Australian Government
Takeovers Panel

Reasons for Decision
Multiplex Prime Property Fund 01 and 02
2009 ATP 18

Catchwords:

market bid – coercive – information deficiencies – partly paid units – accelerated call – Entitlement Offer – bid funding – bidder's intentions - requisition to wind up fund – requisition to replace responsible entity – efficient competitive and informed market - Brookfield Multiplex Capital Management – Australian Style Investments - Multiplex Colt Investments - declaration – unacceptable circumstances - orders – withdraw bid – related applications – heard together

Corporations Act 2001 (Cth), sections 9, 602, 611 item 2, 612, 613, 629, 652C, 657A, 657D

Corporations Amendment (Takeovers) Act 2007, explanatory memorandum

ASIC Regulation 16(1)

Listing rule 7.1, 7.11.3

Acacia Resources Ltd v Delta Gold NL (Nos 1 and 2) (1999) 33 ACSR 144, *Metal Manufacturers Ltd v Marsh Electrical Pty Ltd* (1998) 29 ACSR 245, *Aberfoyle Ltd v Western Metals Ltd* (1998) 1 ACSR 187, *Boughey v The Queen* (1986) 161 CLR 10

GN 7, GN 13, GN 14, ASIC RG 59

GoldLink IncomePlus Ltd [2008] ATP 21, *Golden West Resources Limited* 01 [2007] ATP 31, *Consolidated Minerals Ltd 03R* [2007] ATP 28, *Arrow Taxi Services Ltd* [2007] ATP 11, *Sydney Gas Ltd 01* [2006] ATP 9, *Consolidated Minerals Limited 03* [2007] ATP 25, *Pacific Energy Ltd [2004] ATP 23, Mildura Co-operative Fruit Company Limited* [2004] ATP 5, *Novus Petroleum Ltd* [2004] ATP 2, *Sirtex Medical Ltd [2003] ATP 22, Village Roadshow Limited 02 [2004] ATP 12, Ausdoc Group Ltd [2002] ATP 9, Pasminco Ltd (Administrators Appointed) [2002] ATP 6*

INTRODUCTION

1. The Panel, Stephen Creese, Sophie Mitchell and Ian Ramsay (sitting President) made a declaration of unacceptable circumstances in relation to the affairs of Multiplex. The application concerned a market bid by Australian Style for Multiplex. The Panel found that the structure of the bid was untenable and, in particular, that it was coercive and contained insufficient information. The Panel ordered that the bid be withdrawn.

2. In these reasons, the following definitions apply.

Australian Style	Australian Style Investments Pty Ltd
ASX	Australian Securities Exchange
Brookfield	Brookfield Multiplex Capital Management Ltd as responsible entity for Multiplex
Entitlement Offer	pro rata offer announced by Multiplex on 24 August 2009 (see paragraphs 52 and 53)
Multiplex	Multiplex Prime Property Fund
Multiplex Colt	Multiplex Colt Investments Pty Ltd as trustee of the Multiplex

3. In these proceedings, the Panel:
   (a) directed that the related applications be heard together
   (b) adopted the Panel's published procedural rules and
   (c) consented to parties being represented by their commercial lawyers.

FACTS

4. Multiplex is a listed managed investment scheme (ASX Code: MAFCA). Brookfield is the responsible entity for Multiplex. Units in the fund are partly paid with the second instalment due in June 2011.
5. With the decline in property values, Multiplex is in breach of its loan to value ratio covenants with its financiers.
6. On 3 September 2009 Australian Style, through its broker D2MX Pty Ltd, announced an on-market takeover offer for all the partly-paid units in Multiplex at $0.003. The offer period was scheduled to commence on 18 September 2009.
7. Australian Style proposed acquiring units on market prior to the offer period commencing. As a result of the Panel's interim order the offer period did not commence (see paragraph 19)
8. According to the bidder's statement dated 3 September 2009, as proposed to be amended by a replacement bidder's statement, Australian Style:
   (a) *"is offering to acquire all your Securities (including any Securities that come into existence during the Offer Period)"*
   (b) proposes to replace Multiplex's responsible entity, if it acquires less than all the units and cannot proceed to compulsory acquisition, with a responsible entity who would "*pursue a recapitalization or refinancing proposal that is more favorable to Unit Holders than the Entitlement Offer or, if that is not possible, to wind up [Multiplex]*"
   (c) "*intends to pay the final instalment on the [units] it holds on the currently scheduled due date in June 2011 unless all Unit Holders are relieved of that obligation*"
   (d) if earlier payment of the final instalment is necessary, would seek a winding up of Multiplex or replacement of the responsible entity instead of paying the call or
   (e) if that did not occur, would intend to pay the call but "*there are some conceivable circumstances (depending on the conjunction of timing, values, decisions taken by 3rd parties, market circumstances and the financial fortunes of [Australian Style]*" in which it may be unable to pay the call on all its units.
9. Australian Style has requisitioned a meeting of unit holders to consider:
   (a) replacement of Brookfield as the responsible entity and
   (b) winding up of Multiplex

10. On 24 August 2009 Multiplex announced the Entitlement Offer of 178 units for every unit held. The Offer included the possibility of a 'cash out' facility under which the underwriter would buy units from existing unit holders at $0.001 per unit.

