



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Webcentral Group Limited 03  
[2021] ATP 4**

**Catchwords:**

*Decline to extend time to make a declaration – success fee – capital raising – performance rights – director options – bidder's statement disclosure – target's statement disclosure – extension of time to make an application – standing*

*Corporations Act 2001 (Cth), sections 602, 636, 638, 643, 644, 657C(2), 657C(3)*

*Guidance Note 4: Remedies General*

*Re Webcentral Group Limited [2020] NSWSC 1279*

*Webcentral Group Limited 02R [2020] ATP 26, Molopo Energy Limited 01 & 02 [2017] ATP 10, Innate Immunotherapeutics Limited [2017] ATP 2, The President's Club Limited 02 [2016] ATP 1, Lion-Asia Resources Pte-Ltd [2009] ATP 25, Austral Coal Limited 03 [2005] ATP 14, Sirtex Medical Limited [2003] ATP 22, Austar United Communications Ltd [2003] ATP 16*

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

**INTRODUCTION**

1. The Panel, Amy Alston, Stephanie Charles (sitting President) and Bruce Cowley declined to extend time to make a declaration of unacceptable circumstances 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 raised concerns that Webcentral's target's statement(s) and 5GN's bidder's statement(s) had failed to disclose the existence of a success fee payable in respect of the 5GN bid and Webcentral's intention to undertake a capital raising immediately following the close of the 5GN bid. The Panel considered that while the failure to disclose the success fee was of sufficient seriousness that the Panel was minded to conclude that there were unacceptable circumstances, the Panel decided not to extend time for the making of the application under section 657C.<sup>1</sup>

2. In these reasons, the following definitions apply.

- 5GN** 5G Networks Limited (ASX: 5GN)
- 5GN bid** 5GN's takeover bid for Webcentral announced on 17 September 2020
- bidder's statement(s)** 5GN's bidder statement and supplementary bidder's statement lodged in respect of the 5GN bid collectively

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<sup>1</sup> 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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<b>Capital Raising</b>	has the meaning given in paragraph 19
<b>EGM</b>	has the meaning given in paragraph 20
<b>Engagement Agreement</b>	has the meaning given in paragraph 3
<b>Financial Adviser</b>	the financial adviser engaged by Webcentral to advise it in relation to any control transaction involving Webcentral
<b>Keybridge</b>	Keybridge Capital Limited (ASX: KBC)
<b>Options</b>	has the meaning given in paragraph 20(c)
<b>Performance Rights</b>	has the meaning given in paragraph 20(b)
<b>Scheme Booklet</b>	has the meaning given in paragraph 6
<b>Success Fee</b>	has the meaning given in paragraph 4
<b>target's statement(s)</b>	Webcentral's target statement and supplementary target's statements lodged in respect of the 5GN bid collectively
<b>Webcentral</b>	Webcentral Group Limited (ASX: WCG)
<b>Web.com</b>	Web.com Group, Inc.
<b>Web.com scheme</b>	has the meaning given in paragraph 5

## FACTS

3. On 14 September 2018, Webcentral entered into a financial advisory engagement agreement with the Financial Adviser<sup>2</sup> (**Engagement Agreement**).
4. Under the terms of the Engagement Agreement, a \$1.75 million (ex GST) success fee was payable by Webcentral to the Financial Adviser upon "Financial Close" of a proposal to acquire a controlling interest in (or all, or substantially all, of the assets of) Webcentral occurring (**Success Fee**). "Financial Close" was specified as the first to occur of the date on which:
  - (a) all of the conditions to the proposal were satisfied or waived
  - (b) the offeror reached voting power of at least 50% or
  - (c) the transaction reached financial close or was otherwise completed.
5. On 13 July 2020, Webcentral announced that it had entered into a scheme implementation deed with Web.com which would result in Web.com acquiring 100% of Webcentral at 10 cents per share in cash (**Web.com scheme**).<sup>3</sup>

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<sup>2</sup> The Engagement Agreement was subsequently amended on 23 September 2019 and 10 January 2020. The Financial Adviser requested that its name be removed from the reasons

<sup>3</sup> Webcentral and 5GN submitted that the details of the Success Fee had been disclosed at section 9.13 (transaction costs) of the Scheme Booklet (which is extracted at paragraph 54)

