



**Australian Government**

**Takeovers Panel**

**Reasons for Decision**

**Spotless Group Holdings Limited 02**

**[2017] ATP 9**

**Catchwords:**

*Decline to make a declaration – target’s statement – disclosure – undervalue statement – broker valuations – relevant interest – cash settled equity swaps – present intention statement – earnings guidance – undertakings*

*Corporations Act 2001 (Cth), sections 608(8), 638, 670A*

*ASIC Regulatory Guide 170: Prospective financial information*

*Guidance Note 18 – Takeover documents, Guidance Note 22 – Recommendations and Undervalue Statements*

*Spotless Group Holdings Limited [2017] ATP 5, Macmahon Holdings Limited [2017] ATP 3, Gulf Alumina Limited [2016] ATP 4, Brisbane Markets Limited [2016] ATP 3, Mungana Goldmines Limited 01R [2015] ATP 7, Tully Sugar Limited [2009] ATP 26*

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

**INTRODUCTION**

1. The Panel, Robin Bishop, Byron Koster (sitting President) and Sophie Mitchell, declined to make a declaration of unacceptable circumstances in relation to the affairs of Spotless Group Holdings Limited. The application concerned target’s statement disclosure regarding the off-market cash takeover bid by Downer EDI Services Pty Ltd for Spotless. The Panel decided not to make a declaration after accepting undertakings provided by Spotless for corrective disclosure.
2. In these reasons, the following definitions apply.

<b>Coltrane</b>	Coltrane Asset Management
<b>Downer Services</b>	Downer EDI Services Pty Ltd
<b>Spotless</b>	Spotless Group Holdings Limited

**FACTS**

3. Spotless is an ASX listed company (ASX code: SPO). It provides facilities services in Australia and New Zealand including catering, laundry and linen services.
4. On 21 March 2017, Downer Services lodged a bidder’s statement in relation to its off-market takeover bid for Spotless at \$1.15 cash per share.
5. On 10 April 2017, Downer Services lodged a replacement bidder’s statement following an application to the Panel by Spotless.<sup>1</sup> The offer commenced on 12 April 2017.

<sup>1</sup> See *Spotless Group Holdings Limited [2017] ATP 5*

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6. On 27 April 2017, Spotless lodged a target’s statement recommending that Spotless shareholders reject the offer.
7. On 3 May 2017, Downer Services declared its offer price final in the absence of a superior proposal.

## APPLICATION

### Declaration sought

8. By application dated 3 May 2017, Downer Services sought a declaration of unacceptable circumstances.
9. Downer Services submitted that the target’s statement provided insufficient information to support the Spotless board’s recommendation to reject the offer on the basis that *“the strengths of Spotless’ core business, together with management’s execution of the strategy reset will deliver greater value to Spotless’ shareholders than the Downer offer in the medium term”*. Noting that the target’s statement included neither an independent expert’s report nor a directors’ assessment of the value of Spotless shares, Downer Services submitted that the forward looking information that was provided – earnings guidance for FY17 and FY18 and information about Spotless’s reset strategy – was insufficient to support the ‘reject’ recommendation.
10. Downer Services also submitted that, based on public disclosures, references in the target’s statement to Coltrane having a relevant interest in 10.37% of Spotless shares through cash settled equity derivatives were misleading.
11. Downer Services submitted that the defective disclosure in the target’s statement contravened sections 638(1) and 670A<sup>2</sup> and prevented the acquisition of control over Spotless shares from taking place in an efficient, competitive and informed market.

### Final orders sought

12. Downer Services sought final orders requiring Spotless to provide corrective disclosure in the form of a supplementary target’s statement.

## DISCUSSION

13. We have considered all the submissions and rebuttals from parties, but address specifically only those we consider necessary to explain our reasoning.

### Decision to conduct proceedings

14. Spotless made a preliminary submission that the Panel should not conduct proceedings on the basis that the application lacked substance. It also submitted that Downer Services was free to question Spotless’s disclosure via its own disclosure rather than a *“tactical”* application to the Panel.
15. In a preliminary submission, ASIC advised that it had been making its own enquiries on the Coltrane disclosure issue. It submitted that the Panel should conduct proceedings on the issue if the matter was not addressed by Spotless

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<sup>2</sup> 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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because Spotless had not made full and adequate disclosure of Coltrane’s relevant interest in Spotless. ASIC did not express a preliminary view on the other issues raised in the application.

