



**In the matter of Australian Leisure & Hospitality Group Limited
[2004] ATP 19**

Catchwords:

disclosure in bidder's statement – efficient, competitive and informed market – minimum acceptance condition – statement of intentions – supplementary bidder's statement – undertaking to Panel

Corporations Act 2001 (Cth), sections 602(a), 602(b)(iii), 636(1), 636(1)(c) and 636(1)(m)

PowerTel Ltd (No. 2) [2003] ATP 27

AuIron Energy Ltd [2003] ATP 31

Mildura Co-operative Fruit Company Limited [2004] ATP 5

AAPT Ltd v Cable & Wireless Optus Ltd (1999) 32 ACSR 63

These are the Panel's reasons for declining to make a declaration of unacceptable circumstances in relation to the application made by Australian Leisure & Hospitality Group Limited on 20 July 2004, in relation to the bid for all of the ordinary shares in ALH by Bruandwo Pty Limited, and for accepting instead an undertaking by Bruandwo to issue a supplementary bidder's statement.

THE PROCEEDINGS

1. These reasons relate to an application from Australian Leisure & Hospitality Group Limited (**ALH**) dated 20 July 2004 alleging unacceptable circumstances in relation to the off-market takeover bid by Bruandwo Pty Limited (**Bruandwo**) for all the ordinary shares in ALH.

THE PANEL & PROCESS

2. The President of the Panel appointed Elizabeth Alexander (sitting President), Jennifer Seabrook (sitting Deputy President) and Robyn Pak-Poy as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the application.
3. The sitting Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.
4. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

APPLICATION

Parties

5. ALH is a public company listed on ASX. ALH was established as a business activity of Carlton and United Breweries (a division of Fosters Group Limited) in the mid-1990's. ALH was listed on the ASX on 7 November 2003, following a spin-off from the Fosters Group Limited. ALH's initial public offering was launched under a prospectus dated 19 September 2003 (**ALH's Prospectus**). ALH consists of four principal businesses: on-premise hotel operations, off-premise retail liquor, gaming, and property activities. ALH has 352.5 million ordinary shares on issue.

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6. Bruandwo is a proprietary company which is jointly owned by Bruand Investments Pty Limited, a member of The Bruce Mathieson Group and Woolworths Limited. According to its original bidder's statement, Bruandwo, through its wholly owned subsidiary, MGW Hotels Pty Limited, operates 31 hotels and 110 retail liquor outlets in Queensland, with sales in the 2003 financial year of \$220 million (this sales information was updated for the 2004 financial year in Bruandwo's supplementary bidder's statement issued following the Proceedings). The Bruce Mathieson Group also operates 26 hotels and 9 clubs and 15 retail liquor outlets in Victoria, with sales in the 2003 financial year of \$113 million (again, this sales information was updated in Bruandwo's supplementary bidder's statement issued following the Proceedings). Bruandwo stated in its bidder's statement that if its offer becomes unconditional, Woolworths and The Bruce Mathieson Group propose to recapitalise Bruandwo and reconstruct Bruandwo's ordinary share capital, with Woolworths holding 75% of the shares in Bruandwo and The Bruce Mathieson Group 25%. As part of this process, Woolworths and The Bruce Mathieson Group will procure the transfer and/or lease to Bruandwo of the hotel, club and liquor retailing business conducted by The Bruce Mathieson Group in Victoria. In these reasons, the Panel refers to the existing Bruandwo business and The Bruce Mathieson Group business together as the existing Bruandwo businesses.
7. On 8 July 2004, Bruandwo announced an off-market takeover bid for all the ordinary shares in ALH. The consideration offered under Bruandwo's bid is \$2.75 per share. The bid is subject to a number of conditions, including a condition that Bruandwo acquire a relevant interest in more than 50.1% of ALH ordinary shares on issue¹.
8. Bruandwo lodged its original bidder's statement with ASIC on 9 July 2004 and served a copy on ALH. Following correspondence between Bruandwo's and ALH's legal advisers, Bruandwo prepared and lodged a replacement bidder's statement on 23 July 2004.

