



Australian Government

Takeovers Panel

**Reasons for Decision
Tully Sugar Limited
[2009] ATP 26**

Catchwords:

target's statement – disclosure standard – valuation – independent expert's report – basis for recommendation – material information – financial information – comparative financial information – forecast – 6 month update – net asset backing – earnings per share – unlisted entity – non disclosing entity – liquidity – illiquidity – basis for recommendation – company structure – unsatisfactory disclosure – decline to make a declaration – supplementary disclosure – supplementary target's statement

Corporations Act 2001 (Cth), sections 602, 638, 640, 657A

Re BNQ Sugar and Others (1994) 12 ACSR 695, Unity APA Ltd v Humes Ltd (1986) 13 ACLR 501, Bell Resources Ltd v BHP (1986) ASC 55-489

Origin Energy Limited 02 [2008] ATP 23, Sirtex Medical Ltd [2003] ATP 22, Anaconda Nickel Ltd 02-05 [2003] ATP 04

INTRODUCTION

1. The Panel, Geoff Brunsdon, Kathleen Farrell and Kevin McCann (sitting President), declined to make a declaration of unacceptable circumstances in relation to the affairs of Tully, following provision of a supplementary target's statement. The application concerned alleged deficiencies in the Tully target's statement, in particular in respect of the value of Tully and Tully securities.
2. In these reasons, the following definitions apply.

Bundaberg	Bundaberg Sugar Limited
Maryborough	The Maryborough Sugar Factory Limited
target's statement	Target's statement by Tully dated 12 November 2009
Tully	Tully Sugar Limited
3. In these proceedings, the Panel:
 - (a) adopted the Panel's published procedural rules and
 - (b) consented to parties being represented by their commercial lawyers.

FACTS

4. Tully is an unlisted public company with more than 50 members¹ that operates a sugar mill in far north Queensland. Maryborough is also in the sugar industry. It is an ASX listed company (ASX code: MSF).

¹ s606(1)(a)(ii) extends the application of chapter 6 to such companies. References are to the Corporations Act 2001 (Cth) unless otherwise indicated

5. On 27 August 2009 Maryborough announced an off-market takeover bid for all the shares in Tully, offering 13 Maryborough shares for every Tully share. It lodged its bidder's statement in relation to the offer with ASIC and ASX on 7 October 2009.
6. Following discussions with Tully, Maryborough lodged a supplementary bidder's statement and a replacement bidder's statement with ASIC and ASX on 21 October. Maryborough lodged a second supplementary bidder's statement on 13 November following completion by it of a capital raising.
7. Tully lodged its target's statement with ASIC on 12 November. It contained the Tully directors' recommendation that shareholders reject the Maryborough bid. The target's statement did not include a valuation of Tully either by the directors or an independent expert.
8. In the period after lodgement of the target's statement, the parties exchanged correspondence in relation to the level of disclosure in the document. The correspondence also contains discussion of Tully's current negotiations with Bundaberg in relation to the acquisition of certain assets.
9. On 13 November 2009, the chairman of Tully was interviewed on radio and made statements to the effect that there had been an independent valuation of Tully. The following is an excerpt from the transcript provided by Maryborough:

Interviewer: "What was the valuation put on Tully Sugar by the independent valuers as part of this target statement?"

Dick Camilleri: "Ah, there was a varied variation, from X to X, you know, and I'm not quite sure of the exact numbers but it was in the high 120's I think, from memory"

Interviewer: "That was the higher point, or that was the average?"

DC: "Well, up towards the higher point I think."

Interviewer: "What was the lowest point, was it around the 90?"

DC: "Yeah."
10. Subsequent correspondence between Tully's and Maryborough's advisers revealed that this was incorrect, and the valuation referred to was a broker valuation commissioned by Tully when it was previously considering an IPO. Tully offered to discuss with Maryborough a retraction, which Maryborough did not pursue.

