



Australian Government

Takeovers Panel

**Reasons for Decision
Webcentral Group Limited
[2020] ATP 20**

Catchwords:

Decline to conduct proceedings – interim orders - coercion – shareholder intention statements – waiving conditions - loan to own – target’s statement disclosure - target directors’ assessment of competing proposals

Corporations Act 2001 (Cth), sections 606

Guidance Note 4: Remedies, Guidance Note 22: Recommendations and Undervalue Statements, Guidance Note 23: Shareholder intention statements

Pacific Energy Limited [2019] ATP 20, GBST Holdings Limited [2019] ATP 15, Billabong International Limited [2013] ATP 9

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

INTRODUCTION

1. The Panel, Amy Alston, Stephanie Charles (sitting President) and Michael Lishman declined to conduct proceedings on an application by Keybridge Capital Limited in relation to the affairs of Webcentral Group Limited. Webcentral was subject to a takeover bid from 5G Networks Limited. The application concerned whether (among other things) disclosures in 5GN’s bidder’s statement and Webcentral’s target’s statement in relation to 5GN providing funding to repay Webcentral’s existing financiers in full (conditional, among other things, on 5GN having a relevant interest in at least 50.1% of the Webcentral shares¹) coerced Webcentral shareholders to accept the 5GN bid. The Panel considered it was not in the public interest to conduct proceedings for a number of reasons, including Webcentral’s precarious financial position. Accordingly the Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

5GN	5G Networks Limited
5GN Funding	has the meaning given in paragraph 5(d)
First Supplementary Bidder’s Statement	has the meaning given in paragraph 17
Keybridge	Keybridge Capital Limited
Webcentral	Webcentral Group Limited
Web.com	Web.com Group, Inc.

¹ and 5GN waiving its bid conditions but leaving the condition on its funding in place

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FACTS

3. Webcentral is an ASX listed company (ASX code: WCG). Webcentral offers a full-service digital marketing agency to small and medium business, enterprise and government clients.
4. On 13 July 2020, Webcentral announced that it had entered into a scheme implementation deed with Web.com “providing for Web.com to acquire 100% of Webcentral shares for A\$0.10 per share in cash via a scheme of arrangement”. On 21 August 2020, Webcentral announced that the Supreme Court of New South Wales had made orders convening a scheme meeting in relation to the Web.com proposal, to be held at 9.00am (Sydney time) on Wednesday, 29 September 2020.
5. On 17 September 2020, Webcentral announced that:
 - (a) it had entered into a bid implementation deed with 5GN to acquire all the shares in Webcentral pursuant to a conditional off-market takeover bid offering 1 5GN share for every 12 Webcentral shares
 - (b) Webcentral directors, who collectively had a relevant interest in approximately 19% of the total number of Webcentral shares on issue, intended to accept, or procure acceptance, of the 5GN bid in the absence of a superior proposal²
 - (c) the Webcentral board had determined that the 5GN bid was a superior proposal to a revised proposal from Web.com offering A\$0.18 per share in cash
 - (d) 5GN would provide funding to Webcentral to enable Webcentral to repay its existing financiers in full, if 5GN acquired a relevant interest in at least 50.1% of the Webcentral shares and the 5GN bid became or was declared wholly unconditional (**5GN Funding**) and
 - (e) 5GN had agreed to provide an unsecured loan of A\$500,000 to Webcentral to be used by Webcentral to pay a reimbursement fee to Web.com in relation to the termination of the Web.com scheme implementation deed.
6. On 18 September 2020, 5GN issued its bidder’s statement, which disclosed the following in relation to the debt facilities to be repaid by the 5GN Funding:

“As at 31 July 2020, the total amount drawn under the Existing Debt Facilities was approximately \$47.6 million. This amount includes:

 - *approximately \$41.6 million of term debt;*
 - *bank guarantees of approximately \$5.5 million, of which approximately \$1.9 million are subject to guarantees held in favour of Webcentral from sub-tenants. Net exposure after deducting these back-to-back arrangements is approximately \$3.6 million; and*

² Clause 2.3 of the Bid implementation deed attached to the announcement stated in effect that Webcentral represented and warranted to 5GN that each Webcentral director had provided “by way of resolution of the Webcentral Board or by separate written confirmation that (and Webcentral must use its best endeavours to procure that)” each Webcentral director intended to accept (or procure the acceptance of) the 5GN offer in the absence of a superior proposal

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- *an interest rate hedge, of which the estimated mark-to-market valuation as at 31 July 2020 is approximately \$450,000.*

Webcentral has been in default under these facilities for some time.

