



**In the matter of Focus Technologies Ltd
[2002] ATP 08**

Catchwords:

Relevant interest on exercise of options – whether contravention of section 606 – shareholder resolution – identity of acquirer – adequate disclosure – declining to commence proceedings

Corporations Act 2001 (Cth), sections 602, 606 and item 7 of section 611

An application under section 657C of the Corporations Act by Focus Technologies Limited for a declaration of unacceptable circumstances and orders concerning the issue of shares on exercise of options issued to Tomorrow Corporation Pty Ltd

STATEMENT OF REASONS FOR DECISION

1. The sitting Panel comprises Chris Photakis (sitting President), Teresa Handicott (sitting Deputy President) and Marie McDonald.
2. Focus Technologies Limited (Focus) applied to us for a declaration of unacceptable circumstances in relation to its own affairs and for orders preventing the exercise of certain options to subscribe for shares in Focus.
3. The Panel declined to conduct proceedings, pursuant to ASIC regulation 20.

Nature of Proceedings

4. The Panel considered an application and a number of submissions from Focus before it decided not to proceed. These submissions were not tested by other parties. We considered whether we would make a declaration of unacceptable circumstances or orders if Focus established all that it claimed and if we made no offsetting findings.
5. Because we have provisionally accepted Focus's submissions for this limited purpose, none of these reasons should be treated as findings of fact.

Background

6. In the middle of 2001, Focus (then named 131 Shop.com.au Limited) was listed on ASX. It was closing down its main business (an internet and telephone based business directory service aimed at small to medium sized enterprises) and had some cash reserves.

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7. At the same time, Tomorrow Limited (**Tomorrow**), another listed company, had announced that it was looking to build up several technology businesses based on listed companies, in which it would take large investments. Focus was one of the vehicles chosen by Tomorrow for this purpose. Focus appointed three nominees of Tomorrow to its Board, which at relevant times had only one other member. One of those nominees was Mr Wayne Bos, who was also the CEO of Tomorrow.
8. Focus agreed with Tomorrow that Tomorrow would find businesses for Focus to acquire, that Focus would issue a prospectus to raise the funds necessary to acquire those businesses and that Focus would issue 10,000,000 options to Tomorrow Corporation Pty Limited (TCPL), a wholly-owned subsidiary of Tomorrow.
9. Tomorrow introduced two businesses, which Focus agreed to acquire for a mixture of cash and shares in itself. Focus does not suggest that these introductions were unsuitable, or that they did not satisfy Tomorrow's relevant obligation under the agreement.
10. The transactions agreed between Focus and Tomorrow were approved by Focus shareholders under ASX Listing Rules and the related party provisions of the Corporations Act, at a meeting on 10 July 2001. The meeting also approved the acquisition of shares in Focus on exercise of the options, under item 7 of section 611 of the Act. Shortly after that meeting, Focus issued the options to TCPL.
11. ASX then suspended quotation of Focus shares under Listing Rule 7.16, as Focus then had more options on issue than shares. Focus had predicted this suspension, but it expected that quotation would be reinstated when shares were issued under the prospectus. In fact, quotation has never been reinstated. Although no shares were issued under the prospectus, there are now more shares than options, as some other options have lapsed. Focus remains suspended under Chapter 11 of ASX Listing Rules, because it has no business.
12. In July 2001, Focus issued a prospectus to raise the funds to acquire the businesses introduced by Tomorrow. The market for shares in high technology companies had not recovered from its sharp fall in April 2001. The issue was not underwritten, and there was no formal agreement that Tomorrow would support it. Focus tells us that it was clearly understood that Tomorrow would support the issue.
13. The explanatory memorandum for the meeting referred in general terms to Tomorrow's support for Focus, but did not state that Tomorrow would underwrite or otherwise support the issue. Indeed, the terms in which the explanatory memorandum discussed the acquisition of shares on exercise of the options assumed and implied that Tomorrow would hold no other shares in Focus when it exercised the options.

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14. PricewaterhouseCoopers Securities Ltd (PWC), the independent expert who reported on the resolutions, queried whether the issue would succeed in raising the funds necessary to acquire the businesses. It reported that:
“Notwithstanding that the public offer is not being underwritten, the current directors of 131 Shop [i.e. Focus] are confident that at least \$1,250,000 will be raised through the issue of 5,000,000 shares at \$0.25 each. We have also discussed the capital raising with the principal supporting broker to the issue. Based on our discussions, we have formed the view that, as at the date of our Report, the most likely range of outcomes for the capital raising is between \$875,000 and \$1,750,000 assuming an issue price of \$0.25 per share.”¹
15. PWC also reported that it had discussed the issue with management of Focus and of Tomorrow, that the opinion of management was that at least half of the shares on offer would be taken up and that it was their own opinion that “the most likely outcome”.
16. On 31 July 2001, after the prospectus was issued and before applications closed, Tomorrow announced that it had decided to change its investment strategy away from high technology towards mining. It did not apply for shares under Focus’ prospectus. On 31 July Tomorrow also announced that Mr Bos had resigned as a director of Tomorrow. On 8 and 17 August and 19 November its nominees on Focus’ Board resigned. On 31 July Tomorrow announced that it intended to cancel the 33 million partly paid shares in Tomorrow held by Mr Bos and in return it would transfer the shares in TCPL (which still held the Focus options) to Mr Bos who was also the managing director of TCPL. The Panel understands that none of Mr Bos, Tomorrow, TCPL or any of their associates sought the views of ASIC or the Panel as to the implications for the exercise of the options of the transfer of ownership of TCPL, holding the Focus options, from Tomorrow to Mr Bos.
17. Focus withdrew the prospectus and returned applications for shares. It abandoned the purchases of both businesses. Its shares were suspended, it had no business, its funds had been depleted by the expenses of the failed proposals and it had a large parcel of options on issue.

