



Australian Government

Takeovers Panel

**Reasons for Decision
NewSat Limited
[2009] ATP 20**

Catchwords:

Bid announcement – scrip bid – sufficient funding – recklessness – reasonable basis – premature application – decline to conduct proceedings – NewSat Limited – EWC Payments Pty Ltd

Corporations Act 2001 (Cth), sections 9, 602, 631, 654A

Panel GN 14 – Financing Arrangements

Pinnacle VRB Ltd 02 [2000] ATP 12, Consolidated Minerals Limited 01 [2007] ATP 20

INTRODUCTION

1. The Panel, John Fast (sitting President), John Keeves and Mike Roche declined to conduct proceedings on an application by NewSat in relation to its affairs. The application alleged that an announcement of a scrip off-market takeover bid by EWC for 100% of NewSat was misleading and a sham. Following a supplementary announcement by EWC to deal with the misleading claim, the Panel considered it was premature to conclude that the EWC takeover bid would not proceed as announced or that the bid is a sham. The claims by NewSat, other than in respect of the misleading announcement, should be dealt with at the time of the bidder's statement, if then appropriate. Consequently there was no reasonable prospect at this stage that it would declare unacceptable circumstances and make orders.
2. In these reasons, the following definitions apply.

EWC	EWC Payments Pty Ltd
NewSat	NewSat Limited

FACTS

3. NewSat is an ASX listed company (ASX code: NWT).
4. EWC is a proprietary company with shares capital of \$10. Its sole shareholder is Edelweisscard SA, a Swiss multinational corporation with capital of CHF \$1 million. EWC's directors are Dr Matthew Starr (Australian resident) and Mr Jerome Cle.
5. On 3 September 2009, EWC announced that it had decided to make an off-market takeover offer for all the shares in NewSat. The announcement stated, among other things, that:
 - a) EWC proposed to offer 1 EWC share for every 25 NewSat shares and 1 EWC option for every 29 NewSat options.
 - b) *“With the nominal share value of EWC shares at \$0.20/share, this values NewSat at approx. \$50 million, which is a significant premium of approx 35% over the current market capitalization of approx \$37 million at the closing price of \$0.006/share on 02/09/09.”*
 - c) EWC's revenue figures were *“2007 - \$170 million”* and *“2008 - \$474 million”*.

6. On 3 September 2009, NewSat announced that its board had met to consider the offer and recommended its shareholders not accept the offer. It noted in this announcement that EWC has paid share capital of only \$10.
7. On 3 September 2009, in response to NewSat’s announcement (in particular its reference to EWC’s capital) EWC made a further announcement noting that:
 - (a) *“EWC is a wholly-owned subsidiary of a Swiss multi-national corporation...with paid-up capital CHF \$1,000,000.”*
 - (b) *“EWC’s revenue in 2008 was more than \$474,000,000 in Australia, with a gross profit of more than \$17 million (the majority of retained earnings paid to its Swiss HQ in management fees).*
8. On 8 September 2009, NewSat wrote to EWC requesting copies of financial reports and other information relating to EWC’s bid. This information was not provided by 11 September 2009 as requested.
9. On 15 September 2009, subsequent to EWC’s announcement on 3 September 2009, 5,000,000 shares in NewSat held by Dr Starr and his wife, Wendy Starr, were sold.
10. On 29 September 2009, EWC made a “supplementary” announcement clarifying statements made in its 3 September 2009 announcements.

APPLICATION

Declaration sought

11. By application dated 18 September 2009 NewSat sought a declaration of unacceptable circumstances. NewSat submitted that:
 - (a) EWC has little financial substance and *“the market for [NewSat] securities has, since 3 September 2009, been conducted on the basis of an entirely false premise, being that a takeover offer will be made for 100% of [NewSat’s] shares on terms that will provide [NewSat] shareholders as a whole with an actual consideration equivalent to \$50 million in value”*
 - (b) EWC has breached s631(2) as it *“has acted recklessly either as to whether it will proceed with its announced bid, or as to whether it will be able to perform its obligations relating to the bid if a substantial proportion of offers are accepted”*.¹ Alternatively the *“purported performance by EWC of its obligations relating to the proposed bid would be illusory and contrary to the policy that underlies section 631”*
 - (c) EWC’s announcement, particularly relating to the value of its shares, is misleading and it is likely that EWC will make misleading statements in its bidder’s statement
 - (d) the disposal of shares by Dr Starr and Wendy Starr was contrary to the policy behind s654A, which restricts the disposal of bid class securities during the bid period and
 - (e) as EWC is a proprietary company it *“will not be able to proceed with its proposed bid because if it did, and more than a small number of [NewSat] shareholders were to*

¹ See s 631(2). Unless otherwise indicated, references are to the Corporations Act 2001 (Cth)

accept the offer, EWC would have more than 50 non-employee members in breach of section 113 and it “will be unable to convert to a public company by the time it is obliged to lodge its bidder’s statement with ASIC and ASX”.

