



**In the Matter of Gosford Quarry Holdings Limited
[2008] ATP 11**

Catchwords:

Close of bid period - close of trading on ASX - closing single price auction - compulsory acquisition - extension of offer - misleading statement - offer to close at 4.00 pm - on-market bid

Corporations Act 2001(Cth) 606 - 611 Item 1 - 624(1) - 624(2) - 635 - 649C - 661E(2) - 664F(3)

INTRODUCTION

1. The Panel, Martin Alciaturi, Marian Micalizzi (sitting President) and Mark Paganin, decided not to make a declaration of unacceptable circumstances. The basis is that the acceptances through the market closing auction finishing at 4.12 pm, which took the bidder to 90% of the bid class, occurred in the bid period. This was notwithstanding statements by the bidder that the bid would close at 4.00 pm on the last day.

2. In these reasons the following definitions apply.

| Term | Meaning |
|----------------|---|
| Bell Potter | Bell Potter Securities Limited, the broker acting on behalf of GPG |
| Buduva | Buduva Pty Limited, as trustee for The Baskerville Superannuation Fund, the family superannuation fund of Mr Graeme Cureton (Executive Director of Guinness Peat Group Plc and a Director of GPG and Gosford) |
| CSPA | Closing Single Price Auction |
| Cureton Shares | 165,000 shares in Gosford held by Buduva |
| Gosford | Gosford Quarry Holdings Limited |
| GPG | GPG (No. 6) Pty Limited, a wholly owned subsidiary of Guinness Peat Group Plc |
| Jamber | Jamber Investments Pty Limited |

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. Gosford is a public company listed on ASX (ASX code: GQH)¹.
5. Jamber owns 585,571 Gosford shares.
6. On 1 February 2008, Bell Potter made an announcement to ASX pursuant to s 635 of the Corporations Act.² The announcement said that GPG would offer to acquire on-market all the fully paid ordinary shares in Gosford at \$0.55 per share. The announcement said:

"[Bell Potter] ... announces that during the period commencing on 18 February 2008 and ending 18 March 2008 ('Offer Period') [GPG] will... offer to acquire ... Gosford Quarry Shares.

...

Bell Potter has been instructed to purchase at the Offer Price every Gosford Quarry Share offered for sale during Trading Days in the period from the date of this announcement until the end of the Offer Period"

7. GPG's bidder's statement was lodged with ASIC on 1 February 2008. On the page headed "Important Dates" it shows the closing date of the Offer Period as 18 March 2008 (footnoted to refer to possible extension).

8. Page 1 of the bidder's statement referred to the Offer Period in these terms:

"Unless withdrawn, the Offers will be open during the period that begins at 10.00am (Sydney time) on 18 February 2008 and ends at 4.00 pm (Sydney time):

(a) on 18 March 2008; or

(b) on any date to which the period of this Offer is extended under Section 4 or as required by the Corporations Act."

9. On 18 March 2008, GPG's holding in Gosford increased to more than 50% and so its offer was automatically extended to 1 April 2008 under s 624(2).

10. On 19 March 2008 GPG announced the extension, stating:

"... GPG's offer is now automatically extended by 14 days in accordance with section 624(2) of the Corporations Act 2001 (Cth).

GPG's offer will now close at 4.00 pm (Sydney time) on 1 April 2008".

11. At 4.00 pm (Sydney time) on 1 April 2008, GPG had a relevant interest in 51,846,948 Gosford shares, representing approximately 89.86% of the total issued capital of Gosford.
12. GPG acquired a further 178,500 Gosford shares (in three parcels) during the CSPA function of the market. This occurred at 4:10:56 pm (Sydney time) on 1 April 2008. One of the parcels was the Cureton Shares. After the acquisition of these parcels GPG had relevant interests in approximately 90.17% of the shares in Gosford.
13. In the days following 1 April 2008, GPG increased its holding to 90.67% through a number of on-market trades.

¹ Since suspended because of compulsory acquisition proceeding.

² In these reasons, references are to the Corporations Act (Cth) 2001 unless otherwise stated.

14. On 2 April 2008 GPG announced to ASX that compulsory acquisition of the remaining securities in the bid class would proceed.
15. On 29 April 2008 GPG announced on ASX that it had lodged a copy of the formal compulsory acquisition notice with ASIC and would dispatch letters containing the notices to shareholders. Under ASX Listing Rule 17.4, Gosford was suspended from quotation from the close of business on 6 May 2008.

APPLICATION

16. On 14 May 2008 Jamber applied for a declaration of unacceptable circumstances on the bases that GPG had:
 - (a) contravened s 606 by acquiring shares in Gosford after 4.00 pm (Sydney time) on 1 April 2008 and
 - (b) relied on “illegally acquired” shares as a basis to proceed to compulsory acquisition.

Interim Orders

17. Jamber sought interim orders that GPG be restrained from proceeding any further with compulsory acquisition or otherwise acquiring any further relevant interest in Gosford.
18. Gosford was suspended from quotation from the close of business on 6 May 2008. GPG was unable to acquire Gosford shares on-market after that date. Further, the earliest GPG could compulsorily acquire the remaining Gosford shares was one month after the compulsory acquisition notice was given (see paragraph 15). On this basis, the Panel did not consider it necessary to make interim orders.

