



**In the matter of Goodman Fielder Limited 01
[2003] ATP 01**

Catchwords:

Defeating conditions – unacceptable accounting conditions – material adverse change on the bidder – financing condition – announcement of bid when financing documentation not settled – restraint of dispatch – use of withdrawal rights – failure to waive information condition – novelty not necessarily unacceptable – pre-proceedings settlement

Corporations Act 2001 (Cth), sections 631(1) and (2), 636(1), 625(1), 629(1), 633, 650F(4) and 657A

These are our reasons for declining to make a declaration of unacceptable circumstances in response to the application by Goodman Fielder Ltd. in relation to the takeover bid by BPC1 Pty Ltd. The Panel considered that the undertakings that Burns Philp offered, in response to the Panel's request, adequately addressed its concerns in relation to the bid and bidder's statement.

1. These reasons relate to an application made on 30 December 2002 by Goodman Fielder Ltd (**Goodman Fielder**) for a declaration of unacceptable circumstances pursuant to section 657A of the Corporations Act 2001 (the **Act**), and interim and final orders pursuant to sections 657E and 657D of the Act (respectively), in relation to a takeover bid for Goodman Fielder by BPC1 Pty Ltd (**Burns Philp**). Burns Philp is a subsidiary of Burns, Philp & Company Ltd. (**Burns Philp & Co**)
2. The sitting Panel (the **Panel**) for the Application was constituted by Ilana Atlas (sitting President), Michael Tilley (sitting deputy President) and Marian Micalizzi.
3. The Panel decided, under Regulation 20 of the ASIC Regulations, to conduct proceedings in relation to the Application.

SUMMARY

4. Burns Philp announced on 13 December 2002 a cash bid for Goodman Fielder valuing it at A\$2.2 billion. Burns Philp would need new borrowings of A\$1,300 million, US\$475 million and NZ\$250 million to fund the bid and other related costs as well as its existing cash reserves. Its bid was conditional on the preconditions to the funding for its bid being met.

Takeovers Panel

Reasons for Decision – Goodman Fielder 01

5. Goodman Fielder applied to the Panel on 30 December 2002 for a declaration of unacceptable circumstances and orders in relation to three conditions¹ in the bidder's statement and disclosure in relation to Burns Philp's intentions:
- (a) The "Availability of Facilities" condition in 9.6(q) (the **Finance Condition**).
 - (b) The "Earnings Confirmation" condition in 9.6(g) and the "Liabilities Confirmation" condition in section 9.6(h) (together, the **Accounting Conditions**).
 - (c) The "Material adverse change of Burns Philp" condition in 9.6(k) (the **Burns Philp MAC**).
 - (d) Section 5.4 of the Bidder's Statement titled "Intentions upon acquisition of less than 90% of Goodman Fielder Shares" (**90% Statements**).

Goodman Fielder also sought interim orders seeking to restrain the dispatch of Burns Philp's bidder's statement.

6. The terms and documentation for a number of the loans that Burns Philp would require to fund its bid (**Facilities**) had not been fully settled or signed, although commitment letters were in place. The Panel decided that the uncertainty that the absence of complete documentation would bring about required Burns Philp to give Goodman Fielder shareholders an additional right of withdrawal (**Withdrawal Facility**) until they had been told the terms of those Facilities. The Panel received undertakings from Burns Philp agreeing to the procedures for the Withdrawal Facility².
7. Burns Philp also offered undertakings requested by the Panel to waive two defeating conditions to its bid, the Burns Philp MAC and a condition relating to adverse changes in financial markets that might affect the syndication of some or all of the Facilities (**Markets MAC**). Both the conditions were also preconditions to the Facilities (albeit in slightly different terms). The Panel considered that removing the discretion for exercising these conditions from Burns Philp, so that such discretion remained only with the financiers, would reduce any concerns that might have been held as to their interaction with section 629 of the Act.
8. The Panel decided that the Accounting Conditions did not constitute unacceptable circumstances. However, the Panel came to no decision as to the obligation, if any, of a target board to respond to such conditions in a takeover bid. In addition, the Panel noted that should Burns Philp gain, with reasonable certainty from other sources, the information or assurance it was seeking by way of the Accounting Conditions, and it did not free its bid from the conditions, Goodman Fielder may have cause to make an application for a declaration of unacceptable circumstances.

¹ See Annexure 2 for the text of the relevant conditions from the Burns Philp bidder's statement.

² See Annexure 1 for the text of the undertaking given by Burns Philp.

Takeovers Panel

Reasons for Decision – Goodman Fielder 01

9. Burns Philp provided additional disclosure concerning its ability to waive the 90% Minimum Acceptance Condition in its offer. The information was provided in the Chairman's letter accompanying the bidder's statement and in a supplementary bidder's statement shortly afterwards. Burns Philp also offered an undertaking to give additional disclosure concerning the risks of the material adverse change preconditions in the Facilities being triggered.
10. While not wishing to encourage the use of withdrawal rights as a substitute for settling the terms of essential financial facilities prior to making a bid, the Panel considered that the undertakings and the additional disclosures resolved the issues before it in this matter.
11. On 9 January, the Panel provided parties with its decision and invited Burns Philp to offer undertakings to resolve its specific concerns. The Panel advised that in the absence of the undertakings it would make a declaration of unacceptable circumstances. Burns Philp provided the undertakings in a form acceptable to the Panel and the Panel determined to decline the application. The Panel decided on Thursday 9 January 2003 to decline the application, in part on the basis of the undertakings offered³.

BACKGROUND

12. Burns Philp announced on 13 December 2002 that it intended to make a conditional cash bid for all of the shares in Goodman Fielder that it didn't already own, at \$1.85 per share. It had acquired 14.9% of the shares in Goodman Fielder a day previously at \$1.85 following the close of trade.
13. Burns Philp announced that its bid would be subject to a range of conditions, the material ones of which are:
 - Regulatory Approval Conditions*
 - FIRB, ACCC, NZCC, Hart-Scott-Rodino approval or non-objection
 - No court or regulatory restraints or prohibitions
 - Accounting Conditions*
 - Goodman Fielder's directors providing confirmations as to Goodman Fielder's restructuring costs, earnings, working capital and liabilities
 - Actuarial review of Goodman Fielder's defined benefit superannuation plan
 - Material Change Conditions*
 - No material adverse change in the business of Goodman Fielder or Burns Philp, and no adverse change in financial markets which would affect the syndication of elements of the Facilities
 - Finance and Minimum Acceptance Conditions*

³ The Panel declined some aspects of the application on the basis of the submissions and arguments before it, and declined some aspects of the application on the basis of the undertakings received.

Takeovers Panel

Reasons for Decision – Goodman Fielder 01

- The preconditions and events of default to the Facilities being satisfied (many of which were similar to the bid conditions)
 - Burns Philp acquiring at least 90% of the shares in Goodman Fielder
14. Burns Philp gave a copy of its bidder's statement to Goodman Fielder, ASX and ASIC on 19 December.

Funding

15. The maximum amount payable as consideration under the bid was A\$1,906 million⁴. Burns Philp had spent A\$326 million acquiring its initial 14.9% tranche, and it had A\$491 million remaining in cash reserves. Burns Philp announced that it would borrow A\$1,300 million, US\$475 million and NZ\$250 million to fund the bid, transaction costs and any required refinancing of Burns Philp or Goodman Fielder debt.
16. The bid is one of the largest, externally debt funded, cash takeover bids in Australia for a number of years. As such it was likely that Burns Philp might feel a need to make its bid subject to conditions which are not common in other, less leveraged, bids.

