Australian Government

Takeovers Panel

Reasons for Decision
Pacific Smiles Group Limited
[2024] ATP 12

Catchwords:

Declaration – no orders – equity derivative – guidance note – disclosure – efficient, competitive and informed market – relevant interest – standstill – extension of time to make application

Corporations Act 2001 (Cth), sections 602, 608(2), 657C(3), 657D(2), 671, 671B(3)

Takeovers Panel Procedural Rules 2020, Rule 22(1)

Aurora Funds Management Limited v Australian Government Takeovers Panel (Judicial Review) [2020] FCA 496, Cemex Australia Pty Ltd v Takeovers Panel [2009] FCAFC 78

Guidance Note 4: Remedies, Guidance Note 20: Equity derivatives

Whitehaven Coal Limited [2023] ATP 12, Mineral Commodities Limited 02 [2022] ATP 24, PM Capital Asian Opportunities Fund Limited 01 [2021] ATP 17, Webcentral Group Limited 03 [2021] ATP 4, Smoke Alarms Holdings Limited 02R [2020] ATP 4, Flinders Mines Limited 02 & 03 [2019] ATP 2, RHG Limited [2013] ATP 10, Ross Human Directions Ltd [2010] ATP 8, Summit Resources Limited [2007] ATP 9, Village Roadshow Limited 01 [2004] ATP 4, Grand Hotel Group [2003] ATP 34

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

INTRODUCTION

1. The Panel, Rory Moriarty, Karen Phin (sitting President) and Erin Tinker, made a declaration of unacceptable circumstances in relation to the affairs of Pacific Smiles. Pacific Smiles had entered into a scheme of arrangement under which NDC would acquire 100% of Pacific Smiles. The application concerned whether disclosures regarding a cash-settled total return swap were adequate under GN20 in circumstances where the swap was later amended to provide for physical settlement and the taker of the swap (Beam) took a blocking stake in 19.9% of Pacific Smiles. The Panel considered that the failure to disclose certain agreements at the time of the GN20 notices was contrary to an efficient, competitive and informed market and declared the circumstances unacceptable. However, in the facts of this case, the Panel considered that no orders were appropriate to remedy the effect of the unacceptable circumstances that would not unfairly prejudice any person.

2. In these reasons, the following definitions apply.

Acquisition Agreements	has the meaning given in paragraph 16
Beam	Beam Investments Co Pty Ltd, a wholly owned subsidiary of Genesis Ultimate

Beam SHN (or 7 May SHN)	has the meaning given in paragraph 15
Beam Standstill Agreement	the Confidentiality Deed between Pacific Smiles and Genesis Manager dated 1 February 2024, as amended by the Process Deed between Pacific Smiles and Genesis Manager dated 19 March 2024
Co-investment Agreement	has the meaning given in paragraph 16
Crescent	Crescent Capital Partners Management Pty Ltd
divestiture order	has the meaning given in paragraph 120
Equity Derivative (or TRS)	has the meaning given in paragraph 7
First Notice	has the meaning given in paragraph 7
Genesis Capital Fund	Genesis Capital Fund I, LP
Genesis Manager	Genesis Capital Manager 1 Pty Ltd, an entity jointly held by Lucolifia Pty Ltd as trustee for the Lucolifia Family Trust and Plum Willow Family Trust
Genesis Put Option	has the meaning given in paragraph 16
Genesis Ultimate	Genesis Capital Ultimate GP Pty Ltd, an entity jointly held by Lucolifia Family Trust and Plum Willow Pty Ltd as trustee for Plum Willow Family Trust
Genesis Ultimate Partner	Genesis Ultimate in its capacity as general partner of Genesis Capital Management Partnership I, LP, the general partner of Genesis Capital Fund
GFT 2	GFT 2 Co Pty Ltd as trustee for the GFT 2 Trust, a member of the bidding consortium of Genesis Manager for Pacific Smiles
GFT 2 Loan Deed	has the meaning given in paragraph 16
GFT 2 Put Option	has the meaning given in paragraph 16
GN20	Guidance Note 20: Equity Derivatives, 2nd issue, 4 October 2021
GN20 Notices	the First Notice and Second Notice
Greenhill	Greenhill & Co
GUP Loan Deed	has the meaning given in paragraph 16
GUP Put Option	has the meaning given in paragraph 16

Hedge Shares	the Pacific Smiles shares held as a hedge by Jarden in respect of the Equity Derivative and acquired by Beam following physical settlement of the Equity Derivative
Jarden	Jarden Scientific Trading Limited
Jarden Corporate	Jarden Australia Pty Limited
Loan Deeds	the GUP Loan Deed and the GFT 2 Loan Deed
lower offer restriction order	has the meaning given in paragraph 131(b)
NDC	NDC BidCo Pty Ltd, a wholly owned subsidiary of NDC HoldCo Pty Ltd
NDC Scheme	the scheme of arrangement between Pacific Smiles and its shareholders proposed under the Scheme Implementation Deed dated 28 April 2024 between Pacific Smiles and NDC
NDC Standstill Agreement	the Confidentiality Deed between Pacific Smiles and NDC HoldCo Pty Ltd dated 29 January 2024, as amended and restated dated 28 March 2024 and the Confidentiality Deed between Pacific Smiles and Crescent Capital Pty Limited dated 1 March 2024, as amended and restated dated 28 March 2024
No Relevant Interest Statements	has the meaning given in paragraph 27
Pacific Smiles (or PSQ)	Pacific Smiles Group Limited
Put Options	the GUP Put Option and the GFT 2 Put Option
Second Notice	has the meaning given in paragraph 11
voting restriction order	has the meaning given in paragraph 120

FACTS

3. Pacific Smiles is an ASX listed Australian branded dental group (ASX: PSQ), operating 136 dental centres and with a market capitalisation of approximately $304 million[1].

4. NDC is a wholly owned subsidiary of NDC HoldCo Pty Ltd which operates the National Dental Care network of 88 dental centres and is a portfolio company of funds managed or advised by Crescent.

5. Genesis Manager and its related bodies corporate invest and manage portfolio companies operating healthcare businesses.

[1] As at the date of the application

6. GFT 2 is an entity wholly owned by Glenn Haifer.

7. On 18 December 2023, Genesis Manager[2] gave a notice (the **First Notice**) under the Panel's GN20 disclosing that Beam held an economic interest in 29,913,833 shares in Pacific Smiles, representing an 18.75% economic interest in Pacific Smiles pursuant to a cash-settled total return swap entered into on 6 December 2023 (the **Equity Derivative**). The notice listed Genesis Manager, Genesis Ultimate Partner and GFT 2 as associates of Beam.

8. Also on 18 December 2023, Jarden Group Limited and its related bodies corporate lodged an initial substantial holder notice disclosing that Jarden had obtained a relevant interest in 29,913,883 Pacific Smiles shares, representing 18.75% of Pacific Smiles' shares.

9. Also on 18 December 2023, Pacific Smiles announced that it had received on 16 December 2023 a non-binding indicative proposal from Genesis Manager to acquire all of the shares in Pacific Smiles for $1.40 in cash per share via a scheme of arrangement.

10. On 21 December 2023, Pacific Smiles announced that it had rejected Genesis Manager's proposal. However, Pacific Smiles stated that it intended to offer Genesis Manager limited access to certain non-public information on a non-exclusive basis, subject to certain conditions, including the signing of an appropriate confidentiality and standstill agreement, in order to determine if Genesis Manager is able to formulate a materially improved proposal.

11. On 24 January 2024, Genesis Manager[3] gave a second notice (the **Second Notice**) under GN20 disclosing that on 23 January 2024 Beam increased its economic interest in Pacific Smiles by 1,836,117 Pacific Smiles shares and now held an economic interest in 31,750,000 Pacific Smiles shares, representing a 19.90% economic interest in Pacific Smiles pursuant to the Equity Derivative. The notice again listed Genesis Manager, Genesis Ultimate Partner and GFT 2 as associates of Beam.

12. Also on 24 January 2024, Jarden Group Limited and its related bodies corporate lodged a change of interests of substantial holder disclosing that Jarden had acquired 1,836,117 Pacific Smiles shares increasing its relevant interest to 31,750,000 Pacific Smiles shares, representing 19.90% of Pacific Smiles' shares.

13. On 19 March 2024, Pacific Smiles announced that it had received a revised non-binding indicative proposal from Genesis Manager to acquire all of the shares of Pacific Smiles for $1.75 in cash per share via a recommended scheme of arrangement. The board of Pacific Smiles agreed to grant Genesis Manager further due diligence and entered into a process deed. The announcement stated (among other things) that it was the current intention of Pacific Smiles to recommend shareholders vote in favour of the proposal in the absence of a superior proposal.

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[2] as manager of Genesis Capital Fund
[3] as manager of Genesis Capital Fund

14. On 28 April 2024, Pacific Smiles entered into a scheme implementation deed with NDC under which NDC agreed to acquire 100% of the shares in Pacific Smiles by way of scheme of arrangement for cash consideration of $1.90 cash per share, subject to all applicable conditions being satisfied or waived. The board of Pacific Smiles recommended shareholders vote in favour of the scheme at the scheme meeting subject to a positive independent expert's report and no superior proposal emerging.

15. On 7 May 2024, Beam and its associates lodged an initial substantial holder notice (the **Beam SHN**) disclosing that on 3 May 2024 Beam had obtained a relevant interest in 31,750,000 Pacific Smiles shares, representing 19.90% of Pacific Smiles' shares. The notice stated (among other things) that, on 3 May 2024, Jarden *"accepted a request from Beam Investments to amend the Jarden Scientific TRS to provide for physical settlement of the Jarden Scientific TRS in consideration for the removal of the cash settlement option, removal of the extension option and payment of an amendment fee to Jarden Scientific. Following the amendment and restatement of the Jarden Scientific TRS, Beam Investments exercised its right for physical settlement and has become the legal and beneficial owner of the Shares on 7 May 2024."*

16. The Beam SHN disclosed and attached the following agreements (the **Acquisition Agreements**) pursuant to which its associates obtained a relevant interest in the Hedge Shares:

    (a) a Loan Deed dated 6 December 2023 between Genesis Ultimate Partner and Beam (being Annexure B to the Beam SHN) (**GUP Loan Deed**)

    (b) a Put Option Deed dated 7 December 2023 between Beam and Genesis Ultimate Partner (being Annexure C to the Beam SHN) (**GUP Put Option**)

    (c) a Put Option Deed dated 8 December 2023 between Genesis Ultimate and Genesis Ultimate Partner (being Annexure D to the Beam SHN) (**Genesis Put Option**)

    (d) a Loan Deed dated 15 December 2023 between GFT 2 and Beam (being Annexure E to the Beam SHN) (**GFT 2 Loan Deed**)

    (e) a Put Option Deed dated 15 December 2023 between Beam and GFT 2 Trust (being Annexure F to the Beam SHN) (**GFT 2 Put Option**) and

    (f) a Co-investment Agreement dated 15 December 2023 between GFT 2, Beam, Genesis Ultimate Partner and Genesis Manager (being Annexure G to the Beam SHN) (the **Co-investment Agreement**).

