



**In the matter of S.A. Liquor Distributors Ltd
[2002] ATP 22**

Catchwords:

Unlisted public company – disclosure in bidder’s statement – allegations of misleading statements in bidder’s statement – defeating conditions – regulatory condition – conditions rendering bid illusory – vaguely worded conditions – customer benefit scheme – share purchase facility – collateral benefit – prospectus disclosure – shares held by deregistered companies

Corporations Act 2001 (Cth), sections 602(c), 623(2), 625(1), 629(1), 636(1)(c), 636(1)(g) and 661A(1)

These are our reasons for our decision to accept certain undertakings and to dismiss the application (the Application) dated 10 December 2002 by S.A. Liquor Distributors Ltd (SALD) for a declaration of unacceptable circumstances, and interim and final orders, in relation to a takeover bid for that company by Australian Liquor Marketers Pty Ltd (ALM).

1. The President appointed Jeremy Schultz (sitting President), Elizabeth Alexander AM (sitting deputy President) and Anthony Burgess to constitute the sitting Panel for the Application.
2. The Panel received notices of appearance from SALD, ALM and the Australian Securities and Investments Commission (ASIC).

Summary

3. The issues in this matter concerned the terms and conditions of an off-market takeover bid and disclosure in the relevant bidder’s statement. The principal issues were:
 - (a) what disclosure was necessary in relation to a competition clearance condition;
 - (b) the validity of a condition that the target state that it would still hold certain intellectual property when and if the bid succeeded, and disclosure concerning that condition;
 - (c) the effect of a 90% minimum acceptance condition, where over 10% of the shares had vested in ASIC when ASIC deregistered companies which had held those shares;
 - (d) whether the bidder had sufficiently disclosed its intentions concerning the conduct of the target’s business, where most of the shareholders in the target were also customers of the target;

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- (e) whether the bidder offered certain shareholders of the target a collateral benefit, by stating that shareholders who became customers of the bidder might participate in the bidder's customer incentive scheme; and
- (f) whether the bidder needed to provide prospectus-level disclosure, because it offered to have a broker buy shares on ASX in its parent company for accepting shareholders, using the cash consideration due to them under the bid.

The bidder amended its documents to meet some complaints and the Panel rejected the remainder of the complaints. No declaration or order was made.

Orders Sought

- 4. SALD applied for:
 - (a) a declaration of unacceptable circumstances pursuant to section 657A of the *Corporations Act 2001* (the **Act**) in relation to the affairs of SALD as a result of the service on SALD of a bidder's statement and offer by ALM dated 3 December 2002 (the **Bidder's Statement**) which SALD alleged was deficient in a number of respects;
 - (b) interim orders pursuant to section 657E of the Act prohibiting ALM from dispatching the Bidder's Statement and offer to the shareholders of SALD until further order; and
 - (c) final orders pursuant to section 657D of the Act prohibiting ALM from dispatching the Bidder's Statement and offer to the shareholders of SALD.

Background

- 5. SALD is an unlisted public company which operates in South Australia and is the largest independent wholesaler of liquor to independent retailers in that state. It has only one class of shares, and all of its shares were issued to current or previous customers, though not all of the current shareholders are current customers, and some have left the liquor retailing industry entirely.
- 6. ALM is another independent liquor wholesaler selling to independent retailers. It is a wholly-owned subsidiary of the listed company Metcash Trading Ltd (**Metcash**). While ALM has less of the South Australian market than SALD, it has operations in other states and a larger turnover than SALD overall.
- 7. The bid was for all of the shares in SALD at a price of \$250 per share. The smallest parcel of shares in SALD was 200 shares. Metcash agreed to provide the necessary funds to ALM. The bid was subject to a number of conditions, some of which are discussed below.

