



In the Matter of Programmed Maintenance Services Limited 02

[2008] ATP 9

Catchwords:

Communication to shareholders - deficiencies in disclosure - scrip bid - target's statement - VWAP - quotations - adoption of quotations - spot price - Offer premia - investor presentation - letter before target's statement - 'like for like' comparison

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

Corporations Act 2001(Cth) -602, 638(5) and 657A

Pinnacle VRB Ltd No. 9 [2001] ATP 25 - Sydney Gas Limited 01 [2006] ATP 9 - Universal Resources [2005] ATP 6 - Magna Pacific (Holdings) Ltd [2007] ATP 2

INTRODUCTION

1. The Panel, Irene Lee, Rodd Levy and Chris Photakis (sitting President), made a declaration of unacceptable circumstances and final orders that Programmed make clarifying disclosure regarding an investor presentation and letter to shareholders.

2. In these reasons the following definitions apply.

Term	Meaning
ABN Article	article in the Asia Business News Wire dated 28 March 2008
Bartholomeusz Article	article by Stephen Bartholomeusz in the Business Spectator dated 16 April 2008
Investor Presentation	the investor presentation in relation to the Offer lodged by Programmed with ASX on 16 April 2008
Letter	the letter sent on 22 April 2008 by Programmed to shareholders in relation to the Offer
Programmed	Programmed Maintenance Services Limited
Smith Article	article by Michael Smith in the Australian Financial Review dated 28 March 2008
Spotless	Spotless Investment Holdings Pty Ltd, a wholly owned subsidiary of Spotless Group Limited
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.

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 an off market takeover bid (through Spotless) 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.
6. On 16 April 2008, Programmed lodged the Investor Presentation with ASX. The Investor Presentation included two charts which purported to show the following bars:
 - (a) average takeover premia for completed takeovers *“based on final offer premia of completed takeovers announced between 1 April 2006 and 1 April 2008 of Australian listed companies in which the offer consideration was greater than A\$200 million and less than A\$2,000 million ... ”*
 - (b) median takeover premia for completed takeovers (as above) and
 - (c) what Spotless is offering, using the 3 alternatives in its consideration. This relied on the target’s price as a 6-month and 12-month VWAP for the period ending 26 March 2008, and the bidder’s price at its closing on 2 April 2008, being the date of lodgment of the bidder’s statement.
7. On 22 April 2008, Programmed sent the Letter to shareholders and lodged a copy with ASX. The Letter contained quotes from:
 - (a) the Bartholomeusz Article. This article highlighted some of the positive and negative aspects of the Offer. The Letter included the following quote from this article: *“The directors are probably right when they say in today’s vigorous rejection of the bid, that the Spotless offer, which includes a range of mix and match options involving both cash and shares, undervalues Programmed”*.
 - (b) the Smith Article. This article discussed the Offer and presented some factual background to the management of the bidder and the target. The Letter included the following quote from this article: *“As the Spotless share price sank another 8 per cent following the \$556 million tilt yesterday, it could be argued Programmed is better positioned to play the role of suitor”*.
 - (c) the ABN Article. This article discussed the Offer, provided some background about Spotless and highlighted the movement of both the Spotless and Programmed share prices following the announcement of the Offer.
8. Spotless despatched its Offer dated 2 April 2008 on 24 April 2008. Accordingly, Programmed had until 9 May 2008 to dispatch its target’s statement. As at the date of the Application, Programmed had not lodged or dispatched its target’s statement.

APPLICATION

Summary

9. On 28 April 2008 Spotless applied for a declaration of unacceptable circumstances under s 657A of the Corporations Act¹. Spotless submitted that its bid for Programmed was not taking or will not take place in an efficient, competitive and informed market because the contents of the Letter were both inappropriate and misleading in a number of material respects. It further submitted that the disclosure in the Letter and Investor Presentation in relation to the value of the Offer and the calculation of the premia was contrary to the rationale behind disclosure required by the Panel in Programmed Maintenance Services Limited².

