



Australian Government

Takeovers Panel

**Reasons for Decision
Nitro Software Limited 02
[2023] ATP 3**

Catchwords:

Decline to make a declaration – bidder’s statement – disclosure – misleading statements – funding arrangements – arrangements with co-investors – scrip consideration – redeemable preference shares – private equity – passive investors – extension of time to make application

Corporations Act 2001 (Cth), sections 602, 636(1)(f), 657A, 657C(3)

ASIC Regulatory Guide 9: Takeover bids

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

Aurora Absolute Return Fund [2019] ATP 14, Brisbane Markets Limited [2016] ATP 03, Pinnacle VRB Ltd 04 [2001] ATP 7

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

INTRODUCTION

1. The Panel, Yasmin Allen (sitting President), James Burchnall and John O’Sullivan, declined to make a declaration of unacceptable circumstances in relation to the affairs of Nitro Software Limited. The application concerned the takeover offer by Potentia to acquire 100% of Nitro and whether Potentia had made adequate disclosure in connection with its bid funding, arrangements with co-investors and the redeemable preference shares offered as part of the Scrip Alternative. The Panel was satisfied that the circumstances were not unacceptable following Potentia making additional disclosure to Nitro shareholders.

2. In these reasons, the following definitions apply.

Alludo Rocket BidCo Pty Limited, a wholly owned subsidiary of Cascade Parent Limited (trading as Alludo), which are both controlled by KKR Americas Fund XII L.P.

Alludo Transaction has the meaning given in paragraph 5

Co-investor HarbourVest Partners Co-Investment VI Aggregator L.P., a fund managed by HarbourVest

HarbourVest HarbourVest Partners, LLC

HoldCo Oak Ridge Software Limited, the entity in which Nitro shareholders will receive shares if they elect to receive the Scrip Alternative

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| | |
|--------------------------------|---|
| MIT | a series of managed investment trusts which have been established, and are managed exclusively, by Potentia Capital in connection with the Potentia Takeover Offer |
| Nitro | Nitro Software Limited |
| Other Commitments | A\$112 million of funds committed to Potentia outside of Potentia Fund I and Potentia Fund II as disclosed in section 2(c) of Potentia’s first supplementary bidder’s statement |
| Potentia | Technology Growth Capital LLC, a special purpose vehicle managed by Potentia Capital |
| Potentia Capital | Potentia Capital Management Pty Ltd |
| Potentia Takeover Offer | the off-market takeover bid by Potentia to acquire 100% of Nitro shares, initially for all cash consideration at \$1.80 cash per Nitro share, which was subsequently increased to all cash consideration at \$2.00 cash per Nitro share with a Scrip Alternative |
| RPS | HoldCo redeemable preference shares to be issued to Nitro shareholders who elect to take the Scrip Alternative as consideration under the Potentia Takeover Offer |
| Scrip Alternative | alternative form of consideration under the Potentia Takeover Offer in which Nitro shareholders could elect as consideration either: (a) “All Scrip” comprising 70% HoldCo ordinary shares and 30% RPS or (b) “Mixed consideration” comprising 50% cash and 50% “All Scrip” |

FACTS

3. Nitro is an ASX listed company (ASX code: NTO).
4. On 28 October 2022, Potentia made the Potentia Takeover Offer seeking to acquire all the ordinary shares in Nitro at \$1.80 cash per share.
5. On 31 October 2022, Nitro announced that the Nitro board unanimously rejected the Potentia Takeover Offer and that Nitro would, subject to agreeing an implementation deed, recommend a proposal by Cascade Parent Limited¹ to acquire 100% of Nitro at \$2.00 per Nitro share by way of a scheme of arrangement or, in the alternative, via an off-market takeover bid (**Alludo Transaction**).

¹ trading as Alludo and controlled by KKR Americas Fund XII L.P.

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6. On 11 November 2022, Potentia dispatched its bidder's statement. In the bidder's statement, Potentia stated in Section 7 under the sub-heading "*Sources of Offer Amount*":

"The funds required by the Bidder to pay the Offer Amount will be made available to the Bidder by Potentia Capital.

Potentia Capital has entered into a binding commitment with the Bidder obliging it to provide up to the full Offer Amount to the Bidder as and when required by the Bidder.

Potentia Capital will source the Offer Amount from a number of managed investment trusts (MITs) which have been established by and are managed exclusively by Potentia Capital.

Each MIT will be cash funded in various amounts which in aggregate will be in excess of the Offer Amount as a result of investments into the MITs from:

(i) funds managed by Potentia Capital; and

(ii) funds managed by the Co-investor,

(each a MIT Investor), each of whom has committed to provide equity funding to one or other of the MITs (MIT Equity Commitments).

The MIT Equity Commitments are not subject to any conditions which the Bidder considers may not be satisfied. The commitment period under each MIT Equity Commitment exceeds the anticipated Offer Period.

The funds managed by Potentia Capital have sufficient available and uncommitted cash to meet their MIT Equity Commitment, and the Co-investor has satisfied Potentia Capital and the Bidder that it has sufficient available and uncommitted cash to meet the Co-investor's MIT Equity Commitment.

