

**In the matter of Infratil Australia Ltd 02**  
**[2000] ATP 1**

**Catchwords:**

*Bidder's statement - Panel's role - policy of sections 602 and 636 - content of bidder's statement - profit projections - prospectus disclosure - continuously quoted securities and effect of the issue - reasonable expectation of information - materiality of information - acceptance of undertaking*

*Corporations Law (Cth) sections 602, 636(1)(g) and (m), 657A, 710, and 713*

*Re Primac Holdings Ltd (1996) 22 ACSR 212*

*Pancontinental Mining Ltd v Goldfields Ltd (1995) 16 ACSR 463*

**And an application under section 657C of the Corporations Law by  
INFRATIL AUSTRALIA LIMITED for a declaration of unacceptable  
circumstances**

**SUMMARY**

1. The sitting Panel is made up of Brett Heading (sitting President), Alice McCleary (sitting Deputy President) and Jennifer Seabrook.
2. This matter concerns an application by Infratil Australia Limited, in relation to a proposed takeover bid by Australian Infrastructure Fund (AIF)<sup>1</sup> for Infratil. The consideration for the bid consists wholly of stapled securities in AIF. Infratil sought a declaration under section 657A<sup>2</sup> that unacceptable circumstances existed in relation to the bid, because of deficiencies in the disclosure in the bidder's statement concerning the merits of investing in the stapled securities, AIF's intentions, historical information about AIF and financial projections for the merged entity. It also applied for orders under section 657D designed to remove the alleged deficiencies.
3. The application was made on 1 May 2000, and received on 2 May. The Panel requested and obtained submissions in response from AIF and from ASIC and further submissions from Infratil. It also requested and obtained documents from all parties. A conference was held on 8 and 9 May 2000. It was attended by all parties, except that ASIC did not attend on the second day.
4. In the course of the conference, AIF offered to send an additional document to Infratil shareholders, containing some of the information mentioned below. After discussions with all parties and with the

<sup>1</sup> This is a shorthand reference: see paragraph 7.

<sup>2</sup> Statutory references are generally to the Corporations Law, as in force at 1 May 2000.

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consent of Infratil, on 9 May the Panel accepted an undertaking from AIF to provide that additional document, and dismissed the application by Infratil.

5. These are our reasons for accepting that undertaking. Findings of fact in these reasons are based on submissions made by the parties, and documents produced by the parties.

## BACKGROUND

6. Infratil is a listed company, and its ordinary shares are quoted on the Australian Stock Exchange Limited (*ASX*). It has in excess of 8,000 shareholders and shareholders' funds of \$362.5 million.<sup>3</sup> Its business is to make and manage investments in the securities (mainly unquoted) of companies which own or operate infrastructure projects, including airports, sea ports, and electricity generators.
7. The bidders are Australian Infrastructure Fund Limited (*AIFL*) and Hastings Funds Management Limited (*HFML*), as responsible entity of the Australian Infrastructure Fund (the *trust*), a managed investment scheme registered under Chapter 5C. They are also investors in infrastructure projects. AIFL and AIF are listed, and their "stapled securities" are quoted. AIF is offering 2 of its stapled securities in exchange for every 5 shares held by shareholders in Infratil. Except to mention the bidders separately, we will refer to them together as AIF.
8. A stapled security comprises a unit in the trust and a share in AIFL. Although these are distinct securities, there are provisions in the constitutions of the company and of the trust to the effect that they cannot be dealt with separately, but have to be held and transferred together, and they are quoted on ASX on this basis.
9. On 10 April 2000 AIF lodged with ASIC and served on Infratil a bidder's statement in relation to offers for all of the shares in Infratil. Through its solicitors, Infratil asked for a number of changes to be made in the statement and for certain material to be added. A number of changes were made to the statement, but the majority of the additions requested by Infratil were not made.
10. On 26 April, AIF lodged supplementary and amended bidder's statements<sup>4</sup> with ASIC, under Class Order 00/344. The class order allows a bidder to amend its bidder's statement without lodging a fresh statement, but requires the bidder to wait 14 to 28 days after lodging the amended bidder's statement and before dispatching it to shareholders,<sup>5</sup> unless the target or ASIC consents to earlier dispatch. Neither Infratil

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<sup>3</sup> Infratil's report for the half year to 31 December 1999.

