



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Webcentral Group Limited 04R  
[2021] ATP 6**

**Catchwords:**

*Decline to conduct proceedings – extension of time to make an application – success fee – capital raising*

*Corporations Act 2001 (Cth), sections 636, 638, 643, 644, 657C(3), 657EA, 657EA(2)*

*Eastern Field Developments Limited v Takeovers Panel [2019] FCA 311, Queensland North Australia Pty Ltd v Takeovers Panel [2015] FCAFC 68, Shi v Migration Agents Registration Authority [2008] HCA 31*

*Webcentral Group Limited 03 [2021] ATP 4, Cardinal Resources Limited 06R [2020] ATP 28, Webcentral Group Limited 02R [2020] ATP 26, Webcentral Group Limited [2020] ATP 20, Donaco International Limited 03R [2019] ATP 24*

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

**INTRODUCTION**

- The review Panel, Chelsey Drake, Teresa Dyson and Michelle Jablko (sitting President), declined to conduct proceedings on an application by Keybridge Capital Limited to review the decision of the initial Panel in *Webcentral Group Limited 03*.<sup>1</sup>
- In these reasons, the following definitions apply.

<b>5GN</b>	5G Networks Limited
<b>Capital Raising</b>	has the meaning given in paragraph 12
<b>EGM</b>	has the meaning given in paragraph 13
<b>Engagement Agreement</b>	has the meaning given in paragraph 4
<b>Financial Adviser</b>	the financial adviser engaged by Webcentral to advise it in relation to any control transaction involving Webcentral
<b>initial Panel</b>	means the initial Panel in <i>Webcentral 03</i> , unless otherwise indicated
<b>Keybridge</b>	Keybridge Capital Limited
<b>Options</b>	has the meaning given in paragraph 13(c)
<b>Performance Rights</b>	has the meaning given in paragraph 13(b)
<b>Success Fee</b>	has the meaning given in paragraph 4

<sup>1</sup> [2021] ATP 4

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<b>Webcentral</b>	Webcentral Group Limited
<i>Webcentral 01</i>	<i>Webcentral Group Limited [2020] ATP 20</i>
<i>Webcentral 02R</i>	<i>Webcentral Group Limited 02R [2020] ATP 26</i>
<i>Webcentral 03</i>	<i>Webcentral Group Limited 03 [2021] ATP 4</i>
<b>Web.com</b>	Web.com Group, Inc.
<b>Web.com scheme</b>	has the meaning given in paragraph 5

## FACTS

3. The facts are set out in more detail in *Webcentral 03*. The following is a summary.
4. On 14 September 2018, Webcentral entered into a financial advisory engagement agreement with the Financial Adviser (**Engagement Agreement**). The Engagement Agreement included a \$1.75 million (ex GST) success fee payable by Webcentral to the Financial Adviser in certain circumstances (**Success Fee**).<sup>2</sup>
5. On 13 July 2020, Webcentral announced that it had entered into a scheme implementation deed with Web.com which would result in Web.com acquiring 100% of Webcentral at 10 cents per share in cash (**Web.com scheme**). The scheme booklet for the Web.com scheme<sup>3</sup> disclosed the following in relation to the costs of the Web.com scheme:

*“Webcentral estimates that it will incur approximately \$4.08 million – \$4.53 million (excluding GST and disbursements) in external transaction costs which relate to the Scheme. This includes advisory fees (including for Webcentral’s financial and legal advisers), the Independent Expert’s fees, registry, printing and mailing costs and expenses associated with convening and holding the Scheme Meeting. Of this, approximately \$2.33 million – \$2.78 million (excluding GST and disbursements) will be incurred regardless of whether or not the Scheme is implemented, excluding any Reimbursement Fee that may be payable to Web.com.”*
6. On 17 September 2020, Webcentral announced (among other things) that Webcentral had entered into a bid implementation deed with 5GN to acquire all the shares in Webcentral pursuant to a conditional off-market takeover bid offering 1 5GN share for every 12 Webcentral shares and that the Webcentral board had determined that the 5GN bid was a superior proposal to a revised proposal from Web.com offering 18 cents per share in cash.<sup>4</sup>
7. On 18 September 2020, 5GN issued its bidder’s statement which stated that the 5GN bid *“impliedly values each Webcentral Share at \$0.145”*.
8. On 21 October 2020, Keybridge applied to the Panel (*Webcentral 01*), submitting (among other things) that 5GN’s bid had a coercive effect (as a result of conditions on