APPLICATION

Declaration sought

17. By application dated 17 May 2024, NDC sought a declaration of unacceptable circumstances. NDC submitted (among other things) that:

    (a) Beam's GN20 Notices contained an express statement that Beam and its associates have no relevant interest in any Pacific Smiles shares which was inconsistent with numerous provisions in the Acquisition Agreements which

explicitly refer to the acquisition of shares in Pacific Smiles (and not an economic exposure to Pacific Smiles shares)

(b) that the Acquisition Agreements included put options over Pacific Smiles shares, however, *"Beam incorrectly and misleadingly stated it held no short equity derivative positions"* in its GN20 Notices, and

(c) there was no description in the GN20 Notices of the nature of the association between Beam and GFT 2 (a third-party co-investor) nor any of the other associates listed in the GN20 Notices or disclosure of the *"complex and highly material"* terms of the agreements giving rise to the association.

18. NDC submitted, in summary, that:

(a) *"Beam has secured control of 19.9% of PSQ shares … under the cloak of a cash settled TRS but with some arrangement, practice or agreement giving it certainty that it owned or would on request own those shares and failed to disclose that it had that certainty or believed it had that certainty of ownership"*

(b) *"[Beam] presumably did so in the hope that its control over those shares would never be revealed and it would never have to exercise its control of those shares by becoming the owner of the shares, thus allowing those shares to be voted by Jarden in favour of a scheme proposed by Beam …, while always having the certainty it could take ownership of the shares if a counter proposal was made (i.e. the NDC Scheme)"*

(c) *"Beam took the punt that it would not need to become the shareholder of the shares and thus it would not have ever lodged a substantial holder notice revealing the actual arrangements it had in place"*.

19. NDC submitted that the effect of the circumstances was to result in (a) the market for control of Pacific Smiles not taking place in an efficient, competitive and informed market, (b) Pacific Smiles shareholders not being provided with sufficient information to enable them to assess the merits of the NDC Scheme and (c) if Beam's PSQ Shares are voted against the NDC Scheme, other Pacific Smiles shareholders being excluded from participating in the benefits of the NDC Scheme.

Final orders sought[4]

20. NDC sought final orders that, alternatively:

(a) Beam or its associates must not vote 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 has not withdrawn its recommendation of the NDC Scheme in favour of recommending a superior proposal, or

(b) Beam must divest the Hedge Shares to persons not associated with it and in a manner that obtains as wide a placement as practicable for the highest price

[4] No interim orders were sought

practicable with no person acquiring voting power of more than 5% through such divestment, or in such other manner as is approved by the Panel.

21. NDC also requested that Beam provide corrective disclosure to the market and such other orders including as to costs as the Panel considered appropriate.

DISCUSSION

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

Conducting proceedings

23. Beam provided a preliminary submission submitting that we should not conduct proceedings because the application did not support a finding of unacceptable circumstances.

24. On the face of NDC's application and Beam's preliminary submission, we expected the Equity Derivative to be on standard terms and therefore, unlikely to give rise to a relevant interest. Nevertheless, Beam's potential blocking stake if it decided to vote against the NDC Scheme was likely to have a critical impact on the success of the NDC Scheme.[5] We considered it appropriate to explore the arrangements between Beam and Jarden. We also considered it necessary to understand (among other things) the transactions contemplated by the Acquisition Agreements and how their disclosure at the time the swap was entered into may have affected the circumstances.

25. We considered that we had jurisdiction to consider the matter, noting that the NDC Scheme was not yet before a Court and the issues before us were unlikely to be matters that could be remedied by a Court.[6]

26. In our discussion below, we first address the three main contentions raised by NDC's application being the (a) the undisclosed relevant interest issue, (b) the undisclosed short position issue and (c) the GFT 2 association issue (see paragraph 17). We do not consider that these issues strictly give rise to any disclosure obligations. However, we do conclude that the Acquisition Agreements should have been disclosed in the GN20 Notices for other reasons. In reaching that decision, we take a close look at the nature of equity derivatives, the scope of GN20 and the effects of non-disclosure of the Acquisition Agreements.

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[5] Taking into account typical shareholder turnout, it was highly likely the NDC Scheme would not be approved by the '75%' test that is required for a Court to be empowered to approve the scheme if Beam voted its 19.9% stake against the NDC Scheme. On shareholder voting patterns in schemes, see Corporations and Markets Advisory Committee, *Members' Schemes of Arrangement* (Discussion Paper, June 2008) 56-57 and Tony Damian and Andrew Rich, *Schemes, Takeovers and Himalayan Peaks: The Use of Schemes of Arrangement* (Ross Parsons Centre, 4th ed, 2021) 364-7

[6] See *PM Capital Asian Opportunities Fund Limited 01* [2021] ATP 17, [98]-[100], *Ross Human Directions Ltd* [2010] ATP 8, [19] and *Village Roadshow Limited 01* [2004] ATP 4, [86]-[88]

Undisclosed relevant interest issue

Arrangement or understanding with Jarden

27. Each GN20 Notice contained the statement that *"Beam and its associates have no other long equity derivative positions in PSQ nor a relevant interest in any PSQ shares"* (the **No Relevant Interest Statements**).

28. NDC submitted that, notwithstanding the No Relevant Interest Statements, there was a strong basis for the Panel to infer that Beam in fact had an arrangement or understanding with Jarden that Jarden, as writer of the swap, would hedge the position through a physical holding of Pacific Smiles shares and that Jarden would sell those shares to Beam (or agree to convert from economic settlement to physical settlement) on Beam's request. It submitted that *"it is impossible to believe that what Beam agreed to do in binding documents in December 2023, and then ultimately did in May 2024, was not what was always intended and understood to occur"*.

29. NDC submitted that some practice, conduct or communication must have caused Beam to have certainty that it could become the owner of the Hedge Shares. It submitted that an understanding or arrangement between Beam and Jarden, even if it was implied or informal and whether or not it was inconsistent with the written terms of the swap, would give rise to a relevant interest. NDC referenced section 608(2) where power or control is or can be exercised by means of an agreement, a practice, or any combination of them (whether or not they are enforceable).

30. Beam submitted that *"it did not have any communication (written, oral or otherwise) with Jarden about amending the terms of the cash settled total return swap from an economic settlement to a physical settlement or in relation to any of the matters the subject of the [alleged arrangement or understanding] until shortly prior to 3 May 2024 when Beam made enquiries of Jarden as to whether they would be amenable to such an amendment"*.

31. We asked Beam to describe any communications or provide any documents evidencing communications it (or any person acting on their behalf) had with Jarden, its associates or related entities (or persons acting on their behalf) relating to (a) Jarden hedging its exposure to the Equity Derivative, (b) Jarden's general policy relating to hedging equity derivatives it writes and (c) how Jarden may unwind the Equity Derivative.

32. Beam provided the following documents and submitted that, save for those documents, there were no such written or verbal communications:

    (a) a set of emails dated 6 December 2023 in which (i) Beam requested a cash-settled total return swap from Jarden on the terms of an attached confirmation template, (ii) Jarden offered to enter into the swap on those terms and signed the confirmation and (iii) Beam accepted the swap and countersigned the confirmation, and

    (b) a set of emails dated 3 May 2024 in which (i) Beam requested to amend the swap to change the settlement method from cash to physical and remove the extension provisions, (ii) Jarden agreed to the amendment subject to the payment of an amendment fee and receiving from Beam certain confidential

information on Pacific Smiles in Beam's possession to equalize the information between Beam and Jarden, (iii) the parties exchanged the signed amended and restated confirmation and (iv) Beam instructed Jarden to settle the physical swap on 7 May 2024.

33. Jarden submitted that it had no rebuttals in respect of Beam's submission and denied that it had any agreement, arrangement or understanding with Beam concerning voting or receipt of the Hedge Shares at any time prior to the revision to the terms of the cash-settled swap and that NDC had not produced any evidence to the contrary.

34. We observed that the 3 May amended and restated confirmation referred to "*the confirmation dated 6 December as amended on 15 April 2024*". After further inquiry, Beam and Jarden provided a further set of emails relating to an amendment to the original confirmation made on 15 April 2024 to change the dividend payment date.

35. NDC submitted that it was "*implausible*", based on its experience and in the circumstances, that there were no other communications in the lead up to the establishment of the Equity Derivative or its conversion to physical settlement. For example, looking at the emails of 3 May 2024, NDC noted that within 2 hours and 9 minutes after the time the conversion to physical settlement was first mentioned, the parties had agreed the fee for conversion, agreed the terms of the documents for conversion, completed an information cleansing exercise, fully executed those documents and in the case of Beam, given notice of early termination.

36. Beam submitted that NDC has not explained how any alleged arrangement or understanding could exist between two parties in the absence of any communications (written, oral or otherwise) between them, "*presumably because it would be legally and logically untenable to do so*".

37. We do not agree that direct communication is necessary for finding the existence of an understanding; it can be implied or inferred from the relevant circumstances.[7] Like NDC, we were surprised by the limited communications between Beam and Jarden and would have expected conversations to have occurred regarding both the entry into the swap and its conversion, including with the trading desk, and, in the absence of such conversations, for the processes to take longer given the disciplines employed by investment banks in relation to legal and regulatory requirements.

38. However, we have not been presented with any material to rebut Beam's submission that it had no communication with Jarden about amending the total return swap or Beam acquiring the Hedge Shares before 3 May 2024. Also, no material was presented that Jarden had a general policy regarding hedging equity derivatives it writes or its actions on the unwinding of equity derivatives which would have given Beam certainty that it could amend the total return swap or acquire the Hedge Shares on request. We do however agree with a later submission by ASIC as summarised in paragraph 68(c) below that "*a sale of hedged securities by a writer to a taker in connection with unwinding an equity derivative position will often be the most convenient, low-risk and*

[7] See *Aurora Funds Management Limited v Australian Government Takeovers Panel (Judicial Review)* [2020] FCA 496 at [23]-[34]

cost-effective way to dispose of the hedge securities". This outcome does not require a prior understanding between the taker and writer of an equity derivate swap and rather, is often driven by each party's individual economic incentives. Accordingly, we accept the submissions of Beam and Jarden and do not find any arrangement or understanding that Jarden would sell the Hedge Shares to Beam on Beam's request based on any direct or other communication between NDC and Jarden.

Arrangement or understanding inferred from Acquisition Agreements

39. NDC submitted that the understanding or arrangement regarding the Hedge Shares could be inferred from the Acquisition Agreements.

40. NDC submitted that each of the Acquisition Agreements was premised upon, and contained explicit references to, Beam acquiring a legal and beneficial interest in Pacific Smiles shares, specifically:

    (a) under clause 2.2 of the GUP Loan Deed and the GFT 2 Loan Deed, Genesis Ultimate Partner and GFT 2, respectively, agree to make advances to Beam *"to fund the purchase of shares in Project Beam"* (with 'Project Beam' understood to be a reference to Pacific Smiles)

    (b) recital A of each of the GUP Put Option[8] and the GFT 2 Put Option (under which Genesis Ultimate Partner and GFT 2, respectively, grant Beam the right to require Genesis Ultimate Partner and GFT 2 to purchase Pacific Smiles shares) states that Beam *"is, or will be, the legal and beneficial owner of the Option Shares"* (where 'Option Shares' refers to shares in Pacific Smiles)

    (c) under clause 3.1(f) of each of the GUP Put Option[9] and the GFT 2 Put Option, Beam warrants to Genesis Ultimate Partner and GFT 2, respectively, that *"it will, immediately prior to Completion in respect of [an] Option Notice, be the legal and beneficial owner of the Option Shares to which that Option Notice relates"* and

    (d) under the Co-Investment Agreement:

        (i) paragraph 1 refers to *"the proposed acquisition of shares in [Pacific Smiles] (**Target**) by [Beam], to commence following the date of this letter agreement (**Initial Investment**), and the subsequent potential control transaction proposal to be made by [Beam] to the Target and its shareholders…"*

        (ii) paragraph 2(b) provides that the initial amounts paid by the co-investors, Genesis Ultimate Partner and GFT 2, *"will be invested in connection with the Initial Investment by way of an acquisition of securities in the Target by [Beam]"* at the acquisition price for the securities in the Target (plus transaction costs) and

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[8] Recital A of the Genesis Put Option (under which Genesis Ultimate Partner grants Genesis Ultimate the right to require Genesis Ultimate Partner to purchase Pacific Smiles shares) states that Genesis Ultimate *"is the sole legal and beneficial owner of the Option Shares"*

[9] Under clause 3.1(f) of the Genesis Put Option, Genesis Ultimate warrants to Genesis Ultimate Partner that *"it will, immediately prior to Completion, be the legal and beneficial owner of the Option Shares"*

(iii) paragraph 2(c) provides that the parties acknowledge and agree that, "*following completion of the acquisition of securities in the Target by [Beam] for the Initial Investment Amount: (i) [Beam] (or an alternative investment vehicle nominated by the Manager) may make a bid or proposal or otherwise take action to acquire additional securities in the Target in connection with the Control Transaction…*".