Finance Conditions

17. Burns Philp's borrowings for the bid (the Facilities) were under four facilities⁵.
18. The Finance Condition (9.6(q) in the bidder's statement) as originally drafted was that during, and at the close of, the bid: each of the preconditions to the Facilities remained satisfied, and no events, or potential events, of default to the Facilities have occurred.
19. When the bidder's statement was issued Burns Philp had not settled or signed the final documentation for any of the Facilities with its financiers, although commitment letters were in place for all of the Facilities. The commitment letter for the Term Loan A of the Facilities had settled in some detail the preconditions to, and the events of default of, the loan, and these were set out in Part 1 of Annexure E to the bidder's statement (**Annexure E**).
20. However, the commitment letters for the other Facilities had not reached that degree of finality. The bidder's statement advised that the other elements of the Facilities would be "subject to conditions precedent that are substantially the same as the conditions to availability of the Term A Facility as set out in Part 1 of this Annexure E."

⁴ After allowing for the 14.9% of Goodman Fielder's shares that Burns Philp bought on 12 December 2002.

⁵ Term Loan A A\$1,300 million, Term Loan B US\$375 million, Subordinated Bridge Loan US\$100 million and Capital Notes Bridge Loan NZ\$250 million.

Takeovers Panel

Reasons for Decision – Goodman Fielder 01

21. The bidder's statement also advised that the documentation for the Facilities had not been settled, but when it was settled it would contain:

"provisions customary for transactions of this nature, including provisions dealing with the payment of interest and principal, drawdown procedures, representation, warranties, covenants and events of default and various other covenants and clauses which are ... usual for such transactions as the Facilities".

22. The preconditions to the Term Loan A included (amongst others):
- a. a 90% Minimum Acceptance Condition
 - b. a Material Adverse Change Condition relating to the business of Burns, Philp & Co (similar to the Burns Philp MAC in the bid conditions)
 - c. a Material Adverse Change Condition relating to Goodman Fielder (similar to the condition in 9.6(j) in the bid conditions)
 - d. a financial markets Material Adverse Change Condition (similar to the Market MAC in the bid conditions)
 - e. conditions relating to Burns Philp and its parent's debt to EBITDA ratio (similar to the Accounting Conditions in the bid conditions)
 - f. a condition that the other elements of the Facilities become effective.

Accounting Conditions

23. The Accounting Conditions (9.6(g) & (h) in its bidder's statement (See Annexure 2 of these reasons)) required Goodman Fielder directors to make various statements or confirmations in the Goodman Fielder target's statement concerning:

Earnings for 30 June 2000, 2001 and 2002 years

- a. Non-recurring revenue and expense items; and
- b. Rationalisation and restructuring costs.

Forecasts for 30 June 2003 year given to the 2002 Goodman Fielder AGM

- a. "Significant Items" in the profit forecast; and
- b. rationalisation and restructuring costs

Liabilities 30 June 2002 Annual Accounts

- a. arrangements for trade creditors or debtors affecting working capital levels;

Takeovers Panel

Reasons for Decision – Goodman Fielder 01

- b. disclosure of off balance sheet debts or contingent liabilities (including tax and environmental issues); and
- c. the Goodman Fielder Superannuation Fund⁶

Material Change Conditions

24. The Material Change Conditions (9.6(j), (k) and (l) in the bidder's statement (See Annexure 2)) required, in summary, that:

Goodman Fielder Material Adverse Change Condition

Between 30 June 2002 and the end of the offer period there be no event (announced or becoming known to the bidder) which could have a material adverse effect on the business, financial or trading position, assets or liabilities, profitability or prospects of Goodman Fielder and its subsidiaries

Burns Philp MAC

Between the announcement of the Burns Philp bid and the end of the offer period there be no event which could have a material adverse effect on the business, assets, operations, financial condition or prospects of Burns, Philp & Co and its subsidiaries

Markets MAC

Between the announcement of the Burns Philp bid and the end of the offer period there be no disruption or adverse change in the financial, banking or capital markets that could adversely affect the syndication of the Facilities

Disclosure Concerning the 90% Minimum Acceptance Condition

25. In section 5.4 of its bidder's statement, Burns Philp set out its intentions if it did not achieve compulsory acquisition but were to declare its offer free from the 90% minimum acceptance condition and were to gain effective control of Goodman Fielder. Burns Philp commenced that discussion with a statement that it "reserves its right to declare the offer free from the 90% minimum acceptance condition."
26. Burns Philp did not discuss, in section 5.4 of the Bidder's Statement, any limitation on Burns Philp declaring the offer free from the 90% minimum acceptance condition without the consent of its financiers. Nor did it expressly state that that would contravene the finance condition in 9.6(q) of the Bidder's Statement, or that it could not finance its bid if it didn't gain its financiers' agreement to waive the 90% Minimum Acceptance Condition.

⁶ The Fund is a defined benefit fund. The condition also included a requirement for an actuarial certification of any deficit in the fund.

Takeovers Panel

Reasons for Decision – Goodman Fielder 01

APPLICATION

27. Goodman Fielder applied for a declaration of unacceptable circumstances in relation to three conditions⁷ in the bidder's statement and disclosure in relation to Burns Philp's intentions:
- (a) The Finance Condition;
 - (b) The Accounting Conditions;
 - (c) The Burns Philp MAC; and
 - (d) 90% Statements.

ORDERS SOUGHT

Interim Orders

28. Goodman Fielder sought interim orders that, pending the final determination by the Panel of the proceedings, Burns Philp be restrained from dispatching the Bidder's Statement to the shareholders of Goodman Fielder in its current form. Goodman Fielder noted that it applied for an interim order notwithstanding that section 633 of the Act would otherwise require the copies to be dispatched no later than 16 January 2002.

Final orders

29. Goodman Fielder sought final orders, following the making of the Declaration referred to above, as follows:
- (a) That, in relation to the Financing Condition:
 - i. Burns Philp exclude the Financing Condition by amending the Bidder's Statement prior to the dispatch of the Bidder's Statement to the shareholders of Goodman Fielder; or
 - ii. if the Panel does not make the order in sub-paragraph (a)(i), Burns Philp amend the Bidder's Statement prior to the dispatch of the Bidder's Statement to the shareholders of Goodman Fielder to:
 - A. include all information regarding the Financing Condition including each precondition and event of default, that is material to the making of the decision by a shareholder of Goodman Fielder whether to accept the offer under the bid in terms approved by the Takeovers Panel; and

⁷ See Annexure 2 for the text of the relevant conditions from the Burns Philp bidder's statement.