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6. On 21 August 2020, Webcentral registered a scheme booklet in relation to the Web.com scheme<sup>4</sup> (**Scheme Booklet**).
7. On 17 September 2020, Webcentral announced (among other things) that Webcentral 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 and that the Webcentral board had determined that the 5GN bid was a superior proposal to a revised proposal from Web.com offering 18 cents per share in cash.
8. On 18 September 2020, 5GN issued its bidder’s statement which stated that the 5GN bid “*impliedly values each Webcentral Share at \$0.145*”.
9. On 21 September 2020, Webcentral announced that the scheme meeting in respect of the Web.com scheme scheduled for 29 September 2020 would not be held pursuant to orders of the Supreme Court of New South Wales.
10. On 1 October 2020, Webcentral lodged its target’s statement in respect of the 5GN bid.
11. On 13 October 2020, 5GN declared its bid wholly unconditional.
12. On 15 October 2020, Webcentral lodged its first supplementary target’s statement in respect of the 5GN bid.
13. On 16 October 2020, Webcentral announced that it had appointed Messrs Joseph Demase and Joe Gangi, directors of 5GN, as directors of Webcentral.
14. On 22 October 2020, 5GN lodged its first supplementary bidder’s statement in respect of the 5GN bid which disclosed that Ms Natalie Mactier, a nominee of 5GN, had been appointed to the Webcentral board.<sup>5</sup>
15. Also on 22 October 2020, Webcentral lodged its second supplementary target’s statement in respect of the 5GN bid.
16. On 29 October 2020, Webcentral lodged its third supplementary target’s statement in respect of the 5GN bid.
17. On 10 November 2020, the 5GN bid closed, with 5GN having voting power in 56.68% of Webcentral shares. The Webcentral board then comprised all representatives of 5GN.<sup>6</sup>
18. On 12 November 2020, Mr Nicholas Bolton, a director of Keybridge, submitted that he was advised by Mr Demase, a director of 5GN and Webcentral, that 5GN was informed “*at the last minute*” (i.e. prior to the 5GN bid commencing) that Webcentral

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<sup>4</sup> Webcentral subsequently lodged a replacement scheme booklet in relation to the Web.com scheme with ASIC on 24 August 2020

<sup>5</sup> Replacing Mr Andrew Macpherson

<sup>6</sup> The other Webcentral directors, Messrs Karl Siegling and Andrew Reitzer, resigned when the bid closed. 5GN submitted that Ms Mactier regards herself as an independent director of Webcentral and that while she was nominated to the Webcentral board by 5GN, she is not a representative of 5GN. The Panel does not comment on 5GN’s submission.

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had agreed to pay the Success Fee in respect of the 5GN bid and that Webcentral needed to undertake a capital raising to fund the Success Fee.

19. On 13 November 2020, Webcentral announced that it had received commitments for an equity subscription package of approximately \$5.6 million (before expenses) (**Capital Raising**), comprising:
  - (a) approximately \$3.1 million (before costs) by way of a placement to institutional and sophisticated investors at an issue price of \$0.17 per share and
  - (b) a further \$2.5 million by way of the issue of shares at an issue price of \$0.17 per share to entities associated with Messrs Demase and Gangi, subject to shareholder approval.
20. That same day, Webcentral gave notice of an extraordinary general meeting to be held on 18 December 2020 (**EGM**), seeking shareholder approval for (among other things) the issue of:
  - (a) the shares under the Capital Raising
  - (b) 10 million performance rights to an entity controlled by Mr Demase (**Performance Rights**) and
  - (c) 1 million directors options to each of Webcentral's other two directors, Mr Gangi and Ms Mactier (**Options**).
21. On 4 December 2020, the Success Fee was paid to the Financial Adviser.
22. On 18 December 2020, Webcentral shareholders approved the issue of the shares under the Capital Raising and the issue of the Performance Rights and Options at the EGM.
23. Neither the existence of the Success Fee nor Webcentral's intention to conduct the Capital Raising or issue the Performance Rights and Options were disclosed in Webcentral's target's statement(s) or 5GN's bidder's statement(s).

## APPLICATION

### Declaration sought

24. By application dated 10 January 2021, Keybridge sought a declaration of unacceptable circumstances. Keybridge submitted (among other things) that:
  - (a) The payment of the Success Fee in circumstances where 5GN obtained less than 100% of Webcentral "*represents clear unacceptable circumstances*".
  - (b) The failure by Webcentral and 5GN to disclose in the bid documentation the Success Fee and Webcentral's intention to conduct the Capital Raising and issue the Performance Rights and Options immediately following the close of the 5GN bid constitutes multiples breaches of sections 638 and 644 (in the case of Webcentral) and sections 636 and 643 (in the case of 5GN).
25. Keybridge submitted that the effect of the circumstances was that Webcentral shareholders had relied on disclosure by Webcentral and 5GN that was materially deficient and that had such disclosure been made, it was likely that shareholders would have made a different election in respect of the 5GN bid.

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#### Final orders sought

26. Keybridge sought final orders that Webcentral shareholders be provided with withdrawal rights under the 5GN bid (or the bid be withdrawn) and that corrective disclosures be made by Webcentral and/or 5GN.

#### DISCUSSION

27. We have considered all the material, but address specifically only that part of the material we consider necessary to explain our reasoning.