Potentia Capital as manager of each MIT will cause each MIT to provide cash funding to the Bidder as and when required by subscribing for convertible notes in the Bidder, which may be converted into shares in the Bidder at the election of the MIT."

7. Also on 11 November 2022, following communications between Nitro and Potentia, Potentia issued the first supplementary bidder's statement, which included the following disclosure:

"In relation to the funding arrangements described in Section 7 of the Original Bidder's Statement, note that:

(a) The Co-investor has committed to procure funding of up to A\$160 million pursuant to the MIT Equity Commitment of the Co-investor, conditional on Potentia Capital concurrently procuring funding to the MITs for the balance of the Offer Amount. There are no other conditions to the MIT Equity Commitment of the Co-investor.

(b) The balance of the Offer Amount will be provided from the funds referred to below, which are managed by Potentia Capital at its sole discretion.

(c) Potentia Capital has access to committed funding from the following sources:

(i) Potentia Fund 1 which closed in December 2020 with total funding of A\$458 million.

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- (ii) *Potentia Fund 2 which closed in June 2022 with total funding of A\$635 million.*
 - (iii) *A\$112 million of funds committed to Potentia outside the fund structures referred to above.*
 - (d) *There are no conditions to Potentia Capital's commitment to the Bidder to procure that Potentia Capital's contribution to the Offer Amount will be provided to the Bidder.*
 - (e) *As noted in section 7.3 of the Bidder's Statement, the Offer Amount is A\$382.9 million. As noted above, the Co-investor will provide up to A\$160 million of the Offer Amount and the balance will be provided by Potentia utilising the funds described in paragraph (c) above. Potentia confirms that it has available capacity across the funding sources outlined above to fund the Offer Amount, taking into account all single deal concentration limits within these funds.*
 - (f) *Co-investor is a fund managed by HarbourVest. HarbourVest is a Boston-headquartered independent, global private markets firm with 40 years of experience and more than US\$101 billion of assets under management as of 30 June 2022. HarbourVest has a long-standing relationship with Potentia Capital, both as a limited partner of its funds and a co-investment partner in prior transactions. More information on HarbourVest is available on its website..."*
8. On 23 November 2022, Nitro issued its target's statement recommending that shareholders reject the Potentia Takeover Offer.
9. On 8 December 2022, Potentia issued the second supplementary bidder's statement and a notice of variation in which it (among other things):
- (a) increased its offer price from \$1.80 per Nitro share to \$2.00 per Nitro share and
 - (b) proposed the Scrip Alternative form of consideration to its offer, indicating that it would provide Nitro shareholders with further information regarding the Scrip Alternative by means of a formal variation and further supplementary bidder's statement.
10. Under the heading "*Sources of consideration for the Increased Offer Amount*" in the second supplementary bidder's statement, Potentia disclosed (footnote omitted):
- "As a result of the increase in the Offer Price from \$1.80 to \$2.00 per Nitro Share, the Offer Amount has increased from \$382.9 million to \$441.5 million (plus costs associated with the Offer) (**Increased Offer Amount**), calculated on the same basis as set out in the Original Bidder's Statement.*
- The funds required by the Bidder to pay the Increased Offer Amount will be made available to the Bidder by Potentia Capital out of funds managed by Potentia Capital, as described in the Original Bidder's Statement and First Supplementary Bidder's Statement."*
11. On 12 December 2022, Nitro announced that the Alludo Transaction had been amended to increase the offer price to \$2.15 per Nitro share.

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12. Also on 12 December 2022, Nitro issued the first supplementary target's statement in which (among other things) the Nitro board recommended that shareholders reject the Potentia Takeover Offer.
13. On 23 December 2022, Potentia issued the third supplementary bidder's statement and a notice of variation (among other things) to include the Scrip Alternative referred to in the second supplementary bidder's statement.
14. Under the heading "*Funding*" in the third supplementary bidder's statement, Potentia described how the aggregate cash amount required to fund its bid would reduce should Nitro shareholders elect to receive the Scrip Alternative.
15. Under the heading "*Information on the All Scrip Consideration and Mixed Consideration*" in the third supplementary bidder's statement, Potentia stated:

"HoldCo may elect in its discretion to redeem some or all of the HoldCo Redeemable Preference Shares on or prior to the "Maturity Date" (being the date that is 24 months after the date of issue of the HoldCo Redeemable Preference Shares to the HoldCo Shareholders) (Maturity Date) by giving HoldCo Shareholders a redemption notice.

The HoldCo Redeemable Preference Shares will be redeemed for the redemption amount (being the amount equal to price (sic) that the HoldCo Redeemable Preference Shares were issued) (Redemption Amount)."