Takeovers Panel

Reasons for Decision – Goodman Fielder 01

- B. exclude all pre-conditions and events of default under the “Facilities” (as defined in the Bidder’s Statement) the satisfaction or occurrence of which is within the sole control of, or is a direct result of action by, the Bidder or its associates.
- (b) That, in relation to the Accounting Conditions:
- i. Burns Philp exclude the Accounting Conditions by amending the Bidder’s Statement prior to the dispatch of the Bidder’s Statement to the shareholders of Goodman Fielder; or
 - ii. if the Panel does not make the order in sub-paragraph (b)(i):
 - A. a declaration that the directors of Goodman Fielder are not obliged to respond to the Accounting Conditions in the Target’s Statement; and
 - B. a direction that Burns Philp within seven days after receipt of the Target’s Statement advise ASX and Goodman Fielder whether it will rely on or waive the Accounting Conditions.
- (c) That, in relation to the Burns Philp MAC:
- i. Burns Philp exclude the Burns Philp MAC by amending the Bidder’s Statement prior to the dispatch of the Bidder’s Statement to the shareholders of Goodman Fielder; or
 - ii. if the Panel does not make the order in sub-paragraph (c)(i), Burns Philp amend the Bidder’s Statement prior to the dispatch of the Bidder’s Statement to the shareholders of Goodman Fielder to include all information regarding the Burns Philp MAC that is material to the making of the decision by a shareholder of Goodman Fielder whether to accept the offer under the bid in terms approved by the Takeovers Panel, including all information that shareholders of Goodman Fielder and their professional advisers would reasonably require to make an informed assessment of Burns Philp including the assets and liabilities, financial position and performance, profits and losses and prospects of Burns Philp.
- (d) That, in relation to the 90% Statements, Burns Philp amend the Bidder’s Statement prior to the dispatch of the Bidder’s Statement to the shareholders of Goodman Fielder to correct the misleading nature of the 90% Statements in terms approved by the Takeovers Panel.
- (e) Such further or other orders as the Takeovers Panel considers appropriate.

Takeovers Panel

Reasons for Decision – Goodman Fielder 01

DISCUSSION

30. The Panel received the application on 30 December 2002. Burns Philp and Goodman Fielder volunteered short submissions on the morning of 31 December concerning Goodman Fielder's application for interim orders.
31. In the afternoon of 31 December the Panel wrote to the parties advising that it did not consider that there was sufficient evidence before it to indicate that Goodman Fielder shareholders would be adversely affected (in a way that couldn't be adequately remedied by further disclosure or later amendment of the relevant conditions⁸) if the Burns Philp bidder's statement was dispatched in the form it was lodged with ASIC. It therefore did not consider the requested interim order to be appropriate.
32. The Panel also set out a draft proposed decision of the Panel, under which, if Burns Philp agreed to the Panel's requests, the Panel would decline to conduct proceedings in relation to the application.
33. The proposed decision was not very much different in concept to the final decision of the Panel. The parties made significant efforts to realise the proposal⁹. However, following communications with the parties over the following two days, the Panel was unable to satisfy itself that it could implement its proposal in a way that was reasonably certain, and acceptable to parties, without commencing proceedings.
34. On 5 January 2003, the Panel commenced proceedings and sent a brief to the parties. On 9 January, the Panel provided parties with its decision and invited Burns Philp to offer undertakings to resolve its specific concerns. Burns Philp provided the undertakings in a form acceptable to the Panel and the Panel determined to decline the application.

Novelty

35. The Panel did not consider that the uncommon nature of the Burns Philp bid was indicative of any unacceptability. While the first instance of many issues will require more careful consideration, and may throw up previously not thought of problems to be solved, merely being the first is not a criterion for unacceptability.

⁸ The Panel noted that throughout its consideration of these issues, clause 9.6(a) and 9.7 combined to ensure that no binding contracts could be formed, and all Goodman Fielder shareholders retained a right of withdrawal under the bidder's statement as dispatched.

⁹ Burns Philp agreed to each of these requests and obtained the required financier consents.

Takeovers Panel

Reasons for Decision – Goodman Fielder 01

INTERIM ORDERS

36. The Panel wrote to the parties on 31 December advising that it did not currently consider that there was a sufficient basis for restraining the dispatch of the Burns Philp bidder's statement. It said that on the basis of the information currently before it, that was likely to be the Panel's view, whether or not the proposed resolution of the matter proceeded in accordance with its 31 December letter, or it decided to commence proceedings and dealt with the application in detail. That in fact was the decision and outcome in relation to the application for interim orders.
37. The Panel had some concerns in relation to certain conditions in the Burns Philp bid. However, it did not consider that dispatch of the bidder's statement in its current form would cause harm to Goodman Fielder shareholders or the market for Goodman Fielder shares that could not be remedied by subsequent additional disclosure or later amendment of the relevant conditions. That being said however, the Panel considered that Burns Philp should make clear in the Chairman's letter which was to accompany the bidder's statement that either:
1. Burns Philp had given the undertakings in relation to changes in its bid and bidder's statement, and the consequences of those undertakings, such as an accompanying or forthcoming supplementary bidder's statement; or
 2. the content of its bidder's statement was in dispute before the Takeovers Panel and the Panel has commenced proceedings in relation to the bidder's statement, and the terms of the bid and the bidder's statement may be changed by order of the Panel.
38. Burns Philp undertook to the Panel to make disclosure to that effect, which it did in the Chairman's letter accompanying the bidder's statement and in a supplementary bidder's statement issued on 3 January 2003.
39. The Panel considered that the extensive coverage of the issues before the Panel set out in Goodman Fielder's Media Release of 24 December should have given adequate notice to Goodman Fielder shareholders of the issues in contention. This further reduced the likelihood of a false market in Goodman Fielder shares if the bidder's statement was dispatched in its current form, subject to the clarifications referred to above and any supplementary bidder's statement setting out any changes or further disclosure.

FINANCE CONDITION

40. Goodman Fielder asserted that the Finance Condition makes the Burns Philp bid essentially subject to Burns Philp's control, and placed the risk of finance onto the Goodman Fielder shareholders whereas it should be a risk borne by Burns Philp.

Takeovers Panel

Reasons for Decision – Goodman Fielder 01

41. In any bid with financing conditions as complex and fundamental as the Burns Philp bid, it appears that there will be a material risk of uncertainty as to the status of the bid and the conditions, and some lack of transparency as to the progress of the financing conditions. The Panel recognises that the types of conditions to which Burns Philp's Facilities and offers are subject may well be reasonable and sensible precautions for a bidder making a highly leveraged bid. However, numerous and complex factors must be achieved to ensure that the preconditions to the Facilities are met.
42. The Panel considered that shareholders should not be bound to any acceptance contract before the Facilities were settled and documented¹⁰ as this was information that the shareholders were properly entitled to receive in a bidder's statement. It considered that Goodman Fielder shareholders who may wish to accept the bid before the Facilities had been settled and documented ought to have an opportunity to withdraw that acceptance until the terms had been settled and the documents executed (and for a sufficient period afterwards for Goodman Fielder shareholders to assess the new information).
43. The Panel's intention in its proposals was to allow Goodman Fielder shareholders to have a withdrawal right which applied until Goodman Fielder shareholders had been given enough information to fully inform them on the nature and status of the terms, preconditions and events of default to the Burns Philp Facilities. The Panel did not intend to create a withdrawal right which lasted until Burns Philp's Facilities are unconditional.
44. The Panel expects that the documents setting out the preconditions to drawdown of the Facilities, and to the Finance Condition which remain to be satisfied at the time when the Withdrawal Facility might lapse, will not contain terms which are subject to material negotiation or settling between Burns Philp and its financiers. The Panel considers that if this were the case, the Goodman Fielder shareholders would not know the terms of the Facilities and there would not be a basis for the Withdrawal Facility to terminate.
45. When considering the Finance Condition the Panel looked to three primary issues:
 - a. whether Burns Philp had been sufficiently careful in arranging the Facilities for its bid to ensure that if reasonable preconditions were met, Burns Philp would be able to meet its obligations under the bid and

¹⁰ When referring to the Facilities being settled and documented, the Panel is referring to

- a. the settling of the preconditions and events of default to each of the Facilities;
- b. the settling of the terms and conditions of drawdown, such as referred to in paragraphs (a) to(j) of Part 1 of Annexure E referring to the conditions to the TLA Senior Funding Agreement, and paragraphs (a) and (b) of Part 2 of Annexure E referring to availability of the Term Loan B;
- c. drafting of the final documents of each of the loans making up the Facilities and referred to in Annexure E;
- d. signing and execution of each of those documents.

