



Australian Government

Takeovers Panel

**Reasons for Decision
Spotless Group Holdings Limited
[2017] ATP 5**

Catchwords:

Decline to conduct proceedings – disclosure – bidder’s statement – disclosure of withdrawal rights – VWAP - share prices and premia – intentions – funding arrangements – ASIC relief

Corporations Act 2001 (Cth), sections 631, 633(1), 636(1)(c), 636(1)(m), 650A, 650B, 650C, 650D

ASIC Class Order [CO 13/528]

AAPT Ltd v Cable & Wireless Optus Ltd [1999] NSWSC 509

Guidance Note 18, Takeover Documents

Macmahon Holdings Limited [2017] ATP 4, Mungana Goldmines Limited 01R [2015] ATP 7, Dampier Gold Limited [2014] ATP 10, Minemakers Limited [2012] ATP 8, Multiplex Prime Property Fund 01 and 02 [2009] ATP 18, Mildura Co-operative Fruit Company Limited [2004] ATP 5

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

INTRODUCTION

1. The Panel, Robin Bishop, Byron Koster (sitting President) and Sophie Mitchell, declined to conduct proceedings on an application by Spotless Group Holdings Limited in relation to its affairs. The application concerned (among other things) the offer terms of an off-market cash takeover bid by Downer EDI Services Pty Ltd for Spotless and bidder’s statement disclosure. The Panel considered there was no reasonable prospect that it would declare the circumstances unacceptable after Downer Services obtained relief from ASIC to amend its offer terms and agreed to provide additional disclosure in a replacement bidder’s statement.

2. In these reasons, the following definitions apply.

Downer	Downer EDI Limited
Downer Services	Downer EDI Services Pty Ltd
Entitlement Offer	Downer’s 2 for 5 pro rata renounceable entitlement offer, consisting of an accelerated institutional entitlement offer and a retail entitlement offer
Offer	Downer Services’ off-market takeover for Spotless at \$1.15 cash per share
Original Bidder’s Statement	bidder's statement dated 21 March 2017 in relation to the Offer

FACTS

3. Spotless is an ASX listed company (ASX code: SPO).

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4. On 21 March 2017, Downer announced the Offer and Downer Services lodged the Original Bidder's Statement with ASIC and Spotless.
5. On the same day, Downer also announced its Entitlement Offer, which Downer stated would fund the Offer in combination with Downer's "*committed debt facilities*".

APPLICATION

Declaration sought

6. By application dated 31 March 2017, Spotless sought a declaration of unacceptable circumstances. Spotless submitted, among other things, that the Original Bidder's Statement was deficient (and in breach of sections 636(1)(c) and 636(1)(m)¹) in that:
 - (a) certain statements regarding Spotless shareholders' right to withdraw acceptances of the Offer while the bid remains conditional were incorrect
 - (b) disclosure of the premium of the Offer price compared to the pre-announcement market price of Spotless shares was selective and misleading
 - (c) Downer Services' disclosure of intentions for the Spotless business following completion of the Offer was insufficiently detailed or specific to the Spotless business and
 - (d) disclosure of the funding arrangements for the Offer, and the underwriting arrangements for the Entitlement Offer, was deficient.

Interim orders sought

7. Spotless sought interim orders:
 - (a) restraining the dispatch of the Original Bidder's Statement, and any supplementary bidder's statement and
 - (b) requiring Downer to produce relevant board papers to the Panel on a confidential basis.

Final orders sought

8. Spotless sought final orders including requiring Downer and Downer Services to prepare a replacement bidder's statement remedying the disclosure deficiencies set out in the application to the satisfaction of the Panel.

DISCUSSION

Withdrawal rights

9. Section 7.6(c) of the Original Bidder's Statement provided that unless and until the conditions to the Offer were fulfilled or waived shareholders would be able to withdraw their acceptance of the Offer. However, other terms implied more limited withdrawal rights and key question 12 of the Original Bidder's Statement indicated that shareholders would only be able to withdraw in "*limited circumstances*".

¹ Unless otherwise indicated, all statutory references are to the Corporations Act 2001 (Cth), and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC).