16. We decided to conduct proceedings on:
  - (a) issues regarding Spotless’s undervalue statement including the reasons given by Spotless to reject the offer that related to broker valuations and Coltrane’s present intention statement
  - (b) the accuracy of statements made in relation to Coltrane’s relevant interest in Spotless shares and
  - (c) the qualifications in relation to Coltrane’s present intention statement.
17. To the extent these issues were not expressly raised in the application, we considered that they were logically connected and raised by the circumstances to which the application related.<sup>3</sup>

#### Undervalue statement

18. We consider that Spotless’s statement described in paragraph 9 is an undervalue statement.
19. We queried whether:
  - (a) it was clear to Spotless shareholders why the board of Spotless made a ‘reject’ recommendation, including whether those reasons supported the undervalue statement and
  - (b) Spotless shareholders had sufficient information to make an informed assessment of the undervalue statement.
20. Spotless submitted that it was not required to provide an independent expert’s report or directors’ valuation in the circumstances.<sup>4</sup> Relying on Panel guidance referring to *Tully Sugar Limited*,<sup>5</sup> Spotless also submitted that its directors were not required to ascribe a specific value to Spotless shares in order to make a recommendation or an undervalue statement.<sup>6</sup> Recognising that some guidance on value would be useful, it submitted that it had provided earnings guidance in the target’s statement.
21. In that context, Spotless submitted that the reasons set out in Section 1 of the target’s statement, which were supported by detailed disclosures in the body of the target’s statement, provided sufficient support for the Spotless directors to form the belief that the offer did not represent adequate value for Spotless shares and sufficient information for Spotless shareholders to assess the undervalue statement. Spotless submitted that its board had brought to bear their experience in forming this view and its considerations had been subject to internal analysis and external advice from experienced corporate advisers.

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<sup>3</sup> See *Brisbane Markets Limited* [2016] ATP 3 at [28]

<sup>4</sup> Referring to *Tully Sugar Limited* [2009] ATP 26 at [26] and [38]

<sup>5</sup> [2009] ATP 26 at [26]

<sup>6</sup> Guidance Note 22 – Recommendations and Undervalue Statements at [17]

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22. In rebuttal, ASIC submitted that *Tully Sugar Limited* does not stand for the general proposition that, in satisfying section 638, there is no need to include an assessment or discussion of the value of the target merely because earnings projections are provided.<sup>7</sup> Referring to the various factors set out in Section 1 of the target's statement, ASIC also submitted that "*the 'cumulative' (and potentially overlapping) nature of the various factors make it difficult to understand the value implications of each factor and the extent to which each contribute (sic) to justifying Spotless's (assumed) conclusions as to target value that underpin the reject recommendation.*"
23. Guidance Note 22 states that unacceptable circumstances may arise if target directors recommend that shareholders reject a bid based on an undervalue statement and the reasons for the recommendation are not clearly disclosed.<sup>8</sup> While Spotless provided some reasons to support its undervalue statement, we agree with ASIC that it is difficult to connect the detailed disclosure relating to the strategy reset, earnings guidance and other information about Spotless to the recommendation to reject the offer based on the undervalue statement. However, given that Spotless's undervalue statement is based on a medium to long term strategy, we consider it unlikely that the directors would have reasonable grounds for medium to long term projections.<sup>9</sup>
24. Subject to our specific concerns below on broker valuations and the Coltrane disclosures, we do not consider the information provided by Spotless to support its 'reject' recommendation and undervalue statement to be materially deficient in the circumstances.
25. To the extent Downer Services believes that the reasons supporting Spotless's recommendation to reject the offer are not compelling, Downer Services can express that belief through its own disclosure.<sup>10</sup>

#### *Broker valuations*

26. One of the reasons given by the Spotless directors for their belief that the offer did not represent adequate value was that "*Spotless' earnings expectations are not fully reflected in current broker values*". Spotless compared its NPAT (pre-exceptional items) forecast for FY17 (\$80-90 million) and FY18 (\$85-100 million) to an average of broker forecasts for FY18 (\$83 million).
27. We were concerned that Spotless's statements implied that if Spotless's FY18 guidance was reflected in broker forecasts any valuation by those brokers would be equal to or above the offer price of Downer Services' bid.
28. Spotless submitted that it was not in a position to know or predict the impact of the earnings guidance included in the target's statement on any broker's valuation model. It further submitted that it was a matter for the relevant brokers to update

