Australian Government

Takeovers Panel

Reasons for Decision
Foster's Group Limited
[2011] ATP 15

Catchwords:

accounting standards - ASX announcement - confidentiality undertaking - decline to conduct proceedings - disclosure - earnings guidance – efficient, competitive and informed market - financial results - forecasts - forward-looking statements – investor presentation – media canvassing - misleading and deceptive – net debt – pro forma financial information – prospective financial information - results presentation - takeover bid - target's statement - valuation

Corporations Act 2001 (Cth), sections 602, 1041H

Guidance Note 5: Specific Remedies - Information Deficiencies

ASIC Regulatory Guide 170: Prospective financial information

Programmed Maintenance Services Ltd 02 [2008] ATP 9, Consolidated Minerals Ltd 01 [2007] ATP 20, Nexus Energy Limited [2006] ATP 17, Universal Resources Ltd [2005] ATP 6

INTRODUCTION

1. The Panel, Peter Day, John Fast and David Friedlander (sitting President), declined to conduct proceedings on an application by SABMiller Beverage Investments Pty Limited in relation to the affairs of Foster's Group Limited. The application concerned statements of financial objectives and a *pro forma* net debt figure contained in an investor presentation which accompanied Fosters' 2011 preliminary financial results.

2. The Panel concluded there was no reasonable prospect that it would make a declaration of unacceptable circumstances in relation to the statements of financial objectives. The Panel had some concerns with the *pro forma* net debt figure, however, these concerns were allayed by Foster's volunteering to make an announcement clarifying the basis for reaching a *pro forma* net debt figure. Accordingly, the Panel declined to conduct proceedings.

3. In these reasons, the following definitions apply.

Final Report	the FY2011 Preliminary Final Report released on ASX by Foster's on 23 August 2011
Financial Objectives Statements	Slide 35 of the Results Presentation – see paragraph 15
Foster's	Foster's Group Limited
Net Debt Statement	The last bullet point in slide 27 of the Results Presentation – see paragraph 35
SABMiller	SABMiller plc and its wholly-owned subsidiary SABMiller Beverage Investments Pty Limited, as applicable
Results Presentation	The investor presentation accompanying the Final Report released on ASX by Foster's on 23 August 2011
RG 170	Regulatory Guide 170: Prospective financial information

FACTS

4. Foster's is an ASX listed company (ASX code: FGL).

5. On 21 June 2011, Foster's announced that it had rejected an approach by SABMiller plc to acquire all of the company's shares by way of a scheme of arrangement at $4.90 per share.

6. On 17 August 2011, SABMiller announced a proposal to make a conditional off-market takeover offer for all the issued shares in Foster's at $4.90 per share.

7. On 18 August 2011, Foster's announced that the board unanimously recommend shareholders reject the offer as $4.90 per share "*significantly undervalues the company.*"

8. On 23 August 2011, Foster's released its full year results for the financial year ended 30 June 2011 which were contained in the Final Report which was accompanied by the Results Presentation. On 23 and 24 August 2011, Foster's CEO, Mr John Pollaers, gave a number of interviews discussing the 2011 results and, amongst other things, the takeover offer from SABMiller.

APPLICATION

Declaration sought

9. By an application dated 1 September 2011, SABMiller Beverage Investments Pty Limited, the bid vehicle used by SABMiller for the takeover offer, sought a declaration of unacceptable circumstances.

10. SABMiller submitted that:

    (a) the Financial Objectives Statements were misleading or deceptive because there was no reasonable basis for the statements, and, even if there was a reasonable basis for making them, there was no information disclosed to allow shareholders to test the basis of the statement and

    (b) the basis for reaching the Net Debt Statement was misleading and deceptive and inconsistent with Australian Accounting Standards.

11. SABMiller submitted that the effect of the circumstances was that:

    (a) the Financial Objectives Statements created a misleading and deceptive impression of the prospects of Foster's which may have influenced the Foster's share price and the potential reaction of market participants to the takeover and

    (b) the Net Debt Statement understated net debt by $626.5m and therefore presented Foster's as being "*less levered and as having a lower enterprise value and thus lower valuation multiple than would otherwise (and justifiably) be the case if the normal statutory presentation were adopted.*"

12. SABMiller submitted that this was inconsistent with the acquisition of Foster's taking place in an efficient, competitive and informed market (s602(a)) and inconsistent with the prohibition on making misleading and deceptive statements (s1041H).[1]

[1] All statutory references are to the *Corporations Act 2001* (Cth) unless otherwise stated

Interim orders sought

13. SABMiller sought an interim order that Foster's be prohibited from making statements consistent with the statements described in the application until a final determination was made by the Panel.