12. NewSat submitted that the effect of the circumstances was to inhibit an efficient and informed market for NewSat securities because participants and potential participants in that market have been misinformed concerning the genuineness of the proposed bid, the financial substance of the bidder and the ability of EWC to make a bid.

Interim orders sought

13. NewSat sought interim orders that EWC by way of summons by the Panel be required to produce to the Panel and NewSat:
- (a) balance sheets and profit and loss statements for EWC for the financial years ended 30 June 2007, 30 June 2008 and, if prepared, 30 June 2009
 - (b) audit reports prepared in respect of EWC for the financial years ended 30 June 2007, 30 June 2008 and, if prepared, 30 June 2009 and
 - (c) annual reports (including consolidated balance sheets and profit and loss statements and notes) and any audit reports that have been prepared for the ultimate holding company of EWC for that holding company’s financial years ending in 2006, 2007, 2008 and 2009.
14. We declined to make any interim orders. EWC voluntarily provided the applicant with some additional financial information. Nonetheless, given the circumstances in this matter, we are of the view that it is premature for us to order the provision of such materials (assuming the scope is reasonable) before EWC has had the opportunity to provide information in its bidder’s statement.

Final orders sought

15. NewSat sought final orders:
- (a) cancelling EWC’s purported takeover bid
 - (b) directing EWC to make an announcement to NewSat shareholders advising them that its purported takeover bid has been cancelled
 - (c) that EWC and Dr Starr pay its costs for the Panel proceedings and that the Panel make any other orders that it deems appropriate.

DISCUSSION

16. We considered each of the circumstances alleged to be unacceptable by NewSat, summarised above in paragraph 11. We are of the view that it is premature to deal with the circumstances in 11(a) relating to EWC’s financial substance. The appropriate place for such matters to be dealt with is in the bidder’s statement and target’s statement. If it is not then dealt with, these matters can be brought back to the Panel. We also consider that it was premature to deal with the circumstances raised in 11(b) concerning whether the bid announcement is reckless. Based on the evidence provided we have no reason to believe at this stage that the bid will not

proceed. The circumstances raised in 11(c) and (e) are addressed by the supplementary announcement.

Supplementary Announcement

17. We are concerned that EWC's announcements on 3 September 2009 may mislead shareholders. Clarification by EWC, by way of ASX announcement, was necessary to ensure that the market was not misinformed.
18. We requested that a clarifying announcement be made. Without such an announcement, we were minded to conduct proceedings.
19. First, to include wording *"to the effect that the EWC nominal share value of \$0.20 per share and consequent value of the offer is a statement of opinion by the bidder and that further information concerning the basis for EWC's views on the value of the offer and details of how it was derived will be disclosed in the bidder's statement"*. We do not consider that a bidder must disclose the nominal value (whatever it intends that to mean) of its shares in a takeover bid announcement, however if it does so, without clear reasoning as to how this value was derived, it must clearly state to the market that such a value is an opinion and that the basis of the value will be disclosed in the bidder's statement. As EWC's 29 September 2009 announcement clarified that the nominal share price is a statement of opinion, this requirement appears to have been met.
20. EWC proposed including in its supplementary announcement that it would issue 800,000,000 shares. We asked EWC to clarify how it derived the 800,000,000 shares, on which the \$0.20 nominal share value was based. EWC's supplementary announcement dated 29 September 2009 contained the following statement *"that its issued share capital will comprise 800,000,000 shares upon this offer being accepted by the requisite number of NewSat Limited shareholders and the scrip consideration having been issued to those shareholders."* We are of the view that this statement provides sufficient clarity.
21. Second, to clarify EWC's revenue figures of \$170 million in 2007 and \$474 million in 2008 and the gross profit of \$17 million in 2008 disclosed in EWC's announcements on 3 September 2009 *"so that a reader of the announcements is able to properly assess the relevance and materiality of those figures."* We considered that the clarification may include information about:
 - where the revenue and profit figures were derived from
 - whose revenue and profit figures they are
 - how the revenue and profit figures are attributed to the bidder
 - whether the revenue and profit figures are unaudited
 - what are the consequences on revenue and profit of the management fees paid to Swiss HQ.
22. While such figures do not need to be included in a takeover bid announcement, if they are, then they must include sufficient explanation or supporting details so as not to mislead shareholders.

