



Australian Government

Takeovers Panel

Reasons for Decision

**Warrnambool Cheese and Butter Factory Company Holdings Limited 02
[2016] ATP 11**

Catchwords:

Entitlement offer - compulsory acquisition - decline to commence proceedings - disclosure - effect on control - need for funds - rights issue

Corporations Act 2001 (Cth), sections 602(d), item 10 of s611, 657A

Australian Securities and Investments Commission Regulations 2001 (Cth), reg 20

Guidance Note 17 "Rights Issues"

Yancoal Australia Limited [2014] ATP 24, Aspen Parks Property Fund 01 and 02 [2014] ATP 19, Gladstone Pacific Nickel Limited 02 [2011] ATP 16, Bigshop.com.au Limited 01 [2001] ATP 20, Ashton Mining Ltd [2000] ATP 9

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

INTRODUCTION

1. The Panel, Peter Day, Richard Hunt (sitting President) and Jeremy Leibler, declined to conduct proceedings on an application by Sandon Capital Investments Limited. The application concerned an entitlement offer announced by Warrnambool on 10 June 2016 which closed on 29 June 2016. On the material available, and in view of the outcome of the entitlement offer and the timing of the application, the Panel did not consider that the entitlement offer was likely to be found to give rise to unacceptable circumstances.

2. In these reasons, the following definitions apply.

- Lion-Dairy** Lion-Dairy & Drinks Pty Ltd
- Sandon** Sandon Capital Investments Limited
- Saputo** Saputo Inc (TSX: SAP), Saputo Dairy’s ultimate holding company
- Saputo Dairy** Saputo Dairy Australia Pty Limited
- Warrnambool** Warrnambool Cheese and Butter Factory Company Holdings Limited

FACTS

3. Warrnambool Cheese and Butter Factory Company Holdings Limited is a company listed on ASX (ASX: WCB).

4. Warrnambool’s shareholding structure is as follows:

- (a) Saputo Dairy: 87.92%
- (b) Lion-Dairy: 10.22%

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- (c) Other shareholders: 1.86%
5. On 10 June 2016, Warrnambool announced a 3 for 8 renounceable entitlement offer at \$6.75 per share to raise up to \$142 million. The offer price represented an 18.2% discount to the closing price of Warrnambool's shares on the day prior to the announcement. The offer is not underwritten.
6. The entitlement offer booklet states that Saputo had provided an irrevocable commitment that Saputo Dairy would take up its full entitlement (providing \$124.8 million). It also states that Saputo:
- "has advised WCB that it has not yet made a decision as to whether it would procure Saputo Dairy to exercise the right to proceed with compulsory acquisition of any WCB shares not owned by Saputo Dairy, and such a decision would depend on a number of variables, including:*
- (a) Saputo's assessment of whether the compulsory acquisition of all minority shareholders' WCB shares represents a commercially attractive transaction having regard to market conditions at the relevant time;*
 - (b) Saputo's assessment of the fair value of WCB shares at the relevant time; and*
 - (c) the ability of Saputo and Saputo Dairy to obtain any necessary regulatory approvals.*
- Any final decisions on the matters referred to above will only be made having regard to all material facts known to Saputo and the circumstances at the relevant time."*
7. The offer booklet states the offer proceeds will be used to repay debt.
8. The offer booklet was released to ASX on 10 June 2016 and dispatched to shareholders on 20 June 2016. Pursuant to the timetable, entitlement trading ceased on 22 June 2016 and new shares commenced trading on a deferred settlement basis on 23 June 2016. Allotment is due to take place on 6 July 2016.
9. Sandon made its application on 27 June 2016.
10. The entitlement offer closed on 29 June 2016. Saputo, Lion-Dairy and most shareholders participated such that the shortfall was 0.3%.