APPLICATION

11. By application dated 25 November 2009, Maryborough sought a declaration of unacceptable circumstances. It submitted that the target's statement was materially deficient by omitting information that Tully shareholders would require to make an informed assessment of the Maryborough bid, including:
 - (a) a comparison of the relative value of the consideration offered under the bid with the value of Tully shares, being a proper basis for a directors' recommendation
 - (b) information supporting the statement in the target's statement that \$15 per share was not an accurate indication of the value of Tully shares

- (c) implied statements as to value without setting out a reasonable basis for those statements
 - (d) the independent valuation referred to by the Tully chairman in the radio interview
 - (e) information about Tully's negotiations with Bundaberg and their status and
 - (f) other statements that Maryborough submitted were either misleading or made without a reasonable basis, for example concerning Maryborough's historical financial performance and the nature of its business.
12. Maryborough submitted that the effect of the circumstances was to inhibit the efficient competitive and informed market for Tully shares, to prevent Tully shareholders from being given the information they require to make an informed assessment of the Maryborough bid, and to mislead Tully shareholders.

Final orders sought

13. Maryborough sought final orders to the effect that Tully send shareholders a supplementary target's statement correcting the deficiencies alleged in the application and obtain an independent expert's report valuing Tully shares (if a valuation had not already been obtained).

DISCUSSION

14. We decided to conduct proceedings in relation to the issues raised in (a), (b), (d) and (e) in paragraph 11.
15. In relation to (c), we do not consider that the target's statement purported (impliedly or otherwise) to give an indication of the value of Tully shares or to say that the Maryborough bid undervalued Tully. We did, however, examine whether the target's statement contained enough information to meet the requirements in s638.
16. In relation to (f) Maryborough is entitled to respond via a supplementary bidder's statement or other appropriate communication with the Tully shareholders.

The disclosure standard

17. Section 638² details the standard for disclosure in a target's statement. It requires information that will allow shareholders to make an informed assessment whether to accept the offer³ and a statement by each director of the target recommending (with reasons) that the offer be accepted or not or giving reasons why a recommendation is not made.

² Section 638(1) and (1A) say:

"(1) A target's statement must include all the information that holders of bid class securities and their professional advisers would reasonably require to make an informed assessment whether to accept the offer under the bid.

(1A) However, the statement must contain this information:

- (a) only to the extent to which it is reasonable for investors and their professional advisers to expect to find the information in the statement; and*
- (b) only if the information is known to any of the directors of the target."*

³ Section 638(3)

18. The obligation is placed on directors to determine what information is material to holders of bid class securities and to disclose what any of them knows on those matters.⁴ In the event that statements as to value are included in a target's statement, a reasonable basis for them needs to be disclosed.⁵
19. Beach J in *Unity APA*⁶ observed that shareholders would want to know two things, so far as it was within the knowledge of any of the directors:
 - (a) the present value of the shares and
 - (b) *"what the asset backing of the shares is, what the profitability of the company has been and is likely to be in the future, and what financial benefits [the shareholder] is likely to receive in the way of dividends, bonus issues and the like if the take-over succeeds on the one hand, or fails on the other."*
20. In this case, shareholders need such information to be able to assess whether they wish to remain as shareholders in Tully as a stand-alone entity or become shareholders in the post-acquisition Maryborough. Tully is an unlisted, non-disclosing entity which was a former cooperative. It retains a large grower-base (61%) on its shareholder register. Shareholders do not have the benefit of continuous disclosure, or ready access to the trading price of their shares, or information from analysts following the stock as there might be with a listed entity.
21. Accordingly, we think it is incumbent on the directors to take particular care to ensure that all the information required is included in the target's statement in a way that is readily understandable. The target's statement in this case did not present adequate information.

Present value of Tully shares

22. The target's statement contains no substantive information as to the value of Tully shares.
23. On page 27 of the target's statement, the following statement appeared:

"As an unlisted entity, Tully Sugar often does not know what price Tully Shares trade at. However, some share transfer documentation provided to the Company for registration purposes does show the consideration provided. In the four months prior to the date of this Target's Statement, only one such transfer occurred in which 1,000 Tully Shares were transferred for total consideration of \$15,000.

