



Australian Government

Takeovers Panel

**Reasons for Decision
Aspen Parks Property Fund 01 and 02
[2014] ATP 19**

Catchwords:

Entitlement Offer – control effect – uninformed market – application not timely – cap on shortfall applications – unfair prejudice – decline to conduct proceedings

Australian Securities and Investments Commission Regulations 2001 (Cth), 16(1)(a), 20

GN 17 – Rights issues

Virgin Australia Holdings Limited [2013] ATP 15, Real Estate Capital USA Property Trust [2012] ATP 6, Leighton Holdings Limited 02R [2010] ATP 14, Leighton Holdings Limited 01, 02 and 03 [2010] ATP 13, Transurban Group [2010] ATP 5, Multiplex Prime Property Fund 04 [2009] ATP 21, Babcock & Brown Communities Group 02 [2008] ATP 26, Golden Circle Limited 02 [2007] ATP 24, Dromana Estate Limited 01R [2006] ATP 8, Dromana Estate Limited 01 [2006] ATP 4

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

INTRODUCTION

- The Panel, Christian Johnston, Nora Scheinkestel (sitting President) and Robert Sultan, declined to conduct proceedings on an application by Discovery Parks, and an application by Discovery Parks and Martin Cotterell as trustee for the Marlee Superannuation Fund, in relation to the affairs of Aspen Parks Property Fund. The applications concerned (among other things) an entitlement offer made by Aspen Parks and whether disclosure should have been made earlier of an indicative and later final conditional proposal by Discovery Parks to acquire assets of Aspen Parks. Given the lateness of the applications, the Panel considered that the facts presented were not such as to warrant further delaying the timetable of the entitlement offer, which could be unfairly prejudicial.

- In these reasons, the following definitions apply.

applicants	Discovery Parks and Martin Cotterell as trustee for the Marlee Superannuation Fund
Aspen Parks	Aspen Parks Property Fund
Aspen Company	Aspen Parks Property Management Limited
Aspen RE	Aspen Funds Management Limited
Aspen Trust	Aspen Parks Property Trust
Aspen Wholesale Fund	Aspen Parks Wholesale Property Fund
Discovery Parks	Discovery Parks Holdings Pty Ltd and Beston Parks Land Co Pty Ltd as trustee for Beston Accommodation Parks Trust

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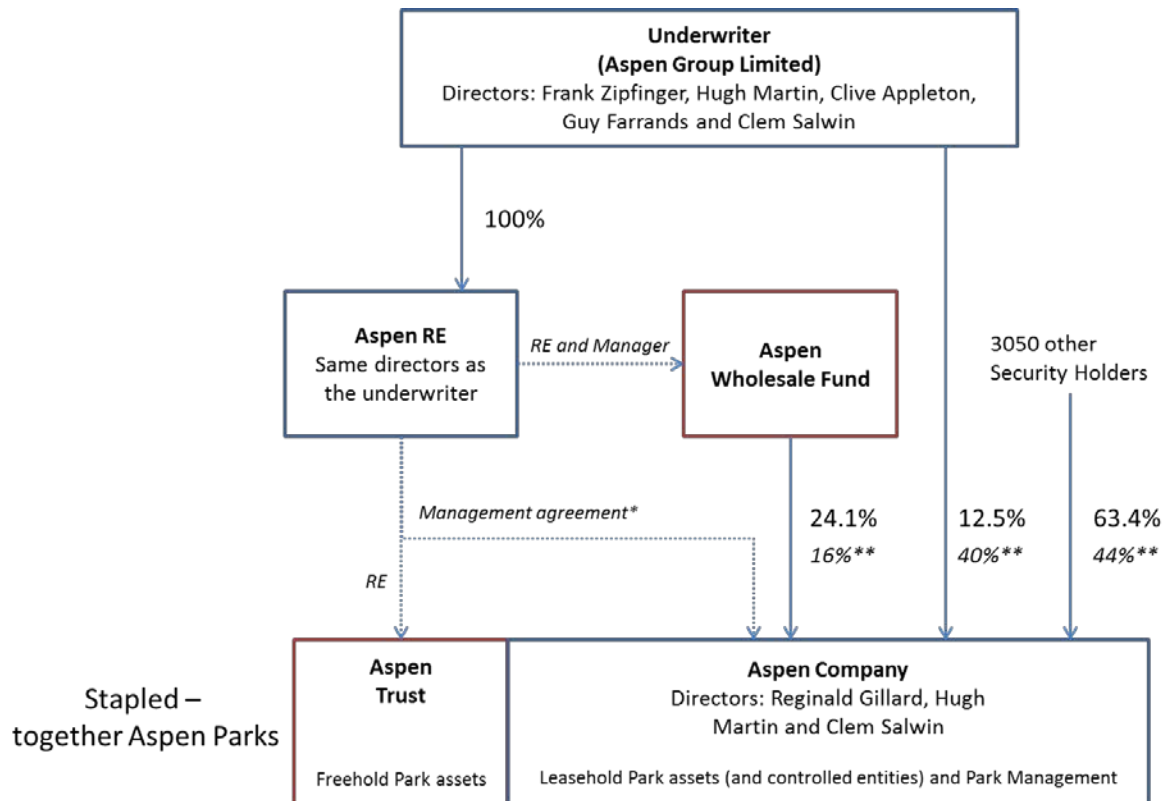
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Ingenia
underwriter