Final orders sought

14. SABMiller sought final orders that Foster's make an announcement in a form approved by the Panel and SABMiller setting out:

    (a) the full basis for the Financial Objectives Statements or otherwise withdraw the statements and

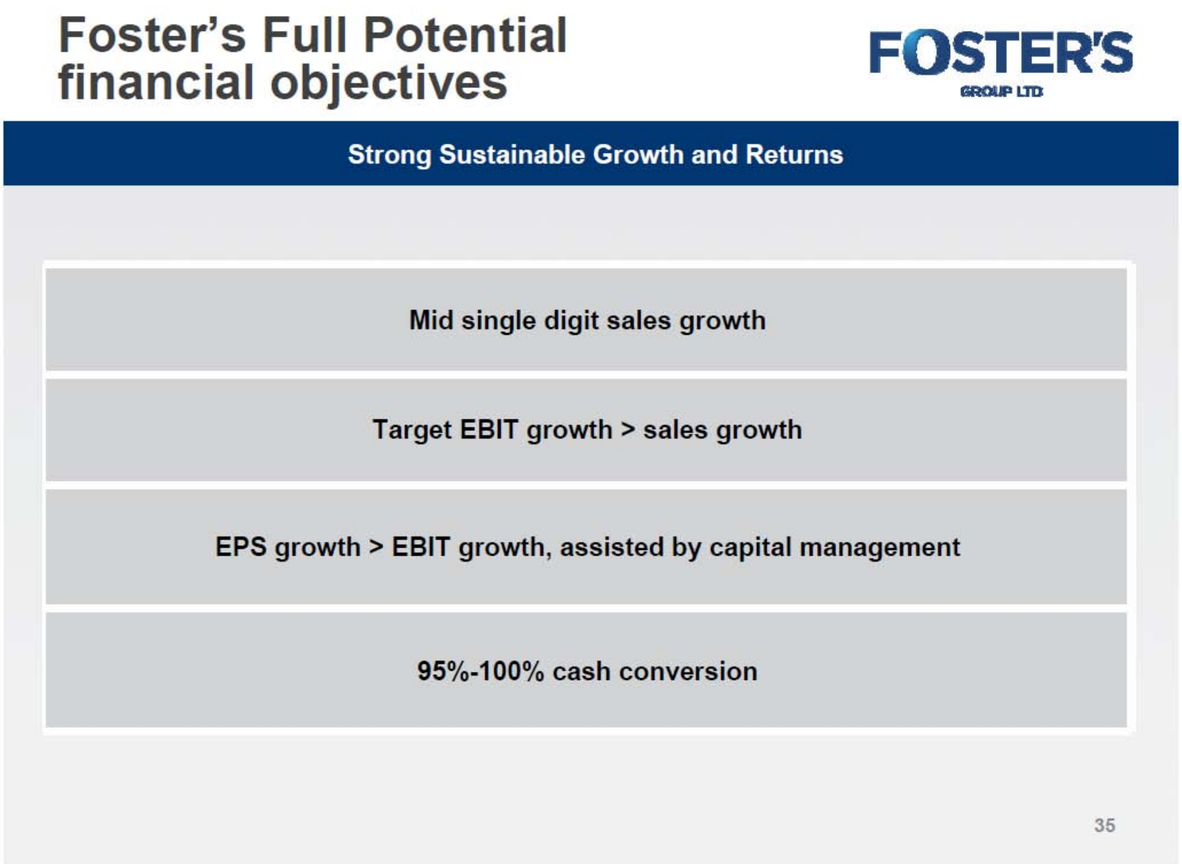
    (b) detailed explanatory notes for the Net Debt Statement or otherwise stating that the deferred tax asset should not have been deducted from net debt.

DISCUSSION

Financial Objectives Statements

The Financial Objectives Statements

15. The Financial Objectives Statements were contained in one of six slides in the Results Presentation dealing with Foster's strategy and outlook.



16. As we discuss below at paragraphs 28 - 30 and at paragraph 42 (in relation to the Net Debt Statement), these statements must be read in context. The full Results Presentation can be accessed here.

17. SABMiller submitted that the Results Presentation contained a number of references to the expected financial performance of Foster's without:

    (a) any factual foundation or assumptions

    (b) a statement by the directors that they considered the projections to be objectively reasonable

    (c) any clear statement of the period to which the projections related

    (d) any description of the methodology used to compile the projections

    (e) a description of the risks the objectives will not be achieved and

    (f) any caveats which highlight the inherent uncertainties in the forward-looking statements.

