



**Australian Government**

**Takeovers Panel**

**Reasons for Decision**

**Warrnambool Cheese and Butter Factory Company Holdings Limited  
[2013] ATP 16**

**Catchwords:**

*Truth in takeovers – rival bids - last and final statements – revised bid – intention to declare dividends – Permitted Dividends – Bid Implementation Deed – disclosure - franking credits - market information – dividends – conditional record date – departure from last and final statements – efficient, competitive and informed market - enough information to consider proposal - decline to make a declaration – undertakings - withdrawal rights - supplementary bidder's/target's statement – directors' duties – varied bid consideration*

*Corporations Act 2001 (Cth), sections 602(a), 631(1)*

*Australian Securities and Investments Commission Act 2001 (Cth) section 201A*

*Guidance Note 4 “Remedies General”*

*ASIC Regulatory Guide 25 “Takeovers: False and misleading statements”*

*Alesco Corporation Limited 03 [2012] ATP 18; Ludowici Limited 01R [2012] ATP 4; Ludowici Limited [2012] ATP 3; BC Iron Limited [2011] ATP 6; Ross Human Directions Limited [2010] ATP 8; Multiplex Prime Property Fund 04 [2009] ATP 21; Regis Resources Limited [2009] ATP 7; International All Sports Ltd 01R [2009] ATP 5; Bowen Energy Ltd [2007] ATP 22; Rinker Group Limited 02R [2007] ATP 19; Rinker Group Limited 02 [2007] ATP 17; Magna Pacific (Holdings) Limited 05 [2007] ATP 16; Becker Group Limited [2007] ATP 13; Summit Resources Limited [2007] ATP 9; Wattyl Ltd [2006] ATP 11; Australian Leisure & Hospitality Group Limited 03 [2004] ATP 25; Novus Petroleum Limited 02 [2004] ATP 9; BreakFree Limited 04R [2003] ATP 42; BreakFree Limited 03 and 04 [2003] ATP 38 and 39; AMP Shopping Centre Trust (No 2) [2003] ATP 24; AMP Shopping Centre Trust (No 1) [2003] ATP 21; Anaconda Nickel Limited 18 [2003] ATP 18*

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
YES	NO	YES	NO	NO	YES

**INTRODUCTION**

1. The Panel, Rod Halstead, Mike Roche and Andrew Sisson (sitting President), although minded to do so, declined to make a declaration of unacceptable circumstances in relation to the affairs of Warrnambool Cheese and Butter Factory Company Holdings Limited (**WCB**) after accepting undertakings from Saputo and WCB. The application concerned announcements of an intention on the part of WCB to declare special dividends, which was subsequently departed from when it was revoked by WCB and a revised offer by Saputo announced. Also, the initial announcements involved the establishment of a ‘conditional’ (and effectively retrospective) record date without there being any certainty of the dividends being paid, affecting market integrity. The Panel decided not to make a declaration after accepting undertakings that gave shareholders no less value than under the original proposal.

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2. In these reasons, the following definitions apply.

Bega	Bega Cheese Limited
Murray Goulburn	Murray Goulburn Co-operative Co Ltd
Saputo	Saputo Dairy Australia Pty Ltd - a wholly owned subsidiary of Saputo, Inc
WCB	Warrnambool Cheese and Butter Factory Company Holdings Limited

## FACTS

3. WCB is an ASX listed company (ASX code: WCB). It is in the business of manufacturing cheese, milk powders, whey protein concentrate, butter, cream and packaged milk.
4. WCB is subject to three competing takeover bids.<sup>1</sup>
5. Bega is an ASX listed company (ASX code: BGA). It is in the business of processing, manufacturing, cutting and packaging cheese and manufacturing other dairy products. On 12 September 2013, Bega announced an off-market takeover bid for all the shares in WCB offering 1.2 Bega shares plus \$2.00 for each WCB share. It since increased its offer to 1.5 Bega shares plus \$2.00 for each share and declared its price final.
6. Murray Goulburn is an unlisted public company. It is in the business of manufacturing dairy foods. On 18 October 2013, it announced an off-market takeover bid for all the shares in WCB at \$7.50 per WCB share. It has since increased its bid price to \$9.50 per WCB share. Its bid is subject to conditions.
7. Saputo is a wholly owned subsidiary of Saputo, Inc – a Canadian company. Saputo, Inc produces markets and distributes dairy products which are sold in some 40 countries.
8. On 8 October 2013, Saputo announced an off-market takeover bid for all the shares in WCB at \$7.00 per WCB share. At the time of the application it had increased its bid price to \$9.00 per WCB share. Its bid has been declared unconditional.
9. The board of WCB has recommended acceptance of Saputo's bid.
10. The relevant history of Saputo's bid is as follows:
  - (a) on 7 October 2013, WCB and Saputo Inc entered a Bid Implementation Deed under which Saputo Inc would make (or cause a wholly owned subsidiary to make) a recommended takeover bid (in the absence of a superior proposal) for all the shares in WCB. The parties agreed initial public announcements, which were made on 8 October 2013
  - (b) on 8 October 2013, in the announcement of its bid, Saputo said:

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<sup>1</sup> *Post script*: Bega's bid closed on 20 December 2013