#### Decision to conduct proceedings

28. We received a preliminary submission from 5GN. 5GN submitted that the Panel should not conduct proceedings, on the bases that (among other things):
- (a) Keybridge did not have standing to make the application, including because it did not accept the 5GN bid and *“ceased to be a substantial holder in Webcentral (on 17 November 2020) having sold its remaining shares on-market after the close of the takeover (on 10 November 2020) at prices significantly in excess of the implied takeover offer price”*. As at the date of the application, Keybridge was the registered holder of one Webcentral share.
  - (b) The Success Fee did not need to be disclosed in the bid documentation as *“in the context of a control transaction with an enterprise value of approximately \$68 million, the success fee was not material to the making of a decision by a Webcentral shareholder whether to accept the 5GN takeover bid.”* In any case, the amount of the Success Fee had been *“in the public domain from the time of the publication of the Scheme Booklet for the Web.com scheme...”*
  - (c) The Capital Raising was not disclosed prior to the close of the 5GN bid because no decision had been made to proceed with the Capital Raising prior to the bid’s close. Further, the potential need for short-term funding and the likelihood of a capital raising had been disclosed in the target’s and bidder’s statements.
  - (d) Keybridge had unreasonably delayed in making its application.
29. In our view, the application raised concerns that warranted consideration, in particular, the non-disclosure of the Success Fee and the Capital Raising in the bid documentation for the 5GN bid. Accordingly, we decided to conduct proceedings and in doing so, sought submissions from the parties, including on the question of standing and whether we should extend time for making the application.
30. We decided to accept a notice of appearance from Mr Larry Bloch, a former director of Webcentral, who had requested to become party to the proceedings.<sup>7</sup>
31. We were also sent a submission from Mr Stephen Fewings and Ms Catherine Fewings, former shareholders of Webcentral. They submitted (among other things) that:

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<sup>7</sup> Mr Bloch was accepted as a party to the proceedings on 28 January 2021

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*“... after greater than normal canvassing and persuasion we reluctantly accepted the offer from 5G Networks. This decision was made on the basis of the content of the takeover documents issued by Webcentral and 5G Networks. It is unacceptable to see the changes so soon after the closure of the offer and to not be aware of those intentions at the time we were strongly persuaded to accept the offer.”*

32. We received and considered their submission, together with submissions from the parties on their submission.
33. The Financial Adviser and Webcentral’s former directors (who were directors of Webcentral at the time of recommending the 5GN bid), Messrs Andrew Macpherson, Andrew Reitzer and Karl Siegling,<sup>8</sup> were also invited to make submissions. Both the Financial Adviser and Webcentral’s former directors (in a joint response) made submissions in response to our invitation as non-parties.

#### Standing

34. Both Webcentral and 5GN submitted that Keybridge did not have standing to make the application under section 657C(2) because it was not a person *“whose interests are affected by the relevant circumstances”*.<sup>9</sup> They submitted (in effect) that Keybridge did not accept the 5GN bid in respect of any of its Webcentral shares and so was not in any way affected by the alleged unacceptable circumstances, *“deliberately chose to sell all but one of its [Webcentral] shares on market”* and *“clearly has ulterior motives”*.
35. Keybridge submitted that it was a substantial holder of Webcentral at all times during the 5GN bid, remains a shareholder of Webcentral and has standing as a party aggrieved by the unacceptable circumstances.
36. The fact that Keybridge had not accepted into the 5GN bid, subsequently sold down to a single share and now sought withdrawal rights (to which it was unclear how Keybridge would benefit) raised questions as to whether Keybridge was a person whose interests are affected by the relevant circumstances and hence perhaps its motivation for making its application.<sup>10</sup>
37. However, Keybridge was a substantial holder in Webcentral at the time the 5GN bid was on foot and the alleged non-disclosure issues complained of in its application occurred.<sup>11</sup> That is to say, Keybridge was a substantial shareholder in Webcentral at the time of the relevant circumstances, even though it only held one Webcentral share at the time of making its application.
38. We accept that the alleged non-disclosure issues may have affected the decision of Keybridge as to whether or not to accept the 5GN bid.

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<sup>8</sup> Mr Macpherson resigned from the Webcentral board on 22 October 2020 (replaced by Ms Mactier). Messrs Siegling and Reitzer resigned when the 5GN bid closed on 10 November 2020

<sup>9</sup> Section 657C(2)(d)

<sup>10</sup> See *Austar United Communications Ltd* [2003] ATP 16 at [52]

<sup>11</sup> Compare *Innate Immunotherapeutics Limited* [2017] ATP 2 at [25]

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39. We also consider that the non-disclosure issues raised by the application would properly be of concern to the market generally or Webcentral shareholders in particular.<sup>12</sup>
40. Accordingly, we accept that Keybridge has standing to make the application regardless of the concerns we had in connection with the underlying motivation for its application.

#### Disclosure issues – Success Fee

41. Ultimately, as we discuss below, we did not decide to extend time for the making of the application. However, we sought submissions on the disclosure issues raised in the application. Our views on those matters are as follows.
42. We asked Webcentral and 5GN why it did not consider it necessary to disclose the Success Fee in its target's statement(s) and bidder's statement(s) respectively.
43. Webcentral submitted that the Success Fee did not need to be disclosed in its target's statement(s) as *"a \$1.75 million success fee was not material in the context of a transaction with an enterprise value of c.\$68 million – it was less than 2.75% of enterprise value"*. It submitted that it was appropriate to consider the materiality of the Success Fee against the enterprise value of the transaction given Webcentral's heavy level of indebtedness. In support of this, it pointed to the break fee that was agreed in the Web.com scheme and Justice Black's comments at the scheme's first court hearing (by analogy) that given Webcentral's high level of gearing, it was appropriate to compare the break fee with Webcentral's enterprise value rather than its equity value.<sup>13</sup>
44. 5GN confirmed in its submissions that on 18 September 2020, during the course of negotiations with Webcentral, it was advised of the amount of the Success Fee and that it was aware of the Success Fee during the period that the bid price for the 5GN bid was established. In a similar vein to Webcentral, it submitted that it did not consider disclosure of the Success Fee material given the enterprise value of the transaction, adding *"in any event, the Success Fee was disclosed in the Scheme Booklet."*
45. Webcentral's former directors, Messrs Macpherson, Reitzer and Siegling, made submissions which echoed the sentiments expressed by Webcentral and 5GN.
46. Keybridge submitted that shareholders would consider a \$1.75 million success fee *"equating to 15% of [Webcentral's] net equity"* as material.<sup>14</sup> It also queried the logic of Webcentral's analogy of the Success Fee to the Web.com scheme break fee, submitting *"WCG sought fit to disclose the break fee in the Web.com Scheme Booklet (as they should have). Why would they then not disclose a Success Fee that is 3.5x the quantum of this break fee in the Target's Statement? It clearly should have been disclosed."*