Process

- 8. The Panel considered that the application raised arguable concerns that there were some material deficiencies in the Bidder's Statement, and decided, under Regulation

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20 of the ASIC Regulations, to conduct proceedings in relation to the Application. The Panel also decided that the deficiencies appeared, on their face, to be sufficiently significant that it would be preferable for the shareholders of SALD to receive the Bidder's Statement only after they had been rectified, rather than allowing ALM to rectify them by a separate supplementary document. Accordingly, it proposed that ALM should:

- undertake to the Panel not to dispatch the Bidder's Statement to the shareholders of SALD until the resolution of the Panel proceedings;
- provide the Panel with a replacement bidder's statement, marked to show changes from the Bidder's Statement (the **Replacement Bidder's Statement**) incorporating amendments to the Bidder's Statement satisfactory to the Panel; and
- lodge the replacement bidder's statement with ASIC and dispatch copies to shareholders in SALD, pursuant to ASIC Class Order 00/344.

Negotiated Changes

9. In its application, SALD offered to negotiate with ALM to try to resolve the issues before a final consideration of the application by the Panel. In its initial response to the application, ALM offered a number of undertakings designed to resolve most of the disclosure issues raised by SALD.
10. In light of the initial correspondence, the Panel issued a brief, in which the Panel invited SALD and ALM to resolve several issues between themselves, specifying issues on which it thought SALD had raised legitimate concerns.
11. After consulting with SALD and the Panel and making some refinements, ALM gave the Panel undertakings designed to deal with:
 - the date of the offer, which was wrongly stated in the Bidder's Statement;
 - clarification of the terms on which Metcash would provide cash for the bid;
 - the omission of an acceptance form from the Bidder's Statement given to SALD;
 - an unclear statement in relation to payment;
 - ALM's intentions regarding the reconstitution of the SALD board; and
 - a condition that no court, tribunal or regulatory authority intervene in the bid, of which ASIC was critical, and which was amended so that it did not apply to acts of ASIC or the Panel.

ACCC Condition

12. ALM's bid was subject to a condition (the **ACCC condition**) that the Australian Competition and Consumer Commission not object to the merger on competition

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grounds. SALD submitted that ALM had failed to provide information about the likelihood of the ACCC Condition being satisfied, in particular, whether ALM had had any preliminary discussions with ACCC concerning the merger, and information about the attitude taken by the ACCC in any such meetings if they had occurred.

13. SALD submitted that if the condition was not satisfied, shareholders who accepted the bid would lose the ability to deal with their shares until the close of the bid, and that this loss of ability to sell to any other buyer would be to no purpose, as the bid could not proceed. It argued that for shares to be tied up in this way would detract from an efficient market for shares in SALD and that shareholders were entitled to be given such information as ALM could provide about the likelihood of the condition being met and the risk of the bid proving to be illusory. SALD proposed that the Panel require ALM to include in the Bidder's Statement a discussion of the likelihood of ACCC clearance being obtained, on the basis of competition law and policy and the composition of the wholesale liquor market in South Australia.
14. The Panel did not require this discussion. There is no general policy that a bidder must provide a clause-by-clause commentary on the likelihood of its conditions being satisfied unless the bidder has firm, non-speculative information that would be material information for a person considering whether or not to accept an offer. An example of where a bidder might be required to disclose information is if a regulator, such as the ACCC, had informed the bidder, which was offering scrip consideration, that the regulator definitely would not approve a merger unless the bidder made significant, specific divestments.
15. In the context of this bid, a discussion from first principles of the likelihood of ALM obtaining ACCC clearance would be too speculative to be helpful to shareholders. Some of the relevant factors are matters of judgement, speculation and hypothesis, such as the definition of the relevant market, whether ALM could meet any concerns of the ACCC by undertakings, and what undertakings (if any) ALM would choose to give, if that were the case. The Panel considered that if SALD considered the issue to be important, it was free to raise the issue with its shareholders and to discuss the issue in the target's statement.
16. If a particular defeating condition is so unlikely to be satisfied as to make the relevant bid illusory, a discussion of this kind may be needed, as may other remedies. The Panel was not satisfied that the ACCC Condition was so unlikely to be fulfilled as to make ALM's bid illusory.
17. ALM advised the Panel that it had not held any preliminary discussions with the ACCC about its bid for SALD, for confidentiality reasons. It offered to amend the Bidder's Statement to explain that for this reason it could not provide any indication of the ACCC's likely attitude to the merger. The Panel accepted this offer.