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*Saputo has agreed with Warrnambool that Warrnambool may declare and pay fully franked special dividends of up to a maximum of \$1.31 per Warrnambool share, with a corresponding reduction in the offer price, upon Saputo reaching specified relevant interest thresholds in Warrnambool. This would enable the distribution of franking credits to Warrnambool shareholders that could deliver additional value estimated by Warrnambool to be up to an additional AU\$0.56 per share depending upon the individual tax circumstances of each Warrnambool shareholder. The special dividends comprise two parts:*

- if Saputo obtains an interest of at least 50.1% in Warrnambool, Warrnambool may pay an initial fully franked dividend of up to \$0.46 per share; and*
- if Saputo obtains an interest of at least 90% in Warrnambool, Warrnambool may pay an additional fully franked dividend of up to \$0.85 per share, or such amount so that the total of the initial and additional dividend is up to \$1.31 per share.*

- (c) also on 8 October 2013, WCB announced that its directors unanimously recommended Saputo's bid in the absence of a superior proposal, and said:

*Saputo's Offer gives WCB the discretion to pay two fully franked special dividends of up to \$1.31 per share in aggregate. Any special dividends would be deducted from the Offer price of \$7.00 cash per share payable by Saputo:*

- if Saputo obtains an interest of at least 50.1% in WCB shares, WCB may pay an initial special dividend of up to \$0.46 per share*
- if Saputo obtains an interest of at least 90% in WCB shares, WCB may pay a subsequent special dividend of \$0.85 per share.*

*If either or both special dividends are paid, some WCB shareholders may also derive additional value above \$7.00 from the franking credits attached to those special dividends. The value from these franking credits will be up to \$0.56 per share for some WCB shareholders if both special dividends are paid ...*

- (d) on 25 October 2013, Saputo increased its bid price to \$8.00 per WCB share<sup>2</sup> and made further statements about the agreement with WCB for special dividends
- (e) also on 25 October 2013, Saputo lodged its bidder's statement, making extensive reference to the special dividends (which it defined as 'Permitted Dividends')
- (f) on 12 November 2013, WCB lodged its target's statement, also making extensive reference to the special dividends
- (g) on 15 November 2013, Saputo and WCB agreed the Bid Implementation Deed Second Amendment, which (among other things):
- provided for the special dividends as follows:

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<sup>2</sup> The price increase was agreed in the Bid Implementation Deed First Amendment

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*... that for the purposes of clause 7.4(b)(i) of the Bid Implementation Deed and for all other purposes WCB will announce each Permitted Dividend with the record date of 26 November 2013*

- provided that Saputo would procure that the bid was free from all outstanding conditions by no later than 28 November 2013 and
  - increased the bid price to \$9.00 per WCB share
- (h) also on 15 November 2013, WCB announced that its directors unanimously recommended Saputo's revised \$9.00 bid price in the absence of a superior proposal, referred to Saputo's intention to declare the bid unconditional on 28 November 2013, and said:

*Subject to Saputo obtaining a relevant interest in at least 50.1% of WCB shares, the WCB board intends to exercise its discretion to declare a fully franked special dividend of \$0.46 per share (**Initial Permitted Dividend**)*

*Subject to Saputo obtaining a relevant interest in at least 90% of WCB shares, the WCB board also intends to exercise its discretion to declare a subsequent fully franked special dividend of \$0.85 per share (**Additional Permitted Dividend**)*

*The record date for both ... is 7.00pm (AEST) on 26 November 2013 (**Record Date**). The timing of the Record Date is to ensure that the Record Date will pass before any WCB Shares accepted into the Revised Saputo Offer are transferred to Saputo....*

*WCB shares will trade ex-dividend from 20 November 2013 (**Ex-Dividend Date**). (original emphasis)*

WCB's announcement also made reference to WCB shareholders who could capture the full benefit of the franking credits receiving additional value of \$0.56 per share

- (i) also on 15 November 2013, Saputo announced its increased bid price, and said:

*Saputo intends to declare Saputo's Offer unconditional by no later than 28 November 2013, following the record date of 26 November 2013 set by the Warrnambool Board for the special dividends announced today*

Saputo's announcement made reference to the special dividends and the benefit of up to \$0.56 per share from the franking credits

- (j) on 20 November 2013, ASX issued a circular informing market participants that it would not establish ex-dividend trading for WCB shares
- (k) also on 20 November 2013 (dated 19 November 2013), WCB announced additional guidance for WCB shareholders concerning "the dates, timing and other matters relevant to the interaction between the fully franked special dividends and the Revised Saputo Offer"
- (l) on 25 November 2013, Saputo and WCB agreed the Bid Implementation Deed Third Amendment, which (among other things):
- unwound the special dividends proposal

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- provided for WCB to make an announcement that it no longer intended to exercise its discretion to declare the special dividends and had revoked the record date and
  - stated Saputo's intention to increase the bid price by \$0.20 if Saputo obtained a relevant interest in WCB shares of greater than 50% during the offer period
- (m) also on 25 November 2013, WCB announced an "Improved and simplified Saputo Offer" which included the following:

*The amended terms are as follows:*

- *WCB revokes its previously announced intention to declare an initial fully franked special dividend of \$0.46 per share and an additional permitted dividend of \$0.85 per share (which intention was subject to Saputo achieving a relevant interest of greater than 50% and 90% respectively and noting that any special dividends paid by WCB would have been deducted from the \$9.00 offer price payable by Saputo)*

*Accordingly, the previously announced record date of 26 November 2013 for the special dividends is revoked and no longer applies and WCB will now not declare any dividends during the offer period*

- (n) also on 25 November 2013, Saputo announced the conditional increase in its bid price and freed its bid of all conditions. Saputo made reference to the special dividends proposal as follows:

*At the request of Warrnambool, Saputo had previously agreed that Warrnambool could at its discretion declare and pay fully franked special dividends upon Saputo reaching specified relevant interest thresholds in Warrnambool to enable the distribution of franking credits (with any dividends so declared being deducted from the Offer consideration of \$9.00 cash per share). Warrnambool has announced today that it no longer intends to declare and pay any dividends during the Offer period.*

11. On 15 November 2013, Saputo had a relevant interest in less than 1% of WCB shares as a result of acceptances under its takeover bid.
12. On 25 November 2013, Saputo had a relevant interest in 3.733% of WCB shares as a result of acceptances under its takeover bid.
13. On 16 December 2013, Saputo had a relevant interest in 16.916% of WCB shares as a result of acceptances under its takeover bid.

## APPLICATION

### Declaration sought

14. By application dated 26 November 2013, Murray Goulburn sought a declaration of unacceptable circumstances. It submitted that abandonment of the special dividends proposal meant that:

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- (a) Saputo would not vary its bid to conform with the previous announcements made by it and WCB, contrary to s631(1)<sup>3</sup> and truth in takeovers policy and
  - (b) WCB shares traded from 15 to 25 November 2013 on the basis of misinformation as to the terms of Saputo's bid, namely that WCB shareholders would contingently receive franking credits of up to \$0.56 per share.
15. Murray Goulburn also submitted that:
- (a) *the board appears to have been unduly hasty in recommending the Saputo bid without waiting to see if an auction develops: it would be preferable for them to advise shareholders to wait until the bid is in its final stages or bidders have declared their bids 'final' and*
  - (b) WCB should have released the Bid Implementation Deed to the market, in line with market practice.
16. Murray Goulburn submitted that *"These circumstances are contrary to the policy objectives of Chapter 6 as set out in section 602 and therefore give rise to unacceptable circumstances."*

#### Interim orders sought

17. Murray Goulburn sought interim orders to the effect that Saputo be restrained from processing acceptances and from acquiring WCB shares on market, and either be restrained from disseminating information about its revised bid or be required to qualify such information by reference to the Panel application.
18. The President decided not to make interim orders, noting that the sitting Panel may make interim orders. The President also noted that the applicant may want to consider renewing its request closer to the time when the conditional further \$0.20 per share might become payable.
19. We decided to make interim orders (Annexure A). We decided that, should an appropriate final order include the unwinding of acceptances, it would be more difficult to implement if it required accepting WCB shareholders to return the consideration to Saputo. Accordingly, we restrained the processing of acceptances. We did not, however, consider this an appropriate case to stop acceptances being received, because if it became appropriate the Panel would be able to set aside those acceptances.

#### Final orders sought

20. Murray Goulburn sought final orders to the effect that:
- (a) WCB reinstate the special dividends, but with the record date for each dividend falling after the declaration of that dividend
  - (b) Saputo be restrained from varying its offer to provide for the payment of an additional \$0.20 when and if Saputo reached a 50.1% relevant interest in WCB

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<sup>3</sup> References in these reasons are to the *Corporations Act 2001 (Cth)* unless otherwise stated

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- (c) Saputo and WCB disclose in a supplementary bidder's statement and a supplementary target's statement (respectively) the effect of the declaration of the special dividends on the consideration under Saputo's bid, including:
  - (i) a statement whether there will be different effects on people who have bought WCB shares at different times, or who accept the offer at different times (and if so, what) and
  - (ii) "cautionary disclosure" as to the likelihood of the special dividends being paid and
- (d) WCB disclose the Bid Implementation Deed.

## DISCUSSION

### Truth in Takeovers

21. ASIC Regulatory Guide 25 "*Takeovers: false and misleading statements*" addresses 'last and final statements' in the context of bids. It says: "*A 'last and final statement' is a statement made by a market participant that it will or will not do something in the course of the bid*".<sup>4</sup>
22. A fundamental principle of an efficient, competitive and informed market is that those who make last and final statements to the market about their own intentions or proposed conduct should act consistently with them. Thus, "*Market participants that make a last and final statement should be held to it, as with a promise*".<sup>5</sup>
23. Renard and Santamaria describe the basis for truth in takeovers policy:  
*... buyers and sellers of securities are entitled to rely on unqualified statements that a bidder, target or major shareholder will do something in relation to the bid, and should not be exposed to loss if that party subsequently acts contrary to the statement.*<sup>6</sup>
24. The Panel has said of RG 25 that it "*properly requires those who make definitive statements to the market as to their intentions to adhere to those intentions by reminding these market actors that an apparently definitive statement of intention will cause market disruption if it is not fulfilled.*"<sup>7</sup>
25. The Panel has, on numerous occasions, endorsed ASIC's truth in takeovers policy.<sup>8</sup>
26. In this context, we considered:
  - (a) WCB's 15 November and 25 November announcements and