The Application

9. ALH made its initial application to the Panel on 20 July 2004 and revised the application on 26 July 2004 following the lodgement of Bruandwo's replacement bidder's statement. Essentially, ALH submitted that the disclosures made in Bruandwo's bidder's statement were inadequate and sought a declaration of unacceptable circumstances and final orders requiring Bruandwo to rectify the perceived deficiencies. Its concerns related to the situation should Bruandwo obtain a relevant interest in more than 50% but less than 90% of ALH shares, as Bruandwo's bid is subject to a 50.1% minimum acceptance condition.
10. In its submissions, ALH identified the following categories in which it sought additional disclosure by Bruandwo:
 - (a) information about the identity and past performance of the existing Bruandwo businesses and about the business experience, knowledge and management expertise of Bruandwo and its shareholders and their respective officers and executives;

¹ Subparagraph 8.8(a)(i) of the bidder's statement.

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- (b) current financial information about the Bruandwo businesses with which Bruandwo proposed to integrate ALH's businesses;
- (c) the intentions of Bruandwo (as well as its joint owners and their respective officers) in relation to how it proposed to integrate ALH's businesses with the Bruandwo businesses, including clarification as to what Bruandwo meant by "integrate" and how conflicts would be dealt with;
- (d) what the effects of that integration may be; and
- (e) guidance in relation to the proposed dividend policy of ALH.

DISCUSSION

Principles regarding provision of information

11. There were two possible bases on which Chapter 6 might require additional information in the Bruandwo bidder's statement:
 - (a) the information relates to intentions Bruandwo or its officers have formed (or are choosing between) about the business, assets or employees of ALH, and disclosure is required under paragraph 636(1)(c); or
 - (b) although the information does not relate to any other specific head in subsection 636(1), disclosure is required under paragraph 636(1)(m), because it is material to a shareholder's decision whether to accept the bid or retain their shares.
12. Whether or not either of these grounds is made out, the Panel is concerned to ensure that, as far as possible:
 - (a) ALH shareholders are given enough information to enable them to assess the merits of Bruandwo's bid (paragraph 602(b)(iii)); and
 - (b) acquisitions of shares in ALH take place in an efficient, competitive and informed market (paragraph 602(a)).
13. Information should only be provided to shareholders and the market, however, if it is sufficiently reliable that it could not be considered speculation².

Shareholders' decisions

14. Because Bruandwo's bid is subject to a 50.1% minimum acceptance condition, but Bruandwo has said that it intends to compulsorily acquire the minority's shares if it is able to do so,³ it is possible that shareholders will retain ALH shares in circumstances where Bruandwo holds more than 50% but less than 90% of the ALH shares.
15. Accordingly, the decision in respect of which Bruandwo is required to inform each shareholder is whether to accept the cash now on offer or to retain their ALH shares, possibly becoming minority shareholders in a company in which Bruandwo holds a

² The Panel made similar observations in *PowerTel Ltd (No. 2)* [2003] ATP 27 (at [58]-[68]) when considering the information a target was required to include in a target's statement regarding the target's financial prospects, should the bid fail. As discussed below, the Panel considers that similar principles regarding what information is material to target shareholders also applies to the inclusion by a bidder of information about the financial prospects of the target should the bid succeed, but in circumstances where some target shareholders retain minority holdings.

³ Section 3.3 of the bidder's statement.

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majority of the shares. To assess the value of their ALH shares in this eventuality involves shareholders forming a view as to how Bruandwo would change how ALH is managed and how these changes would affect the value of their shares. Unlike information about alternative bids or the merits of selling on-market, which Bruandwo is not required to provide to ALH shareholders⁴, information about the future of an investment in ALH under Bruandwo's majority control relates directly to the choice with which Bruandwo's offer confronts ALH shareholders, even though this may not be Bruandwo's preferred outcome⁵.

16. In submissions provided by the parties, the information relevant to that choice was resolved into three main issues: integration intentions, management expertise and dividend policy intentions.

Integration Intentions

17. The Bruandwo bidder's statement included the following statement of intention at section 3.3:

To undertake a detailed review of the activities and undertakings of ALH to evaluate its performance, profitability and prospects and to develop a detailed plan for the integration of the businesses of ALH with the businesses of Bruandwo (which will include the businesses referred to in section 2.5) with the objective of enhancing revenue, reducing operating costs, achieving other operating efficiencies and otherwise maximising the operating performance of the combined group.

