

A DOWNER ON THE SPOTLESS BID: PANEL DECLINES TO ALLOW CORRECTION OF A MISTAKE

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Legal Briefings - By **George Durbridge**

In the recent Spotless decision, the Takeovers Panel and ASIC declined to allow Downer to take steps to rectify an obvious drafting mistake. The effect of the decision was that target shareholders were given withdrawal rights until the takeover bid was entirely unconditional, in circumstances where Downer had not expressed the clear intention that withdrawal rights would exist beyond the point where regulatory approvals were obtained.

IN BRIEF

- The Takeovers Panel and ASIC declined to allow the bidder to rectify an obvious mistake.
- As a result target shareholders were given withdrawal rights for the entirety of the takeover bid, whereas, consistent with usual practice, the bidder only intended that withdrawal rights would only exist until regulatory approvals were obtained.
- Any statement which may come before the Panel should be drafted to eliminate possible misunderstandings. As well as takeover documents, this applies to a notice of meeting to approve an acquisition, a prospectus for a rights issue and any statement to which the truth in takeovers policy may apply.

INTRODUCTION

In the recent Takeovers Panel decision in *Re Spotless Group Holdings* [2017] ATP 5, the Takeovers Panel took out of context a statement made in a takeover document and applied it in favour of some or all shareholders in a company, without paying due regard to what the document in question actually said or meant, when read fairly as a whole. Nevertheless, the decision is a salutary reminder to bidders to examine their documents with a view to finding and eliminating unintended readings, and not to assume that the Panel or ASIC will reject uncommercial and even indefensible readings.

THE MISTAKE

The issue arose from Downer's publication of its original bidder's statement which, by Downer's admission, contained a mistake. Downer proposed to treat the mistake as a typographical error.

Usually, a bid condition does not prevent a contract from arising from an acceptance or allow a target shareholder to withdraw an acceptance unless the bid is extended, but may mean that the contract is dissolved if the bid condition is neither satisfied nor waived before the bid closes. Exceptionally, some conditions relating to regulatory approvals (such as Foreign Investment Review Board approval) are required to be expressed as true conditions precedent, so that no contract arises until the condition is satisfied. In these cases, an acceptance can be withdrawn until the condition is satisfied. (Bidders cannot usually waive these conditions precedent.)

The bid conditions in Downer's bid were not unusual, and included a minimum acceptance condition, adverse events conditions, a generally expressed condition that any necessary regulatory consents be obtained and a more specific condition requiring foreign investment approval in New Zealand. Clause 7.6(c) of the offer terms provided that each bid condition was a condition precedent and that an acceptance could be withdrawn until all of them were satisfied or waived. This was sufficiently unusual to have put on guard a reader accustomed to takeover bids: only the bid conditions relating to regulatory approvals would ordinarily have been expressed as conditions precedent.

In addition, there were three statements each of which suggested that the statement that all of the bid conditions were conditions precedent had been made in error:

- After setting out the bid conditions, the statement said that none of them prevented a contract of sale resulting from an acceptance. This overlooks the one true condition precedent in the bid, so it is also incorrect, but in the opposite sense to clause 7.6(c).
- Clause 7.6(b) of the bidder's statement, the clause immediately preceding clause 7.6(c), said that acceptances could only be withdrawn if the bid was extended for a month while

still conditional. This involves the same oversight, but again plainly contradicts clause 7.6(c).

- The statement concerning withdrawals is repeated in a prominent series of Key Questions which stated that shareholders could only withdraw acceptances in “limited circumstances”.

Abetted by Spotless and ASIC, the Panel decided that disclosure of the provision that the conditions were all conditions precedent was an announcement that Downer would make a bid on those terms, and that Downer would not be allowed to correct it in the offers it dispatched, because s631 of the Corporations Act requires a bid to be made on terms substantially as favourable as the terms the bidder has announced. It required Downer to modify its bidder’s statement to render the rest of it consistent with clause 7.6(c), as read by the Panel. This was despite the Panel accepting that the drafting mistakes were “small and inadvertent”.

In parallel with the Panel proceedings, Downer applied to ASIC for relief to allow it to narrow its withdrawal rights again on the basis of its mistake. ASIC declined to grant the relief.

ASIC’s support for this decision represents a policy reversal: in 2015, ASIC modified Chapter 6 to allow Ferrovial to include in its bid for Broadspectrum a condition that it obtain regulatory approvals under the Overseas Investment Act of New Zealand, which had been overlooked in the initial announcement and bidder’s statement.

COMMENTARY

The Panel’s conclusion, and ASIC’s decision to decline to grant relief to Downer, seem harsh in the circumstances. Only a careful reader would have found the relevant statement, and the same careful reader would have noticed the inconsistency with the immediately preceding clause. If the person had carefully read further, they would have found additional reason to doubt the statement, and none to believe it. That is, anyone sophisticated enough to find the problematic statement, would also have found in the same document reason not to rely on it. The Panel (and ASIC) should have done the same.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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