11. ASX granted Multiplex a waiver from the listing rules for the Entitlement Offer. Because the offer ratio exceeded 1:1 and ASX treated the offer as non-renounceable,[1] ASX was prepared to waive listing rule 7.11.3[2] on condition that shareholder approval was obtained. For that approval, substantial unit holders and any proposed underwriter or sub-underwriter were not allowed to vote.

12. On 14 September 2009 Brookfield issued the notice of meeting for the scheduled meeting on 7 October 2009. The purpose of the meeting is to consider:

    (a) approval of the Entitlement Offer to remedy the breach of the loan to value covenants

    (b) resolutions put forward by Australian Style concerning replacement of the responsible entity and winding up of Multiplex

    (c) if the resolution to remove Brookfield as the responsible entity succeeds but the Australian Style replacement is not agreed, then to approve a Brookfield Multiplex Group entity as responsible entity.

APPLICATION

13. Two applications were made in response to Australian Style's announcement of its bid.

14. By application dated 6 September 2009, Brookfield, the responsible entity of Multiplex, sought a declaration of unacceptable circumstances. It submitted that the bidder's statement was defective in that it contained misleading statements, omitted material causing it to be misleading, and omitted material that section 636[3] required. It submitted that the effect was to deprive unit holders of information they required so resulting in the acquisition of control over Multiplex not taking place in an efficient, competitive and informed market**.**

15. By application dated 10 September 2009, Multiplex Colt, a substantial unit holder of Multiplex, sought a declaration of unacceptable circumstances. It submitted that the bid by Australian Style had a substantial coercive effect on unit holders which was inconsistent with an efficient competitive and informed market and section 602 (reasonable and equal opportunity to participate in, and reasonable time to consider, the proposal).

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[1] Because the prospect of deriving any value from the underlying units was remote as the units traded at $0.001

[2] Listing rule 7.1 requires a listed entity proposing to issue more than 15% of its securities to obtain shareholder approval unless an exception applies. One exception is for pro rata offers, but under listing rule 7.11.3 such offers must be renounceable

[3] Unless otherwise indicated, references are to the *Corporations Act 2001* (Cth)

Interim orders sought

16. Brookfield sought interim orders to restrain Australian Style from acquiring any units on market, proceeding to settle any trades, dispatching the bidder's statement, lodging a supplementary or replacement bidder's statement and sending or making any communication with unit holders.

17. Multiplex Colt did not seek interim orders.

18. Section 611 item 2 allows a bidder under an unconditional bid to acquire securities on market during the bid period.[4] For an on-market bid, the bid period is defined by the Corporations Act to start when the bid is announced to the market.[5] Section 612 contains exceptions to item 2, but none relevant to this matter.

19. The Acting President, Mr Graham Bradley, made interim orders prohibiting Australian Style from acquiring units on market (annexure A). In his view, given that the matter involved partly paid units and the possibility of an accelerated call, if the bidder's statement was deficient an order for divestiture of any units acquired by Australian Style may not have been an appropriate or effective remedy. We agree.

20. He did not make the other interim orders requested by Brookfield. He noted that Australian Style had not entered any trades (and he indicated that he would want submissions in relation to the effect of failed settlement of trades before considering this), and did not consider it was appropriate to restrain Australian Style from providing further information (by way of replacement bidder's statement or otherwise). However, he noted that it would be preferable for the dispatch of any such communications to await a decision on the application (or agreement of the target) if they related to the subject matter of the bidder's statement given the risk of confusion to unit holders should a further amendment to the bidder's statement be necessary. We agree.[6]

21. Australian Style requested a trading halt in Multiplex. Brookfield also wanted a trading halt. However, the Acting President considered a trading halt was not warranted given his order to prevent Australian Style from acquiring units on-market. We agree.

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[4] Item 2 says "*An acquisition in relation to bid class securities that results from an on-market transaction if:*
(a) the acquisition is by or on behalf of the bidder under a takeover bid; and

(b) the acquisition occurs during the bid period; and

(c) the bid is for all the voting shares in the bid class; and

(d) the bid is:

(i) unconditional; or

(ii) conditional only on the happening of an event referred to in subsection 652C(1) or (2)

See also sections 612 and 613.

[5] Section 9

[6] See, for example, *Sydney Gas Ltd 01* [2006] ATP 9 at [28], *Golden West Resources Limited* 01 [2007] ATP 31 at [28]

Final orders sought

22. Brookfield sought final orders to the effect that Australian Style comply with section 636 and correct the deficiencies in its bidder's statement.

