



**In the matter of Goodman Fielder Limited 03  
[2003] ATP 14**

**Catchwords:**

*Content of bidder's statement – defeating conditions – disclosure of information regarding financing of takeover bid – failure to fulfill financing conditions within two months – disclosure of bidder's intentions regarding continuation of business*

*Corporations Act 2001 (Cth), sections 631(1) and 636(1)*

**These are the Panel's reasons for declining to commence proceedings in response to an application by Goodman Fielder Ltd. in relation to the takeover bid by BPC1 Pty Ltd for Goodman Fielder.**

*Summary*

1. On 19 February, the Takeovers Panel decided to decline to commence proceedings in relation to an application in relation to the takeover bid by BPC1 Pty Ltd and Burns Philp Co Ltd. (**Burns Philp**) as it relates to the affairs of Goodman Fielder Ltd. The application was made by Goodman Fielder on 19 February 2003.
2. These are the Panel's reasons, as required under Regulation 21(2) of the ASIC Regulations, for not commencing proceedings.
3. The sitting Panel comprises Ilana Atlas (sitting President), Michael Tilley and Marian Micalizzi.

*Background & Application*

4. Goodman Fielder sought a declaration of unacceptable circumstances (under section 657A of the Corporations Act (**Act**)) and orders (under section 657D of the Act) in relation to the takeover bid by Burns Philp.
5. Goodman Fielder sought a declaration that each of the following matters constitute unacceptable circumstances.
  - a. The failure of Burns Philp to make an offer capable of acceptance and on terms which are certain within 2 months after publicly proposing to make a takeover bid for Goodman Fielder.
  - b. The failure of Burns Philp to finalise its financing and in particular to specify the pre-conditions and events of default of its bid financing facilities within 2 months after announcing its bid for Goodman Fielder.
  - c. The contravention by Burns Philp of sections 631(1) and 636(1)(f) of the Act.
  - d. The failure of Burns Philp to keep Goodman Fielder shareholders informed of the status of its bid financing, of the defeating conditions in its offer, and of its present intentions regarding the continuation of the business of Goodman Fielder and any major changes to be made to the business of Goodman Fielder.

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#### *Orders sought*

6. Goodman Fielder sought the following consequential orders under section 657D(2) of the Act.
  - (a) That Burns Philp amend clause 9.6(q) of its Bidder's Statement by excluding:
    - (i) the documentation of Term Loan B, the Term Loan B Facility Agreement becoming effective, and any similar condition or event concerning the Term Loan B as:
      - (A) preconditions of other Facilities which can trigger the defeating condition in that clause; or
      - (B) as events of default in other Facilities which, if they do not occur, can trigger the defeating condition in that clause; and
    - (ii) any pre-condition or event of default not specified to Goodman Fielder shareholders in the Bidder's Statement or a Supplementary Bidder's Statement on the date of this Application.
  - (b) That Burns Philp publish a Supplementary Bidder's Statement within 3 business days after this order is made, specifying:
    - (i) the final list of pre-conditions and events of default that can be relied upon to trigger the "Availability of Facilities" condition in section 9.6(q) of the Bidder's Statement, whether or not the documentation of the facilities has been finalised;
    - (ii) the current status of each element of its bid financing, and the actual or estimated cost of its bid financing;
    - (iii) the current status of each pre-condition and event of default to the Facilities, and in particular whether any event has occurred which may cause a pre-condition to fail or an event of default to occur;
    - (iv) the revised credit ratings of Burns Philp and the Burns Philp Facilities and the impact which the ratings have on funding costs;
    - (v) the current status of the defeating condition in section 9.6(c) and an explanation for that status;
    - (vi) whether it intends to waive or trigger the accounting conditions in sections 9.6(g) and (h); and
    - (vii) Burns Philp's present intentions concerning the divestment of businesses in New Zealand.

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7. Goodman Fielder said that it sought these orders on the basis that Burns Philp would remain bound by its undertaking given to the Panel in the Goodman Fielder 01 matter in all respects.

#### *Process*

8. The Panel members read and considered the application by Goodman Fielder prior to meeting by telephone at 7.30 p.m. on Wednesday 19 February 2003.
9. Burns Philp submitted a letter to the Goodman Fielder 03 Panel during the afternoon of 19 February. The letter set out various aspects of Burns Philp's expected timeline for disclosing aspects of its bid about which Goodman Fielder had complained in this application. Burns Philp advised the Panel that it considered that some of the contents of the letter were highly commercially sensitive and asked that the Panel not provide the letter to Goodman Fielder without consulting Burns Philp, but Burns Philp did acknowledge that it may be impossible for the Panel to consider the letter without at least advising Goodman Fielder of the nature of the contents of the letter.
10. The Panel decided to decline to commence proceedings independently of consideration of the contents of Burns Philp's letter. The Panel considered that the letter did not change the basis for making that decision.

