



Australian Government

Takeovers Panel

**Reasons for Decision
Webcentral Group Limited 02R
[2020] ATP 26**

Catchwords:

Decline to conduct proceedings – coercion – shareholder intention statements – waiving conditions – loan to own – target’s statement disclosure – target directors’ assessment of competing proposals – contravention of s606

Corporations Act 2001 (Cth), sections 606, 657EA(2)

Guidance Note 23: Shareholder intention statements

Webcentral Group Limited 02 [2020] ATP 20, Keybridge Capital Limited 08R, 09R & 10R [2020] ATP 9, Pacific Energy Limited [2019] ATP 20, GBST Holdings Limited [2019] ATP 15

Procedural Rule 6.1.1, Note 3

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

INTRODUCTION

1. The review Panel, Yasmin Allen (sitting President), Bruce McLennan and Kerry Morrow affirmed the initial Panel’s decision to decline to conduct proceedings in *Webcentral Group Limited*.¹

2. In these reasons, the following definitions apply.

5GN	5G Networks Limited
5GN Funding	has the meaning given in paragraph 6(d)
Keybridge	Keybridge Capital Limited
Webcentral	Webcentral Group Limited
Web.com	Web.com Group, Inc.

FACTS

3. The facts are set out in more detail in *Webcentral Group Limited*. The following is a summary.

4. On 13 July 2020, Webcentral, an ASX listed company (ASX: WCG), announced that it had entered into a scheme implementation deed with Web.com. The proposed scheme of arrangement would result in Web.com acquiring 100% of Webcentral at 10 cents per share in cash.

¹ [2020] ATP 20

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5. On 7 September 2020, Webcentral announced that it had received a non-binding indicative scrip proposal from 5GN² to acquire all the shares in Webcentral. The indicative terms of the 5GN proposal included a 50.1% minimum acceptance condition and a proposal to provide funds allowing Webcentral to repay its existing financiers the full amount outstanding under its existing debt facilities. The offer price was one 5GN share for every 12 Webcentral shares.
6. On 17 September 2020, Webcentral announced that:
 - (a) Notwithstanding “*the increased headline cash offer*” of 18 cents per Webcentral share under a revised proposal from Web.com, the 5GN bid was a superior proposal.
 - (b) Webcentral had entered into a bid implementation deed³ with 5GN for a conditional off-market takeover bid offering one 5GN share for every 12 Webcentral shares.
 - (c) Webcentral directors (collectively holding a relevant interest in approximately 19% of Webcentral shares) intended to accept, or procure acceptance, of the 5GN bid in the absence of a superior proposal.
 - (d) 5GN would, on reaching a relevant interest in at least 50.1% of Webcentral shares and declaring its bid unconditional, provide funding to enable Webcentral to repay its existing financiers (**5GN Funding**).
 - (e) The Web.com scheme of arrangement would no longer proceed and 5GN would lend Webcentral \$500,000 to pay the break fee to Web.com.
7. On 18 September 2020, 5GN issued its Bidder’s Statement which disclosed (among other things) that:

“As at 31 July 2020, the total amount drawn under [Webcentral’s] Existing Debt Facilities was approximately \$47.6 million... 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.”
8. On 21 September 2020, Webcentral announced that the scheme meeting in respect of the Web.com proposed scheme of arrangement scheduled for 29 September 2020 would not be held pursuant to orders of the Supreme Court of New South Wales.
9. On 13 October 2020, 5GN declared its bid unconditional and disclosed that all of Webcentral’s directors had accepted the 5GN bid. However, the 50.1% acceptance condition to the 5GN Funding remained in place.
10. On 16 October 2020, Webcentral made an announcement in which it detailed that in relation to the 5GN Funding “... 5GN has stated that if it does not acquire 100% of Webcentral shares, it will require Webcentral to repay the loans provided by 5GN to

² Which at the time held a 10.2% relevant interest in Webcentral

³ Dated 17 September 2020

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Webcentral.” The Webcentral directors “*strongly encouraged*” shareholders to accept the 5GN bid.

