



Australian Government

Takeovers Panel

**Reasons for Decision
Multiplex Prime Property Fund 03
[2009] ATP 22**

Catchwords:

Entitlement Offer – information deficiencies – control effect - efficient competitive and informed market - cash out facility – decline declaration - undertaking - Brookfield Multiplex Capital Management Ltd – Brookfield Multiplex Capital Securities Ltd– Australian Style Investments Pty Ltd - Grocon Investment Management Pty Ltd

Corporations Act 2001 (Cth), sections 602, item 10 and 13 of 611, 657A

Corporations Amendment (Takeovers) Act 2007, explanatory memorandum

ASIC Act section 201A

Multiplex Prime Property Fund 01 and 02 [2009] ATP 18, Emperor Mines Ltd 01R [2004] ATP 27, PowerTel Limited 01 [2003] ATP 25, Pinnacle VRB Ltd (No. 8) [2001] ATP 17

Guidance Note 17 - Rights Issues

INTRODUCTION

1. The Panel, Stephen Creese, Sophie Mitchell and Ian Ramsay (sitting President) declined to make a declaration of unacceptable circumstances after accepting supplementary disclosure and an undertaking from BMCM to amend the terms of a dispersion strategy introduced into the Entitlement Offer. The Panel was however minded to make a declaration, but for the further disclosure and undertaking. The application concerned a 178:1 pro rata Entitlement Offer by Multiplex and a conditional ‘cash-out’ facility for unit holders who chose not to take up their entitlement.

2. In these reasons, the following definitions apply.

Australian Style	Australian Style Investments Pty Ltd
BMCM	Brookfield Multiplex Capital Management Ltd as responsible entity for Multiplex
BMCS	Brookfield Multiplex Capital Securities Ltd as trustee for Brookfield Multiplex PPF Investment No 2 Trust, the underwriter of the Entitlement Offer
Entitlement Offer	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, announced by Multiplex on 24 August 2009 and approved by unit holders on 7 October 2009
Grocon	Grocon Investment Management Pty Ltd
Multiplex	Multiplex Prime Property Fund

3. In these proceedings, the Panel:

Takeovers Panel

Reasons - Multiplex Prime Property Fund 03 [2009] ATP 22

- (a) adopted the Panel's published procedural rules and
- (b) consented to the parties being represented by their commercial lawyers.

FACTS

4. Multiplex is a listed managed investment scheme (ASX Code: MAFCA). BMCM is the responsible entity for Multiplex. Units in the fund are partly paid with the second instalment of 40 cents due in June 2011.
5. On 30 July 2009 Multiplex announced that it was in breach of its loan to valuation ratio (LVR) covenants with its financiers. The financiers have waived the breach, first until 31 August, then until 30 September and lastly until 16 November. The waiver currently applies until 16 November 2009 and the Panel and market have been advised that it will not be extended. For example, BMCM in announcements to ASX said on 13 October 2009, "*The financiers have reiterated the importance of timing for stabilisation of the Fund and stated that they are not prepared to further extend the waiver period...*" and on 22 October 2009, BMCM referred to "*the impending 16 November 2009 financing deadline facing the Fund*".
6. On 24 August 2009, Multiplex announced an Entitlement Offer of 50,154,148,106 partly paid units to raise \$50.15 million. Of that amount, \$44.7 million will be used to reduce the debt and cure the LVR breach. The balance is mostly taken up in costs and fees. The Entitlement Offer is non-renounceable (an ASX requirement), and is fully underwritten by BMCS. It contained no shortfall facility or backend bookbuild.
7. Decisions in respect of the Entitlement Offer were taken by the independent directors of BMCM.
8. On completion of the Entitlement Offer the amount outstanding on partly paid units will be reduced from 40 cents to 0.2237 cents per unit. Because the offer ratio is 178:1, to maintain the same proportionate holding, a unit holder must pay 17.8 cents per unit held to acquire the extra 178 units. The unit holder will then be liable for 0.2237 cents per unit on the increased number of units (ie, there will be 179 units on issue where previously there was one, so the total call due in 2011 is 40.04 cents).
9. The Entitlement Offer included the possibility of a 'cash out' facility under which BMCS would, subject to certain conditions, buy units from existing unit holders at 0.1 cent per unit.
10. On 7 October 2009, unit holders approved the making of the Entitlement Offer under the ASX listing rules. ASX required that the votes of substantial holders be disregarded.
11. On 8 October 2009, Multiplex released the Entitlement Offer booklet dated 7 October 2009. According to the chairman's letter, "*The Independent Directors have determined that the most appropriate course of action is to raise capital via the Entitlement Offer*".¹
12. On 9 October 2009, Australian Style applied for a declaration on the basis of the control effect of the proposal.

