



**In the matter of Mildura Co-operative Fruit Company Limited  
[2004] ATP 5**

**Catchwords:**

*Co-operative company – content of bidder’s statement – content of target’s statement – consent to use statements in target’s statement – dispatch of target’s statement to preference shareholders – allegations of misleading or deceptive statements and omissions – methodologies used to assess adequacy of bid price – effect of shareholding restrictions – role of financial adviser – disclosure of financial advice – disclosure of bidder’s intentions – misleading announcements to the market – collateral benefits – supplementary bidder’s statement – supplementary target’s statement – declaration of unacceptable circumstances – proceedings concluded based on undertakings*

*Corporations Act 2001 (Cth), sections 638(1) and (5), 636(1), 602(a) and (b), 670A(2)*

*Great Mines Ltd [2004] ATP 1*

*Goodman Fielder (No. 2) [2003] ATP 5*

*Pancontinental Mining Ltd v Goldfields (1995) 13 ACLC 577*

*Ridley MI v Joe White Maltings (1996) 22 ACSR 319*

*ASIC v National Exchange Pty Ltd [2003] FCA 995*

**These are our reasons for:**

- **making a declaration of unacceptable circumstances on 8 March 2004 in the Mildura Co-operative Fruit Company Limited proceedings;**
- **concluding proceedings in relation to the affairs of MCFC following acceptance by us of undertakings by MCFC and MIC; and**
- **consenting to MIC withdrawing its application to us dated 11 February 2004 under section 657C for a declaration of unacceptable circumstances under section 657A and final orders under section 657D.**

**THE PROCEEDINGS**

1. These reasons relate to:

- (a) three applications to us by Mildura Investment Company Pty Ltd (MIC) dated 27 January (**MIC Application 1**), 28 January (**MIC Application 2**) and 11 February 2004 (**MIC Application 3**) (together, the **MIC Applications**) under sections 657A, 657D, and 657E of the *Corporations Act 2001* (Cth) (the **Act**)<sup>1</sup>; and

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<sup>1</sup> In these reasons, statutory references are to the Act, unless otherwise indicated

- (b) one application to us by Mildura Co-operative Fruit Company Limited (MCFC) (the **MCFC Application**) dated 30 January 2004 under sections 657A and 657D.
2. The MIC Applications and MCFC Application arose from connected facts and the remedies applied for were inter-related. We decided to conduct proceedings in relation to MIC Application 1, MIC Application 2 and the MCFC Application. We were not required to decide whether unacceptable circumstances existed in relation to MIC Application 3 because MIC withdrew it with our consent before we decided whether to conduct proceedings in relation to it.
  3. Given the nature of the disputes and the overlapping remedies sought by the parties, we decided to consider MIC Application 1, MIC Application 2 and the MCFC Application under ASIC Regulation 16(1)(a) in one proceeding (the **Proceeding**).
  4. Details of the background to the MIC Applications and MCFC Application are set out in [8] to [39].
  5. We concluded Proceedings by making a declaration of unacceptable circumstances, and accepting undertakings (the **Undertakings**) offered by MCFC and MIC.

## THE PANEL & PROCESS

6. Simon McKeon (sitting President), Jeremy Schultz (sitting Deputy President) and Marian Micalizzi were the sitting Panel for the Proceeding.
7. We adopted the Panel's published procedural rules for the purposes of the Proceeding.

## FACTUAL BACKGROUND

### *The Parties*

8. MCFC is an unlisted public company incorporated in Australia with more than 50 shareholders. Its principal activities are the acquisition, processing, packing and sale of fruit and vegetables, and the provision of associated services to growers.
9. MCFC has no institutional shareholders. Almost all of the shareholders are individuals. A large majority of the shareholders are horticulturalists or fruit growers (or former horticulturalists or fruit growers) in the Sunraysia district around Mildura.
10. Apart from its ordinary shares, MCFC has two classes of preference shares: existing preference shares and new preference shares. The existing preference shares are convertible to ordinary shares if the MCFC board makes such a

determination as permitted by the constitution. The new preference shares are convertible into ordinary shares if the requisite number of new preference shareholders and ordinary shareholders resolve to merge their shares into a single class of ordinary shares.

11. MIC is a company specifically incorporated for the purpose of making the takeover offer. The sole director and shareholder of MIC is Mr John Armour (**Mr Armour**). The principal financier of MIC is Rosalie Vaughan (Mr Armour's spouse).

*The progress of the Bid prior to the applications*

12. On 2 January 2004, MIC announced a takeover bid for all the issued ordinary shares in MCFC by way of a cash offer of \$1.00 for every ordinary MCFC share held by MCFC shareholders (the **Bid**), and subsequently lodged a bidder's statement (the **Bidder's Statement**) with ASIC. The Bid did not extend to any MCFC preference shares.
13. On 9 January, MCFC wrote to MIC alleging that the Bidder's Statement failed to comply with the disclosure requirements under the Act and that it also contained a number of misleading and deceptive statements. On 12 January, MIC wrote to MCFC responding to the allegations raised by MCFC.
14. On 16 January, MIC sent a copy of the Bidder's Statement in relation to the Bid to each holder of ordinary shares in MCFC.