Notwithstanding their previous support, there can be no assurance that the Existing Financiers will remain supportive of Webcentral if the Offer is not successful.”

7. On 21 September 2020, Webcentral announced that the Supreme Court of New South Wales had made orders to the effect that the scheme meeting in respect of the proposed scheme of arrangement with Web.com would not be held.
8. On 9 October 2020, 5GN announced that it had extended its bid offer period from its original closing date of 20 October 2020 to 27 October 2020.
9. On 13 October 2020, 5GN declared its bid unconditional and disclosed that all of Webcentral’s directors had accepted into the 5GN bid and that 5GN had voting power in Webcentral of 34.75%. However, the 50.1% acceptance condition to the 5GN Funding remained in place.
10. On 16 October 2020, Webcentral announced that it had appointed Messrs Joseph Demase and Joe Gangi, who were directors of 5GN, as directors of Webcentral. The announcement also stated that, in relation to the 5GN Funding (emphasis in the original):

“The Webcentral Directors wish to emphasise the following potentially adverse consequences that are relevant to Webcentral Shareholders who do not accept the Offer now that 5GN has declared the Offer unconditional.

As set out in Webcentral’s Target’s Statement, 5GN has agreed that, if it acquires at least 50.1% of the Webcentral Shares, 5GN will (via a subsidiary) provide a secured loan to Webcentral of approximately \$47.7 million. Webcentral will, in turn, use the money from that loan to repay its Existing Financiers in full. Webcentral will then owe approximately \$47.7 million to 5GN. Webcentral will have to repay that loan, which will bear interest at a rate higher than the interest rate under the Existing Debt Facilities by approximately 2 times, within 12 months.

5GN has stated that if it does not acquire 100% of the Webcentral Shares, it will require Webcentral to repay the loans provided by 5GN to Webcentral.

In those circumstances, Webcentral may need to undertake an equity raising to repay some or all of the loans provided by 5GN. It is reasonable to expect that any such equity raising will likely be at a material discount to the then prevailing share price and if any Webcentral Shareholders do not participate in that equity raising, they are likely to be materially diluted.

*If these risks conflict with your individual risk profile, you should strongly consider these implications in making your decision as to whether to **ACCEPT** the Offer.”*

APPLICATION

Declaration sought

11. By application dated 21 October 2020, Keybridge sought a declaration of unacceptable circumstances. Keybridge submitted (among other things) that:

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- (a) Disclosures in 5GN’s bidder’s statement and Webcentral’s target’s statement in relation to the 5GN Funding created “*a highly coercive effect on shareholders to accept the 5GN Bid to cause control to pass in a manner inconsistent with that of an efficient, competitive and informed market*”.
- (b) The commitments from the Webcentral directors that they would accept into the 5GN bid were anti-competitive (in light of the competing proposal by Web.com that Keybridge submitted was superior), constituted an agreement “*in a form incompatible with the exceptions provided by Panel Guidance Note 23*” and contravened s606.³
- (c) Disclosure in Webcentral’s target’s statement was unclear, in particular in relation to why Webcentral had formed the view that the 5GN bid was superior to the Web.com proposal.

Interim orders sought

- 12. Keybridge sought interim orders that 5GN not process any acceptances until such time as the Panel had considered its application and that 5GN extend its bid by 3 weeks.

Final orders sought

- 13. Keybridge sought final orders that Webcentral shareholders be provided with withdrawal rights under the 5GN bid (or the bid be withdrawn), that all shares acquired in contravention of s606 be vested in ASIC for sale and further disclosure.

