



Tuesday, 28 March 2006

Wattyl Limited - Panel Decision

The Panel advises that it has accepted undertakings from Wattyl Limited and Barloworld Limited in response to the application made by AEP Financial Investments Pty Ltd, a subsidiary of Allco Equity Partners Ltd (see [TP06/22](#)). On the basis of the undertakings and the further disclosure, the Panel has declined the application by AEP.

Disclosure

Wattyl undertook to the Panel to produce and dispatch a third supplementary target's statement, approved by the Panel, addressing those matters on which the Panel required further disclosure.

Accordingly, the Panel has today approved the dispatch of Wattyl's third supplementary target's statement. The Panel required the following:

- (a) Given the Wattyl directors' published intention (in an ASX announcement annexed to its second supplementary target's statement to the AEP offer) to recommend acceptance of the bid proposed by Barloworld, further disclosure was required regarding:
 - (i) a statement made by the chairman of Wattyl to the annual general meeting in October 2005, following discontinuation of the merger discussions with Barloworld in September 2005, that:
"the opportunity or chance of turning that [ACCC decision] around right now would be very low"
The statement was a response to a question whether Wattyl could now purchase the Taubmans paint business.
The ACCC decision that the chairman was referring to was the ACCC's opposition to Wattyl's proposal in 1996 to purchase Taubmans;
 - (ii) the history of ACCC opposition to a merger between Wattyl and Taubmans in 1996 and that since then Barloworld has made further acquisitions of competitive businesses in the Australian market; and
 - (iii) the fact that Barloworld's proposed bid will be subject to a Regulatory Approval (Competition) Condition (**ACCC Condition**), but the satisfaction or triggering of the condition is unlikely to be known within the time frame of the current AEP offer.

- (b) Further disclosure with respect to the special dividend Wattyl had originally announced in its target's statement it would pay if the AEP offer closed unsuccessfully. In particular, given Wattyl had withdrawn the special dividend, whether Wattyl intended it to be reintroduced at any stage and the timing of any reintroduction.

Break fee

The Panel also accepted undertakings from both Barloworld and Wattyl to amend the break fee agreed by Wattyl with Barloworld.

In summary, Barloworld and Wattyl have agreed to amend their pre-bid agreement so that the break fee will not be payable if:

- (a) the ACCC Condition is not satisfied by 13 August 2006¹; or
- (b) prior to 13 August 2006, the approval needed to satisfy the ACCC Condition is refused and that decision is accepted by Barloworld (i.e. no appeal, litigation, request for authorisation etc. is pursued).

Wattyl will publish a copy of the terms of the amendments to the pre-bid agreement on ASX following finalisation of the terms.

Forecasts

AEP submitted that the absence of a basis for the Directors assumptions underlying the revenue forecasts made by Wattyl in its target's statement, and a statement that directors believed the assumptions to be reasonable, in connection with the forecast financial performance in the target's statement, gave rise to unacceptable circumstances. The Panel did not find that Wattyl is required to make additional disclosure. The Panel noted the explanations that Wattyl provided in the forecasts, the investigating accountant's report prepared by PriceWaterhouseCoopers, and the customary nature of the negative assurance given by PriceWaterhouseCoopers.

The No Shop Provision

The Panel found that the exclusivity provision in clause 8 of the pre-bid agreement between Wattyl and Barloworld (referred to in the agreement as a "no shop" clause) is very close to one that would be unacceptable. It would be unacceptable if it extended to a prohibition on Wattyl talking to other bidders or prospective bidders (often referred to as a "no talk" clause). However each of the parties to the agreement has assured the Panel that the provision is not a "no talk" provision. The Panel therefore does not consider this circumstance to be an unacceptable circumstance, although if, in practice, the parties act as if the provision is a "no talk" provision, that could be grounds for the Panel to reconsider the clause on a new application.

¹ 13 August 2006, being 6 months after the announcement by Barloworld of its proposed bid.

The Assistance Provision

AEP also sought, in its submission, an additional order that clause 3 of the pre-bid agreement be cancelled. Clause 3 deals with Watty1 providing assistance and information to Barloworld to pursue its takeover offer. The Panel did not find clause 3 gave rise to unacceptable circumstances.

The Panel will publish its reasons for its decision on its website in due course.

The President of the Panel appointed Kathleen Farrell (sitting President), Meredith Hellicar and Alice McCleary as the sitting Panel to consider the application.

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