¹ Independent Chairman's Letter, page 2 of the Entitlement Offer Booklet dated 7 October 2009

Takeovers Panel

Reasons - Multiplex Prime Property Fund 03 [2009] ATP 22

13. On 19 October 2009, “to settle the proceedings”, BMCM proposed undertaking to make supplementary disclosure as requested by the Panel, submit an application to ASIC for a modification of s606 in respect of the cash out facility, and implement a shortfall facility. It proposed that eligible unit holders² who applied for all their entitlement under the Entitlement Offer could apply for up to 5 times their entitlement under the shortfall facility. The “shortfall pool” would exclude units not taken up by an entity in or managed by the Brookfield Multiplex Group or held on behalf of such entity.
14. Brookfield Multiplex Group holds 21.6% of Multiplex through Multiplex Colt Investments Pty Limited and 9.9% through Multiplex Acumen Property Fund. Later on 19 October, the “shortfall pool” proposal was modified so that only the 21.6% holding would be excluded from the shortfall. It has since been dropped altogether.
15. On 19 October the Panel determined to conduct proceedings. It issued a brief to all parties.
16. On 20 October 2009, BMCM undertook not to allot or issue units in response to applications under the Entitlement Offer and not to process applications under the cash out facility unless the Panel consented, the proceedings were determined or BMCM first gave the Panel two business day’s notice.
17. On 22 October 2009, at around the same time it responded to the Panel’s brief, BMCM issued to ASX supplementary information on the Entitlement Offer “*in an effort to resolve the issues in the Takeovers Panel proceedings*”. The supplementary information provided unit holders with information about their choices and incorporated into the terms of the Entitlement Offer an uncapped shortfall facility to allow eligible unit holders to apply for additional units and a backend bookbuild for remaining units not taken up.
18. The shortfall facility was subject to conditions, including discretion in BMCM to reject applications and limits on participation by reference to chapter 6 (see paragraph 51). The bookbuild was subject to conditions, including a similar limit by reference to chapter 6 and a credit condition. Under the credit condition, no allotment of units would take place unless the subscriber made a public statement about holding or selling its units and demonstrated financial ability to pay the final instalment (see paragraph 55).
19. On 23 October 2009, BMCM issued further supplementary information to ASX in relation to the cash out facility “*pursuant to section 1019J ... to ensure that the conditional offer made to unitholders ... remains open*”. It announced that it had given the Panel two business day’s notice of its intention to commence processing applications.³
20. On 27 October 2009, BMCM gave a further undertaking:
 - (a) in respect of the cash out facility, to seek ASIC relief and

² Defined as a unit holder with a registered address in Australia or New Zealand on the record date (7 p.m. AEDT on 16 October 2009)

³ On 26 October 2009, the Panel issued an interim order to prevent the allotment or issue of units under the Entitlement Offer or the processing of applications under the cash out facility

Takeovers Panel

Reasons - Multiplex Prime Property Fund 03 [2009] ATP 22

- (b) in respect of the Entitlement Offer, to modify the terms of the shortfall facility and backend book build. (see annexure)

