



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Tully Sugar Limited 01R  
[2010] ATP 1**

**Catchwords:**

*Review application - target's statement - disclosure standard - supplementary target's statement - sufficient information - sufficient basis for recommendation - decline to conduct proceedings - Tully Sugar Limited - The Maryborough Sugar Factory Limited*

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

*Tully Sugar Limited [2009] ATP 26, Multiplex Prime Property Fund 03R [2009] ATP 23, GoldLink IncomePlus Limited 04R [2009] ATP 3*

*Guidance Note 2 (Reviewing decisions)*

**INTRODUCTION**

1. The Panel, Simon McKeon (sitting President), Norman O'Bryan AM SC and Karen Wood, declined to conduct proceedings on an application from The Maryborough Sugar Factory Limited for a review of the initial Panel's decision in *Tully Sugar Limited*.<sup>1</sup> The application concerned disclosure in Tully's target's statement. The review Panel agreed with the initial Panel's decision and did not think there was any reasonable likelihood that the review application would result in a different outcome.

2. In these reasons, the following definitions apply.

Maryborough	The Maryborough Sugar Factory Limited
supplementary target's statement	Supplementary target's statement by Tully dated 23 December 2009
target's statement	Target's statement by Tully dated 12 November 2009
Tully	Tully Sugar Limited

**FACTS**

3. The facts are as set out in the initial Panel's reasons.
4. The initial Panel found disclosure in Tully's target's statement to be materially deficient. It accepted, without making a declaration, a proposal to make revised disclosure in a supplementary target's statement.
5. On 23 December 2009 Tully lodged with ASIC and issued the supplementary target's statement.
6. On 4 January 2010 a second supplementary target's statement was lodged and issued by Tully stating that Queensland Sugar Ltd had acquired 310,400 shares (representing 9.75% of Tully). The price was confidential to the parties and could not

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<sup>1</sup> [2009] ATP 26

be confirmed by Tully. The directors continued to recommend rejection of the Maryborough offer.

## REVIEW APPLICATION

7. By application dated 23 December 2009, Maryborough sought a review of the initial Panel's decision. The President consented to the review.
8. The parties agreed that the matter did not need to be progressed between Christmas and New Year.
9. Maryborough submitted that a declaration of unacceptable circumstances was required because (among other things):
  - (a) Tully's directors made their recommendation to reject Maryborough's offer without a sufficient basis and
  - (b) the qualitative and other reasons given as the basis of their recommendation in the supplementary target's statement were insufficient and erroneous.
10. This, it submitted, gave rise to the market for control of Tully shares not being efficient, competitive and informed.<sup>2</sup>
11. Maryborough sought final orders that Tully's directors withdraw their recommendation and lodge a further supplementary target's statement with appropriate consequential amendments to the target's statement and supplementary target's statement.

## DISCUSSION

### Decline to conduct proceedings

12. A review Panel can decline to conduct proceedings and allow the initial Panel's decision to stand in an appropriate case.<sup>3</sup> We do so here. While we do not regard the disclosure as best practice, we regard it as sufficient following the supplementary target's statement (subject to minor clarifications) and accordingly do not think there is any reasonable likelihood that the review application will result in a different outcome to that of the initial Panel.
13. We have considered the matter on its merits. We have considered:
  - (a) all the material before the initial Panel including the initial application, the briefs and communications to the parties, and the submissions and rebuttals
  - (b) the initial Panel's decision email and draft reasons for decision
  - (c) the review application and
  - (d) Tully's submission dated 4 January 2010 incorporating a second supplementary target's statement dated 4 January 2010.

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<sup>2</sup> Section 602(a)

<sup>3</sup> *GoldLink IncomePlus Limited 04R* [2009] ATP 3; *Multiplex Prime Property Fund 03R* [2009] ATP 23

**Maryborough's submissions**

*No reasonable basis for recommendation*

14. Maryborough submitted that Tully's directors continued to fail to assess the value of Tully shares compared to the Maryborough offer. Maryborough submitted that it would only be in unusual circumstances that it would be possible for a target board to make a recommendation based on qualitative factors, in the absence of a valuation and without being able to identify whether an offer is at a premium or a discount to the value of its shares. It submitted that such unusual circumstances were not present in the current takeover.
15. Tully made a preliminary submission in which it noted paragraph 53 of the initial Panel's draft decision, to the effect that the bias of s638(3) is towards the directors providing a recommendation. Accordingly, it submitted, the directors should not be prevented from making a recommendation unless their reasons for doing so were manifestly inadequate.
16. We think the Panel should not dissuade directors from making a recommendation. Rather, it should encourage them to do so. Of course, the basis for a recommendation must be disclosed, must not be misleading and must give shareholders enough information for them to make an informed assessment about whether to accept the offer. In making a recommendation it is not incumbent on directors to obtain a valuation, or indeed to value the target's shares themselves, even if it might be good practice to do so in the case of an unlisted company which does not have any trading price transparency.
17. Like the initial Panel (after the issue of the supplementary target's statement), we think the reasons given for the recommendation are sufficient, although we sought two points of clarification (see paragraphs 21 and 24). It is now for Maryborough to respond, should it wish to articulate why the reasons do not justify rejection of its bid.
18. Maryborough also submitted that the recommendation did not have reasonable regard to the value and forecast earnings metrics in the supplementary target's statement. Maryborough identified these metrics as: the substantial premium Maryborough is offering to the highest trading price of Tully shares from 24 January 2008, the illiquidity of Tully shares, the forecast earnings per share for 2010 of the merged entity compared with Tully alone, and the forecast EBITDA and profit of Maryborough for 2010. We do not agree, and consider that it is now for Maryborough to respond if it wishes.

