



**In the matter of Volante Group Limited
[2006] ATP 2**

Catchwords:

content of bidder's statement; due diligence condition; material change condition; defeating conditions; frustrating action; informed market; efficient market; application dismissed; undertaking; undertaking not to despatch bidder's statement;

Corporations Act 2001 (Cth), sections 631, 633(1), 636(3)(b), 657C, 657E, 1043A(2)

Goodman Fielder 01 [2003] ATP 01

Anaconda 03 [2003] ATP 04

Guidance Note 12

Guidance Note 16

ASIC Practice Note 55

ASIC Policy Statement 159

ASIC Class Order CO 03/635

ASIC Information Release IR 05-04

These are the Panel's reasons for accepting an undertaking by Commander Corporation Pty Limited (Commander) to dispatch a supplementary bidder's statement and not conducting proceedings in relation to an application by Volante Group Limited (Volante).

THE PROCEEDINGS

1. These reasons relate to an application (the **Application**) to the Panel by Volante on 6 January 2006 under section 657C¹ in relation to the proposed takeover offer by Commander announced on 23 December 2005 (**Offer**).

THE PANEL & PROCESS

2. The President of the Panel appointed Nerolie Withnall (sitting President), Jeremy Schultz (sitting Deputy President) and Simon Withers as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the Application.
3. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.
4. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

SUMMARY

Volante

5. Volante is a company listed on the Australian Stock Exchange Ltd ("**ASX**"). It is an Australian-owned information and communications technology infrastructure and services company.

¹ Statutory references in this letter are to the Corporations Act, unless expressly stated.

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Commander

6. Commander is a subsidiary of Commander Communications Limited (“CCL”), which is listed on ASX and provides telecommunication services (fixed line, mobile, data and hardware) and computer services (PCs, servers, software, outsourcing) to small business and corporate customers throughout Australia.

Decision

7. The Panel was concerned that the original bidder’s statement contained a number of errors (as agreed by Commander) and had not been prepared with the highest standards of care and accuracy. The Panel decided that all of the issues raised in the application relating to errors in the original bidder’s statement or announcement could suitably be dealt with by a supplementary bidder’s statement dispatched with the original bidder’s statement, and that the draft supplementary bidder’s statement tendered by Commander would be sufficient, with some refinements requested by the Panel and accepted by Commander. On Commander undertaking to issue such a supplementary bidder’s statement, the Panel declined to commence proceedings in response to the Application. The Panel did not accept that the issues raised in the Application relating to the defeating conditions of the bid and to consent to cite providers of ASX prices would have merited a declaration of unacceptable circumstances.

APPLICATION

Background

8. Commander announced on 23 December 2005 a cash bid for Volante at \$1.01 per share, subject to a number of defeating conditions. Commander lodged its bidder’s statement with the Australian Securities & Investments Commission (“ASIC”) on 23 December 2005 (“**Original Bidder’s Statement**”).
9. On 4 and 5 January 2006, Volante’s solicitors drew to Commander’s attention the errors in the bidder’s statement and in the 23 December 2005 announcement which are mentioned below. They had not obtained a satisfactory resolution of those issues on 6 January 2006, when they made the Application. The first day on which Commander was entitled to dispatch offers was 7 January 2006.

Declaration and orders sought in the Application

10. In summary, the Application alleged the following in relation to the Original Bidder’s Statement:
 - (a) the Original Bidder’s Statement contained a number of deficiencies which are materially misleading and inconsistent with the principles that the acquisition of control of Volante takes place in a correctly informed market and that the offerees be given the necessary information to enable them to assess the merits of the Offer. The deficiencies alleged by Volante included:
 - (i) the compound average growth rate numbers shown in the chart in section 2(a) on page 3 of the Original Bidder’s Statement had been incorrectly calculated in that they were based on 2 years of compounding rather than the stated 3 year timeframe from December 2002 to December 2005;

