



**In the matter of Colonial First State Property Trust Group 02
[2002] ATP 16**

Catchwords:

Restraining dispatch of replacement bidder's statement – whether abridgement of 14 day period permitted – modification of Corporations Act section 633 item 6

Corporations Act 2001 (Cth), section 633 item 6

These are our reasons for declining an application by the Responsible Entity for the Colonial Funds in relation to Mirvac Funds Limited's takeover bid for the Colonial Funds.

1. The application sought urgent interim orders to restrain dispatch of the bidder's statement in Mirvac Funds Limited's (**Mirvac**) takeover bid for the four funds which make up the Colonial First State Property Trust Group (**Colonial Funds**). The application was made by CFS Managed Property Limited (**Colonial Responsible Entity**) on 23 September 2002.
2. The sitting Panel for the application was Ms Jennifer Seabrook (sitting President), Ms Karen Wood (sitting Deputy President) and Ms Teresa Handicott.
3. The Panel decided not to conduct proceedings in relation the application.
4. The Panel advised the parties of its decision in this matter on 23 September 2002.

Background

5. On 11 September Mirvac lodged a bidder's statement with the Australian Securities and Investments Commission (**ASIC**) and the Colonial Responsible Entity. The bidder's statement would be available for dispatch on Thursday 26 September.
6. In correspondence between them, Commonwealth Property Office Fund (**Commonwealth**) raised a number of disclosure issues and constitutional issues with Mirvac in relation to Mirvac's bidder's statement.
7. Mirvac prepared a replacement bidder's statement (**Replacement Bidder's Statement**) which appeared to deal with many of the issues which had been in contention between the parties concerning disclosure.
8. On Friday 20 September 2002 at 8.43pm the Colonial Responsible Entity's lawyers received by e-mail from Mirvac's lawyers, a copy of Mirvac's Replacement Bidder's Statement in respect of its takeover bid for all the units in the Colonial Funds. The precise date on which the final version of the Replacement Bidder's Statement was received is not clear because further amended versions were provided. If the correct date is 20 September, the Replacement Bidder's Statement would (without ASIC's

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consent under its Class Order 00/344) be available for dispatch on Monday 7 October.

9. On Friday 20 September 2002 at 6.22pm, the Colonial Responsible Entity's lawyers received a letter from ASIC advising that ASIC consent had been sought to the early dispatch of Mirvac's Replacement Bidder's Statement and asking for submissions on the application by 4pm Monday 23 September. ASIC also sent the letter to lawyers acting for Commonwealth Property Office Fund (**Commonwealth**) and Gandel Retail Trust (**Gandel**).
10. On Monday 23 September 2002 at about 12.00 noon, the Colonial Responsible Entity's lawyers sent submissions to ASIC in response to ASIC's letter of 20 September 2002. Lawyers for Commonwealth and Gandel also made submissions to ASIC.
11. After reviewing those submissions and before the time of the application, ASIC granted consent to the early dispatch of the Replacement Bidder's Statements on 23 September 2002.
12. Meetings of the Colonial Funds unitholders (**Meetings**) were due to be held on Monday 30 September¹. At the Meetings, the unitholders were to vote on a proposal to merge the Colonial Funds with Commonwealth and Gandel (**Merger Proposal**). The closing date for receipt of proxies was Friday 27 September for mail and hand deliveries and 9:00am on Saturday 28 September for lodgment by fax.
13. At 4:47pm on 23 September, the Colonial Responsible Entity made this application to the Panel. The application sought interim orders to restrain dispatch of the Replacement Bidder's Statement until 6:00pm on Tuesday 24 September 2002 to allow the Colonial Responsible Entity time to make a further application in relation to some of the matters that were in dispute between the parties. If an application were made in that time, the Colonial Responsible Entity sought to further restrain dispatch until the matters were resolved. The Colonial Responsible Entity sought to restrain dispatch for a short period until it had been able to make formal application in relation to the constitutional issue (or had decided not to make such an application).
14. Mirvac had made two applications in relation to the Merger Proposal on 30 August 2002 and 2 September 2002. Further background information on the circumstances surrounding this application can be found in the Panel's published reasons in relation to Mirvac's two applications.