Intellectual Property Condition

Criticism of the Condition

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18. ALM's bid was subject to a condition (the **Intellectual Property Condition**) that on successful conclusion of the bid, SALD would own or be licensed to use the intellectual property currently being used in "the management infrastructure system employed in SALD's business". SALD submitted that this condition gave rise to a number of problems:
- the condition was misleading because it was unclear;
 - the condition was uncertain, because ALM would not know whether it was fulfilled and there was no explanation as to how ALM would ascertain whether it was fulfilled;
 - because of these factors, the condition effectively gave ALM an option whether to proceed with its bid, and such an option detracts from an efficient market in shares of ALM; and
 - given the apparent importance of this intellectual property to ALM, ALM's intentions with regard to it were required to be set out in the Bidder's Statement by paragraph 636(1)(c) of the Act (bidder's intentions).
19. Without criticizing the Intellectual Property Condition, ASIC stressed that conditions need to be sufficiently definite that the target company and its shareholders can assess the risk that they will not be satisfied and that bidders cannot avoid the policy of section 629, by relying on vaguely worded conditions.

Resolved by Refinement and Evidence

20. In evidence and submissions, ALM explained the commercial issues to which the Intellectual Property condition related. It offered to clarify the condition by specifying more closely the intellectual property to which it applied, inviting SALD to participate in formulating a definition acceptable to both ALM and SALD.
21. The Panel invited ALM to explain in the Bidder's Statement how ALM intended to establish whether or not the condition had been fulfilled and how any difficulty in deciding whether the condition had been fulfilled would affect SALD shareholders who accepted its offers. ALM responded by undertaking to amend the condition so that it is taken to be fulfilled unless SALD disclosed facts showing that it had not been not fulfilled.
22. ALM submitted that these changes dealt with the section 629 issue, as well as the uncertainty issues, because whether the condition was fulfilled was a matter of fact, not opinion. In response to the argument that it must disclose its intentions regarding the intellectual property, ALM submitted evidence that it intended to use the intellectual property only for the purposes of continuing SALD's existing business. ALM pointed out that it had stated its intention to continue that business.
23. The Panel accepted ALM's undertakings to amend the condition and its submissions that the condition did not tend to frustrate the policy of section 629, detract from an efficient market in SALD shares or reveal any need for additional disclosure about ALM's intentions.

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90% Minimum Acceptance Condition

24. ALM's bid was subject to a 90% Minimum Acceptance Condition, and ALM's statements of its intentions regarding the future of SALD's business, assets and staff were premised on this condition being satisfied and on compulsory acquisition of the remaining shares. SALD submitted that ALM should disclose in the replacement bidder's statement its intentions should the 90% Minimum Acceptance Condition not be satisfied.
25. ALM advised that it had no intention of waiving the condition, that it had formulated no intentions about the future of SALD if it held less than 100% of the shares and that it appreciated that it would have to provide a supplementary bidder's statement dealing with its revised intentions if it decided to waive the condition. ALM undertook to provide a statement to this effect in the replacement Bidder's Statement.
26. Satisfaction of the 90% minimum acceptance condition was more problematic than usual, because a number of companies which between them held over 10% of the shares in SALD had been deregistered. Upon their deregistration, the companies' assets vested in ASIC, including the shares, and the companies were unable to deal with them. Accordingly, the 90% minimum acceptance condition and the requirements of section 661A could not be satisfied, unless some of those companies were reinstated, or ASIC accepted the offers. However, ASIC advised that its policy is not to accept takeover offers for shares it holds as assets of deregistered companies.
27. ASIC advised that in such circumstances it is prepared to consider favourably applications for modification of the compulsory acquisition provisions to prevent its policy on this issue adversely affecting bidders. ALM obtained relief from ASIC to allow it to acquire shares compulsorily, if holders of more than 90% of the shares (other than shares held in the names of the deregistered companies) accepted its offer, and ALM varied its condition accordingly.

