



Australian Government

Takeovers Panel

**Reasons for Decision
Namoi Cotton Limited
[2024] ATP 23**

Catchwords:

Withdrawal of application – consent to withdraw an application – collateral benefits – shareholder intention statements

Corporations Act 2001 (Cth), sections 623, 654A

Takeovers Panel Procedural Rules 2020, rule 15

Citect Corporation Ltd [2006] ATP 6

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

INTRODUCTION

1. The Panel, Jon Gidney, John McGlue and Rory Moriarty (sitting President), consented to a request from Louis Dreyfus Company Melbourne Holdings Pty Ltd to withdraw its application in relation to the affairs of Namoi Cotton Limited. Namoi Cotton Limited was the subject of two competing off-market takeover offers from Louis Dreyfus Company Melbourne Holdings Pty Ltd and Olam Agri Australia Pty Ltd. The application concerned, among other things, whether in acquiring Namoi Cotton Limited shares unconditionally in off-market transactions from two shareholders of Namoi Cotton Limited, Olam Agri Australia Pty Ltd gave benefits to those two shareholders which were likely to induce them to dispose of shares in Namoi Cotton Limited, and which were not offered to all holders of securities in the bid class under the Olam Agri Australia Pty Ltd bid.

2. In these reasons, the following definitions apply.

HLAM	Harvest Lane Asset Management Pty Ltd
HLAM Agreement	has the meaning given in paragraph 8(b)
Intention Statements	has the meaning given in paragraph 11
LDC	Louis Dreyfus Company Melbourne Holdings Pty Ltd
LDC Offer	has the meaning given in paragraph 4
Namoi	Namoi Cotton Limited
Olam	Olam Agri Australia Pty Ltd
Olam Offer	has the meaning given in paragraph 6
Revised LDC Offer	has the meaning given in paragraph 26(b)(i)

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STAM	Samuel Terry Asset Management Pty Ltd as trustee for Samuel Terry Absolute Return Group
STAM Agreement	has the meaning given in paragraph 8(a)
Strategic Stake	has the meaning given in paragraph 8

FACTS

3. Namoi is an ASX listed company (ASX code: NAM) whose principal activities are ginning and marketing of cotton.

LDC Offer

4. On 30 April 2024, LDC lodged a bidder's statement in relation to an off-market bid for all of the ordinary shares in Namoi for \$0.60 cash per Namoi share (**LDC Offer**). LDC issued a replacement bidder's statement on 7 May 2024 increasing the LDC Offer to \$0.67 cash per Namoi share and various supplementary bidder's statements, including one on 4 September 2024 declaring its offer unconditional after having obtained ACCC clearance and FIRB approval.
5. At the date of LDC's application, LDC had disclosed that it had received acceptances of 4.28% under the LDC Offer.

Olam Offer

6. On 9 May 2024, Olam also lodged a bidder's statement in relation to an off-market bid for all of the ordinary shares in Namoi (**Olam Offer**). Olam issued a replacement bidder's statement on 16 May 2024 and various supplementary bidder's statements, including one on 13 September 2024 increasing its offer price from \$0.70 to \$0.75 per Namoi share.
7. The Olam Offer was conditional on:
 - (a) ACCC clearance
 - (b) FIRB approval
 - (c) a 50.1% minimum acceptance condition and
 - (d) there being no prescribed occurrences.

Olam's Strategic Stake

8. On 13 September 2024, the same day that Olam announced its increased offer price of \$0.75 per share, Olam announced that it had entered into share purchase agreements with:
 - (a) STAM to acquire 16,269,181 Namoi shares from STAM for \$0.75 per Namoi share, representing 7.92% of Namoi's total issued capital (**STAM Agreement**) and
 - (b) HLAM to acquire 4,241,761 Namoi shares from HLAM for \$0.75 per Namoi share, representing 2.07% of Namoi's total issued capital (**HLAM Agreement**),both on an unconditional and off-market basis, with each transaction scheduled to complete on 18 September 2024 (**Strategic Stake**).

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9. The Strategic Stake represented, in aggregate, a 9.99% shareholding in Namoi, the maximum number of Namoi shares which Olam could acquire without FIRB approval.
10. At the date of LDC's application, Olam's relevant interest in Namoi was 16.34%, comprising the Strategic Stake and conditional shareholder acceptances of 6.35% under the Olam Offer.