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<sup>2</sup> See *Webcentral 03 [2021] ATP 4* at [4]

<sup>3</sup> Lodged with ASIC on 21 August 2020. Webcentral subsequently lodged a replacement copy of the scheme booklet in relation to the Web.com scheme with ASX on 24 August 2020

<sup>4</sup> Webcentral subsequently announced on 21 September 2020 that the scheme meeting in respect of the Web.com scheme scheduled for 29 September 2020 would not be held pursuant to orders of the Supreme Court of New South Wales

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an offer for debt funding from 5GN), the commitments from Webcentral directors that they would accept the 5GN bid were anti-competitive and that disclosure in Webcentral’s target’s statement was unclear.

9. On 28 October 2020, the Panel declined to conduct proceedings in *Webcentral 01*. On 30 October 2020, Keybridge made an application seeking a review of the Panel’s decision in *Webcentral 01* (*Webcentral 02R*).
10. On 10 November 2020, the 5GN bid closed, with 5GN having voting power in 56.68% of Webcentral shares. The Webcentral board then comprised Messrs Joseph Demase and Joe Gangi, who are also directors of 5GN, and Ms Natalie Mactier, a nominee of 5GN.<sup>5</sup>
11. On 12 November 2020, Mr Nicholas Bolton, a director of Keybridge, submitted that he was advised by Mr Demase (a director of 5GN and Webcentral) that 5GN was informed “*at the last minute*” (i.e. prior to the 5GN bid commencing) that Webcentral had agreed to pay the Success Fee in respect of the 5GN bid and that Webcentral needed to undertake a capital raising to fund the Success Fee.
12. On 13 November 2020, Webcentral announced that it had received commitments for an equity subscription package of approximately \$5.6 million (before expenses) (**Capital Raising**), comprising:
  - (a) approximately \$3.1 million (before costs) by way of a placement to institutional and sophisticated investors at an issue price of \$0.17 per share and
  - (b) a further \$2.5 million by way of the issue of shares at an issue price of \$0.17 per share to entities associated with Messrs Demase and Gangi, subject to shareholder approval.
13. That same day, Webcentral gave notice of an extraordinary general meeting to be held on 18 December 2020 (**EGM**), seeking shareholder approval for (among other things) the issue of:
  - (a) the shares under the Capital Raising
  - (b) 10 million performance rights to an entity controlled by Mr Demase (**Performance Rights**) and
  - (c) 1 million directors options to each of Webcentral’s other two directors, Mr Gangi and Ms Mactier (**Options**).
14. On 24 November 2020, the review Panel in *Webcentral 02R* affirmed the decision of the initial Panel in *Webcentral 01*. As part of those proceedings, the review Panel had decided to seek submissions from Keybridge in response to preliminary submissions from Webcentral and 5GN.<sup>6</sup> In response, Keybridge submitted (among other things) that there had been ‘new developments’ that were relevant to the proceedings, being the increased share price (25 cents versus 14.17 cents under the bid), the low

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<sup>5</sup> Messrs Demase and Gangi were announced as directors of Webcentral on 16 October 2020. Ms Natalie Mactier was announced as a director of Webcentral on 22 October 2020, replacing Mr Andrew Macpherson. The other Webcentral directors, Messrs Karl Siegling and Andrew Reitzer, resigned when the bid closed.

<sup>6</sup> [2020] ATP 26 at [23]

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acceptance level of 8.84% after the bid ceased being coercive, the board (all members now 5GN representatives so its submissions are no longer impartial), the capital raising (not disclosed during the bid and including the participation by parties associated with 5GN), and a success fee (also undisclosed).<sup>7</sup> As part of communicating its decision on 24 November 2020, the review Panel advised Keybridge that it considered that the issues relating to the capital raising and success fee were new circumstances requiring a fresh application.<sup>8</sup>

