



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Keybridge Capital Limited  
[2013] ATP 17**

**Catchwords:**

*Disclosure – bidder’s statement – intentions – coercive conduct – decline to conduct proceedings – directors’ duties*

*Corporations Act 2001 (Cth), sections 602, 636, 657A, 657C, 670A*

*Guidance Note 18 “Takeover documents”; Guidance Note 5 “Specific Remedies – Information Deficiencies”*

*Multiplex Prime Property Fund 01 & 02 [2009] ATP 18; Multiplex Prime Property Fund 04 [2009] ATP 21; International All Sports Ltd 01R [2009] ATP 5; Bowen Energy Ltd [2007] ATP 22; Magna Pacific (Holdings) Limited 05 [2007] ATP 16; Southcorp Limited [2005] ATP 4*

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
NO	NO	NO	NO	NO	NO

**INTRODUCTION**

1. The Panel, Mark Darras, Robert Johanson (sitting President) and Robert Sultan, declined to conduct proceedings on an application by Keybridge Capital Limited in relation to its affairs. The application primarily concerned disclosure deficiencies in the bidder’s statement lodged by Oceania Capital Partners Limited relating to (among other things) tax losses, Oceania Capital’s intentions for Keybridge and a selective buy-back proposal. The Panel considers that the disclosure issues did not require further disclosure by the bidder and some were matters the target could address if it wished.
2. In these reasons, the following definitions apply.

<b>Keybridge</b>	Keybridge Capital Limited
<b>Oceania Capital</b>	Oceania Capital Partners Limited

**FACTS**

3. Keybridge is an ASX listed investment company (ASX code: KBC). It is in the process of realising assets and distributing the proceeds to its shareholders.
4. Oceania Capital is also an ASX listed company (ASX code: OCP).
5. On 28 November 2013, Oceania Capital announced an off-market takeover bid for all the ordinary shares in Keybridge at \$0.16 per share. The bid is only conditional on there being no prescribed occurrences. Oceania Capital's bidder's statement was dispatched to shareholders on 16 December 2013.

## Takeovers Panel

### Reasons - Keybridge Capital Limited [2013] ATP 17

6. Oceania Capital instructed its broker to stand in the market to acquire Keybridge shares at or below the \$0.16 bid price, in reliance on item 2 of s611.<sup>1</sup>
7. Oceania Capital is Keybridge's largest shareholder (20.77% as at the announcement of its bid). Following on-market purchases on 28 November 2013, its interest is 22.05%.

## APPLICATION

### Declaration sought

8. By application dated 12 December 2013, Keybridge sought a declaration of unacceptable circumstances. Keybridge submitted that Oceania Capital's bidder's statement contained material omissions in relation to:
  - (a) the impact of the bid on the use of tax losses by Keybridge to off-set future taxable income
  - (b) Oceania Capital's intentions to wind up Keybridge following the bid and
  - (c) a selective buy-back proposal between Keybridge and Oceania Capital prior to the announcement of the takeover bid.
9. Keybridge also submitted that:
  - (a) the takeover bid was coercive on Keybridge shareholders having regard to the potential inability to use tax losses and Oceania Capital's intention to wind up Keybridge and
  - (b) if Oceania Capital's bid is successful and it appoints nominees to the Keybridge board, there may be contraventions of directors' duties where the appointees have a predetermined approach to the question of winding up Keybridge.

### Interim orders sought

10. Keybridge sought interim orders to the effect that Oceania Capital:
  - (a) not acquire any Keybridge shares on-market and
  - (b) not dispatch the bidder's statement, lodge a supplementary or replacement bidder's statement or send any other communication in relation to its bid.
11. On 12 December 2013, the President declined to make the interim orders sought because, among other things:
  - (a) Keybridge did not make its application until the first day that Oceania Capital was permitted to dispatch its bidder's statement when it could have done so much earlier
  - (b) Keybridge had failed to demonstrate "*a higher level of alleged harm*" to warrant the Panel's interference with dispatch of the bidder's statement<sup>2</sup> and

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<sup>1</sup> References are to the *Corporations Act 2001 (Cth)* unless otherwise stated

<sup>2</sup> See Guidance Note 5 "*Specific Remedies – Information Deficiencies*" at [9]

## Takeovers Panel

### Reasons - Keybridge Capital Limited [2013] ATP 17

- (c) if the Panel were to find unacceptable circumstances, a supplementary bidder's statement would likely address these circumstances.
12. Had we been required to consider an interim order, we would have agreed with the President.

