



Australian Government

Takeovers Panel

**Reasons for Decision
Argosy Minerals Limited
[2014] ATP 7**

Catchwords:

Entitlement offer – rights issue – renounceable – not underwritten – deep discount – decline to conduct proceedings – dilution – shortfall facility – control effect – no evidence presented – commercial factors – lack of commercial rationale – need for funding – standing – disposal of main undertaking – continuous disclosure

Corporations Act 2001 (Cth), sections 249D, 657A(2)

Guidance Note 1 – Unacceptable circumstances, Guidance Note 17 – Rights issues

Leighton Holdings Limited 02R [2010] ATP 14

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
No	No	No	No	No	No

INTRODUCTION

1. The Panel, Geoff Brunson (sitting President), Peter Day and Sarah Dulhunty, declined to conduct proceedings on an application by Sunbreaker Holdings Pty Ltd (as trustee for the Lloyd Super Fund) and Graham Geoffrey Walker in relation to the affairs of Argosy Minerals Limited. The application concerned a 2 for 1 renounceable entitlement offer by Argosy and the decision of Argosy’s 88.6% shareholder, Discovery Africa Limited, not to participate in the offer. The Panel considered that there was no evidence presented that an unacceptable change of control or potential control in Argosy would occur by reason of or in connection with the entitlement offer. Accordingly, the Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

Applicants	Sunbreaker and Graham Geoffrey Walker
Argosy	Argosy Minerals Limited
CPS	CPS Capital Pty Ltd
Discovery	Discovery Africa Limited
Sunbreaker	Sunbreaker Holdings Pty Ltd (as trustee for the Lloyd Super Fund)

FACTS

- 3. Argosy is an ASX listed company (ASX code: AGY).
- 4. Discovery (ASX code: DAF) holds approximately 88.6% of Argosy.
- 5. Discovery made an off-market scrip takeover bid for Argosy, which closed on 12 December 2013. The implied value of the bid, based on the last trading day before

Takeovers Panel

Reasons – Argosy Minerals Limited [2014] ATP 7

the announcement of the bid, was \$0.038 per Argosy share. There has been thin trading in Argosy shares in the last six months between \$0.020 and \$0.045.

6. The Applicants are shareholders in Discovery. Together the Applicants hold approximately 15.65% of Discovery.¹
7. On 13 February 2014, Sunbreaker requisitioned a meeting of Discovery's shareholders under s249D² to remove certain Discovery directors and appoint new directors. The meeting is scheduled for 10 April 2014.
8. Argosy has three directors, being Mr Philip Thick, Mr Kevin Nichol and Mr Danie Van Den Bergh, each of whom is also a director of Discovery. Mr Nichol and Mr Van Den Bergh are the subject of removal resolutions at the requisitioned meeting of Discovery shareholders.³
9. On 14 March 2014, Argosy released an offer document in which it disclosed that it would undertake a 2 for 1 renounceable entitlement offer at \$0.0025 per share (amended to \$0.002 per share) with a shortfall facility. At the close of trading on the last day that Argosy shares traded prior to the announcement of the entitlement offer (12 March 2014), the Argosy share price was \$0.031.
10. The offer document disclosed that:
 - (a) Discovery did not intend to take up its entitlement but may trade its rights.
 - (b) The funds raised under the entitlement offer were to be used for:
 - (i) investigating and advancing business development opportunities for Argosy, including identifying new projects
 - (ii) recapitalising Argosy and
 - (iii) replenishing working capital.
 - (c) The entitlement offer was not underwritten.
11. If the entitlement offer was fully subscribed, Discovery's interest in Argosy would be diluted from 88.6% to 29.5%.
12. Trading of rights commenced on 20 March 2014 and is scheduled to end on 3 April 2014. The period in which the entitlement offer can be accepted is scheduled to close on 10 April 2014 (ie the same day as the Discovery shareholders' meeting). New shares are scheduled to be issued on 14 April 2014.
13. CPS was appointed lead manager for the entitlement offer. It holds a mandate for the "ongoing recapitalisation and refocusing" of Argosy.

