Takeovers Panel

Reasons for Decision
Goodman Fielder (No. 02)

In the matter of Goodman Fielder Ltd (No. 02)
[2003] ATP 5

<u>**Catchwords:**</u>

Target's statement and advertising – use of comparable transactions – valuations – lack of supporting information rendered use misleading – use of valuation methods – selection of comparable companies– whether independent expert required

Target statement -use of forecasts of target's earnings– whether misleading – identity of preparer and basis of preparation- role of financial adviser and accounting adviser– whether independent expert required.

Target's statement – role of experts

Access to target information by bidder – advice concerning tax dispute with ATO

Corporations Act 2001 (Cth), sections 638(1) and (5)

ASIC Practice Note 43 'Valuation Reports and profit forecasts'
The City Code on takeovers and Mergers Rule 20.2

Ampolex Limited v Perpetual Trustee Company (Canberra) Limited (1996) 20 ACSR 637
Normandy Mining Ltd [2001] ATP 27

These are the Panel's reasons for accepting undertakings from Goodman Fielder, in response to the Panel's request, and declining to make a declaration of unacceptable circumstances and orders in response to the application by BPC1 Pty Ltd in relation to the target's statement and certain advertisements in the takeover bid by BPC1 Pty Ltd for Goodman Fielder Ltd.

THE APPLICATION

1. These reasons relate to an application made on 20 January 2003 by BPC1 Pty Ltd (**Burns Philp**) for a declaration of unacceptable circumstances under section 657A of the *Corporations Act 2001* (the **Act**), and interim and final orders under sections 657E and 657D of the Act, in relation to a takeover bid for Goodman Fielder Ltd (**Goodman Fielder**) by Burns Philp, which is a subsidiary of Burns, Philp & Company Ltd. (**Burns Philp & Co**)

THE PANEL & PROCESS

2. The sitting Panel for the application was constituted by Ilana Atlas (sitting President), Michael Tilley (sitting deputy President) and Marian Micalizzi.

3. The Panel decided under Regulation 20 of the ASIC Regulations to conduct proceedings in relation to the Application.

4. This application related to the contents of the target's statement and of certain newspaper advertisements published by Goodman Fielder in relation to the same takeover bid as was considered in the Panel's Goodman Fielder 01 proceedings.

SUMMARY

5. Burns Philp applied for a declaration of unacceptable circumstances against Goodman Fielder's target's statement and advertisements that Goodman Fielder published. The target's statement and the advertisements contained bar charts that sought to compare the price being offered by Burns Philp against a range of notional values for Goodman Fielder shares derived from other transactions or share market multiples. Goodman Fielder generated the comparison prices by multiplying its forecast EBITDA result by the multiples it generated by its analysis of the "comparable transactions".

6. Burns Philp asserted that Goodman Fielder was presenting these "Implied Goodman Fielder Offer Price" numbers as valuations of Goodman Fielder, without adequate supporting information and without a qualified person having prepared the valuation.

7. Burns Philp criticized the forecast in Goodman Fielder's target's statement for the financial year to 30 June 2003. Burns Philp criticized Goodman Fielder not disaggregating the portions of the forecast that were based on actual results from those which were forecast. Burns Philp criticized the fact that the forecast was made by the directors of Goodman Fielder rather than by an independent expert. Burns Philp also made some complaints about other minor aspects of the forecast.

8. Burns Philp also sought:

   (a) disclosure about tax advice which Goodman Fielder had said it relied on;

   (b) equal access to any information that Goodman Fielder had given to any person considering a rival proposal; and

   (c) access to information from Goodman Fielder to address the issues which Burns Philp had raised in its Accounting Conditions.

9. The Panel found that the comparative bar charts in Goodman Fielder's advertisements and target's statement were incomplete to the point of being misleading because of the lack of supporting information about the data, assumptions and methodology behind them. It advised Goodman Fielder that it would make a declaration and orders unless Goodman Fielder published corrective and supplementary information in similar advertisements and a supplementary target's statement. The Panel also required Goodman Fielder to advise its shareholders that the "Implied Goodman Fielder Offer Prices" were

not valuations and should not be relied on by Goodman Fielder shareholders as valuations. Goodman Fielder published the corrective advertisements and supplementary target's statement.

10. The Panel required some further disclosure concerning Goodman Fielder's tax advice. However, it did not require Goodman Fielder to give Burns Philp any information concerning the Accounting Conditions nor did it require Goodman Fielder to give Burns Philp similar access to information that Goodman Fielder may have given to rival proposals. These latter decisions were consistent with the view the Panel had taken in the Goodman Fielder 01 decision.

APPLICATION

Declaration

11. Burns Philp applied for a declaration that unacceptable circumstances existed in relation to the affairs of Goodman Fielder as a result of the following:

    (a) Goodman Fielder had denied Burns Philp equivalent access to internal information, or due diligence, to that it had allowed for a number of other potential bidders or acquirers of Goodman Fielder assets[1];

    (b) Goodman Fielder's failure to address the issues underlying the Accounting Conditions in Burns Philp's bidder's statement, either in its target's statement or privately to Burns Philp impaired the market in shares in Goodman Fielder (the Accounting Conditions were part of the subject material of the Goodman Fielder 01 matter);

    (c) information in the target's statement bearing on the forecast earnings of Goodman Fielder was misleading;

    (d) information in the target's statement and advertisements concerning the "implied offer price" for Goodman Fielder shares was misleading, because it was likely to be construed as a valuation of Goodman Fielder shares and failed to disclose the basis of the valuation, the comparison was made with inappropriate companies and industry sectors, and used the wrong measure of earnings;

    (e) there was no review by an independent expert of the financial information in the target's statement;

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[1] There had been media reports for some days of Goodman Fielder discussing alternative opportunities with a range of acquirers and providing some with some access to Goodman Fielder information, including access to reported data rooms set up by Goodman Fielder.

(f) the disclosure concerning the tax dispute of which Goodman Fielder was notified on 24 December 2002 was incomplete and misleading;

(g) the description of a report by Ernst & Young was misleading.

Interim Orders

12. Burns Philp requested that the Panel, or the President of the Panel, as soon as practicable make interim orders, under section 657E, that Goodman Fielder:

    (a) immediately cease to place any advertisements further to the 18 January advertisements making reference to:

        (i) "comparable" companies or transactions,

        (ii) the forecast net operating profit after tax of the Goodman Fielder group for the year ending 30 June 2003, or

        (iii) any alternative proposal to the Burns Philp takeover bid (**Alternative Proposal**);

    (b) not send any notice in writing to any of its shareholders (other than Burns Philp) in relation to, or drawing attention to, such matters; and

    (c) not otherwise contact, or correspond with, any of its shareholders (other than Burns Philp), including, without limitation, by means of telephone canvassing,

    until the earlier of seven days after the date of dispatch of the final target's statement, or final determination of the issues raised in the application.

13. Burns Philp sought an interim order restraining use of a "staff video" which had minor references to the Burns Philp bid and which Goodman Fielder had distributed to various sites for viewing by staff (**Staff Video**).