Takeovers Panel

Reasons for Decision – Goodman Fielder 01

Goodman Fielder shareholders would be paid i.e. Burns Philp had not been reckless in terms of its ability to pay for the shares in announcing its bid;

- b. whether the Finance Condition allowed Burns Philp any material discretion in whether or not the Finance Condition (and thence the bid itself) would proceed; and
 - c. whether Goodman Fielder shareholders would receive an offer whose terms were settled and disclosed in such reasonable detail and certainty that Goodman Fielder shareholders could make an informed and reasonable decision on the merits of the bid (including the likelihood of the Facilities being delivered and therefore the bid proceeding).
46. The Panel considered that Burns Philp appeared to have properly looked to its responsibilities for meeting its obligations should its bid succeed. The Panel did not consider, subject to Burns Philp providing the proposed undertakings, that Burns Philp's bid offended the principles relating to funding certainty and disclosure in takeover bids. Having said that, the Panel considers it would have been better practice for the terms of the Term Loan B, the Subordinated Bridge Loan and the Capital Notes Bridge Loan to have been settled prior to Burns Philp giving its bidder's statement to ASIC and Goodman Fielder.
47. The Panel decided that the proposed undertakings, including a variation to the Finance Condition which the Panel requested (see paragraph 61 below), sufficiently removed any discretion which Burns Philp might have to prevent the preconditions to the Facilities being met.
48. The Panel noted the undertaking given by Burns Philp at section 9.8 of the bidder's statement that it would use its best endeavours to ensure the preconditions to the Facilities were met. The presence of this undertaking implies that there remained steps or elements of the Facilities which were capable of being affected by Burns Philp and its actions. However, the Panel considered that the undertaking in section 9.8 is of material value and reassurance to Goodman Fielder shareholders. See paragraph 91 below for a discussion of the section 629 issues in these proceedings.
49. When Burns Philp's undertaking in section 9.8 of the bidder's statement is taken with the Withdrawal Facility offered by Burns Philp, which lasts until 10 days after the Facilities are finally settled and documented and a supplementary bidder's statement containing further information on the Facilities is despatched to Goodman Fielder shareholders, the Panel considered that Goodman Fielder shareholders will have sufficient firm information on which to assess the Finance Condition and the prospects of the Burns Philp bid proceeding.

Takeovers Panel

Reasons for Decision – Goodman Fielder 01

Identification of Financing Conditions

50. Goodman Fielder asserted that the preconditions and events of default affecting the financing of the bid are inadequately identified.
51. The Panel considered that the bidder's statement does adequately identify the preconditions and events of default to the Facilities currently known to Burns Philp. Burns Philp advised the Panel that Annexure E is a verbatim transcription of the terms of the letters of commitment to the Term Loan A and that Part 1 of Annexure E sets out all of the preconditions and events of default affecting the Term A Facility. The Panel considered that when this information is combined with the Withdrawal Facility, and the other disclosures by Burns Philp as to the procedural issues to be settled before the Facilities are fully settled and documented, Goodman Fielder shareholders will have an adequate identification of the risks currently facing the Facilities.
52. The Panel considered that full identification of each term of the Facilities, which would require annexing the final documentation for the Facilities to the bidder's statement, is not feasible, nor useful for the vast majority of Goodman Fielder shareholders.
53. The Panel advised parties that it assumes that disclosure of the preconditions and events of default of all of the financing facilities described in Parts 2 and 3 of Annexure E will be material to the decision of Goodman Fielder shareholders whether or not to accept the Burns Philp. Therefore, those issues will be the subject of a supplementary bidder's statement or statements as soon as Burns Philp knows the terms, irrespective of these proceedings.

Goodman Fielder Counter Proposal

54. Goodman Fielder submitted that the withdrawal right proposed by the Panel should remain until all of the preconditions and events of default affecting the financing of the bid as set out in Annexure E (**Lenders' Conditions**) have been satisfied or waived, with the exception of paragraphs (c)(1), (e), (f), (j) and (k) of Part 1 of Annexure E, or the date for publication of the notice required by section 630(1) (**Excepted Conditions**). This implies a view that it is unusual, objectionable, or both for the financing of a cash bid to be subject to some or all of these conditions.
55. The Panel does not consider that Goodman Fielder's proposal is reasonably required to protect the interests of the Goodman Fielder shareholders or to ensure that the market for control of Goodman Fielder shares takes place in an efficient competitive and informed market. Its objective was to have the Withdrawal Facility operate until the Facilities were settled and documented (and a short period after) but not until those terms had been performed.

Takeovers Panel

Reasons for Decision – Goodman Fielder 01

Withdrawal Rights

56. The Panel considered that the concept of withdrawal rights is not new or unusual in Australia. It noted the condition precedent to the formation of takeover contracts set out in condition 9.6(a) of the Burns Philp bidder's statement. ASIC has also used the concept of withdrawal rights in some of its decisions concerning modifications and exemptions to the takeovers provisions. In addition, there is a statutory right of withdrawal set out in section 650E of the Act, and the Panel has previously required shareholders to have withdrawal rights in some other Panel decisions (albeit not in the same context). The Panel also noted the material withdrawal rights which are required in relation to tender offers in the United States.
57. The Panel considers that the Withdrawal Facility is a sensible resolution of the issues before it. However, it also considers that withdrawal rights are less desirable than bidders settling and documenting the terms, preconditions and events of default for any financing arrangements, and executing those financing arrangements, prior to making their bid. The Panel would not wish to encourage the use of withdrawal rights as a substitute for such timely preparation and finalisation. The added complexity that withdrawal rights introduce is reason enough not to encourage them.

No Reliance Undertaking

58. At one stage of the Panel's consideration of the application an undertaking by Burns Philp was discussed to the effect that Burns Philp would not rely on the condition in clause 9.6(q) of the bidder's statement to avoid takeover contracts as a result of the occurrence of any matter which was within the sole control of Burns Philp (the **No Reliance Undertaking**). The Panel decided, against Goodman Fielder's submissions, not to accept that undertaking.
59. The Panel considered that such an undertaking could lead the preconditions to the Facilities and the defeating conditions of the bid to be materially mismatched. In light of clause 9.4(c)(12) of the bidder's statement¹¹ this could clearly lead to a situation in which Burns Philp had purchased unconditionally shares for which it did not have funds to pay. The Panel considered that this would be:
- a. a materially undesirable outcome;
 - b. materially more disadvantageous to the Goodman Fielder shareholders who had sold those shares to Burns Philp than if the bid lapsed because of the non-satisfaction of a defeating condition

¹¹ Under Clause 9.4(c)(12) of the bidder's statement, Goodman Fielder shareholders who accept the bid agree, irrevocably, to allow Burns Philp to transfer their shares to its ownership, regardless of whether or not Burns Philp has, at that time, paid the consideration due for the shares under the offer.