#### Final orders sought

13. Keybridge sought final orders to the effect that Oceania Capital:
- (a) not acquire any Keybridge shares on-market
  - (b) not dispatch the bidder's statement, lodge a supplementary or replacement bidder's statement or send any other communication in relation to the bid and
  - (c) withdraw its bid.

## DISCUSSION

### Disclosure

#### *Tax losses*

14. Keybridge currently has tax losses that may be able to be used to off-set future taxable income.
15. The availability of tax losses depends on Keybridge satisfying certain tests under the *Income Tax Assessment Act 1936 (Cth)* and the *Income Tax Assessment Act 1997 (Cth)*. One of these tests is the 'continuity of ownership' test.
16. During 2013, taxation advice was provided to two of Keybridge's directors, Mr Robert Moran and Mr Nicholas Bolton, to the effect that the 'continuity of ownership' test would not be satisfied if Oceania Capital's shareholding in Keybridge were to reach 30% or greater.
17. In its bidder's statement, Oceania Capital did not disclose the impact that its bid would have on Keybridge's ability to use its tax losses. Keybridge submitted that this information was material to Keybridge shareholders in deciding whether to accept the bid and should have been disclosed in the bidder's statement. Further, Keybridge submitted that this information was known by Oceania Capital because Mr Moran, who is a director of both Oceania Capital and Keybridge, received the taxation advice. Under the terms of his service agreement with Keybridge, Mr Moran is permitted to disclose Keybridge confidential information to Oceania Capital on condition that, among other things, the disclosure is reasonable in the circumstances and Oceania Capital does not disclose the information to any other person without the prior approval of Keybridge's chairman.
18. Oceania Capital submitted that it was uncertain whether Keybridge would be able to satisfy the necessary legislative tests to use tax losses in the future. It also submitted that the tax advice was nine months old, did no more than outline the operation of the tax legislation, and had no regard to the current and likely future circumstances of Keybridge. In these circumstances and having regard to the requirement in s670A(2), that a person must have a reasonable basis for making forward looking

statements, Oceania Capital submitted that it was not in a position to make “meaningful or reliable” disclosure about this issue. It submitted that Keybridge was the appropriate party to make disclosure about tax losses.

19. We think there are two disclosure issues relating to Keybridge’s tax losses:
  - (a) there is a risk that Keybridge’s tax losses may be affected by the bid and
  - (b) there was no assessment of the impact on Keybridge if the benefit of its tax losses were lost.
20. In relation to the second issue, we note that the deferred tax benefits have not been recognised as an asset by Keybridge in its FY 2013 Financial Statements on the basis that “it is currently not probable that future taxable profits will be available against which the Group can utilise the benefits of these tax losses ...”.<sup>3</sup>
21. Even if the tax losses could be used, Keybridge can make any disclosure required in its target’s statement. This is a topic that Keybridge shareholders would likely look to their directors to express a view on.<sup>4</sup> We also think this is a topic which Keybridge is better placed to make disclosure on.

### *Intentions*

22. Section 636(1)(c) requires a bidder to include in the bidder’s statement details of its intentions regarding continuation of the business, major changes to be made to the business, and future employment of present employees. Such intentions are not required to be formed, only disclosed if formed.<sup>5</sup>

23. Section 7.2 of the Oceania Capital’s bidder’s statement provides that:

*“whilst OCP has a KBC Shareholding of less than 50%, it will seek to have KBC:*

- continue its path of prudent asset sales; and*
- distribute all surplus cash to shareholders.*

*OCP does not consider the investable capital available to KBC to be of sufficient critical mass to justify KBC’s continuation as a stand-alone listed investment company with the associated management and administration costs.*

*If OCP achieves a KBC shareholding of more than 50% such that KBC becomes a subsidiary of OCP and thus ceases to be a stand-alone company, OCP will be in a position to determine the composition of the KBC Board and hence KBC’s investment strategy. Given that OCP is an investment company with a similar management and administrative structure to KBC, this outcome would provide the opportunity for KBC to derive cost savings by sharing some of such functions with OCP. Accordingly, in this event OCP’s intention would be to consider the continuation of KBC as an investment vehicle making investments identified by the KBC board, with the aim of maximizing Shareholder returns over time.”*

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<sup>3</sup> See note 10 of Keybridge’s 2013 financial statements

<sup>4</sup> See *Southcorp Limited* [2005] ATP 4 at [114]

<sup>5</sup> See Guidance Note 18 “Takeover documents” at [28]

## Takeovers Panel

### Reasons - Keybridge Capital Limited [2013] ATP 17

24. Keybridge submitted that on the basis of these intentions, it is likely that Oceania Capital would aim to initiate an orderly winding up of Keybridge. As a result, Keybridge submitted, the bidder's statement was deficient and should have been more precise in setting out the particulars of Oceania Capital's intended course of action and the steps involved.
25. Oceania Capital submitted that its intentions were straight-forward and that no intention to wind up Keybridge was disclosed because there was no intention at this time.
26. In essence, Keybridge is asking us to draw inferences beyond Oceania Capital's stated intentions, which we do not consider is supported by the material before us. While we think that Oceania Capital's intentions could have been expressed more clearly, we do not think the disclosure of Oceania Capital's intentions is inadequate.

