



NZX Regulation Decision

Infratil Limited ("IFT")

Application for waiver from NZX Listing Rules 7.8.5(b)

26 June 2020



Background

1. The information on which this decision is based is set out in Appendix One to this decision. This waiver will not apply if that information is not or ceases to be full and accurate in all material respects.
2. Capitalised terms that are not defined in the decision have the meanings given to them in the NZX Listing Rules (**Rules**).
3. The Rules to which this decision relates are set out in Appendix Two to this decision.

Waiver from NZX Main Board Listing Rule 7.8.5(b)

Decision

4. Subject to the conditions set out in paragraph 5 below, and on the basis that the information provided by IFT is complete and accurate in all material respects, NZX Regulation (**NZXR**) grants IFT a waiver from Rule 7.8.5(b) which would otherwise require IFT to prepare an appraisal report to accompany any Notice of Meeting at which shareholders will consider and vote on, an Ordinary Resolution in accordance with Rule 4.1.1 and Rule 4.2.1, to approve a proposal for the issue of IFT ordinary shares to MCO by way of satisfaction of IFT's contractual obligation to pay Incentive Fees to MCO in accordance with the prescribed payment mechanisms set out in the Management Agreement between IFT and MCO.
5. The waiver in paragraph 4 above is provided on the conditions that:
 - a. the relevant Notice of Meeting must otherwise comply with Rules 7.8.2 and 7.8.4;
 - b. the relevant issue of shares, if approved by shareholders by Ordinary Resolution, and if the IFT Board approves the issue of shares, must be made within the date that is 12 months following the date of the relevant Ordinary Resolution approving the issue of shares;
 - c. the waiver, its conditions and its implications are disclosed in the relevant Notice of Meeting; and
 - d. the 2002 Notice of Meeting and appraisal report is available for IFT shareholders to review on the first occasion that IFT relies on this waiver.

Reasons

6. In coming to the decision to provide the waiver set out in paragraph 4 above, NZXR has considered that:

- a. the policy behind Rule 7.8.5(b) (which requires the provision of an Appraisal Report together with a Notice of Meeting called to consider and approve certain transactions, including transactions involving the issue of shares to Associated Persons) is to ensure that security holders have the benefit of an independent assessment of the benefits and risks of a proposed transaction, to enable security holders to make a fully informed decision about whether to approve the transaction;
- b. IFT has submitted, and NZXR has no reason not to accept, that an Appraisal Report in relation to a proposed issue of shares to MCO in payment of an Incentive Fee payable under the terms of the Management Agreement between IFT and MCO would not provide IFT shareholders with any significant benefit or additional information on which to make an informed decision on whether to approve the issue of shares to MCO in payment of the Incentive Fee because shareholders have already approved the contractual arrangements under the Management Agreement that give rise to the obligation for IFT to pay MCO incentive fees either in cash, or in shares, when certain prescribed performance hurdles have been met;
- c. an Appraisal Report was provided to shareholders in 2002 at the time the contractual arrangements under the Management Agreement giving rise to the obligation for IFT to pay incentive fees were considered and approved by shareholders;
- d. the calculation of the price payable for shares to be issued by IFT to MCO in payment of any incentive fee is fixed in the Management Agreement between IFT and MCO which has been approved by IFT shareholders; and
- e. IFT has submitted, and NZXR has no reason not to accept, that a further Appraisal Report in respect of a proposal to issue shares to MCO in payment of an incentive fee or an instalment of an incentive fee would not provide shareholders with any additional meaningful information in relation to the proposal to issue shares to MCO as permitted under the terms of the Management Agreement between them, beyond the information that they have already been provided, and the further information that will be set out in, or accompany, the Notice of Meeting in compliance with Rule 7.8.2 and Rule 7.8.4.

Confidentiality

7. IFT has requested that this decision be kept confidential until IFT releases an announcement or the Notice of Meeting relating to paying the Incentive Fee instalment by the issue of Shares.
8. In accordance with Rule 9.7.2, NZXR grants IFT's request.

