Takeovers Panel

Reasons for Decision InvestorInfo Limited

In the matter of InvestorInfo Limited
[2004] ATP 6

Catchwords:
Efficient market – Eggleston principles – equal opportunity to share in benefits – prospectus disclosure – rights issue – substantial holding – undertaking to Panel – underwriting – voting power

Corporations Act 2001 (Cth) Part 2E.2 and sections 602, 606(1), items 7, 9, 10 and 13 of 611, 657A, 657C, 657D, 713, 724(2), 739(3)
Australian Securities and Investments Commission Act 2001 (Cth) section 201A
ASX Listing Rule 3.1
Takeovers Panel Guidance Note 1 – 'Unacceptable Circumstances'
ASIC Policy Statement 159
Phosphate Resources Limited [2003] ATP 03, cited
Anaconda Nickel Limited 02-05 [2003] ATP 04, approved
QR Sciences Limited [2003] ATP 37, applied

These are our reasons for concluding proceedings in relation to the affairs of InvestorInfo Limited without making a declaration of unacceptable circumstances following the lodgement of a supplementary prospectus by InvestorInfo Limited and the acceptance by us of undertakings by Mr Anthony Young.

THE PROCEEDING

1. These reasons relate to an application (the **Application**) by Mr Gregory Bright (**Mr Bright**) under section 657C of the *Corporations Act 2001* (Cth) (the **Act**),[1] received on 11 March 2004, in relation to the affairs of InvestorInfo Limited (**INV**).

THE PANEL & PROCESS

2. Les Taylor (sitting President), Peter Scott (sitting Deputy President) and Mark Paganin were the sitting Panel for the proceeding (the **Proceeding**) conducted on the Application.

3. We adopted the Panel's published procedural rules for the purposes of the Proceeding.

APPLICATION

Factual background leading up to the Application

The Parties

4. INV is an Australian registered company listed on the stock market of Australian Stock Exchange Limited (**ASX**).

5. Mr Anthony Young (**Mr Young**) is a director and substantial shareholder of INV. Mr Young and his associates constitute the largest shareholding group of INV. As at

[1] All statutory references are to the Act, unless otherwise indicated.

10 February 2004, Mr Young and his associates held 13,952,026 ordinary shares, representing 25.98% of the issued capital in INV.[2]

6. Mr Bright is a founder and former director of INV. As at 19 February 2004, Mr Bright and his associates held 8,592,565 ordinary shares, representing approximately 16.00% of the issued capital of INV.

7. On 16 March 2004, we received notices of appearance from two other INV shareholders advising of their intention to be parties to the matter, being:

   (a) Mr Hiran Nicholas Selvaratnam, the beneficial owner of 4,050,000 ordinary shares, representing 7.54% of the issued capital of INV; and

   (b) Mr Jeffrey Bresnahan, the holder and beneficial owner of 1,015,915 ordinary shares, representing 1.89% of the issued capital of INV.

   Mr Selvaratnam and Mr Bresnahan made no separate submissions. They used the same lawyers to assist them and simply stated that they supported the submissions made by Mr Bright.

Timing of Events prior to Application

8. Mr Bright resigned from the board of INV on 23 January 2004.

9. On 6 February 2004, INV announced to ASX its intention to undertake an underwritten pro rata renounceable rights offer (the **Rights Offer**) under which all existing Australian and New Zealand shareholders of INV would be offered an entitlement to one new ordinary share for each ordinary share held, at an issue price of 6.7 cents per share, to raise a total of approximately $3.6 million.[3]

10. On 13 February 2004, INV lodged the prospectus (**Prospectus**) for the Rights Offer. On 18 February 2004, INV sent a letter to shareholders informing them of the Rights Offer. Copies of the Prospectus were dispatched to shareholders on 1 March 2004.

11. The key dates, as initially set out in the Prospectus, were as follows:

   (a) the rights under the Rights Offer commenced trading on 19 February 2004 and ceased trading on 16 March 2004;

   (b) the closing date for acceptances under the Rights Offer was initially 23 March 2004;

   (c) new shares were to be allotted on 14 April 2004; and

   (d) trading of the new shares was to commence on 15 April 2004.

12. The Rights Offer was fully underwritten by Mr Young (the **Underwriting**). The underwriting agreement was dated 6 February 2004 (the **Underwriting Agreement**).

13. The Prospectus stated that Mr Young would receive a fee of $72,000 in connection with the Underwriting, being 2% of the amount to be raised by the Rights Offer.

14. No sub-underwriters were identified in the Prospectus.

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[2] In these reasons, the issued capital of INV does not include shares to be issued under the Rights Offer unless otherwise stated.

[3] Details of relevant prices for INV shares on the ASX stock market are set out in [50].

15. The Prospectus stated that if no one (except Mr Young and his associates) made applications under the Rights Offer, Mr Young and his associates would hold 58.93% of the post-Rights Offer issued capital in INV. The Prospectus disclosed Mr Young's potential interests in INV shares under various levels of applications under the Rights Offer.[4]

16. For the 6 months to 31 December 2003, INV made a net profit after tax of $98,128. For the 3 months ending 29 February 2004, INV made a net loss after tax of approximately $135,000.

