

WARRNAMBOOL CHEESE - THE NEXT CHAPTER

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Legal Briefings - By **Simon Reed** and **Geoff Kerrigan**

SUMMARY

- In this case the rights issue closed prior to the Panel making its decision on whether to conduct proceedings. This was due to a significant delay by the applicant in commencing Panel proceedings.
- Although a delay in commencing proceedings is not a bar to the Panel conducting proceedings, it is a factor that will weigh against the Panel conducting proceedings. This is particularly the case where actions (such as rights trading and deferred settlement trading) have been undertaken in reliance on the relevant transaction.
- The Panel's reasons suggest that the Panel may have allowed the rights issue to proceed in any event (notwithstanding that a substantial shareholder could have gone above 90% as a result of the rights issue).

BACKGROUND

Readers may recall the contest for control of Warrnambool Cheese and Butter Factory Company Holdings Limited (WCB) in 2013. The end result was that Saputo Dairy Australia Pty Ltd (Saputo Dairy), a wholly owned subsidiary of Saputo Inc (Saputo), become a 87.92% shareholder in WCB.

Lion-Dairy & Drinks Pty Ltd (Lion Dairy) ended up a 10.22% shareholder and the balance of the shares (1.86%) was held by minority shareholders, the largest of which was Sandon Capital Investments Pty Ltd (Sandon). Sandon was the applicant in the Panel proceedings.

On 10 June 2016, WCB announced a 3 for 8 renounceable entitlement offer at \$6.75 per share to raise up to \$142 million (Rights Issue). The offer was priced at an 18.2% discount to the WCB share price prior to announcement of the Rights Issue. The Rights Issue was not underwritten.

The Rights Issue was fully supported by Saputo, which had given an irrecoverable commitment to WCB that Saputo Dairy would take up its full entitlement under the Right Issue.

If no other WCB shareholder participated in the Rights Issue then Saputo would move from 87.9% to 90.9%. WCB noted in its submissions to the Panel that this was the amount that Saputo could have moved to within the '3% creep' exception in any event.

The significance of Saputo acquiring a 90% shareholding in WCB is that under the Corporations Act the holder of at least 90% of the shares in a company can initiate a statutory process to compulsorily acquire the 10% of the shares in the company that it does not already own.

Before the Panel made its decision on conducting proceedings, the Rights Issue closed with only a 0.3% shortfall. This meant that Saputo Dairy could not meet the 90% compulsory acquisition threshold following the Rights Issue. This result was a key consideration in the Panel's decision not to conduct proceedings.¹

TIMING ISSUES

The Rights Issue timetable was as follows:

- **10 June 2016:** announcement of the Rights Issue and release of offer booklet to ASX;
- **20 June 2016:** dispatch of offer booklet to WCB shareholders;
- **22 June 2016:** rights trading ceases;
- **23 June 2016:** deferred settlement trading commences;
- **29 June 2016:** entitlement offer close date;
- **6 July 2016:** allotment of Rights Issue shares.

Sandon made its application to the Panel on 27 June 2016 seeking interim and final orders that the Right Issue not proceed.

The Panel did not grant interim relief on the basis that it could make interim orders to extend the close date for the Rights Issue or require the return of application moneys (if necessary) at any time before the allotment of the Rights Issue shares on 6 July 2016.

The Panel noted that Sandon's application was 'very late in the piece' as there were only 2 days between when the application was made and when the Rights Issue closed and that the announcement of the Rights Issue timetable on 10 June 2016 put Sandon 'on notice' that it needed to act promptly.

As noted in previous decisions, the prejudice to affected parties from the Panel's intervention in a right issue context is likely to be greater if the application is made late and the Panel will require a 'more cogent' reason to intervene in these circumstances.

Whilst the delay in commencing the proceedings was not necessarily a bar to conducting proceedings, it contributed to the decision not to conduct proceedings in this matter.

STRUCTURE OF THE RIGHTS ISSUE AND REQUIREMENT FOR FUNDS

In relation to the terms and structure of the Rights Issue, Sandon argued that:

- the Rights Issue was not structured to provide an incentive for shareholders other than Saputo Dairy to participate;
- WCB did not require the funds proposed to be raised; and
- the Rights Issue was highly dilutive and a device to pass control to WCB.

WCB responded that the funds raised were necessary to de-leverage the business (taking into account forecast lower levels of demand and prices for its products). WCB also submitted that it had taken the following steps to minimise the control impact of the Rights Issue:

- establishing an independent board committee to consider and structure the Rights Issue;
- engaging independent legal and financial advisors to advise the independent board committee;
- making the offer renounceable and pricing the offer at a discount to market price; and

- including a shortfall facility available to shareholders other than Saputo Dairy.

The Panel accepted that the funds were required and that the combination of mitigation strategies outlined above meant it was not likely that the Rights Issue would be found to give rise to unacceptable circumstances.

WCB indicated that the Rights Issue was not underwritten due to a lack of suitable underwriting options (both in terms of external underwriting and sub-underwriting by major shareholders). This was accepted by Panel, although it was noted that this could have been more clearly explained in the Rights Issue documentation.

DISCLOSURE OF SAPUTO'S INTENTIONS AND CONTROL OUTCOMES

Sandon also submitted that the Rights Issue offer booklet failed to adequately disclose Saputo's intention should it acquire more than 90% of WCB under the Rights Issue. The offer booklet merely stated that Saputo had 'yet to make a decision' on whether it would proceed with compulsory acquisition if it became entitled to do so.

Sandon noted this statement was inconsistent with Saputo's previous disclosure in its bidder's statement, where Saputo indicated that it intended to proceed with compulsory acquisition if entitled to do so.

The Panel was surprised that Saputo had not made a decision whether or not to proceed with compulsory acquisition (if it became entitled to do so), particularly as Saputo would only have 6 months' from obtaining a 90% shareholding to issue a compulsory acquisition notice and that the issue of such a notice would require preparatory work to determine the acquisition price and prepare an independent expert's report.

However, the Panel did not consider this further, or decide whether supplementary disclosure was necessary, due to the outcome of the Rights Issue.

KEY TAKEAWAYS

The Panel's decision suggests that with appropriate mitigation strategies in place and a genuine need for funds that a rights issue which could result in a major shareholder becoming entitled to commence the compulsory acquisition procedure will not necessarily give rise to unacceptable circumstances.

For minority shareholders, or those looking to participate in Panel proceedings more generally, the Panel's decision not to conduct proceedings highlights the importance of commencing Panel proceedings at the earliest opportunity, as a delay in making an application may well affect the outcome.

ENDNOTES

1. See: Warrnambool Cheese and Butter Factory Company Holdings Limited 02 [2016] ATP 11 (**Panel Decision**) [25], [33] and [38].

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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