41. NDC noted that the first business day after the Co-Investment Agreement was entered into, Jarden spent approximately $41.5 million purchasing 29,700,983 Pacific Smiles shares.[10] NDC submitted that, in all the circumstances, "*there can be no conclusion other than that*" the Pacific Smiles shares purchased by Jarden were bought for Beam and that from that time onwards Beam "*controlled and/or had the right to control those shares*" or at the least it evidenced what Beam, Genesis Ultimate Partner and GFT 2 "*understood to be the case*" and they have acted on that basis.

42. NDC submitted that none of the Acquisition Agreements refer to Beam acquiring only an economic exposure to Pacific Smiles shares which would have been consistent with the No Relevant Interest Statements. It further submitted that it was inconceivable, given the timing of the agreements and swaps trading, that legally binding agreements *"presumably drafted with care and deliberation and with the assistance of experienced legal counsel"* would refer to acquisitions of shares *"if that was not in fact what the parties to those documents understood to be, and had certainty was, the case*".

43. Beam denied that the terms of the Acquisition Agreements established any arrangement or understanding between Beam and Jarden. In relation to the Loan Deeds, Beam submitted that the wording "*merely reflects a desire by it to acquire PSQ shares*". In relation to the Put Options, Beam submitted that the ownership warranties are only given if and when Beam decides to exercise its put option by providing the 'Option Notice'.

44. Beam submitted that the Acquisition Agreements "*are a bespoke suite of funding and advisory arrangements between Beam and its disclosed associates, to which Jarden is not a party and of which Jarden was unaware at any time prior to Beam lodging the [Beam SHN]*".

45. Beam submitted that the commercial purpose of the Put Options was to provide "*one of a number of pathways*" through which Beam could satisfy its repayment obligations under the Loan Deeds. It noted that it is not necessary for Beam to own Pacific Smiles shares for it to repay the loans. Further, Beam submitted that if it elects to repay an amount owing under the loans via exercise of a Put Option, Beam may acquire the relevant Pacific Smiles shares by any lawful means and at any time.

46. Beam submitted that its position is also supported by the terms of the Equity Derivative, relevantly:

(a) Clause 3.1(e) that provides (in effect) that Jarden and Beam acknowledge and agree that no party has any obligation to acquire, hold or dispose of any Pacific Smiles shares and, to the extent they do, they have no agreement, arrangement

[10] Jarden began buying Pacific Smiles shares on 7 December 2023

or understanding including with respect to the exercise of voting rights relating to such shares or the disposal of such shares and *"each of Counterparty and each Relevant Individual will make its and his/her own determination independently of Jarden (and vice versa) in relation to corporate actions in respect of the Issuer and any Shares that it or he/she/it may hold"*,

(b) Clause 3.1(f) that provides (in effect) that each party's rights and obligations are not dependent or conditional upon Jarden or any of its affiliates owning or having any legal or equitable interest in Pacific Smiles shares, and

(c) Clause 3.2(c) that provides that if Jarden or its affiliates hold or control any Pacific Smiles shares, Beam *"acknowledges and agrees that it has no right or interest (legal, beneficial or otherwise) in or to any of those Shares or any power in relation to them including, without limitation, any power to control, or right to be consulted, concerning disposal or trading of those Shares by Jarden or its Affiliates or any decision by Jarden or its Affiliates with respect to the exercise by Jarden or Jarden's nominee of the right to vote attaching to those Shares, which Counterparty acknowledges is at the sole and absolute discretion of Jarden or its Affiliate (as applicable)."*

47. Jarden submitted that the Equity Derivative initially written by Jarden was *"an absolutely standard form cash settled total return swap"*. It submitted that there was no agreement, arrangement or understanding between Beam and Jarden in relation to Jarden's hedging of the swap and Beam had no control over the Hedge Shares. Jarden further submitted that there was no restriction in the swap which would have prevented Jarden from considering offers from any party to purchase or borrow Jarden's Hedge Shares.

48. We are not prepared to infer from the Acquisition Agreements that there was any arrangement or understanding between Beam and Jarden in relation to the disposal or voting of the Hedge Shares that resulted in Beam having a relevant interest in the Hedge Shares before the swap was converted. Jarden is not a party to the Acquisition Agreements and there is no evidence that Jarden was aware of those agreements. The terms of the swap appeared to be standard. Those terms did not restrict Jarden's choices with respect to its disposal of the Hedge Shares. Similarly, the Acquisition Agreements do not restrict how Beam can satisfy its obligations under those agreements.

Certainty, or certainty of belief, inferred from Beam Standstill Agreement

49. NDC was informed by Pacific Smiles that Beam's conversion of the Equity Derivative from cash to physical settlement did not breach the Beam Standstill Agreement. NDC submitted that it was reasonable to infer that the standstill either acknowledged that the Hedge Shares were already shares in which Beam had a relevant interest or contained a provision allowing conversion of the Equity Derivative to physical settlement. It submitted that the fact that the standstill was drafted in such a manner gives a further basis to infer that Beam had certainty, or certainty of belief, that it controlled or on request would control the Hedge Shares.

50. Neither Beam nor Pacific Smiles made any submissions on this topic prior to us making our declaration. We can see how knowledge of an exception in Beam's

standstill in relation to the Equity Derivative could send a certain signal to the market. Nevertheless, we did not rely on this submission in relation to the making of our declaration but we did investigate this issue further in relation to our consideration of orders below.

Undisclosed short position issue

51. NDC submitted that the Put Options create short positions contrary to the No Relevant Interest Statements. It submitted that:

    (a) under the Put Options, Beam (as taker) may sell option shares to Genesis Ultimate Partner and GFT 2 at an exercise price equal to the purchase price paid by Beam for the option shares and its transaction costs

    (b) Beam benefits from each put option where the market price of Pacific Smiles shares falls below its acquisition price, and therefore holds a short position

    (c) this is consistent with the definition of a short position for purposes of GN20 which provides that *"equity derivatives, in the hands of the taker, may be long (i.e., the taker is to benefit from an increase in the price of the underlying security) or short (i.e., the taker is to benefit from a decrease in the price of the underlying security)"*.[11]

52. NDC submitted that the Put Options should have been disclosed in accordance with paragraph [13(i)] of GN20 that requires the taker to disclose (among other things) any short equity derivative position that offsets the taker's long positions. In the alternative, NDC submitted that the Put Options should have been disclosed in the GN20 Notices in accordance with the same policy that requires disclosure of collar arrangements[12] that *"operate to limit the taker's… downside exposure"*.

53. Beam submitted that it took no benefit from *"a decrease in the price of the underlying security"* by being a party to the Put Options for so long as it held merely a long economic (as opposed to a long equity) position with respect to Pacific Smiles shares.

54. ASIC acknowledged Beam's submission but noted that if Beam was found to have a relevant interest in the Hedge Shares then it may have been required to disclose the Put Options. ASIC also discouraged a narrow interpretation of GN20 stating that the disclosure of an arrangement where there is ambiguity as to whether it falls within GN20 would be consistent with the principles of GN20.

55. We agree with Beam's submission. The Put Options only provide an offset when Beam holds physical shares and were not required to be disclosed under either paragraph [13(i)] of GN20 or as a collar arrangement under paragraph [12] of GN20.

GFT 2 association issue

56. NDC noted that while the GN20 Notices listed Genesis Capital, Genesis Ultimate Partner and GFT 2 as associates of Beam, there was no description of the nature of the association with each of these entities. It submitted that given the *"name of each associate contained the word Genesis or a short collection of letters starting with the letter G"*

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[11] GN20 at [5]
[12] Referring to GN20 at [12]

a reader would have the impression that each of the associates were members of the Genesis Capital group.

57. In fact, when the Beam SHN was filed, NDC stated that it revealed that (a) GFT 2 is a co-investor with Genesis Manager in Beam rather than being a member of the Genesis group, (b) agreements giving rise to the association were entered into prior to the date the GN20 Notices were made and (c) the terms of the agreements giving rise to the association were complex and highly material.

58. NDC's submissions regarding the identity of GFT 2 did not take us far, noting that the entity's beneficial ownership could be independently discovered via a company search. However, the terms of the Acquisition Agreements and when they were entered into made us question if they should have been disclosed at the time of the First Notice. We discuss this in detail below.

59. NDC also submitted that, notwithstanding the disclosure of the Acquisition Agreements in the Beam SHN, it appeared that the full terms of association between Beam and GFT 2 remained concealed from the market.

60. It submitted that the arrangements with GFT 2 are uneconomic for GFT 2 absent some further agreement, arrangement or understanding because:

    (a) GFT 2 granted Beam an interest free loan of up to $31,250,000

    (b) the loan is repayable at Beam's election in a manner that gives Beam complete optionality as to whether GFT 2 obtains any return on its capital because Beam can choose either to:

        (i) repay the loan in cash without interest, which it would be incentivised to do if the value of the Pacific Smiles shares has increased or

        (ii) repay the loan by transferring Pacific Smiles shares or Beam shares, which it would be incentivised to do if the value of the Pacific Smiles shares has reduced.

61. Beam submitted that no other agreements, arrangements or understandings with GFT 2 or any of its associates existed that were not included in the Beam SHN. It also submitted that clause 6(c)(i)(A) of the Co-investment Agreement requires Beam (as Manager) to monitor and manage the co-investment in the same manner as it deals with the investment by the Genesis Capital Fund and therefore it is unsurprising that the terms of the GFT 2 Loan Deed and the GFT 2 Put Option are materially identical to the GUP Loan Deed and GUP Put Option, respectively. Beam also submitted that NDC ignored the economic benefit that GFT 2 could obtain through receipt of ordinary equity securities in Beam pursuant to clause 4(b) of the Co-investment Agreement. It submitted that these matters weigh against any finding that GFT 2 was *"placed at some special economic disadvantage, as compared to Beam's other associates, so as to warrant any suspicion that there could be an undisclosed agreement, arrangement or understanding"*.