17. As at 31 December 2003, INV held approximately $1.44 million in cash.

Declaration and orders sought in the Application

The Application

18. Mr Bright made the Application to us on 11 March 2004. The Application alleged that the Rights Offer and the Underwriting allowed Mr Young to acquire control over voting shares of INV in a way that was not "effective" or "competitive". The Application also alleged that the Underwriting did not allow other INV shareholders a reasonable and equal opportunity to participate in any benefits accruing to Mr Young.

Interim orders sought

19. Mr Bright sought interim orders under section 657D to prevent INV from allotting any shares on exercise of rights under the Rights Offer, pending determination of the Application.

Declarations sought

20. Mr Bright sought a declaration of unacceptable circumstances by the Panel under section 657A of the Act with respect to the affairs of INV.

Final orders sought

21. Mr Bright sought final orders under section 657D to protect the rights or interests of Mr Bright and other INV shareholders (other than Mr Young) affected by the circumstances. In particular, Mr Bright sought an order that:

    (a) the Rights Offer be prevented from proceeding;

    (b) in the alternative, Mr Young be prevented from acting as the underwriter under the Rights Offer and that Mr Young be prevented from receiving fees for acting as underwriter; or

    (c) in the alternative, INV obtain shareholder approval of the Rights Offer and the Underwriting having regard to Chapter 2E.

[4] Prospectus section 10.4.

Developments during the Proceeding

22. We issued a brief to parties on 16 March 2004 seeking further details regarding the Rights Offer, the Underwriting, the Underwriting Agreement and other relevant matters. The parties provided submissions in response to the brief on 18 March 2004.

23. On 19 March 2004, following receipt of parties' submissions, ASIC issued an interim stop order under section 739(3) that no offers, issues, sales or transfers of shares in INV be made under the Prospectus. This interim order was replaced with a further order issued on 8 April 2004 on the same terms as the initial order (together the **Stop Order**). In its statement of its areas of concern, ASIC identified deficiencies in the Prospectus' disclosure regarding the proposed use of the Rights Offer proceeds.

24. Following the Stop Order, INV issued and lodged a supplementary prospectus dated 21 April 2004 (the **Supplementary Prospectus**).

DISCUSSION

Exceptions to section 606

25. Item 10 of section 611 (**Rights Issue Exception**) provides that the following acquisition is exempt from the prohibition in sub-section 606(1):

> *An acquisition that results from an issue of securities that satisfies all of the following conditions:*
>
> *(a) a company offers to issue securities in a particular class;*
>
> *(b) offers are made to every person who holds securities in that class to issue them with the percentage of the securities to be issued that is the same as the percentage of the securities in that class that they hold before the issue;*
>
> *(c) all of those persons have a reasonable opportunity to accept the offers made to them;*
>
> *(d) agreements to issue are not entered into until a specified time for acceptances of offers has closed;*
>
> *(e) the terms of all the offers are the same.*
>
> *This extends to an acquisition by a person as underwriter to the issue or sub-underwriter.*

We refer to the exception in the last sentence of this item as the **First Underwriting Exception.**

26. Item 13 of section 611 (**Second Underwriting Exception**) provides that the following acquisition is also exempt from the prohibition in sub-section 606(1):

> *An acquisition that results from an issue under a disclosure document of securities in the company in which the acquisition is made if:*
>
> *(a) the issue is to a person as underwriter to the issue or sub-underwriter; and*
>
> *(b) the disclosure document disclosed the effect that the acquisition would have on the person's voting power in the company.*

Policy behind the Rights Issue and Underwriting Exceptions

27. There is little parliamentary material explaining the policy of the Rights Issue Exception or the First Underwriting Exception and the Second Underwriting Exception (together, the **Underwriting Exceptions**). As a general rule, a person is entitled to rely on each exception in section 611 independently of any other. However, in the case of the underwriting of a rights issue, it does not matter whether the underwriter seeks to rely on the First Underwriting Exception or the Second Underwriting Exception – in this case, if the combination of the rights issue and the underwriting would mean that the reliance on the First Underwriting Exception would take place in unacceptable circumstances, then so also would reliance on the Second Underwriting Exception.

28. In relation to the Rights Issue Exception, both ASX[5] and Parliament[6] have taken the view that rights issues are likely to be less prejudicial to shareholders than raising capital by other means, or not raising it at all. If a company needs money, or can employ additional funds profitably, it may be in the interests of existing shareholders to issue shares, by rights issue or placement.

29. Unlike a placement, a rights issue enables shareholders to maintain their percentage interest in the company and take advantage of any discount to market price incorporated in the issue price. If the rights are renounceable, a shareholder can sell them instead of exercising them, and the price they receive for them will reflect any discount incorporated in the issue price. If no shareholder increases their holding more than proportionately and the underwriter does not acquire more than 20% of the voting power, there is no violence to the letter of section 606 or infraction of the policy, or avoidance of the protections, of Chapter 6, and no exception is required. However this ideal is often not attained, and the Rights Issue Exception and, where the rights issue is underwritten, the Underwriting Exceptions deal with the consequences of this. Accordingly, they represent a compromise to accommodate departures from section 606 which are felt not to be inconsistent with the thrust of section 602. Without these exceptions, section 606 could very easily make substantial rights issues impossible for many companies, or prevent substantial shareholders from taking up all of their rights.