*MIC issues press release regarding grower payments*

15. MIC made no specific statement in the Bidder's Statement about its intentions in relation to the level of payments MCFC would pay to growers for their produce (the **Grower Payments**), should MIC obtain control of MCFC.
16. On 20 January, an article appeared in the local newspaper, *Sunraysia Daily*, titled "Co-op Takeover Bid Blasted" which contained statements attributed to the chairman of the Sunraysia branch of the Victorian Farmers Federation. The article reported the chairman as saying that:

*"the change of operation from the co-operative philosophy to a profit driven one would see substantial cuts in the payments growers would receive for their fruit and would probably be the death knell for the dried fruit industry."*

17. On 20 January, MIC issued a press release titled "No decrease in grower payments" which included the following statement:

*"growers are concerned about the level of payments they receive at the moment from the Co-op. Mildura Investment Company will review those payments with a view to ensuring that they are at least at market level. Further, Mildura Investment Company will endeavour to ensure that, wherever possible, payments*

are above the rate that would otherwise be set by the market" (original emphasis)

18. The comments in the MIC press release were quoted in the *Sunraysia Daily*, dated 21 January, and also on the Mildura 3MA radio news on 21 January.
19. On 23 and 28 January, ASIC wrote to MIC requesting that MIC immediately issue a supplementary bidder's statement in relation to MIC's comments in the press release concerning the Grower Payments, on the basis that they constituted a material change in MIC's disclosed intentions regarding the future of MCFC's business, should its Bid succeed.
20. Given that this issue came before us in the MCFC Application on 30 January, ASIC took the view that its discussions with MIC in relation to this issue should be suspended pending the Panel's decision.

#### *MCFC sends Target's Statement to ordinary and preference shareholders*

21. On 21 January, MCFC sent a copy of its target's statement (the **Target's Statement**) to each holder of ordinary shares and each holder of preference shares.
22. In sending the Target's Statement to its preference shareholders, MCFC advised the preference shareholders in a covering letter dated 21 January (the **Covering Letter**) that they were entitled to receive the Target's Statement on the basis that their shares may convert to ordinary shares as set out in MCFC's constitution (as permitted by section 254G), although MCFC stated that the directors considered that it was unlikely that this conversion would occur in the context of MIC's bid.

#### *Content of the Target's Statement*

23. In the Target's Statement, MCFC quoted parts of a letter dated 4 September 2003 (the **4 September Letter**) written to it on behalf of Mr Armour (the **Quotations**), which had not otherwise been published. The Quotations related to views expressed by Mr Armour in relation to the value of MCFC shares at that time.
24. MCFC did not seek the consent of Mr Armour to use the Quotations in the Target's Statement.
25. The Target's Statement assessed the adequacy of the consideration offered by MIC under the Bid (the **Bid Price**) by reference to (among other things):
  - (a) a comparison between the Bid Price and the net asset backing of MCFC according to MCFC's most recent financial statements at the time the Target's Statement was prepared (being the year ending 30 June 2003); and

- (b) comparisons between the price/earnings ratio (**PER**) and dividend multiple derived from the Bid Price and the PER and dividend multiple for companies included in the S&P/ASX Small Ordinaries Index (the **Index**),
- (together, the **Bid Price Comparison**).
26. The Bid Price Comparison concluded that the Bid Price of \$1.00 was much less than the value of the MCFC shares.
27. In the Target's Statement, MCFC commented that:
- “John Armour's Bidder's Statement discloses that the Bidder (in effect, John Armour) does not possess the relevant expertise in running Mildura Co-operative's business or businesses in the industries in which it operates”,*
- (the **Expertise Statement**).
28. The Target's Statement also referred separately to the existence of provisions in MCFC's constitution which provide for limits on the number of ordinary shares which one person may hold or vote (the **Takeover Restrictions**), which the directors of MCFC have a discretion to vary.
29. The Takeover Restrictions provide that:
- (a) no person may be the registered holder of more than 100,000 ordinary shares or such higher number than the directors of MCFC may determine;
  - (b) if a person has a relevant interest in more than the maximum limit of ordinary shares, the voting rights attached to the ordinary shares held in excess of the maximum are suspended from the time of acquisition to the time of disposition of such an interest; and
  - (c) a holder of an ordinary share may only transfer such an ordinary share to one or more existing holders of ordinary shares or one or more persons who “deal with” MCFC. The definition of a person who “deals with” MCFC in the constitution requires the person to be a grower, supplier, customer, employee, contractor or other person who has a business relationship with MCFC.
30. In the Bidder's Statement, MIC made the following comments in relation to the Takeover Restrictions:
- (a) MIC would request the board of MCFC to make the limit of the number of ordinary shares a person could hold equal to the number of shares for which MIC had received acceptances under the Bid;

- (b) if the board of MCFC refused the above request, MIC would establish a wholly owned subsidiary for each additional parcel of 100,000 shares (or part thereof) for acceptances which had been received by MIC;
  - (c) MIC had formed the view that the restriction on the voting rights attached to those ordinary shares held in excess of the maximum limit had no effect and did not operate to suspend the voting rights attached to any shares; and
  - (d) MIC had “dealt with” MCFC and was therefore qualified as a person to whom MCFC shareholders could transfer their shares. Also, MIC would procure any special purpose subsidiary set up as mentioned in paragraph (b) to “deal with” MCFC and qualify as a transferee.
31. On 23 January, MIC wrote to MCFC alleging that the Target’s Statement failed to meet the disclosure requirements under the Act and contained statements and omissions that were misleading or deceptive and that the use of the Quotations contravened subsection 638(5) of the Act which prohibits a target’s statement from including a statement by a person, or a statement said to be based on a statement by a person unless the person has consented to the statement being included in the target’s statement in the form and context which it is included. On 27 January, MCFC wrote to MIC responding to the allegations raised by MIC.

