



Australian Government

Takeovers Panel

Reasons for Decision

**PM Capital Asian Opportunities Fund Limited 02
[2021] ATP 13**

Catchwords:

Decline to make a declaration – bidder’s statement – defeating conditions – voting rights for acceptance shares while bid conditional – disclosure

Corporations Act 2001 (Cth), section 629

Guidance Note 5: Specific Remedies – Information Deficiencies, Guidance Note 18: Takeover Documents

PM Capital Asian Opportunities Fund Limited 01 [2021] ATP 17, E&P Financial Group Limited [2021] ATP 1, NGM Resources Limited [2010] ATP 11, Sydney Gas Limited 01 [2006] ATP 9, Australian Leisure and Hospitality Group Limited 01 [2004] ATP 19, Skywest Limited 02 [2004] ATP 11

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

INTRODUCTION

1. The Panel, Paula Dwyer (sitting President), Christian Johnston and Neil Pathak, declined to make a declaration of unacceptable circumstances in relation to the affairs of PM Capital Asian Opportunities Fund Limited. PM Capital Asian Opportunities Fund is subject to a takeover bid from WAM Capital Limited. The application submitted that (among other things) certain bid conditions were uncertain or gave the bidder an option as to whether to proceed with the bid, there were disclosure deficiencies in the bidder’s statement, and the power of attorney provision in the bidder’s statement was unacceptable in circumstances where the bidder’s votes could defeat an alternative scheme proposal. Given WAM Capital subsequently declared its bid unconditional and some of the matters raised in the application had been addressed to some extent in the target’s statement, the Panel was not satisfied that the circumstances were unacceptable.

2. In these reasons, the following definitions apply.

- Attorney Provision** Clause 8.9(f) of the Offer Terms and set out in paragraph 10 below
- Bidder’s Statement** The bidder’s statement dated 14 October 2021 given by WAM to PAF
- NTA** net tangible assets
- Offer Terms** The Terms of the Offer set out in Schedule 1 of the Bidder’s Statement
- No Progress Condition** Clause 8.1(b) of the Offer Terms described in paragraph 9(a) below

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PAF	PM Capital Asian Opportunities Fund Limited
PGF	PM Capital Global Opportunities Fund Limited
PGF Scheme	The proposed merger of PAF and PGF by way of scheme of arrangement announced on 15 September 2021
WAM	WAM Capital Limited
WAM Bid	WAM's off-market takeover bid for PAF made under the Bidder's Statement dated 14 October 2021

FACTS

3. PAF is an ASX listed investment company (ASX code: PAF).
4. PGF is also an ASX listed investment company (ASX code: PGF)
5. PM Capital Limited is the investment manager of both PAF and PGF.
6. On 15 September 2021, PAF announced that it had entered into a scheme implementation deed with PGF under which PGF proposed to acquire all of PAF's shares which it did not already own by way of scheme of arrangement, with PAF shareholders offered PGF shares as consideration. The number of PGF shares to be issued as consideration for each PAF share under the PGF Scheme was to be calculated by dividing PAF's NTA per share (after tax, but before deferred tax assets) by PGF's NTA per share on the effective date of the merger.
7. On 28 September 2021, WAM announced its intention to make an off-market takeover bid for all of PAF's shares offering 1 WAM share for every 1.99 PAF shares held.¹
8. On 14 October 2021, WAM lodged the Bidder's Statement, which contained conditions substantially the same as those announced on 28 September 2021.
9. The conditions of the WAM Bid included that:
 - (a) the PGF Scheme "does not progress" (the **No Progress Condition**)
 - (b) between the date of the bidder's statement and the end of the offer, there was no occurrence or change which had, or could reasonably be expected to have had a material adverse effect on the assets, liabilities, financial position, performance, profitability or prospects of PAF
 - (c) between the date of the bidder's statement and the end of the offer, no superior alternative proposal, other than the PGF Scheme, was announced
 - (d) the reported pre-tax NTA of PAF did not decline by 5% or more
 - (e) the S&P/ASX All Ordinaries Accumulation Index did not decline by 5% or more

¹ WAM stated an intention to increase the consideration under the WAM Bid to 1 WAM share for every 1.975 PAF shares if a break fee in relation to the PGF Scheme is removed. See *PM Capital Asian Opportunities Fund Limited 01* [2021] ATP 17

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- (f) between the date of the bidder's statement and the end of the offer, no person other than WAM or its associates gained or increased their voting power in PAF by 5% or more
- (g) between the date of the bidder's statement and the end of the offer, PAF or its subsidiaries did not enter into, offer to enter into or announce a proposal to enter into any material transaction of \$250,000 or more (in aggregate)
- (h) between the date of the bidder's statement and the end of the offer, no claim was threatened or commenced against PAF that could have resulted in a judgment of \$50,000 or more and
- (i) between the date of the bidder's statement and the end of the offer, that no litigation was threatened or commenced or any decision made by a regulator that would have required the consideration under the offer to increase or WAM or any of its associates to pay any amount to any PAF shareholder.

