Australian Government

Takeovers Panel

Reasons for Decision
IFS Construction Services Limited
[2012] ATP 15

Catchwords:

Adjournment of meeting - announcement of bid - defeating conditions - efficient, competitive and informed market - equal opportunity - section 602 principles - shareholder vote – proxies – declaring proxies invalid – section 249D meeting – 2 month time limit - declaration – orders - costs

Corporations Act 2001 (Cth), sections 249D, 249W, 250A, 602, item 9 of 611, 631

Northwest Capital Management v Westate Capital Limited [2012] WASC 121, Beck v LW Furniture Consolidated (Aust) Pty Ltd [2012] NSWCA 76, ASIC v NRMA Ltd [2002] NSWSC 1135, Byng v London Life Associated Ltd [1989] 1 All ER 560, Guss v Veenhuizen [1976] HCA 25, Jackson v Hamlyn [1953] Ch 577, Scadding v Lorant (1851) 3 HLC 418

Guidance Note 4: Remedies General

Padbury Mining Limited [2010] ATP 9, Tully Sugar Limited [2009] ATP 26, Lion Selection Ltd (No. 2) [2008] ATP 16, Bowen Energy Limited [2007] ATP 22, Pivot Nutrition Pty Ltd [1997] ATP

Interim order	IO undertaking	Conduct	Declaration	Final order	FO undertaking
No	**No**	**Yes**	**Yes**	**Yes**	**No**

INTRODUCTION

1. The Panel, Martin Alciaturi, Robin Bishop and Norman O'Bryan AM SC (sitting President), on an application by Mr Scott Vivian-Williams and others made a declaration of unacceptable circumstances in relation to the affairs of IFS. The application concerned the lengthy adjournment of a meeting convened pursuant to section 249D[1] and rejection of proxies covering approximately 38.3% of IFS in the context of a proposed bid announced by a major shareholder. The Panel declared the circumstances unacceptable and ordered (among other things) that the meeting be reconvened on or before 31 August 2012 and the proxies not be treated as invalid merely because they came via Mr Scott Vivian-Williams.

2. In these reasons, the following definitions apply.

Applicants	Caramulo Pty Ltd <SV Williams Family A/C>, Scott Vivian-Williams and Jonica Vivian-Williams <Vivian-Williams SF A/C>, and Scott Vivian-Williams and Jonica Vivian-Williams
IFS	IFS Construction Services Limited
Meeting	Extraordinary General Meeting of IFS convened pursuant to section 249D for 18 July 2012
Millennium	Millennium Scaffolding Systems (Asia) Ltd

[1] References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

FACTS

3. IFS is listed on ASX (ASX Code: IFS). The Applicants together hold approximately 7% of IFS.

4. In March 2012, the Applicants sought out independent directors and identified 3 candidates who agreed to act as independent directors of IFS.

5. On 23 May 2012, the Applicants requisitioned a meeting under section 249D to remove all the current directors of IFS and appoint the "*Proposed Independent Directors*".

6. On 18 June 2012, IFS issued a notice of meeting for 18 July 2012 at 11.00am.

7. On or about 2 July 2012, Mr Scott Vivian-Williams sent a circular to certain shareholders with a pre-completed proxy form in favour of the resolutions and appointing himself as proxy. That circular contained directions for returning completed proxies by post, fax or email to Mr Vivian-Williams. Mr Vivian-Williams received 123 signed forms representing approximately 38.3% of IFS. Mr Vivian-Williams delivered the proxy forms to the IFS share registry on 16 July 2012.

8. On 13 July 2012, IFS announced that it had received a notice of intention to make a takeover offer from Millennium. The bid was to be for 3.6 cents cash per share and conditional on 50.1% acceptances, prescribed occurrences and the requisitioned meeting not passing the resolutions.

9. Mr Billy Ong and Ms Anita Ong are directors of both IFS and Millennium.

10. On 18 July 2012 (prior to the Meeting), IFS announced the appointment of Mr David Sanders as a director and "*Interim Chairman for the purposes of Chairing the General Meeting of Shareholders*". Mr Sanders is a lawyer, and a principal of Bennett + Co, solicitors of Perth.

11. At the beginning of the Meeting, Mr Sanders declared all of the proxy forms delivered to Mr Vivian-Williams to be invalid on the ground that they were provided to the company by an intermediary instead of directly. He adjourned the Meeting "*with the consent of shareholders for two months at the same venue*". An amending resolution to reduce the adjournment to 2 weeks had been put and rejected.[2]

12. On 18 July 2012, IFS announced that the meeting had been adjourned. It included in the announcement the reasons given by Mr Sanders for it. They were:

    (a) Millennium's bid was conditional, including on the motions being rejected and

    (b) to give shareholders an opportunity to correct "*the fault caused by [Mr Vivian-Williams'] circular*".

