



In the matter of Patrick Corporation Limited

[2005] ATP 17

Catchwords:

Announcement – disclosure – bid consideration – in specie dividend – bidder’s statement

Corporations Act, sections 631, 657D, 657E, 657A

These are the Panel’s reasons for the decision not to commence proceedings following the application by Patrick Corporation Limited for a declaration of unacceptable circumstances in relation to announcements by Toll Holdings Limited of a proposed takeover bid for Patrick.

THE PROCEEDINGS

1. These reasons relate to an application (**Application**) to the Panel from Patrick Corporation Limited (**Patrick**) on 5 September 2005 under sections 657A, D & E of the Corporations Act 2001 (Cth) (**Act**) in relation to a proposed takeover offer by Toll Holdings Limited (**Toll**). Patrick applied to the Panel for a declaration of unacceptable circumstances and interim and final orders.

THE PANEL & PROCESS

2. The President of the Panel appointed Mr Stephen Creese, Ms Marie McDonald (sitting President) and Mr Simon Withers as the sitting Panel to consider the Application.

SUMMARY

3. The Panel declined to commence proceedings in response to the Application.
4. The Application alleged that Toll’s investor presentation dated 22 August 2005 and two ASX announcements on 22 August and 5 September 2005 in relation to the proposed bid (**Toll Announcements**) had given rise to unacceptable circumstances by:
 - (a) misrepresenting the intention to cause Patrick to distribute shares in Virgin Blue Holdings Limited (**Virgin Blue**) (**Virgin Blue Distribution**) to be part of the consideration offered under the Toll bid; and
 - (b) including the value of the proposed Virgin Blue Distribution in calculating the value of the Toll bid and the premia of the bid value over pre-announcement trading prices of Patrick shares.
5. The Panel did not consider there was any real likelihood made out by Patrick in its application that the aspects of the Toll Announcements of which Patrick complained, would cause unacceptable circumstances having regard to the limited (if any) effect of those aspects of Toll’s announcements, on:
 - (a) the control or potential control of Patrick; or

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- (b) the acquisition, or proposed acquisition, of a substantial interest in Patrick or another company.
6. Therefore, the Panel declined to commence proceedings, under Regulation 20 of the Australian Securities and Investments Commission Regulations 2001.

APPLICATION

Interim orders sought

7. Patrick sought interim orders under section 657E of the Act that, pending the final determination by the Panel of the proceedings the subject of the Application, Toll be restrained from lodging a bidder's statement with ASIC or making any further disclosures to the market or market participants in relation to the Toll bid which suggest that the proposal in the Toll Announcements to effect a distribution of shares in Virgin Blue from Patrick if Toll acquires control of Patrick forms part of the value of the Toll bid.

Declarations sought

8. The Application sought a declaration under section 657A of the Corporations Act that each of the following constitutes unacceptable circumstances:
- (a) the inclusion of the value of the shares in Virgin Blue which Toll intends to cause Patrick to distribute to Patrick shareholders as described in:
 - (i) the calculation by Toll in the Toll Announcements regarding the value of the Toll bid; and
 - (ii) the calculations of the premia of the value of the Toll bid over the trading price of Patrick shares in the periods prior to the first Toll announcement on 22 August 2005; and
 - (b) the inclusion of equivalent disclosures to those in paragraph (a) above in the investor presentation made by Toll to the ASX on the same day as the 22 August announcement.

Final orders sought

9. Following the making of the declaration referred to in paragraph 8 above, Patrick sought the following consequential orders under section 657D(2) of the Act:
- (a) that Toll make an announcement to the market in a form which is approved by the Panel which states clearly that the intention to distribute Virgin Blue shares does not form part of the value offered under the Toll bid, and restates its calculations of the offer value and premia which were included in the Toll Announcements so that those calculations relate only to the Toll shares and cash to be offered as consideration under the Toll bid;
 - (b) that Toll provide a copy of its bidder's statement to the panel prior to lodgment with the ASX and ASIC so that the Panel can be satisfied that Toll's disclosures in its bidder's statement are consistent with the orders in (a); and
 - (c) such further or other orders as the Panel thinks fit.

