Australian Government

Takeovers Panel

Reasons for Decision
MacarthurCook Property Securities Fund 01 & 02
[2012] ATP 7

Catchwords:

Rights issue – non-renounceable – underwriting – sub-underwriting – potential control impact – no genuine dispersion strategy – need for funds – deficient disclosure – association – decline to conduct – consent to withdraw application

Corporations Act 2001 (Cth), sections 602, 606, item 10 of section 611, item 13 of section 611, 657A

Procedural Rule 3.4.1

Australian Securities and Investments Commission Regulations 2001 (Cth), regulation 20

Guidance Note 17: Rights Issues, Guidance Note 20: Equity Derivatives

Real Estate Capital USA Property Trust [2012] ATP 6, Multiplex Prime Property Fund 03 [2009] ATP 22, DataDot Technology Limited [2009] ATP 13, Bisalloy Steel Group Limited [2008] ATP 29, SteriCorp Limited [2005] ATP 9, Rivkin Financial 02 [2005] ATP 1, Emperor Mines Ltd 01R [2004] ATP 27, Emperor Mines Limited 01 [2004] ATP 24, Investor Info Limited [2004] ATP 6

INTRODUCTION

1. The Panel, Stephanie Daveson, Hamish Douglass (sitting President) and Francesca Lee, consented to Laxey Partners Ltd withdrawing its application (*01*) and declined to conduct proceedings on an application from Pelorus Private Equity Limited (*02*) - both of which related to the affairs of MacarthurCook Property Securities Fund. The applications concerned a 13 for 15 non-renounceable rights issue, to be fully underwritten by the responsible entity. Updated disclosure and amendments to the structure of the rights issue satisfied the Panel's concerns.

2. The applications were made concurrently and contained some different allegations, but related to the same facts. While the Panel did not consider the matters together, for convenience, the Panel has combined its reasons. Where relevant, the reasons distinguish between the two proceedings.

3. In these reasons, the following definitions apply.

AIMS	AIMS Group Holding Pty Ltd, the parent company of RE
Initial Record Date	7.00pm (Sydney time) on 2 May 2012
Laxey	Laxey Partners Ltd, the applicant in *MacarthurCook Property Securities Fund 01*
MacarthurCook	MacarthurCook Property Securities Fund
OCBC	Overseas Chinese Banking Corporation Limited
Pelorus	Pelorus Private Equity Limited, the applicant in *MacarthurCook Property Securities Fund 02*
Perpetual	Perpetual Trustee Co Limited
RE	MacarthurCook Fund Management Limited, as responsible

	entity for MacarthurCook
Rights Issue	the fully-underwritten non-renounceable rights issue announced by RE on 20 April 2012, offering 13 new units for every 15 units held to raise up to A$5.869 million at an offer price of A$0.035 (or S$0.0454) per unit
ZhaoFeng	ZhaoFeng Property Management Limited

FACTS

4. MacarthurCook is listed on ASX (ASX code: MPS) and SGX (SGX code: MacCookPSF).

5. On 31 December 2011, the debt facility which MacarthurCook held with OCBC was due to expire. OCBC agreed to extend the facility so that repayment of $4,600,000 was required by 31 March 2012. Further repayments were required as follows: $1,500,000 by 30 June 2012, $6,000,000 by 30 September 2012 and $4,700,000 by 31 December 2012. The repayment forecasts prepared by RE and provided to OCBC assumed that MacarthurCook would undertake an underwritten rights issue to meet the March repayment.

6. On 27 January 2012, AIMS purchased 6,625,517 units in MacarthurCook (approximately 3.4% of MacarthurCook's issued capital) from ZhaoFeng, to whom MacarthurCook had placed 13,250,000 units at 7.55 cents per unit in June 2010. This increased AIMS' holding to 12.09%.

7. Throughout February and March 2012, RE approached three professional underwriters (and entered into two mandate letters[1]) to underwrite a proposed rights issue. RE was advised, among other things, that the rights issue should be non-renounceable based on the quantum of the equity raising, MacarthurCook's register, the trading pattern of the units and the tight timeframes imposed. None of the professional underwriters were interested in underwriting the offer, for reasons including timing constraints and the lack of support from sub-underwriters (at least 15 had been approached). Shaw Corporate Finance Pty Ltd, one of the professional underwriters approached, was specifically instructed by RE not to contact Pelorus as a potential sub-underwriter because an entity related to Pelorus was involved in litigation with RE.

8. On 30 March 2012, RE contacted OCBC seeking a short delay to the offer on the basis that it was still waiting for the ASIC relief necessary to facilitate the Rights Issue.[2] On the same day RE announced that it was in continuing discussions with OCBC for an extension of the obligation to repay $4,600,000 under its debt facility due by 31 March 2012.