#### *Selective buy-back proposal*

27. Prior to Oceania Capital making its bid, it had been in discussions with Keybridge concerning a selective buy-back proposal. An independent board committee comprising Keybridge's two independent directors was formed to consider the proposal. The committee disbanded on 27 November 2013, with the committee members not supportive of a selective buy-back.
28. Keybridge submitted that during these discussions Oceania Capital had agreed to its shares being bought back at a price higher than the bid price and that Oceania Capital's failure to disclose this information in its bidder's statement deprived shareholders of an opportunity to make an informed assessment of the bid. Oceania Capital submitted that it did not initiate the proposal and, at an early stage, it and Keybridge determined not to pursue the proposal because of the lack of support from the committee. The proposal was therefore of no more than historical interest.
29. We agree with Oceania Capital that this is, at best, of historical interest. There was no selective buy-back proposal which was capable of being approved by shareholders and on this basis we do not think that information about the proposal is material. Even if we were to accept the facts as submitted by Keybridge, we do not consider that there needs to be any disclosure in the bidder's statement. This was a different proposal at a different time.
30. In any event, to the extent that Keybridge considers information relating to the selective buy-back proposal material for its shareholders to consider, we think it can make the disclosure.

#### **Coercion**

31. Keybridge submitted that its shareholders would be coerced into accepting the bid as a result of:
  - (a) the removal of Keybridge's ability to use its tax losses if Oceania Capital acquired a certain shareholding and

## Takeovers Panel

### Reasons - Keybridge Capital Limited [2013] ATP 17

- (b) Oceania Capital's intention to wind up Keybridge, because increases in Oceania Capital's voting interest increase the likelihood that it would be in a position to determine the outcome of a special resolution to wind up Keybridge.
32. In *Multiplex Prime Property Fund 01 & 02* [2009] ATP 18, Australian Style Investments Pty Limited made an on-market bid for Multiplex Prime. At the same time, Australian Style Investments proposed a resolution to wind up Multiplex Prime. If Australian Style Investments were to acquire units under the bid, its ability to determine the outcome of the wind up resolution would have increased as well as (up to the 50% level) its ability to withdraw its bid (as it intended to rely on a right to withdraw its bid under s652C in the event of a successful wind up resolution). The Panel said that the effect of this would coerce unit holders into rushing to accept the bid (at [31]) and made orders requiring Australian Style Investments to withdraw its bid.
33. Unlike in *Multiplex Prime*, in the matter before us there is no evidence of anything outside the normal incidence of a change of ownership that could reasonably be considered coercive such as to give rise to unacceptable circumstances.

#### Directors' duties

34. Keybridge raised a concern that, if Oceania Capital nominated people to the board, those nominees may have a pre-determined approach to the question of winding up Keybridge. Keybridge submitted that "*Such a commitment to a pre-determined course of action would be a fundamental contravention of the directors' duties of the Keybridge board*".
35. Section 7.6 of the bidder's statement states that "*If after the conclusion of the Offer KBC is not a wholly owned subsidiary of OCP, OCP expects that the Directors of KBC (including those nominated by OCP) will act at all times in accordance with their duties and intends that all requisite shareholder approvals and other requirements of law, including the Corporations Act and the Listing Rules, are complied with as required in pursuing any of the intentions which are referred to above*".
36. We think that there is no reason at this stage to think that the directors will not act in accordance with their duties.

#### DECISION

37. For the reasons above, we do not consider that there is any reasonable prospect that we would 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)*.

#### Orders

38. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make an interim order.

**Takeovers Panel**

**Reasons - Keybridge Capital Limited  
[2013] ATP 17**

39. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

**Robert Johanson  
President of the sitting Panel  
Decision dated 19 December 2013  
Reasons published 6 January 2014**

## Takeovers Panel

Reasons - Keybridge Capital Limited  
[2013] ATP 17

### Advisers

Party	Advisers
Keybridge	Atanaskovic Hartnell Lawyers
Oceania Capital	Johnson Winter and Slattery