



**Australian Government**

**Takeovers Panel**

**Reasons for Decision**

**Envestra Limited**

**[2014] ATP 13**

**Catchwords:**

*Announcement of bid – bid implementation agreement – permitted dividend – intention to declare dividend – truth in takeovers – last and final statements – decline to conduct proceedings*

*Corporations Act 2001 (Cth), sections 631, 657A, 670A, 1041H*

*ASIC Regulatory Guide 25 – Takeovers: false and misleading statements*

*Warrnambool Cheese and Butter Factory Company Holdings Limited [2013] ATP 16; Alesco Corporation Limited 03 [2012] ATP 18*

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
No	No	No	No	No	No

**INTRODUCTION**

1. The Panel, Peter Day, Rod Halstead (sitting President) and Ron Malek, declined to conduct proceedings on an application by Envestra in relation to its affairs. The application concerned announcements made on 30 May 2014 by Envestra and CK ENV that related to a conditional off-market takeover bid by CK ENV for Envestra and the entitlement of Envestra shareholders to receive a final dividend. The Panel considered that the application was premature.
2. In these reasons, the following definitions apply.

Envestra	Envestra Limited
CK ENV	CK ENV Investments Pty Ltd, a wholly-owned subsidiary of the CK Consortium
CK Consortium	Cheung Kong (Holdings) Limited, Cheung Kong Infrastructure Holdings Limited and Power Assets Holdings Limited

**FACTS**

3. Envestra is an ASX listed company (ASX code: ENV).
4. Cheung Kong Infrastructure Holdings (Malaysian) Limited, a wholly-owned subsidiary of a member of the CK Consortium, holds approximately 17.46% of Envestra.
5. On 30 May 2014, Envestra and CK ENV announced that they had entered into a bid implementation agreement under which CK ENV would make a conditional off-

market takeover bid for all the shares in Envestra at \$1.32 cash per share. Both announcements<sup>1</sup> also contained the following statement:

*Envestra shareholders will be entitled to receive a final dividend of up to \$0.035 per Envestra share in respect of the financial year ending 30 June 2014, provided that such dividend is declared (or determined to be paid) on or prior to 21 August 2014 (Final Dividend) without any reduction to the [Consortium] Offer price of \$1.32 per [Envestra] share.*

6. One of the defeating conditions in the bid implementation agreement was that no dividend other than the final dividend would be declared before the end of the offer period.
7. On 20 June 2014, Envestra announced that it proposed declaring a final dividend of \$0.035 per share with ex-dividend and record dates around mid-July but that the CK Consortium objected to the declaration of a dividend in those circumstances.
8. Later that day, CK ENV issued a media statement (not released on ASX) stating that it had no objection to the declaration of a final dividend but did object to an “accelerated timetable” for declaration and payment.
9. On 7 July 2014, Envestra announced that, until its application to the Panel was resolved, it would not be able to state with certainty the date on which a final dividend would be declared, although it anticipated that the declaration would occur no earlier than 11 July 2014 and no later than 21 August 2014.
10. CK ENV’s offer will close on 8 August 2014, unless extended.

## APPLICATION

### Declaration sought

11. By application dated 1 July 2014, Envestra sought a declaration of unacceptable circumstances. Envestra submitted that (among other things) the CK Consortium’s objection to the early declaration of the final dividend, and threatened legal action against the non-affiliated directors<sup>2</sup> designed to deter the early declaration of the final dividend, would deprive shareholders of the benefit of a \$0.035 dividend in addition to the \$1.32 offer price.
12. Envestra submitted that the effect of the circumstances was:
  - (a) *the acquisition of control of Envestra would take place in the absence of an efficient, competitive and informed market*
  - (b) *the shareholders of Envestra will not be given enough information to enable them to assess the merits of the CK Offer and*
  - (c) *Envestra shareholders would not be given a reasonable opportunity to participate in the full benefits of the CK Offer as announced on 30 May 2014.*

### Interim orders

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<sup>1</sup> The announcements were in an agreed form and were annexed to the bid implementation agreement, a copy of which was released to ASX

<sup>2</sup> The directors of Envestra who are not affiliated with Envestra’s two major shareholders, APA Group and Cheung Kong Infrastructure Holdings (Malaysian) Limited

13. Envestra sought interim orders to the effect that CK ENV be restrained from dispatching its bidder's statement and (after the offer opened) from declaring the offer unconditional, pending the determination of the application.
14. On 2 July 2014, the Acting President declined to make interim orders as she considered it was not necessary or desirable, in order to maintain the status quo, to restrain the dispatch of the bidder's statement. Additionally, she considered it was premature to make an interim order that CK ENV be restrained from declaring the offer unconditional.

