



Australian Government

Takeovers Panel

**Reasons for Decision
Careers Australia Group Limited 03
[2015] ATP 1**

Catchwords:

Decline to conduct proceedings – misleading statements - omissions – bidder’s statement – supplementary bidder’s statements – target’s statement - supplementary target’s statements -reasonable basis for future matters – bid closed – Chapter 6 Company – compensation order – interim order for production of documents – out of time – extension of time for making application

Corporations Act 2001 (Cth) sections 636(1)(m), 657B, 657C, 659C, 670A

Australian Securities and Investments Commission Act 2001 (Cth) section 190

Procedural Rules 4.1.1, 6.1.1 note 2, Annexure A

Guidance Note 1: Unacceptable Circumstances

Ludowici Limited 01R(a) and (b) [2012] ATP 4, Ludowici Limited [2012] ATP 3, Qantas Airways Limited 02R [2007] ATP 7, Qantas Airways Limited 02 [2007] ATP 6, Austral Coal Limited 03 [2005] ATP 14

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

INTRODUCTION

1. The Panel, John M Green, Francesca Lee and Laurie Shervington (sitting President), declined to conduct proceedings on an application by Wayburn Holdings Pty Ltd and others. The essence of the application is that, in relation to a bid that closed in July 2013, Cirrus and two of its nominee directors made statements in the bidder’s statement and target’s statement which presented a negative view of the prospects of Careers Australia Group Limited when they reasonably ought to have known otherwise. The Panel considered that given the time that has passed, the evidence required to establish unacceptable circumstances, the existence of another forum to decide the issues and it appears that the court is better placed to consider the matter, there was no reasonable prospect of a declaration of unacceptable circumstances. Moreover, the application is out of time and the Panel would not extend time.

2. In these reasons, the following definitions apply.

Applicants

Jiggi Investments Pty Ltd ATF 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 The Somerfam Super Fund, Devine Superannuation Pty Ltd ATF Devine Executive Super Fund, Orbit Capital Pty Ltd, Pinbrook Pty Ltd, Jim and Lisa Elder ATF Elder Superannuation Fund and

Takeovers Panel

Reasons – Careers Australia Group Limited 03 [2015] ATP 1

	Ganbros Pty Ltd
Careers Australia or CAG	Careers Australia Group Limited
Cirrus	Cirrus Business Investments Limited, an entity owned by White Cloud Capital Fund and its investors

FACTS

3. Careers Australia is an unlisted public company limited by shares.
4. The Applicants are former shareholders in Careers Australia who together held in excess of 19% of its shares.
5. On or about 3 May 2013, Careers Australia received a takeover proposal from Cirrus offering \$0.66 per share. At the time Cirrus held approximately 45.2% of Careers Australia.
6. On 23 May 2013, Cirrus served its bidder's statement on Careers Australia. In the bidder's statement, the following statements were made:
 - (a) *"...Cirrus believes that CAG remains subject to ongoing challenges and risks in its operating model. For example, Cirrus understands that CAG is currently highly dependent on a third party for its Diploma student enrolment, ... and will need to make investments to decrease such a dependency as the business grows."*¹
 - (b) *"Consequently, Cirrus believes that the CAG group will continue **to need to reinvest available cash resources** to finance ongoing growth, increasingly own its enrolment channels, meet the evolving market demands and plug various strategic gaps to deepen and broaden CAG's capabilities. Cirrus believes that a likely consequence of such reinvestment is that it is **unlikely there will be any dividends in respect of CAG shares for some time and, indeed, further capital may likely be required to support CAG's growth plans.**"*²

(Applicants' emphasis)
 - (c) *"As CAG continues to experience both strong growth within the Diploma division and some short term profitability issues in the Apprentices division, Cirrus believes that the CAG Group's net cash generation will continue to lag EBIDTA and therefore **further capital** may potentially be needed to support growth...."*³

