



**In the matter of Sedimentary Holdings Ltd
[2006] ATP 24**

Catchwords:

association; decline to commence proceedings; disclosure in bidder's statement; supplementary bidder's statement; pre-bid agreement; competitive market; common directors; joint bid; intentions below 50% control; waiver of 50.1% minimum acceptance condition; conflict management procedures

Corporations Act 2001 (Cth), sections 606, 657A, 657C

AuSelect Ltd; Sedimentary Holdings Ltd; Lion Selection Group Ltd

These are the Panel's reasons for declining to commence proceedings in relation to an application from Sedimentary Holdings Ltd concerning its affairs.

SUMMARY

1. These reasons relate to an application (the **Application**) to the Panel from Sedimentary Holdings Ltd (**Sedimentary**) received on 14 August 2006 under section 657C¹ in relation to the affairs of Sedimentary.
2. AuSelect Ltd (**AuSelect**) had made a scrip takeover offer for all the shares in Sedimentary (**AuSelect Offer**). Prior to the bid, AuSelect had entered a pre-bid agreement (**Pre-Bid Agreement**) with Lion Selection Group Limited (**Lion**) under which Lion was required to accept into the AuSelect Offer under certain circumstances for 17.8% of Sedimentary which Lion held. In addition, Lion held a further 5.9% of Sedimentary which did not form part of the Pre-Bid Agreement.² Lion and AuSelect shared identical boards and senior management.
3. On 11 August 2006, AuSelect declared that the AuSelect Offer was free from all conditions, including the 50.1% minimum acceptance condition. This announcement triggered Lion's obligation under the Pre-Bid Agreement to accept its 17.8% holding in Sedimentary into the AuSelect Offer within 7 days in the absence of a higher offer.
4. Sedimentary submitted that:
 - (a) unacceptable circumstances existed in relation to the Pre-Bid Agreement, and that Lion and AuSelect were effectively parties to a joint bid for Sedimentary;
 - (b) AuSelect freeing its offers from all defeating conditions resulted in profound changes to the AuSelect Offer, requiring additional disclosure concerning (amongst other things) AuSelect's intentions below 50.1% ownership of Sedimentary and sufficient time for Sedimentary shareholders to assimilate the new information.
5. AuSelect provided a draft supplementary bidder's statement to the Panel in a preliminary submission which clarified a number of the issues of which Sedimentary complained. AuSelect offered to undertake to dispatch the supplementary bidder's statement to Sedimentary shareholders.

¹ Unless otherwise specified, all statutory references are to the Corporations Act.

² The relevant interest in 17.8% via the Pre-Bid Agreement took AuSelect's voting power in Sedimentary to 19.9%.

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6. The Panel did not consider that the material before it in relation to the disclosure by AuSelect (taking into account the proffered supplementary bidder's statement), the Pre-Bid Agreement and the relationship between AuSelect and Lion provided a sufficient basis for the Panel to commence proceedings in relation to the Application.

PROCEEDINGS

The Panel & Process

7. The President of the Panel appointed Andrew Lumsden (Sitting President), Simon Mordant (Deputy President) and Susan Doyle 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

10. On 2 February 2005, Lion lodged a substantial shareholder notice which indicated that it held a relevant interest in 23.85% of Sedimentary (this voting power was subsequently diluted by the issue of ordinary shares by Sedimentary which were notified to ASX on 28 February 2005 and 7 March 2005).
11. On 14 July 2006, AuSelect:
 - (a) entered into a Pre-Bid Agreement in respect of Sedimentary shares owned by Lion which amounted to 17.8% of Sedimentary; and
 - (b) announced its intention to make the AuSelect Offer.
12. Under the Pre-Bid Agreement, Lion agreed to accept into the AuSelect Offer for 17.8% of the shares in Sedimentary under certain conditions. Lion was only required to accept the AuSelect Offer if it became free of all defeating conditions. Lion was not required to accept into the AuSelect Offer if a higher competing offer was made (and AuSelect did not match the competing offer). The Pre-Bid Agreement stated that it did not affect Lion's rights to dispose of the remaining 5.9% of Sedimentary that Lion held.
13. On 18 July 2006, AuSelect:
 - (a) served on Sedimentary and lodged with the ASX a copy of its bidder's statement (**Bidder's Statement**); and
 - (b) lodged a substantial holding notice which indicated that it had voting power in Sedimentary of 19.9% (comprising its initial 2.1% holding and 17.8% through the Pre-Bid Agreement).
14. On 19 July 2006, Sedimentary announced on ASX, inter alia, that:
 - (a) it had appointed legal and financial advisers;
 - (b) it was preparing a target's statement; and
 - (c) it strongly recommended that Sedimentary shareholders take no action in relation to the AuSelect Offer until the target's statement was dispatched.