The Directors do not believe that this trading price is an accurate reflection of the value of Tully Sugar and note that it is a significant discount to the net assets per Tully Share shown in Tully Sugar's balance sheet as at 30 April 2009."
24. Maryborough submitted that no proper basis was given for the directors' belief that \$15 per share was not an accurate reflection of value. Maryborough submitted that a NTA comparison was not an appropriate basis on which to value Tully shares because, among other things, it did not account for the illiquidity of Tully shares (as an unlisted entity) or its ability to realise the assets. We do not see why a discount to

⁴ Renard and Santamaria, *Takeovers and Reconstructions in Australia*, para [1143]

⁵ *Origin Energy Limited 02* [2008] ATP 23 [19]-[22]

⁶ *Unity APA Ltd v Humes Ltd* (1986) 13 ACLR 501

NTA is not a basis for this statement. In our view, however, while a discount to NTA is an indicator of value, this statement alone does not provide sufficient guidance as to value for Tully shareholders.

Is a valuation required?

25. Maryborough submitted that, for the target's statement to meet the disclosure requirement in s638, in the absence of any substantive information in relation to the value of Tully shares, a valuation of Tully and its shares in an independent expert's report was required. We disagree for the reasons set out below.
26. We consider that s638 requires that some guidance as to value be given.⁷ But this guidance need not take the form of:
 - (a) an explicit statement of what the directors consider Tully shares are worth. We do not consider that the principle in s602(a) would necessarily be served by the Tully directors naming the price at which they would be willing to recommend an offer or
 - (b) an independent expert's report valuing Tully shares (as was sought by Maryborough). Section 640 sets out when an expert's report must be included with a target's statement. The Panel has identified circumstances in which the requirement should be extended.⁸ Neither the preconditions to the operation of section 640 nor those circumstances are present here.
27. In our view, if the Tully directors did not have a valuation (either internal or by an independent expert), they should not be required to produce one. As Kiefel J stated in *BNQ Sugar*,⁹ "there is nothing in the Corporations Law concerning Part B statements which requires evaluation to be provided and it could not be said that valuations are supplied as a matter of course in takeovers." Of course, the directors may obtain an independent expert's report or produce a (substantiated) valuation of their own, if they choose. If they do not choose, they should at least include in the target's statement sufficient financial information that would enable a Tully shareholder and their professional advisers to make an assessment of the merits of Tully and the Maryborough bid.
28. In this case we think that Tully could have resolved a number of the disclosure issues by providing an independent expert's report.
29. Tully has offered further disclosure in a supplementary target's statement that includes disclosure of the fact that the directors do not have a valuation. They said that they were not qualified to value the company, and that it was not appropriate for them to do so. They also said that their reasons for their recommendation could be found in the target's statement and supplementary target's statement.
30. In that event, it was incumbent on them (as we note in paragraph 27) to provide sufficient information. The target's statement did not do so. We address this below.

⁷ See also *Anaconda Nickel Ltd 02-05* [2003] ATP 04 at [161]-[168]

⁸ In *Sirtex*, the Panel said that if "there was evidence to suggest that a target board to whom section 640 of the Act did not apply was too beholden to a bidder to be relied upon to provide an independent and critical assessment in their target's statement, it would be consistent with the policy of the legislation for the Panel to require the production of an Independent Expert's Report."