23. Multiplex Colt sought final orders to the effect that Australian Style not acquire any units in Multiplex until it had:

    (a) obtained a commitment from the financiers of Multiplex not to call for immediate repayment of their loans, to waive existing breaches, and the financiers had agreed to relax the loan to value ratio covenants and

    (b) established evidence of sufficient alternative funding to meet both the debt and any other liabilities that Australian Style might have.

24. Multiplex Colt also sought an order that Australian Style not rely on the right to withdraw the bid under section 652C in relation to winding up of Multiplex if it votes in favour of the winding up.

DISCUSSION

25. The applications raised issues relating to alleged coercion of unit holders and alleged inadequate disclosure in the bidder's statement. We considered the application by Multiplex Colt (coercion) first. If the bid does not proceed, Brookfield's application (disclosure) does not need to be addressed in as much detail.

Structure of the bid

26. Multiplex Colt submitted that unit holders would have no real choice but to accept the bid for the following reasons:

    (a) the bid would entitle the financiers to call for immediate repayment of amounts owing to them, which Multiplex did not have. The call, due on 15 June 2011, may be accelerated. Australian Style had not demonstrated arrangements to meet the repayment. Accordingly, unit holders who did not accept the bid faced the possibility of an accelerated call on their partly paid units. Because the NTA per unit is likely to be significantly less than the $0.40 final instalment (even after sale of the assets), transfer of the units before a call is made looks attractive and

    (b) Australian Style can rely on the prescribed occurrences in section 652C to withdraw unaccepted offers, if its voting power is below 50% at the relevant time. The risk of it doing this may stampede unit holders into accepting early.

Section 652C

27. Australian Style flagged an intention to rely on a right under section 652C to withdraw unaccepted offers (if its voting power is below 50%) in the event of a resolution to wind up Multiplex. That section allows a bidder to withdraw a market bid if certain events happen, including that the target or a subsidiary resolves to be wound up.[7]

[7] Section 652C(1)(h)

28. Australian Style's ability to rely on the section is not certain. It cannot control when acceptances that might take its voting power over 50% will be received.

29. Moreover, "*a market bid is an unconditional undertaking to stand in the market to buy shares. Therefore, the ability of a bidder to withdraw that offer must only arise in certain guarded circumstances.*"[8] One of the policy bases of section 652C is similar to the policy behind sections 631 and 652B; that is, preservation of market integrity.[9] Section 602(a) puts the principle in this way: "*the acquisition of control over [interests] takes place in an efficient, competitive and informed market.*" An aspect of this is certainty.

30. An off-market bid cannot include a condition that depends on (among other things) a direct result of action by the bidder.[10] This helps give certainty. A market bid is unconditional, but, in our opinion, the same policy concern arises by the direct result of action by the bidder triggering section 652C. There is an additional policy concern. Because in a market bid only unaccepted offers are withdrawn, there is a tendency to stampede offerees.

31. Australian Style itself is proposing the resolution to wind up Multiplex; and, if it were to acquire units under the bid, its ability to determine the outcome of that resolution increases, and (up to the 50% level) its ability to withdraw from its bid increases. Multiplex Colt submitted that this would coerce unit holders into rushing to accept. We agree.

32. The intention of Australian Style to rely on section 652C is at odds with basic principles and policies underlying takeovers regulation.[11] It is likely[12] to result in the bid remaining open for less than one month, which offends the policy in section 602(b)(ii). Moreover, this situation is brought about by the bidder itself. Lastly, because it is also likely to have the effect of stampeding offerees into accepting it offends the policy in sections 602(a) and (b)(ii).

33. ASIC submitted that the Panel's policy on coercion was based on whether the actions of a person resulted in the market for control not being efficient, competitive and informed. It pointed to the Panel's policy on lock-up devices[13] and broker handling fees[14] as recognition of the principle.

34. Brookfield submitted that the real coercion related to the risk of Australian Style not being able or willing to satisfy the call. This would have an adverse outcome on unit holders who remained in Multiplex. We agree that this exacerbates the stampeding effect. Brookfield acknowledged that disclosure may "*cleanse the current coercive nature of the Offer*". In a subsequent submission Brookfield said that disclosure alone was not sufficient. We do not think disclosure alone solves the problem.

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[8] McDonough, *Annotated Takeover Law*, p216
[9] ASIC Regulatory Guide 59 at [59.4]
[10] Section 629(1)(b)
[11] See *Consolidated Minerals Ltd 03R* [2007] ATP 28 at [23]
[12] That is, "*substantial - a `real and not remote' - chance regardless of whether it is less or more than 50 per cent*": *Boughey v The Queen* (1986) 161 CLR 10, 21 per Mason, Wilson and Deane JJ. See *Consolidated Minerals Limited 03* [2007] ATP 25 at [26]
[13] Guidance Note 7
[14] Guidance Note 13

35. In *Pacific Energy Ltd* the bidder and target were involved in significant litigation against one another. The Panel said:

> *"In this regard, the Panel considered that it would not be consistent with the existence of an efficient, competitive and informed market if [target's] shareholders felt that they had no choice but to accept a bid (irrespective of whether they considered that it was adequately priced) because of concerns that [bidder] would not properly manage the defence of the Litigation if it acquired control of [target]."*[15]