APPLICATION

21. By application dated 9 October 2009, Australian Style sought a declaration of unacceptable circumstances in relation to:
 - (a) BMCS underwriting the Entitlement Offer and
 - (b) the cash out facility.
22. On the underwriting, it submitted that the Entitlement Offer had been structured so as to effect a change of control "*without having to comply with the usual rules to make a takeover*" and not in accordance with Guidance Note 17. It also submitted that there was a serious issue to be examined about whether the directors of BMCM had acted in good faith in the discharge of their duties.
23. On the cash out facility, Australian Style submitted that it "*contains curious conditions which are difficult to explain and are buried down the back in Annexure B*" of the offer document. Approval under section 611 item 7 might not be obtained making the cash out facility unavailable when it is too late to take up the Entitlement Offer. Moreover, it submitted that, with Brookfield and those hoping to cash out unable to vote, the approval could be sensitive to a small number of unit holders who accept the Entitlement Offer.
24. In a preliminary submission, BMCM submitted (among other things) that:
 - (a) Australian Style had unreasonably delayed in making its application
 - (b) Australian Style had not taken previous opportunities to make submissions on the points it was now raising
 - (c) Panel proceedings could give rise to significant prejudice to unit holders by reason of their impact on the financiers' wavers, the underwriting agreement and uncertainty for unit holders and
 - (d) unit holders had overwhelmingly supported the Entitlement Offer.
25. Australian Style sought to make a response, which we agreed to accept. It submitted (among other things) that BMCM's preliminary submission did not show why the Panel would be unable to consider the circumstances to be unacceptable within section 657A. It also submitted that an application prior to the meeting on 7 October 2009 would have been premature, and that relevant information not formerly disclosed to unit holders was not made available before then.

Final orders sought

26. Australian Style sought final orders to the effect that BMCS not acquire further units in Multiplex unless it complies with an exception in section 611 other than items 10 or 13.

Additional party

27. On 15 October 2009 Grocon lodged a Notice of Appearance, which we accepted.

DISCUSSION

28. We considered whether to conduct proceedings, particularly in relation to:
- (a) disclosure to unit holders in relation to the entitlement offer and cash out facility and
 - (b) the structure of the offer and actions taken by the fund to mitigate any potential control impact of the entitlement offer.

We informed the parties that we may not conduct proceedings in relation to aspects of the application concerning good faith of the directors or the alternative proposal from Grocon and Oaktree Capital Management Pte Ltd. We did not conduct proceeding on these aspects.

29. Before conducting proceedings we asked a number of questions concerning clear and concise disclosure of the choices for unit holders, disclosure regarding potential dilution in both percentage and NTA terms, conditions to the cash out facility, and market trading in the units (other than a statement of the 30 day VWAP). We also asked whether an application for relief from s606 in relation to the cash out facility been made to ASIC.
30. We considered that this additional information was required for unit holders to make a choice about whether to subscribe for additional units under the Entitlement Offer or opt for the cash out facility offer or do nothing. The information in the offer booklet we found very difficult to access. We note BMCM said that *"there is no single articulation of unitholder choices in the entitlement offer booklet."*
31. On 19 October 2009, at the time BMCM offered the capped shortfall facility, it submitted that *"the existing structure was negotiated heavily so as to have a bankable/underwritable offering, however, the underwriter has given ground at the request of MAFCA given the impending banking waiver deadline."* However, because the shortfall was capped and no bookbuild was proposed we were not satisfied that the proposal sufficiently dealt with mitigation of the potential control effect. We therefore decided to conduct proceedings.
32. On 20 October we issued a brief.
33. BMCS submitted that the shortfall facility and book build were appropriately structured to best address any potential control impact. It pointed out that:
- (a) the Entitlement Offer fell within item 10 of section 611 and
 - (b) Panel guidance made it clear that there is a rebuttal presumption that a rights issue structured to fall within exception 10 (or exception 13) is not unacceptable.⁴
34. Australian Style submitted that an uncapped shortfall facility and backend bookbuild would address some of the potential control impacts of the Entitlement Offer, as long as units not taken up by the Brookfield Multiplex Group were not excluded and there were no other unusual or exceptional conditions. It submitted that the underwriter should have no concern with the level of take-up by unit holders under the