⁹ *Re BNQ Sugar and Others* (1994) 12 ACSR 695

Tully Chairman's radio comments

31. On the basis of the Tully Chairman's radio comments, we think shareholders would be led to believe that there is a current, independent valuation of Tully that is relevant to their decision in relation to the bid. However, this is not the case.
32. Maryborough submitted that the only way to address the effect of the comments was for Tully to commission an independent expert's report valuing Tully shares. At 10 December 2009, there had been no acceptances of the bid. Tully is not listed, so there is no market trading to concern us. There have been 3 transfers lodged since the comments were made (each dated 10 December 2009) but no evidence has come forward that they were influenced by the comments. In the circumstances, we think that the effect of the comments can be undone by a suitable retraction in a supplementary target's statement, which makes it clear that shareholders should not rely on them. Tully offered such a retraction. We take comfort that the retraction will appear with the additional information we require. We do not agree that an independent expert's report is required.

Financial information

33. Tully provided a historical comparison of itself and Maryborough as stand alone entities. We think that this is not enough. It does not address (to the extent possible) the asset backing of the shares, the profitability of the company, or the financial benefits likely from remaining with Tully as a stand alone entity or accepting the bid and becoming a shareholder in Maryborough as it would appear post acquisition.

6 Month update

34. With a balance date of 30 April, the latest financial information disclosed to Tully shareholders was, at the time of the target's statement, over 6 months old.
35. Tully submitted that it could be misleading to provide an update, given the nature of Tully's business. Tully submitted that it earned the vast majority of its income during the first six months of its financial year, meaning that its performance in the first half of each year was substantially stronger than in the second half. Maryborough submitted that the costs incurred in the second half of the financial year would be predictable, that by this time of year Tully should know the size of its 2009 crop, and Tully would know the sugar price it would be likely to realise given its hedging arrangements.
36. An update could be suitably qualified so as not to be misleading. We think a 6 month update should be provided so that Tully shareholders will have information on the current financial position of their company. Tully offered to provide updated financial information for the six months to 31 October 2009 in the supplementary target's statement. It was not audit reviewed (as an unlisted company Tully was not required to, and did not have, audit reviewed half-yearly accounts), and this was made clear. As an unlisted, non-disclosing entity we do not think it is reasonable for shareholders or their professional advisers to expect to find audit-reviewed information.¹⁰

¹⁰ Section 638(1A)

Forecast

37. The target's statement contained broad qualitative statements in relation to Tully's prospects, such as the directors' belief that Tully would "grow and lead consolidation of the sugar industry in far north Queensland". There was, however, no quantitative guidance as to Tully's expected performance. Consistent with the comments of Beach J in Unity APA, Renard and Santamaria say:

*"Arguably the most helpful action target directors can take in assisting holders of securities in their decision whether or not to accept a takeover bid is to publish a realistic forecast of the target's profit for the current financial year (and later years if that is possible)."*¹¹

38. We asked Tully if it could produce a forecast or profit guidance for the 2010 financial year. This is not to say that a forecast is generally required in a target's statement.
39. Tully offered to provide a forecast, which revealed an expected drop in profits of over 75%. Tully also offered information that its NTA per share at 30 April 2009 was \$35.53 and said: "The Directors consider the specific factors contributing to the reduced current year profit (as explained in section 5.3 of the Supplementary Target Statement) do not impair the value of Tully Sugar's assets due to their unusual and non-recurring nature."
40. We consider the fall in profit and NTA information to be material information that should be disclosed.

Information comparing Tully's and Maryborough's businesses

41. The target's statement contained profiles of the two businesses, including descriptions of their operations. We consider that the two businesses should be directly compared, with some analysis of the earnings implications of their respective attributes. For example, the separate statements in the target's statement that Tully's sugar milling business was of a high quality and that Maryborough's was 'uncertain' need to be brought together in a comparison of the two businesses, fully explained and given some quantitative context.
42. Tully offered a table comparing the key issues to consider in relation to the two businesses and an earnings comparison which included forecast earnings. Tully also offered information in relation to key contracts supporting the directors' view that Tully as a stand-alone entity would have a more certain business than a post-acquisition Maryborough, including a projection of the earnings impact of the contracts and the underlying assumptions. We consider that shareholders will now be provided with meaningful information about the businesses.