13. After the Meeting was adjourned and before the application was made, Millennium acquired 2,050,000 shares (1.2%) in IFS by purchases on-market.

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[2] The rejected proxies could not be counted in the vote

14. On 20 July 2012, Mr Alan Winduss (not a nominee of the Applicants) was appointed to fill a casual vacancy on the board of IFS.

15. On 25 July 2012, the Applicants were advised on behalf of a creditor of Hire Access Pty Ltd (the main subsidiary of IFS) that a winding-up application had been lodged in respect of Hire Access. The winding up application may potentially trigger a defeating condition of the proposed offer by Millennium. IFS has made no disclosure to shareholders of the winding-up application, despite the matter being raised with IFS by the Panel during these proceedings.

APPLICATION

Declaration sought

16. By application dated 27 July 2012, the Applicants sought a declaration of unacceptable circumstances. They submitted that unacceptable circumstances arose from:

    (a) the improper rejection of the proxy forms

    (b) the unlawful adjournment of the meeting

    (c) the appointment of Mr Winduss to the board of IFS and

    (d) the purchase of additional shares by Millennium.

17. The Applicants submitted that the rejection of the proxies and adjournment of the meeting had the effect of preventing the acquisition of control over voting shares in IFS taking place in an efficient, competitive and informed market. This was because:

    (a) had the resolutions been properly considered at the meeting and been successful (as the proxies received by the Applicants indicated they would likely have been) -

        (i) the directors considering the proposed bid would not be the existing directors and so the directors' recommendation might well be different and

        (ii) a defeating condition of the proposed bid would have been triggered so that the bid may not have proceeded (in other words, shareholders did not have an opportunity to vote on whether they supported the bid or the resolutions) and

    (b) the purchase of additional shares by Millennium increased its voting power and might affect the outcome of the resolutions on the reconvening of the Meeting.

18. The Applicants also submitted that the effect of the circumstances was to deprive shareholders of a reasonable and equal opportunity to participate in any benefits accruing under a proposal under which a person would acquire a substantial interest in IFS. This was because a new board may have been able to negotiate a higher price under the proposed bid.

Final orders sought

19. The Applicants sought final orders, including to the effect that:

    (a) IFS be required to reconvene the Meeting within two weeks of the Panel making orders to consider the resolutions

    (b) IFS be required to accept and count all votes cast by the invalidated proxy forms

    (c) the appointment of Mr Winduss (and any further appointments of casual vacancies prior to the reconvened meeting) be declared invalid

    (d) the additional shares acquired by Millenium (and any others acquired by it) not be voted at the reconvened meeting and

    (e) IFS make disclosure with respect to:

        (i) the relationship between IFS, Mr Ong and Millenium

        (ii) its instructions/recommendation to IFS shareholders in relation to the Proposed Offer

        (iii) the votes relating to the proxy forms received in respect of the meeting and

        (iv) the winding-up application.

DISCUSSION

Jurisdiction

20. Millennium submitted that the subject of the application was a possible change of control of the board of IFS, not the acquisition of control over voting shares as required by sections 602 and 657A.

21. IFS submitted that the circumstances surrounding the adjournment of the meeting did not come within the ambit of section 657A(2).

22. The Applicants submitted that:

    Had the meeting been correctly held and the [proxies] included, a completely independent Board would be taking these actions rather than a Board controlled by the bidder, Millennium. The existing Board and Millennium have engineered circumstances which mean that the proposed bid is not taking place in an efficient, competitive and informed market.

23. We agree with the Applicants that this is in issue.

24. The Applicants also made a submission that section 659B would not permit this issue to be considered by a court as the proposed bid meant that a bid period had commenced. ASIC submitted that section 659B may have had this consequence. We doubt this, but do not address it.

25. We decided that the Panel has jurisdiction to consider this application. A takeover bid has been announced and the bidder, Millennium, is in the market acquiring

shares in IFS. The proposed bid includes a condition that the resolutions at the section 249D meeting not succeed. Also, a director of the bidder is a director of the target, and a director whom the Applicants are seeking to remove at the section 249D meeting.

