



**In the matter of Patrick Corporation Limited 02
[2006] ATP 10**

Catchwords:

ACCC; adequate time to consider offers; ASIC modification; behavioural undertakings; closing date; decline to commence proceedings; directors' knowledge of relevant businesses; listed company disclosure; offer period; restrain dispatch of a document; scrip offer; supplementary bidder's statement; undertaking; undertaking to ACCC; withdrawal rights

Toll Holdings Limited; Patrick Corporation Limited; SembCorp Logistics Ltd; Virgin Blue Limited; Pacific National;

Corporations Act 2001 (*Cth*) section: 602(b)(ii), 633(1); 657A, 657D,
Australian Securities and Investments Commission Regulations: Reg 20

These are the Panel's reasons for declining to commence proceedings in relation to an application from Patrick which would have required Toll to withhold dispatch of its Seventh Supplementary Bidder's Statement for two weeks from the date it gave it to Patrick, and to extend the closing date of its bid to a month after the date of dispatch of the Seventh Supplementary Bidder's Statement. Toll offered the Panel an undertaking to extend the closing date of its offers to at least one month after the date of dispatch of its Seventh Supplementary Bidder's Statement and to offer a withdrawal right to any Patrick shareholder who had accepted the Toll offer on or prior to the date Toll announced the Seventh Supplementary Bidder's Statement.

SUMMARY

1. These are the Panel's reasons for declining to commence proceedings in relation to an application (the **Application**) to the Panel from Patrick Corporation Limited (**Patrick**) on 22 March 2006 in relation to the takeover offer by Toll Holdings Limited (**Toll**) for all of the ordinary shares in Patrick. Patrick sought a declaration of unacceptable circumstances, interim orders and final orders.
2. Patrick submitted that Toll's revised offer for Patrick (**Toll Revised Offer**), as set out in its announcement dated 22 March 2006 and in its Seventh Supplementary Bidder's Statement dated 22 March 2006, is materially different to its original offer which was dated 29 September 2005. Patrick submitted that the Toll Revised Offer therefore represents, for all intents and purposes, a new offer for Patrick and should be treated as such for the purposes of Chapter 6 of the Corporations Act 2001 (*Cth*)¹. Patrick submitted therefore that the Patrick directors and Patrick shareholders should be given sufficient time and information to enable them to properly assess the Toll Revised Offer and that the timetable for a new offer should be followed for the Seventh Supplementary Bidder's Statement.
3. However, the Panel considered that with the undertakings which it accepted from Toll, the Patrick directors and Patrick shareholders would have a reasonable time to

¹ All section references are to the Corporations Act 2001 (*Cth*) unless otherwise stated.

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consider the Toll Revised Offer. This was in part due to the knowledge which Patrick could be presumed to have in relation to the business affected by undertakings which Toll had given to the ACCC to achieve ACCC consent to the Toll Revised Offer, in part due to the non-crucial size of most the businesses affected by the undertakings which Toll had given to the ACCC, and in part to the public disclosures which had been made in relation to each of the elements of the change to which Patrick pointed.

4. The Panel also considered that as SembCorp Logistics Ltd (**SembLog**), which Toll had announced an offer for on 6 March 2006, was a significant, publicly listed company, Patrick would have had reasonable information and some time to consider the effects of the acquisition on Toll, given the date of Toll's public announcement of its proposed acquisition of Semblog.
5. The Panel further considered that Patrick, as 50% owner of Pacific National could be assumed to have good knowledge of Pacific National and its businesses, so would be well placed to assess the effects of the undertakings Toll gave to the ACCC in relation to selling 50% of Pacific National.
6. Toll undertook to:
 - (a) extend the closing date of its offer to 28 April 2006, being one month from the date of the dispatch of the Seventh Supplementary Bidder's Statement, which would be sent to Patrick shareholders on Monday 27 March 2006; and
 - (b) subject to consent from ASIC, offer a withdrawal right for all Patrick shareholders who accepted the Toll offer on or before 22 March 2006, being the date on which Toll lodged its Seventh Supplementary Bidder's Statement.