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<sup>4</sup> RG 25 at para [25.2]

<sup>5</sup> RG 25 at para [25.9]

<sup>6</sup> Renard and Santamaria, *Takeovers and Reconstructions in Australia*, para [1677], quoted in a scheme chapter but applicable in takeovers

<sup>7</sup> *BreakFree 04R* [2003] ATP 42 at [64]

<sup>8</sup> *Anaconda Nickel Limited 18* [2003] ATP 18 at [33]; *BreakFree Limited 04* [2003] ATP 39; *BreakFree Limited 04R* [2003] ATP 42 at [64]; *Novus Petroleum Limited 02* [2004] ATP 9 at [30]; *Australian Leisure & Hospitality Group Limited 03* [2004] ATP 25 at [49]; *Summit Resources Limited* [2007] ATP 9; *Rinker Group Limited 02* [2007] ATP 17 at [30]; *Rinker Group Limited 02R* [2007] ATP 19 at [115(b)]; *Ludowici Limited* [2012] ATP 3 at [38]; *Ludowici Limited 01R* [2012] ATP 4; *Alesco Corporation Limited 03* [2012] ATP 18

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(b) Saputo's 15 November and 25 November announcements.

#### *WCB's announcements*

27. On 15 November 2013, WCB announced an intention to declare special dividends, subject to Saputo achieving certain acceptance levels under its bid. There were no other qualifications. This was supplemented by an announcement on 20 November 2013 setting out in detail the implications of the special dividends on different categories of persons who accepted Saputo's bid. The 20 November announcement contained no other qualifications.
28. Each of these announcements was made by agreement with Saputo.
29. Murray Goulburn, Bega and ASIC each submitted that on 15 November 2013 WCB made a last and final statement in relation to the payment of dividends should certain acceptance levels be reached. We agree.
30. WCB submitted that the intended payment of a dividend is inherently uncertain and fundamentally inconsistent with truth in takeovers policy, and the policy does not apply to dividends. We do not agree with this submission, at least in such broad terms. While circumstances might intervene between the announcement of an intention to declare a dividend and its declaration, that is not the case here. In any event, such a situation does not detract from the announcement of the intention being a last and final statement.
31. WCB relied on *Wattyl*<sup>9</sup> to support its submission. It submitted that there was no suggestion or discussion by the Panel about truth in takeovers applying when Wattyl's dividend proposal was withdrawn. In *Wattyl*, the target announced an intention to declare a dividend if the bid by AEP closed unsuccessfully. Subsequently, a competing bid by Barloworld was launched with a condition that Wattyl not pay dividends in excess of its reported net profit after tax. Wattyl announced the withdrawal of its proposed dividend pending the outcome of the Barloworld offer. AEP sought supplementary disclosure; it did not seek that Wattyl be held to its statement. The Panel concluded that more information was required with respect to Wattyl's intention concerning reintroduction of the dividend.
32. In our view, *Wattyl* can be distinguished from the present matter. A truth in takeovers case was not brought before the Panel in *Wattyl* and so, without the benefit of submissions and a conclusion on them, it is not reliable support for the submission made in the present matter. Moreover, the nature of the statement in *Wattyl* was different, the statement was not made in conjunction with the bidder (see paragraph 40) but in response to a subsequent bid, and the subsequent bid by Barloworld was conditional on the dividend not going ahead.
33. WCB's target's statement in response to Saputo's bid included a statement that there was no guarantee that the special dividends would be declared or paid or

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<sup>9</sup> *Wattyl Ltd* [2006] ATP 11



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that any of the conditions for them would be met.<sup>10</sup> However, no such qualification appeared in the 15 November or 20 November announcements. There, the only qualification of the intention to declare special dividends was the acceptance level under Saputo's bid.

34. On 25 November 2013, WCB announced that it had revoked its intention to declare special dividends. It also announced that it would not declare any dividends during the offer period. This announcement was not made in conformity with the qualification regarding the acceptance level under Saputo's bid. By making the 25 November announcement, WCB departed from the last and final statement it made on 15 November.
35. The market expects that last and final statements will not be departed from. It has been the policy in Australia for many years that last and final statements must be complied with and the market practice is well understood.<sup>11</sup>
36. As a result of the 25 November announcement, the market between 15 and 25 November was misinformed that WCB would declare special dividends if the relevant acceptance level under Saputo's bid was reached. It was operating on information that was departed from, when it was entitled to assume that the information would not be departed from. This detracted from an efficient and informed market.<sup>12</sup>