26. The situation differs from cases such as *Bowen Energy*[3] and *Padbury Mining*.[4] It is more like *Lion Selection*.[5] The meeting here was to have taken place in the context of a proposed bid and its outcome might well defeat the bid. Composition of the board in this context, particularly when a condition of the proposed bid is that the meeting not change the composition of the board, is a matter that we think the Panel can address. We also think that the recommendation of the directors is an important aspect of a bid, particularly for retail shareholders.[6] Therefore, the composition of the board is an aspect of the fulfilment of the purposes of Chapter 6 as set out in section 602 in this case.

Adjournment

27. The Applicants submitted that the meeting should not have been adjourned. They initially responded to a proposal to adjourn the meeting by moving an amendment for a short adjournment of two weeks. This failed and they then voted for the adjournment for two months. However, the Applicants submitted that they only voted to adjourn the meeting because the proxies they lodged had been rejected (ie, the adjournment was better than having the meeting proceed with the proxies rejected). They submitted that, if the proxy forms had not been incorrectly rejected, they would have "*vigorously opposed any adjournment… However, as the Chairman's first action at the meeting was to declare the [proxy forms] invalid, there was no point proceeding with the meeting… as … the intentions of approximately 40% of the IFS shareholders would have been ignored….*"

28. The voting on the adjournment was 68,248,227 in favour and 300 against. However, it would, in our view, be likely to have been as follows if the proxies held by Mr Vivian-Williams were not disallowed:

    (a) 65,479,546 proxies held by Mr Vivian-Williams would have been voted against any adjournment

    (b) 62,233,713 votes, which were cast against shortening the adjournment, would have been cast in favour of the 2-month adjournment and

    (c) 6,014,814 votes, which were cast in favour of shortening the adjournment, would have been cast against any adjournment, or at least not cast in favour of one.

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3 *Bowen Energy Limited* [2007] ATP 22

4 *Padbury Mining Limited* [2010] ATP 9

5 *Lion Selection Ltd (No. 2)* [2008] ATP 16 at [24]: *The meeting was to obtain shareholder approval for a proposal that would amount to a frustrating action. The Panel thought that this entitled it to consider the issues raised, where otherwise the matters might not be within the Panel's jurisdiction*

6 *Tully Sugar Limited* [2009] ATP 26 at [52]

29. Therefore, we think it is likely that the meeting would not have voted for an adjournment but for the proxies being disallowed.

30. The chairperson's exercise of a power at a general meeting must "*be taken reasonably with a view to facilitating the purpose for which the power exists*."[7]

31. IFS's announcement dated 18 July 2012 addressed why the proxies sent to Mr Vivian-Williams before being delivered to IFS were declared invalid. It said:

    A circular was sent to shareholders of the company by Mr Scott Vivian-Williams enclosing a pre-prepared proxy form and requesting the return of that proxy form to a post office box, email address and fax number that are different to those specified in the Notice of Meeting itself. A number of proxy forms have also been delivered to the company's share registry by the requisitioning party solicitors for the shareholders who have requisitioned the general meeting contrary to the directions in the Notice of Meeting for proxy forms to be returned by shareholders directly to the share registry. In the opinion of the Chairman, Mr David Sanders, the interference with the process under s250B of the Corporations Act invalidates these proxies. The Chairman Mr David Sanders therefore proposed the resolution to adjourn the meeting for two months so that shareholders will be given an opportunity by the Company to correct the fault caused by this Circular.

32. This is a proper purpose, assuming the proxies were invalid, which we turn to later, but the length of the adjournment was excessive in our view. It was far longer than was necessary to enable fresh proxies to be given. It would have been possible to correct the supposedly faulty proxies (if that was necessary) within a couple of weeks.

33. The adjournment for 2 months took the meeting well beyond the time set out in section 249D for such a meeting to be held, and was in our view in contravention of that section.[8]

34. ASIC submitted that the Federal Court decision in *ASIC v NRMA* is the current authority on the issue of adjourning a section 249D meeting. It submitted that for a meeting to be 'held' it had to be commenced and concluded. Accordingly any adjournment to a date after the two months provided for in section 249D(5), except by order of the court, was contrary to that section.[9] In *ASIC v NRMA*, Windeyer J said:[10]

    The simple argument of ASIC is that "held" means a meeting commenced and concluded. The simple argument of NRMA is that "held" means duly convened and commenced and lawfully adjourned or at least includes such a meeting. The ASIC argument relies on the ordinary meaning of the word. It is a verb of past tense or a past participle. But people often

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7 *Byng v London Life Associated Ltd* [1989] 1 All ER 560 at 569

