



Australian Government

Takeovers Panel

MEDIA RELEASE

No: TP20/23

Tuesday, 7 April 2020

Keybridge Capital Limited 04, 05 & 06 – Declaration of Unacceptable Circumstances

The Panel has made a declaration of unacceptable circumstances (Annexure A) in relation to applications dated 18 February 2020 and 28 February 2020 by WAM Active Limited (see [TP20/08](#) and [TP20/09](#)) and dated 12 March 2020 by Keybridge Capital Limited (see [TP20/14](#)), in each case in relation to the affairs of Keybridge.

Background

The following facts are in summary form (see the declaration for more background).

On 13 December 2019, WAM Active announced an off-market takeover bid for all the shares in Keybridge.

On 8 January 2020, Aurora Funds Management Limited as responsible entity for the Aurora Dividend Income Trust (ADIT) announced an intention to make an off-market takeover bid for all the shares in Keybridge. Keybridge's Managing Director, Mr Nicholas Bolton, has a 54.5% purely economic interest in Aurora Funds Management.

On 7 February 2020, ADIT lodged its bidder's statement with ASIC. Notwithstanding further disclosure in a supplementary bidder's statement on 30 March 2020, the disclosure as to the proposed funding of ADIT's bid was materially deficient because, among other things, it did not establish that the entities that agreed to provide funding had the necessary financial resources.

On 24 February 2020, WAM Active announced that it had elected to waive the majority of the defeating conditions to its bid. At this time, WAM Active's bid was due to end at 7.00pm (Sydney time) on 3 March 2020.

On 2 March 2020, WAM Active announced that its bid was free of its remaining conditions. Due to a provision in the *Corporations Act 2001* (Cth), WAM Active needed to free its bid from those conditions not less than 7 days before the end of the offer period in order to validly do so. Accordingly, WAM Active did not effectively free its bid of all its defeating conditions.

Also on 2 March 2020, WAM Active purported to extend its bid. Due to another provision in the *Corporations Act 2001* (Cth), WAM Active was unable to extend its bid at this time as its bid remained subject to defeating conditions.

WAM Active's bid therefore closed at 7.00pm (Sydney time) on 3 March 2020 subject to defeating conditions. All takeover contracts and acceptances in relation to WAM Active's bid then became void and no transfers should have been registered. On or about 6 March 2020, WAM Active commenced processing acceptances received under its bid.¹

Declaration

The Panel considered that the circumstances were unacceptable because:

- Keybridge shareholders were not given enough information to enable them to assess the merits of ADIT's bid causing the market for control in Keybridge not to be efficient, competitive and informed.
- In light of Mr Bolton's economic interest in Aurora Funds Management, Keybridge did not have sufficient procedures in place to mitigate any actual or potential conflict of interest (arising from at least the time ADIT announced its intention to make an off-market takeover bid).
- WAM Active acquired a substantial interest in Keybridge (purportedly under a takeover bid) in circumstances where its bid had closed subject to defeating conditions.

The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in s657A(3).

The Panel is still considering the applications in relation to orders.

The sitting Panel is Chelsey Drake, Bruce McLennan and Sharon Warburton (sitting President).

The Panel will publish its reasons for the decision in due course on its website www.takeovers.gov.au.

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¹ The substantive acting President made an interim order preventing the processing of acceptances on 11 March 2020 ([TP 20/12](#))



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ANNEXURE A

CORPORATIONS ACT SECTION 657A DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