APPLICATION

Declaration sought

11. By application dated 27 June 2016, Sandon sought a declaration of unacceptable circumstances. Sandon submitted that:
- (a) Warrnambool did not require the funds and there was no incentive for shareholders to participate in the offer
 - (b) the offer was being inappropriately used to enable Saputo Dairy to proceed to compulsory acquisition and therefore was an abuse of item 10 of s611¹

¹ References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

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- (c) the entitlement offer booklet was deficient in that it failed to disclose:
- (i) Saputo Dairy's intentions should it hold 90% or more of Warrnambool shares after the entitlement offer closes and
 - (ii) sufficient reasons for –
 - the size of the entitlement offer
 - why additional funds were required and
 - the benefits participating shareholders should expect if they participate in the offer.
12. Sandon submitted that the effect of the circumstances was that:
- (a) the entitlement offer amounted to an abuse of item 10 of s611 and
 - (b) Warrnambool was not following an appropriate procedure as a preliminary to compulsory acquisition of voting shares, in breach of the principle in s602(d).

Interim order sought

13. Sandon sought an interim order that the entitlement offer be prevented from proceeding.
14. We took the view that, at this stage of the offer, a decision on interim orders could wait until after we had asked some preliminary questions, given that we could (if necessary) reopen the offer or require a return of application money (allotment not taking place until 6 July).

Final orders sought

15. Sandon sought final orders that the entitlement offer be prevented from proceeding and any application money be returned to applicants.

DISCUSSION

Offer structure

16. Sandon submitted that Warrnambool had structured the entitlement offer so as to provide no incentive for shareholders to participate. It submitted that this amounted to an abuse of item 10 of s611. Warrnambool submitted that the exception in item 10 of s611 was not being relied on in respect of the entitlement offer, and if no other shareholder took up the offer Saputo Dairy would move from 87.9% to 90.9% which it could do within item 9 of s611 (the 3% creep rule).
17. Sandon also submitted that the Panel's decision in *Gladstone Pacific*² was apposite. In that case, the Panel found that there was no need for funds and that the highly dilutive rights issue was a device to pass control.³

² *Gladstone Pacific Nickel Limited 02* [2011] ATP 16

³ [2011] ATP 16 at [40]

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18. Warrnambool submitted that its entitlement offer was appropriately priced and structured to minimise the potential control implications. It pointed to:
 - (a) the establishment of an independent board committee (comprising directors independent of Saputo) to consider and structure the offer having carefully considered the requirements of Guidance Note 17
 - (b) independent legal and financial advice taken by the independent board committee on an appropriate structure to address the potential control implications
 - (c) renounceability
 - (d) discount
 - (e) an offering size “*necessary to achieve the desired level of de-leveraging*” and
 - (f) the existence of a top-up facility, which Saputo Dairy would not participate in.
19. Warrnambool submitted that “*The WCB Board expected dairy prices to remain weak during FY17 with global milk production remaining high and a limited change in demand.*”
20. We accept that Warrnambool needs funds in the current dairy market to reduce its net debt ratio which, it submitted, “*is well above market norm for a listed consumer products company.*” As noted in the offer booklet “*all of the proceeds from the Entitlement Offer, less costs, will be used to repay debt. This will strengthen the balance sheet and provide greater financial flexibility to invest in strategic capital investment initiatives.*”
21. Sandon submitted that the funds being raised were not required, noting that “*there has been no mention in ASX announcements prior to this time of any intention or pressing need to repay debt.*”
22. We accept that funds are required.⁴
23. In terms of structure, having regard to (among other things) the need for funds, the top-up facility, renounceability, price discount and the conduct of the independent board committee in structuring the offer (including seeking legal and financial advice) we do not consider that the entitlement offer is likely to be found to give rise to unacceptable circumstances.
24. Sandon also submitted that “*in the absence of an urgent or compelling need for WCB to raise funds, the real reason for undertaking the entitlement Offer is to give Saputo Dairy an opportunity to proceed to compulsory acquisition in a manner inconsistent with the principle in section 602(d) of the Corporations Act.*” This is a conditional submission, and in our view the conditions have not been met. First, we do not agree that there is no need for funds. Second, s602(d) is not in terms applicable as it applies only in respect of compulsory acquisition under Part 6A.1, being compulsory acquisition after a takeover bid.
25. Nevertheless, we may have considered further inquiries into the effect of the entitlement offer.⁵ However, in view of the fact that it has closed with only