30. In general, a rights issue does nothing positively to further the policies of Chapter 6, but in many cases, it does not hinder those policies, because it does not materially disturb control of the issuer company.

31. However, but for section 606, a rights issue which is not fully underwritten could lead to an incremental change of control in favour of a significant shareholder who simply exercises its entitlement, depending on the level of acceptances of the offer by other shareholders. Other shareholders have no opportunity to sell their shares to the person who acquires control (as they would in a bid under Chapter 6), and no opportunity to veto the transaction collectively (as they would under an item 7 section 611 resolution). At most, the other shareholders can take up their rights,

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[5] For example, ASX Listing Rules 7.2 exception 1 and 10.11 exception 1.

[6] In addition to the Rights Issue Exception, see section 215, *Foreign Acquisitions and Takeovers Act 1975* (Cth) subsection 26(4).

proportionately increasing their existing investments, typically without any appreciable individual effect on the outcome of the issue or any opportunity to affect the outcome by collective action of any kind. Indeed, a shareholder who forms the view that there is likely to be a significant shortfall is left having to choose whether to spend money by exercising rights to preserve a percentage holding that may well cease to be relevant to control or to allow the rights to lapse, even further ensuring that control would pass to the significant shareholder.

32. Unless the rights issue is underwritten, a proportion of the rights are likely not to be exercised. Even if the issue is attractive to shareholders, there are likely to be shareholders who do not take enough interest in their investments or who do not have the resources to take up their rights or who for other reasons cannot do so. Accordingly, a shareholder who takes up the whole of their entitlement is likely to increase their percentage holding. How far they will increase their percentage holding depends on the actions of other shareholders, which they normally cannot find out about until applications have closed and it is too late to act on the information. It would often be impossible for a substantial holder to take up the whole of their entitlement without risking a breach of section 606 (even taking account of item 9 of section 611 (**3% Creep Exception**)). If section 606 is not to limit companies' ability to use rights issues and shareholders' access to rights issues to raise capital, shareholders must be given an exemption under the Rights Issue Exception in order to allow them to take up all of their rights, even where there is a shortfall[7].

33. Obtaining full underwriting of the issue resolves this problem for the shareholders. It ensures that no shareholder will have a greater proportion of the issued shares after the issue than they had before it. Underwriting also assists rights issues and the policy favouring them, by overcoming minimum subscription and marketing issues. However, it achieves these effects at the cost of shifting the risk of contravention of section 606 to the underwriter. An underwriter is exposed to an indeterminate increase in their holding, and requires exemption under the Underwriting Exceptions if underwriters are to be able to underwrite rights issues at ratios higher than 1 for 4 (or lower for an underwriter who already has any voting power in the issuer company).

34. It seems, then, that the policy of the Rights Issue Exception is that where a company raises additional capital, and particularly where it issues at a discount to market, it is preferable that Chapter 6 not impede shareholders being given a fair opportunity to take up the issue in proportion to their existing holdings, because that would tend to force the company to place new issues in large lines, tending to close up the register without any direct compensating benefit to shareholders.

35. The First Underwriting Exception (and the Second Underwriting Exception insofar as it applies to a rights issue) is a necessary part of the policy, but represents the compromise built into the policy, which is not based purely on consideration of the policy set out in section 602: it is a compromise between takeovers policy and the

[7] We note that under the New Zealand Takeovers Code, the matter is dealt with slightly differently – the shareholder may exercise the rights and then must sell down any excess within a prescribed period: see Takeovers Code (Class Exemptions) Notice (No 2) 2001 clause 8.

unrelated policy that the interests of shareholders are best served by making some accommodations to allow rights issues.

36. Ensuring that these exceptions are not being used in a way that infringes the policies, or avoids the protections, of Chapter 6 is an important element of the policy.

37. From this point of view, whether the Rights Issue Exception or either the First Underwriting Exception or the Second Underwriting Exception (insofar as it applies to rights issues) is being used properly depends on the extent to which participation in the rights issue (and in alternative benefits) is made genuinely accessible to shareholders in general. We use the term "genuinely accessible" to include not just providing an opportunity to participate in the rights issue but as a broader concept looking at the likely reaction to the offer of shareholders and other investors and the likely effects of the issue on shareholders and the issuer.

Guidance regarding abuse of exceptions

38. The Panel's Guidance Note 1 "Unacceptable Circumstances" (**GN 1**)[8] and ASIC Policy Statement 159 "Takeovers: discretionary powers" (**PS 159**)[9] both set out factors that are relevant in assessing whether or not a rights issue (especially if underwritten) and its benefits have been made genuinely accessible to shareholders in general. Some of these factors (and an explanation of their relevance to whether the issue is accessible) are:

    (a) whether the issuing company received advice from securities advisers – if advice from professional financial advisers (for example, investment banks, and other corporate advisers such as stockbrokers and accountants) is received concerning the various means by which funding could be raised and their respective advantages and disadvantages, it becomes clearer why the issuer chose to raise funds by a rights issue and, potentially, for the commercial terms of the rights issue (for example, amount to be raised, price per share and issue ratio);

