



**In the matter of Queensland Cotton Holdings Limited
[2007] ATP 05**

Catchwords:

Lock-up device – no-shop provision – no-talk provision – fiduciary carve out – fiduciary exception – break fee – merger implementation agreement – interpretation of fiduciary exception – indicative proposal – competing proposal – superior proposal – anti-competitive effect – customary market practice – undertaking – equal access – confidential information – misleading disclosure – supplementary target statement

*Corporations Act 2001 (Cth): section 602, 657A, 657D, 657E
Guidance Note 7*

Queensland Cotton Holdings Limited, Louis Dreyfus Cotton International NV, Olam International Limited

These are the Panel’s reasons for declining to commence proceedings in relation to the affairs of Queensland Cotton Holdings Limited in response to an application by Louis Dreyfus Cotton International NV dated 16 April 2007. The Panel declined to commence proceedings having received certain undertakings and confirmations from Queensland Cotton, Louis Dreyfus and Olam International.

THE PROCEEDINGS

1. These reasons relate to an application (the **Application**) to the Panel from Louis Dreyfus Cotton International NV (**Louis Dreyfus**) on 16 April 2007 in relation to the affairs of Queensland Cotton Holdings Limited (**Queensland Cotton**).

SUMMARY

2. In its Application, Louis Dreyfus submitted that:
 - (a) a Takeover Bid Implementation Agreement dated 6 March 2007 (**TBIA**) that Queensland Cotton had entered with Olam International Limited (**Olam**) included terms regarding “no-shop”, “no-talk” and fiduciary exception that had an anti-competitive effect on the market for control of Queensland Cotton;
 - (b) the Queensland Cotton Board was incorrectly interpreting and applying the terms of the TBIA by amongst other things:
 - (i) declining to advise Louis Dreyfus what further information the Queensland Cotton board required for the proposal Louis Dreyfus had submitted to be considered a “competing proposal” which the Queensland Cotton board could consider within the terms of the fiduciary exception in the TBIA; and
 - (ii) declining to provide Louis Dreyfus with access to confidential information to enable Louis Dreyfus to assess whether or not to make a formal takeover bid for Queensland Cotton.

Louis Dreyfus submitted that this was causing the acquisition of control of Queensland Cotton to take place in a market that was not efficient, competitive and informed; and

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- (c) Queensland Cotton's target's statement in respect of the bid by Olam, and its subsequent market announcement dated 16 April 2007, contained false or misleading disclosures, specifically in relation to the possible competing proposal by Louis Dreyfus.
3. Queensland Cotton submitted that the arrangements between Queensland Cotton and Olam were consistent with those adopted in the normal course of a takeover in the Australian jurisdiction. Olam submitted that the TBIA was "in accordance with market practice" for this type of agreement.
 4. The Panel considered that an initial significant issue before it that might have given rise to unacceptable circumstances was if Queensland Cotton interpreted the TBIA in such a restrictive way as to prevent Queensland Cotton from being able to clarify what additional steps or information Louis Dreyfus would need to provide to Queensland Cotton for its proposal to be considered a Competing Proposal.
 5. In correspondence with the Panel, Queensland Cotton identified specific criteria that it considered would have to be met for it to consider Louis Dreyfus's proposal to be a Competing Proposal. The criteria were, it said, customary Australian market practice. The Panel considered that it was possible for the parties to resolve this issue if Olam confirmed that, in the event that Louis Dreyfus made a proposal to Queensland Cotton which satisfied the criteria, Olam would not object to Queensland Cotton relying on the fiduciary exception provision.
 6. The Panel requested, and received from the parties, various undertakings and confirmations. Accordingly, the Panel decided not to commence proceedings in response to the Application, as it considered that the most pressing issue had been resolved. The Panel noted that it would be open for Louis Dreyfus or any of the other parties to make a further application to it concerning the issue of access to Queensland Cotton's information, should they consider it appropriate in the future.

THE PANEL & PROCESS

7. The President of the Panel appointed Elizabeth Alexander AM (sitting President), Garry Besson and Alastair Lucas (sitting Deputy 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.

APPLICATION

Background

10. Louis Dreyfus, a company incorporated in Belgium, is a substantial shareholder in Queensland Cotton. In October 2006, it increased its holding from 14.9% to 19.9%.
11. Olam is a company incorporated in Singapore. On 7 March 2007, Olam and Queensland Cotton announced a proposed off-market takeover bid by Olam for all the shares in Queensland Cotton. Olam lodged its bidder's statement on 30 March 2007 and Queensland Cotton lodged its target's statement on 3 April 2007.