Final Orders

19. Jamber sought final orders that GPG’s notices to Gosford shareholders pursuant to s 661B are invalid and that GPG be restrained from acquiring any Gosford shares pursuant to those notices.

DISCUSSION

On-Market Bid

20. An on-market takeover bid is a bid announced through a broker to the stock exchange: s 635, item 2. The bidder authorises the broker to make offers on its behalf on the relevant market (in this case, the market provided by ASX) to acquire all of the securities in a class of securities issued by the target.
21. Under ASX Market Rule 20.2.1, the announcement by the broker must be a written document containing all the information required by that rule, including the date of the commencement and conclusion of the offer period (defined in ASX Market Rule 2.10 as the period for which offers under the bid remain open).
22. On the same day as the announcement is made, a bidder’s statement must be sent to ASX and the target and be lodged with ASIC: s 635 item 5. The content requirements for the bidder’s statement are set out in s 636. Unlike former s750, Pt C, which provided that the statement had to set out full particulars of the offers including the

period for which they would remain open, there is no express requirement that the bidder's statement set out full particulars of the offer.

23. An offer under a takeover bid must remain open for the period stated in the offer: s 624(1). In *Business Capital Ltd v Lorinv Pty Limited*³ Brooking J acknowledged that the Companies (Acquisition of Shares) Code treated the making of the announcement as the making of the offers and the announcement as constituting the offers. He left open the question of whether the terms of a Part C statement (now the bidder's statement) could be used to interpret an otherwise ambiguous announcement.
24. The Panel considers that GPG's offer was made in the broker's announcement dated 1 February 2008 together with the broker 'standing in the market'. The bidder's statement does not, in the Panel's view, constitute the offer. Thus, prior to the operation of the extension pursuant to s 624(2), the offer period was during "Trading Days" until the "end of the Offer Period" as set out in the announcement (see paragraph 6).
25. The term "Trading Day" is defined by ASX as a day determined by ASX to be a Trading Day and notified to members. The definition does not mention any specific time of day. ASX's Trading Calendar 2008 says that a Trading Day is the period during which ITS (the Integrated Trading System) is open for trading.
26. In the Panel's view the natural and ordinary meaning of a Trading Day is that part of a day on which trading can occur on-market. In the Panel's view that is until 4:12 pm (see paragraph 34). The Panel does not consider that the references to 4:00 pm in the bidder's statement (see paragraph 8) changed the term of the offer period set out in the announcement, although an incorrect reference to the close of the bid in the bidder's statement might mislead or deceive shareholders.

Extension of Offer Period

27. Section 624(2) provides for a mandatory 14 day extension of the offer period where the bidder's voting power in the target increases to more than 50% in the last 7 days of the offer period. This section also requires the bidder to give the target and everyone who had not accepted the offer written notice of the extension. However, the extension is not dependent on the giving of this notice.
28. As a result of the operation of s 624(2), GPG's offer was automatically extended to 1 April 2008, being 14 days after GPG's voting power in Gosford increased to more than 50% on 18 March 2008. The issue for the Panel was the time on 1 April that the offer closed.

What time did the offer close?

29. There are three possibilities for the time the offer closed on 1 April (all Sydney time):
 - (a) 4.00 pm, as stated in the bidder's statement
 - (b) 4.12 pm being the close of trading on ASX and
 - (c) 12 midnight, being the last instant of the day.
30. Jamber submitted that the offer closed at 4:00 pm and GPG should have withdrawn its buy order at that time. It submitted that GPG should not be able to ignore its own

³ (1988) 12 ACLR 677 at 679-80

clear and precise statements in the bidder's statement when the market and everyone else was "forced to rely on those statements". It did not explain how persons were forced to rely on the statements.

31. GPG submitted that the offer closed at midnight by operation of law, and so had to be open for as long as possible on 1 April 2008. The close of the offer at 4.12 pm, when ASX trading ended, was the latest time possible. It said that "*although the announcement indicated (incorrectly) that the offer would close at 4:00 pm (Sydney) time, trading on the ASX did not in fact close until 4:12 pm*". In the context of an on-market bid, GPG submitted, it would be undesirable for the market if a bidder was able to specify a time during the trading day when the offers would close because placing and removing takeover offers is effected by ASX Market Control, not directly by brokers, and complications might arise, for example, if ASX did not remove the offers at precisely the correct time.
32. ASIC RG 7, after referring to the law regarding calculation of time periods⁴ provides in effect that where a time period is expressed to be after an act or event, the time period commences at the beginning of the day after the event; that is after midnight of the day on which the event takes place. The period then runs for the relevant number of whole days after that midnight.
33. The Panel considers that s 624(2) required the extension to be open for as long as practicalities allowed on the fourteenth day after GPG reached 50%. An on-market offer is made by the broker standing in the market. Section 624(2) therefore required the offer to remain open on the fourteenth day until the broker could no longer stand in the market to receive acceptances; that is, when trading on ASX closed.

