



**In the matter of Volante Group Limited 02
[2006] ATP 7**

Catchwords:

acquisition of business; assumptions; declined application; disclosure in target's statement; forecasts; inconsistent information; independent expert report; misleading announcements to the market; misleading information; preferred tenderer; reasonable for investors and their professional advisers to expect; supplementary target's statement; undertaking to the Panel valuation; working capital requirements

Corporations Act 2001 (Cth), section 602(b)(iii), 638(1), 670A
ASIC Policy Statement 75
Guidance Note 16

These are the Panel's reasons for declining an application by Commander in relation to Volante's target's statement. The Panel considered that an undertaking from Volante to make additional disclosure about a number of issues, including its success in converting "preferred tenderer" status to confirmed contracts, and clarification concerning the proposed acquisition of a business, would correct any unacceptable circumstances as a result of Volante's target's statement.

SUMMARY

1. Volante Group Limited (**Volante**) was subject to a takeover bid by Commander Corporation Pty Limited (**Commander**), a subsidiary of Commander Communications Limited.
2. In response to Commander's bidder's statement, Volante lodged its target's statement (**Target's Statement**). In the Target's Statement Volante had referred to a "large Managed Services contract" which was currently under negotiation but for which Volante had been named preferred tenderer. Volante gave revenue projections which assumed this contract would be obtained and Lonergan Edwards, the independent expert, valued the company on the basis of these projections but Volante had not given adequate information relating to this contract to allow Volante shareholders and Commander to make a properly informed assessment of the effect on the value of Volante of securing or not securing this "large Managed Services contract".
3. Commander asserted that Volante had made inadequate disclosure in relation to the Managed Services contract, especially in giving forecasts which only assumed that Volante secured the contract and did not give any information or sensitivity analysis in the event that Volante did not secure the Managed Services contract.
4. In addition, Commander submitted that Volante had disclosed information to a journalist in relation to:
 - (a) the fact that Volante was the preferred supplier for 50% of the contract currently under negotiation with the DCSS;
 - (b) the South Australian government had invited 2 other tenderers to "return to the table" to bid for the remainder of that contract; and
 - (c) the proposed acquisition of a business by Volante,

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and that that information was either misleading itself, or should have been disclosed in the Target's Statement.

5. On the basis of undertakings from Volante and Lonergan Edwards (which provided an expert's report to accompany the Volante target's statement) to provide additional disclosure the Panel declined the Application. The reasons for the Panel declining to make a declaration of unacceptable circumstances were:
 - (a) Volante undertaking to the Panel to include in a supplementary target's statement the following information:
 - (i) a statement regarding the Volante directors' reasons for considering that adequate disclosure to Volante shareholders did not require inclusion of a FY 2007 forecast excluding revenue for that part of the South Australian Government's Distributed Computer Support Services procurement (**DCSS Contract**) for which Volante had been awarded preferred supplier status;
 - (ii) a statement of Volante's knowledge of whether or not it was the only preferred supplier for part of the DCSS Contract for which it has been awarded "preferred supplier" status;
 - (iii) a statement explaining, or reconciling, in a consistent fashion the different acquisition prices used in the an article published in the Australian Financial Review on 1 February 2006 and the media release lodged with the ASX dated 3 February 2006 relating to the Acquisition;
 - (iv) a statement explaining that Volante considered that it would not require any material increase in working capital as a result of the new contracts Volante had recently won or had been awarded "preferred supplier" status, or the Acquisition; and
 - (b) Lonergan Edwards undertaking to the Panel to include, or consent to the inclusion, in a supplementary target's statement:
 - (i) Lonergan Edwards' basis for considering that a FY 2007 forecast excluding revenue for the DCSS Contract was not material information for a Volante shareholder considering Lonergan Edwards' report.; and
 - (ii) a clear explanation for Volante shareholders of the adjustments Lonergan Edwards made to the FY 2007 forecast to produce the normalised FY 2007 forecast.
6. The Panel considered that the additional information in paragraph 5 above was information which the Volante shareholders required to make an informed decision with respect to the takeover offer by Commander, and that that information had not been given to Volante shareholders in the original target's statement. However, following an undertaking from Volante to dispatch a supplementary target's statement to its shareholders containing the Panel considered that there was no real likelihood that the deficiencies that Commander submitted existed in the Target's Statement would constitute unacceptable circumstances having regard to the effect of them on:
 - (a) the control or potential control of Volante; or

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- (b) the acquisition, or proposed acquisition, of a substantial interest by Commander.

