



**In the matter of Golden West Resources Limited 01**

**[2007] ATP 31**

**Catchwords:**

*Information deficiencies – replacement bidder’s statement – consent to early dispatch – use of recent price for comparison of price of shares to value of bid – decline to commence proceedings*

*Corporations Act 2001 – sections 602(b)(iii), 657A(2)(a), 657A(2)(b)*

*Golden West Resources Limited – Fairstar Resources Limited*

## **INTRODUCTION**

1. The Panel, Irene Lee, Andrew Lumsden (President) and Chris Photakis, declined to commence proceedings.
2. In these reasons the following definitions apply.

<b>Term</b>	<b>Meaning</b>
Application	application by GWR dated 30 October 2007 concerning the affairs of GWR, as revised on 19 November 2007
Bidder’s Statement	Fairstar’s bidder’s statement dated 26 October 2007 together with its second supplementary bidder’s statement dated 13 November 2007
Fairstar	Fairstar Resources Ltd
GWR	Golden West Resources Limited

3. In these proceedings the Panel:
  - (a) adopted the published procedural rules and
  - (b) consented to parties being represented by their commercial lawyers.

## **DISCUSSION**

### **Facts**

4. GWR is a listed iron ore exploration company. Its primary asset is the Wiluna West iron ore project in Western Australia. Fairstar is a listed exploration company with gold, uranium and oil and gas interests.
5. Fairstar has made a scrip takeover bid for all the shares in GWR, subject (among other things) to a minimum acceptance condition of 50.1%. It is offering 5 fully paid Fairstar shares for every GWR share.
6. GWR complained about “material deficiencies” in Fairstar’s bidder’s statement. Lengthy correspondence passed back and forth between the parties. Fairstar revised its documentation a number of times to seek to meet GWR’s concerns.

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7. On 30 October 2007 GWR made an application to the Panel for a declaration and orders correcting alleged information deficiencies and requiring a further replacement bidder's statement. More correspondence between the parties ensued. On 2 November 2007 a draft second replacement bidder's statement was prepared to address the five information deficiencies raised in the application. More correspondence ensued.
8. In all, Fairstar prepared:
  - (a) a bidder's statement dated 15 October 2007
  - (b) a supplementary bidder's statement on 25 October
  - (c) a first replacement bidder's statement dated 26 October 2007 (consolidating documents (a) and (b))
  - (d) a second replacement bidder's statement in early November (consolidating documents (c) and (e) but which was never issued) and
  - (e) a second supplementary bidder's statement dated 13 November 2007.
9. On 13 November 2007 Fairstar dispatched its Bidder's Statement (i.e., the first replacement bidder's statement dated 26 October 2007 and the second supplementary bidder's statement dated 13 November 2007).

#### Application

10. On 19 November 2007 GWR revised its application. A number of the issues raised in the original application had been addressed in Fairstar's second supplementary bidder's statement (either fully or partially to GWR's satisfaction).
11. What remained were two aspects to the revised application:
  - (a) Information deficiencies in the Bidder's Statement. GWR submitted that the Bidder's Statement still contained material information deficiencies which were likely to cause its shareholders to consider the bid as more desirable than it should be. The Panel treated this as a submission that shareholders were not given enough information to enable them to assess the merits of the proposal: s602(b)(iii);<sup>1</sup> and
  - (b) The form and manner of dispatch of the Bidder's Statement. GWR submitted that dispatching the Bidder's Statement as two documents instead of as a consolidated replacement document created a tendency to mislead and confuse shareholders. The Panel treated this as a submission that the acquisition of control over voting shares in GWR would not take place in an efficient, competitive and informed market: s602(a).

#### Decision

##### *Information deficiencies in Fairstar's bidder's statements*

12. There were four areas of information deficiency that GWR submitted Fairstar must correct:

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<sup>1</sup> Unless otherwise indicated, references in these reasons are to the Corporations Act 2001 (Cth).