Takeovers Panel

Reasons for Decision – Goodman Fielder 01

- c. more disruptive to the market for control of shares in Goodman Fielder than the failure of Burns Philp's bid because a defeating condition was not satisfied;
 - d. less advantageous to Goodman Fielder shareholders than the bid failing by the triggering of a defeating condition, despite Burns Philp's best endeavours;
 - e. unfairly prejudicial to Burns Philp, and to Burns, Philp & Company Ltd. and its shareholders, if the Panel had required an undertaking which could result in the situation mentioned above, in circumstances where Burns Philp's best endeavours would have been insufficient to prevent that situation.
60. Therefore, given Burns Philp's undertaking in section 9.8 of its bidder's statement, the adverse consequences of the Non-Reliance Undertaking, and the limited additional benefits that it might give the Goodman Fielder shareholders, the Panel did not require Burns Philp to give such an undertaking.

Terms of 9.6(q) – Availability of Facilities

61. In order to give effect to Burns Philp's offer to waive the Burns Philp MAC and the Markets MAC, the Panel advised Burns Philp that it considered that Burns Philp should also vary the terms of condition 9.6(q). The variation which the Panel suggested would make the defeating condition operate only if:
- (1) a precondition to the availability of the Facilities is not satisfied **and** the underwriters to the Facilities have not waived the relevant precondition;
or
 - (2) an event of default, or potential default occurs **and** the underwriters to the Facilities have not agreed to forgive that event, or potential event of default.
62. Burns Philp undertook to vary the terms of condition 9.6(q).

ACCOUNTING CONDITIONS

63. Goodman Fielder asserted that the Accounting Conditions are fundamentally at odds with the scheme of takeovers regulation in Australia. The Panel does not accept this.
64. The Accounting Conditions do appear to cause greater risk, to Goodman Fielder shareholders considering whether or not to accept the bid, that a defeating condition of the bid will be triggered, and therefore the bid will not succeed. Future bidders will no doubt weigh the disincentive to target shareholders

Takeovers Panel

Reasons for Decision – Goodman Fielder 01

accepting their bid that such conditions will cause, against the assurance they perceive the condition will bring to them.

65. However, the Panel considered that the conditions do not appear to introduce materially more uncertainty than other defeating conditions whose status may not be known until late in the bid period.
66. The Panel does not consider it unreasonable for a bidder to seek information from the target which is relevant to the price being offered for the target shares or the objectives of the bid. The Panel does not consider it unreasonable for a bidder to make its bid conditional on receiving that information.
67. However, in saying this, the Panel has not reached any view that a target is placed under any additional obligation, in general or in particular circumstances, to disclose any or particular information merely because a bidder has chosen to make its bid subject to such a condition.
68. The Panel considers that there remains a reasonable prospect of Burns Philp acquiring sufficient information to satisfy the concerns underlying the Accounting Conditions in ways other than strictly in accordance with the wording of the Accounting Conditions. This is despite the public statements made by the Goodman Fielder board thus far. Goodman Fielder also advised the Panel in its submissions that its directors would not approve the giving of the confirmations, or respond to the conditions in any other way.
69. If Burns Philp did acquire such sufficient and reliable information, and did not then proceed to waive the Accounting Conditions the Panel considers that Goodman Fielder would be entitled to make an application to the Panel.
70. The Panel's decision in this matter should not be taken as encouragement by the Panel for the routine use of conditions similar to the Burns Philp Accounting Conditions.

BURNS PHILP MATERIAL ADVERSE CHANGE CONDITION

71. The Burns Philp MAC was stated to allow Burns Philp not to proceed with its bid if there is change which might have a material adverse effect on the business, assets, operations financial condition or prospects of Burns, Philp & Company Ltd. and its subsidiaries. The defeating condition is set out at 9.6(k) of the bidder's statement. It is essentially replicated in the preconditions to the Facilities at Annexure E. Part 1, (c)(2).
72. The Panel considered that the condition as drafted was excessively uncertain and the risks associated with its triggering were not adequately disclosed or discussed. The Panel was concerned that this uncertainty and lack of specific disclosure concerning matters which might trigger the condition left a material risk that the condition would contravene section 629.

Takeovers Panel

Reasons for Decision – Goodman Fielder 01

73. The Panel advised Burns Philp that waiving the condition would resolve the Panel's concerns. Together with the amendment to the terms of the Finance Condition, waiving the condition would place determination of whether the bid is defeated because a condition had been met, in the hands of Burns Philp's financiers rather than Burns Philp.
74. The relevant preconditions in the Facilities are drafted for the benefit of the financiers and it is the financiers who are entitled to terminate the Facilities rather than Burns Philp. This is materially different to the events triggering a condition that was for Burns Philp's benefit and subject to Burns Philp's right to waive.
75. Burns Philp offered early in the discussions to waive the condition, included that in its final undertaking, and has subsequently done so. In doing so Burns Philp noted that it was not admitting that the condition was unacceptable or contravened the Act.

ADVERSE CHANGE IN FINANCIAL MARKETS

76. The Panel considered that the Markets MAC (set out in 9.6(l) of the bidder's statement) suffered many of the faults of the Burns Philp MAC i.e. its was drafted very broadly and non-specifically, it was subject to uncertainty as to what would trigger the condition. In addition, there was no materiality test applied to this condition, and there was inadequate disclosure of the risk factors which might cause it to be triggered, such that Goodman Fielder shareholders would find it difficult to assess the likelihood of the bid proceeding and the merits of the bid.
77. The Panel advised Burns Philp that if Burns Philp undertook to the Panel that it would waive the condition, and announced its intention to do so, the Panel would not consider the condition a reason to commence proceedings.
78. Similarly to the Burns Philp MAC, waiving the condition would place determination of whether the bid should fail because a condition had been met in the hands of Burns Philp's financiers rather than Burns Philp. In addition, the precondition to the Facilities is subject to a materiality threshold which the original defeating condition was not, although Burns Philp advised that the difference had been unintentional and the Markets MAC defeating condition should also have been subject to a materiality test.
79. Burns Philp offered early in the discussions to waive the condition, included that in its final undertaking, and has subsequently done so. In doing so Burns Philp noted that it was not admitting that the condition was unacceptable or contravened the Act.

Takeovers Panel

Reasons for Decision – Goodman Fielder 01

DISCLOSURE OF RISK FACTORS RELEVANT TO CONDITIONS

80. Goodman Fielder asserted that the Panel's proposed decision should be amended to require the disclosure of risk factors relevant to an assessment whether the Burns Philp MAC and Markets MAC conditions (set out in paragraphs (c)(2) and (c)(3) of Part 1 of Annexure E) would be satisfied. In its application, Goodman Fielder also referred to the extensive disclosures of risk factors made in a registration statement lodged by Burns Philp with the Securities and Exchanges Commission of the United States of America dated 3 December 2002 (the *Registration Statement*) in relation to an offering of debentures.
81. The Panel does not consider that disclosure of the type set out in the Registration Statement is appropriate for the risk factors associated with the risk of Burns Philp's Facilities not being available under Burns Philp's cash bid due to non-fulfilment of a precondition or event of default.
82. This is largely because of the short time for which the preconditions and events of default will operate, compared to the maturity of the debt securities being offered under the Registration Statement. In addition, a number of the defeating conditions of the bid restricting Burns Philp, and Burns, Philp & Company's, ability to alter the nature of their businesses, and the undertaking in section 9.8 of the bid, reduce the potential material effects on the operations of Burns, Philp & Company's businesses in the period for satisfaction of the preconditions and events of default to the Finance Condition.
83. The Panel considers that the statement by Burns Philp in the last paragraph of 6.5(c) of the bidder's statement is useful and valuable information for Goodman Fielder shareholders in assessing the risk of failure of Burns Philp's funding for its bid under the Facilities¹². However, the Panel does not consider that it sufficiently assists Goodman Fielder shareholders in assessing the risk of the Facilities not being available to Burns Philp to fund its bid.
84. Burns Philp made representations to the Panel that it was not likely that the Burns Philp MAC condition would be triggered during the offer period given the nature of its business, the products sold, its customer base and the geographic spread of its operations. The Panel invited Burns Philp, if it asserted in its submissions, that this was a basis for a low risk of failure of the Finance Condition in its bid, to give undertakings to make such a statement to Goodman Fielder shareholders to assist their consideration of the risk of the Facilities not being available to Burns Philp. Burns Philp accepted and included an undertaking to this effect in the undertakings given.

