



In the Matter of Perilya Limited

[2008] ATP 28

Catchwords:

Bidder's statement – deficiencies in disclosure – pro-forma balance sheet – out of date information - disclosure concerning synergies – interim order declined – undertaking – no declaration necessary – combining accounts for different periods – qualifying prominent statements in less prominent sections – withdrawal rights

Perilya Limited – CBH Resources Limited - Broken Hill Operations Pty Limited

Corporations Act 2001 – 602(a), 631, 636, 657A, 657D, 657E and 670A

INTRODUCTION

1. The Panel, Elizabeth Alexander (Sitting President), Stephen Creese and Jennifer Seabrook, declined to make a declaration of unacceptable circumstances after accepting an undertaking from CBH to address disclosure issues in BHO's bidder's statement. A supplementary bidder's statement will be dispatched as soon as possible after the audit reviewed financial statements of both CBH and Perilya for the half year ended 31 December 2008 are available and withdrawal rights will be offered to shareholders who accept the bid before then.
2. In these reasons the following definitions apply.

| Term | Meaning |
|-------------|--------------------------------|
| BHO | Broken Hill Operations Pty Ltd |
| CBH | CBH Resources Limited |
| Perilya | Perilya Limited |
3. In these proceedings the Panel:
 - (a) adopted the published procedural rules and
 - (b) consented to parties being represented by their commercial lawyers.

FACTS

4. Perilya is a public company listed on ASX (ASX code: PEM). CBH is a public company listed on ASX (ASX code: CBH).
5. On 2 October 2008 CBH announced an off-market scrip takeover bid for Perilya, to be made by BHO, a wholly-owned subsidiary of CBH.¹ Consideration under the bid was 4.2 CBH shares for each Perilya share. The last day on which dispatch of the bidder's statement had to commence was 1 December 2008.
6. On 12 November 2008, BHO served its bidder's statement on Perilya and lodged it with ASIC and ASX.

¹ References in these reasons to the bidder's statement are to the replacement bidder's statement referred to in paragraph 9

7. On 19 November 2008, Perilya wrote to CBH drawing its attention to what Perilya considered were a number of material defects in BHO's bidder's statement.
8. On 25 November 2008, Perilya lodged an application with the Panel in respect of two of the alleged deficiencies identified in its letter of 19 November: presentation of the financial information and disclosure of expected synergies.
9. On 26 November 2008, following changes requested by ASIC, BHO lodged a replacement bidder's statement. ASIC provided consent under ASIC Class Order 00/355 so that the original timetable for dispatch of the bidder's statement remained. Perilya advised the Panel that none of the issues raised in its application were addressed by the changes made in the replacement bidder's statement, and that its concerns remained.

Application

10. By application dated 25 November 2008 Perilya sought a declaration of unacceptable circumstances in relation to the disclosure in the bidder's statement:
 - (a) of CBH's financial information and pro-forma financial information for the financial year ended 30 June 2008 and
 - (b) about synergies expected to be realised following completion of the transaction.
11. It submitted that:
 - (a) the bidder's statement was misleading and inadequate, inhibiting an efficient, competitive and informed market for control of Perilya shares
 - (b) holders of Perilya shares had not been given enough information to assess the merits of the CBH offer and
 - (c) the bidder's statement did not comply with the content requirements of section 636² and contravened s670A.

Interim Orders

12. Perilya sought an interim order that CBH and BHO be restrained from dispatching the bidder's statement, pending determination of the proceedings.
13. The last day for commencement of dispatch of the bidder's statement under s631 was 1 December 2008, which, CBH submitted, meant that it had to commence printing by 26 November 2008.
14. The President of the Panel declined to make the interim order sought and noted that:
 - (a) the Panel is generally reluctant to make an interim order that would upset the timetable of an offer (although it was also noted that CBH proposed a long initial opening time for its bid)
 - (b) it appeared that if further disclosure was required it could be provided to shareholders in addition to the current disclosure and could be conveniently dealt with in a supplementary disclosure document

² Unless otherwise indicated, references are to the *Corporations Act 2001* (Cth)

- (c) the application was made on the day before printing of the bidder's statement would otherwise commence and it was not clear why the application hadn't been made earlier and
- (d) the decision did not imply that the sitting Panel could only order further disclosure by way of supplementary bidder's statement alone. It was open to the sitting Panel to decide that a replacement bidder's statement was ultimately required. If the bidder decided to print and dispatch, this was a risk it assumed.