¹ At 12 December 2013, Sunbreaker held 10.32% and Mr Walker 5.33%

² References are to the *Corporations Act 2001 (Cth)* unless otherwise specified

³ Mr Thick stated that he would resign from the Argosy board if the removal resolutions were approved

APPLICATION

Declaration sought

14. By application dated 18 March 2014, the Applicants sought a declaration of unacceptable circumstances. The Applicants submitted that the entitlement offer, with Discovery not participating, had the effect or likely effect of causing a change of control or potential control in Argosy.
15. The Applicants also submitted that Argosy had separately failed to comply with its continuous disclosure obligations in respect of its sole undertaking (being a graphite project in Namibia). Further, by not participating in the entitlement offer, Discovery was disposing of its main undertaking without the required shareholder approval under the ASX Listing Rules.

Interim order

16. The Applicants sought interim orders to the effect that the entitlement offer be suspended.⁴
17. On 19 March 2013, the President declined to make the interim orders sought after considering the likelihood of the sitting Panel finding there to be unacceptable circumstances and, should the sitting Panel find unacceptable circumstances, the adequacy of remedies available to the sitting Panel.

Final orders sought

18. The Applicants sought final orders to the effect that:
 - (a) the entitlement offer be cancelled
 - (b) alternatively, the entitlement offer be suspended pending further announcement following the requisitioned meeting of Discovery shareholders
 - (c) alternatively, the timetable for the entitlement offer be re-set to the day following the requisitioned meeting of Discovery shareholders
 - (d) appropriate notices be sent to Argosy shareholders
 - (e) the lead manager mandate agreement between Argosy and CPS be cancelled
 - (f) Discovery obtain shareholder approval for the purposes of the ASX Listing Rules in relation to the disposal of its main undertaking and
 - (g) the conduct of the incumbent directors of Argosy and Discovery be referred to ASIC for further investigation of potential breaches of the Corporations Act and ASX Listing Rules.

DISCUSSION

Standing

19. The Applicants are shareholders in Discovery, not Argosy.

⁴ Pending (a) an announcement by Argosy following the outcome of the application or (b) an announcement following the requisitioned meeting of Discovery shareholders or the outcome of the Panel application

Takeovers Panel

Reasons – Argosy Minerals Limited [2014] ATP 7

20. In preliminary submissions, Argosy submitted that the Applicants do not have standing for the purposes of s657C(2). They are not persons whose interests are affected by the relevant circumstances as they stand in no better position than a member of the general public. Argosy further submitted:

“The fact that Discovery might choose to dilute its control over Argosy by not taking up the rights issues [sic], is a matter in which Discovery Africa has an interest. It is not a matter in which the applicants have an interest. Their interest is in Discovery Africa conducting itself according to its articles and to the will of the members expressed in general meeting.”

21. As we have decided not to conduct proceedings, we do not need to determine the question of standing. If we had conducted proceedings, we would have considered further whether the Applicants had an interest above that of a member of the public.⁵

Control effect

22. The Applicants submitted that the entitlement offer and Discovery’s decision not to take up its entitlements was an attempt to affect control in Argosy. The Applicants submitted that Argosy had no need for funds (Argosy had funding arrangements in place with Discovery) and that the take-up of rights by the other existing Argosy shareholders was unlikely given their apparent lack of interest in Discovery’s takeover offer.
23. Argosy submitted that the entitlement offer did not involve a change of control. It submitted that the potential dilution of Discovery from approximately 88.6% to 29.5% as a result of the entitlement offer could not, by itself, be considered a change of control. It submitted that “[m]any other presently unknown facts would need to be placed before the Panel before it could conclude that a change of control was possible”.
24. When considering whether to conduct proceedings, we consider (among other things) whether the claims before us would give rise to unacceptable circumstances if established.⁶ This requires us to turn our minds to whether the circumstances are likely to have an unacceptable effect on the control or potential control of the entity in question.⁷
25. The dilution of a controlling shareholder’s interest may have an effect on the control of an entity. However, if the effect is purely that control is dispersed, the effect is unlikely to be unacceptable. It is certainly different if another control block arises, which would need to be considered in the context of all the circumstances.
26. Irrespective of whether the entitlement offer would have an unacceptable effect on control or potential control, it appears to us to lack a commercial rationale. In particular, we think the following features are curious:
- (a) Discovery’s decision not to participate in the entitlement offer so soon after making a takeover offer and acquiring 88.6% of Argosy