    (b) whether the issuing company made attempts to find unrelated underwriters and sub-underwriters – this indicates that someone who has no collateral involvement is prepared to take the risk of a shortfall; such a person will seek to reduce that risk by seeking to increase the likelihood of shareholders taking up their rights and by attempting to lay off their risk to other investors through sub-underwriting;

    (c) the attractiveness of the pricing of the rights issue – a significant discount to market will indicate that the issuer is seeking to attract shareholders to exercise their rights;

    (d) whether the rights issue is renounceable – renounceability, especially when combined with an attractive issue price, indicates that the issuer wants the rights exercised and that, given that there is no relevant exception from section 606 for the buyers of rights who then exercise them, that the exercise of rights

[8] See [1.25] - [1.27].
[9] See [159.152] - [159.187].

should have the least effect possible on proportionate interests of existing shareholders;

(e) market factors during the rights issue – these may incline or disincline shareholders to participate;

(f) what disclosures are made or not made by the issuing company before and during the rights issue – full and meaningful disclosure ensures that shareholders and other investors have a clear understanding of the issuer's business, financial performance, plans and prospects and the effect on them of the issue and will enable shareholders and investors to make a better informed decision in relation to investing in the issuer;

(g) the ratio of the rights issue (although we acknowledge that once a company has determined the total amount that needs to be raised, and has settled on a price that will be sufficiently attractive, the ratio offered under the rights issue is a pre-determined result);

(h) the financial situation of the company (i.e. whether it has a need or use for the funds in the near term) – this may indicate that a rights issue, particularly one underwritten by a related underwriter, is the only rational means by which necessary funds may be raised;

(i) whether there is an adequate explanation of the purpose of the issue and the company's prospects in the disclosure document – by explaining the use of funds in some detail the issuer helps to show that there is a genuine need for the funds and makes the issue more attractive to shareholders by showing a commercial justification rather than just asking investors to trust the directors;

(j) whether the underwriter has entered into the underwriting in the ordinary course of its business – as with (b);

(k) whether the company has explored other capital-raising alternatives – as with (a);

(l) the terms of the underwriting – unusual terms may suggest that the issuer or the underwriter do not expect the shareholders to take up the rights or an intention that control of the issuer pass to the underwriter;

(m) the shareholding structure of the company - if a substantial shareholder is close to control and is also involved in the underwriting this may indicate the matters discussed in (l);

(n) the response of the substantial shareholders to the rights issue – this may indicate whether there is likely to be a large shortfall with the corresponding effects discussed at [31]-[33];

(o) recent variations of the company's capital, such as a buy-back – this can indicate whether there is a genuine need for the funding;[10]

(p) whether the identities of any sub-underwriters have been disclosed to shareholders – if the likely control scenarios are disclosed, including the

[10] See *Phosphate Resources Limited* [2003] ATP 03.

identities of those who may end up owning any shortfall, the future shareholding pattern of the issuer is being frankly discussed, which suggests that shareholders are being openly invited into the rights issue;

(q) dealings by an underwriter or sub-underwriter in securities or renounceable rights before or during the rights issue – this may suggest an attempt to build up a base from which control may be obtained and evidence that the issue is not genuinely accessible to shareholders; and

(r) if the underwriter or sub-underwriter is associated with any directors or substantial shareholders and the role of the underwriter (if any) in the making of the offer under the rights issue – as in (a), (b) and (i).

39. None of these factors is decisive on its own; a decision whether any particular rights issue complies with the policy underlying the Rights Issue Exception and each of the Underwriting Exceptions as they relate to rights issues will depend on assessing each of these factors, as relevant in the particular circumstances, and any other factor which bears on a consideration of whether participation in that rights issue has been made genuinely accessible to shareholders in general, within the limits of the particular company's position and the constraints set by Chapter 6D. That is, the list is not exhaustive, and the importance of the different factors will alter from rights issue to rights issue (even for the same issuer).

Assessment of INV's Rights Offer and Underwriting

40. We considered that, having regard to the factors outlined in GN 1 and PS 159, the Rights Offer and Underwriting contained a number of elements that, when taken together, may possibly have led to control of INV passing in an unacceptable manner. Those elements are discussed below.

Mr Young's potential increase in voting power

41. The potential for Mr Young's voting power to increase to 58.93% through the Underwriting was a concern, particularly given his role as a director (and therefore a related party of INV) and his (along with his associates) existing substantial shareholding. This is notwithstanding that Mr Young's potential increase in voting power was disclosed in the Prospectus (required so that he could rely on the Second Underwriting Exception as well as the First Underwriting Exception).

42. We recognise that some companies, particularly smaller companies, often have difficulty in obtaining professional underwriting at prices which do not make the funding too expensive. Especially where a company has a compelling need for funds, the best means of ensuring that those funds are obtained may be through a rights issue underwritten by a substantial shareholder. Even for large companies, in extreme cases such as the rights issue by Anaconda Nickel Limited,[11] a substantial shareholder may be the logical and only available underwriter. We do not wish to inhibit this sort of underwriting from proceeding - underwriting is likely to make a rights issue more attractive for shareholders, as it indicates that at least one informed buyer is willing to take the risk and ensures that the full amount will be raised.