<sup>4</sup> References to the bidder's statement are generally to this amended bidder's statement.

<sup>5</sup> In effect, the 14 to 28 day delay in item 6 of subsection 636(1) recommences.

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nor ASIC did consent and AIF applied to us for review of ASIC's refusal. On 3 May, we affirmed ASIC's decision.

#### APPLICATION

11. Infratil sought a declaration that the omission of certain information from the amended bidder's statement constituted unacceptable circumstances in relation to the affairs of Infratil and an order that the statement be amended by the inclusion of that information. Quoting from the application, the relevant information is:
- (a) *details of:*
    - (i) *the historical earnings performance of AIFL and AIF; and*
    - (ii) *projected future earnings of AIFL and AIF (absent the acquisition of Infratil);*
  - (b) *details of the financial position of AIFL and AIF including which entity holds particular assets, where profits are earned and why it is desirable that AIFL (not AIF) acquire the Infratil shares;*
  - (c) *details of:*
    - (i) *the historical distribution record of AIFL and AIF; and*
    - (ii) *projected future distributions of AIFL and AIF (absent the acquisition of Infratil);*
  - (d) *an explanation of the nature of the distributions referred to in paragraph (c) above and the taxation implications of those distributions;*
  - (e) *a pro-forma current balance sheet for AIFL and AIF, separately and merged, as at 31 December 1999 updated for significant post balance date changes;*
  - (f) *an explanation of the structure of the bidders and the rights and liabilities that attach to each stapled security;*
  - (g) *an explanation of the differences between the trust structure of the bidders and company structure of Infratil;*
  - (h) *an explanation of the taxation implications for Infratil shareholders who accept the offer and the availability or otherwise of capital gains tax rollover relief in the context of the recent "scrip for scrip" changes;*
  - (i) *the effect of the bid on AIFL and AIF, individually and as a merged entity, assuming the bid is successful, including:*
    - (i) *the effect on the capital bases of AIFL and AIF;*
    - (ii) *the prospects of AIFL and AIF; and*
    - (iii) *any material differences which depend upon the bidding entity in which assets acquired under the takeover bid are held from time to time;*

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- (j) *a projected balance sheet and profit and loss statement (on a merged basis) for AIFL and AIF following the Infratil acquisition;*
- (k) *details of:*
  - (i) *the intentions of AIFL and AIF with respect to the ongoing management of Infratil in the event that AIFL and AIF gain control, but less than 100% ownership, of Infratil; and*
  - (ii) *details of the manner in which conflicts may arise in allocating investment opportunities between Infratil, on the one hand, and AIFL/AIF on the other, in the event that AIFL and AIF gain control, but less than 100% ownership, of Infratil and also between AIFL/AIF and other unlisted funds managed by HFML.*

### LEGISLATIVE BACKGROUND

- 12. Chapter 6 of the Corporations Law limits the ways in which a person can acquire control over a company by buying, or otherwise obtaining control over, its shares. It seeks to prevent takeovers by selective dealing, and to require equal access and adequate information in takeovers by general offer.
- 13. Where a person makes takeover offers for shares in a company, section 636 requires the person to provide to offerees a bidder's statement containing certain information. That statement, and another statement which the target company is required to provide, are intended to assist offerees in their decision whether to accept the bidder's offers. Among the matters required to be contained in a bidder's statement are:
  - (a) the bidder's intentions, under paragraph 636(1)(c);
  - (b) information about scrip the bidder offers as consideration, under paragraph 636(1)(g); and
  - (c) any other information known to the bidder's which is material to a decision whether to accept, other than information about the value of scrip consideration, under paragraph 636(1)(m).