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12. Queensland Cotton and Olam entered into the TBIA, which contained, amongst other things, the following:
 - (a) “no-shop” and “no-talk” provisions (clause 8.1 of TBIA);
 - (b) a further provision that the “no-talk” provision would cease to apply if compliance with the “no-talk” provisions would, in the opinion of the board of Queensland Cotton reasonably formed in good faith for a proper purpose, in reliance on legal advice and having received financial advice that the competing proposal is superior to the Olam offer, constitute a breach of any statutory or fiduciary duties of the Queensland Cotton board (clause 8.2 of TBIA) (**Fiduciary Exception Provision**);
 - (c) provisions as to when a break fee may be payable by Queensland Cotton to Olam (clause 5);
13. On 2 April 2007, Louis Dreyfus wrote to Queensland Cotton (**2 April Letter**) advising, amongst other things:
 - (a) that it was seriously considering and had taken extensive steps to make a competing proposal, as defined in the TBIA (**Competing Proposal**), the terms of which would be superior to the Olam Offer;
 - (b) that it needed to undertake due diligence in respect of non-public information of Queensland Cotton; and
 - (c) that it was seeking the same level of access to Queensland Cotton’s confidential information and management as had been given to Olam.
14. On 3 April 2007, Queensland Cotton responded to Louis Dreyfus to the effect that it did not regard the contents of the 2 April Letter as a “firm proposal” and given the “no-shop” and “no-talk” provisions, there was no basis to provide access to Louis Dreyfus.
15. On 3 April Queensland Cotton also lodged its target’s statement. In its target’s statement Queensland Cotton made a number of statements concerning the correspondence between Louis Dreyfus and Queensland Cotton. The Queensland Cotton directors stated in the target’s statement that “*As at the date of this Target’s Statement, the Directors are not aware of any proposed competing transaction.*” The directors went on to make a number of further statements which raised doubts and qualifications as to the likelihood of Louis Dreyfus making a “competing proposal” for Queensland Cotton.
16. On 10 April 2007, Louis Dreyfus wrote to Queensland Cotton (**10 April Letter**) with a revised proposal. In the letter, Louis Dreyfus, amongst other things:
 - (a) reiterated its serious commitment to making a superior proposal;
 - (b) stated the offer price under its proposal would be A\$5 or more;
 - (c) specified its valuation assumptions; and
 - (d) described its specific due diligence information requests.
17. Louis Dreyfus also requested the Queensland Cotton board to clarify:

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- (a) the additional steps it considered were needed to be taken by Louis Dreyfus; and
 - (b) the additional information that it considered Louis Dreyfus needed to provide, if, notwithstanding the contents of the 10 April Letter, the board considered that there was still no basis to permit access to any confidential information.
18. Together, the 2 April Letter and 10 April Letter are referred to as the **Indicative Proposal**.
19. On 11 April 2007, Queensland Cotton responded to the effect that:
- (a) the 10 April Letter did not provide a basis for Queensland Cotton to give access to confidential information without breaching the TBIA and potentially triggering payment of a break fee;
 - (b) the Indicative Proposal did not meet the requirement for a “Competing Proposal” that was superior to the Olam offer;
 - (c) the board was unable to provide any guidance on the additional steps Louis Dreyfus needed to take or information it needed to provide to permit access to any of Queensland Cotton’s confidential information due to the “no-shop” provision and break fee provisions.
20. On 13 April 2007, Louis Dreyfus issued a media release in which it announced that it had communicated to the Queensland Cotton board its intentions to make a takeover bid for all of the shares in Queensland Cotton, subject to a number of conditions (which Louis Dreyfus set out in the announcement).
21. On 16 April 2007, Queensland Cotton responded by issuing a media release, which attached a copy of the Louis Dreyfus media release, in which it stated that its position continued to be that there was no present basis to permit Louis Dreyfus access to any confidential information.