⁴ GN 17 at para [8]

Takeovers Panel

Reasons - Multiplex Prime Property Fund 03 [2009] ATP 22

Entitlement Offer or proposed shortfall facility. We understand the point Australian Style is making, but note that generally an underwriter would be concerned at the level of take up because this affects its obligations. Moreover, in this matter the underwriter may have an additional concern about the ability to meet the future call, although this concern is limited because units are freely tradable on ASX.

35. Australian Style also submitted that creditworthiness of potential unit holders should be irrelevant. We do not accept this entirely. The financiers require, as a condition of the waiver, that units may not be issued under the shortfall facility if that would lead to a unit holder (other than a Brookfield entity) having voting power of at least 50% and they consider it detrimental to their interests.⁵ Allowing that to occur when the Entitlement Offer is about getting Multiplex out of its LVR breach makes no sense. The 50% condition in the shortfall is qualified by reference to circumstances that would entitle the financiers to determine that the waiver no longer applied. Therefore, we are prepared to accept it.
36. Grocon stands in a different position to other parties. It is not a unit holder. It is seeking to propose an alternative transaction to the Entitlement Offer.
37. Grocon submitted that *"cases such as Powertel 01 and Pinnacle VRB No 8 reveal, where there is a clear proposal supported by the board of a target (or the responsible entity of the target in the case of a listed managed investment scheme), its role is not to prefer that alternative over other alternatives, on the basis of its assessment on the interests of members, but rather to provide for all alternatives to be made available for members, for their consideration."*⁶
38. We do not disagree with the submission as a general proposition, but note that in *Pinnacle* (a case concerning frustrating action) the Panel qualified the principle that members should be given an informed choice rather than their board pre-empting that choice. One qualification related to *"exceptional circumstances where the Panel may be satisfied that approval of members need not be sought despite an action triggering a bid condition. An example could be a transaction which was clearly for the commercial advantage of the company and so motivated. If it were far advanced at the time the bid was announced and not designed to forestall a future bid, it may be contrary to the interests of target members to require that transaction be submitted for approval, particularly where that course could jeopardise that transaction going ahead at all."*⁷

⁵ See paragraph 4.7.1 of the Entitlement Offer Offer Booklet says: *"That waiver expires at midnight on 16 November 2009 or, if earlier, the date on which any of the following occurs:*

- *an event of default, or another event entitling the Financiers to accelerate the Partly Paid Facility occurs (other than the Current Covenant Breach);*
- *there is a breach of distribution and fee payment restrictions or cash sweep requirements applying to the Fund during the period of the waiver;*
- *a member of the Brookfield Multiplex Group transfers any of its Units or any economic interest in its Units, other than to another member of the Brookfield Multiplex Group; or*
- *any person, other than a member of the Brookfield Multiplex Group, holds voting power (as defined in the Corporations Act) in the Fund of at least 50%, and the Financiers form the opinion that their rights or interests under the Debt Facility are or are likely to be materially adversely affected as a result and they notify [BMCM] that the waiver no longer applies."*

⁶ *PowerTel Limited 01* [2003] ATP 25, *Pinnacle VRB Ltd (No. 8)* [2001] ATP 17

⁷ *Pinnacle No 8*, fn 6 at [11]