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- (a) availability of capital gains tax (CGT) rollover relief
  - (b) funding the costs of the bid
  - (c) disclosure of fees and
  - (d) stamp duty.
13. The Panel decided not to commence proceedings on this issue.
14. In terms of CGT rollover relief, GWR made an announcement on 13 November 2007, the same day as dispatch of the Bidder's Statement, that it had written commitments from shareholders holding 22.6% of GWR shares that they will not accept the current Fairstar offer.<sup>2</sup> GWR submitted that, accordingly, Fairstar cannot acquire 80% of GWR and CGT rollover relief will not be available.
15. The Bidder's Statement includes in the Summary, in bold:
- “You should particularly note that if you accept the Offer and realise a capital gain on your GWR Shares, you will not be entitled to capital gains tax rollover relief unless Fairstar requires at least 80% of GWR (the offer being subject to a minimum acceptance condition of 50% only). As a result, you may incur an immediate tax liability on disposing of your GWR Shares to Fairstar.”*
16. The Panel considered that the Bidder's Statement makes it clear that CGT rollover relief is subject to 80% acceptance. The market can assess the shareholders' "will not accept" statements and their impact on the Fairstar offer and CGT rollover relief without the need for supplementary disclosure. If GWR wishes, it can address the question of rollover relief in its target's statement. The 'failure' to refer to the announcement regarding the "will not accept" statements, or to release a supplementary bidder's statement to address them, would not give rise to unacceptable circumstances in this case.
17. It appears<sup>3</sup> that the "will not accept" commitments take the form of undertakings that are "irrevocable and [remain] in full force and effect until" Fairstar's offer is withdrawn, or GWR's directors recommend that shareholders accept it, or the consideration under it is varied. Therefore they could fall away and CGT rollover relief may be available.
18. In terms of funding the costs of the bid, Fairstar had proposed an underwritten placement of its shares to fund transaction and other costs associated with its bid. GWR submitted that the identity and financial capacity of sub-underwriters must be disclosed, and there should be information about how the underwriter would respond to a failure of the sub-underwriters to fulfil their obligations.
19. The Panel did not accept this. The underwriter, Findlays, is an ASX-regulated broker with the associated prudential requirements and supervision that that entails. The 'failure' of Fairstar to provide the information in the Bidder's Statement about the sub-underwriters or how Findlay would respond to a failure on their part would not give rise to unacceptable circumstances in this case.

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<sup>2</sup> On 21 November 2007 GWR announced an increase in the number of shareholders who will not accept to 27.85%.

<sup>3</sup> Announcement by GWR 21 November 2007.

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20. GWR also submitted that the terms of the underwriting did not precisely correlate with the terms of the bid, and as a result there was a risk that should have been disclosed to GWR shareholders, namely of the bid proceeding but the underwriting not proceeding.
21. The Panel considered that, in the absence of a defeating condition in the bid should the underwriting agreement be terminated, it would be desirable for Fairstar to disclose :
  - (a) the risk (and any consequences) that the underwriting agreement may be terminated but the Fairstar offer may still proceed and
  - (b) what Fairstar intends to do to fund the transaction costs if the underwriting agreement is terminated and the bid is not.
22. However, the underwriting related to funding transaction costs associated with the bid. It did not relate to directly funding the bid consideration. While the Panel accepts that the loss of the underwriting may affect the underlying value of the scrip consideration, the 'failure' to include this risk in the Bidder's Statement would not give rise to unacceptable circumstances in this case.
23. Nevertheless, the Panel advised parties that it would welcome advice from Fairstar that it will provide additional disclosure as described above in its next communication to GWR shareholders.<sup>4</sup>
24. In terms of disclosure of fees, the Bidder's Statement includes a table of estimated transaction costs covering corporate advisory fees, stamp duty, legal and accounting fees, and "Other professional advisers' fees", totalling \$22,108,000 (assuming 100% acquisition of GWR). The "Other professional advisers' fees" are \$4,288,000. GWR submitted that a breakdown of "Other professional advisers' fees" was material information for shareholders.
25. The Panel did not consider that additional disclosure about the "Other professional advisers' fees" was likely to materially influence shareholders' decisions to accept or reject the bid. The absence of such disclosure would not give rise to unacceptable circumstances in this case.
26. In terms of stamp duty, GWR submitted that shareholders the subject of its "will not accept" announcement were free to accept a higher bid, and accordingly the Bidder's Statement should set out the effect of 90% acceptances on stamp duty. The effect was an estimated expense of \$13 million under the West Australian "land rich" provisions.
27. Given that the stamp duty expense is referred to in the disclosure relating to the underwriting, and is included in the pro-forma consolidated balance sheet as a capitalised cost of the takeover bid, the Panel did not consider that there was a 'failure' of disclosure that would give rise to unacceptable circumstances in this case.