15. On 4 December 2020, the Success Fee was paid to the Financial Adviser.
16. On 18 December 2020, Webcentral shareholders approved the issue of the shares under the Capital Raising and the issue of the Performance Rights and Options at the EGM.
17. On 10 January 2021, Keybridge made a further application to the Panel (*Webcentral 03*), submitting (among other things) that the payment of the Success Fee in circumstances where 5GN obtained less than 100% of Webcentral was unacceptable and that the failure by Webcentral and 5GN to disclose the Success Fee and Webcentral's intention to conduct the Capital Raising and issue the Performance Rights and Options immediately following the close of the 5GN bid constitutes multiple breaches of sections 638 and 644<sup>9</sup> (in the case of Webcentral) and sections 636 and 643 (in the case of 5GN).
18. On 4 February 2021, the initial Panel in *Webcentral 03* declined to extend time under section 657C(3) to make a declaration of unacceptable circumstances. The initial Panel considered that the failure by Webcentral and 5GN to disclose the Success Fee in its target's statement(s) and bidder's statement(s) respectively was of sufficient seriousness that it was minded to conclude that there were unacceptable circumstances. However, the initial Panel considered that:
  - (a) There were no orders which could be made given the potential unfair prejudice any orders could have.<sup>10</sup>
  - (b) The application was made on 10 January 2021 which was more than 2 months after 5GN lodged its bidder's statement on 18 September 2020, being the time at which disclosure of the Success Fee first should have been made in respect of the 5GN bid.<sup>11</sup> The initial Panel considered that Keybridge had not provided an adequate explanation for its delay in bringing its application after expressly being advised to do so by the review Panel in *Webcentral 02R* and that the delay had made the questions of orders in the circumstances more difficult.<sup>12</sup>

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<sup>7</sup> [2020] ATP 26 at [24(g)]

<sup>8</sup> *Webcentral 03* [2021] ATP 4 at [83] and *Webcentral 02R* [2020] ATP 26 at [43]

<sup>9</sup> Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth) and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

<sup>10</sup> [2021] ATP 4 at [72] to [81]

<sup>11</sup> For purposes of section 657C(3)

<sup>12</sup> [2021] ATP 4 at [82] to [93]

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19. The initial Panel considered on balance, that taking into account previous disclosure in the bid documentation and timing, disclosure of the Capital Raising was not required during the 5GN bid.<sup>13</sup>

## **APPLICATION**

20. On 7 February 2021, Keybridge requested the President's consent for leave to review the initial Panel's decision in *Webcentral 03*, submitting (among other things) that:
- (a) The initial Panel in *Webcentral 03* "*appears to assert that the unacceptable circumstances first occurred on 18 September 2020*". Had the review Panel in *Webcentral 02R* "*formed the view that Keybridge need[ed] [to] resubmit its complaint about the Success Fee within 2 months of 18 September 2020, it should have notified Keybridge of this prior to 18 November 2020 and not 6 days later. Accordingly, Keybridge was not afforded procedural fairness if the Panel intended to take the view the application needed to be lodged by 18 November 2020*".
  - (b) Keybridge's application in *Webcentral 03* was within 2 months of the close of 5GN's bid and 5GN becoming aware of its obligation to disclose under section 643.
  - (c) The initial Panel in *Webcentral 03* "*in its preliminary decision*" was minded to grant Keybridge an extension of time. "*If the matter was so finely balanced, it ought be reviewed by a Panel afresh*".
  - (d) There were satisfactory remedies available to the initial Panel in *Webcentral 03*, including withdrawal rights (as sought by Keybridge) or divestment orders.
  - (e) The initial Panel in *Webcentral 03* erred in its decision not to declare the Capital Raising unacceptable.
21. Given that the initial Panel was prepared to make a declaration of unacceptable circumstances but had ultimately exercised its discretion not to extend time under section 657C(3)(b) (having initially formed a preliminary view that it was minded to grant the extension of time), the substantive President gave Keybridge consent to submit a review application.<sup>14</sup>
22. On 8 February 2021, Keybridge made its review application, effectively incorporating by reference its application for the substantive President's consent.

## **DISCUSSION**

23. We have considered all the material, including the material before the initial Panel in *Webcentral 03*, but address specifically only that part of the material we consider necessary to explain our reasoning.

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<sup>13</sup> [2021] ATP 4 at [67] to [71]

<sup>14</sup> Under section 657EA(2)

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24. The powers of a review Panel are set out in section 657EA. Our role is to conduct a *de novo* review.<sup>15</sup> One of the powers a review Panel has is to decline to conduct proceedings and allow the initial Panel’s decision to stand.<sup>16</sup>
25. We received preliminary submissions from Webcentral and 5GN. We also received the initial Panel’s reasons<sup>17</sup> and sought submissions and rebuttals from the parties in response to the initial Panel’s reasons.

