



**In the matter of Patrick 04
[2006] ATP 16**

Catchwords:

Additional disclosure - withdrawal of application - supplementary target's statement - undertakings to Panel

ASIC Act, section 201A

Corporations Act 2001 (Cth), sections 602, 644, 647, 657A, 657C, 657D

Takeovers Panel Rules for Proceedings, rule 14

Patrick Corporation Ltd; Toll Holdings Lt

These are the Panel's reasons for its decision to consent to Toll Holdings Limited withdrawing its application to the Panel dated 8 April 2006. The application was for a declaration of unacceptable circumstances and orders in relation to a supplementary target's statement by Patrick Corporation Limited.

SUMMARY

1. These reasons relate to an application (**Application**) to the Panel from Toll Holdings Limited (**Toll**) at 7.30 p.m. on Saturday 8 April 2006 in relation to the affairs of Patrick Corporation Limited (**Patrick**).
2. The Application sought an order by the Panel directing that Patrick dispatch, on or before 11 April 2006, Patrick's supplementary target's statement in response to Toll's revised bid and seventh supplementary bidder's statement of 22 March 2006.
3. During the proceedings, the Panel accepted an undertaking from Patrick to lodge its second supplementary target's statement with the Australian Securities and Investment Commission (**ASIC**) and release it to Australian Stock Exchange Ltd (**ASX**) on 18 April 2006. However, the Panel did not conclude the proceedings at that time because it wanted to monitor the circumstances to ensure that unacceptable circumstances did not arise.
4. On 14 April 2006, Patrick advised the Panel that it had reached a negotiated agreement with Toll concerning Toll's bid for Patrick. As a consequence, Patrick requested the consent of the Panel to release it from that undertaking. Patrick provided a draft media release to the Panel which set out that Toll had revised its offer for Patrick, that the Patrick board now recommended the Toll offer, that Patrick and Toll intended to publish supplementary statements by 21 April 2006 to address the new circumstances and that Toll would extend its offer to 12 May 2006. The Panel consented to Patrick being released from the undertaking.
5. Following the lodgement with ASIC by Patrick on 21 April 2006 of its second supplementary target's statement, Toll applied for the Panel's consent to the withdrawal of Toll's application.
6. On the basis that Toll and Patrick had lodged supplementary bidder's and target's statements, and Toll had extended the closing date for its offer, the Panel consented to the Application being withdrawn.

PROCEEDINGS

The Panel & Process

7. The President of the Panel appointed Graham Bradley, Carol Buys and Nerolie Withnall (sitting President) as the sitting Panel (**Panel**) for the proceedings (**Proceedings**) arising from the Application.
8. The Panel determined to commence proceedings at 10.00 a.m. on Sunday 9 April 2006 and provided parties with a brief later that morning. 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 leading up to application

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**). On 15 September 2005, Toll lodged its bidder's statement with ASIC and ASX.
11. On 18 October 2005, Patrick lodged its target's statement in relation to the Toll Offer, which was subsequently amended by a supplementary target's statement on 20 October 2005 (**Target's Statement**).

Court Proceedings and other developments

12. Following Patrick's lodgement of its Target's Statement, it initiated a number of Court proceedings including:
 - (a) on 16 January 2006 in the Supreme Court of Victoria to commence proceedings in the name of Pacific National Pty Ltd (**Pacific National**) for damages and other orders against Toll and related entities;
 - (b) on 15 February 2006 in the Supreme Court of Victoria to wind up Pacific National on just and equitable grounds under section 461(1)(k);
 - (c) on 27 March 2006 in the Supreme Court of Victoria to restrain Toll and related entities from giving effect to undertakings given by Toll to the Australian Competition and Consumer Commission (ACCC) on 11 March 2006; and
 - (d) on 3 April 2006 in the Federal Court of Australia for judicial review of the ACCC's decision to accept undertakings from Toll and discontinue its proceedings in relation to its proposed acquisition of Patrick.
13. Included in its undertakings to the ACCC, Toll undertook to divest:
 - (i) 50% of the shares in Pacific National;
 - (ii) the Minto siding in Sydney;
 - (iii) Patrick's Bass Strait shipping and freight forwarding operations;
 - (iv) Toll's interest in PrixCar Services Pty Ltd; and
 - (v) either Toll's or Patrick's vehicle transport distribution business.