The Options

18. As mentioned above, Focus issued 10,000,000 options to TCPL after the 10 July meeting. Those options may be exercised at any time until July 2008, at an exercise price of 20 cents, but only after shares in Focus have traded on ASX at over 40 cents. Subject to ASX escrow requirements, they are transferable.
19. If the options were exercised today and no other shares were issued, TCPL and Mr Bos would acquire a relevant interest in 32.9% of the voting shares in Focus.

¹ These amounts equate to between 3.5 and 7 million shares. Falkiners Stockbroking Ltd are described in the prospectus as Sponsoring Broker to the Public Offer.

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20. If the proposals put to the meeting had succeeded and shares had been issued as part consideration for the purchases of the businesses, and there had been no other issues, the voting power of Tomorrow and its associates would have reached 26.7% on exercise of the options.
21. In either case, the acquisition would contravene section 606, without shareholder approval under item 7 of section 611 of the Corporations Act. Shareholder approval was sought and obtained on 10 July for the acquisition by TCPL of 10,000,000 shares in Focus on exercise of the options.
22. The resolution was to the following effect:
23. “That, subject to each of resolutions 1, 2, 4 to 6 set out in the Notice being duly passed,² the members of the Company hereby approve, pursuant to item 7 of section 611 of the Corporations Law³ and Listing Rule 11.1 of the Australian Stock Exchange Listing Rules, the acquisition by Tomorrow Limited, Tomorrow Corporation Pty Limited (a wholly-owned subsidiary of Tomorrow Limited), Wayne Bos and Guinness Peat Group plc and its related bodies corporate of up to 32.9% of the voting power in the Company by virtue of Tomorrow Corporation Pty Limited exercising any or all of the 10,000,000 options over unissued ordinary shares in the Company to be granted pursuant to resolution 2 above.”
24. On page 14 of the explanatory memorandum, a table shows TCPL’s voting power in several different scenarios. On page 21, it states that:
“If the Share Offer does not proceed, the maximum extent of the increase in the voting power of Tomorrow Corporation would be approximately 32.9% of the voting power of the Company.”
25. Guinness Peat Group and Mr Bos are mentioned because Guinness Peat Group controls Tomorrow and Mr Bos then held enough partly paid shares in Tomorrow that in certain circumstances he would have controlled Tomorrow. Those partly paid shares were cancelled and Tomorrow transferred TCPL to Mr Bos as consideration for cancellation of his Tomorrow shares.
26. The Explanatory Memorandum was premised on TCPL being a wholly-owned subsidiary of Tomorrow and did not canvass TCPL exercising the options when it is no longer a subsidiary of Tomorrow. Such a possibility is not mentioned in the risks section of the explanatory memorandum nor the PWC report. The explanatory memorandum did, however, contemplate the possibility of control of Tomorrow itself changing.

² These relate to the other aspects of the proposal.

³ The Corporations Law has since been replaced by the *Corporations Act 2001*, which is for present purposes the same.

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Whether Acquisition Illegal

27. If the approval of 10 July 2001 was validly obtained, an acquisition consistent with it will not contravene section 606, because of the exception to section 606 in item 7 of section 611. On the face of it, the resolution is effective to approve an acquisition by TCPL of 10,000,000 shares in Focus on exercise of the options, even after the transfer of TCPL to Mr Bos by Tomorrow.
28. However, the resolution used the expression “Tomorrow Corporation Pty Limited (a wholly-owned subsidiary of Tomorrow Limited)” and none of the notice of meeting, the explanatory memorandum and the expert’s report contemplated the options being exercised when TCPL is no longer a subsidiary of Tomorrow.
29. These matters form the basis of an argument that the approval was effective only so long as TCPL continued to be a subsidiary (or a wholly-owned subsidiary) of Tomorrow and that it lapsed when Tomorrow divested TCPL to Mr Bos. In essence, that argument is the legal counterpart to the current application for a declaration of unacceptable circumstances. However, it was not developed in the application and we express no view about it.

Power to Declare Unacceptable

30. Approval was obtained under item 7 of section 611 for the acquisition by TCPL of shares in Focus on exercise of the options. However, if that approval was not given with adequate and accurate information, or if the resulting acquisition is materially different to that which the shareholders of Focus approved, it is open to the Panel to decide that the circumstances of the acquisition would be unacceptable, when and if it occurs. It would then be open to the Panel to make a declaration to that effect and orders to overcome the unacceptable circumstances.
31. Relevantly, an acquisition of shares on exercise of the options may give rise to unacceptable circumstances, if:
 - a. it is an acquisition of a substantial interest in Focus; or
 - b. it affects control, or potential control of Focus; or
 - c. it involves a contravention of Chapter 6.

On the present state of affairs, it is likely that the exercise of the options would lead to both an acquisition of a substantial interest in Focus and an effect on control of that company.

32. In deciding whether there are unacceptable circumstances, we must have regard to the purposes of Chapter 6, as set out in section 602 and the other provisions of that Chapter. Relevantly, the purposes of Chapter 6 include shareholders in a company knowing the identity of a person who proposes to acquire a substantial interest in the company and having sufficient information to assess the merits of that proposal.

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Decision

33. We decided, on the facts and circumstances of this particular case before us, there was no urgent basis for intervention by the Panel now. The relevant facts are that:
- the options are not currently exercisable;
 - they are unlikely to be exercisable in the foreseeable future;
 - they could be exercised in a number of ways which would not breach the Corporations Act; and
 - no evidence was presented that Mr Bos intends to rely on the shareholder resolutions of 10 July 2001.

Chris Photakis

President of the Sitting Panel

Decision dated 30 May 2002

Reasons published 6 June 2002