14. Goodman Fielder undertook not to do any of those things, and the Panel decided not to make any interim order.

Final Orders

15. Burns Philp requested final orders to the following effect:

    (a) that Goodman Fielder provide Burns Philp with access to all information, executives and employees that Goodman Fielder had made available to any third party who had been invited by Goodman Fielder to put forward an Alternative Proposal (**Goodman Fielder Information**);

    (b) that Goodman Fielder provide Burns Philp with the independent tax advice referred to in section 6.3 (page 47) of its target's statement (**Tax Advice**) and all related information reasonably required by Burns Philp, including access to all information, executives and employees of Goodman Fielder or its representatives or advisers as is necessary to enable Burns Philp to properly assess the Tax Advice (**Related Tax Information**);

(c) that, as soon as practicable, Goodman Fielder issue, and send to all of its share and option holders, a supplementary target's statement that clearly sets out:

   (i) the material assumptions and qualifications contained in the Tax Advice or, in the event that the Tax Advice is unqualified or not subject to any assumptions, that fact;

   (ii) the identity of the provider of the Tax Advice; and

   (iii) whether the provider of the Tax Advice consents to being named in that capacity in the supplementary target's statement and whether the provider has consented to the inclusion of the disclosure relating to the Tax Advice in the target's statement;

(d) that Goodman Fielder use its best endeavours to obtain the consent referred to in paragraph (c)(iii) above;

(e) that Goodman Fielder provide Burns Philp all information reasonably required by Burns Philp, including access to executives and employees of Goodman Fielder or its representatives or advisers as is necessary to enable it to determine whether a person in the position of a director of Goodman Fielder is in a position to provide the confirmations referred to in clause 9.6(g)(1), 9.6(h)(1) and 9.6(h)(2) of the Burns Philp's bidder's statement[2] (**Accounting Information**)

(f) that, as soon as practicable, Goodman Fielder place corrective advertisements in all the newspapers in which it placed advertisements on 18 January 2003 (the **18 January Advertisements**), which:

   (i) are of the same prominence as the 18 January Advertisements;

   (ii) clearly state that:

[2] The Accounting Condition is discussed in the Panel's reasons for decision in *Goodman Fielder (No. 1)*. It requires Goodman Fielder's directors to provide confirmations as to the restructuring costs, earnings, working capital and liabilities in Goodman Fielder's financial statements for the financial years 2000, 2001 and 2002, and an actuarial review of Goodman Fielder's defined benefit superannuation plan..

(a) the tables and accompanying information contained in section 3.1.2 (pages 18-19[3]) of the Target's Statement and reproduced in the 18 January Advertisements provide no reliable indication of the value of Goodman Fielder shares;

(b) the tables and accompanying information contained in section 3.1.2 (pages 18-19) of the Target's Statement and reproduced in the 18 January Advertisements provide no basis for the conclusion that Goodman Fielder's shares are valued at between $2.14 to $2.92; and

(c) shareholders should have no regard to the tables and accompanying information in section 3.1.2 (pages 18-19), and any directors' recommendation based on those tables in deciding whether to accept Burns Philp's offer;

(g) that, as soon as practicable, Goodman Fielder issue, and send to all of its share and option holders, a supplementary target's statement that contains all of the information referred to in paragraph (f)(ii) above;

(h) such further or other orders, or directions as to the conduct of the proceedings, as the Takeovers Panel thinks appropriate;

(i) in the alternative to the final orders referred to in paragraph (a) and (b), but in addition to the final orders referred to in paragraphs (c) to (h), Burns Philp requested that the Panel (or a member of the Panel) make a direction, under section 16(1)(d) of the *Australian Securities and Investments Commission Regulations* 2001 (Cth)[4] and/or under section 192(1) of the *Australian Securities and Investments Commission Act* 2001 (Cth)[5], requiring Goodman Fielder to produce, by 9.30am (Sydney time) on the date which is two business days after the final determination of the issues raised in the application, to the Takeovers Panel, ASIC and Burns Philp:

(i) the Goodman Fielder Information;

(ii) the Tax Advice and Related Tax Information; and

(iii) the Accounting Information.

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[3] These were the page references in the version of the target's statement that was lodged with ASIC on 17 January 2003. In the printed version of the target's statement that was dispatched to shareholders, the relevant tables and accompanying information appeared on pages 12 and 13.

[4] The power to direct parties to lodge with the Panel specified documents relating to Panel proceedings.

[5] The power to issue a summons requiring a person to produce documents or give oral evidence.

(j) Burns Philp offered to enter into reasonable arrangements in relation to the confidentiality of information it sought from Goodman Fielder in paragraphs (a), (b), (e) and (i) above.

DISCUSSION

The 18 January Advertisements

16. On Saturday 18 January, Goodman Fielder published half-page and full-page advertisements in several newspapers in Australia and New Zealand. The advertisements advised Goodman Fielder shareholders not to accept the Burns Philp bid and to ignore documentation sent to them by Burns Philp. The bid was described as being "highly conditional". The Goodman Fielder directors also said that the bid did not "adequately compensate shareholders for the underlying value of Goodman Fielder and its ongoing potential" and was opportunistic, in light of the effect of short-term commodity price increases due to the current drought.

17. The advertisements also said that Goodman Fielder was in active discussions with other parties which might lead to alternative proposals for consideration by shareholders, which might enhance value for shareholders.

18. The advertisements also said "[t]he offer price of $1.85 does not reflect an appropriate acquisition price for control of Goodman Fielder" and referred readers to a bar chart which appeared in the advertisement (the **acquisition multiples bar chart** in the target's statement discussed below). The bar chart compared the offer price with a range of notional values for Goodman Fielder shares based on earning multiples derived from transactions involving the acquisition of sales of controlling interests in the shares of other companies. Goodman Fielder chose the companies and transactions used in the acquisitions multiples bar chart as being comparable with Goodman Fielder.

19. Burns Philp complained of four things in the advertisements:

    (a) the statement that Goodman Fielder was entertaining alternative proposals;

    (b) they advised shareholders to ignore documentation sent by Burns Philp. Burns Philp complained that this advice impeded its efforts to better inform Goodman Fielder shareholders ;

    (c) the advertisements were published before shareholders had received the target's statement and there was a real risk that Goodman Fielder shareholders would read the advertisements and make up their minds to do what their directors told them (ie reject the bid) without reading the bid documents; and

(d) the acquisition multiples bar chart, which Burns Philp characterized as misleading as it failed to disclose the assumptions on which it was based and would be taken by shareholders as a valuation of Goodman Fielder.

20. The Panel considered that :

(a) the complaint concerning alternative proposals was not supported in submissions and the Panel did not make any declaration or other order concerning it;

(b) the advice provided by Goodman Fielder was not unusual for target companies to shareholders concerning a bid which is not presently recommended. The Panel rejected this complaint; and

(c) for reasons discussed below in connection with the target's statement, the criticism of the acquisitions multiples bar chart was justified.

21. The Panel advised Goodman Fielder that it proposed to make a declaration of unacceptable circumstances in relation to the acquisitions multiples bar chart in the advertisements, and orders that Goodman Fielder publish corrective advertisements, unless Goodman Fielder gave the Panel suitable undertakings. In the event, Goodman Fielder undertook to publish, and did publish, corrective advertisements, as discussed below, and no declaration or order was made.

The Target's Statement - "Implied Price" Bar Charts

22. On 17 January 2003 Goodman Fielder released its target's statement in response to the Burns Philp bid. The target's statement contained a forecast of Goodman Fielder's earnings for the financial year 2003, which is mentioned below.