8 *ASIC v NRMA Ltd* [2002] NSWSC 1135

9 The requisition was given on 23 May 2012, so IFS had until 23 July to hold the meeting. It was adjourned on 13 July 2012. ASIC noted that even the two-week adjournment sought by the Applicants would not have been permitted without a court order. The Applicants acknowledged this in their submissions

10 *ASIC v NRMA Ltd* [2002] NSWSC 1135 at [12]. See also *Guss v Veenhuizen* [1976] HCA 25, to which Windeyer J referred

refer to matters in progress such as continuing court actions as being held before a particular judge. In that case, however, "being" involves continuing. The NRMA says that it could not have been the intention to abrogate the power to adjourn a meeting so as to make it a requirement to complete a requisitioned meeting within the stipulated time. Without going to authority I would have considered that the ordinary meaning of "held" in s249D(5) requires completion and does not allow adjournment outside the statutory date, unless by order of the court. The clear intention is to require the resolution proposed to be dealt with within a limited time which intention would be abrogated if the chairman could exercise his power of adjournment to fix some future time which time would presumably have to be fixed by him or by the directors. This is particularly so when the resolutions would determine the future of directors.

35. The Applicants submitted that any adjournment, let alone one for 2 months, meant the proposed bid would not take place in an efficient, competitive and informed market, because:

    (a) the register would change (Millennium had already purchased an additional 2,050,000 shares, and has since purchased more)

    (b) Millennium and the IFS board would know what percentage of the votes supported the change, and from whom proxies were received, and could lobby those shareholders and

    (c) the IFS board as currently composed would initiate the company's consideration of the proposed bid and that board is, the Applicants submitted, controlled by individuals associated with the bidder.

36. IFS submitted that Mr Sanders considered 2 months a sensible time because the time limit for making a bid following an announcement is 2 months[11] and therefore shareholders could consider the bid when the reconvened meeting was held. We disagree that this period was an appropriate one in the circumstances. The period for compliance with section 631 does not bear on the question of an appropriate period for this adjournment.

37. We think that the adjournment had the effect of providing Millennium with the maximum amount of time (i.e. the two month maximum period allowed under section 631(1)(b) between announcement and commencement of a bid) in which to better secure its control of, or at least substantial influence over, IFS. This included Millennium making purchases on-market.

38. In our view, the 2 month period of the adjournment assisted Millennium to get its bid underway.

39. The terms of Millennium's all-cash bid are very simple. The bid itself could have been launched before 13 July 2012. Indeed, we note Millennium's submission that it only formed the intention to bid on 13 July, being the day it informed IFS. IFS announced Millennium's intention to bid on the same day. However, that submission was contradicted by the emails Millennium produced showing that preparations to announce the bid were underway on 12 July 2012. Most

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[11] Section 631

significantly, they show that Millennium was instructing its broker to prepare to stand in the market immediately after the announcement.

40. Whilst the purchases were not unlawful (Millennium was allowed to creep[12]), they occurred in a market that was not operating in an efficient, competitive and informed way because of the unlawful manner in which the meeting had been managed and adjourned. In our view, based on our experience, there is a real risk that dissenting shareholders may have sold out of frustration, or because they feared that Millennium's bid might not materialise for a long time, having regard to the length of the announced adjournment and the uncertainty of the outcome of the Meeting.

41. Further, shareholders may well perceive that they are unable to remove a board to which a majority of them are opposed. In that event, should the bid be made, such a perception will be an inducement to them to accept regardless of their view on price. Accordingly, the bid may proceed in an inefficient and uncompetitive market.

42. We think that Millennium making its bid conditional on the meeting not approving the resolutions to change the board evidences its intention to retain and enhance its control of, or at least substantial influence over, IFS until at least September 2012. We note that a majority of the incumbent board were Millennium's nominees from a 2010 board spill promoted by Millennium. They might therefore reasonably be expected to be more favourably disposed to Millennium's proposed bid than independent directors.

43. Shareholders in IFS have been denied the ability to trigger a defeating condition of the proposed bid and therefore potentially to defeat the bid.

44. The directors of a target company have a wide discretion in deciding how they respond to a bid, particularly in the decision whether to appoint an independent expert and in selecting and instructing an expert. The opinions, behaviour and recommendations[13] of the directors of a target company are often highly influential in takeovers. There is no reason to suppose that they will not be so in this case (there appear to be no institutions or large nominee shareholders in IFS's top 20 shareholder list). Thus, a 2-month adjournment would mean that, even if the current directors were replaced at the resumed Meeting, they would have made decisions greatly affecting IFS's response to Millennium's bid. Their continuation in office is therefore likely to affect the acquisition of voting shares in IFS taking place in an efficient, competitive and informed market and may adversely affect the information in the market when the bid is made and the information available to shareholders to assess the merits of the bid.