### THE PANEL'S FUNCTION

- 14. The Panel has the power under section 657A to declare circumstances in relation to the affairs of a company to be unacceptable circumstances. The principal consequence of making such a declaration is that the Panel may then make remedial orders under section 657D. There is no definition of what are unacceptable circumstances, but there are certain constraints on the exercise of the power, and certain matters to which we must attend.
- 15. The bid relates to control of Infratil and to a proposed acquisition of a substantial interest in that company, and the circumstances of the bid have a material relation to the affairs of Infratil. We may declare

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circumstances surrounding AIF's bid for Infratil to be unacceptable, if we consider them to be unacceptable in the light of the policy and the express requirements of the provisions of Chapter 6, and section 602 in particular, or because of a contravention of a provision of Chapter 6.

16. We must also consider whether it would be contrary to the public interest to make such a declaration, we are directed to consider the provisions of Chapter 6 and we are authorised to take into account any other policy considerations we think relevant. Under section 201A of the Australian Securities Commission Act 1989, we may accept the offer of an enforceable undertaking.

#### THE POLICY OF SECTION 602

17. Paragraphs 602(a) and (b)(iii) are relevant to this matter:

*"The purposes of this Chapter are to ensure that (a) the acquisition of control over ... the voting shares in a listed body ... takes place in an efficient, competitive and informed market; and (b) the holders of the shares ... (iii) are given enough information to enable them to assess the merits of ... a proposal under which any person would acquire a substantial interest in the company."*<sup>6</sup>

18. For the shareholders in Infratil to have "enough information to enable them to assess the merits of the proposal" put to them by AIF, they need access to information about the bid and specifically about the AIF scrip being offered to them. Other provisions of the Corporations Law require information to be provided when securities are offered for value. Where quoted securities are offered, information is made available under the Listing Rules, supported by several provisions of the Law. Where unquoted securities are offered, the Law generally requires a prospectus or other disclosure document complying with Chapter 6D.
19. Accordingly, at least the same information must be available to them, as if the merged entity comprising AIF and Infratil was listed, and they bought its stapled securities on market. In our view, the circumstances of the bid would be unacceptable if offerees did not have access to information of this type.
20. A shareholder in Infratil who receives an offer under this bid must choose whether to retain shares in Infratil, or whether to take stapled securities in AIF in exchange for the shares. That is in effect a comparison between two possible investments.
21. If the bid succeeds and AIF securities are issued to accepting shareholders, AIF will acquire a substantial investment in Infratil, up to 100%. So the choice an offeree must make is between an investment in Infratil

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<sup>6</sup> This text has been re-arranged.

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as it now stands and an investment in a merged entity comprising AIF and (most or all of) Infratil. The merged entity would not be the simple sum of the two bodies as they now stand:

- (a) the accounting treatments and limits on distributions adopted by AIF are materially different from those applicable to Infratil, which would lead to a change in the reported and distributable profits of Infratil, quite apart from any changes in its holdings or operations;
  - (b) immediately after acquiring control of Infratil, the enlarged AIF would have control of a number of the bodies in which it held investments. As AIF's constitution forbids it to control the bodies in which it invests, it proposes to sell down those controlling holdings; and
  - (c) the management policies of AIF are materially different from those of Infratil, and their application could lead to further changes in the composition and performance of the Infratil assets.
22. Information about the merged entity can only be sought in the bidder's statement, as it cannot easily be calculated using AIF's and Infratil's published accounts and continuous disclosure notices. AIF is a continuously listed body which has, it seems, lodged accounts with ASIC which satisfy the requirements of the Corporations Law and notified ASX from time to time of events affecting it, as required by the Listing Rules. However, the enlarged AIF which would result from the takeover would be very different from the body to which AIF's annual and half-yearly reports and its continuous disclosures have related. After the sale of assets forced by the acquisition of Infratil and the re-investment of the proceeds of sale, AIF could be different again.

### **THE POLICY OF SECTION 636**

23. Paragraph 636(1)(g) requires a bidder's statement for a scrip bid to include the same information as would be required in a prospectus for that scrip. We will set out the relevant provisions below, when we consider whether the bidder's statement contravenes them. Paragraph 636(1)(g) applies paragraph 713(2)(a) to the bidder's statement, which requires it to disclose the effect of the bid on the assets and liabilities, financial position and performance, profits and losses and prospects of AIF. This information is only required, to the extent that an offeree would reasonably expect to find it in the bidder's statement, but it has not been published anywhere else. In our view, the circumstances of the bid would be unacceptable, if offerees did not have access to information of this type.

