



In the Matter of GoldLink IncomePlus Limited 03

[2008] ATP 21

Catchwords:

Proportional takeover bid - deficiencies in disclosure - bid funding - intentions if bid successful - maximum amount of consideration - marketable parcel - forward looking statements - offer terms and conditions - accountant certificates

GoldLink IncomePlus Limited - Emerald Capital Limited

Corporations Act 2001 - Ch 2E, 602, 657A, 657C, 657D, 657E, 636, 629, 618, 653B(1)(b), 670A(2)

INTRODUCTION

1. The Panel, Elizabeth Alexander AM (sitting President), Andrew Lumsden and Robert Johanson, declined to conduct proceeding after Emerald provided additional disclosure in its bidder's statement.
2. In these reasons the following definitions apply.

Term	Meaning
Emerald	Emerald Capital Limited (formerly New Opportunity Limited)
GLI	GoldLink IncomePlus Limited

INTRODUCTION

Facts

3. GLI is a public company listed on the ASX. GLI is the subject of a proportional off-market takeover bid by Emerald to acquire 45% of each shareholder's shares at \$0.23 per share. Emerald lodged its bidder's statement with ASIC on 26 June 2008.
4. On 2 July 2008, GLI sent a letter to Emerald outlining concerns about disclosure in the original bidder's statement.
5. On 4 July 2008, Emerald responded to GLI, providing:
 - (a) an undertaking that it would not dispatch the original bidder's statement in the current form and
 - (b) a draft replacement bidder's statement.
6. On 8 July 2008, GLI sent a further letter to Emerald outlining continuing concerns it had with disclosure in the draft replacement bidder's statement. Emerald responded to GLI on 10 July 2008, providing a further draft.
7. GLI continued to have concerns about:
 - (a) disclosure of Emerald's financing arrangements for the bid
 - (b) the maximum consideration required under the bid
 - (c) disclosure of Emerald's intentions for GLI should the bid succeed

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- (d) disclosure of Emerald's expectations for GLI's investment returns should the bid succeed and
- (e) certain terms and conditions of the bid.

Application

8. By application dated 14 July 2008, GLI submitted that unacceptable circumstances existed because the further draft replacement bidder's statement omitted material information and was potentially misleading with the effect that, if the further draft replacement bidder's statement was sent to GLI shareholders:
- (a) shareholders and directors would not have sufficient information to enable them to make an informed assessment of the merits of the bid and
 - (b) any acquisition of GLI shares would not take place in an efficient, competitive and informed market.

Interim Orders

9. GLI sought an interim order that Emerald be restrained from despatching the original bidder's statement or any supplementary bidder's statement until proceedings had been determined by the Panel.
10. In view of the undertakings and the fact that the issues were likely to be resolved quickly, the Panel did not need to make the interim orders.

Final Orders

11. GLI sought final orders, including that Emerald:
- (a) prepare and lodge with ASIC a supplementary bidder's statement and a replacement bidder's statement¹, disclosing the information sought in the application and
 - (b) not despatch the replacement bidder's statement until the Panel had informed Emerald that the form of the replacement bidder's statement was appropriate.

DISCUSSION

Financial resources of financiers

12. The further draft replacement bidder's statement disclosed that Emerald had entered into convertible note deeds with several related and unrelated parties, pursuant to which each provided a drawdown facility to Emerald to fund the bid. It further disclosed that:

"Emerald has obtained certificates from each of the accountants for the Financiers that confirm their ability to fulfill their commitments under the Facility Agreements. Emerald considers this to be a reasonable form of verification of each Financier's capability to fulfill its obligations under the Facility Agreements."

13. GLI submitted that four of the financiers had nominal paid up capital of \$1 (the fifth having \$102), none had been required to lodge financial reports with ASIC and there was no publicly available information about their net tangible assets. GLI further

¹ In accordance with ASIC Class Order [CO 00/344]

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submitted that, given the lack of available information about Emerald's financiers, undisclosed accountant's certificates did not constitute clear evidence to enable shareholders to decide whether the financiers had the ability to meet their funding commitments to Emerald.

14. A bidder may fund its bid from any source it chooses. However, it must demonstrate that it (or its lenders) have the financial resources to satisfy its obligations under a bid.²
15. Emerald agreed to disclose in the further draft replacement bidder's statement the identity of each accountant who provided a certificate and further disclosure that in each case the accountant considered that the financier had sufficient capacity to satisfy the financing commitments under the facility agreement. The Panel considers that this additional disclosure is consistent with the disclosure made in Tower Software Engineering Pty Limited.³

Maximum amount of cash consideration

16. Section 618⁴ provides that if a person accepts an off-market bid and is left with less than a marketable parcel of securities⁵ the offer extends to that parcel. Section 653B(1)(b) provides that a person who holds one or more parcels of securities as a trustee or nominee for another person may accept as if a separate offer has been made in relation to each of those parcels.
17. GLI submitted that disclosure in the further draft replacement bidder's statement regarding the maximum cash consideration payable was deficient as no allowance had been made for shares held by trustees or nominee holders who may be able to accept for 100% of the parcels they hold as a result of the operation of section 653B(1).
18. Following a review of the GLI register, Emerald submitted that, taking into account parcels which would be less than a marketable parcel, and those held by nominees, the total amount of extra funding that could be required for the bid was \$750,000. The Panel considers that Emerald had a reasonable basis to determine that \$750,000 will cover any likely additional funding requirements.
19. Emerald agreed to disclose in the further draft replacement bidder's statement that entities associated with Mr Kestell and Mr Pynes (directors of Emerald) had agreed to provide additional funding of up to \$375,000 each. Emerald also agreed to identify the accountants who had certified that these entities had sufficient capacity to satisfy the additional financing commitment.
20. In the Panel's view, the additional funding disclosure provided shareholders with enough information to decide whether the financiers had the ability to meet their funding commitments.