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[1] One with Shaw Corporate Finance Pty Ltd to underwrite the entire Rights Issue and the other was with Maybank Kim Eng Corporate Finance Pte Ltd which related only to the units listed on SGX

[2] ASIC relief was required for the purpose of sections 601FC and approval was sought under section 615 of the Corporations Act

9. On 4 April 2012, Pelorus (through its associate, Blackwall Property Funds Limited) announced that it had requisitioned a meeting of MacarthurCook unitholders to replace RE as the responsible entity of MacarthurCook.[3]

10. On 11 April 2012, RE contacted Laxey to advise that it intended to undertake a rights issue. RE provided Laxey with a draft investor presentation disclosing that it was underwriting the offer (in its personal capacity) for a proposed underwriting fee of 6% of the amount raised.

11. On 12 April 2012, Laxey offered to underwrite the Rights Issue, but with a 5.5% fee. RE responded that it would underwrite the offer itself but would reduce its fee from 6% to 5.5%.

12. On 16 April 2012, following a request from ASIC that the top 5 institutional unitholders in MacarthurCook be offered the opportunity to sub-underwrite the Rights Issue as a condition of ASIC's relief, RE approached AIMS (12.09%), Pelorus (9.28%), Laxey (5.02%), Perpetual (1.74%) and ZhaoFeng (1.37%).

13. The sub-underwriting offers provided that:

    (a) a fee of 2% of the shortfall was payable to the sub-underwriters

    (b) the offer had to be accepted by 8.00pm on the following day (subsequently extended)

    (c) in order to guarantee their full pro-rata proportion of any shortfall, sub-underwriters had to 'cash cover' the entire amount being raised within approximately 48 hours of the deadline for accepting the offer to sub-underwrite (rather than their proportion of the sub-underwriting) and

    (d) unitholders who were offered the opportunity to sub-underwrite were not entitled to participate in the shortfall (even if they elected not to sub-underwrite).

14. On 17 April 2012, Laxey again offered to underwrite the Rights Issue, this time for a fee of 5%.

15. On 17 April 2012, RE responded that it had already entered into an underwriting deed between RE (in its personal capacity), AIMS and RE (in its capacity as responsible entity of MacarthurCook).

16. On 18 April 2012, OCBC confirmed in writing to RE that it was willing to extend the deadline for the debt repayment due on 31 March 2012 if AIMS, as sub-underwriter, provided documentary evidence to OCBC that it had cash covered the underwriting commitments up to $4,744,000 to fund its sub-underwriting.

17. On 18 April 2012 (contemporaneously with Laxey's application to the Panel), Laxey accepted the sub-underwriting offer. Laxey noted with its acceptance that it was only

[3] The meeting is scheduled to be held on 29 June 2012

accepting to ensure that it did not miss out on the opportunity to participate in the shortfall if the Panel proceedings failed to address the unacceptable circumstances.

18. On 20 April 2012, RE announced the Rights Issue, to be underwritten by RE and sub-underwritten by AIMS and Laxey. It separately also released to ASX a notice of amendment to the constitution of MacarthurCook made without unitholder approval pursuant to section 601GC(1)(b)[4] on the basis that RE reasonably considered that the amendment would not adversely affect members' rights. The amendment inserted a new clause:

Despite any other clause in this Constitution, the Responsible Entity may issue Units under or in connection with the April 2012 Offer to Unit Holders, to any underwriter, to any sub-underwriter or to any placee of any underwriter for an Issue Price of Singapore $0.0454 per Unit or Australian $0.035 per Unit. The Responsible Entity may also pay any fee of an underwriter of the April 2012 Offer fully or partly in Units issued at that price.[5]

APPLICATION

Declaration sought - *01*

19. By application dated 18 April 2012, Laxey sought a declaration of unacceptable circumstances. Laxey submitted (among other things) that:

    (a) the Rights Issue was highly dilutionary and had been structured in a way that potentially affected control of MacarthurCook. It submitted that the Rights Issue and the underwriting arrangements were an attempt by RE and its associates to concentrate their unitholding, gain further control of MacarthurCook and ensure that RE could not be replaced as the responsible entity[6]

    (b) the terms of the sub-underwriting offered to the 5 unitholders were materially inferior to the terms of the underwriting offered by RE to itself and

    (c) of the 5 unitholders offered sub-underwriting, 3 were connected to RE. It submitted that AIMS was RE's holding company, Perpetual was the custodian of units held by another AIMS-controlled entity and ZhaoFeng was its associate.