Appendix One

1. Infratil Limited (**IFT**) is a Listed Issuer with ordinary shares Quoted on the NZX Main Board.
2. IFT and Morrison & Co Infrastructure Management Limited (**MCO**) entered into a Management Agreement dated 11 February 1994 (as amended from time to time) (**Management Agreement**), under which certain incentive fees are payable in relation to IFT's international investment portfolio (the **Incentive Fees**).
3. MCO is an "associated person" of an IFT director (by virtue of Marko Bogoevski being a director of IFT and MCO).
4. Shareholders approved amendments to the Management Agreement in 2002, including the establishment of the International Portfolio and introduction of the Incentive Fees, the mechanisms for calculating whether an Incentive Fee is payable, and that ability for IFT to pay the Incentive Fees either in cash or by the issue of Shares (or a combination). An appraisal report was provided with the 2002 Notice of Meeting, analysing the proposed changes to the Management Agreement, including a detailed analysis of the Incentive Fee structure. The appraisal report concluded that the fee arrangement for the International Portfolio is reflective of an arms-length negotiation having regard to a number of matters, and the Management Agreement changes, including the incentive fees, are fair to the non-associated IFT shareholders.
5. The Management Agreement (as amended) sets out a process for determining whether Incentive Fees are payable in any year, and calculating the Incentive Fees payable, summarised as follows:
 - a. Each year, IFT's international investment portfolio assets which have been owned for more than three years are valued for the IFT Board by specialist independent valuers. The values are intended to identify the proceeds IFT would receive were it to sell the relevant investments net of all transaction costs and taxes.
 - b. If the valuation shows that the portfolio of international investments has delivered a return (in NZ\$) of over 12% per annum then Incentive Fees are payable to MCO equivalent to 20% of the value above the 12% return.
 - c. As a protection against the possibility of the portfolio of investments subsequently falling in value, payment of the Incentive Fees is spread over three years. If the value of the portfolio at either of the subsequent two balance dates is lower than the current valuation, that years' payment is cancelled.
6. The Management Agreement sets out a process and timeline for IFT to pay the relevant instalment of the Incentive Fee (once it is confirmed) in cash or opt to pay the Incentive Fee by way of issuing Shares to MCO.
7. If IFT opts to pay an Incentive Fee instalment by the issue of Shares:
 - a. the number of Shares to be issued will be calculated by dividing the Incentive Fee by 98% of the volume weighted average price of the Shares as traded on NZX over the 5 business days prior to the issue of the Shares (**Issue Price**); and

- b. it has 12 business days from finalisation of the independent valuations to allot those shares.
8. An independent valuation of the international investment portfolio has determined that the relevant threshold values set out in the Management Agreement have been met for the year ending 31 March 2020, and the Incentive Fee instalment for 2020 will be ~NZ\$41.7 million. Further Incentive Fee instalments of the same amount will be payable in 2021 and 2022 if the sustained value conditions are satisfied.
9. Due to the tight timeframe provided under the Management Agreement between the valuation and calculation of the Incentive Fees, and the date on which the Shares must be issued if IFT opts to pay an instalment of the Incentive Fee by the issue of Shares, shareholder approval for the proposed issue of shares needs to be sought in advance of the calculation of the Incentive Fee payment for the 2021 instalment. Approval in advance would also be required for any future payments of the Incentive Fee by the issue of Shares.
10. IFT therefore proposes to seek shareholder approval at its AGM on 20 August 2020, to provide the option for IFT to issue Shares to MCO for the 2021 instalment of the Incentive Fee in accordance with the Management Agreement.
11. As any shareholder approval for an issue of shares is only valid for 12 months, IFT would need to seek shareholder approval at its AGM in 2021 to provide the option for IFT to issue Shares to MCO for the 2022 instalment of the Incentive Fee, and at each future AGM to provide the option to issue shares in respect of any future payment of Incentive Fees.
12. If IFT opts to pay an Incentive Fee instalment by the issue of Shares, and therefore seeks shareholder approval for the issue, Rule 7.8.5(b) requires that an Appraisal Report accompany any notice of meeting as more than 50% of the shares to be issued are to be issued to associated persons of a director.
13. Any Ordinary Resolution seeking to approve the payment of an Incentive Fee instalment by the issue of shares will be framed in such a way that the issue of shares will be subject to IFT Board approval following the valuation and determination of the price for the issue of shares. IFT may or may not also seek shareholder approval the payment of an Incentive Fee instalment by the issue of shares in the future. IFT has therefore applied for a standing waiver from Rule 7.8.5(b).
14. If shareholder approval is obtained, the IFT Board will retain the discretion to determine whether to pay the relevant Incentive Fee instalment in cash or in Shares (or a combination of both). If the Board decides to pay the Incentive Fee instalment in Shares (whether in full or part), the Board would need to resolve to issue the shares in accordance with sections 42 and 47 of the Companies Act 1993 (including that the share issue is fair and reasonable to IFT and to all existing shareholders) and sign the associated directors' certificate.