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<sup>12</sup> See *Austar United Communications Ltd* [2003] ATP 16 at [56]

<sup>13</sup> *Re Webcentral Group Limited* [2020] NSWSC 1279 at [30]-[31]

<sup>14</sup> Keybridge submitted that Webcentral's net equity at the time of the 5GN bid (or 30 June 2020) was \$11.67 million

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47. Section 636 in respect of the content requirements of a bidder's statement requires disclosure of *"any other information that: (i) is material to the making of the decision by a holder of bid class securities whether to accept an offer under the bid..."*<sup>15</sup>
48. Section 638 requires a target's statement to include all the information that shareholders and their professional advisers would reasonably require to make an informed assessment whether to accept the offer.<sup>16</sup>
49. We consider the Success Fee to be material for Webcentral in the context of a bid with an implied consideration of approximately \$17.71 million.<sup>17</sup>
50. We also note the comments made by the Panel in *Sirtex Medical Limited* regarding the disclosure of a success fee which was payable by the bidder if it acquired less than 90% of the target:<sup>18</sup>

*Some Sirtex shareholders may have preferred to remain as shareholders of Sirtex rather than accept the Bid. If the Success Fee were payable where Cephalon acquired more than 50%, and less than 90% of Sirtex, those shareholders who remained would have borne the cost of the Success Fee in proportion to their shareholding. Therefore, the information was material to the decision which shareholders faced in deciding whether or not to accept the Bid. Further, as the Success Fee was higher than the Panel's recommended maximum break fee payment, this may raise cause for concern.*
51. Accordingly, it was clear to us that disclosure of the Success Fee was, in the first instance, required in 5GN's bidder's statement in order to comply with section 636. Had 5GN made such disclosure in its bidder's statement, Webcentral would not have been required to make the same disclosure in its target's statement.<sup>19</sup> However, given 5GN's bidder's statement omitted disclosure of the Success Fee, we consider that Webcentral's target's statement also did not comply with section 638.
52. By omitting the Success Fee in their subsequent supplementary target's statements and supplementary bidder's statement, Webcentral and 5GN have also failed to meet their obligations in respect of preparing supplementary disclosure in sections 644 and 643 respectively.
53. In light of 5GN's preliminary submission that the Success Fee had been disclosed earlier in the Scheme Booklet and that the market was already trading on the basis of a known success fee (and therefore further disclosure was not required), we asked for submissions on whether the details of the Success Fee had been sufficiently

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<sup>15</sup> See section 636(1)(m)

<sup>16</sup> See section 638(1)

<sup>17</sup> Based on an implied offer value of \$0.145 per Webcentral share. As at the time of the 5GN bid, Webcentral had 122,131,124 shares on issue

<sup>18</sup> [2003] ATP 22 at [72]. In that case, in light of a commitment by the bidder that it would not waive the 90% minimum acceptance condition, the Panel considered that disclosure to target shareholders of the success fee would not be required. However, the Panel noted that disclosure of the success fee may have been required if it became payable in the event the bid was not successful or pursuant to the target's continuous disclosure obligations if the target directors considered it to be price sensitive information. The Panel also noted that it would have been willing to reconsider the issue if the success fee became payable if the bid was not successful at 90%. Ultimately, the Panel did not have to make a firm decision on the success fee, as the bid failed

<sup>19</sup> Section 638(2)(c)

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disclosed previously and to what extent Webcentral and 5GN could rely on the Scheme Booklet disclosure to justify the lack of disclosure in their bid documentation.