Ingenia Communities Group (ASX: INA)
Aspen Group Limited, a listed company (ASX: APZ)

FACTS

3. The structure of the Aspen Parks group is described in the following diagram.



• Management agreement under which Aspen Company and Aspen RE as responsible entity of the Aspen Trust appoint Aspen RE to manage Aspen Parks

** Post entitlement offer

4. Aspen Parks consists of a stapling of units in Aspen Trust and shares in Aspen Company. Aspen RE is the responsible entity for Aspen Trust. Aspen Parks owns accommodation parks throughout Australia.
5. On 25 August 2014, Aspen Parks announced that it would make a 1 for 2 non-renounceable underwritten entitlement offer at an issue price of \$0.49 per stapled security to raise a minimum of \$39.9 million. There were two offers to participate in shortfall, an offer to security holders in Aspen Parks (up to 200% of their entitlement) and an offer to unitholders in Aspen Wholesale Fund (a 24.1% security holder in Aspen Parks). The underwriter is the parent company of Aspen RE and a 12.5% security holder.
6. The chairman's letter in the prospectus and product disclosure statement for the entitlement offer disclosed that:
 - (a) since 30 June 2013, the value of Aspen Parks' property portfolio had declined by \$63.4 million

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- (b) Aspen Parks' loan to value ratio (LVR) had increased to 54.8% and its existing debt facilities contained a covenant that its LVR not exceed 55%. The board¹ did not consider Aspen Parks' current LVR to be sustainable and therefore determined that the entitlement offer was necessary
 - (c) Aspen Parks had received a preliminary, non-binding indicative proposal from Ingenia to acquire up to 100% of the securities of Aspen Parks.² The board was prepared to hold talks with Ingenia, and potentially other suitably qualified parties, to determine if a compelling and certain proposal could be developed and
 - (d) the board reserved the right to cancel the entitlement offer in the event that it received a compelling and certain proposal capable of being put to security holders.
7. The prospectus and product disclosure statement also disclosed that the underwriter would obtain a maximum relevant interest of 41.7% in Aspen Parks' securities if no investors participated in the entitlement offer.
 8. On 28 August 2014, Discovery Parks made an indicative offer to acquire all the assets of Aspen Parks.
 9. On 2 September 2014, Aspen Parks announced Ingenia's withdrawal from the Aspen Parks sale process.
 10. On 3 September 2014, Aspen Parks and Discovery Parks entered into a confidentiality deed and Discovery Parks commenced due diligence.
 11. On 25 September 2014, Discovery Parks submitted an offer to Aspen Parks to acquire the assets of Aspen Parks for \$217.3 million (made up of \$214 million cash and Discovery Parks' scrip and the assumption of up to \$3.3 million of net trading liabilities). Discovery Parks proposed that the asset acquisition would be conditional on Aspen Parks obtaining security holder approval for the asset acquisition and an equal access buy-back of shares in Aspen Company that would occur concurrently with a redemption of units in Aspen Trust. The offer was also conditional on confirmatory due diligence and the execution of an implementation agreement. The offer was stated to lapse on 3 October 2014.³
 12. The Discovery Parks offer was considered by an 'independent board committee' of Aspen Parks comprising Mr Reg Gillard (an independent director of Aspen Company), Mr Hugh Martin (a director of the underwriter, Aspen RE and Aspen Company) and Mr Clive Appleton (a director of the underwriter and Aspen RE).
 13. On 30 September 2014, Discovery Parks' solicitors wrote to the independent board committee's solicitors, expressing concerns with the independent board committee's feedback on Discovery Parks' offer and requesting that Aspen Parks disclose its offer and extend the entitlement offer by 4 weeks.