36. In *Sirtex Medical Ltd* the bidder's statement identified the possibility of a Distribution Agreement between the bidder and the target if the bidder obtained between 50% and 90% of voting power in the target. Concerning information about the proposed Distribution Agreement the Panel said:

> *"Generally this would have been merely a disclosure issue. However, [bidder's] announcement that it may waive the 90% Minimum Acceptance Condition and enter into the Distribution Agreement and Capital Raising had a material tendency to be coercive on shareholders."*[16]

37. In *Village Roadshow Limited 02* the Panel took the view that the combined effect of a deficiency of information and a buyback of shares anticipated to consolidate control of the major shareholder had "*some tendency to coerce ordinary shareholders into selling into the buyback*". [17] It required additional information before the buyback could resume.

38. In *Ausdoc Group Ltd*[18] the Panel took the view that a break fee that was payable if there was no higher bid and the bidder's 90% minimum acceptance condition was not satisfied or waived may have had the effect of coercing shareholders into accepting the bid and would have been unacceptable but for undertakings to waive rights in respect of the fee.

39. These decisions reflect a consistent line of thinking, summed up by the (majority) Panel in *Pasminco Ltd (Administrators Appointed)* that *"Chapter 6 is designed to prevent people getting control of companies by coercion, or rushed, uninformed or selective dealing."*[19]

40. In our view, Australian Style's bid is coercive.

41. Multiplex Colt submitted that, without a commitment from the financiers not to call for repayment of amounts owing to them, or a demonstrated ability to meet the debt obligations and other liabilities, Australian Style's bid was coercive and could not be remedied by disclosure. This was because the consequence for a unit holder not accepting the bid meant that the unit holder did not have a real choice about accepting.

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[15] [2004] ATP 23 at [19]. The Panel allowed the application to be withdrawn after the bidder amended the terms of the bid to ensure that the 50% minimum acceptance condition could not be waived
[16] [2003] ATP 22 at [53]
[17] [2004] ATP 12 at [75]
[18] [2002] ATP 9
[19] [2002] ATP 6 at [98]

42. We think this goes too far. Australian Style cannot unilaterally insert itself into the relationship between Multiplex and its financiers. We would not require it to obtain such a commitment. Nonetheless, the combination of circumstances is unacceptable here, although we think it would be possible to make a bid without such a commitment.

43. We note that, paradoxically, if everyone rushes to accept, that would quickly take Australian Style above 50% and remove its ability to withdraw under section 652C(1), thus removing the stampede effect for those who would accept later. However, other features of the bid also give rise to unacceptable circumstances.

Accelerated call

44. Putting aside the Entitlement Offer, Multiplex's units are partly paid with a call of $0.40 due on 15 June 2011. The Product Disclosure Statement[20] initially offering the units set out circumstances in which the obligation to pay the final instalment may be accelerated, including if an insolvency event occurs or if the responsible entity is replaced. It noted that acceleration of the call may not be at the discretion of the responsible entity as security granted to NAB and ANZ would enable them to require Multiplex to accelerate payment of the final instalment in the identified circumstances.

45. Multiplex is currently in breach of its financing covenants and, subject to a waiver, the banks may move to enforce their security and cause the final instalment payable on the units to be accelerated. Conditions attaching to the waiver mean that the waiver may be withdrawn if Australian Style succeeds in its resolutions concerning replacing the responsible entity or winding up Multiplex.

46. Brookfield submitted that this risk was not disclosed; nor was how Australian Style intended to address the covenant breach if the capital raising did not proceed.

47. It also submitted that the policy behind section 631 and Guidance Note 14 require Australian Style to demonstrate sufficient funding to meet the call obligation. It drew an analogy to a bid where the target has known change of control provisions in its funding arrangements.

48. Australian Style, in its submissions, stated that it does not have sufficient funds to meet the second instalment on units held or to be acquired under the bid.

49. ASIC submitted that, if there was a real possibility that the second instalment would be accelerated and if Australian Style did not have the ability to meet it, there would be a highly coercive effect on unit holders. The reason was the likelihood that the units would be worth less than the call, putting pressure on unit holders to accept the offer instead. ASIC submitted that the possibility of Australian Style participating in the cash out facility did not address its concerns because it is uncertain whether that facility will proceed.

50. A consequence of the bid and Australian Style's intentions is that the call, otherwise due in 2011, may be accelerated. Australian Style cannot be certain under a market bid that it will be in a position to determine whether a call is made. If a call is made,

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[20] Section 7.2.18

and Australian Style cannot fund the call, we accept that unit holders may be in a materially worse position.

51. Based on a submission by Australian Style, disclosure of the position would reveal that Australian Style cannot meet the call, and that would exacerbate the coercive effect of the bid.