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[12] Item 9 of section 611

[13] *Tully Sugar Limited* [2009] ATP 26 at [52]

Rejection of proxies

45. The Applicants submitted that at least 41.6% of the share register voted in favour of replacing the existing Board as follows:

Proxies	For	Against	%
Williams Proxy Forms	65,479,546	Nil	38.3
HBSC Custody Nominees	4,000,000	Nil	2.34
Other Proxies	1,617,142	Nil	0.95
TOTAL	**71,096,688**		**41.6%**

46. The Applicants submitted that, at the Meeting, the chairman was questioned with respect to the current law regarding the delivery of proxies to a company via third parties.

47. IFS submitted that its lawyers had sought legal advice from Bennett + Co (of which Mr Sanders is a principal) as to the validity of the proxies. It originally claimed legal professional privilege and declined to disclose the advice, but in effect waived privilege in its rebuttals by submitting that the proxy forms were declared invalid (based on legal advice) because the proxies were not delivered to the company directly by shareholders, as required by the Corporations Act. IFS further submitted:

In this regard the Chairman was concerned that the reason the proxies were not delivered correctly to the company was the fact that the Applicants had sent a mailout to all shareholders which on the front page requested shareholders to deliver their proxy forms back to an address, facsimile number and email address that had no connection with the company.

In this regard the Chairman was particularly concerned that the statement on the cover of the mailout was misleading in that it implied that the facsimile number and address referred to, where (sic) in fact an address and facsimile number of the company when they were not.

48. In our view the circular sent to shareholders inviting them to complete the pre-completed proxy form and return it to Mr Vivian-Williams was not misleading. The circular made it clear that Mr Vivian-Williams was seeking to garner support for the resolutions to replace the existing directors. The email address to which he invited shareholders to send their completed proxy forms was clearly not the company's. While less clear that the postal address and fax number were not the company's, this might readily have been understood .

49. The most recent decision on the question of proxy delivery is *Northwest Capital Management*.[14] In that case it was held that section 250B does not prevent the

[14] *Northwest Capital Management v Westate Capital Limited* [2012] WASC 121

handling of proxies by third parties on their way from the shareholder to the company. After reviewing earlier decisions, Edelman J said:

… There is nothing in s 250B which prohibits the sender of a proxy to entrust it to either of these people to ensure that it is received by NWPL as they had been informed in the notice was required.

For completeness, I observe that there is nothing in the second reading speech which introduced s 250B, nor the explanatory memorandum, of the Act which introduced this section which requires a conclusion contrary to that which I have reached. The conclusion I reach applies the words of the section without the added gloss of 'directly'. A proxy can be 'received by the company' where a person who is instructed to provide a proxy to a company, entrusts it to a third party to ensure that the proxy is provided to the company and the third party in fact provides the proxy to the company.[15]

50. In our view, the proxies should not have been declared invalid on the basis they were.

Conclusion on proxies and adjournment

51. We regard the approach adopted by IFS, and by Mr Sanders as a director during the relevant period and as chairman of the meeting, as an example of poor corporate governance.

52. The combined effect of disallowance of the proxies and deferral of the meeting, resulting in the preservation of the existing board until at least the resumption of the Meeting, meant that shareholders have not been able to give effect to their wishes. This diminishes the value of the company to them and in our view would be likely to induce them to sell their shares cheaper than they would otherwise have done.

53. In short, the existing board was entrenched until the Millennium bid was made.

The appointment of Mr Winduss

54. On 20 July 2012, Mr Alan Winduss was appointed to the board of IFS as a casual vacancy.

55. The Applicants submitted that, had the meeting not been invalidly adjourned, the replacement directors would have been elected and Mr Winduss would not have been appointed. Accordingly, they submitted that his appointment was invalid.

56. In the announcement of Mr Winduss' appointment, he was described as an independent, non-executive director. We have no evidence to suggest that he is not. We do not think we should interfere with his appointment.

57. Generally, however, unless it is necessary for compliance with the law or corporate governance obligations, when there is a clear contest amongst shareholders about the composition of a company's board, which is ready for resolution in the short term (as here) we think it is undesirable for an existing board to make appointments.

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[15] Ibid at [117]-[118], footnotes omitted

58. In addition, the Applicants submitted that any subsequent appointments of casual vacancies prior to the reconvened meeting should also be declared invalid. As events have transpired this will not be necessary.