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<sup>7</sup> Referring to *Gulf Alumina Limited* [2016] ATP 4

<sup>8</sup> Guidance Note 22 – Recommendations and Undervalue Statements at [13]

<sup>9</sup> See ASIC Regulatory Guide 170: Prospective financial information at [170.39]-[170.41]

<sup>10</sup> Downer Services had addressed its disagreement with Spotless's reasons in its second supplementary bidder's statement lodged on 3 May 2017

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their valuations and for Downer Services, if it wished, to make supplementary disclosure to Spotless shareholders.

29. ASIC submitted that it was preferable for Spotless to provide further information regarding the value impact of the earnings guidance, but if that was not required, target shareholders should at least be warned that it was uncertain whether, or to what extent, a change in broker forecasts in response to the guidance would be material.
30. Downer Services submitted that, in light of Spotless's undervalue statement, it would have been appropriate for the Spotless board to disclose price targets in the analyst reports that they had referenced in the target's statement. Downer Services also noted that of the five broker reports to which it had access, four had updated their reports following Spotless's FY18 guidance in the target's statement.
31. We consider references in the target's statement to Spotless's FY18 earnings expectations not being fully reflected in current broker views are potentially misleading in light of Spotless's undervalue statement because shareholders might imply that if Spotless's FY18 guidance was reflected in broker forecasts, broker valuations would be higher and support the undervalue statement.
32. Where there has been materially deficient disclosure, it is generally expected that the party making that disclosure will correct that deficiency.<sup>11</sup> We require corrective disclosure by Spotless to remove the implication and reflect the revised broker forecasts. We do not consider it necessary for Spotless to include analyst's price targets but note that Downer Services could do so in its own disclosures.<sup>12</sup>

#### Coltrane's interest in Spotless shares

33. Another reason given by the Spotless directors' for their belief that the offer did not represent adequate value was that Coltrane had "*accumulated relevant interests in 10.37% of Spotless Shares on issue and currently intends to REJECT the Offer at the current Offer Price (although it has not made any final decision and reserves the right to take any action it considers appropriate in relation to the Offer)*" (footnotes excluded). In footnotes, Spotless noted that Coltrane's relevant interest was through cash settled equity swaps and an expectation to be delivered upon request the ordinary shares the subject of those swaps and that Coltrane's action in relation to the offer was subject to it becoming the holder of those shares.
34. Downer Services submitted, based on public information, that statements referring to Coltrane's relevant interest in 10.37% of Spotless were inaccurate and misleading. Coltrane's substantial holding notices disclosed that Coltrane's relevant interest arises under section 608(8) based on an expectation that it will have delivered to it upon request the shares that are the subject of those swaps. However, Downer Services submitted that one counterparty to the swaps, Morgan Stanley, did not hold sufficient shares to satisfy any such request based on Morgan Stanley's substantial holding notices and the position with regard to the other

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<sup>11</sup> *Macmahon Holdings Limited* [2017] ATP 3 at [29] and *Mungana Goldmines Limited 01R* [2015] ATP 7 at [24]-[28]

<sup>12</sup> Subject to complying with Guidance Note 18 – Takeover documents

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swap counterparty, Goldman Sachs, was unknown because it had not lodged a substantial holding notice in Spotless.

