



Australian Government

Takeovers Panel

Reasons for Decision

AWE Limited

[2018] ATP 4

Catchwords:

Decline to conduct proceedings – bidder’s statement – disclosure – material omission – funding arrangements – dispatch – interim orders – undertaking

Corporations Act 2001 (Cth), sections 631(1)(b), 633(1), 643(1)(c)

Guidance Note 5: Specific Remedies – Information Deficiencies, Guidance Note 14: Funding arrangements

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
YES	YES	NO	NO	NO	NO

INTRODUCTION

1. The Panel, Elizabeth Hallett, Rod Halstead and Ron Malek (sitting President), declined to conduct proceedings on an application by AWE Limited in relation to its affairs. The application concerned bidder’s statement disclosure in relation to an off-market takeover bid by CERCG Aus Gas Pty Ltd for AWE. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable after CERCG provided corrective disclosure in a form and manner acceptable to the Panel.

2. In these reasons, the following definitions apply.

AWE	AWE Limited
CERCG	CERCG Aus Gas Pty Ltd
China Trading	China Energy Reserve and Chemicals Trading Company Ltd
MinRes	Mineral Resources Limited
Mitsui	Mitsui & Co Ltd

FACTS

3. AWE is an ASX listed company (ASX code: AWE). It is an energy company focused on upstream oil and gas exploration and production.
4. On 8 December 2017, China Energy Reserve and Chemical Group Co., Ltd announced its intention (through its wholly owned subsidiary, CERCG) to make an off-market takeover bid for AWE for cash consideration of \$0.73 per AWE share.
5. On 21 December 2017, AWE announced that it had entered into a scheme implementation deed with MinRes under which MinRes agreed to acquire all of the shares in AWE for cash and MinRes shares with an implied value of \$0.83 per AWE share, to be effected by way of scheme of arrangement.
6. On 25 January 2018, CERCG lodged its bidder’s statement and sent it to ASX.

7. On 29 January 2018, AWE announced that it had received a non-binding proposal from Mitsui to acquire all of the shares in AWE for cash consideration of \$0.95 per AWE share, to be effected by way of an off-market takeover bid.
8. On 31 January 2018, AWE initiated the matching rights procedure set out in the scheme implementation deed with MinRes. MinRes did not match the proposal from Mitsui.
9. On 5 February 2018, after making its application, AWE announced that it had entered into a bid implementation agreement with Mitsui for Mitsui to acquire 100% of the shares in AWE for \$0.95 cash per share.

APPLICATION

Declaration sought

10. By application dated 2 February 2018, AWE sought a declaration of unacceptable circumstances. AWE submitted that CERCG's bidder's statement was deficient because it failed to:
 - (a) prominently disclose the MinRes scheme or that the implied value of the MinRes scheme and the current market price of AWE shares materially exceeded the CERCG offer price and
 - (b) sufficiently disclose information necessary to understand whether funding was available for the bid.
11. AWE submitted that, as a result of these omissions, the acquisition of control over voting shares in AWE was not taking place in an efficient, competitive and informed market and AWE shareholders were not given enough information to enable them to properly assess the merits of CERCG's bid.

Interim order sought

12. AWE sought an interim order to restrain dispatch of the bidder's statement or any supplementary or replacement bidder's statement pending determination of its application.
13. In its preliminary submissions, CERCG offered to address the matters raised in the application by making additional disclosure in a supplementary bidder's statement and delay dispatch of the bidder's statement so that the supplementary bidder's statement could be dispatched in the same envelope as the bidder's statement.
14. Under section 631(1)(b),¹ the last date that CERCG's bidder's statement could be sent to AWE shareholders was 8 February 2018. CERCG submitted that if dispatch needed to occur after 8 February 2018, it needed an interim order to be made to accommodate the delay.
15. To give us time to consider the matter, we made an interim order (**Annexure A**) to the effect that CERCG not send copies of its bidder's statement and offer document to AWE shareholders before 12 February 2018. We indicated that if more or less

¹ Unless otherwise specified, all statutory references are to the *Corporations Act 2001* (Cth) (as modified by ASIC) and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter

time was required to dispatch the bidder's statement, we could consider a further interim order.