KEYBRIDGE CAPITAL LIMITED 04, 05 & 06

CIRCUMSTANCES

1. On 13 December 2019, WAM Active Limited (**WAM Active**) announced an off-market takeover bid for all the shares in Keybridge Capital Limited (**Keybridge**) at 6.5 cents per Keybridge share. WAM Active lodged its bidder's statement with ASIC on the same day.
2. On 8 January 2020, Aurora Funds Management Limited as responsible entity for the Aurora Dividend Income Trust (**ADIT**) announced an intention to make an off-market takeover bid for all the shares in Keybridge at 6.6 cents per Keybridge share.
3. On 17 January 2020, Keybridge lodged its target's statement in respect of WAM Active's bid with ASIC. The target's statement was announced on 20 January 2020.
4. On 24 January 2020, WAM Active extended the offer period for its bid to 7.00pm (Sydney time) on 17 February 2020.
5. On 7 February 2020, ADIT lodged its bidder's statement with ASIC. The bidder's statement disclosed that, should ADIT's cash reserves be insufficient to fully fund the total cash consideration and the costs of the bid, ADIT would draw on bid funding agreements entered into with HHY Fund and Aurora Fortitude Absolute Return Fund. The disclosure in ADIT's bidder's statement as to the proposed funding of ADIT's bid was materially deficient because, among other things, it did not establish that the entities that agreed to provide funding had the necessary financial resources.
6. On 10 February 2020, WAM Active further extended the offer period for its bid to 7.00pm (Sydney time) on 3 March 2020.
7. On 12 February 2020, Keybridge announced that it had agreed to place 22,000,000 shares to sophisticated investors at an issue price of 6.9 cents per

Keybridge share (**Placement**). The Placement subsequently took place on 17 February 2020.

8. The Placement triggered a condition to WAM Active's bid that related to Keybridge issuing securities.¹ The terms of WAM Active's bid provided that where an event occurs that triggers a condition, the condition "*affected by that event becomes two separate Conditions on identical terms except that: (i) one of them relates solely to that event; and (ii) the other specifically excludes that event.*"
9. On 19 February 2020, Keybridge lodged a supplementary target's statement with ASIC in respect of WAM Active's bid. The supplementary target's statement disclosed among other things that Keybridge's Managing Director, Mr Nicholas Bolton, "*has a 54.5% purely economic interest in the Responsible Entity and manager of ADIT, Aurora Funds Management Limited*". From at least the time that ADIT announced its intention to make an off-market takeover bid, Keybridge needed to consider the issue of conflicts and ensure that sufficient procedures were in place to mitigate any actual or potential conflict of interest.
10. On 24 February 2020, WAM Active announced an increase in its offer price from 6.5 cents to 6.9 cents per Keybridge share and that it had elected to waive the majority of the defeating conditions to its bid, with the effect that WAM Active's bid was only subject to a 'No Prescribed Occurrences' condition as set out in section 10.7(c) of WAM Active's bidder's statement. The 'No Prescribed Occurrences' condition contained a number of separate conditions, including:
 - (a) the conditions referred to in paragraph 8 and
 - (b) a condition similar to the condition in section 652C(1)(a) of the *Corporations Act 2001 (Cth)*² (**Act**) but with the additional words "*or any of the Controlled Entities of KBC*".³
11. On 25 February 2020, WAM Active announced a notice of status of defeating conditions, which stated that:

For the purposes of section 630(3) of the Corporations Act 2001 (Cth), WAM Active gives notice that:

 - (a) *the Offer remains subject to the condition in section 10.7(c) (No Prescribed Occurrences) but has been freed of all other conditions set out in section 10.7 of the Bidder's Statement...*

¹ Set out in section 10.7(c)(iv) of WAM Active's bidder's statement

² As modified by ASIC, including by [CO 13/521]

³ Set out in section 10.7(c)(i) of WAM Active's bidder's statement

12. On 2 March 2020, WAM Active announced that:

Pursuant to section 650F of the Corporations Act 2001 (Cth), [WAM Active] gives notice that:

(a) The Offer is free of the Condition set out in section 10.7(c) (No Prescribed Occurrences) of the Bidder's Statement; and

...

Accordingly, the Offer is now unconditional.