ALM's post-takeover intentions

Intentions and Statements about Prospects

28. The Bidder's Statement mentioned benefits which SALD's customers would receive by becoming customers of the merged ALM and SALD, because the merged entity could obtain and pass on greater volume discounts from suppliers and provide better customer services than could SALD. The Bidder's Statement did not describe these benefits in detail, or explain the basis on which ALM believed that the benefits would be secured.
29. SALD submitted that either ALM had no reasonable basis for its statements about the benefits to customers (and that those statements were therefore misleading) or that those statements implied that ALM had intentions about the conduct of the business which it had not disclosed (and that the Bidder's Statement was defective in that respect). It was also critical of the fact that ALM set out its intentions for the future conduct of SALD's business in one part of the Bidder's Statement, and its statements about the benefits to customers of the merger in another part.

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Evidence and Amplification

30. In its brief, the Panel asked ALM whether it had a reasonable basis for making the statements about the benefits to customers of the merger, whether those statements could be made more precise and whether they related to undisclosed intentions regarding the future conduct of SALD's business.
31. ALM provided a witness statement setting out statistics about its turnover and that of SALD and information about the basis on which volume discounts are obtained. ALM regarded this as giving a reasonable basis for the predictions that the merged entity could provide better terms of trade to SALD's customers than could SALD, while continuing SALD's business in accordance with the intentions it had already disclosed.
32. The witness statement satisfied the Panel that ALM had a reasonable basis for its statements about the future of SALD's business. The Panel considered, however, that ALM should provide more detail about how it intended SALD under ALM's control would deal with its existing customers and about the benefits the customers would derive from becoming customers of the ALM group. The Panel considered that some of the information in the witness statement would be useful to shareholders for this purpose. ALM undertook to include similar information in the Bidder's Statement and to bring together the two sections of the Bidder's Statement dealing with the future of SALD's business.
33. The Panel did not request ALM to provide figures on the changes in volume discounts which might become available as a result of the merger, as specific figures may have been misleadingly speculative.

Metcash Customer Share Incentive Scheme

The Scheme

34. ALM stated in its Bidder's Statement that SALD customers who became customers of ALM might become entitled to participate in the Metcash Customer Share Incentive Scheme, if ALM made offers under the Scheme again. The Scheme does not operate continuously. ALM has twice made rounds of offers under the Scheme, using registered prospectuses. The Bidder's Statement was clear that ALM did not promise to make another round of offers under the Scheme.
35. Under the Scheme, ALM customers have in the past been offered the opportunity to subscribe for shares in Metcash at a 10% discount to the market price. Every ALM customer who acquired more than a threshold amount of stock from ALM could acquire 3 Metcash shares per \$1000 purchases from ALM during the relevant calendar year. Metcash shares trade at about \$1.50. Accordingly, the discount is worth about 45 cents per \$1000 purchases, or about \$225 p.a. to a customer who purchases \$500,000 worth of stock from ALM annually. The customer in the example would pay \$2250 for the shares and would be one of SALD's larger customers. The price offered under the bid for the smallest shareholding in SALD was \$50,000.