### **Does the statement satisfy these policies ?**

24. We turn, therefore, to consider whether the amended bidder's statement contains the information which offerees should have available to them

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and which has not otherwise been provided to the market. It contains several passages relating to the merged entity and the prospects of an investment in it. We mention them in increasing order of usefulness.

25. Paragraph 3.5 states that cost savings are anticipated from the merger. They are modest and contingent. Paragraphs 19 and 20 describe AIF's activities and prospects in aspirational terms, and paragraph 22 mentions risk factors in very general terms.
26. Paragraph 3.1 notes that accepting Infratil shareholders will become entitled to AIF distributions for the half-year ending 31 December 2000, and that corresponding distributions for the calendar year 1999 were 16 cents per stapled security, equivalent to 6.4 cents per Infratil share, at the exchange ratio proposed in the bid. It goes on to say that "the Directors of AIF can give no assurance about the future level of distributions". AIF reaffirmed this point before us, and we will return to it.

27. Paragraph 3.3 states that:

*The proposed acquisition would provide Infratil investors with access to a complementary group of infrastructure assets to those held by Infratil. The airport sector investments would include Melbourne, Launceston and a further stake in Perth Airport, in addition to Infratil's investments in Perth and Northern Territory Airports. You would also gain immediate investment participation in, inter alia, AIF's additional infrastructure sectors including telecommunications (Vodafone Pacific), natural gas pipelines (Epic Energy) and tollroads (Statewide Roads and Transurban).*

28. Paragraph 21.2 repeats paragraph 3.3, and lists AIF's investments as at 31 December 1999. Paragraph 21.1 sets out a balance sheet for AIF as at 31 December 1999, and a pro forma consolidated balance sheet for the merged entity, using Infratil's book values for its investments, as reported by Infratil as at 31 December 1999. There is no pro forma profit and loss account for the merged entity, no historic profit information for AIF and no statement whether AIF's past profits can be maintained, with or without a merger with Infratil. There is no explanation of the different bases of accounting between AIF and Infratil.
29. The pro forma balance sheet for the merged entity was made up of historic figures published by AIF and by Infratil in their respective balance sheets as at 31 December 1999. For the reasons briefly mentioned at paragraph 21, it is a very rough guide to the assets of the merged entity. It is no guide at all to the prospects of the merged entity.

### PROFIT PROJECTIONS

30. We were concerned at AIF's not providing any information at all about its past or future profits. It was, after all, common ground that the

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market values of AIF's and Infratil's investments and their operating revenues could be projected into the near future with a fair degree of confidence. In particular, AIF is well informed on Perth Airport, which is Infratil's major investment, making up nearly half of its book, as AIF is also a direct investor in Perth Airport.

31. The explanation tendered by AIF is that its accounting and distributable profits are to a large degree independent of the market values of its assets, their operating revenue and the dividends they pay. Rather, the profits of the trust derive principally from the periodic revaluation of its assets, according to a method laid down in the trust deed. This is carried out by an independent expert, whose opinion on value may differ from that of AIF management.
32. The cash flow from each of the trust's investments is calculated for the life of the project, and discounted to balance date. The most recent interest rate and cash flow figures are used, and because they are compounded over many years, the calculation is sensitive to small variations in those figures. Accordingly, neither the valuations nor the distributable profits can be reliably calculated in advance.
33. This method of determining profits has been adopted to maximise the distributable profits of AIF and the tax benefits of its stapled securities.
34. We accept this explanation for AIF's directors' refusal to give projections of asset valuations, profits or distributions. However, when a security is offered to the public, offerees really need some indication as to its future financial performance, or at least an adequate explanation as to why no projection can be given.<sup>7</sup> The terms of the undertaking attempt to deal with both aspects of this conclusion.
35. In our view, the totality of the information available to offerees would be deficient, judged against the standards set by sections 602 and 636, if the amended bidder's statement was posted without additional information being published. The bidder's statement does not contain enough information to bring the information in the public domain up to the standard set by either of these provisions. We are fortified in this conclusion by observations of Dowsett J in *Re Primac Holdings Ltd*.<sup>8</sup>