54. The Scheme Booklet at section 9.13 (transaction costs) stated as follows:

*Webcentral estimates that it will incur approximately \$4.08 million – \$4.53 million (excluding GST and disbursements) in external transaction costs which relate to the Scheme. This includes advisory fees (including for Webcentral’s financial and legal advisers), the Independent Expert’s fees, registry, printing and mailing costs and expenses associated with convening and holding the Scheme Meeting. Of this, approximately \$2.33 million – \$2.78 million (excluding GST and disbursements) will be incurred regardless of whether or not the Scheme is implemented, excluding any Reimbursement Fee that may be payable to Web.com.*

55. Webcentral submitted that the details of the Success Fee had been sufficiently disclosed in the Scheme Booklet, matters that have previously been publicly disclosed by the target do not need to be repeated in a target’s statement and “*in the absence of any disclosure relating to the Success Fee in the target’s statement, it was reasonable for Webcentral shareholders to have assumed that the same quantum of success fee was payable in connection with the 5GN takeover bid, being the “replacement” rescue and change of control transaction to the Web.com scheme.*”

56. 5GN made similar submissions in the context of preparing its bidder’s statement (i.e. the bidder does not have to disclose information that has previously been disclosed). It also submitted that as Webcentral’s target’s statement identified the Financial Adviser as Webcentral’s financial adviser, who was also the financial adviser to the Web.com scheme, “*shareholders would have expected that a success fee at least in the amount of the Success Fee would be payable on the consummation of [an] alternative control transaction that saved the company from insolvency...*”

57. 5GN conceded, however, that it “*could perhaps with the benefit of hindsight have specifically disclosed in its bidder’s statement that [the Financial Adviser] would be paid a \$1.75m success fee on completion of the Takeover Bid.*”

58. The Financial Adviser submitted that in its view, “[t]he market would have expected 5GN’s bid to have resulted in similar costs having been incurred by Webcentral. It is not credible to suggest that Webcentral would not have incurred similar costs because the change of control transaction which was ultimately successful was the 5GN bid (rather than the Web.com scheme).”

59. Keybridge submitted that:

*“...even in the Scheme Booklet, one needed to deduce what the success fee would be (by deducting the transaction costs if the Scheme did not complete from the costs if it did). It is hardly a clear disclosure at all...*

*Keybridge considers it a stretch for 5GN to state that this disclosure adequately articulates the success fee arrangement. In any event, given the materiality of the success fee, this ought to have been explained to Webcentral shareholders in clear and unambiguous terms.*

*In any case, even at the highest of 5GN’s argument that the possibility of a success fee was disclosed in the Web.com Scheme Booklet and that a shareholder must therefore deduce that that some such fee applied to the 5GN Bid, such disclosure (if carried across – which we deny)*

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*would be hopelessly inadequate for a WCG shareholder to form a view about the material terms of the Success Fee as it would apply to a 5GN Bid, that required just 50.1% acceptances, and all shareholders would bear some of it indirectly.”*

60. We agree with the submissions made by Keybridge. The disclosure of fees in the Scheme Booklet did not satisfy the disclosure obligations in Webcentral’s target statement(s) and 5GN’s bidder’s statement(s).
61. We note that the disclosure in the Scheme Booklet was general disclosure in relation to the fees associated with the Web.com scheme – it did not specifically set out the amount or terms of the Success Fee. The existence of the Success Fee could only be surmised, as Keybridge points out, by back-solving (i.e. by subtracting the transaction costs if the Web.com scheme did not complete from the costs if it did complete). Importantly, there was no obvious connection between the Web.com scheme and the 5GN bid.
62. We do not consider it is plausible to submit that all Webcentral shareholders should have known that a similar success fee would have been payable on similar terms under the 5GN bid. It is not reasonable to suggest that shareholders could have made that connection.
63. Accordingly, Webcentral shareholders did not have sufficient information to enable them to assess the merits of the 5GN bid and were required to make decisions whether to hold their shares or accept the 5GN bid on the basis of inadequate information.
64. On the basis of the non-disclosure of the Success Fee, we were minded to declare that unacceptable circumstances exist in relation to Webcentral. However, for the reasons discussed below, we were not minded to extend time under section 657C for the making of the application.
65. We considered submissions on whether the Success Fee was anti-competitive or coercive, or unacceptable in and of itself (having regards to its quantum and terms). We do not consider that there was evidence to suggest the Success Fee had any anti-competitive or coercive effect. We also do not consider the quantum and triggers<sup>20</sup> for the Success Fee to be unreasonable in the circumstances.
66. We also wish to address submissions made by Webcentral and 5GN to the effect that the Panel should provide guidance for market participants on the disclosure of success fees going forward. We do not consider that any new guidance is required – the obligations of a bidder and target to disclose information which is material to the decision of shareholders in deciding whether or not to accept the bid are clear.

#### **Disclosure issues – Capital Raising and Performance Rights and Options**

67. Keybridge submitted that Webcentral should have disclosed the Capital Raising and Performance Rights and Options in its target’s statement(s) on the bases that:
  - (a) *“The intention [of Webcentral] to dilute shareholders in a manner that did not allow them to participate...”, the fact that Webcentral “intended a placement to so called ‘third parties’ and to related parties of the bidder at a substantial premium to the Bid*

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<sup>20</sup> See paragraph 4 above

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price...” and that “5GN was going to be diluted of its interest in WCG (thereby dropping below 50% after having secured control of the Board) immediately following the closure of the Bid...” was all material information for shareholders to consider during the 5GN bid period.