10. The Offer Terms provided that:

8.9 *By signing and returning the Acceptance Form, you will be deemed to have:*

...

- (f) *from the time of acceptance until the Offer has become unconditional, until the earlier of the withdrawal of your acceptance under section 650E of the Corporations Act or the end of the Offer Period, irrevocably appointed WAM or any nominee of WAM as your attorney to exercise all your powers and rights attaching to your PAF Shares including (without limitation) to requisition, convene, attend and vote at all general meetings of PAF or appoint a proxy or proxies to attend and vote on your behalf at that meeting, where the passing or defeat of any resolution before the meeting might adversely affect the likelihood of the Offer being successful, and to do so in a way which would prevent that effect arising;*
 - (g) *on this Offer or any takeover contract becoming unconditional, agreed not to attend or vote in person at any general meeting of PAF, and irrevocably appointed WAM or any nominee of WAM as your attorney to exercise all your powers and rights attaching to your PAF Shares including (without limitation):*
 - (i) *to requisition, convene, attend and vote at all general meetings of PAF or appoint a proxy or proxies to attend and vote on your behalf at that meeting; and*
 - (ii) *sign all documents and resolutions relating to your PAF Shares, and generally to exercise all powers and rights which you may have as a PAF Shareholder and perform actions as may be appropriate to vest good title in your PAF Shares in WAM;*
- ...
- (i) *agreed not to exercise or purport to exercise any of the powers conferred on WAM or its nominee in clause 8.9(f) of this Schedule 1*

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11. Section 1.8 of the Bidder's Statement titled *'What happens if I accept the Offer?'* discloses (on page 14) that:

Once you accept the Offer in respect of all of your PAF Shares (even while it remains subject to Defeating Conditions), you will not be able to sell those PAF Shares or otherwise deal with the Rights attaching to those PAF Shares subject to your limited statutory rights to withdraw your acceptance in certain circumstances.

This includes appointing WAM as your attorney to vote at any PAF Shareholder meeting (see Schedule 1 clauses 8.9(f) and 8.9(g)). WAM does not support the proposed Scheme; as demonstrated throughout this Bidder's Statement, the WAM Offer is a superior proposal for PAF Shareholders when compared with the proposed Scheme and WAM therefore expects PAF Directors to recommend WAM's Offer. Should the Scheme progress and if WAM is entitled to vote at PAF's Scheme meeting, WAM will vote against any PAF Shareholder resolution implementing the Scheme.

APPLICATION

Declaration sought

12. By application dated 22 October 2021, PGF sought a declaration of unacceptable circumstances. PGF submitted that, among other things:
- (a) there were a number of disclosure deficiencies in the Bidder's Statement
 - (b) the WAM Bid contained conditions that were unacceptable including:
 - (i) the No Progress Condition because (among other things) it was so vaguely drafted that it gave WAM discretion in relation to the interpretation of the condition in contravention of section 629 and
 - (ii) the conditions described in sub-paragraphs 9(d) to 9(i) above were "hair-trigger" conditions that offended the policy of certainty inherent in the requirements of Chapter 6 for takeover bids² and
 - (c) the Attorney Provision was unacceptable in circumstances where WAM could defeat the scheme with proxies covering only a small percentage of total PAF shares and then have the option to decide to proceed with its offer given the high likelihood of the conditions to the offer being breached.
13. PGF submitted that the effect of the circumstances was that the WAM Bid was "*not proceeding in an efficient, competitive and informed way*" and that the Attorney Provision had the effect of reducing the potential for competition between the WAM Bid and the PGF Scheme.

Interim order

14. PGF sought an interim order that WAM be restrained from dispatching the Bidder's Statement to PAF shareholders pending determination of the application.
15. Submissions were sought from the parties in relation to the request on an urgent basis and before we considered whether to conduct proceedings. PAF submitted that

² citing *NGM Resources Limited* [2010] ATP 11 at [21]. See, e.g., sections 629 and 631.

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the interim order should be granted because “it would be far better to present the WAM information to shareholders in a straightforward way without the confusion of supplementary or corrective disclosure”. WAM submitted that the interim order should not be made, including because the application was not timely (being made well after WAM’s announcement of intention to make the WAM bid on 28 September 2021, which contained the conditions to the WAM Bid) and PGF or PAF had not sought to raise any disclosure concerns with WAM prior to the application being made. WAM intended to dispatch the Bidder’s Statement on 28 October 2021 as set out in the Bidder’s Statement timetable.