16. On 9 February 2018, at CERCG's request and in connection with an undertaking provided by CERCG (discussed below), we revoked our original interim order and made a further interim order (**Annexure B**) that CERCG not send copies of its bidder's statement and offer document to AWE shareholders before 13 February 2018.²

Final orders sought

17. AWE sought final orders providing for corrective disclosure in the form of a replacement bidder's statement.

DISCUSSION

18. In light of CERCG's offer to provide corrective disclosure, prior to deciding whether to conduct proceedings, we asked the parties and ASIC for any comments on the draft supplementary bidder's statement. We also asked whether, if the bidder's statement and the supplementary bidder's statement were dispatched at the same time, it would be clear and sufficiently prominent for all shareholders (including retail shareholders) that CERCG's offer was lower than the then recommended bid by Mitsui and the trading price of AWE shares.
19. AWE submitted that a supplementary bidder's statement was inadequate because the bidder's statement was designed to encourage AWE shareholders to accept the takeover (referring to, for example, the "ACCEPT" statement in very large font on the front page and statements made in the Chairman's letter and section "Why you should accept the Offer") in circumstances where there was a higher and less conditional offer from Mitsui and this would not be overcome by including a separate piece of paper with the bidder's statement. It submitted that, to overcome a fundamentally misleading representation in the bidder's statement, a replacement bidder's statement was required.
20. CERCG offered to amend the draft supplementary bidder's statement to give greater prominence to the disclosure regarding the differential between its offer price and the Mitsui offer price and market price. In addition to including the supplementary bidder's statement in the same envelope as the bidder's statement, it also offered to attach the supplementary bidder's statement to the front of the bidder's statement so that it would be the first document that AWE shareholders physically sight. Noting that all announcements relating to the Mitsui offer occurred after the date of lodgement of its bidder's statement, CERCG submitted that it should not be required to "re-write" its bidder's statement and issue a replacement bidder's statement because of material subsequent events.³

² We indicated to CERCG that we assumed that it would make its own assessment as to whether an ASIC modification was also required in relation to s631(1)(b). CERCG did obtain ASIC relief in relation to item 6 in the table in s633(1)

³ Referring (among other things) to s643(1)(c)

21. While the Panel prefers that information is provided in “*fewer, comprehensive and comprehensible documents*”⁴ and generally does not consider the cost of re-printing to be persuasive,⁵ each case depends on the nature of the information and the circumstances at hand.
22. Here, given there had been extensive disclosure by AWE and several announcements regarding the Mitsui bid, we were concerned to ensure that retail shareholders and any not watching the market receive appropriate disclosure to alert them to the circumstances that exist now. We considered that a supplementary document received by AWE shareholders at the same time as the bidder’s statement⁶ would be suitable for such shareholders to deliver the information that the CERCG offer was lower than the Mitsui offer and the current trading price of AWE shares in a clear and concise manner (and possibly in a less confusing way than possible in a replacement bidder’s statement). We were concerned that the corrective disclosures should have sufficient prominence over the “ACCEPT” on the front of the bidder’s statement. We requested that CERCG undertake to attach the supplementary bidder’s statement to the front of the bidder’s statement in such a way as to ensure, to the extent that it was reasonably practicable, that the supplementary bidder’s statement be the first disclosure that AWE shareholders would see when they opened their envelope.
23. CERCG also amended the draft supplementary bidder’s statement to disclose that the AWE board of directors had unanimously recommended that shareholders do not accept the CERCG offer.
24. It is usually open to a bidder to encourage target shareholders to accept its offer, although it must not do so in a way that is misleading or deceptive. In our view, CERCG went far enough in alerting shareholders to the disparity between its bid and the Mitsui bid. AWE is free to address why AWE shareholders should not accept the CERCG offer in its target’s statement.
25. In relation to the funding disclosure, AWE submitted that the bidder’s statement did not disclose whether the obligations of the persons funding the bid (CERCG Trading and Mr Jianguo Wang) were subject to any conditions, whether the funds to be provided by Mr Wang were currently held in his existing Australian bank accounts, whether the funds held by CERCG Trading in its Hong Kong bank accounts were currently available and whether arrangements were in place to address currency fluctuations.
26. CERCG’s draft supplementary bidder’s statement clarified that the funding obligations were unconditional and the transfer of the funds was not subject to any material condition precedent. We were satisfied with the additional disclosure in the circumstances. A bidder must have a reasonable basis to expect that it will have funding in place to pay for all acceptances when the bid becomes unconditional. We note that as the likelihood of bid conditions being fulfilled or