⁴ See Guidance Note 17 “Rights Issues” at [7]

⁵ *Yancoal Australia Limited* [2014] ATP 24

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approximately 0.3% shortfall (and therefore Saputo Dairy did not meet the 90% compulsory acquisition threshold), and in view of the timing of the application, we do not consider that conducting proceedings is warranted. Accordingly, we do not need to consider whether there is any policy deriving from s602(d) applicable to compulsory acquisition under Part 6A.2.

Disclosure

Saputo's intentions concerning compulsory acquisition

26. Sandon submitted the offer booklet failed to adequately disclose Saputo Dairy's intentions should it hold 90% or more of Warrnambool shares following completion of the offer, contrasting what is said with what was said at the time Saputo Dairy bid for Warrnambool.⁶
27. The entitlement offer booklet says: "*[Saputo] has advised WCB that it has not yet made a decision as to whether it would procure Saputo Dairy to exercise the right to proceed with compulsory acquisition of any WCB shares not owned by Saputo Dairy.*"
28. The bidder's statement said: "*Saputo intends to proceed with the compulsory acquisition of any Warrnambool Shares not acquired under the Offer, in accordance with section 661A...*" and also said: "*if it later becomes a 90% holder... Saputo intends to exercise [the general compulsory acquisition power under Part 6A.2]...*"
29. Sandon submitted that this was analogous to *Gladstone Pacific* in which the Panel said "*We consider that the disclosure in the Prospectus fell short of what was required. In particular, the Prospectus failed to adequately inform shareholders about... the intentions of Palmer Companies as regards exercising their voting rights should they become entitled to proceed to compulsory acquisition.*"⁷
30. Warrnambool submitted that the board had considered Saputo's intentions statement in light of its previous statements, noting the passing of time, and that Saputo's intentions in connection with the entitlement offer were accurately reflected in the offer booklet. It also submitted that "*The Application suggests that Saputo is required to provide definitive intentions in that regard. We submit that there is no such requirement. All that is required is that any such intentions as have been formed be disclosed.*"
31. Saputo submitted the previous intention statements had been made more than two and half years ago and the circumstances and the regulatory environment (including in relation to obtaining FIRB approval) had since changed.
32. We accept Saputo's reasons for its changed intentions, although we have reservations about the way it has expressed itself. If Saputo Dairy gets to 90%, which must have been considered a real possibility, it has only 6 months in which to lodge the compulsory acquisition notice (s664A). The notice must include the amount to be paid and an expert's report. It seems surprising that it had "*not yet made a decision as to whether it would procure Saputo Dairy to exercise the right to proceed with compulsory acquisition*".

⁶ On 8 October 2013, Saputo announced an off-market takeover bid for all the shares in Warrnambool. On 13 February 2014, Saputo announced that its bid had closed with it holding 87.92% of Warrnambool

⁷ [2011] ATP 16 at [46]

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33. Be that as it may, in our view it would have been helpful to Warrnambool shareholders if the reasons as explained to us had been more clearly articulated in the offer booklet. We may have required this but in view of the outcome of the entitlement offer and the timing of the application, we did not consider it was warranted pursuing this issue further.

Offer structure and benefits

34. Sandon submitted that the offer booklet failed to disclose sufficient reasons for (a) the size of the entitlement offer (b) why additional funds were required and (c) the benefits participating shareholders should expect to receive by participating.
35. Warrnambool made a preliminary submission that the offer booklet met all relevant legal disclosure standards. But in both its preliminary submission and in response to preliminary questions we asked, Warrnambool explained in reasonable detail why it had settled on the size of the offer and why funds were required, which made the rationale for the entitlement offer much clearer than in the offer document. This information would have been helpful to shareholders.