¹² That statement read: "[Burns, Philp and Company] and [Burns Philp] are not aware of any reason why those conditions precedent will not be satisfied in time to allow the proceeds to be available to lend the Offer Amount to [Burns Philp] to pay the consideration under the Offer as and when required under the terms of the Offer."

Takeovers Panel

Reasons for Decision – Goodman Fielder 01

DISCLOSURE CONCERNING THE 90% MINIMUM ACCEPTANCE CONDITION

85. Goodman Fielder argued that Burns Philp's statements at section 5.4 in the "Intentions" section of its bidder's statement were misleading because they failed to disclose that Burns Philp could not declare the offer free from the 90% minimum acceptance condition without the consent of its financiers, and that such a declaration would contravene the finance condition in 9.6(q) of the Bidder's Statement (although Goodman Fielder acknowledged that this matter was disclosed elsewhere in the Bidder's Statement, see Annexure E). Further, Goodman Fielder asserted, Burns Philp failed to disclose that if it declared the offer free from the 90% minimum acceptance condition, it would have no basis upon which it can finance the offers.
86. The Panel considered that the statement in relation to this issue which Burns Philp proposed to include in the Chairman's letter accompanying the bidder's statement was likely to adequately address the concern raised by Goodman Fielder. The Panel accepted ASIC's submissions that a Chairman's letter is not a substitute for proper disclosure, and that Burns Philp should, as soon as practicable, advise Goodman Fielder shareholders of any changes to its bid, or further disclosure, in a supplementary bidder's statement.
87. Goodman Fielder did not agree that the disclosure proposed was adequate and the Panel noted that if Goodman Fielder considers this is an issue which Goodman Fielder shareholders should consider, it is open to Goodman Fielder to raise the issue in its target statement..
88. Burns Philp in the Chairman's letter states:
- "Burns Philp has not yet decided to waive that condition {the 90% Minimum Acceptance Condition} and has not approached its financiers for the required consent, but, should it do so, you will be provided with a Supplementary Bidder's Statement explaining any resulting changes to the Offer in detail."*
89. Burns Philp advised the Panel in submissions that it would make any necessary disclosure (for example, any changes to its intentions) in a supplementary bidder's statement if and when it decided to waive the 90% Minimum Acceptance Condition.
90. Burns Philp provided the undertakings in the preliminaries to commencement of the proceedings and made the disclosure in the Chairman's letter and annexed a copy of the Chairman's letter to the next supplementary bidder's statement following the Chairman's letter (dated 3 January 2003).

SECTION 629

91. Goodman Fielder asserted that the Finance Condition breaches the provisions of section 629 of the Act. Burns Philp disagreed with this assertion. While not

Takeovers Panel

Reasons for Decision – Goodman Fielder 01

reaching any definite conclusion on this issue, the Panel accepted Goodman Fielder's proposition that an argument may be open that section 629 may act upon any element of a condition in a takeover bid which is subject to action by the bidder, for example, a financing condition that requires the bidder to sign and execute a pending financing agreement.

92. If this is an issue for Burns Philp in this bid, it is also an issue generically in takeover bids.
93. The Panel considered that many, if not most, takeover bids over recent years have been, at one time or another, subject to elements under the sole control of the bidder. The elements of the Finance Condition which will remain under the sole control of Burns Philp after the Withdrawal Facility lapses will not be materially more significant than the Australian market is quite used to. For example, a financing condition that requires the bidder to sign and execute a pending financing agreement by the bidder. Alternatively, a number of bids are subject to a defeating condition requiring approval, or non disapproval, under competition or foreign investment legislation, which may involve complex negotiation and input from a bidder.
94. The effect of this interaction with Burns Philp's bid would be to reduce the reliance that Burns Philp might be able to place on some aspects of its financing conditions. That is a risk that Burns Philp, in the structuring of its bid, and the terms of its conditions, has chosen to accept.
95. The Panel considers that the undertaking in section 9.8 of the bidder's statement is adequate, from a policy perspective, to ensure that Goodman Fielder shareholders will not be disadvantaged by any elements of the conditions to the bid which might be argued to be within Burns Philp's control.
96. In addition, triggering of the condition in 9.6(q) (as amended, see paragraph 61 above) by any precondition or event of default, will, even if the precondition was caused by the actions of Burns Philp, finally depend on the decision of the financiers whether or not to waive that precondition or event of default. Therefore, following the reasoning in *Aberfoyle*¹³, there is reasonable doubt as to whether the condition would contravene section 629.

ASIC RELIEF

97. The Panel consulted with ASIC through its consideration of the matter on the relief that Burns Philp might require from ASIC if it was to give the undertakings. ASIC advised the Panel that it had considered the relief required to facilitate the variations to Burns Philp's announced bid under sections 650D and 654A of the Act to enable Burns Philp to vary its bid as proposed. ASIC

¹³ *Aberfoyle Ltd v Western Metals Ltd* [1988] 744 FCA

Takeovers Panel

Reasons for Decision – Goodman Fielder 01

indicated that, on the information currently before it, it was prepared to grant that relief required to facilitate the resolution of this application.

98. The Panel also advised parties that it considered that a modification of section 653B(1)(a)(ii) is desirable to allow Goodman Fielder shareholders who exercise their right under the Withdrawal Facility to reaccept once the Finance Condition is settled or satisfied.
99. On 10 January 2003, ASIC granted the necessary relief to Burns Philp.

DECISION

100. On 9 January 2003, having initially attempted to resolve the matter by undertaking and agreement, and then conducting proceedings and considering parties' submissions, the Panel wrote to the parties. The Panel said that it considered it would not be in the public interest to make a declaration of unacceptable circumstances if Burns Philp gave undertakings to the Panel to the effect below (subject to the necessary modifications or exemptions from ASIC). The basis for the Panel's decision was set out in the letter and is consistent with these reasons. The Panel invited Burns Philp to give undertakings to the Panel that it would:
 - a. free its offer from conditions 9.6(k) and (l) (the Burns Philp Material Adverse Change Condition and Market Material Adverse Change Condition);
 - b. vary its offer to give Goodman Fielder shareholders who accept the Burns Philp bid a withdrawal right (**Withdrawal Facility**) which extends from the commencement of the bid until 10 (ten) calendar days from the date of Burns Philp sending a supplementary bidder's statement to Goodman Fielder shareholders setting out the terms of the settled and signed finance facilities (**Facilities**) for Burns Philp's bid, or the waiver of the financing condition set out in 9.6(q) of the bid (**Finance Condition**);
 - c. vary the Finance Condition to exclude from the operation of the condition preconditions and events of default to the Facilities which the underwriters to the Facilities have agreed to waive;
 - d. as soon as practicable after the resolution of these proceedings, and receiving any necessary relief from ASIC, send a supplementary bidder's statement (**Variation Supplementary Bidder's Statement**) to each Goodman Fielder shareholder, along with the notice of variation to its offer:
 - i. giving a plain English description of the Withdrawal Facility;
 - ii. advising that a form (**Withdrawal Form**) to exercise the Withdrawal Facility will be sent with a supplementary bidder's statement