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Submissions

36. SALD submitted that the statement that eligible customers of SALD might take part in the Metcash Customer Share Incentive Scheme constituted the offer of a collateral benefit which was prohibited by section 623 of the Act or offended the equality of opportunity principle in section 623 and paragraph 602(c) of the Act. Some SALD shareholders will not be able to participate in the Scheme, because they are not liquor retailers, and even among the shareholders who are liquor retailers, the quantum of benefit will depend on turnover, not on their respective shareholdings. The Panel was concerned by this submission, because section 623 is directly relevant to one of the core policies of Chapter 6.
37. ASIC discussed the technical arguments in relation to this issue, and pointed out that whether the offer of participation in the Scheme was unacceptable depended on whether the benefits were material and whether the same terms were offered to ALM's other customers. ASIC advised that it had in the past, given exemptions from section 623 in broadly similar cases. However, in the examples given by ASIC it was at least notionally possible for all offeree shareholders to participate in the benefits.
38. ALM confirmed that if another round of offers is made under the Scheme, the offers will be open to former SALD customers on the same basis as they are open to all of ALM's customers, and undertook to include a clear statement to that effect in the Bidder's Statement. It submitted that the mention of the Scheme did not constitute an offer which was capable of contravening section 623, as ALM undertook no obligation to make another round of offers under the Scheme. It also submitted that whether a customer of SALD could participate in the Scheme would depend on their becoming a customer of ALM, not on their having accepted an offer under the bid, and relied on the *Bridge Oil* principle mentioned below.

Technical Arguments

39. On the basis that the reference to the Metcash Share Incentive Scheme was an offer of participation in the Scheme, the argument is open that the offer contravened section 623 of the Act, because participation is a benefit, the offer of which may induce an offeree to accept an offer under the bid. In the *Bridge Oil* case,¹ the Federal Court held that former section 698 was not contravened by collateral dealing between a bidder and shareholders and employees, on the basis that the bidder was dealing with the employees in their capacity as employees, not as shareholders. Section 698 has since been replaced by new section 623.
40. In the Panel's view, however, for reasons which do not involve the *Bridge Oil* principle, it is unlikely that by alluding to the Scheme, ALM contravened section 623, which relevantly applies in relation to a benefit which is "likely to induce [the offeree] to ... accept an offer under the bid". Although it can be the only reason for ALM to have included discussion of the Scheme in its bidder's statement, the prospect of benefit under the Scheme is too uncertain and too slight to be likely to

¹ *Gantry Acquisition Corp v Parker & Parsley Petroleum Australia Pty Ltd* (1994) 14 ACSR 11, per Sheppard and Beazley JJ. See also the discussion of *Bridge Oil* in *Aberfoyle Ltd v Western Metals Ltd* [1998] 744 FCA.

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induce an offeree to accept the bid, or to materially influence that decision. The Bidder's Statement is clear that offers may not be made again under the Scheme. The value to an offeree shareholder of participation in the Scheme is small compared with the value of their shares. Because of these factors, if there was a technical contravention, it was not of such a kind as to lead to unacceptable circumstances.

Policy Arguments

41. The Panel decided that the possibility of participation in the Scheme was not a benefit of a kind to which the policy of section 623 and paragraph 602(c) applied. That benefit would be provided to the shareholders as customers, i.e. in a different capacity from as owners of shares in the company. Whether or not the *Bridge Oil* principle governs the construction of section 623, it is one of the factors relevant to the policy of section 623 and paragraph 602(c) in a case such as this, where it is inherent in the nature of the bid that there will be transactions between the bidder and some of the offerees outside the bid, on the same arm's length commercial terms on which the bidder conducts its business with other people: see also paragraphs 46 to 51 of the Panel's decision on *Advance Property Fund*.
42. The Panel accepted ALM's undertaking mentioned above, and declined to make a declaration or order or to require any further undertaking concerning the differential benefit argument.

Comment

43. Problems of differential benefit of this kind may occur whenever a takeover is made by or for a company which operates as a co-operative, in a broad sense. Different benefits (such as rebates proportioned to turnover) are frequently embedded in those companies' businesses and constitutions, not components which a bidder can elect whether or not to offer as an inducement to accept its bid. Unless the benefits are clearly immaterial to decisions whether to accept a bid or to sell shares, the issue needs to be addressed by the bidder at an early stage, often by seeking relief from ASIC. Although there is no published policy on the issue, ASIC and its predecessors have for many years given relief to allow different offers to be made to "wet" and "dry" shareholders in a co-operative.