Declaration sought - *02*

20. By application dated 24 April 2012, Pelorus sought a declaration of unacceptable circumstances. Pelorus generally supported the application by Laxey and also submitted that:

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[4] Unless otherwise indicated, reference are to the *Corporations Act 2001* (Cth)
[5] A new definition was also inserted defining 'April 2012 Offer' to mean, essentially, the Rights Issue
[6] Laxey had agreed to sub-underwrite its pro-rata amount of the shortfall. Accordingly, the Rights Issue had the potential for AIMS to increase its interest in MacarthurCook from 12.09% up to 39.3% depending on the participation of unitholders. If Laxey had not done so, AIMS' interest could have increased up to 52.9%

(a) there were serious deficiencies in the disclosure surrounding the Rights Issue, and in particular, how RE would satisfy the future debt payments owing to OCBC and

(b) there was misleading disclosure in the investor presentation dated 20 April 2012, including:

(i) KPMG was noted as supporting the Rights Issue, however Pelorus submitted KPMG did not advise on the specific structure of the Rights Issue and did not review the investor presentation

(ii) page 3 of the investor presentation stated that the Rights Issue would raise $5.869 million, yet in footnote 2 (on page 8) there was mention of RE being paid up to $1.064 million in deferred management fees to pay for underwritten units, so the money being raised was actually $4.826 million and

(iii) page 8 of the investor presentation showed $5.071 million to be applied to debt amortisation whereas the amount was $4 million following the application of deferred management fees by RE to pay for underwritten units.

21. Pelorus also provided additional information about the alleged association with ZhaoFeng. It submitted that ZhaoFeng was associated with AIMS and the sale by ZhaoFeng of more than 6,000,000 MacarthurCook units in January 2012 to AIMS was designed to help AIMS achieve its control objectives.

Interim orders sought – *01* & *02*

22. Both Laxey and Pelorus sought an interim order to the effect that the Rights Issue be suspended pending determination of their applications. ASIC relief was required for the Rights Issue to proceed. ASIC had decided, and confirmed to the Panel, that it would not grant relief until the proceedings in *MacarthurCook Property Securities Fund 01* had been determined without prior written notice to the Panel.

23. As the Rights Issue could not proceed without ASIC relief, an interim order was unnecessary at that stage. We kept the issue under review. It became unnecessary to decide on interim orders in the end.

Final orders sought - *01*

24. Laxey sought alternate final orders that:

(a) MacarthurCook be prevented from proceedings with the Rights Issue

(b) unitholder approval[7] be obtained for the Rights Issue and underwriting

(c) AIMS, RE or any of their associates be prevented from acquiring a relevant interest in any units to be issued under the Rights Issue (including any shortfall) except:

[7] Excluding AIMS, RE and any of their associates

(i) for their pro-rata entitlement or

(ii) to the extent that unitholders unrelated to them had not applied for new units under the Rights Issue, including under the shortfall facility

(d) Laxey (and other unrelated unitholders) be permitted to sub-underwrite on the same terms as RE was underwriting the Rights Issue and

(e) Laxey be permitted to apply for units under the shortfall facility despite having been offered sub-underwriting arrangements.

25. Laxey also sought that the professional costs associated with underwriting the Rights Issue be borne by RE personally and not by MacarthurCook.

Final orders sought - *02*

26. Pelorus sought similar final orders to orders (a) and (b) by Laxey, and also that AIMS divest itself of all units sold to it by ZhaoFeng in January 2012.

DISCUSSION

27. In considering the control implications of a rights issue, the Panel is concerned to ensure that the effect, or likely effect, of the rights issue does not inhibit the principles set out in section 602. The Panel considers, among other things, the company's situation (including need for funds), the structure of the rights issue and the effect of the rights issue.[8]

Need for funds

28. Guidance Note 17 states that, in considering a company's need for funds, "*the Panel will look at the company's financial situation, the amount sought to be raised and the suitability of raising capital by the rights issue*".[9]

29. RE submitted that a capital raising was necessary and that MacarthurCook was relying on the debt facility extensions from OCBC. We accept that MacarthurCook was, at least from early 2012, in need of funds. This is a relevant consideration. However, need for funds is not a safe harbour, although we acknowledge 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.[10]

30. MacarthurCook's need for funds does not remove RE's obligation to minimise the control effects of the Rights Issue. The Rights Issue as initially proposed did not achieve that. We are not satisfied that the potential control effects of the Rights Issue were minimised by the structure initially proposed.