23. In the target statement, the Goodman Fielder directors recommended that shareholders reject the bid, for the same reasons as they gave in the newspaper advertisements, but the target's statement contained more supporting information. Burns Philp objected to the target's statement in several respects, many of them the same as those it objected to in the advertisements.

24. On pages 18 and 19 of the target's statement, Goodman Fielder printed two bar charts comparing the price offered by Burns Philp with a range of notional values for Goodman Fielder shares. It described these values as "Implied Goodman Fielder Offer Price". These notional values were based on other transactions in shares in what were described as "Comparable Food Companies", selected "globally". They were calculated by multiplying a forecast of Goodman Fielder's earnings by earnings multiples based on the various comparable transactions. These earnings multiples were multiples of enterprise value to earnings before interest, tax, depreciation and amortisation

(**EBITDA**). They were derived by dividing enterprise value by EBITDA for those transactions which Goodman Fielder had chosen as comparable.

25. One chart (**trading multiples**) was based on listed company share market capitalisations divided by forecast EBITDA. Goodman Fielder said that the trading multiples did not reflect a premium for control. The other chart (**acquisition multiples**[6]) was based on acquisitions of controlling interests, and was republished in the 18 January advertisements. The charts implied that Goodman Fielder shares might be worth from $2.14 to $2.92, as against Burns Philp's bid price of $1.85.[7]

26. The bars in the chart of acquisition multiples were labelled "Average of [Global] Cereals and Snacks Transactions", "Average of [Global] Diversified Food Transactions", "Average of Australian Food Transactions" and "Average of [Global] Bread, Baking and Baked Goods Transactions".[8]

27. The target's statement did not, however, identify the companies or the transactions on which the bar charts were based, or give any other detail on which the relevance or accuracy of the notional prices could be checked. The bar charts were not stated to have been prepared by, or checked by, anyone other than the Goodman Fielder directors who signed the statement. There was no other information about the value of Goodman Fielder shares, in particular, no independent expert report.

28. In submissions, Goodman Fielder identified the companies and the transactions on which the bar charts had been based. They concerned companies of various different sizes, with shares traded in Australia, the United States and Europe and operating in all of those countries and in various parts of the food industry.

29. Burns Philp submitted that the bar charts and the conclusion that Goodman Fielder drew from them, that the bid undervalued Goodman Fielder, were misleading, for the following reasons:

    (a) the bar charts were in substance presented as a valuation of Goodman Fielder when insufficient work had been done on them by an independent qualified valuer to warrant them being presented as valuations in the advertisements and the target's statement;

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[6] However, forecast, or even historical, EBITDA was not available for all of the comparable transactions.

[7] This was the *cum dividend* price offered at the outset of the bid. Since Goodman Fielder has declared an interim dividend of 3.5 cents and a special dividend of 20 cents, the bid price has reduced to $1.815 *ex dividend* and reduced further to $1.615 *ex dividend* on 7 March, the record date for the special dividend. Burns Philp later increased its offer price by 2 cents, giving a final offer price of $1.635.

[8] The word "global" was supplied by a footnote.

(b) Goodman Fielder had provided no information on the companies used for comparison, no comparisons on alternative bases, no evaluation of the suitability of the companies used in the comparison and no data on which a reader could base their own assessment of value;

(c) the assumptions and bases Goodman Fielder appeared to rely on were not appropriate:

  (i) EBITDA is not a suitable basis of comparison between transactions by itself (especially for firms with different capital intensity);

  (ii) many of the companies chosen for comparison were too large to be fairly compared with Goodman Fielder;

  (iii) the use of the Cereals and Snacks group was inappropriate, as those products are a small part of Goodman Fielder's business;

  (iv) several recent Australian transactions had been omitted; and

(d) the valuation should have been undertaken, or at least reviewed, by an independent expert.

Bar Charts as a Valuation

30. Burns Philp submitted that the bar charts were presented as valuation and should be assessed such. Goodman Fielder argued that the bar charts were not a valuation. The Panel rejected Goodman Fielder's assertion.

31. Goodman Fielder argued that principles about the disclosure of the basis of a valuation do not apply to the bar charts in the target's statement, because they were provided only to show that the Burns Philp bid was priced too low, and not as a valuation, with "no suggestion that the indicative prices represent the underlying value of Goodman Fielder shares".

32. The Panel rejected this submission and accepted ASIC's and Burns Philp's submissions that the bar charts needed to comply with relevant requirements for presentation of valuations. This was because they were presented as a guide to the possible range of values of Goodman Fielder shares, they were the only information in the target's statement about the value of the shares and they were accepted as a valuation by the press, without objection by Goodman Fielder. Had the indicative prices in the bar charts borne no relation to the underlying value of Goodman Fielder shares, they would have been of no relevance to whether the bid was pitched too low.

Use of EBITDA

33. Although it expressly acknowledged that EBITDA multiple valuation was not of itself unacceptable, Burns Philp submitted that the choice of EBITDA as a

basis of comparison between transactions may be unsatisfactory, and more so where details of the methodology and comparison companies are not provided. Burns Philp said that EBITDA multiple valuation may be problematic if there are real differences between the companies being compared in terms of different levels of depreciation and amortization, due to different levels of invested capital.

34. Burns Philp said that other comparative measures should have been used as well, such as EBIT, and other valuation techniques, such as discounted cash flow. It said that the lack of information about the source data, methodology and assumptions in the bar chart valuations was exacerbated by the absence of any other valuation methodology.

35. In the Panel's view, it was not objectionable to use EBITDA as one basis of comparison between companies. It accepted Goodman Fielder's submissions as to common use of it as a valuation tool in the market. Like most valuation methodologies, it is an imperfect basis of comparison, but in this context it is overall no better or worse a guide to comparative value than using EBIT. The tables of trading and acquisition multiples in Goodman Fielder's submissions revealed an apparently reasonable attempt to base the comparison on projected data for the financial year to 30 June 2003, consistent with the forecast for Goodman Fielder's own earnings.

36. The only direct indication in the target's statement of the value of a Goodman Fielder share came from the bar charts. It was incomplete to the point of being misleading to present the charts of "Implied Offer Price" based on EBITDA as the only indicator of value, with no data on which the charts could be critically assessed. This was exacerbated by Goodman Fielder providing no expert report and no alternative basis for the determination of value.

Comparison Companies

37. Burns Philp objected to Goodman Fielder's choice of comparable transactions, and submitted that the selected transactions were of different companies in different parts of the food industry in Australia and overseas, and the characteristics of those companies made comparison with the Goodman Fielder transaction inappropriate, in particular:

    (a) many of the companies used in the bar charts are much larger than Goodman Fielder, and larger companies often trade at higher price/earnings ratios, justified by advantages of scale, brand recognition, index inclusion etc over smaller companies;

    (b) different multiples apply to companies in different areas of the food industry, those for companies making branded snacks being high and those for companies making unbranded commodity foods being relatively low;

(c) some of the multiples used in the charts were for companies in overseas markets or earlier years, for which multiples are typically higher than are currently seen in Australia at present; and

(d) Goodman Fielder should not be compared with branded snack food companies, as those form only a small proportion of its business.

Both Goodman Fielder and Burns Philp provided large amounts of data on other transactions, and market analysts' reports, to support their own conclusions. As is usual in such cases, both sides had elements in their arguments which carried weight.