Additional units

52. Multiplex is in breach of its "loan to value" ratio with its financiers. On 24 August 2009 Brookfield announced the Entitlement Offer to address this. The offer is a pro-rata offer of 178 units for every unit held at $0.001 payable on application and a further $0.02237 payable in June 2011. The offer is underwritten by an entity in the Brookfield Multiplex Group. The offer is conditional on unit holder approval, the responsible entity not being replaced (or, if replaced, by a Brookfield Multiplex Group entity), winding up not proceeding and the underwriting agreement not being terminated prior to the issue.

53. Under the Entitlement Offer, unit holders who do not wish to participate may have an ability to sell their units to the underwriter for at least $0.001 each. In the ASX announcement of 24 August 2009, Multiplex listed the conditions for the cash out facility as including formal launch of the Entitlement Offer, dispatch of the offer materials, completion of the Entitlement Offer and receipt of necessary approvals and regulatory relief.

54. On 3 September 2009, D2MX Pty Ltd, as executing broker, announced the bid on behalf of Australian Style. Australian Style has disclosed that it has funds to pay the consideration for units currently on issue.

55. Putting aside the possibility of the bid being withdrawn, the offer period was scheduled to commence on 18 September 2009[21] and end on 19 October 2009 (unless extended). While no date had been fixed for the Entitlement Offer, Multiplex's financiers had granted a waiver from their rights until 30 September 2009. The waiver has since been extended to 16 November 2009. It is still conditional.

56. It therefore seems likely[22] to us that units under the Entitlement Offer would be issued during the bid. In any event, there is no basis to assume the bid would be completed before the Entitlement Offer units are issued.

57. Australian Style said in its bidder's statement that it was offering to acquire all the units including any that come into existence during the offer period. It then set out under "Source of cash consideration" the amount required assuming no further units were issued. That section immediately follows a discussion of the Entitlement Offer. This seems inconsistent and confusing.

58. Australian Style stated in submissions that it does not have sufficient funds to acquire all the units on issue during the offer period including those issued under the Entitlement Offer. However, it said it could choose to participate in the proposed

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[21] As a result of an interim order by the Panel the offer period did not commence

[22] See fn 12

"cash-out" facility to be offered as part of the Entitlement Offer if it becomes available. However, the availability of the cash out facility is uncertain.

59. The cash out facility may not proceed. In our view, reliance upon the proposed cash-out facility is not sufficient given that the existence of facility is uncertain. And even if it does go ahead, and assuming Australian Style has the additional units registered in its name by the record date, Australian Style would be required to fund the difference between its offer price ($0.003) and the price payable under the cash-out facility ($0.001).

60. In Guidance Note 14, the Panel says:

"The Panel's main concerns in relation to funding arrangements are that:

*(a) at all relevant times, the bidder have (sic) reasonable grounds to expect that it will have sufficient funding arrangements in place to satisfy full acceptance of its offers when the bid becomes unconditional (a **Reasonable Basis**) …"*[23]

and

"If the bid covers securities that are issued during the offer period, the bidder's funding arrangements should be sufficient to pay for those additional securities. However if the bidder has reasonable grounds to expect that acceptances will not be received in respect of particular securities, the funding arrangements need not extend to those securities. (footnotes omitted)[24]

61. The bid covers securities issued during the offer period. Australian Style has stated in its submissions that it cannot fund the additional securities from the Entitlement Offer. In our view, there is no evidence that the bidder has reasonable grounds to expect that acceptances will not be received in respect of those securities. Certainly a reasonable basis for funding of those additional securities is not disclosed. Again, in our view, reliance upon the proposed cash-out facility is not sufficient.

62. In a market bid, where acceptance is unconditional and payment occurs within three days of the trade, limited funding exacerbates the stampede effect, which is at odds with basic principles and policies underlying takeovers regulation. It could also adversely affect market operations (especially settlement) because it could result in a bidder being required to stand in the market but being unable to pay for securities bought by the broker on its behalf.

63. The requirement for disclosure in section 636 assumes funding is available and is designed to provide comfort of that fact to offerees. We do not accept the submission of Australian Style (if we have understood it correctly) that a clear statement of the funding held is enough, regardless of whether the funding is sufficient. Even if there is no contravention, it is the Panel's role to *"address circumstances which impair [the purposes of Chapter 6 as set out in section 602], without having to also establish either a contravention of the Act or an effect on control or potential control of a company or on the acquisition or proposed acquisition of a substantial interest in the company*".[25]

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[23] GN 14 at [14.2]
[24] GN 14 at [14.14]
[25] Corporations Amendment (Takeovers) Act 2007, explanatory memorandum para 3.8

64. There are also significant deficiencies in the information contained in the bidder's statement.

Disclosure

65. We do not think the bidder's statement contains enough information. Australian Style made a preliminary submission, enclosing a draft replacement bidder's statement. Even as proposed to be amended, we do not think it contains enough information. In view of the concerns above, we did not need to address all the information deficiencies in the bidder's statement or replacement bidder's statement. However, particular information deficiencies of concern are worth mentioning.