Proceedings

10. The Panel decided to conduct proceedings in relation to the following issues the applicant raised in the Application:
 - (a) inaccurate and defamatory statements in the Letter. This issue was subsequently resolved by the parties
 - (b) selective quotation in the Letter
 - (c) whether it was necessary to obtain the authors' consents to being quoted in the Letter
 - (d) sensationalist and emotive tone in the Letter and
 - (e) the calculation of the Offer premia in the Investor Presentation.
11. The Panel decided not to conduct proceedings in relation to the presentation of the value of the Offer in the Letter and the Investor Presentation.

Interim Orders

12. Spotless sought interim orders that, pending the final determination of the Application, Programmed be restrained from dispatching the target's statement and any further communications with its shareholders in relation to the value of the Offer.
13. In a letter to Spotless dated 24 April 2008, Programmed gave an undertaking that it would not include any quotations from analysts and journalists in its target's statement. It had also said that its target's statement would include a table identifying the value of the Offer at a range of Spotless' share prices.
14. On 2 May 2008, Programmed gave undertakings to the Panel that, if it dispatched a target's statement or other shareholder communication before the Panel had concluded proceedings:
 - (a) it would not include any of the information complained about in the Application (other than in relation to value of the Offer, the Panel having indicated that it would not conduct proceedings on this issue)

¹ All section references are to the *Corporations Act 2001 (Cth)* unless otherwise stated.

² [2008] ATP 7

- (b) it would not include references to Offer premia which are not in a form approved by the Panel and
 - (c) it would inform the Panel at least 24 hours prior to dispatch of the target's statement if it intended to depart from the position in paragraph 13.
15. On the basis of the undertakings, the Panel considered it did not need to make interim orders.

Final Orders

16. Spotless sought final orders including that:
- (a) Programmed make available on its website the full text of the source material for each quotation in the Letter and obtain consent from the authors to use the material in this way
 - (b) Programmed make corrective disclosure to shareholders
 - (c) none of the material from the Letter be included in Programmed's target's statement or other shareholder communications
 - (d) all further disclosure in relation to the value of the Offer contain an equivalent level of qualification to that included in Spotless' bidder's statement and
 - (e) Programmed pay Spotless' costs.

DISCUSSION

Standards required in target company communications

17. The making of a takeover bid for a company is a critical time for its shareholders. Probably more than at any other time in the company's history, shareholders will look to their directors to provide advice. Accordingly, the directors must ensure that their advice is reasonably based, clear, concise, objective and not misleading. All information presented must be prepared with the highest degree of care, as it would be if the directors were issuing a prospectus. The directors should consider carefully each statement and be satisfied that it meets this test.³
18. Accurate, reliable information and properly reasoned views will best assist the shareholders and promote an efficient, competitive and informed market.
19. Shareholders and the market are not assisted by statements which are emotive, sensationalise any aspect of the bid or the bidder, exaggerate a position or are alarmist or unbalanced.
20. These comments apply to all communications by a target company to its shareholders, whether they are made in, or separately from, the target's statement.

³ In Pinnacle VRB Limited (No. 9) [2001] ATP 25 the Panel stated that "any person putting information before target shareholders in relation to a takeover offer should take considerable care to ascertain that the facts they assert are correct and can be verified".

Communications before the target's statement is sent

21. It is common for a target to communicate with its shareholders shortly after a proposed bid is announced and around the time that the bidder's statement is despatched. Typically, a target will advise shareholders that they should wait until they receive the target's statement before taking any action. However, the Panel expects that material sent before the target's statement is prepared to the same standard as the target's statement. In *Universal Resources*⁴, the Panel said:

"The Panel considered that, where Universal's board chose to contact its shareholders in advance of sending its target's statement, and wished to present arguments or information in relation to shareholders' decision as to accept or not (rather than merely a holding statement of 'Do nothing until we send you the target's statement'), it was incumbent on Universal's board to ensure that the relevant correspondence met the same standards as a target's statement in relation to the areas which it addressed. For instance, where such correspondence addressed questions of value, the correspondence should have set out any underlying assumptions or material limitations on the analysis presented."