35. Given that the offer was subject to a 90% minimum acceptance condition, Downer Services submitted that it was unacceptable for Spotless not to have taken steps to ensure the accuracy of Coltrane's substantial holding disclosures where it was relying on Coltrane's interest in Spotless as part of its takeover defence.
36. We note that the application did not relate to Coltrane's primary disclosure (and the application was not given to Coltrane or the swap counterparties). Rather, it was concerned only with Spotless's disclosure. Given Spotless's heavy reliance on the present intention statement we agree that, as a matter of due diligence, Spotless should have ensured that its statement was correct.
37. We queried what Spotless had done to confirm Coltrane's relevant interest prior to lodging the target's statement. Spotless submitted that its financial and legal advisors had contacted Coltrane and its legal advisor to confirm the view that Coltrane had a relevant interest through the cash settled swaps. Spotless also submitted that each time it made public reference to Coltrane, its holding or intention statement, it obtained Coltrane's consent. In its submissions, ASIC queried whether Spotless's enquiries of Coltrane were adequate, including in light of the discrepancy in the relevant interests of Coltrane and Morgan Stanley, in order to place reasonable reliance on Coltrane's statements. We did not need to decide this issue given subsequent disclosures by Coltrane and Morgan Stanley.
38. On 10 May 2017, Morgan Stanley lodged a notice of change of interest of substantial holder showing an increase in its voting power from 6.20% to 8.27%.
39. The following day, Coltrane lodged a clarifying substantial holding notice at the request of ASIC disclosing that its voting power was currently up to 10.64% and between 8.07% (being the maximum number of shares to which the swaps with Morgan Stanley relate) and 10.64% (with the difference being the number of shares to which the swaps with Goldman Sachs relate). Coltrane also disclosed that:
  - (a) the operation of section 608(8) meant that Coltrane and its associates' voting power in Spotless at any particular time depended on the relevant interests in Spotless shares held by the counterparties to the swaps
  - (b) Morgan Stanley had since confirmed that a Morgan Stanley holding company held Spotless shares equivalent to the number to which the swaps related (swap shares) as a hedge for the swaps and that their present intention was to make those swap shares available to Coltrane upon the unwinding of those swaps and
  - (c) the swap counterparties were not obliged under the terms of the swaps to hold swap shares at all times and therefore, depending on whether the swap counterparty had a relevant interest in Spotless shares equivalent to the total number of swap shares, Coltrane may not maintain at all times a relevant interest in Spotless shares equivalent to the number of Spotless shares the subject of the swaps.

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40. In response to these notices, Spotless submitted that the information in the target's statement regarding Coltrane's interest remained the same – that is, "*Coltrane still (now) has an interest equivalent to 10.6%*". ASIC submitted in rebuttal that the information was not the same because the target's statement referred to Coltrane's "*relevant interest*" and that relevant interest was now between 8.07% and 10.64%.
41. Spotless submitted that the approach taken by Downer Services and ASIC in relation to its disclosure on Coltrane was "*overly technical*" and that what was material here was that when Coltrane demands a physical holding of 10.64% of Spotless, it will get that holding.
42. In our view, following the updated substantial holder notices lodged by Morgan Stanley and Coltrane respectively, references in the target's statement to Coltrane's relevant interest are inaccurate and should be corrected to reflect:
  - (a) the current relevant interest of Coltrane being "up to" 10.64% and
  - (b) that Coltrane's relevant interest is qualified by an assumption as to the holding of Goldman Sachs.

#### **Coltrane's present intention statement**

43. We asked Spotless whether Coltrane's present intention statement provided a sound reason to reject Downer Services' offer given the qualification that Coltrane had not made any final decision and reserved the right to take any action it considered appropriate in relation to the offer.
44. Spotless submitted that Coltrane had not changed its mind to date and therefore, if Coltrane rejected the offer, the offer could not proceed because of the 90% minimum acceptance condition. It submitted that this was a sound reason for a shareholder not to accept the offer. Spotless also submitted that the present intention was within the knowledge of the Spotless directors and therefore, they needed to disclose that fact.
45. In view of the importance placed by Spotless on Coltrane's intention statement, we consider that Spotless needs to ensure that the qualifications to that statement are described accurately and given appropriate prominence.
46. Section 1.9 of the target's statement was headed in bold "*Coltrane Asset Management has accumulated relevant interests in 10.37% of Spotless Shares on issue and currently intends to REJECT the Offer at the current Offer Price*". Unlike the earlier reference to Coltrane's present intention statement (see paragraph 33), the qualification that Coltrane had not made a final decision and reserved the right to take any action was only in the body of text below the heading.
47. ASIC submitted that the qualification should have been clear and equally prominent to the statements they qualified. We agree. We consider that the heading of Section 1.9 is potentially misleading and should contain the qualification.
48. ASIC also submitted, given the updated information regarding Coltrane's relevant interest in Spotless shares, that it was highly material that the present intention statement was only relevant if Coltrane decided to physically settle the cash settled

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equity swaps. We agree and consider that Spotless should make it clear that, in order to reject the offer, Coltrane would need to seek delivery of the shares the subject of the swaps.