16. The third supplementary bidder's statement also described how, if some or all of the redeemable preference shares were not redeemed by the Maturity Date, a shareholder may elect to convert some or all of them into HoldCo ordinary shares or otherwise have them redeemed.
 17. Under the heading "*Refinancing and redemption of HoldCo Redeemable Preference Shares*" in the third supplementary bidder's statement, Potentia stated:
- "In the event that the Conditions of the Offer are satisfied or waived Potentia Capital anticipates that it will cause HoldCo to seek to raise debt financing with the proceeds of that debt financing being used to redeem some or all of the HoldCo Redeemable Preference Shares from all holders of HoldCo Redeemable Preference Shares (including the Potentia Shareholders)."*
18. In Schedule 2 of the third supplementary bidder's statement, Potentia identified "*a number of potential risks that Nitro Shareholders should consider when deciding whether to accept All Scrip Consideration or Mixed Consideration*". This disclosure included, under the heading "*Risk factors relating to the business and operations of Nitro*":

"If domestic or global economic conditions deteriorate, the Nitro Group Members may not be able to access financial markets to seek equity or debt funding on competitive terms. This may adversely impact the financial performance of Nitro or the capacity for the Nitro Group Members to implement their strategy."

APPLICATION

Declaration sought

19. By application dated 9 January 2023, Alludo sought a declaration of unacceptable circumstances on the basis that *“deficiencies in the bidder’s statement and supplementary bidder’s statements issued by [Potentia] have had the effect of hindering the acquisition of control of Nitro taking place in an efficient, competitive and informed market.”*
20. Alludo submitted (among other things) that Potentia’s disclosure:
 - (a) was deficient in relation to:
 - (i) Potentia’s funding arrangements
 - (ii) Potentia’s arrangements with co-investors and
 - (iii) the RPS offered under the Scrip Alternative and
 - (b) was misleading in relation to the prospects of the Alludo Transaction being successful.

Interim orders sought

21. Alludo sought interim orders that, until the conclusion of the Panel proceedings, Potentia:
 - (a) be restrained from processing acceptances under the Potentia Takeover Offer, and
 - (b) not be permitted to act as attorney or to exercise voting rights in respect of any shares accepted under the Potentia Takeover Offer in reliance on clause 10.8 of Potentia’s original bidder’s statement.

Final orders sought

22. Alludo sought final orders to the effect that Potentia dispatch a supplementary bidder’s statement to Nitro shareholders (which ASIC and the Panel do not object to):
 - (a) correcting *“the misleading information or other disclosure deficiencies in Potentia Capital’s existing bidder’s statement and supplementary bidder’s statements”*
 - (b) offering Nitro shareholders withdrawal rights and
 - (c) explaining the Panel’s proceedings.

Preliminary submissions

23. Nitro made a preliminary submission supporting Alludo’s application. It submitted that Potentia’s funding arrangements were vague and misleading, which made it *“impossible” to establish how, from whom and on what terms the Bidder can access the funds required to pay for the Nitro Shares acquired under the Potentia Takeover Offer.”*
24. It also submitted that further disclosure was required in relation to HarbourVest and Potentia’s *“outside fund structures”*, submitting that HarbourVest was effectively a joint bidder and its funding arrangements with Potentia and the rights it has in relation to HoldCo were *“highly relevant to Nitro Shareholders”* particularly given the Scrip Alternative. Similarly, it submitted that the disclosure relating to the A\$112

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million in commitments that Potentia has access to from “outside fund structures” was “opaque” and that basic and fundamental details had been knowingly omitted, including the identity of the investors who have made the commitments, confirmation as to whether the full amount can be used to fund the Potentia Takeover Offer and whether the investors have any rights in relation to HoldCo that would impact a Nitro shareholder’s assessment of whether to accept the Scrip Alternative.

25. Lastly, Nitro submitted that the RPS were complex and warranted (among other things) “*significantly enhanced disclosure... including the risks concerning HoldCo's capacity to discharge its obligations to redeem the outstanding RPS securities at maturity.*”
26. Potentia made a brief preliminary submission that the Panel should decline to conduct proceedings because:
 - (a) the matters did not require further disclosure (however, if the Panel was minded to conduct proceedings, Potentia was “*willing to consider the Panel's concerns and if necessary provide supplementary disclosure to resolve them*”) and
 - (b) the interim order was not necessary, would not “*preserve the status quo*” and was, in the circumstances of the Alludo Transaction, in the nature of a final order.

DISCUSSION

27. We have considered all the material, but address specifically only that part of the material we consider necessary to explain our reasoning.

Decision to conduct proceedings

28. We considered that, *prima facie*, there appeared to be merit in the disclosure issues raised in the application. However, we considered initially whether this was a matter that the Panel should engage in, particularly in light of the implication in Potentia’s preliminary submission, that it was willing to make further disclosure.
29. Accordingly, before deciding whether to conduct proceedings, and noting that the Panel’s *Guidance Note 5: Specific Remedies – Information Deficiencies* encourages parties to resolve disclosure issues independently and that the parties were sophisticated market participants who should be in a position to sort out such issues, we invited Potentia to prepare a draft supplementary bidder’s statement addressing the disclosure issues and to provide a copy to us and all parties.
30. We also said that we were not minded to make interim orders, provided Potentia undertook to give us at least 24 hours’ written notice before processing any acceptances under the Potentia Takeover Offer. Potentia gave the undertaking (together with a confirmation, as requested, that it had not processed any acceptances).
31. Potentia submitted a draft supplementary bidder’s statement under which it sought to provide further disclosure in relation to:
 - (a) how it intended to fund the Potentia Takeover Offer, including the underlying sources of the funding

