



In the Matter of Just Group Limited

[2008] ATP 22

Catchwords:

Supplementary bidder's statement – value of consideration – misleading statements – extension of offer – 50.1% minimum acceptance condition – shareholders' intentions – further disclosure – undertakings – restraint on despatch of supplementary bidder's statement – substantiation of indications of acceptance

Just Group Limited – Premier Investments Limited

ASIC RG 25

Corporations Act 2001 2001 (Cth) sections - 602 - 657A - 657D - 643

INTRODUCTION

1. The Panel, Garry Besson (sitting President), Andrew Sisson and Heather Zampatti, declined to conduct proceedings on the basis that Premier provided further disclosure clarifying the implied value of the Premier offer and substantiated statements by its Chairman concerning intentions of major shareholders to accept the offer.
2. In these reasons the following definitions apply.

Term	Meaning
Just Group	Just Group Limited
Premier	Premier Investments Limited
Supplementary Bidder's Statement	The third supplementary bidder's statement dated 23 July 2008

BACKGROUND

Facts

3. Just Group and Premier are public companies listed on ASX (ASX codes: JST and PMV).
4. On 31 March 2008, Premier announced an off-market takeover bid for Just Group offering \$2.095 cash¹ plus 0.25 Premier shares for each Just Group share.
5. On 23 July 2008, Premier lodged the Supplementary Bidder's Statement outlining proposed revisions to the offer including:
 - (a) a 15 cents per share increase in the cash component of the offer if Premier acquired a relevant interest in 90% or more of Just Group

¹ The announcement provided that the cash component was \$2.20 (inclusive of a \$0.105 per share dividend to be paid during the offer period). The cash component was adjusted to \$2.095 after the dividend was paid.

- (b) Premier's final dividend would be 18 cents per share and accepting Just Group shareholders would be eligible to receive the dividend on Premier shares issued to them before 29 September 2008 and
 - (c) the offer would close on 15 August 2008 (subject to automatic extension) unless Premier had sufficient acceptances being more than 50% of Just Group on or before 6 August 2008, in which case it may extend the offer period. To calculate sufficient acceptances it would "*aggregate of the number of Just Group shares for which acceptance instructions had been received under the acceptance facility and the number of Just Group shares in which Premier has a relevant interest*".
6. The Supplementary Bidder's Statement further provided that if Premier acquired a relevant interest in 90% or more of Just Group during the offer period the value of the offer would be \$4.06 to \$4.49.
7. During a media teleconference on 23 July 2008, the Chairman of Premier is reported to have said that a couple of major players on the Just register had indicated that they were going to accept Premier's enhanced offer.
8. On 24 July 2008, the Chairman's comments were reported in the press, including:
- (a) "*We have confidence, because in conversations this morning a couple of institutional owners indicated they are going to accept our enhanced offer and we are very pleased about that ...*" Asked whether the acceptors included the two biggest owners, Barclays Global and AXA Alliance, [the Chairman] responded: "*I don't think I can comment on who we have spoken to.*"²
 - (b) "*[the Chairman] said he was 'confident' Premier would get to 50 per cent acceptance after major shareholders indicated they would back the deal*"³
 - (c) "*[the Chairman] asserts the bid would have reached the minimum 50 per cent threshold even without the improved terms. But the sweetener was enough to persuade a couple of instos who said a few bob more would do the job.*"⁴ and
 - (d) "*He [the Chairman] said that several institutional shareholders had 'indicated' they would accept the enhanced and final offer.*"⁵

Application

9. By application dated 24 July 2008, Just Group sought a declaration of unacceptable circumstances. It submitted that the Supplementary Bidder's Statement:
- (a) exaggerated the value of the proposed increase in the bid (where Premier acquired a relevant interest in 90% or more of Just Group)
 - (b) included misleading information about when shareholders are entitled to participate in Premier's 18 cents per share final dividend

² Extract from The Australian, 24 July 2008, page 21

³ Extract from The Australian Financial Review, 24 July 2008, page 18

⁴ Extract from The Australian, 24 July 2008, page 27

⁵ Extract from Sydney Morning Herald, 24 July, page 29

- (c) did not include updated information about the S&P/ASX200 index⁶ and
- (d) did not include statements made to the media by Premier's Chairman commenting on "*his confidence in Premier reaching a 50% shareholding*" and substantiation of those statements.

Interim Orders

- 10. Just Group sought interim orders that, pending the final determination by the Panel, Premier be restrained from dispatching the Supplementary Bidder's Statement to Just Group shareholders.
- 11. On the basis of an undertaking (see paragraph 15), interim orders were not required.