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- (ii) the EBIT and EBITDA figures included in the table in section 3.3 of the Original Bidder's Statement were incorrect. EBIT figures were the "Profit from ordinary activities before income tax expense" figures from Volante's annual report, not the EBIT figures. EBITDA figures were calculated by adding back the depreciation and amortisation charge to the "Profit from ordinary activities before income tax expense" figures rather than adding back to EBIT; and
 - (iii) Commander had breached section 636(3)(b) by not obtaining the consent of IRESS or Bloomberg for the inclusion of certain information on pages 1, 2 and 3 of the Bidder's Statement; and
 - (b) the defeating conditions of the Offer contained in clauses 7.1(i) and 7.1(e) of Annexure A of the Original Bidder's Statement were inconsistent with the principles that the acquisition of control of Volante take place in an efficient and competitive market (in the case of clause 7.1(i)) and an efficient and correctly informed market (in the case of clause 7.1(e)).
11. Volante submitted that each of the above constituted unacceptable circumstances in relation to the affairs of Volante, which first occurred upon the lodgement of the Original Bidder's Statement on 23 December 2005 and which would continue until the relevant deficiencies were corrected and the relevant defeating conditions were waived by Commander.

Interim orders sought in the Application

12. Volante sought an interim order pursuant to section 657E that Commander delay the despatch of its Original Bidder's Statement to Volante shareholders until the deficiencies in the Original Bidder's Statement identified in its Application had been corrected.
13. The Original Bidder's Statement had been lodged with ASIC and served on Volante on 23 December 2005. Under item 5 of the table in subsection 633(1), a bidder must lodge a bidder's statement within 14-28 days before the bidder's statement is sent to offeree shareholders. As such, unless the interim relief was granted, the Panel proceedings were unlikely to be determined until after the date by which Commander was able to despatch its bidder's statement to Volante shareholders, being between 6 January 2006 and 20 January 2006.

Final orders sought in the Application

14. Volante sought the following final orders:
- (a) that Commander:
 - (i) correct the deficiencies in the Original Bidder's Statement that Volante had identified in its Application in the manner set out in its Application, stating clearly and prominently the deficiencies in the version of the Original Bidder's Statement lodged on 23 December 2005 and setting out clearly the corrected information;
 - (ii) give Volante and the Panel a printer's proof of the corrected bidder's statement showing all art work and design features as well as the relevant

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text, not less than two business days before it is sent to Volante shareholders under section 633(1) item 6 and may not send the bidder's statement in purported compliance with that section until Volante and the Panel had informed Commander that the form of the statement is considered by Volante and the Panel to be appropriate and to comply with the requested order; and

- (iii) undertake corrective advertising, substantially in accordance with the terms set out in paragraphs 5 and 6 of the Example Order attached to the Panel's Guidance Note 16; and
- (b) that Commander waive the defeating conditions to the Offer in clauses 7.1(i) and (e) of Annexure A to the Original Bidder's Statement or otherwise delete them as conditions to the Offer; and
- (c) such further or other orders as the Panel considers appropriate.

DISCUSSION

Deficiencies in Bidder's Statement

15. The Panel was concerned that the Original Bidder's Statement had not been prepared with the highest standards of care and accuracy.
16. The Panel considered whether, on the basis that Volante's application was correct in all factual respects, it should order Commander not to despatch the Original Bidder's Statement. One factor in favour of stopping the issue of the Original Bidder's Statement was to ensure that Volante shareholders would receive an accurate bidder's statement and have before them only correct information on which to assess the merits of the Offer. However, in this particular matter:
 - (a) Commander had acknowledged the errors which Volante had identified in its Application as detailed in paragraphs 9(a)(i) and (ii). There was no dispute between Commander and Volante as to the fact that the Original Bidder's Statement did contain errors in relation to the chart in section 2(a) on page 3 and the EBIT and EBITDA figures included in the table in section 3.3. The parties were substantively in agreement as to the facts (with a one minor exception being a disagreement between Commander and Volante as to whether EBIT and EBITDA should include interest revenue); and
 - (b) Commander had produced a draft supplementary bidder's statement which the Panel believed addressed Volante's concerns and which the Panel believed required only minor corrections. A supplementary bidder's statement is not the Panel's preferred method of correcting errors in a bidder's statement which has not been sent to target shareholders. However, in these circumstances, the Panel felt that an exception could be made, because:
 - (i) apart from the compound average growth rate numbers shown in the chart in section 2(a) on page 3, the Panel considered that the errors identified by Volante were of relative immateriality and were not individually misleading;