THE PROCEEDINGS

7. These reasons relate to an application (the **Application**) to the Panel from Commander on 3 February 2006 in relation to the affairs of Volante.

THE PANEL & PROCESS

8. The President of the Panel appointed Louise McBride, Simon Withers and Nerolie Withnall (sitting President) as the sitting Panel for the proceedings (**Proceedings**) arising from the Application.
9. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.
10. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

APPLICATION

Background

11. On 23 December 2005, Commander announced a takeover offer for all the issued shares in Volante (**Offer**), and lodged with the Australian Securities and Investments Commission (**ASIC**), filed with Australian Stock Exchange Limited (**ASX**) and served on Volante a bidder's statement in relation to the Offer.
12. On 25 January 2006, Volante lodged with ASIC, filed with ASX, served on Commander its Target's Statement in response to the bidder's statement and sent the Target's Statement to Volante shareholders. The Target's Statement contained an independent expert's report by Lonergan Edwards.
13. On 1 February 2006, an article (**Article**) was published in the Australian Financial Review (**AFR**) which reported information disclosed in an interview with Mr Ian Penman, Volante's chief executive officer. The article, amongst other things, reported Mr Penman as saying that Volante was *"working towards an acquisition of its own, worth up to \$10 million, in line with business plans discussed when it handed down its full-year results in September last year."*

The Application

14. The issues that Commander alleged in relation to the Target's Statement, the independent expert report contained in the Target's Statement and the Article are set out in the Application. Briefly, they are as follows:
- (a) Volante had referred to a "large Managed Services contract" in the Target's Statement which was currently under negotiation but for which it had been named preferred tenderer. Volante gave revenue projections for FY2007 which assumed this contract would be obtained and Lonergan Edwards', the independent expert, valued the company on the basis of these projections. However, Commander submitted, Volante had not given adequate information relating to this contract to allow Volante shareholders and Commander to make

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a properly informed assessment of the effect on the value of Volante of securing or not securing this “large Managed Services contract”. Commander had assumed that the contract in question was the contract in relation to the DCSS Contract. Commander alleged that the omission of this information rendered the Target’s Statement misleading. Commander also alleged that the failure of Lonergan Edwards to include any qualification as to the use of management forecasts, which included revenue from the DCSS Contract, was also misleading; and

- (b) Volante should give additional disclosure, or clarification, on the following issues:
- (i) Volante had referred to the potential acquisition of another company or business (**Acquisition**) by Volante in the Target’s Statement but had given inadequate (or potentially conflicting) disclosure relating to the Acquisition to allow Volante shareholders to make a properly informed decision of the value of Volante;
 - (ii) Mr Ian Penman had disclosed information to a journalist of the AFR subsequently published in the Article. Commander stated that a number of statements contained in the Article were misleading in that they provided incomplete information in relation to a number of issues raised in the Target’s Statement and were confusing or inconsistent when compared to the disclosure in the Target’s Statement or in Volante’s ASX announcement of 3 February 2006. Commander submitted that Volante should issue further clarification by way of lodgement of a supplementary target’s statement in relation to these statements; and
 - (iii) the working capital requirements of Volante in servicing the DCSS Contract and the Acquisition.