Takeovers Panel

Reasons - Multiplex Prime Property Fund 03 [2009] ATP 22

39. At this late stage the Entitlement Offer is the only option available to unit holders. Grocon has not made, or announced, an alternative executable proposal. See also paragraph 42.
40. We note Grocon's concerns over the proposed confidentiality and standstill agreement required for access to the Fund's information, but also note the submission of BMCM that "*At least 7 potential investors, all of whom are sophisticated and unrelated to Brookfield Multiplex Group, have accessed the due diligence data room having first executed the Confidentiality Agreement*"
41. Multiplex may have had a number of options available to it, such as those mentioned in submissions by Grocon, namely to sell an asset or pay penalty interest. BMCM rebutted those options as not viable. However, it is the role of the directors of BMCM (as the responsible entity), not the Panel, to determine what proposals available to Multiplex should be put to unit holders. We are here referring to 'internally generated' proposals, not third party proposals.
42. Moreover, and of fundamental importance in this proceeding, Multiplex needs the funds to be raised under the Entitlement Offer. BMCM submitted that "*the lenders under the Debt Facility have informed BMCM that they will not further extend the date for satisfaction of conditions of the LVR Waiver (see market announcement dated 13 October 2009).*" There is no evidence that the 16 November deadline is not a 'hard' deadline. Indeed, BMCM submitted that "*16 November 2009 is not a 'soft' date*". We further note BMCM's submission that "*the lenders have consistently indicated to BMCM that they are not prepared to extend the waiver period further....*". Grocon submitted that BMCM did not make consistently final statements about the deadline (ie, in a submission referred to the financiers as having **no current intention** to extend it). It is always a possibility that the financiers might further waive their rights, but BMCM cannot control that or rely on it.
43. Guidance Note 17 recognises that item 10 of section 611 is an exception to the prohibition in section 606 because companies may need funding.⁸ No submission suggested that Multiplex was not in need of funds.
44. It is also of importance that the units are partly paid, because if Multiplex is not refinanced, unit holders are at risk of an accelerated call. In our view, this puts Multiplex in a different position to an entity with fully paid units where one view might be that investors had simply lost their investment. Grocon submitted that one option was to accelerate the call. In Multiplex, we accept that potentially significant prejudice to existing unit holders could arise if the outstanding call of \$0.40 per unit was accelerated.
45. The Panel has previously decided that:
"in cases where a smaller company is in urgent need of funds there is often likely some form of trade-off between certainty of funding and issues of concentration of control".⁹
46. The question therefore becomes whether the Entitlement Offer has been structured so as not to give rise to unacceptable circumstances. Factors taken into account

⁸ GN 17 at para [16]

⁹ *Emperor Mines Ltd 01R* [2004] ATP 27 at [30]

Takeovers Panel

Reasons - Multiplex Prime Property Fund 03 [2009] ATP 22

include the ratio, pricing, renounceability, underwriting and dispersion of any shortfall. And, as Guidance Note 17 points out, *“It is important that the reasons behind the choice and roles of any supporting shareholders, underwriters and sub-underwriters be disclosed to shareholders”*.¹⁰

