



**In the Matter of Gosford Quarry Holdings Limited 01R
[2008] ATP 13**

Catchwords:

Review application – on market bid – close of bid period – close of trading on ASX – closing single price auction – compulsory acquisition – extension of offer – misleading statement – offer to close at 4.00 pm – announcement of extension incorrect

Corporations Act 2001(Cth) 606 – 624(2) – 657EA

GPG – Gosford Quarry – Jamber Investments Pty Ltd – Bell Potter Securities Limited

INTRODUCTION

1. The review Panel, Peter Mason AM (sitting President), Tom Bathurst QC and Catherine Brenner, declined to conduct proceedings. It considered that it was unlikely to find unacceptable circumstances in the extended on-market offer by GPG remaining open until the market closed. This was so notwithstanding that the announcement of the extension (and the bidder's statement) referred to the offer remaining open until 4.00pm.
2. In these reasons the following definitions apply.

Term	Meaning
Bell Potter	Bell Potter Securities Limited, the broker acting on behalf of GPG
Buduva	Buduva Pty Limited, as trustee for The Baskerville Superannuation Fund, the family superannuation fund of Mr Graeme Cureton (Executive Director of Guinness Peat Group Plc and a Director of GPG and Gosford)
CSPA	Closing Single Price Auction
Cureton Shares	165,000 shares in Gosford held by Buduva
Gosford	Gosford Quarry Holdings Limited
GPG	GPG (No. 6) Pty Limited, a wholly owned subsidiary of Guinness Peat Group Plc
Jamber	Jamber Investments Pty Limited

FACTS

3. GPG made an on-market takeover bid for Gosford, which is listed on ASX (ASX code: GQH) but suspended pending compulsory acquisition proceeding.
4. Jamber owns 585,571 shares in Gosford.

5. Under s635 of the Corporations Act¹ on 1 February 2008 Bell Potter announced to ASX:
- "[Bell Potter] ... announces that during the period commencing on 18 February 2008 and ending 18 March 2008 ('Offer Period') [GPG] will... offer to acquire ... Gosford Quarry Shares.*
- ...
- Bell Potter has been instructed to purchase at the Offer Price every Gosford Quarry Share offered for sale during Trading Days in the period from the date of this announcement until the end of the Offer Period"*
6. On the same day GPG lodged a bidder's statement with ASIC. It said:
- "Unless withdrawn, the Offers will be open during the period that begins at 10.00am (Sydney time) on 18 February 2008 and ends at 4.00 pm (Sydney time):*
- (a) *on 18 March 2008; or*
- (b) *on any date to which the period of this Offer is extended under Section 4 or as required by the Corporations Act."*
7. GPG's holding in Gosford increased to more than 50% on 18 March 2008, resulting in the offer being extended under s624(2) to 1 April 2008. GPG announced the extension on 19 March 2008. It said:
- "... GPG's offer is now automatically extended by 14 days in accordance with section 624(2) of the Corporations Act 2001 (Cth).*
- GPG's offer will now close at 4.00 pm (Sydney time) on 1 April 2008".*
8. At 4.00 pm (Sydney time) on 1 April 2008, GPG had a relevant interest in 51,846,948 ordinary shares in Gosford (89.86%). At 4:10:56 pm (Sydney time) it acquired a further 178,500 shares in Gosford (including the Cureton Shares) during the CSPA function of the market, taking its relevant interests to approximately 90.17%.
9. In on-market trades in the days following 1 April 2008, GPG increased its relevant interests to 90.67%.
10. On 2 April 2008 GPG announced to ASX that compulsory acquisition of the remaining securities in the bid class would proceed.
11. On 29 April 2008 GPG announced on ASX that it had lodged a copy of the formal compulsory acquisition notice with ASIC and will dispatch letters containing the notices to shareholders.

APPLICATION

Initial application

12. On 14 May 2008 Jamber applied for a declaration of unacceptable circumstances and interim and final orders. In essence it sought that compulsory acquisition not proceed. The bases were that the offer should have closed at 4.00pm Sydney time,

¹ References are to the *Corporations Act 2001* (Cth) unless otherwise stated.

when GPG did not have a relevant interest in 90% of Gosford. Therefore, GPG contravened s606 by acquiring shares in Gosford after 4.00 pm and was relying on those “illegally acquired” shares as a basis for compulsory acquisition.

13. The initial Panel decided that s624(2) extended the offer period until 4:12 pm (Sydney time) on 1 April 2008 and the references to 4:00 pm in the announcement of the extension did not change that. Accordingly, GPG had relevant interests in more than 90% of Gosford when the bid period ended. It decided that there were no unacceptable circumstances.