Discussion

15. The primary issue for the Panel was what information about the Mirvac bid it considered should be before the Colonial Funds unitholders prior to their being required to vote at the Meetings and whether or not to restrain Mirvac from

¹ The Meetings were originally scheduled to be held on 3 September. The Meetings had been previously postponed until 10 September and then until 30 September.

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dispatching its Replacement Bidder's Statement to Colonial Funds unitholders. Subsidiary issues included what degree of finality of the dispute was it reasonable for Colonial Funds unitholders to expect prior to the Meetings and how much time should unitholders reasonably expect to consider the information prior to the Meetings.

Postponing the Colonial Funds Meetings

16. The Panel discussed whether to require the Colonial unitholders' Meetings to be adjourned any further so as to allow the issues still in contention to be resolved and to allow accurate information on the final resolution of the issues to be provided to the unitholders before they had to decide between the alternative proposals.
17. The unitholders' Meetings had already been adjourned from 3 September until Monday 30 September. If the meeting was to be adjourned for 1 month or more in total, then section 252K of the Corporations Act (**Act**) required that new notice must be given to the unitholders. This means that the last possible date for the Meetings to be held under the current notices of meeting was Wednesday 2 October.
18. The Colonial Responsible Entity informed the Panel that there were no suitable venues available in Sydney to accommodate the large number of Colonial unitholders on Tuesday 1 October or Wednesday 2 October.
19. If a new notice of meeting were given, the Colonial Responsible Entity advised that it would require a further period of approximately 5 weeks until the unitholders' meeting could be held (including drafting, printing and 21 days notice²).

The Enhancements

20. On 29 August 2002 and subsequently, Commonwealth and Gandel announced certain enhancements to the consideration being offered to Colonial unitholders under the Merger Proposal (**Enhancements**). The Colonial Responsible Entity informed the Panel that there was no guarantee that the Enhancements would be available if the unitholders' meeting was delayed any further. The Panel considered that it would be a commercial decision for Commonwealth and Gandel whether or not to affirm the Enhancements.

Timing Issues

21. The following times and dates are relevant in the Panel's decision:
 - a. ASIC granted the relief for Mirvac to dispatch its Replacement Bidder's Statement early, at the end of Monday 23 September;
 - b. ASIC had advised parties on Friday 20 September that it understood that on Monday 23 September Mirvac would be seeking consent for early dispatch of its Replacement Bidders Statement. ASIC sought submissions on that issue by 4.00 on Monday 23 September. ASIC advised that it expected any party who

² Under section 252F of the Act (section 249H of the Act does not apply to listed managed investment schemes).

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considered the document should not be dispatched to Colonial Unitholders would apply to the Panel before 4.00 p.m. on Monday 23 September to restrain dispatch of the Replacement Bidders Statement;

- c. Prior to ASIC's decision, Mirvac was entitled to dispatch its Replacement Bidder's Statement around Monday 7 October (the exact date depends on when the consolidated bidder's statement was received by Colonial – the precise date was not clear from the submissions);
 - d. The ASIC relief allowed Mirvac to dispatch the Replacement Bidder's Statement that evening and Mirvac expected that the Replacement Bidder's Statement would be delivered to many of the Colonial Funds unitholders on Tuesday 24 September or Wednesday 25 September;
 - e. The Meetings were due to be held on Monday 30 September;
 - f. The last date proxies could be received by mail or hand delivery was Friday 27 September (although it was possible to lodge them by fax until 9.00 a.m. on Saturday 28 September).
22. The Panel considered that the ASIC adjusted Mirvac timetable would allow the Colonial Funds unitholders to have the Replacement Bidder's Statement in time to read and consider it before having to lodge proxies for the Monday Meetings.

