



Tuesday, 2 November 2004

CRESCENT GOLD: PANEL DECIDES NOT TO COMMENCE PROCEEDINGS

The Panel has considered the application by Crescent Gold Limited dated 26 October 2004 (**the Application**) alleging unacceptable circumstances in relation to its affairs.

The Panel has decided not to commence proceedings in relation to the Application.

Application

Crescent alleged that unacceptable circumstances exist in relation to an issue of 10 million options over unissued Crescent shares to Tomorrow Corporation Pty Ltd (TCPL) in 2001 (when Crescent was known as Focus Technologies Limited). Crescent sought orders either vesting or voiding those options, or restricting their exercise.

Background

In summary, the Application asserted that the following factual background lead to the unacceptable circumstances:

- At the beginning of 2001, both Crescent and Tomorrow Limited (**Tomorrow**, now called MEM Group Limited) were listed on ASX. In February 2001, it was announced that Tomorrow would take an investment of 45% in Crescent, and that 3 Tomorrow executives (Messrs Wayne Bos, Rod Lyle and Alan Studley) would join the Crescent board (leaving only one non-Tomorrow related director on the board). The announcement also stated that Tomorrow was to introduce a potential acquisition opportunity to Crescent.
- It was subsequently announced that the proposal had been restructured so that instead of making a current investment in Crescent, Tomorrow would receive 10 million options, exercisable at \$0.20 over seven years, and only exercisable if Crescent shares had traded at \$0.40 or more over five consecutive trading days.
- In March 2001, it was announced that Crescent would acquire two technology-related businesses introduced by Tomorrow. Later, on 10 August 2001, it was announced that neither of these acquisitions would proceed.
- A meeting of Crescent shareholders was held on 10 July 2001, to approve, among other things, the issue of 10 million options to TCPL, a subsidiary of Tomorrow, and the acquisition of voting power in excess of 20% in Crescent by Tomorrow, TCPL and its associates, pursuant to item 7 of section 611 of the Corporations Act 2001 (Cth) (**the Act**). The resolutions were passed and the options were issued to TCPL on 2 August 2001.
- On 31 July 2001 (i.e. two weeks after the Crescent shareholder meeting) Tomorrow announced that it would not be making further investments in the technology sector, and that Mr Bos would cancel 33 million partly paid shares in Tomorrow in consideration for acquisition of the 10 million Crescent options

held by TCPL. At a general meeting in November 2001, Tomorrow shareholders approved the sale of Tomorrow's shares in TCPL to an entity associated with Mr Bos, in consideration for Mr Bos agreeing to cancel the partly paid shares in Tomorrow and an anti-dilution right in relation to Tomorrow. Mr Bos had resigned as a director of Crescent shortly before the Tomorrow shareholder meeting.

Panel's consideration of the Application

Previous Panel application

The issue of the options to TCPL was the subject of a previous application by Crescent to the Panel in January 2002. The Panel declined to conduct proceedings in relation to that previous application. A full copy of the previous Panel decision can be found on the Panel's website (www.takeovers.gov.au) at: Focus Technologies Limited [2002] ATP 08.

Crescent submitted that the present Application was on grounds substantially different to the previous application. The Panel does not agree.

The factual background (as set out above) and the alleged unacceptable circumstances set out in the present Application are essentially the same as those presented to the Panel under Crescent's previous application in January 2002.

In the Panel's view, the present Application does not raise any new material facts or circumstances which would cause it to reconsider the alleged unacceptable circumstances that were presented to the previous Panel on the first application, when that earlier Panel decided not to commence proceedings.

Arguments by Crescent in present Application

The Panel acknowledges that the Application presented a series of new arguments by Crescent, which were not presented in its previous 2002 application, as to why the factual scenario described above constituted unacceptable circumstances. These arguments involved alleged contraventions of:

- the related party provisions and the director's duty provisions of the Act (due to inadequate disclosure of material information and personal interest);
- the related party provisions (due to failure to obtain relevant approvals) and the continuous disclosure provisions (due to inadequate disclosure) of the ASX Listing Rules; and
- the insider trading provisions of the Act.

As it declined to commence proceedings, the Panel did not form a view as to whether there was any basis for the allegations made by Crescent in its Application.

In the Panel's view, these arguments were available to Crescent based on the facts known to it at the time that it made its first application in 2002 (and indeed the essential elements were alluded to, at least in part, by Crescent in its 2002 application). The Panel does not consider that the presentation of new arguments in this case, without any new facts or evidence, warrants a reconsideration of the alleged unacceptable circumstance which have already been the subject of the 2001 decision by an earlier Panel. In reaching this conclusion, the Panel notes that the

application was not presented as a review application in respect of the Panel's previous decision in *Focus Technologies Limited*.

Panel's jurisdiction

The Panel notes that several of the arguments presented by Crescent in the Application relate to alleged breaches of provisions of the Act outside Chapters 6, 6A, 6B or 6C (the **Takeovers Chapters**). The Panel's jurisdiction to make a declaration of unacceptable circumstances is not restricted where breaches of provisions outside the Takeovers Chapters (such as those alleged by Crescent) have occurred and where those breaches are part of circumstances which meet the tests set out in subsection 657A(2). However, the Panel will not normally have regard to such breaches in determining whether unacceptable circumstances exist. This is in contrast to the Takeovers Chapters where the existence of breaches of the Takeovers Chapters is expressly relevant to a Panel's decision as to whether or not unacceptable circumstances exist. This is because under paragraph 657A(2)(b), the Panel is able to declare circumstances unacceptable because they constitute, or give rise to, a contravention of a provision of the Takeovers Chapters.

Where a person does consider that a breach of a provision of the Act has occurred, there may be a cause of action available to that person under the Courts' jurisdiction. Indeed, the Courts are often the appropriate jurisdiction for matters arising from a breach of provisions other than those in the Takeover Chapters.

Extension of time

Under subsection 657C(3), an application for a declaration of unacceptable circumstances must be made within 2 months after the relevant circumstances have occurred, or such longer period as the Panel may determine.

As the material events occurred in late 2001 and in the absence of any new circumstances being raised in the Application, the Panel may have needed to exercise its discretion to extend the time for making the Application if it was to commence proceedings.

In considering whether or not to grant the extension of time, the Panel considered whether there was a substantive matter to be heard on the Application and, in the course of its deliberations, concluded that it would not commence proceedings in any event because no new circumstances or facts had been raised in the Application. It was therefore unnecessary for the Panel to decide whether an extension of time should be granted.

Decision

Accordingly, under Regulation 20 of the ASIC Regulations, the sitting Panel decided not to conduct proceedings on the Application.

The sitting Panel is Kathleen Farrell (sitting President), Michael Ashforth (sitting Deputy President) and Celia Searle.

Nigel Morris

Director, Takeovers Panel

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