



**In the matter of EPHS Limited
[2002] ATP 12**

Catchwords:

Disclosure in bidder's statement – allegation of misleading and deceptive statements – value of target assets – valuation methodology

Corporations Act 2001 (Cth), sections 636(1)(m) and 657A(3)

An application under section 657C of the Corporations Act by EPHS Limited for a declaration of unacceptable circumstances and orders concerning the bidder's statements in relation to bids by Cabcover Limited through its representative Akram El-Fahkri for two classes of shares in EPHS. The Panel declined to make a declaration of unacceptable circumstances or final orders in relation to the bidder's statements, accepting amendments to the bidder's statements instead.

APPLICATION

1. The sitting Panel comprised Alice McCleary (sitting President), Scott Reid (sitting Deputy President) and Robyn Pak-Poy.
2. On 29 May 2002, Cabcover Limited (**Cabcover**) lodged with the Australian Securities and Investments Commission (**ASIC**) bidder's statements for bids for A Class and B Class shares in EPHS Limited (**EPHS**). For present purposes, the differences between the classes of shares and between the respective bidder's statements are immaterial.
3. On 17 June 2002, EPHS applied to the Panel for a declaration that certain statements and omissions in the bidder's statements gave rise to unacceptable circumstances, and for orders to prevent their dispatch without further amendment. The matters which concerned EPHS were principally Cabcover's disclosure of:
 - a. the bidder's intentions regarding the business, assets and employees of EPHS;
 - b. the sources of funding for the bid;
 - c. the bidder's views concerning the performance of EPHS's business; and
 - d. the bidder's views concerning the value of EPHS and the appropriate way to value EPHS.
4. The discussion of valuation in the bidder's statement was the principal concern of the Panel.
5. These issues were dealt with in the course of proceedings, by direct agreement between the parties, or by the bidder adopting suggestions made by the Panel or its staff. The Panel was satisfied with these changes.

Takeovers Panel

EPHS - Reasons for Decision

6. The time involved in making the required amendments to the bidder's statement meant that Cabcover would be unable to send the documents to shareholders before the last date for dispatch of 26 June 2002 (28 days after lodging on 29 May 2002). Cabcover therefore applied to the Panel for interim orders to prevent Cabcover being in breach of section 633. The Panel dealt with this request by making interim orders on 26 June 2002 requiring Cabcover not to send the original offers while proceedings continued.

VALUATION ISSUES

EPHS Business and Assets

7. EPHS conducts a business of operating a taxi service. Its members are mainly the operators of the relevant taxis. Over the last few years, this business has generated a small profit or a small loss. In the year to 30 June 2000, EPHS made a profit of \$65,000, including dividend income of \$59,000, from the parcel of shares it held in Cabcharge Australia Limited (**Cabcharge**), a listed company, described further below. In the year to 30 June 2001, the corresponding figures were \$45,000 and \$161,000.
8. EPHS's most valuable asset by far is a parcel of shares in Cabcharge. During 2002, the market price of Cabcharge shares has ranged from \$2.59 to over \$3, with the most recent prices at the time of these proceedings being close to \$2.75. At the beginning of the bid, EPHS held approximately 1.9m shares in Cabcharge, with an approximate market value of \$5.2m.
9. To put these figures in context, EPHS has about 60 members and 830,000 shares. The bid was initially at \$2.25 per A Class share and \$2.00 per B Class share - resulting in a total initial bid value of \$1,842,500.

Cabcover's Valuation of EPHS

10. While the bidder did not gloss over the fact that EPHS held a valuable parcel of shares in Cabcharge, it valued the company in its offers by capitalising its earnings, on the basis that it intended to continue the company's business and did not intend to dispose of assets. This method produces a fairly small value (the bidder suggests \$443,000).
11. EPHS pointed out that the Cabcharge shares owned by EPHS alone are worth a lot more than the value attributed to the company by capitalising its earnings. It also criticised the bidder's description and valuation of the company's business, on the basis that the information the bidder had provided was incomplete, and some of it was wrong or out-of-date.
12. The bidder's statement urged EPHS shareholders to accept the bidder's offer, characterised the offer as generous and pointed out that shareholders were unlikely to get much monetary return from their investment, other than by accepting the offer.

Panel Decision

13. The Panel considered it was important that shareholders not be given a description of the value of their shares which might mislead the ordinary reader.

Takeovers Panel

EPHS - Reasons for Decision

14. The Panel decided that shareholders could have been misled by the document, given the exclusive emphasis on valuation by capitalising earnings and a shortage of information concerning the value of the parcel of Cabcharge shares. In particular, the Panel considered that it was inappropriate for the bidder to suggest that EPHS should be valued exclusively or primarily by capitalising its earnings, ignoring the readily realisable value of the Cabcharge shares it held. The bidder accepted some corrections from EPHS of statements concerning EPHS's business. The bidder also adopted some requests the Panel made, namely that the basis of its valuation, and the value of the shares held by EPHS, ought to be made very clear.
15. When those changes were made, the Panel decided that the bidder's statements did not tend to mislead or deceive the ordinary reader. Rather, the documents put forward an arguable basis of valuation, and a valuation on that basis which is approximate but does not appear to be misleading or seriously defective. However, it was open to the target to provide alternative arguments and it appeared to the Panel that the target was competent and prepared to do so. The bidder's statements make it clear that an alternative approach is open, and that it would lead to a much higher valuation. Accordingly, the Panel advised the parties that it had no objection to the revised bidder's statements being lodged and dispatched.
16. The proceedings in this matter have extended for over a month. This has been largely due to the process of the parties seeking to reach agreement on appropriate disclosure in the bidder's statements. The Panel considered that this time was used appropriately in ensuring that the bidder's statements that were finally dispatched were not misleading or deceptive, and that the process of the parties resolving the disclosure issues was preferable to the Panel imposing its wording as a solution.

DECISION

17. Revised bidder's statements acceptable to the Panel have been dispatched. We therefore dismiss the application and make no declaration or final orders. We consented to the parties being represented by their commercial solicitors. There being no declaration, we have no power to order costs.
18. Most issues in the matter were settled between the parties; Cabcover, EPHS and ASIC, with the support of the Panel, and we thank them for their constructive participation in the process.

Alice McCleary
President of the Sitting Panel
Decision dated 25 July 2002
Reasons published 8 August 2002