



Wednesday, 7 May 2008

Programmed Maintenance 02 - Declaration of Unacceptable Circumstances and Orders

The Panel advises that it has made a declaration of unacceptable circumstances (Annexure A) and final orders (Annexure B) in relation to an application dated 28 April 2008 by Spotless Investment Holdings Pty Ltd in relation to the affairs of Programmed Maintenance Services Ltd (TP [08/35](#)).

Background

Spotless made an off-market takeover bid for all the shares in Programmed dated 2 April 2008.

On 16 April 2008, Programmed lodged an investor presentation with ASX. The investor presentation included charts which disclosed Programmed's calculations of the takeover premium for the bid, based on 6-month and 12-month Volume Weighted Average Prices ending 26 March 2008 of Programmed and the closing price of Spotless on 2 April 2008, being the date of lodgement of the bidder's statement (and made comparisons with premiums in other bids).

On 22 April 2008, Programmed sent a letter to shareholders and lodged a copy with ASX. A leaflet that accompanied the letter contained a number of media and analysts quotes in relation to the bid.

Declaration

The Panel considered that the following circumstances were unacceptable having regard to their effect on the control or potential control of Programmed, or the acquisition of a substantial interest in Programmed, and were otherwise unacceptable having regard to the principles in s602 of the Corporations Act.¹

The Panel considered that:

1. Where a target (or bidder) selects a particular presentation of the premium implied under an offer, it needs to be prepared to explain the basis upon which that presentation has been selected. In this instance, there was insufficient disclosure of why the target chose 6-month and 12-month Volume Weighted

¹ Ensuring an efficient, competitive and informed market for corporate control, sufficient information (including identity of the acquirer) and time to consider a control proposal and equality of benefits flowing from a proposal to shareholders.

Average Prices of its share price ending 26 March 2008 and compared it with the bidder's closing price on 2 April 2008 in calculating the premiums on page 5 of the investor presentation.

2. Where a target sends material to its shareholders in advance of its target's statement, that material should be prepared to the same standard as if it were included in the target's statement. For instance, where correspondence addresses questions of value, the correspondence should set out any underlying assumptions or material limitations on the analysis presented. If this material includes a quote from another person, the target directors are effectively adopting that statement as their own and, as such, should be prepared to corroborate and substantiate it. In this instance, the Panel considered that the following media comments in the leaflet were made without sufficient substantiation from the target:
 - (a) An extract from an article in The Business Spectator on 16 April 2008 by Stephen Bartholomeusz that: "*The directors are probably right when they say in today's vigorous rejection of the bid, that the Spotless offer, which includes a range of mix and match options involving both cash and shares, undervalues Programmed*".
 - (b) An extract from an article on 28 March 2008 in the Australian Financial Review by Michael Smith that: "*As the Spotless share price sank another 8 per cent following the \$556 million tilt yesterday, it could be argued Programmed is better positioned to play the role of suitor*".

The Panel did not consider it against the public interest to make the declaration, and in making it has had regard to the matters in s657A(3).

Orders

The Panel has made orders to the effect that Programmed send a clarification letter to shareholders in a form approved by the Panel. If the letter is not sent out with the target's statement, then the target's statement must be accompanied by a copy of this media release and the letter sent separately.

The sitting Panel for the proceedings was Irene Lee, Rodd Levy and Chris Photakis (President).

The Panel will publish its reasons for its decision on its website at www.takeovers.gov.au in due course.

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ANNEXURE A

Corporations Act Section 657A Declaration of Unacceptable Circumstances

IN THE MATTER OF PROGRAMMED MAINTENANCE SERVICES LIMITED 02

WHEREAS

1. On 24 April 2008 Spotless Investment Holdings Pty Ltd, a wholly owned subsidiary of Spotless Group Limited, (**Spotless**) despatched offers for all the shares in Programmed Maintenance Services Limited (**Programmed**).
2. On 16 April 2008, Programmed lodged an Investor Presentation with ASX. The Presentation included "Takeover Premium Comparison" charts on page 5. The charts purported to show the following bars:
 - (a) average takeover premia for completed takeovers "based on final offer premia of completed takeovers announced between 1 April 2006 and 1 April 2008 of Australian listed companies in which the offer consideration was greater than A\$200 million and less than A\$2,000 million ... "
 - (b) median takeover premia for completed takeovers (as above)
 - (c) what Spotless is offering, using the 3 alternatives in its consideration. This relies on the Programmed price as a 6-month and 12-month Volume Weighted Average Price for the period ending 26 March 2008, and the Spotless price at its closing on 2 April 2008, being the date of lodgement of the bidder's statement.
3. On 22 April 2008, Programmed sent a letter to shareholders and lodged a copy with ASX. The letter included in an accompanying leaflet:
 - (a) an extract from an article in The Business Spectator on 16 April 2008 by Stephen Bartholomeusz that: *"The directors are probably right when they say in today's vigorous rejection of the bid, that the Spotless offer, which includes a range of mix and match options involving both cash and shares, undervalues Programmed"*
 - (b) An extract from an article on 28 March 2008 in the Australian Financial Review by Michael Smith that: *"As the Spotless share price sank another 8 per cent following the \$556 million tilt yesterday, it could be argued Programmed is better positioned to play the role of suitor"*(the **Circumstances**).

4. It appears to the Panel that the Circumstances are unacceptable having regard to:
 - (a) the effect that the Panel is satisfied that the Circumstances have had, are having, will have or are likely to have on:
 - (i) the control or potential control of Programmed; or
 - (ii) the acquisition or proposed acquisition by Spotless of a substantial interest in Programmed; or
 - (b) the purposes of Chapter 6 set out in section 602 of the Act.
5. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances in relation to the Circumstances and the affairs of Programmed.
6. The Panel has had regard to the matters in section 657A(3).

DECLARATION

Under section 657A, the Panel declares that the Circumstances constitute unacceptable circumstances in relation to the affairs of Programmed.

Alan Shaw
Counsel
with authority of Christopher Photakis
President of the Sitting Panel
Dated 6 May 2008



ANNEXURE B

Corporations Act Section 657D Orders

IN THE MATTER OF PROGRAMMED MAINTENANCE SERVICES LIMITED 02

PURSUANT TO:

A declaration of unacceptable circumstances dated 6 May 2008 in relation to the off market takeover offer for Programmed Maintenance Services Limited (**Programmed**) by Spotless Investments Holdings Pty Limited (**Spotless**).

UNDER SECTION 657D THE PANEL ORDERS

1. Programmed prepare and dispatch a clarification letter to its shareholders, in a form approved by the Panel.
2. At the election of Programmed, Programmed either enclose with the dispatch of its target's statement:
 - (a) a copy of the clarification letter; or
 - (b) a copy of the Panel's media release (to be finalised for release on 7 May 2008) in relation to the declaration of unacceptable circumstances made in respect of the affairs of Programmed.
3. If Programmed elects the course described in paragraph 2(b), Programmed must send a copy of the clarification letter to its shareholders as soon as practicable after the form of the letter has been approved by the Panel.

Alan Shaw
Counsel
with authority of Christopher Photakis
President of the Sitting Panel
Dated 7 May 2008