18. Essentially, these are a summary of the criteria set out by ASIC in RG 170 as to how prospective financial information should be disclosed.[2]

19. SABMiller submitted that "*communications prior to a bidder's statement or target's statement should maintain the same standards as any other statement in a takeover*" and that "*In the context of an announced takeover bid, FGL should not make aspirational statements and should instead confine itself to providing financial forecasts in its target's statement or otherwise on the basis of appropriately detailed, diligenced and verifiable information and assumptions which have been signed off by the FGL board.*"

20. SABMiller noted that during the presentation where the results were delivered, the CEO of Foster's, Mr Pollaers, gave an oral disclaimer that the Financial Objectives Statements were "*not intended to be a forecast of earnings for this year or, for that matter, any particular year. It is a view of what the financial profile of our business should look like as we move through this turnaround. It's pretty simple, but it is based upon a confident view of what a sustainable financial return for this business would look like.*" SABMiller submitted that persons who read the Results Presentation without the benefit of this disclaimer were likely to think that the statements had a reasonable basis and were more reliable than intended.

21. SABMiller also noted that Foster's had not previously provided earnings guidance to the market.

22. Foster's made preliminary submissions that the application was "clearly frivolous and vexatious" because, amongst other things, the Financial Objectives Statements were not prospective financial information and were not forward-looking statements (within the meaning of RG 170) and were not misleading or deceptive. Rather, Foster's submitted that the Financial Objectives Statements were included in the Results Presentation to "*inform Foster's shareholders and the market of existing management's business and financial strategy*." We agreed with some of Foster's

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[2] See RG170 from 170.58 – 170.94

preliminary submissions, but did not find that the application was either frivolous or vexatious.

Disclosure after a takeover bid is announced

23. Guidance Note 5 provides that the Panel seeks to ensure that disclosure standards similar to those for a disclosure document or PDS under the Corporations Act are applied to bidder's statements, target's statements and market announcements relating to a bid.

24. The Panel has on a number of occasions reiterated the importance of ensuring that communications made prior to the release of a bidder's or target's statement should maintain the same standard of disclosure required in those documents.[3] In *Programmed Maintenance Services Limited 02* the Panel stated:

> "*The making of a takeover bid for a company is a critical time for its shareholders. Probably more than at any other time in the company's history, shareholders will look to their directors to provide advice. Accordingly, the directors must ensure that their advice is reasonably based, clear, concise, objective and not misleading. All information presented must be prepared with the highest degree of care, as it would be if the directors were issuing a prospectus. The directors should consider carefully each statement and be satisfied that it meets this test.*"[4]

25. We agree entirely. In *Programmed Maintenance Services Limited 02* the Panel examined a letter sent to shareholders and an investor presentation released before the target's statement which, amongst other things, included analysis of the adequacy of the takeover premium and the value of the scrip consideration offered. Similarly, in *Universal Resources Ltd* the Panel examined a letter sent to shareholders before the target's statement which, amongst other things, included analysis of the adequacy of the premium and (impliedly) the value of the scrip consideration offered.[5] In *Consolidated Minerals Ltd 01* the Panel found statements made by a bidder regarding the value of it scrip in the context of a takeover bid offering (in part) scrip consideration outside of the bidder's statement to be unacceptable.[6]

26. Each of these matters dealt with communications to target shareholders regarding the adequacy of the takeover bid before the target's statement or bidder's statement had been released. In this instance, we are dealing with a slightly different case – that of a Results Presentation. Clearly, Foster's financial performance and net debt position will affect shareholders' assessment of the merits of the takeover offer. However, the disclosure in question is not a direct assessment of the adequacy of the bid (such as an assessment of the premium or value of the consideration offered).

27. Perhaps a matter more closely analogous to the current facts is *Nexus Energy Limited*.[7] In that matter, the Panel examined an investor presentation given by the target at an emerging companies conference after the bidder had announced its intention to

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[3] *Consolidated Minerals Ltd 01* [2007] ATP 20 at [75]; *Universal Resources Ltd* [2005] ATP 6 at [16]; *Programmed Maintenance Services Ltd 02* [2008] ATP 9 at [20] and [21].
[4] *Nexus Energy Limited* [2006] ATP 17
[5] *Universal Resources Ltd* [2005] ATP 6
[6] *Consolidated Minerals Ltd 01* [2007] ATP 20
[7] *Nexus Energy Limited* [2006] ATP 17

make a takeover offer but before the bidder's statement or target's statement had been released. There the Panel examined disclosure regarding the target's assets and forward-looking statements regarding potential financial and production performance (as opposed to an assessment of the takeover bid). The Panel in *Nexus Energy Limited* stated that "*once a company is subject to a takeover bid, it is required to take even greater care in ensuring that all of its communications to shareholders or the market are not misleading in any way*."[8] We adopt and endorse this statement.