38. On the whole, however, the Panel did not object to Goodman Fielder's choice of comparable transactions. Burns Philp was free to provide its views on appropriate alternative companies or transactions to Goodman Fielder shareholders. Ideal comparable transactions would involve recent transactions in shares in companies comparable in size to Goodman Fielder, engaged in a similar mix of operations, operating and traded in the same or similar markets. Neither party provided even one example which met all of these criteria, and it would have been surprising if they had. It is because ideal comparable transactions are rare that valuation using comparison multiples is not an exact science and requires judgement by the valuer.

39. Goodman Fielder's selection of comparable transactions is not obviously or deliberately misleading. In particular, while Goodman Fielder is a lot smaller in absolute terms than some of the US and European companies in the tables, it is large in the Australian context. Accordingly, like the large overseas companies in the tables, its price may benefit from inclusion in indices, attracting fund managers' attention etc.

40. It was appropriate to include snack food companies in the bar charts, together with commodity food companies, as Goodman Fielder's business is a mixture of branded and commodity products. Goodman Fielder submitted that snack foods, and branded foods are the most important components of its future business and so are very material to valuation of Goodman Fielder in future.

41. The Panel recognises this, however, it considers that it would have been preferable for Goodman Fielder to flag the relatively small proportion of its earnings which branded snack foods currently comprise, or only applied the snack foods multiple to the snack foods earnings component of Goodman Fielder. Indeed, Goodman Fielder stated in its submissions that no one acquisition multiple "refers to the value of the 'whole' of Goodman Fielder". It would have been preferable for Goodman Fielder to make this explicit in the target's statement.

42. In most cases, valuations of companies using valuation multiples requires significant selection and judgement from the valuer in marshalling, presenting

and assessing comparative data. Therefore, comparative charts of this kind are likely to be incomplete to the point of being misleading unless details of the comparable transactions, the estimates of EBITDA used and the years to which those estimates relate are disclosed. The information was readily available to Goodman Fielder, as it was disclosed to the Panel in Goodman Fielder's submissions. It should also have been disclosed to Goodman Fielder shareholders.

No Independent Expert Report on Valuation

43. Burns Philp submitted that the target's statement was deficient because the valuations in the bar charts were not supported by an independent expert's report. The Panel did not accept that the valuations were defective solely because no independent expert's report was provided, but it did think that the problems with the valuation may have been averted if such a report had been obtained. The absence of an independent expert's report placed a higher onus on the Goodman Fielder directors to expose their assumptions, data and methodology more clearly for examination. The various issues concerning experts are discussed together below.

Conclusion on the Bar Charts

44. Accordingly, the Panel decided that the bar charts in the target's statement were given as a guide to the possible range of values of Goodman Fielder shares, and as such were objectionable because they were not accompanied by the data on which they were based or other information which would allow readers to assess the reasonableness of Goodman Fielder's range of values. The same comments apply to the use of the acquisition multiples bar chart in the 18 January Advertisements.

45. The Panel informed parties that it proposed to make a declaration that unacceptable circumstances existed in relation to the affairs of Goodman Fielder and orders that Goodman Fielder publish corrective advertisements and a supplementary target's statement, containing the data concerning the comparisons, unless Goodman Fielder published appropriate corrective advertisements and a supplementary target's statement.

The Target's Statement - Earnings Forecast

46. The target's statement also included an earnings forecast for the financial year to 30 June 2003, stated to be based on actual results for the first five months of that the financial year and projected results for the remainder. The actual and projected results were not set out separately. Notes to the forecast discussed the commercial factors which had affected the earnings and the assumptions and risk factors relevant to the forecast.

47. Burns Philp submitted that the profit forecast was defective, because:

(a) Burns Philp suggested that Goodman Fielder's directors did not appear to Burns Philp to have sufficient expertise to themselves have prepared the forecast. Burns Philp suggested the forecast should have been supported by an independent expert's report;

(b) the qualifications and expertise of the individuals who prepared it were not disclosed;

(c) Macquarie Bank (which advised the Goodman Fielder directors, but was not held out to be the valuer) should have taken responsibility for the forecast;

(d) the actual and forecast figures used in compiling the forecast were not separately stated;

(e) the forecast failed to indicate the effect on the forecast figures of the relevant financial year being 53 weeks long, not the usual 365 days or 52 weeks; and

(f) it gave the misleading implication that the forecast had the support of Ernst & Young (who had prepared a report included in the target's statement titled "Limited Scope Review of Directors' Forecasts") .

48. The Panel agreed that further information should be provided about the identity and experience of the persons who prepared the forecast and the data and methods used to compile the forecast, and that the actual and forecast results should be disaggregated, but not with the other criticisms.

Responsibility for Forecast

49. Goodman Fielder's disclosure of the assumptions, accounting policies and risk factors affecting the forecast was generally satisfactory.

50. However, the Panel decided that it was unsatisfactory that there was no indication who had prepared the forecast, what their qualifications were and the data and methods used to compile the forecast. This information would allow users of the forecast to decide how much weight to put on the element of judgement involved in preparing the forecast.

Basis of Forecast

51. It was also unsatisfactory that the actual results to November 2002 were not presented separately, to allow users to understand the contribution of actual and forecast results to the overall forecasts given. Actual and forecast figures would have to be disaggregated in a prospectus, and the same standard is required in a target's statement. The information that Goodman Fielder provided to the Panel in its submissions was suitable for the purpose. Goodman Fielder submitted that the non-linear nature of its earnings meant

that publishing half-yearly actuals would be a misleading indicator to full year performance. The Panel considers that this issue could have easily been dealt with by an explanatory note from Goodman Fielder.

Macquarie's Role, Lack of Full Independent Expert Report

52. Burns Philp complained that it appeared that Macquarie Bank Ltd. had advised the Goodman Fielder directors in the directors' preparation of the target's statement, including the forecast and valuations, but that Macquarie was not named in relation to the forecast or valuation. The Panel accepted Goodman Fielder's response that the Goodman Fielder directors took responsibility for the forecast and the valuations and as such the description of Macquarie in the target's statement as advisers to the board, and the disclaimer of any part of the target's statement to be Macquarie's statement, was acceptable.

53. Burns Philp submitted that the forecast was deficient because it should have been supported by an independent expert's report. Burns Philp submitted this was necessary to enable shareholders to determine how much weight they could put on the forecast. Goodman Fielder in turn submitted that it is not uncommon in Australian practice for directors to provide forecasts in target's statements.

54. The Panel did not accept that the forecast was defective solely because a full independent expert's report was not provided, but it did think that some of the problems with the forecast may have been averted if a full report had been obtained. There was a limited scope review by Ernst & Young, which did not deal with whether the assumptions and data were reasonable.

55. The issues concerning the roles of experts are discussed together in the next main section of these reasons.

53 Week Financial Year

56. Goodman Fielder's forecast for the financial year 2003 was expressed to relate to a 53-week year. Burns Philp submitted that the forecast was deficient and misleading because it did not indicate the effect on the forecast figures of a 53-week year being used instead of a 52-week year. Burns Philp objected that the use of a 53-week year tends to increase the year's revenue over the same year, calculated on only 52 weeks. The increase is about 2%, and in this case it changes a 0.5% fall in earnings between financial years 2002 and 2003 into a 1.5% increase.