Metcash Share Facility

The Facility

44. Under the offer as originally lodged and served, an accepting SALD shareholder might elect to apply the cash consideration to the purchase of Metcash shares on the ASX (**Metcash Share Facility**). ALM had arranged with a broker that ALM would pay the cash consideration to the broker, who would purchase shares on ASX for the accepting shareholder. Although brokerage on these purchases would be less than usual, there would be no discount on the current market price of the shares.
45. If a bidder offers securities as consideration for shares to be acquired under a bid, paragraph 636(1)(g) of the Act requires the bidder to include in the bidder's

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statement the same information as the issuer of those securities would have to provide if it offered the securities by prospectus.²

Submissions

46. ALM took the view that the Facility did not attract paragraph 636(1)(g), nor, directly or indirectly, Division 4 of Chapter 6D of the Act, because it was not offering shares in Metcash as consideration under its offers, but was offering additionally to the cash consideration, the services of the broker to acquire existing Metcash shares. Both SALD and ASIC pointed out that there is a risk of the prospectus provisions (applying directly, or by virtue of paragraph 636(1)(g)) being avoided, if issuers can do so by providing already-issued shares instead of issuing shares. They said that there is the same disparity between offeror and offeree in access to information about the shares and the offeree runs the same risks in taking the shares, whether they are old or new.

Decision

47. The Panel considered that the Metcash Share Facility was in substance an offer of Metcash shares in exchange for the SALD shares held by an offeree. Accordingly, paragraph 636(1)(g) required ALM to disclose in its Bidder's Statement all the information that would be required under section 713 if Metcash offered shares in itself. The main effect was that the Bidder's Statement would have to contain any information which Metcash had withheld under the confidentiality exceptions to Listing Rule 3.1. The Bidder's Statement did not purport to contain this information.
48. The Panel advised ALM that if it retained the Metcash Share Facility as part of its offer, it should disclose in the Replacement Bidder's Statement all the information that would be required for a prospectus for an offer of Metcash shares under section 713 of the Act. ALM chose to remove the Metcash Share Facility component of its offer, and to delete all references to the Facility in the Bidder's Statement, offer and acceptance form.

Comment

49. Issuers should not be able to avoid compliance with the prospectus provisions, by offering securities which have already been issued. Because of the unusual nature of the offer of shares and the fact that Metcash was not raising funds by issuing the shares, directly or indirectly, however, there is an argument that ALM could properly have been exempted from paragraph 636(1)(g) in relation to the Metcash Share Facility. In complying with the insider trading provisions before causing or authorising ALM to make the offer, however, Metcash must have satisfied itself that it had not withheld price-sensitive information under the Listing Rules. These are issues which might best have been resolved in the context of an application by ALM to ASIC for relief from paragraph 636(1)(g), before ALM gave its bidder's statement to SALD.

² Strictly, paragraph 636(1)(g) applies only if the offer is made by the issuer of the securities or by a company which controls the issuer. The securities being offered were shares in Metcash, but ALM is only a subsidiary of Metcash: it neither is nor controls Metcash. This has been addressed by clause 9 of ASIC Class Order 01/1543, which applies paragraph 636(1)(g) to an offer made by a subsidiary of the issuer of the scrip.

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Conclusion

50. On receipt of a marked-up replacement bidder's statement with changes carrying out ALM's undertakings mentioned above, the Panel dismissed the application. There having been no declaration of unacceptable circumstances, there will be no order for costs. The Panel consented to the parties being represented by their respective solicitors.
51. The Panel thanks the parties for the constructive and practical way in which the matter was run, with amendments of the offer documents being readily offered and as readily accepted. In particular, ALM early on offered undertakings to amend its bidder's statement which were largely sufficient and it later provided a witness statement by its chief executive officer, which overcame several of the most difficult issues in the matter.

