



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Alesco Corporation Limited 03  
[2012] ATP 18**

**Catchwords:**

*Announcement - misleading announcement - efficient, competitive and informed market - Eggleston principles - negotiations - no agreement - not unacceptable circumstances - dividends - franking credits - bid consideration - truth in takeovers*

*Corporations Act 2001 (Cth), sections 602, 657A*

*ASIC Regulation 20, 21(2)*

*ASIC RG 25: Takeovers: False and misleading statements*

*Alesco Corporation Limited 01 and 02 [2012] ATP 14*

**INTRODUCTION**

1. The Panel, Geoff Brunson, Sarah Dulhunty, and Vicki McFadden (sitting President), declined to conduct proceedings on an application by Alesco Corporation in relation to its affairs. The application concerned an announcement on 28 August 2012 by DuluxGroup that Alesco submitted was misleading because it inaccurately represented negotiations between the parties about a proposal which the Alesco board would recommend and was likely to undermine the prospect of obtaining regulatory support for an agreed solution that would maximise shareholder value. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

75c Proposal	Dulux providing Alesco shareholders \$2.05 per share, incorporating \$0.75 in fully franked dividends (with shareholders entitled to retain the value of any franking credits that attach to the dividends) and \$1.30 cash
42c Proposal	Dulux providing Alesco shareholders \$2.05 per share, incorporating \$0.42 in fully franked dividends (with shareholders entitled to retain the value of any franking credits that attach to the dividends) and \$1.63 cash
Alesco	Alesco Corporation Limited
Dulux	DuluxGroup Limited and its wholly owned subsidiary, DuluxGroup (Nominees) Pty Ltd

**FACTS**

3. Alesco is an ASX listed company (ASX code: ALS). Dulux is an ASX listed company (ASX code: DLX).

## Takeovers Panel

### Reasons – Alesco Corporation Limited 03 [2012] ATP 18

4. The takeover bid by Dulux for Alesco has a long history: see *Alesco 01 and 02*<sup>1</sup>.
5. On 23 July 2012, Dulux increased its takeover offer for Alesco and made a “last and final” statement. It announced:

*[Dulux] today announced that it is increasing its offer for [Alesco] by:*

- *increasing the cash offer to \$2.05 per share and*
- *allowing Alesco shareholders to receive up to \$0.18 per share in franking credits attached to dividends declared by Alesco.(footnote) ...*

*[Dulux] declares that the Revised Offer is its **best and final** offer, subject to no competing proposal emerging. This means that, subject to no competing proposal emerging, **[Dulux] will not further increase the offer price.** (Original emphasis)*

The footnote read: *Eligibility to utilise franking credits will depend on individual shareholders’ specific circumstances. Shareholders are advised to consult with their tax adviser.*

6. Dulux and Alesco have been engaged in negotiations regarding potential increased bid value through payment of franked dividends, namely either the 75c Proposal or the 42c Proposal.<sup>2</sup>
7. On 15 August 2012, Alesco announced that it was in discussions with Dulux regarding the possibility of the 75c Proposal. Alesco said the proposal would need to be conditional on Dulux acquiring a 90% relevant interest in Alesco shares. It also said that ASIC believed the proposal raised issues with ASIC’s ‘truth in takeovers’ policy given the “best and final” statements made by Dulux.
8. On 28 August 2012, Dulux announced an update under the heading “[Dulux] acts to provide certainty for Alesco shareholders”. It said:

*[Dulux] had previously announced on 23 July 2012 that it would be prepared to allow Alesco to pay \$0.42 per share of fully franked dividends... Under this proposal, Alesco shareholders may benefit from franking credits of up to \$0.18 per share. ...*

*Over recent weeks, extensive discussions have continued between the parties in good faith in relation to the 75c Proposal. The parties have substantially completed negotiations for a Takeover Implementation Agreement for a recommended offer. [Dulux] considers that the only material outstanding impediments to finalising and signing the agreement for the 75c Proposal are the terms of Alesco’s recommendation ... and whether the 75c Proposal would be permitted to be implemented by the Takeovers Panel having regard to [ASIC’s] ‘truth in takeovers’ policy.*

9. The announcement continued that Dulux was willing to engage in a Takeovers Panel process to finally determine that matter but only on condition that, if the 75c

---

<sup>1</sup> *Alesco Corporation Limited 01 and 02 [2012] ATP 14*

<sup>2</sup> Given that Alesco had announced that it would be paying fully franked dividends of \$0.15 per share, the proposals meant allowing shareholders to retain a further dividend of either 60c or 27c and the attendant franking credit (which is the area of potential increase)

## Takeovers Panel

### Reasons – Alesco Corporation Limited 03 [2012] ATP 18

Proposal could not be implemented (or not without significant financial consequences), the Alesco board would unanimously recommend the 42c Proposal.