The winding up application regarding Hire Access

59. A winding-up application had been lodged in respect of Hire Access and the Applicants before the Panel sought disclosure in respect of it. The winding up application may potentially trigger a defeating condition of the proposed offer by Millennium.

60. IFS submitted that the relevant documentation had gone astray and that it had paid the amount owing and arranged for the winding-up application to be withdrawn.

61. We do not think we need to take this matter any further.

Other matters

62. IFS submitted that Mr Sanders had advised the IFS board that, by reason of IFS's constitution, his appointment would last only until the end of the Meeting.[16] It also submitted that he resigned for personal reasons. The announcement of his resignation gave a different reason, namely that he had served his short term appointment.

63. The reconvening of an adjourned meeting is the continuation of the meeting,[17] not a new meeting,[18] so the meeting has not ended in our view. It is unclear why Mr Sanders purported to resign.

64. Mr Sanders did not become a party to the proceedings. He was invited to, but did not, respond to the brief questions, except to say:

> *I confirm that I do not wish to become a party to the proceedings. In the circumstances where I was acting as an officer of IFS Construction Services Limited at the General Meeting the subject of the proceedings I also do not consider it either necessary or appropriate for me to provide submissions independently from the company. I will, however, provide the company with all necessary assistance to enable the company to address the matters raised in relation to my role as Chairman of that meeting.*

65. We accepted Mr Sanders' approach and did not communicate directly with him further.

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[16] It may have ended when the meeting opened. Clause 13.4 of IFS's constitution provides that an appointed director "*holds office only until the next following general meeting and is then eligible for re-election…*" In *Beck v LW Furniture Consolidated (Aust) Pty Ltd* [2012] NSWCA 76 a similar clause was held to result in the director's appointment ending at the start of the meeting: [51] per Campbell JA, agreed by Young JA and Sackville AJA

[17] *Scadding v Lorant* (1851) 3 HLC 418

[18] *Jackson v Hamlyn* [1953] Ch 577. See also section 249W, *Joske's Law and Procedure at Meetings in Australia*, 10th ed, [15.70]

DECISION

Declaration

66. It appears to us that the circumstances are unacceptable having regard to:

    (a) the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on -

        (i) the control, or potential control, of IFS or

        (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in IFS and/or

    (b) the purposes of Chapter 6 set out in section 602 of the Corporations Act 2001 (Cth) (Act).

67. Accordingly, we made the declaration set out in Annexure A and consider that it is not against the public interest to do so. We had regard to the matters in s657A(3).

Orders

68. Following the declaration, we made the final orders set out in Annexure B. Under s657D the Panel's power to make orders is very wide. The Panel is empowered to make 'any order'[19] if 4 tests are met:

    (a) it has made a declaration under s657A. This was done on 17 August 2012.

    (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. For the reasons below, we are satisfied that our orders do not unfairly prejudice any person.

    (c) it gives any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. This was done on 15 August 2012. Each party made submissions and rebuttals, and orders were made on 17 August 2012.

    (d) it considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons, or ensure that a takeover or proposed takeover proceeds as it would have if the circumstances had not occurred. The orders do this by reconvening the meeting at the earliest opportunity, allowing the proxies to be counted (if not otherwise invalid) and preventing later acquired shares by the bidder to be voted on the resolutions. They also provide further time to enable the target to respond to the bid (when made).

69. In our view there is no unfair prejudice created by the orders since they do no more than seek to re-establish the position as it should have been at the date of the

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[19] Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

meeting, namely on 18 July 2012. They do not, for example, seek to limit the ability of the company to invalidate the proxies on proper grounds. Or prevent the bidder from acquiring shares. Or prevent the bidder voting them except at the reconvened meeting. They do not unreasonable delay the proposed bid.

Postscript

70. On 27 August 2012, IFS announced that Hire Access and another subsidiary company of IFS had been placed in voluntary administration.

71. On 28 August 2012, IFS announced that Mr Winduss had resigned.

72. On 30 August 2012, prior to the reconvened meeting to be held on 31 August, IFS announced that 3 directors had been appointed as nominated in accordance with the section 249D notice and the existing directors had resigned.

73. On 31 August 2012, the meeting was held which in effect confirmed this position.

Costs

74. Following the making of the declaration and orders we informed the parties that we were still considering the question of costs, subject to hearing from the parties. We sought submissions.

