

Reasons for Decision Infratil Australia Ltd 01

**In the matter of Infratil Australia Ltd 01
[2000] ATP 2**

Catchwords:

Off-market bid - dispatch of offers - supplementary bidder's statement and replacement bidder's statement - ASIC consent Corporations Act 2001 (Cth) sections 256B, 602(b)(iii), 602(c), 612(c), 621(3), 621(4), 622, 636(1)(g), 657A, 710-713

Corporations Law (Cth) sections 633, 643, 656A

Australian Securities and Investments Commission Regulations: r 13

ASIC Interim Policy Statement: 159

ASIC Class Order 00/344

And an application under section 656A of the Corporations Law by AUSTRALIAN INFRASTRUCTURE MANAGEMENT LIMITED and HASTINGS FUNDS MANAGEMENT LIMITED, for review of a decision by the AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

1. The sitting Panel comprises Brett Heading (sitting President), Alice McCleary (sitting Deputy President) and Jennifer Seabrook. The Panel decided not to conduct a conference on this matter.
2. The decision under review is affirmed.

FACTUAL BACKGROUND

3. This is an application under section 656A of the Corporations Law for review of a decision by the Australian Securities and Investments Commission.
4. It concerns a proposed takeover bid by Australian Infrastructure Management Limited and Hastings Funds Management Limited as responsible entity for Australian Infrastructure Fund (together *AIF*) for all of the shares in Infratil Australia Limited (*Infratil*). The bid would be a scrip bid, under which AIF offered 2 stapled securities for each 5 shares in Infratil. A stapled security comprises a share in Australian Infrastructure Management Limited and a unit in the Australian Infrastructure Fund, which is a unit trust registered under Chapter 5C of the Corporations Law. The share and the unit cannot be dealt with separately. Infratil shares and AIF's stapled securities are both quoted on ASX.
5. AIF lodged a bidder's statement with ASIC on 10 April 2000 and served it on Infratil the same day. Infratil, through its solicitors, asked for

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certain changes to the statement, and for additional material to be included. On 26 April 2000, AIF lodged a supplementary bidder's statement and a replacement bidder's statement with ASIC, under ASIC Class Order 00/344. Most of the changes requested by Infratil were made, but most of the additional material was not included.

INFRATIL'S APPLICATION

6. Infratil has applied for a declaration under section 657A that unacceptable circumstances exist in relation to the bidder's statement and for orders designed to remedy those circumstances. We are currently considering that application, and we propose to conduct a conference on Monday 8 May.
7. Without anticipating our decision on that application, we can say that Infratil alleges that the bidder's statement, even as amended, is defective, because it does not contain sufficient information, including:
 - the past and prospective earnings and distributions of the bidders and the merged entity;
 - the balance sheets of the bidders;
 - the effects on the bidders' financial positions and prospects of the takeover;
 - the structure of AIF, why assets are held in one vehicle or the other, and the effects of the takeover on this structure and its functioning;
 - the tax consequences of accepting the bid – in particular whether the bid will attract rollover relief from capital gains tax;
 - the rights attached to the stapled securities which would be issued as consideration to accepting offerees;
 - should AIF gain control of Infratil, but less than 100% ownership, the intentions of AIF regarding the management of Infratil and its access to investment opportunities available to AIF.
8. This application raises a number of issues about the policy of the new provisions concerning bidder's statements, as well as matters of fact and judgement about the particular circumstances of AIF's bid for Infratil. Partly because of those policy issues, considerable revisions will be required to the bidder's statement, if Infratil's application is upheld.

LEGISLATIVE BACKGROUND

9. Under section 633 of the Corporations Law, a bidder may dispatch offers and copies of the bidder's statement to holders of bid class shares between 14 and 28 days after it has sent the statement to the target. Under section 643, if the bidder becomes aware of a deficiency in the original bidder's statement at any time between lodging the original

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statement and the close of the bid, it must lodge a supplementary bidder's statement and send copies to the target and the Stock Exchange. Copies of the supplementary statement need not be sent to offeree shareholders. A bidder may issue a supplementary statement for a reason other than to remedy a deficiency.

10. Where a bidder agrees to changes in its bidder's statement after service and before dispatch, it could give effect to those changes either by lodging a new statement or by issuing a supplementary statement. Each of those courses has disadvantages, for the bidder, the offeree, or both. Class Order 00/344 offers a third way of changing the statement: it allows a bidder to lodge an amended statement incorporating the changes, but requires the bidder to wait 14 days before posting the offers and the amended statement to offerees, unless it receives the consent of the target or of ASIC to earlier dispatch.

ASIC'S DECISION AND POLICY

11. In this case, Infratil refused its consent. AIF applied to ASIC for its consent to earlier posting. ASIC refused its consent. This application is for review of that decision to refuse consent.
12. ASIC has a policy on consent to early dispatch under the Class Order. It is set out in paragraph 36 of Interim Policy Statement 159 (*IPS 159*):

'We may consent in writing to shorten the period after consulting with the target, if the changes to the bidder's statement are:

- (a) not material; or*
- (b) a result of negotiations with the target.'*

13. This is explained in paragraph 35 of IPS 159, omitting material relevant only to market bids:

'The Class Order provides that the timetables for an off-market bid (s633(1)) ... recommence following the service of the replacement bidder's statement on the target, so that the target has the following period of time to consider any changes made by the bidder ... at least 14 days, and no more than 28 days, unless ASIC or the target agree in writing to a shorter period of time ...'