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<sup>7</sup> We were variously told that the difficulty of predicting AIF's profits was due to the need to be conservative in making projections, and to the independence of the valuer. In the end these explanations were essentially irrelevant. We would not mention this, as there was no intention to mislead, except that there is no clear explanation of this process or of its objective in either of the prospectuses AIF has issued, or in the bidder's statement. It can be extracted, with some difficulty, from AIF's annual reports.

<sup>8</sup>(1996) 22 ACSR 212 at 223 – 224.

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#### COMPLIANCE WITH CHAPTER 6

36. The alternative approach to this aspect of the bidder's statement is to consider whether unacceptable circumstances would have resulted from a contravention of Chapter 6.
37. Since this is a scrip bid, the bidder's statement is required by paragraph 636(1)(g) to contain the same information as would be required by sections 710 to 713 in a prospectus issued by the bidder for the issue or sale of the securities offered as consideration.
38. The general requirement for the contents of a prospectus is set out in subsection 710(1). Relevantly, it provides that:

*A prospectus for a body's securities must contain all the information that investors and their professional advisers would reasonably require to make an informed assessment of ... the rights and liabilities attaching to the securities offered and the assets and liabilities, financial position and performance, profits and losses and prospects of the body that is to issue the securities.*

*The prospectus must contain this information only to the extent to which it is reasonable for investors and their professional advisers to expect to find the information in the prospectus.<sup>9</sup>*

39. Since the stapled securities are continuously quoted securities, AIF is entitled to use section 713 of the Law, under which less information needs to be provided in the prospectus, but offerees' attention must be drawn to the issuer's accounts and continuous disclosure notices. That section relevantly provides that:

- (2) *The prospectus must contain all the information investors and their professional advisers would reasonably require to make an informed assessment of:*
- (a) *the effect of the offer on the body [i.e. the issuer of the securities];*  
*and*
  - (b) *if the securities are interests in a managed investment scheme - the effect of the offer on the scheme;*
  - (c) *the rights and liabilities attaching to the securities offered;*
  - (d) *...*

*The prospectus must contain this information only to the extent to which it is reasonable for investors and their professional advisers to expect to find the information in the prospectus.*

- (3) *The prospectus must state that:*

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<sup>9</sup> Part of the text has been re-arranged.

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- (e) *as a disclosing entity, the body or scheme is subject to regular reporting and disclosure obligations; and*
- (f) *copies of documents lodged with ASIC in relation to the body may be obtained from, or inspected at, an ASIC office.*
- (4) *The prospectus must either:*
  - (a) *inform people of their right to obtain a copy of any of the following documents:*
    - (i) *the annual financial report most recently lodged with ASIC by the body or scheme;*
    - (ii) *any half-year financial report lodged with ASIC by the body or scheme after the lodgment of that annual report and before the lodgment of the prospectus with ASIC; and*
    - (iii) *any continuous disclosure notices given by the body or scheme after the lodgment of that annual report and before the lodgment of the prospectus with ASIC; or*
  - (b) *include, or be accompanied by, a copy of that document.*

*If the prospectus informs people about their right to obtain a copy of the document, the person making the offer must give a copy of the document free of charge to anyone who asks for it during the application period for the prospectus.*

- (5) *Information about the offer must also be set out in the prospectus if the information:*
  - (a) *has been excluded from a continuous disclosure notice in accordance with the listing rules of the securities exchange to which the notice was given; and*
  - (b) *is information that investors and their professional advisers would reasonably require for the purposes of making an informed assessment of:*
    - (i) *the assets and liabilities, financial position and performance, profits and losses and prospects of the body; and*
    - (ii) *the rights and liabilities attaching to the securities being offered.*

*The prospectus must contain this information only to the extent to which it is reasonable for investors and their professional advisers to expect to find the information in the prospectus.*