DISCUSSION

Presentation of financial information

15. The bidder's statement included financial information for CBH on a stand-alone basis for the financial year ended 30 June 2008 and an explanation of material events after that date. Perilya submitted that events since 30 June 2008 had materially changed the financial position of CBH, and in the absence of more up to date financial information the bidder's statement was misleading. Perilya submitted that CBH should include unaudited internal accounts for the period 1 July to 31 October 2008. It submitted that if this information was provided with the appropriate warning that those accounts were unaudited, there would be no risk of shareholders being misled by unreliable or 'speculative' information.
16. Perilya also submitted that the explanation of material events after 30 June 2008 did not adequately explain the financial impact of:
 - (a) announced downsizing of operations at the Endeavor Mine
 - (b) the Endeavor Mine's current operational cash costs
 - (c) continuing "cash burn" from operations
 - (d) the buy-back of CBH Notes
 - (e) redundancy costs
 - (f) any additional working capital movements or requirements and
 - (g) the potential impairment of the balance sheet given the downsizing and reduction in metal prices.
17. Perilya submitted there was limited information on CBH's current cash position as a result of these disclosure deficiencies.
18. The bidder's statement also included a pro-forma balance sheet for CBH and Perilya on a merged group basis at 30 June 2008. Perilya submitted that this pro-forma financial information was inadequate because, in addition to the above alleged deficiencies, it did not include adjustments required to give an accurate profile of the proposed merged group. Perilya submitted that there was:
 - (a) no statement of the expected cash costs of the combined operations or cash position of the merged group
 - (b) no reference to the target cash cost of production and
 - (c) no quantification of synergies (discussed further below).

19. CBH submitted that updating the merged group pro-forma balance sheet in the way sought by Perilya was inappropriate because:
- (a) it does not have access to enough³ financial information on Perilya more up to date than its 30 June accounts: it would be inappropriate to compile a pro-forma balance sheet based on CBH information at 31 October and Perilya information at 30 June and
 - (b) it was not able to update the pro-forma balance sheet with adjustments for expected synergies and cash costs because it had only completed preliminary quantitative analysis in relation to synergies and the CBH board had not adopted any such analysis (see paragraph 25 below).
20. We agree that CBH should not be required to disclose information in a pro-forma balance sheet that combines accounts for different periods.
21. While CBH cannot include adjustments that are not available to it, we consider that best practice would be to provide shareholders with more up to date financial information. The following factors are relevant in this case:
- (a) the bid is a scrip bid
 - (b) offers under the bid were made in December 2008, 5 months after the balance date of the financial information in the bidder's statement
 - (c) there have been a number of material developments and corporate actions of CBH since 30 June 2008, for example:
 - (i) CBH's cash position had reduced from approximately \$125 million to \$90 million at the date of its last quarterly report lodged with ASX
 - (ii) the buy back of \$56.5 million of CBH Notes at a cost of \$15.4 million and
 - (iii) the scaling back of operations at the Endeavor Mine, which involves expected redundancy costs of approximately \$3 million
 - (d) the nature of the industry in which both companies operate
 - (e) the recent volatility in the securities market generally and
 - (f) the recent deterioration in the market prices of, and demand for, metals.
22. BHO and CBH offered undertakings to provide a supplementary bidder's statement updating the financial information as soon as the 31 December results for both itself and the target are available. We are prepared to accept the undertakings. We think that the market and shareholders will be sufficiently informed of the intended updating of information and shareholders will be able to withdraw acceptances if made before then. On this basis, it appeared to us no declaration of unacceptable circumstances was necessary.

Basis for expected synergies

23. CBH provided prominent disclosure that valuable synergies were expected to arise and of the type of synergies it expected would arise if its bid was successful.

³ We note that both companies are obliged to lodge quarterly cash flow statements with ASX

24. Perilya submitted that there was insufficient disclosure of CBH's views on the level and value of expected synergies from the merger of the two entities. It submitted that the statements "it just makes sense!"⁴ and "valuable operating synergies"⁵ were either misleading in the sense that there was no reasonable basis for making them or CBH had further information which it had not disclosed in the bidder's statement. Perilya submitted that CBH should quantify the expected synergies.
25. CBH stated that its board had not adopted any quantitative analysis of the expected synergies. If CBH cannot provide a value for the synergies it expects to realise as a result of its offer, it should be made clear to Perilya shareholders that those synergies are *potential* synergies and as such are by no means certain.
26. It is not enough to qualify prominent statements in less prominent parts of the bidder's statement. For example the statement that "*[c]ombining the operations into one company will enable valuable operating synergies to be realised*" in the chairman's letter is potentially misleading without appropriate disclosure of quantitative analysis or qualification. CBH should provide shareholders with disclosure in the chairman's letter itself that the synergies are only *potential synergies* so that the statements can be understood in context.
27. Perilya submitted that the statement "two cash-flow producing assets are better than one"⁶ was misleading because it was made without basis. CBH submitted that the statement was not misleading because "[h]olding two cash-flow producing assets provides greater diversification for shareholders than one". We consider the statement to be potentially misleading because it conveys the impression that the net cash flow from combining the two assets will necessarily be positive and that diversification per se is inherently positive.
28. Perilya shareholders should be provided with supplementary disclosure to address these issues. We did not consider the potentially misleading statements so problematic as to require immediate correction. It will be sufficient for them to be corrected at the time of the supplementary bidder's statement on financial information. Two factors in particular were relevant to this. First, there are qualifications although not conveniently located. Second, accepting shareholders will be offered withdrawal rights. Given that CBH offered an undertaking to provide supplementary disclosure, in our view no declaration of unacceptable circumstances was necessary.