#### *Saputo's announcements*

37. On 15 November 2013, Saputo made an announcement that referred to WCB's intention to declare the special dividends.
38. Saputo and WCB agreed on the special dividend proposal and the record date of 26 November 2013 in the Second Amending Deed of 15 November 2013. Saputo and WCB made 'interlocking' announcements, each referencing both the consideration Saputo was offering and the special dividends WCB intended to declare. The agreement between them was part of an arrangement for Saputo's bid and, in our view, Saputo's announcement represented a last and final statement regarding the intention of WCB to declare the special dividends.
39. Saputo accepted that truth in takeovers policy applied to its 15 November announcement, namely in relation to its price increase and its intention to declare its offer unconditional, but submitted that it was merely reflecting statements made by WCB in relation to the special dividends. Saputo submitted that it was not appropriate for it to be subject to truth in takeovers policy in relation to a revocable corporate action announced by WCB.
40. In our view, each of the announcements by WCB and Saputo of 15 November dealt with aspects of a proposal in respect of Saputo's bid. While the aspects may have

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<sup>10</sup> See pages 11 and 18 of WCB's target statement dated 12 November 2013

<sup>11</sup> *Rinker Group Limited 02R* [2007] ATP 19 at [46(b)]

<sup>12</sup> Section 602(a)

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been technically separate, in substance and for practical purposes they were *“interdependent and had been designed as integrated parts of a single transaction.”*<sup>13</sup>

41. Murray Goulburn submitted that the special dividends proposal was *“effectively part of the consideration offered by Saputo for these purposes”*. ASIC put the same point in a different way, submitting that *“the statements by Warrnambool would not have been made without the approval of Saputo in accordance with the Bid Implementation Deed.”* We agree with these submissions.
42. In our view, therefore, the special dividends proposal is also a last and final statement by Saputo.
43. Alternatively, Saputo is bound by a “third-party statement” made by WCB. The Panel considered the position of third-party statements in *BreakFree 04*.<sup>14</sup> It said:  
*In order for it to be reasonable for market participants to rely on a Third Party Statement, we consider that the statement must be expressly made with authority from, or be publicly supported by, the Third Party in circumstances where it is expressly recognised (or there is a necessary inference) that the Third Party knows that it will not be able to depart from the statement.*
44. This was the position here with Saputo, even though the statement was not of the type made in that matter.
45. On 25 November 2013, Saputo announced (among other things) that WCB no longer intended to declare and pay any dividends during the offer period. This was an aspect of the arrangements between WCB and Saputo agreed between them in the Third Amending Deed dated 25 November 2013. For the reasons given above, this announcement resulted in the market not being efficient and informed (see paragraph 36).

#### ***Conclusion on truth in takeovers***

46. The structure announced by WCB and Saputo on 15 November 2013 was essentially unworkable for the reasons set out in paragraph 48 and following. On 25 November 2013, WCB announced that it revoked its previous intention to declare the dividends. Saputo announced on the same day its intention to revert to takeover consideration which did not include franked dividends and associated franking credits. These announcements represented a departure from the previous statements to which the parties were bound.
47. WCB and Saputo submitted that the announcements of 25 November were also last and final statements. Indeed, Saputo submitted, in relation to its 25 November announcement, *“it would be contrary to the rationale underpinning truth in takeovers policy to allow a situation where a clear statement of Saputo is now resiled from.”* However, this cannot be correct. Treating a departure from a last and final statement as itself a last and final statement that must be complied with would defeat the policy.

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<sup>13</sup> *Becker Group Limited* [2007] ATP 13 at [39]

<sup>14</sup> *BreakFree Ltd 03 and 04* [2003] ATP 38 and 39, confirmed in *BreakFree Ltd 04R* [2003] ATP 42 at [67]

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#### Market trading

48. The 15 November announcements by WCB and Saputo advised the market of WCB's intention to declare the special dividends if the relevant acceptance levels (50% and 90%) were reached under Saputo's bid. These were future events. The WCB announcement also set a record date of 26 November, referred to in the Saputo announcement, but by reason of the qualification the record date was necessarily ahead of any certainty that the dividends would become payable. It was a conditional record date, and would become retrospective.
49. The conditional record date was to be 26 November 2013. Based on the usual timetable under ASX Listing Rules, the ex-dividend date was to be 20 November 2013. However, on 20 November 2013, ASX decided not to establish ex dividend trading. This was because "*whether or not the Special Dividends are declared and paid depends upon the satisfaction of certain conditions.*"<sup>15</sup>
50. Another complication was that Saputo intended to declare its bid unconditional by 28 November 2013, after the record date.
51. At the very least, the announcements had the potential to cause confusion and disruption to the market for WCB shares. For example, after the conditional record date, it would be difficult for a buyer to assess the value of WCB shares given that the amount the buyer would receive if the shares were accepted into Saputo's bid would progressively reduce as the acceptance thresholds were reached.
52. WCB sought to address the confusion. On 20 November 2013, it made an announcement detailing various scenarios for shareholders who remained shareholders on the record date and accepted Saputo's bid, and shareholders who become registered shareholders after the record date and accepted Saputo's bid. We do not think this resolved the confusion.
53. In our view, the market would not have been able to trade in an informed and orderly manner after the conditional record date. This was even more problematic in the context of the competing bids for WCB.
54. The announcements put into place arrangements that were complex, created uncertainty and were most undesirable. We do not want to see similar arrangements in future. ASIC was of the same view. As the Panel noted in *Alesco 03*:

*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....*<sup>16</sup>

#### Compensation

55. ASIC submitted that on 22 November 2013 there was a drift in trading prices of WCB shares on market from approximately \$9.15 to a close of \$9.05.