When does trading close on ASX?

34. The market goes through a number of phases on any trading day⁵. These include:
 - (a) **Normal Trading Phase** – between 10:00 am and 4:00 pm, Sydney time. Brokers enter bids and offers which are matched against each other instantly if they overlap, resulting in trades.
 - (b) **Pre CSPA Phase** - between 4:00 pm and 4:10 pm, Sydney time. During this phase, orders can be entered, cancelled or amended. There is no trading in this phase.
 - (c) **CSPA Phase** - between 4:10 pm and 4:12 pm, Sydney time. At the end of the Pre CSPA phase there is an auction period, during which orders cannot be adjusted. During this phase the 'single closing price' is determined and all orders entered into the market that 'overlap' will be executed at the single closing price.
35. The Panel considers that trading on ASX occurs until 4:12 pm Sydney time. That is the time when buy and sell orders entered into the market which 'overlap' are traded at the single closing price. The single closing price might be different to the bidder's offer price, and if higher the bidder will not participate in the trades cleared at that single price. This does not change the necessity of the bidder continuing to offer to accept shares at its price until the last possible moment on the fourteenth day of the extension.

⁴ In particular, s 105 and *Prowse v McIntyre* (1961) 111 CLR 264

⁵ See ASX Market Rules Appendix 31

36. In short, the Panel considers that the offer closed at 4.12 pm, according to its terms which were set out in Bell Potter's announcement to the market, as extended by s 624(2). This is but an application of the principle in *Qantas Airways Ltd 02*⁶ and *02R*.⁷
37. As the announcement of the extension could not change this, the question was whether the announcement of the extension was misleading.

Effect of reference to 4:00 pm

38. Jamber submitted that the reference to 4.00 pm was a last and final statement that GPG should be held to as it had been misled. However, Jamber had not been misled to its detriment, since it was not seeking to accept at all.
39. GPG submitted that the announcement on 19 March 2008 (ie, of the extension) was "*clear and concise practical guidance to the market*". The Panel does not accept this. The announcement's reference to 4.00 pm was simply incorrect.
40. GPG submitted that the reference to 4:00 pm in the extension announcement was a proxy for the close of trading on the ASX and would be understood as such. The Panel does not accept this. While perhaps, colloquially, it might be regarded as a proxy, many market participants are aware of the phases of trading on ASX and would be likely to regard a reference to 4.00 pm as a reference to the end of the Normal Trading phase.
41. GPG further submitted that the difference between 4:00 pm and 4:12 pm had no material bearing on shareholders participating in an efficient and informed market. The Panel agrees with this submission. After the close of the offer period, Gosford shares continued to trade on the ASX until 6 April 2008 (when they were suspended from quotation) and any shareholder who wished to sell their shares at \$0.55 was able to do so during this period. Shareholders did not lose a reasonable or equal opportunity or miss out on a reasonable time or enough information to consider the proposal. The Panel considered that the reference to 4:00 pm, notwithstanding that the offer continued until the close of trading at 4:12 pm, did not mislead or deceive shareholders such as to give rise to unacceptable circumstances. The Panel did not consider that the purposes of Chapter 6 set out in section 602 were undermined.

Cureton Shares

42. Jamber submitted that the late acceptance for the Cureton Shares (see paragraph 12) was a deliberate ploy by GPG and Mr Cureton to achieve 90% relevant interest and compulsory acquisition.
43. During the course of the proceedings, the Panel questioned what communication GPG had with Mr Cureton and Buduva in relation to the acceptance for the Cureton Shares. GPG submitted that although there was communication with Mr Cureton (who principally had the carriage of the takeover bid on behalf of GPG) on 1 April 2008, "*GPG did not give any instruction to Mr Cureton or anyone else on behalf of Buduva in relation to its shareholding ... nor was the Buduva shareholding the subject of any discussion with Mr Cureton*".

⁶ [2007] ATP 6

⁷ [2007] ATP 7

44. The Panel accepted this response from GPG. Accordingly, the Panel considers that there is no evidence that acceptances after 4.00 pm on 1 April 2008 were undertaken in contravention of any other provision of the Corporations Act (eg, s 623 dealing with collateral benefits).

DECISION

45. The Panel considers that s 624(2) extended the offer period until 4:12 pm (Sydney time on 1 April 2008). The Panel does not consider that the references to 4:00 pm Sydney time in the announcement of the extension (see paragraph 10) changed the term of the offer period. The acceptances through the market closing auction at 4.12 pm, which took GPG to 90%, occurred in the bid period.
46. The Panel considered that there was no contravention of s 606 and the purposes of chapter 6 set out in s 602 were not undermined.
47. The Panel decided not to make a declaration of unacceptable circumstances.
48. Because it made no declaration, the Panel did not consider the question of costs.

Marian Micalizzi

President of the Sitting Panel

Decision dated 23 May 2008

Reasons published 30 May 2008