62. We did not receive any submissions from GFT 2 on this issue.

63. We accept Beam's submissions on this issue and did not consider it necessary to take this issue further.

Intention to acquire the Hedge Shares

Nature of equity derivatives

64. ASIC submitted that "*[t]he terms of the Acquisition Agreements, which pre-date the acquisition of shares by Jarden on 18 December 2023, may provide grounds for an inference that Beam had intended to acquire the Pacific Smiles securities. Although Beam has submitted that the references to acquisition of Pacific Smiles shares in the [Acquisition Agreements] are unrelated to Beam's entry into the TRS, it is open to the Panel to consider whether the proximity in the timing of entry into these documents suggests that Beam's long equity derivative position was intended to conceal a potential pre-bid stake for Genesis Capital Manager, an associate of Beam.*"

65. In its guidance on equity derivatives, the Panel specifically recognises the benefits of equity derivatives and states that it does not want to interfere with the market for equity derivatives where they are not used in ways that undermine the policy of Chapter 6.[13]

66. There are advantages for a bidder entering into a long equity derivative position over acquiring a physical stake. For example, the upfront cost of entering into the derivative is generally much less than the cost of buying the shares and the derivative locks in the pre-bid stake price protecting against target share price rises.

67. In addition to the economic advantages, as described by NDC[14] (and not rebutted by Beam or Jarden), in any scheme proposed by Beam and recommended by Pacific Smiles, Beam would not need to take the Hedge Shares because as per usual practice, the Hedge Shares would be either not voted or voted in line with the board recommendation on the scheme. However, if a rival scheme was proposed and recommended by Pacific Smiles, Beam could seek to convert the swap from cash to physical settlement and obtain a potential blocking stake.

68. ASIC submitted that the following circumstances also place Beam "*in a unique position of proximity*" to the Hedge Shares:

    (a) by maintaining the long position itself, Beam may have exercised a degree of control, even if remote, over disposal of the Hedge Shares, due to the potential reluctance of Jarden to reduce its exposure to the Hedge Shares unless and until the swap was unwound

    (b) equity derivative positions referencing a substantial holding may be more likely to result in hedging (often occurring through the acquisition of the underlying securities by the writer)[15] given the greater exposure of the counterparty

[13] GN20 at [1]
[14] See paragraph 18
[15] See GN20 at [6]

(c) its informational and strategic advantage vis-a-vis the rest of the market in positioning itself to acquire the securities from the writer, including:

(i) the opportunity throughout the life of a cash settled derivative to negotiate the addition of a physical settlement option. ASIC noted that this is what occurred on 3 May 2024 through the $17,500 fee paid by Beam to Jarden to agree to amend the Equity Derivative

(ii) the competitive advantage Beam would have had if Jarden sought to sell the Hedge Shares upon the unwinding of the cash settled derivative, noting that "*a sale of hedged securities by a writer to a taker in connection with unwinding an equity derivative position will often be the most convenient, low-risk and cost-effective way to dispose of the hedged securities*".

69. The potential effect on the market in the underlying securities that comes about from creating the economic incentive to hedge and then controlling the unwinding of the hedge, is the basis upon which it is expected under GN20 that the taker of a long equity derivative position will disclose that position.[16]

70. It is not in dispute that Beam disclosed its long equity derivative position to the market in its GN20 Notices dated 18 December 2023 and 24 January 2024 or that Jarden disclosed its position as beneficial holder of the Hedge Shares in its substantial holder notices dated 18 December 2023 and 24 January 2024.

71. Absent any finding that Beam had a relevant interest in the Hedge Shares as per our conclusions above, we queried whether the failure to disclose the terms of the Acquisition Agreements at the time of disclosure of Beam's long equity derivative position in Pacific Smiles shares was contrary to our guidance in GN20 and an efficient, competitive and informed market.

Disclosure requirements

72. GN20 states that the Panel expects disclosure to be made where the long position of a person and their associates is 5% or more of the voting rights in an entity (and any changes by at least 1%).[17] Failure to disclose in accordance with paragraphs [12] to [18] of GN20 may give rise to unacceptable circumstances, irrespective of whether a control transaction has commenced.[18] Set out below are the GN20 paragraphs relevant to the proceedings (with footnotes):

> *12. Disclosure of equity derivatives should allow the market to understand fully the nature of the taker's long position. This may require disclosure of any cap and/or collar arrangements and (if the information is known or readily available) the extent to which the counterparty has hedged.*[4]
>
> [4] *The taker may not know the hedge status, or be able to ascertain it, or the hedge status might change frequently, or the hedge may not be the underlying security (for example it may be another equity derivative).*

[16] See GN20 at [7]-[8]
[17] GN20 at [9]
[18] Ibid

13. The Panel considers that, in cases when it expects disclosure, the following information should be disclosed (as applicable):

a. identity of the taker (but not the writer)

b. relevant security

c. price (including reference price, strike price, option price etc as appropriate)

d. entry date

e. number of securities to which the derivative relates

f. type of derivative (e.g. contract for difference, cash settled put or call option)

g. any material changes to information previously disclosed to the market

h. long equity derivative positions held by the taker and its associates, its relevant interests and its associates' relevant interests (and the identity of all associates referred to)

i. short equity derivative positions that offset long positions[5] and

Example 1: A taker "rents" voting power by acquiring physical securities and simultaneously taking offsetting short equity derivative positions.

Example 2: A substantial holding of, say, 10% that is disclosed but subsequently a short equity derivative contract is entered for, say, 5%.

[5] Long and short positions should not be netted for the purposes of disclosure, unless the derivatives being netted are exchange traded equity derivatives that are exactly offsetting in nature, period and price.

j. short positions of more than 1% that have been acquired after a long position is disclosed, whether by notice or substantial holder notice (ie, the taker should update its disclosure with reference to the short position).

14. The Panel is unlikely to consider that:

a. the information needs to be in the form of a formal substantial holder notice (ASIC Form 603 and 604), unless required by Chapter 6C or

b. standard (for example ISDA) documentation needs to be provided.

15. Disclosure may be made:

a. as a written notice annexed to a substantial holder notice, if one is required at the time of disclosure or

b. otherwise, by a written notice to the entity.[6]

[6] The written notice should be made in a form that is suitable for immediate release to the market without the need for substantial alteration or summation by the listed entity. It should also include a statement that disclosure is made under this Guidance Note and request that it be provided to the ASX. In cases where a substantial holder notice is not required, details of any acquisitions of physical securities (that have not already been disclosed) should be disclosed in the same level of detail as is required under the substantial holder provisions. Such disclosure would need to be repeated in a further substantial holder notice if one is required.

> *16. In considering whether timely and adequate disclosure has been made, the Panel will have regard to the requirements for substantial holder notices – that is, within 2 business days of becoming aware or, in a bid period, by 9.30 am on the next trading day.*[7]

73. Beam submitted that GN20 does not contemplate the disclosure of the Acquisition Agreements, noting specifically that paragraph [13(h)] of GN20 provides for the disclosure of: "*long equity derivative positions held by the taker and its associates, its relevant interests and its associates' relevant interests (and the identity of all associates referred to)*" (emphasis added). It submitted that in each GN20 Notice, Beam disclosed the identity of its associates.

74. In contrast, Beam noted that when it was required under section 671B(1)(a) to lodge a substantial holder notice upon taking the physical shares, it disclosed the Acquisition Agreements in its Beam SHN as required under section 671B(3)(d)(iii). Section 671B(3)(d)(iii) provides in effect that a substantial holder notice must include the name of each associate who has a relevant interest in voting shares of the company, together with details of any relevant agreement through which the associate has the relevant interest.

75. Beam further submitted that if we accept that Beam was not required to submit a substantial holder notice, then it must follow that it was not required to disclose information "*over and above*" the information required of it under GN20.

76. We accept that Beam was not required to submit a substantial holder notice prior to the conversion of the swap for the reasons set out above. We also accept that Beam disclosed the identity of its associates in its GN20 Notices in accordance with paragraph [13(h)] of GN20. However, our guidance is not prescriptive. It serves to guide how the Panel will consider the purposes of Chapter 6 in relation to certain circumstances.

77. As to whether any other provision of GN20 specifically requires the disclosure of the Acquisition Agreements, the following provisions appear relevant:

    (a) paragraph [14] which states that the information need not be in the form of a formal substantial holder notice unless required by Chapter 6C

    (b) paragraph [15], footnote 6 which provides that, in cases where a substantial holder notice is not required, details of any acquisitions of physical securities in a GN20 notice "*should be disclosed in the same level of detail as is required under the substantial holder provisions*" and

    (c) paragraph [16] which states that in considering whether "*timely and adequate*" disclosure has been made, the Panel will have regard to the requirements for substantial holder notices "*that is, within 2 business days of becoming aware or, in a bid period, by 9:30 am on the next trading day*" (emphasis added).

78. We largely agree with the submissions of Beam in relation to these provisions. Beam was not required to use the form of a substantial holder notice because it was not required to lodge a substantial holder notice under Chapter 6C. The words "*that is*" in paragraph [16] appear to limit that provision to one of timing rather than content.

Footnote 6 refers to disclosure being in the same level of detail as is required under the substantial holder provisions but appears limited to where the holder of the equity derivative position also holds physical securities.

79. ASIC submitted that footnote 6 sets a policy that a written notice under GN20 should provide the same level of detail as is required under the substantial holder provisions under Part 6C.1.[19] We would not go that far. However, we do have sympathy for ASIC's further submission that "*[a] market participant should reasonably expect the market protection of the "same" disclosure as contemplated in GN 20 to be followed*". It is not obvious to us why GN20 does not expect the disclosure of details of any relevant agreement with associates, in addition to their identity, as required under the substantial holder provisions.[20]

80. Beam submitted that it would be contrary to legislative intent for the Panel to interpret section 671B in a manner that would require the disclosure of equity derivatives in the form of substantial holder notices.[21] We acknowledge that section 671B does not extend to the disclosure of equity derivatives, however, this is not what we are being asked to consider.

81. The guidance provided by the Panel in its guidance notes is intended to support its principles-based mandate.[22] The guidance does not bind a sitting Panel and the examples in guidance notes are illustrative only. However, each guidance note importantly sets out the policy upon which the guidance is based and that a sitting Panel will consider when assessing the circumstances.

82. In GN20, the main policy basis and the Panel's jurisdiction concerns the effect of non-disclosure on the control or potential control of an entity and the acquisition or proposed acquisition of a substantial interest, and whether non-disclosure is contrary to an efficient, competitive and informed market.[23]

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[19] After the reasons were provided to parties, ASIC clarified that they "*only intended to reference the Panel's guidance that acquisitions of physical securities (that have not already been disclosed) should be disclosed in the same level of detail as is required under the substantial holder provisions, rather than intending to impute an extension of that position or otherwise selectively quote footnote 6 to make a different point*"

[20] See, by analogy, *Grand Hotel Group* [2003] ATP 34 at [41] "*that the principles underlying subsection 671B(3) will usually be frustrated where a notice is lodged which merely states that persons are associated because a paragraph of the definition of "associate" in section 12 of the Act has been triggered… the provisions of Chapter 6C and the principles in section 602 will usually require a far more specific description of the nature of the association to be provided*" and at [43] "*market participants should not have to speculate on the nature and extent of the agreement, arrangement or understanding between persons who state that they are associated*"

[21] Referring to the Parliamentary Joint Committee on Corporations and Financial Services Report, *Inquiry into the Exposure Draft of the Corporations Amendment (Takeovers) Bill 2006* (February 2007) at [3.48] that highlights that section 671B as presently drafted does not extend to the disclosure of equity derivatives

[22] See Simon McKeon, "The Panel's Performance and Prospects: A Commercial Evaluation" in Jennifer G Hill and RP Austin (eds), *The Takeovers Panel After 10 Years* (Ross Parsons Centre, 2011) 173, 179 and Michael Hoyle, "An Overview of the Role, Functions and Powers of the Takeovers Panel" in Ian Ramsey (ed), *The Takeovers Panel and Takeovers Regulation in Australia* (Melbourne University Press, 2010) 39, 44-52

[23] GN20 at [10]

83. Paragraph [13] of GN20 is not a safe harbour. As noted in paragraph [12] of GN20, the disclosure "*should allow the market to understand fully the nature of the taker's long position*".