THE PROCEEDINGS

The Panel & Process

7. The President of the Panel appointed Graham Bradley (sitting Deputy President), Carol Buys and Nerolie Withnall (sitting President) as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the Application.
8. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.
9. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

Background

Toll's offer

10. On 22 August 2005 Toll announced its intention to make a takeover offer for all of the ordinary shares in Patrick (**Toll Offer**). The Toll Offer is described in the Bidder's Statement dated 15 September 2005 and despatched on 3 October 2005 as supplemented by the Supplementary Bidder's Statements dated 2 November 2005, 11 November 2005, 24 November 2005, 3 February 2006, 17 February 2006, 6 March 2006 and 22 March 2006.

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The Toll Revised Offer

11. On 22 March 2006, Toll announced the Toll Revised Offer. The changes to the terms of its offer included:
 - (a) the cash amount was increased to \$1.90;
 - (b) the special dividend of Virgin Blue Ltd shares was discontinued².
12. The number of Toll shares offered under the Toll Revised Offer remained the same 0.4 Toll shares per Patrick share.
13. The offer period was scheduled to close on 13 April 2006, three weeks after the date on which Toll proposed to dispatch the Seventh Supplementary Bidder's Statement to Patrick shareholders.

SembCorp Logistics Limited

14. On 6 March 2006, Toll announced the acquisition of an agreement to acquire a 60% interest in SembLog and an offer for the balance of the shares, which valued SembLog at S\$1.4 billion.
15. SembLog is a public company listed on the Singapore stock exchange.

The ACCC undertakings

16. On 9 February 2006, the ACCC announced that it had instituted proceedings against Toll in the Federal Court seeking an injunction to prevent Toll acquiring a further interest in Patrick or taking any steps to acquire or exercise substantial influence or control over the business, assets or affairs of Patrick.
17. On 27 February 2006, Toll announced that it would propose revised undertakings to the Federal Court to address the competition concerns articulated by the ACCC.
18. On 11 March 2006, the ACCC announced that it had accepted revised undertakings from Toll in relation to its proposed acquisition of Patrick, and that the ACCC would withdraw its opposition to the acquisition. Toll announced that it would announce a revised offer for Patrick within the following two weeks. The ACCC published its announcement and the undertakings on its website.
19. The undertakings contained significant divestment commitments (**divestment undertakings**), including:
 - (a) 50% of the shares in Pacific National;
 - (b) Patrick's Bass Strait operations;
 - (c) Patrick's Tasmanian freight forwarding operations;
 - (d) Patrick's or Toll's vehicle logistics operations; and
 - (e) the Minto terminal.
20. Toll also committed to significant behavioural undertakings (**behavioural undertakings**) including:

² This had been set out as a possibility in the original bidder's statement.

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- (a) an arrangement that would assist a new rail line haul competitor to commence east-west rail freight services in competition with Pacific National; and
- (b) not to utilise its control of Patrick's port operations to discriminate in favour of Toll's land-side logistics operations.

Application

- 21. In the Application, Patrick sought a declaration under section 657A that unacceptable circumstances exist in relation to the Revised Offer:
 - (a) given the scope and nature of changes of the Revised Offer; and
 - (b) having regard to the principle in section 602(b)(ii).
- 22. Patrick sought an interim order under section 657E that Toll be restrained from despatching its Seventh Supplementary Bidder's Statement pending the hearing of the Application.
- 23. Patrick also sought the following final orders under section 657D:
 - (a) that Toll be restrained from despatching its Seventh Supplementary Bidder's Statement in respect of the Revised Offer until 14 days after it has been lodged with ASIC and the ASX and served on Patrick;
 - (b) that Toll be directed to:
 - (i) extend the offer period so that it expires no earlier than one month after its Seventh Supplementary Bidder's Statement has been despatched; and
 - (ii) grant withdrawal rights to any Patrick shareholder that accepts the Toll Revised Offer in the period between lodgement and despatch of its Seventh Supplementary Bidder's Statement; and
 - (c) such further or other orders as the Panel thinks fit.