75. The Applicants sought their costs from IFS from the date of the adjournment. They submitted that a Panel application was the only means available to them for resolving the matter. They further submitted that "*IFS was made aware of the present state of the law, and chose to proceed with defending the Application regardless.*"

76. ASIC also sought costs. It submitted that, if the Panel considered it appropriate to make a costs order against IFS, such order should cover ASIC's costs.

77. IFS's solicitors sought an extension of two days in which to make rebuttal submissions, as "*we are unable to take instructions from the Board of IFS as the Director is currently overseas.*" This was telling. We granted the extension but IFS did not make any rebuttal submission on costs.

78. Guidance Note 4[20] says that costs orders are the exception not the rule, and that a party is entitled to make, or resist, an application once without exposure to a costs order, provided it presents a case of reasonable merit in a businesslike way.[21] The company did not present such a case. It appears that the whole exercise was a delaying tactic to avoid the inevitable. None of the expense of the Applicants ($32,700 rounded off) or ASIC ($7,000 rounded off) ought to have been necessary. Therefore, we think that the Applicants and ASIC should receive their costs against the company.

79. Moreover, IFS failed to comply with our orders, and offered no explanation or excuse for doing so. Indeed, it became necessary to demand confirmation that our orders would be carried out, failing which we indicated that we would consider

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[20] Guidance Note 4: Remedies General at [27 (c)]

[21] Guidance Note 4: Remedies General at [27 (d)]

varying them, including possibly by placing the convening and conducting of the meeting in the hands of the Applicants. Ultimately, IFS took the necessary steps, but we have added the additional costs of the Applicants involved ($4,700) to our costs order.

80. We varied our orders (Annexure C) to include a costs order covering the costs to the Applicants and ASIC.

Norman O'Bryan AM SC
President of the sitting Panel
Decision dated 17 August 2012
Reasons published 7 September 2012

Advisers

Party	Advisers
Applicants	Hardy Bowen Lawyers
IFS	Tan & Tan
Millennium	Gadens Lawyers

Australian Government

Takeovers Panel

Annexure A

CORPORATIONS ACT
SECTION 657A
DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

IFS CONSTRUCTION SERVICES LIMITED

CIRCUMSTANCES

1. On 23 May 2012, certain shareholders holding approximately 7% of IFS Construction Services Limited (IFS) requisitioned a meeting under section 249D to remove all the current directors of IFS and appoint 3 other directors.

2. Mr Billy Ong is chairman, and has a relevant interest in approximately 21.82%, of IFS.

3. On 15 June 2012, IFS issued a notice of meeting to be held at 11:00 am (WST) on 18 July 2012.

4. On 13 July 2012, IFS announced that it had received from Millennium Scaffolding Systems (Asia) Ltd (Millennium) a notice of intention to make a takeover offer (proposed bid). Mr Billy Ong is the Managing Director of Millennium.

5. The announcement attached a letter from Millennium stating that the proposed offer would be a cash offer at 3.6 cents per share for all the fully paid shares in IFS and would be subject to a number of conditions, including:

   "(ii) subject to Clause 1(b), the resolutions requisitioned by the Section 249D Notice are not approved by shareholders of IFS at the General Meeting."

   Clause 1(b) provided that Millennium could not rely on the condition if it voted in favour of the resolutions either itself or as proxy for other shareholders.

6. Prior to the meeting on 18 July 2012, IFS announced the appointment of Mr David Sanders as a director of IFS and as "Interim Chairman for the purposes of Chairing the General Meeting of Shareholders".

7. At the beginning of the meeting, Mr Sanders declared proxies representing 65,479,546 shares (approximately 38.3%) to be invalid and adjourned the meeting "with the consent of shareholders for two months at the same venue".

8. On 6 August 2012, IFS announced the purported resignation of Mr Sanders as a director.

9. Since the adjournment of the meeting, Millennium and/or its associates have acquired additional shares in IFS.

10. Rejection of the proxies denied shareholders the ability to determine which directors would respond to the proposed bid during the important initial stages.

11. Adjournment of the meeting for 2 months:

    (a) denied shareholders the ability to trigger a defeating condition of the proposed bid before it was made and therefore potentially to forestall the making of the bid

    (b) ensured that the same board would hold office until Millennium's bid was made and have the initial carriage of IFS's response to that bid and

    (c) assisted Millennium by giving it the opportunity to increase its existing substantial interest in IFS, having regard to the potential closeness of the vote if the proxies were not invalid.

12. The acquisition of additional shares has increased the ability of Millennium to determine the outcome of the meeting.