*MCFC engages KPMG*

32. KPMG Corporate Finance Pty Ltd (**KPMG**) was identified on the cover of the Target’s Statement as being MCFC’s financial adviser. However, KPMG was not referred to in the body of the Target’s Statement.
33. On 23 January, MIC wrote to MCFC asking MCFC to confirm that it did not receive any advice (whether written or oral, formal or informal) from any qualified person as to the value of MCFC’s ordinary shares or as to the adequacy, reasonableness or fairness of the Bid.
34. On 25 January, MCFC wrote to MIC stating that it had not received any opinion from any qualified person as to the value of MCFC’s ordinary shares or to the adequacy, reasonableness or fairness of the Bid. However, MCFC indicated in its response that in coming to their recommendation that MCFC shareholders not accept the offer, the MCFC directors had regard to, among other things, a preliminary discussion with KPMG as to the possible value of MCFC shares. MCFC asserted that this discussion and any associated written or oral advice received by KPMG (the **KPMG Advice**) was not required to be disclosed to shareholders on the basis that it was incomplete, insufficiently definite, highly subjective and speculative.

*MIC makes MIC Application 1*

35. MIC Application 1 was made to us on 27 January. The issue in MIC Application 1 concerned the use of the Quotations by MCFC in its Target Statement without the consent of Mr Armour in contravention of subsection 638(5). This issue is discussed at [40] – [51].

*MIC makes MIC Application 2*

36. MIC Application 2 was made to us on 28 January. In general, the issues in MIC Application 2 concerned:
- (a) whether the Target’s Statement should have been dispatched to preference shareholders (discussed at [52] – [56]);
  - (b) whether analysis of the Bid using the Bid Price Comparison, and statements/omissions regarding the Takeover Restrictions (and their effect on the Bid Price Comparison) in the Target’s Statement, were misleading (discussed at [57] – [69]);
  - (c) whether statements/omissions in the Target’s Statement about Mr Armour and MIC’s expertise in running MCFC’s businesses were misleading (discussed at [70] – [73]); and
  - (d) whether MCFC should disclose the KPMG Advice to shareholders in accordance with section 638 (discussed at [74] – [81]).

*MCFC makes MCFC Application*

37. The MCFC Application was made to us on 30 January. The issue in this application concerned whether MIC’s statements about Grower Payments were misleading and whether MIC had breached subsection 636(1) or the policy of subsections 602(a) and (b) by not disclosing details of its intentions regarding Grower Payments in the Bidder’s Statement. This issue is discussed at [82] – [97].

*MIC makes MIC Application 3*

38. MIC Application 3 was made to us on 11 February. In this application, given that the Target’s Statement only contained details about MCFC’s financial performance for the year ending 30 June 2003, MIC sought an order that MCFC issue a supplementary target’s statement which contained details regarding the financial performance of MCFC for the first half year ending 31 December 2003.
39. We were not required to decide whether unacceptable circumstances existed in relation to MIC Application 3 because MIC withdrew it with our approval before we decided whether to conduct proceedings in relation to it, on the basis that MCFC would provide in a supplementary target’s statement details of MCFC’s net profit after tax and earnings before interest and tax for the half year ending 31 December 2003.

## DISCUSSION

### A. CONSENT TO INCLUDE QUOTATIONS - SECTION 638(5)

40. In MIC Application 1, MIC alleged that the inclusion in the Target's Statement of the Quotations constituted unacceptable circumstances because:
- (a) shareholders had been provided with misleading, out of date and inappropriate information;
  - (b) it contributed to a misinformed market; and
  - (c) MCFC had breached subsection 638(5) which prohibits a target's statement from including a statement by a person, or a statement said to be based on a statement by a person unless the person has consented to the statement being included in the target's statement in the form and context which it is included.
41. On the basis of those allegations, MIC sought an interim order that, for a period of two months, MCFC refrain from making any public statements (including, without limitation, statements to and in the media and statements to shareholders) that referred to, were based upon or in any way drew attention to the Quotations.
42. MIC also sought final orders that:
- (a) MCFC withdraw its Target Statement, by MCFC writing to every MCFC shareholder (including holders of preference shares) and advising them that the Target's Statement did not comply with the Act (without stating why) and should not be relied on in making a decision about whether to accept MIC's offer;
  - (b) the letter not deal with any other matter and, specifically, was not to make any recommendation about, or comment on, the offer by MIC and was not to refer to, contain statements based upon or in any way draw attention to the Quotations;
  - (c) the letter not be accompanied by any other document; and
  - (d) MCFC issue a replacement target's statement which did not include any statements by Mr Armour or his solicitors, or any statement based on a statement by Mr Armour or his solicitors unless Mr Armour or his solicitors, as applicable, gave their written consent.
43. MCFC submitted that its use of the Quotations did not contribute to unacceptable circumstances because:
- (b) MIC had in effect consented to the use of the Quotations because in correspondence between MCFC and MIC prior to MIC Application 1, MIC suggested that in the event of disagreement between MIC and MCFC as to



what information should be included in the Bidder's Statement (relevantly, whether details of the 4 September Letter should have been included in the Bidder's Statement), the appropriate forum for MCFC to convey its opinions was in its Target's Statement; and