[11] See *Anaconda Nickel Limited 02-05* [2003] ATP 4.

43. However, underwriting under which a substantial shareholder (as opposed to an unrelated underwriter) may obtain or increase control of the issuing company is likely to attract closer scrutiny to determine whether it may have the effect of infringing on the policies, or avoiding the protections, of Chapter 6.[12]

44. We noted that the Underwriting Agreement contained a termination event entitling Mr Young to relieve himself of his Underwriting obligations, if a person other than Mr Young and his associates obtained a relevant interest in more than 20% of INV's issued capital and maintained that interest for 14 days or more and sought an explanation for its inclusion. INV's initial explanation, that this was designed to prevent Mr Young from increasing his interest beyond about 30%, was withdrawn when we asked how it was meant to have that result. INV and Mr Young then amended the Underwriting Agreement by removing the relevant clause.

External advice

45. INV's submissions stated that the terms and conditions of the Rights Offer were proposed by Mr Young and Mr Mark Cohen, the Chairman of INV, based on their financial markets experience, and that the INV board did not believe that external confirmation of these terms and conditions was required.

46. We accepted INV's submissions that following the tabling of a draft underwriting proposal letter by Mr Young, Mr Young absented himself from the INV board's further discussion of, and voting on, the proposed Rights Offer and Underwriting. However, we consider that it is better practice for a company in INV's position to obtain appropriate external financial advice if it is considering a transaction under which control may pass to any party, particularly a director or substantial shareholder, without a takeover bid being made.

Unrelated underwriter

47. INV submitted that the INV board did not consider or contact any potential underwriters apart from Mr Young in relation to the Rights Offer, as it was sufficiently confident that the terms and conditions of the underwriting proposed by Mr Young, including the 2% underwriting fee, were superior to what INV could obtain from third party underwriters.

48. As indicated above, we acknowledge that smaller companies often have difficulty obtaining professional underwriting from independent parties. However, given the control consequences of the proposed Rights Offer and Underwriting and that no external advice had been obtained on the funding more generally, we consider that it is better practice for a company in INV's position to at least hold discussions with alternative underwriters in order to determine whether or not underwriting on equivalent terms might be available from unrelated parties.

Rights Offer pricing

49. Generally, if a rights issue is priced at the current market price or at only a small discount to that market price, it is more likely to be considered unattractive by

[12] A transaction of this nature will also attract closer examination by ASIC: PS 159 at [159.170].

shareholders or potential buyers of renounceable rights, leading to a larger shortfall and a greater increase in the underwriter's voting power.

50. On 5 February 2004 (the day before the Rights Offer was announced) INV shares were trading at 6.95 cents per share, making the issue price of 6.7 cents a 3.6% discount to the market price. The average closing price of INV shares on the five days before the Rights Offer was announced was 7.11 cents per share, making the issue price a 5.7% discount to that average market price. The Application submitted that this represented a relatively small discount in comparison to other rights issues in the Australian market. We agree with this submission, which accords with our own knowledge and experience.

51. INV's submissions indicated that the INV share price, and the extent of the final discount represented by the Rights Offer issue price, was significantly affected by share trading undertaken by Mr Bright prior to the announcement of the Rights Offer. The relevant share trading by Mr Bright took place on 15 and 16 January 2004, approximately 3 weeks before the announcement of the Rights Offer. In our view, this gave INV ample time to assess the impact of the trading on the market price and revise the proposed issue price, if appropriate.

Disclosure regarding use of funds

52. As outlined in PS 159,[13] if a company cannot clearly identify a need for the capital through its disclosure of the purpose of the rights issue, this may suggest an abuse of one or more of the Rights Issue Exception and the Underwriting Exceptions.

53. The Prospectus stated[14] that INV intended to use the proceeds of the Rights Offer to "*fund future acquisition or investment opportunities consistent with INV's growth and diversification strategy*".[15]

54. We considered that the Prospectus, even taking account of previous statements of corporate strategy made by INV and released to ASX, did not provide shareholders with adequate information to assess the nature of the proposed acquisitions referred to, or the basis on which the directors would decide whether a particular acquisition opportunity fell within the strategy, to enable shareholders to form any clear assessment of the future direction of the company, and that this lack of clarity detracted from the accessibility of the Rights Offer.

55. In considering the disclosures made under the Prospectus, we were less concerned in this instance with assessing whether or not the Prospectus complied strictly with the requirements of section 713, although the policy of disclosure of Chapter 6D clearly correlates with the information principles contained in section 602 and embodied in other provisions of Chapter 6.[16] Following the Stop Order, we understand that ASIC and INV discussed the disclosure requirements of Chapter 6D and in particular, whether the disclosure in the Prospectus satisfied the requirements of section 713(5). ASIC's concerns were raised in light of references in INV's submissions to potential

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[13] See [159.169(d)].

[14] See page 1 of the Prospectus.

[15] Cf. the statement on page 5 of the Prospectus (clause 8.1) that "*[t]he proceeds of the Rights Issue will be used by INV to fund future acquisition opportunities consistent with INV's growth and development strategy*".

