



**In the Matter of DoloMatrix International Limited**

**[2008] ATP 10**

**Catchwords:**

*Bidder's statement – deficiencies in disclosure – financial forecasts – assumptions – defeating conditions – decline to commence proceedings*

*DoloMatrix International Limited – Transpacific Industries Group Limited – Transpacific Industries Holdings Pty Limited*

*Corporations Act 2001 – 657A, 602, 636, 670A and 629*

**INTRODUCTION**

1. The Panel, Braddon Jolley, Simon Mordant (Sitting President) and Andrew Sisson, declined to conduct proceedings following the agreement of Transpacific to provide additional information in a supplementary bidder's statement.
2. In these reasons the following definitions apply.

<b>Term</b>	<b>Meaning</b>
application	Application under s657C by DoloMatrix dated 12 May 2008 concerning its affairs
DoloMatrix	DoloMatrix International Limited
Transpacific	Transpacific Industries Group Limited

**DISCUSSION**

**Facts**

3. DoloMatrix is a public company listed on ASX (ASX code: DMX). It has 136,792,017 ordinary shares on issue. Its market capitalisation is approximately \$48 million. Transpacific is a public company listed on ASX (ASX code: TPI). It has 287,219,707 ordinary shares on issue. Its market capitalisation is approximately \$2.1 billion.
4. On 19 March 2008, Transpacific announced a scrip takeover bid for DoloMatrix. Transpacific Industries Holdings Pty Limited, a wholly-owned subsidiary of Transpacific, proposed to purchase each DoloMatrix share for \$0.30, the consideration being in the form of Transpacific shares, the number being calculated in accordance with a formula in the announcement. In the bidder's statement the formula produced an indicative offer of 0.034 Transpacific shares for each DoloMatrix share.
5. On 30 April 2008, Transpacific served its bidder's statement on DoloMatrix and lodged it with ASIC. It proposed to despatch the bidder's statement to DoloMatrix shareholders by 19 May 2008.

6. On 8 May 2008, DoloMatrix's solicitors, Addisons, wrote to Transpacific's solicitors, Clayton Utz, raising a number of alleged deficiencies in the bidder's statement, which are the subject of this application. DoloMatrix requested that Transpacific confirm whether the FY2008 forecasts, which were based on past forecasts, were still accurate and that the basis for the calculation of those forecasts and the assumptions underlying those figures be included in the bidder's statement. It also requested the inclusion of forecasts for the financial year ending 30 June 2009, saying that this was needed for DoloMatrix shareholders to properly understand the future prospects of Transpacific having regard to its high levels of debt, intangible based goodwill and high debt to equity ratio going into FY2009.
7. On 9 May 2008, DoloMatrix raised further concerns about the lack of disclosure by Transpacific in its bidder's statement and repeated its request for the inclusion of FY2009 forecasts.
8. Transpacific declined to make the changes in response to the issues raised by DoloMatrix in relation to the bidder's statement.

### Application

9. DoloMatrix submitted that:
  - (a) to clarify the uncertainty surrounding the FY2008 forecasts, and to provide DoloMatrix shareholders with sufficient information, a current statement as to the FY2008 figures should be included in the bidder's statement, as well as full details of the assumptions used to prepare that information and an explanation of how the prospective financial information was calculated
  - (b) FY2009 forecasts, including assumptions and sensitivity analyses in the event of a recession in Australia, should be included in the bidder's statement, in order to provide DoloMatrix shareholders with sufficient information on the future prospects of Transpacific to consider the scrip offer
  - (c) there was a lack of information concerning Transpacific's future prospects. DoloMatrix submitted that the bidder's statement should include a pro forma income statement, balance sheet and cash flow statement for the year ended 30 June 2008 for the combined entity and all available information on the future prospects, including financial prospects, of Transpacific following the proposed transaction. DoloMatrix further submitted that in light of Transpacific's debt exposure, Transpacific should provide further details of this
  - (d) statements in the Chairman's letter were misleading or inaccurate. It was also submitted that the Chairman's letter provided a misleading impression of the DoloMatrix share price and
  - (e) the defeating condition set out in section 11.11(b)(i) of the bidder's statement, which required that Transpacific receive "all necessary regulatory approvals and consents to the acquisition of 100% of DoloMatrix ..." was uncertain because Transpacific had not specified what regulatory approvals and consents were necessary, there was no way of ascertaining what the relevant waiting periods were, or how and when it would be satisfied. DoloMatrix submitted

that this resulted in the condition being under the control of Transpacific which breached section 629.<sup>1</sup>

- (f) the defeating condition set out in section 11.11(c)(B) of the bidder's statement resulted in the defeating condition in section 11.11(c) being vague and uncertain in its operation and depending upon the opinion or state of mind of Transpacific, in breach of section 629. The condition provided:

*"Condition (c) [No material adverse change] is deemed to be breached if:*

- (i) the Bidder becomes aware prior to the end of the Offer Period that DoloMatrix has materially breached its continuous disclosure obligations under the ASX listing rules; and
- (ii) *had the Bidder known of the information giving rise to such breach prior to the Announcement Date it would have had a material adverse effect on the price at which the Bidder would have offered under the Takeover Bid."*

### Interim Orders

10. DoloMatrix sought an interim order that Transpacific be restrained from dispatching its bidder's statement pending the determination of the Panel proceedings.