84. We asked the parties about the effect of the non-disclosure of the Acquisition Agreements on the market, NDC and Pacific Smiles.

Effects on the market

85. NDC submitted that the terms of the Acquisition Agreements provided a strong inference that the Hedge Shares would be acquired by Beam. Accordingly, it submitted that, contrary to what the market would have expected from Beam's GN20 disclosures, the Hedge Shares were not 'open votes' or 'available for purchase' shares in the market.

86. Pacific Smiles submitted that the existence of the Put Options (and the ability to acquire physical shares) and the nature of the counterparties to the Put Options were each relevant factors to an assessment of the prospects of the Hedge Shares being used as a potential blocking stake to any change of control transaction proposed by another party.

87. ASIC similarly submitted that the disclosure that was given to the market suggested that the Equity Derivative "*represented a purely economic position which was not destined for physical settlement, limiting the scope of its potential influence and impact*".

88. Beam rejected the inference submitting that there were a number of avenues for it to acquire Pacific Smiles shares following an unwinding of the Equity Derivative. While that may be true, we agree with ASIC's submission (at paragraph 68) that a taker of an equity derivative has informational and strategic advantages over the rest of the market in positioning itself to acquire shares held by the writer.

89. NDC submitted that had the Hedge Shares been held on the usual basis, any market participant, including NDC, could have offered to buy the Hedge Shares from Jarden and also given Jarden an economic swap to fully hedge its exposure under the Equity Derivative. If Jarden acted in an economically rational manner, NDC submitted, Jarden could be expected to accept such an offer absent an arrangement, understanding or practice that it would keep the shares for Beam.

90. We have not found such an arrangement, understanding or practice and there is no material to suggest that a market participant could not have offered to buy the Hedge Shares at any time. Jarden confirmed that it did not receive any bid for or offer from any party to acquire the Hedge Shares until it received the amendment request from Beam on 3 May 2024 to allow for physical settlement. If a bid or offer had been made, Jarden submitted that it would have considered it having regard to its risk position and made an economically rational decision.

91. NDC submitted that the Acquisition Agreements contained certain information that was not available to the market. For example, the repayment date in the Loan Deeds revealed the time by which the Equity Derivative could be expected to be unwound (being no later than 4 June 2024). It also submitted that the market was unaware that if Beam exercised the put options, there would be two parcels (held by Genesis

Ultimate Partner and GFT 2) not one and this presented different implications in relation to control. Beam rejected the latter submission noting that the parties to the Acquisition Agreements formed part of the same bidding consortium for Pacific Smiles.

92. Beam submitted that any disclosure of the Acquisition Agreements prior to the Beam SHN would have had no effect on the market because the market for Pacific Smiles shares was operating in a manner that was efficient, competitive and informed at all times. Beam submitted that this was evidenced by the fact that there was no market reaction to the Beam SHN, noting that the average trading price of $1.8986 across the 2-day period following lodgment of the Beam SHN after market close on 7 May 2024 (being 8 May 2024 to 9 May 2024) was substantially identical to the average trading price of $1.8988 across the 2-day period immediately prior to the lodgment of the Beam SHN after market close on 7 May 2024 (being 6 May 2024 to 7 May 2024).

93. NDC rejected that the price performance of Pacific Smiles shares was evidence that the information in the Acquisition Agreements was not material, noting many conflicting reasons for the price movements.

Effects on NDC and Pacific Smiles

94. Pacific Smiles submitted that the absence of the additional information in the Acquisition Agreements limited Pacific Smiles' ability to properly assess risks and make fully informed strategic decisions. In particular, the additional information would have informed Pacific Smiles' strategy during the negotiation of the Beam Standstill Agreement.

95. NDC submitted that throughout the relevant period when NDC decided to make a non-binding offer to Pacific Smiles, undertake due diligence on Pacific Smiles and entered into the Scheme Implementation Deed, it relied on the information about the extent of any interest in Pacific Smiles shares held by Beam and its associates set out in the No Relevant Interest Statements.

96. NDC submitted (among other things) that, had it been fully informed of the content of the Acquisition Agreements, NDC may have:

    (a) negotiated different terms to its non-disclosure agreement and standstill with Pacific Smiles

    (b) required engagement with the Genesis group prior to finalising the Scheme Implementation Deed

    (c) acquired an interest in Pacific Smiles shares before undertaking due diligence or making its bid

    (d) adopted a different bid strategy and/or

    (e) decided not to undertake due diligence and/or sign the Scheme Implementation Deed.

97. ASIC submitted that "*[o]ne purpose of Chapter 6 set out in s602(a) and (c) is to ensure that market participants are fully informed of the circumstances of a company, to facilitate an*

efficient market through effective price signalling and an orderly bidding environment that delivers optimum value to shareholders. Had the Acquisition Agreements been disclosed in early December 2023, NDC may have endeavoured to secure additional shares in Pacific Smiles ahead of announcing its scheme or taken some other action. This may have assisted NDC's strategic position in relation to the scheme while supporting market transparency regarding the pricing of Pacific Smiles shares and the level of competition for them."

98. Beam submitted that NDC presented a number of hypothetical possibilities without presenting any evidence as to how it actually interpreted the GN20 disclosures from Beam or the Acquisition Agreements. In the absence of such evidence, Beam submitted, noting ASIC's submission (at paragraph 68) that the sale of hedge shares by a writer to a taker on an unwinding is often the most convenient, low-risk and cost-effective way to dispose of the hedged securities, that it *"beggars belief that NDC had not considered the possibility that Beam might seek to acquire the Hedge Shares prior to 7 May SHN and to take steps to neutralise that possibility (including, for example, approaching Jarden to offer to acquire the Hedge Shares prior to 3 May 2024)"*.

99. Beam submitted that we should *"look beyond the unsubstantiated inferences and assumptions advanced by NDC and instead look at the evidence before it (specifically the trading data) to conclude that there would be no effect on the market or NDC if the Acquisition Agreements were disclosed prior to the 7 May SHN"*.

100. We are not required to establish *in fact* the effects of the circumstances.[24] We need to be satisfied, relying on our commercial expertise[25], of the effect that the circumstances have had, are having, will have or are likely to have on the control or potential control of Pacific Smiles.

101. We spent some time considering the question of whether NDC should have been on notice that Beam may convert the cash-settled swap to physical or otherwise seek to acquire the Hedge Shares on unwinding. There is no doubt that the holder of a long equity position is in a strong position to acquire the shares from the writer if desired at the termination of the swap.[26] But this is the case for any cash-settled swap. The point of difference here is the existence of the undisclosed Acquisition Agreements.

102. At the time Beam issued the First Notice and made its first indicative proposal to acquire Pacific Smiles it was reasonably foreseeable that other proposals by third parties to acquire Pacific Smiles may have been forthcoming. This is supported by Beam's own action of entering into the swap which gave it options in relation to any control transaction strategy. It could hold, unwind or convert the Equity Derivative consistent with its commercial objectives.

103. We accept that Beam's long position was disclosed and to some degree the market (including NDC) was on notice of the options available to Beam and the potential implications for any control transaction. With one of those options being the

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[24] See Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007, 3.7
[25] *Cemex Australia Pty Ltd v Takeovers Panel* [2009] FCAFC 78 at [81]-[89] and [134]-[139]
[26] See, for example, PCP 2005/1 Consultation Paper, Dealings in Derivatives and Options, UK Takeover Panel, 3.2-3.3

possibility of acquiring the physical shares, we asked ourselves whether the market already held the belief that Beam was intending to acquire the physical shares. Based on the information the market had at the time of the First Notice, we think market participants would have considered that there was a possibility that Beam would take up physical shares given its indicative proposal to acquire 100% of Pacific Smiles. However, with the information in the Acquisition Agreements that the market was missing, we think that any belief that Beam intended to acquire the physical shares would have materially strengthened.

104. We consider details contained in the Acquisition Agreement go to the potential intention of Beam in obtaining a relevant interest in 19.9% of Pacific Smiles and was information that should have been disclosed in order for the market to understand fully the nature of Beam's long position and for an efficient, competitive and informed market for control of Pacific Smiles. The Acquisition Agreements were premised on the acquisition of Pacific Smiles shares and revealed the nature of the association between the consortium members.

105. Our concern regarding there being an efficient and informed market is heightened in the context of a potential control transaction. The existence or likelihood of a blocking stake is critical information as to the success of any control transaction. The Acquisition Agreements contained information relevant to an assessment of the intentions of Beam. We consider the failure to disclose the Acquisition Agreements meant that the market for Pacific Smiles shares was not efficient, competitive and informed. We also consider it reasonable that the disclosure of the Acquisition Agreements at the time of the First Notice may have affected the strategic decisions of NDC and Pacific Smiles in relation to NDC's proposed scheme, as submitted by NDC and Pacific Smiles.

DECISION

Declaration

106. On 12 June 2024, we sought submissions from parties on a draft declaration. The draft declaration provided our view that (among other things) the Acquisition Agreements provide information that goes to *"the potential intention of Beam in obtaining a 19.9% interest in Pacific Smiles, the funding of any acquisition and the nature of the association"* and the failure to disclose the Acquisition Agreements 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.

107. NDC submitted that we should also declare that it was unacceptable for Beam not to disclose that it had certainty or certainty of belief that it controlled the Hedge Shares prior to 7 May 2024, particularly where that certainty or belief was selectively disclosed to some market participants but not the market generally. As evidence, NDC produced an affidavit from a senior executive of Crescent regarding a conversation he had with a Pacific Smiles shareholder who wished to remain anonymous. The senior executive stated that the shareholder had described to him a conversation the shareholder had with a Genesis group representative well prior to the conversion of the Equity Derivative in which the Genesis group representative

said in relation to the Hedge Shares that *"yes we can vote the shares and we control the shares"*.

108. Beam objected to a new issue being raised by NDC at this stage of the proceedings, particularly where NDC had prior knowledge of the issue. Beam denied that the words (or words to the effect) referenced in paragraph 107 were said. In summary, it submitted that the submission was out of process, lacked specificity, was hearsay and ought to be ignored.

109. We did not give any weight to the affidavit. While we are not bound by the rules of evidence,[27] we agree with Beam that the conversation described in the affidavit was a second-hand account and lacked details on which we could draw any inference.

110. In relation to the draft declaration, Beam submitted (among other things) that neither GN20 nor section 671B requires the disclosure of agreements relating to *"the funding of any acquisition"* of securities. Technically, that is correct and we removed the reference to funding from our declaration to ensure there is no misunderstanding. However, here, the funding was bound with the association relationship and indicated a level of seriousness that we consider demonstrated intent to acquire a physical stake and was relevant to our findings.

111. It appears to us that the circumstances are unacceptable:

    (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:

        (i) the control, or potential control, of Pacific Smiles or

        (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Pacific Smiles

    (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602.

112. Accordingly, we made the declaration set out in Annexure A and consider that it is not against the public interest to do so. We had regard to the matters in s657A(3).

Extension of time to make the application

113. 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.

114. In *Webcentral Group Limited 03*, the Panel set out the following factors as relevant in considering whether to extend time under section 657C(3)(b):

    (a) the discretion to extend time should not be exercised lightly

[27] *Takeovers Panel Procedural Rules 2020*, Rule 22(1)

(b) whether the application made credible allegations of clear and serious unacceptable circumstances, the effects of which are ongoing

(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 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.[28]

115. The application was made on 17 May 2024, which was more than 2 months after the First Notice was made and the unacceptable circumstances arose.