Liquidity

43. The liquidity of Tully's stock is relevant to the decision whether to remain a Tully shareholder. The effect of Tully being unlisted, and Maryborough being listed, should have been disclosed in the target's statement. Liquidity in this case is a clear distinguishing factor between the alternatives. The target's statement did not contain any information in this regard. We therefore consider that the statement in relation to recent trading of Tully shares (see paragraph 23) was misleading.

¹¹ Renard and Santamaria, para [1143]. See also *Bell Resources Ltd v BHP* (1986) ASC 55-489

44. Tully offered information on all the trades registered by the board (other than trades between related parties or in connection with a deceased estate) for the last two years and provided some analysis of the information. It revealed a VWAP of \$16.72 and that, in total, approximately 2.7% of the company's shares had changed hands, compared to 31.8% for Maryborough.
45. We are satisfied that this information assists Tully shareholders to properly evaluate the choice between remaining a shareholder in Tully as a stand-alone entity and becoming a shareholder in Maryborough post acquisition.

Future structure of Tully

46. We consider that the target's statement contains insufficient information in relation to the future of Tully. Tully's 2009 annual report contained the following statement from the Chairman:

"Your Board is still working through its consultants/advisers to evaluate the optimum structure for the Company going forward. The recent collapse of the share market has had an impact on our endeavours but we will continue to investigate opportunities for the Company. The Board has also taken into account shareholder comments that were expressed at the last Annual General Meeting and recent Bi-Annual Meeting regarding Company structure and Board composition. Your Board will present its findings and recommendations to shareholders at an appropriate time so as to enable shareholders to make an informed decision on their preferred strategy for the future of the Company.

We will continue to assess opportunities to increase shareholder's value but will not do so to the detriment of our core business."

47. The target's statement contains no reference to this statement, much less any update as to the directors' progress with their review. In our view when shareholders are confronted with the choice presented by a bid for their company this would be an "appropriate time" for such an update.
48. Tully offered to provide shareholders with information in relation to the review.
49. One aspect of this was Tully's negotiations with Bundaberg. Maryborough submitted that Tully was obliged to disclose information about its dealings, notwithstanding that Tully's discussions with Bundaberg were incomplete and subject to confidentiality obligations. It submitted that the disclosure should include that Tully was in negotiations and the indicative terms and proposed value of the prospective transaction.
50. We agree that some disclosure is required in relation to the potential transaction, given that, if it proceeds, it could have a material effect on the profile of Tully. However, we do not agree that particulars of the dealings need to be provided if, as Tully submitted, the negotiations were incomplete and confidential. We do not consider it would be reasonable for shareholders or their professional advisers to expect to find that information in the target's statement.¹²
51. Tully offered to disclose in a supplementary target's statement that it was in negotiations with Bundaberg, that those discussions were incomplete and

¹² s638(1A)(a)

confidential and that any agreement would be subject to shareholder approval. We are satisfied with this.

Directors' recommendation

52. The directors' recommendation will often influence the outcome of a bid, particularly where there is a large retail shareholder base, as is the case with Tully. It is important that such a statement should be made only with a sound basis.
53. ASIC submitted that the reasons relied on by the directors for their recommendation were qualitative and did not form a sufficient basis for their recommendation given that the directors had not determined whether the Maryborough offer was at a premium or a discount to the value of the Tully shares. ASIC submitted that the recommendation should be withdrawn and no recommendation made unless the directors undertook, or commissioned, further work and made a new recommendation in light of that new work. Section 638(3) requires directors to either make a recommendation in the target's statement or give reasons as to why a recommendation cannot be made. While the bias of the law is in favour of the directors providing a recommendation, it does not require one.
54. In order to make a recommendation, directors should ensure that they are equipped with all the relevant information. In this regard, if unqualified to value their company themselves, good practice would be for the directors to obtain a valuation before making a recommendation. However, the law does not require it, and we are not requiring it.
55. We would prefer that the directors had put themselves in a position where they could form a view as to whether the Maryborough offer was at a premium or discount to the value of Tully shares, but with the additional disclosure now made we think the bases are sufficient to enable directors to make a recommendation and the circumstances are not unacceptable. The bases, summarised in section 1 with cross-references, include a comparison of the milling businesses and marketing arrangements as well as earnings per share, forecast earnings and EBITDA information. The supplementary target's statement also includes information about the net asset backing of Tully shares.
56. In a draft of the supplementary target's statement the following appeared:
"The Directors are not qualified to provide their own quantitative assessment of the value of the Tully Shares. They have therefore not determined whether the Offer Price represents a premium or a discount to the value of the Tully Shares."
57. In a subsequent draft of the supplementary target's statement the second sentence was deleted. This resulted in submissions from ASIC and Maryborough that the deleted sentence should be reinstated as it was material information. Maryborough referred to it as *"an important fact"*, and ASIC submitted that *"... whether an offer represents a premium or a discount to the value of the target shares is highly relevant to a shareholder's decision..."* Tully was prepared to reinstate it and confirmed that it is a correct statement.

