other purchases of shares in Winepros had been through other brokers (this was supported by other evidence). Each stated that they had not discussed Winepros between 11 January and 24 October 2002.
 - (c) The conversations regarding the voting intentions of the Beirne interests and the Harry interests narrated to us by Starmore Investments and discussed above at paragraph 20. These conversations were the only direct evidence of association between the Beirne interests and the Harry interests.
32. As explained above in paragraphs 21 and 22, the conflict of evidence in relation to the conversations and the existence of Mr. Beirne's proxy at the relevant times, meant that the Panel was unable to place the heavy reliance on Messrs Poole and Cunningham's accounts of these conversations which is needed to base on them a finding of association between the Harry and the Beirne interests.
33. Assuming, however, that Starmore Investment's account of the conversations were substantially correct, they indicated that Messrs Harry and Beirne were at the relevant times both opposed to the resolutions. It does not follow that they had an agreement, arrangement or understanding to co-operate, or that they were acting in concert, in relation to the company's affairs, or this particular aspect of them. A concurrence of view about the merits of a particular resolution proposed by another person does not constitute an understanding about the conduct of the company's affairs. That is particularly true when each of the shareholders has reasons to oppose the resolution, which do not depend on there being any understanding between them.

Conditions of the Starmore Investments Bid

34. Southern Cross was to provide the funding for Starmore Investment's bid as discussed above at paragraph 12. Starmore stated in its bidder's statement that it was proposed that Southern Cross would enter into separate sub-participation agreements with an as yet unidentified group of sophisticated investors (**sub-participants**). The sub-participants were to receive Winepros shares in satisfaction of their portion of the funding.

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35. The Panel was somewhat concerned at the terms of Starmore Investment's bid relating to these funding arrangements and the lack of information concerning the identity of the sub-participants. Starmore stated in its bidder's statement that none of the sub-participants would have voting power greater than 19.9%, however the Panel remained concerned at the lack of disclosure.
36. None of the parties raised any issues in relation to Starmore Investment's bidder's statement and the Panel did not take its concerns any further.

Waiver of condition in Starmore Investments' bid

37. Starmore Investments stated in its bidder's statement that it was a condition of its bid that the resolutions referred to above in paragraph 11 were approved by shareholders in accordance with, among other provisions, section 260B of the Corporations Act. Section 260B requires shareholder approval by a special resolution for a company to provide financial assistance for acquiring shares in the company.
38. Starmore Investments indicated that it was considering reclassifying the above resolution from a special resolution to an ordinary resolution. The Panel was concerned that Starmore Investments not seek to change the conditions of its bid without ensuring that its funding agreement allowed it to do so or that it had consent from Southern Cross.
39. Starmore Investments provided an undertaking that if the resolution were passed but were not passed by a 75% majority, Starmore Investments would either say that the relevant condition of the bid had been triggered, or they would waive the relevant condition. As a result of the undertaking the Panel decided that its concerns relating to this issue had been addressed.
40. The bidder's statement referred to a special resolution, and Starmore Investments had not stated publicly that it would seek to rely on an ordinary resolution. Therefore the Panel considered that there was no need to inform the public prior to the General Meeting as to do so may have caused some confusion.

General Meeting

41. The Panel determined not to interfere with the Winepros General Meeting which was scheduled for Tuesday 30 October 2002.

Substantial Shareholding Notices

42. The Panel notes that Trojan House Group advised in its submissions that Trojan House, JRS Investments, Troy Harry and John Harry are associated parties and collectively hold 19.9% of the shares in Winepros. The Panel notes that none of those persons had lodged a substantial shareholder notice indicating that they are associates.

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43. The Panel notified ASIC of this issue and asked the Trojan House Group for an undertaking that such a substantial shareholder notice would be lodged forthwith. The Trojan House Group has since provided such an undertaking and given the substantial shareholder notice to Winepros and the ASX.

Decision

44. The Panel considered that there was insufficient material put to it to support the allegations by Starmore Investments that the Acquirers had entered into any relevant agreements relating to the acquisition, or voting, of shares in Winepros. On that basis the Panel made no finding of unacceptable circumstances in this case. It released its decision on 29 October 2002.
45. The Panel consented to the parties being represented by their commercial solicitors.
46. The Panel made no order as to costs.

Teresa Handicott

President of the Sitting Panel

Decision date 29 October 2002

Reasons published 13 December 2002