



**In the matter of SSH Medical Limited
[2003] ATP 32**

Catchwords:

Announcement of bid – content of bidder's statement – defeating conditions – defeating condition unacceptable – efficient market – misleading announcements to the market – no communication of relevant bid conditions – prescribed occurrence conditions – withdrawal rights – withdrawal of Panel application

Corporations Act 2001 (Cth), sections 602, 631, 652C, 657A and 670F

Takeovers Panel Guidance Note 5 – 'Restraining the Dispatch of Documents'

ASIC Practice Note 59 'Announcing and withdrawing takeover bids'

ASX Listing Rule 7.9

Realestate.com.au Ltd [2001] ATP 1, approved

Brisbane Broncos Ltd (No 1) & (No 2) [2002] ATP 1, approved

Brisbane Broncos Ltd (No 3) [2002] ATP 3, approved

These are our reasons for our decision to consent to the Applicant, SSH Medical Limited, withdrawing its application to the Panel under section 657C for a declaration of unacceptable circumstances under section 657A and associated interim and final orders respectively under sections 657E and 657D.

THE PROCEEDINGS

1. These reasons relate to an application (the **Application**) to the Panel by SSH Medical Limited (**SSH**) under section 657C of the *Corporations Act 2001 (Cth)* (the **Act**) dated 1 September 2003. The Application concerned an announcement by Analytica Limited (**Analytica**) that it would make an off-market takeover bid for all the shares in SSH (**Bid**).

THE PANEL & PROCESS

2. The President of the Panel appointed Braddon Jolley (sitting President), Elizabeth Alexander (sitting Deputy President) and Irene Lee as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the Application.
3. We adopted the Panel's published procedural rules for the purposes of the Proceedings.

SUMMARY

4. We were not required to decide whether unacceptable circumstances existed in relation to the affairs of SSH. Shortly after we decided to commence proceedings, Analytica announced that it would not make offers under its Bid. Its stated reason for not proceeding with the Bid was that certain events that were announced after its Bid was announced would lead to the Bid failing.

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5. Following Analytica's announcement that it would not proceed with the Bid, SSH applied to us seeking leave to withdraw the Application.
6. We had concerns with various issues arising under the Bid, such as the inclusion in the Bidder's Statement of conditions of which the market was not informed when the Bid was announced. We were also concerned with Analytica's subsequent decision not to proceed with the Bid.
7. However, continuation of the current proceedings could not have remedied these concerns. Specifically, it could not have resulted in an order being made for the Bid to proceed, as the Application concerned the alleged defective nature of the Bid. The only order sought in the Application was that the Bidder's Statement be restrained from dispatch.
8. In the absence of any submissions objecting to the withdrawal, we consented to the withdrawal of the Application on the basis that:
 - (a) the circumstances leading to SSH's request for consent to withdraw the Application arose as a result of the parties good faith attempts to resolve their dispute; and
 - (b) there was no reason to believe that the unacceptable circumstances complained of in the Application would continue.

APPLICATION

Declaration and orders sought in the Application

9. SSH applied to the Panel for a declaration of unacceptable circumstances under section 657A of the Act in connection with Analytica's Bid.
10. SSH sought an interim order under s 657E of the Act restraining the dispatch of Analytica's Bidder's Statement until the unacceptable circumstances it submitted existed were rectified.
11. SSH sought final orders under s 657D of the Act prohibiting Analytica from:
 - (a) dispatching the Bidder's Statement to SSH's shareholders; and
 - (b) proceeding with the Bid until the validity of the acquisition of a controlling interest in Analytica by Psiron Limited (**Psiron**) was appropriately dealt with.
12. SSH also requested an order that Analytica pay SSH's costs in relation to the Application.

DISCUSSION

Factual background leading up to Application

13. Both Analytica and SSH were at all relevant times public companies listed on the Australian Stock Exchange (**ASX**). Both companies were involved in the development and commercialisation of healthcare products.