47. Grocon criticised the structure of the Entitlement Offer, referring to it as *“a gimcrack effort at fixing the Fund’s persisting financial deficiencies.”* It also submitted that the Panel has not before found acceptable a 178:1 non-renounceable non-discounted entitlement offer. While this may be true, in our opinion, Multiplex finds itself in unique circumstances. It urgently needs to raise funds, its market price is as low as ASX permits, ASX determined that the Entitlement Offer should be treated as non-renounceable, and unit holders have the risk of an accelerated call hanging over their heads. We therefore reluctantly accept the structure. In other circumstances a massively dilutive rights issue such as this may not be acceptable. Nor, in this case, would we necessarily consider the structure acceptable if not for the fixed deadline imposed by the financiers.
48. On the question of underwriting, we note the submission of BMCS that *“The entity is in quite obvious financial distress and there are understandably few institutions willing to underwrite a significant capital raising.”*
49. BMCS further submitted that its purpose was not to effect a change of control. It said: *“Contrary to what has been suggested in the [Australian Style] Application, BMCS did not agree to underwrite the Entitlement Offer or make the Cash-out Facility Offer available to unitholders for the purpose of effecting a change of control or a takeover of MAFCA. The Entitlement Offer is simply designed to enable MAFCA to remedy an ongoing breach of its financing covenants. As a member of the Brookfield Multiplex Group, BMCS’s interest as underwriter is consistent with a desire to ensure that group’s already significant investment in MAFCA is not unreasonably prejudiced by a winding up and to protect the underlying value of that investment. This purpose is supported by the agreement of BMCS to the inclusion of the Shortfall Facility and Bookbuild, both mechanisms which limit the potential for BMCS to increase its control of MAFCA as a result of underwriting the Entitlement Offer.”*
50. Notwithstanding Multiplex’s need, we are not prepared to accept a structure that does not have an open-ended dispersion strategy to minimise the impact of the potential control effect. Australian Style submitted that, as a practical matter, it is unlikely that the dispersion strategy will change the control effect of the Entitlement Offer. Grocon made a similar submission when it said *“unless the deficiencies in the basic economic terms of the Entitlement Offer are addressed, the Shortfall Facility will only amount to offering investors more of a bad thing”* However, we cannot assume that to be the case and with the amendments sought by the Panel there is now a dispersion strategy (both a shortfall facility and a bookbuild) where neither previously existed.
51. As announced on 22 October 2009, the shortfall facility contained the following conditions that were of concern:

¹⁰ GN 17 at para [62]

Takeovers Panel

Reasons - Multiplex Prime Property Fund 03 [2009] ATP 22

- (iv) *the Responsible Entity will have the discretion to reject applications under the Shortfall Facility if in the opinion of the Responsible Entity:*
 - (A) *an applicant has sought to obtain a larger Entitlement than it would otherwise be entitled to, whether through means of unit-splitting, aggregation of entitlements or otherwise; or*
 - (B) *an applicant or a third party has engaged in any other activity that is designed to circumvent the intention behind the Shortfall Facility, being to make additional New Units available to Eligible Unitholders only;*
- (vi) *there will be no allocation to an Eligible Unitholder if (and only to the extent that) in the opinion of the Responsible Entity:*
 - (A) *this would cause a person's voting power (within the meaning of the Corporations Act) in the Fund to exceed 20%;*
 - (B) *this would cause a breach of any relevant law; or*
 - (C) *this would lead to any person, other than a member of the Brookfield Multiplex Group, holding voting power in the Fund of at least 50% in circumstances where that would entitle the lenders under the Debt Facility to determine that the loan covenant waiver previously provided by them no longer applies (further details of that loan covenant waiver are set out in section 4.7 of the Offer Booklet).*

52. Condition (iv) is probably unnecessary given that the record date has already passed, but it may have some limited application. To regulate the exercise of the discretion, we require disclosure of the exercise of the discretion and the reasons for its exercise. BMCM agreed to announce to ASX instances and reasons why it had used its discretion to reject shortfall applications. This gives transparency to the process.

53. Condition (vi)(A) seems to us to be an unnecessary restriction given (vi)(B). It could have the effect of preventing an eligible unit holder legitimately acquiring units in excess of 20% under, say, an exception to the prohibition in section 606. Accordingly, we require that it be dropped. BMCM has agreed to waive the condition.

54. We are concerned about condition (vi)(C), but in the end consider that the 50% trigger probably prevents any real harm. The likelihood of a party reaching that level is small and for the reason in paragraph 35 such a condition is not unreasonable in the circumstances.