57. The Panel did not accept this submission. The practice of balancing on a weekend is common in the grocery sector, and with companies which trade with grocers. It leads to most financial years being marginally shorter than a

calendar year, balanced out by occasional longer years of 53 weeks.[9] The use of a 53-week year will not have a material effect on the revenue forecast.[10] However, Goodman Fielder's defense against the Burns Philp bid was largely about future growth opportunities and the achievements of its management in turning the business around. The fact that earnings growth would be negative if a 52 week year had been used may have been material in terms of perceptions as to the viability of Goodman Fielder's strategy. On that basis, it may have been preferable for Goodman Fielder to add at least a footnote, giving figures based on a 52 week year.

Adjustment of Earnings

58. The earnings forecast disregards items which Goodman Fielder regards as non-recurring. These include a disputed amount of tax, which could exceed the amount provided in respect of it by $100 million, an amount of $11 million relating to workers' compensation, and penalty interest on a loan which would become payable if the Burns Philp bid results in a change of control.

59. The Panel thinks it inappropriate to take the effect of using a 53-week year together with the information about tax, workers' compensation and the penalty interest as amounting together to a material misstatement in the forecast. They are separate items, each is immaterial in its own right, and there is no reason to believe that they have been marshalled to adjust Goodman Fielder's performance. If Burns Philp regards these items, or any of them, as important, it can comment on them in communications with Goodman Fielder shareholders.

The Target's Statement - Share Price Graph

60. Burns Philp objected to a graph showing the Goodman Fielder share price from 6 June 2002 to 6 September 2002 because it represented the share price over the period most favourable to the Board's contention that the bid undervalued Goodman Fielder.

61. The Panel did not raise the issue in its brief. The dates used have been stated clearly and Goodman Fielder has given its explanation why those dates are appropriate. If Burns Philp believes that the share price over another period

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[9] A year of precisely 52 weeks is 364 days long, so a company which uses 52-week years brings forward its balance day by 1 day a year (2 days in leap years), which must be adjusted for by using a year of 53 weeks once every 5 or 6 years. Subsection 323D(2) of the Corporations Act requires a financial year to be 12 months plus or minus up to 7 days.

[10] There is no evidence in Goodman Fielder's recent financial statements of 53-week years having been used, but Goodman Fielder said in an announcement of the results for the first half of the financial year 2003 "In line with standard practice in the grocery sector and as is necessary every few years, Goodman Fielder reports its financial results for a 53 week year. This falls due in F03 and therefore impacts on HY03, with the half reporting period extended to 3 January 2003, spanning a quiet trading period."

would be more representative, it can publish appropriate price graphs. However, Goodman Fielder did expose itself to criticism by selecting a commencement date which was most favourable to its case without mentioning that the immediate past period would have showed a materially lower share price and higher bid premium, and without explaining why it had selected the particular start date.

The Target's Statement – Tax Advice

62. After the Burns Philp bid was announced, Goodman Fielder announced that the Australian Tax Office had recently proposed to assess additional tax and penalties in relation to a long running dispute which Goodman Fielder had thought disposed of. In the target's statement, the directors stated that Goodman Fielder had sought independent advice and had been advised that "it should have no additional tax liability in relation to this matter". The target's statement did not identify the tax advisers or state that they had consented to the publication of a statement based on their advice.

63. Burns Philp submitted that the target's statement was deficient because it did not include the identity of the tax advisers or their consent, as required by subsection 638(5) of the Act. Nor did it include any qualifications to, or basis for, the advice. Burns Philp sought an order that that, as soon as practicable, Goodman Fielder issue, and send to all of its share and option holders, a supplementary target's statement that clearly set out:

(a) the material assumptions and qualifications contained in the tax advice or, in the event that the tax advice is unqualified or not subject to any assumptions, that fact;

(b) the identity of the provider of the tax advice; and

(c) whether the provider of the tax advice consents to being named in that capacity in the supplementary target's statement and whether the provider has consented to the inclusion of the disclosure relating to the tax advice in the target's statement,

and that Goodman Fielder use its best endeavours to obtain this consent.

64. The Panel required Goodman Fielder to provide a supplementary target's statement containing the names and consents of the experts who provided the tax advice, as required by section 638(5). The reasons are set out in the next section of these reasons, on the role of experts.

65. On balance, the Panel decided not to require the supplementary target's statement to set out details of the basis of the advice or the qualifications. Publication of that information was more likely to prejudice the company in its dealings with the Tax Office than to assist shareholders in deciding whether to

accept offers under the bid. By giving the gist of the advice without disclosing the qualifications and assumptions affecting the advice, the Goodman Fielder directors in effect represented to shareholders that those qualifications and assumptions were reasonable.

The Target's Statement - Role of Experts

66. As mentioned above, Burns Philp submitted that the valuation and forecast components of the target's statement were defective, because there should have been an independent expert report on those components, even by way of a review of the directors' valuation and forecast. The Panel did not accept that the Goodman Fielder directors could not provide valuation and forecast advice to their shareholders if they were suitably qualified and experienced. However, it observed that there were deficiencies in the presentation of both the valuation and the earnings forecast, which an independent expert would have been expected to avoid.

No Independent Report on Valuation or Forecast

67. In the Australian market, where an earnings forecast or a valuation is provided in the context of a takeover bid, the forecast or valuation is now expected and required to provide information about the information and assumptions used, the methods applied, the risks of error and the expertise and identity of those preparing the figures. This applies to directors' forecasts, as much as to those prepared by outside experts. This information is helpful to shareholders and analysts in deciding what reliance to place on the earnings forecast.

68. While an independent expert report is not required for every forecast or valuation, the standards applied by independent experts are one of the benchmarks for the reasonable expectations of shareholders and the market, when a valuation or forecast is published in the context of a takeover bid.

69. ASIC Practice Note 43.15 recommends that any asset valuation or profit forecast issued by directors during a takeover should be supported by a report by an independent expert using an appropriate method and reasoned, sustainable assumptions. It would have been preferable that the Goodman Fielder directors had taken this advice.

70. Whether or not an independent expert is retained, ASIC policy and contemporary standards require the basis of a valuation or forecast to be set out, sufficiently to allow an assessment of its reliability. The policy of ensuring that acquisitions of shares in companies take place in an informed, competitive and efficient market supports this requirement. An independent expert retained to value the company would have had to provide at least as much data about the comparable transactions as Goodman Fielder in fact used in preparing the bar charts, and analysts will require those data to assess the reasonableness of Goodman Fielder's range of values.

Limited Scope Report on Forecast

71. The target's statement contains a report by Ernst & Young headed "Limited Scope Review of Directors' Forecasts"[11]. In it Ernst & Young say of their report that:

> "Our limited scope review has been … undertaken to form an opinion whether anything has come to our attention which causes us to believe whether, in all material aspects, the forecast is properly prepared on the basis of the assumptions set out in section 4.2 of the Target's Statement and is presented fairly in accordance with Australian Accounting Standards and on a basis consistent with the accounting policies adopted and disclosed by Goodman Fielder for the year ended 30 June 2002 and those proposed to be adopted for the forecast period. …
>
> … our limited scope review did not include a review of the reasonableness of the assumptions nor the underlying data supporting the assumptions on which the Directors Forecast is based."

72. That is, the report is a review of the arithmetic and compilation of the forecast and its compliance with the accounting standards and with Goodman Fielder's accounting policies. Ernst & Young say specifically that they did not review whether the forecast was likely to come true, the assumptions were reasonable or the underlying data supporting the assumptions were correctly derived from the accounting records.