**Extension of time**

26. Keybridge’s submissions in response to the initial Panel’s reasons focussed on the initial Panel’s refusal to extend time.
27. Keybridge submitted, in effect, that it did not agree with the initial Panel’s conclusion that the circumstances surrounding failure to disclose the Success Fee arose on 18 September 2020, “*being the time at which disclosure of the Success Fee first should have been made in respect of the 5GN bid.*”<sup>18</sup> Keybridge submitted that:
- “The Initial Panel has found that each of the supplementary statements from 5GN and WCG were a contravention of s643 and s644. It necessarily follows, that, immediately prior to the close of [the] Bid at 7pm on 10 November 2020, 5GN ought to have made disclosure under s643 and failure to do so is a discreet breach. This is distinctly different to a circumstance relating to a breach of s606 flowing from a point in time share purchase, this has a [definable] date. Failing to make a disclosure at a point of time as required by the Act is the unacceptable circumstance, and it continues to occur at each increment of time until it is rectified during the bid period, which it was not.”*
28. Webcentral submitted that Keybridge’s characterisation of the unacceptable circumstances continuing on 10 November 2020 was “*not how the statutory provisions operate*”, noting that even “*if circumstances are “continuing”, this is not relevant to the calculation of the 2 month rule in s657C(3)(a)*”. Webcentral’s interpretation of section 657C(3)(a) accords with that of the Full Federal Court in *Queensland North Australia Pty Ltd v Takeovers Panel*.<sup>19</sup>
29. We agree with the initial Panel’s articulation of the factors that are relevant in considering whether to extend time, namely:
- “(a) the discretion to extend time should not be exercised lightly”*
- (b) whether the application made credible allegations of clear and serious unacceptable circumstances, the effects of which are ongoing*

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<sup>15</sup> *Eastern Field Developments Limited v Takeovers Panel* [2019] FCA 311 at [181]

<sup>16</sup> *Cardinal Resources Limited 06R* [2020] ATP 28 at [6] and *Donaco International Limited 03R* [2019] ATP 24 at [6]

<sup>17</sup> And submissions made by the parties to the initial Panel in relation to those reasons prior to publication

<sup>18</sup> [2021] ATP 4 at [82]

<sup>19</sup> [2015] FCAFC 68. Even if a declaration could be fashioned that related only to unacceptable circumstances surrounding failure to disclose the Success Fee in the limited time period suggested by Keybridge, we consider (applying our commercial judgement) that it would not be in the public interest to do so noting the limited effect of such a declaration

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(c) *whether it would be undesirable for a matter to go unheard, because it was lodged outside the two month time limit, if essential matters supporting it first came to light during the two months preceding the application and*

(d) *whether there is an adequate explanation for any delay, and whether parties to the application or third parties will be prejudiced by the delay.*"<sup>20</sup>

30. Keybridge submitted that the *Corporations Act 2001* (Cth) recognises that it can take up to 2 months to prepare an application and that it should not be held to a higher standard than that intended by the lawmakers.

31. The initial Panel stated that there *"were considerations that weighed in favour of extending time, including because Keybridge became aware of the Success Fee less than 2 months before it made its application and the application made credible allegations of clear and serious unacceptable circumstances"*.<sup>21</sup> Webcentral submitted that *"there was no rule that the 2 months starts again when the applicant first becomes aware of the relevant circumstances"* and:

*"Although the Initial Panel arrived at the correct conclusion on the question of whether to extend time, it is not the case that a consideration that "weighed in favour" of granting an indulgence to Keybridge was that Keybridge became aware of the Success Fee less than 2 months before it made its application."*

32. 5GN submitted that the enunciation of the factor set out in paragraph 29(c) by the initial Panel was *"not supported by law or principle"*, submitting that:

*"While the 2 month limit starts when the relevant circumstances first occur (despite them continuing), that 2 month time limit should not be imported into section 657C(3)(b) so that any person who commences an application within 2 months of first becoming aware of the relevant circumstances will be granted an extension, if one is required. It is the timeliness principle which should apply namely, the Panel should not extend time, absent special circumstances, where an application has not been made within a very short time of the applicant first becoming aware of the relevant circumstances."*

33. We agree with the initial Panel that the fact Keybridge first became aware of the Success Fee less than 2 months before it made its application was a relevant consideration that weighed in favour of extending time.<sup>22</sup> However, like the initial Panel, we do not consider that this is the only factor to take into account. In cases where an application is made outside the 2 month time period in section 657C(3)(a) but the circumstances only come to light during that period, another factor that would potentially weigh against giving an extension of time is whether the applicant has delayed in making its application from when it first became aware of the circumstances.<sup>23</sup> We agree with Webcentral that *"there was no rule that the 2 months starts again when the applicant first becomes aware of the relevant circumstances"*.