The Letter to Shareholder

False and Defamatory Statements

22. Spotless submitted that the quotation from the ABN Article which was extracted in the Letter contained defamatory and inaccurate statements in relation to Spotless and Chairman, Mr Peter Smedley concerning the impact of a particular management style.
23. On 30 April 2008, the author of the ABN Article published a retraction of the factual inaccuracies in it. Spotless submitted that, having relied on the ABN Article, Programmed would be engaging in further misleading and deceptive conduct if it did not alert its shareholders to the retraction. On 5 May 2008 Programmed sent a letter to its shareholders acknowledging the factual inaccuracies and indicating that the ABN Article did not support the conclusions that Programmed sought to draw from it. Spotless confirmed that it was satisfied with Programmed's disclosure regarding the retraction. Accordingly, the Panel did not consider this issue further, but was very concerned that the inclusion of this quotation fell short of the standards expected of a target company mentioned above.

Use of Quotations

24. Spotless submitted that the Letter contained extracts from the Bartholomeusz Article and the Smith Article which materially misrepresented the overall message of the articles. It said that the articles were considerably more balanced.
25. Spotless submitted that the failure to provide context for the quotations, and the failure to present a balanced picture of the source materials, misled shareholders and gave the impression that the journalists unreservedly supported and agreed with the directors' recommendation to reject the Offer.

⁴ *Universal Resources Limited* [2005] ATP 6 at [16].

26. Spotless further submitted that applying lower standards of due diligence and verification to communications with shareholders prior to dispatch of a target's statement was inconsistent with the principles in s 602.
27. Programmed submitted that the quotes were not misleading and were in line with the views expressed by the author in relation to the subject matter of the quote and in line with views generally expressed in the media and in analytical comment in relation to the Offer. It submitted that the quotes could be included in a target's statement, subject to obtaining the consent of the authors.
28. It is common in takeovers that directors may wish to quote or re-publish a statement made by a third person, such as a journalist or analyst⁵. If directors choose to do so, the Panel considers that several things follow:
 - (a) the directors are effectively adopting the statement as their own (unless they clearly indicate otherwise) and must ensure that it meets the same standards as if it was the directors' own statement
 - (b) the quote must not be presented in a misleading fashion, such as by being taken out of context, by omitting any qualification that was in the original, or by including without explanation of its difference an accurate quote that is however an extreme view not consistent with the general views expressed by other commentators and
 - (c) the quote should not be included without substantiation if the directors would have been required to substantiate it had they made it themselves (eg, a comment about value⁶). In those cases, it is no answer to simply say that the quotation was accurate.
29. Accordingly, Programmed shareholders are entitled to assume that the directors adopted and endorsed the quotes from the Bartholomeusz Article and the Smith Article.
30. The quote from the Bartholomeusz Article represented a statement of valuation (i.e. the bid "*undervalued Programmed*"). The Panel considers that the Letter had not been prepared to the same standard as a target's statement as there was insufficient disclosure in the Letter about why the directors of Programmed considered that the bid "*undervalued Programmed*". The Panel considered that the quotation was misleading in the absence of some form of substantiation by the directors of Programmed.
31. The quote from the Smith Article appeared on a page in the Letter headed "*Programmed has a better track record than Spotless*". The Panel considers that the Letter had not been prepared to the same standard as a target's statement as the quote was potentially confusing and misleading, did not fit the context of the page on which it appeared and should only have been included in the Letter with an explanation by Programmed as to what it meant by including the statement. It was unclear for example whether this statement was meant to indicate that Programmed should be bidding for Spotless.

⁵ Section 638(5) requires consent of third parties where the quote appears in a target's statement.