116. NDC submitted that we should grant an extension under section 657C(3)(b) because the market was not aware of the existence of the Acquisition Agreements before 7 May 2024 and NDC has at all times acted expeditiously after becoming aware of the unacceptable circumstances on 7 May 2024 by writing to Beam on 11 May 2024 to express its concerns and then submitting the application on 17 May 2024.

117. Beam submitted that we should not exercise our discretion to extend time for the making of the application including because the application fails to make credible allegations of clear and serious unacceptable circumstances noting its submissions on the effect of the circumstances and any effects are not ongoing because they ceased upon disclosure of the Acquisition Agreements in the Beam SHN.

118. NDC submitted that not extending time would undermine the efficacy of Chapter 6 and the market by inviting market participants that wish to withhold information to do so without consequence. Similarly, Pacific Smiles submitted that "*the delay in disclosing this information is the essence of the unacceptable circumstances, and therefore, the Panel should extend the time for the making of the application*".

119. We agree with the submissions of NDC and Pacific Smiles and extend time for the application under section 657C(3) to the date on which it was made.

Orders

Preliminary consideration of orders sought by NDC

120. We indicated to parties at the time of seeking submissions on the draft declaration that we were not convinced that the final orders sought by NDC were appropriate. NDC sought an order preventing Beam from voting against the NDC scheme if at the time of the scheme meeting the board of Pacific Smiles has not withdrawn its recommendation of the NDC Scheme in favour of recommending a superior proposal (the **voting restriction order**) or, alternatively, requiring the divestiture of Beam's Pacific Smiles shares to non-associated persons (the **divestiture order**).

121. We asked parties whether either order would (a) protect the rights and interests of persons who have been affected by the circumstances referred to in our declaration[29]

[28] [2021] ATP 4 at [86] (footnotes omitted)
[29] See section 657D(2)

and (b) be unfairly prejudicial to any party in light of the terms of our declaration.[30] We also asked if there were any alternative orders.

122. Pacific Smiles submitted that the orders sought by NDC were required to protect the rights and interests of NDC and other Pacific Smiles shareholders being the primary persons affected by the unacceptable circumstances. It submitted that by not being properly informed of the nature of Beam's long position until 7 May 2024, Pacific Smiles, NDC, other Pacific Smiles shareholders, potential acquirers and the market were denied the opportunity to make fully informed strategic decisions, engage with each other with the benefit of that information and properly assess (and if appropriate, take steps to mitigate) the risks and uncertainties to the NDC Scheme created by the nature of Beam's long position and the likelihood of the shares the subject of the Equity Derivative being voted against the NDC Scheme.

123. In addition to its submissions at paragraph 96, NDC elaborated on the different bid strategies and approaches it would have implemented if it had properly been informed of Beam's long position, including:

    (a) before engaging with Pacific Smiles, requiring Pacific Smiles to confirm that it had an agreement in place with Beam or Genesis Manager requiring it to vote in favour of a scheme of arrangement that was supported by the board

    (b) requiring Pacific Smiles to allow NDC to engage with the Genesis group to agree a joint transaction in conjunction with the Genesis group such that it was supported by Beam and/or

    (c) purchasing its own 19.9% shareholding so as to equalise the playing field between itself and the Genesis group – either before signing the standstill or by negotiating an exception to allow it (consistent with what it appeared the Genesis group negotiated).

124. NDC submitted that it believed at all relevant times that if it offered the highest price for Pacific Smiles shares, its scheme had high prospects of succeeding as no party had a blocking stake based on the GN20 Notices, its understanding of how hedge shares are voted, the Beam Standstill Agreement and certain representations from Pacific Smiles. It submitted that Crescent has significant experience in public M&A transactions and would not exhaust "*significant time, effort and advisory fees into a process if it was known it was likely doomed to fail*".

125. Pacific Smiles submitted that the voting restriction order would allow non-associated Pacific Smiles shareholders to determine the outcome of the NDC Scheme and prevent the possibility of certain unfair outcomes arising from the unacceptable circumstances that would be materially adverse to Pacific Smiles shareholders. This included, for example, a scenario where Beam's vote would result in the NDC Scheme not proceeding and Beam makes a subsequent offer to acquire Pacific Smiles for less consideration than that available under the NDC Scheme.

[30] See section 657D(1)

126. Beam submitted that the orders sought by NDC were disproportionate to the mischief.[31] It submitted that in circumstances where Pacific Smiles, NDC or any other market participant (a) did not make any enquiries as to the information contained in the GN20 Notices, (b) would be aware of the possibility that Beam could negotiate with Jarden to convert the Equity Derivative from cash-settled to physically-settled and (c) did not approach Jarden to enquire about acquiring the Hedge Shares, there is no legitimate basis for the Panel to restrict the ability of Beam, who legally acquired and owns the Hedge Shares, from exercising its legal rights in respect of the Hedge Shares in a manner that it sees fit.[32]

127. Beam submitted that it would be open to issuing a supplementary GN20 disclosure enclosing copies of the Acquisition Agreements, noting that this was the remedy recently adopted by the Panel in *Whitehaven Coal Limited* in circumstances where the non-disclosure was "*deliberate and ongoing*".[33]

128. NDC submitted that *Whitehaven Coal Limited* was entirely distinguishable from the present circumstances, including because it did not involve an active control transaction. NDC also noted that the Panel in that matter stated that: "*We consider that it would be open to a Panel to make orders reaching beyond disclosure, including to order the cancellation of any agreement entered into in relation to the equity derivatives and, where physical shares are held, to order a voting freeze or a divestment*".[34] We agree that the circumstances in *Whitehaven Coal Limited* are very different and not relevant here.

129. In relation to Beam's alternative order to provide supplementary GN20 disclosure, we also agree with a submission made by NDC that a retrospective notice would have no consequence.

Proposed orders

130. After making our declaration and considering the submissions and rebuttals on the orders sought by NDC, and notwithstanding our preliminary views on orders, we were concerned about the impact on Pacific Smiles shareholders if Beam blocked the NDC Scheme. We wanted to examine more closely the effects of the non-disclosure of the Acquisition Agreements. We also wanted to understand the terms of the standstill arrangements between Pacific Smiles and each of Beam and NDC and communications between the parties about those arrangements.

131. We advised parties that we were considering ***whether or not*** to make one of two alternative orders,[35] either:

    (a) the voting restriction order or

    (b) if the NDC Scheme is not approved at the scheme meeting because of the votes cast by Beam and its associates, then for a period of [6] months after the date of

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[31] Guidance Note 4: Remedies at [17]
[32] Referring to *RHG Limited* [2013] ATP 10, [35], [36] and [40]
[33] [2023] ATP 12, [97]-[99]
[34] Ibid [97]
[35] We did not consider the divestiture order to be appropriate

the scheme meeting, an order restricting Beam or its associates from announcing a takeover bid or scheme of arrangement in relation to Pacific Smiles that offers consideration that is less than or equal to the consideration offered under the NDC Scheme at the time of the scheme meeting (the **lower offer restriction order**).

Standstill arrangements

Exceptions under the Beam Standstill Agreement

132. Pacific Smiles provided us with the Beam Standstill Agreement and the NDC Standstill Agreement.

133. Pacific Smiles and Beam disclosed that, under the Beam Standstill Agreement, Beam would be allowed to convert the Equity Derivative to physical Pacific Smiles shares without Beam being in breach of the Beam Standstill Agreement under the following circumstances:

    (a) the acquisition of Pacific Smiles shares *"in connection with the cash settled total return swap transaction dated on or around 6 December 2023 and disclosed to the ASX on 18 December 2023 (including as it may be amended from time to time), including (for the avoidance of doubt) the acquisition of such shares by Genesis or any other Relevant Person in connection with such swap"* and

    (b) the standstill restrictions cease to apply if *"any person other than Genesis, a Representative or Associate makes a bona fide takeover bid for, or enters into a binding implementation agreement or equivalent document (for the avoidance of doubt, excluding a process deed or similar document that is preliminary to entering a binding implementation agreement or equivalent document) with PSQ in relation to a scheme of arrangement or other acquisition of, a majority of equity securities in respect of PSQ"*.

134. Pacific Smiles submitted that the entry into the Scheme Implementation Deed with NDC meant that the restrictions imposed on Genesis Manager (and its associates) under the Beam Standstill Agreement were released on 28 April 2024 and the subsequent acquisition by Beam of the Pacific Smiles shares underpinning the Equity Derivative did not breach the Beam Standstill Agreement.

Communications between Pacific Smiles and NDC regarding the Beam Standstill Agreement

135. We asked Pacific Smiles and NDC for details and copies of their communications in relation to any standstill arrangements that Pacific Smiles had with any person other than NDC.

136. Pacific Smiles and NDC described several communications between Greenhill (the financial adviser to Pacific Smiles) and a representative of NDC between 12 to 29 January 2024. NDC raised questions in relation to the nature of the Equity Derivative but Greenhill advised that it had no further background beyond what had been publicly disclosed. On the date of the Second Notice, NDC questioned if Genesis Manager had breached its standstill and later sent a text stating *"[c]learly genesis does not have a standstill and wondering if I am wasting my time. We don't need to do this transaction…"*. According to Pacific Smiles, Greenhill told NDC that it could

assume that Pacific Smiles has, and will seek to agree, an appropriate standstill with any party that it enters into a non-disclosure agreement. According to NDC, Greenhill stated that this would help ensure that there was a level playing field for all parties and the objective of the Pacific Smiles board was to ensure that the highest price would win the asset. The Beam Standstill Agreement was only signed on 1 February 2024.

137. On 8 May 2024, in response to an Australian Financial Review article, NDC sent a text to Greenhill stating *"it looks like genesis is trying to block the deal rather than beat our bid. We also would not have done the work and made a bid if we knew they had voting rights not just economic rights"*. Greenhill replied that the Beam Standstill Agreement was confidential but that Pacific Smiles was focused on legal adherence.

138. On 9 May 2024, NDC's lawyers contacted Pacific Smiles' lawyers requesting that Pacific Smiles enforce its rights regarding any breach by Genesis Manager of its standstill under the Beam Standstill Agreement. Pacific Smiles' lawyers noted those terms were confidential, but they confirmed that Pacific Smiles would enforce a breach if there was one.

Communications between Pacific Smiles and Beam regarding the Beam Standstill Agreement

139. We asked Pacific Smiles, Beam and GFT 2 for details and copies of their communications in relation to the Beam Standstill Agreement. Pacific Smiles and Beam provided a large amount of correspondence evidencing the negotiation of the standstill arrangements.

140. The correspondence included the following:

    (a) a telephone call on 11 January 2024 (between representatives of Greenhill and Jarden Corporate (the financial adviser to Beam) regarding Pacific Smiles' requested requirement for Beam to vote in favour (or accept) (with respect to the shares the subject of the Equity Derivative) a superior proposal in circumstances where Beam has failed to match or provide a superior proposal. According to Pacific Smiles, Jarden Corporate stated this was a threshold item for Genesis Manager and called it a *"clear line in the sand"*, and if this was pushed Genesis Manager would likely withdraw their offer and seek alternative strategies, including Pacific Smiles board representation and

    (b) an email from Jarden Corporate to Greenhill dated 19 January 2024 in which Jarden Corporate sought certain changes to the draft non-disclosure and standstill arrangements, noting that *"in the absence of [those changes], we will be formally withdrawing our offer and reviewing our alternatives which will include seeking Board representation"*.