16. The Panel’s guidance provides that “documents should be complete and not misleading when released” and that “[t]he Panel prefers that information is provided in fewer, comprehensive and comprehensible documents, rather than in correcting, supplementary documents”.³ This guidance also recognises however that “[t]he Panel generally considers that restraining dispatch of a document is not desirable”⁴ and “[p]arties should first seek to negotiate amendments themselves and resolve as many issues as possible before the document is released”.⁵
17. In the circumstances, we declined to make the interim order requested including because:
 - (a) PGF did not seek to resolve the issues raised in its application with WAM prior to making the application and WAM was not put on notice that an application was threatened⁶
 - (b) PAF, being the target company of the WAM Bid, had not raised any of the issues in the application and
 - (c) given the short period of time before dispatch, PGF had not demonstrated a level of harm sufficient for us to interfere with dispatch, noting that we considered that we could adequately remedy the matters raised in the application by making final orders if a declaration of unacceptable circumstances was made.

Final orders

18. PGF sought final orders including that WAM provide a replacement bidder’s statement to correct the alleged deficiencies, including to amend the Attorney Provision so that it does not operate while the offer remains conditional.

DISCUSSION

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

³ Guidance Note 5: Specific Remedies – Information Deficiencies at [10]

⁴ Ibid. at [5]

⁵ Ibid. at [9]

⁶ noting Guidance Note 5: Specific Remedies – Information Deficiencies at [8] and [9]

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Decision to conduct proceedings

20. WAM made a preliminary submission in response to the application, submitting that we should decline to conduct proceedings on the basis that (among other things):
- (a) the application was not timely and neither PGF nor PAF had sought to raise any disclosure concerns or concerns regarding the conditionality of the WAM Bid with WAM prior to the application being made and
 - (b) PAF had not contacted WAM in relation to the Bidder's Statement or made an application to the Panel and the concerns raised by PGF could be addressed in PAF's target's statement if it shared PGF's concerns.
21. In our view, the application raised some concerns that warranted consideration. We advised parties that:
- (a) we were minded to find that it was not unacceptable in the circumstances for the Attorney Provision to permit WAM, from the time of acceptance of the offer, to appoint proxies to attend and vote at a general meeting of PAF "*where the passing or defeat of any resolution before the meeting might adversely affect the likelihood of the Offer being successful, and to do so in a way which would prevent that effect arising*", provided there was adequate disclosure.⁷ However, we queried whether the disclosure was adequate
 - (b) we were concerned that it was inevitable that the No Progress Condition, even if PAF considered WAM's offer superior, would be triggered and asked questions regarding this condition. Our preliminary view was that a number of the other conditions were unlikely to be satisfied, but not to the extent that they contravened section 629 or were otherwise unacceptable⁸ and
 - (c) we were minded to find that many of the other disclosure concerns could be left to PAF to address in its target's statement, but invited responses on questions regarding WAM's use of premia comparing the 'implied value' of its offer (deducting the cash dividend value from the cum dividend WAM share price on 13 October 2021) with PAF's pre-tax and after-tax NTA⁹ and disclosures around the risks and implications of WAM failing to acquire 100% of PAF in light of its 50.1% minimum acceptance condition.¹⁰

Attorney Provision and Bid Conditions

22. On 5 November 2021, the same day that submissions were due on our brief, WAM declared the WAM Bid free from all defeating conditions.
23. PGF and PAF conceded that the concerns regarding the Attorney Provision and the bid conditions no longer required a response. ASIC was concerned that the Attorney Provision may be unacceptable in circumstances where the PGF Scheme is voted down and the bid does not proceed due to one of the bid conditions not being

⁷ See *Sydney Gas Limited 01* [2006] ATP 9 at [83]-[86]; *Skywest Limited 02* [2004] ATP 11 at [12]-[13]

⁸ See e.g., *E&P Financial Group Limited* [2021] ATP 1

⁹ See e.g., Guidance Note 18: Takeover Documents at [34(c)]

¹⁰ See e.g., *Australian Leisure and Hospitality Group Limited 01* [2004] ATP 19

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fulfilled and that this, among other things, required additional disclosure. However, ASIC agreed with other parties that this issue (as well as concerns regarding any bid condition) no longer needed to be determined.