As part of this review, Bruandwo intends to review employment functions across the combined group including, but not limited to, the corporate, finance and accounting, human resources, information technology, legal and risk management functions with a view to eliminating any duplication of functions and reducing costs and thereby maximising the benefits arising from the integration of the businesses of ALH with the businesses of Bruandwo.

18. The bidder's statement did not further specify what Bruandwo meant by "integrating" ALH with its existing businesses. However, Bruandwo advised the Panel that it did not mean to sell the existing Bruandwo businesses or their assets and liabilities into ALH, or vice versa. Bruandwo offered to add a statement to this effect to its bidder's statement, both during its preliminary correspondence with ALH and in its submissions in the Proceeding.
19. In their submissions, the parties debated whether a bidder is (or can be) required to disclose the benefits which it hopes to derive from the takeover. Subsection 636(1) imposes no specific requirement to this effect and in general, bidders are not required to disclose these benefits. There is, however, no clear-cut exclusion of this sort of information, and these benefits should be disclosed in a particular case to the extent that they are in that case material to shareholders' choice between accepting the bid and retaining their shares and are not mere speculation.

⁴ The Panel noted that in *AAPT Ltd v Cable & Wireless Optus Ltd* (1999) 32 ACSR 63, Austin J rejected any suggestion that the bidder was required to provide information for the purpose of assisting shareholders to assess the likelihood of an increase in its bid price, or the merits of selling on-market or the merits or likelihood of any transaction other than the bid.

⁵ The Panel has considered similar issues in the context of a shareholder approval under item 7 of section 611: *Aulron Energy Ltd* [2003] ATP 31, at [56]-[60].

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20. In its submissions, ALH argued that the industry experience of Bruandwo's principals and the large amount of money it was offering for ALH indicated that Bruandwo did have a definite idea of how it would change, and later run, the ALH business as part of its integration programme.
21. Bruandwo stated in its submissions, however, and the Panel accepted, that it did not have, and was not able to access, the detailed, non-public information on ALH's operations which would allow it to state precisely how it would integrate ALH with its existing businesses. Therefore, while Bruandwo may have had clear ideas about how it would prefer to run ALH's business, Bruandwo had no detailed information about how ALH's management was currently running that business or about any obstacles which it might encounter in implementing its preferred business model which may have enabled Bruandwo to provide detailed financial projections showing the impact of their integration objectives on the financial performance of ALH.
22. However, the Panel considered that Bruandwo should have been able to list the principal objectives of its planned integration. That list would be "hard" information of a sort that could usefully be provided to ALH shareholders, particularly given the expertise of Bruandwo's principals, whereas statements giving detailed and/or quantified descriptions of the financial impact of any future integration may have been speculative⁶.
23. The Panel accepts that references in a bidder's statement to integration may have to be imprecise, where the bidder does not have access to information on which to base detailed integration plans. However, the Panel considered that Bruandwo could, and should, have given a better indication of the directions it would pursue, particularly as it had already developed some objectives for the integration, albeit without the detailed internal information on ALH to crystallise its integration plans.
24. The Panel considered that Bruandwo should provide supplementary information, relevant if it obtained majority control of ALH but not full ownership:
 - (a) clarifying that it did not plan to transfer ownership of the existing Bruandwo businesses to ALH, or of the ALH business to Bruandwo; and
 - (b) setting out the objectives it would pursue in integrating the two businesses.

Bruandwo's management expertise

25. How well Bruandwo might run ALH, compared to the current management, and compared to the consideration offered in the bid, is critical to an offeree's decision whether to hold or sell their ALH shares.
26. In this context, the identities of Bruandwo's nominees for election to the ALH board are relevant. Bruandwo provided the Panel with information about the regulatory approvals it had sought for the appointment of certain of its own directors to the board of ALH, showing that it had at least started the process of selecting its nominees.

⁶ In *AAPT*, Austin J did not require the bidder to disclose details of a worked-out integration plan which was disclosed in evidence in the Court proceedings, on the basis that much of the detail either was tentative or would be unhelpful to shareholders.