- (b) the information contained in the 4 September Letter was highly material and that in the event of any inconsistency between subsections 638(1) and 638(5), subsection 638(1) should prevail.
44. We do not agree with MCFC's first submission because the correspondence relied on did not in fact consent to any use of the 4 September Letter, let alone to the quotation of particular passages in the form and context in which they were quoted, which is what the section requires. The suggestion by MIC was not an invitation for MCFC to include the Quotations in the Target's Statement, but rather to address the issues discussed in the 4 September Letter.
45. In addition, the Target's Statement did not state that Mr Armour had consented to the use of the Quotations, as section 638(5) requires.<sup>2</sup>
46. We also do not accept MCFC's second submission that the obligation to provide all material information in subsection 638(1) prevails over the prohibition on using a person's statement without their consent in subsection 638(5). The specific prohibition in subsection 638(5) overrides the general obligation in subsection 638(1), so that if a statement to which subsection 638(5) applies is required to be included in order to fulfil the disclosure obligations in subsection 638(1), the target must either seek and obtain the consent required by subsection 638(5) (and comply with the other aspects of that subsection) or seek a modification or exemption from ASIC under section 655A to allow the statement to be included without that consent.
47. Therefore, in this circumstance, we consider that MCFC should have consulted with Mr Armour or his solicitors to seek Mr Armour's consent to include the relevant quotations in the Target's Statement prior to releasing the Target's Statement. If that consent was not forthcoming, MCFC could then have applied to ASIC for an exemption from subsection 638(5) as mentioned above.
48. MCFC's failure to obtain the consent of Mr Armour to include the Quotations in the Target's Statement was a breach of subsection 638(5) and constituted unacceptable circumstances. We wish to emphasise that subsection 638(5) is an important part of Chapter 6. It creates an offence of strict liability, and is basic to the incidence of civil and criminal liability for statements made in takeover documents. We note that in this case, MCFC made no attempt to seek the consent of Mr Armour (or consult with his solicitors to seek his consent) to use the Quotations in the Target's Statement.

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<sup>2</sup> See *Great Mines Ltd* [2004] ATP 1 at [57] – [61]; *Goodman Fielder (No. 02)* [2003] ATP 5 at [63]-[64]

49. We informed MCFC that unless MCFC provided us with suitable undertakings, we proposed to make orders that MCFC issue a supplementary target's statement stating that by using the Quotations, it failed to comply with subsection 638(5), that MCFC shareholders disregard all references to the Quotations, that Mr Armour did not consent to the use of the Quotations and that the directors of MCFC (and not Mr Armour) were responsible for the views expressed in the Quotations.
50. Upon accepting the undertakings offered by MCFC (set out in Annexure A), we decided not to make the interim or final orders requested by MIC.
51. Despite accepting MCFC's undertakings, we decided to make a declaration of unacceptable circumstances considering our strong belief in the importance of subsection 638(5) and of discouraging disregard for that provision in the future.

## **B. PREFERENCE SHAREHOLDERS**

52. In MIC Application 2, MIC alleged that unacceptable circumstances existed because MCFC's preference shareholders had been misled as to a fundamental term of their securities by MCFC sending them a copy of the Target's Statement and advising them in the Covering Letter that the preference shares were convertible to ordinary shares.
53. MIC sought an order that MCFC write a letter to each holder of new preference shares and existing preference shares advising them that, among other things:
  - (a) in the case of new preference shares, the statement in the Covering Letter that their shares were convertible to ordinary shares was wrong and MCFC was not required to send its Target's Statement to holders of new preference shares;
  - (b) in the case of existing preference shares, their shares were convertible to ordinary shares only if the directors of MCFC have made a determination to that effect and the directors had made no such determination at that time and MCFC was not required to send its Target's Statement to holders of existing preference shares; and
  - (c) the letter was not to deal with any other matter.
54. Upon review of the Covering Letter, we were satisfied that its terms were such as to ensure that MCFC's preference shareholders were not misled, by having been sent the Target's Statement, into believing that they could accept the Bid for their preference shares. The Covering Letter made it clear to preference shareholders that the offer did not extend to preference shares.
55. In addition, we were satisfied that the Covering Letter clearly communicated to preference shareholders that it was highly unlikely that any of the preference shares would be converted into ordinary shares during the offer period.

56. These matters being clear, we saw no harm in MCFC having provided copies of the Target's Statement to its preference shareholders (whether new or existing), whether or not MCFC was required to do so.

### **C. BID PRICE COMPARISON AND TAKEOVER RESTRICTIONS**

57. In MIC Application 2, MIC alleged that unacceptable circumstances existed because:

- (a) the Target's Statement did not adequately set out the views and intentions of MCFC's directors regarding the Takeover Restrictions, or limitations on the Bid Price Comparison analysis (including the effect of the Takeover Restrictions on the Bid Price Comparison) and that these omissions were misleading; and
- (b) the use of the Index in the Bid Price Comparison was misleading owing to the fact that MCFC shares were not quoted on any stock exchange.

58. MIC sought an order that MCFC issue a supplementary target's statement which referred to the Bid Price Comparison methodologies contained in its Target's Statement and explained that those methodologies may have the effect of misleading shareholders into attributing a higher value to ordinary shares in MCFC than was appropriate given that comparisons with the PER and dividend multiple of companies in the Index failed to take into account that companies in the Index were listed, and because of the Takeover Restrictions.