Takeovers Panel

Reasons for Decision – Goodman Fielder 01

announcing the date for closing of the Withdrawal Facility (**Cut-Off Supplementary Bidder's Statement**);

- iii. offering Goodman Fielder shareholders phone fax and email addresses by which they can request Burns Philp to send them a Withdrawal Form before the Cut-Off Supplementary Bidder's Statement;
 - iv. advising that the Cut-Off Supplementary Bidder's Statement may not be sent, and the Withdrawal Facility will lapse at the time, if Burns Philp declares the bid free from the Finance Condition before the Cut-Off Supplementary Bidder's Statement would be due to be sent;
- e. after settling and signing the documentation for all of the Facilities listed in Annexure E to the Burns Philp bidder's statement, send a copy of the Cut-Off Supplementary Bidder's Statement to each Goodman Fielder shareholder:
- i. setting out (in similar style and detail to the description of the terms of Term Loan A in Part 1 of Annexure E of the Burns Philp bidder's statement) the events of default and preconditions to each of the Facilities (the Panel would require a pre-condition which was common to a number of different Facilities to be identified in relation to each Facility, but not necessarily repeated in full in relation to each Facility);
 - ii. clearly setting out the preconditions to drawdown of the Facilities, and to the Finance Condition, which remain to be satisfied at the date of the Cut-Off Supplementary Bidder's Statement;
 - iii. advising of the status of those events of default and preconditions (to the best, current knowledge of Burns Philp);
 - iv. containing a Withdrawal Form;
 - v. explaining the Withdrawal Facility i.e. that any Goodman Fielder shareholder who had accepted the Burns Philp bid may withdraw that acceptance by giving written notice on the Withdrawal Form to Burns Philp no later than 10 (ten) calendar days after the date of the Withdrawal Form Supplementary Bidder's Statement (**Cut-Off Date**);
 - vi. explaining that acceptances made after the Cut-Off Date, and acceptances made prior to that date and not withdrawn before the Cut-Off Date, will not be able to be withdrawn under the Withdrawal Facility;

Takeovers Panel

Reasons for Decision – Goodman Fielder 01

- vii. explaining that the Withdrawal Facility will, however, lapse immediately if the bid is declared free of the Finance Condition;
 - viii. explaining that (subject to relief from ASIC) section 653B of the Act has been modified to allow a person who has previously exercised their right under the Withdrawal Facility to accept the bid again after the closure of the Withdrawal Facility for the same shares;
 - f. include in the bidder's statement accompanying the notice of variation a statement assisting Goodman Fielder shareholders to consider the general likelihood of the events of default and preconditions to the Burns Philp Facilities not being met;
 - g. use its best endeavours to gain the appropriate relief from ASIC.
101. Burns Philp gave undertakings on 9 January 2003 that are consistent with the Panel's request and these reasons and the Panel determined to decline the application.
102. The Panel wishes to thank all the parties involved for making very significant efforts to resolve this application so expeditiously.
103. The Panel consented to the parties being represented by their commercial solicitors in the matter.

Ilana Atlas
President of the Sitting Panel
Decision dated 10 January 2003
Reasons published 21 January 2003

Takeovers Panel

Reasons for Decision – Goodman Fielder 01

Annexure 1 – Burns Philp Final Undertaking

Undertaking Provided by Burns Philp

Following is the text of the undertaking accepted by the Takeovers Panel.

Preamble

The undertaking set out below relates to the off-market takeover bid by BPC1 Pty Limited ABN 45 101 665 918 (**Burns Philp**) for all the issued ordinary shares in Goodman Fielder Ltd ABN 44 000 003 958 (**Goodman Fielder**) in respect of which a bidder's statement, containing an offer (**Offer**), was lodged with the Australian Securities and Investments Commission (**ASIC**) on 19 December 2002 (**Bidder's Statement**).

Undertaking

Pursuant to subsection 201A(1) of the *Australian Securities and Investments Commission Act 2001* (Cth), Burns Philp undertakes to the Takeovers Panel that it will:

- a. as soon as practical, free its Offer from conditions in clauses 9.6(k) and (l) (the Burns Philp Material Adverse Change Condition and Market Adverse Change Condition);
- b. as soon as practical after obtaining any necessary relief from ASIC, vary its Offer to give Goodman Fielder shareholders who accept the Offer a withdrawal right (**Withdrawal Facility**) which extends from the date of the Offer until the time (**Cut-Off Time**) which is the earlier of:
 - (1) 7.00 p.m. (Sydney time) on the date which is 10 (ten) calendar days from the date of Burns Philp sending a supplementary bidder's statement to Goodman Fielder shareholders setting out the terms of the settled and signed finance facilities (**Facilities**) for Burns Philp's bid; and
 - (2) the time (if any) when Burns Philp declares its Offer free of the financing condition set out in clause 9.6(q) of the Offer (**Finance Condition**);
- c. as soon as practical after obtaining any necessary relief from ASIC, vary the Finance Condition to exclude from the operation of the condition preconditions and events of default to the Facilities which the underwriters to the Facilities have agreed to waive;
- d. as soon as practicable after the resolution of these proceedings, and receiving any necessary relief from ASIC, send a supplementary bidder's statement (**Variation Supplementary Bidder's Statement**) to each

Takeovers Panel

Reasons for Decision – Goodman Fielder 01

Goodman Fielder shareholder, along with the notice of variation to its Offer:

- i. giving a plain English description of the Withdrawal Facility;
 - ii. advising that a form (**Withdrawal Form**) to exercise the Withdrawal Facility will be sent with a supplementary bidder's statement announcing the date for closing of the Withdrawal Facility (**Cut-Off Supplementary Bidder's Statement**);
 - iii. offering Goodman Fielder shareholders phone, fax and email addresses to which they can send a request to Burns Philp to be sent a Withdrawal Form before the Cut-Off Supplementary Bidder's Statement is issued;
 - iv. advising that (1) the Cut-Off Supplementary Bidder's Statement may not be issued, and the Withdrawal Facility will lapse, when and, if Burns Philp declares the Offer free from the Finance Condition before the Cut-Off Supplementary Bidder's Statement is issued, and (2) the Withdrawal Facility will otherwise lapse at the Cut-Off Time;
- e. after the settling and the signing of the documentation for all of the Facilities listed in Annexure E to the Burns Philp bidder's statement, send a copy of the Cut-Off Supplementary Bidder's Statement to each Goodman Fielder shareholder:
- i. setting out (in similar style and detail to the description of the terms of Term Loan A in Part 1 of Annexure E of the Burns Philp bidder's statement) the events of default and preconditions to each of the Facilities (any pre-condition which is common to a number of different Facilities will be identified in relation to each Facility, but not necessarily repeated in full in relation to each Facility);
 - ii. clearly setting out the preconditions to drawdown of the Facilities, and to the Finance Condition, which remain to be satisfied at the date of the Cut-Off Supplementary Bidder's Statement;
 - iii. advising of the status of those events of default and preconditions (to the best, current knowledge of Burns Philp);
 - iv. containing a Withdrawal Form;
 - v. explaining the Withdrawal Facility i.e. that any Goodman Fielder shareholder who had accepted the Offer may withdraw that acceptance by giving written notice on the Withdrawal Form to Burns Philp no later than the Cut-Off Time;