11. In the same announcement, Webcentral said that it had appointed Messrs Joseph Demase and Joe Gangi, directors of 5GN, as directors of Webcentral.
12. On 22 October 2020, following receipt of Keybridge’s initial application, 5GN released its First Supplementary Bidder’s Statement which disclosed (among other things) that:
 - (a) *“Under the facility agreement entered into between 5GN and Webcentral, it was a condition precedent to the obligation of 5GN to provide the funding to pay the Existing Financiers that the “Drawdown Date” had occurred. The Drawdown Date was defined as 5 business days after 5GN acquired a relevant interest in at least 50.1% of Webcentral Shares, the Offer became unconditional, and the board of Webcentral comprised a majority of persons nominated by 5GN.”*
 - (b) Following the appointment of Ms Natalie Mactier, a nominee of 5GN, to the Webcentral board,⁴ 5GN nominees made up the majority of the Webcentral board.
 - (c) 5GN and Webcentral had 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. 5GN had also agreed to provide Webcentral the 5GN Funding on 26 October 2020.
13. 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...

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.”
14. On 10 November 2020, the 5GN bid closed, with 5GN having voting power in 56.68% of Webcentral shares.
15. The Webcentral board now comprises Mr Demase, Mr Gangi and Ms Mactier. They are all representatives of 5GN.⁵
16. On 13 November 2020, Webcentral announced a capital raising. Approximately \$3.1 million was placed to institutions and sophisticated investors and approximately

⁴ Replacing Mr Andrew Macpherson

⁵ The other Webcentral directors, Messrs Karl Siegling and Andrew Reitzer, resigned when the bid closed

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\$2.5 million worth of shares would be issued to Messrs Demase and Gangi, subject to shareholder approval.⁶ The capital raising took place at 17 cents per share.

APPLICATION

17. By application dated 30 October 2020, Keybridge sought a review of the initial Panel's decision to decline to conduct proceedings. The substantive President of the Panel consented to that review on 30 October 2020.⁷
18. The initial Panel considered that there was no reasonable prospect that it would make a declaration of unacceptable circumstances and declined to conduct proceedings. In summary:
 - (a) It accepted that Webcentral was in need of the 5GN Funding and operational certainty.
 - (b) It was of the view that any coercive effect of 5GN waiving its bid conditions (i.e. its 50.1% minimum acceptance condition) but keeping the 50.1% acceptance level as a condition of the 5GN Funding was "*partly remedied by 5GN's subsequent waiver of that condition.*" While "*conceivable*" that shareholders were coerced or confused, the initial Panel considered it was likely the result of Webcentral's financial position and further that likely orders (withdrawal rights) were of limited utility and "*unlikely to be taken up*" given the progress of the bid.
 - (c) There was no evidence of association between Webcentral's directors and 5GN and the directors' intention statements complied with Panel policy.⁸
 - (d) The Panel is generally reluctant to substitute its decision for that of target directors⁹ and the directors had given some explanation to shareholders of why they considered the 5GN bid superior to the Web.com proposal.
19. In its review application, Keybridge submitted (among other things) that:
 - (a) The effect of the initial Panel's decision is that Webcentral shareholders who accepted the 5GN bid before its initial application did so in an uninformed and coercive environment, and a precedent would be set that allows pre-bid agreements with a lower bidder.
 - (b) New evidence had emerged following release of 5GN's First Supplementary Bidder's Statement or Webcentral's Second Supplementary Target's Statement,

⁶ A notice of meeting was issued on 13 November 2020 for a shareholder meeting to be held on 18 December 2020

⁷ Under section 657EA(2). 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)

⁸ The initial Panel noted that the directors had waited 21 days before accepting in accordance with Guidance Note 23: *Shareholder intention statements*

⁹ See *Pacific Energy Limited* [2019] ATP 20 at [18] and *GBST Holdings Limited* [2019] ATP 15 at [36]

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and the knowledge that Web.com did not further compete for Webcentral as it was “*unsure of the terms of reference that constituted a superior offer*”.¹⁰

- (c) The clarification in 5GN’s First Supplementary Bidder’s Statement, regarding the repayment of the 5GN Funding, was unnecessary if the initial statement (to the effect that 5GN would require repayment if it did not acquire 100% of the Webcentral shares) was not confusing.
- (d) There was no reason for 5GN to waive the minimum acceptance condition when it did, unless that condition had been coercive. Keybridge submitted that the benefit of these ‘remedial’ actions did not extend to Webcentral shareholders who had already accepted the 5GN bid, and therefore those shareholders should be offered withdrawal rights.
- (e) The initial Panel failed to consider whether the Web.com offer was a superior proposal. Keybridge submitted that, if it was superior, then the directors’ intention statements contravened section 606 and affected competition.

Final orders sought

20. Keybridge sought final orders that:

- (a) withdrawal rights be offered to affected shareholders who accepted the 5GN bid prior to clarification of the 5GN Funding and
- (b) a divestment order of shares acquired in contravention of section 606.