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- (b) the process by which the funding would be provided from the underlying sources to Potentia
 - (c) the Co-investor and HarbourVest and
 - (d) the RPS.
32. Alludo submitted that the draft supplementary bidder’s statement was inadequate and that *“Potentia has clearly failed to adequately address those issues. In many cases, Potentia has not even attempted to address the issues at all.”* It itemised a long list of its concerns and requested that we commence proceedings.
33. Nitro made a shorter submission agreeing with Alludo’s detailed submissions and stating that it *“remains concerned that the disclosure documents in relation to the Potentia Takeover Offer (including the [draft supplementary bidder’s statement]) omit material information which Nitro Shareholders and the market require to properly assess the merits and certainty of the Potentia Takeover Offer”*.
34. Potentia filed an out of process *“point-by-point”* response to the above submissions. We decided to accept Potentia’s out of process response and invite a response to it by the other parties, which they gave.
35. Despite all this endeavour, some issues remained, and we considered that they warranted investigation. Accordingly, we decided to conduct proceedings, save that we did not pursue the issue raised concerning prospects of the Alludo Transaction being successful. Given Potentia’s 19.31% shareholding in Nitro and its *“truth in takeovers”* commitment to vote against the Alludo scheme proposal, we do not consider the statements made by Potentia on this issue to be misleading and Alludo and Nitro were able to provide any clarification they considered necessary.
36. We issued a brief, seeking responses in respect of both the disclosure issues and the broader policy issue of whether it is appropriate to accept a lower level of funding detail under *ASIC Regulatory Guide 9: Takeover Bids (RG 9 Takeover Bids)* if the funds are sourced from passive rather than active investors (that is, in circumstances reasonably common in private equity bids).

Potentia’s funding arrangements

37. Alludo submitted that Potentia’s disclosure in relation to its funding arrangements was deficient (among other things) because there was:
- (a) no disclosure in relation to the amount of funding available for the Potentia Takeover Offer from each of Potentia Fund I, Potentia Fund II and the Other Commitments and
 - (b) inadequate disclosure in relation to the terms and conditions of the funding arrangements.
38. We were provided with several examples of funding disclosure in other schemes and takeover bids involving private equity bidders. While the examples exhibited a range of levels of detail, in our view most provided more extensive funding disclosure compared to Potentia’s disclosure.

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39. In RG 9 Takeover Bids², ASIC explains that the key purpose of requiring detailed funding disclosure is to give certainty to target shareholders that the bidder has sufficient funding in place to pay the offer consideration to all accepting shareholders:
- “The object of the requirement to disclose bid financing arrangements is to ensure that target security holders have sufficient information to enable them to assess the bidder’s ability to pay for the securities it is offering to buy. As a fundamental disclosure requirement, s636(1)(f) is also an important part of maintaining an informed market. Inadequate disclosure of funding arrangements may be misleading or otherwise give rise to a false market in the target’s (and possibly the bidder’s) securities. The funding disclosure requirements therefore reinforce the purposes underlying Ch 6 of ensuring (a) an efficient and informed market for the control of the target (s602(a)); and (b) that target security holders and directors have sufficient information to assess the merits of the bid (s602(b)(iii))”.*
40. The Panel’s *Guidance Note 14: Funding Arrangements (GN 14 Funding Arrangements)* also addresses the importance of having funding in place, or a reasonable basis to expect that it will be in place and, consistent with ASIC’s position in RG 9, states (footnotes omitted):
- “Timely disclosure of funding arrangements, and updated disclosure as needed, is an important aspect of an efficient, competitive and informed market, and ensures that holders of shares are given enough information to enable them to assess the merits of the proposal.”*
41. As noted above, Potentia disclosed that its funding would come from the following sources:
- (a) Potentia Fund I, which closed in December 2020 with total funding of A\$458 million and
 - (b) Potentia Fund II, which closed in June 2022 with total funding of A\$635 million
 - (c) Other Commitments, being A\$112 million committed to Potentia from outside the above fund structures and
 - (d) the Co-investor, in an amount of up to A\$160 million.
42. Alludo submitted that presentation of the information in relation to the funding available from Potentia Fund I and Potentia Fund II gives the impression that Potentia has access to ~A\$1.2 billion of funding for the Potentia Takeover Offer, which is misleading as a material proportion of Potentia Fund I is understood to have been deployed and as there are likely to be single deal concentration limits that limit the ability of Potentia to draw down on all of the stated funds for the purposes of the Nitro acquisition.
43. Nitro made a similar submission, adding that “[Potentia] continues to force Nitro Shareholders to accept an ambiguous statement that it “has available capacity across the funding sources outlined [in clause 2(e)] to fund the Offer Amount’ ...”