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[8] *Bisalloy Steel Group Limited* [2008] ATP 29 at [21], Guidance Note 17: Rights Issues at [6]
[9] Guidance Note 17: Rights Issues at [7]
[10] *Emperor Mines Ltd 01R* [2004] ATP 27 at [30], *Multiplex Prime Property Fund 03* [2009] ATP 22 at [45]

Structure of the Rights Issue initially proposed

31. Laxey submitted in its application that the Rights Issue was structured to hand further control of MacarthurCook to RE and its associates. Laxey also submitted that under the timetable the Rights Issue would be completed before the unitholders' meeting to consider replacing RE and the Rights Issue was being made to frustrate the Pelorus proposal (ie, replacement of RE).

32. Pelorus submitted in its application that the sub-underwriting terms were intentionally unreasonable and uncommercial and the process had been designed to ensure that AIMS maximised its voting power and to discourage non-underwriters (including Pelorus) from increasing theirs. It also submitted that there was no good reason to exclude the major institutional unitholders from participating in the shortfall and no reason for the Rights Issue not to be renounceable.

33. RE made a preliminary submission on each application (among other things) that the Panel should decline to conduct proceedings. It submitted that:

    (a) the structure of the Rights Issue was not unacceptable

    (b) the purpose of the Rights Issue was to satisfy an urgent need for funds

    (c) the Rights Issue had been proposed before Pelorus had requisitioned a meeting to replace the RE

    (d) the Rights Issue had been arranged in accordance with the requirements of Guidance Note 17 to mitigate potential control effects (including a deep discount, an uncapped shortfall facility and offers to sub-underwriters)

    (e) the shortfall had been structured in accordance with the Panel's orders in *Real Estate Capital USA Property Trust*[11] and

    (f) the sub-underwriting offers were on standard terms and proposed sub-underwriters were given sufficient time to consider the offers.

34. The Rights Issue initially proposed exhibited the following features:

    (a) potential sub-underwriters were prevented from participating in any shortfall (ie, oversubscription prior to any remainder passing to the underwriter) once they had received an offer to sub-underwrite, irrespective of whether they elected to sub-underwrite or not

    (b) each sub-underwriter had to 'cash cover' the entire amount being raised, and do so within approximately 48 hours of the deadline for accepting the offer to sub-underwrite, in order to guarantee the full allocation of its pro-rata entitlement

    (c) the RE (as underwriter) was permitted to apply deferred management fees of approximately $1.1 million against payment for underwritten units and

[11] [2012] ATP 6

(d) in the event that the shortfall was oversubscribed, applications were to be scaled back on a pro-rata basis between unitholders who applied for additional units and sub-underwriters, rather than sub-underwriters taking what remained after filling over-subscriptions.

35. We were concerned about these aspects of the Rights Issue.

Initial changes made to the Rights Issue structure

36. Two days after the Laxey application (*01*), on 20 April 2012, the sub-underwriting offers were amended in the following ways:

(a) sub-underwriters were given additional time to consider whether to participate in the sub-underwriting and, if they wished to participate, to provide funds to 'cash cover' their commitment

(b) sub-underwriters were only required to 'cash cover' the maximum amount of the shortfall that they could acquire (calculated on a pro-rata basis between all sub-underwriters) and

(c) the sub-underwriting fee was increased from 2% to 5.5% of the amount ultimately sub-underwritten.

37. RE provided the revised structure to AIMS and Laxey and again invited Pelorus to participate in the sub-underwriting.

38. RE also submitted that, as the Rights Issue had been fully sub-underwritten by AIMS and Laxey, no units would be acquired by RE (as underwriter) and accordingly there would be no application of deferred management fees to pay for underwritten units.

39. Given this, we do not need to consider the application of management fees to pay for underwritten units any further (although we address this briefly at paragraph 70 below).

40. In addition, the changes address our concerns in relation to the requirement for sub-underwriters to cash-cover the entire underwritten amount.

41. However, as the changes did not resolve all of our concerns we decided to conduct proceedings in *MacarthurCook Property Securities Fund 01* and, on 25 April 2012, issued a brief. This was before we had met to consider whether to conduct proceedings in *MacarthurCook Property Securities Fund 02*.

Our concerns with the revised Rights Issue structure

42. The revised structure retained the feature that potential sub-underwriters were 'locked-out' of participating in the shortfall once they had received an offer to sub-underwrite, even if they decided not to sub-underwrite. In our view, this is not consistent with an ordinary sub-underwriting offer. We remained concerned with this feature of the Rights Issue.

43. The revised structure also retained the feature that the shortfall was divided on a pro-rata basis between unitholders who applied for additional units and sub-underwriters. In other words, sub-underwriters took up their sub-underwriting

entitlements by participating in the shortfall pro-rata with unitholders who applied for additional units. Such a structure does not meet our understanding of normal underwriting (and sub-underwriting) arrangements. Ordinarily, as Guidance Note 17 suggests, the Panel would expect that any shortfall is first satisfied by unitholders who wish to apply for additional units (which may require a scale-back if there are more units applied for than shortfall units available), following which any sub-underwriters take up the remaining units.