Review application

14. On 27 May 2007, Jamber applied for a review of the initial Panel's decision. The Acting President of the Panel consented to the review under s657EA(2).
15. The parties were invited to make any new submissions in respect of the review, but not repeat submissions to the initial Panel (which the review Panel had).
16. Jamber made 3 additional submissions:
 - (a) the bidder's statement and offer must be read together, particularly given that the announcement of the offer was silent as to time
 - (b) Mr Cureton, who had the conduct of the bid on behalf of GPG and was therefore responsible for statements regarding the offer closing at 4.00pm, should not have accepted in respect of the Cureton Shares after 4.00pm and
 - (c) the circumstances are unacceptable because they contravened section 606, the spirit of chapter 6 and GPG unilaterally extended the offer period in a manner not permitted by the Corporations Act and inconsistently with statement to the market.
17. GPG did not make any additional submissions.
18. The Panel treats applications for review as hearings *de novo*: Guidance Note 2, paragraph 2.24. The review Panel has reconsidered the matter on its merits on the facts as they stand at the time of the review. The review Panel has considered:
 - (a) the initial application, submissions and rebuttals
 - (b) the review application and further submissions and
 - (c) the draft of the reasons for decision of the initial Panel (a copy of which has also been provided to the parties).

DISCUSSION

19. The review Panel considers that the terms of s624(2) govern the extension. Like the initial Panel, it considers that s624(2) required the extension to be open for as long as practicalities allowed on the fourteenth day after GPG reached 50%; that is, until Bell Potter could no longer stand in the market to receive acceptances.
20. Recognising that the review Panel exercises its own judgement, it has read the draft reasons of the initial Panel and agrees with them.

21. The review Panel also considered the additional arguments put forward by Jamber.

The bidder's statement and offer must be read together

22. It is not relevant to consider whether the bidder's statement and announcement of the bid should be read together since, in the review Panel's view, the situation is determined by the operation of s624(2). It agrees with the initial Panel that the announcement of the extension, while it may be misleading, would not change what the law requires.

Mr Cureton's conduct

23. The review Panel did not consider there was any evidence that would lead it to find unacceptable circumstances in Mr Cureton accepting when he did. If, as seems clear, Mr Cureton's acceptance benefited the bidder, it seems unlikely that he would intentionally seek to wait until it was too late. And there is no evidence that Jamber relied on his conduct and acted to its detriment.

24. The submission made on behalf of Jamber was essentially that Mr Cureton should be held to the 4.00pm statement because, in effect, he had made it. However, the Panel's role is to consider all the circumstances and to decide whether they are unacceptable. The review Panel did not consider it was likely to find unacceptable circumstances.

Contravention of s606, the spirit of chapter 6 and unilateral extension

25. As the review Panel, like the initial Panel, thinks that s624(2) governs the extension of the on-market offer, there has been no contravention of s606. In that event, there being no other issues with the notices, the spirit of chapter 6 set out in s602(d), dealing with an appropriate procedure as a preliminary to compulsory acquisition, appears to have been met. For this reason also the review Panel does not accept that GPG "unilaterally extended the offer period in a manner not permitted by the Corporations Act".

26. The extension is not consistent with the extension announcement. This is more difficult. The submission was that the purpose of chapter 6 set out in s602(a), dealing with an efficient competitive and informed market, has not been met. A bidder's statement should be accurate and great care is needed to ensure that documents issued in connection with a takeover are consistent with each other and with the actual position. Clearly, it would have been better for the announcement of the extension (and the bidder's statement) to have been more carefully prepared. Nevertheless, the review Panel was not satisfied that there was likely to be unacceptable circumstances established by the errors in those documents.

27. The review Panel considered that the submissions of Jamber did not demonstrate any reasonable likelihood that the circumstances raised in the initial application and review application would appear to the Panel to be unacceptable:

(a) having regard to the effect of the circumstances on:

(i) the control or potential control of Gosford

- (ii) the acquisition, or proposed acquisition, by any person of a substantial interest in Gosford²
- (b) having regard to s602 or
- (c) because of a contravention.

DECISION

28. The review Panel decided not to conduct proceedings.

Orders

29. The review Panel did not make a declaration of unacceptable circumstances or orders. It therefore did not make any orders as to costs.

Peter Mason AM

President of the review Panel

Decision dated 30 May 2008

Reasons published 30 May 2008

² See Emmett J in *Glencore International AG v Takeovers Panel* [2005] FCA 1290.