(Applicants' emphasis)
 - (d) *"dividends are unlikely in the foreseeable future and further capital may be required over time to support CAG's long term growth"*⁴
 - (e) *"Cirrus believes that CAG will require reinvestment of available profits and cash flow to support its various challenges, its growth and build a robust enterprise of enduring*

¹ Bidder's statement dated 22 May 2013, page 3 (letter to shareholders)

² Bidder's statement dated 22 May 2013, page 3 (letter to shareholders)

³ Bidder's statement dated 22 May 2013, page 18 (information on CAG)

⁴ Bidder's statement dated 22 May 2013, page 7 (considerations in relation to whether to accept the Offer)

Takeovers Panel

Reasons – Careers Australia Group Limited 03 [2015] ATP 1

value, nationally and internationally...Consequently, there are unlikely to be dividends for some time yet and further capital may be required.”⁵

- (f) *“It is the current intention of Cirrus that CAG management should continue to conduct the business of CAG for growth.... Consequently, Cirrus does not presently intend to seek any dividends from CAG and will recommend against any dividends for the foreseeable future.”⁶*

(Applicants’ emphasis)

7. Careers Australia formed an independent board committee – Messrs Shane Edwards and Ian Grier AM - to consider Cirrus’ offer.
8. Careers Australia appointed an independent expert, which concluded that Cirrus’ offer was neither fair nor reasonable. It valued the shares in the range \$0.85 - \$0.96.
9. On 12 June 2013, Careers Australia released its target’s statement, recommending that shareholders reject Cirrus’ offer. In the target’s statement, the following statements were made:
 - (a) *“The other CAG Directors, Mr Robert C Mansfield AO, Mr Errol D Clark and Mr Jonas Martin-Lof are nominee directors of Cirrus, and therefore have abstained from making any recommendation. The Cirrus-nominated directors have not approved this Target’s Statement.”⁷*
 - (b) *“The Cirrus nominated directors were asked to confirm that the Target’s Statement sets out all information that CAG shareholders and their professional advisers would reasonably require to make an informed assessment on whether to accept the Offer.”⁸*
 - (c) *Cirrus nominated directors, Errol Clark and Jonas Martin-Lof, wrote to the IBC on 12 June 2013 to say that they were unable to provide such a confirmation and that the Target’s Statement does not, in their view, set out all information that CAG shareholders and their professional advisers would reasonably require to make an informed assessment of the Offer.....A copy of the correspondence from Messrs Clark and Martin-Lof is included at Attachment 2 of this Target’s Statement.”⁹*
10. The attachment to the target’s statement referred to in paragraph 9(c) was an extract of correspondence from the Cirrus-nominated directors in which the following statements were made:
 - (a) *“We have reviewed the Target’s Statement and believe it gives a misleading and incorrect picture of CAG. Specifically, the value of its shares and its overall operating and financial condition.”*
 - (b) *“... The CAG valuation focus on EBITDA/EBIT multiples completely ignores the most important driver of value, operating cashflow. While CAG has achieved sound revenue*

⁵ Bidder’s statement dated 22 May 2013, page 9 (reasons why you may wish to accept the Offer)

⁶ Bidder’s statement dated 22 May 2013, page 23 (intentions if Cirrus increases its shareholding – dividend policy)

⁷ Target’s statement dated 12 June 2013, page 5 (chairman’s letter). There is a cross-reference to section 10.8 of the target’s statement; which is the quote in paragraphs 9(b) and 9(c) of these reasons

⁸ Target’s statement dated 12 June 2013, page 43 (no other material information)

⁹ Target’s statement dated 12 June 2013, page 43 (no other material information)

Takeovers Panel

Reasons – Careers Australia Group Limited 03

[2015] ATP 1

growth in recent years it has not been able to generate positive operating cashflows on a consistent basis. The absence of information on this cash flow issue leads to a distorted, incorrect and misleading view of CAG and its share value."

