



**In the matter of BreakFree Ltd (No. 2)
[2003] ATP 30**

Catchwords:

Review of ASIC decision – refusal to consent to early dispatch of amended bidder’s statement – consideration of submissions by target – target criticisms of bidder’s statement – substantial changes made by bidder – necessary time for target to consider changes – remaining deficiencies in bidder’s statement – factors to be considered in exercising the discretion – serious question whether aspects of the amended bidder’s statement are misleading – affirm ASIC decision – canvassing by parties of issues before the Panel in the media

Corporations Act 2001 (Cth), sections 602, 602(b), 631, 633, 633(1) (items 6 and 12), 643, 647, 655A, 656A, 657D, 657E, 670A

ASIC Interim Policy Statement 159 ‘Takeovers: Discretionary powers’, paragraphs 29 to 38

ASIC Class Order 00/0344 ‘Changes to bidder’s statement between lodgment and dispatch’

Takeovers Panel Guidance Note 5 - ‘Restraining the dispatch of documents’

Infratil Australia Ltd [2000] ATP 1, applied

Email Limited (No. 2) [2000] ATP 4, applied

These are our reasons for affirming a decision of ASIC not to consent to early dispatch of a bidder's statement in relation to the bid by S8 Ltd for BreakFree Ltd.

Background

1. On 11 July 2003, S8 announced a bid for all of the shares in BreakFree. Our reasons for decision in *BreakFree (No. 1)* describe that bid. On 19 August, S8 lodged a bidder's statement with ASIC and served a copy on S8. On 29 August, BreakFree raised a number of issues in a letter to S8, copied to ASIC, and ASIC also raised some issues with the bidder's statement. S8 provided ASIC with a draft response to the concerns raised by BreakFree on 1 September, and gave the document to BreakFree on 2 September.
2. On 2 September S8 lodged a Supplementary Bidder's Statement with ASIC and served copies on ASX and on BreakFree. On 3 September S8 applied to ASIC for consent to dispatch an amended bidder's statement (consolidating the changes in the supplementary bidder's statement) on 5 September.

Proceedings

3. On 4 September, having given BreakFree's solicitors a short opportunity to respond to S8's application, ASIC refused the application, and gave short reasons for the refusal. Later on 4 September, S8 applied to the Panel for review of ASIC's decision, with a view to dispatching the offers on 5 September.
4. On the evening of 4 September, the Panel executive requested ASIC to provide a statement of reasons and invited the parties to provide responses to the application and some additional questions, all by midday on 5 September, and indicated that they would propose that the Panel adopt that request as our

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brief, should we decide to conduct proceedings. ASIC provided a statement of reasons and the parties provided submissions within that timeframe, for which we are grateful.

5. We met on 5 September and, after reviewing the application and the additional questions formulated by the executive, we decided to conduct proceedings and to adopt the executive's request for submissions as our brief.
6. On reviewing ASIC's statement of reasons and the submissions received that day, we advised the parties that we were not persuaded by those materials to vary ASIC's decision to refuse consent, but that parties might have until 4.00pm on Monday 8 September to lodge rebuttals, and we would make a final decision after considering the rebuttals. We met again on the evening of 8 September, reviewed the rebuttals, and finally decided not to vary ASIC's decision.

Variations between Service and Dispatch

7. The issue arises in this way. A bidder making an off-market bid for a listed company under Chapter 6 of the Corporations Act needs to lodge a bidder's statement and offer with ASIC and serve copies of them on the target company and on ASX. Under item 6 of subsection 633(1) of the Act, the bidder needs to have served the bidder's statement on the target between 14 and 28 days before it dispatches copies of the statement and offers to offeree shareholders. That provision exists to afford the board of the target company a reasonable period of time to assess and react to the bid, relevantly including preparing a target's statement, requesting changes to the bidder's statement and offers and deciding whether to seek orders restraining dispatch of the offers.¹
8. Under item 6, a bidder which amends its bidder's statement or offer can lodge a fresh statement and offer, in which case the time from service to dispatch commences to run again, however minor the changes and however little the amendments would in fact impede the target in issuing a target's statement in the time available to it.
9. If the changes affect the statement only, the bidder may lodge a supplementary bidder's statement under section 643. In this case item 6 allows the bidder to dispatch the original statement and offer 14 days after they were served on the target, and the supplementary bidder's statement need only be given to ASX as an announcement. Neither section 633 nor section 647 requires the bidder to post copies of the supplementary bidder's statement to offerees, or to consolidate the changes with the original documents. However, in a number of cases it has been held that it is unsatisfactory to send corrections to a bidder's statement in a separate document, instead of sending a corrected statement.