#### *Goodman Fielder Submissions*

11. Goodman Fielder submitted that on 13 December 2002, Burns Philp announced its intention to make a conditional off-market cash takeover bid for all of the issued ordinary shares in Goodman Fielder at \$1.85 per share. As at the date of this application:
  - a. Burns Philp has not settled and signed all of the documentation for the debt facilities for its bid;
  - b. Burns Philp has not published the Cut-Off Supplementary Bidder's Statement referred to in the undertaking given to the Panel by Burns Philp on 9 January 2003;
  - c. Because the documentation has not been settled for all of the financing, Burns Philp has not published the terms and conditions of its offer, specifically those which relate to the terms of the Finance Condition in Burns Philp's bid; and
  - d. the New Zealand Commerce Commission clearance in section 9.6(c) of the Bidder's Statement has not been obtained.
12. As a consequence of these matters, Goodman Fielder submitted:
  - a. the terms and conditions of the Burns Philp bid remain unspecified and uncertain;
  - b. Burns Philp's ability to fund its bid is uncertain; and

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- c. Burns Philp has failed to disclose material information required to be disclosed in the Bidder's Statement pursuant to section 636(1)(f) of the Act concerning the details of its financing.
13. Goodman Fielder submitted that the fact that Burns Philp had not settled the financing, within 2 months after the announcement of the bid contravenes the spirit and the actual requirements of section 631(1) of the Act and is unacceptable.

#### *Discussion*

14. Goodman Fielder described the Burns Philp bid in its application as ephemeral. The Panel considered the amount of resources and effort that Burns Philp had put into progressing its bid so far and considered that "ephemeral" was neither an accurate or appropriate description.
15. The Panel found no basis for Goodman Fielder's assertion that section 631 of the Act required Burns Philp to finalise its financing within any period suggested by Goodman Fielder. The Panel considered that Burns Philp's actions fall within the obligations imposed under section 631 by taking the steps it has so far in giving its offers to Goodman Fielder shareholders (in essentially the terms of the 13 December announcement) and by advising the market of the conditional nature of the offer.
16. Goodman Fielder provided no evidence to the Panel that Burns Philp had done other than progress the financing of its bid. The Panel observed that Burns Philp appears to have informed the market when elements of its financing have been settled and signed.
17. The Panel does not consider that the fact that Burns Philp has not settled the documentation as to all of the financing facilities means that Burns Philp has not made an offer in essentially the terms announced on 13 December 2002.
18. The Panel did not consider that the delay in settling the finance terms was unacceptable given that the bid also remains subject to the withdrawal rights which the Panel required to be given to Goodman Fielder shareholders in the Goodman Fielder 01 proceedings. On that basis, any Goodman Fielder shareholders who choose to accept Burns Philp's offers now are not currently locked into the offer.
19. Similarly, there are many takeover offers which are open for more than two months which remain subject to conditions for the whole of the bid. Some close with the conditions fulfilled, and contracts are formed. Some close with the conditions not fulfilled, and the offers and acceptances fall away. That is an accepted part of takeover practice in Australia.
20. A number of the defeating conditions in Burns Philp's bid remain outstanding, the Finance Condition is one. Other conditions on which Goodman Fielder shareholders are still waiting include the decision of the New Zealand Commerce Commission. Although these other delays are not a defence of the delay in settling Burns Philp's financing facilities, they do indicate that sometimes shareholders will reasonably be required to wait for long periods before knowing the status of conditions in takeover bids.

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21. The delay to date in settling the Burns Philp financing facilities does not currently put the Burns Philp bid outside accepted market practice.
22. The Panel noted that Goodman Fielder shareholders are being advised by Goodman Fielder directors to wait for advice from Goodman Fielder itself on the alternative proposals which it has been advising its shareholders that it is currently negotiating..
23. The Panel recognises that it is appropriate for the Goodman Fielder board to look for alternative opportunities for Goodman Fielder shareholders to compare to the Burns Philp offers. However, the Panel finds it anomalous for the Goodman Fielder board to be unhappy about its shareholders not having a certain offer to accept (or reject) when the Goodman Fielder board itself was advising Goodman Fielder shareholders that it was not in a position to advise Goodman Fielder shareholders of the content of these alternative proposals or information on the probability of an alternative transaction arising.
24. The Panel expects that Burns Philp will ensure that it continues to have made adequate disclosure of material issues relating to its steps to secure the funding for its bid, and any other issues which may be relevant to Goodman Fielder shareholders, such as firm requirements by regulators.

#### *Decision*

25. The Panel declined to commence proceedings. It published its decision on 20 February 2003.

**ILANA ATLAS**

**Sitting President**

**Goodman Fielder 03**

**27 February 2003**