59. MCFC submitted that:

- (a) the facts that MCFC was unlisted and that the Index comprised listed companies were made clear in the Target's Statement;
- (b) MCFC's size and scope of operations fell within the range of companies included in the Index, making the use of the Index in the Bid Price Comparison valid and appropriate; and
- (c) the Takeover Restrictions had no effect on Bid Price Comparison in the context of MIC's bid given that:
  - (i) the Bid was for 100% of the ordinary shares in MCFC;
  - (ii) shareholders could resolve to remove the Takeover Restrictions from MCFC's constitution should they so desire; and
  - (iii) the directors of MCFC had discretion to increase the limit on the number of ordinary shares that could be registered in the name of a particular shareholder.

60. MCFC has shown that it could reasonably be compared with the companies making up the Index, as regards its size.

61. However, we consider that the use of the Bid Price Comparison analysis was deficient as the Target's Statement did not explain with sufficient clarity that the Bid Price Comparison was only presented on the basis of an assumed proposal to acquire a controlling interest in MCFC and was not appropriate to the assessment of a bid for a minority interest in MCFC.
62. The net asset backing method was based on allocating to each ordinary share an aliquot share of the value of the company as a whole as disclosed by its balance sheet, with no minority or marketability discount. Also, since the PER and dividend multiple methods were based on on-market transactions in minority interests, they reflected a minority discount, but not the same marketability discount that would be applied to an unlisted company. Both of these discounts are relevant to a purchase of a small interest in an unlisted company.
63. By presenting the Bid Price Comparison as appropriate, the part of the Target's Statement which used the Bid Price Comparison analysis to assess the Bid Price implicitly assumes that the Bid should be assessed as a bid for a controlling interest. MCFC insisted that the Bid Price Comparison methodologies were appropriate, as the Bid was for 100% of the ordinary shares. Since the Bid was not subject to a minimum acceptance condition, this submission was unconvincing.
64. We consider that assessing the Bid as a bid for a controlling interest was a realistic basis of comparison: not because the Bid was expressed to be for all of the ordinary shares, but because enforcement of the Takeover Restrictions may have frustrated the Bid, unless MIC received acceptances for a controlling interest.
65. We noted that the directors of MCFC intended to enforce the Takeover Restrictions, although MIC believed that the Takeover Restrictions were ineffective, at least in relation to its Bid. We were concerned that the Target's Statement did not disclose with sufficient clarity whether and how the directors of MCFC would enforce the Takeover Restrictions in relation to the Bid.
66. If the Takeover Restrictions were effectively applied to acceptances under the Bid, MIC could not vote the shares for which it received acceptances and transfers of those shares might not be registrable, subject to the directors' discretion to allow a person to acquire shares in excess of the limit of 100,000 ordinary shares or to MIC acquiring enough shares through acceptances to remove either the directors of MCFC or the Takeover Restrictions. That is, if they were effective, the Takeover Restrictions would operate as a poison pill, preventing MIC from acquiring a substantial minority position, but potentially allowing it to acquire a controlling interest on terms acceptable to shareholders or the directors.
67. On this analysis, the Bid was appropriately characterised as a bid for a controlling interest, but the discussion of the adequacy of the Bid Price was deficient because it did not explain how the Takeover Restrictions affected the

appropriate use of the Bid Price Comparisons. Indeed, the operation of the Takeover Restrictions as a poison pill in relation to the Bid had not been discussed in the Target's Statement with sufficient clarity, although it may have been critical to the future direction of the Bid.

68. We informed MCFC that we intended to order that MCFC issue a supplementary target's statement which:
- (a) reproduced the section of the Target's Statement containing the discussion of the Bid Price Comparison but setting out the limitations applicable to the use by MCFC's shareholders of the Bid Price Comparison in responding to the Bid; and
  - (b) set out how the MCFC directors would exercise their powers under the Takeover Restrictions in relation to the Bid, and in particular, whether they would restrain transfers and voting of shares for which acceptances of offers under the Bid were accepted under the Takeover Restrictions.
69. Upon accepting the undertakings offered by MCFC (set out in Annexure A), we decided not to make this order.

#### **D. MIC'S EXPERTISE IN RUNNING MCFC**

70. In MIC Application 2, MIC alleged that unacceptable circumstances existed because MCFC made the Expertise Statement in the Target's Statement without going on to say that MIC had previously stated in its Bidder's Statement that it would be relying on current executive management for that experience, which created a misleading impression that MIC would be running MCFC's businesses and doing so without necessary expertise.
71. MIC sought an order that MCFC issue a supplementary target's statement amending its Target's Statement by noting, wherever a reference was made to the lack of relevant expertise of Mr Armour, that MIC stated in its Bidder's Statement that MIC intended, in general, to retain the current executive management to run MCFC's businesses, except where a decision is taken to sell a business.
72. Upon reviewing the relevant sections of the Target's Statement and the parties' submissions, we do not find the statements in the Target's Statement relating to MIC's expertise in running MCFC's businesses to be misleading or deceptive, taken in context, or that they create an impression that MIC would run the businesses without necessary expertise.
73. In forming this view, we noted that the Target's Statement alluded to MIC's statements in the Bidder's Statement regarding the retention of existing executives with the expertise needed to run the parts of MCFC's business that MIC decides to retain, and that the Target's Statement also directed shareholders to the relevant section of the Bidder's Statement where this was discussed.