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- (ii) the pattern of errors identified by Volante in the Original Bidder's Statement was indicative of carelessness on behalf of the drafter rather than an attempt to deceive; and
 - (iii) the Panel considered that Commander's offer to correct the errors in the Original Bidder's Statement with the issue of a supplementary bidder's statement would deal with any concerns the Panel had about the target shareholders and the market remaining adequately informed and not being misled by the Original Bidder's Statement.
17. The Panel advised Commander that it would see no need to commence proceedings if Commander made the following refinements in its draft supplementary bidder's statement:
- (a) Commander should set out the reasons why its EBIT and EBITDA figures differed from Volante's EBIT and EBITDA figures. Apart from the numerical error identified by Volante in its Application, there was a difference of opinion between Commander and Volante as to whether EBIT and EBITDA figures should include interest revenue. The Panel did not object to Commander's treatment of interest revenue, but thought that it would be useful for Volante shareholders to be given a brief explanation of this difference of treatment;
 - (b) the supplementary bidder's statement should include a short description at the start explaining that the purpose of the supplementary bidder's statement was to correct errors in the Original Bidder's Statement; and
 - (c) the errors which were being corrected should be identified as "corrections" and not as "amendments" in the supplementary bidder's statement.
18. On Commander advising the Panel that it would include those refinements in its supplementary bidder's statement, the Panel considered that the supplementary bidder's statement allowed the errors identified by Volante to be remedied quickly and cheaply without the expense of conducting proceedings. Accordingly, the Panel accepted the following undertakings from Commander:
- (a) to provide to Volante shareholders, with the Original Bidder's Statement, a copy of a supplementary bidder's statement correcting the numerical errors of which Volante complained, with some refinements requested by the Panel;
 - (b) to publish a replacement bidder's statement on the ASX showing the changes from the corrective supplementary bidder's statement in mark up; and
 - (c) to advise Volante shareholders in the next announcement to the ASX concerning the Offer that Commander would provide a copy of the replacement bidder's statement to a Volante shareholder on request.

Consent from IRESS and Bloomberg

19. Volante alleged Commander had not obtained the consent of Bloomberg and IRESS for information which it had included in the "Why you should accept this Offer" section on pages 1, 2 and 3 of the Original Bidder's Statement. Volante alleged that citing Bloomberg and IRESS as providers of such information without their consent is not permitted by ASIC Class Order 03/635 and that therefore Commander had breached section 636(3)(b).

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20. Commander contended that ASIC Class Order CO 03/635 exempted Commander from the obligation to obtain the prior consent of Bloomberg and IRESS to refer to them in the Original Bidder's Statement. Commander stated that the trading data had been extracted from Bloomberg and IRESS information services which are available in electronic format. Commander considered that this was a book, journal or comparable publication and therefore within the class order. Commander also considered that the trading information used to compile the disclosure was a correct and fair extract from the information supplied by Bloomberg and IRESS. It also referred to the discussion regarding this issue set out in ASIC Policy Statement PS 159 (see paragraphs 159:215 to 159:230 inclusive).
21. The Panel considered that the failure by Commander to obtain consent from Bloomberg and IRESS for the inclusion of the relevant information in the Original Bidder's Statement may have been a breach of section 636(3)(b), particularly in light of ASIC's comments in its information release IR 05-04 (see comments under market data providers). However, the Panel considered that if there had been a breach, it was unlikely to mislead offeree shareholders or the market. As such, the Panel did not regard it as necessary to resolve the issue whether there had been a breach.
22. The Panel notes that a contravention of a provision of Chapter 6 and a declaration of unacceptable circumstances are two separate and distinct questions. A breach of the Corporations Act does not automatically result in a declaration of unacceptable circumstances.