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<sup>15</sup> ASX Circular 20 November 2013

<sup>16</sup> *Alesco Corporation Limited 03* [2012] ATP 18 at [33]

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56. It is unclear whether the price fall was influenced by the notional record date and the stock notionally going ex-dividend.
57. Some of the sellers after the intended ex-dividend date, and particularly on 22 November, may have formed a view that they could sell their shares and still be entitled to the dividends, prompting calls for compensation. For us to consider compensation would require some measure of speculation about what market participants understood would be the position when that position was essentially unworkable. We are not inclined to undertake this speculation.<sup>17</sup>

#### Section 631

58. Murray Goulburn submitted that the course of conduct which Saputo had announced did not comply with s631(1).
59. Section 631(1) provides that:

*A person contravenes this subsection if:*

  - (a) *either alone or with other persons, the person publicly proposes to make a takeover bid for securities in a company; and*
  - (b) *the person does not make offers for the securities under a takeover bid within 2 months after the proposal.*

*The terms and conditions of the bid must be the same as or not substantially less favourable than those in the public proposal.*
60. ASIC submitted that for some shareholders, principally those eligible to utilise franking credits, Saputo's revised bid announced on 25 November was less favourable than that announced on 15 November. It also submitted that s631 did not apply directly to Saputo's 25 November announcement, as that announcement was in relation to a bid that had already been made. It further submitted that, notwithstanding a distinction between a takeover proposal in the pre-offer period and a takeover that had already been made, "*the making of a takeover announcement and the consequential obligation to make offers conforming with announced terms that cannot be modified once made, reflect a general policy that once announced on certain terms, target shareholders will be entitled to accept offers that, at all relevant times, are no less favourable than those announced and are modified only as contemplated under the takeover procedure.*"
61. Saputo submitted that s631(1) was not applicable. It also submitted that its revised bid was not substantially less favourable given that "*any franking credits in the context of a potential \$9.20 all-cash offer ... represents only a small percentage of the whole (approximately 3% in fact)*". WCB made similar submissions.
62. We agree with ASIC, WCB and Saputo that this is not a s631 issue directly. Section 631 though reflects a policy that a bidder cannot do less than it has announced, which is in play in this case. A departure from a statement made during a bid is addressed in truth in takeovers policy. We are not inclined to the submission of

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<sup>17</sup> *Regis Resources Limited* [2009] ATP 7 at [27]

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Saputo that its revised bid of \$9.20 was not substantially less favourable even if acceptances reached 90%, but in the circumstances we do not need to make a decision.

#### Conduct of the board

63. Murray Goulburn submitted that the WCB board appeared to have been unduly hasty in recommending Saputo's bid without waiting to see if an auction developed and that it would have been preferable for the board to advise shareholders to wait until the bid was in its final stages or the bidders had declared their bids "final".
64. It did not develop this submission or seek orders in relation to it. In response to the Panel's brief, Murray Goulburn submitted: "*We do not assert that matters regarding directors duties come within the jurisdiction of the Panel specifically.*" It added, however, that the actions of the WCB board had contributed to the unacceptable circumstances.
65. The Panel has historically been reluctant to involve itself in matters concerning alleged breaches of directors' duties.<sup>18</sup>
66. Saputo submitted that these were "*matters pertaining to fiduciary factors which the Panel has rightly, in Saputo's opinion, declined to consider on previous occasions*". Saputo relied on *Ross Human Directions*.<sup>19</sup> In deciding to conduct proceedings, the Panel there said:

*On the question of whether the SIA fettered the ability of the RHD directors to carry out their fiduciary duties, we consider the fetters in the fiduciary context of considering the deal protection measures, but it is not the Panel's role to determine claims for breach of fiduciary duty (to the extent that they were put).*
67. We do not think the Panel in *Ross Human Directions* was saying that the Panel will never look at the actions of a board in connection with a control transaction. In fact the Panel in that matter did that very thing, although not to make a decision about directors' duties but to make a decision about the effect of the board's actions. This is unsurprising. The actions of a target's board clearly can be the subject of a Panel application (frustrating action being a good example).
68. We think that a Panel would (and we would) be prepared to consider whether actions taken by a board had such an effect on a control transaction as to give rise to unacceptable circumstances in an appropriate case.
69. WCB, similarly to Saputo, submitted that this was not a matter for the Panel, and denied that its board had been unduly hasty in recommending the Saputo offer. In particular WCB's submissions included that:

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<sup>18</sup> For example, *Magna Pacific (Holdings) Limited 05* [2007] ATP 16; *Multiplex Prime Property Fund 04* [2009] ATP 21, *International All Sports Ltd 01R* [2009] ATP 5 and *Bowen Energy Ltd* [2007] ATP 22

<sup>19</sup> *Ross Human Directions* [2010] ATP 8 at [23]

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- (a) its recommendation of Saputo's offer was first made on 8 October 2013 - ten days before Murray Goulburn's offer was publicly announced on 18 October 2013
  - (b) its recommendation of the Saputo offer was at all times qualified as applying in the absence of a superior proposal and
  - (c) since Saputo's bid was first recommended there have been many proposals (either new or improved) from Bega, Saputo and Murray Goulburn.
70. We do not think it is necessary to deal with this point in this case, and in any event there was no evidence put forward of undue haste.