(Applicants' emphasis)

- (c) *"... It is striking that the references in the draft Target's Statement to the Independent Expert's Report do not appear to contain any reference to cash flow... As directors of CAG, we would suggest that the shareholders need to understand the cash flow capabilities of the company to assess its relative robustness and valuation standing."*

(Original emphasis)

- (d) *"Thus, we do not approve the Target's Statement on the grounds it is misleading..."*

11. The offer price under Cirrus' bid was increased to \$0.85 per share, then to \$0.87 per share, before the bid closed on 23 July 2013.
12. On 11 July 2013, the Applicants sold their shares into the bid. We understand that by this time the offer price was \$0.87 per share and the bid had been recommended by Careers Australia's independent board committee.¹⁰
13. At the time of the bid, the board of Careers Australia comprised:
 - Mr Shane Edwards (independent board committee member)
 - Mr Ian P Grier AM (independent board committee member)
 - Mr Patrick McKendry
 - Mr Robert Mansfield AO (nominee appointed by Cirrus)
 - Mr Errol Clark (nominee appointed by Cirrus) and
 - Mr Jonas Martin-Lof (nominee appointed by Cirrus)
14. In all, 5 supplementary bidder's statements and 7 supplementary target's statements were issued.¹¹
15. On completion of the bid, Cirrus had 99.99% of Careers Australia.
16. On or about 22 November 2014, the Applicants obtained a copy of the audited annual 2013/14 financial statements for Careers Australia dated 27 October 2014. In the financial statements, disclosure was made of revenues, profits, dividends and a capital return that had been made.
17. On 17 December 2014, the Applicants' solicitors wrote to Cirrus' solicitors seeking an undertaking by Cirrus that it would compensate all former Careers Australia shareholders who accepted the bid for the dividends forgone after the sale of their shares.

¹⁰ It is not clear from the application

¹¹ We do not have access to the supplementary target's statements or supplementary bidder's statements, as they were not included as part of the application, Careers is not a listed company and its website does not carry this information. We understand that Cirrus' bid became a recommended bid at some point

Takeovers Panel

Reasons – Careers Australia Group Limited 03 [2015] ATP 1

18. On 19 December 2014, Cirrus' solicitors responded that they were seeking instructions.
19. On 23 December 2014, this Panel application was filed.

APPLICATION

Declaration sought

20. By application dated 23 December 2014, the Applicants sought a declaration of unacceptable circumstances.
21. The Applicants submitted that the manner in which Cirrus proceeded with its bid constituted unacceptable circumstances because:
 - (a) the bidder's statement (as supplemented) failed to disclose all information that was material and known to Cirrus, and contained misleading and deceptive statements and material omissions and
 - (b) Messrs Clark and Martin-Lof caused the target's statement to contain misleading and deceptive statements and material omissions.
22. Accordingly, they submitted, Cirrus acquired control over voting shares in Careers Australia otherwise than in an efficient, competitive and informed market and shareholders had not been given enough information to enable them to assess the merits of the offer.

Interim orders sought

23. The Applicants sought interim orders to the effect that:
 - (a) the Panel extend time for making the application
 - (b) Cirrus produce identified material, essentially board minutes authorising the bidder's statement and supplementary bidder's statements, verification material, and communications in relation to the bid between White Cloud and Cirrus and between Cirrus and its nominees on the Careers Australia board
 - (c) Careers Australia produce identified material, essentially board minutes (i) authorising the issue of the target's statement and supplementary target's statements, (ii) considering the independent expert report, (iii) relating to the return of capital, (iv) relating to payment of dividends and (v) relating to the acquisition of Global Learning Support Pty Ltd; communications with the independent expert, management accounts, budget and forecast reports, communications between Careers Australia and (i) its bankers and (ii) its major government customers from 30 June 2012 to 23 July 2013
 - (d) Messrs Clark and Martin-Lof produce identified material, essentially all documents relied on by them to make the statements in paragraph 10 of these reasons, communications between them and White Cloud or Cirrus in relation to (i) the bidder's statement and supplementary bidder's statements and (ii) the target's statement and supplementary target's statements, and other communications involving the other Cirrus nominee on the Careers Australia board and

Takeovers Panel

Reasons – Careers Australia Group Limited 03 [2015] ATP 1

- (e) Cirrus immediately notify all former Careers Australia shareholders of the above.