Consideration of the Financial Objectives Statements

28. The Financial Objectives Statements must be read in context – in this instance, in the context of the presentation and that of the company.

29. The 2011 results were the first results released by Foster's following the demerger of its global wine business. They were also the first full year results released by Foster's new CEO, Mr Pollaers. It was entirely unremarkable for Mr Pollaers to communicate to shareholders and the market the new direction and outlook for the company at this point in time.

30. The Financial Objectives Statements appeared in the 'F12 Priorities and Outlook' section of the Results Presentation which followed a discussion of the FY2011 results. The Priorities and Outlook section dealt largely with Fosters' strategy following the demerger and its near-term outlook. The Financial Objectives Statements need to be considered in the context of the entire Results Presentation of which they form one slide – not in isolation therefrom.

31. The Financial Objectives Statements were essentially qualitative in their nature. We do not consider the Financial Objectives Statements to be prospective financial information of the kind that engages the requirements as set out in RG 170 regarding disclosure of assumptions, methodologies, risks, sensitivities and the like. We think in this instance and in context that they are more in the nature of strategic objectives. We do not think that investors would reasonably mistake the Financial Objectives Statements for a financial forecast.

32. We reviewed a series of comparable investor presentations accompanying financial results and did not find the Financial Objectives Statements to be materially different from the outlook and strategy statements that listed companies commonly make when results are released.

33. Accordingly, we do not think that the Financial Objectives Statements are misleading or deceptive nor are they likely to mislead or deceive.

34. We make the above statements without taking any backwards step in terms of the Panel's guidance regarding disclosure standards once a takeover bid has been announced. Valuations and profit forecasts ought not be packaged as objectives. The same standard of disclosure should apply to communications before a target's statement as applies to the target's statement itself. Further, once a takeover bid has been announced, the target company should be on a heightened state of alert

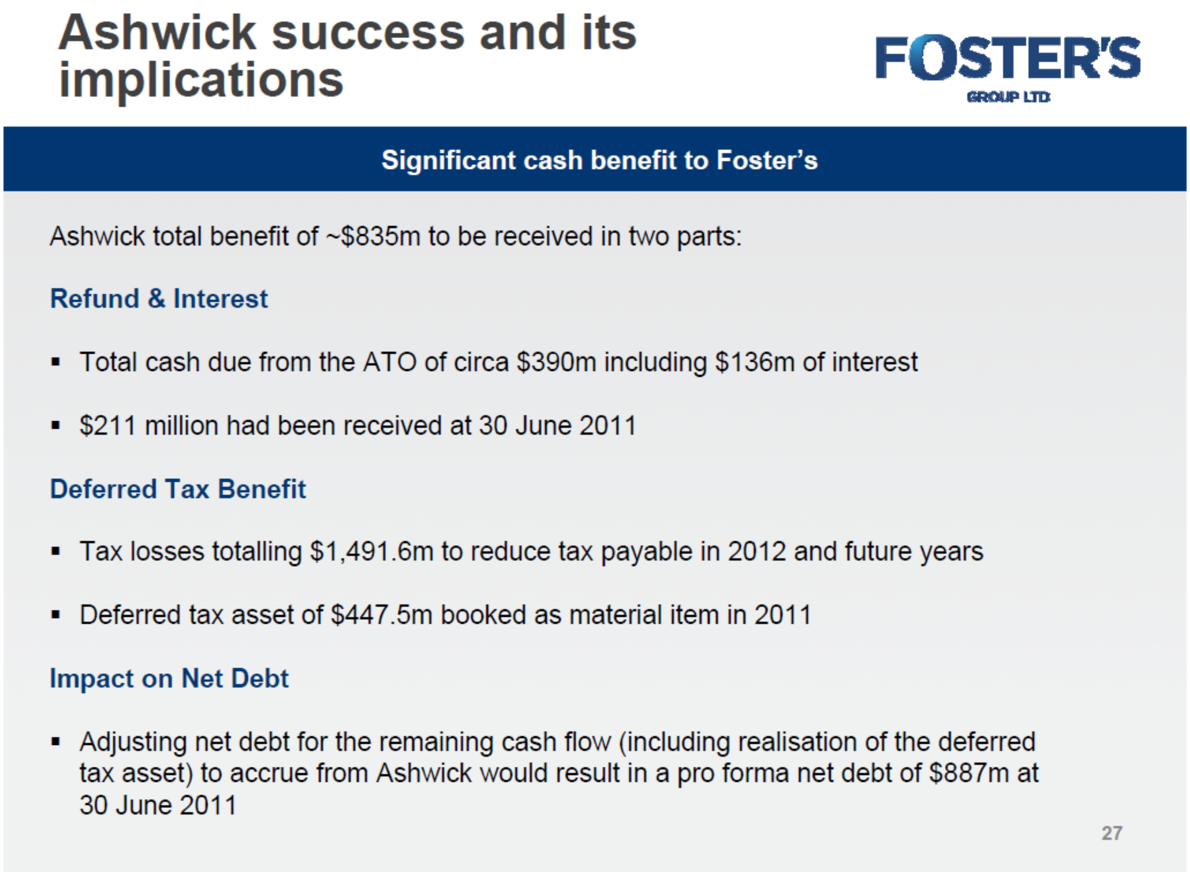
[8] *Nexus Energy Limited* [2006] ATP 17 at [31]