¹ defined as the boards of both Aspen RE and Aspen Company

² this was also the subject of a separate announcement by Aspen Parks on 25 August 2014

³ Discovery Parks' offer was resubmitted on 6 October 2014, after it had made its first Panel application

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14. On 1 October 2014, the independent board committee of Aspen Parks informed Discovery Parks that it considered Discovery Parks' offer was not sufficiently attractive to security holders and the underwriter had rejected the independent board committee's request for a one week extension of the entitlement offer.
15. On or about 2 October 2014, Aspen Parks issued a supplementary prospectus and product disclosure statement disclosing Discovery Parks' offer and why the independent board committee had rejected it.
16. The entitlement offer closed on 3 October 2014. Security holders subscribed for approximately 17.5% of their entitlements. The underwriter subscribed for the remaining 82.5%, which would increase its percentage security holding from 12.5% to 40.0%.

APPLICATION

Declaration sought

17. By application dated 3 October 2014, Discovery Parks sought a declaration of unacceptable circumstances. On 7 October 2014, Discovery Parks was joined by Mr Martin Cotterell in making a further application. The second application incorporated the submissions in the first application with some additional submissions on matters including the structure of the entitlement offer and standing.
18. The applicants submitted, among other things, that:
 - (a) Aspen Parks did not disclose the indicative offer to its security holders and delayed in disclosing the final offer until 2 October 2014. Therefore Aspen Parks' security holders were unlikely to be aware of Discovery Parks' offer.
 - (b) The entitlement offer was structured to have a significant control effect, with the offer being non-renounceable, having a related party as underwriter and having a 200% cap on the shortfall offer to security holders. With at least a 40% security holding in Aspen Parks, the underwriter would be able to block any resolution to remove its subsidiary as the responsible entity of Aspen Parks.
 - (c) Aspen Parks required Discovery Parks to enter into a confidentiality deed but provided minimal or inadequate information in return and as a result delayed Discovery Parks *"from being in a position to make the Final Offer"*.
 - (d) The independent board committee of Aspen Parks did not give due consideration to Discovery Parks' final offer and improperly rejected it. Further, the independent board committee was not in a position to assess Discovery Parks' offer impartially and independently because two of three members of the committee were directors of the underwriter.
19. The applicants submitted that the effect of these circumstances (among others) was that it was likely that control would pass to the underwriter in a manner that was unacceptable.

Interim orders sought

20. Allotment under the entitlement offer was scheduled for 8 October 2014. The applicants sought interim orders to the effect that:

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- (a) no acceptances in the entitlement offer be processed, no securities be issued and no application monies be returned and
 - (b) the underwriter be prevented from withdrawing its underwriting of the entitlement offer as a consequence of any interim or final orders.
21. Aspen Parks and the underwriter amended their underwriting agreement to extend the allotment and settlement date under the entitlement offer to noon (Sydney time) on 10 October 2014 and agreed not to allot and issue securities before that time. They also agreed not to amend further their underwriting agreement to shorten this period. This provided us with time to consider the applications without making any interim orders.

