



Australian Government

Takeovers Panel

Reasons for Decision Careers Australia Group Limited 02R [2013] ATP 6

Catchwords:

Review - decline to conduct proceedings - contract - unsolicited bid - IPO - liquidity event - efficient, competitive and informed market - equal opportunity - shareholder approval - independent board committee approval - withdrawal rights

Corporations Act 2001 (Cth) sections 237, 602, 611 item 7, 657EA

Careers Australia Group Limited 02 [2013] ATP 5, Careers Australia Group Limited 01 [2012] ATP 5, CMI Limited 01R [2011] ATP 5, Tully Sugar Limited 01R [2010] ATP 1, Multiplex Prime Property Fund 03R [2009] ATP 23, GoldLink IncomePlus Limited 04R [2009] ATP 3

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
Yes	No	No	No	No	No

INTRODUCTION

1. The Panel, Elizabeth Bryan, Alastair Lucas AM (sitting President) and Robert Sultan declined to conduct proceedings on an application by Jiggi Investments Pty Ltd and others to review the decision of the initial Panel in *Careers Australia Group Limited 02*.¹ The review Panel agreed with the initial Panel and considered that there was no reasonable prospect of the review Panel coming to a different conclusion.
2. In these reasons, the following definitions apply.

Applicants

Jiggi Investments Pty Ltd ATF Graham and Company Executive Superannuation Fund, Wayburn Holdings Pty Ltd, Vernon and Jillaine Wills ATF the Wills Family Super Fund, Vernon Wills and Jillaine Wills, D & E Somerville ATF Sommerville Super Fund, Ganbros Pty Ltd, Jim and Lisa Elder ATF Elder Superannuation Fund, Orbit Capital Pty Ltd, Devine Superannuation Pty Ltd ATF Devine Executive Super Fund, Depofo Pty Ltd ATF Super account, Depofo Pty Ltd ATF Depofo TT account, Pinbrook Pty Ltd, Myall Resources Pty Ltd ATF Myall Unit A/C, Myall Resources Pty Ltd ATF Myall Super A/C and Onmell Pty Ltd ATF Brent Potts Super Fund A/C

Careers Australia

Careers Australia Group Limited

Cirrus

Cirrus Business Investments Limited

¹ [2013] ATP 5. The initial Panel declined to conduct proceedings

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Crescent	Crescent BidCo Pty Limited, a wholly owned subsidiary of Crescent Capital Partners Management Pty Limited
Deed	the Convertible Note Deed between Careers Australia and Cirrus under which Careers Australia issued 60.6 million convertible notes with a face value of \$40 million to Cirrus
Quote Holdings	Quote Holdings Pty Ltd as trustee for the Salrowe Superannuation Fund
White Cloud	White Cloud Capital Fund Limited

FACTS

3. The facts are set out in *Careers Australia Group Limited 02*. Essentially, in 2011 Careers Australia and Cirrus (controlled by White Cloud) entered into the Deed and Careers Australia shareholders approved Cirrus acquiring up to 45.29% of Careers Australia through conversion of notes issued under the Deed. Cirrus holds a 45.2% interest in Careers Australia, having converted all its notes except those equating to a further 2%.
4. On 5 June 2013, Cirrus made a conditional, off-market takeover bid for all the remaining shares in Careers Australia.
5. Careers Australia formed an independent board committee to consider the Cirrus bid, which recommended that the bid be rejected. An independent expert concluded that the bid was neither fair nor reasonable.
6. On 26 June 2013, the conditions of the Cirrus bid were waived.² To that date, Cirrus had not increased its interest in Careers Australia under its bid.
7. On 27 June 2013, a competing, off-market, cash bid was made by Crescent for all the shares in Careers Australia at 80c per share. It is due to close (unless extended) on 29 July 2013. It is subject to conditions, including a 50.1% minimum acceptance condition. The independent board committee recommended the Crescent bid, subject to it becoming unconditional and in the absence of a superior proposal.
8. On 1 July 2013, Cirrus increased its bid to 85c cash per share. This automatically extended the closing date of its bid to 15 July 2013.