Application

22. In its Application, Louis Dreyfus submitted that:
- (a) the “no-shop”, “no-talk” and fiduciary exception provisions contained in the TBIA had an anti-competitive effect on the market for control of Queensland Cotton;
 - (b) the refusal of the Queensland Cotton Board to allow equal due diligence access to Louis Dreyfus, in incorrectly interpreting and applying the terms of the TBIA, was causing the acquisition of control of Queensland Cotton to take place in a market that was not efficient, competitive and informed; and
 - (c) Queensland Cotton’s target’s statement in respect of the bid by Olam and its subsequent market announcement dated 16 April 2007 contained false or misleading disclosures, specifically in relation to the possible competing proposal by Louis Dreyfus.
23. Following receipt of the Application, the Panel received a letter from Olam’s solicitors dated 18 April 2007 (**Olam Submissions**) and a letter from Queensland Cotton’s solicitors dated 19 April 2007 (**Queensland Submissions**). Each submitted

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that the Panel should not commence proceedings in response to Louis Dreyfus's application.

Declaration and orders sought in the Application

24. Louis Dreyfus sought a declaration of unacceptable circumstances under section 657A(1) as a result of:
 - (a) certain aspects of the terms of the lock-up device and fiduciary carve out in the TBIA;
 - (b) the interpretation, and application of, the terms of the TBIA by the Queensland Cotton board;
 - (c) disclosure in Queensland Cotton's target's statement and announcement of 16 April 2007.
25. Louis Dreyfus sought interim orders under section 657E that:
 - (a) all acceptances of the Olam offer received as at the date of the Application; and
 - (b) any further acceptances received thereafter until the Panel's final decision, be suspended and not capable of acceptance by Olam.
26. Louis Dreyfus sought final orders under section 657D that:
 - (a) any discussions relating to access by Louis Dreyfus not be regarded as a breach by Queensland Cotton of the TBIA nor as triggering the requirement to pay a break fee to Olam;
 - (b) all Queensland Cotton shareholders who have accepted the Olam offer be permitted to withdraw their acceptances;
 - (c) the offending aspects of the lock-up device and fiduciary carve-out be struck out of the TBIA;
 - (d) Queensland Cotton grant access to its confidential information to Louis Dreyfus on terms no less favourable than were granted to Olam;
 - (e) Queensland Cotton issue a supplementary target statement correcting deficiencies which Louis Dreyfus submitted existed in relation to Louis Dreyfus.

DISCUSSION

Interpretation of the TBIA

27. In relation to the interpretation of the "no-shop", "no-talk" and fiduciary exception provisions, it appeared to the Panel that the dispute related to whether the Indicative Proposal constituted a Competing Proposal, as defined in the TBIA. Based on the information in the Application, it appeared to the Panel that Queensland Cotton had taken the view that the Indicative Proposal did not constitute a Competing Proposal and that it was not able to rely on the Fiduciary Exception Provision to participate in any discussions with or provide any information to Louis Dreyfus in relation to the Indicative Proposal, because of the "no-shop" and "no-talk" provisions.

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28. The Panel considered that an initial significant issue before it that might have given rise to unacceptable circumstances was if Queensland Cotton interpreted the TBIA in such a restrictive way as to prevent Queensland Cotton from being able to clarify what additional steps or information Louis Dreyfus would need to provide to Queensland Cotton for its proposal to be considered a Competing Proposal.
29. Olam submitted in the Olam Submissions that the TBIA is “in accordance with market practice” for this type of agreement and that the no-shop and no-talk provisions are in line with the Panel’s Guidance Note 7 and market practice. Further, it submitted that the TBIA “does not restrict the Queensland Cotton board from providing access to due diligence information where it considers it to be in the best interests of Queensland Cotton shareholders”.
30. Queensland Cotton submitted in the Queensland Cotton Submissions that the arrangements between Queensland Cotton and Olam are consistent with those adopted in the normal course of a takeover in the Australian jurisdiction. It listed five criteria that a proposed rival bidder must meet, which it says reflects the customary Australian market practice, in order to engage with a target company under arrangements such as it had entered.
31. The Panel noted that the five criteria may be one way for a potential rival bidder to satisfy a target board that it has made a firm proposal (which may be subject to conditions being satisfied before it is announced) capable of triggering a fiduciary exception. The Panel noted that there may be other ways as well. However, it did not consider it necessary to address what those ways might include. The Panel considered that whether such a clause is available to allow discussions with another potential bidder will depend on the circumstances of each case and whether the fiduciary exception is interpreted so as to allow directors to respond positively to any superior proposal if they form the view that to do so would be in the best interests of target shareholders (see paragraph 31 of Guidance Note 7). The Panel considered that in certain circumstances, a takeover proposal which is framed differently to the five criteria may still fall within a fiduciary carve-out clause.
32. In light of the Olam and Queensland Cotton Submissions, the Panel considered that it was possible for the parties to resolve this issue if Olam confirmed that in the event that Louis Dreyfus made a proposal to Queensland Cotton, which satisfied the five criteria set out in the Queensland Cotton Letter, Olam would not object to Queensland Cotton relying on the fiduciary exception provision to participate in any discussions or provide some or any information to Louis Dreyfus as considered appropriate by the Queensland Cotton board. Olam should also confirm that merely by so doing a break fee payment would not be required under the break fee provisions in the TBIA. The Panel accepted that any such confirmation could be made subject to:
 - (a) the terms and conditions of the further proposal, including price; and
 - (b) Queensland Cotton receiving all appropriate external advices (including that the further proposal is superior to the Olam bid).
33. The Panel advised parties that if it received the undertakings and confirmations requested that it considered it would not be minded to commence proceedings in