DISCUSSION

Interim orders

- 14. The President sought submissions from the parties in response to Keybridge’s request for interim orders.
- 15. Webcentral submitted that it did not have any “*in principle*” objection to Keybridge’s proposed interim orders but noted that Webcentral understood that 5GN had processed some acceptances already and that it “*would seem unfair to treat Webcentral shareholders differently depending on the timing of receipt of their acceptance*”.
- 16. 5GN submitted that the interim orders sought by Keybridge should not be made but, if requested, it would be prepared to give an undertaking not to process acceptances under its bid. 5GN submitted that shareholders who accepted its bid might be disadvantaged, in particular they “*may be materially disadvantaged by movements in the 5GN share price, once they are issued 5GN shares*”.
- 17. On Thursday, 22 October 2020, while the President was considering interim orders, 5GN released its First Supplementary Bidder’s Statement (**First Supplementary Bidder’s Statement**), which disclosed (among other things) that:

³ Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth), and all terms used in Chapter 6 or 6C have the meaning given in the relevant chapter (as modified by ASIC)

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- (a) Ms Natalie Mactier, a nominee of 5GN, was appointed to the Webcentral board as an independent director (replacing Mr Andrew Macpherson). As a result, 5GN nominees made up the majority of Webcentral's board and
- (b) 5GN and Webcentral entered into an agreement to waive the requirement for 5GN to hold a relevant interest in 50.1% in Webcentral as a condition to drawing down on the 5GN Funding and, in effect, 5GN had agreed to provide the funding for Webcentral to pay the existing financiers the full amount of their debt facilities on Monday, 26 October 2020.

18. The First Supplementary Bidder's Statement also disclosed the following in relation to 5GN's intentions regarding repayment of the 5GN Funding:

"5GN refers to the statement in the Original Bidder's Statement that: "If 5GN does not acquire 100% of the shares in Webcentral it will require those loans to be repaid."

5GN wishes to confirm that, this statement does not mean that 5GN has the intention or the right to require the loans to be repaid in the short term if it does not acquire 100% of Webcentral. As explained in the Target's Statement, the principal loan of approximately \$47.7 million is repayable 1 year after drawdown, being 26 October 2021. 5GN does not have a contractual right to require early repayment unless there is a default by Webcentral. The statement merely makes the point that if 5GN does not acquire 100% of Webcentral it will, at some time in the future, require repayment...

In no sense should the statement be taken to imply that 5GN will request immediate repayment of the loans if it does not reach a 100% interest in Webcentral under the Offer."

19. The President considered the submissions⁴ and the First Supplementary Bidder's Statement and decided to make interim orders (**Annexure A**) that 5GN:

- (a) Not process any acceptances received on and from Friday, 23 October 2020⁵. The President considered that there was risk that if circumstances in the application were found to be unacceptable, those circumstances would worsen if interim orders were not made⁶.
- (b) Extend its offer period for a period of not less than one week. The President considered it was appropriate for the bid to be extended to allow a sitting Panel time to consider whether to conduct proceedings.

⁴ Including a technical submission from ASIC. Webcentral requested that the President make an interim order to, in effect, prohibit Keybridge from trading in Webcentral shares or derivatives over Webcentral shares. Webcentral submitted (among other things) that Keybridge would be "in a position to benefit if Webcentral's share price falls following the announcement of the Panel application given the uncertainty that the application may create in the market in terms of what it may mean for the future of Webcentral". The President declined to make this interim order, noting that if Webcentral was concerned that Keybridge's application and past and future trading in Webcentral shares constitutes unacceptable circumstances, it could make its own application

⁵ The President considered that there was a potential for Webcentral shareholders who had accepted the 5GN bid before that date and not had their acceptances processed to be prejudiced if the interim order was extended to their acceptances

⁶ See Guidance Note 4: Remedies, at [12(a)]