## E. KPMG ADVICE

74. In MIC Application 2, MIC suggested that the KPMG Advice was material and ought to have been disclosed in the Target's Statement in accordance with section 638 which requires that a target's statement include all the information that shareholders and their advisers would reasonably require to make an informed assessment whether to accept an offer under a bid.
75. MIC sought an order that, in relation to any advice given to MCFC by KPMG and its associates (whether written or oral, formal or informal, final or preliminary) as to the value of shares in MCFC and/or whether the offer by MIC is fair or reasonable:
- (a) any oral advice be reduced by KPMG to writing;
  - (b) KPMG provide, to us only, a statutory declaration attaching copies of all written advice and a written record of all oral advice; and
  - (d) we keep the statutory declaration and all attachments confidential unless we formed the view that the advice was information that holders of ordinary shares and their professional advisors would reasonably require to make an informed assessment whether to accept MIC's offer.
76. In determining whether the KPMG Advice ought to have been disclosed in the Target's Statement in accordance with section 638, we asked MCFC to provide us with a copy of any written advice or opinion (with any oral advice to be transcribed and provided to us) obtained from KPMG as to the value of shares in MCFC.
77. In response, MCFC provided us with:
- (a) a draft discussion paper titled "*Indicative Pricing Analysis*" (with numbers blacked out) which KPMG had provided to the MCFC directors on 15 January 2004. This paper was produced to assist discussion between KPMG and MCFC's directors, and was the primary component of the KPMG Advice;
  - (b) a letter to MCFC dated 6 February 2004 and a witness statement from KPMG that the result of the valuation exercise in that paper supported the MCFC's directors' assessment of the Bid Price in the Target's Statement and MCFC's submissions as to the information used in preparing that paper.
78. On the basis of this information, we are satisfied that the KPMG Advice does not attract the principle in *Ridley MI v Joe White Maltings* (1996) 22 ACSR 319 that an expert valuation report in the hands of a target board may be material

information which subsection 638(1) requires the board to disclose in the relevant target's statement.

79. In forming this view, we considered that the KPMG Advice had not been prepared as a detailed valuation, but rather as a check on the directors' view that the Bid grossly undervalued the MCFC shares, and accordingly that it did not attempt to pinpoint a precise market value. In particular:

(a) *Highly qualified advice*

The KPMG Advice was highly qualified. It specifically stated that it was a preliminary review which had "been limited to selected information provided to [KPMG] by [MCFC] management" and also "based on publicly available information."

In addition, the KPMG Advice stated that in providing the advice, KPMG "relied upon and assumed, without independent verification, the accuracy and completeness of information available from public sources", and had not undertaken the detailed review necessary to form a view on the value of shares.

(b) *Insufficient details about assumptions and limitations*

Where a valuation report is provided in the context of a takeover bid, it should provide details about the assumptions used, the valuation methodologies used, the selection of comparable companies or transactions, limitations on the valuation methodologies, and the risks of error.

Not having been prepared as a valuation, the KPMG Advice did not disclose these matters in the detail which would be required in a published valuation report.

80. Because it was a working document for the use of the directors and their advisers, it would not have been appropriate for the KPMG Advice to be circulated to shareholders. Like the Courts, we consider that disclosure of information which is not suitable to be relied upon is not required and indeed is to be avoided.<sup>3</sup>

81. The object of the principle in *Ridley MI v Joe White Maltings* and section 638 is to put shareholders in possession of the information required to enable them to make an informed and critical assessment of the offer and an informed decision whether to accept it. In the current circumstances, without any clarifying explanations, we believed that it was unlikely that the KPMG Advice would have assisted shareholders to make a critical assessment of the MIC offer and an informed decision whether to accept it.

## F. GROWER PAYMENTS

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<sup>3</sup> See *Pancontinental Mining Ltd v Goldfields* (1995) 13 ACLC 577

82. In the MCFC Application, MCFC alleged that unacceptable circumstances had arisen because:
- (a) Mr Armour had made statements to the press to the effect that, if MIC were to acquire control of MCFC, it would review the level of Grower Payments with a view to increasing them above the rate that would otherwise be set by the market, with inadequate disclosure of what the review would entail or how the above market rates would be achieved and sustained;
  - (b) the Bidder's Statement was defective as no mention was made of any intention regarding the level of Grower Payments or any intention to increase such payments in contravention of paragraph 636(1)(c);
  - (c) to allow the Bid to proceed on this basis would mean that MIC's proposal to acquire control of MCFC would not take place in an efficient, competitive and informed market and that MCFC shareholders would not have been given sufficient information to enable them to assess the merits of MIC's offer; and
  - (d) the comments about increased Grower Payments gave rise to concerns that certain shareholders (relevantly, those who were growers) were being offered a collateral benefit to induce them to accept the offer, in contravention of section 623.
83. On the basis of those allegations, MCFC sought an order that MIC either:
- (a) issue a supplementary bidder's statement setting out, among other matters, details of MIC's intentions to increase Grower Payments, the basis of any review of Grower Payments, how MIC proposed to achieve increased Grower Payments, how MIC intended to impact dried fruit Grower Payments, the impact on the financial capacity of MCFC should increased Grower Payments be made, how Mr Armour and MIC were qualified to make the statements in relation to increased Grower Payments and any other disclosure necessary to keep MCFC shareholders fully informed; or
  - (b) if MIC had no reasonable basis for making the relevant statements, MIC issue a supplementary bidder's statement and full page notice in the *Sunraysia Daily* retracting all statements in relation to increases in Grower Payments and stating it had no basis for making such statements.
84. MIC submitted that MIC (relevantly, Mr Armour) had formed no intention regarding Grower Payments at the time the Bidder's Statement was issued. Instead, MIC asserted that it was commercially forced to form an intention and to make a statement about Grower Payments following statements published in the *Sunraysia Daily* to the effect that if MIC obtained control of MCFC, the size of Grower Payments would diminish.