STAM and HLAM Intention Statements

11. Also on 13 September 2024, shortly before Olam's acquisition of the Strategic Stake was disclosed to the ASX:
 - (a) STAM issued a shareholder intention statement stating that it intends to accept the Olam Offer (being at the revised price of \$0.75 per Namoi share) in respect of all of the Namoi shares that it holds as at the date of acceptance in the absence of a superior proposal and subject to the independent expert concluding that the Olam Offer is fair and reasonable and
 - (b) HLAM issued a shareholder intention statement stating that it intends to accept the Olam Offer in respect of all of the Namoi Shares that it holds as at the date of acceptance in the absence of a superior proposal,
(the **Intention Statements**).
12. In both instances, the Intention Statements were drafted to allow each of STAM and HLAM to dispose of their respective Namoi shares at any time before formally accepting into the Olam Offer.

Namoi independent directors' recommendations

13. Namoi's independent directors changed their recommendation for the LDC Offer and Olam Offer on numerous occasions as the respective offers were varied.
14. Relevantly to the application:
 - (a) on 11 September 2024, the Namoi independent directors unanimously recommended that Namoi shareholders accept the LDC Offer, including on the basis that the LDC Offer was unconditional and that it is "*uncertain when, if ever, the Olam Takeover Offer will become unconditional*" and
 - (b) on 13 September 2024, the Namoi independent directors unanimously recommended that Namoi shareholders accept the Olam Offer and reject the LDC Offer, including on the basis of Olam's revised offer price and as a result of STAM's and HLAM's support for the revised Olam Offer following release of the Intention Statements.

APPLICATION

Declaration sought

15. By application dated 18 September 2024, LDC sought a declaration of unacceptable circumstances. It submitted (among other things) that:

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- (a) Namoi shareholders (including those who already accepted into the Olam Offer) did not have a reasonable and equal opportunity to sell their Namoi shares unconditionally to Olam as opposed to through the Olam Offer which was highly conditional and uncertain and
 - (b) there had been a breach of section 623¹ given STAM and HLAM received a collateral benefit (being the unconditional and immediate sale of the Strategic Stake to Olam) which was a material net benefit and induced STAM and HLAM to sell the Strategic Stake and which had not been made available to any other Namoi shareholders.
16. LDC also submitted that the benefit received by STAM and HLAM had likely induced STAM and HLAM to provide the Intention Statements.
17. Further, LDC submitted that, even if a contravention of section 623 was not found or the equal opportunity principle had not been offended, it was essential to the operation of an efficient, competitive and informed market that the prospect of Olam acquiring Namoi shares off-market on an unconditional basis be prominently disclosed in its bidder's statement.

Interim orders sought

18. LDC sought interim orders preventing:
- (a) the Strategic Stake sale if completion had not occurred and
 - (b) Olam from acquiring any shares or increasing its voting power in Namoi (other than through the Olam Offer) until the application had been determined.

Final orders sought

19. LDC sought final orders in effect:
- (a) either preventing the Strategic Stake sale if completion had not occurred or unwinding the sale if it had occurred and
 - (b) requiring that before Olam proceeded with an on-market acquisition of Namoi shares while the Olam Offer was still conditional, that it gives 5 business days' notice that it would pursue on-market acquisitions and give Namoi shareholders who had accepted the Olam Offer the right to withdraw their acceptance so that they could sell their Namoi shares into any order placed on-market.

DISCUSSION

20. We have considered all the material presented to us in coming to our decision, but only specifically address those things that we consider necessary to explain our reasoning.

¹ Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth) and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

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21. On 26 September 2024, Olam made a preliminary submission which (among other things):
 - (a) provided the following update:
 - (i) on 18 September 2024, the HLAM Agreement had completed and Olam had therefore become the registered holder of 4,241,761 Namoi shares, representing 2.07% of Namoi's total issued capital and
 - (ii) on 26 September 2024, Olam and STAM agreed to terminate the STAM Agreement for the off-market and unconditional sale from STAM to Olam of 16,269,181 Namoi shares, representing 7.92% of Namoi (subject to Olam obtaining ASIC relief in respect of section 654A) and
 - (b) submitted that the Panel, considering this update, should not commence proceedings because as a result of the termination of the STAM Agreement, Olam had now only acquired a 2.07% relevant interest in Namoi pursuant to the completed HLAM Agreement, which is not material.
22. Notwithstanding these updated circumstances, particularly the termination of the STAM Agreement, we still had concerns in relation to Olam's acquisition of the 4,241,761 Namoi shares pursuant to the HLAM Agreement. Our preliminary view was that Olam, during the Olam Offer, may have given a benefit to HLAM (that benefit being the unconditional and immediate sale of the Namoi shares to Olam) which was not offered to all Namoi shareholders under the Olam Offer, noting the Panel's decision in *Citect Corporation Limited*.²
23. In *Citect Corporation Limited*, the Panel determined that TCEP Australia LLC, by acquiring 15.1% of Citect Corporation Limited shares unconditionally in off-market transactions from various institutional shareholders during its subsidiary's conditional takeover bid in respect of Citect Corporation Limited, provided benefits to those shareholders. Those benefits likely induced them to sell their shares and were not offered to all shareholders under the bid. In that case, the Panel considered that this constituted or gave rise to a contravention of section 623 and therefore to unacceptable circumstances.
24. We also had concerns regarding the Intention Statements, particularly given the timing of Olam's acquisition of the Strategic Stake in relation to the release of these statements. In our view, this raised a question of whether an inference could be drawn that Olam may have entered into a relevant agreement with STAM and/or HLAM concerning their Namoi shares beyond those covered by the STAM Agreement and HLAM Agreement.
25. Given our concerns, we decided to ask the parties for further information before deciding whether to conduct proceedings. We asked:

² [2006] ATP 6

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- (a) LDC and ASIC (in effect) whether they had any submissions on the matters at hand and ASIC whether it was minded to provide Olam the relief with respect to section 654A that was required to terminate the STAM Agreement
 - (b) Olam to provide a chronology of events in the lead up to (1) Olam's entry into the HLAM Agreement and STAM Agreement and (2) the provision by HLAM and STAM of their Intention Statements, including who first proposed each of these initiatives
 - (c) STAM and HLAM to explain their respective rationales for (1) entering into the STAM Agreement and HLAM Agreement respectively and (2) providing their respective Intention Statements and
 - (d) HLAM whether it could escrow the funds received from the sale of its 4,241,761 Namoi shares to Olam pursuant to the HLAM Agreement until the determination of Panel proceedings.
26. Immediately prior to us considering the submissions, the following events occurred:
- (a) on 30 September 2024:
 - (i) LDC increased the offer price under the LDC Offer from \$0.67 per share to \$0.68 per share
 - (ii) LDC lodged its fourth supplementary bidder's statement with ASIC advising that it would further increase its offer price to \$0.77 per share subject to, and conditional on, STAM accepting the LDC Offer in respect of at least 51,300,000 Namoi shares and
 - (iii) STAM accepted 51,314,436 shares into the LDC Offer and
 - (b) on 1 October 2024:
 - (i) LDC lodged its fifth supplementary bidder's statement with ASIC advising that its offer price under the LDC Offer had increased to \$0.77 per share (**Revised LDC Offer**) following STAM's acceptance and that as a result of the acceptance LDC's relevant interest in Namoi increased to 47.66%
 - (ii) Olam announced to the ASX that it had determined not to extend the Olam Offer (which remained conditional on ACCC approval, FIRB approval, a 50.1% minimum acceptance condition and a no prescribed occurrences condition) beyond its closure date of 8 October 2024 and
 - (iii) the Namoi independent directors revised their recommendation and unanimously recommended that Namoi shareholders accept the Revised LDC Offer (in the absence of a superior proposal and subject to the independent expert continuing to conclude the offer is fair and reasonable).
27. In light of these events, Olam undertook to accept the Revised LDC Offer by no later than the offer's current close date with respect to its registered holding of 4,241,761 Namoi shares which it purchased from HLAM. It also invited LDC to seek to

withdraw its application on the basis that it no longer served any utility. Olam also noted that it no longer needed ASIC relief with respect to the termination of the STAM Agreement due to the operation of section 654A(2).

28. On 2 October 2024, in light of Olam’s undertaking, LDC sought our consent to withdraw its application.³

DECISION

29. We consent to LDC withdrawing its application. We consider the following events resolved the circumstances underlying the application:
- (a) Olam and STAM agreeing to terminate the STAM Agreement
 - (b) Olam effectively withdrawing its bid and
 - (c) Olam undertaking to accept the Revised LDC Offer with respect to its registered holding of 4,241,761 Namoi shares (which it acquired pursuant to the HLAM Agreement).
30. In light of the above, we do not need to detail the submissions provided by the parties in response to our preliminary questions. We do not reach any conclusions on whether there was a breach of section 623, whether the share purchases proposed and completed under the STAM Agreement and the HLAM Agreement respectively had an effect on control or represented a substantial interest, or whether there were otherwise any unacceptable circumstances.
31. We have not made a decision under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth) whether to conduct proceedings in relation to the application, and do not need to do so in light of the withdrawal.

Rory Moriarty
President of the sitting Panel
Decision dated 2 October 2024
Reasons given to parties 16 October 2024
Reasons published 21 October 2024

³ Under Procedural Rule 15

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Advisers

Party	Advisers
Louis Dreyfus Company Melbourne Holdings Pty Ltd	Arnold Bloch Leibler
Namoi Cotton Limited	King & Wood Mallesons
Olam Agri Australia Pty Ltd	Baker McKenzie
Samuel Terry Asset Management Pty Ltd as trustee for Samuel Terry Absolute Return Group	Allens
Harvest Lane Asset Management Pty Ltd	Herbert Smith Freehills