² at [RG 9.364] – [RG 9.366]

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44. ASIC did not go quite as far, submitting that the disclosure “*may not be sufficiently clear or prominent for a target shareholder to understand that there is a lesser level of funding committed or available than the amounts disclosed*”.
45. Potentia submitted that the disclosure of the amounts in Potentia Fund I and Potentia Fund II “*does not suggest that all of the committed funding is available to fund the bid. This is made clear in section 2(e) of the First Supplementary Bidder’s Statement, in which Potentia Capital confirms that it has available capacity across the funding sources outlined in section 2 to fund the Offer Amount, taking into account all single deal concentration limits within these funds.*”
46. Each of Alludo and Nitro submitted that there was a heightened need for detailed funding disclosure in this case on the basis that Potentia had made a non-binding indicative offer for all the shares in Tyro Payments Limited at an enterprise value of approximately \$875 million, raising questions for Nitro shareholders and the market more generally as to Potentia’s capacity to fund both bids.
47. We consider that Potentia’s funding disclosure was deficient (irrespective of any greater levels of funding disclosure that may have been required as submitted by Alludo and Nitro) in that it was not possible to ascertain the amount committed or designated as available (and which will remain available) for use as consideration under the Potentia Takeover Offer under each of the funding sources. Accordingly, it was not possible for Nitro shareholders to properly assess whether the amounts when added together would be sufficient to fund the Potentia Takeover Offer. We consider this deficiency to be particularly material given the complexity of Potentia’s funding arrangements and its concurrent Tyro proposal.
48. Potentia submitted that disclosing “[t]he precise amount of funds available for deployment at any point in time is commercially sensitive.” We are prepared to accept that submission, noting that exact disclosure in this instance could disadvantage Potentia. For example, it could be used by Tyro or potential competing bidders for Tyro to the detriment of Potentia in any commercial negotiations. While that is perhaps not a consideration that we should concern ourselves with, clearly, we should only demand disclosure that is necessary to meet the requirements of the law and policy.
49. We consider the split of funding between Potentia, the Co-investor and the investors providing the Other Commitments is important information that must be disclosed to enable Nitro shareholders to know the identity of the bidder and assess the merits of the Potentia Takeover Offer. This view is consistent with ASIC’s view in RG 9 Takeover Bids at [RG 9.386] which states that:

“If more than one person is to contribute to funding for the bid, the proportion of funding to be provided by each person must be disclosed.”
50. Despite this, in the circumstances, we consider the precise funding split between Potentia Fund I and Potentia Fund II is not information that is material to Nitro shareholders’ decision whether to accept the Potentia Takeover Offer provided that it is clearly disclosed that Potentia has sufficient funds committed or designated as available (and which will remain available) across those funds for use as consideration under the Potentia Takeover Offer.

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51. Accordingly, we do not consider it necessary for Potentia to designate an amount which correlates to the maximum amount of funds available. For example, it could be expressed as having “at least” a particular amount committed or designated for the Potentia Takeover Offer by Potentia Fund I and Potentia Fund II in aggregate, provided that such amount, when added to other amounts disclosed as being committed or designated for the Potentia Takeover Offer by other disclosed funders, is sufficient to fund the Potentia Takeover Offer. Potentia agreed to make supplementary disclosure on this basis.
52. Alludo also submitted that the terms and conditions of Potentia’s funding arrangements had not been adequately disclosed, including because there was limited disclosure of how funding is committed at each level from the underlying sources to Potentia via the MITs, including whether this is documented at each level and whether (and what) conditions apply to funding under each level.
53. Given the number of parties contributing funding for the Potentia Takeover Offer, and the multiple MITs through which that funding would be channelled through to Potentia, the funding arrangements were complex. Accordingly, we had concerns as to whether the steps in the funding process had been sufficiently disclosed.
54. In particular, we had concerns regarding whether all of the conditions to funding had been disclosed and would be able to be satisfied. For example, a condition to the Co-investor’s funding was effectively that Potentia Capital must concurrently provide funding to the MITs for “*the balance of the Offer Amount plus transaction costs.*” It was not clear how much of the “*up to*” (now) A\$210m would be provided by the Co-investor and therefore Nitro shareholders could not determine how much funding was required from Potentia Capital to satisfy this condition.
55. Further, in relation to the proposed funding of the MITs by Potentia Capital and the Co-investor, Potentia had simply disclosed in Section 7.4 of the original bidder’s statement that “*the MIT Equity Commitments are not subject to any conditions which the Bidder considers may not be satisfied*” without clearly stating those conditions. Accordingly, as submitted by Alludo, “*this made it impossible for Nitro shareholders to assess the risk of Potentia Capital not funding, which in turn makes it impossible for them to assess the risk of the Co-investor not funding.*”
56. Potentia submitted, in effect, that its disclosure of the funding arrangements was sufficient and that disclosure of the precise manner in which funding is committed at each level from the underlying sources to Potentia via the MITs, including whether and how this is documented at each level and each condition to funding in detail that goes beyond what is reasonably required to inform Nitro shareholders of the funding arrangements for the Potentia offer.
57. Potentia’s submission appeared to be at odds with:

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- (a) section 636(1)(f)(iii)³ which requires a bidder's statement to include details of any arrangements under which cash will be provided by a person other than the bidder and
- (b) GN 14 Funding Arrangements which states that a bidder should consider making disclosure in relation to:
 - (i) the terms of intra-group arrangements if the funder is a group member and
 - (ii) material conditions precedent to drawdown, and any basis on which the bidder believes it will be able to satisfy those conditions.

However, Potentia offered to include further disclosures covering these points in the supplementary bidder's statement and therefore we did not have to consider this further.