10. On 29 August 2012, Alesco announced that it rejected the 42c Proposal, but would recommend the 75c Proposal. Alesco reiterated that its support was conditional on Dulux first reaching 90% acceptances. It said:

*Having regard to [Dulux's] announcement yesterday, the Alesco board now advises that it will recommend an offer incorporating its discretion to pay an additional fully franked special dividend of up to \$0.60 per share (**Additional Special Dividend**) subject to the following conditions being satisfied on or before 30 November 2012:*

- *Overwhelming support for the dividend by Alesco shareholders, and in this context [Dulux] agreeing not to waive its 90% minimum acceptance condition without Alesco's consent*
- *The Australian Taxation Office (ATO) issuing a tax ruling confirming that Alesco shareholders are not precluded from an entitlement to the franking credits and associated tax offset attached to any dividends paid by Alesco in relation to the Offer, and that the ATO will not take any other action to deny any franking benefits to Alesco shareholders*
- *Availability of financing for the Additional Special Dividend on terms acceptable to Alesco*
- *No superior offer emerging and*
- *[Dulux] confirming that*
  - *it will not deduct the value of franking credits attached to the Additional Special Dividend from its offer price and*
  - *its Offer will remain open and conditional until no earlier than three business days after the record date for the Additional Special Dividend. (original emphasis)*

## APPLICATION

### Declaration sought

11. By application dated 29 August 2012, Alesco sought a declaration of unacceptable circumstances. It submitted that, given the history of the matter, Dulux's portrayal of the status of its proposal was "*selective, self-serving and misleading*". Alesco submitted that:

- (a) Dulux should have referred to Alesco's conditions of 90% acceptances and satisfactory Australian Taxation Office ruling
- (b) Dulux had implied that the only material impediment to the 75c Proposal was Alesco recommending the fall-back 42c Proposal (if the 75c Proposal could not be implemented), but Alesco had consistently maintained that the 42c Proposal was materially inadequate and would not be supported and consequently was not a feature of negotiations in relation to the 75c Proposal and

## Takeovers Panel

Reasons – Alesco Corporation Limited 03  
[2012] ATP 18

- (c) the announcement suggested that the only conclusion to draw from Alesco's failure to recommend the 42c Proposal was that the board was "*implacably opposed to a deal*" with Dulux when that was not true.
12. Alesco submitted that the effect of the circumstances was that Alesco shareholders and other market participants were likely to be misled as to the "*circumstances surrounding both the 75c Proposal and the 42c Proposal being implemented*".
13. It also submitted that the public introduction of the new (and known to be unattainable) condition of support for the fall-back 42c Proposal appeared designed to stymie the prospect of the 75c Proposal.
14. It also submitted that the misleading impact of Dulux's announcement would give rise to unacceptable circumstances having regard to the effect or likely effect it would have on control of Alesco and on the acquisition of control of Alesco taking place in an efficient, competitive and informed market.
15. Further, Alesco submitted that the announcement would seem to have brought an end to the prospect of negotiating an agreed solution, which was a tactic designed to force Alesco into recommending the 42c Proposal. It submitted that the circumstances were unacceptable in that they were likely to deprive Alesco shareholders of a reasonable opportunity to participate in the potential benefits accruing under a negotiated proposal.
16. Further, Alesco submitted:
- However, putting aside Dulux's misleading introduction of the impossible condition that support for the 75c Proposal should be accompanied by support for the fallback 42c Proposal, there is now a 'concrete' 75c Proposal before the Panel which reflects the terms and conditions set out in the Alesco Announcement. Alesco submits that the unacceptable circumstances could be remedied by affording Alesco shareholders the opportunity to participate in the potential benefits accruing under that proposal.*

### Interim orders sought

17. Alesco sought interim orders to the effect that Dulux and Alesco be prevented from making any further announcement regarding the proposals or terms of the offer until Panel proceedings are determined.

### Final orders sought

18. Alesco sought final orders to the effect that :
- (a) Dulux make corrective disclosure
  - (b) Dulux be prevented from deducting from its offer the value of franking credits under the 75c Proposal and
  - (c) 'truth in takeovers' policy not apply to the 75c Proposal.
19. Alesco submitted that corrective disclosure alone was insufficient and these orders were necessary to prevent Dulux obtaining a tactical advantage.

## DISCUSSION

### Preliminary submission

20. Dulux made a preliminary submission that its 28 August announcement did not present any circumstances which the Panel could declare to be unacceptable. It submitted:
  - (a) the potential for the Alesco board to recommend the 42c Proposal had been explored previously
  - (b) the 28 August announcement was not misleading, as the market was already aware that Alesco would only support the transaction if it became a wholly-owned subsidiary of Dulux, and Dulux was entitled to interpret support for the 42c Proposal as a material sticking point in the negotiations
  - (c) Alesco's submission that the announcement stymied the 75c Proposal was overreaching and
  - (d) the application was tactical, to buy more time for Alesco's defence.
21. Dulux submitted that it was not making any preliminary submissions concerning 'truth in takeovers'.