Final Orders

- 12. Just Group sought final orders that Premier:
 - (a) issue a further supplementary bidder's statement in a form approved by the Panel which corrected and clarified the errors and misleading statements in the Supplementary Bidder's Statement and
 - (b) issue a retraction of the statements attributed to its Chairman if such statements are not substantiated in the further supplementary bidder's statement.

DISCUSSION

Supplementary Bidder's Statement

- 13. Just Group submitted that Premier's calculation of the offer value (if Premier acquired a relevant interest in more than 90% of Just Group) in the Supplementary Bidder's Statement involved double counting and therefore overstated the offer value, in particular the calculation of:
 - (a) \$4.06 (based on Premier's VWAP) assumed that the Premier share price was not affected by the extra 15 cents to be paid to accepting shareholders and that the 18 cents per share dividend was already built into the Premier share price and
 - (b) \$4.49 (based on Premier's NTA) did not allow for the potential that the extra 15 cents may reduce the NTA value.
- 14. Premier responded that the offer value was not overstated as the dividend had not been declared during the relevant VWAP period and any adjustment would require Premier to speculate how Premier shares might trade following the announcement of the dividend and enhanced offer.
- 15. On 25 July 2008, Premier gave an undertaking to the Panel that it would only dispatch the Supplementary Bidder's Statement if at the same time it dispatched a

⁶ Just Group submitted that it was misleading not to include this in the Supplementary Bidder's Statement as the offer was subject to a condition that the index not close below 4600 on any trading day during the offer period.

letter to Just Group shareholders (in a form approved) which included disclosure clarifying the implied value of the Premier offer.

16. On 28 July 2008, Premier announced that it had commenced the dispatch of the Supplementary Bidder's Statement and the clarification letter. The clarification letter:
 - (a) identified that Premier and Just Group had different views on the appropriate methodology for calculating the increased offer value
 - (b) included tables which showed the difference between applying the Premier and the Just Group valuation methodologies
 - (c) detailed when shareholders would need to accept the offer to be issued Premier shares in time to be entitled to participate in Premier's 18 cents per share final dividend and
 - (d) updated information about the S&P/ASX200 index.
17. On 28 July 2008, Just Group informed the Panel that the undertaking and the clarification letter had resolved the issues of value and misleading information in the Supplementary Bidder's Statement. This left the issue of shareholder intentions.

Shareholder intentions

18. Under ASIC's Regulatory Guide 25 "Takeovers, false and misleading statements", a statement by a bidder that "*the bid has been well received by the institutions*" or that "*it is close to satisfying its minimum acceptance condition*" may mislead or confuse holders and the market.⁷
19. Similarly, a statement by a bidder that a substantial holder has said it will accept an offer should be in specific, percentage terms (for example, holders of X% of ordinary shares have stated their intention to accept into the bid).⁸ ASIC may require that the bidder identify the substantial holder and give details of what the substantial holder had told it.⁹
20. The Panel has consistently supported the principle in RG 25.¹⁰ The market has to know whether a public statement can be "relied on" (in the sense of the maker's conduct being consistent with the statement): Breakfree 04R.¹¹ Therefore, the statement needs to be sufficiently specific, as RG 25 requires.
21. Just Group submitted that during a takeover bid comments by the bidder claiming acceptances are material and very influential to shareholders in considering whether to accept the bid. The Panel agrees.

⁷ ASIC RG 25.73

⁸ ASIC RG 25.74

⁹ ASIC RG 25.33

¹⁰ Examples of different applications of the principle are BreakFree 04R [2003] ATP 42, Novus Petroleum 02 [2004] ATP 9, Summit Resources [2007] ATP 9 and Rinker Group 02 [2007] ATP 17 and 02R [2007] ATP 19. Section 631 is a legislative example of the principle.

¹¹ BreakFree 04R [2003] ATP 42 at para [65]

22. Just Group further submitted that the comments by Premier's Chairman were capable of misleading Just Group shareholders and Premier should retract the statements or disclose:
- (a) the names of the shareholders
 - (b) the number of shares they spoke for and
 - (c) the precise wording they used and whether their intentions to accept were qualified.

Mergermarket

23. On 29 July 2008, an article in online publication Mergermarket said that a "source familiar with the situation" had said that Just Group shareholders sufficient to take acceptances to over 50% had told Premier that they would accept the offer. Premier issued a statement to the market denying that it was the source of the comment and correcting the Mergermarket report. Premier's announcement included the following:

"At this stage, Premier has not received firm acceptances – or firm indications of an intention to accept – from holders of over 50% of Just shares.