## THE PROSPECTUS PROVISIONS

- 40. Comparing sections 710 and 713, subsection 713(2) requires much the same disclosure as section 710 about the rights and liabilities attached to the securities on offer, but in place of requiring disclosure about the assets, liabilities, financial position and performance, profits and losses and prospects of the offeror, simply requires disclosure of the effects of the bid on the offeror. The policy of section 713 includes offerees having access to enough information about the assets, liabilities, financial

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position and performance, profits and losses and prospects of the offeror to make a decision on the offer made to them. That is apparent from subsection 713(5).

41. The difference between sections 710 and 713 is not in the objective, but in how it is achieved: subject to the requirement to disclose the effects of the bid and information which has been withheld under the confidentiality exceptions in the Listing Rules, a bidder which offers continuously quoted securities may rely on its periodic and continuous disclosures, at least as regards the assets, liabilities, financial position and performance, profits and losses and prospects of the issuer of the scrip. Any issue of securities for valuable consideration must have an effect on the assets and liabilities of the bidder, and on its prospective profits and losses. That effect could be immaterial, or it could completely alter the merits of the issuer as an investment.
42. By requiring disclosure of the effects of the bid on the bidder, to the extent that offerees would reasonably expect that disclosure in the bidder's statement, Parliament obliged a bidder to decide to what extent (if any) the information already in the market about its assets, liabilities, financial position and performance, profits and losses and prospects needs to be supplemented with information about the merged entity.
43. There is no one standard of short form disclosure under section 713. Like section 710, section 713 is a general disclosure provision, which requires different information in different cases. Unlike section 710, section 713 assumes offerees have access to the information already in the market, but it requires the offeror to provide a variable amount of additional information, concerning the effect of the relevant offer on the offeror.
44. A number of issues raised by Infratil went directly to the merits of investment in the merged entity and to the assets, liabilities, financial position and performance, profits and losses and prospects of the merged entity. In our view, information on these matters is clearly required for shareholders in Infratil to make an informed decision whether to accept AIF's offers and is clearly required to be included in the bidder's statement by section 713, to the extent that it was reasonable to expect to find it there.

### **REASONABLE EXPECTATION?**

45. In our view, offerees would reasonably expect to find information on the merged entity in the bidder's statement. Information on the merged entity is available to AIF, but not as readily available to anyone else. There are other sources of information on AIF, of course: brokers will publish analyses, and traders on ASX will price AIF's stapled securities. But those are secondary sources: all brokers' analyses and all market

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prices ultimately depend on information published by issuers. Further, the prices being paid on market now for AIF's securities principally reflect the perceived value of AIF as it exists today, not the merged entity including Infratil.

46. Accordingly, information concerning the merged entity, on the omission of which we have already commented, is required to be provided by paragraph 713(2)(a), because it relates to the effects of the bid on AIF.

### **SECTIONS 713 AND 602**

47. Each party put submissions to us on the requirements of section 713 and their relationship with Chapter 6 and section 602 in particular.
48. Infratil put it to us that paragraph 602(b)(iii) requires all of the information for a decision whether to accept to be actively given by the bidder to the offerees, by including the information in its bidder's statement. We reject this submission. Paragraph 602(b)(iii) is a general, philosophical, provision, which sets out a policy which has been implemented in detail in the operative provisions of Chapter 6, and it is precisely in the detail of those provisions that this issue arises. Paragraph 602(b)(iii) does not say who is to give the shareholders the information it mentions, or how it is to be given. In fact Chapter 6 requires the target to give some of that information to the shareholders in its target's statement, and requires both bidder and target to publish more of the information to ASX in the form of supplementary statements.
49. AIF put it to us that the clear policy of the legislation is that an issuer of continuously quoted securities may rely on the information it has published under periodic and continuous disclosure obligations, and it is not required to repeat that information in its bidder's statement. In effect, it was argued that there is an exception to the policy of paragraph 602(b)(iii) that offerees be given the information they require. AIF pointed to a similar exception relating to supplementary bidder's and target's statements, which must be given to ASX, but need not be posted to offerees. And they say that in applying the legislative policy of paragraph 602(b)(iii) the Panel must give proper regard to the detailed policy decisions which underlie particular provisions of Chapter 6, as well as to the broad policy of the Chapter. We accept all of these submissions.