APPLICATION

9. In the initial proceeding, the Applicants sought orders (among others) to make the Cirrus bid conditional on either shareholder,³ or independent board committee, approval based on clause 14.3 of the Deed.⁴

² Section 630(3) notice dated 27 June 2013

³ Careers Australia shareholders not associated with Cirrus

⁴ Clause 14.3 provides: “The Company [Careers Australia] and the Noteholder [Cirrus] acknowledge and agree that, subject to the ongoing duties of the Directors and without fettering any discretion the Directors have, the Company will consider either an initial public offering and listing on the Australian Securities Exchange (IPO) or another form of liquidity event with a period of 2 years from the Issue Date and the parties undertake to take all reasonable steps to effect the IPO or other form of liquidity event provided that such action is considered to be in the best interests of all the Company security holders at that time. In the event that the Directors, acting in the best interests of the Company

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10. The initial Panel declined to conduct proceedings on the bases that:
 - (a) clause 14.3 did not require such approval and
 - (b) the bid complied with Chapter 6,⁵ and met the purposes in s602, and did not give rise to unacceptable circumstances.

Declaration sought

11. By review application dated 24 June 2013, the Applicants sought a review of the decision of the initial Panel. The acting President consented to the review application.
12. The Applicants submitted that the initial Panel erred in that:
 - (a) clause 14.3 bound Cirrus and the acquisition of 2.8% of the shares would give Cirrus control of Careers Australia (if the remaining notes were converted in reliance on the creep exception), so a nexus existed between the clause and control of Careers Australia
 - (b) clause 14.3 implied that the bid was required to be subject to shareholder or independent board committee approval and an unsolicited bid did not discharge (indeed, was contrary to) Cirrus' obligations under clause 14.3. The initial Panel's decision meant that the bid was able to proceed contrary to the principles in ss602(a), (b) and (c) and
 - (c) Careers Australia shareholders will potentially be denied the opportunity to participate in benefits that may have accrued from an IPO or other liquidity event in accordance with clause 14.3.
13. The Applicants further submitted that failure to comply with clause 14.3 constituted unacceptable circumstances because:
 - (a) acceptance by 2.8% of shareholders would deprive non-accepting shareholders of the prospect of a future IPO or other liquidity event and
 - (b) acceptance by 14 shareholders would remove Careers Australia from the protection of Chapter 6.⁶
14. The Applicants further submitted that clause 14.3 was disclosed at the time of the approval of the Deed, creating a legitimate expectation that control of Careers Australia would not pass to Cirrus without further approval of non-associated shareholders. Accordingly, the acquisition of voting shares under the bid will not take place in an efficient, competitive and informed market.
15. Lastly, the Applicants submitted that the bid denied shareholders the opportunity to consider other forms of liquidity event that may arise.

security holders elect not to proceed with an IPO or other form of liquidity event at that time the Directors shall consider at least annually thereafter whether an IPO or other form of liquidity event would be in the best interests of the Company security holders at that time."

⁵ References are to the *Corporations Act 2001* (Cth) unless otherwise specified

⁶ In this respect the Applicants noted *Careers Australia Group Limited 01* [2012] ATP 5, particularly at [28]

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Interim orders sought

16. The Applicants sought interim orders similar to those in *Careers Australia Group Limited 02* with an additional order that Cirrus not declare the bid unconditional until the review Panel had made its decision.
17. The acting President made interim orders (Annexure).

Final orders sought

18. The Applicants sought final orders similar to those in *Careers Australia Group Limited 02*, but did not pursue their previous request for orders for disclosure of clause 14.3.

Preliminary submissions

19. Quote Holdings submitted a notice of appearance and preliminary submission. We accepted Quote Holdings as a party and received its preliminary submission, to the effect that making the bid conditional on shareholder approval would be unreasonable and unfair because each shareholder not associated with Cirrus should be in a position to make its own decision.
20. We note that Quote Holdings has entered into a pre-bid agreement to accept the Crescent bid within 2 business days for its 10.1% of Careers Australia.⁷ The Applicants further submitted in response (which we agreed to receive) that the pre-bid agreement cast doubt on Quote Holdings' submission, including the submission that shareholders should not be "*held hostage to the majority of the shareholders not associated with Cirrus*". We do not think it does.
21. White Cloud made preliminary submissions, including that:
 - (a) Cirrus had complied with its obligations under clause 14.3, and in any event that had "*no bearing on the legitimacy of the Offer*"
 - (b) the bid did not offend the principles of s602, whereas the orders sought by the Applicants would
 - (c) there are no grounds for a declaration of unacceptable circumstances and
 - (d) the Applicants were seeking to circumvent the threshold for bringing court proceedings on behalf of Careers Australia.⁸