55. As announced on 22 October 2009, the bookbuild contained the following conditions that were of concern:

- (d) *there will be no allocation to an investor under the Bookbuild if (and only to the extent that) in the opinion of the Responsible Entity:*
 - (i) *this would cause a person's voting power (within the meaning of the Corporations Act) in the Fund to exceed 20%;*
 - (ii) *this would cause a breach of any relevant law; or*
 - (iii) *this would lead to any person, other than a member of the Brookfield Multiplex Group, holding voting power in the Fund of at least 50% in circumstances where that would entitle the lenders under the Debt Facility to determine that the loan covenant waiver previously provided by them no longer applies;*

Takeovers Panel

Reasons - Multiplex Prime Property Fund 03 [2009] ATP 22

- (f) *a person who subscribes under the Bookbuild for New Units that would lead to it acquiring a substantial holding (as that term is defined in the Corporations Act) in the Fund, will only be allocated New Units in excess of the level at which they would acquire a substantial holding if they:*
- (i) *issue a public statement to ASX stating definitively that they will, or authorise the Responsible Entity to issue a public statement to ASX on their behalf stating definitively that they will hold their New Units until the earlier of:*
 - (a) *the "record date" for determining who is liable to pay the final instalment under the New Units; or*
 - (b) *the date upon which it has disposed of all of those New Units (provided that it may only do so in on-market transactions undertaken in the ordinary course of business on the stock market of a securities exchange or by Crossings permitted under section 17 of the ASX Market Rules or pursuant to a bona fide takeover bid);*
 - (ii) *either demonstrate, to the reasonable satisfaction of the Responsible Entity, that they have (or will have) the financial ability to pay the final instalment on the New Units when it becomes due and payable or provide a guarantee and indemnity from a parent entity or other entity of substance, to the reasonable satisfaction of the Responsible Entity, in respect of the obligations to pay the final instalment on the New Units.*

56. Condition (d)(i) suffers the same defect as condition (vi)(A) in relation to the shortfall facility. As above, BMC M has agreed to waive the 20% condition.
57. Condition (f) imposes requirements on bookbuild applicants that are too onerous and likely to discourage participation. While some institutions may want a smaller holding, in our view, it is likely to result in some institutions not agreeing to subscribe for units under the bookbuild. This would have the effect of rendering the bookbuild ineffective as a dispersion strategy or at least reducing its effectiveness. BMC M has agreed to waive the condition.
58. BMC M gave undertakings (see annexure) to address our concerns. In our view, the shortfall facility and bookbuild (as amended at our request) are together an appropriate dispersion strategy in the circumstances. The amendment or waiver of conditions proposed by BMC M and the underwriter removes unacceptable limits on the dispersion strategy.
59. Further, BMC M undertook that it will promptly seek a modification of section 606 to enable the underwriter to acquire a relevant interest in units under the cash out facility and will accept any reasonable conditions imposed by ASIC in response to such an application. This will provide more certainty for unit holders considering whether they wish to participate in the cash out facility.
60. BMC M has made additional disclosure as required by the Panel sufficient to avoid a declaration of unacceptable circumstances. However, given the enhanced disclosure, unit holders who have applied for units under the Entitlement Offer based on the previous disclosure should, in our opinion, be given a right to withdraw (although they would be free to resubmit a fresh application for units). The undertaking addresses this. BMC M will write to unit holders who accepted the Entitlement Offer

Takeovers Panel

**Reasons - Multiplex Prime Property Fund 03
[2009] ATP 22**

before receipt of the supplementary disclosure inviting them to withdraw if they wish.

61. We are concerned with the actions of BMCM in releasing the supplementary information while those documents were under active review by us. However, given the imminent funding deadline and the volume of material already provided to unit holders and the nature of the changes to the disclosure requested by the Panel, we do not consider that a further separate disclosure document being sent to unit holders would be helpful in this case. An announcement to the market of the changes requested by the Panel is sufficient.

DECISION

62. Given the further disclosure and undertakings offered by BMCM, we are satisfied that it is not against the public interest to decline to make a declaration.
63. Given that we make no declaration of unacceptable circumstances, we make no final orders, including as to costs.
64. A copy of the undertaking is in the annexure.