Potentia's arrangements with co-investors

- 58. Alludo submitted that Potentia's failure to disclose the identities of the investors providing the Other Commitments was a material omission and at odds with ASIC's guidance in RG 9 Takeover Bids at [RG 9.384] which states:
"It is insufficient to disclose only that the bidder has secured funds which it anticipates will be available to satisfy its obligations under the bid. The bidder must disclose the ultimate source of the borrowings or other funding."
- 59. Further, it submitted that the identity of those investors was particularly important information for Nitro shareholders given that the Other Commitments could represent up to 25% of the total funding for the Potentia Takeover Offer.
- 60. Potentia noted that the Other Commitments may be invested at its discretion and were not committed specifically for investment in Nitro and that "[t]he investors are therefore in a very similar position to the Limited Partner investors in Potentia Fund I and Potentia Fund II (i.e. they are passive investors)." Despite this, Potentia confirmed that it would disclose the identity of these investors in a supplementary bidder's statement.
- 61. Given Potentia's willingness to address this issue through supplementary disclosure, we did not need to form a view on this.
- 62. In terms of the broader arrangements with the Co-investor and the investors providing the Other Commitments, Alludo and Nitro submitted that Potentia should be required to disclose any rights these investors have or may have in HoldCo given the emergence of the Scrip Alternative.
- 63. ASIC submitted, in effect, that the level of disclosure needed depended on whether the Co-investor or the investors providing the Other Commitments had a measure of control (section 50AA), which requires a substantive and practical consideration of all relevant circumstances – including practical or customary influence – rather than merely legal or temporal rights a person may have.

³ 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)

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64. Potentia did not challenge these submissions, although noted that neither the Co-investor, nor the co-investors providing the Other Commitments, had any rights in respect of HoldCo other than indirectly through their shareholdings in the MITs and as such no further disclosure was necessary.
65. We accept Alludo's and Nitro's submissions that Nitro shareholders who accept the Scrip Alternative are entitled to know who might end up as significant shareholders in HoldCo and what rights they may have in HoldCo. Thus, we requested that Potentia disclose further details of the arrangements it has with the Co-investor and the investors providing the Other Commitments, including whether there are any (and what) governance or investor rights those investors may have in respect of HoldCo. If there are none, as was submitted by Potentia, we requested that this be made clear. Potentia agreed to do so.

RPS under the Scrip Alternative

66. Alludo submitted that the Scrip Alternative, comprising 70% of a HoldCo ordinary share and 30% of a HoldCo RPS, was complex and that further disclosure was required to enable Nitro shareholders to properly assess the risk profile of an investment in HoldCo. In particular, Alludo submitted that Potentia should be required to make risk disclosure concerning HoldCo's capacity to discharge its obligation to redeem the RPS at maturity or at least explain to Nitro shareholders why it considers that there is no risk.
67. Potentia submitted that it did *"not expect to have any difficulties in sourcing debt funding to repay the RPS on issue unless there is a very significant and sustained disruption to debt markets that results in a material reduction in the availability of commercial debt"*, noting that it has 24 months from the date of their issue to redeem them.
68. Nitro submitted that since the RPS may be converted into ordinary shares if redemption cannot be funded, *"the certainty with which Potentia can procure debt funding to finance the redemption is highly material to the assessment of the value of the RPSs and thus, the scrip alternative."*
69. While we appreciate Potentia does not currently expect to have any difficulty obtaining debt funding for the redemption of RPS in 24 months' time, we recognise that the world could change a lot over that period, and that Nitro shareholders should be informed of the risks regarding debt funding the redemption of the RPS and the position in the event that Potentia cannot fund redemptions.
70. In response to our concerns, Potentia offered to disclose:
 - (a) that it *"does not expect to have any difficulties in sourcing debt funding to repay the RPS on issue unless there is a very significant and sustained disruption to debt markets that results in a material reduction in the availability of commercial debt. It should be noted in this context that has 24 months from the date of their issue to redeem the RPS"* and
 - (b) the position if Potentia cannot fund redemptions.
71. We consider that the above, when taken together with the other disclosures in the bidder's statement (as supplemented) in relation to the RPS, was sufficient.

