Australian Government

Takeovers Panel

Reasons for Decision
Alesco Corporation Limited 01 and 02
[2012] ATP 14

Catchwords:

Bidder's statement – target's statement - efficient, competitive and informed market - Eggleston principles - misleading announcements - supplementary bidder's/target's statement – Franking credits – headline price of revised offer - / decline to make a declaration

Corporations Act 2001 (Cth), sections 602, 636, 638

Guidance Note 5 "Specific Remedies – Information Deficiencies", Guidance Note 18 "Takeover Documents"

Foster's Group Limited [2011] ATP 15, Programmed Maintenance Services Limited 02 [2008] ATP 9, Consolidated Minerals Limited [2007] ATP 20, Nexus Energy Limited [2006] ATP 17

INTRODUCTION

1. The Panel, Geoff Brunsdon, Stephen Creese (sitting President) and Sarah Dulhunty, declined to make a declaration of unacceptable circumstances on applications by Alesco Corporation and DuluxGroup respectively, in relation to the affairs of Alesco**.** The application by Alesco (01) concerned whether an announcement by DuluxGroup of its Revised Offer was misleading because it overstated the dividends that Alesco could pay, the value of franking credits and added the franking credits to the total value of consideration. The application by DuluxGroup (02) concerned whether a letter and media statements from Alesco referring to DuluxGroup's cash component of the consideration were misleading. The Panel decided not to make a declaration after accepting further disclosure by way of supplementary bidder's statement and supplementary target's statement respectively.

2. In these reasons, the following definitions apply.

Alesco	Alesco Corporation Limited
Dulux	DuluxGroup Limited and its wholly owned subsidiary, DuluxGroup (Nominees) Pty Ltd

FACTS

3. Alesco is an ASX listed company (ASX code: ALS). Dulux is an ASX listed company (ASX code: DLX).

4. On 1 May 2012, Dulux announced an intention to make a takeover offer for Alesco. The offer was a cash offer for all the shares in Alesco that Dulux did not already own at $2.00 per share. In the same announcement, Dulux said that it had acquired 19.96% of Alesco.

5. On 10 May 2012, Dulux released its bidder's statement.

6. On 11 May 2012, Alesco's directors advised shareholders to take no action until the board had issued its formal recommendation.

7. On 21 May 2012, a replacement bidder's statement was released.

8. On 12 June 2012, Alesco released its target's statement recommending that the bid be rejected.

9. On 13 July 2012, Dulux announced that the total of its voting power in Alesco, and the Alesco shares the subject of acceptance instructions in the institutional acceptance facility, had increased to 29.93% and that it had waived some conditions of its bid.

10. On 23 July 2012, Dulux announced that it would increase its offer. It said:

    [Dulux] today announced that it is increasing its offer for [Alesco] by:

    - *increasing the cash offer to $2.05 per share and*
    - *allowing Alesco shareholders to receive up to $0.18 per share in franking credits attached to the dividends declared by Alesco.(footnote)*

    *This revised proposal will provide [Alesco] shareholders with total value of up to $2.23 per share (**Revised Offer**). A number of Alesco's shareholders have indicated that they would highly value fully franked dividends, which is why [Dulux] has chosen to structure its Revised Offer in this way. The exact value achieved will depend on each shareholder's individual tax circumstances.*

    *For the $0.18 franking credits to be distributed to Alesco shareholders, the Alesco board will need to declare and pay $0.42 per share of fully franked dividends (**Dividends**).*

    In this instance, [Dulux] would adjust the cash component of $2.05 to consist of $1.63 cash plus $0.42 in Dividends. The additional $0.18 in franking credits attached to the Dividends (footnote) would be made available to Alesco shareholders by [Dulux] waiving its right under the offer terms to deduct the value of these franking credits from the offer price.