[16] For example, paragraph 636(1)(g).

acquisitions being investigated by the INV board, which had not previously been disclosed due to the application of the "carve-outs" in ASX Listing Rule 3.1. We considered it properly within ASIC's jurisdiction to deal with the issue of whether or not the requirements of section 713 had been satisfied.

56. We were more concerned that, given INV's relatively secure financial position (notwithstanding recent disappointing results) and the failure to disclose to shareholders a need for capital, the explanation of the intended use of funds:

    (a) represented a failure properly to market the Rights Offer to shareholders; and

    (b) did not satisfy the information principles in section 602.[17]

Shareholder approval

57. The Application noted that INV did not seek to have the Underwriting approved under either item 7 of section 611 or Part 2E.2. We agree.

58. Where any one or more of the Rights Issue Exception or Underwriting Exceptions properly applies, shareholder approval under item 7 of section 611 is not required. Similarly, if the underwriter is a related party, such as a director, but the underwriting is on terms that would be reasonable if the dealings with the related party were at arm's length, then the company is not required to obtain shareholder approval of the underwriting under Part 2E.2.

59. However, if a company takes the step of obtaining shareholder approval of a proposed underwriting for either or both of these purposes, then we would be less likely to consider such underwriting would constitute unacceptable circumstances. There is no implied prohibition in seeking to rely on a further exception in section 611 merely because there is another one available. Similarly, merely because there may be an available exception in sections 210 to 216, does not mean that shareholder approval may not be obtained for the giving of a financial benefit. This would not be a case of a resolution being proposed which is beyond the power of the general meeting.[18]

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[17] These information principles were set out in *QR Sciences Limited* [2003] ATP 37, at [62]: "In such cases, the information principle expressed in the requirement for an 'efficient, competitive and informed market' in paragraph 602(a) and for relevant information to be provided under subparagraphs 602(b)(i) and (iii) … will apply to the relevant transaction as well as any other disclosure requirements." Another way of viewing this is that the requirement in paragraph 713(2)(a) that the prospectus "*contain **all the information** investors and their professional advisers would require to make an **informed assessment** of…the effect of the offer on the body"*(emphasis added) envisages that the prospectus discuss in sufficient detail the use of funds. Strictly, the offer, being only an offer, has no effect on the body. However, the highlighted words presuppose that there is information that investors would require to make an informed assessment (and presumably to make an investment decision as a consequence) and that it relates to the effects of making the offer (and completing the transactions contemplated by it). That effect is not just that cash will be received and shares issued, but also that the cash raised will be used to do something. It is an effect of the offer because it is the commercial reason why the body is making the offer and it would be reasonably required by investors because they will want to know what it is that the body proposes to do with the money raised and what the company will look like as a consequence of that.

[18] *NRMA Ltd v Parker* (1986) 6 NSWLR 517, 11 ACLR 1; 4 ACLC 609; *Queensland Press Ltd v Academy Investments No 3 Pty Ltd* [1988] 2 QdR 575, 11 ACLR 419, 5 ACLC 175

Unacceptable circumstances

60. In our view, taking each of the elements discussed above into account, it was reasonable to infer that participation in the Rights Offer and Underwriting was not being made genuinely accessible to shareholders in general, thereby undermining the policy behind the Rights Issue Exception and Underwriting Exceptions.

61. The Rights Offer and the Underwriting would have resulted in unacceptable circumstances, having regard to the purposes of Chapter 6 set out in section 602, because:

    (a) INV shareholders (other than Mr Young) and the market would not have had sufficient information to make an informed assessment of the merits of the proposed transaction represented by the Rights Offer and Underwriting;

    (b) the matters set out above would have meant that the transactions comprising the Rights Offer and Underwriting would not have taken place in an efficient, competitive and informed market in shares in INV; and

    (c) other INV shareholders may not have had a reasonable or equal opportunity to participate in the benefits accruing through the Rights Offer and Underwriting under which Mr Young may have acquired a controlling interest in INV.

Supplementary Prospectus and undertakings

Supplementary Prospectus

62. We identified to the parties matters that we considered to be deficiencies of the Rights Offer. We understand that INV had separate discussions with ASIC in relation to its concerns regarding the Prospectus' compliance with section 713. As a result, INV issued the Supplementary Prospectus. The Supplementary Prospectus:

    (a) included additional disclosure regarding the intended use of funds and gave further details of potential acquisitions being investigated by the INV board in order to satisfy ASIC's concerns;

    (b) gave shareholders who took up their rights in full an opportunity to apply for any shortfall shares under the Rights Offer (the **Secondary Offer**) before those shares were dealt with under the Underwriting and discussed the allocation policy that the directors would apply if there were more applications under the Secondary Offer than shortfall shares;

    (c) disclosed the amendment to the Underwriting Agreement made by INV and Mr Young; and

    (d) in accordance with section 724(2), gave shareholders who had already made applications under the Rights Offer an opportunity to withdraw those applications.

63. To ensure that the information principles in section 602 are satisfied, a company which wants to make a rights issue in adverse circumstances (i.e. where a substantial shareholder is the only available underwriter and control may pass as a result of that underwriting) should explain the issue, and its purpose, as clearly as possible and ensure that the offer is made as genuinely accessible to the shareholders in general as can properly be arranged. We consider that the additional disclosure sought by

ASIC in relation to the propose use of funds for acquisitions and details of particular proposals being considered by the INV board were more than sufficient to satisfy the information principles of section 602.