### **NON-PROVISION OF CONTINUOUS DISCLOSURE INFORMATION**

50. Even accepting these submissions by AIF as to the requirements of section 713, the bidder's statement does not comply with the section. Copies of annual reports, half-yearly reports and continuous disclosure documents are not included in the amended bidder's statement, and do

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not accompany it. Under subsection 713(4) an offeror which does not provide these documents must undertake in the statement that it will provide a copy of each document, free of charge, to any person who asks for it during the bid period. There is no such undertaking in the amended bidder's statement.

51. AIF submitted that subsection 713(4) does not require AIF to offer to provide copies of its periodic and continuous disclosure publications to offerees. In AIF's submission, the concluding paragraph of subsection 713(4) requires only that AIF mention offerees' right to obtain searches of the documents from ASIC. If asked, a bidder must provide the copies, free of charge, but it does not require the bidder to offer to provide the copies. They point to a change in wording from previous paragraph 1022AA(3)(a), which in terms required an issuer to offer to provide the copies.
52. We reject this reading. This requirement is contained in paragraph 713(4)(a):

*The prospectus must either (a) inform people of their right to obtain a copy of any of the following documents ... or (b) include, or be accompanied by, a copy of the document.*

and the last, unnumbered, paragraph of subsection (4):

*If the prospectus informs people about their right to obtain a copy of the document, the person making the offer must give a copy of the document free of charge to anyone who asks for it during the application period for the prospectus,*

This suggests the following observations:

- (a) The requirement to provide copies is here linked in fact and in the words by which it is imposed to the offerees' right to obtain copies of the documents. This juxtaposition and the legislative history imply that the section imposes an obligation to offer copies.
- (b) The fact that subsection 713(3) requires the statement to 'state that copies of documents lodged with ASIC in relation to the [issuer] may be obtained from, or inspected at, an ASIC office' implies that the statement required by subsection (4) refers to another right to obtain the documents, i.e the one created by that subsection itself.
- (c) The expression "right to obtain copies" more naturally refers to the right created by subsection (4) than to offerees' ability to search the documents at ASIC, for a prescribed fee, or at ASX, for a commercial charge.

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- (d) One of the main purposes of requiring the offeror to provide the documents on request is lost, if offerees do not know to ask for them.
- (e) AIF noted that subsection 713(4) is less explicit than previous section 1022AA in requiring an offeror to offer copies of continuous disclosure documents, and argued that the change reflected a change of legislative policy. It relied on the usual rule of construction, that Parliament only changes the wording of a statute when it wants to change the sense.

That rule does not apply to simplified legislation such as the new Chapter 6D, because the provisions have been rewritten with the express intention of making them shorter and simpler, even where there is no intention to change the sense. There have been changes in policy, but there have been many more changes in wording which are not intended to change the policy.

#### **MATERIALITY OF THIS OMISSION**

- 53. AIF's failure to offer access to these documents could make a material difference to retail offerees. Section 713 relieves a bidder of the obligations to research and provide a great deal of information, which section 710 would otherwise require to be set out in the bidder's statement, and which is highly material to an investment decision to be made by offerees. It substitutes a requirement that the bidder provide, or offer to provide, offerees with specified documents, no doubt on the basis that those documents will contain broadly equivalent information. For the statement to provide neither the documents themselves nor the offer of documents is to fail entirely to provide offerees with information on those matters, which section 710 would require.
- 54. Of course, these documents, unlike information on the prospects of the merged entity, have already been published and can be obtained by offerees. However, the offeror has the fullest knowledge of, and the best access to, these documents. The cost to it, in time and money, of providing the documents to one offeree is likely to be less than the cost to the offeree of searching them, and the aggregate savings will increase if more offerees require copies, or if the offeror provides a suitable selection of the documents.
- 55. These comments apply generally to documents under section 713. They have particular force as applied to bidders' statements. Offerees must make a choice whether or not to accept, and it is one which can affect an existing investment, even if they let it go by default. Unlike people to whom a prospectus is circulated, they do not have the option of keeping their money in their pockets. They have a relatively short time to decide what to do. Unlike shareholders to whom a rights offer is made, they

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are not selected as persons who have already taken an interest in the issuer, and who receive its annual and half-yearly reports.