¹ The Act allows a target up to 4 weeks after service of the original bidder's statement to dispatch its target's statement, made up of at least 14 days from service of the bidder's statement to dispatch (item 6 of subsection 633(1)), and another 15 days from dispatch of the bidder's statement to dispatch of the target's statement (item 12). Item 6 allows the target to agree to the bidder abridging the period.

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ASIC's Class Order²

10. ASIC has modified section 633 by Class Order 00/344 (the **Class Order**) to allow a bidder to make some changes in its bidder's statement and offer, without restarting its bid timetable. The Class Order enables a bidder to lodge a consolidated replacement bidder's statement and offer and to dispatch copies of the consolidated document less than 14 days after lodging it, if ASIC or the directors of the target consent. ASIC says in [PS 159:36]³ that it may consent to early dispatch where the changes to the bidder's statement are not substantial, or where they result from negotiations with the target company. In either of these cases, there are no unexpected substantial changes which may delay the target's response.
11. The Class Order does not prevent a bidder from dispatching the original documents on the original posting date. ASIC has, however, pointed out in [PS 159:37] that it might be misleading to post a bidder's statement and offer which were materially defective without correcting them, even if the corrections were contained in a separate document sent with the statement and offer.
12. Because the function of consenting to dispatch earlier than section 633 would otherwise allow has been created by an instrument under section 655A, decisions by ASIC whether or not to provide the consent are decisions under section 655A, which are subject to review by the Panel under section 656A.

Timing

13. The original bidder's statement was served on BreakFree on 19 August. Under item 6 of subsection 633(1), S8 could have dispatched offers and copies of that bidder's statement on 2 September. S8 served the clean copy of the amended bidder's statement on BreakFree on 2 September and item 6 would have allowed it to dispatch copies to shareholders on 16 September. (If a bidder relies on the Class Order in order to dispatch an amended bidder's statement, the timing can be slightly different since the Class Order determines the date for dispatch based on the date the marked-up copy of the bidder's statement is given to the target. In S8's case, the marked-up copy was given to BreakFree two days after the clean, amended version of the bidder's statement (that is, on 4 September) meaning that, if S8 relied on the Class Order, it could only dispatch its amended bidder's statement on 18 September.)

² We made our decision in relation to these proceedings on 10 September 2003 on the basis of ASIC Class Order 00/344 and ASIC *Interim Policy Statement 159 Takeovers - Discretionary Powers* as they stood at that time. The references in these reasons to [PS 159] and the Class Order are references to those documents in the form that they existed on 10 September. ASIC has subsequently (on 23 September 2003) issued the final version of *Policy Statement 159 Takeovers - Discretionary Powers* and an amended Class Order 00/344.

³ *Interim Policy Statement 159 Takeovers - Discretionary Powers*.

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S8's Grounds

14. S8's application to ASIC gave as reasons for the abridgement that S8 had already commenced its printing process, that it needed to print the documents without delay, before stock market prices used to calculate the consideration offered under section 621 became stale, and that any residual issues could be addressed in the target's statement or in a supplementary bidder's statement which S8 had foreshadowed it would issue when BreakFree published its accounts for the financial year to 30 June 2003.
15. The application for review referred to the Class Order and submitted that all of the amendments that S8 had made to the bidder's statement resulted from requests made by BreakFree or by ASIC, were clarifying in nature only and were not substantial. It also stated that S8 had understood that ASIC's consent would be given as a matter of course.
16. In submissions, S8 pointed out that it had incurred the delay in dispatch by agreeing to some of the changes requested by BreakFree. It argued that it should not be disadvantaged by being held up in dispatching its bidder's statement and offers because it had made those changes, and that the fact that BreakFree had sought additional changes was irrelevant to the issue whether dispatch should be held up because of the changes S8 had made.
17. S8 also argued that the delay in posting would mean that it could not meet its obligation under section 631 to make offers in accordance with its 11 July announcement by 11 September. ASIC defused that issue by offering to consider an application for an extension of time under section 631, and we understand that such an extension has now been granted.

ASIC's Statement of Reasons

18. After setting out the facts of the matter, ASIC gave as its principal reason for refusing consent that it was inappropriate to exercise a discretion to facilitate the early dispatch of a bidder's statement, where there was a genuine issue as to whether the document was defective, particularly if the bidder would obtain a strategic advantage from early dispatch, and obtain it wrongly, if the statement really was defective.
19. ASIC did not adopt BreakFree's concerns, but said it was satisfied that there was a genuine dispute as to the adequacy of the content of the statement.
20. ASIC provided copies of its emails and correspondence with S8. They did not support S8's perception that consent to early dispatch would be granted as a matter of course.