13. The conditions set out in paragraphs 10(a) and 10(b) above did not relate only to the happening of an event or circumstance referred to in subsection 652C(1) or (2) of the Act and so were not prescribed occurrences. Accordingly, WAM Active needed to give a notice to Keybridge freeing its bid from those conditions not less than 7 days before the end of the offer period in order to validly do so.⁴ This did not occur as, at the time WAM Active purported to free its bid from those conditions, the offer period was scheduled to end at 7.00pm (Sydney time) on 3 March 2020.
14. Also on 2 March 2020, WAM Active purported to extend its bid to 7.00pm (Sydney time) on 3 April 2020. WAM Active was unable to extend its bid at this time as its bid remained subject to defeating conditions.⁵
15. As WAM Active did not effectively free its bid of all its defeating conditions, and was unable to extend its bid at the time it purported to do so, WAM Active's bid closed at 7.00pm (Sydney time) on 3 March 2020 subject to defeating conditions. All takeover contracts and acceptances in relation to WAM Active's bid then became void and no transfers should have been registered.⁶
16. On 4 and 5 March 2020, other parties to the Panel proceedings informed WAM Active of their view that WAM Active's bid had not been validly freed of its

⁴ Under section 650F(1) of the Act, a bidder can only free offers under its bid from a defeating condition if it gives the target a notice declaring the bid free from the condition in accordance with the following: (a) if the condition relates only to the happening of an event or circumstance referred to in subsection 652C(1) or (2) of the Act, not later than 3 business days after the end of the offer period or (b) in any other case, not less than 7 days before the end of the offer period

⁵ Under section 650C of the Act, a bidder making a bid that is subject to a defeating condition may extend the offer period after the bidder has given the notice under subsection 630(3) (see paragraph 11) only if one of a list of certain events happens after the giving of the notice. None of those events had occurred at the time of WAM Active's purported extension. A bid will also automatically extend if one of a list of certain events set out in section 624(2) occurs (though a bidder must give each person specified in s650D(1)(c) (other than those who have accepted an offer under the bid) written notice that the extension has occurred within 3 days after that event). WAM Active did not purport to rely on that section

⁶ See section 650G of the Act

defeating conditions. One of those parties stated that WAM Active should not seek to process acceptances received under its bid.

17. On or about 6 March 2020, WAM Active commenced processing acceptances received under its bid.
18. On 10 March 2020, WAM Active commenced Court proceedings to seek, in effect, a declaration that an alleged procedural defect was not a defect or, alternatively, orders effectively rectifying the alleged defect. The application did not extend to any matters the subject of this declaration.
19. On 30 March 2020, ADIT lodged a supplementary bidder's statement with ASIC. The supplementary bidder's statement included accountant's certificates opining on whether there had been material changes in the financial position of each of HHY Fund and Aurora Fortitude Absolute Return Fund since the date that each fund published its financial statements. Neither certificate included an opinion on the relevant fund's ability to meet its obligations under its funding agreement with ADIT. The certificates were not sufficient to remedy the information deficiencies in ADIT's bidder's statement.

EFFECT

20. By reason of the information deficiencies in ADIT's bidder's statement (including as supplemented on 30 March 2020), Keybridge shareholders:
 - (a) were not given enough information to enable them to assess the merits of ADIT's bid and
 - (b) were required to make decisions whether to accept ADIT's bid on the basis of inadequate information, causing the market for control in Keybridge not to be efficient, competitive and informed.
21. In light of Mr Bolton's economic interest in Aurora Funds Management Limited, Keybridge did not have sufficient procedures in place to mitigate any actual or potential conflict of interest (arising from at least the time ADIT announced its intention to make an off-market takeover bid). In the context of competing bids from WAM Active and ADIT, it was important for Keybridge shareholders to receive advice and information that was not tainted in its independence. Therefore, the effect of the lack of sufficient procedures was that the market for control of Keybridge shares was not efficient, competitive and informed.
22. WAM Active acquired a substantial interest in Keybridge (purportedly under a takeover bid) in circumstances where its bid had closed subject to defeating conditions.

CONCLUSION

23. It appears to the Panel that the circumstances are unacceptable circumstances:

- (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of Keybridge or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Keybridge
 - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602 of the Act and
 - (c) in the further alternative, because certain of the unacceptable circumstances constituted, constitute, will constitute or are likely to constitute a contravention of a provision of Chapter 6 of the Act.
24. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3).

DECLARATION

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of Keybridge.

Tania Mattei
Counsel
with authority of Sharon Warburton
President of the sitting Panel
Dated 7 April 2020