### The 28 August announcement

22. Dulux's 28 August announcement set out the company's position regarding the status of negotiations with Alesco. In our view, it does not set out to represent Alesco's position and has not, by omitting material details of Alesco's position, been misleading.
23. Perhaps it would have been of assistance to Alesco's shareholders if Dulux had provided more detail along the lines set out in paragraph 11 above. But we are not satisfied that these omissions or implications justify the submission by Alesco that Dulux's "*portrayal of the status of the proposal is selective self-serving and misleading*".
24. In any event, Alesco made its own announcement on 29 August 2012 which detailed its position regarding the status of negotiations with Dulux. Even if there had been something misleading about Dulux's 28 August announcement, Alesco clarified it, resolving any misleading circumstance.
25. We agree with the preliminary submission by Dulux that its 28 August announcement does not present circumstances which the Panel could declare unacceptable and, to the extent that clarification of Alesco's position is warranted, it could, and indeed has, made its own announcement.
26. Alesco made a further submission that a new requirement - that it support the 42c Proposal - was designed to stymie the prospects of agreement on the 75c Proposal. We are concerned with the effect of circumstances, not with the motive for them. Whether the requirement is agreed or not is a matter entirely for the parties. The absence of agreement does not give rise to unacceptable circumstances.
27. Alesco also submitted that the 28 August announcement has brought to an end the prospect of negotiating an agreed solution, as a consequence of which there is a risk that control of Alesco may pass to Dulux at an undervalue. Accordingly, it

## Takeovers Panel

Reasons – Alesco Corporation Limited 03  
[2012] ATP 18

submitted, Alesco shareholders are being deprived of a reasonable opportunity to participate in the potential benefits accruing under a negotiated proposal. We disagree that this gives rise to unacceptable circumstances. An offer has been made. Dulux can increase its offer as it considers appropriate. Alesco can recommend Dulux's offer, or not, as it considers appropriate. Again, this is entirely a matter for the parties, not the Panel. The absence of agreement, or failure to reach agreement, does not give rise to unacceptable circumstances.

### Other matters

28. Alesco submitted that, putting aside the difference between the parties on the 42c Proposal fall-back, "*there is now a 'concrete' 75c Proposal before the Panel.*"
29. It is clear that there is no agreement, let alone on the 75c Proposal.
30. Dulux required Alesco to confirm by 29 August 2012 that it agreed to engage in a "*Takeovers Panel process*" on the terms set out in its 28 August announcement or it would consider that discussions in relation to the 75c Proposal would be at an end. On 29 August 2012 Alesco clearly announced that it rejected those terms.
31. Section 659AA provides that the Panel is the main forum for resolving disputes about a takeover bid. Here, there is no dispute about whether 'truth in takeovers' policy applies to a revised bid as there is no revised bid. The situation is unchanged from that which existed in *Alesco 01 and 02*, namely:

*At the time we agreed to rectification of the disclosure issues, negotiations between the parties were continuing. It is impossible to make any determination about whether and how truth in takeovers policy will apply in the absence of a concrete proposal. We therefore indicated to the parties that any departure from a last and final statement, and the application of truth in takeovers policy, was not a matter before the Panel.<sup>3</sup>*

32. We note that Dulux, in its 28 August announcement, reiterated its last and final statement when it said:

*Nevertheless, [Dulux] is willing to engage in a Takeovers Panel process to finally determine the matter but only on condition that, in the event that Takeovers Panel proceedings determine that the 75c Proposal cannot be implemented (or cannot be implemented without significant financial consequences), then the Alesco board would unanimously recommend **[Dulux's] best and final \$2.05 cash offer and 42c Proposal**. This would ensure there was certainty for shareholders at the end of a lengthy Panel process (which may involve appeals). (emphasis added)*

33. The market, and Alesco shareholders in particular, have not been well served by public references to a possible transaction (the 75c Proposal), which may not be able to be implemented. ASIC had indicated to the parties that it would commence Panel proceedings to restrain Dulux from departing from its last and final statement. We have not had the benefit of submissions, and indeed the matter is not before us as there is no agreement on the 75c Proposal, but on everything we have seen we are inclined to the view of the Panel executive (regrettably made public by Dulux) that so

---

<sup>3</sup> *Alesco Corporation Limited 01 and 02* [2012] ATP 14 at [57]

## Takeovers Panel

Reasons – Alesco Corporation Limited 03

[2012] ATP 18

far we have seen nothing that provides us with any confidence that the 75c Proposal would be permitted.

### DECISION

34. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. 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

35. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make an interim order
36. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

**Vicki McFadden**

**President of the sitting Panel**

**Decision dated 3 September 2012**

**Reasons published 4 September 2012**

### Advisers

Party	Advisers
Alesco	King & Wood Mallesons Greenhill Caliburn
Dulux	Gilbert + Tobin Macquarie Capital (Australia) Limited