44. The Panel has previously raised concerns where a substantial holder has acted as underwriter (or sub-underwriter) but sought to participate in the shortfall at the same time as holders who apply for additional securities.[12]

45. Guidance Note 17 states (at paragraph [23]):

Features which may help a dispersion strategy mitigate potential control effects include:

(a) an underwriter (sub-underwriter) receiving entitlements under the dispersion facility after all other requests have been satisfied…

46. Underwriting (and sub-underwriting) involves assuming a risk that investors will not take up all of an offer of securities.[13] For the most part, underwriters (and sub-underwriters) seek to earn a fee for accepting that risk. Professional underwriters do not normally wish to acquire securities as a result of an underwriting arrangement. They may pass on underwriting risk to sub-underwriters. A sub-underwriter's position may be different to an underwriter's position, in that a sub-underwriter may be a major security holder already and be less concerned about getting securities. However, that does not justify arrangements that favour the acquisition of securities by sub-underwriters. Irrespective of whether a person participates in an offer as an underwriter or sub-underwriter, the Panel will look at whether there is a control effect of the Rights Issue or other issue of securities.

47. In *Rivkin Financial 02*,[14] the Panel considered the use of the Corporations Act exceptions relating to underwriting, being item 10 of section 611 and item 13 of section 611. The Panel stated:[15]

In each case, the increase in voting power must result from underwriting or sub-underwriting arrangements. The Panel will consider unacceptable circumstances to exist where the increase in voting power results from arrangements which although described as underwriting arrangements are, in fact, better characterised as something else, such as placement arrangements.

48. Moreover, a shortfall facility can be used as a dispersion strategy to mitigate potential control effects of a rights issue.[16] However allowing sub-underwriters to participate in a shortfall facility at the same time as other security holders potentially

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[12] *Emperor Mines Limited 01R* [2004] ATP 27, *Emperor Mines Limited 01* [2004] ATP 24
[13] ASIC Regulatory Guide 61: Underwriting – application of exemptions at [61.3]
[14] [2005] ATP 1, see also *Investor Info Limited* [2004] ATP 6
[15] [2005] ATP 1 at [63]
[16] Guidance Note 17: Rights Issues at [22]

lessens the efficacy of a shortfall facility as a dispersion strategy when a sub-underwriter is also a unitholder.

49. RE submitted that the structure had been based on the Panel's orders in *Real Estate Capital USA Property Trust.*[17] In *Real Estate Capital* the Panel ordered that a shortfall facility be offered at the close of the offer, the underwriter (who was also a substantial unitholder) having already become entitled to the entire shortfall under the offer. We think *Real Estate Capital* differs from this case in a number of ways, and primarily because:

    (a) The underwriter in *Real Estate Capital* had accepted considerable financial risk to support the fund at a time when no one else would, including by offering to subscribe for convertible notes.

    (b) The Panel's orders opened up the opportunity for unitholders to apply for oversubscriptions knowing that the rights issue had been successful and knowing the then state of the market. It seems to us that it would not be appropriate for unitholders to have the 'benefit of hindsight' after the underwriter had assumed all the risk. Therefore we think the Panel allowed the underwriter to participate in that divestment on a pro-rata basis to avoid the orders being unfairly prejudicial to it.[18]

    (c) The underwriter in *Real Estate Capital* was not the responsible entity of the fund (or a related entity). In this case the underwriter is the responsible entity and AIMS, a sub-underwriter, is the controller of the responsible entity.

50. As the Panel said in *Rivkin Financial 02*:[19]

    The Panel accepts that a company or underwriter may, in many circumstances, properly and sensibly approach major shareholders to sub-underwrite an issue as a legitimate means of securing financial support for a capital raising. However, in such circumstances, where a board may expect any shareholder willing to sub-underwrite to retain any shortfall allocation they receive, the board must make every effort to ensure that the underwriting process provides as equal an opportunity as possible for shareholders to participate. Alternatively, it could obtain shareholder approval for the underwriting arrangements. To do otherwise is inconsistent with the equal opportunity principle in section 602(c).