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Policy

72. We sought submissions from the parties as to whether the existing disclosure policy from ASIC and the Panel in relation to bid funding required a level of disclosure that would disadvantage private equity bidders, noting current market practice and the disclosure in the Transaction Booklet issued by Nitro in respect of the Alludo Transaction.
73. Alludo submitted that existing ASIC and Panel guidance makes clear that adequate bid funding disclosure is an important aspect of an efficient, competitive and informed market, and is necessary to ensure that target shareholders and the market have enough information to assess the merits of a bidder's proposal and the bidder's ability to pay for the securities it is offering to buy. Alludo submitted that this is the case whether the bidder is private equity, a trade buyer or other type of investor. Alludo submitted that *"current market practice in private equity bids (including bids by private equity led consortiums) in relation to disclosure of funding arrangements is sound and appropriately reflects this guidance"*.
74. Nitro's submission was broadly along the same lines, noting that *"the issue here is not in relation to the existing disclosure regime, but for Potentia's clear disregard of its legal/regulatory obligations and the unacceptable impact this has had on the market control of Nitro."*
75. We were particularly interested in ASIC's views on this topic.
76. Noting that RG 9 Takeover Bids is directed at all takeover bids, not specifically takeover bids involving private equity bid funding, ASIC submitted that the guidance sets out *"ASIC's view of disclosure required to satisfy a bidder's obligations under s636(1)(f) and the principles underlying Chapter 6 as set out in s602 (and having regard to relevant caselaw)."*
77. Separately, as noted in paragraph 36 above, we sought ASIC's view as to whether it is appropriate to accept a lower level of funding detail under RG 9 Takeover Bids if the funds are sourced from 'passive' rather than 'active' investors.
78. In response, ASIC submitted that:
 - (a) *"even where the relevant controller of a bid vehicle is a private equity manager, it is necessary to assess the disclosure requirements in s636 against the totality of the arrangements and relationships between the parties who are acquiring an interest in the bid vehicle"*
 - (b) *there will be "many bids by funds (whether private equity or otherwise) and other financial sponsors with passive investors that will not necessarily require disclosure of the investors' identities and relevant arrangements" and*
 - (c) *there will be "cases where it will be necessary and appropriate to disclose the identity of investors who are providing funding directly for a bid in exchange for equity in the bid vehicle (for example, if the investors may be associates of the controller of the bid vehicle) even though those investors might be considered 'passive' or the entity they are taking an equity interest in is controlled by another person. This may include, for example, where the investors, due to their identity or arrangements or relationship with*

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the bidder, have an ability to influence the conduct of the takeover bid or the bid vehicle."

79. We agree with ASIC's view that whether the disclosure requirements have been satisfied must be assessed by reference to the totality of the circumstances. In particular, we accept ASIC's submission that disclosure of the identity of 'passive' investors providing equity funding for a bid may be required in certain circumstances, including where those investors are in a position to influence the conduct of the bid or the bid vehicle. This is consistent with the Panel's conclusion in *Brisbane Markets Limited*.⁴
80. Potentia submitted that "*much of the general principles are relevant...but much of the fine detail is not*" noting that "*Private equity bidders and targets generally take this commercially realistic approach – a bidder does not disclose, and the target does not seek to trace through, the full chain of funding into the fund or funds that are to provide the funding to the bidder vehicle, since that does not advance the purpose of the disclosure requirement.*" We accept Potentia's submission to the extent it stands for the proposition that there is a point at which going into labyrinthine detail of complex funding arrangements is unlikely to be understood by retail shareholders and is therefore not effective disclosure. However, at a minimum, it is critical that a summary of the material steps, the terms and conditions and the key risks of any bid funding arrangements are adequately disclosed, together with adequate information regarding the sources of bid funding, to ensure that target shareholders and directors have sufficient information to determine whether the bidder has and will continue to have sufficient funding to pay the consideration offered under the bid and to identify the persons making the bid.
81. Potentia also submitted that "*private equity could be disadvantaged by a formulaic or inflexible application of requirements*". As members of a commercial tribunal, we have some sympathy for this submission and, as noted in paragraphs 48 and 50 above, were prepared to accept this in not demanding a precise split of the maximum funds available for the bid under each of Potentia Fund I and Potentia Fund II.

Extension of time

82. Section 657(C)(3) states:
- An application for a declaration under section 657A can only be made within:*
- (a) *2 months after the circumstances have occurred or*
 - (b) *a longer period determined by the Panel.*
83. While not submitted by the parties, we noted that Alludo's application may be out of time, at least with respect to the deficient disclosure in respect of Potentia's bid funding arrangements and arrangements with co-investors as these circumstances arguably first occurred when Potentia's original bidder's statement was lodged with ASIC and ASX on 28 October 2022.

⁴ *Brisbane Markets Limited* [2016] ATP 03 at [71] to [82]

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84. Accordingly, we sought submissions from the parties as to whether we should extend the time for making Alludo’s application under section 657C(3)(b).
85. Alludo submitted that no extension of time was required because:
- (a) Potentia’s original bidder’s statement and first supplementary bidder’s statement (which includes much of the offending disclosure) are both dated 11 November 2022⁵, being less than 2 months before the date of its application
 - (b) Potentia’s second supplementary bidder’s statement dated 8 December 2022 which disclosed Potentia’s offer price increase from \$1.80 to \$2.00 further exacerbated the issues with Potentia’s funding disclosure and
 - (c) Potentia’s third supplementary bidder’s statement dated 23 December 2022 which disclosed the Scrip Alternative gave rise to new unacceptable circumstances in respect of the failure to disclose the governance/investor rights granted to Potentia’s co-investors.
86. Further, Alludo submitted that, if despite the above the Panel considered the appropriate reference date to be 28 October 2022, an extension should be granted due to the seriousness of the issues raised in its application citing *Aurora Absolute Return Fund*⁶.
87. Nitro submitted that the appropriate reference date was 23 December 2022, being the date on which Potentia lodged its third supplementary bidder’s statement, as new unacceptable circumstances were created at that time due to Potentia adding the Scrip Alternative.
88. Similar to Alludo’s submissions, Nitro submitted that the Panel should grant the extension even if it considers Alludo’s application was out of time on the basis that “*a clear, serious and ongoing thread of unacceptable circumstances has occurred and has continued to occur from the date of Potentia’s first bidder’s statement...because the market has been misinformed, and Nitro shareholders have been misled, for over 6 weeks.*”
89. Potentia submitted that the Panel should not grant an extension under section 657C(3) (among other reasons) because (footnotes omitted):
- (a) Alludo had not provided any adequate explanation for its delay in bringing its application, noting that the circumstances complained of first occurred on 28 October 2022
 - (b) the discretion to extend time should not be exercised lightly
 - (c) Alludo has not made credible allegations of clear, serious and ongoing effects of the unacceptable circumstances and
 - (d) Alludo has not established that it is in the public interest for time to be extended.