64. We considered that in INV's circumstances, an offer to all shareholders to underwrite the Rights Offer by applying for a proportionate share of the shortfall, similar to that referred to in *QR Sciences Limited* [2003] ATP 37,[19] was an option available to INV to enhance genuine access for all shareholders to participate in the proposed transaction. INV accepted this suggestion and incorporated the Secondary Offer into the Supplementary Prospectus. We note that the Secondary Offer specifically prevented any person from contravening section 606 without relying on the First Underwriting Exception (as contemplated by *QR Sciences)*, and observe that this was not a requirement of ours.

65. The Supplementary Prospectus also provided additional details regarding sub-underwriting of the Rights Offer by Mr John Caldon. These sub-underwriting arrangements with Mr Caldon substantially reduced the potential shortfall that Mr Young may have been required to take under the Underwriting. INV has stated in the Supplementary Prospectus that Mr Caldon is not an associate of INV or any INV directors, including Mr Young and Mr Caldon has provided the Panel with a witness statement to this effect.

Mr Young's undertakings

66. Mr Young has undertaken to the Panel that he will sell any shares he is obliged to take up under the Underwriting which, when aggregated with the existing post-Rights Offer shares in which Mr Young or his associates have a relevant interest, exceed 28.3% of INV's post-Rights Offer issued capital (**Excess Shares**). Mr Young's undertakings are set out in Annexure A to these reasons (the **Undertakings**).

67. 28.3% is the maximum percentage to which Mr Young may have increased his voting power under the 3% Creep Exception.

68. In summary, the Undertakings provide that:

    (a) if the Excess Shares represent 5% or less of INV's post-Rights Offer issued capital, Mr Young must sell those Excess Shares within 3 months of the date of their issue;

    (b) if the Excess Shares represent more than 5% INV's post-Rights Offer issued capital, Mr Young must transfer those Excess Shares to a trustee (approved by the Panel) to be held on the basis that those Shares will be transferred back to Mr Young as and when Mr Young arranges for the sale of those Excess Shares. If not all the Excess Shares are sold within 3 months, then the trustee is to appoint a broker to sell the remaining shares within 1 month at the best possible price and the proceeds (net of costs) will be remitted to Mr Young via the trustee;

    (c) no sale of the Excess Shares is to be made to an associate of Mr Young or any of his associates; and

[19] At [65].

(d) neither Mr Young nor the trustee will exercise any voting rights attached to the Excess Shares, or any voting rights attached to the same proportion of Mr Young's existing shares as the Excess Shares represent of the whole of INV's post-Rights Offer issued capital, until all the Excess Shares are sold.

69. The Undertakings were freely offered in support of Mr Young's repeated submissions that he had no intention of increasing his voting power in INV to more than 30%, notwithstanding the disclosures in the Prospectus that Mr Young's voting power may have increased to 58.93% as a result of the Underwriting.

70. We considered that, if the Excess Shares were 5% or less of INV's post-Rights Offer issued capital (being less than the number of shares that constitutes a "substantial holding" as defined in section 9), this was a sufficiently small parcel of shares to allow Mr Young to retain ownership of those shares during the sale process, provided that he did not exercise any voting rights attached to them. However, we were concerned that if the Excess Shares exceeded 5%, then that was a sufficiently large parcel to have an impact on the control of INV, and that it would be prudent to introduce additional measures (via an independent trustee) to ensure the sale process is properly followed and that voting rights in relation to those shares were not exercised.

71. As Mr Young agreed to honour his obligations with respect to the Underwriting, and has undertaken not to retain any voting power in excess of 28.3% that he may attain as a result of that Underwriting, in our view he is assuming risk similar to that borne by an independent underwriter not interested in increasing its control in the issuing company. On this basis, the Underwriting ceases to have any unacceptable effect and it is not appropriate to prohibit the payment of the underwriting fee to Mr Young under the Underwriting Agreement.

Consequence of Supplementary Prospectus and Undertakings

72. We consider that the Supplementary Prospectus and the Undertakings remove those circumstances which we would have considered unacceptable, by:

(a) ensuring that Mr Young does not increase his voting power in INV through the Rights Offer or the Underwriting above the level to which he would be entitled to go under the "creep" exception in item 9 of section 611;

(b) offering all INV shareholders an opportunity to participate on an appropriate proportional basis in any Rights Offer shortfall, in priority to Mr Young as the underwriter to the Rights Offer, by making the Secondary Offer;

(c) providing INV shareholders with enhanced disclosure regarding the proposed use of the funds to be raised under the Rights Offer, in response to ASIC's and our concerns; and

(d) allowing any INV shareholders whose decision to participate in the Rights Offer may have been affected by the inadequate disclosure in the initial Prospectus to withdraw their applications.

73. Although the Undertakings and the Secondary Offer have been offered in response to our identification of issues to the parties, their terms were generally proposed by INV and Mr Young, rather than at our insistence. We do not insist that all companies

which commence rights issues underwritten by a director or substantial shareholder should incorporate similar elements to their transactions. Nor do we consider that all of the elements undertaken by Mr Young and INV in this Proceeding would be necessary in all circumstances to prevent unacceptable circumstances.