141. In its rebuttals, NDC submitted that the above statements supported NDC's allegation that Beam had a relevant interest in the Hedge Shares. It submitted that either Jarden Corporate knew that the Equity Derivative would be converted on request of Beam or Beam had an arrangement or understanding with Jarden or Jarden Corporate had advised Genesis Manager that Jarden's practice is to convert an economic swap into a physical holding on request. While our declaration of

unacceptable circumstances had already been made, NDC submitted in effect that the new information further supported the effects of the unacceptable circumstances and the need for the voting restriction order.

142. In response to this submission, Jarden made an out-of-process submission which we accepted. Jarden reiterated that there was no arrangement, or understanding between Beam and Jarden, or a practice of Jarden that the economic exposure would be converted into a physical interest upon Beam's request until the terms of the Equity Derivative were amended. It submitted that a private side negotiation by Jarden Corporate on behalf of Beam concerning voting rights under the terms of a standstill did not infer that there was any arrangement concerning shares held by Jarden to hedge a cash-settled TRS with Beam, written by Jarden which is an entity on the public side.

143. We agreed to receive an out-of-process submission from NDC in response to Jarden's out-of-process submission. NDC submitted that the above statements described in paragraph 140 were made by Jarden Corporate, and we can draw inferences from those statements.

144. The above statements do not change our view as to whether there was an arrangement, understanding or practice in respect of the Hedge Shares. However, the references to seeking Pacific Smiles' board representation imply a level of certainty that Beam could obtain Pacific Smiles shares.

145. We discuss the correspondence further below.

Orders in the circumstances

Voting restriction order

146. NDC submitted that only the voting restriction order would effectively and adequately remedy the unacceptable circumstances. NDC submitted that it would restore Beam's interest in Pacific Smiles to the status quo of the economic long position that was understood by NDC and the market to be the case. By doing "*no more and no less*", it submitted that the voting restriction order was a proportionate remedy.[36] NDC submitted that the order would protect Pacific Smiles shareholders' interests by allowing those shareholders who have not engaged in unacceptable circumstances to decide whether the NDC Scheme prevails, giving them a reasonable opportunity to participate in the benefit of the NDC Scheme and $0.15 per share above Genesis Manager's prior non-binding bid, amounting to approximately $24 million in incremental value.

147. NDC submitted that there were no adverse effects of the voting restriction order on Beam or its associates that were unfairly prejudicial in the circumstances. It submitted that it remained open to Beam or its associates to make a superior proposal and if the proposal was recommended by the Pacific Smiles board, the voting restriction order expressly permitted Beam to vote against the NDC Scheme. It also submitted that Beam was not economically prejudiced because it could

[36] Referring to GN4 at [2] and [17]

dispose of its Pacific Smiles shares either on-market or through the NDC Scheme at a significant premium and it retained its downside economic protection by virtue of its put option with GFT 2. NDC also submitted that by making the NDC Scheme more likely to proceed, it removed all of GFT 2's downside risk exposure.

148. Beam rejected that the voting restriction order would not unfairly prejudice Beam and its associates, as well as other Pacific Smiles shareholders, including because:

    (a) it would interfere with the terms of the Beam Standstill Agreement, negotiated extensively between two sophisticated parties, which clarify that nothing restricts Beam from voting its Pacific Smiles shares in any manner (see paragraph 158 below)

    (b) it could lead to a situation where Beam's shares in Pacific Smiles are compulsorily acquired in circumstances where Beam has not had an opportunity to vote on the NDC Scheme and is not a seller of Pacific Smiles shares at the proposed price under the NDC Scheme[37]

    (c) it would materially increase the likelihood of the NDC Scheme succeeding and therefore materially reduce any incentives for NDC to offer a superior price

    (d) it would strip away Beam's legal right as a Pacific Smiles shareholder to vote its shares in any manner that it wishes in respect of the NDC Scheme.

149. NDC submitted that if we are minded to make the voting restriction order but are concerned about any unfair prejudice to Beam, we could consider restricting the voting restriction order to any shares held by Beam, Genesis, GFT 2 or their associates exceeding 5%, as the basis of the relevant disclosure would not have arisen if Beam had had a long position below 5%.

Lower offer restriction order

150. NDC submitted that the lower offer restriction order would not ensure the NDC Scheme proceeds as far as possible as if the unacceptable circumstances had not occurred. This would result in NDC suffering unremedied direct loss from pursuing and entering into the NDC Scheme and the opportunity costs of not being able to maximise the transaction's success if proper disclosure was made. It submitted that the order only temporarily protects shareholders from a lower bid and leaves Pacific Smiles in an extended period of uncertainty as to its control.

151. Pacific Smiles submitted that the order would have a *"significant negative impact"* on the market for the control of Pacific Smiles. This is because it would create a circumstance where Beam, as a potential bidder, has voted down a competing proposal but (a) is not able to announce a bid or scheme for an extended period at Genesis Manager's previous consideration, or another price which has the potential to be recommended by the Pacific Smiles board and (b) will continue to hold a blocking stake which would act as a significant obstacle for any alternative bidders. With the prospects of an alternative proposal arising in that 6-month period

[37] GFT 2 made a similar submission

effectively frozen, the uncertainty for the business, management team and employees would impact retention, business operations and the value of the business.

152. Beam raised similar concerns that the order would preclude Beam or its associates from making an offer for Pacific Smiles if, within the 6-month period, the circumstances of Pacific Smiles were to change such that a control proposal priced at or below the consideration offered by NDC in the NDC Scheme was to become commercially attractive to Pacific Smiles and its shareholders. This would reduce competition for the control of Pacific Smiles under those circumstances. Beam also submitted that the way the order was drafted precluded it from making proposals to Pacific Smiles with an alternative structure to that of the NDC Scheme (for example, a structure which contained a combination of cash consideration together with an offer of stub equity). It suggested some amendments to the draft order to address these concerns.

Effect of the unacceptable circumstances

153. If we are "*satisfied that the rights or interests of any person, or group of persons, have been or are being affected, or will be or are likely to be affected, by the circumstances*", we may make any order[38] that we think appropriate to "*protect those rights or interests, or any other rights or interests, of that person or group of persons*" under section 657D(2)(a).

154. In order to be satisfied as to how rights or interests have been affected, we asked each of Pacific Smiles and NDC to explain what "*additional information in the Acquisition Agreements*" (see paragraph 94) changed its assessment of the nature of Beam's long position and/or the risks it posed to the NDC Scheme.

155. Pacific Smiles submitted that the nature of the interest of the associates of Beam, the existence of the Put Options and the likelihood for any Pacific Smiles shares acquired by Beam being held directly by the associates of Beam (particularly GFT 2) were the key areas which, if known to Pacific Smiles at the relevant time, would likely have influenced the manner in which Pacific Smiles conducted itself in relation to negotiations with Beam and NDC. It submitted that while Beam as a smaller, professional private equity investor was unlikely to be a long-term shareholder (outside of the context of its proposed control transaction) and was likely to act economically rationally, Beam's associates (particularly GFT 2) have a significantly different risk profile. If disclosed earlier, Pacific Smiles would have had the benefit of all relevant information when negotiating with Beam to mitigate risks to competing proposals including by, for example, taking a stronger position in relation to insisting on the inclusion of the provision in the Beam Standstill Agreement requiring Beam to vote in favour (or accept) a superior proposal in circumstances where Beam has failed to match or provide a superior proposal, which point was ultimately conceded.

[38] including a remedial order but not including an order directing a person to comply with a requirement of Chapter 6, 6A, 6B or 6C

156. Beam submitted that the communications between Greenhill and Jarden Corporate at paragraph 140 contradicted the view that Beam was not a long-term investor and made it clear that Beam would not accept any restriction on voting.

157. Beam also rejected Pacific Smiles' claim that the *"additional information"* in the Acquisition Agreements impacted its *"ability to properly assess risks and make fully informed strategic decisions"*. It submitted that Pacific Smiles was aware at all relevant times throughout the standstill negotiation that there was a possibility that Beam might seek to negotiate an amendment of the Equity Derivative to permit physical settlement. Beam also submitted that Pacific Smiles agreed with Beam that Beam would not be restricted from doing so or acquiring shares pursuant to the exercise of any such negotiated right to physically settle the Equity Derivative or be disenfranchised from its ability to vote those shares. Beam submitted that these matters provided as much, if not more, information as the Acquisition Agreements insofar as it relates to information which goes to the potential intention of Beam in obtaining a 19.9% interest in Pacific Smiles.

158. Beam provided drafts of the Beam Standstill Agreement with drafting notes between the respective lawyers of Beam and Pacific Smiles that demonstrated Pacific Smiles' knowledge and acceptance of the possibility that Beam would seek to convert the Equity Derivative to physical settlement:

    (a) an explicit carve-out to the standstill was added to permit the acquisition of a relevant interest in Pacific Smiles in connection with the Equity Derivative *"(including as it may be amended from time to time)"*

    (b) an exception to the confidentiality restriction was added to permit Genesis Manager to disclose confidential information to the writer of the swap should the parties to the swap agree to physical settlement and

    (c) Genesis Manager rejected, on the basis that it *"[was] not able to accept disenfranchisement with respect to voting"*, a clause that restricted it from voting on shareholder resolutions concerning board composition including in relation to any entity obtaining or increasing its voting power in Pacific Smiles in excess of 20% (except where the resolution is recommended by a majority of the board of Pacific Smiles and the voting is in accordance with the recommendation).[39]

159. Beam also disagreed that the disclosure of the Acquisition Agreements in the GN20 Notices would have affected the views NDC held on the matters noted at paragraph 124. Specifically, in relation to the standstill, Beam submitted a sophisticated market participant *"ought to have been aware that standstill agreements commonly cease to apply immediately upon the public announcement of a competing control transaction and that, as a result:*

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[39] These agreed amendments were incorporated in the Beam Standstill Agreement. In relation to (c), the Beam Standstill Agreement prohibits Beam from soliciting proxies or otherwise seeking to influence or control the board of Pacific Smiles or its composition, or management of Pacific Smiles, provided that nothing shall in any way restrict Beam from voting on any shareholder resolution concerning Pacific Smiles

(a) *it was entirely possible (if not likely or highly likely) that Beam's standstill restrictions would fall away in their entirety immediately upon the public announcement of the NDC Scheme (which is, in fact, what occurred); and*

(b) *from that time, it would be open to Beam to seek to acquire Pacific Smiles shares (which is what, in fact, precisely (and entirely lawfully) occurred)"* (footnotes excluded).

160. We note that the NDC Standstill Agreement also included this clause. Beam noted that while NDC ought to have been aware of this, for reasons unknown to Beam, it was evident from correspondence referred to at paragraph 136 that they were not.

161. Beam submitted that any belief NDC held regarding whether Beam was restricted from acquiring the Hedge Shares under the Beam Standstill Agreement was based on NDC's own subjective assessment of the meaning and import of Pacific Smiles' public statement concerning the nature of the confidentiality and standstill arrangements and certain representations made by Pacific Smiles representatives, as opposed to any nondisclosure of the Acquisition Agreements in the GN20 Notices. It submitted that any remedy to address this issue is not a matter for the Panel but rather a matter for NDC and Pacific Smiles to resolve as between themselves in a different forum.

162. Beam further submitted that the evidence demonstrated that the non-disclosure of the Acquisition Agreements in the GN20 Notices did not have any effect or ongoing effect on the rights or interests of NDC, Pacific Smiles or any other market participant which justified the making of any orders.

