

Article Information

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Schemes of Arrangement - What not to do as a substantial shareholder. Unacceptable Circumstances

The Takeovers Panel recently made a declaration of unacceptable circumstances and ordered a substantial shareholder to vote in favour of a scheme of arrangement when the shareholder had disposed of two-thirds of its shares after publishing intention statements that it was in favour of the scheme.

Legal Framework

Entities that have a substantial holding in a company, must, under 671B of the [Corporations Act](#) (the Act) notify the ASX and the company within 2 business days every time there is a movement in its holdings of at least 1%.

ASIC regulatory guide 25 'false and misleading statements', addresses 'truth in takeovers' and applies to bidders, targets and substantial holders when they depart from a public statement regarding their intentions in relation to a bid. The 'truth in takeovers' policy promotes the intention of Chapter 6 of the Act for the acquisition of control to take place in an 'efficient, competitive and informed market'.

BACKGROUND

The Scheme

On 28 January 2025, Dropsuite Limited (**Dropsuite**) announced that it had entered into a scheme implementation deed with NinjaOne LLC and NinjaOne Australia Pty Ltd (**NinjaOne**) where NinjaOne agreed to acquire 100% of Dropsuite's ordinary shares for \$5.90 per share (**the Scheme**). Within this announcement, approved by its largest shareholder, Topline Capital Management LLC (**Topline**), that held 31% DropSuite's issued capital at the time was a statement that Topline intended to vote in favour of the Scheme (**January Statement**).

The First Disposal

Between 28 January, the same day as the January Statement, and 6 February, Topline disposed of Dropsuite shares, decreasing its voting power to 19.7% (**First Disposal**). During this time, Dropsuite's holdings moved by more than 1% on 28 January, 31 January and 4 February, however Topline only lodged a substantial holdings notice on 18 February. In its notice, Topline stated that it continued to "firmly support" the Scheme and that it intended to "hold its remaining shares" (**February Statement**).

Topline's February Statement, identified that the sales were due to "an unforeseen (sic) need for liquidity". This is consistent with the fact that the average price of the disposed shares was \$5.75 per share, 15 cents less than the price offered in the Scheme.

The Application

On 17 March, an affected third-party lodged an application with the Takeovers Panel (**the Panel**) seeking a declaration that Topline knowingly misled the market and failed to disclose the transactions that caused a movement of at least 1% in their holdings within 2 business days after they became aware. The applicant also sought orders that Topline re-acquire Dropline shares to their pre-disposal voting power, 31%.

The Second Disposal

The next day, on 18 March, Dropsuite issued a second substantial holdings notice stating that it disposed of further shares, decreasing its voting power to 10.5% (**Second Disposal**). This occurred from 27 February until 17 March. During this time, Dropsuite's holdings moved by more than 1% on 28 February, 11, 12 and 14 March. Again, Dropsuite failed to disclose each transaction to the market within the required time. Although the application to the Panel only referred to the First Disposal, the Second Disposal was also considered because the Panel opined that the Second Disposal was part of the same action and directly relevant to the application.

SUBMISSIONS

Topline submitted in response to the application, that:

- Their contraventions of section 671B were a case of 'honest, inadvertent and administrative oversight' caused by a combination of limited resources and extraordinary volatile market conditions;
- at the time each statements was made, they had no intention of disposing of further shares;
- It is not reasonable to expect intention statements to provide a long list of terms reserving every action an entity can take in the future; and
- Although their Second Disposal was in contradiction to statement of support in the February Statement, it was unlikely that anyone considering to trade in Dropsuite shares would have considered it, as it was '*contained in fine print as a footnote at the very back*' of the February Statement; and
- Their actions had no impact on an efficient, competitive and informed market.

ASIC, Dropsuite and the applicant all made submissions to the effect that:

- The January Statement was ambiguous;
- when an intention statement is provided at the announcement of a scheme that is in favour of the scheme, it is understood that the shareholder will not dispose of a significant amount of shares; and
- an entity disposing of shares undermines its support for a scheme.

DECISION

The Panel determined that Topline contravened substantial shareholder provisions by failing to publish substantial shareholder notices in the required timeframe during the First and Second Disposals. The Panel made particular emphasis that the change in voting power was a significant decrease, and that the Second Disposal which was in direct contradiction to the February Statement. The decrease in voting power impacted the certainty of the Scheme being approved and put shareholders, relying on the Statements, at a greater risk.

The Panel also observed that Topline started to dispose of Dropline shares the same day as the January Statement, suggesting that Topline was aware its voting power would change before the Scheme was voted on.

The combined effect of these decisions by Topline created an uninformed market by depriving it of material information.

The Panel made a declaration of unacceptable circumstances, and ordered Topline to:

- not sell or dispose of any shares, or decrease their voting power, in Dropsuite; and
- vote (or cause to be voted) all Dropsuite shares in favour of the Scheme, in the absence of a Superior Proposal and subject to an independent expert concluding that the Scheme is in the best interest of Dropsuite shareholders.

The Panel did not order Topline to re-acquire shares to rebuild their voting power to 31% because it determined that this could have significant unintended impacts on the share price, third-party investors, and unreasonably financially burden Topline.

Conclusion

Entities must take care when preparing notices of intention regarding schemes of arrangement and determine whether there are any circumstances that may require them to dispose of their shares. Generally, the Panel and Shareholders will perceive the disposal of shares to be in contention with schemes if done without adequate communication.

The Decision of the Panel also highlights that an entity must make a substantial shareholder notice on each day there is a movement of at least 1% in holdings, and not at the end of the disposing period.

We note that the Panel ordering Topline to vote in a particular manner is contentious. ASIC submitted that to direct how an entity votes overlaps with the Court's discretion and is in contention with a member's right to decide how to vote.