regarding all of its public announcements. However, in this case we took no issue with the Financial Objectives Statements made by Foster's

Net Debt Statement

The Net Debt Statement

35. The Net Debt Statement was contained on the following slide under the 'Impact on Net Debt' heading.



36. SABMiller submitted that the basis for reaching the *pro forma* net debt figure of $887 million was misleading and deceptive and was inconsistent with Australian Accounting Standards.

37. The basis for the *pro forma* net debt figure of $887 million seems to have been arrived at applying the following arithmetic:

Net Debt	$1,513.5m	(taken from slide 26)
Further refund due	($179.0m)	(Total refund ($390m) less cash received ($211m))
Deferred tax asset	($447.5m)	(taken from slide 27)
Pro forma Net Debt	**$887.0m**	

38. SABMiller submitted that the $447.5 million deferred tax asset was a non-cash item subject to a number of conditions and uncertainties and therefore should not have been treated as a cash equivalent and deducted from net debt. Further, if the adjustment for deferred tax asset was included in the *pro forma* net debt figure, a

detailed explanatory note should have been included qualifying the basis for reaching the figure of $887 million.

39. SABMiller also submitted that the Net Debt Statement should have included a further explanation that if the tax losses were utilised by Foster's, franking credits would be reduced by the same amount.

40. SABMiller submitted that "*FGL's conduct amounts to an understatement of Net Debt by $626.5 million as the presentation is not made in accordance with Australian Accounting Standards. Accordingly, it presents FGL as less levered and as having a lower enterprise value and thus lower valuation multiple than would otherwise (and justifiably) be the case if the normal statutory presentation were adopted.*"

41. Foster's made preliminary submissions that the Net Debt Statement was a *pro forma* figure which was, by its nature, hypothetical and illustrative only, the basis for which was articulated in the relevant slide and was not misleading or deceptive.

Consideration of the Net Debt Statement

42. The Net Debt Statement must be read in context. The Results Presentation included three slides regarding Fosters' debt position. One of these dealt specifically with Foster's net debt position and contained a cascade chart showing the component changes to its net debt position between 30 June 2010 and 30 June 2011.[9] That slide was very clear and, in our opinion, is far more likely to have attracted the attention of analysts and other interested parties than the Net Debt Statement. Another later slide reiterated the actual, rather than *pro forma*, net debt position clearly.

43. We are concerned that the Net Debt Statement is capable of implying that the deferred tax asset can be treated as an immediate cash equivalent and netted off against the actual net debt position. This is capable of implying that the deferred tax asset has the same present value to Foster's as if it were available to reduce debt as at 30 June 2011.

44. This is plainly not the case. A deferred tax asset should only be recognised to the extent that it will enable the entity to pay less tax on *future* taxable income than it would otherwise be obliged to pay.[10] Accordingly, if the asset is realised, this will occur in future years, and there is always some uncertainty as to whether it will be realised at all.

45. The *pro forma* adjustment is too great a shorthand because it ignores the present time value of the tax asset, the period over which the tax losses may be recouped and the uncertainty inherent in generating particular quanta of taxable income against which losses can be offset and cash savings of tax (which would otherwise be payable) thus deployed against outstanding debt. A reader might have been left with the impression that the debt could "immediately", or in the "very near term", be reduced, when this was not the case (as Foster's had already advised[11]).