Explanation of line items

58. The limited historical financial information provided in the target's statement was inadequately explained. For example, on page 34, there was no explanation of the increases in 'other expenses from ordinary activities' and 'income tax attributable to ordinary activities' items. These were significant items that should have been explained.
59. Tully offered to provide a full explanation of each item. The explanations revealed material aspects of the financial profile of the business. For example, the further disclosure revealed that a substantial cost incurred was attributable to compensation paid to growers as a result of adverse movements in sugar prices. Information such as this is material to a shareholder's understanding of the financial profile of the company, and is therefore material to an informed assessment of the offer. We are satisfied with this.

Panel's concerns in relation to disclosure

60. We have become increasingly concerned with aspects of the disclosure by Tully. For example:
 - (a) the target's statement did not include any financial information after 30 April 2009 that might assist shareholders ascertain the value of their shares. While the law does not compel the inclusion of a forecast, it became apparent in response to questions in the Panel's briefs that Tully's net profit after tax for the 2010 financial year was expected to decrease by approximately 75% from the 2009 year. There was no indication of this material decrease in the target's statement.
 - (b) the target's statement included one reference to value, namely that in the four months before the target's statement there had been one transfer of 1,000 shares for \$15,000. The target's statement said that this did not accurately reflect the value of Tully and was at a significant discount to the net assets shown in the balance sheet at 30 April 2009. After the Panel inquired, Tully disclosed that there have been 24 trades in the last two years and 5 further transfers lodged which reflect a VWAP of approximately \$16.
 - (c) Only after we raised the issue of the directors' review of Tully's company structure (see paragraph 46) was any update provided to shareholders in the supplementary target's statement.
61. We found such material non-disclosure most unsatisfactory. Directors of a company are subject to various duties in the context of a takeover offer. They will have information that shareholders do not. Once a bid has been made for the company, shareholders must consider whether to retain their investment in the company or accept the offer. This is a significant decision they must make. They naturally look to, and expect, the directors to provide relevant information about their company. The law recognises this. The directors have a statutory obligation to make certain information available to shareholders.
62. This duty is heightened in the case of an unlisted public company, which is not a disclosing entity, has no continuous disclosure obligations, and has no visible "market price" for its shares against which shareholders can assess an offer.

63. We do not think the directors provided the information they were required to until the Panel intervened. We also note that recent transfers of Tully's shares have occurred at higher prices, whether as a result of Maryborough's bid or some other factor.

DECISION

64. Given the unsatisfactory disclosure in the initial target's statement, we considered it appropriate to require the Tully directors to provide additional information for inclusion in the supplementary target's statement to enable Tully shareholders to assess the merits of the Maryborough bid. Given that the further information has now been offered by Tully, we have declined to make a declaration and are satisfied that it is not against the public interest to do so. We had regard to the matters in s657A(3).

Orders

65. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

Kevin McCann
President of the Sitting Panel
Decision dated 22 December 2009
Reasons published 7 January 2010