Submissions of the parties

Patrick

- 24. Patrick submitted that the changes to Toll generated by the SembLog acquisition and the ACCC undertakings, plus the dropping of the Virgin Blue special dividend made the Toll Revised Offer essentially a new offer. Patrick said:

"Patrick submits that the significance of these matters is such that substantial amounts of supplementary disclosure will need to be made by Toll, analysed by the Patrick Board and the review of the Patrick Board considered by Patrick Shareholders in order for an informed decision to be made on the Revised Offer. Therefore, the Revised Offer represents, for all intents and purposes, a new offer for Patrick and should be regarded in substance as a new offer for the purposes of Chapter 6 of the Corporations Act. Such an approach is necessary in order to ensure that the Patrick Board and Patrick Shareholders are given sufficient time and information to enable them to properly assess the Revised Offer."
- 25. Patrick also included a schedule to one of its letters to the Panel which set out a list of information deficiencies which Patrick submitted it had identified in the Seventh Supplementary Bidder's Statement. Patrick's letter advised that it would seek to

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resolve the disclosure issued it had identified with Toll and may seek to expand its application to include the disclosure issues.

Toll

26. Toll submitted that:

- (a) Patrick had been persistently pressing for urgent release of a supplementary bidder's statement from Toll to update the market and Patrick shareholders as to the various changes arising from the SembLog acquisition and the ACCC undertakings;
- (b) the changes to Toll were not material, either individually or collectively;
- (c) there had been a wealth of disclosure and publicity concerning all of the "changes" for a considerable period of time leading up to the release of the Seventh Supplementary Bidder's Statement, so any claims for large amounts of time to consider the changes should be discounted for disclosure of the changes that had been made and the time for which those disclosures had already been public;
- (d) the changes to the bid consideration were not unusual or unexpected such that Patrick shareholders or directors would require a long period to assimilate and assess the changes;
- (e) the Panel and ASIC had both published policy which required dispatch of a supplementary bidder's statement to shareholders in certain circumstances;
- (f) restraining the Seventh Supplementary Bidder's Statement would disadvantage smaller, less sophisticated shareholders who normally make decisions based on the paper copies, whereas professional investors would have already downloaded copies of the Seventh Supplementary Bidder's Statement from ASX or Toll's website and would have an information advantage;
- (g) the disclosure issues which Patrick had identified were all capable of being resolved (if they needed resolving at all) by supplementary disclosure after the Seventh Supplementary Bidder's Statement had been dispatched.

DISCUSSION

Restraining despatch of Toll's Seventh Supplementary Bidder's Statement

27. The Panel considered that:

- (a) the takeover bid for SembLog was a material matter (costing S\$1.4 billion compared to Toll's market value of \$4.7 billion); and
- (b) the execution of the ACCC undertakings were important (relating to divestitures worth over \$1.5 billion and significant behavioural undertakings),

in the context of the Toll Revised Offer because the offer consideration comprises mainly of Toll scrip. On that basis, three weeks from the date of lodgement of the Seventh Supplementary Bidder's Statement to the proposed close of the Toll Revised Offer, appeared unlikely to be adequate time for shareholders and directors of Patrick to assess the merits of the Toll Revised offer.

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28. That said, the Panel considered that the following issues were mitigating factors in relation to the amount of time that either Patrick shareholders or directors would reasonably require to assess the merits of the Toll Revised Offer:
- (a) the Patrick shareholders and directors had been advised of Toll's takeover offer for SembLog on 6 March 2006 (or earlier);
 - (b) SembLog is a significant public company listed on the Singapore Stock Exchange so there was a large amount of publicly available information on it which should have been readily available to the Patrick directors. SembLog is a company in Patrick's own business area and Patrick is likely to have kept itself informed of the nature and operations of similar business around the world in its efforts to maintain its international competitiveness;
 - (c) there had been considerable media comment and analysis of the effects and merits of the SembLog transaction for Toll following the announcement;
 - (d) the terms of the ACCC undertakings were publicly disclosed by the ACCC on 11 March 2006;
 - (e) while the divestment undertakings and behavioural undertakings given to the ACCC were significant they were not fundamentally crucial to Toll and its overall operations;
 - (f) there had been considerable media comment and analysis of the effects and merits of the ACCC undertakings for Toll following the announcement;
 - (g) Patrick is a 50% owner of Pacific National and thus should have had full knowledge of the nature of the 50% of Pacific National which Toll was required to divest, and significant knowledge of the potential effects of the behavioural undertakings which Toll was required to provide to the ACCC;
 - (h) Patrick is the owner of the Patrick AutoCare business which was likely to be sold by Toll to comply with its undertakings³, and thus had good knowledge of the nature of that divestiture (or a reasonable knowledge by inference of the nature of Toll's autologistics business which competed directly with Patrick's AutoCare business);
 - (i) Toll's interest in PrixCar Services Ltd which it would have to dispose of is only 33% and is immaterial in size compared to Toll;
 - (j) the Patrick Tasmania freight forwarding business which Toll would have to dispose of is owned by Patrick and is relatively small;
 - (k) the Patrick Bass Strait shipping business which Toll would have to dispose of is owned by Patrick and is relatively small; and
 - (l) at the date of the Panel's considerations, the Seventh Supplementary Bidder's Statement had been in Patrick's possession for three days, Patrick had commenced its analysis already and the document would not be dispatched for a further two days.