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[9] Slide 26 of the Results Presentation

[10] AASB 112 at [24] – [29]

[11] Foster's ASX announcement dated 19 July 2011 referred to in paragraph 47

46. Given that an announced bid had been made in respect to Foster's, the Net Debt Statement which was included in Foster's Results Presentation should have been prepared with greater care so as to ensure that it did not overstate the position of the company as at 30 June 2011.

47. However, the Net Debt Statement was only made once, and was presented as a *pro forma* figure in order to show the impact of the Ashwick litigation.[12] In addition, on 19 July 2011, Foster's issued a significant release to ASX updating the market on its tax loss utilisation position. That release was more detailed on the subject than the slides in the Results Presentation and adequately dealt with a number of issues raised by SABMiller, including the position on franking of future dividends. It gave detail on the likely timing of utilisation of Foster's deferred tax asset, which would have an impact on the utility of the Net Debt Statement. In a perfect world, the Net Debt Statement would have connected the dots between that information and the *pro forma* net debt figure in slide 27 of the Results Presentation.

48. As SABMiller submitted, the *pro forma* net debt figure of $887 may be used as part of a valuation of Foster's in order to assess the adequacy of its bid – either through a multiple comparison, discounted cash flow analysis or some other valuation methodology. In our view, people who are more likely to use this information for the purpose of conducting a valuation are likely to start from the actual net debt position in Foster's financial statements and make the adjustments that they consider to be appropriate from there. To the extent that the Net Debt Statement may factor into any such analysis, we consider that the lack of clarification contained in in slide 27 of the Results Presentation to be marginal at best in the context of the overall value of Foster's.

49. Accordingly, we do not find that the Net Debt Statement is misleading or deceptive or likely to mislead or deceive in any material sense.

DECISION

50. Given that the Net Debt Statement represented an isolated departure and the remedy that SABMiller sought was a clarifying announcement, we concluded that any tendency it may have to detract from an informed market could be cured if Foster's made an announcement clarifying these issues. Accordingly, we suggested to Foster's that it consider making an appropriate announcement, on the basis that this would adequately address the only issues of concern.

51. Foster's drafted an ASX announcement clarifying the Net Debt Statement. We then provided the parties with an opportunity to review and comment on the announcement. We were satisfied that the announcement adequately clarified the basis for reaching the *pro forma* net debt figure.

52. In arriving at this decision, we took into account that, by conducting proceedings, it would be unlikely that any fresh facts or arguments would be elicited. The policy and legal issues had been thoroughly ventilated in the application and related

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[12] *Federal Commissioner of Taxation v Ashwick (Qld) No. 127 Pty Ltd* [2011] FCAFC 49

correspondence, copies of which were provided with the application, and in a preliminary submission by Foster's.

53. In reaching this decision, we also took into account the information reaching the market about the matter, which has generated an unusual degree of press interest. Some information concerning the submissions in this matter appeared to have been leaked to the press, but SABMiller advised that all of their advisors understood the undertakings, and that none of them had breached the undertakings. A publicist for Foster's commented to the press on the merits of the matter before these reasons were released, but Foster's advised that they instructed their publicist to cease talking to the press immediately the Executive drew their attention to the relevant articles. The media outcomes referred to in this paragraph were inconsistent with undertakings given by the parties to the Panel and to one another not to canvass the issues in the matter until publication of the reasons.

54. These events underline the potential imbalance in the information reaching the market if one side of an argument is publicised while the other side may not be. This is inimical to maintaining an efficient competitive and informed market. We deprecate both disclosures, but we do not think that we need to take any action to preserve or restore an informed market.

55. Given the publicity already attributed to SABMiller's application and the announcement clarifying the basis for reaching a *pro forma* net debt figure, we do not consider that there is any reasonable prospect that we would find that the Financial Objectives Statement or the Net Debt Statement is likely to bring about unacceptable circumstances affecting SABMiller's bid for Foster's. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

Orders

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

David Friedlander
President of the sitting Panel
Decision dated 7 September 2011
Reasons published 9 September 2011

Advisers

Party	Advisers
Foster's	Allens Arthur Robinson Goldman Sachs Gresham Partners
SABMiller	Allen & Overy J.P. Morgan Limited Moelis Australia Advisory Pty Limited RBS Corporate Finance (Australia) Ltd Morgan Stanley & Co. Limited