### Final Orders

11. DoloMatrix sought final orders that Transpacific lodge a replacement bidder's statement correcting the deficiencies identified in the original bidder's statement and include such disclosures as are necessary for Transpacific to meet its disclosure obligations.

## DECISION

12. The Panel was minded to conduct proceedings in relation to the following aspects of the application:
- (a) the FY2008 financial forecasts, concerning the need to include the assumptions underlying those forecasts in the bidder's statement and
- (b) the defeating condition issues.
13. The Panel informed the parties of this. It also informed them that it was minded to decline to conduct proceedings in relation to the FY2009 forecasts, future prospects and inaccurate statements aspects of the application. Given the relative sizes of the bidder and the target and that Transpacific had stated that a FY2009 forecast had not been prepared, the Panel was unlikely to consider that unacceptable circumstances arose by reason of Transpacific not including a forecast or more details about its future prospects in the bidder's statement. The Panel noted that Transpacific had responded to DoloMatrix on this issue by saying that it had determined not to include information beyond FY2008 as "FY2008 is not yet complete and the Transpacific Board is not in a position to provide forecast information which is sufficiently meaningful and reliable to include in this Bidder's Statement." In relation to the inaccurate statements, the Panel considered that they were not such as to

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<sup>1</sup> Unless otherwise indicated, references in these reasons are to the Corporations Act 2001 (Cth).

mislead shareholders and were matters that could be dealt with adequately by DoloMatrix in its target's statement.

*FY 2008 forecast*

14. The Panel considered that it was inappropriate for Transpacific to merely refer in the bidder's statement to its announcement of 27 February 2008, which in turn referred to a previous announcement of 8 November 2007, in respect of its previously announced FY2008 financial forecasts. Transpacific should make it clear that by including a reference to past forecasts, it is confirming that those forecasts are still accurate and are based on current conditions. It should also include the relevant assumptions underpinning those forecasts.
15. When including financial forecasts in a bidder's statement, the bidder is required to disclose sufficient of the bases and assumptions underlying those forecasts to target shareholders to allow them to understand and assess the weight they should give to those forecasts.<sup>2</sup> This principle is also reflected in sections 602(b)(iii) and 636, and in section 670A where it is negatively expressed as a prohibition on giving a bidder's statement that omits material required under section 636. The Panel considers that the statement regarding the FY2008 financial forecasts in the bidder's statement should have also included an explanation of the bases for those forecasts and the assumptions upon which the figures were based. Transpacific agreed to include this in a supplementary bidder's statement.

*Defeating conditions*

16. The Panel did not consider that the defeating condition in section 11.11(b)(i) contravened section 629. Notwithstanding that there may be no contravention, it is important that conditions are sufficiently definite so that a target and its shareholders can assess the risk that they will not be satisfied.
17. DoloMatrix had expressed concerns that Transpacific may not apply for all necessary regulatory approvals. Transpacific responded that it had an implied obligation to use its best endeavours to procure the satisfaction of regulatory approvals. In the Panel's view, this obligation should have been stated explicitly. Moreover, while it is relatively common to refer to 'all necessary regulatory approvals', it is appropriate that material approvals and consents are identified. The Panel considered it appropriate that the language of section 11.11(b)(i) be amended, so that DoloMatrix and its shareholders are aware so far as possible of what that condition entails. Transpacific agreed to amend the condition in a supplementary bidder's statement.
18. In relation to the defeating condition in section 11.11(c)B, the Panel considered that it did contravene section 629, as it resulted in the defeating condition in section 11.11(c) being a condition within Transpacific's control. This was because Transpacific could itself decide that it would have offered a lower price. Transpacific agreed to waive the defeating condition in section 11.11(c), to the extent that it would be triggered by relying on paragraph B.

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<sup>2</sup> Midwest Corporation Limited [2007] ATP 33; Magna Pacific (Holdings) Limited [2007] ATP 02; Infratil Australia Limited [2000] ATP 1.

*Conclusion*

19. Following discussions with the parties, Transpacific agreed to dispatch a supplementary bidder's statement to DoloMatrix shareholders, which:
  - (a) included the assumptions underlying its FY2008 financial forecasts
  - (b) in respect of the defeating condition in section 11.11(b)(i), included a statement that Transpacific is not aware of any regulatory approvals or consents that are required in relation to the proposed transaction (other than ACCC clearance, which is the subject of a separate condition), but that it will immediately apply for, disclose and use its best endeavours to obtain such approvals upon becoming aware of any that are required and
  - (c) included a partial waiver of the defeating condition in section 11.11(c), the effect of which is that Transpacific will not be able to rely on a deemed breach of the condition that there is "no material adverse change" where it forms the view that it would have offered a lower price had it been aware of information that DoloMatrix failed to disclose to the market.
20. Transpacific agreed to dispatch the supplementary bidder's statement to DoloMatrix shareholders concurrently with the bidder's statement, the form of which has been approved by the Panel.
21. For the above reasons, the Panel concluded 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**

22. 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.

**Simon Mordant**

**President of the Sitting Panel**

**Decision dated 16 May 2008**

**Reasons published 16 May 2008**