14. In its Statement of Reasons, ASIC commented that:

'In reaching its decision, ASIC did not restrict itself to the policy considerations expressed above. The application was considered in the broader context of [the] bid, with particular weight being accorded to the target's intended Panel referral.

The consideration of these broader circumstances by ASIC in determining whether to exercise discretion under Class Order 00/344 is consistent with

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ASIC's published policy. Interim Policy Statement 159 indicates that consent to an abridgement will not be automatically available merely because either of the criteria referred to in paragraph 36 have been met.

The application was ultimately rejected on the basis that to facilitate the dispatch of the replacement bidder's statement to target shareholders when there was a genuine dispute as to the adequacy of the content of the statement would have been contrary to the interests of target shareholders.

ASIC has not formed a final view as to whether the bidder's statement contain material omissions, but was satisfied at the time of making the decision that there was a genuine dispute to be resolved and that the target's allegations were not merely frivolous or vexatious.'

15. ASIC's reference to 'the target's Panel referral' is to Infratils's application, mentioned above, which had been foreshadowed at the time ASIC made its decision and which has since been made.

POLICY AFFIRMED

16. ASIC's policy set out in paragraphs 35 and 36 of IPS 159, quoted above, is a policy which it was open to ASIC to adopt.
17. The policy appears to give effect to the main legislative objective in requiring a bidder to wait 14 days after serving its bidder's statement on the target company and before posting offers, namely to give the target adequate time to consider the changes. The target needs time to assimilate the changes, in order to prepare its target's statement. The target, and perhaps rival bidders or substantial holders, might also use the time to apply to the Panel in relation to the bid itself or the statement.
18. Since the changes might be major or minor, predictable or novel, the need for delay will differ between cases. Accordingly, it was appropriate to provide for an abridgement of the default 14 days delay. Since the delay is imposed primarily for the target's sake, it was appropriate to give the target the right to consent to early dispatch. Since a target may not wish to consent, it was also appropriate for ASIC to reserve the right to give the consent itself. The grounds on which ASIC may consent are directly related to the target's possible need for additional time to prepare its response.

EXCEPTION TO POLICY

19. However, this decision was not made by a simple application of the policy. As ASIC's statement of reasons indicates, the policy does not cover all contingencies, and ASIC in fact refused its consent on a consideration which is not mentioned in IPS 159 i.e. 'to facilitate the

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dispatch of the replacement bidder's statement to target shareholders when there was a genuine dispute as to the adequacy of the content of the statement would have been contrary to the interests of target shareholders'.

20. In our view, both of the criteria mentioned in paragraph 36 of IPS 159 were satisfied. The changes to the bidder's statement were the result of negotiations between solicitors for AIF and for Infratil, they were not extensive, and, while they were important, they did not raise difficult new issues for Infratil's consideration. A short delay would have been adequate to ensure that Infratil was not disadvantaged in preparing its target's statement or in seeking an order from the Panel to restrain dispatch. If those were the only relevant matters, ASIC's policy would indicate that consent should be given to early dispatch.
21. However, we agree with ASIC that those criteria do not exhaust the considerations which ASIC may take into account in deciding whether to consent to early dispatch of the bidder's statement. We therefore turn to the additional factor which was decisive with ASIC.

OUR DECISION ON THE ADDITIONAL FACTOR

22. In considering this factor, we need to resolve a tension between:
 - on the one hand, the policy of subparagraph 602(b)(iii) of the Corporations Law, that shareholders in a target company are given enough information to enable them to assess the merits of a takeover; and
 - on the other hand, the policy of paragraph 13(b) of the regulations, that Panel proceedings be conducted in as timely a manner as the proper performance of the Panel's functions permits.
23. We do not wish to hold up the dispatch of these offers any longer than necessary. Under the Class Order, the bidder's statement can be posted on 10 May. The Panel proposes to conduct a conference on Infratil's application on Monday 8 May, with a view to making a decision on the application by 10 May. Whether this is practicable will depend in part on the assistance we receive from the parties.
24. We have considered whether we could give effect to the policy of regulation 13 by allowing the bidder's statement to be dispatched immediately, with additional material being posted to offerees later, if we require any additional material when we make our decision on Infratil's application. We accept the submission of AIF that there is now little in the amended bidder's statement to which Infratil takes exception – the remaining issues are mainly about omissions from the bidder's statement.

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25. If Infratil establishes a significant part of its case on its application, a considerable amount of material will need to be added to the bidder's statement. Offerees would need to be sent the additional material, some time after they had been sent the bidder's statement. From the point of view of an offeree, it would be preferable that the bidder's statement was not sent piecemeal.
26. The volume and importance of the additional material which would be required distinguish this case from one where the issue is whether less significant supplementary material should be required. In such a case, the Panel might prefer to allow the document to be sent out, on the basis that any addition could appropriately be made by supplementary statement, particularly if the bidder had made a serious attempt to accommodate any reasonable requirements of the target.
27. Given the Panel's timetable for dealing with Infratil's application, we believe that the inconvenience to AIF of delaying posting the bidder's statement until we have considered that application is not out of proportion to the possible mischief to offerees of allowing the bidder's statement to be posted as it now stands, if it needs supplementation after we have considered the issues.

DECISION

28. We affirm ASIC's decision to refuse consent to the early dispatch of AIF's bidder's statement. We thank all parties for their prompt and relevant submissions. There will be no order for costs.

Brett Heading

Member of the Sitting Panel

Decision dated 3 May 2000

Reasons published 9 May 2000