



**In the matter of Patrick 03
[2006] ATP 12**

Catchwords:

Additional disclosure – adequate time – collection agent – corrective disclosure – equal opportunity – institutional shareholders – misleading statements – material omissions – professional investors – supplementary bidder’s statement – institutional acceptance facility – unequal benefit – withdrawal right

Corporations Act 2001 (Cth) sections 602(c), 623, 624, 650F, 657A, 657D, 657E

Australian Leisure and Hospitality Group Ltd 03 [2004] ATP 25

Patrick Corporation Ltd; Toll Holdings Ltd

These are the Panel’s reasons for deciding to decline part of the application by Patrick Corporation Limited relating to the acceptability of the institutional acceptance facility which Toll Holdings Limited had established in relation to its takeover offer for all of the shares in Patrick. The other part of the application related to various disclosure issues regarding the content of Toll’s seventh supplementary bidder’s statement. Following a request from the Panel to use their best endeavours to resolve any of the disclosure issues that they could between themselves, the parties advised the Panel that Toll had undertaken to Patrick to issue a further supplementary bidder’s statement. Patrick accepted that Toll’s additional disclosure had addressed sufficient of its disclosure concerns for it not to press that part of its application.

SUMMARY

1. These reasons relate to an application (the **Application**) to the Panel from Patrick Corporation Limited (**Patrick**) at 6.30 p.m on Saturday 25 March 2006 in relation to a takeover offer by Toll Holdings Limited (**Toll**) for all of the ordinary shares in Patrick (**Toll Offer**).
2. In summary, Patrick submitted that Toll’s seventh supplementary bidder’s statement dated 22 March 2006 (**Supplementary No.7**) contained various materially misleading statements and had omitted various material matters.
3. Patrick also submitted that the institutional acceptance facility which Toll had arranged to be established in relation to the Toll Offer (**IAF**) contravened the “equality of opportunity” principle in section 602(c) of the *Corporations Act 2001* (Cth)¹ because the IAF was not available to all Patrick shareholders.
4. During the proceedings, the Panel requested the parties to use their best endeavours to resolve between them any of the disclosure issues raised by Patrick in the Application. Following negotiation, the parties advised the Panel that Toll had undertaken to Patrick to issue a further supplementary bidder’s statement and that Patrick considered that the further supplementary bidder’s statement addressed sufficient of its disclosure concerns that it would not press that part of the Application. Accordingly, the Application was narrowed so that the only remaining issue in the proceedings was in relation to the IAF.

¹ Statutory references are to the Corporations Act, unless otherwise stated.

5. The Panel concluded that while the IAF might influence when and how a Patrick eligible, professional investor might accept the Toll Offer, the availability of the IAF did not breach the equality of opportunity principle in Section 602, and was not a benefit that was likely to induce those shareholders to accept the Toll Offer and was, therefore, not proscribed by the Section 623. The Panel considered that the disclosure arrangements for the IAF would ensure that the market remained properly informed. The Panel also considered that the terms of the Corporations Act and the IAF would ensure that other Patrick shareholders had an adequate time to consider their acceptance decision if the 50.1% condition for the IAF was triggered and the eligible shareholders' shares were accepted into the Toll Offer.
6. Accordingly, the Panel did not find that unacceptable circumstances existed, and declined the part of the Application relating to the IAF.

PROCEEDINGS

The Panel & Process

7. The President of the Panel appointed, Graham Bradley, 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 to the Application

Toll's Offer

10. On 22 August 2005, Toll announced the Toll Offer. The Toll Offer was 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 and 6 March 2006.

The Toll Revised Offer

11. On 22 March 2006, Toll announced its revised offer for Patrick (**Revised Toll Offer**) and lodged its Supplementary No.7 with the Australian Securities and Investment Commission (**ASIC**) and Australian Stock Exchange Ltd. (**ASX**).
12. The changes to the terms of the Toll Offer included that:
 - (a) the cash amount was increased to \$1.90²;
 - (b) the IAF was included;
 - (c) a distribution in specie of Virgin Blue Ltd shares was eliminated; and

² Or potentially \$2.20 subject to two conditions.

- (d) Toll would waive its 90% minimum acceptance condition if it acquired 50.1% of Patrick.

APPLICATION

Declaration sought

13. In relation to the IAF, Patrick sought a declaration under section 657A that the alleged discriminatory nature of the IAF constituted unacceptable circumstances as it was not made available to all Patrick shareholders and therefore contravened the “equality of opportunity” principle in section 602(c).

Interim orders sought

14. Patrick initially sought an interim order under section 657E that Toll be restrained from despatching Supplementary No.7 pending the hearing of the Application. However, following successful negotiations between the parties in relation to disclosure issues, the Panel declined to make the interim order.

