



Thursday, 15 June 2006

Tower Software Engineering Pty Ltd -Decision

The Takeovers Panel advises that it has considered the application (**Application**) by Mr Berend Hoff (**Mr Hoff**) in relation to the affairs of Tower Software Engineering Pty Ltd (**Tower**) dated 25 May 2006 (see TP 06/576).

The Panel considers that circumstances exist that would have justified a declaration of unacceptable circumstances in connection with the early dispatch of Pendant Software Pty Ltd's (**Pendant Software**) bidder's statement. However, the Panel decided that the undertakings and further disclosure offered by Pendant Software and Pendant Properties Pty Ltd (**Pendant Properties**) remedied the unacceptable circumstances and accordingly, the Panel declined the Application and has not made a declaration of unacceptable circumstances.

Background

The Application concerned a takeover offer by Pendant Software for Tower, made on 18 April 2006 (**Offer**).

The Offer provided that all Tower shareholders must first comply with the provisions in Tower's constitution granting existing members a pre-emptive right to purchase shares offered for sale (**Pre-emptive Rights Regime**). Prior to the Offer, the Pre-emptive Rights Regime had already been satisfied by one member, Equity Partners One Pty Ltd (**Equity Partners**). As no existing Tower shareholder had elected to acquire all of Equity Partners' shares, Equity Partners had a three month window within which to sell its shares to a non-member (such as the bidder).

At a Tower board meeting held on 18 April 2006:

- (a) Mr Frost, a director of both Tower and Pendant Software, tabled a bidder's statement in relation to the Offer (**Bidder's Statement**); and
- (b) a motion was moved that Tower dispense with the usual 14 day period between giving a bidder's statement to the target and dispatching offers to target shareholders (as provided for under the Corporations Act). This allowed Pendant Software to send the offers and Bidder's Statement to Tower shareholders immediately.

If the Bidder's Statement had been dispatched in accordance with normal 14 day timetable, Equity Partners' window within which it could accept the Offer (before having to re-comply with the Pre-emptive Rights Regime) would have expired.

The Panel found that at the time the Tower board agreed to early dispatch, it:

- (a) had not seen a draft of the Bidder's Statement before that meeting;
- (b) had, at the most, time to read the Bidder's Statement at the meeting, but only very limited opportunity to consider its content;

- (c) had not sought or obtained any advice on the content of the Bidder's Statement; and
- (d) had not sought or obtained any advice on the issue of consenting to early dispatch.

The Panel considered that, where the Bidder's Statement was not properly reviewed from the perspective of the target by any person, the Tower directors should have considered seeking advice before agreeing to early dispatch.

If it had not been for the Tower board's decision to agree to early dispatch, Equity Partners would not have been able to accept the Offer (as it would have had to re-comply with the Pre-emptive Rights Regime). Accordingly, the Panel found that the circumstances (being the board's decision to consent to early dispatch) had the direct effect of enabling Pendant Software to acquire a relevant interest in Equity Partners' shares in Tower (amounting to the acquisition of a substantial interest in Tower).

Decision

The Panel considered that the Tower board's decision to consent to early dispatch in these circumstances would have justified a declaration of unacceptable circumstances (having regard to the effect of that decision on the acquisition by Pendant Software of Equity Partners' shares in Tower, and on the control, or potential control, of Tower). The Panel considers that the decision of the Tower directors to consent to early dispatch, without having either undertaken a thorough review of the bidder's statement or sought appropriate advice, would need to be justified by extremely compelling reasons to be consistent with paragraphs (a) and (b)(iii) of section 602.

The Panel considered that a declaration would have been warranted, in the light of the effect on the efficient, competitive and informed market for voting shares in Tower, regardless of whether any of Pendant Software, Equity Partners or any Tower director knew or intended that allowing early dispatch would result in or enable immediate acceptance of the Offer by Equity Partners.

Undertaking

The Panel accepted undertakings offered by Pendant Software and Pendant Properties (a 30% shareholder in Tower and associate of Pendant Software) and accordingly, has declined to make a declaration of unacceptable circumstances. The undertakings are described in Annexure A (**Undertakings**).

Mr Hoff submitted that the Undertakings would allow Pendant Software and Equity Partners to benefit from the unacceptable circumstances and to maintain the loss by Tower shareholders of their pre-emptive rights.

The Panel considered that had it not been for the Tower board's decision to consent to early dispatch, Equity Partners would have been unable to accept the Offer without giving a further pre-emption notice. Accordingly, there would have been at least one month in which a potential rival bidder could have made a bid and had a viable prospect of acquiring control. The Undertakings provide an equivalent opportunity for a potential rival bidder to make a takeover bid and acquire the Equity Partners' shares if Pendant Software does not match that rival bid. Accordingly, the Panel considers that the Undertakings are sufficient to address the unacceptable circumstances arising from the decision to consent to early dispatch

and to ensure that there is an efficient, competitive and informed market for the control of Tower.

The Panel did not consider it could justifiably require that Tower shareholders be given the opportunity to buy Equity Partners' shares under the Pre-emptive Rights Regime. The takeovers legislation does not require that shareholders be given the opportunity to exercise pre-emptive rights and even if it did, the Panel found that Tower shareholders did have such an opportunity (as a result of Equity Partners early satisfaction of the Pre-emptive Rights Regime prior to the Offer), but did not seek to take advantage of it.

The Panel will publish its reasons for its decision on its website in due course.

The President of the Panel appointed Kevin McCann (sitting President), Norman O'Bryan (sitting Deputy President) and Chris Photakis as the sitting Panel to consider the Application.

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Annexure A - Undertakings

Pendant Software has agreed to undertake that:

- A. *It will not re-present the Equity Partners transfer for registration or otherwise seek to become a member of Tower before 14 July 2006.*
- B. *It will present the Equity Partners transfer to Tower for registration before 5.00pm on 14 July 2006.*
- C. *It will extend the offer period for its Offers so that it expires no earlier than 5.00pm on 25 July 2006.*
- D. *If offers under a takeover bid for all Tower shares which offer cash of more than \$1.45 per Tower share:*
 - (a) *are sent to Tower shareholders on or before 14 July 2006; and*
 - (b) *become free of all defeating conditions on or before 28 July 2006; (**Superior bid**),*

Pendant Software will, within 5 business days, either:

- (c) *increase the consideration offered under its offer to be at least equal to that offered under the Superior bid; or*
- (d)
 - (i) *(if the Superior bid is not made by a member of Tower) give a notice in writing to Tower in accordance with Rule 120.2 of the constitution of Tower offering to sell all of the shares the subject of the Equity Partners transfer at a price per share not higher than the price offered in the Superior bid and (unless such shares are acquired by other members under the Pre-emptive Rights Regime) accept the Superior bid for all Tower shares transferred to it by Equity Partners and not acquired by other members under the Pre-emptive Rights Regime. Such acceptance shall be made forthwith upon the expiry of the 1 month period referred to in Rule 120.6 of the constitution of Tower; or*
 - (ii) *(if the Superior bid is made by a member of Tower) accept the Superior bid for all Tower shares transferred to it by Equity Partners (or to which the Equity Partners transfer relates).*

Pendant Software has also agreed to provide further disclosure in relation to its Offer funding in a supplementary bidder's statement.

Pendant Software has advised the Panel that Pendant Properties has agreed to undertake with respect to the above that:

If Pendant Software gives a notice in writing to Tower in accordance with Rule 120.2 of the constitution of Tower offering to sell all of the shares the subject of the Equity Partners transfer, Pendant Properties will not purchase any of those shares.