⁴ Guidance Note 5: Specific Remedies – Information Deficiencies at [10(b)]

⁵ GN 5 at [8]

⁶ See GN 5 at [13]

waived increases, further steps and updated disclosure regarding the certainty of funds may be necessary.⁷

27. CERCG agreed to provide an undertaking (**Annexure C**) to the Panel to attach a supplementary bidder's statement in a form approved by the Panel to the front of the bidder's statement to be dispatched to AWE shareholders. As noted above, we made a further interim order to extend the time for dispatch to 13 February 2018.

DECISION

28. Following CERCG's compliance with the undertaking, we consider that there is no reasonable prospect that we would make a declaration of unacceptable circumstances. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

Orders

29. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any final orders.

Ron Malek

President of the sitting Panel

Decision dated 15 February 2018

Reasons given to parties 22 February 2018

Reasons published 26 February 2018

⁷ See Guidance Note 14: Funding arrangements at [17] and [20]

Takeovers Panel

Reasons - AWE Limited
[2018] ATP 4

Advisers

Party	Advisers
AWE	Allens
CERCG	MinterEllison
Mitsui	Herbert Smith Freehills



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**ANNEXURE A
CORPORATIONS ACT
SECTION 657E
INTERIM ORDER**

AWE LIMITED

AWE Limited (AWE) made an application to the Panel dated 2 February 2018 in relation to its affairs. On 25 January 2018, CERCG Aus Gas Pty Ltd (CERCG) lodged a bidder's statement and offer document in relation to its off-market bid to acquire 100% of the shares in AWE with the Australian Securities and Investments Commission.

The Panel ORDERS:

1. That CERCG not send copies of its bidder's statement and offer document to AWE shareholders before Monday, 12 February 2018.
2. This interim order has effect until the earliest of:
 - (i) further order of the Panel
 - (ii) the determination of the proceedings and
 - (iii) 2 months from the date of this interim order.

**Allan Bulman
Director
with authority of Ron Malek
President of the sitting Panel
Dated 7 February 2018**



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ANNEXURE B
CORPORATIONS ACT
SECTION 657E
FURTHER INTERIM ORDER

AWE LIMITED

The Panel made an interim order on 7 February 2018 in connection with an application by AWE Limited (**AWE**) and a bidder's statement and offer document that CERCG Aus Gas Pty Ltd (**CERCG**) lodged with the Australian Securities and Investments Commission on 25 January 2018. The Panel has decided to make a further interim order.

The Panel **ORDERS**:

1. This interim order revokes the interim order made on 7 February 2018.
2. That CERCG not send copies of its bidder's statement and offer document to AWE shareholders before Tuesday, 13 February 2018.
3. This interim order has effect until the earliest of:
 - (i) further order of the Panel
 - (ii) the determination of the proceedings and
 - (iii) 2 months from the date of this interim order.

Bruce Dyer
Counsel
with authority of Ron Malek
President of the sitting Panel
Dated 9 February 2018



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ANNEXURE C
AUSTRALIAN SECURITIES AND
INVESTMENTS COMMISSION ACT 2001 (CTH) SECTION 201A
UNDERTAKING

AWE LIMITED

CERCG Aus Gas Pty Ltd (CERCG) undertakes to the Panel that it will attach a copy of a supplementary bidder's statement in a form approved by the Panel to the front of every copy of its Bidder's Statement dispatched to AWE Limited (AWE) shareholders within a 3 day period commencing on Tuesday, 13 February 2018 pursuant to item 6 of s633(1) of the *Corporations Act 2001* (Cth); in such a way to ensure to the extent that it is reasonably practicable that the supplementary bidder's statement is the first disclosure that AWE shareholders will see when they open the envelope containing the abovementioned documents.

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

Interpretation

Bidder's Statement means CERCG's Bidder's Statement and offer document in relation to its off-market bid to acquire 100% of the shares in AWE.

Signed by Ms Liping Xuan of CERCG Aus Gas Pty Ltd
with the authority, and on behalf, of
CERCG Aus Gas Pty Ltd
Dated 9 February 2018