51. RE stated that the commercial rationale behind the Rights Issue "*was the same as that which applies to accelerated offers, namely to ensure that the transaction is completed quickly (due to the need to meet* [OCBC's] *timetable for repayment)*". RE stated that the sub-underwriting offers were designed to "*lay-off*" as much of the underwriting risk at the front end of the transaction as possible. RE submitted that the Rights Issue had been modelled on an accelerated offer, in that institutional and retail investors were "*treated as separate groups but with more generous terms being offered to the institutional unitholders in order to afford them a reasonable and equal opportunity to participate in the*

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[17] [2012] ATP 6
[18] Compare to *DataDot Technology Limited* [2009] ATP 13 at [66] – [67]
[19] [2005] ATP 1 at [67]

sub-underwriting". RE also submitted that *"if this offer structure is considered unfair then it would follow that all accelerated offers are unfair."*

52. We disagree. There are significant differences between an accelerated offer structure and the structure proposed by RE. For instance:

    (a) In an accelerated offer structure, institutional investors receive their entitlements up front, before retail investors. This 'de-risks' their investment. Here, the sub-underwriters were required to cash-cover their entitlements but would not be issued units until after the offer closed. Thus they were at risk for the entire offer period.

    (b) While institutions are prevented from participating in the retail tranche of an accelerated offer if they choose not to participate in the institutional component, they may receive some compensation if the offer is oversubscribed through a back-end bookbuild of any remaining shortfall.

53. Allowing sub-underwriters to participate in that capacity in the shortfall is unusual and not an obvious characteristic of an accelerated offer structure.

Control effect

54. In *Bisalloy Steel Group Limited*,[20] the Panel stated:

    If a company proposes to implement a rights issue, we would expect it to take reasonable steps to minimise the potential impact of the rights issue on the control of the company.

    Reasonable steps include (in appropriate cases):

    (a) seeking to share participation in any shortfall among existing shareholders (for example, by way of a shortfall facility or back end bookbuild) and

    (b) where the rights issue is to be underwritten or sub-underwritten, seeking to appoint a number of underwriters or sub-underwriters or approaching non-related persons (such as professional underwriters or institutional shareholders) to act as an underwriter or sub-underwriter.[21]

55. The structure initially proposed by RE had the effect of increasing the potential for AIMS to remain the largest unitholder following the offer. This effect arose because:

    (a) the terms of the sub-underwriting discouraged acceptance by sub-underwriters or made acceptance commercially impractical

    (b) sub-underwriters were 'locked-out' of the shortfall whether they participated in the sub-underwriting or not and

    (c) sub-underwriters (including AIMS) participated in the shortfall at the same time as unitholders who wished to acquire additional units.

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[20] [2008] ATP 29 at [22]-[23]
[21] See also Guidance Note 17: Rights Issues at [5]

The Laxey acquisition

56. On 1 May 2012, AIMS entered into an agreement with Laxey pursuant to which AIMS agreed to acquire 15,302,362 fully paid units in MacarthurCook from Laxey (representing Laxey's entire unitholding, and being 7.9% of the units on issue). This was more units than Laxey had disclosed to the market on 16 April 2012. RE submitted that Laxey may have held its additional interest through a derivative instrument. If this was the case we query whether disclosure of any interest held by Laxey through derivatives should have been made, given the potential for the Rights Issue to be viewed as a control transaction.[22] In any event, regardless of any disclosure obligations, it is important that the Panel is fully informed of relevant circumstances before making a decision and we were not in this case made aware of any additional interest.

57. The acquisition of Laxey's units by AIMS increased AIMS' total unitholding to 19.99%. It also removed the only sub-underwriter that was not related to RE from the Rights Issue structure (the other sub-underwriter being AIMS).

58. As a result of the acquisition of Laxey's units, AIMS had the potential to increase its unitholding in MacarthurCook from 19.99% to a maximum of 57.14% if no other unitholders took up their entitlements. Also, given Pelorus (the next largest unitholder after AIMS) had rejected the original (and secondary) offers to sub-underwrite the Rights Issue, Pelorus would have remained 'locked-out' of the shortfall.

59. Following the agreement reached between Laxey and RE, Laxey sought our consent to withdraw its application.[23]

60. On 2 May 2012, following the settlement with Laxey, RE informed the Panel that it had decided to amend the offer structure to remove any restrictions on unitholders participating in the shortfall, to further mitigate the potential control implications of the Rights Issue. This would allow Pelorus to participate as a unitholder in the shortfall (up to the takeovers threshold) as well as take up the revised offer to sub-underwrite.[24] In other words, Pelorus would not be 'locked out' of participation in the shortfall by reason of having been offered sub-underwriting.

61. However, we remained concerned with the structure of the Rights Issue. In particular, RE was going to withdraw the current Rights Issue and re-launch with an amended record date. This would allow AIMS to participate in the shortfall on a pro-rata basis based on its 19.99% unitholding, rather than its 12.09% unitholding (as at the Initial Record Date).