Final orders sought

22. The applicants sought final orders to the effect that:
- (a) Discovery Parks provide Aspen Parks' security holders with additional disclosure concerning its offer
 - (b) Aspen Parks' security holders be given withdrawal rights and an additional 4 weeks to apply under the entitlement offer after they receive the additional material from Discovery Parks and
 - (c) Aspen Parks establish an independent board committee comprising members who are independent of the Aspen Parks group entities to consider Discovery Parks' offer.

DISCUSSION

Related matters heard together

23. We direct that the 2 applications, being related matters in our view, be considered together in this Panel proceeding.⁴

Preliminary submissions

24. Aspen Parks (through the independent board committee) and the underwriter made preliminary submissions in response to the first Panel application. Both submitted that there were no disclosure deficiencies. Aspen Parks submitted, among other things, that:
- (a) it had a need for the funds and was contemplating an acquisition opportunity whose exclusivity was soon to expire
 - (b) two investment banks offered to underwrite the entitlement offer but only for a fee and with other conditions concerning discount and sub-underwriting. The underwriter offered to underwrite for no fee⁵

⁴ Regulation 16(1)(a) of the *Australian Securities and Investments Commission Regulations 2001* (Cth). See also *Leighton Holdings Limited 01, 02 and 03* [2010] ATP 13 at [32]

⁵ also the underwriter subscribed for the securities at \$0.51 per security compared to the \$0.49 per security offered to Aspen Parks' security holders

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- (c) Discovery Parks' offer required the cooperation of the "relevant boards of directors" and not Aspen Parks' security holders. The Panel should not assume jurisdiction to compel Aspen Parks to undertake a sale of all its assets and conduct a buy-back and
- (d) the Panel does not have jurisdiction over the Aspen Trust.
25. The underwriter submitted, among other things, that the underwriting agreement gave Aspen Parks the ability to withdraw the entitlement offer if a recommended offer or proposal for the securities emerged. It submitted that this "is an unusual term in any underwriting agreement and one that gives full effect to the principles in section 602(c) of the Corporations Act".
26. Aspen Parks submitted in response to the second Panel application that Mr Cotterell "had previously been a senior employee of [Aspen Parks] and that Mr Cotterell resigned from [Aspen Parks] in 2013 and is now employed by [Aspen Parks'] competitor, Ingenia". It submitted that the application was vexatious and frivolous.

Standing and lateness of the applications

27. The applicants submitted that Mr Cotterell had standing as a security holder in Aspen Parks. They also submitted that Discovery Parks had standing for two reasons. The first was because its offer was a competing proposal (with the understanding that the entitlement offer would be cancelled if its offer had been accepted by Aspen Parks). The second was that Discovery Parks had a legitimate interest in Aspen Parks not engaging in unacceptable circumstances. Therefore the applicants submitted that Discovery Parks had "an interest above that of a member of the public" and therefore had standing.⁶
28. The facts here are similar to *Multiplex Prime Property Fund 04*.⁷ In that matter the applicant (Grocon Investment Management Pty Ltd) had submitted that Multiplex's entitlement offer may result in Brookfield Multiplex Group acquiring control or increasing control in an unacceptable manner, after it had approached Multiplex with a recapitalisation proposal as an alternative to the entitlement offer. The Panel decided that it did not need to consider the issue of standing as it had decided not to conduct proceedings because the application was made too late.⁸
29. Similarly we do not need to consider whether Discovery Parks has standing.⁹ Both applications were made too late. The first application was made on the day the entitlement offer closed. When applications are made late, the prejudice to affected parties "is likely to be greater and the Panel requires more cogent reason to intervene".¹⁰ As discussed below, we consider that, while there may have been issues to consider if an

⁶ *Leighton Holdings Limited 02R* [2010] ATP 14 at [15]-[16]

⁷ [2009] ATP 21

⁸ [2009] ATP 21 at [23]-[25]

⁹ if we had conducted proceedings, we would have made enquiries in relation to standing and Mr Cotterell's interest and role

¹⁰ *Golden Circle Limited 02* [2007] ATP 24 at [14]. See also *Multiplex Prime Property Fund 04* [2009] ATP 21 at [31]

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application had been made earlier, there is no cogent reason to intervene at this late stage.