85. Taking these facts into consideration, MIC submitted that there could be no breach of paragraph 636(1)(c) because that paragraph requires that details of the intentions of a bidder be disclosed in the bidder's statement where those intentions have been formed, and that the paragraph does not strictly require that intentions be formed.
86. We agree with MIC's submission. We believe that paragraph 636(1)(c) requires that the intentions of a bidder be disclosed in the bidder's statement where those intentions have been formed and that it does not strictly require that intentions be formed.
87. However, in our view, by not formulating intentions regarding Grower Payments and disclosing them in the Bidder's Statement, MIC seriously departed from the policy of paragraphs 602(a) and (b)(iii).
88. In making this decision, we take into account the special nature of a company based on co-operative principles. We consider that the ongoing trading relationship between suppliers and the co-operative is generally a critical issue when supplier-members decide whether to accept a takeover bid for an agricultural or trading co-operative company. In that context, details of the intentions of MIC in relation to Grower Payments are material to shareholders to enable them to make an informed and critical assessment of the offer. The Bidder's Statement did not sufficiently deal with the effects of MIC acquiring control over MCFC on financial dealings between MCFC and suppliers. No information about the proposed review or future level of Grower Payments was included.
89. Also, we were concerned that Mr Armour's reported comments about the Grower Payments had the potential to cause confusion among shareholders, or to mislead them about the likelihood that Grower Payments would increase if MIC's bid was successful, making them unreliable as a basis for a decision whether to accept the bid, and misleading in the extended sense in subsection 670A(2). There are two reasons for our concerns.
90. First, in his reported comments, Mr Armour did not make sufficiently clear the distinction between increases to Grower Payments to dried fruit suppliers and citrus suppliers. Accordingly, his reported comments implied that MCFC, under MIC's control, might exercise a unilateral power to vary the Grower Payments in relation to dried fruits, as well as citrus. In fact, MCFC cannot unilaterally determine Grower Prices for dried fruit. Dried fruit is not purchased from growers by MCFC itself, but by Sunbeam Foods Pty Ltd (**Sunbeam Foods**) of which MCFC owns 50% and may only appoint 2 out of 5 directors on the Sunbeam Foods board.
91. Second, given MIC's acknowledged lack of expertise regarding MCFC's businesses, its stated concern to maintain the profit level of MCFC, its stated concern about MCFC's existing profit level and the magnitude of the Grower Payments relative to MCFC's profit, as disclosed by MCFC's financial

statements, we were concerned that MIC did not have a reasonable basis for making the statements about increasing Grower Payments above market rates.

92. We note that MIC's reported statements about Grower Payments only committed it to conducting a review of the payments, not to increasing the level of the payments, and that there was no reason to doubt the entire truth of the statement that MIC would conduct a review of the payment levels. However, in the Federal Court's decision in *ASIC v National Exchange Pty Ltd* [2003] FCA 995, it was held that in determining whether a statement is misleading, the ultimate impression created by the statement must be considered and its effect gauged, and that a statement may also be literally true yet be framed in such a setting as to mislead or deceive. We believe that MIC's statements about the future level of Grower Payments that MIC would pay growers if it obtained control of MCFC were misleading as they suggested that it was probable that Grower Payments would be increased, a proposition for which there appeared to be no reasonable basis.
93. In coming to our decision, we accepted MCFC's submission that Grower Payments are fundamental to the business of MCFC and would be in the forefront of many shareholders' minds. Grower Payments comprise a significant amount relative to MCFC's profit<sup>4</sup> and any material increase in Grower Payments above the market rate would have a substantial impact on MCFC's profitability and (if sustained) on its long term viability.
94. We informed MIC that we intended to make an order requiring MIC to issue a supplementary bidder's statement which provided additional details on MIC's intentions (and basis for those intentions) in relation to Grower Payments.
95. Upon accepting the undertakings offered by MIC (set out in Annexure B), we decided not to make this order.
96. Despite the undertakings accepted by us from MIC, we made a declaration of unacceptable circumstances in relation to MIC not formulating and disclosing intentions regarding Grower Payments in the Bidder's Statement. We made this decision on the basis that MIC's conduct constituted a serious departure from the policy of paragraphs 602(a) and (b)(iii) that acquisitions of shares take place in an efficient, competitive and informed market, and that shareholders have adequate information to enable them to assess the merits of a takeover offer. We consider it to be important to indicate to the market our disapprobation of these circumstances.
97. We are not convinced that Mr Armour's statements constituted an offer of a collateral benefit in contravention of section 623 as submitted by MCFC. The

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<sup>4</sup> For the year to 30 June 2003, MCFC's net profit was \$3.5 million, its revenue from citrus was \$68 million out of total revenue of \$88 million and its cost of goods sold was \$66 million. These figures do not leave much scope to increase Grower Payments, without offsetting cost reductions or profit increases.

statements made by Mr Armour about the Grower Payments do not constitute an offer of a benefit to which the policy of section 623 and paragraph 602(c) apply. Any benefit would have been provided to the shareholders in their capacity as suppliers to MCFC, not as shareholders in MCFC, because it would have been provided to all suppliers, whether they were or had been shareholders in the company. The only tendency of such a benefit to induce a shareholder to accept the bid would be through its effect on the shareholder in their capacity as a supplier, or perhaps on the interests of suppliers generally.