Underwriting

36. The appointment of an underwriter was considered by the independent board committee, but it decided against an underwritten entitlement offer. A detailed explanation was provided in response to our preliminary questions to the effect that:
- (a) the independent board committee had sought, and acted on, the advice of Rothschild
 - (b) it would have been difficult, if not impossible, to find an underwriter given the very low free float (1.86%), the illiquid trading (annual turnover of 0.16% of issued capital based on the last 6 months of trading) and the absence of institutional shareholders on the register and
 - (c) the only likely sub-underwriters would be the 3 largest shareholders (Saputo Dairy, Lion-Dairy and the applicant) and due to the structure of the offer and the use of the top-up facility, they would either not be able to participate due to regulatory constraints (FIRB and the Corporations Act) or could already participate for more than their entitlement.
37. Again, we consider that the offer booklet could have more clearly explained why the entitlement offer was not underwritten.

Conclusion on disclosure

38. In summary, in our view aspects of the disclosure in the entitlement offer booklet could have been better. In particular, the need for funds and the considerations in determining the size of the raising, Saputo's intentions regarding compulsory acquisition and information about why the entitlement offer was not underwritten could have been more fully explained. Again, though, in view of the outcome and the timing, we do not consider it is now warranted pursuing this issue further.

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Timing of the application

39. The application came very late in the piece. The offer booklet had been public since at least 10 June 2016, when it was released on ASX. It was dispatched to shareholders on 20 June 2016. At the time the application was made, there were only 2 days until the offer closed.
40. In this respect Warrnambool made a preliminary submission that:
- Given that rights trading has already ended, the new shares to be issued under the Entitlement Offer are already trading on a deferred settlement basis and the Entitlement Offer closes 48 hours after the Application was made, we submit that the Panel should be very reluctant to commence proceedings and allow disruption to a legitimate capital raising transaction which has been out in the market now for 19 days.*
41. Sandon submitted that on 10 June 2016, following the ASX announcement, one of its directors placed a call to the contact person named in Warrnambool's announcement but did not get a call back and then, on 22 June 2016, sent a letter but got no response. Warrnambool submitted that the letter had been sent to an unmonitored email address and was not seen prior to the application being made.
42. As early as 2000, the Panel said "*The fact that the application was made so late increased the difficulties the Panel and all parties experienced in resolving it satisfactorily...*"⁸ In a similar way to *Bigshop 01*, Warrnambool's announcement of 10 June 2016 should have put Sandon on notice of the need to act promptly, and "*the delay ... in making its application to the Panel contributed to the Panel's decision not to grant its application.*"⁹
43. Although the timing is slightly different, we adopt the position that the Panel adopted in *Aspen Parks*:
- The first application was made on the day the entitlement offer closed. When applications are made late, the prejudice to affected parties "is likely to be greater and the Panel requires more cogent reason to intervene"... we consider that, while there may have been issues to consider if an application had been made earlier, there is no cogent reason to intervene at this late stage.*¹⁰
44. Whatever the rights or wrongs of all this, the application could have been made earlier and the applicant did not address why there had been a delay. While a late application is not necessarily a bar to conducting proceedings, here it added to our reasons for not conducting proceedings.

DECISION

45. 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)*.

⁸ *Ashton Mining Ltd* [2000] ATP 9 at [35]

⁹ *Bigshop.com.au Limited 01* [2001] ATP 20 at [73]-[74]

¹⁰ *Aspen Parks Property Fund 01 and 02* [2014] ATP 19 at [29]

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Orders

46. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any interim or final orders.

Richard Hunt

President of the sitting Panel

Decision dated 30 June 2016

Reasons published 5 July 2016

Advisers

Party	Advisers
Warrnambool Cheese and Butter Factory Company Holdings Limited	Clayton Utz
Sandon Capital Investments Limited	Watson Mangioni Lawyers Pty Ltd