Restraining the Mirvac Bidder's Statement

23. The Panel was not willing to restrain the dispatch of the Replacement Bidder's Statement. It considered that doing so, without also postponing the Meetings, would materially limit the information that the Colonial Funds unitholders would receive on the rival Mirvac proposal that was material to their decision as to how to vote at the Meetings.
24. The Panel was concerned that restraining dispatch of Mirvac's Replacement Bidder's Statement until the Colonial Responsible Entity had drafted its full application, parties had had a reasonable time to make submissions and rebuttals, and then the Panel had had time to consider them, would effectively negate any shortening of time granted by ASIC and eliminate any effective time for the Colonial Funds unitholders to consider Mirvac Replacement Bidder's Statement and offer prior to having to make their proxy decisions.
25. The Panel considered that it would be better for Colonial Funds unitholders to receive a bidder's statement that was arguably defective (but which on the basis of the issues brought to the Panel's attention could be rectified by further disclosure or withdrawn) than either no bidder's statement at all, or a bidder's statement that was free from defects but received too late for the unitholders to properly consider before the Meetings.
26. The Panel considered the Colonial Responsible Entity's concern that the Replacement Bidder's Statement may contain misleading information. The Panel decided that if this were the case, the Replacement Bidder's Statement could be rectified through further disclosure to the unitholders, by Mirvac or the Colonial, Commonwealth or

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Gandel Responsible Entities. The Panel considered that there was still time for this to be done prior to the Meetings by announcements to ASX and on the company websites and by newspaper advertisements. If necessary, the Replacement Bidder's Statement could be withdrawn by Mirvac voluntarily or by Panel order. The Panel weighed this against the harm of denying the Colonial Funds unitholders the opportunity to consider the Replacement Bidder's Statement with reasonable time prior to having to make any decision on the Merger Proposal.

27. The Panel considered that no evidence had been brought before it to show that the Replacement Bidder's Statement contained information which would actively mislead Colonial unitholders in their decision making. Of the issues raised, all had been effectively canvassed in public and were capable of being raised again by the parties prior to the time at which Colonial unitholders would have to make decisions about voting by proxy or at the Meetings. Therefore the Panel considered that it was unlikely that allowing the Replacement Bidder's Statement to be dispatched would cause material harm. Any harm was capable of remedy, or had already been immunised against and the potential harm of delay was material.

Supplementary Information to Unitholders Prior to the Meetings

28. The Panel considered that it would be entirely feasible for both the Colonial Responsible Entity and Mirvac to provide further supplementary information to Colonial Funds unitholders prior to their proxy or Meeting decision dates, either by letter posted on Tuesday, or by announcement to ASX and on the company websites. The Panel noted that the Colonial Responsible Entity had repeatedly, and very properly, advised Colonial Funds unitholders to watch the ASX website and the Colonial Funds website in the days leading up to the Meetings because of the fluid position regarding information.

Constitutional issue

The Colonial Responsible Entity's Assertion about the Constitutional Issue.

29. Mirvac advised that it had legal advice that the consideration being offered under its takeover bid is valid under the constitution of Mirvac Property Trust. The Colonial Responsible Entity has disputed this, but the onus is on the Colonial Responsible Entity to make their case.
30. The Panel noted that there are a number of ways of dealing with the possible constitutional issue, however the Panel has declined to deal with this issue unless a further application is made in that regard.

Disclosure

31. The Panel noted that if the Colonial Responsible Entity was of the opinion that the Replacement Bidder's Statement was misleading, then the Colonial Responsible Entity should publish corrective information or raise specific concerns in a separate application to the Panel.

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Further disclosure

32. The Panel requested the parties to ensure that the unitholders are provided with sufficient information, in time to make proper use of it prior to the unitholders' meeting, concerning the issues still in contention.

Decision

33. The Panel decided not to make the interim orders sought by the Colonial Responsible Entity.
34. The Panel consented to the parties being represented by their commercial solicitors.

Jenny Seabrook

President of the Sitting President

Decision dated 23 September 2002

Reasons published 11 December 2002