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27. Also relevant is the competence of Bruandwo to run the ALH business (including the competence of the joint venturers who control Bruandwo). There were short statements in Bruandwo's original bidder's statement about the numbers of properties operated by the Bruandwo businesses and their turnover (reproduced at [6] above). The Panel did not consider these sufficient to assess whether or not Bruandwo would be a sound manager of ALH.
28. The Panel considered that Bruandwo needed to provide:
 - (a) enough information to allow shareholders to form a view whether it would be a sound manager of ALH, by reference to the track record of Bruandwo's existing businesses; and
 - (b) the identities of the people it currently proposed to appoint to the ALH board. Bruandwo stated that it would seek to reconstitute the board of ALH to reflect Bruandwo's majority ownership, which the Panel understood to take into account that the number of nominees Bruandwo would nominate would depend on its degree of success with the bid.
29. The Panel considered it appropriate to allow Bruandwo some scope in proposing the form of the track record information provided, having noted that Bruandwo had confirmed that it did not intend to merge the businesses and that any future transaction with ALH which Bruandwo may propose to achieve its integration objectives would need to comply with all relevant legal requirements (including the related party provisions of both the Act and the ASX Listing Rules). The Panel felt that Bruandwo's proposed additional disclosure, which informed ALH shareholders that each of the existing Bruandwo businesses and Woolworth's liquor retailing business had been profitable, and indicated how earnings had grown relative to sales in those operations, gave them a reasonable basis to form their own opinion regarding Bruandwo's management track record.
30. If Bruandwo had intended to merge ALH with the existing Bruandwo businesses, continuing ALH shareholders might have become shareholders in the merged business. In that case, the Panel might have required Bruandwo to provide ALH shareholders with more details in relation to the financial performance for those businesses, or pro forma financial statements for the merged business. However, given that Bruandwo had confirmed that this was not the case, the Panel did not think such disclosure was necessary.

Dividend Policy Intentions

31. In ALH's Prospectus, ALH stated that it proposed to follow a policy of paying out 70% of its annual profits as dividends. In its bidder's statement, Bruandwo stated that:

Bruandwo, through its nominees on the board of directors of ALH, intends to review the dividend policy of ALH to ensure that it reflects an appropriate balance between ensuring that ALH retains sufficient funds to meet its ongoing activities and capital requirements and the payment of dividends to shareholders.

32. There is no specific requirement in section 636 for a bidder to state its intentions regarding the dividend policy of a target of which it obtains majority control but not complete ownership, although a bidder's intentions regarding future dividends may be highly relevant to people considering continuing as shareholders.

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33. The Panel considers that this information is material to a shareholder contemplating retaining an investment in the target and, if the bidder can provide firm information about the dividend policy the target would pursue under the bidder's control, it should do so.
34. Obviously, bidders face difficulties with stating their intentions. By saying that it will stop the target paying dividends if it obtains control, a bidder risks criticism for coercing shareholders to sell. By saying it intends continuing a particular dividend policy, a bidder risks inducing shareholders to retain their shares and creating an obstacle to later reducing the dividend, even if good reasons emerge for reducing it. However, the Panel considers that these are not reasons for not providing appropriately qualified statements of intention. Bidders may properly protect themselves by stating that any indication of future dividend policy is subject to factors such as post-bid review, the contingencies of future years and time limits.
35. Bruandwo's statement of intentions provided ALH shareholders with no guidance as to the dividend policy that ALH would follow under Bruandwo's majority control. For these reasons, the Panel considered that Bruandwo needed to state whether or not it proposed to follow the existing policy of ALH, of paying out 70% of annual profits as dividends.