**Ian Ramsay
President of the Sitting Panel
Decision dated 27 October 2009
Reasons published 2 November 2009**



Australian Government

Takeovers Panel

Section 201A of the Australian Securities & Investments Commission Act (Cwlth)

Undertakings

In the matter of Multiplex Prime Property Fund 03

Pursuant to section 201A of the Australian Securities & Investments Commission Act 2001 (Cwlth) BMCM makes the following undertakings

1. BMCM undertakes to the Panel that it will:
 - (a) promptly seek a modification of section 606 of the Corporations Act 2001 (Cwlth) to enable the Underwriter to acquire a relevant interest in units under the "Cash-out Facility Offer" (as contemplated in the Offer Booklet), notwithstanding that, at the time of acquisition, the Underwriter's voting power in MAFCA may be above 20% but less than 90%; and
 - (b) accept any reasonable conditions imposed by ASIC in response to such an application.
2. BMCM undertakes to the Panel that it will:
 - (a) promptly, and in any event, no later than the date that notifications of under-subscriptions are due to take place under the timetable for the Entitlement Offer, announce to ASX:
 - (i) the instances in which it exercised its discretion to reject applications under Condition (iv); and
 - (ii) the reasons for exercising any such discretion.
 - (b) waive the 20% Conditions; and
 - (c) waive the Credit Condition.
3. BMCM undertakes to the Panel that it will send a letter to all unitholders of MAFCA who:
 - (a) accepted the Entitlement Offer via BPay on or prior to 28 October 2009;
 - (b) accepted the Entitlement Offer by sending an acceptance form to BMCM on or prior to 28 October 2009; or
 - (c) accepted the Cash-out Facility Offer by sending an acceptance form to BMCM on or prior to 28 October 2009,

Takeovers Panel

Reasons - Multiplex Prime Property Fund 03 [2009] ATP 22

informing those unitholders that they have the right to withdraw their acceptance and resubmit a new application.

4. BMCM undertakes to the Panel that it will promptly announce to ASX the effect of the undertakings in 1, 2 and 3 following announcement by the Panel of the outcome of the proceedings.
5. BMCM undertakes to the Panel that it will immediately confirm in writing to the Panel once it has fulfilled its obligations under 1, 2 3 and 4.

In this undertaking:

20% Conditions means the conditions to allocation under the Shortfall Facility and the Bookbuild in the circumstances set out:

- (a) at page 3 of the Supplementary Offer Booklet at sub-paragraph (vi)(A); and
- (b) at page 4 of the Supplementary Offer Booklet at sub-paragraph (d)(i).

ASIC means the Australian Securities and Investments Commission.

BMCM means Brookfield Multiplex Capital Management Limited, as responsible entity of MAFCA.

Bookbuild means the "*Bookbuild*" described in the Supplementary Offer Booklet.

Condition (iv) means BMCM's discretion to reject applications in the circumstances set out on page 3 of the Supplementary Offer Booklet at sub-paragraph (iv).

Credit Condition means the condition to allocation of "*New Units*" (as that term is defined in the Supplementary Offer Booklet) under the Bookbuild described on page 5 of the Supplementary Offer Booklet at subparagraph (f).

Entitlement Offer has the meaning it is given in the Offer Booklet.

MAFCA means the Multiplex Prime Property Fund.

Offer Booklet means the entitlement offer booklet dated 7 October 2009 and released on the ASX platform on 8 October 2009.

Shortfall Facility means the "*Shortfall Facility*" described in the Supplementary Offer Booklet.

Supplementary Offer Booklet means the document entitled "Supplementary Information including an offer to eligible unitholders to apply for additional units" announced to the ASX by BMCM on 22 October 2009.

Underwriter means Brookfield Multiplex Capital Securities Limited in its capacity as trustee for Brookfield Multiplex PPF Investment No 2 Trust.

Dated 27 October 2009

Takeovers Panel

**Reasons - Multiplex Prime Property Fund 03
[2009] ATP 22**

**[SIGNED by NEIL OLOFFSON as authorised representative for BROOKFIELD
MULTIPLEX CAPITAL MANAGEMENT LIMITED]**