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14. On 22 July 2003 Analytica announced a proposed one for one scrip takeover bid for all of the ordinary shares in SSH. The Bid was expressed to be subject to a 75% minimum acceptance condition and completion of a rights issue in Analytica to raise \$3 million.
15. On 20 August 2003 SSH announced that it proposed to raise capital by way of three transactions (**Capital Raisings**). These comprised: a \$1 million issue of converting notes to Macquarie Health Corporation Limited (**Macquarie Health**)¹; a \$2 million debt facility with an undisclosed investor; and a \$0.5 million debt raising with Macquarie Health. Only the first of these transactions was announced to be subject to SSH shareholder approval, as required under Listing Rule 7.9 (*Issues under a takeover offer or takeover announcement*).
16. Analytica served its Bidder's Statement on SSH on 22 August 2003.
17. The Bidder's Statement expressed the Bid to be subject to a large number of conditions of which the market was not informed when the Bid was announced (**Additional Conditions**). The Additional Conditions are summarised below:
 - (a) that the Bid either not be opposed by, or receive informal clearance from, the Australian Competition and Consumer Commission;
 - (b) that the US Department of Justice or Federal Trade Commission give effective approval to the merger under the US antitrust legislation;
 - (c) that all regulatory approvals required in connection with the Bid be obtained and that there be no regulatory intervention which could impede the Bid;
 - (d) that the directors of SSH provide the following accounting information in the Target's Statement:
 - (i) a statement of SSH's cash position as at 31 August 2003; and
 - (ii) an earnings confirmation for each of 2000/01, 2001/02 and 2002/03;
 - (iii) a statement that there were no liabilities not disclosed in SSH's 30 June 2002 accounts;
 - (e) that no rights under agreements to which SSH was party be exercised to call in loans, terminate joint ventures etc;
 - (f) that there be no material adverse change in either SSH or Analytica;

¹ Macquarie Health is not related to Macquarie Bank Limited, or the latter company's related entities.

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- (g) that there be no material adverse change in financial markets that could adversely affect the availability of the 'Facilities';
 - (h) that SSH not make any material acquisitions or disposals; and
 - (i) that the S&P ASX 200 Index not fall below 3000 points.
18. The reasons for the inclusion of some of these conditions was unclear. For example, it was unclear why the Bid was subject to receiving approval from the US antitrust authorities. The approval did not seem applicable, and Analytica had stated in another part of the Bidder's Statement that it did not believe that it needed to seek approval from the relevant US authorities. Similarly, the condition in paragraph 17(g) was unclear; the term 'Facilities' did not otherwise appear in the Bidder's Statement and, furthermore, the Bid was a scrip bid.
19. On 27 August 2003 SSH contacted Analytica advising of various concerns it had with the Bid. The parties attempted to resolve their differences between 27 and 29 August. However, ultimately SSH applied to us for a declaration of unacceptable circumstances on 1 September 2003.

The Application

20. The Applicant submitted that unacceptable circumstances arose, amongst other things, as a result of:
- (a) the Additional Conditions being included in the Bidder's Statement, contrary to ASIC's stated policy in Practice Note 59 and seemingly in breach of section 631 of the Act;
 - (b) other deficiencies in the Bidder's Statement, including misleading statements and omissions of information required by the Act, including information concerning Analytica's prospects and the risks involved in accepting the offers made under the Bid; and
 - (c) uncertainties regarding the validity of the manner of acquisition of Psiron's 44.6% shareholding in Analytica.

Chronology of events after Application made

21. Before deciding whether to conduct proceedings, we invited SSH and Analytica to attempt to resolve between themselves the issues raised in the Application and to revert to us by 4.00pm on 5 September 2003. Following a request from the parties, this time was extended until 4.00pm on 9 September 2003.
22. On 9 September 2003 SSH and Analytica advised us that they had been unable to reach agreement on many of the issues raised in the Application. For example, Analytica did not appear willing to drop a significant number of the Additional Conditions. At 3.15pm on 10 September 2003 we informed the parties that we had decided to commence proceedings.

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23. At or around 5.00pm on 10 September 2003, Analytica announced to the ASX that it was withdrawing the Bid (**Withdrawal**). It stated that the Bid would have been futile because both the prescribed occurrence condition and the material adverse change condition would have been breached by the Capital Raisings. Analytica had not informed the market of these conditions when it announced the Bid.
24. Analytica also informed us that it had reason to believe that the minimum acceptance condition in its Bid would not be fulfilled.
25. At or about the same time that Analytica announced the Withdrawal we received a letter from SSH applying for consent to withdraw the Application, including the application for costs. This letter stated:

“SSH believes that no useful purpose would be served in continuing with proceedings, as they relate to a Bidder’s Statement that will now not be despatched to shareholders. Likewise, withdrawal of the bid will have the effect that the unacceptable circumstances alleged by SSH will cease to occur.”

Panel’s request for information

26. On 11 September we wrote to Analytica and SSH requesting certain information to assist us to determine whether we should consent to SSH's request to withdraw its Application.
27. We requested that each of SSH and Analytica provide us with a formal statement, to which section 199 of the ASIC Act applied, setting out the substance of all discussions between representatives of SSH, Analytica and Psiron and their respective advisers in the period between 9am 9 September 2003 until the time that Analytica announced the Withdrawal to ASX.
28. In addition, we asked the parties to inform us if any relevant agreements (as defined in section 9 of the Corporations Act) had arisen from, or were connected with, those discussions between any or all of SSH, Analytica and Psiron and their respective associates.