DISCUSSION

Toll Announcements

10. In Toll's 22 August 2005 announcement, it referred to "a proposal to acquire Patrick Corporation Limited" and stated that
"Under the proposal, Patrick shareholders will receive for each Patrick share:
 - 0.4 Toll shares;
 - \$0.75 cash; and
 - an *in specie* fully franked special dividend from Patrick of 0.3 Virgin Blue shares."
11. The Panel considered that it was unlikely that the market had been misled by the Toll Announcements as to the source of the cash and shares Patrick shareholders would receive under Toll's offer for Patrick shares. The Panel also considered that Patrick shareholders would aggregate the three elements of value offered by Toll in assessing the value that they would receive for their Patrick shares, and thus it was not misleading to describe the value of the Toll offer as the sum of the three elements (provided that any risk that an accepting shareholder would not receive all 3 elements of the package was also disclosed). The Panel considered that the Toll Announcements had made the source of the different elements of the package sufficiently clear.
12. The Panel considers that Toll has made it sufficiently clear in its announcements that the cash and Toll shares component (**Consideration**) will come from Toll as part of the bid consideration regulated under the Act and that the Virgin Blue Distribution would come from Toll procuring Patrick to make the special dividend once Toll's bid for Patrick was successful.
13. The Panel considered that the section headed "**Conditions and Payment Terms**" in Toll's 22 August announcement gave sufficient information, for an initial announcement, about the payment times and mechanisms for the market to understand the major elements of the proposal.
14. The Panel noted Toll's clear statement in its announcements that accepting Patrick shareholders will receive the Virgin Blue Distribution. In its 5 September 2005 announcement Toll stated:
"if Toll's takeover bid is successful, Patrick shareholders who accept the offer **will** receive for each Patrick share:" (emphasis added).
15. Toll then went on to set out the elements of the Consideration and Virgin Blue Distribution again. The Panel considers that the 5 September 2005 statement was, in many ways, clearer than 22 August 2005 statement given that the 22 August 2005 statement stated that:
"Toll **intends** that Patrick will pay the special dividend as soon as practicable after Toll obtains control of Patrick and the conditions of its offer are satisfied or waived." (emphasis added)

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16. Patrick shareholders and the market are entitled to rely on Toll's clear statement that they will receive the Virgin Blue Distribution if the Toll bid is successful.
17. The Panel noted that Toll did not make clear in its statement what it meant by its bid being "successful". Toll's announcements did say that its bid will be conditional on receiving sufficient acceptances to enable it to compulsorily acquire the remaining shares. The Panel has asked Toll to clarify to the market what Toll means by its bid being "successful".
18. The Panel also noted that Patrick has repeatedly sought to have Toll expressly state that the Consideration is consideration offered under the takeover bid and that the Virgin Blue Distribution is a separate proposal to be delivered after Toll's bid. Patrick makes great play of this difference. The Panel has not received any evidence that there is great significance in the differentiation, and does not consider that Toll's statements have been misleading. However, the Panel has advised Toll that if is aware of any circumstances whereby the issue would matter, Toll should disclose that (in its bidder's statement at the latest) and explain the consequences of those circumstances.
19. The Panel noted that there is an additional point which Toll has not brought to Patrick shareholders' attention in its announcements. It is the fact that if Toll's bid proceeds and is "successful", and Toll procures Patrick to make the special *in specie* distribution of Virgin Blue shares, the dividend will be distributed to all Patrick shareholders, including those who do not accept Toll's offer.