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15. On 1 August 2006, AuSelect commenced dispatch of the Bidder's Statement. The Bidder's Statement indicated that Lion held 23.7% of Sedimentary.
16. On 9 August 2006, Sedimentary announced that, in accordance with a four day extension granted by ASIC, it intended to dispatch its target's statement on 21 August 2006. Sedimentary also announced that it had commenced discussions with other parties in relation to a counter offer, that those discussions were progressing, and that Sedimentary would keep its shareholders updated on progress to obtaining an alternative offer over the coming weeks.
17. On 11 August 2006, AuSelect announced that:
 - (a) it declared the AuSelect Offer free from all defeating conditions (including the 50.1% minimum acceptance condition);
 - (b) it had voting power in Sedimentary of 20.03%;
 - (c) payment terms were accelerated so that Sedimentary shareholders who accepted the AuSelect Offer would receive consideration within 7 days of their acceptance; and
 - (d) it intended to lodge a supplementary bidder's statement "shortly" in order to give effect to the accelerated payment terms.
18. Correspondence ensued between Sedimentary and AuSelect over the next few days, but the parties were unable to resolve the issues which were the subject of this application.

APPLICATION

Declaration sought

19. On 14 August 2006, Sedimentary lodged its application which sought a declaration of unacceptable circumstances pursuant to section 657A that having regard to:
 - (a) the declaration by AuSelect on 11 August 2006 (10 days before Sedimentary's target statement was due) that the offers under the AuSelect Offer were free from all conditions including the 50.1% minimum acceptance condition;
 - (b) the absence of any supplementary disclosure since AuSelect's Bidder's Statement;
 - (c) the terms of the Pre-Bid Agreement; and
 - (d) the scheduled conclusion of the AuSelect Offer on 1 September 2006, unacceptable circumstances existed in relation to the affairs of Sedimentary.

Orders sought

20. Sedimentary sought final orders requiring, subject to ASIC's consent, that the AuSelect Offer be withdrawn or, in the alternative, final orders that (amongst other things) AuSelect dispatch to Sedimentary shareholders a supplementary bidder's statement which remedied the unacceptable circumstances.

DISCUSSION

Breach of section 606

21. Sedimentary submitted that, given the inter-relationships between AuSelect, Lion and Lion Manager Pty Ltd (which is responsible for the management of AuSelect and Lion) which Sedimentary suggested existed (**Inter-Relationships**) (especially the common directors and executive staff), it was not credible that the Pre-Bid Agreement related to only 17.8% of the shares in Sedimentary. Sedimentary submitted that the Panel should infer that there was an undisclosed agreement, or at least an understanding, between AuSelect and Lion concerning the acceptance of the remaining 5.9% of Lion's holding in Sedimentary. The effect of such an agreement would be that, in breach of section 606, entry into the Pre-Bid Agreement increased AuSelect's voting power in Sedimentary from 2.1% to 25.8% rather than the 19.9% which AuSelect submitted in its substantial holding notice lodged on 18 July 2006.
22. AuSelect submitted that in view of the Inter-Relationships, the boards of AuSelect and Lion had, prior to the AuSelect Offer, implemented a number of conflict management procedures designed to ensure that decisions relating to the AuSelect Offer and the disposal of Lion's shares in Sedimentary were made independently and in the best interests of AuSelect and Lion respectively. These procedures included setting up separate board committees in relation to the AuSelect Offer and those committees acting independently (receiving independent valuation and legal advice).
23. The Panel decided that it had not been presented with sufficient evidence from which it could reasonably infer that there was an arrangement or understanding between AuSelect and Lion regarding Lion's remaining 5.9% interest in Sedimentary. The Panel noted that agreements such as the Pre-Bid Agreement are not uncommon where a person holds more than 20% of a target company but is willing to sell an initial stake to a potential bidder, or even wishes to encourage the person to become a bidder, for 100% of the target company. Furthermore, the Panel observed that Lion and AuSelect had put in place some structural arrangements designed to ensure that Lion and AuSelect were seen to be acting independently in relation to the AuSelect Offer.
24. Whilst the Application highlighted the Inter-Relationships which Sedimentary suggested, the Panel considered that AuSelect's bidding structure was designed to minimise the potential consequences of the Inter-Relationships. Furthermore, Sedimentary failed to present any probative material that would justify the Panel inquiring into the bona fides of those arrangements. Accordingly, the Panel did not consider it appropriate to conduct proceedings to scrutinise the basis for the Inter-Relationships and Pre-Bid Agreement more closely.

