



Australian Government

Takeovers Panel

MEDIA RELEASE

No: TP24/40

Friday, 5 July 2024

Pacific Smiles Group Limited – Panel Declines to Make Orders

The Panel has declined to make orders in relation to an application dated 17 May 2024 by NDC BidCo Pty Ltd in relation to the affairs of Pacific Smiles Group Limited (**Pacific Smiles**) (see [TP24/24](#)).

Background

Between 6 and 15 December 2023, Beam Investment Co Pty Limited (**Beam**) entered into several agreements with its consortium partners (referred to as **Acquisition Agreements**).

On 18 December 2023, Beam gave a notice under the Panel’s Guidance Note 20: Equity Derivatives (**GN20**) disclosing an economic interest of 18.75% (later increased to 19.90%) in Pacific Smiles through a cash settled total return swap. The notice listed Beam’s associates (but did not describe the nature of the association) and did not attach the Acquisition Agreements.

The equity derivative was fully hedged by Jarden Scientific Trading Limited.

Also on 18 December 2023, an associate of Beam, Genesis Capital Manager I Pty Ltd (**Genesis Manager**), made a non-binding indicative proposal to acquire all of the shares in Pacific Smiles via a scheme of arrangement. This offer was rejected by Pacific Smiles.

On 19 March 2024, Pacific Smiles announced it had received a revised non-binding indicative proposal from Genesis Manager after providing certain non-public information to Genesis Manager under a confidentiality and standstill agreement. The announcement stated (among other things) it was the current intention of Pacific Smiles to recommend shareholders vote in favour of the proposal in the absence of a superior proposal.

On 28 April 2024, Pacific Smiles entered into a scheme implementation deed with NDC BidCo Pty Ltd (**NDC**), a wholly owned subsidiary of a portfolio company of funds managed or advised by Crescent Capital Partners Management Pty Ltd (**Crescent**), under which Pacific Smiles agreed to implement a scheme of

arrangement that is recommended by the board of Pacific Smiles (subject to a positive independent expert's report¹ and no superior proposal emerging).

On 7 May 2024, Beam gave a substantial holder notice stating (among other things) that its cash settled total return swap had been amended on 3 May 2024 to "*provide for physical settlement*" and that Beam had exercised its right for physical settlement on 7 May 2024 and became the legal and beneficial owner of approximately 19.90% of Pacific Smiles shares.

The Panel considered that the Acquisition Agreements provided information that went to the potential intention of Beam in obtaining a 19.90% interest in Pacific Smiles and the nature of the association. It considered that Beam's failure to disclose those agreements in its GN20 notices meant that the market did not understand fully the nature of Beam's long position and was contrary to an efficient, competitive and informed market for control of Pacific Smiles. It declared these circumstances unacceptable (see [TP24/37](#)).

No orders

The Panel considered submissions on several alternative orders including an order restricting Beam from voting any Pacific Smiles shares in which they have a relevant interest or voting power against the NDC scheme if at the time of the scheme meeting the board of Pacific Smiles had not withdrawn its recommendation of the NDC scheme in favour of recommending a superior proposal. However, the Panel has concluded that no orders are appropriate to remedy the effect of the unacceptable circumstances that would not unfairly prejudice any person.

While the Panel considered that the non-disclosure of the Acquisition Agreements affected the behaviour and considerations of Pacific Smiles and NDC, the materials showed that there were many factors that contributed to decisions made by Pacific Smiles and NDC in connection with the proposed NDC scheme, including assumptions made in relation to the standstill arrangements of both Genesis Manager and NDC/Crescent with Pacific Smiles.

The Panel's decision is limited to the facts of this matter.

Equity derivative disclosure

The Panel was concerned about, and would strongly discourage, an overly narrow or formalistic reading of the Panel's GN20. In its view, takers of equity derivatives need to ensure that their disclosure allows the market to understand fully the nature of their long position, particularly when there is a control transaction or potential control transaction. Here, that meant disclosing agreements with Beam's associates

¹ Deloitte Corporate Finance Pty Ltd has concluded that the scheme is fair and reasonable and therefore in the best interests of Pacific Smiles shareholders, in the absence of a superior proposal

that related to the potential acquisition of Pacific Smiles shares, notwithstanding that GN20 did not specify that the disclosure of agreements is required.

The Panel warned that potential bidders adopting a similar strategy to that taken by Beam should be careful to ensure that their disclosures do not mislead the market as to their intentions. A different set of circumstances may lead to orders that reverse an advantage obtained from any inadequate disclosure.

The sitting Panel was Rory Moriarty, Karen Phin (sitting President) and Erin Tinker.

The Panel will publish its reasons for the decision in due course on its website www.takeovers.gov.au.

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