Final orders sought

24. The Applicants sought final orders to the effect that:

- (a) Cirrus contravened s 636(1)(m)¹²
- (b) Cirrus contravened s 670A(1)
- (c) Messrs Clark and Martin-Lof contravened s 670A(1)
- (d) Cirrus (alternatively, Messrs Clarke and Martin-Lof) be directed to “*compensate the Applicants and all other former CAG shareholders who accepted the Offer for loss or damage they have suffered as a consequence of selling their CAG shares to Cirrus, ... where such loss or damage is to include without limitation loss of opportunity and loss of dividends and is to be assessed by an independent expert appointed by the Panel*” and
- (e) Cirrus immediately notify all former Careers Australia shareholders of the above.

Preliminary submissions

25. Cirrus made preliminary submissions. Careers Australia made preliminary submissions adopting those of Cirrus.

DISCUSSION

Jurisdiction

26. Cirrus’ bid closed some 18 months ago. In our view, the fact that a bid has closed does not necessarily remove the Panel’s jurisdiction. In *Qantas 02*,¹³ the Panel declined to conduct proceedings on an application to reopen a bid to allow a late acceptance to be counted which would have taken the bidder over 50%. The Panel considered that it had jurisdiction although the bid was closed. The Panel said at [14]:
- The Panel's decision not to commence proceedings was not based on any view that it did not have jurisdiction to consider the application.*
27. Careers Australia is now 99.99% owned by Cirrus and is no longer a Chapter 6 company, although it was at the time of the bid. In our view, this fact does not necessarily remove the Panel’s jurisdiction. If the view were taken to the contrary, a curious situation would arise that the Panel would have jurisdiction at the beginning of a bid but not necessarily towards the end of a successful bid, at least in the case of an on-market or unconditional bid. This cannot have been intended.
28. However, the fact that a bid has closed may be a factor relevant to whether the Panel should conduct proceedings.

¹² References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

¹³ *Qantas Airways Limited 02* [2007] ATP 6 at [14]; On review, *Qantas Airways Limited 02R* [2007] ATP 7

Takeovers Panel

Reasons – Careers Australia Group Limited 03 [2015] ATP 1

Out of time

29. Under s657C(3) an application must be made within two months after the circumstances have occurred or a longer period determined by the Panel. It provides:
- An application for a declaration under section 657A can be made only within:*
- (a) 2 months after the circumstances have occurred; or
 - (b) a longer period determined by the Panel
30. Section 657B entitles the Panel to make a declaration within three months after the circumstances occur or one month after the application was made (whichever ends last). It provides:
- The Panel can only make a declaration under section 657A within:*
- (a) 3 months after the circumstances occur; or
 - (b) 1 month after the application under section 657C for the declaration was made;
- whichever ends last. The Court may extend the period on application by the Panel.*
31. The circumstances alleged in the application involve misleading statements and material omissions in a bidder's statement and target's statement for a bid that closed on 23 July 2013. The Applicants submit that the application was made within two months because the unacceptable circumstances only came to light on 27 October 2014 when the financial statements were released and they only became aware of the circumstances on 22 November 2014.
32. Cirrus submitted in its preliminary submission that the relevant circumstances occurred in 2013 (and it denied the Applicants' allegations).
33. In our view the application was not made within the two month period.
34. The Applicants submitted, in the alternative, that the Panel should exercise its power to allow a longer period for making the application because:
- (a) the existence of the unacceptable circumstances only became apparent when the financial statements were released on 27 October 2014
 - (b) there was no way for the Applicants, or any person, to know before then of the misleading statements and material omissions
 - (c) they have acted in a timely way since becoming aware of the circumstances on 22 November 2014
 - (d) essential matters supporting their case first came to light during the two months before the application and
 - (e) it is against public policy for Cirrus to have acquired control of Careers Australia to the detriment of shareholders by perpetuating unacceptable circumstances.
35. The test for extending time was explained in *Austral Coal 03*.¹⁴ The Panel there said:

¹⁴ *Austral Coal Limited 03* [2005] ATP 14 at [18]-[21]

Takeovers Panel

Reasons – Careers Australia Group Limited 03 [2015] ATP 1

18. *The Panel considered that it should not lightly exercise that discretion. The time limit was set by the legislature to provide certainty to market participants in the context of takeovers that actions could not be challenged indefinitely.*
 19. *Notwithstanding this, the Panel considered that it would be undesirable for Glencore's application be (sic) allowed to go unheard because it was lodged outside the 2 month time limit, if:*
 - (a) *essential matters supporting Glencore's case first came to light during the 2 month period preceding the application; and*
 - (b) *Glencore's application made credible allegations of clear, serious and ongoing unacceptable circumstances.*
 20. *Unacceptable circumstances in relation to Austral Coal should not go unremedied merely because their existence has been able to be hidden for more than 2 months.*
 21. *The Panel, therefore, considered it desirable to review the merits of the Application on its face in order to assist in its decision whether or not to grant an extension of time.*
36. We have undertaken a similar exercise and, for the reasons below, come to a similar conclusion to the Panel in *Austral Coal 03* that we should not extend time.

Merits of the application

37. As part of making a decision about whether to conduct proceedings, the Panel considers:
- (a) whether it has jurisdiction
 - (b) whether the claims would give rise to unacceptable circumstances if established
 - (c) the strength of the preliminary evidence
 - (d) the remedies available
 - (e) whether the circumstances are the subject of court proceedings
 - (f) whether the application is out of time and, if not, whether it is timely and
 - (g) whether the application is trivial, frivolous or vexatious.¹⁵
38. The Applicants essentially make three submissions:
- (a) Cirrus knew, or ought to have known, of positive cash flow and a growth forecasts for Careers Australia, but failed to make any disclosures in contravention of s 636(1)(m) and s 670A
 - (b) Cirrus made the dependency statement,¹⁶ further capital statements¹⁷ and dividends statements¹⁸ in its bidder's statement. They were statements as to future matters that were false and it had no reasonable grounds to believe they were true, in contravention of s 670A(1) and

¹⁵ Procedural Rule 6.1.1 note 2

¹⁶ Paragraph 6(a) of these reasons

¹⁷ Paragraphs 6(b) and 6(c) of these reasons

¹⁸ Paragraphs 6(d), 6(e) and 6(f) of these reasons

Takeovers Panel

Reasons – Careers Australia Group Limited 03 [2015] ATP 1

- (c) Messrs Clark and Martin-Lof had no reasonable basis to make the statements they did in the target's statement, given that Cirrus was in possession of profit and revenue forecasts indicating significant future growth, information indicating the likely expansion of the Careers Australia business and information indicating that further cash would not be required.
39. The time that has elapsed since Cirrus' bid closed is considerable. Even on the material before us it is apparent that there have been many intervening events that have changed the landscape. For example, Cirrus submitted that, in the 18 months since the bid closed, Careers Australia's business structure and revenue mix have changed, its revenue and profit from its online offering have grown because of changes in market demand and investments it has made, and in January 2014 it undertook debt refinancing.
40. Moreover, at the time of the bid there were multiple supplementary bidder's statements and supplementary target's statements, a competing bid, two price increases and a change of recommendation in relation to Cirrus' bid. Not all the relevant material was supplied to us in the application.¹⁹ But we have enough to appreciate that it would be no straightforward matter to reconstruct what information was available to shareholders and whether they were likely to be misled.
41. Further, it is hard to see how we could now respond to the circumstances by the creation of new rights and obligations. As noted in Guidance Note 1:
- The Panel aims to correct unacceptable circumstances as quickly and as cost effectively as possible. It seeks to ensure that control transactions are decided by informed security holders who have confidence in the integrity of Australia's market for corporate control.*²⁰
42. That time has now passed. Perhaps, based solely on the framing of the Applicants' claims, there is sufficient material to suggest that some inquiry should be made. However, it is also not unreasonable to imagine - as submitted by the Respondents - that CAG's circumstances and opportunities may have materially improved since the close of the bid. We have formed no views on the ultimate merits of the claims. The question for now is whether it should be the Panel or another forum that investigates those claims. In our view, the circumstances surrounding the application, including the intervening circumstances since the bid closed, are likely to require information gathering and forensic analysis that the Panel is not best equipped to undertake.
43. Cirrus submitted that the Court, not the Panel, exists to adjudicate on legal rights. We agree. Cirrus also submitted that the remedies sought in the application made it clear that the Applicants were seeking adjudication on legal rights. This is less clear, in that there is an area of overlap between a Court's characterisation of circumstances as a contravention of the Act and the Panel's characterisation of circumstances as unacceptable circumstances.
44. The application seeks an interim order for the production of numerous documents. The Panel has this power, but Cirrus submitted that it and Careers Australia would not have the protection they would have as parties to litigation. We do not entirely