Orders sought

15. In relation to the IAF, Patrick sought orders under section 657D that Toll:
- (a) do one of the following:
 - (i) revoke the IAF;
 - (ii) amend the terms of the IAF so that it was made available to all Patrick shareholders; or
 - (iii) offer all Patrick shareholders who accepted the Revised Toll Offer a right of withdrawal on terms equivalent to those shareholders who participated in the IAF; and
 - (b) amend the Supplementary No.7 in terms approved by the Panel prior to its dispatch to Patrick shareholders to reflect the course of action chosen by Toll concerning the IAF.

INSTITUTIONAL ACCEPTANCE FACILITY

16. Toll announced in its Supplementary No.7 that it would arrange for the establishment of the IAF by Citigroup. It provided a description of the mechanism and stated that it would announce details of the number of shares subject to the IAF with its daily substantial holder notices and would announce the triggering of the IAF.³
17. The IAF was available to holders of 100,000 or more shares in Patrick who were professional investors for the purposes of section 9. There were about 220 such shareholders (0.6% of all Patrick shareholders) who held between them approximately 81.8% of all shares in Patrick.

³ This statement tracked an undertaking to the Panel, mentioned in *Australian Leisure and Hospitality Group Ltd 03 [2004] ATP 25* at [59] to [61].

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18. The IAF comprised a series of agreements between Citigroup as collection agent and each participating shareholder under which the shareholder:
 - (a) notified its present intention to accept the Toll Offer (when and if the Toll Offer became unconditional);
 - (b) instructed the collection agent to accept the bid on its behalf (once Toll issued a confirmation notice (**Confirmation Notice**)); and
 - (c) provided a completed acceptance or an instruction to a custodian to accept the offer.
19. The Confirmation Notice was effectively an undertaking from Toll to the collection agent to declare the bid free of any remaining defeating conditions, no later than when acceptances for the shares subject to the IAF were provided to Toll. The terms of the IAF provided that the collection agent would only act on the Confirmation Notice if the IAF shares and the other shares in which Toll (and its associates) advised it had relevant interests (**aggregated interests**) were together more than 50% of the shares in Patrick.
20. This mechanism was designed to provide Toll with a sufficient basis to give the Confirmation Notice when Toll's aggregated interests constituted more than 50% by number of Patrick shares, without:
 - (a) the participating shareholders accepting the bid before that point; or
 - (b) the collection agent, which held their instructions as a bare trustee, acquiring relevant interests in the participating shareholders' Patrick shares, which could exceed 20% of the shares in Patrick.
21. The collection agent would provide Toll daily with a statement of the number of shares which were subject to the IAF to enable Toll to disclose its aggregated interests before 9.30 a.m. on each trading day.
22. Toll submitted that there would be at least 7 days between the day on which Toll gave the Confirmation Notice and the close of its bid, because:
 - (a) Toll had to declare the bid free of the 90% minimum acceptances condition before it gave the Confirmation Notice, and under paragraph 650F(1)(b) it could not do this less than 7 days before the close of the bid; and
 - (b) if acceptances from the IAF shares took Toll's relevant interests over 50% of Patrick shares in the last week of the Toll Offer, section 624 would act to extend the Toll Offer for two weeks.

DISCUSSION

23. Toll identified in its submissions ten occasions since 2001 on which similar acceptance facilities had been offered in bids under the Act. The only previous proceedings before the Panel or the courts concerning an acceptance facility related

to disclosure about a facility offered by Bruandwo in connection with its bid for ALH, mentioned above⁴.

24. Commentators have identified two related reasons why bidders may offer acceptance facilities to institutional shareholders in companies where institutions hold significant proportions of the shares:
 - (a) First, some institutions hold shares under restrictive investment mandates which prevent the relevant institution from accepting a bid until it has become unconditional and control has passed above the 50% level.
 - (b) Second, even where there are no restrictions in mandates, institutions are often unwilling to accept a bid until the bid is declared free of defeating conditions.
25. For these reasons, completion of a bid can be held up by a vicious circle, even though the relevant institutions are otherwise satisfied with the price on offer, in which:
 - (a) institutional offerees cannot or will not accept the bid because it is still conditional or has not reached the relevant acceptance level, but;
 - (b) the bid remains conditional and that level is not reached, because the institutions have not accepted, and the bidder has no assurance that declaring its bid free from defeating conditions will induce the institutions to accept.
26. To break this circle, after discussions with shareholders as to the adequacy of the price, a bidder may declare its bid free of conditions, exposing both bidder and accepting offerees to the risk that contracts between them will be or become unconditional, without the bidder obtaining the desired level of control. However, the bidder has no certainty that its offer will be successful, and institutions that accept the offer have no assurance that they have accepted the winning offer.
27. From both a bidder's and an offeree's point of view, an acceptance facility is an alternative to declaring the bid free from defeating conditions before the bidder is assured of reaching control. Although a bidder who declares a bid free of a minimum acceptance condition often later receives the desired level of acceptances, this by no means always happens. An acceptance facility enables institutional shareholders to assure the bidder that it will receive sufficient acceptances before it declares its bid free of a minimum acceptance condition, without risking selling their shares unless and until the relevant level of acceptances is reached and the condition is dropped.
28. An acceptance facility is an open and accountable method for co-ordinating institutional shareholder acceptances, it avoids private communications between one institutional shareholder and another, or between institutional shareholders and bidder. If institutional shareholders do not accept a bid without such a facility, they may send no clear price signal: it may be because they are not satisfied by the price, or because of restrictive investment mandates, or because they merely still wish to