#### Disclosure of the Bid Implementation Deed

71. Murray Goulburn sought disclosure of the Bid Implementation Deed. It submitted that release of the document to the market was in line with market practice.
72. On 8 October 2013, WCB released an announcement that it had entered into a Bid Implementation Deed in respect of Saputo's bid (which its board recommended). A summary of the terms of the Deed was an annexure to the announcement.
73. While we think it is best market practice to release the Deed in full, and there are risks in not doing so,<sup>20</sup> we are not aware of anything to suggest that the market was not adequately informed in this case.

#### Media canvassing

74. On 28 November 2013, and again on 11 December 2013, we reminded all parties of the importance of compliance with the undertakings they had given to the Panel and other parties in respect of confidentiality and media canvassing. This followed a number of articles in the press with specific information about the matter.
75. The Panel regards confidentiality, and media canvassing restrictions, as important to the timely disposition of matters before it. We regret that we needed to remind all parties about the importance of complying with their undertakings not once, but twice.

#### DECISION

76. For these reasons, we are strongly of the view that unacceptable circumstances occurred in relation to both the announcements of 15 November and 25 November by Saputo and WCB.
77. We were minded to make a declaration of unacceptable circumstances. However, we have accepted undertakings from Saputo and WCB (Annexures B and C) to remedy the unacceptable circumstances.

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<sup>20</sup> *BC Iron Limited* [2011] ATP 6; *AMP Shopping Centre Trust (No 2)* [2003] ATP 24, *AMP Shopping Centre Trust (No 1)* [2003] ATP 21

## Takeovers Panel

### Reasons - Warrnambool Cheese and Butter Factory Company Holdings Limited [2013] ATP 16

78. The undertakings include:
- (a) Saputo extending its offer period and increasing the consideration offered
  - (b) Saputo offering shareholders withdrawal rights and
  - (c) WCB making an announcement outlining the status of the three bids currently being made in relation to its shares.
79. We think the undertakings address the unacceptable circumstances by offering all shareholders at least as much value (including full allowance for franking credits) as would have been received under the special dividends proposal announced on 15 November. We accept the undertakings and do not make a declaration (with consequential orders).
80. In accepting the undertakings, our concern is to ensure a satisfactory practical outcome. In our view, it is impractical to require WCB and Saputo to conform to their last and final statements of 15 November, as that structure is essentially unworkable. Moreover, it is Panel policy that the public interest is generally served by accepting undertakings that address the unacceptable circumstances to the Panel's satisfaction.<sup>21</sup>
81. Given the undertakings we decline 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

82. As we make no declaration of unacceptable circumstances, we make no final orders, including as to costs.
83. As acceptance of the undertakings ends the proceedings, the interim orders are now at an end.

**Andrew Sisson**  
**President of the sitting Panel**  
**Decision dated 17 December 2013**  
**Reasons published 24 December 2013**

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<sup>21</sup> Guidance Note 4: "*Remedies General*" at [38]

## Takeovers Panel

### Reasons - Warrnambool Cheese and Butter Factory Company Holdings Limited [2013] ATP 16

#### Advisers

Party	Advisers
Bega Cheese Limited	Addisons Kidder Williams Ltd
Murray Goulburn Co-operative Co Ltd	Herbert Smith Freehills Lazard
Saputo Dairy Australia Pty Ltd	Maddocks
Warrnambool Cheese and Butter Factory Company Holdings Ltd	Minter Ellison CIMB





**Australian Government**

**Takeovers Panel**

**Annexure A**  
**CORPORATIONS ACT**  
**SECTION 657E**  
**INTERIM ORDERS**

**WARRNAMBOOL CHEESE AND BUTTER FACTORY COMPANY HOLDINGS LIMITED**

Murray Goulburn Co-operative Co. Limited made an application to the Panel dated 26 November 2013 in relation to the affairs of Warrnambool Cheese and Butter Factory Company Holdings Limited (**Warrnambool**).

The Panel ORDERS:

1. Saputo Dairy Australia Pty Ltd (**Saputo**) must not take any further steps to process any acceptances received under its bid for Warrnambool.
2. Saputo must, as soon as practicable, provide a statement in a form approved by the Panel to Warrnambool explaining to Warrnambool shareholders the effect of this interim order.
3. Warrnambool must immediately release to the market the statement received from Saputo.
4. These interim orders have effect until the earliest of:
  - (i) further order of the Panel
  - (ii) the determination of the proceedings and
  - (iii) 2 months from the date of these interim orders.