74. We do note, however, that taking steps such as:

    (a) offering all shareholders the opportunity to participate equally in any shortfall under a rights issue; or

    (b) including in rights issue underwriting agreements a commitment by underwriters who are substantial shareholders to sell down within a specified timeframe,

    is likely to increase the genuine accessibility of a rights issue to shareholders in general and hence reduce the perception that a company is undertaking an underwritten rights issue in a manner which is inconsistent with the policy underlying the Rights Issue Exception and Underwriting Exceptions.

DECISION

Undertakings and conclusion of Proceeding

75. In light of:

    (a) the provision of the Undertakings to us by Mr Young;

    (b) the Secondary Offer made to shareholders under the Supplementary Prospectus; and

    (c) the additional disclosures made in the Supplementary Prospectus,

    we concluded the Proceeding on the basis that it was not necessary or appropriate to make a declaration of unacceptable circumstances, and consequently no order was required.

Legal representation and costs

76. We consented to the parties being legally represented by their commercial lawyers in the Proceeding.

77. As we made no declaration of unacceptable circumstances we would be unable to order that any person pay costs and so did not consider this issue.

78. The Panel wishes to thank all the parties involved for their co-operation and efforts to resolve this application as expeditiously as possible.

Les Taylor
President of the Sitting Panel
Decision dated 22 April 2004
Reasons published 6 May 2004

Annexure A – Undertakings provided by Mr Young during the Proceeding

21 April 2004

The Takeovers Panel
Level 47
Nauru House
80 Collins Street
Melbourne VIC 3000

Dear Sirs

In the matter of InvestorInfo Limited (INV)

Undertaking by Anthony Young

I refer to the letter dated 1 April 2004 issued by the Takeovers Panel (**Panel**) in relation to the Panel's proposals to resolve the outstanding matters in the Proceeding.

The following defined terms are used in this undertaking:

Base Parcel means 28.3% of the post Rights-Offer INV share capital or 30,393,912 INV shares.

Broker means a Participating Organisation of ASX as that term is defined in the ASX Business Rules.

Excess Shares means the shortfall New Shares which I am required to subscribe for under the underwriting agreement which, when aggregated with the post-Rights Offer INV shares in which I or my associates have a relevant interest, exceed the Base Parcel.

New Shares means the shares offered under the Prospectus.

Prospectus means the Prospectus issued by INV and dated 13 February 2004.

Rights Offer means the rights offer made by INV pursuant to the Prospectus.

Secondary Application means an application for any shortfall in New Shares under the Rights Offer.

Undertaking by Anthony Young

I, Anthony Kieron Young undertake to the Panel under section 201A of the ASIC Act as follows:

1. That I will only submit Secondary Applications and will ensure that my associates only submit Secondary Applications in aggregate for no more than 2,488,860 New Shares.
2. That if the number of Excess Shares as at the date of their issue is equal to or less than 5% of the total post-Rights Offer INV share capital:

(a) I will sell all of those Excess Shares within 3 months from the date of issue, with all such sales to be made either:

(i) to persons who sign a statutory declaration that they will be the sole beneficial owner of the Excess Shares and that they are not associates of me or any of my associates; or

(ii) under an on-market transaction as defined in the Act i.e. a sale on the stock market operated by ASX in the ordinary course of business on that market; and

(b) until all of the Excess Shares are sold I will not exercise any voting rights attaching to:

(i) the Excess Shares; or

(ii) the same percentage of the Base Parcel of shares as the remaining Excess Shares are of the total post-Rights Offer INV share capital.

3. That if the number of Excess Shares as at the date of their issue is more than 5% of the total post-Rights Offer INV ordinary share capital I will agree to immediately transfer (for no consideration) all of the Excess Shares to a trustee for me, nominated by me and approved by the Panel (being a person that is, or is a wholly-owned subsidiary of, someone specified in section 283AC(1) of the Act, subject to section 283AC(2)), on the basis that:

(a) on instruction from the Panel the trustee will transfer the same number of Excess Shares back to me as the number of INV shares I sell in the manner set out in the undertaking given in paragraph 2 above within 3 months from the date of transfer to the trustee;

(b) if I do not sell in accordance with paragraph 2 a number of shares equal to all the Excess Shares within 3 months from the date of transfer to the trustee, then the trustee is instructed and authorised to appoint a Broker to sell the remaining Excess Shares in a manner that the Broker considers will achieve the best possible price, provided that the Broker must sell all remaining Excess Shares within 1 month of its appointment, and remit the proceeds of sale (net of costs, including the Broker's commission) to the trustee to hold for me;

(c) I will bear the cost of appointing a trustee, and of the trustee acting, for the purpose set out in this paragraph 3; and

(d) until all of the Excess Shares are transferred to me or sold as mentioned in this paragraph 3:

(i) the trustee does not exercise any voting rights attaching to the Excess Shares; and

(ii) I undertake not to cast the votes attached to the same percentage of the Base Parcel of shares as the remaining Excess Shares are of the total post-Rights Offer INV share capital.

Yours sincerely

Anthony Young