23. Similarly, EWC had previously disclosed, in relation to its \$17 million gross profit figure in 2008, that *“the majority of retained earnings [are] paid to its Swiss HQ in management fees”*. Because this statement had been made, and details about the payment of the fees was not included or disclosed elsewhere, we requested that EWC provide further information regarding the management fees. It has done so.
24. The EWC announcement on 29 September 2009 satisfies our requirement in relation to the revenue and profit figures as well as the management fees.
25. Third, in respect of profit and revenue figures we requested that the announcement state *“that the basis for the revenue and profit amounts and details of how they were derived will be disclosed in the bidder's statement along with other information to enable NewSat shareholders to make an informed decision concerning EWC's offers.”* Whenever such figures are included in a takeover announcement it must be made clear to shareholders that additional information about them will be included in the bidder's statement. This was done.
26. Fourth, we asked for EWC's *“timing and plan for it to convert into a public company”*. NewSat submitted that *“EWC will be unable to convert to a public by the time it is obliged to lodge its bidder's statement with ASIC and ASX”*. As a proprietary company can have no more than 50 non-employee members, EWC is required to convert to a public company in order to provide scrip consideration to all NewSat shareholders. Given that, at 24 September 2009, no documents had been lodged with ASIC in relation to EWC converting to a public company, we consider that details of the planned process should be disclosed to the market. Again we are satisfied that EWC's announcement on 29 September 2009 sufficiently addressed this.
27. As a result of the 29 September 2009 announcement we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances at this stage. It remains open for NewSat to make additional disclosure to its shareholders (should it consider it necessary or desirable) and we note that it did so on 30 September 2009.
28. However, we should emphasise that, takeover announcements (and other ASX announcements in connection with a bid) must be made with the utmost care and diligence and no less rigour should be applied to an announcement than to a bidder's statement. We agree with the Panel in *Pinnacle VRB Ltd 02*² that *“a listed company ... must use the utmost care in preparing and checking its ASX announcements and takeover documents for completeness and accuracy”*.

EWC's Financial Standing

29. A significant concern of NewSat's was EWC's financial standing. NewSat submitted that there existed a *“fundamental disconnect between the claims made in EWC's 3 September 2009 announcements, on the one hand, and its true financial position, on the other hand.”* It further submitted that there were *“serious grounds for doubt as to the veracity of EWC's claims relating to the value of its shares”*, having a nominal value of 20 cents per share. EWC submitted that its bid was *“real”* and that it would provide all relevant information in its bidder's statement.

² [2000] ATP 12 at 31-37. See also Consolidated Minerals Limited 01 [2007] ATP 20

30. We do not consider that a takeover bid announcement necessarily needs to include detailed financial and valuation analysis. This can generally await the bidder's statement, provided what is announced is not misleading. With the announcement provided on 29 September 2009, we believe that the market has sufficient information for the time being.

Sale of shares by Starr

31. NewSat submitted that on 15 September 2009, after the takeover bid was announced, Dr Starr (a director of EWC) and his wife sold 5,000,000 NewSat shares. NewSat further submitted that *"This conduct is contrary to the policy behind section 654A, which restricts the disposal of bid class securities during the bid period."*³ EWC submitted that the sole beneficial owner of the sold shares was Dr Starr's wife and that Dr Starr had no knowledge that the shares were sold. No evidence was presented that the bid announcement had a material effect on NewSat's share price or share liquidity; nor was there any evidence that the bid announcement had been made to achieve this purpose. We have not considered and therefore reach no conclusion about whether section 654A has been breached. Any investigation in this case is a matter for others.

DECISION

32. For the reasons above, following the 29 September 2009 announcement we do not consider that there is any reasonable prospect that we would at this stage make a declaration of unacceptable circumstances. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

John Fast
President of the sitting Panel
Decision dated 2 October 2009
Reasons published 5 October 2009

³ We note that the bid period as defined by section 9 had not commenced. We also note that section 654A applies to the disposal of shares by a bidder