DISCUSSION

22. We have considered the matter on its merits. We have considered the following documents before the Panel:
 - (a) all the material before the initial Panel, including the initial application, the preliminary submission and the Applicants' response to the preliminary submission that the initial Panel decided to receive
 - (b) the initial Panel's reasons and

⁷ Crescent bidder's statement dated 27 June 2013, p28

⁸ Section 237

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- (c) the review application and preliminary submissions on the review and the further submission by the Applicants that we decided to receive.
23. We have also considered the public documents in relation to the Crescent bid and the revised Cirrus bid.
24. We agree with the initial Panel and do not think there is any reasonable likelihood of a declaration of unacceptable circumstances, so we decline to conduct proceedings on the review application.⁹
25. Clause 14.3 obliges Careers Australia to consider an IPO or other liquidity event. If the Careers Australia directors elect to proceed, the clause obliges Cirrus to take all reasonable steps to effect it. These obligations are qualified by reference to what is in the best interests of Careers Australia's security holders at the time. Nothing that we can see, expressly or impliedly, obliges Cirrus not to make this bid unless it has first received shareholder or independent board committee approval.
26. As that is our view of the effect of the clause, there is no prospect that we would find on the material provided to us that there was any legitimate expectation in shareholders regarding this bid arising from the shareholder vote on the Deed.
27. We agree with the initial Panel that: *"The making of an offer that complies with Chapter 6 and meets the purposes set out in s602 is not an event that we should ordinarily interfere with"*¹⁰ and we decline to do so.
28. We do not agree with the Applicants that the bid necessarily denies another liquidity event, from a third party or otherwise. Indeed, a third party has bid and there is competition for Careers Australia shares. On this basis as well, we decline to conduct proceedings.

DECISION

29. For the reasons above, we do not consider that there is any reasonable prospect that the review application will result in a different outcome to that of the initial Panel.
30. Accordingly, we decline to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth). We consider it is not against the public interest to do so.

Orders

31. We make no final orders, including as to costs.
32. The interim orders are at an end.

Alastair Lucas AM
President of the review Panel
Decision dated 2 July 2013
Reasons published 3 July 2013

⁹ A review Panel is entitled to do this: *GoldLink IncomePlus Limited 04R* [2009] ATP 3, *Multiplex Prime Property Fund 03R* [2009] ATP 23, *Tully Sugar Limited 01R* [2010] ATP 1, *CMI Limited 01R* [2011] ATP 5

¹⁰ [2013] ATP 5 at [36]

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Advisers

Party	Advisers
Applicants	HopgoodGanim
Careers Australia Group Limited	Herbert Smith Freehills
Cirrus Business Investments Limited and White Cloud Capital Advisors Limited in its capacity as advisor of White Cloud Capital Fund	Minter Ellison
Quote Holdings Pty Ltd as trustee for the Salrowe Superannuation Fund	NA



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Annexure
CORPORATIONS ACT
SECTION 657EA
INTERIM ORDERS

CAREERS AUSTRALIA GROUP LIMITED 02R

Jiggi Investments and other shareholders of Careers Australia Group Limited made a review application to the Panel dated 24 June 2013 in relation to the affairs of Careers Australia Group Limited.

The Acting President ORDERS:

1. Cirrus Business Investments Limited not process any acceptances received under its off-market takeover bid for shares in Careers Australia Group Limited.
2. These interim orders have effect until the earliest of:
 - (i) further order of the Panel
 - (ii) the Panel deciding not to conduct proceedings
 - (iii) if the Panel decides to conduct proceedings, the determination of those proceedings and
 - (iv) 3 business days before the end of the period specified in s620(2)(a)(ii) of the *Corporations Act 2001 (Cth)*.

Alan Shaw
Counsel
with authority of Andrew Sisson
Acting President
Dated 25 June 2013