³ Both Toll and Patrick have autologistics divisions and Toll was required to dispose of one of them.

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29. The Panel acknowledged Toll's submission that delaying the Seventh Supplementary Bidder's Statement would have some detriment to smaller Patrick shareholders. The Panel considered the balance between allowing Patrick directors some more time to review the Seventh Supplementary Bidder's Statement in order to advise their shareholders, and pressing for expeditious dispatch to shareholders.
30. However, when the Panel considered all of the issues, on balance, there was not a sufficient reason for the Panel to restrain dispatch of Toll's Seventh Supplementary Bidder's Statement any longer to allow the Patrick directors an opportunity to review Toll's Seventh Supplementary Bidder's Statement.

Extension of offer

31. For similar reasons, the Panel considered that the time which Patrick directors and shareholders would have to consider the Seventh Supplementary Bidder's Statement after its dispatch, and any response supplementary target's statement from Patrick, would be adequate under the terms of the Toll undertakings.
32. The Panel considered that the period of one month from the time of dispatch of the Seventh Supplementary Bidder's Statement to the proposed closing date of the offer would allow Patrick to prepare and dispatch a supplementary target's statement and allow Patrick shareholders sufficient time to consider the Toll Revised Offer and the Patrick response to it.
33. The Panel was not provided with any material reasons or evidence that extending the closing date of the Toll Revised Offer would adversely affect Toll or any other person.

Withdrawal rights

34. The Panel considered that the changes which had occurred to Toll and the Toll offer were sufficient to warrant granting the right to withdraw acceptances made on or before the date of the announcement of the Seventh Supplementary Bidder's Statement. The Panel considered that the withdrawal rights offered by Toll under its undertakings would be appropriate given the small percentage of shares which had been accepted into the Toll offer, less than 0.1% at the time of the Application.

Disclosure issues

35. At the time of its decision, the disclosure issues were still subject to negotiation between Patrick and Toll. On that basis, the Panel did not consider them. It advised Patrick of this, and that Patrick was free to bring a fresh application in relation to the disclosure issues if its negotiations with Toll broke down and Patrick considered that there were still material disclosure issues to be resolved.

Toll Undertakings

36. The Panel noted the two sets of undertakings provided by Toll which had assisted resolution of these proceedings. The first was the undertaking given by Toll on 23 March 2006 that it would not dispatch the Seventh Supplementary Bidder's Statement before 1.00 p.m. on Monday 27 March 2006, to allow the Panel time to consider the Patrick application. The second was the final undertakings given by Toll in relation to the scheduled closing date for its bid, and the withdrawal rights for

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Patrick shareholders who had accepted on or before the date Toll announced the Seventh Supplementary Bidder's Statement.

DECISION

Decline to commence proceedings

37. For the reasons set out above, and on the basis of the undertakings offered by Toll, the Panel, under Regulation 20 of the ASIC Regulations 2001, declined to commence proceedings in response to the Application.

Orders

38. As the Panel did not commence proceedings, it made no orders as to costs or otherwise.
39. Following a request by the President, on 22 March 2006 the Panel accepted an undertaking from Toll not to despatch its Seventh Supplementary Bidder's Statement to Patrick shareholders before 1.00 pm on Monday, 27 March 2006. Accordingly, the Panel did not make interim orders.