Appendix Two - Rules

7.8 Notices of Meeting

7.8.4 As a minimum, the notice of meeting for a resolution to approve and issue, acquisition or redemption of Financial Products, or provision of financial assistance, must state or contain so much of the following information as is applicable and known to the Issuer:

(a) the number of any Financial Products to be issued, acquired, or redeemed or, if the number is not known, the formula to be applied to determine the number, and the maximum number which may be issued, acquired or redeemed.

(b) the purpose of the transaction,

(c) any issue, acquisition or redemption price, or if the price is not known, the formula to be applied to determine the price, and the time or times for payment with sufficient detail to enable the Financial Product holders to ascertain the terms to or from any party,

(d) the party or parties to whom any Financial Products are to be issued, or from whom they are to be acquired or redeemed, where that is known, and identifying by name any such parties who are Directors or Associated Persons of the Issuer or any Director,

(e) in the case of an issue, the consideration for the issue and, where that is cash, the specific purpose of raising the cash,

(f) the period of time within which any issue, acquisition or redemption will be made,

(g) in the case of any issue, the ranking of the Financial Products to be issued for any future benefit, and

(h) in the case of a resolution under Rule 4.16.1, the amount and full terms of the financial assistance to be given and the party or parties who will receive it, identifying by name any such parties who are Directors or Associated Persons of the Issuer or any Director.

7.8.5 A notice of meeting to consider a resolution of the nature referred to in Rule 7.8.4 (other than a resolution to permit and issue under Rule 4.7.1) must be accompanied by an Appraisal Report if:

(a) the resolution is required by Rule 4.13,

(b) more than 50% of the Financial Products to be issued are likely to be acquired by Directors or Associated Persons of Directors, or

(c) more than 50% of the Financial Products to be acquired or redeemed or the financial assistance to be given is intended or likely to go to Directors or Associated Persons of Directors.

“Appraisal Report” means a report prepared by an appraiser and complying with Rule 7.10.

“Associated Person” a person (A) is associated with, or an Associated Person of, another person (B) if:

- i. A is able, directly or indirectly, to exert a substantial degree of influence over the activities of B (or vice versa).
- ii. B is a body corporate and A has the power, directly or indirectly to exercise, or control the exercise of, more than 50% of the Votes attaching to the Financial Products of B (or vice versa),
- iii. A and B are Relatives of Related Bodies Corporate,
- iv. A and B are partners to whom the Partnerships Act 1908 applies,
- v. A is a director or Senior Manager of B (or vice versa), or
- vi. A and B are acting jointly or in concert,

except that:

vii. A is not an Associated Person of B merely because:

....

iii there is another person with which A and B are both associated,

viii. Persons will not be Associated Persons if NZX makes a Ruling that they are not Associated Persons.