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10. Downer Services submitted that it was evident to any reader that there was a mistake in section 7.6 and the withdrawal rights were only intended to apply in respect of the regulatory approvals contained in condition 7.11(b)(i). Downer Services proposed to treat this as a typographical error which they could fix prior to dispatch.
11. Spotless submitted that, given section 7.6(c), the statement in key question 12 was incorrect and misleading. Spotless also submitted that under s631, Downer Services had a statutory obligation to proceed with a bid on not substantially less favourable terms than the terms announced. Spotless submitted that for Downer Services to narrow the withdrawal rights would strip Spotless shareholders of material rights they were given under the terms of the Offer. Spotless also submitted that Downer Services' proposed variation would not be in accordance with ss650B, 650C and 650D and therefore would breach s650A.
12. Downer Services in response submitted that because the withdrawal rights were not referred to in its announcement of the Offer to ASX on 21 March 2017, they did not form part of its public proposal. Accordingly, Downer Services submitted that making its proposed amendment for its dispatched bidder's statement would not contravene s631.
13. While we were deciding whether to conduct proceedings Downer Services separately applied to ASIC for (among other things) relief from the requirement in item 6 of the table in s633(1)² that it dispatch offers on the same terms as those in the Original Bidder's Statement, which was necessary to make the proposed amendment. On our request, Downer Services undertook that it would provide the Panel and Spotless with 24 hours' notice to consider the form of any supplementary bidder's statement before dispatch.
14. ASIC did not give relief for Downer Services to narrow its withdrawal rights. Rather, ASIC gave relief to allow Downer Services to remove terms inconsistent with the broad withdrawal rights conferred by section 7.6(c).³ ASIC also required Downer Services to prepare supplementary and replacement bidder's statements to confirm the right of Spotless shareholders to withdraw their acceptance of the Offer while the Offer remained conditional.
15. We were not persuaded by Downer's interpretation of s631(1). In our view, the initial announcement of the Offer did not exhaust the operation of s631(1). Rather, in subsequently sending the Original Bidder's Statement to ASX, Downer Services was again making a public proposal that would trigger s631(1) to the extent that it proposed more favourable terms.⁴ Furthermore, in our view, Downer Services' proposed corrections to the withdrawal rights went far beyond anything that could properly be treated as typographical. We accept that the mistakes were small and inadvertent, but that did not make them immaterial. In certain circumstances, the

² As modified by ASIC Class Order [CO 13/528].

³ ASIC also provided relief for Downer Services to amend the terms of the offer to clarify that Downer Services will not deduct from the offer consideration any amount attributable to franking credits.

⁴ Alternatively, the two announcements could be regarded as one proposal, given they were one minute apart and the first noted that the second would "contain detailed information relevant to the Offer".

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difference between broad and narrow withdrawal rights could be of great significance to an accepting Spotless shareholder.

16. However, given ASIC's decision not to grant relief for the withdrawal right amendments sought by Downer Services but to otherwise facilitate amendments to the Offer consistent with section 7.6(c), we did not need to conduct proceedings on these issues. We reviewed Downer Services' amended Offer and amended disclosure in its replacement bidder's statement. The changes made by Downer Services adequately addressed our concerns.

Premium

Range of premia

17. Spotless submitted that the Original Bidder's Statement included selective and misleading disclosure regarding the premium of the Offer to Spotless's pre-announcement market price.
18. The Original Bidder's Statement included disclosure of the premium that the Offer represented to:
 - (a) the price of Spotless shares on 20 March 2017, the last trading day before the announcement of the Offer
 - (b) the VWAP⁵ of Spotless shares since 28 February 2017, the date Spotless announced its most recent half-yearly financial results and
 - (c) the one-month VWAP of Spotless shares before the announcement of the Offer.
19. Spotless submitted that this disclosure was inadequate as it did not include the premium that the Offer price represented against VWAP over longer periods. It sought to require disclosure also of the premium that the Offer price represented to:
 - (a) a three month VWAP
 - (b) a six month VWAP and
 - (c) Spotless's highest market price.
20. Spotless submitted that previous Panel decisions⁶ supported the provision of a broader range of VWAP premia, so that its shareholders would be provided with balanced disclosure.
21. In Spotless's half-year results announcement on 28 February 2017, it materially downgraded its earnings guidance and reset its dividend policy. Downer Services submitted that to include any comparison in a bidder's statement to any historical Spotless share prices prior to this downgrade would be irrelevant and potentially misleading to Spotless shareholders.

⁵ Defined in the Original Bidder's Statement as the "volume weighted average price, calculated as the cumulative value traded on ASX and CHI-X divided by cumulative volume traded on ASX and CHI-X".

⁶ citing *Dampier Gold Limited* [2014] ATP 10 at [13] and *Minemakers Limited* [2012] ATP 8 at [56].

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22. In our view, Downer Services' decision to limit its presentation of premia to Spotless share prices only on and after this downgrade was not, in context, misleading.
23. In addition Spotless's announcement to ASX on 3 April 2017 set out the premium that the Offer represented to Spotless's six and twelve month VWAP, as well as the discount it represented to Spotless's twelve month and all-time closing highs. While it is not Spotless's role to remedy material deficiencies in disclosure by Downer Services,⁷ Spotless shareholders had the benefit of an array of premia that the Offer represented in any event.
24. Spotless also submitted that "*given the need to lodge a replacement bidder's statement*" Downer Services should be required to disclose the market price of Spotless shares immediately prior to "*the date of the replacement Bidder's Statement and/or printing*", consistent with GN 18. GN 18 states that unacceptable circumstances may arise if disclosure is made as to premium or discount and "*the prices at the most recent practicable date are not included*".⁸ However, in our view that statement is primarily addressing scrip bids, where the value of the bid consideration may be affected by the announcement of the bid.