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[22] Guidance Note 20: Equity Derivatives
[23] Procedural Rule 3.4.1
[24] Something AIMS could not do given its 19.99% voting power

Final changes to the Rights Issue structure

62. On 3 May 2012, RE offered to further amend the structure of the Rights Issue. The amendments included that:

    (a) following the pro-rata offer to all eligible unitholders, any remaining units would be allocated:

        (i) firstly, on a pro-rata basis to eligible unitholders who applied for additional units and

        (ii) secondly, any remainder on a pro-rata basis to all sub-underwriters, based on their holding at the Initial Record Date and

    (b) Pelorus be offered a new opportunity to sub-underwrite the Rights Issue with AIMS, in the proportions that existed on the Initial Record Date (at which point AIMS had an interest of 12.09%, not 19.99%, and Pelorus had an interest of 9.28%), with Pelorus being given at least one business day to consider the offer and with the sub-underwriting offer to be on the same terms as previously offered to Laxey and AIMS, including that Pelorus would receive a 5.5% sub-underwriting fee.

63. These changes satisfy our concerns over the structure of the Rights Issue.

64. We now address some additional submissions made by the parties in both *01* and *02*.

OTHER ISSUES

Related party transaction - *01*

65. Laxey submitted that the entry into the underwriting deed was a related party transaction that required unitholder approval: *"whilst* [RE] *may argue that the underwriting deed is on arm's length terms…, ASIC Regulatory Guide 159 provides that an underwriting agreement will not be considered to be on arm's length terms if the purpose of the underwriting is to give the underwriter control."*

66. RE submitted that the independent directors were satisfied that the underwriting deed was on arm's length terms as it was on better terms than those proposed by professional underwriters.

67. Laxey further submitted that:

    (a) the underwriting agreement could not have been on arm's length terms because it was prepared to underwrite on the same terms and for a lower fee and

    (b) unitholder approval was required for the underwriting arrangements as it allowed RE to apply deferred management fees to pay for underwritten units.

68. RE submitted that it decided to proceed with the underwriting and not engage with Laxey's offer to underwrite because:

    (a) there was an urgent need for funds

    (b) Laxey would require an AFSL

    (c) there had already been significant delay

(d) none of the material commercial terms had been discussed with Laxey

(e) the underwriting deed had already been signed and

(f) the underwriting deed was on terms no more favourable to MacarthurCook than what other (unrelated) parties had offered.

69. ASIC submitted that Laxey would not need to hold an AFSL to underwrite or sub-underwrite the rights issue unless it was in the business of providing financial services in this jurisdiction. Laxey submitted that it was not required to hold an AFSL because of an ASIC exemption.

70. We asked why RE originally formed the view that the terms were arm's length commercial terms given that RE, as underwriter, had the right to apply deferred management fees to pay for underwritten units. However, when the Rights Issue subsequently became fully sub-underwritten, this issue was neutralised (as the underwriter would not receive any units).

71. We did note that in order to underwrite the Rights Issue, RE needed to amend the constitution of MacarthurCook (as it otherwise would not be permitted to act as underwriter). The amendments allowed RE to underwrite the issue and units to be issued at a greater discount than would otherwise be permitted under the constitution. The amendments were made on 19 April 2012 (see paragraph 18 above) without unitholder approval. Pelorus submitted in its application (*02*) that the changes to the constitution should have received unitholder approval as they "*adversely affect the rights of unitholders*".[25] We did not seek submissions on this point and did not pursue the issue as ultimately we did not consider that it was a matter for us in the circumstances.

72. We also asked why RE could not engage with Laxey's offer to underwrite because it had entered into an underwriting deed, since that agreement was with itself, albeit in different capacities.

73. Ultimately we did not need to consider the other related party issues, and we note that whether unitholder approval of the underwriting arrangement should have been obtained is not necessarily an issue for the Panel (we did not seek submissions specifically on this point as we did not need to consider this issue). However, we would also note that underwriting, or sub-underwriting, by a related party is relevant to whether or not the structure of a Rights Issue (and any underwriting arrangements) is unacceptable and it may be relevant to a sitting Panel to consider the question of related party approval or exception in this context.[26]

Disclosure - *02*

74. Pelorus submitted that there were serious disclosure deficiencies, both generally in relation to the Rights Issue and in parts of the investor presentation.

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[25] See section 601GC(1)

[26] See Guidance Note 17: Rights Issues at [6(b)], [20] and [21], see also *SteriCorp Limited* [2005] ATP 9 at [63], although we would be prepared to consider Chapter 2E issues in more detail in the appropriate matter

75. RE submitted that the materials issued in connection with the Rights Issue were not inadequate, misleading or deceptive.