Clause 7.1(e) of Annexure A of the Original Bidder's Statement – "Material Change" condition

23. Clause 7.1(e) outlined the following defeating condition in relation to the Offer:

"(e) during the period commencing on the Announcement Date and ending on the expiry of the Offer Period, no change occurs or is announced that would reasonably be expected to the [sic] affect the capital structure, business, financial or trading position, future profitability, condition of assets or liabilities of Volante or a controlled entity of Volante in a manner which would be material in the context of Volante's operations as a whole."
24. Volante did not submit that this defeating condition was objectionable in itself. However, it submitted that the condition should be waived by Commander or deleted because it was not one of the conditions set out in CCL's announcement of the Offer on 23 December 2005 (**23 December announcement**). A heading in the 23 December announcement referred to a "No material adverse change" condition, but neither the text under that heading nor the relevant condition in the Original Bidder's Statement required any change to be "adverse".
25. Volante submitted that section 631 and paragraph 35 of ASIC Practice Note 59 supported its request for this condition to be waived or deleted. Section 631 states that the terms and conditions of a bid must be the same as, or not substantially less favourable than those in the public proposal announcing the takeover bid. Paragraph 35 of ASIC Practice Note 59 states that a false market in shares of a company will arise if the offeror can add other conditions later to its bid which were not specified in the public announcement of the bid.

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26. The Panel noted that the word “adverse” had only been included in the heading to the “material change” condition in the 23 December announcement and not in the description of the “material change” condition itself. Accordingly, it was unlikely to have deceived the market. The Panel considered that the error identified by Volante was again further evidence of carelessness on behalf of the drafter of the Original Bidder’s Statement and not an attempt to deceive. The Panel considered that an appropriate remedy was for Commander to clarify that this condition was not subject to any requirement that the relevant change in circumstances be adverse to the interests of Volante shareholders i.e. the condition did not include the word “adverse”. The Panel was willing to allow Commander to either clarify this in the supplementary bidder's statement or in the next announcement it lodges with the ASX. The Panel notes that a “material change” condition may be unique but that it is not uncommon for takeover bids to be subject to a condition that the target not enter into a material transaction, without stipulating that the transaction be adverse.
27. The Panel obtained from Commander an undertaking that it would clarify (in its next announcement to the ASX concerning the Offer) any confusion arising from the 23 December announcement of its Offer in which the word “adverse” was carelessly and incorrectly included in the heading of the paragraph describing the “material changes” defeating condition in the Offer.

Clause 7.1(i) of Annexure A of the Original Bidder’s Statement – “No selective disclosure of information” condition

28. Clause 7.1(i) set out the following defeating condition in relation to the Offer:

“(i) at all times during the period from the Announcement Date to the end of the Offer Period, Volante promptly (and in any event within 2 Business Days) provides to Commander a copy of all information that is not generally available (within the meaning of the Corporations Act) relating to Volante or any controlled entity of Volante or any of their respective businesses or operations that has been provided by Volante or any of their respective officers, employees, advisers or agents to any person (other than Commander) for the purposes of soliciting, encouraging or facilitating a proposal or offer by that person, or by any other person, in relation to a transaction under which:

(i) any person (together with its Associates) may acquire Voting Power of 10% or more in Volante or any controlled entity of Volante (whether by way of takeover bid, compromise or arrangement under Part 5.1 of the Corporations Act or otherwise);

(ii) any person may acquire, directly or indirectly (including by way of joint venture, dual listed company structure or otherwise), any interest in all or a substantial part of the business or assets of Volante or any controlled entity of Volante; or

(iii) that person may otherwise acquire control or merge or amalgamate with Volante or any controlled entity of Volante.”