DISCUSSION

21. We have considered all the material before the initial Panel, the initial Panel’s reasons and the submissions referred to below. We address specifically only that part of the material we consider necessary to explain our reasoning.

Preliminary matters

- 22. Both Webcentral and 5GN made a preliminary submission, submitting that we should decline to conduct proceedings.
- 23. We specifically gave Keybridge a right to reply to the preliminary submissions of Webcentral and 5GN, in part, because of the length of those preliminary submissions in contrast to the review application itself and noting the Panel’s procedural rules regarding the length of preliminary submissions.¹¹ We also invited submissions on the reasons of the initial Panel from Keybridge.
- 24. In summary, Keybridge submitted that:
 - (a) The initial Panel accepted that a coercive environment had existed and shareholders may have been confused but erred in thinking that the cause was Webcentral’s financial situation. It noted that 13.09% of the register accepted “*during this coercive vacuum*”.

¹⁰ As submitted by Web.com in a preliminary submission during the initial proceedings

¹¹ Procedural Rule 6.1.1, Note 3 specifies that “*Preliminary submissions should be brief (generally no more than 2 pages).*”

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- (b) Considering the current share price,¹² it is not unlikely that withdrawal rights would be taken up, pointing to the Panel decision in *Keybridge Capital Limited 08R, 09R & 10R* where it was said that “*withdrawal rights protect the rights and interests of accepting shareholders who have been affected by the unacceptable circumstances*”.¹³
 - (c) Webcentral still has competing suitors, and Web.com was inappropriately shut out, so if control was still available (through withdrawal rights) there may be an opportunity for competitive bids in the interests of shareholders.
 - (d) It was not necessary to provide any additional material to suggest there was an association between Webcentral and 5GN, rather the contravening association occurs by the mere act of substantial holders giving “*a binding intention statement to accept into the 5GN Bid without a bona-fide carve out for superior offers.*” Keybridge conceded that “*If the Review Panel forms the view that the Web.com 18c offer was not superior to 5GN’s Bid, then Keybridge would accept that s606 had not been contravened by consequence of the intention statements from a substantial shareholder that otherwise took the bidder over 20%*”.
 - (e) On all measures, Web.com’s 18 cents per share offer was higher than the assumed value of the 5GN bid.
 - (f) Webcentral’s directors engaged in uncommercial behaviour by failing to seek that 5GN or Web.com improve its offer.
 - (g) There had been ‘new developments’, being the increased share price (25 cents versus 14.17 cents under the bid), the low acceptance level of 8.84% after the bid ceased being coercive, the board (all members now 5GN representatives so its submissions are no longer impartial), the capital raising (not disclosed during the bid and including the participation by parties associated with 5GN), and a success fee (also undisclosed).
25. We note that the initial Panel decided not to accept a notice of appearance from Web.com (who had requested to become a party to the initial proceedings) because it did not conduct proceedings. Web.com did not seek to become a party to the review.
26. We were sent a submission by [REDACTED], a former director of Webcentral.¹⁴ He submitted (among other things):

“I have serious concerns about this process – particularly given the market price for WCG shares is now 25% above the 5GN offer. There has been a coercive undertone to the offer given the control the debt piece by 5GN gave them prior to reaching their 50% threshold.

I would like to request for a withdrawal right from this deal from the Takeovers Panel.”

¹² Keybridge submitted that “*WCG’s Share Price is now 25.0c versus a final [5GN] Bid consideration worth 14.17c. The price that shareholders can receive by selling their shares on market is now 176% more than the consideration they received through the [5GN] Bid*”.

¹³ [2020] ATP 9 at [126]

¹⁴ [REDACTED]

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27. We received and considered his submission, together with submissions from the parties on his submission.