### Final orders sought

15. Envestra sought final orders to the effect that:
  - (a) CK ENV not rely on payment of a final dividend with a record date during the offer period for the purpose of any defeating condition or to reduce the offer price
  - (b) CK ENV not declare the offer unconditional and transfer shares so as to defeat the entitlement of Envestra shareholders to the agreed final dividend and
  - (c) CK ENV and the CK Consortium either withdraw the objection to payment of the final dividend with a record date during the offer period or extend the offer period so that it will not close until after the record date for the final dividend or account to shareholders for the dividend.

## DISCUSSION

### Preliminary submission

16. The CK Consortium made a preliminary submission that the Panel should decline to conduct proceedings because, among other reasons:
  - (a) it was solely a matter for Envestra's directors to declare a final dividend and set a record date and this was not a Chapter 6<sup>3</sup> issue
  - (b) because it was a matter for Envestra's directors, they could set a record date which was within the offer period so the circumstances they complained of would not exist and
  - (c) it was Envestra that made a private commercial dispute with the CK Consortium public, potentially confusing shareholders.

### Jurisdiction

17. The declaration of a dividend and its timing is entirely a matter for Envestra, not the Panel. To that extent, it is not a Chapter 6 issue. However, it does not follow that the Panel has no jurisdiction. The Panel is required to consider all the relevant circumstances and to further consider the effect of those circumstances.<sup>4</sup> Decisions taken by directors can give rise to unacceptable circumstances.

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<sup>3</sup> References are to *Corporations Act 2001* (Cth) unless otherwise indicated

<sup>4</sup> *Alesco Corporation Limited 03* [2012] ATP 18

18. If CK ENV did not extend the offer period or the declaration of a dividend was not made in time, accepting Envestra shareholders might not be paid a final dividend. This might give rise to unacceptable circumstances<sup>5</sup> if the prevailing circumstances at that time meant that the Eggleston principles<sup>6</sup> or the policies underpinning Chapter 6 were not being met.

### Breach of section 631

19. Envestra submitted that under section 631, CK ENV had a statutory obligation to proceed with a bid on not substantially less favourable terms than the terms announced. Envestra submitted that this required CK ENV to (among other things) facilitate the declaration of a final dividend with a record date during the offer period.
20. It is not yet known whether Envestra shareholders who accept the offer will receive a final dividend in addition to the \$1.32 cash consideration. At present, the bid cannot be said to be substantially less favourable than the terms announced on 30 May 2014.

### Truth in takeovers

21. Envestra submitted that the 30 May statements were unqualified statements to which the truth in takeovers policy applied and, in that context, *“any action by CK ENV Investments or the CK Consortium (including threats of legal action designed to deter the early declaration of the final dividend) that would seek to deprive Envestra shareholders of the benefit of a 3.5 cent final dividend in addition to the \$1.32 offer price would be in contravention of ASIC Regulatory Guide 25 and, potentially, section 670A or 1041H (or both) of the Act.”*
22. The CK Consortium submitted in its preliminary submission that the Panel cannot be expected to make a determination based on hypothetical situations when the Envestra directors can avoid the circumstances on which Envestra is seeking the Panel’s intervention.
23. Envestra has not yet declared its final dividend or set a record date for the final dividend; nor has CK ENV advised whether it will extend the offer period. The Panel also does not know whether Envestra shareholders who accept the offer will be “deprived of the benefit of the final dividend”. Therefore, we consider that no circumstances exist yet which are, or might be, unacceptable.
24. We have not had the benefit of submissions on whether the 30 May statements are truth in takeovers statements. We note the Panel has previously accepted that announcements made by a target and a bidder regarding a dividend proposal can be statements to which the truth in takeovers policy applies.<sup>7</sup> We also have not had the benefit of submissions on whether the market relied, or was entitled to rely, on the 30 May statements as a promise that accepting Envestra shareholders would receive a final dividend in addition to the \$1.32 cash consideration.

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<sup>5</sup> Section 657A(2)

<sup>6</sup> Section 602

<sup>7</sup> *Warrnambool Cheese and Butter Factory Company Holdings Limited* [2013] ATP 16

25. But, apart from any other possible bases for a declaration, if the 30 May statements are unqualified statements on which the market is entitled to rely, any departure from them (eg, by denying accepting shareholders the opportunity to receive a final dividend if declared on or before 21 August 2014) would be a matter that gives rise to serious questions to be considered in light of all the circumstances at the time.

## DECISION

26. For the reasons above, we take the view that the application is premature and we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances at this time.
27. 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).
28. If, in future, the 30 May statements are departed from, including through the actions or inactions of any party, a fresh application could be made.

## Orders

29. Given that we have decided not to conduct proceedings, we do not (and do not need to consider whether to) make any interim order.

**Rod Halstead**  
**President of the sitting Panel**  
**Decision dated 9 July 2014**  
**Reasons published 14 July 2014**

## Advisers

Party	Advisers
Applicant	Johnson, Winter & Slattery Goldman Sachs
CK Consortium	Minter Ellison Citi