Declarations sought

15. Commander sought a declaration under section 657A that:

- (a) the deficiencies in the Target's Statement identified in the Application:
 - (i) were materially misleading and inconsistent with the principles that the acquisition of control of Volante should take place in a correctly informed market and that Volante shareholders and the market should be given the necessary information to enable them to assess the merits of the Offer; and
 - (ii) constituted unacceptable circumstances in relation to the affairs of Volante, which first occurred upon lodgement of the Target's Statement on 25 January 2006 and which would continue until the relevant deficiencies were corrected; and
- (b) the selective disclosure of information regarding Volante to a journalist of the AFR subsequently published in the Article constituted unacceptable circumstances in relation to the affairs of Volante, which first occurred on publication of that Article on 1 February 2006. The unacceptable circumstances would continue until disclosure of that information, and additional information

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necessary to ensure that the information and the Target's Statement are not misleading, was made in a supplementary target's statement.

Final orders sought

16. Commander sought final orders under section 657D:
 - (a) that Volante:
 - (i) correct the deficiencies in the Target's Statement identified in the Application and confirm or correct the information reported regarding Volante in the Article in a supplementary target's statement, stating clearly and prominently the deficiencies in the version of the Target's Statement lodged on 25 January 2006 and setting out clearly the accurate information;
 - (ii) give Commander and the Panel a printer's proof of the supplementary target's statement showing all art work and design features as well as the relevant text, not less than 2 business days before it was lodged with ASIC, filed with ASX and sent to Commander under sections 647(2) and (3) and not lodge, file and send the supplementary target's statement in purported compliance with that section until Commander and the Panel had informed Volante that the form of the statement was considered by Commander and the Panel to be appropriate and to comply with this order;
 - (iii) send a copy of the supplementary target's statement to Volante shareholders; and
 - (iv) undertake corrective advertising; and
 - (b) such further or other orders as the Panel considers appropriate.

Undertakings

17. Volante sought an undertaking from Commander prior to any deliberations by the Panel in relation to this matter that:
 - (a) Commander not make any direct or indirect reference to the DCSS Contract, the South Australian Government or any other Volante contract in any ASX announcement or media release; and
 - (b) Commander undertake not to contact the South Australian Government, any customer of Volante or any representative thereof for the purposes of discussing or in any way referring to any Volante contracts.

DISCUSSION

DCSS Contract

18. Commander, in its Application, submitted that given the apparent materiality of the DCSS Contract to Volante's future performance and value, and the fact that Volante had not yet entered into a firm contract with the South Australian Government, Volante had made inadequate disclosure to its shareholders in the Target's Statement concerning the DCSS Contract.

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19. Commander submitted that to properly assess the revenue and earnings forecasts for the 2007 financial year included in the Target's Statement and the resulting valuation of the Volante shares, Volante shareholders would require additional disclosure about the following issues:
 - (a) a sensitivity analysis illustrating the effect on the forecasts and valuation of Volante failing to secure the DCSS Contract;
 - (b) an understanding of the working capital requirements of Volante in servicing this material contract (if awarded);
 - (c) an understanding of the prospects of Volante actually securing the DCSS Contract;
 - (d) an understanding of alternate sources of revenue that may be available to Volante if it was unsuccessful in securing the DCSS Contract; and
 - (e) an understanding of the time frame within which a legally binding contract with the South Australian Government would be entered into and, in particular, whether Volante shareholders would have certainty on this issue prior to the anticipated date for expiry of the Offer.
20. Volante, in response, submitted that no additional disclosure in relation to the DCSS Contract was required. Volante had initially disclosed information concerning the DCSS Contract in a media release lodged with ASX on 20 January 2006. In that disclosure, Volante had included only the revenue from that part of the DCSS Contract for which Volante had been granted "preferred supplier" status in their forecasts. Volante believed that its shareholders should know directors' reasonable expectation of the earnings uplift from a highly probable contract. In Volante's opinion, this was information that Volante's shareholders and their professional advisers would reasonably require to make an informed assessment whether or not to accept the Offer.
21. Volante submitted that the degree of confidence which Volante directors had in relation to finalising the DCSS Contract stemmed from the fact that on all prior occasions when Volante had been selected as preferred supplier for a major managed services contract, it has gone on to successful contract completion.
22. Volante submitted that the additional disclosure which Commander had requested in its Application in relation to the DCSS Contract would single out that contract as being more valuable or important than other opportunities for which Volante was also tendering at the time. In any case, Volante submitted that it was impractical to give such detailed information on the DCSS Contract because to do so would put the DCSS Contract at risk and the South Australian Government had given it strict instructions not to make any further public disclosure in relation to the DCSS Contract.
23. The Panel was sympathetic to Volante's concerns that further disclosure of the details of the DCSS Contract may adversely affect Volante's ability to successfully conclude its current negotiations with the South Australian Government. However, the Panel noted that:

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- (a) one of the key decisions that Volante directors had made in preparing their forecasts was to include all managed services contracts for which Volante had been notified that it was a “preferred supplier”;
 - (b) the Target’s Statement did not include a clear explanation why directors had included “preferred supplier” contracts in their forecasts; and
 - (c) the inclusion of the DCSS Contract, a contract for which Volante had tendered and been named “preferred supplier”, was one of the primary reasons Volante directors had forecast a large increase in the revenue generated from its services division. The DCSS Contract was therefore a material contract for Volante.
24. Volante had disclosed to the Panel that the reason its directors were prepared to include “preferred supplier” contracts in their forecasts, and did not consider that it was appropriate to include a forecast excluding the DCSS revenue, was Volante’s successful track record in concluding such contracts. This information was, however, not included in the Target’s Statement. The Panel believed that Volante’s track record was information required by a Volante shareholder to make the investment decision described in section 638(1). Without this information, a Volante shareholder would not be able to fully understand why directors were including revenue from contracts where Volante has not yet entered into a firm contract and how much weight to put on the projected revenue. Disclosure of this key piece of information would explain to Volante shareholders why the directors believed that the prospect of not securing the DCSS Contract was low.
25. The Panel was satisfied that providing the above information in a supplementary target’s statement to Volante shareholders, would adequately remedy any unacceptable circumstances in relation to the DCSS revenue.
26. The Panel did not believe that Volante should be required to make any additional disclosure concerning the time frame within which a legally binding contract with the South Australian Government would be entered into and, in particular, whether Volante shareholders may have certainty on this issue prior to the anticipated date for expiry of the Offer. The Panel considered that Volante had made reasonable and adequate disclosure concerning timing of contract finalisation. However, timing was an issue which the Panel did not believe was within Volante’s control or which was clear at this stage of the tender process and was subject to too many variables.
27. The Panel decided that the information which Commander submitted Volante should disclose was not information which Volante needed to disclose, Volante shareholders would need to make their investment decisions, or that investors and their advisers would reasonably require or expect to be disclosed. The Panel considered that:
- (a) the Volante directors had taken a reasonable view that the past record of translating “preferred tenderer” status to confirm contracts made the prospect of not gaining the DCSS contract sufficiently small to be immaterial to shareholders’ decisions; and
 - (b) the information Commander sought to be disclosed, would cause Volante and its shareholders unfair harm and that it was not reasonable, nor industry practice, to require disclosure by Volante.

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Normalisation of FY 2007 EBITA forecast

28. The valuation of Volante shares conducted by Lonergan Edwards was based upon a multiple of normalised FY 2007 EBITA forecast. Lonergan Edwards valued each of the businesses of Volante separately using separately derived and adjusted forecast EBITAs and multiples.
29. The Panel notes that Lonergan Edwards clearly explained in paragraph 123 of its independent expert report that it had adopted the normalised FY 2007 EBITA forecast of the Volante services business for its valuation of the services business. However, in the Panel's opinion, that paragraph did not clearly explain the adjustments which Lonergan Edwards made to the directors' FY 2007 EBITA forecast for the services business in order to produce a normalised FY 2007 EBITA forecast. Without this information, a Volante shareholder would not be able to fully understand the valuation basis of the most significant of Volante's businesses.