#### **Contents of the Bidder's Statement – Tax**

56. The amended bidder's statement contains no information as to whether the recently enacted provisions for rollover relief for scrip takeovers would apply to the AFI bid for Infratil, and on what assumptions. Nor did it outline the tax treatment of distributions by the merged entity. Infratil submitted that information about these issues is material to a decision on accepting the offers, and paragraph 636(1)(m) requires it to be disclosed. We agree. The tax status of any investment is important, and that is doubly true of a tax-effective investment such as the stapled securities in AIF. The current uncertain legislative status of scrip-for-scrip tax rollover was also relevant.
57. AIF submitted that offerees could not reasonably expect to be provided with this information, as AIF is not obliged to give tax advice to each shareholder in Infratil. Of course, AIF is not required to give Infratil shareholders individual tax advice, but it is obliged to give them certain information about the bid and the securities in general, to which it has access and which their advisors will need to advise offerees on those matters.
58. In our view, the circumstances of the bid would be unacceptable, because the policy of paragraph 602(b)(iii) would not be satisfied, if offerees were unable to find basic information on the tax consequences of the takeover itself and the tax status of the distributions of the merged entity.

#### **Contents of the Bidder's Statement – Intentions**

59. Among the issues raised by Infratil were several on AIF's intentions about the future management of Infratil's assets. Paragraph (b) in the extract from the application set out at paragraph 11 above mentions details concerning whether any or all of the assets would be held in the trust or in the company. Without belittling these concerns, we note that in the course of the conference they merged with the issues concerning the prospects of the merged entity. Accordingly, we will not deal with them separately in these reasons.

#### **The Additional Document**

60. As set out in these reasons, we had serious concerns with the adequacy of the amended bidder's statement, in the context of the available information about AIF and Infratil. We did not, however, decide whether to declare the circumstances of the bid unacceptable, because of AIF's offer of the additional document and its acceptance of a number of requests made by us and by Infratil as to its content. The additional

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document will be provided with the bidder's statement. It covers some, but not all, of the matters which Infratil raised.

61. Because of our decision on the prospects issue (paragraphs 31 to 33), we did not require the additional document to contain financial projections. Instead, to facilitate a comparison between Infratil, AIF and the merged entity, we required the pro forma balance sheet to be rewritten to include a column setting out the assets (at market value) and liabilities of Infratil (provided by Infratil). We also required the bid to remain open until AIF has made a preliminary announcement of its distribution for the half year to 30 June 2000. In the absence of projections of the profits and distributions of AIF, we thought it inappropriate that the bid should close immediately before figures for the current period were published.
62. That decision is specific to the particular situation of AIF and does not imply a general view that financial projections are not required in bidder's statements. Quite the contrary: where meaningful projections can be made, it is good practice to provide them, and it will often be reasonable to expect to find them in a bidder's statement. We agree with the views on this issue of Tamberlin J in *Pancontinental Mining Ltd v Goldfields Ltd*<sup>10</sup>. Had Infratil made a scrip takeover offer, for instance, we would have expected it to provide projections on the prospects for its investments.
63. There will be no order for costs. The Panel's policy is to use costs orders to penalise delay and obstruction, and we encountered neither delay nor obstruction.
64. We thank all of the parties for their ready co-operation, in providing the submissions and the documents we requested, without a summons and on time, in making senior officers available at short notice and responding to questions directly and frankly and in the end for their assistance in concluding the matter.

**Brett Heading**

**President of the Sitting Panel**

**Decision dated 9 May 2000**

**Reasons published 20 June 2000**

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<sup>10</sup> (1995) 16 ACSR 463 at 471 - 472.