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14. On 1 December 2005, Patrick announced that it had entered into an option with the owners of FCL Interstate Transport Services Pty Ltd (**FCL**) to acquire FCL (**FCL Acquisition**). Exercise of the option was subject to ACCC approval. Accordingly, Patrick was in discussions with the ACCC about the terms of any conditions the ACCC may require to grant its approval.
15. On 6 March 2006, Toll announced that that it had entered into an agreement with SembCorp Industries Limited to acquire a 60% interest in SembCorp Logistics Limited (**SembLog**), an Asian logistics provider, for a consideration of approximately \$1.5 billion.
16. As at 8 April 2006, Patrick had not lodged any supplementary target's statements in relation to the court proceedings set out above, the changes to the Toll Offer or its application for ACCC approval for the FCL Acquisition.

Revised Toll offer

17. On 22 March 2006, Toll announced a revised offer for Patrick (**Revised Offer**).
18. The changes to the terms of the Toll Offer included that:
 - (a) the cash amount was increased to \$1.90¹;
 - (b) the Institutional Acceptance Facility was included;
 - (c) a distribution in specie of Virgin Blue Ltd shares was eliminated; and
 - (d) Toll would waive its 90% minimum acceptance condition if it acquired 50.1% of Patrick.
19. On 27 March 2006, Patrick announced to ASX that Patrick directors recommended that shareholders reject the Revised Offer (**Rejection Recommendation**).

APPLICATION

Declaration sought

20. In its Application, Toll applied to the Panel for a declaration under section 657A of the Corporations Act (*Cth*) 2001² that the following circumstances constituted unacceptable circumstances in relation to the affairs of Patrick:
 - (a) since Patrick lodged its first supplementary Target's Statement, new circumstances occurred which were material from the point of view of a Patrick shareholder within the meaning of section 644(1);
 - (b) Patrick made an announcement on 27 March 2006 to ASX in relation to the Rejection Recommendation and that Patrick would prepare and despatch a second supplementary target's statement in response to the Revised Offer;
 - (c) as at 8 April 2006, Patrick had failed to prepare and dispatch a supplementary target's statement in breach of its obligations under section 647(2) to do so as soon as practicable, and failed to confirm it would do so or by what date it would do so;

¹ Or potentially \$2.20 subject to two conditions.

² Statutory references are to the Corporations Act unless otherwise stated.

- (d) accordingly, contrary to the principles set out in section 602(a) and 602(b), the market for Patrick shares was uninformed, and Patrick shareholders had not been given enough information to enable them to make an informed assessment of the merits of the Revised Offer nor a reasonable time to consider such information.
21. Toll submitted that these unacceptable circumstances would continue unless and until Patrick prepared a supplementary target's statement which contained all the information required by section 644(1), which it then lodged with ASIC, released to ASX, served on Toll and sent to all Patrick shareholders.

Orders sought

22. Toll sought the following orders under section 657D(2):
- (a) that Patrick be directed to lodge with ASIC and ASX, serve on Toll and dispatch to all Patrick shareholders a supplementary target's statement which contains all information required by section 644(1), on or before 5:00pm on Tuesday, 11, April 2006; and
 - (b) such further orders as the Panel thinks fit.

DISCUSSION

Developments during the proceeding

23. The Panel issued a brief to the parties on the morning of Sunday 9 April 2006 seeking details regarding the process and timing of Patrick's preparation and lodgement of the supplementary target's statement. The parties provided submissions in response to the brief on the morning of Monday 10 April 2006.

Submissions

24. In its Application and submissions, Toll set out its reasons why it considered Patrick should have been able to prepare and despatch its supplementary target's statement within 20 days of receiving the Toll seventh supplementary bidder's statement, and why Patrick shareholders should be given the Patrick target's statement in the time which Toll was requesting.
25. Toll submitted that publication of the Patrick directors' Rejection Recommendation on 27 March 2006 was a clear indication that the Patrick board had already considered and taken advice in relation to the Revised Offer by then to the extent that it was prepared to make an announcement to its shareholders and the market.
26. Toll submitted that the delay by Patrick in complying with its obligations under sections 644 and 647(2) between 22 March and 8 April 2006 gave rise to unacceptable circumstances. Toll submitted that the circumstances were inconsistent with an efficient, competitive and informed market for Patrick shares and the principle that Patrick shareholders should have a reasonable time to consider the information which Patrick is required to provide to its shareholders.