Submissions by BreakFree

21. BreakFree opposed consent to early dispatch of the offers and bidder's statement. On 3 September, it submitted to ASIC that it had not had time to properly consider the amended bidder's statement, that the document appeared still to be defective and that more than two days were needed for

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BreakFree to make, and for ASIC and S8 to respond to, submissions that the document was still defective. On 4 September, BreakFree provided ASIC and S8 with a note of what it regarded as continuing deficiencies in the document.

22. On 5 September, BreakFree submitted to us that ASIC's consent was properly withheld, because:
 - (a) S8 had not complied with the requirement of the Class Order to provide a marked-up copy of the amended bidder's statement;
 - (b) the amended statement was still defective;
 - (c) the deficiencies were such as to make the bidder's statement misleading, and should not be dealt with in a supplementary bidder's statement; and
 - (d) the amendments themselves required BreakFree to undertake additional analysis.
23. BreakFree also submitted that the decisions by ASIC and the Panel regarding a similar issue in *Infratil Australia Ltd*⁴ support ASIC's decision, and stand for the propositions that:
 - (a) [PS 159:36] does not set out exhaustively the factors which are relevant to a decision whether to consent to early dispatch of an amended bidder's statement;
 - (b) the possible need of a target for additional time to prepare its response to the bidder's statement is a relevant consideration; and
 - (c) ASIC is entitled to withhold consent to early dispatch, where there are serious and genuine factual and legal concerns which should not be left to be addressed in the target's statement.

Materiality of Changes made by S8

24. In our view, the changes made by S8 to its bidder's statement were substantial. They included adjustments of information which could be expected to be material to shareholders deciding whether to accept S8's offer. All but two of them, however, addressed criticisms BreakFree had made of the document in its original form, to a greater or less extent accommodating BreakFree's criticism (the other two changes were in response to suggestions from ASIC). Not all of BreakFree's criticisms were addressed and of those which were addressed, not all were fully accepted.
25. There is nothing in the changes made by S8 to surprise BreakFree or materially delay it in preparing a target's statement, even allowing for the fact that some of the changes were in response to issues raised by ASIC, not BreakFree. Although new information was introduced concerning benefits expected to be gained from the merger of the two businesses, the figures were neither large nor implausible. Taking them together, the changes are not such as to justify more than a day or two's extra time to prepare the target's statement. Had the

⁴ [2000] ATP 1

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materiality of these changes been the only issue, we would have allowed S8 to dispatch a consolidated bidder's statement with only a short delay.

Alleged Continuing Deficiencies

26. On the other hand, BreakFree pointed to a number of issues concerning the bidder's statement which it said had not been satisfactorily addressed by S8's modifications. Among those were concerns on BreakFree's part that:
- (a) S8 had made predictions regarding the future share price of the merged entity for which there was no reasonable basis and were therefore misleading under subsection 670A(2);
 - (b) S8 had made predictions regarding the future dividend yield of the merged entity which had no reasonable basis and were therefore misleading under subsection 670A(2) ;
 - (c) S8 had overstated the number of units over which it had management rights, and did not adequately correct this when it amended the bidder's statement;
 - (d) The independent expert's report on the assumptions used in the bidder's statement was signed before material new information was added to the bidder's statement (the consent to include the report would have been invalidated when the new material was added);
 - (e) S8 should have mentioned in the bidder's statement that it proposed to amend its constitution to allow it to issue preference shares (citing *Re Evans Deakin Industries Ltd (No. 2)* (1980) 5 ACLR); and
 - (f) A bar chart comparing dividends of the two companies was misleading, because the choice of scale exaggerated the differences.
27. These were not the only concerns raised by BreakFree. Given that they may be raised before us in the form of an application to restrain dispatch of the bidders statement, we have not formed a concluded view about them, the other issues raised by BreakFree, or the issues raised previously and addressed by S8 in its supplementary bidder's statement. Enough has been said, however, to indicate that BreakFree's concerns relate to material which could be highly influential in shareholders' decisions and that it alleges serious deficiencies in that material. BreakFree's submissions are not fully argued, but do contain supporting information in relation to these matters.

S8's Rebuttals

28. In rebuttals delivered on 8 September, S8 proposed a number of amendments to its bidder's statement, and arguments as to why other changes would be inappropriate, in reply to the items set out in paragraph 26.