    The same footnote used in both instances read*: Eligibility to utilise franking credits will depend on individual shareholders' specific circumstances. Shareholders are advised to consult with their tax adviser.*

11. Further on in the announcement, stating why Dulux believed the revised offer provided compelling value to Alesco shareholders, the first bullet point read:

    *The Revised Offer will provide Alesco shareholders with **total value of up to $2.23 per share** including up to $0.18 per share in franking credits attached to the dividends declared by Alesco* (original emphasis)

12. On 24 July 2012, Alesco announced that it would be paying fully franked dividends of $0.15 per share ($0.05 final dividend and $0.10 special dividend). The likely quantum of the dividends was foreshadowed in Alesco's preliminary results announcements on 6 June 2012 and target's statement of 12 June 2012.

13. Also on 24 July 2012, Alesco wrote to Dulux expressing concerns about aspects of Dulux's announcement. It said that the revised offer was an increase in cash value to $2.05 per share and not a total value of up to $2.23 per share, which assumed that Alesco would pay a fully franked dividend of $0.42 per share during the offer period.

14. On 27 July 2012, Alesco sent a letter to shareholders, which was also announced on ASX. The letter said:

The effect of these announcements is that if you accept the Offer, [Dulux] will pay shareholders ***a cash amount of $1.90 per share****. In addition, Alesco will pay shareholders the fully franked final dividend of $0.05 per share and special dividend of $0.10 per share.*

Total franking credits of $0.06 per share will be attached to the dividends paid. The value of those franking credits ***is not the same*** *for all shareholders and varies* ***depending on the tax position of individual shareholders*** *(including whether a shareholder is an individual, a superfund or a corporate entity). Your Board will be issuing a supplementary target's statement with further details to assist you in understanding this issue. You will likely also see a supplementary bidder's statement that may deal with the issue.* (original emphasis)

15. Further on in the letter, in stating why shareholders should reject the revised offer, the letter said:

The Independent Expert assessed that the value of Alesco on a controlling interest basis ranges from $2.23 to $2.52 per Alesco share. [Dulux's] revised Offer remains materially below the bottom of this range.

16. On or about 27 July 2010, Alesco's chairman, Mr Mark Luby, and other Alesco representatives made statements to the media about the Dulux offer. Those statements were reported, including in *The Australian* on 28 and 30 July which reported the following:

In a statement last night, Alesco chairman Mark Luby claimed Dulux's bid had effectively been reduced because it included dividends the company had already declared.

…

Mr Luby criticised the structure of the bid and said the franking credit benefits would not apply to all investors.

17. On 30 July 2012, Dulux wrote to Alesco about the letter and the media comments, saying that it was unequivocal that Dulux had increased its offer.

18. On 31 July 2012, Alesco wrote back that it did not intend in any way to give a misleading impression that Dulux had decreased its bid. Alesco said that it intended to deal with the revised bid fully in a supplementary target's statement to be issued shortly after Dulux issued the supplementary bidder's statement for its revised offer.

APPLICATION

Declaration sought - 01

19. By application dated 24 July 2012, Alesco sought a declaration of unacceptable circumstances. It submitted that the correct disclosure should have been that the cash consideration of $2.05 was less the actual value of the dividend, namely $0.15. It submitted that the reported $2.23 total value could not be achieved given Dulux's knowledge of Alesco's intentions as to dividends. It further submitted that the

amount of franking credits should not have been added to the cash amount of the bid, as they were not strictly comparable.

20. Alesco submitted that the effect of the circumstances was that they were likely to "*impact the efficient, competitive and informed market for voting shares*" in Alesco.

Interim orders sought - 01

21. Alesco sought interim orders to the effect that Dulux be prevented from lodging or despatching its supplementary bidder's statement and immediately lodge a corrective announcement.

22. We did not need to make interim orders (see paragraph 29).

Final orders sought - 01

23. Alesco sought final orders to the effect that Dulux:

    (a) amend the terms of its revised bid to give Alesco shareholders $2.23

    (b) allow shareholders who have already accepted the bid to withdraw their acceptances and

    (c) compensate on-market purchasers who were under the impression that they would receive $2.23 per share.

