



In the Matter of Programmed Maintenance Services Limited

[2008] ATP 7

Catchwords:

AREO - bidder's statement - deficiencies in disclosure - scrip - target's statement - VWAP

Programmed Maintenance Services Limited - Spotless Investment Holdings Pty Ltd - Spotless Group Limited

Corporations Act 2001 - 657A and 602(a)

Guidance Note 16 (Correction of Takeover Documents)

Consolidated Minerals Limited [2007] ATP 20

General Property Trust [2004] ATP 30

Normandy Mining Limited [2001] ATP 27

INTRODUCTION

1. The Panel, Irene Lee, Rodd Levy and Chris Photakis (sitting President), declined to conduct proceedings.
2. In these reasons the following definitions apply.

Term	Meaning
AREO	accelerated renounceable entitlement offering
Programmed	Programmed Maintenance Services Limited
Spotless	Spotless Investment Holdings Pty Ltd, a wholly owned subsidiary of Spotless Group Limited
application	application by Programmed dated 10 April 2008 concerning its affairs
VWAP	volume weighted average price

3. In these proceedings the Panel:
 - (a) adopted the published procedural rules and
 - (b) consented to parties being represented by their commercial lawyers.

DISCUSSION

Facts

4. Programmed is a public company listed on ASX (ASX code: PRG).
5. On 27 March 2008 Spotless Group Limited announced its intention to make a takeover bid¹ for all of the shares in Programmed with 3 alternative forms of consideration, one comprising Spotless Group Limited scrip and the other two a combination of Spotless Group Limited scrip and cash.

¹ To be effected through an off market takeover bid by Spotless.

6. On 2 April 2008, Spotless served its bidder's statement on Programmed and lodged it with ASIC.
7. Programmed raised a number of issues with Spotless Group, most of which the parties resolved between them. Spotless agreed to incorporate the resolved issues in a supplementary bidder's statement. Two issues remained unresolved.

Application

8. Programmed alleged deficiencies in the disclosure in the bidder's statement.
 - (a) The bidder's statement valued its offer (scrip and scrip and cash alternatives) by reference to the VWAP 10 days prior to 27 March 2008 (that being the date of the bid announcement) rather than by reference to more up to date prices.
 - (b) The bidder's statement did not contain a clear statement that Spotless does not intend to undertake the AREO capital raising prior to the close of the offer.

Valuation

9. Programmed submitted that the bidder's statement should state the value of the Spotless offer by reference to Spotless' share prices that are more up to date than the VWAP of the 10 days prior to the announcement of the offer. In this regard, Programmed noted that:
 - (a) there was a substantial decline in Spotless' share price since the announcement of the offer and
 - (b) there was a consequential decline in the value of each offer consideration alternative.
10. Programmed submitted that decisions of the Panel such as General Property Trust,² Normandy Mining Ltd ³and Consolidated Minerals Ltd⁴ supported the practice of using pricing information that is as up to date as possible.
11. Spotless had argued, in correspondence with Programmed, that it was appropriate in the context of this transaction to use the 10 day VWAP up until 26 March 2008, which was the day before the announcement date as this avoided any impact of the takeover bid on the price of Spotless shares.
12. The 10 day VWAP of the Spotless share price up to and including 9 April was \$3.24. Programmed submitted that, using an attributed value of \$3.26 per Spotless share, the implied value of the Spotless offer for each consideration alternative would be:
 - (a) All share alternative: \$5.25.
 - (b) Majority share alternative: \$5.46.
 - (c) Maximum cash alternative: \$5.67.

² [2004] ATP 30

³ [2001] ATP 27

⁴ [2007] ATP 20

AREO

13. Section 11.4 of the bidder's statement disclosed that Spotless had entered into a binding volume equity underwriting agreement. In section 10.4 the bidder's statement set out pro-forma financial statements on the assumption that the AREO issue is undertaken within 12 months at a price of \$3.77.
14. Programmed submitted that:
 - (a) Spotless should undertake that it would not conduct the AREO prior to the offer close so that all accepting Programmed shareholders could participate in the benefits of the AREO (if it was conducted).
 - (b) The bidder's statement should disclose an intention not to undertake the AREO prior to the offer close.
15. Spotless had indicated that intention previously to Programmed, but had not made that intention public. Programmed submitted that shareholders needed to know whether the AREO would be undertaken in a time that enabled them to participate in it so that they could value the Spotless offer.