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20. On Friday, 23 October 2020, Keybridge made a further request for an interim order that *“Webcentral must not drawdown on the loan facility provided by 5GN until the conclusion of the Panel proceedings without giving the Panel 5 clear business [days’] notice of its intention to do so”*. Keybridge submitted it was concerned that if Webcentral drew down on the 5GN Funding, Webcentral would be less attractive to a competing bidder because, among other things, *“the entrenchment of control resulting from 5GN being the lender”* and *“the higher costs of the facility relative to the arms-length Existing Facility”*.
21. Webcentral submitted that the President should not make this further interim order. Webcentral submitted (among other things):
- (a) It had a serious debt problem. Without the 5GN Funding, Webcentral was not expected to be able to repay the debt owed to the existing financiers, meaning *“that voluntary administration could be a real possibility”*. In December 2019, the existing financiers appointed PricewaterhouseCoopers to act as investigating Accountants, continuously monitoring Webcentral’s financial position. In addition, Webcentral’s liquidity position was extremely tight and precarious. Webcentral required additional short-term funding and lender support to be able to continue as a going concern. It was highly likely that the existing financiers would not provide any additional liquidity and Webcentral was not in a position to repay some of the debt owing to the existing financiers due by the end of November 2020.
- (b) The negotiated terms of the 5GN Funding were *“fair, reasonable and on arm’s length terms”*. While the interest rate under the 5GN Funding (5.5%) was greater than that provided by the existing financiers, it was still *“below market for a company in Webcentral’s financial predicament”*. In addition:
“The 5GN Loan does not include financial covenants (other than two EBITDA covenants) and does not include any near-term amortisation obligation on the loan. These improvements in lending terms represent a significant offset to the increase in interest rate”.
22. 5GN made similar submissions to Webcentral and submitted (among other things) that it:
“should not be considered to be in a similar position to the existing financiers. 5GN is not in the business of lending. 5GN will not impose constraints on the business of Webcentral as the existing financiers...”
23. PricewaterhouseCoopers⁷, acting for the existing financiers, provided a submission stating, among other things, that:
“The lenders are concerned about the impact of any delay to the refinancing that may occur as a consequence of the proceedings brought by Keybridge Capital Limited to the Takeovers

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Panel. WCG's liquidity position is extremely tight and our understanding is that it is unlikely the lenders could justify providing additional funding support should the need arise. Accordingly, if a short term liquidity issue arises, it is our view that there is a very real prospect that WCG could face an insolvency event, in which case there could be a considerable loss of value for the lenders, other creditors, employees and equity stakeholders."

24. The President decided not to make any further interim order as requested by Keybridge.⁸ The President noted the submission from Webcentral that Keybridge's proposed interim orders could lead to the appointment of administrators over the assets of Webcentral and considered (among other things) that:
- (a) If there were any features to the 5GN Funding that could operate as a lock-up, this could be a concern.⁹ However there was no material to suggest that such features were present or that it would not be possible for a rival bidder to pay out 5GN's debt.
 - (b) In the event that the provision of the loan was found to be unacceptable, it was conceivable that the Panel could fashion final orders to deal with those circumstances.¹⁰

Decision whether to conduct proceedings

25. We considered all the material, but address specifically only that part of the material we consider necessary to explain our reasoning.
26. In considering all the circumstances, we are of the view that it is not in the public interest to conduct proceedings.
27. 5GN submitted that Webcentral continued to be cash starved, important decisions were not being made and employees were leaving. Webcentral submitted that Webcentral needed "*operational direction and certainty under the stewardship of a new controller*". We consider that these submissions are relevant to take into account in assessing Keybridge's submissions.
28. We consider that any coercive effect of 5GN waiving its bid conditions and leaving the 50% acceptance condition on the 5GN Funding was partly remedied by 5GN's subsequent waiver of that condition. It is conceivable that Webcentral shareholders were coerced into accepting the 5GN bid prior to the waiver of the 50% acceptance condition to the 5GN Funding. It is also conceivable that Webcentral shareholders may have been confused when 5GN declared its bid free of conditions, including its minimum acceptance condition, with the 50% acceptance condition to the 5GN Funding being waived at a later date (noting that this was only for the period from 13 October to 22 October 2020).
29. We consider that it is unlikely however that we would find the abovementioned circumstances unacceptable. Applying our commercial judgement, we consider that

⁸ This was communicated to the parties on Sunday, 25 October 2020

⁹ For a discussions about features of a debt facility that may operate as a lock up see *Billabong International Limited* [2013] ATP 9

¹⁰ And, accordingly, the President was not persuaded that there was a "*risk that unacceptable circumstances will occur, continue or worsen in the absence of an*" interim order – see Guidance Note 4: Remedies, at [12(a)]