Deliverability of Virgin Blue shares Distribution

20. The Panel notes that Toll has made no mention in any of its announcement of any circumstances, or possibility, of its bid being "successful", for example by all defeating conditions being waived or met, and Patrick shareholders who accept Toll's offer **not** receiving the Virgin Blue Distribution.
21. The Panel has advised Toll that Toll should make immediate disclosure to the market if Toll considers that there may be circumstances where its bid is "successful" (for example by all defeating conditions being waived or met) but Patrick shareholders who accept Toll's offer may, or will, **not** receive the Virgin Blue Distribution. If Toll considers that there may be such circumstances, the Panel would expect a clear and detailed analysis of the circumstances, the risk factors associated with them, and the consequences for accepting Patrick shareholders.
22. Otherwise, the Panel has advised Toll that it considers that the market, and Patrick shareholders, are entitled to act on the basis that such circumstances will **not** happen, and that Toll will take all steps to ensure that such circumstances do **not** and will **not** happen.
23. The Panel has advised Toll that it expects that the Toll bidder's statement will make full and clear disclosure of the mechanism by which Toll proposes to deliver the Virgin Blue Distribution.

Patrick shareholder understanding

24. The Panel did not consider that Toll's aggregation of the Consideration and the Virgin Blue Distribution together as the total value which Patrick shareholders

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would receive for their Patrick shares was misleading (subject to Toll disclosing any circumstances in which Patrick shareholders would not receive the Virgin Blue Distribution). The Panel considered that the aggregation of the Consideration and Virgin Blue Distribution was appropriate and is how most Patrick shareholders would assess the Toll takeover bid.

25. If the fact that the Virgin Blue shares would be delivered by way of an in specie dividend from Patrick, rather than as consideration directly from Toll and regulated under the Act, was material to any Patrick shareholder's decision, then that fact had been clearly disclosed.
26. Similarly, the fact that the Virgin Blue Distribution depends on Toll "procuring" Patrick to do so has been adequately disclosed.
27. The Panel considered that ordinary shareholders would understand the mechanism that Toll is proposing, that it has some accepted precedents in Australia, and that Toll had given sufficient information in its initial announcements concerning its bid.

Details required in initial announcement

28. Patrick submitted to the Panel that the Toll announcements did not provide sufficient detail as to the proposal and that the market in Patrick shares would trade in an uninformed manner in the period between Toll's initial announcement and the lodging of Toll's bidder's statement. The Panel considers that an initial announcement of an intention to make a takeover does not require all details of mechanisms etc to be disclosed. However, any bidder who omits a material condition or qualification of any part of its proposed bid runs a material risk of its initial announcement being misleading by omission and risks contravening section 631 of the Act.

Orders requested

29. Patrick had requested in its application that the Panel make orders in relation to Toll's bidder's statement. The Panel considered that it currently has no basis for considering that Toll's bidder's statement will provide other than full and clear disclosure concerning the Consideration and Distribution and the mechanisms for delivering them. Therefore, the Panel advised Patrick that it would be premature to consider the content of the Toll bidder's statement until Toll had lodged it. The Panel noted that Patrick was free to make any new application if it considered, after reviewing the Toll bidder's statement, that issues of unacceptable circumstances might arise. The Panel did not consider that it had been shown any basis to move from its position that it does not pre-vet takeovers documents without proper cause.

DECISION

30. The Panel did not consider there was any real likelihood made out by Patrick in its application that the aspects of Toll's announcements on 22 August 2005 and 5 September 2005 of which Patrick complained, would cause unacceptable circumstances having regard to the limited (if any) effect of those aspects of Toll's announcements, on:
 - (a) the control or potential control of Patrick; or

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- (b) the acquisition, or proposed acquisition, of a substantial interest in Patrick or another company.
31. Therefore, the Panel declined to commence proceedings, under Regulation 20 of the Australian Securities and Investments Commission Regulations 2001.
 32. As the Panel has made no declaration of unacceptable circumstances, it makes no orders as to costs.

Marie McDonald
President of the Sitting Panel
Decision dated 8 September 2005
Reasons published 9 September 2005