Premier had not received firm acceptances – or firm indications of an intention to accept – from holders of sufficient shares to require it to update the market by 9:30am today on the level of acceptances.... As at the close of business yesterday, Premier had received acceptances from holders of 1.89% of Just shares ... Premier also owns 0.9% of Just shares.

....

Premier has always anticipated that acceptances will begin to flow into its Institutional Acceptance Facility during the course of this week"

24. Just Group submitted that Premier's release of 29 July did not remedy the effects of the statements of 23 July because Just Group shareholders could not reconcile the Chairman's statements with this corrective statement. Just Group submitted that the last sentence quoted above ("*Premier has always anticipated that acceptances will begin to flow into its Institutional Acceptance Facility during the course of this week*") was misleading as the basis for this belief had not been disclosed. Just Group further submitted that shareholders would be confused by this sentence when read in conjunction with the Chairman's statements about "*his confidence in Premier reaching a 50% shareholding*".
25. The Panel agrees that the 29 July statement did not remedy the effects of the 23 July statement. The clarification of 29 July is quite specific in its reference to the Mergermarket article. It does not specifically address the 23 July statements, although it could have done so easily and would have been better if it had. The Panel did however think that the 29 July statement improved the clarity of the position.

Further disclosure

26. Prima facie, without substantiation of the Chairman's comments Just Group shareholders were likely to be misled, or at least may not have enough information, about Premier's relevant interest in Just Group and the extent to which institutional

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shareholders had indicated a firm intention to accept or had provided acceptance instructions into the acceptance facility. The Panel considered that the acquisition of control over Just Group shares may not be taking place in accordance with the principles in s602.

27. Accordingly, the Panel was minded to commence proceedings, however, following discussion with the Panel, on 31 July 2008 Premier made the following additional announcement to ASX (footnotes omitted):

"Premier makes this announcement at the request of the Takeovers Panel, following the application by Just Group Limited.

Premier's Chairman made the following statement ("Chairman's Statement") in response to a question at a media conference convened on 23 July 2008, following the lodgement of Premier's Third Supplementary Bidders Statement -

...earlier this morning we've spoken to a couple of the major players on the Just register and they have indicated that they are going to accept our new enhanced offer and we're very pleased about that...

The Chairman's Statement referred to conversations that took place, following the lodgement of Premier's Third Supplementary Bidder's Statement, with the holders of 7.8% of the shares in Just. Those shareholders have now provided acceptance instructions into the acceptance facility.

The Chairman's Statement is an accurate reflection of the relevant conversations.

We confirm, as announced this morning, that as at 11.59 pm on 30 July 2008, Premier and its associates had a relevant interest in 25.636% of Just Group shares. Further, acceptances in respect of an additional 12.438% of Just Group shares had been received into the acceptance facility as at that time."

28. The Panel considered that this disclosure, together with the announcement of 29 July, provided Just Group shareholders with enough information about Premier's interest in Just Group (i.e. its relevant interest and the levels of acceptances by institutional shareholders) to enable them to decide whether to accept the offer. To the extent that any were likely to be misled by the information previously in the market, the two announcements clarified the position.
29. The disclosure of the percentage accorded with RG 25.74. The Panel noted that ASIC may go further in requiring also the naming of the shareholders. The Panel did not consider it necessary for Premier to identify the shareholders who held the 7.8% (in accordance with RG 25.33) as the shares were in the acceptance facility.
30. The Panel did not consider it necessary for Premier to issue a supplementary bidder's statement as it was not necessary to name the shareholders, and the statements were about the Chairman's confidence based on the shareholders' intentions. The Panel

also noted that the statements were not in the bidder's statement, any supplementary bidder's statement or any other document dispatched to Just Group shareholders.

DECISION

31. For the reasons above the Panel decided not to conduct proceedings.

Media

32. The Panel noted that there were announcements and some press coverage about issues connected with the application. This did not help. Panel proceedings are assisted if parties refrain from publicly debating issues that are before the Panel. The Panel seeks to encourage this restraint by its prohibition on "media canvassing".¹² In some cases other issues are so connected with issues that are before the Panel that it is incumbent on parties not to take too technical an interpretation of the prohibition.

Garry Besson
President of the Sitting Panel
Decision dated 1 August 2008
Reasons published 4 August 2008

¹² Rule 12 of the Panel's Rule for Proceedings