Anti-competitive behaviour

25. Sedimentary submitted that as a result of the operation of the Pre-Bid Agreement and accelerated payment terms announced by AuSelect on 11 August there would be a substantial lessening of the prospect of a competitive proposal for Sedimentary emerging and Sedimentary shareholders were likely to be "coerced" into accepting the AuSelect Offer in advance of a competitive proposal emerging.

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26. The Panel found that the AuSelect Offer was announced on 14 July 2006 and that the Pre-Bid Agreement would not require Lion to accept the AuSelect Offer until Friday 18 August 2006 i.e. 5 business days after the AuSelect Offer was declared free of defeating conditions on 11 August 2006. In the circumstances, the Panel considered that sufficient time had elapsed between the announcement of the AuSelect Offer and Lion's potential acceptance, for a rival bidder to emerge.
27. The Panel observed that the Pre-Bid Agreement contained a provision which released Lion from its obligation under that agreement (to accept into the bid in respect of 17.8%), if a superior offer emerged within a specified time. AuSelect could only re-enliven that obligation if it matched or bettered the alternative offer.
28. In view of the opportunity that a rival bidder could have obtained Lion's 17.8% stake, and the period of over a month between the announcement of the AuSelect Offer and the date on which Lion would become obliged to accept into the AuSelect Offer for 17.8%, the Panel did not consider that the Pre-Bid Agreement substantially lessened the prospect of a competing proposal for Sedimentary emerging.

Disclosure

29. Sedimentary submitted that, as the AuSelect Offer was now unconditional Sedimentary shareholders should be provided with full and proper disclosure of AuSelect's intentions, and pro-forma financial information, given the possibility that AuSelect would end up with a holding that was less than 50% of Sedimentary but may still have a material effect on the control of Sedimentary and its future operations.
30. AuSelect submitted that almost all of the information that Sedimentary's Application sought was already contained in the Bidder's Statement. AuSelect also indicated its willingness to send additional information to Sedimentary Shareholders in the form provided to the Panel.
31. While the Panel was concerned that Sedimentary shareholders should not have to add pieces of information from a number of sources, or places in the AuSelect Bidder's Statement and supplementary bidder's statement, it considered that a combination of the existing disclosure and the form of the supplementary disclosure provided to the Panel by AuSelect would give Sedimentary shareholders adequate information. Therefore, the Panel decided not to commence proceedings in relation to the disclosure issues raised by Sedimentary.

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DECISION

32. The Panel did not consider that the material before it in relation to the disclosure by AuSelect (taking into account the proffered supplementary bidder's statement), the Pre-Bid Agreement and the Inter-Relationships provided a sufficient basis for the Panel to commence proceedings in relation to the Application.
33. The Panel did not receive any application for an award of costs, and made no order for costs.
34. AuSelect provided the information proffered to the Panel, to Sedimentary shareholders in two supplementary bidder's statements on 22 and 29 August 2006.

Andrew Lumsden

President of the Sitting Panel

Decision dated 18 August 2006

Reasons published 14 September 2006