Undertakings

40. The Panel accepted a written undertaking from Toll⁴. Toll undertook to the Panel to:
- (a) extend the closing date of its offer to Friday 28 April 2006, being at least one month from the date of dispatch of the Seventh Supplementary Bidder's Statement;
 - (b) dispatch the Seventh Supplementary Bidder's Statement to Patrick shareholders on Monday, 27 March 2006;
 - (c) subject to consent from ASIC, offer a withdrawal right for all Patrick shareholders who accepted the offer on or before 22 March 2006, being the date on which Toll lodged the Seventh Supplementary Bidder's Statement;
 - (d) apply to ASIC by no later than Monday, 27 March 2006 for a modification of the Corporations Act to allow for the offer of the withdrawal right; and
 - (e) make the withdrawal right open for exercise up to and including 5 April 2006, being the date occurring one week after receipt by Patrick shareholders of the Seventh Supplementary Bidder's Statement, assuming that Patrick shareholders receive the Seventh Supplementary Bidder's Statement on 29 March 2006.
41. The Panel accepted this undertaking on the basis that the undertaking would allow the Patrick directors and Patrick shareholders a reasonable time to consider the Toll Revised Offer.

Nerolie Withnall

⁴ The undertaking given by Toll to the Panel is annexed to these reasons.

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President of the Sitting Panel

Decision dated 25 March 2006

Reasons Published 30 March 2006

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Annexure A - Toll undertaking

Background

The undertaking set out below ("**Undertaking**") relates to the off-market takeover bid by Toll Holdings Limited ("**Toll**") pursuant to which Toll has made offers ("**Offer**") to acquire all of the issued fully paid ordinary shares in Patrick Corporation Limited ("**Patrick**") in respect of which:

1. Toll lodged with the Australian Securities & Investments Commission ("**ASIC**") and sent to Australian Stock Exchange Limited ("**ASX**") and Patrick a bidder's statement on 15 September 2005 and supplementary bidder's statements on 2 November 2005, 11 November 2005, 24 November 2005, 3 February 2006, 17 February 2006, 6 March 2006 and 22 March 2006 ("**Seventh Supplementary Bidder's Statement**"); and
2. Patrick lodged with ASIC and sent to ASX and Toll a target's statement on 18 October 2005 and a supplementary target's statement on 20 October 2005.

Unless expressly stated to the contrary, where a term or expression is used but not defined in this Undertaking, such term or expression shall have the meaning given in the *Corporations Act 2001*(Cth) ("**Act**").

Undertaking

Pursuant to s.201A(1) of the *Australian Securities and Investments Commission Act 2001* (Cth), Toll hereby undertakes to:

1. announce to ASX on 27 March 2006 that it will:
 - (a) extend the offer period of its Offer until 7:00pm on 28 April 2006 pursuant to s.650C(1) of the Act ("**Extension**"); and
 - (b) subject to ASIC granting the modifications of the Act referred to in paragraph 5 below: offer to each of the Patrick Shareholders who accepted the Offer on or before 22 March 2006 ("**Affected Shareholders**") the right to withdraw their acceptance of the Offer ("**Withdrawal Right**"), such right to be capable of being exercised on or before 7:00pm on 5 April 2006;
2. dispatch the Seventh Supplementary Bidder's Statement to Patrick Shareholders on or before 28 March 2006;
3. lodge a notice of the Extension with ASIC and give notice of such Extension to Patrick and to all Patrick Shareholders as soon as practicable in accordance with s.650D of the Act;
4. subject to ASIC granting the modifications of the Act referred to in paragraph 5 below:
 - (a) offer to each of the Patrick Shareholders who accepted the Offer on or before 22 March 2006 ("**Affected Shareholders**") the right to withdraw their acceptance of the Offer ("**Withdrawal Right**"), such right to be capable of being exercised on or before 7:00pm on 5 April 2006; and

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- (b) on or before 29 March 2006, dispatch to each of the Affected Shareholders a letter (accompanied by a withdrawal form) advising the Affected Shareholders of the existence of the Withdrawal Right and the manner and deadline by which they may exercise the Withdrawal Right; and
- 5. apply to ASIC no later than 27 March 2006 under s.655A of the Act for such modifications of the Act (including s.653B(1)(a) and s.654A(1)) as may be necessary or desirable to facilitate the offer of the Withdrawal Rights to Affected Shareholders.

Dated as of 25 March 2006