Entitlement offer

30. The structure of Aspen Parks includes a company with more than 50 members (Aspen Company). The entitlement offer includes an offer to shareholders whose shares are stapled to units in the Aspen Trust. We consider that we have jurisdiction to consider the control effect of the entitlement offer.
31. The following aspects of the entitlement offer may have given rise to issues to be explored:
 - (a) The effect on control on Aspen Parks, including the fact that the underwriter is an existing security holder in Aspen Parks and wholly owns Aspen RE. Guidance Note 17 states that while underwriting by a related party or major security holder is not, itself, unacceptable, “*greater care is needed to mitigate the potential control effects*” and the failure of directors to canvass properly “*professional underwriters or seek out alternatives to a related party or major shareholder underwriter (sub-underwriter) may increase the likelihood of unacceptable circumstances*”.¹¹ If we had conducted proceedings, we would have looked closely at the underwriting and the offers for underwriting by the two investment banks.
 - (b) The cap on applications to participate in the shortfall facility.¹²
32. There may have been scope (if it was warranted) to have amended the terms of the entitlement offer during the offer period, which could have mitigated any control effect and not have been unfairly prejudicial to Aspen Parks and the underwriter. However, given the applications were made at the end of, or after, that period and no security holder applied to the Panel earlier, we consider that it is not warranted to delay the entitlement offer timetable further. To do so could be unfairly prejudicial.

Discovery Parks’ offer

33. The Panel has been unwilling to question the judgment of a company’s board in rejecting a scheme proposal or in deciding which of two proposals was superior.¹³
34. Discovery Parks’ offer was structured as an asset sale and concurrent buy-back. This structure would require the agreement of the Aspen Parks’ board to be implemented, not unlike a scheme proposal. As such, we consider that it was properly a matter for Aspen Parks’ board to decide whether or not to pursue it. They decided not to pursue it.
35. Discovery Parks’ indicative offer was incomplete. Discovery Parks’ final offer was still conditional and was disclosed soon after the decision to reject it was made.

¹¹ GN 17 - *Rights issues* at [21]. See also *Real Estate Capital USA Property Trust* [2012] ATP 6 at [41]-[43] and *Dromana Estate Limited 01* [2006] ATP 4 at [23]-[25]

¹² See *Dromana Estate Limited 01R* [2006] ATP 8 at [45] and *Virgin Australia Holdings Limited* [2013] ATP 15 at [33]-[42]

¹³ *Transurban Group* [2010] ATP 5 at [17]-[22] and *Babcock & Brown Communities Group 02* [2008] ATP 26

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Given these two facts, we do not consider there was a requirement for more disclosure of Discovery Parks' offer than was made.

36. While we query whether the independent board committee could be characterised as 'independent', and therefore whether it should have been described in that way, it may have been difficult to convene a truly independent board committee given the structure of Aspen Parks. In our view there was nothing on the material presented to suggest that proper protocols in considering the Discovery Parks' offer were not in place. We also do not consider that there was any reasonable prospect that an enquiry about the provision of due diligence material to Discovery Parks or the conduct or impartiality of the independent board committee would lead to a declaration of unacceptable circumstances.

DECISION

37. 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 applications under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

Orders

38. Given that we have decided not to conduct proceedings we do not make any orders, including any costs orders.

Nora Scheinkestel

President of the sitting Panel

Decision dated 9 October 2014

Reasons published 21 October 2014

Advisers

Party	Advisers
Aspen Group Limited	Ashurst UBS
Aspen Parks (Independent Board Committee)	King & Wood Mallesons Fort Street Advisers
Discovery Parks and Martin Cotterell as trustee for the Marlee Superannuation Trust	Johnson Winter & Slattery