Acquisition

30. Commander, in its Application, submitted that the disclosure in the Target's Statement in relation to the following issues was misleading and required further clarification by way of a supplementary target's statement. In particular, Commander stated that:
 - (a) there was some inconsistency in the way in which the Acquisition was described on page 22 and pages 41 and 49 of the Target's Statement;
 - (b) that the Volante directors appeared to have taken into account the Acquisition in their forecasts (although this was not entirely clear according to Commander) but had stated on page 49 that Volante had not made a decision on whether to proceed with the Acquisition;
 - (c) it was unclear if there was more than 1 acquisition under consideration; and
 - (d) Volante should have included a sensitivity analysis in relation to the Acquisition.
31. As Volante had announced that it would go ahead with the Acquisition in the Media Release, the Panel did not believe that there needed to be any further clarification in relation to the matters identified in paragraphs 24(a) to (c). Furthermore, the Panel did not believe that a sensitivity analysis of the effect of the acquisition proceeding or not proceeding, on Volante's revenue or EBITA, was necessary as the Media Release had made it clear that Volante was proceeding with the Acquisition.
32. The Panel was, however, concerned with a submission from Commander that the disclosure in relation to the Acquisition in the Article and a Media Release had been inconsistent and would be confusing for Volante shareholders. In particular, the Panel noted that in the Article Mr Penman stated that Volante was "working towards an acquisition of its own, worth up to \$10 million" whereas the Media Release described the Acquisition as being \$5 million (payable in instalments over two financial years) plus additional deferred cash payments dependent on the achievement of various performance hurdles. The Panel believed that such varying statements would confuse shareholders. The Panel agreed that Volante should include a statement in a supplementary target statement explaining in a consistent

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fashion the different numbers used in the Article and the Media Release relating to the Acquisition.

Working capital

33. Commander, in its Application, submitted that Volante should include a description of the working capital requirements that Volante would require to service the DCSS Contract (if awarded) and the Acquisition.
34. Volante advised in its submissions that none of the new contracts included in the directors' forecasts were expected to require any material additional working capital. The Panel believed that this information should be disclosed to Volante shareholders as it was information which Volante shareholders would find useful in assessing the profitability of the new contracts which Volante had secured or could potentially secure, or the Acquisition.

Lonergan Edwards' enquiries

35. The Panel was concerned that Lonergan Edwards had not made adequate disclosure in its independent expert report of the enquiries or examinations it had undertaken to establish reasonable grounds for believing the directors' revenue and earnings forecasts and whether these forecasts had been prepared on a reasonable basis. The Panel did not think that the disclosure in paragraph 40 of the independent expert report was adequate. The Panel believed that Lonergan Edwards should have included in its independent expert report similar information to that provided in its submissions to the Panel which described the enquiries Lonergan Edwards had carried out to establish reasonable grounds that the DCSS Contract is likely to be awarded to Volante on terms consistent with (as a minimum) those reflected in Volante's directors forecasts. Such information would have given Volante shareholders:
 - (a) a better understanding of the checks Lonergan Edwards had undertaken to discharge its obligations as an independent expert¹; and
 - (b) independent information to assess the reasonableness of directors' revenue and earnings forecasts.

DECISION

No Declaration as a result of Undertaking

36. Volante undertook to dispatch a supplementary target's statement to its shareholders containing the additional information described in paragraph 5 which the Panel considered was required by Volante shareholders to make an informed decision with respect to Commander's Offer. Volante provided the Panel with a draft supplementary target's statement incorporating that information.
37. As a result of the additional information which Volante undertook to give to Volante shareholders, the Panel considered that there was no real likelihood that the deficiencies that Commander submitted existed in the Target's Statement would constitute unacceptable circumstances having regard to the effect of them on:

¹ See ASIC Policy Statement 75, paragraph 42.

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- (a) the control or potential control of Volante; or
 - (b) the acquisition, or proposed acquisition, of a substantial interest in Volante by Commander.
38. Therefore, under Regulation 20 of the Australian Securities and Investments Commission Regulations 2001, the Panel accepted the undertaking and declined the Application.

Orders

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

Nerolie Withnall

President of the Sitting Panel

Decision dated 27 February 2006 [the date on which Volante agreed to dispatch the supplementary target's statement]

Reasons published 19 May 2006