76. We had concerns, and requested that the following additional disclosure be made:

    (a) additional detail with respect to how RE expected to repay the balance of the outstanding money to OCBC

    (b) details of the amended structure of the rights issue, including that any shortfall was to be satisfied first from applications by existing unitholders in accordance with their pro-rata entitlements and the remainder going to any sub-underwriters on the above pro-rata basis (if applicable)

    (c) the fact that a change of RE was an event of default under the revised OCBC facility and

    (d) a clarification of KPMG's views in relation to the Rights Issue.

77. RE updated its disclosure. We are satisfied that this adequately addresses our concerns.

Association – *01 & 02*

78. Laxey submitted that, other than Pelorus and itself, the other unitholders who were approached by RE to sub-underwrite the Rights Issue (ie AIMS, Perpetual and ZhaoFeng) were connected to RE. AIMS and Laxey were the only offerees to accept the offer to sub-underwrite. Laxey has since settled with AIMS and is no longer a sub-underwriter. AIMS is the ultimate controller of RE and the control effect of AIMS' sub-underwriting is considered above. The only information supplied about Perpetual was that it was the custodian of units in MacarthurCook held by another fund controlled by AIMS.

79. Pelorus also submitted that ZhaoFeng was an associate of AIMS, and provided additional material. It submitted that ZhaoFeng had acted to help AIMS achieve its control objective. It submitted the following material in support of the alleged association:

    (a) the sole director of ZhaoFeng was also the sole director of AIMS Securities Consultants Limited

    (b) ZhaoFeng was a shelf company that had never traded, had no operating business and its registered address was a residential property in Auckland

    (c) Austock (the broker for the June 2010 placement to ZhaoFeng) was *"paid a fee without introducing the client as if the transaction was arm's length"* as the chief executive for Austock had told Pelorus that the placement was prefilled before Austock was involved and

    (d) ZhaoFeng could have sold units on market at prices up to 16 cents per unit before January 2012, which it did not do, rather choosing to sell half its units to AIMS in January 2012 at 7 cents.

80. RE denied an association between ZhaoFeng and RE and AIMS. RE submitted that it had *"been informed by AIMS that AIMS Securities Consultants Limited is a completely separate company from AIMS"* and it *"is merely a coincidence that the two companies share the first word in their name"*.

81. RE submitted that the placement in June 2010 was made to ZhaoFeng as it had expressed interest in investing in MacarthurCook as an institutional holder and funds were needed at the time to pay down the OCBC facility. It submitted that the implication by Pelorus that the sale by ZhaoFeng to AIMS was below market price was incorrect and misleading. RE set out a number of reasons. Lastly, RE submitted that if an association between MacarthurCook and ZhaoFeng was found it would not give rise to unacceptable circumstances and in any event the application was out of time.[27]

82. In *Mount Gibson Iron Limited,*[28] the Panel stated that its starting point for conducting proceedings on an association case is that it is for the applicant to:

    demonstrate a sufficient body of evidence of association and to convince the Panel as to that association, albeit with proper inferences being drawn.

83. We are not sure that this test has been met, but in any event we have decided not to conduct proceedings in relation to the alleged association because:

    (a) the interest which AIMS acquired from ZhaoFeng is not a sufficiently material increase in AIMS shareholding to have an effect on control. There may be an issue of disclosure, although the transfer of the holding has removed the currency of it

    (b) the restructure of the Rights Issue means that the increase in AIMS's holding does not have a material impact on the shortfall or sub-underwriting distribution and

    (c) once AIMS agreed to acquire units from Laxey, taking its unitholding in MacarthurCook to 19.99%, the units acquired by AIMS from ZhaoFeng become less material to the potential control impact of the Rights Issue.

DECISION

MacarthurCook Property Securities Fund 01

84. On 1 May 2012, Laxey sought consent to withdraw its application to the Panel.[29] The Panel will refuse consent if there is reason to suspect that the unacceptable circumstances will continue. The changes to the structure of the Rights Issue and the additional disclosure that has been made satisfied our concerns, and we consent to Laxey withdrawing its application.

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[27] Section 657C(3)
[28] [2008] ATP 4 at [15]
[29] Procedural Rule 3.4.1

MacarthurCook Property Securities Fund 02

85. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances in relation to association, this being the one remaining issue for us to consider in the *02* proceedings after the Rights Issues structure and disclosure deficiencies were addressed in the *01* proceedings.

86. Accordingly, we have decided not to conduct proceedings in relation to the application made by Pelorus under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

Orders

87. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

Hamish Douglass
President of the sitting Panel
Decision dated 8 May 2012
Reasons published 15 May 2012

Advisers (for both *01* and *02*)

Party	Advisers
Laxey Partners Limited	Middletons
MacarthurCook Fund Management Limited as responsible entity for MacarthurCook Property Securities Fund	Ashurst Australia
Pelorus Private Equity Limited	Herceg Lawyers