⁵ *Leighton Holdings Limited 02R* [2010] ATP 14, at [15] and [16]

⁶ Note 2 to *Procedural Rule 6.1.1*

⁷ Section 657A(2)(a)

Takeovers Panel

Reasons – Argosy Minerals Limited [2014] ATP 7

- (b) the price at which shares would be issued under the entitlement offer, being a deep discount (approximately 65%) to the last traded price of Argosy shares prior to the announcement of the entitlement offer as well as the implied value paid by Discovery under its bid for Argosy and
- (c) the apparent lack of any need for funds to be raised.

27. Argosy submitted that:

“Whilst the Panel can and should have regard to commercial realities, it must not succumb to mere speculation and hyperbole actuated by fertile minds intent upon achieving an unidentified purpose. The Panel must accept that the decision of the Argosy board to make the rights offer was commercially justified and thus legitimate in circumstances where the board has determined to raise further capital.”

28. The existence of unacceptable circumstances does not depend on the intention of the parties; what matters is the effect of the circumstances in light of the principles in s602.⁸ Further, the Panel does not generally second guess a decision of the board to raise capital, but we do not accept the submission that we must accept that the decision was commercially justified. Had we conducted proceedings, this would be one of the areas we would seek to inform ourselves about in order to properly understand the context of the circumstances.
29. Separate to a decision to raise capital, the commercial justification for pursuing an entitlement offer is relevant to whether unacceptable circumstances exist. In the context of an entitlement offer, the Panel considers commercial factors as part of the context of the effect that the entitlement offer has on control. They include the entity’s situation (including whether the entity has explored other capital raising alternatives and the financial situation and solvency of the entity) and the structure of the rights issue (including the size, price and discount to market).⁹ In light of these factors, a commercial justification for the entitlement offer was seemingly lacking in this case (but we did not seek submissions).
30. In relation to the effect that the entitlement offer may have on the control or potential control of Argosy, it is too early to determine at this stage; there is no evidence that another party or parties will acquire control as a result of or in connection with the entitlement offer. Until the entitlement offer is concluded and any shortfall shares allocated, it is speculative whether the entitlement offer will have any unacceptable control effect. If a change or potential change of control in Argosy arises by or in connection with the entitlement offer (as opposed to the mere dilution of Discovery’s control), or such a change becomes evident, a fresh application could be made by ASIC or a person interested.
31. While there is no evidence on the facts before us that the entitlement offer will have an unacceptable effect on control, we have a number of concerns and referred the issues raised in the application to ASIC.

⁸ Guidance Note 1 *Unacceptable circumstances*, at [24]

⁹ Guidance Note 17 *Rights issues*, at [6]

Continuous disclosure and Listing Rules matters

32. The Applicants raised issues about Argosy's compliance with its continuous disclosure obligations and Discovery not obtaining shareholder approval under the ASX Listing Rules for the disposal of its main undertaking. However, the Panel is not the appropriate forum for these issues to be raised and dealt with; they are instead issues for ASIC and ASX, as relevant, to address.

DECISION

33. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001 (Cth)*.

Orders

34. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make an interim order or award costs. However, should this matter come back and unacceptable circumstances are found, an application for costs should be considered.

Geoff Brunson

President of the sitting Panel

Decision dated 21 March 2014

Reasons published 28 March 2014

Takeovers Panel

Reasons – Argosy Minerals Limited
[2014] ATP 7

Advisers

Party	Advisers
Applicants	Nova Legal
Argosy	CPB Lawyers