DECISION

Letter to Bruandwo

36. For the reasons outlined above, the Panel considered it appropriate that ALH shareholders be provided with more information than was provided in the Bruandwo bidder's statement sent to shareholders on 26 July 2004.
37. On 5 August 2004, the Panel wrote to Bruandwo identifying the areas in which the Panel considered the Bidder's statement did not contain sufficient information relevant to the case that Bruandwo received sufficient acceptances to satisfy the 50.1% condition but less than 90% of the ALH shares. The Panel advised Bruandwo that it was considering making a declaration of unacceptable circumstances and orders unless Bruandwo dealt with the identified deficiencies by making further disclosure of:
 - (a) the nature and objectives of the proposed integration;
 - (b) information regarding the track record of the existing Bruandwo businesses to allow ALH shareholders to form a view on Bruandwo's ability to manage ALH in the future;
 - (c) the identity of Bruandwo's proposed candidates for election to the ALH board; and
 - (d) Bruandwo's intentions regarding ALH's current dividend policy.
38. The Panel invited Bruandwo to provide a draft supplementary bidder's statement dealing with the above information requirements for the Panel to review. The Panel also gave ALH an opportunity to make submissions regarding the draft supplementary bidder's statement before the Panel accepted Bruandwo's undertaking to lodge it.

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39. That supplementary bidder's statement:
- (a) described the objectives of Bruandwo's plan to integrate the business of ALH into Bruandwo's and Woolworth's existing businesses, principally to use in ALH's business Bruandwo's expertise in running hotels and Woolworths' expertise in liquor retailing. It also described a number of areas in which Bruandwo would seek cost savings and efficiencies, and where combined buying or marketing might be cheaper or more effective;
 - (b) pointed out that how far Bruandwo could carry out its integration proposals and whether cost savings could be made would depend on the results of a full review of ALH, which could only be undertaken with access to relevant internal information;
 - (c) in particular, pointed out that ALH's directors (and particularly its independent directors, if Bruandwo did not have full ownership of ALH after the bid) would have to decide whether Bruandwo's integration proposals were in the best interests of ALH;
 - (d) listed and gave brief particulars of the officers of Bruandwo who are likely to be considered first for appointment to the board of ALH;
 - (e) gave more extensive and more recent particulars of the growth and the strengths of the existing Bruandwo businesses and of Woolworths' liquor retailing business, and statements about the growth of sales and the comparative growth of earnings for each of those businesses; and
 - (f) described the dividend distribution history of MGW Hotels and Woolworths, mentioned the contingencies which may affect the decision of a future ALH board as to what (if any) dividend ALH should pay in future years and stated that Bruandwo had formed no intention whether to retain the existing policy of paying a dividend equal to about 70% of profit.

Undertaking and conclusion of Proceedings

40. The Panel accepted an undertaking from Bruandwo to issue a supplementary bidder's statement in the form reviewed by the Panel, and to send clean copies of the amended parts of the bidder's statement (rather than the amending supplementary bidder's statement) to ALH shareholders as soon as possible after its issue. Bruandwo's undertaking is set out in Annexure A to these reasons. In accepting Bruandwo's undertaking, the Panel noted that Bruandwo had confirmed in the draft supplementary bidder's statement that it would extend its offer period by at least 5 business days.
41. Based on the undertaking provided by Bruandwo, the Panel concluded the Proceedings on the basis that it was not necessary to make a declaration of unacceptable circumstances and that no order was required.

Elizabeth Alexander AM
President of the Sitting Panel
Decision dated 13 August 2004
Reasons published 27 August 2004

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Annexure A - Undertaking provided by Bruandwo

UNDERTAKING BY BRUANDWO PTY LIMITED ABN 68 098 212 134

Background

The undertaking set out below relates to the off-market takeover bid by Bruandwo Pty Limited (**Bruandwo**) for all the issued ordinary shares in ALH in respect of which a bidder's statement was lodged with ASIC on 23 July 2004.

Undertaking

Pursuant to s201A(1) of the Australian Securities and Investments Commission Act 2001, Bruandwo undertakes to the Takeovers Panel that it will issue no later than 13 August 2004 (or such later date as is approved by the Takeovers Panel) a supplementary bidders statement substantially in the form of the supplementary bidders statement a copy of which is attachment "A" to this undertaking (or in such other form as the Takeovers Panel and Bruandwo agree) and send it to ALH shareholders as soon as possible after issuing it.

DATED: 9 August 2004

SIGNED for and on behalf of **BRUANDWO PTY LIMITED**

R K S Jeffs

Company Secretary