Decision whether to conduct proceedings

28. In considering all the circumstances, on balance, we consider that there was no reasonable prospect that we would make a declaration of unacceptable circumstances.
29. Webcentral submitted that it has had “...a very serious debt and liquidity problem for over 12 months” and “absent the Web.com scheme and later the 5GN takeover, the only viable alternative was voluntary administration”.
30. 5GN submitted that it did not have the intention, or the right under the loan documentation, to require the 5GN Funding to be repaid any earlier than the due date for payment. It submitted that this was the position regardless of whether it acquired 100% of Webcentral or not, and that Webcentral shareholders would not have been confused about this.
31. It also submitted, repeating submissions made to the initial Panel, that it had provided the funds to Webcentral and that its actions were “not designed to coerce Webcentral shareholders to accept the takeover offer.” It submitted that its “prime motivation” was to free Webcentral from the effects of its debt burden.
32. We note, of course, that we are not concerned with whether there was an intention to coerce shareholders, but with the effect of any actions. We also note that 5GN’s loan substituted a debt in favour of 5GN, but did not free Webcentral of the debt burden.
33. However, it appeared, as 5GN submitted, that without repayment of the debt to existing financiers, “the equity position of the Webcentral shareholders was fraught.” Web.com’s proposal also included financing of the Webcentral debt. By contrast, for that to be drawn down, the Web.com scheme proposal needed to be approved and as a scheme of arrangement, there was a higher approval threshold.
34. 5GN also submitted that its decision to declare its bid unconditional was not an acknowledgement that the condition was coercive, but a commercial decision to make the funds available (on condition that its nominees were appointed to a majority position on the Webcentral board). We understand 5GN to be submitting that, if anything, it was Webcentral’s debt problem that was coercive.
35. The initial Panel found that 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, in particular, during the period after 5GN declared its bid free of conditions.¹⁵ We agree.
36. However, we consider it unlikely that we would find this unacceptable in light of other factors that may have influenced acceptances into the bid at that time, including the decision of the Webcentral directors to accept into the bid when they did and in the context of Webcentral’s financial situation.

¹⁵ See paragraph 28 of the initial Panel’s reasons

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37. We note, as did the initial Panel, that Webcentral’s directors waited more than three weeks before accepting into the 5GN bid in accordance with Guidance Note 23.¹⁶ In that time, no alternative proposals came forward.
38. While withdrawal rights may be taken up given the increase in Webcentral’s share price following the bid, we consider the initial Panel’s comments on a potential remedy if they found unacceptable circumstances to exist do not override their conclusion that they considered it unlikely that they would find the potentially coercive effects of the circumstances to be unacceptable.
39. We also consider it unlikely that we would second guess the decisions of the target directors to recommend the 5GN bid and make their intention statements in the circumstances.¹⁷ Even if we were to accept Keybridge’s submission, that all that was necessary to find a relevant agreement between 5GN and the directors providing intention statements was that no weight could be given to the superior proposal carve-out, there was insufficient material for us to doubt the directors’ view that the 5GN bid was superior.
40. We did ponder why Webcentral, in such financial difficulty, would decide to pay a break fee rather than let shareholders effectively decide at the impending Web.com scheme meeting which proposal they preferred. If shareholders preferred scrip to cash, the bid would succeed when the scheme vote did not. We also pondered if the board had put competitive pressure on either 5GM or Web.com to further improve their proposals. However, on balance and considering all the circumstances that have unfolded, these matters did not warrant further investigation.
41. Both 5GN and Webcentral made submissions, in effect, that the Webcentral board made its own assessment and took advice from experienced advisers on the competing proposals. Specifically, Webcentral submitted that after consulting its advisers, the directors “*simply recommended the offer they believe offered the best outcome for Webcentral and its shareholders and, after giving ample opportunity for further competing proposals to emerge (consistent with the Panel’s guidance), accepted that offer from 5GN in respect of their own shares.*”
42. We consider, as did the initial Panel, that the board’s reasoning for preferring the 5GN bid to the revised Web.com proposal (notwithstanding the “*higher headline cash offer*”) is set out in the Target’s Statement in some detail.¹⁸
43. We also note Webcentral’s capital raising announcement from 13 November 2020. Keybridge submitted that, at 17 cents, the capital raising was at all times higher than the effective price of the 5GN bid and was to be at least 45% funded by parties associated with 5GN. It submitted that this transaction must have been known to 5GN prior to the end of the bid and should have been disclosed in the bid documentation during the course of the 5GN bid, together with an alleged success fee payable to Webcentral’s financial advisers. We consider that these are new

¹⁶ Guidance Note 23: *Shareholder intention statements*

¹⁷ See *Pacific Energy Limited* [2019] ATP 20 at [18] and *GBST Holdings Limited* [2019] ATP 15 at [36]

¹⁸ See paragraph 31 of the initial Panel’s reasons

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circumstances requiring a fresh application and advised the applicant of this position on the date of our decision.

DECISION

44. For the reasons above, we affirm the decision of the initial Panel not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).
45. We do not (and do not need to) consider whether to make any interim or final orders.

Yasmin Allen
President of the sitting Panel
Decision dated 24 November 2020
Reasons given to parties 8 January 2021
Reasons published 14 January 2021

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Advisers

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