² Guidance Note 14.4

³ [2006] ATP 20

⁴ References are to sections of the *Corporations Act (2001) (Cth)*

⁵ The ASX Listing Rules provides that a marketable parcel is a parcel of not less than \$500

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Intentions

21. GLI submitted that information in the further draft replacement bidder's statement concerning Emerald's intentions for GLI should the bid succeed did not comply with section 636(1) and was insufficient for shareholders to be able to evaluate the merits of the bid properly.
22. GLI further submitted that Emerald should include details of Emerald's business plan and investment strategy and information concerning Emerald's long-term intentions for GLI, including any plans to raise further capital or to return capital to shareholders.
23. Emerald agreed to amend further the draft replacement bidder's statement to include the following further disclosure:

"Emerald proposes that GLI implements a new business plan that will see it remain as an alternative investment company with a view to recreating and growing shareholder wealth. The investment mandate will be broad and the nominees onto the GLI Board will have a wide discretion to determine what, how and when to invest (subject to the criteria outlined below). Until such time as the nominees onto the GLI Board make a decision on appropriate investments, it is likely that GLI's funds will remain invested in cash (or cash equivalents)"

24. The Panel accepted that, while the amended intention statement was general and unspecific, it was similar to many other such statements and was sufficient.

Shareholder approval under Chapter 2E of the Corporations Act

25. The further draft replacement bidder's statement disclosed that:
 - (a) approval of Emerald's shareholders may be required under the related party provisions in Chapter 2E for Emerald to provide financial benefits to the financiers, but
 - (b) funds may be drawn down under the facility agreements even though such shareholder approval had not been obtained.
26. GLI submitted that:
 - (a) if the funds may be drawn down, there was no need for disclosure about Ch 2E and
 - (b) there was no apparent reason why Emerald's shareholders would give Ch 2E approval if the funding was secure in the absence of such approval.
27. Emerald submitted that it intended to seek shareholder approval but that it may not be relevant to include disclosure about Ch 2E approval.
28. Emerald proposed to amend the further draft replacement bidder's statement to remove the reference to shareholder approval under Ch 2E.
29. The draw down under the facility agreements was not conditional on shareholder approval being obtained, so the Panel considered that removal of the references to shareholder approval adequately addressed the issue raised by GLI.

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Forward Looking Statements

30. Section 670A(2) deems a statement about a future matter to be misleading unless the person making the statement had reasonable grounds for making it.
31. GLI submitted that the further draft replacement bidder's statement included statements of future intention, including that:
 - (a) Emerald's offer would enable GLI shareholders to capture the potential of growth in value over the years to come
 - (b) Emerald's proposed strategy would provide GLI shareholders with exposure to a diversified portfolio of investments with the objective of delivering regular income and capital growth and
 - (c) Emerald would target return on equity of 15% per annum.
32. GLI further submitted these forward looking statements were deemed by s670A(2) to be misleading unless Emerald had reasonable grounds for making them.
33. The Panel considered that the statements (other than the targeted return statement) were imprecise. While it appeared that some specificity was possible, the Panel noted that in many cases, as with other intention statements, these statements were less definitive than they might be. The Panel did not consider that shareholders would regard the statements in paragraphs 31(a) and (b) as forward looking statements of the type intended to be caught by s670A(2).
34. Given the lack of disclosure of the assumptions underpinning the targeted return on equity of 15%, GLI submitted that it was unlikely that Emerald had reasonable grounds in respect of this statement.
35. Emerald agreed to amend the further draft replacement bidder's statement to remove references to targeting returns of 15%.
36. The Panel considered that the removal of the reference to targeting returns of 15%, which was specific, removed the need for disclosure of a reasonable basis for that statement.

Terms and Conditions

37. GLI submitted that the bid announcement was so worded that it was a condition of the bid that the S&P/ASX 200 Index had to be 10% or more below its level as at the close of business on 17 June 2008 for three consecutive days.
38. Emerald proposed to amend this condition by inserting the word "not" so that it was a condition of the bid that the S&P/ASX 200 Index is "not" for any three consecutive trading days 10% or more below the specified level.
39. The Panel considered that the inclusion of the word "not" did not change the intention of the condition or market understanding of it. The drafting of the announcement, while sloppy, would not in the Panel's view have misled the market⁶.

⁶ Volante Group Limited [2006] ATP 2 and Internet Resources Limited [2008] ATP 17

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DECISION

40. On the basis of the additional disclosure in the further draft replacement bidder's statement, the Panel declined to conduct proceedings.
41. The Panel felt that the matters raised in the application ought to have been resolved between the parties without recourse to the Panel. As well, the Panel considered that the application should have been more succinct.

Elizabeth Alexander AM
President of the Sitting Panel
Decision dated 22 July 2008
Reasons published 23 July 2008