73. While the description in the Ernst & Young report itself of its scope is precise, that description is technical. In the introductory part of the target's statement and in the immediate context of the forecast the report is described as a "Review of Directors' Forecasts" and a "report by Ernst & Young Corporate Finance Pty Ltd in relation to the Directors' Forecast"[12]. The description does not distinguish between a full negative assurance review and a limited scope review.

74. In the Panel's view, the description early in the target's statement was likely to cause Goodman Fielder shareholders to assume that the review was a full negative assurance review report i.e. a full review of methods, data and assumptions. The overall effect is likely to be to induce a belief that the directors' forecast has been subject to a full negative assurance review.

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[11] Pages 40 – 42 of the target's statement.

[12] Page 14 of the target's statement. On page 60, in the consents, it is correctly described as a limited scope review.

Tax Advice

75. As mentioned above, the target's statement stated that Goodman Fielder had sought independent advice on a dispute with the Australian Tax Office and had been advised that "it should have no additional tax liability in relation to this matter". The target's statement did not identify the tax advisers or state that they had consented to the publication of a statement based on their advice.

76. Burns Philp submitted that the target's statement was deficient because it did not include the identity of the tax advisers or their consent, as required by subsection 638(5) of the Act. The Panel agreed.

77. Subsection 638(5) is as follows:

    "The target's statement may only include, or be accompanied by, a statement by a person, or a statement said in the target's statement to be based on a statement by a person, if:

    (a) the person has consented to the statement being included in the target's statement, or accompanying it, in the form and context in which it is included;

    (b) the target's statement states that the person has given this consent; and

    (c) the person has not withdrawn this consent before the target's statement is lodged with ASIC."

    The provision of such a consent may involve the person in civil or criminal liability if the statement is misleading or deceptive.[13]

78. The statement referred to above in subsection 638(5) is explicitly based on the advice of persons other than the directors. It makes no difference that those persons are not named.[14] Subsection 638(5) requires those persons' names and their consents to the use of their statements to be provided. It is important to the assessment of such statements that users of the target's statement be able to see that credible experts have been consulted and that they take responsibility for the statements made on their authority.

Role of Macquarie Bank

79. The target's statement disclosed that Macquarie Bank Ltd was the financial adviser to the board, but it did not expressly base any statement on a statement by Macquarie or include Macquarie's consent to the inclusion of any

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[13] Sections 670A and 670B.

[14] *Ampolex Limited v Perpetual Trustee Company (Canberra) Ltd* (1996) 20 ACSR 637 at 647.

statement[15]. Burns Philp submitted that Macquarie had assisted the board in drawing up the earnings forecast and bar charts of notional bid prices and otherwise with the preparation of the target's statement, and that subsection 638(5) of the Act required the Goodman Fielder directors to identify the statements in the target's statement for which Macquarie was responsible and to obtain and publish Macquarie's consent to that identification.

80. The Panel was prepared to infer that Macquarie had assisted the board to prepare the target's statement, but rejected the submission that this triggered a requirement for a consent under subsection 638(5). The requirement to obtain and publish a person's consent for a statement in a target's statement applies to a statement expressed to be made directly or indirectly on the authority of the person. Because there are no statements in the target's statement which are expressed to be made by Macquarie or to be based on statements by Macquarie, there are no statements to which the section relevantly applies, by contrast with the tax advice.

81. Nor are there any statements to which the policy of subsection 638(5) applies, even in the absence of a direct or indirect attribution to Macquarie. There are no statements attributed to unnamed experts. It is not misleading for the directors to assume responsibility for the target's statement, although they have received expert assistance in compiling it.[16]

82. Burns Philp relied on a previous Panel decision in *Normandy (No. 1)*. In a Chairman's letter which accompanied the target's statement in that matter, there was a statement that the target's financial adviser had advised the target's board that the bid was inadequate and undervalued the target company. The sitting Panel required the target to obtain the adviser's consent to the inclusion of that statement.[17] That statement, however, unequivocally attributed a view to a named person and subsection 638(5) (or at least the policy of that provision) required the consent to be obtained. The present situation is different, as the Goodman Fielder directors have not stated that Macquarie is responsible for any statement in the target's statement.

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[15] The target's statement said (in section 8.8): "Macquarie Bank Limited has given and not withdrawn before the date of this Target's Statement its consent to being named in this Target's Statement as financial adviser to Goodman Fielder. Macquarie Bank Limited does not make or purport to make any statement that is included in this Target's Statement and there is no statement in this Target's Statement which is based on any statement of Macquarie Bank Limited. Macquarie Bank Limited specifically disclaims responsibility for any statement included in this Target's Statement."

[16] Compare ASIC Practice Note 55.11(a).

[17] Subsection 638(5) may not have applied to the statement, but only because it was in a Chairman's letter rather than in the body of the target's statement. The better view is that it did apply, because the Chairman's letter accompanied the target's statement.

83. The directors did, however, state that the target's statement did not contain any statement based on a statement by Macquarie.[18] In the context of subsection 638(5), this is not objectionable, even assuming that the board took Macquarie's advice in preparing the target's statement.

The Accounting Condition and the Equal Access Assertion

84. Burns Philp sought several orders under which it would have had access to, or been provided with, specified categories of information concerning the business and accounts of Goodman Fielder. Those categories are:[19]

    (a) any information which had been provided to a person who had been invited by Goodman Fielder to put forward a proposal to acquire Goodman Fielder or part of its business (the **Goodman Fielder Information**) i.e. the Equal Access Assertion;

    (b) the tax advice referred to above, with any related information necessary to make a proper assessment of that advice (the **Tax Information**); and

    (c) information relating to disclosure of anomalies in Goodman Fielder's financial statements for the financial years 200, 2001 and 2002 (the **Accounting Information**).

85. Burns Philp submitted that unacceptable circumstances existed because of Goodman Fielder's failure to provide this information and access, under paragraph 602(b)(iii) of the Act (enough information to decide), or under paragraph 602(a) (the efficient, competitive and informed market principle). It submitted that a declaration and orders to rectify them were justified, because:

    (a) Goodman Fielder had already given access to the Goodman Fielder Information to prospective rivals bidders, and the efficient, competitive and informed market principle in paragraph 602(a) would be contravened if it did not give equal access to all bidders, including Burns Philp;[20]

    (b) if the "sell side" of the market (ie target shareholders) is entitled to equality of information and all the information they need to decide whether to accept the offer, participants on the "buy side" (ie bidders) should also have, so far as practicable, the same entitlement. Burns Philp said that the provision of private information to some bidders but not others will not promote an efficient market. Such an approach would favour the preferred bidder over the one that is not as welcome;

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[18] On page 60: it might have been better to have said there was no statement **said to be** based on a statement by Macquarie.

[19] Fuller descriptions of these categories are set out at paragraph 8 above.

[20] Obviously, this argument was limited to serious bidders who were prepared to give suitable assurances as to confidentiality, but those issues were not in contention.