*Insufficient or erroneous basis for recommendation*

19. Maryborough submitted that it was erroneous and misleading for the supplementary target's statement to include as one of the reasons for the directors' recommendation:
  - (d) *the Directors note that the guidance as to Tully's future milling EBITDA provided in section 3.2 of this Supplementary Target's Statement significantly exceeds*

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*Maryborough's forecast performance in the 2010 financial year, which in turn is a significant improvement on Maryborough's financial performance;*<sup>4</sup>

20. It submitted that this compared Tully's assumed, pro forma, prospective EBITDA with Maryborough's actual disclosed EBITDA guidance to 30 June 2010.
21. Tully included reference to total annual milling EBITDA of approximately \$18.9m in paragraph (h) on page 12. We think the period referred to should have been stated. Maryborough submitted that Tully was "*comparing an apple with an orange*". Tully proposed a third supplementary target's statement to clarify that the EBITDA was "*an estimate of what the Company's annual milling EBITDA would be if each of the assumptions listed at paragraphs (a)-(e) were realised in a particular year covered by the current [6 year] cane supply agreements....*" This gives enough information for Tully's shareholders to be able to assess the comparison for themselves.
22. Maryborough also submitted that the following part of one of the reasons for the directors' recommendation was misleading:
  - (c) *the Directors note that whilst Tully Sugar's forecast earnings in the year to 30 April 2010 are less than the pro-forma combined earnings of the merged entity shown in section 3.1 of the Supplementary Target's Statement, these have been negatively impacted by poor weather and hedging issues which are not in any way relevant to the Company's financial performance in future years....*<sup>5</sup>
23. It submitted that it was misleading to state that future weather events and hedging activities may not be relevant to a company's future financial performance.
24. We think it is unlikely that a statement as bold as saying 'such events could never be relevant to the company's financial performance' could be made. Tully proposed a third supplementary target's statement to clarify that the weather and hedging referred to was in respect of the 2009 year, so would not itself affect later years, and that "*weather in future years and hedging arrangements entered into in respect of future cane production will impact Tully Sugar's future financial performance.*"

#### *Misleading statements*

25. Maryborough submitted that the highlighted part of the following statement was made without a proper basis:

***The Directors do not believe that the trading prices noted above are an accurate reflection of the value of Tully Shares and note that they reflect a significant discount to the net assets per Tully Share of \$35.53 shown in Tully Sugar's balance sheet as at 30 April 2009. (emphasis added)***<sup>6</sup>

26. It submitted that net asset backing does not take into account the illiquidity of Tully's shares or the ability to realise the assets. We do not think the statement is misleading. Shareholders can see the trades for themselves and assess the statement. Moreover, the trades occurred before Maryborough's bid, so occurred in a different market.

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<sup>4</sup> Section 1 of the supplementary target's statement, para (d)

<sup>5</sup> Section 1 of the supplementary target's statement, para (c)

<sup>6</sup> Section 2.3 of the supplementary target's statement

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27. It also submitted that the balance of the statement implied that net asset backing was an appropriate way to value the shares, which (Maryborough submitted) it is not. We do not agree that the statement implies a valuation. The initial Panel dealt with the argument that NTA was not a basis for the statement. It did not see why it was not. We agree with the initial Panel.

#### *Other disclosure issues in the original target's statement*

28. Maryborough submitted that statements it had identified in its initial application as misleading in the target's statement<sup>7</sup> had not been retracted or rectified. These were collected under the following headings in the initial application:
- *Failure to set out a reasonable basis for stating that Tully has a strong basis on which to lead consolidation of the sugar industry in Far North Queensland*
  - *Failure to set out a reasonable basis for stating that there is likely to be a decline in the dividends that Tully shareholders receive*
  - *Misleading statements as to MSF's recent financial performance*
  - *Misleading statement as to MSF dividends*
  - *Failure to set out a reasonable basis for stating that there is a significant level of uncertainty concerning the future viability and value of MSF's southern milling and farming assets*
  - *Misleading statement as to MSF's business.*
29. None of these issues appeared of concern to the initial Panel and we consider them minor issues, if issues at all. They are not of concern to us.

## DECISION

30. Having regard to all the material we agree with the initial Panel's decision. A supplementary target's statement was warranted. A further supplementary target statement has been required. At this point we do not think the market for control of Tully shares is not efficient, competitive and informed such as to give rise to unacceptable circumstances. Like the initial Panel, we consider that the directors did not do it well, but disclosure has been made. Some of it reflects opinion and judgment on their part. That is not unacceptable in this case and Maryborough is free to respond if it wishes.
31. Accordingly, under regulation 20 of the ASIC regulations we decline to conduct proceedings in relation to the review application. We are satisfied that it is not against the public interest to decline to conduct proceedings.

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<sup>7</sup> Section 6 of the initial application under the heading "Other deficiencies in disclosure"

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32. As there is no declaration, no order as to costs may be made or, we think, in any event would be warranted.

**Simon McKeon  
President of the review Panel  
Decision dated 7 January 2010  
Reasons published 8 January 2010**