29. Volante alleged that the inclusion of such a defeating condition to the Offer constituted unacceptable circumstances on the basis that:

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- (a) the condition attempted to unilaterally impose a ‘lock-up’ device which had a significant anti-competitive effect on potential rival bidders. In order to comply with the condition Volante would effectively be required to notify Commander that a potential competing bidder was considering making an offer to Volante shareholders and provide the same information to Commander that was provided to a competing bidder conducting due diligence. Volante would be unlikely to obtain the interest of any potential competing bidders if it was not able to provide confidentiality and/or exclusivity;
 - (b) compliance with the condition would require Volante to breach the requirements of the inside information “tipping” prohibition in section 1043A(2); and
 - (c) compliance with the condition may result in the directors of Volante breaching their fiduciary duties in that they may be required to disclose confidential information to Commander without any undertaking from Commander to preserve the confidentiality of that information and without any ability to otherwise control the use and disclosure of the information. This was contrary to the interests of Volante and its shareholders.
30. The Panel considered that Commander was free to make its bid subject to such a condition if it believed that it needed the type of assurances in the condition. As such, the Panel decided that the “No selective disclosure of information” condition was not unacceptable.
31. The Panel did not agree with Volante’s concerns with the condition, to the extent that they were premised on its being obliged to comply with the condition. Consistent with the decisions in relation to the “Accounting Conditions” in *Goodman Fielder 01*² proceedings and the “Independent Expert Condition” in *Anaconda 03*³ proceedings, the Panel decided that while Commander was entitled to make its Offer subject to such a condition, Volante was not under any additional obligation, in general or in particular circumstances, to disclose any or particular information merely because a bidder has chosen to make its bid subject to such a condition. The condition does not compel the directors of Volante to give Commander any information which it disclosed to another potential bidder. If the directors of Volante chose not to comply with this condition, this would not constitute a “triggering action” (as defined in Guidance Note 12 – Frustrating Action). The Panel considered that the Volante directors were obliged to consider carefully whether or not to provide such information to Commander, but their decision will be influenced by a range of issues. Those issues may include contractual obligations to third parties, confidentiality and other undertakings proffered by Commander, as well as the value that may be lost to the shareholders if an offer fails because the Volante directors decline to provide such information and Commander decides to rely on the defeating condition and withdraw its bid.
32. The Panel appreciates the force of Volante’s concern that provision of confidential information to a person proposing to make a bid may technically contravene the

² See [2003] ATP 01

³ See In the matter of Anaconda Nickel Limited 02-05 [2003] ATP 04

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tipping prohibition, but notes that this is not a problem specific to this condition, but a generic issue about provision of confidential information to intending bidders, and that many companies have adopted protocols to manage the technical and substantive risks involved.

DECISION

Interim Relief

33. In response to Volante's request for an interim order delaying despatch of the Original Bidder's Statement, the Panel sought and received from Commander an undertaking not to despatch the Original Bidder's Statement without the prior consent of the Panel. This undertaking was given by Commander on 6 January 2006. As a result, the Panel did not need to make the interim order requested by Volante.

Final Relief

34. On the basis of undertakings from Commander as follows, under Regulation 20 of the Australian Securities and Investments Commission Regulations 2001 the Panel declined to commence proceedings in response to the Application and released Commander from its undertaking that it would not despatch its bidder's statement without the prior consent of the Panel. The undertakings are:
- (a) provide to Volante shareholders, with the Original Bidder's Statement, a copy of a supplementary bidder's statement correcting the numerical errors of which Volante had complained, with some refinements requested by the Panel;
 - (b) publish a replacement bidder's statement on the ASX showing the changes from the supplementary bidder's statement;
 - (c) advise Volante shareholders in its next announcement to the ASX concerning the Offer that Commander will provide a copy of the replacement bidder's statement to Volante shareholders on request; and
 - (d) clarify (with its next announcement to the ASX concerning its Offer for Volante) any confusion arising from the 23 December 2005 announcement of its Offer in which the word "adverse" was incorrectly included in the heading of the paragraph describing the "material changes" defeating clause in Commander's Offer.

Orders

35. As the Panel had made no declaration of unacceptable circumstances, it made no orders as to costs or otherwise.

Nerolie Withnall

President of the Sitting Panel

Decision dated 9 January 2006

Reasons published 12 January 2006