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<sup>4</sup> Fairstar has confirmed it will do this.

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*Form and manner of dispatch of bidder's statements*

28. Panel policy is that it is preferable for a bidder to dispatch one consolidated bidder's statement document to target shareholders rather than a document with supplementary documents amending it: Guidance Note 16, *Sydney Gas 01*<sup>5</sup>.
29. In the correspondence between the parties, Fairstar indicated it was prepared to lodge and dispatch a second replacement bidder's statement. It sought GWR's consent to abridge the time for dispatch. GWR did not consider that the information deficiencies it raised had been sufficiently addressed and would not consent to an abridgement of the dispatch period.
30. A bidder may dispatch a replacement bidder's statement under ASIC class order relief<sup>6</sup> if, among other things, it dispatches the statement within 14 to 28 days after it lodges the statement with ASIC and serves it on the target. The class order provides, in effect, that the timetable for the bid recommences following the service of a replacement bidder's statement on the target, unless ASIC or the target agree in writing to a shorter time.
31. However, under section 646 a supplementary bidder's statement lodged with ASIC is taken, together with the original bidder's statement, to be the bidder's statement for events that occur after lodgement. The effect is that time does not begin to run again. Accordingly, without GWR's consent, Fairstar could not dispatch a second replacement bidder's statement until 14-28 days after it lodged the statement with ASIC and sent a copy to GWR and ASX. But because that time had already passed for the first replacement bidder's statement dated 26 October it could be dispatched to shareholders. Fairstar dispatched the second supplementary bidder's statement dated 13 November with the first replacement bidder's statement.
32. The material in the second supplementary bidder's statement was easily transposed into the first replacement bidder's statement. Both documents had been dispatched to GWR shareholders. The Panel has not required additional information in response to the application. The only appropriate order therefore would be that a third document, a consolidation of the two already sent, be sent to shareholders, which the Panel considered was unlikely to simplify the situation for those shareholders. Moreover, GWR had withheld its consent to early dispatch of the second replacement bidder's statement. While it is true that GWR was still complaining of information deficiencies, it could have reserved its position in respect of this, so that its concerns could have been the subject of a Panel application (or other resolution) notwithstanding that a consolidated document had been dispatched to shareholders with its consent to an abridgement of time. Without that consent, delays would have resulted from consolidating the information into a further replacement bidder's statement.
33. For these reasons, the Panel decided not to commence proceedings on this issue.

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<sup>5</sup> [2006] ATP 9

<sup>6</sup> CO 00/344.

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34. Lastly, during its consideration of the application the Panel noted the Managing Director's letter dated 13 November in Fairstar's second supplementary bidder's statement. The letter compares the value of Fairstar's offer by reference to the Fairstar and GWR share closing prices on 24 October. Panel policy is that, when comparing the value of an offer to a target's share price, the most recently available prices should be used. This includes the price of the offeror's shares in a scrip offer. An earlier comparison may be used (if not otherwise misleading), but the most recent comparison should be included. The Panel advised Fairstar that it expects that any future comparison will include the most recently available prices.<sup>7</sup>

**Andrew Lumsden**

**President of the Sitting Panel**

**Decision dated 22 November 2007**

**Reasons published 10 December 2007**

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<sup>7</sup> Fairstar has confirmed it will do this.