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it is likely that after making further enquiries that we would find that any coercive effect is predominantly a reflection of Webcentral's financial situation. In addition, we consider that any order we would make if we found unacceptable circumstances on this ground would be of limited utility. The most likely order we would make if we found unacceptable circumstances would be to offer accepting shareholders withdrawal rights, which in light of the progress of the bid was unlikely to be taken up by many of them.¹¹

30. The Panel is generally reluctant to substitute the decision of target directors in their consideration of a control transaction.¹² Keybridge did not provide any material (other than the directors' statements and the bid implementation agreement) to suggest there was any association between Webcentral's directors and 5GN. Webcentral's directors had waited more than three weeks before accepting into the bid, allowing for a superior proposal to be made. Accordingly, the directors' intention statements were compliant with Panel policy.¹³
31. Webcentral's target statement provided some disclosure in relation to why Webcentral directors preferred the 5GN bid to the earlier proposal by Web.com.¹⁴ Target directors' recommendations "*must be soundly-based and reasonable*"¹⁵ and disclosing the target directors' assessment of a bid vis-à-vis a prior proposal may be required in a target's statement depending on the circumstances. In this case however, we do not consider there is a reasonable prospect that we would find unacceptable circumstances on this point.

DECISION

32. 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).
33. Because we decided not to conduct proceedings, we decided not to accept a notice of appearance from Web.com who had requested to become a party to the proceedings.

¹¹ Both Webcentral and 5GN submitted that Keybridge delayed in making its application. We disagree. 5GN declared its bid unconditional on 13 October 2020 (with its 50% acceptance condition to the 5GN Funding in place) and Keybridge made its application on 21 October 2020. However we consider we cannot ignore the progress of the 5GN bid and the likely efficacy of orders that we could make if we found unacceptable circumstances

¹² See *Pacific Energy Limited* [2019] ATP 20 at [18] and *GBST Holdings Limited* [2019] ATP 15 at [36]

¹³ Guidance Note 23: *Shareholder intention statements*

¹⁴ Stating that with the 5GN bid there was an opportunity for Webcentral shareholders to participate in the future of both businesses, there was less completion risk and that 5GN had disclosed that it would declare its bid unconditional when it obtained a relevant interest of at least 50.1% of all Webcentral shares. We also note that Webcentral's announcement dated 17 September 2020 (referred to in paragraph 5) stated that 5GN had confirmed that "*it would have voted, or procured the vote of, all the Webcentral shares in which it has a relevant interest against the Web.com Scheme even if the consideration had been increased to \$0.18 per Webcentral share*"

¹⁵ Guidance Note 22: *Recommendations and Undervalue Statements*, at [7]

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Orders

34. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any interim or final orders. As we have decided not to conduct proceedings, the President's interim orders (see paragraph 19 and Annexure A) cease to have effect.

Stephanie Charles

President of the sitting Panel

Decision dated 28 October 2020

Reasons given to parties 9 November 2020

Reasons published 18 November 2020

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Advisers

Party	Advisers
5GN	Cornwalls Norton Rose Fulbright
Keybridge	-
Webcentral	Herbert Smith Freehills



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Annexure A

CORPORATIONS ACT SECTION 657E INTERIM ORDERS

WEBCENTRAL GROUP LIMITED

Keybridge Capital Limited made an application to the Panel dated 21 October 2020 in relation to the affairs of Webcentral Group Limited (**Webcentral**).

The President **ORDERS**:

1. 5G Networks Limited (**5G Networks**) must not process any acceptances received on and from Friday, 23 October 2020 in relation to its off-market takeover bid for all of the fully paid ordinary shares in Webcentral pursuant to its bidder's statement dated 18 September 2020 (**Offer**).
2. 5G Networks must extend the offer period in relation to the Offer for a period of not less than one week.
3. These interim orders have effect until the earliest of:
 - (i) further order of the Panel
 - (ii) the determination of the proceedings and
 - (iii) 2 months from the date of these interim orders.

Tania Mattei
Counsel
with authority of Alex Cartel
President
Dated 23 October 2020