¹⁹ See footnote 11

²⁰ *Guidance Note 1: Unacceptable Circumstances* at para [4]

Takeovers Panel

Reasons – Careers Australia Group Limited 03 [2015] ATP 1

agree with this proposition. The Panel may give directions preventing or restricting publication of matters contained in documents.²¹ And the Applicants have given the Panel and the parties the usual undertaking in the Notice of Appearance regarding use and disclosure of confidential information.²²

45. The application seeks final orders for compensation which, Cirrus submitted, was in effect an award of damages. Cirrus submitted that the Panel considers that it has power to make a compensation order²³ (which we agree with), but “*It would be overextending that power to rely on it to conduct an action in damages relating to a bid which has closed, something for which s659C clearly contemplates that the Court is the proper forum.*”
46. Section 659C addresses Court proceedings after the end of the bid period. It provides in essence that, if the Panel refuses to make a declaration and the Court finds (after the end of the bid period) that conduct contravened the Act, the Court may:
 - (a) determine whether a person is guilty of an offence and impose a penalty
 - (b) determine whether a person contravened a provision of the Act and order the person to pay an amount of money to another person (whether by way of damages, account of profits, pecuniary penalty or otherwise) or
 - (c) make an order under s 1318 (relief) or s 1322 (correcting irregularities).
47. The section also provides that the only kind of remedial order that the Court may make is one that requires the person to pay money to another person.
48. Whether or not s 659C contemplates that the Court is the appropriate forum (which we take from Cirrus’ submission to mean to the exclusion of the Panel), it is clear from s 659C that the subject matter of the application can be addressed in another forum, namely the Court, and it appears to us that the Court is a more appropriate forum in this matter for the reasons given above.
49. Accordingly, the application is out of time and we would not in all the circumstances extend time.

DECISION

50. On the basis of the above, in our view the application presented no reasonable likelihood of us finding unacceptable circumstances and therefore in our view it is not in the interests of public policy to extend the 2 month time limit for the Applicants to make the application. Moreover, had the application been made within the 2 month time limit, we would have declined to conduct proceedings.
51. 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).

²¹ Section 190 *Australian Securities and Investments Commission Act 2001* (Cth)

²² Procedural Rule 4.1.1 and Annexure A. This undertaking is in essence that the party and its directors, officers and advisers will not use or disclose any confidential information provided to it in the proceeding, except (a) in the proceeding itself as permitted under the Panel's rules or (b) as required by law or the rules of a securities exchange

²³ *Ludowici Limited* [2012] ATP 3; on review *Ludowici Limited 01R(a) and (b)* [2012] ATP 4 at [31]

Takeovers Panel

Reasons - Careers Australia Group Limited 03
[2015] ATP 1

Orders

52. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider further whether to make an interim order.
53. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

Laurie Shervington
President of the sitting Panel
Decision dated 6 January 2015
Reasons published 13 January 2015

Advisers

Party	Advisers
Applicants	HopgoodGanim
Cirrus Business Investments Limited	Minter Ellison
Careers Australia Group Limited	Herbert Smith Freehills