#### Conclusion

49. We agreed to accept an undertaking from Spotless (see **Annexure A**) to provide the corrective disclosure described above in the form of a supplementary target's statement to be lodged with ASIC and sent to ASX, Downer Services and each holder of ordinary shares of Spotless.<sup>13</sup>

#### Other issues

50. For the reasons below, we declined to conduct on the disclosure issues regarding Spotless's earnings guidance and strategy reset.

#### *Earnings guidance*

51. Downer Services submitted that there was inconsistent disclosure regarding the assumptions to the FY17 guidance when compared to Spotless's earning announcement on 28 February 2017. In response, Spotless submitted in its preliminary submission that it had applied a consistent methodology for all forward looking statements in the target's statement and the effect of the assumptions set out in the target's statement which relate to FY17 was the same as the effect of the assumption disclosed on 28 February 2017. We considered that even if the disclosure was, as a result of any inconsistency, misleading that it was not materially misleading and Downer Services had in any event brought the issue to Spotless shareholders' attention in its second supplementary bidder's statement.
52. In relation to FY18 guidance, Downer Services submitted it was unacceptable that not all assumptions were set out in the target's statement, the guidance was presented in an "*abbreviated form*" and Spotless shareholders were told not to "*place undue reliance*" on the guidance. The unacceptability arose, Downer Services submitted, because of the statutory liability that exists for forward looking statement and the fact that FY18 guidance was presented as one of the principal reasons to reject the takeover offer. Spotless submitted that the use of the "*abbreviated form*" and "*undue reliance*" language was standard market practice<sup>14</sup> and that all material assumptions had been listed in the target's statement. While we had some concerns regarding Spotless's disclosure of the reasons for its 'reject' recommendation (discussed above), in our view, the form and presentation of the FY18 guidance itself was adequate (for example, it included a sensitivity analysis) and the qualifications were not unacceptable.
53. Downer Services also submitted that, given that ten months of the financial year had lapsed, Spotless should have provided more detailed information to shareholders concerning the FY17 guidance. Spotless submitted that there were "*innumerable*" factors which impact the ultimate financial results of Spotless and the earnings range provided by Spotless was the range the Spotless directors

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<sup>13</sup> Supplementary target's statement dated 23 May 2017

<sup>14</sup> See, for example, ASIC Regulatory Guide 170 at [170.91] regarding warnings to be given in relation to prospective financial information

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considered they had a reasonable basis to include. We accepted that it may be difficult for Spotless to be more precise until its books are closed and audited, particularly given the nature of Spotless's business.

#### *Strategy reset*

54. In relation to the strategy reset disclosure, Downer Services submitted (among other things) that Spotless needed to provide materially more information about the implementation of the strategy reset including the likely time involved and the likely financial impact of the strategy reset on the medium term value of Spotless shares. Spotless submitted in its preliminary submission that it had provided detailed and appropriately measured disclosure as to the impact of the strategy reset and the additional financial information sought by Downer Services would be so preliminary in nature that the Spotless board would not be in a position to provide the information on a reasonable basis. While there was no cross-reference to risk factors in the strategy reset disclosures, overall we considered there was sufficient detail regarding the strategy reset including information on contract win rates and the impact on revenue.

#### **DECISION**

55. Given the undertakings offered by Spotless, we declined 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 section 657A(3).

#### **Orders**

56. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

**Byron Koster**

**President of the sitting Panel**

**Decision dated 23 May 2017**

**Reasons given to parties 7 June 2017**

**Reasons published 13 June 2017**

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### Advisers

Party	Advisers
Downer Services	Ashurst Australia
Spotless	Gilbert + Tobin



**Australian Government**

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**Annexure A**

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

**Spotless Group Holdings Limited 02**

Spotless undertakes to the Panel that it will lodge with ASIC and send to ASX, Downer and each holder of Spotless Ordinary Shares a supplementary target's statement under s644(1) of the *Corporations Act 2001* in a form approved by the Panel:

- (a) as soon as practicable; and
- (b) by no later than 4 business days after the Panel approves the supplementary target's statement.

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

In these undertakings the following terms have the corresponding meaning:

<b>Spotless</b>	Spotless Group Holdings Limited
<b>Downer</b>	Downer EDI Services Pty Ltd

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**Signed by Paul Morris of Spotless Group Holdings Limited  
with the authority, and on behalf, of  
Spotless Group Holdings Limited  
Dated 23 May 2017**