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<sup>20</sup> [2021] ATP 4 at [86] (footnotes omitted)

<sup>21</sup> [2021] ATP 4 at [90]

<sup>22</sup> We also agree with the enunciation of the principle in paragraph 29(c) above

<sup>23</sup> It is not axiomatic that an extension of time should be given for an application made immediately when an applicant is made aware of circumstances that occurred outside the time limit in section 657C(3)(a). Other

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34. Keybridge submitted that it was not in a position to act *“more expeditiously”* because (among other things):
- (a) It was self-represented and only had a small team which was very busy.
  - (b) *“The period included the Christmas break and an environment where Keybridge’s entire team has been working from home due to COVID restrictions in Victoria”.*
  - (c) *“Even the Federal Court recognises that time stops counting during the Christmas break period, certainly for time of appeals... The Panel falls into the Federal Court jurisdiction”.*
  - (d) *“Keybridge was only notified confidentially by the Panel to make a fresh application on 24 November 2020”.*
  - (e) *“Considering Keybridge’s small team and resourcing limitations, it was not in a position to prepare and submit an application more expeditiously – and required up to the entire two month allowance under section 657C(3)”.*
35. Applying our commercial judgement, we consider that Keybridge did not need 2 months to make its application. Keybridge was aware of sufficient facts by 24 November 2020 to make its application promptly. We agree with the initial Panel that the process of making the application in Keybridge’s case was straightforward.<sup>24</sup> The delay was to the prejudice of other parties and third parties and, as noted by the initial Panel, made the question of orders more difficult.<sup>25</sup>
36. Keybridge submitted that the initial Panel in *Webcentral 03* had failed to identify in its reasons the date that Keybridge ought to have made its application and that parties should have had an opportunity to provide submissions on whatever date that was. Webcentral submitted, in effect, that suggesting that the initial Panel should have identified such a date represents a misunderstanding of the Panel’s role and the requirement that applications should be timely, submitting that the *“Panel’s public statements have let all potential applicants know the importance of moving expeditiously”*. We agree with Webcentral.<sup>26</sup>
37. Accordingly, we agree with the initial Panel’s reasons not to extend time in paragraphs 82 to 93 of its reasons.

**Potential orders**

38. We also agree with paragraph 80 of the initial Panel’s reasons in relation to whether any orders could be made to deal with any potential unacceptable circumstances in relation to the non-disclosure of the Success Fee. We consider that these factors also

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issues such as the seriousness of the alleged unacceptable circumstances, the time that has elapsed and the availability of other remedies are also relevant considerations to take into account

<sup>24</sup> [2021] ATP 4 at [91]

<sup>25</sup> [2021] ATP 4 at [92]

<sup>26</sup> We also consider that Webcentral’s submission effectively rebuts Keybridge’s submission referred to in paragraph 20(a)



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apply to the question of whether orders could be made to remedy any failure to disclose the Capital Raising.<sup>27</sup>

39. Accordingly, we do not consider that we would be in a position to make orders in relation to the issues raised by Keybridge.

**DECISION**

40. For the reasons above, we do not consider that there is any 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). Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any interim or final orders.

**Michelle Jablko**  
**President of the sitting Panel**  
**Decision dated 26 February 2021**  
**Reasons given to parties 19 March 2021**  
**Reasons published 25 March 2021**

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<sup>27</sup> We also consider that it is relevant that we are considering whether orders might be appropriate at an even later date, noting that review proceedings are a *de novo* review based on the facts at the time of the review, see generally - *Shi v Migration Agents Registration Authority* [2008] HCA 31

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**Advisers**

<b>Party</b>	<b>Advisers</b>
5GN	Cornwalls Norton Rose Fulbright
Keybridge	-
Webcentral	Herbert Smith Freehills
Mr Larry Bloch	-