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response to Louis Dreyfus's application, as the most pressing issue would have been resolved.

34. The parties agreed to provide the following undertakings and confirmations to the Panel:
 - (a) Olam undertook to the Panel that in the event the Louis Dreyfus makes a proposal to Queensland Cotton which satisfies the five criteria, it would not seek a break fee payment under clause 5.2 of the TBIA if Queensland Cotton, in good faith, relies on the Fiduciary Exception Provision to participate in any discussions with, or provide information to, Louis Dreyfus;
 - (b) Louis Dreyfus confirmed on 24 April 2007 that it had submitted a proposal to Queensland Cotton which satisfied the five criteria suggested in the Queensland Cotton Letter (**24 April Proposal**); and
 - (c) Queensland Cotton confirmed on 1 May 2007 that it sought to engage with Louis Dreyfus in relation to the 24 April Proposal in reliance on the fiduciary exception provision in the TBIA.
35. The undertaking by Olam was subject to the proposal by Louis Dreyfus being for a specified offer price which is higher than the Olam offer price and being on conditions that the Queensland Cotton board determines (after having received appropriate advice of the nature referred to in clause 8.2 of the TBIA) is superior to the Olam offer. The Panel assumed that Olam was not seeking to give an undertaking to the Panel that is not consistent with the terms of the TBIA and accepted the undertaking on this basis.
36. The Panel considered that it was ultimately for the Queensland Cotton board to determine whether an offer was superior (after taking appropriate advice) and whether it was able to rely on the Fiduciary Exception Provision under the TBIA.
37. Having received the undertakings and confirmations from the parties described above, the Panel considered that the most pressing issues raised in Louis Dreyfus's application had been resolved by the co-operation of the parties and that commercial negotiations were able to be progressed. Therefore, the Panel did not consider that there was a basis to commence proceedings in respect of the application by Louis Dreyfus.
38. The Panel noted that it was for the directors of Queensland Cotton to make a decision as to whether to grant access to Louis Dreyfus to some or all of its confidential information as requested. The Panel did not wish to comment on whether it considered Queensland Cotton should grant some or any access to Louis Dreyfus. The Panel noted that it would be open for Louis Dreyfus or any of the other parties to make a further application to it concerning the issue of access to Queensland Cotton's information, should they consider it appropriate in the future.

Disclosure in target's statement and subsequent announcement

39. Given the parties had provided the undertakings and confirmations, the Panel considered that Queensland Cotton shareholders would expect to be advised of some or all elements of the Louis Dreyfus proposal and their directors' progress in negotiations with Louis Dreyfus. The Panel considered that disclosure of these

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developments could have been addressed in a number of ways. The Panel noted that one of the ways this could be done would be by the issue of a supplementary target's statement by Queensland Cotton.

40. Accordingly, the Panel did not consider that there was a basis to commence proceedings in respect of the disclosure in Queensland Cotton's target statement and subsequent announcement.

Interim Order

41. The Olam Submissions stated that Olam would not declare its offer unconditional until Monday 7 May 2007 (at the earliest). Accordingly, the Panel did not consider that there were sufficient grounds for it to make the interim orders requested by Louis Dreyfus.

DECISION

42. On the basis of the undertakings and confirmations received by Queensland Cotton, Louis Dreyfus and Olam, and the reasons set out above, the Panel declined to commence proceedings in response to the Application under Regulation 20 of the ASIC Regulations 2001.
43. As the Panel did not commence proceedings, it made no orders as to costs or otherwise.
44. For the reasons set out above, the Panel did not make interim orders.

Elizabeth Alexander AM
President of the Sitting Panel
Decision dated 3 May 2007
Reasons published 22 June 2007