24. WAM submitted that the Attorney Provision was market standard, WAM had disclosed that it did not support the PGF Scheme and intended to vote against it and that disclosure had been given prominence in section 1.8 of the Bidder's Statement (as well as in the Offer Terms) and was also included in the cover letter when the Bidder's Statement was dispatched to PAF shareholders.
25. In relation to the No Progress Condition, WAM submitted that section 1.21 of the Bidder's Statement clarified that WAM would only rely on the condition in the event that PAF's directors "*progressed the Scheme at odds with their previous statements in relation to superior proposals*". It submitted it was not inevitable that PAF would still need to progress the PGF Scheme if another superior offer emerged (including through discussions with WAM).
26. We agreed with the parties generally that issues regarding the Attorney Provision and the bid conditions were overtaken by subsequent events, including the offer being declared unconditional. We do not accept that the operation of the Attorney Provision while the WAM Bid was conditional was either market standard or necessarily adequately disclosed. However, given the WAM Bid had been declared unconditional, we did not need to consider further whether disclosure around the Attorney Provision or any of the bid conditions was adequate in the circumstances.

Other disclosure issues

27. PAF submitted that statements in the Bidder's Statement relevant to the implied value of WAM's offer consideration could not be fully addressed by PAF in the target's statement as they depended on material information not published by WAM to the ASX and were outside the knowledge of PAF. PAF submitted that the effect of WAM's deficient disclosure was that the market trades WAM stock at its current price above NTA. The matters, it submitted, that could only be corrected by WAM were:
 - (a) details regarding WAM's investment portfolio performance which excluded the fees and expenses incurred to generate the returns
 - (b) details regarding WAM's investment portfolio performance which must exclude any franking credits in the calculation of investment returns when comparing performance against the S&P/ASX All Ordinaries Accumulation Index (as such index does not include franking) and
 - (c) WAM's management expense ratio must be corrected to reflect all fees and expenses including performance fees and corporate expenses before making any comparisons to PAF's expenses.

Similar submissions were made by PGF.

28. As to comparing the 'implied value' of WAM's offer consideration to PAF's pre-tax and after-tax NTA, PAF submitted that there was no reasonable basis for WAM to only deduct the cash dividend from the share price when historically WAM's share

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price upon trading ex-dividend always declined by more than that amount and in line with its dividend gross up for franking credits. PGF also submitted that the comparison based on share price versus NTA was not a like-for-like comparison and therefore was inherently misleading.

29. PGF also submitted that WAM's ASX announcement of 5 November 2021 declaring its bid free of conditions compounded the misleading and deceptive conduct of WAM. PGF referred, among other things, to further comparisons made by WAM using a single point in time closing price for WAM shares on 5 November 2021 versus PAF's pre-tax NTA on that day.
30. WAM submitted that it was appropriate for it to calculate implied value using WAM's share price available at the time of the Bidder's Statement and the amount of the dividend and it had no reasonable basis for predicting market impact post dividend. WAM submitted that the *"realisable value of PAF and PGF securities remains below their pre-tax NTA, and WAM's view is that the appropriate premium for WAM's Bid in comparison to the Scheme consideration is the realisable value of WAM shares"*.
31. As to factoring in franking credits into WAM's share value following a dividend, WAM submitted that this would be meaningless and misleading given the variance of impact of franking credits to any given shareholder.
32. As to the risks to PAF shareholders of WAM not achieving 100%, PGF submitted (among other things) that WAM had provided no disclosure concerning the risk that if WAM did not achieve 80% ownership of PAF, PAF shareholders would not have access to CGT rollover relief and would have no cash to pay it.
33. WAM submitted that the risk section in the Bidder's Statement cross-referenced section 10 of the Bidder's Statement that included disclosure as to CGT rollover relief.
34. PAF issued its target's statement on the same day submissions on the brief were due. The PAF directors (who comprised the PAF board committee) recommended that shareholders should reject the WAM Bid. The target's statement addressed a number of the disclosure concerns raised in PGF's application including by highlighting those concerns to its shareholders, giving prominence to the CGT risks and, in relation to WAM's portfolio investment performance, estimating annual returns by making adjustments for fees, expenses and franking (including commissioning an investigating accountant's report on the veracity of PAF's approach).
35. In relation to the disclosure concerns raised in the application, we consider that these had been addressed to some extent in PAF's target's statement and we are not satisfied that it is appropriate in the circumstances to require further disclosure by WAM. A number of the issues represent subjective differences between the parties and these differences were highlighted with prominence in the target's statement.

DECISION

36. For the reasons above, we declined to make a declaration of unacceptable circumstances. We consider that it is not against the public interest to decline to make a declaration and we had regard to the matters in s657A(3).

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Orders

37. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

Paula Dwyer
President of the sitting Panel
Decision dated 12 November 2021
Reasons given to parties 4 February 2022
Reasons published 8 February 2022

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Advisers

Party	Advisers
PGF	Johnson Winter & Slattery
PAF	Baker McKenzie
WAM	Mills Oakley