Declaration sought - 02

24. By application dated 1 August 2012, Dulux sought a declaration of unacceptable circumstances. It submitted that the way Dulux's revised offer had been described was intended to cause Alesco shareholders to believe that Dulux had revised or decreased its offer to $1.90. It submitted that Alesco had deliberately created confusion and misled the market.

25. Dulux submitted that shareholders being misled into believing that Dulux had reduced its offer meant that the acquisition of control over voting shares in Alesco was not taking place in an efficient, competitive and informed market (section 602(a)) and Alesco shareholders had not been given accurate information to enable them to assess the merits of Dulux's offer (section 602(b)).

Interim orders sought - 02

26. Dulux sought interim orders to the effect that Alesco be prevented from making further announcements or sending further correspondence to its shareholders about the terms of the offer without the Panel first reviewing it.

27. We did not need to make interim orders (see paragraph 29).

Final orders sought - 02

28. Dulux sought final orders to the effect that Alesco:

(a) make an immediate announcement that Dulux had increased its offer to $2.05 (plus franking credits)

(b) make clear in any further statements to the market, shareholders or the media that the offer had been increased and

(c) send a supplementary target's statement to shareholders.

Agreement not to make disclosure

29. Dulux indicated to the Panel that it would not issue a supplementary bidder's statement until the conclusion of the Panel proceedings. We invited the parties to agree not to make any further announcements in relation to the matters in dispute, or in relation to the offer (other than as required under Listing Rule 3.1), pending our decision. We were concerned that there was a risk of compounding the matters at issue between the parties by any further disclosure seeking to " clarify" the offer. We indicated to the parties that we were minded to make an interim order unless they agreed to refrain from further comment.

30. The parties agreed. On this basis, we decided not to make any interim orders.

DISCUSSION

Disclosure standard

31. Any document published to shareholders must be capable of being relied upon.[1] The Panel has expressed the sentiment, in both in GN 5 and GN 18,[2] that the same standard of care, and the same standard of disclosure, should be applied to any takeover document sent to offeree shareholders as is applied to the formal bidder's statement or target statement.

32. *Fosters*[3] is the most recent in a long line of cases in which the Panel has stated the importance of communications in a takeover being made to the same standard as is required in a bidder's statement or target's statement. That Panel in that case endorsed the comments in *Nexus*:[4]

> *once a company is subject to a takeover bid, it is required to take even greater care in ensuring that all of its communications to shareholders or the market are not misleading in any way.*

Disclosure by Dulux

33. The revised offer by Dulux was relatively straightforward. The way it was described was not.

34. Dulux's revised offer was increased cash consideration. The bid was a cash bid less the cash amount of Alesco's dividend, which had not then been formally announced

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1 *Consolidated Minerals Limited* [2007] ATP 20 at [75]

2 Guidance Note 5 "Specific Remedies – Information Deficiencies" at [17], Guidance Note 18 "Takeover Documents" at [34]

3 *Foster's Group Limited* [2011] ATP 15

4 *Nexus Energy Limited* [2006] ATP 17 at [31]

but had been foreshadowed by Alesco in earlier announcements.[5] Many bids are structured in this way and the market is familiar with this type of increase. Dulux described this element of the revised offer accurately. However Dulux went further. It sought to include, as part of the total value of the consideration, the franking credits that Alesco shareholders might receive. This complicates the picture because the value of the franking credit is not the same for all shareholders. Indeed, some shareholders, may have a preference for a capital sum over a franked dividend.

35. Dulux went further still. It announced that it was 'increasing' its offer by "*allowing Alesco shareholders to receive up to $0.18 per share in franking credits attached to the dividends declared by Alesco.*"[6] For shareholders to receive a franking credit of $0.18, Alesco would have to declare a dividend of $0.42. This amount was much higher than allowed by Alesco's dividend policy and guidance, and higher than the dividends Alesco has since declared. The aggregate of $2.05 and the higher franking credit figure reached the bottom of the independent expert's valuation range for Alesco (namely $2.23).