Precedents - *Infratil*

29. In *Infratil Australia Ltd*⁵, the sitting Panel upheld a decision by ASIC to refuse consent under the Class Order to early dispatch of a replacement bidder's statement, although the changes resulted from discussions between the parties, were not substantial and did not raise difficult new issues for the target's consideration. The sitting Panel agreed with ASIC that the matters mentioned in [PS 159:36] are not exhaustive and that in the circumstances ASIC had been entitled to pay regard to the fact that there was a dispute as to whether additional material (considerable in volume and importance) should be added to the bidder's statement.
30. In striking a balance between the policy of not unduly impeding the dispatch of takeover documents and the policy that the market and offeree shareholders should be informed, the sitting Panel had regard to the existence of that dispute and that a process was well advanced to resolve it. It upheld ASIC's decision, in effect requiring the bidder to wait until a related application had been heard by the same Panel. Of course, there would have been no basis for holding back the bidder's statement, unless the Panel had formed a view that there was a serious question whether the bidder's statement was defective.

Precedents - *Email (No. 2)*

31. Similarly, in *Email Ltd (No. 2)*⁶, a review Panel restrained dispatch of a bidder's statement, because there was a credible claim (supported by expert evidence) that the statement was positively misleading in a material respect. The Panel said that it would not have been enough that the statement was incomplete, because mere omissions would do no permanent harm, and could be remedied by a supplementary bidder's statement.

Restraint Policy

32. In paragraph 5.5 of its Guidance Note No. 5 on *Restraining the Dispatch of Documents* the Panel has set out the policy it proposes to apply where application is made for orders under section 657D or 657E restraining the dispatch of takeover offers. The Guidance Note says that:

5.5 ... Dispatch of a bidder's statement should only be held up where the Panel is satisfied that the statement contains defects which may not be adequately remedied by a supplementary bidder's statement (with any necessary extension of the closing date of the bid) or correction in the target's statement. Therefore any application will have to show clear and serious issues relating to the adequacy of the bidder's [statement]. ... Generally before restraining dispatch the Panel would have to be satisfied that there is a significant risk that the bidder's statement will be misleading in a material respect, or that a material omission is unlikely to be remedied by the provision of a supplementary bidder's statement.
33. That statement relates to making orders to restrain dispatch. A consent to early

⁵ [2000] ATP 1

⁶ [2000] ATP 4

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dispatch of a bidder's statement should allow the target (or another party) a reasonable opportunity to apply for an order restraining dispatch, for instance by consenting to the bidder dispatching the statement after a specified period.

Conclusion on Policy

34. In our view, the policy set out by ASIC in [PS 159:36 to 37] and the Class Order and applied by it to this application was one which it was open to ASIC to adopt and which is relevant to the present facts.
35. The primary objective of the policy is to facilitate correction of bidder's statements in the interval between service and dispatch, without penalising a bidder for adopting some of a target's concerns or compromising the principle in section 602(b) of the Act which requires the directors of a target to have a reasonable time to consider a proposal by a person to acquire a substantial interest in the target. That policy does not require a bidder to accept all of a target's concerns regardless of their merits.
36. In exercising this discretion, however, we are of the view that:
 - (a) [PS 159:36] does not set out exhaustively the factors which are relevant to a decision whether to consent to early dispatch of an amended bidder's statement under the Class Order;
 - (b) ASIC is entitled to take account of its concerns as to whether the bidder's statement as amended should not be issued, because it seems to ASIC that it may contain deficiencies that give rise to serious factual and legal concerns which should not be left to be addressed in:
 - (i) the target's statement; or
 - (ii) a further supplementary bidder's statement after dispatch of the amended bidder's statement,(that is, because there is a serious concern that aspects of the bidder's statement are misleading rather than being merely incomplete); and
 - (c) it is relevant to consider:
 - (i) the materiality of the changes made to the bidder's statement; and
 - (ii) the extent to which the changes respond to issues raised by the target,to assess the impact of the changes on the target's ability to assess and react to the bid, relevantly including preparing a target's statement, requesting changes to the bidder's statement and offers and deciding whether to seek orders restraining dispatch of the offers.
- We consider that this view is consistent with the approach in *Infratil*.
37. It follows that even before deciding whether such deficiencies appear to exist, ASIC may delay its decision on whether to consent to early dispatch long enough to allow the target (or other interested party) enough time to:

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- (a) draw ASIC's attention to the deficiencies after an amended bidder's statement has been prepared in the context of ASIC deciding whether to consent to the early release of the document under the Class Order; and
 - (b) consider whether to seek to restrain dispatch of the bidder's statement.
38. In the end though, each limb of this policy requires ASIC to exercise its own judgement on the facts relevant to a decision whether to allow the dispatch of an amended bidder's statement without additional delay, whatever the target's view.