13. It appears to the Panel that the circumstances are unacceptable having regard to:

    (a) the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:

        (i) the control, or potential control, of IFS or

        (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in IFS and/or

    (b) the purposes of Chapter 6 set out in section 602 of the Corporations Act 2001 (Cth) (Act).

14. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3).

DECLARATION

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of IFS Construction Services Limited.

Alan Shaw
Counsel
with authority of Norman O'Bryan AM SC
President of the sitting Panel
Dated 17 August 2012

Australian Government

Takeovers Panel

Annexure B

CORPORATIONS ACT
SECTION 657D
ORDERS

IFS CONSTRUCTION SERVICES LIMITED

The Panel made a declaration of unacceptable circumstances on 17 August 2012.

THE PANEL ORDERS

Reconvening of section 249D meeting

1. IFS Constructions Services Limited (**IFS**) must reconvene the meeting adjourned from 18 July 2012 so that it is held on a date no later than 31 August 2012 and must take all necessary steps to do so.

Proxies

2. Subject to order 4, IFS must not, at the reconvened meeting, treat as invalid the proxies lodged by Mr Scott Vivian-Williams on behalf of certain shareholders representing 65,479,546 shares in IFS merely on the basis that they had been lodged by or on behalf of Mr Vivian-Williams.
3. Mr Scott Vivian-Williams must, within 5 business days of the date of this order, confirm to IFS in writing that all the proxies lodged with him:
   (a) have been lodged with IFS
   (b) have not been altered in any way by him or on his behalf after he received them and
   (c) are not to his knowledge the subject of any countermand or replacement proxy.
4. IFS may treat as invalid any proxies that are not the subject of the confirmation in order 3, provided IFS has written legal advice that it is appropriate to treat the particular proxy as invalid.

Voting restriction

5. Millennium and its associates must not vote at the reconvened meeting, and IFS must disregard any votes cast in respect of, any shares in IFS acquired by Millennium and its associates on or after 18 July 2012.
6. Millennium must inform IFS of the number of shares which it and its associates have acquired on or after 18 July 2012. Notification must be given the day before IFS prints the notice reconvening the meeting and again the day before the reconvened meeting.

Information to shareholders

7. IFS must as soon as practicable make an announcement to the market, in a form approved by the Panel, that:
   (a) the meeting is to be reconvened, and on what date
   (b) the proxies referred to in order 2 will not, unless order 4 applies, be treated as invalid at the reconvened meeting on that basis
   (c) shareholders who wish to vote in the same way they did at the meeting on 18 July 2012 need not lodge a new proxy form, but must do so if they wish to vote in a different way, and the date by which and place at which any new proxy form must be received
   (d) the number of shares that, at the date of the notice reconvening the meeting, cannot be voted by Millennium and its associates (and if they are, the votes will be disregarded)
   (e) shares subsequently acquired by Millennium and its associates will also not be voted (and if they are, the votes will be disregarded) and
   (f) the effect of the Panel's orders.
8. IFS must include the information required to be provided to the market in order 7 in the notice to shareholders reconvening the meeting.
9. IFS must, at least one week before the date of the reconvened meeting, publish a suitably prominent advertisement (in a form approved by the Panel) in the business section of a nationally circulating newspaper and *The West Australian* that includes sufficient information as will inform shareholders of the reconvened meeting and the market announcement in order 7.

Millennium bid

10. Millennium must not lodge the bidder's statement in relation to its proposed bid for IFS announced on 13 July 2012 until after the conclusion of the reconvened meeting.
11. IFS's directors must not consent to an abridged time under step 6 of section 633(1) of the *Corporations Act 2001* (Cth) until after the conclusion of the reconvened meeting.

Alan Shaw
Counsel
with authority of Norman O'Bryan AM SC
President of the sitting Panel
Dated 17 August 2012

Australian Government

Takeovers Panel

Annexure C

CORPORATIONS ACT
SECTION 657D(3)
VARIATION OF ORDERS

IFS CONSTRUCTION SERVICES LIMITED

Pursuant to section 657D(3) of the *Corporations Act 2001* (Cth)

THE PANEL ORDERS

The final orders made on 17 August 2012 are varied by adding the following heading and paragraph:

Costs

12. Within 10 business days of the date of this order for costs, IFS must pay:
    (a) to the Applicants, $37,400 and
    (b) to ASIC, $7,000
    representing costs actually, necessarily, properly and reasonably incurred in the course of the proceedings.

Alan Shaw
Counsel
with authority of Norman O'Bryan AM SC
President of the sitting Panel
Dated 5 September 2012