Depiction of Offer premia

25. Spotless also submitted that charts in the Original Bidder's Statement that did not have a y-axis starting at 0 were misleading and "*designed to amplify the appearance of a downward trajectory*" in Spotless' share price.
26. In response, Downer Services submitted that the depiction of the premium in the charts was clear and consistent with market practice.
27. We had reservations about the potential for two share price performance charts in particular to mislead Spotless shareholders. Whether or not there are other market examples of this, we do not consider it acceptable market practice. We requested Downer Services to amend the y-axis on these charts to start at 0 in its replacement bidder's statement, which it agreed to do.⁹

Intentions

28. Spotless submitted that the disclosure of Downer Services intentions for the Spotless business post-acquisition in the Original Bidder's Statement was "*formulaic, general and wholly inadequate*".¹⁰
29. In particular, Spotless referred to the acquisition's size and the significance that it would, if successful, represent to the existing Downer business. Spotless also referred

⁷ *Mungana Goldmines Limited 01R* [2015] ATP 7 at [24]-[28] and *Macmahon Holdings Limited* [2017] ATP 4 at [29].

⁸ Guidance Note 18, Takeover Documents, at [34(a)].

⁹ We did not require correction of charts in relation to premia (which also had a y-axis starting above 0). Although this was not ideal, the relevant percentages were clearly shown, making it less likely someone reading the Original Bidder's Statement on the run would be misled.

¹⁰ The Original Bidder's Statement disclosed that the intentions, views, understanding and beliefs of Downer Services are the same as those of Downer (its parent) and both are collectively referred to as the intentions of Downer Services in the Original Bidder's Statement.

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to the fact that Downer and Spotless had held preliminary merger discussions in June 2016. In this context, Spotless submitted that it was not credible to suggest Downer Services had not formed more detailed intentions in relation to the acquisition than those disclosed in the Original Bidder's Statement.

30. In response, Downer Services submitted that its statements of intention in relation to Spotless in the Original Bidder's Statement addressed each of the matters required by s636(1)(c). Downer Services submitted that because the Spotless business does not materially overlap with Downer's existing business, and that it did not have access to due diligence on Spotless, it was not able to form intentions other than those disclosed. Downer Services also noted that Spotless, through Spotless's own adviser, was the party who proposed the merger of the two businesses in June 2016. Downer Services submitted that Downer rejected that proposal at the time and did not engage with Spotless or its adviser.
31. We do not have sufficient evidence from which to infer that Downer Services had, or has, formed intentions relating to the Spotless business other than those disclosed in its Original Bidder's Statement.¹¹ We consider Downer Services disclosure of its post-acquisition intentions was adequately detailed and sufficiently bespoke to Spotless, particularly in the context of an offer of cash consideration and given that:
 - (a) the business being acquired does not materially overlap with an Downer's existing business and
 - (b) Downer Services did not have access to due diligence.

Funding arrangements

32. In the Original Bidder's Statement, Downer Services disclosed that the Offer would be funded by the Entitlement Offer and a loan facility entered into by related entity of Downer Services.
33. The loan facility was conditional on, among other things, at least \$800 million being raised under the Entitlement Offer.¹² Downer Services did not disclose the amount of the debt facility in the Original Bidder's Statement. The underwriting arrangements in relation to the Entitlement Offer, and the various termination events for these underwriting arrangements were disclosed in Annexure A of the Original Bidder's Statement.
34. Spotless submitted that Downer Services should be required to set out in full the material terms of the underwriting agreement (including in relation to termination rights), as well as the amount of, and conditions relating to, the loan facility.
35. In our view, Downer Services' disclosure of its funding arrangements was adequate in the circumstances.

¹¹ Furthermore, there was no suggestion of any special circumstances that might cause the Panel to question failure to form intentions: *Mildura Co-operative Fruit Company Limited* [2004] ATP 5 at [85]–[87] and *Multiplex Prime Property Fund 01 and 02* [2009] ATP 18 at [76].

¹² At the date of Spotless's application being made, that threshold had not been reached.

DECISION

36. For the reasons above, and given the matters addressed by Downer Services' replacement bidder's statement, we do not consider 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

37. 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.

Byron Koster

President of the sitting Panel

Decision dated 7 April 2017

Reasons given to parties 24 April 2017

Reasons published 27 April 2017

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Advisers

Party	Advisers
Spotless Group Holdings Limited	Gilbert + Tobin Citigroup Global Markets Australia Pty Limited
Downer EDI Services Pty Ltd & Downer EDI Limited	Ashurst UBS AG, Australia Branch