## **G. GENERAL COMMENTS**

98. In concluding these Proceedings by accepting the Undertakings offered by MCFC and MIC, we consider that any additional and corrective information which those parties provide to shareholders should be provided in as few documents, and that each of those documents be as comprehensive, as circumstances allow.
99. We approved the supplementary statements to be issued by MCFC and MIC for distribution, on the basis that they gave effect to each party's respective undertakings. By accepting the supplementary statements as complying with those undertakings, we do not endorse them in any other way.

## **DECISION**

### **Undertakings and Declaration of unacceptable circumstances**

100. The following circumstances in relations to the affairs of MCFC constitute unacceptable circumstances, namely:
  - (a) MCFC did not seek or obtain the consent of Mr Armour (or any other relevant person) to use the Quotations in the Target's Statement; and
  - (b) MIC did not formulate and disclose intentions regarding Grower Payments in the Bidder's Statement.
101. However, in light of the Undertakings, we decided that no final orders were required.

### **Legal representation and costs**

102. We consented to the parties being legally represented by their commercial lawyers in the Proceeding.
103. We decided that no cost orders should be made in the Proceeding.

**Simon McKeon**  
**President of the Sitting Panel**  
**Decision dated 8 March 2004**  
**Reasons published 15 April 2004**

## Annexure A - Undertakings provided by MCFC during the Proceeding

### Undertakings

**By: Mildura Co-operative Fruit Company Limited**

**To: The Takeovers Panel**

**Date: 26 February 2004**

MCFC makes the following undertakings to the Takeovers Panel:

1. MCFC will send to each shareholder a supplementary target's statement which:
  - (a) prominently at the beginning of the document states that by including the Quotations in the Target's Statement without the consent of Mr Armour, MCFC failed to comply with subsection 638(5) of the Act and accordingly that shareholders should disregard all direct and indirect references to the Quotations in the Target's Statement, referring specifically to the first bullet points on pages 3 and 7 and the whole of each of pages 9, 10 and 38, without mentioning the subject of the Quotations;
  - (b) states that because Mr Armour did not consent to the use of the Quotations, MCFC and the directors (and not Mr Armour) are responsible to shareholders for the content of the Quotations;
  - (c) sets out prominently, by reference to section 8.3 of the Target's Statement, how the directors will exercise their powers under the Takeover Restrictions in relation to the Bid, and in particular whether they will restrain transfers and voting of shares for which acceptances of offers under the Bid are accepted under the Takeover Restrictions and whether the directors would consider exercising their powers under the Takeover Restrictions differently, if the Bid Price was significantly higher, or for any other reason; and
  - (d) reproduces section 4 of the Target's Statement (with the exception of section 4.4 which does not relate to Bid Price Comparisons) with prominent amendments to the introduction to that part setting out the limitations applicable to the use by offeree shareholders of the Bid Price Comparisons in responding to the Bid.
2. The supplementary target's statement mentioned above:
  - (a) will be dispatched within 14 days of the Panel making its final order in relation to these proceedings; and

- (b) will be lodged with the Panel (together with a copy of any document which is intended to accompany the supplementary target's statement) not less than 2 business days before printing is due to commence and approved by the Panel as complying with these orders before printing commences.

## Annexure B - Undertakings provided by MIC during the Proceeding

### Undertaking

**By: Mildura Investment Company Pty Limited**

**To: The Takeovers Panel**

**Date: 26 February 2004**

1. MIC hereby undertakes to post to each ordinary shareholder in MCFC a supplementary bidder's statement in which it updates section 4 of the Bidder's Statement to take account of the matters set out in Recitals I to M of the Draft Orders, including by:
  - (a) stating whether the proposed review of [Grower Payments] will apply to each of dried fruits, citrus and other produce;
  - (b) in relation to each class to which the review is to apply, stating whether MCFC has power to increase relevant [Grower Payments] unilaterally; and
  - (c) in relation to each class to which the review is to apply, setting out its grounds for believing that MCFC could sustainably pay [Grower Payments] which are above the rate that would otherwise be set by the market, or that it has no grounds for such a belief; and

in which MIC may explain the context in which the statements reproduced in the Quotations were made and its views on the effect of the Takeover Restrictions.

2. MIC hereby undertakes to offer, in the supplementary bidder's statement, each person who has accepted an offer under the Bid (including each person whose acceptance is received by MIC within 2 business days after the day on which it dispatches the supplementary bidder's statement) the right to withdraw their acceptance, as if subsection 650E(1) of the Corporations Act required it to afford such a right.
3. MIC hereby undertakes to extend the closing date of the bid to not earlier than 19 March 2004, in accordance with section 650D of the Corporations Act.
4. MIC hereby undertakes that the supplementary bidder's statement:
  - (a) shall be lodged in draft form with the Panel (together with a copy of any document which is intended to accompany the supplementary bidder's statement) not more than 4 business days after the date of these undertakings to be approved by the Panel as complying with

these undertakings and then dispatched not more than 4 business days after such approval; and

- (b) may comment on issues other than those with which it is required by this undertaking to deal, with a view to ensuring that the documents contain all the matters which MIC is required to (or desires to) communication to shareholders be as few and as comprehensive as reasonably possible.