Decision to make no orders

163. NDC strongly submitted that orders ought to be made that remedy the unacceptable circumstances identified in the declaration including because, in summary:

(a) after making a declaration of unacceptable circumstances, the Panel may make orders to protect rights or interests affected by those unacceptable circumstances or to ensure (as far as possible) that a bid proceeds as if the unacceptable circumstances had not occurred

(b) failing to remedy the circumstances would be contrary to the purposes set out in section 602 and legislative intent of Chapter 6 and would be to the substantial detriment of NDC and Pacific Smiles shareholders

(c) not making orders effectively sanctions breaches of the Panel's published guidance and invites market participants to develop strategies that capitalise on this precedent as a means of deal protection and

(d) not making orders risks dissuading bidders in future control transactions from entering into acquisition processes where cash-settled equity swaps have been disclosed, reducing the competitive nature of the market for control.

164. NDC noted that it had been some 17 years since a sitting Panel made a declaration of unacceptable circumstances but did not make orders[40] in the decision of *Summit Resources Limited*.[41] The sitting Panel in that case did not consider that *"there were any orders which would appropriately remedy the effects of the unacceptable circumstances"*[42] but had it *"considered that granting orders would have been effective in remedying the unacceptable circumstances, it would have done so"*[43]. Given the rarity of this occurring, we considered the *Summit Resources Limited* decision closely.

165. Summit was subject to an unconditional off-market scrip takeover bid by Paladin Resources Ltd which the Summit board had rejected. Instead, Summit had entered into an agreement with Areva NC Australia Pty Ltd for the issue of shares and options and a commodity market transaction, with the issue of shares subject to shareholder approval. Paladin made an intention statement that it intended to vote its shares in favour of the Areva transaction. However, it later increased its bid and Summit recommended the bid. Paladin subsequently made statements that it would vote against the Areva transaction and shortly thereafter Summit decided not to convene the general meeting. The Panel made a declaration of unacceptable circumstances on the basis that Paladin's departure from its intention statement was not consistent with the 'truth in takeovers' policy, but decided *"in these particular circumstances"* not to make orders.

166. NDC submitted that *Summit Resources Limited* is fundamentally a different scenario to the circumstances giving rise to the present declaration. Paladin's intention statement was made after and could not have been relied on by Areva or Summit in devising or negotiating the Areva transaction, the statement did not deprive any Summit shareholder of a reasonable opportunity to benefit from Paladin's bid (as they could accept it) and there was no evidence that the statement affected any Summit shareholder's decision to accept the Paladin bid.

167. NDC further submitted that the reasons for which the Panel found that there was no effective remedy are not present here – those reasons being:

    (a) the *"passage of events between the time of the circumstances and the time when the matter was put before the Panel"* whereas here NDC had brought its application expeditiously and in any event before the shareholder vote on the NDC Scheme

    (b) there was no evidence to establish if the relevant shareholders had been influenced by the conflicting intention statements whereas here NDC and Pacific Smiles had relied upon Beam's deficient disclosure when making strategic decisions in respect of the NDC Scheme

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[40] We note that the Panel has on several occasions made a declaration and accepted undertakings in lieu of orders – see, for example, most recently in *Mineral Commodities Limited 02* [2022] ATP 24, *Smoke Alarms Holdings Limited 02R* [2020] ATP 4 and *Flinders Mines Limited 02 & 03* [2019] ATP 2

[41] [2007] ATP 9

[42] Ibid [6]

[43] Ibid [34]

(c) there was no evidence that the unacceptable circumstances had an effect which a relevant order (a withdrawal right) was likely to address whereas here the voting restriction order would directly and proportionately remedy the effect of the unacceptable circumstances by preventing Beam using its "tainted" votes to block the recommended NDC Scheme which was developed and agreed by NDC and Pacific Smiles during the period that the market was uninformed and

(d) the applicant (Areva) had the right to requisition a meeting of shareholders to consider the Areva transaction whereas NDC has no self-remedy.

168. We accept that generally speaking the factors relied on in *Summit Resources Limited* for not making an order do not apply here. Rather than lacking a suitable remedy to address the effect of the unacceptable circumstances, here we have a remedy that would address the impact of Beam's potential blocking stake on the NDC Scheme. However, when we balance the unacceptable circumstances being the non-disclosure of the Acquisition Agreements at the time of the GN20 Notices and the effects of that non-disclosure against the unfair prejudice of the proposed orders, we do not consider any order appropriate in the circumstances.

169. In our view, the non-disclosure of the Acquisition Agreements affected the behaviour and considerations of Pacific Smiles and NDC and was contrary to an efficient, competitive and informed market. However, the materials show that there were many factors that contributed to decisions made by Pacific Smiles and NDC in connection with the NDC Scheme, including representations made regarding the competitive playing field for Pacific Smiles and assumptions made in relation to the standstill arrangements.

170. We consider that it would have been reasonable for NDC to assume that the Beam Standstill Agreement, like the NDC Standstill Agreement, contained a release of the standstill if a third party made a takeover bid for Pacific Smiles or entered into a formal agreement with Pacific Smiles in relation to a scheme.

171. We are satisfied that, in these circumstances, it is unfairly prejudicial to Beam and its associates to make the voting restriction order particularly where it was expressly entitled under the Beam Standstill Agreement to acquire Pacific Smiles shares in connection with the Equity Derivative and effectively obtain a blocking stake.

172. Given the consistent views received in relation to the lower offer restriction order, we consider the negative effects of that order outweigh the benefits afforded by that order.

173. In conclusion, no orders are appropriate to remedy the effect of the unacceptable circumstances that would not unfairly prejudice any person. Our decision is limited to the facts of this matter.

Costs

174. NDC requested that we make an order that Beam pays NDC's costs incurred in connection with the application given that Beam decided not to disclose the Acquisition Agreements until the Beam SHN giving rise to unacceptable

circumstances and it did not voluntarily remedy the impact of those circumstances as invited to do so by NDC prior to making the application.

175. We do not make a costs order. We do not consider the conduct of Beam or other parties during the proceedings warranted such an order.[44]

Other

176. We strongly discourage an overly narrow or formalistic reading of the Panel's guidance. 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 that related to the potential acquisition of Pacific Smiles shares, notwithstanding that GN20 did not specify that the disclosure of agreements is required.

177. 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.

Karen Phin
President of the sitting Panel
Decision dated 17 June 2024 (declaration) and 4 July 2024 (orders)
Reasons given to parties 9 October 2024
Reasons published 16 October 2024

[44] See GN4 at [29]

Advisers

Party	Advisers
NDC	A&O Shearman
Pacific Smiles	Gilbert + Tobin
Beam	Clifford Chance LLP
GFT 2	Arnold Bloch Leibler
Jarden	King & Wood Mallesons

Australian Government

Takeovers Panel

Annexure A

CORPORATIONS ACT
SECTION 657A
DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

PACIFIC SMILES GROUP LIMITED

CIRCUMSTANCES

1. Pacific Smiles Group Limited (**Pacific Smiles**) is an ASX listed company (ASX: PSQ).

2. Beam Investment Co Pty Limited (**Beam**) is a wholly owned subsidiary of Genesis Capital Ultimate GP Pty Ltd (**Genesis Ultimate**).

3. On 6 December 2023, Beam entered into a loan deed with Genesis Capital Fund I, LP (**Genesis Capital**).

4. Genesis Ultimate is the general partner of Genesis Capital Management Partnership I, LP, the general partner of Genesis Capital (where referred to in this capacity, **Genesis Ultimate Partner**).

5. On 7 December 2023, Beam entered into a put option deed with Genesis Ultimate Partner.

6. On 8 December 2023, Genesis Ultimate entered into a put option deed with Genesis Ultimate Partner.

7. On 15 December 2023, Beam entered into a loan deed and a put option deed with GFT 2 Co Pty Ltd[1] as trustee for the GFT 2 Trust (**GFT 2**).

8. Also on 15 December 2023, Beam entered into a co-investment agreement with GFT 2, Genesis Ultimate Partner and Genesis Capital Manager I Pty Ltd (**Genesis Manager**).[2]

9. On 18 December 2023, Beam gave a notice (**First Notice**) under the Panel's Guidance Note 20 which included disclosure of a 18.75% economic interest in Pacific Smiles shares through a cash settled total return swap (**Equity Derivative**).

10. The First Notice listed Beam, Genesis Manager, Genesis Ultimate Partner and GFT 2 as associates (but not the nature of the association). The agreements referred to in

[1] GFT 2 Co Pty Ltd is an entity wholly owned by Glenn Haifer

[2] Genesis Ultimate and Genesis Manager are entities jointly held by Lucolifia Pty Ltd as trustee for the Lucolifia Family Trust and Plum Willow Pty Ltd as trustee for The Plum Willow Family Trust

paragraphs 3 and 5 to 8 (**Acquisition Agreements**) were not attached to the First Notice.

11. Also on 18 December 2023, Jarden Scientific Trading Limited (**Jarden**) filed an initial substantial holder notice disclosing that it had voting power of 18.75% in Pacific Smiles.

12. Also on 18 December 2023, Genesis Manager made a non-binding indicative proposal to acquire all of the shares in Pacific Smiles via a scheme of arrangement. On 21 December 2023, Pacific Smiles announced that it had rejected Genesis Manager's proposal.

13. On 24 January 2024, Beam gave a second notice (**Second Notice**) under the Panel's Guidance Note 20 which included disclosure of a 19.90% economic interest in Pacific Smiles shares through the Equity Derivative and Jarden lodged a substantial holder notice disclosing that it had voting power of 19.90% in Pacific Smiles. The Second Notice also listed Beam, Genesis Manager, Genesis Ultimate Partner and GFT 2 as associates (but not the nature of the association). The Acquisition Agreements were not attached to the Second Notice.

14. On 19 March 2024, Pacific Smiles announced that it had received a revised non-binding indicative proposal from Genesis Manager and that Pacific Smiles and Genesis Manager had entered into a process deed.

15. On 28 April 2024, Pacific Smiles entered into a scheme implementation deed with NDC BidCo Pty Ltd[3] 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 report and no superior proposal emerging).

16. On 7 May 2024, Beam filed an initial substantial holder notice stating (among other things) that its Equity Derivative 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.[4] Beam's initial substantial holder notice attached the Acquisition Agreements.

EFFECT

17. The Panel considers that:

    (a) at the time Beam issued the First Notice and made its indicative proposal to acquire Pacific Smiles it was reasonably foreseeable that other proposals by third parties to acquire Pacific Smiles may have been forthcoming

[3] NDC BidCo Pty Ltd is a wholly owned subsidiary of NDC HoldCo Pty Ltd
[4] On 8 May 2024, Jarden lodged a corresponding ceasing to be a substantial holder notice in relation to Pacific Smiles

(b) the Acquisition Agreements provide information that goes to the potential intention of Beam in obtaining a 19.90% interest in Pacific Smiles and the nature of the association and

(c) Beam's failure to disclose the Acquisition Agreements in the First Notice and the Second Notice 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.

CONCLUSION

18. It appears to the Panel that the circumstances are unacceptable circumstances:

(a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:

(i) the control, or potential control, of Pacific Smiles or

(ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Pacific Smiles

(b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602 of the Corporations Act 2001 (Cth).

19. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3).

DECLARATION

20. The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of Pacific Smiles.

Tania Mattei
General Counsel
with authority of Karen Phin
President of the sitting Panel
Dated 17 June 2024