Patrick 02 proceedings

27. In the matter of *Patrick 02 [2006] ATP 10 (Patrick 02)*, Patrick had submitted that the Revised Offer was materially different to the original Toll Offer. As such, Patrick submitted that the Patrick directors and Patrick shareholders should be given sufficient time and information to enable them to assess the Revised Offer properly and that the timetable for a new offer should be followed for Toll's seventh supplementary bidder's statement.
28. The Panel decided not to commence proceedings in relation to the Patrick 02 matter following the offering of an undertaking by Toll to, amongst other things, extend the closing date of the Revised Offer from 13 April 2006 to 28 April 2006 (being one month from the date of the dispatch of Toll's seventh supplementary bidder's statement).
29. In the current proceedings, Patrick submitted that, due to the volume of analysis it needed to undertake in order to give a full and considered response to its shareholders, and the expected timing of a number of events still to occur, it would not be able to lodge the supplementary target's statement with ASIC until 18 April 2006, i.e. 10 calendar days, and eight business days, before the date on which the Toll Offer was due to close.
30. The date Patrick proposed to lodge its supplementary target's statement was 27 calendar days after Toll gave the seventh supplementary bidder's statement to Patrick on 22 March 2006.
31. Given this delay in preparing and lodging the supplementary target's statement and Toll's previous undertaking in Patrick 02 to extend its offer, the Panel was reluctant to request that Toll extend the closing date for its Revised Offer.

Patrick's preparation of its supplementary target's statement

32. Patrick submitted to the Panel details of the analysis and enquiries it said it was required to go through, and the information which it said it still needed to receive, prior to its directors feeling able to approve the supplementary target's statement.
33. Patrick submitted that in the period that the Toll Offer had been made, the degree of change to Toll, such as its proposed acquisition of 60% of SembLog and Toll's undertakings to the ACCC meant that the Revised Offer was from - and about - a substantially reshaped Toll. Accordingly, Toll's seventh supplementary bidder's statement effectively represented a new bid and required a completely comprehensive response from Patrick.
34. Patrick submitted that the ACCC's delay in making its decision in relation to the FCL Acquisition also hindered Patrick's completion of its supplementary target's statement. Patrick argued that the outcome of the ACCC's decision on the FCL Acquisition was material information for Patrick shareholders as it would reveal whether Patrick was able, in the ACCC's opinion, to acquire FCL and compete with Toll.
35. Patrick had retained Lonergan Edwards to provide an updated valuation report on the Revised Offer. Patrick submitted that this report could not be completed until the outcome of the ACCC's decision on the FCL Acquisition was known, because the

issue as to whether Patrick would be permitted to acquire FCL was a factor going to the value of Patrick on a stand alone basis.

36. In relation to these submissions, the Panel was concerned that:
- (a) Patrick's obligations under sections 644 and 647(2) in relation to preparing a supplementary target's statements in relation to new circumstances and providing it to its shareholders, and also to Toll, as soon as practicable were not being met;
 - (b) as the Revised Offer was due to close on 28 April 2006, by the time Patrick shareholders were given a supplementary target's statement (following Patrick's proposed lodgement with ASIC on 18 April 2006) they may not have had a sufficient time to consider the information Patrick provided regarding the Revised Offer. The Panel considered that the legislature (and ASIC in a number of its Policy Statements) had indicated that two weeks is an appropriate minimum period for shareholders in a target company to have the bidder's statement and target's statement prior to closure of an offer. The process adopted by Patrick made it highly unlikely that Patrick shareholders would have the Patrick second supplementary target's statement for that period if the Toll Offer was not extended;
 - (c) the Patrick board had apparently reviewed enough information to make its Rejection Recommendation on 26 March 2006, which it then promoted widely in newspaper advertisements, but submitted to the Panel that it would not have sufficient information to release a supplementary target's statement until 18 April 2006, being 22 days after its Rejection Recommendation, and some 27 days after Toll's revised bid was announced;
 - (d) Patrick sought to postpone the finalisation and dispatch of its second supplementary target's statement to take account of a number of events which occurred over a continuing period after the dispatch of Toll's seventh supplementary bidder's statement, as the date for the closure of Toll Offer continued to approach. The Panel was concerned about the possibility of continuing events or items for which the finalisation of the second supplementary target's statement ought arguably to be delayed; and
 - (e) Toll had allowed a significant period to elapse before making an application to the Panel in regard to Patrick's failure to lodge a supplementary target's statement. This materially limited the scope for the Panel to make orders that were capable of being complied with.