⁶ Universal Resources Limited [2005] ATP 6

Investor PresentationValue of the Offer

32. The Investor Presentation included two charts which purported to show the premia of the Offer compared to the 'average takeover premia' and the 'median takeover premia' (see paragraph 6). Spotless submitted the following aspects of this comparison were inappropriate and misleading:
- (a) Programmed was not comparing "like with like", particularly given current market volatility
 - (b) the Programmed long term VWAPs were opportunistically chosen to give the least favourable view of the Offer premia
 - (c) it is unusual for 6-month and 12-month VWAPs to be utilised in a comparison of takeover premia and particularly given current volatility and
 - (d) Programmed failed to provide adequate disclosure about the sensitivity of the Offer premia to movements in Spotless' share price.
33. Spotless submitted that current volatility in the Spotless share price brought into question whether Programmed had a reasonable basis upon which to choose the spot price for Spotless. It also submitted that the spot price (\$3.18) was chosen because it gave the lowest premia figures.
34. Programmed submitted that its directors considered that a comparison of Spotless' Offer value against Programmed's 6-month and 12-month VWAP was appropriate for several reasons, including that it was consistent with market practice and Programmed's share price had traded at these levels for 9 out of the 12 months prior to announcement of the Offer. Programmed further submitted that the spot price of Spotless was chosen as it is likely to represent the best indicator for the amount that Programmed shareholders could expect to realise if they sold their Spotless shares received as consideration either immediately or in the short term. It was also Spotless' share price at the date it lodged the bidder's statement and therefore was a useful reference point for the purpose of comparison.
35. As stated in paragraph 17, the Panel considers that information presented to shareholders must be prepared with the highest degree of care to ensure that the information is useful and not potentially misleading. This is particularly the case when presenting comparisons of market values or premia. The Panel does not consider that it should limit the ways in which market value or premia might be calculated. However, an explanation of why a particular presentation had been chosen would normally be required:
- (a) if a method of calculation is chosen to the exclusion of a more reasonable method or
 - (b) if the result is compared with a result calculated on a different basis (ie, not on a "like for like" basis), or
 - (c) if the different basis of calculation is not reasonable and clear.

36. The need to explain the use of an unusual presentation of information was noted in the Panel's decision in *Magna Pacific*⁷. The Panel should not be taken to mean that every time there is a reference to a share price, VWAP, premium or other measure of value, the reasons for that choice must be explained. The Panel's concerns arise where shareholders may be misled by the information presented.
37. In this matter, the Panel was concerned about the use of 6-month and 12-month VWAPs for the Programmed share price as a comparison to the spot price of Spotless shares. The share prices of both companies had declined over the relevant period, which made the premia comparison unbalanced and potentially misleading without further explanation. In this case, therefore, Programmed should have disclosed why it believed the method of comparison it chose was appropriate.

Unacceptable circumstances

38. The Panel considers that the circumstances in which Programmed made disclosure in the Letter and the Investor Presentation were unacceptable because:
 - (a) the quote from the Bartholomeusz Article was made without sufficient substantiation
 - (b) the quote from the Smith Article lacked sufficient explanation as to what was meant by the statement and
 - (c) in calculating the Offer premia in the Investor Presentation, Programmed failed to provide sufficient disclosure as to why it considered its calculation methodology appropriate.
39. For these reasons, the Panel considers that the circumstances are unacceptable having regard to:
 - (a) the effect the circumstances have had, are having, will have or are likely to have on:
 - (i) the control or potential control of Programmed or
 - (ii) the acquisition or proposed acquisition by Spotless of a substantial interest in Programmed or
 - (b) the purposes of Chapter 6 set out in section 602 of the Act, namely ensuring an efficient, competitive and informed market for corporate control.

DECISION

40. The Panel considers it appropriate for Programmed to issue a clarification letter, in a form agreed by the Panel, to shareholders which:
 - (a) provides substantiation of the quote from the Bartholomeusz Article
 - (b) explains why it included the quote from the Smith Article and explains what it meant by the statement and
 - (c) provides sufficient disclosure as to why it considered the premia calculation in the Investor Presentation appropriate.

⁷ *Magna Pacific (Holdings) Limited* [2007] ATP 02 at [46]

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41. Given the potentially confusing and misleading nature of the disclosure in the Letter and Investor Presentation, the Panel considers that Programmed should either:
 - (a) enclose a copy of the clarification letter with the dispatch of its target's statement or
 - (b) if the Panel has not agreed on the form of the clarification letter by the dispatch date, enclose a copy of the Panel's decision media release in relation to the these proceedings with the dispatch of its target's statement.
42. If Programmed elects the course described in paragraph 41(b), the Panel considers that Programmed should send a copy of the clarification letter to its shareholders as soon as practicable after the form of the letter has been approved by the Panel.

Declaration

43. Under section 657A, the Panel declared that the circumstances constituted unacceptable circumstances in relation to the affairs of Programmed (see Annexure A).