36. Dulux submitted that Alesco had the capacity to pay such additional dividends. In our view, this is beside the point. In any event, Alesco submitted that it could not prudently do so. It submitted that the position would be different if it was inevitable that Alesco would become a wholly-owned subsidiary of Dulux. However, Alesco submitted that there was a risk of this not occurring while Dulux retained the ability to waive its 90% minimum acceptance condition. Dulux had stated in an announcement on 13 July 2012 that it had obtained permission from its financier to waive the 90% minimum acceptance condition upon reaching total acceptances (including IAF acceptance instructions) of 50.1% but it had not made any decision at that stage.

37. Dulux also submitted that its announcement was clear and that shareholders were familiar with the concepts of cash, dividends and franking credits. In our view, the Dulux statement was unusual in two respects. Firstly, it included the face value of the franking credits in a "headline" number. Secondly, it chose a potential value of the franking credits based on a dividend that had not been declared and was known to be higher than any likely to be declared. Neither of those two aspects of Dulux's announcement in our view meets the standard required of bidders.

38. Dulux submitted that there have been a number of examples[7] of the potential value of franking credits being included in statements of the potential value of offers. The examples Dulux drew on to support its position do not do so, except in one case. The others make it clear that shareholders 'may also benefit' from a franking credit For example, in the PEP/Spotless case, the ASX announcement included a headline consideration comprising the cash and dividend, adding separately "*Those*

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[5] See paragraph 12

[6] It made the announcement before Alesco had declared the $0.05 ordinary dividend and $0.10 special dividend (totalling $0.15)

[7] Manhattan Software Bidco/MYOB, PEP/Spotless, Campbell Bros/Ammtec, ARH/Colorado, Viterra/ABB

shareholders who can capture the full benefit of the franking credits associated with the Special Dividend will receive an additional benefit valued at $0.016…" [8] This is very clear.

39. ASIC submitted that headline statements about the price or value of an offer should not include reference to any value that may be attributable to franking credits. This was because the value varied significantly depending on the circumstances of each individual shareholder. Accordingly, ASIC submitted, qualifications (whether prominent or otherwise) did not sufficiently deal with the potential misleading effect.

40. If ASIC meant that the headline price should not incorporate the value of franking credit, then we agree. If ASIC meant that there should be no reference to franking credits, then perhaps this goes too far. In our view, the appropriate way to make an announcement of bid consideration that comprises a cash component and a cash dividend component is usually to add those two elements together, with due regard to the effect of the dividend record date on offerees who have traded during the bid. To the extent any reference is made to potential franking credit value, it should be the subject of a separate statement, as (for example) was done in the PEP/ Spotless case.

41. Alesco provided a number of brokers' circulars dealing with the Revised Offer. Most did not indicate any misunderstanding of Dulux's announcement, either as to the amounts of dividends Alesco would be declaring, or as to the value of franking credits to shareholders. However, two indicated some confusion and misunderstanding. These two would at least be apt to mislead those brokers' clients.

42. The announcement by Dulux of its revised offer had the potential to mislead or confuse shareholders.

43. Dulux agreed to provide supplementary disclosure in a supplementary bidder's statement to be dispatched to its shareholders. We reviewed the draft (minus parts omitted as not relevant to the proceedings). Dulux's supplementary bidder's statement was released to the market on 17 August 2012, and will be sent to shareholders. This satisfies our concerns.

44. As for Alesco's compensation claim, the trading pattern of Alesco shares was complicated by the difficulty in valuing franking credits (ie, those who sold shares may not have valued the franking credits and those that bought shares may not have expected to benefit from them given the '45 day rule'[9]), and the broker reports of the disclosure were inconclusive. We note also that trading prices never approached the $2.23 level. Therefore, assuming (without deciding) that a compensation order may be an appropriate remedy here, there were insufficient bases to enable us to find that Dulux should be obliged to compensate anyone who bought or sold on the basis of the Revised Offer.