Responses to the Panel’s request

29. On 11 and 12 September SSH and Analytica respectively provided formal statements to the Panel. These stated that there were no relevant agreements between any of them, Psiron, and their respective associates other than an agreement that, if Analytica withdrew its Bid, SSH would withdraw its Application and would not support any application by ASIC for an order that Analytica proceed with the Bid.
30. The parties had attempted to negotiate the sale of a division of SSH’s business to Analytica over the relevant time period. However, those negotiations were unsuccessful.

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31. The Managing Director of SSH stated that SSH had resolved to accept Analytica's offer of Withdrawal as it considered that the Bid was not in the best interests of SSH shareholders. SSH further believed that Withdrawal would relieve SSH of the unnecessary expense of preparing and mailing a Target's Statement, and other administrative and advisory costs.

Panel considerations on withdrawal of Application

32. Rule 14 of the Panel's Rules for Proceeding (**Rules**) only permits a party to withdraw its application with the Panel's consent.
33. As stated in paragraph 5.13 of the Panel's Guidance Note entitled 'Restraining the Dispatch of Documents' the Panel encourages parties to reach an agreed resolution wherever possible. The Panel will generally grant leave to the applicant to withdraw its application if it is satisfied that the agreed resolution is consistent with the principles set out in sections 602 and 657A(3) of the Act. The Panel may refuse leave to withdraw an application if it has reason to suspect that unacceptable circumstances will continue or will occur.
34. The withdrawal of an application always raises the question of whether there remain issues in the matter which need to be dealt with in the interests of the public, the market in the relevant company's shares or the holders of those shares. This concern is particularly relevant where the withdrawal results from an agreement under which a party receives a private benefit.
35. In the current matter, we received statements under section 199 of the ASIC Act from SSH and Analytica which stated expressly that neither had given the other a significant private benefit in connection with the withdrawal of the Application or the Bid. We have no reason to doubt these statements.
36. The alleged unacceptable circumstances identified in the Application related to the Bid being made. We had no reason to suspect that the alleged unacceptable circumstances would continue in light of Analytica announcing that it did not propose to make offers under the Bid. The Withdrawal further resulted in the orders requested by SSH becoming redundant.
37. ASIC informed us on 12 September 2003 that it did not seek to make any submissions on the Withdrawal. However, ASIC referred to Analytica's reasons for the Withdrawal and noted that a person breaches the Act where they do not make offers under a bid within two months after announcing the bid, unless the person could not reasonably have been required to proceed with the bid as announced, because of events occurring, or information disclosed, after the announcement.

Relevant provisions of the Act

38. Section 631(1) provides that a person who publicly proposes to make a takeover bid for securities in a company contravenes that subsection unless they make

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offers for the securities under a takeover bid within two months after the proposal. The terms and conditions of the bid must be the same as, or not substantially less favourable than, those in the public announcement. Section 631(1A) provides that breach of section 631(1) is a strict liability offence.

39. Section 670F provides that a person does not commit an offence under subsection 631(1) and is not liable under section 670E to private persons who incur loss as a result of the impugned conduct if the person proves that they could not reasonably have been expected to comply with that subsection because:
- (a) at the time of the proposal or announcement, circumstances existed that the person did not know of, and could not reasonably have been expected to know; or
 - (b) after the proposal or announcement, a change in circumstances occurred that was not caused, directly or indirectly, by the person.

Relevant policy underlying legislation

40. As the Panel's decisions in the matters of *Brisbane Broncos 01 and 02*² and *Brisbane Broncos 03*³ and *Realestate.com.au Ltd*⁴ make clear, the Panel takes compliance with section 631 very seriously.
41. Section 631 is central to the scheme of Chapter 6, for breach of which there are substantial penalties. The announcement of a bid may lead to a false market in shares in the target (and perhaps of the bidder) if a bid is not made as announced. A breach of the section tends directly to defeat the principle in paragraph 602(a) of the Act that acquisitions of shares in companies should take place in an efficient, competitive and informed market.
42. As stated in the Panel's decision in *Brisbane Broncos 03*⁵:
- 39. The policy of section 631 is to promote certainty and confidence in the market for control of Australian companies, by preventing bids being announced and not subsequently followed through with without good reason. Takeovers are very significant events in securities markets, and the announcement of a takeover offer will usually be significant for the price of the relevant securities.*
- 40. The intent of section 631 is to allow shareholders and investors to act on statements with confidence that persons who make statements to the market will follow through*

² *Brisbane Broncos Ltd (No 1) & (No 2)* [2002] ATP 1

³ *Brisbane Broncos Ltd (No 3)* [2002] ATP 3

⁴ *Realestate.com.au Ltd* [2001] ATP 1

⁵ [2002] ATP 3 at [39]-[41]

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with what they have announced. The absence of such confidence is likely to decrease the efficiency of capital markets in Australia.