⁴ The acceptability of an IAF was not fully considered by the ALH 03 Panel. The Panel accepted undertakings in relation to disclosure, but the bidder did not establish an IAF during the ALH 03 Panel proceedings, and the reasons for those proceedings expressly disavow any endorsement of the facility which the bidder established in that case.

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retain flexibility to follow a higher price in a rival offer. If they do not take part in an IAF, it is likely to signal to the bidder that they are not satisfied with the price.

Patrick's submissions

29. Patrick submitted that the exclusion of the majority of shareholders from participation in the IAF meant that the provision of the IAF gave rise to unacceptable circumstances, because:
- (a) the shareholders eligible to use the IAF would have better opportunities than ineligible shareholders to participate in benefits accruing under the bid, contrary to the policy of paragraph 602(c), that so far as practicable, all holders of shares in the bid class have reasonable and equal opportunities to participate in the benefits accruing to shareholders under the bid;
 - (b) shareholders who participated in the IAF would receive benefits which would be likely to induce them to accept and which were not made available to all shareholders under the bid, contrary to the policy of section 623 and paragraph 602(c). Those benefits include the abilities to:
 - (i) indicate to Toll in some binding form that they wished to accept the bid; and
 - (ii) withdraw their acceptances and sell on-market or into a higher bid at any time before Toll gave the Confirmation Notice; and
 - (c) Toll would receive a benefit from shareholders' participation in the IAF, because it would have a virtual call option over the shares entered in the IAF, which it could exercise by giving a Confirmation Notice.
30. Patrick submitted that the self-imposed limitations in some of the institutions' mandates afforded no reason for providing benefits and opportunities to the institutions which were not provided to all Patrick shareholders. If the institutional shareholders chose to impose such limits on themselves, they did not earn any right to special treatment.
31. Patrick added that there was no reason in policy, logistics or the licensing provisions of the Act why the IAF could not be made available to all Patrick shareholders.
32. In fact, it would be a little more complex and expensive to structure an acceptance facility so as to take advantage of subsection 609(3), if it applied, if some of the participating shareholders were not professional investors.
33. Patrick acknowledged that the IAF was structured in much the same way as other recent acceptance facilities. It did not submit that Toll's existing and proposed disclosures about the IAF or acceptances into the IAF, were insufficient or defective, or that the IAF would be objectionable if it were made available to all Patrick shareholders. In particular, it did not suggest that the operation of the IAF might breach section 606 or attract section 671B.

Toll's Response

34. Toll submitted that the IAF was simply a procedural mechanism under which participating shareholders could indicate a present intention to accept when it was

clear that it would become unconditional. It conferred no monetary or timing benefit on participating shareholders and afforded no additional or unequal opportunities on eligible shareholders. By taking part in the IAF, until the Confirmation Notice was issued, shareholders did not accept the bid, undertook no binding obligations, and conferred on Toll no right or interest in their shares.

35. In particular, Toll submitted that:

- (a) It would not have a right comparable with a call option over shares under the IAF, because a participating shareholder could withdraw its instructions to the collection agent at any time until Toll gave the Confirmation Notice. Even if Toll did acquire an option over shares entered in the IAF, this would represent a benefit conferred by the participating shareholder on Toll, not a benefit conferred by Toll on the participating shareholder.
- (b) The power to withdraw their shares from the IAF was not a selective benefit to the participating shareholders. Because participation in the IAF was not acceptance of the bid, the ability to withdraw their shares merely put the participating shareholders in the same position as any other shareholder who had not accepted the bid, who could sell their shares on market or into a rival bid at any time. The IAF overcame a disadvantage suffered by some institutions, and that this was a practical necessity for the bid to become unconditional. Even if participation in the IAF was a benefit, it was not one which induced a shareholder to accept the bid: at most, it enabled the shareholder to signal their willingness to accept the bid earlier than they might otherwise have done.
- (c) It is a wide-spread commercial and market reality, which bidders must consider and address, that many shares in listed companies are now held by institutions with restrictive mandates. Those mandates tend to introduce inefficiencies into the market in the context of a bid, and it is beneficial to all shareholders and the market as a whole to provide a mechanism which overcomes those inefficiencies, if that mechanism does not provide benefits or opportunities to some shareholders and not to others.
- (d) The IAF facilitated discovery of major shareholders' willingness to sell on the bid terms, which promoted an efficient, competitive and informed market for control of Patrick shares and benefited all Patrick shareholders. The specific effect on some institutional shareholders (of allowing them to signal their intention to accept at the current price, in a way which was consistent with restrictions in their investment mandates) similarly benefited the entire market. All market participants could determine the level of support for the bid before the last-minute rush of acceptances which used to be common in bids with no acceptance facility.
- (e) Even if use of the IAF facilitated acceptances by participating shareholders, that did not mean that it afforded those shareholders a better opportunity to participate than the opportunity afforded to ineligible shareholders, who could effectively achieve the same result by giving suitable instructions to their brokers. Toll submitted that non-participating shareholders would be assured of a reasonable opportunity to accept the bid after the IAF triggered because if