⁵ Potentia subsequently submitted that the Panel should place no weight on this submission, noting that Potentia’s original bidder’s statement was, contrary to the submissions of Alludo, clearly dated 28 October 2022

⁶ [2019] ATP 14 at [47]

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90. Given the varied allegations made in Alludo's application, the evolution of Potentia's simple all cash offer to the complex cash and Scrip Alternative offer, and the three supplementary bidder's statements filed by Potentia prior to Alludo's application, determining the applicable reference date to assess the timeliness of Alludo's application for the purposes of s657C(3)(a) was a difficult exercise.
91. Taking a conservative view that the issues with respect to Potentia's funding disclosure first arose at the time of the release of its original bidder's statement on 28 October 2022, more than two months before Alludo's application, we consider that Alludo needed an extension of time to make its application (at least, to the extent it concerned Potentia's funding disclosure).
92. In our view, the deficiencies in Potentia's bidder's statement (as supplemented) in respect of its bid funding arrangements raised serious questions as to Potentia's ability to fund the Potentia Takeover Offer and who in fact was making that offer. This is material information for Nitro shareholders and, without further supplementary disclosure, we had serious concerns that:
 - (a) the acquisition of control of Nitro may not be taking place in an efficient, competitive and informed market, contrary to section 602(a) and
 - (b) Nitro shareholders and directors may not have sufficient information to properly identify the persons making the Potentia Takeover Offer or to assess the merits of the Potentia Takeover Offer, contrary to sections 602(b) and (d).
93. In light of these concerns, and the potential material detriment to Nitro shareholders, we are satisfied that it is in the public interest to extend the timing for making the application in this case. We did not make this decision lightly.

Further disclosure provided

94. For the reasons above, we consider that Potentia's disclosure in relation to its bid funding arrangements, its arrangements with the co-investors and the RPS was materially deficient. Accordingly, we communicated to the parties that we were minded to declare that unacceptable circumstances existed in relation to the affairs of Nitro unless Potentia made further disclosure in a form that the Panel did not object to.
95. After consulting with the Panel and ASIC, Potentia released and despatched a sixth supplementary bidder's statement providing further and clarifying disclosure in relation to its bid funding arrangements, arrangements with co-investors and RPS which we consider sufficiently dealt with the issues raised in Alludo's application in a form we did not object to.
96. We had concerns that certain statements Potentia had been making to the market at the time in relation to a potential increase to its offer price from \$2.00 to between \$2.20 and \$2.30 (subject to completing satisfactory due diligence) may confuse shareholders reading the sixth supplementary bidder's statement, who may be misled into thinking the release of that supplementary bidder's statement was connected to those statements or disclosed additional funding for that potential increase.

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97. To mitigate this risk, we requested that Potentia include the following statement in the supplementary bidder's statement in a prominent box on the first page:
"The disclosures contained in this Sixth Supplementary Bidder's Statement only relate to our current Offer Price of \$2.00 per Nitro Share"
98. We also requested that Potentia include a statement noting that the corrective disclosure was required by the Panel in connection with these proceedings.
99. Potentia agreed to include these statements.
100. We noted in our media release published on 8 February 2023 that we expected Potentia to provide additional disclosure in respect of its bid funding arrangements if it increased the consideration under the Potentia Takeover Offer above \$2.00 per Nitro share.

DECISION

101. For the reasons above, and given the matters addressed by Potentia in its supplementary bidder's statement⁷, we declined to make a declaration of unacceptable circumstances.
102. We consider that it is not against the public interest to decline to make a declaration and we had regard to the matters in section 657A(3).

Costs

103. In view of the earlier opportunities available to Potentia to remedy the deficient disclosure (see paragraph 29 above) we sought submissions from the parties on the question of whether Potentia should be ordered to pay the reasonable costs of ASIC and some of the reasonable costs of Nitro and Alludo.
104. Given that we made no declaration of unacceptable circumstances, we did not make any final orders, including as to costs. If we had made a declaration in this case, we would not have been minded to make a costs order in any event because reasonable minds may differ about the amount of disclosure required in light of previous market practice. However, in a matter where there were more clear-cut disclosure deficiencies, a costs order may be appropriate.

Yasmin Allen

President of the sitting Panel

Decision dated 8 February 2023

Reasons given to parties 15 March 2023

Reasons published 17 March 2023

⁷ The matters were addressed in Potentia's Sixth Supplementary Bidder's Statement lodged with ASIC and released to ASX on 8 February 2023

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Advisers

| Party | Advisers |
|----------|-------------------------|
| Potentia | Johnson Winter Slattery |
| Nitro | Allens |
| Alludo | Gilbert + Tobin |