Decision

39. In our view, on the present facts ASIC was entitled to:
- (a) form the view that there is a serious question whether aspects of the amended bidder's statement are misleading (and not merely incomplete); and
 - (b) withhold consent to early dispatch of the bidder's statement because it has concerns of that nature.
40. Since we have reached the view that there is a serious question whether the amended bidder's statement is misleading, we affirm ASIC's decision.

Potential Further Proceedings⁷

41. Strictly, S8's proposals in its rebuttal submissions of 8 September to further amend the bidder's statement are irrelevant to the application before us, which relates to whether the amended bidder's statement lodged with ASIC on 2 September should be dispatched without further delay.
42. In accordance with Guidance Note 5, we encourage S8 and BreakFree to resolve these issues between themselves and to ASIC's satisfaction.
43. At some point, however, BreakFree may decide to bring these residual issues before the Panel (for example, in the form of an application to restrain dispatch of the bidder's statement, or seeking correction of the document). Although we have no comment in relation to the merits of such an application, or its likelihood of success, we note that Guidance Note 5 indicates that the time at which such an application is made will be a relevant consideration for a Panel that is asked to consider an application to restrain the dispatch of a document. Therefore, any application based on the currently identified and formulated concerns should be brought as soon as possible after it becomes apparent that those concerns are unlikely to be resolved by negotiation.

⁷ These reasons were prepared prior to the commencement of the BreakFree 03 proceedings (which relate to an application received on 12 September 2003).

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Press Comment

In the context of the BreakFree proceedings

44. During both these proceedings and the BreakFree 01 proceedings our attention was drawn on a number of occasions to comments made by S8 and BreakFree in the press concerning issues which were, or which were soon to become, the subject of proceedings before the Panel.
45. As a result of those comments, we reminded both S8 and BreakFree of the obligations (**No Canvassing Requirement**) assumed by all parties (including themselves) to Panel proceedings (see Panel Procedural Rule 12 and the undertakings that parties are required to provide when they lodge a notice of appearance) not to canvass in the media issues which are the subject of Panel proceedings.
46. The Panel did not form a concluded view that any specific comments resulted in a breach of the No Canvassing Requirement.
47. However, the Panel was concerned about certain comments attributed to S8 in the *Courier Mail* on 5 September in relation to issues the subject of the Application. These comments were made at a time when it was reasonable to expect that S8 was contemplating making the Application.
48. Comments were also attributed to BreakFree in the *Gold Coast Bulletin* on 5 September in relation to issues traversed in the Application. However, it was not as clear that BreakFree should have anticipated that these remarks related to the subject matter of imminent Panel proceedings at the time they were made.

General comments

49. Parties to Panel proceedings should bear in mind that where comments are made in breach of the No Canvassing Requirement, in our view they then become part of the factual background for the relevant proceedings (and any subsequent proceedings) and therefore may become a relevant consideration for the Panel when determining:
 - (a) whether unacceptable circumstances exist; and
 - (b) what the unacceptable circumstances are, and what needs to be done to remedy them.
50. Once made, the Panel may take steps to ensure that such comments do not result in an uninformed, or misinformed, market for the control of voting shares in a company (including through corrective comments Panel releases or decisions, or by making interim orders requiring a party to correct the relevant information).
51. Even if a person is not yet a party to Panel proceedings, he or she should exercise caution in making comments in the media where:
 - (a) there is a likelihood that the relevant issues may come before the Panel, in

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- particular if the person is considering making such an application; or
- (b) the person is considering whether to become a party to proceedings that have been initiated.

Whilst comments made at such a time may not technically contravene the No Canvassing Requirement, they can nevertheless contravene the spirit of that requirement and the Panel may still take action accordingly.

52. The Panel will not accept an explanation from a party that comments made by it to the press were used out of context, and that the party is not at fault for the comments as printed. The Panel is of the view that if a party to actual, or contemplated, Panel proceedings decides to make comments in the press then that party assumes responsibility for the way in which its comments are used. If reporting of a party's comments is inaccurate, it is the party's responsibility to ensure that the inaccuracy is corrected to the Panel's satisfaction. If the party chooses not to do so, it bears the risk that the Panel will take action in relation to those statements.

In Conclusion

53. We refuse the application to vary ASIC's decision to refuse consent. We thank parties for providing their statement of reasons and submissions quickly. We adopt the Panel's published procedural rules for the purposes of this proceeding and consent to the parties being represented by their solicitors. There will be no order for costs.

Kathleen Farrell
President of the Sitting Panel
Decision dated 10 September 2003
Published 26 September 2003