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[8] ASX announcement 30/4/12

[9] That is, the tax requirement for a shareholder to hold ordinary shares for no less than 45 days (not counting days of purchase or sale) in order to qualify for certain franking credits

Disclosure by Alesco

45. As the Panel said in *Programmed Maintenance 02*:[10]

    The making of a takeover bid for a company is a critical time for its shareholders. Probably more than at any other time in the company's history, shareholders will look to their directors to provide advice. Accordingly, the directors must ensure that their advice is reasonably based, clear, concise, objective and not misleading.

46. Dulux submitted that the statement in Alesco's letter to shareholders was literally correct, but the overall impression of the announcement was misleading. The emphasis in the letter (which was also announced on ASX) stressing the reference to $1.90 was not helpful to shareholders, although a careful reader would have established what the position with the revised offer in fact was. The way the revised offer was described was less than ideal but, in our view, probably not bad enough to mislead or confuse shareholders. No evidence was provided that brokers were misled or confused by it.

47. However the statements to the media, or if incorrectly reported then the failure to issue a correction, fall short of an appropriate standard.

48. Alesco submitted that a correction was not issued "*Primarily because it was a pretty minor point*". We do not agree. Alesco also submitted that its announcement on 23 July 2012 responding to the revised offer, and reaffirming its advice to shareholders to reject it, was clear. While that may be so, the message across all media should be consistent. It is likely to give rise to unacceptable circumstances that a target makes a statement formally and then makes a different (and misleading) statement during interviews. And if what the chairman said was misquoted, an obligation arose to correct the way the revised offer had been described by the reporter.

49. Alesco agreed to provide supplementary disclosure in a supplementary target's statement, to be dispatched to its shareholders. We reviewed the draft. Alesco's supplementary target's statement was released to the market on 15 August 2012, and will be sent to shareholders. This satisfies our concerns.

DECISION

No Declaration

50. Both Alesco and Dulux have now made corrective disclosure.

51. For the reasons above, we declined to make a declaration of unacceptable circumstances. We consider that it is not against the public interest to decline to make a declaration and we had regard to the matters in s657A(3).

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[10] *Programmed Maintenance Services Limited 02* [2008] ATP 9 at [17]

Orders

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

Other matters

53. The announcement by Dulux on 23 July 2012 of its revised offer included also the following statement:

[Dulux] declares that the Revised Offer is its ***best and final*** *offer, subject to no competing proposal emerging. This means that, subject to no competing proposal emerging,* ***[Dulux] will not further increase the offer price****. (Original emphasis)*

54. Dulux had defined its revised offer in the announcement as follows

[Dulux] today announced that it is increasing its offer for [Alesco] by:

- *increasing the cash offer to $2.05 per share and*
- *allowing Alesco shareholders to receive up to $0.18 per share in franking credits attached to the dividends declared by Alesco.(footnote)*

*This revised proposal will provide [Alesco] shareholders with total value of up to $2.23 per share (****Revised Offer****).*

55. During the course of the proceedings before the Panel, the parties continued to negotiate with a view to an offer price that might be recommended by the Alesco board. However, in rebuttal submissions ASIC raised a concern that the market expectation from the announcement would be that, should Alesco declare a franked dividend higher than $0.42 per share, Dulux would enforce its right to deduct from the bid consideration that part of the value of franking credits exceeding $0.18 per share.

56. In other words, ASIC submitted that truth in takeovers policy applied to the revised offer.

57. At the time we agreed to rectification of the disclosure issues, negotiations between the parties were continuing. It is impossible to make any determination about whether and how truth in takeovers policy will apply in the absence of a concrete proposal. We therefore indicated to the parties that any departure from a last and final statement, and the application of truth in takeovers policy, was not a matter before the Panel.

58. If this issue arises, ASIC or indeed anyone else is free to make an application to the Panel.

Stephen Creese
President of the sitting Panel
Decision dated 16 August 2012
Reasons published 22 August 2012

Advisers

Party	Advisers
Alesco	King & Wood Mallesons Greenhill Caliburn
Dulux	Gilbert + Tobin Macquarie Capital (Australia) Limited