Responsible entity

66. The identity of the proposed replacement responsible entity is not disclosed. Australian Style supplemented its disclosure by saying its replacement responsible entity would be "*one who will pursue a recapitalization or refinancing proposal that is more favourable to Unit Holders than the Entitlement Offer…*"

67. This is not sufficient. In our view, in the context of the bid the proposed replacement responsible entity must be identified and information about it made available.

Units issued during the bid

68. The bid covers securities issued during the offer period, but a reasonable basis for funding of those additional securities is not disclosed.

69. This is not sufficient. Australian Style has not disclosed, and there is no evidence that it has reasonable grounds to expect, that acceptances will not be received in respect of those securities. Australian Style submitted that at the time of announcing the bid it expected that the bid would be closed before the issue of units under the Entitlement Offer or could have been withdrawn prior to completion of that offer. If it withdrew its bid or the bid closed before the issue of units, Australian Style expected that, if necessary, it could accept the cash out facility.

70. In our view, reliance on these mechanisms is uncertain. Moreover the proposed cash-out facility wouldn't fund the whole of the acquisition costs. And, we point out, that these mechanisms do not, in our opinion, amount to reasonable grounds to expect that acceptances will not be received.

71. Brookfield, in its submissions, linked the acquisition of units under the bid, including those issued under the Entitlement Offer, with the second instalment obligation (aggregating to $112.8 million across the full capital base).

72. ASIC submitted that paragraph 1.1 of the bidder's statement extended the bid to all securities that exist, or will exist, at any time during the bid period. If units may be issued under the Entitlement Offer during the bid period then its ability to pay for those units should be disclosed. It submitted that similar reasoning to *Novus Petroleum Ltd*[26] applied. In that decision, the Panel required a bidder to disclose whether it would need, and had arrangements, to replace any of the target's funding which may have become repayable as a result of the bid. We agree.

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[26] [2004] ATP 2

73. Disclosure of funding for units issued during the bid or the basis of any expectation why acceptances would not be received in respect of those units is required.[27]

Funding the call

74. The importance of Australian Style being able to fund the call has been discussed above. A reasonable basis for funding the unpaid call is not disclosed.

75. Australian Style, quoting *Metal Manufacturers*[28] and *Aberfoyle*,[29] submitted that the financial situation of Australian Style may be, but is not necessarily, a material matter. In *Metal Manufacturers* Bryson J said that information may be required if there may be something in it to indicate whether "sharing destiny" as a minority shareholder with the offeror would be wise or reasonable.[30] On that test, in our view, the possible acceleration of the call makes information about whether Australian Style can meet the call material.

Intentions

76. Section 636(1)(c) requires (among other things) the bidder's statement to include details of the bidder's intentions regarding the continuation of the target's business, major changes to be made to the business, and future employment of employees. This requires that the intentions of a bidder be disclosed in the bidder's statement where those intentions have been formed. It does not strictly require that intentions be formed.[31] But not formulating intentions may amount to a departure from the policy of sections 602(a) and (b)(iii).[32]

77. Much of that section of the bidder's statement dealing with Australian Style's intentions is predicated upon Australian Style securing enough units to achieve its objective to wind up Multiplex. Even section 6.4, which is headed "Continued operation of Multiplex if Australian Style acquires less than 100% ownership", simply states that Australian Style will seek to replace the responsible entity with one who will pursue a recapitalisation or refinancing proposal more favourable to unit holders than the Entitlement Offer or, if that is not possible, to wind up Multiplex.

78. Australian Style's disclosure of its intentions, should it not succeed in its objectives, is insufficient in our view. The statement says nothing about the continued operation of Multiplex. It says nothing about Australian Style's plans, should it secure enough units to control Multiplex but not enough to secure its objectives.

79. Intention statements might be general and not specific[33] but they should give unit holders some idea of what the bidder intends.

Inconsistencies

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27 GN 14 at [14.14]

28 *Metal Manufacturers Ltd v Marsh Electrical Pty Ltd* (1998) 29 ACSR 245 at 250

29 *Aberfoyle Ltd v Western Metals Ltd* (1998) 1 ACSR 187 at 210

30 Fn 28 at p250. *Metal Manufacturers* was considered in *Acacia Resources Ltd v Delta Gold NL* (Nos 1 and 2) (1999) 33 ACSR 144. Warren J adopted the 11 principles summarised by Tamberlin J in *Pancontinental Mining Ltd v Goldfields Ltd* (1995) 16 ACSR 163.

31 *Mildura Co-operative Fruit Company Limited* [2004] ATP 5 at [86]

32 Fn 31 at [87]

33 *GoldLink IncomePlus Ltd* [2008] ATP 21

80. Disclosures, particularly in respect of the treatment of units issued during the bid and Australian Style's intentions, appear to be inconsistent and therefore likely to be confusing to unit holders.

81. For example, although the offer is for all units including those that might be issued, section 9.1 dealing with the source of cash consideration does not mention the possibility of units being issued.