41. The Panel considers that this is one of the fundamental principles in Australian takeovers regulation, and that it must take action to prevent, or repair the effect of, statements or actions which detract from that policy intention, whether they were deliberate or inadvertent.

43. *Brisbane Broncos 01 and 02⁶* sets out in detail the policy underlying sections 631 and 670F of the Act, as well as relevant case law on the sections (and their predecessors).
44. The facts required to be found before section 670F operates indicate that the principles behind section 630(1) are to be balanced against the mischief to the bidder resulting from new (or newly disclosed) circumstances and any contribution of the bidder to those circumstances or failure to discover them. The bidder must show that it would be unreasonable to expect it to proceed with its announced bid. The reversed onus and the strong expression "would not be reasonable" indicate that the bidder must make out a strong case, both that it:
- (a) would be prejudiced by having to proceed with the bid; and
 - (b) had not voluntarily assumed the risk of that prejudice by:
 - (i) contributing to the triggering event;
 - (ii) failing to inquire into the risk that it would occur; or
 - (iii) failing to protect itself by making its bid conditional on the relevant events not occurring.

Panel considerations in the present matter

45. Although we were not required to reach a formal decision on the matter, we note that the inclusion in the Bidder's Statement of the Additional Conditions, the Withdrawal and the fact that the Withdrawal was not announced until three weeks after the Capital Raisings, on which it purported to be based, had raised substantial issues about compliance with section 631(1).
46. We accept that a bidder may usually add a prescribed occurrence condition to its Bidder's Statement that was not mentioned in its announcement, unless it has expressly stated there will not be one. This is consistent with Santow J's

⁶ *Brisbane Broncos Ltd (No 1) & (No 2)* [2002] ATP 1 at [13]-[22]

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judgment in *Boral Energy Resources Ltd v TU Australia (Queensland) Pty Ltd*⁷ and ASIC Practice Note 59.⁸

47. Similarly the inclusion of a narrowly drafted condition that the bid is conditional on the absence of intervention by a regulatory body may be inoffensive. The relevant regulatory body would have been able to take such action irrespective of whether the condition was included; therefore, inclusion of such a condition *in itself* does not amount to the inclusion of a term or condition which makes a bid less likely to succeed. The Panel notes, however, that failure to inform the market of such a condition when a bid is announced may mislead the market to assume that no regulatory approvals are required, thereby frustrating the principle that bids be made in efficient, competitive and informed markets. This may of itself lead to liability for misleading and deceptive conduct.
48. In the current case, the Additional Conditions raised concerns either because they made the Bid liable to fail in ways not foreshadowed in the announcement of 22 July, or because they were confusing in the context of the Bid.
49. Further, we were not positively satisfied from Analytica's public announcement of the Withdrawal and its limited submissions to us on the matter that Analytica met the standards imposed by section 670F.
50. We urge bidders and persons contemplating material transactions involving public companies to obtain sufficient legal advice in advance of announcing such transactions to the market.
51. However, the continuation of the current proceedings could not result in an order under which the Bid would result in offers being made, as there was no application for an order having that effect. The only application was for an order restraining dispatch of the Bid, until and unless it was made on the right terms and with proper disclosure. Nobody applied for an order that offers be made on the terms announced.⁹ The Panel does not have jurisdiction to require compliance with section 631.

DECISION

52. In the absence of any submissions objecting to the withdrawal, we considered that, SSH's request for consent having arisen from negotiations in good faith aimed at resolving the issues between the commercial parties, we should consent to SSH withdrawing the Application and accordingly gave that consent

⁷ (1998) 28 ACSR 1.

⁸ ASIC Practice Note 59 'Announcing and withdrawing takeover bids' paras 59.37 and 59.57.

⁹ We note, but do not comment on, the limitation in subsection 657D(2) on the Panel's power to make orders "directing a person to comply with a requirement of Chapter 6, 6A, 6B or 6C".

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under Procedural Rule 14. We note that ASIC has reserved its rights in relation to this matter.

Orders

53. We made no final orders.

Legal representation

54. We consented to the parties being legally represented by their commercial lawyers in the Proceedings.

Braddon Jolley

President of the Sitting Panel

Decision dated 22 September 2003

Reasons published 15 October 2003