(c) Rule 20.2 of the City Code on Takeovers and Mergers prohibits a target company from discriminating between rival bidders when it provides access to non-public information, subject to reasonable and even-handed confidentiality requirements;

(d) Goodman Fielder would incur a negligible additional detriment in providing the Goodman Fielder Information to Burns Philp as it had already provided the same information to other prospective bidders, on similar terms as to confidentiality;

(e) Burns Philp had a legitimate interest in receiving the Accounting Information because that information relates to whether the earnings forecast discussed earlier was a reasonable proxy for the maintainable earnings of Goodman Fielder;

(f) Goodman Fielder's accounts have for some years reflected high levels of rationalisation and restructuring costs, and for a proper assessment of the company's maintainable earnings it was essential to separate the recurring items properly from the non-recurring items;

(g) to the extent that it enables this separation to be made, the Accounting Information corresponds to information which would have been provided in the target's statement if Goodman Fielder had provided a valuation by an independent expert;

(h) if the market in general and Burns Philp in particular could not derive the information needed to value Goodman Fielder's shares from its accounts and other public disclosures, Burns Philp could suffer loss for which there would be no effective remedy;

(i) the efficient, competitive and informed market principle is for the benefit of bidders, as well as of other market participants;

(j) such a failure may occur, notwithstanding that Goodman Fielder complied with all of its obligations under the accounts provisions, the Listing Rules and the provisions concerning targets' statements; and

(k) for a market participant to need to seek a remedy in damages in the case of deficient public disclosure would in any case be a symptom of a failure of an informed, efficient and competitive market.

86. Similarly to the position which it had previously adopted in the Goodman Fielder 01 proceedings in relation to the Accounting Information, the Panel declined to make a declaration or order to this effect.

87. Goodman Fielder pointed out that there is no support in black letter law for the Equal Access Assertion, or the proposed orders to disclose information to Burns Philp. On the contrary, Goodman Fielder has a proprietary interest in its

confidential information and the directors have a right and obligation to use it for the best advantage of the company. Provided they do so for proper purposes, and within the other constraints of the Act[21], they have the right to barter access to that information in order to improve the terms and conditions of any bids, for the benefit of their shareholders.

88. Importantly, however, this position for directors (and the discussion below) is subject to the requirement in section 638(1) of the Act which requires at target's statement to include "*all information that holders of bid class securities and their professional advisers would reasonably require to make an informed assessment whether to accept the offer under the bid.*" In this case, Burns Philp did not convince the Panel that the information which it said Goodman Fielder had given to other potential acquirers of Goodman Fielder (or its assets) fell within the requirements of section 638(1).

89. Clearly, this will frequently be a very difficult decision for target directors to make. They must balance their desire to make best use of the target company's information to extract the highest value offers for their shareholders, against their shareholders' desire to assess whether the concerns raised by Burns Philp in its Accounting Conditions were valid and therefore good reason to accept the offer and exit their holding in the target company.

90. In exchange for giving access to company information, the Goodman Fielder directors received valuable undertakings from prospective alternative buyers, requiring them to make only recommended or permitted bids. Goodman Fielder said that similar access for Burns Philp would give Burns Philp additional certainty and reduce its risk. On that basis Burns Philp should not expect to be given the information for free. Goodman Fielder said that more favourable terms for Goodman Fielder shareholders was the appropriate price for reducing Burns Philp's risks and uncertainty. Subject to the overriding requirement to comply with statutory and regulatory requirements it has set out above in relation to the other constraints on target directors, the Panel considers this is a reasonable position for a target board.

91. Additional disclosure might be ordered, and access might be ordered instead, if the Panel found that the market was uninformed because a target had failed in disclosure obligations in annual reports, continuous disclosure or the target's statement, or that relevant misinformation had been given to shareholders. The Panel found no evidence supporting a finding to that effect about Goodman Fielder. Subject to the specific adverse findings above, the rest of the target's statement appears to be broadly in line with what is expected and required in the Australian market. It contains strong statements by the Goodman Fielder

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[21] For example, the insider trading provisions, the continuous disclosure provisions and the target's statement disclosure provisions.

directors that Goodman Fielder's financial statements and continuous disclosure are complete.

92. As ASIC pointed out, there are civil and criminal sanctions if the information published by Goodman Fielder in its annual reports, its continuous disclosure documents and its target's statement is deficient. Goodman Fielder also advanced the argument that if Burns Philp later found that the Goodman Fielder directors had misrepresented the financial position of Goodman Fielder Burns Philp could sue them for the damage caused. However, the Panel does not consider this a commercially reasonable position, as an award of damages against an individual is unlikely to be an adequate remedy in a matter in which so much money is involved, even though the existence of the sanction is a deterrent against takeovers participants making false or misleading statements because of its potentially material effect on them individually.

93. There is nothing in Australia corresponding with Rule 20.2 of the City Code. While the overall objectives of the City Code and of Chapter 6 are similar, not all provisions of the City Code should be adopted here, for there are many differences in how those objectives are achieved. In Australia more emphasis has been put on the obligation of the target company to inform shareholders by means of a target's statement.

94. ASIC analysed the issue of providing equal information as an issue about frustration of the bid. Without necessarily adopting that analysis, the Panel agrees with ASIC's conclusion that in general, failure of a target to comply with a disclosure condition imposed by a bidder would not constitute frustrating action, and that there appears to be insufficient in the present circumstances to make them an exception to that generalisation. Rather, the Panel repeats its view set out above, that the proper test is whether the target shareholders reasonably require the information to assess the merits of the bid and to decide whether or not to accept.

95. Accordingly, the Panel decided not to declare that unacceptable circumstances existed, or to make orders, because Burns Philp had not been given the access or the information it requested.

96. The Panel accepted, however, a submission by ASIC that the Goodman Fielder directors needed to explain to their shareholders why they have given access to rival bidders, but not to Burns Philp, both to resolve the apparent anomaly and to provide additional information about the bid process. The Panel advised Goodman Fielder that the explanation given in its submissions would be suitable. The Panel did not accept ASIC's submission that a similar explanation should be given as to why the Goodman Fielder directors have not complied with the accounting conditions.

DECISION

Decision On Supplementary Target's Statement

97. In relation to the target's statement, the Panel advised Goodman Fielder that, unless it received suitable undertakings, it proposed to make a declaration of unacceptable circumstances and orders that Goodman Fielder issue and send to its shareholders a supplementary target's statement, which must:

 (a) be approved by the Panel before publication;

 (b) set out the same data about the comparisons with other companies as are set out in the tables in section 4.3 of its submissions. The comparison companies should be grouped in the same way as in the tables of acquisition and trading multiples on pages 18 and 19 of the target's statement;

 (c) state that the bar charts and additional information should not be relied on as a valuation or as a guide to the value of Goodman Fielder shares;

 (d) set out:

  (i) who prepared the earnings forecast;

  (ii) their qualifications to do so;

  (iii) the nature of the data they used;

  (iv) an express statement that the Goodman Fielder directors are satisfied that the forecast is based on events and actions that the directors believe on reasonable grounds will take place; and

  (v) a statement why the Goodman Fielder directors believe the assumptions are reasonable;

 (e) spell out in non-technical language how limited the Ernst & Young review really was, why such a limited report was obtained, and explain that the Ernst & Young review should not be taken as a full negative assurance review of the forecast i.e. that Ernst & Young have not reviewed the earnings forecast itself, or the reasonableness of the assumptions and data used in its preparation; and

 (f) state why Goodman Fielder gave access to rival bidders, but not to Burns Philp.