**Alan Shaw**  
**Counsel**  
**with authority of Andrew Sisson**  
**President of the sitting Panel**  
**Dated 29 November 2013**



**Australian Government**

**Takeovers Panel**

## **Annexure B**

### **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT 2001 (CTH) SECTION 201A UNDERTAKING**

#### **WARRNAMBOOL CHEESE AND BUTTER FACTORY COMPANY HOLDINGS LTD**

Saputo Dairy Australia Pty Ltd (**Saputo**) undertakes to the Panel that it will:

In relation to the proposed acquisition of Warrnambool Cheese and Butter Factory Company Holdings Limited (**Warrnambool**) by Saputo (**Offer**):

1. extend the Offer period so that the Offer will not close before 7.00pm on a date which is not earlier than 5 business days after the End Date (as defined below)
2. if Saputo obtains a relevant interest in greater than 50% of issued Warrnambool shares during the Offer period, increase its offer price from \$9.00 to \$9.20 cash per Warrnambool share
3. if Saputo obtains a relevant interest in greater than 75% of issued Warrnambool shares during the Offer period, increase its offer price to \$9.40 cash per Warrnambool share
4. if Saputo obtains a relevant interest in greater than 90% of issued Warrnambool shares during the Offer period, increase its offer price to \$9.60 cash per Warrnambool share
5. offer the withdrawal right set out in paragraphs 6 and 7 below (**Withdrawal Right**) to each Warrnambool shareholder who has accepted the Offer:
  - 5.1. on or before the Modification Date (as defined below) by CHESSE or
  - 5.2. by fax, or by hand, or by mail post where the Acceptance and Transfer Form is dated (or was otherwise received) on or before the Modification Date,

#### **(Relevant Warrnambool Shareholder)**

6. send a notice to each Relevant Warrnambool Shareholder advising them of their right to withdraw their acceptance together with a form (**Election Form**) providing each Relevant Warrnambool Shareholder with the option of either withdrawing their acceptance or of affirming their acceptance of the Offer. The notice and Election Form will be despatched to all Relevant Warrnambool Shareholders whose acceptances were received on or before the Modification Date by no later than the end of the business day following the Modification Date. Saputo will despatch the notice and the Election Form to each Relevant Warrnambool Shareholder whose acceptances were not received on or before the Modification Date, by no later than the end of the business day following the receipt of the acceptance
7. allow each Relevant Warrnambool Shareholder until 7.00pm on the End Date the opportunity to exercise the Withdrawal Right by returning to Saputo the duly completed Election Form indicating that the Relevant Warrnambool Shareholder wishes to withdraw its

## Takeovers Panel

### Reasons - Warrnambool Cheese and Butter Factory Company Holdings Limited [2013] ATP 16

acceptance. Saputo will ensure that the Withdrawal Right remains on foot and does not lapse before 7.00pm on the End Date

8. in the event that a Relevant Warrnambool Shareholder returns a duly completed Election Form, on or before the End Date, indicating that the Relevant Warrnambool Shareholder wishes to affirm its acceptance of the Offer, pay the Offer consideration to the Relevant Warrnambool Shareholder within 5 business days of receipt by Saputo of the Election Form
9. in the event that a Relevant Warrnambool Shareholder does not return an Election Form, pay the Offer consideration to that Relevant Warrnambool Shareholder within 5 business days after the End Date
10. take all reasonable steps necessary to promptly give effect to the exercise of a Withdrawal Right by a Relevant Warrnambool Shareholder and
11. prepare, lodge and dispatch a supplementary bidder's statement and provide an announcement to Warrnambool (both in a form approved by the Panel), for immediate lodgement and release to the market, that it has provided this undertaking, formally announcing the changes to the Offer outlined in paragraphs 1 to 9 of this undertaking and advising that the variations to the Offer price referred to in paragraphs 2,3 and 4 is a "last and final" statement as to the Offer price for the purposes of ASIC Regulatory Guide 25.
12. In this undertaking:

"**Modification Date**" is the business day after the date on which Australian Securities & Investments Commission provides modification of the *Corporations Act 2001 (Cth)* (**Act**) under section 655A of the Act to enable Saputo to give effect to the Withdrawal Right and

"**End Date**" is the date 10 business days after the Modification Date.

Saputo agrees to confirm in writing to the Panel when it has satisfied its obligations under this undertaking.

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Signed by Louis-Philippe Carrière, director  
with the authority, and on behalf, of Saputo

Dated 16 December 2013



**Australian Government**

**Takeovers Panel**

## **Annexure C**

# **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT 2001 (CTH) SECTION 201A UNDERTAKING**

## **WARRNAMBOOL CHEESE AND BUTTER FACTORY COMPANY HOLDINGS LTD**

Warrnambool Cheese and Butter Factory Company Holdings Ltd (**Warrnambool**) undertakes to the Panel that it will, as soon as practicable, release to ASX:

1. an announcement (in a form approved by the Panel) outlining the status of the 3 takeover bids being made in relation to Warrnambool shares; and
2. the announcement provided to it by Saputo Dairy Australia Pty Ltd (**Saputo**) pursuant to Saputo's undertaking to the Panel.

Warrnambool further undertakes to the Panel that, as soon as reasonably practicable after Saputo issues a supplementary bidder's statement in accordance with Saputo's undertaking to the Panel, it will issue a supplementary target's statement in response to that supplementary bidder's statement.

Warrnambool agrees to confirm in writing to the Panel when it has satisfied its obligations under this undertaking.

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**Signed by Paul Maloney, Company Secretary of Warrnambool Cheese and Butter  
Factory Company Holdings Limited  
with the authority, and on behalf, of Warrnambool Cheese and Butter Factory Company  
Holdings Limited  
Dated 17 December 2013**