82. Similarly, the text of section 6.4 does not deal with the continued operation of Muliplex as the heading suggests.

Conclusion

83. It appears to us that the acquisition of control over units in Multiplex will not take place in an efficient, competitive and informed market, unit holders do not have a reasonable time to consider the proposal or a reasonable and equal opportunity to participate in any benefits of the proposal, and they, and the directors of Brookfield, are not given enough information to enable them to assess the merits of the proposal.

84. The combination of circumstances in this case creates uncertainty for unit holders and does not satisfy the principles in section 602. That combination includes the structure of the bid, inadequate disclosure, Multiplex's circumstances, Multiplex's financing arrangements, the Entitlement Offer, the trading price of the units, that the bid is on-market, the size of the call, the funding of the bid, and the intentions of Australian Style with respect to replacing the responsible entity, winding up Multiplex and withdrawing the bid.

Is Multiplex takeover proof?

85. Australian Style submitted that the application by Multiplex Colt extended the Panel's policy too far. It submitted that the reason the financiers were in a position to make a call was because of the loan to value ratio breach and not because of the bid. The relief sought, in its submission, amounted to the bid not being able to proceed, making Multiplex virtually takeover proof.

86. We considered whether the structure of Multiplex, and the circumstances in which it finds itself, results in it being takeover proof, as submitted by Australian Style. We consider that it would be possible to structure a bid (probably an off-market bid) with appropriate disclosure and conditions.

Concerns for unit holders

87. Notwithstanding our conclusion, we have concerns for the position of unit holders. These arise from the structure of Multiplex, the Entitlement Offer and terms of the financiers' waiver. In particular, we note statements in the notice of meeting to the effect that:

    (a) appointing a non-Brookfield Group member as responsible entity triggers pre-emptive rights and irrevocable offers over assets of the fund

    (b) the pre-emptive rights and rights of first and last refusal may result in a lower price being realised for assets than in the open market

(c) removal of the responsible entity will not affect the continuation of the management services agreement and the fees payable to the existing responsible entity will be paid to the Fund Manager

(d) immediate payment of deferred management fees of approximately $4m will be required to be paid on replacement of the responsible entity and

(e) "*If the proportion of Units on issue not held by Brookfield Multiplex Group is low, ASX may seek to remove the Fund from its official list and delist the Unit*s".

88. In response to these concerns, Brookfield made submissions that the pre-emptive rights and rights of first and last refusal were clearly disclosed in its product disclosure statement and subsequently through announcements to ASX, and that the change in responsible entity provision was also disclosed. It further submitted that it has clarified that the statement regarding delisting related to the spread requirement in the listing rules and that the Management Services Agreement reflected market practice at the time it was entered into.

DECISION

Declaration

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

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

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

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

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

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

Orders

91. Following the declaration, we made the final orders set out in Annexure C. The effect of the order is that the bid must be withdrawn.

92. Under s657D the Panel's power to make orders is very wide. The Panel is empowered to make 'any order'[34] if 4 tests are met:

(a) it has made a declaration under s657A. This was done on 23 September 2009

(b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. We are satisfied that our orders do not unfairly prejudice any person. No party, including Australian Style, objected to the Panel's proposed order

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

(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 18 September 2009. Each party made submissions and rebuttals.

(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, in our view, protect rights and interests of persons affected by the unacceptable circumstances. The bid suffered from significant deficiencies. While stopping a bid is very unusual,[35] in our opinion it is the most appropriate remedy.

93. We make no order as to costs.

Ian Ramsay
President of the Sitting Panel
Decision dated 23 September 2009
Reasons published 29 September 2009

[35] In *Arrow Taxi Services Ltd* [2007] ATP 11 the possibility of such an order existed, but it became unnecessary to decide

Australian Government
Takeovers Panel

Annexure A

CORPORATIONS ACT
SECTION 657E
INTERIM ORDER

Multiplex Prime Property Fund

Brookfield Multiplex Capital Management Limited as responsible entity for Multiplex Prime Property Fund made an application to the Panel dated 6 September 2009 in relation to the affairs of Multiplex Prime Property Fund (**Multiplex**).

The Acting President ORDERS:

1. Australian Style Investments Pty Limited not acquire units (or cause a broker to acquire units) in Multiplex by on-market purchase
2. This interim order has effect until:
   (i) further order of the Panel or
   (ii) 5pm EST 7 September 2009.

Alan Shaw
Counsel
with authority of Graham Bradley
Acting President
Dated 7 September 2009

Australian Government
Takeovers Panel

Annexure B

CORPORATIONS ACT
SECTION 657A
DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

Multiplex Prime Property Fund 01 and 02

CIRCUMSTANCES

1. Multiplex is a listed managed investment scheme (ASX Code: MAFCA). Brookfield is the responsible entity for Multiplex. Units in the fund are partly paid with the second instalment due in June 2011.