- (b) *“The performance rights, options and various placements materially impinge on the future value of WCG shares. Shareholders ought to have been able to consider the impact of these events during the Bid period.”*

68. Webcentral submitted that:

- (a) It was not possible to disclose the Capital Raising and Performance Rights and Options as *“no decision had been made by the Webcentral board before the end of the takeover to proceed with the Capital Raising or proposed issue of Performance Rights and Options. Any disclosure before the Webcentral board decided to proceed with these plans would have been premature, with the potential to mislead or confuse shareholders.”*
- (b) The first preparatory steps for the Capital Raising were taken by Webcentral management commencing after 27 October 2020 (once 5GN had obtained operational control of Webcentral<sup>21</sup>). An engagement letter with Cornwalls Capital was signed on 29 October 2020 to lead manage a possible placement of approximately \$3.3 million at 17 cents per Webcentral share. However, *“[a]t the time the terms of the Capital Raising were not fully developed and no decision to proceed down any particular path had been made.”*
- (c) The independent committee of the Webcentral board tasked with responding to the 5GN bid (comprising Messrs Reitzer and Siegling) was not aware of the Capital Raising or proposed issue of Performance Rights and Options.
- (d) *“In any event, shareholders were aware that Webcentral needed short-term financing and that there was a possibility of a post-takeover capital raising by Webcentral.”*

69. 5GN submitted (in effect) that:

- (a) Given representatives of 5GN had replaced senior management of Webcentral on 27 October 2020,<sup>22</sup> 5GN effectively became aware of the preparations for the Capital Raising after 27 October 2020.
- (b) The Capital Raising and Performance Rights and Options were not considered at board level by either 5GN or Webcentral until after the close of the 5GN bid.
- (c) The likelihood of Webcentral undertaking a capital raising was referred to in the target’s and bidder’s statements and *“[s]hareholders electing to accept the 5GN takeover bid did so in the full knowledge that a dilutive capital raising was likely...”*

70. Taking into account previous disclosure in the bid documentation, and timing, on balance, we do not consider that disclosure of the Capital Raising was required during the 5GN bid period. We also do not consider that disclosure of the proposed

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<sup>21</sup> Webcentral submitted on that on 27 October 2020, 5GN had repaid the Webcentral debt, Mr Gangi became Chairman of Webcentral (replacing Mr Reitzer) and Mr Demase become interim CEO (replacing Mr Brett Fenton)

<sup>22</sup> See footnote 21 above

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issue of Performance Rights and Options was required. In reaching our decision, we consider the following relevant:

- (a) Webcentral's target's statement and 5GN's bidder's statement provided some disclosure of Webcentral's need for short-term financing and the possibility of undertaking a capital raising following the 5GN bid.<sup>23</sup>
- (b) Webcentral's third supplementary target's statement was released on 29 October 2020, being the same date that the mandate with Cornwalls Capital was signed. While the mandate letter secured Cornwalls Capital as lead manager for a proposed equity raising, we do not consider that, at that time, the particulars of the Capital Raising could have been disclosed by Webcentral given that no formal decision had been made to proceed with the Capital Raising and the terms of the Capital Raising were still to be finalised. While the mandate letter indicates that Webcentral proposed a placement to raise approximately \$3.3 million at 17 cents per share, it also stipulated that "[t]he final structure, timing and terms and conditions of the Offer will be determined after further consultation between the Lead Manager and the Company and will be dependent on market conditions, which may change over time." The final structure of the Capital Raising was in fact different to the one that was contemplated in the mandate letter.
- (c) Given the above, we also do not consider that Webcentral was in a position to disclose that 5GN's interest in Webcentral would be diluted to under 50% after the close of the 5GN bid.

71. However, the above should not be taken to suggest that a bidder can evade their obligation to disclose a proposed capital raising to take place just after the close of a bid by delaying board approval for the capital raising. In this case, we came to the conclusion we did based on the entirety of the facts.

#### Orders in these circumstances

72. The issue in relation to the non-disclosure of the Success Fee was of sufficient seriousness that we were initially minded to consider that it was in the public interest to make a declaration of unacceptable circumstances. However, given the passage of time since the close of the 5GN bid, it was unclear to us that any unacceptable circumstances in relation to the Success Fee could now be remedied by orders.

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<sup>23</sup> For example, Webcentral's target statement states that: "In addition, Webcentral Shareholders should be mindful that 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 Finance to Webcentral. 5GN expects the loans to be repaid out of earnings of Webcentral, or that further debt or equity capital will be raised by Webcentral to repay the loans provided by 5GN Finance. If you remain a Webcentral Shareholder and become a minority shareholder, if Webcentral undertakes an equity raising to repay some or all of the loans provided by 5GN Finance, it is reasonable to expect that it 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." Also see the Chairman's Letter and sections 1.1(j), 5.5, 7.3(d) and (f) and 8.3 of Webcentral's target's statement and sections 7.4, 10.3, 10.4 and 12.1 of 5GN's bidder's statement