Orders

44. Following submissions, the Panel made the final orders set out in Annexure B.

Costs orders

45. The Panel did not make any costs orders.

Clarification Letter

46. In accordance with the orders of the Panel, on 9 May 2008 Programmed despatched a clarification letter to its shareholders in a form approved by the Panel.

Christopher Photakis
President of the Sitting Panel
Decision dated 6 May 2008
Reasons published 28 May 2008



ANNEXURE A

Corporations Act Section 657A

Declaration of Unacceptable Circumstances

In the matter of PROGRAMMED MAINTENANCE SERVICES LIMITED 02

WHEREAS

1. On 24 April 2008 Spotless Investment Holdings Pty Ltd, a wholly owned subsidiary of Spotless Group Limited, (**Spotless**) despatched offers for all the shares in Programmed Maintenance Services Limited (**Programmed**).
2. On 16 April 2008, Programmed lodged an Investor Presentation with ASX. The Presentation included "Takeover Premium Comparison" charts on page 5. The charts purported to show the following bars:
 - (a) average takeover premia for completed takeovers "based on final offer premia of completed takeovers announced between 1 April 2006 and 1 April 2008 of Australian listed companies in which the offer consideration was greater than A\$200 million and less than A\$2,000 million ... "
 - (b) median takeover premia for completed takeovers (as above)
 - (c) what Spotless is offering, using the 3 alternatives in its consideration. This relies on the Programmed price as a 6-month and 12-month Volume Weighted Average Price for the period ending 26 March 2008, and the Spotless price at its closing on 2 April 2008, being the date of lodgement of the bidder's statement.
3. On 22 April 2008, Programmed sent a letter to shareholders and lodged a copy with ASX. The letter included in an accompanying leaflet:
 - (a) an extract from an article in The Business Spectator on 16 April 2008 by Stephen Bartholomeusz that: "*The directors are probably right when they say in today's vigorous rejection of the bid, that the Spotless offer, which includes a range of mix and match options involving both cash and shares, undervalues Programmed*"
 - (b) An extract from an article on 28 March 2008 in the Australian Financial Review by Michael Smith that: "*As the Spotless share price sank another 8 per cent following the \$556 million tilt yesterday, it could be argued Programmed is better positioned to play the role of suitor*"

(the **Circumstances**).
4. It appears to the Panel that the Circumstances are unacceptable having regard to:
 - (a) the effect that the Panel is satisfied that the Circumstances have had, are having, will have or are likely to have on:
 - (i) the control or potential control of Programmed; or
 - (ii) the acquisition or proposed acquisition by Spotless of a substantial interest in Programmed; or

- (b) the purposes of Chapter 6 set out in section 602 of the Act.
5. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances in relation to the Circumstances and the affairs of Programmed.
 6. The Panel has had regard to the matters in section 657A(3).

DECLARATION

Under section 657A, the Panel declares that the Circumstances constitute unacceptable circumstances in relation to the affairs of Programmed.

Alan Shaw
Counsel
with authority of Christopher Photakis
President of the Sitting Panel
Dated 6 May 2008



ANNEXURE B

Corporations Act Section 657D Orders

IN THE MATTER OF PROGRAMMED MAINTENANCE SERVICES LIMITED 02

PURSUANT TO:

A declaration of unacceptable circumstances dated 6 May 2008 in relation to the off market takeover offer for Programmed Maintenance Services Limited (**Programmed**) by Spotless Investments Holdings Pty Limited (**Spotless**).

UNDER SECTION 657d THE PANEL ORDERS

1. Programmed prepare and dispatch a clarification letter to its shareholders, in a form approved by the Panel.
2. At the election of Programmed, Programmed either enclose with the dispatch of its target's statement:
 - (a) a copy of the clarification letter; or
 - (b) a copy of the Panel's media release (to be finalised for release on 7 May 2008) in relation to the declaration of unacceptable circumstances made in respect of the affairs of Programmed.
3. If Programmed elects the course described in paragraph 2(b), Programmed must send a copy of the clarification letter to its shareholders as soon as practicable after the form of the letter has been approved by the Panel.

Alan Shaw
Counsel
with authority of Christopher Photakis
President of the Sitting Panel
Dated 7 May 2008