Jeremy Schultz

President of the Sitting Panel

Decision dated 23 December 2002

Reasons published 6 August 2002

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Annexure A - Undertakings by ALM

Undertaking in respect of SA Liquor Distributors Limited ("SALD")

Undertaking to the Takeovers Panel

Australian Liquor Marketers Pty Ltd ("ALM") undertakes to:

- (a) SA Liquor Distributors ("SALD"); and**
- (b) the Takeovers Panel ("Panel") under section 201A of the ASIC Act,**

to amend its Bidder's Statement dated 3 December 2002 prior to dispatch to SALD shareholders and to otherwise act as follows:

1. Date of the Offer

Amend Section 4.4 by inserting the following sentence as a new paragraph immediately before the last paragraph of Section 4.4:

"For the avoidance of doubt the Offer Period commenced on the date the first Offer and Bidder's Statement was dispatched to SALD shareholders namely on [18] December 2002."

The date will be inserted immediately prior to dispatch. There will be consequential amendments of deleting the words "the date of the Offer" where they appear in Section 4.7(a)(iii) and (vi) and replacing them with "3 December 2002".

2. Acceptance Form

Amend Section 4.5 by replacing "Application Form" with "Acceptance Form".

3. Payment

Amend Section 1.2 by deleting the present sentence and replacing with:

"ALM is offering \$250.00 cash for each SALD Share."

4. Reconstitution of SALD Board

Amend Section 5.4(a) by replacing 'Reconstitute the Board of SALD' with the following words:

"Upon conducting its review of the business and assets referred to below in Section 5.4(b) ALM will consider and decide whether it will reconstitute the Board of SALD so as to solely comprise ALM and/or Metcash executives."

5. ACCC Condition

Amend Section 4.7(a)(ii) by inserting after the existing paragraph a new paragraph as follows:

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“On [17] December 2002 ALM wrote to the ACCC to inform it of the proposed acquisition of SALD Shares. As at the date of dispatch of the Offer and Bidder’s Statement, no response had been received from ACCC and consequently ALM expresses no view as to whether or not ACCC will object to the acquisition of SALD Shares by ALM.”

6. Intellectual Property Condition

Amend Section 4.7(a)(ii) by amending the definition of Intellectual Property so that the lead in paragraph will read as follows:

“With respect to all of the intellectual property associated with the computer and IT (information technology) and other systems and processes dealing with administration of and ordering, dispatching, data warehousing, invoicing and accounting for goods bought and sold employed in SALD’s business at the date of this Offer (“the Intellectual Property”).....”

Alternatively, ALM undertakes to further refine the definition following consultation with SALD.

7. Regulatory Condition

Amend Section 4.7(a)(vi)(O) by replacing “(including the Corporations and Securities Panel)” with the following words:

“(but excluding the Corporations and Securities Panel and the Australian Securities and Investments Commission)”

8. Post-Takeover Conditions

If the Panel is of the view that the grounds for the views expressed in the directors’ letter require further disclosure (but only then), ALM undertakes to issue a supplementary statement containing those views.

9. Funding

Amend Section 5.3 by adding at the end of the second paragraph, the following new sentence:

“Metcash has unconditionally agreed to make the funds available to ALM through debt.”

10. Metcash Customer Share Incentive Scheme

Amend Section 3.3 by deleting the last paragraph of that section and replacing it with:

“If customers of SALD become customers of ALM, whether or not as a result of the Offer being successful and the businesses of SALD and ALM being integrated or otherwise, then eligible customers of ALM may be invited to participate in future schemes if they meet the qualifying criteria and the Board of Metcash decides to proceed with a further Scheme.”

In addition, the whole of Section 3.3 as amended will be moved to Section 5.1. with consequential numbering changes.

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If, notwithstanding the above amendments, the Panel is still of the view that the wording gives rise to unacceptable circumstances, ALM will remove all reference to the Customer incentive schemes from the Bidder's Statement.

11. Metcash Share Facility

If the Panel is of the view that Section 3.5 gives rise to unacceptable circumstances (but only then) delete Section 3.5, the last sentence of Section 4.8 and all references to the Metcash Share Purchase Facility in the Acceptance Form.

DATED 16 December 2002

Executed for and on behalf of
Australian Liquor Marketers Pty Ltd