Interim Orders

16. Programmed sought interim orders that Spotless be restrained from dispatching the bidder's statement pending the determination of the Panel proceedings.
17. Spotless advised the Panel it was not intending to dispatch its bidder's statement until the determination of the proceedings. On that basis the Panel did not make the interim orders.

Final Orders

18. Programmed sought final orders that:
 - (a) Spotless prepare and dispatch a replacement bidder's statement, in a form approved by the Panel:
 - (i) correcting the misstatements identified in the application
 - (ii) containing the additional disclosure offered in correspondence from Spotless' lawyers prior to the date of the application and
 - (iii) including a statement that Spotless had no current intention to undertake the AREO prior to the offer close.
 - (b) Spotless amend the terms of the offer to allow shareholders withdrawal rights if the intention not to undertake the AREO before the offer closed changes.
 - (c) Spotless pay Programmed's costs.

Further disclosure

19. Spotless agreed to include a statement in section 11.4 of its bidder's statement that it did not currently intend to conduct the proposed AREO prior to the closing date of the offer.
20. Spotless also agreed to amend the disclosure in its bidder's statement (in a form that the Panel approved) so that all references to valuation or premium of the offer using

pre-bid announcement values were clearly stated to be as at the date of the announcement of the offer and expressed in the past tense. Spotless also agreed to amend a table in its bidder's statement, that set out comparative valuations at different prices for Spotless shares, to include prices nearer to the date of printing of the bidder's statement, and a wider range of potential values for Spotless shares.

21. Following the further disclosure provided by Spotless in its supplementary bidder's statement, Programmed consented to the dispatch of Spotless' supplementary bidder's statement without the need to wait another 14 days.

DECISION

22. In *Consolidated Minerals Ltd*⁵ a letter to shareholders set out an implied value based on a pre-announcement price. The letter did not also set out the value based on the trading price at the close of trading on the day preceding dispatch of the letter. Had this been included, the implied value of the offer would have been seen to be lower than was stated. The Panel decided that the letter should have used the most recently available share price. The Panel said that, if a value based on another date was also included, the reason for putting that other the date forward should have been disclosed clearly.
23. In *General Property Trust*⁶ the Panel considered that it would be unacceptable for the bidder to describe the value of its offer based solely on the VWAP up to the date of announcement when the bidder's statement was dispatched approximately 4 weeks later. The Panel required an implied value to be included based on the VWAP of the bidder's securities prices as near as practicable to when the bidder's statement went to print.
24. The Panel regards it as better practice to include for shareholders an implied value of a scrip offer based on a share price that is the most up-to-date price reasonably available.⁷ The bidder may want to include a pre-bid value as that might reflect a price undisturbed by the announcement of the bid itself. But it should nevertheless include an up-to-date value.
25. In this case, the bidder did include a pre-bid announcement value. The Panel did not consider it inappropriate to include references to that value (the implied value as a VWAP calculation based on the 10 days prior to the announcement) as the bidder's statement was changed to show the references clearly as being in the past tense. Shareholders would not have been misled by the references shown in that way. There was a clearly laid out table on page 6 of the bidder's statement which set out implied values across a range of prices, including up-to-date prices.⁸
26. The proposed statement by Spotless regarding the AREO meant that, should Spotless change its current intention, it would need to issue a supplementary bidder's

⁵ [2007] ATP 20.

⁶ [2004] ATP 30.

⁷ *Consolidated Minerals 01, GPT*, but see *Magna Pacific Holdings Ltd* [2007] ATP 02 for a different view concerning calculation of premium.

⁸ The table included prices below and above the up-to-date price, so it doubled as a form of "sensitivity analysis".

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statement. This would give shareholders adequate notice of the proposal. There would be adequate time to consider the effect of that proposal, if necessary.

27. The Panel considered that the further disclosure provided by Spotless in its bidder's statement, adequately resolved the issues raised by Programmed.
28. For the above reasons, the Panel concluded that there was no reasonable prospect that it would make a declaration of unacceptable circumstances if it conducted proceedings. Accordingly, the Panel declined to conduct proceedings.

Costs orders

29. The Panel did not make a declaration of unacceptable circumstances, so it did not have power to make an order as to costs under paragraph 657D(2)(d). In any event, the Panel would not have been inclined in this case to make a cost order.
30. The Panel was pleased that the issues raised by Programmed with respect to the bidder's statement had been (properly) resolved by negotiation between Programmed and Spotless, many of them prior to making the application.

Chris Photakis

President of the Sitting Panel

Decision dated 21 April 2008

Reasons published 22 April 2008