Takeovers Panel

Reasons for Decision – Goodman Fielder 01

- vi. explaining that acceptances made after the Cut-Off Time, and acceptances made prior to the Cut-Off Time and not withdrawn before the Cut-Off Time, will not be able to be withdrawn under the Withdrawal Facility;
 - vii. explaining that the Withdrawal Facility will, however, lapse immediately if the Offer is declared free of the Finance Condition;
 - viii. explaining that (subject to relief from ASIC) section 653B of the Corporations Act has been modified to allow a person who has previously exercised their right under the Withdrawal Facility to accept the Offer again after the closure of the Withdrawal Facility for the same shares;
- f. include in the Variation Supplementary Bidder's Statement a statement indicating that:
- i. in relation to any conditions to the Facilities which depend on an act of Burns Philp – Burns Philp's intention is to comply with the preconditions;
 - ii. in relation to any conditions to the Facilities which relate to the business, assets, operations, financial condition or prospects of Burns, Philp & Company Limited (and its subsidiaries) – whether, in Burns Philp's view, it is likely that any such condition will be triggered during the offer period given the nature of its business, the products sold, its customer base and the geographic spread of its operations; and
 - iii. in relation to any conditions to the Facilities which relate to a material adverse change in the financial markets – without engaging in speculation (such as in relation to matters like a possible war in Iraq, the status of the US economy and any other matters), whether Burns Philp has any reason to expect that a material adverse change will occur; and
- g. use its best endeavours to gain the appropriate relief from ASIC.

Dated: 9 January 2003

Signed for and on behalf of BPC1 Pty Limited

T Degnan, Director

Takeovers Panel

Reasons for Decision – Goodman Fielder 01

Annexure 2 – Text of Relevant Conditions from Burns Philp' Bidder's Statement

Accounting conditions

9.6(g) Earnings Confirmation

The Target's Statement containing a statement (**Earnings Confirmation**), expressed to be made with the approval of the Directors of Goodman Fielder, which confirms, after due enquiry, each of the matters set out below, and the Earnings Confirmation not being materially varied, revoked or qualified (whether in any supplementary target's statement of otherwise) prior to the close of the Offer:

- (1) For each of the financial years ended 30 June 2000, 30 June 2001 and 30 June 2002:
 - (A) Trading EBIT:
 - (i) does not include any Non Recurring revenue items in excess of \$10,000,000 in aggregate in any financial year; and
 - (ii) does not exclude any Recurring expense items in excess of \$10,000,000 in aggregate in any financial year;
 - (B) rationalisation and restructuring costs do not include any Recurring expense items in excess of \$10,000,000 in aggregate in any financial year; and
 - (C) no amount in respect of any provision created through expensing of any rationalisation and restructuring costs has been applied towards satisfaction of any Recurring expenses in excess of \$10,000,000 in aggregate in any financial year.
- (2) In respect of the financial year ending 30 June 2003:
 - (A) the forecast consolidated net operating profit after tax of the Goodman Fielder Group of between \$114,000,000 and \$128,000,000, as announced at the 2002 AGM of Goodman Fielder, does not include any Significant Items; and
 - (B) the Directors, based on reasonable assumptions, do not expect the Goodman Fielder Group to incur aggregate rationalisation and restructuring costs in excess of the amount of provision for rationalisation and restructuring included in the \$82.5 million "other (primarily rationalisation and restructuring)" provision stated in Note 16 in the 2002 Annual Accounts.

Takeovers Panel

Reasons for Decision – Goodman Fielder 01

9.6 (h) Liabilities Confirmation

The Target's Statement containing a statement (Liabilities Confirmation), expressed to be made with the approval of the Directors, which confirms, after due enquiry, each of the matters set out below (which in the case of clause 9.6(h)(3) shall include certification by a qualified actuary), and the Liabilities Confirmation not being materially varied, revoked or qualified (whether in any supplementary target's statement or otherwise) prior to the close of the Offer:

- (1) The consolidated Working Capital of the Goodman Fielder Group as at 30 June 2002, as disclosed in the 2002 Annual Accounts:
 - (i) was reflective of the amounts due to trade creditors in the ordinary course of ordinary business as at 30 June 2002, and no unusual or extended payment terms, or other arrangements in relation to inventory, had been granted or taken as at 30 June 2002 which were materially different from those applying at the end of each of the 11 calendar months immediately preceding June 2002; and
 - (ii) was reflective of the amount due from debtors in the ordinary course of ordinary business up to 30 June 2002, and no unusual or accelerated payment terms had been agreed with debtors as at 30 June 2002 which were materially different from those applying at the end of each of the 11 calendar months immediately preceding June 2002.
- (2) As at the date of the Liabilities Confirmation:
 - (A) no Off Balance Sheet Debt exists the nature, size and existence of which has not been disclosed in the 2002 Annual Accounts or in announcements by Goodman Fielder to ASX; and
 - (B) to the best of the knowledge and belief of the Directors, there are no contingent liabilities, tax liabilities arising from any investigation by a taxing authority, environmental liabilities, asset sale warranty claims or indemnity claims in excess of \$20,000,000 in aggregate the nature, size and existence of which has not been disclosed in the 2002 Annual Accounts or in announcements to ASX.
- (3) Based upon a valuation of the Goodman Fielder Superannuation Fund undertaken not earlier than the Announcement Date and performed on the basis of reasonable assumptions, the fund was not in deficit by an amount in excess of \$20,000,000.

Takeovers Panel

Reasons for Decision – Goodman Fielder 01

9.6 (j) **Material adverse change of Goodman Fielder**

Before the end of the Offer Period, there not having occurred, been announced or becoming known to Bidder (whether or not becoming public) any event, change or condition that has had, or could reasonably be expected to have, a material adverse effect on the business, financial or trading position, assets or liabilities, profitability or prospects of Goodman Fielder or any of its subsidiaries, taken as a whole, since 30 June 2002 (except for such events, changes or conditions disclosed in public filings by Goodman Fielder or any of its subsidiaries prior to 12 December 2002 and any event, change or condition that may arise as a consequence of the announcement or consummation of the Offer or the financing of the Offer), including where it becomes known to Bidder that information publicly filed by Goodman Fielder or any of its subsidiaries is, or is likely to be, incomplete, incorrect or untrue or misleading.

(As at the Announcement Date, Bidder was not aware of any event, change or condition that may cause a breach of this condition).

9.6(k) **Material adverse change of Burns Philip**

Between the Announcement Date and the end of the Offer Period, there not having occurred, been announced or made known to Bidder, any **event**, change or condition that has had, or could reasonably be expected to have, a material adverse effect on the business, assets, operations, financial condition or prospects of Burns Philip and its subsidiaries, taken as a whole (excluding any event, change or condition that may arise as a consequence of the announcement or consummation of the Offer or the financing for the Offer, or that is within the sole control of, or is a direct result of action by, Burns Philip or any of its subsidiaries).

9.6 (l) **Adverse change in financial markets**

Between the Announcement Date and the end of the Offer Period, there being no disruption or adverse change in financial, banking or capital markets, or in the market for new issuances of leveraged loans, in each case that could reasonably be expected to adversely affect the syndication of the Facilities.