Undertaking from Patrick

37. The Panel was concerned that unless it either made an order requiring Patrick to finalise and dispatch its second supplementary target's statement, or accepted the undertaking offered by Patrick, there seemed a real risk that the second supplementary target's statement would be delayed further, reducing the time which Patrick shareholders had to consider the second supplementary target's statement before the Toll Offer was due to close. The Panel considered the short period of time

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within which to effect any sort of change in the timing of Patrick's supplementary target's statement, and the difficulties which the Easter holiday period added³.

Taking these things into account, the Panel considered that only pressing Patrick for an undertaking appeared capable of providing certainty to Patrick shareholders as to the date of the supplementary target's statement.

38. On 12 April 2006, in the interests of Patrick shareholders, the Panel accepted an undertaking from Patrick to lodge with ASIC and ASX, serve on Toll and dispatch to all Patrick shareholders a supplementary target's statement under s644(1) (**Undertaking**). Patrick's undertaking is set out in Annexure A to these reasons.

Further revised Toll Offer

39. On 14 April 2006, Patrick provided the Panel with a copy of a draft joint announcement from Patrick and Toll that:
- (a) Toll had increased its offer for Patrick to 0.4 Toll shares plus \$3.00 for each Patrick share; and
 - (b) Patrick's board unanimously recommended acceptance of this revised offer, in the absence of a higher offer for Patrick being received.

(Joint Announcement)

Consent to withdrawal of undertaking

40. In conjunction with providing the Panel with the Joint Announcement, on 14 April 2006, Patrick applied for the Panel's consent pursuant to section 201A(2) of the ASIC Act to withdraw its Undertaking.
41. On the basis of the Joint Announcement, namely:
- (a) prompt release to the market of the Joint Announcement;
 - (b) supplementary disclosure documents being published by Toll and Patrick by 21 April 2006;
 - (c) extension by Toll of its offer period; and
 - (d) consent from Toll for the withdrawal of the Undertaking,
- the Panel consented to the withdrawal of the Undertaking.

Lodgement of supplementary disclosure documents

42. On 21 April 2006, Patrick lodged its second supplementary target's statement with ASIC and ASX.
43. On 21 April 2006, Toll lodged its ninth supplementary bidder's statement with ASIC and ASX and extended its offer period to 12 May 2006.

Withdrawal of Application

44. On 21 April 2006, Toll applied for the Panel's consent pursuant to Rule 14 of the Takeover Panel's Rules for Proceedings to the withdrawal of the Application.

³ Good Friday occurred on 14 April 2006, and the following Monday 17 April was a public holiday.

DECISION

Withdrawal of Application

45. On 21 April 2006, on the basis that Toll and Patrick had lodged supplementary bidder's and target's statements with ASIC and ASX, and Toll had extended its offer period, the Panel consented to the Application being withdrawn.

Nerolie Withnall

President of the Sitting Panel

Decision dated 24 April 2006

Reasons published 2 June 2006

Annexure A – Patrick 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:

- (a) Toll lodged with the Australian Securities & Investments Commission ("ASIC") and sent to Australian Stock Exchange Limited ("ASX") and to 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, 22 March 2006 and 6 April 2006; and
- (b) 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 s201A(1) of the Australian Securities and Investments Commission Act 2001 (Cth), Patrick hereby undertakes to lodge with ASIC and ASX, serve on Toll and dispatch to all Patrick shareholders a supplementary target's statement under s644(1) of the Act (Supplementary Target's Statement):

- (a) as soon as soon as practicable; and
- (b) by no later than 10.00am on 18 April 2006,

in each case subject to the terms of:

- (c) any further undertaking in a form agreed with the Takeovers Panel; or
- (d) order by the Panel,

extending the time period referred to in paragraph (b).

Dated 12 April 2006

Executed for and on behalf of Patrick Corporation Limited