2. Australian Style announced an on-market takeover offer for all the partly-paid units in Multiplex at $0.003. The offer period was scheduled to commence on 18 September 2009 (as a result of an interim order by the Panel the offer period did not commence). Australian Style proposed acquiring units on market prior to the offer period commencing.

3. According to the bidder's statement dated 3 September 2009, as proposed to be amended by a replacement bidder's statement, Australian Style:

   (a) *"is offering to acquire all of your Securities (including any Securities that come into existence during the Offer Period)"*

   (b) proposes to replace Multiplex's responsible entity, if it acquires less than all the units and cannot proceed to compulsory acquisition, with a responsible entity who would "*pursue a recapitalization or refinancing proposal that is more favorable to Unit Holders than the Entitlement Offer or, if that is not possible, to wind up [Multiplex]*"

   (c) *"intends to pay the final instalment on the [units] which it holds on the currently scheduled due date in June 2011 unless all Unit Holders are relieved of that obligation"*

   (d) if earlier payment of the final instalment is necessary, would seek a winding up of Multiplex or replacement of the responsible entity instead of paying the call or

   (e) if that did not occur, would intend to pay the call but "*there are some conceivable circumstances (depending on the conjunction of timing, values, decisions taken by 3rd parties, market circumstances and the financial fortunes of [Australian Style])*" in which it may be unable to pay the call on all its units.

4. Australian Style has requisitioned a meeting of unit holders to consider:

   (a) replacement of Brookfield as the responsible entity and

   (b) winding up of Multiplex

5. Australian Style has flagged an intention to rely on a right under section 652C to withdraw unaccepted offers (if its voting power is below 50%) in the event of a resolution to wind up Multiplex. Its ability to rely on the section is not certain. Moreover, Australian Style itself is proposing the resolution; and, if it were to acquire units under the bid, its ability to determine the outcome of that resolution, and hence its ability to withdraw, increases.

6. Multiplex is in breach of its "loan to value" ratio with its financiers. Brookfield has announced a capital raising by way of a pro-rata Entitlement Offer of 178 units for every unit held at $0.001 payable on application and a further $0.002237 payable in June 2011. The offer is underwritten by an entity in the Brookfield Multiplex Group.

7. The financiers to Multiplex have granted a waiver from their rights until 16 November 2009. Conditions attaching to the waiver mean that the waiver may be withdrawn if Australian Style succeeds in its resolutions concerning replacing the responsible entity or winding up Multiplex. This may result in the call on partly paid units being accelerated.

8. It appears to the Panel that the acquisition of control over voting units in the listed managed investment scheme will not take place in an efficient, competitive and informed market, that holders of interests do not have a reasonable time to consider the proposal or a reasonable and equal opportunity to participate in any benefits of the proposal, and that holders of interests, and the directors of the responsible entity for the scheme, are not given enough information to enable them to assess the merits of the proposal. In particular, the intention of Australian Style to rely on s652C is at odds with basic principles and policies underlying takeovers regulation as it is likely to result in the bid remaining open for less than one month.

9. In addition, there was insufficient disclosure in the bidder's statement concerning (among other things):

   (a) the responsible entity that Australian Style proposed would replace Brookfield, should it succeed in its proposed resolution to replace Brookfield as the responsible entity

   (b) the reasonable basis on which Australian Style could fund the acquisition of units issued under the Entitlement Offer announced by Brookfield prior to the offer (and Australian Style's statement in its submissions is that it cannot fund it)

   (c) the reasonable basis on which Australian Style could fund payment of the call on the unpaid units, should the call be accelerated as a result of circumstances surrounding the bid or otherwise (and Australian Style's statement in its submissions is that it cannot fund it)

   (d) Australian Style's intentions should it not succeed in its objectives

10. In addition, disclosures, particularly in respect of the treatment of units issued during the bid and Australian Style's intentions, appear to be inconsistent and therefore likely to be confusing to unit holders.

11. 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 Multiplex or

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

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

12. 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 Multiplex.

DEFINITIONS

In this declaration:

"Australian Style" means Australian Style Investments Pty Ltd

"Brookfield" means Brookfield Multiplex Capital Management Ltd as responsible entity for Multiplex

"Entitlement Offer" means the pro rata offer announced by Multiplex on 24 August 2009

"Multiplex" means Multiplex Prime Property Fund

Alan Shaw
Counsel
with authority of Ian Ramsay
President of the sitting Panel
Dated 23 September 2009

Australian Government
Takeovers Panel

Annexure C

CORPORATIONS ACT

SECTION 657D

ORDERS

Multiplex Prime Property Fund 01 and 02

The Panel made a declaration of unacceptable circumstances on 23 September 2009.

THE PANEL ORDERS

1. As soon as practicable after the date of this order:
   (a) Australian Style Investments Pty Ltd withdraw its on-market takeover bid for Multiplex Prime Property Fund and
   (b) Make an announcement to the market (in a form to which the Panel does not object) of the withdrawal of its bid.

Alan Shaw
Counsel
with authority of Ian Ramsay
President of the sitting Panel
Dated 23 September 2009