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73. We sought submissions from the parties on whether we should make the final orders sought by Keybridge in its application (being withdrawal rights and corrective disclosure) or if any alternative orders were appropriate.
74. Keybridge submitted (among other things) that:
- (a) Withdrawal rights were appropriate given that they *“give shareholders the ability to be put in the position they would have been [in] had they been aware that the bid was non-compliant at the time they accepted.”*
  - (b) Alternatively, the Panel could make divestment orders in respect of 5GN’s holding in Webcentral that exceeds 20% (Keybridge submitted that the failure to prepare a compliant bidder’s statement meant that the 5GN bid was not a takeover bid for the purposes of the exception in item 1 of section 611 and therefore 5GN had breached section 606) or compensation orders for shareholders impacted by the non-disclosure (being both shareholders that accepted and did not accept the bid).
75. 5GN submitted (among other things) that:
- (a) Withdrawal rights would not remedy any unacceptable circumstances. If any shareholders were potentially prejudiced by the non-disclosure, it would have been the non-accepting shareholders (i.e. because they would bear the burden of paying the Success Fee), *“but in the circumstances of the rising Webcentral share price and ongoing liquidity in Webcentral shares on ASX, they were not, in fact, prejudiced.”*
  - (b) Withdrawal rights not only prejudice 5GN (because granting withdrawal rights would reduce 5GN’s holding in Webcentral) but also Webcentral and its shareholders as *“it would distract 5GN from its objective of restoring Webcentral’s operational and financial fortunes”*, noting that 5GN’s commitment to carry out its intention to restore the business of Webcentral and relieve Webcentral from its large debt burden was *“predicated on it having a controlling interest in Webcentral”*.
  - (c) *“... the forensic requirements of assessing compensation in this case would be well beyond the remit of the Panel, even if detriment was caused.”*
76. Webcentral submitted (among other things) that:
- (a) If Webcentral shareholders who were not aware of the Success Fee had the relevant information, that would have been more reason for those shareholders to accept into the 5GN bid to *“avoid any adverse effect of payment of the Success Fee...”* Accordingly, withdrawal rights, which are only available to accepting shareholders, would do nothing to remedy any alleged effects of the disclosure deficiency.
  - (b) It is *“reasonable to assume that there would be a high level of take up [of the withdrawal rights] by those former Webcentral shareholders who have not already sold their 5GN shares (noting the significant (unexpected) increase in Webcentral shareholder price since the close of the takeover)”*. This would *“likely cause the Webcentral share price to fall significantly given the number of shareholders who would try to sell on-market to take advantage of the current high share prices.”*

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- (c) The negative impact on Webcentral’s share price would cause unfair prejudice to former and remaining Webcentral shareholders, as well as people who have bought Webcentral shares on-market since the end of the offer period (at prices up to 65 cents per Webcentral share).
- (d) As to compensation orders, *“the Panel cannot settle an amount by which selling shareholders should be compensated, because they suffered no adverse effects. It cannot award any amount to non-accepting shareholders because they are better off for having held onto their Webcentral shares.”*
77. Mr Bloch supported an order for withdrawal rights, submitting that *“[t]he only appropriate remedy for [the] circumstances is to require Webcentral and 5GN to provide full and fair disclosure of the Success Fee and allow all accepting shareholders to reconsider their decision to accept based on complete information.”*
78. ASIC submitted that in considering whether any proposed orders might be unfairly prejudicial, *“...consideration would include what impacts and prejudice the proposed orders may have on the non-accepting shareholders of Webcentral, the shareholders of 5GN and those persons that have made trading decisions in shares of either Webcentral or 5GN.”*
79. We agree with a submission made by ASIC that, as a general starting proposition, withdrawal rights should be available to protect the rights and interests of persons who may have accepted a takeover bid in circumstances where disclosure to them was defective and such persons have been adversely affected by that deficiency.
80. However, in the circumstances, given the passage of events between the close of 5GN bid and the time when the matter was put before us,<sup>24</sup> we do not consider that there are any orders which could be made given the potential unfair prejudice any orders could have. In reaching our decision, we consider the following relevant:
- (a) The 5GN bid closed approximately two months ago.
- (b) Since that time, Webcentral’s share price has experienced a positive re-rating – it is currently trading at 58 cents per share<sup>25</sup> which is four times higher than the consideration received under the 5GN bid. We consider that the increase in the share price is, at least in part, attributable to Webcentral improving its financial position as a result of 5GN providing it with financing.
- (c) We agree with Webcentral that in light of the current share price, it is likely that there would be a high level of take up of withdrawal rights from accepting shareholders, and it would be hard now to differentiate those who have simply experienced ‘seller’s remorse’.
- (d) It is difficult in the circumstances to conclude whether disclosure of the Success Fee would have encouraged acceptance or non-acceptance of the 5GN bid (or made no difference) or which cohort of shareholders (accepting or non-accepting) have been affected by the disclosure deficiency and therefore, whether withdrawal rights would be appropriate.

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<sup>24</sup> See *Lion-Asia Resources Pte-Ltd* [2009] ATP 25 at [41]-[47] where the Panel considered that the passing of time was a relevant consideration in determining whether withdrawal rights could be offered

<sup>25</sup> As at the close of trading on 4 February 2021

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- (e) However, given the likely high take up of withdrawal rights in these circumstances, we are satisfied that such an order would be unfairly prejudicial on the non-accepting shareholders of Webcentral, the shareholders of 5GN and those persons that have since made trading decisions in shares of either Webcentral or 5GN given the downward pressure likely to be exerted on the Webcentral share price.
- (f) Corrective disclosure would be of no benefit as the bid has long ended and we consider withdrawal rights are not appropriate in the circumstances.
- (g) Any potential compensation order is difficult to quantify in the circumstances. In any event, a court is better placed to consider the question of compensation in this case.