Undertaking

29. CBH offered an undertaking to:
 - dispatch a supplementary bidder's statement updating the financial information in the bidder's statement as soon as practicable after financial information for both companies for the period to 31 December 2008 becomes available
 - include in the supplementary bidder's statement corrective disclosure addressing the issues outlined above in relation to expected synergies and

⁴ Cover of the bidder's statement

⁵ Chairman's letter and section 11.10

⁶ In section 4.3 of the bidder's statement, in relation to the merged group having operations in two locations

- at the time that the supplementary bidder's statement is dispatched, withdrawal rights will be provided to Perilya shareholders who have accepted the CBH offer before the release of the supplementary bidder's statement.
30. We consider that this addresses any potential issues that may arise in relation to the disclosure provided to Perilya shareholders in the bidder's statement. While there will be some time between the conclusion of this proceeding and the provision of the supplementary disclosure, we consider that together the disclosure of this Panel decision which provides a warning to Perilya shareholders in the interim period and the effect of the undertaking to provide withdrawal rights sufficiently protect Perilya shareholders.

DECISION

31. Given the undertaking offered by CBH, we were satisfied that it is not against the public interest to decline to make a declaration. Perilya shareholders are adequately protected by their forthcoming right to withdraw any acceptances lodged before the provision of the supplementary bidder's statement. Further, to the extent that the circumstances have any effect beyond the bid, the Panel's media release dated 19 December 2008 ([TP08/112](#)) made public the fact that further information in relation to the bid will be provided. It is of course open to Perilya to make its shareholders aware of the situation (indeed it may be that Perilya should do so).
32. As we declined to make a declaration we did not make any final orders, including any costs orders.
33. A copy of the undertaking is in the annexure.

Elizabeth Alexander
President of the Sitting Panel
Decision dated 19 December 2008
Reasons published 2 January 2009



Annexure

Section 201A of the Australian Securities & Investments Commission Act (Cth)

Undertakings

In the matter of Perilya Limited

Pursuant to section 201A of the *Australian Securities and Investments Commission Act 2001* (Cth) (the *ASIC Act*), Broken Hill Operations Pty Ltd (*BHO*) undertakes to the Panel that it will do each of the following.

1. If the Australian Securities and Investments Commission (*ASIC*) does not, under section 655A(1) of the *Corporations Act 2001* (Cth) (the *Corporations Act*) on terms acceptable to BHO, grant all necessary modifications and exemptions to the *Corporations Act* to give each Perilya shareholder who accepts BHO's offer prior to the dispatch of the supplementary bidder's statement contemplated in paragraph 2 a right to withdraw substantially in accordance with section 650E of the *Corporations Act* (provided that section 650E(1) does not apply and the reference in section 650E(2)(a) to "1 month" is replaced with "14 days" for this purpose), BHO will do all things necessary to trigger the operation of section 650E of the *Corporations Act* with effect on or about the date on which the supplementary bidder's statement contemplated in paragraph 2 is dispatched.
2. As soon as practicable after CBH Resources Limited (*CBH*) and Perilya Limited (*Perilya*) release their audit reviewed financial statements for the half year ending 31 December 2008 and, in any event, no later than 7 days prior to the date on which the offer period under its bid is due to end, BHO will complete the dispatch to Perilya shareholders of a supplementary bidder's statement which, in a form approved by the Panel:
 - 2.1. updates the financial information and pro-forma financial information presented in its replacement bidder's statement lodged with ASX on 26 November 2008
 - 2.2. corrects and qualifies statements in relation to synergies in its replacement bidder's statement and
 - 2.3. sets out a variation of BHO's offer to include the withdrawal right permitted as a consequence of paragraph 1.
3. To the extent necessary to comply with paragraph 2, BHO will extend the offer period under its bid.
4. BHO will not declare its offer unconditional until it has satisfied its obligations under paragraph 2.

Pursuant to section 201A of the ASIC Act, CBH undertakes to the Panel that it will do each of the following.

5. CBH will release its audit reviewed financial statements for the half year ending 31 December 2008 by no later than 27 February 2009.
6. CBH will do all things necessary to ensure that BHO complies with all of its obligations under this undertaking.
7. CBH will confirm in writing to the Panel when it and BHO have satisfied all of their obligations under this undertaking.

Signed by John Elliott of Clayton Utz,
with the authority, and on behalf, of
CBH Resources Limited and Broken Hill Operations Pty Ltd

Dated 18 December 2008