the IAF triggered before the section 630 notice, shareholders would have at least a week before the bid closed, or if it triggered in the last week it would cause the extension of the offer period by two weeks under section 624, and the fact of it triggering would be publicised.

Panel's Decision

36. The Panel agreed in substance with Toll's submissions. The Panel identified that the primary issues before it were whether the IAF discriminated in favour of shareholders who were eligible to participate in the IAF with the effect that those shareholders received benefits that other shareholders did not, or that all shareholders did not have reasonable and equal opportunities to participate in the benefits accruing to shareholders under Toll's bid. The Panel found that the answer to both issues was that the IAF was a procedural mechanism which addressed problems which, although they concerned institutional acceptances, affected the relevant institutions, the bidder and the market at large, without providing discriminatory benefits or unequal opportunities to participating shareholders. It did not confer on participating shareholders benefits such as a higher price, earlier payment or an absence of conditions.
37. The only advantage accruing to shareholders who participated in the IAF was that they could be sure of accepting the bid when and if it became unconditional, without the need to lodge acceptances at that time. In the Panel's view, this advantage was not a collateral benefit likely to induce an eligible shareholder to sell such as a higher price, earlier payment or a sale free of conditions and was, therefore, not proscribed by Section 623. For professional investors the saving in time or trouble was unlikely to be material. The fact that those shareholders retained the power to withdraw from the IAF and sell their shares on market or into another bid was not a benefit conferred on those holders by Toll by way of the IAF, but simply a right they reserved in their individual contracts with the collection agent under the IAF.⁵
38. Accordingly, since the IAF did not offend section 623 the remaining issue was whether the fact that retail shareholders could not participate in the IAF prevented all shareholders having reasonable and equal opportunities to participate in any benefits accruing to shareholders under the Toll bid, so far as practicable.
39. The Panel concluded that the opportunities of retail shareholders to benefit under the bid were not curtailed and remained reasonable. Since a retail shareholder could replicate the IAF (as far as it affected them, albeit without giving Toll the signalling effect) by instructing their broker to accept the Toll bid, when and if the IAF was triggered, they could have essentially equal confidence of participating in the benefits accruing under the bid, without risking selling their shares into a bid which was not priced high enough to buy control.
40. The interaction between the IAF and section 624 and section 650F(1)(b) allowed non-participating shareholders to have the same opportunity to react to late developments in the bid as the institutional shareholders. Relevantly, they would have not less than a week to decide whether to accept, after a shift in control at the

⁵ Cf *Cultus Petroleum NL v OMV Australia Pty Ltd* [1999] NSWSC 422 at [13] and [14], per Santow J and *Savage Resources Ltd v Paminco Investments Pty Ltd* (1998) 159 ALR 304 at 319 – 320, per Hely J

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50% level or a declaration free of conditions. The announcements Toll would make, both those required by the Act and those it announced (and undertook) that it would make about the operation of the IAF, would ensure that all shareholders would be able to make informed decisions during that week.

41. The Panel did not accept Patrick's submission that the IAF constituted unnecessary and objectionable special treatment for institutions which chose to fetter themselves with restrictive mandates. The mandates are a widespread and established feature of the securities market in this country which an IAF addresses in an open and non-discriminatory way.
42. The Panel was not persuaded that retail shareholders would be greatly advantaged by having access to the IAF. In general, retail shareholders do not have the same limiting investment mandates as some institutions.
43. Toll submitted that to extend the IAF to retail shareholders would cause a "very substantial increase in the logistical and administrative burden of operating the IAF". However, the Panel came to no view on this submission.

DECISION

44. For the above reasons, the Panel dismissed the Application, without making a declaration of unacceptable circumstances or orders and without receiving any undertakings.

Nerolie Withnall

President of the Sitting Panel

Decision dated 5 April 2006

Reasons published 2 June 2006