81. However, the above should not be taken to suggest that we would not make orders remedying a disclosure defect after a bid has closed in other circumstances.

#### Out of time

82. The application was made on 10 January 2021 which was more than two months after 5GN lodged its bidder's statement on 18 September 2020, being the time at which disclosure of the Success Fee first should have been made in respect of the 5GN bid.

83. We note that the issues in Keybridge's application were first raised in the *Webcentral Group Limited 02R*<sup>26</sup> proceedings and that the review Panel in those proceedings advised Keybridge on 24 November 2020 that it considered that the issues were new circumstances requiring a fresh application.<sup>27</sup> Keybridge made its application approximately 7 weeks later.

84. Section 657C(3) provides that:

*An application for a declaration under section 657A can be made only within:*

- (a) *two months after the circumstances have occurred; or*
- (b) *a longer period determined by the Panel.*

85. We requested submissions on whether we should extend time under section 657C(3)(b).

86. We consider the following factors are relevant in considering whether to extend time:

- (a) the discretion to extend time should not be exercised lightly<sup>28</sup>
- (b) whether the application made credible allegations of clear and serious unacceptable circumstances, the effects of which are ongoing<sup>29</sup>

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<sup>26</sup> *Webcentral Group Limited 02R* [2020] ATP 26

<sup>27</sup> *Webcentral Group Limited 02R* [2020] ATP 26 at [43]

<sup>28</sup> *Austral Coal Limited 03* [2005] ATP 14 at [18]

<sup>29</sup> *Ibid* at [19] and *The President's Club Limited 02* [2016] ATP 1 at [143]

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- (c) whether it would be undesirable for a matter to go unheard, because it was lodged outside the two month time limit, if essential matters supporting it first came to light during the two months preceding the application<sup>30</sup> and
  - (d) whether there is an adequate explanation for any delay, and whether parties to the application or third parties will be prejudiced by the delay.<sup>31</sup>
87. In explaining why it waited until 10 January 2021 to make its application, Keybridge submitted (among other things) that:
- (a) it had resourcing issues over the December and Christmas holiday period
  - (b) it only became aware of the circumstances on 12 November 2020 following a conversation with Mr Demase and that its application was made within two months of that date and
  - (c) it had considered lodging an application prior to the EGM on 18 December 2020 at which Webcentral shareholders were to approve the issue of shares under the Capital Raising and the issue of Performance Rights and Options. However, at that time, *“Keybridge was in communication with 5GN and WCG as to the legal defects in its EGM being sought and offered commercial alternatives that were more attractive than the placement proposed to be considered at the EGM. Keybridge considered that making such an application would not advance the likelihood of its proposals being accepted or would be characterised as an attempt by Keybridge to use Panel proceedings as a device to pressure 5GN and WCG to accept those proposals.”*
88. Keybridge further submitted that *“[i]t is clearly in the public interests to ensure that the misconduct raised in Keybridge’s application does not go unaddressed.”*
89. Webcentral and 5GN both submitted (in effect) that Keybridge had offered no reasonable explanation for the 7 week delay in making its application. It further submitted that *“[t]he timeliness principle requires an applicant to bring an application as soon as possible after the relevant circumstances occurred even within the 2 month period... Keybridge should have made the application as soon as possible after 24 November 2020 once being specifically invited to do so by the Panel. They deliberately chose not to do so for their own tactical or other reasons and have allowed a situation to develop in which the orders they seek would be even more prejudicial than they would have been had they been sought and made in November 2020.”*
90. There were considerations that weighed in favour of extending time, including because Keybridge became aware of the Success Fee less than 2 months before it made its application and the application made credible allegations of clear and serious unacceptable circumstances. However, there were factors that weighed against granting an extension.
91. The time that has elapsed since the close of the 5GN bid is considerable given Keybridge’s delay in making its application. Keybridge could and should have acted more expeditiously in making its application after expressly being advised to do so by the review Panel on 24 November 2020 – we do not consider that Keybridge has

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<sup>30</sup> *Molopo Energy Limited 01 & 02 [2017] ATP 10 at [248]*

<sup>31</sup> *Ibid at [249]*

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provided an adequate explanation for its delay. The process of making the application, particularly in Keybridge’s position, was straightforward.

92. The delay has made the question of orders in the circumstances even more difficult.<sup>32</sup> In our view, as discussed above, there are no satisfactory remedies now available to remedy the unacceptable circumstances.
93. While we are minded to make a declaration of unacceptable circumstances in relation to the non-disclosure of the Success Fee, we come to the conclusion that we should not extend time for the making of the application.

## DECISION

94. For the reasons above, we declined to grant an extension of time under section 657C(3)(b) to make a declaration of unacceptable circumstances.
95. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

**Stephanie Charles**

**President of the sitting Panel**

**Decision dated 4 February 2021**

**Reasons given to parties 16 February 2021**

**Reasons published 22 February 2021**

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<sup>32</sup> Guidance Note 4: Remedies General at [18] states that “Orders may be time sensitive. An order that is appropriate at the commencement of a matter may be inappropriate days later because the market has moved or third persons have changed their positions.”

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#### Advisers

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