98. Goodman Fielder provided and carried out suitable undertakings, and no declaration or order was made.

Decision on Corrective Advertisements

99. In relation to the 18 January Advertisements, the Panel advised Goodman Fielder that, unless it received suitable undertakings, it proposed to make a declaration of unacceptable circumstances and orders that Goodman Fielder publish corrective advertisements which must be:

    (a) approved by the Panel before publication;

    (b) the same size as the 18 January Advertisements;

    (c) published in the business sections of each newspaper in which the 18 January Advertisements appeared;

    (d) include the information and statement mentioned in paragraph 98; and

    (e) state that the bar charts and additional information should not be relied on as a valuation of Goodman Fielder shares;

    and orders that:

    (f) the same text be announced to ASX; and

    (g) Goodman Fielder may publish no advertisements concerning the subject-matter of the 18 January Advertisements, unless they include the information set out above.

100. Goodman Fielder provided and carried out suitable undertakings, and no declaration or order was made.

Decision on Access to Information

101. The Panel advised the parties that it proposed to make no declaration or order concerning Burns Philp's application in relation to the publication of the Goodman Fielder Information, the Tax Information or the Accounting Information, with the limited exceptions already mentioned.

Other Orders

102. Both Burns Philp and Goodman Fielder sought leave to be legally represented in the proceedings by their commercial solicitors, pursuant to section 194 of the ASIC Act. This leave is granted. There having been no declaration of unacceptable circumstances, there will be no order for costs.

Ilana Atlas
President of the Sitting President
Decision dated 06 February 2003
Reasons Published 04 December 2003

Takeovers Panel

Reasons for Decision - Goodman Fielder 02

Thursday 6 February 2003

PANEL ACCEPTS UNDERTAKING FROM GOODMAN FIELDER IN DECLINING BURNS PHILIP APPLICATION

The Takeovers Panel announces that it has today accepted the offer of undertakings from Goodman Fielder in relation to the application by BPC1 Pty Ltd and Burns Philp Co Ltd for a declaration of unacceptable circumstances and orders in relation to the affairs of Goodman Fielder Ltd. BPC1 is currently bidding for Goodman Fielder. It made the application on 20 January 2003.

On the basis of the undertakings from Goodman Fielder in relation to several of the matters raised by Burns Philp in its application, the Panel declined to make the declaration or orders requested. Under the undertakings, Goodman Fielder will publish a supplementary target's statement and advertisements containing additional and corrective information.

The advertisements and the supplementary target's statement will contain additional information about the companies used by Goodman Fielder in bar charts that Goodman Fielder had published in previous advertisements and in its target's statement. The bar charts were of comparative trading and acquisition multiples in transactions which Goodman Fielder has asserted are comparable to an acquisition of Goodman Fielder. The advertisements and target's statement will contain a statement that the bar charts and additional information should not be relied on as a valuation of shares in Goodman Fielder.

The supplementary target's statement will also contain:

- fuller information in relation to the Goodman Fielder directors' forecast of the company's earnings for the current financial year,
- a plain English explanation of the limited scope of the review of that forecast provided by Ernst & Young and
- the identity of the experts who provided Goodman Fielder with the advice mentioned in paragraph 6.3 of its target's statement that it should have no additional tax liability in relation to the dispute with the Australian Tax Office which it disclosed to the market on 8 January 2003.

The Panel has declined to order Goodman Fielder to provide additional information to Burns Philp in relation to the Accounting Conditions in the bid or to provide Burns Philp with access to non-public information similar to that given to prospective rival bidders. The Panel found no grounds to override Goodman Fielder's right to choose to whom and on what terms to provide access to its proprietary information in the best interests of Goodman Fielder and its shareholders. The supplementary target's statement will, however, provide an explanation of Goodman Fielder's decision not to give Burns Philp access.

A copy of the undertakings is attached.

The sitting Panel comprises Ilana Atlas (sitting President), Michael Tilley and Marian Micalizzi.

George Durbridge
Director, Takeovers Panel
Level 47 Nauru House,
80 Collins Street,
Melbourne VIC 3000

Ph: +61 3 9655 3553

George.durbridge@takeovers.gov.au

Takeovers Panel

In the matter of Goodman Fielder Limited (No 2)

Undertaking by Goodman Fielder Limited

Background

The undertaking set out below relates to the off-market takeover bid by BPC1 Pty Limited (***Burns Philp***) for all the issued ordinary shares in Goodman Fielder Limited (***Goodman Fielder***) in respect of which a bidder's statement was lodged with ASIC on 19 December 2002 and a target's statement was lodged with ASIC on 17 January 2003.

Undertaking

Pursuant to s201A(1) of the Australian Securities and Investments Commission Act 2001, Goodman Fielder undertakes to the Takeovers Panel that it will:

1. issue no later than 14 February 2003 (or such later date as is approved by the Panel) a supplementary target's statement and send it to Goodman Fielder shareholders as soon as possible after issuing it, which shall be approved by the Panel before publication (***supplementary target's statement***);
2. set out in the supplementary target's statement the same data about the comparisons with other companies as are set out in the tables in section 4.3 of the Goodman Fielder submissions lodged with the Panel on 28 January 2003. The comparison companies will be grouped in the same way as in the tables of acquisition and trading multiples on pages 18 and 19 of the target's statement. The supplementary target's statement will state that the tables are not a valuation of Goodman Fielder shares and should not be relied upon as a valuation;
3. set out in the supplementary target's statement:
   (i) disaggregated forecast financial information for the financial year to 30 June 2003, separately stating half year actual results to 31 December 2002;
   (ii) who prepared the earnings forecast in the target's statement;
   (iii) the qualifications of those persons who prepared the earnings forecast in the target's statement;
   (iv) the nature of the data and the methods used to compile the earnings forecast;
   (v) an express statement that the directors are satisfied that the forecast is based on events and actions that the directors believe on reasonable grounds will take place; and
   (vi) a statement why the directors believe the assumptions are reasonable;
4. set out in non-technical language in the supplementary target's statement how limited the Ernst & Young review is and why such a limited report was obtained. In particular, the supplementary target's statement will explain that the Ernst & Young review should not be taken as a full

review of the forecast and that Ernst & Young have reviewed the compilation of the forecast and its compliance with accounting standards, but not the reasonableness of the earnings forecast itself or of the assumptions and data used in the preparation of the earnings forecast;

5. state in the supplementary target's statement why Goodman Fielder has given access to potential rival bidders, but not to Burns Philp;

6. state in the supplementary target's statement the names and consents of the experts who provided the tax advice referred to in part 6.3 of the target's statement;

7. as soon as possible, and no later than Saturday 15 February, publish advertisements of the same size as the 18 January advertisements and in the same sections of the paper as the 18 January advertisements appeared (if the advertisements are published in the Saturday papers), or in the business sections (if the advertisements are published in a weekday or Sunday paper), of each newspaper in which the 18 January advertisements appeared, and announce the same text to ASX;

8. the advertisements will be approved by the Panel before publication. The advertisements will use the term "additional and corrective information" and include the information and statement referred to in paragraph 2 above, to the extent that those tables formed part of the 18 January advertisements. They will also state that the tables are not a valuation of Goodman Fielder shares and should not be relied upon as a valuation;

9. not publish any other advertisements concerning the same subject-matter as the 18 January advertisement unless they include the same information referred to in paragraph 8 above; and

10. provide a copy of the Staff Video to the Panel by 10 February 2003 and take such action in relation to the Staff Video as the Panel requires.

DATED: 6 February 2003

SIGNED FOR AND ON BEHALF OF)
GOODMAN FIELDER LIMITED)

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Director