

Decision required under the Overseas Investment Act 2005: Aspen Pharmacare Holdings Limited

Date	28 November 2018
Security Level	Commercial: In Confidence
Priority	High
Case Number	201810210
Decision Required By	7 December 2018

Contact for Telephone Discussion

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Executive Summary:

1. Aspen Pharmacare Holdings Limited has applied for consent to acquire:
 - (a) 50% of the shares in New Zealand New Milk Limited (Aspen already owns the other 50%); and
 - (b) 100% of the shares in New Zealand New Milk Brands Limited.
2. This is an overseas investment in significant business assets, and requires consent because the combined value of the assets of New Zealand New Milk Limited and New Zealand New Milk Brands Limited exceeds \$100 million.

Applicant

3. Aspen is a global pharmaceutical and nutritional company registered and based in South Africa.
4. Aspen's shares are listed on the Johannesburg Stock Exchange and are predominantly owned by a wide variety of small shareholders. Only four shareholders (one of Aspen's founders and three investment firms) own more than 5% of its shares, but none own more than 13% of Aspen's shares.

Investment

5. New Zealand New Milk Limited manufactures infant milk formula predominantly for export.
6. New Zealand New Milk Brands Limited exports the manufactured infant milk formula to China for sale.
7. Aspen plans to sell its global 'nutritionals' business to Lactalis Group, a multinational dairy products corporation. Aspen needs to acquire the shares in New Zealand Milk and New Zealand Milk Brands in order to complete the sale to Lactalis. The Lactalis transaction will also require consent, and will be sought separately.

Vendor

8. The vendor of the shares is New Zealand New Milk Holdings Limited, which was formed to hold the shares in these two companies and does not undertake any business activities. The vendor is approximately 65% overseas owned.

Instructions

9. Please see **Appendix 2** for instructions on how to make a decision and guidance on the relevant factors and criteria for consent.

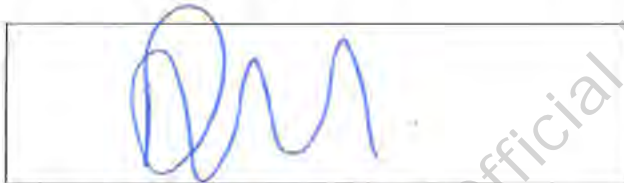
Decision:

10. I have determined that:
 - (a) the '**relevant overseas person**' is Aspen Pharmacare Holdings Limited; and
 - (b) the '**individuals with control of the relevant overseas person**' are:

Individual	Role
Stephen Bradley Saad	Director of the Applicant
Michael Guy Attridge	Director of the Applicant
Douglas Kuseni Dlamini	Director of the Applicant
Roy Cecil Anderson	Director of the Applicant

Individual	Role
Linda de Beer	Director of the Applicant
Christopher Nattle Mortimer	Director of the Applicant
Babalwa Ngonyama	Director of the Applicant
David Simon Redfern	Director of the Applicant
Sindiswa Victoria Zilwa	Director of the Applicant

11. I am satisfied that the criteria for consent in section 18 have been met:
- the individuals with control of the relevant overseas person collectively have business experience and acumen relevant to the overseas investment; and
 - the relevant overseas person has demonstrated financial commitment to the overseas investment; and
 - all the individuals with control of the relevant overseas person are of good character; and
 - each individual with control of the relevant overseas person is not an individual of the kind referred to in section 15 or 16 of the Immigration Act 2009; and
12. Consent is granted to the overseas investment in the form of the Proposed Decision in Appendix 1 and subject to the conditions set out in the Proposed Decision.



Pedro Morgan – Principal Advisor

Date

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Report of the Overseas Investment Office
on the application for consent by
Aspen Pharmacare Holdings Limited
Case: 201810210

Contents

WHAT IS THE INVESTMENT?4

WHO IS MAKING THE INVESTMENT5

DOES THE APPLICANT MEET THE INVESTOR TEST CRITERIA?6

CONSENT CRITERIA.....7

THIRD PARTY SUBMISSIONS7

APPENDIX 1 - PROPOSED DECISION9

APPENDIX 2 - INSTRUCTIONS 12

APPENDIX 3 - GOOD CHARACTER..... 13

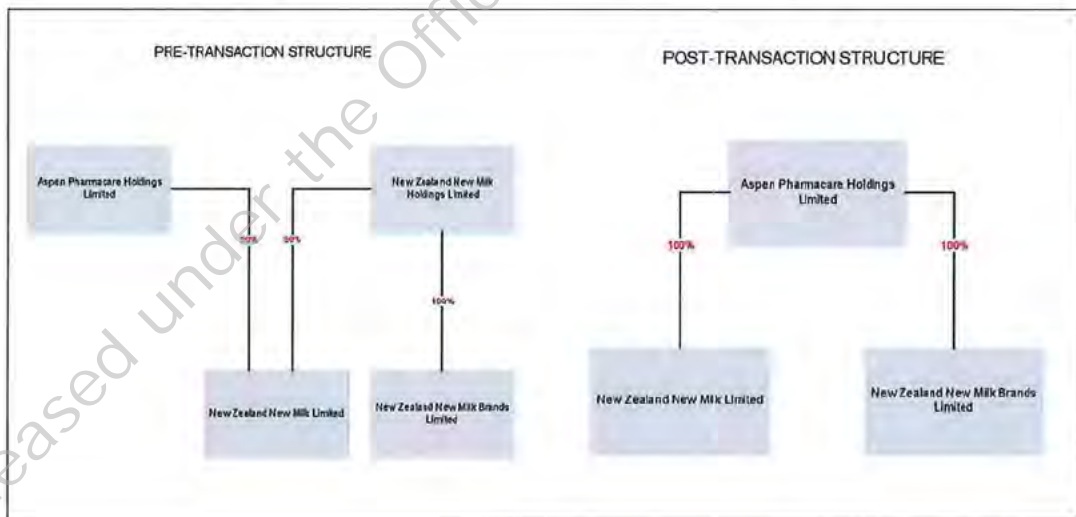
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What is the Investment?

Applicant	Aspen Pharmacare Holdings Limited (Various 67.97%, South Africa 26.98%, United States of America 5.05%)
Vendor	New Zealand New Milk Holdings Limited (China 58.54%, New Zealand 34.173%, Various 7.287%)
Consideration	\$87,500,000
Recommendation	Grant Consent

Description of the Investment

1. Aspen Pharmacare Holdings Limited ("**Applicant**") has applied for consent to acquire:
 - (a) 50% of the shares in New Zealand New Milk Limited ("**NZNML**") (the Applicant already owns the other 50%); and
 - (b) 100% of the shares in New Zealand New Milk Brands Limited ("**NZNMBL**");
 ("**Investment**").
2. Pre-Investment and post-Investment ownership diagrams are below:



3. The Investment is an overseas investment in significant business assets and requires consent because the combined value of the assets of NZNML and NZNMBL exceeds \$100 million.
4. Aspen plans to sell its global 'nutritionals' business to Lactalis Group, a multinational dairy products corporation. Aspen needs to acquire the shares in New Zealand Milk and New Zealand Milk Brands in order to complete the sale to Lactalis. The Lactalis transaction will also require consent, and will be sought separately.

Vendor

5. The vendor of the shares is New Zealand New Milk Holdings Limited ("**Vendor**"). The vendor is approximately 65% overseas owned.

6. The Vendor was formed to hold the shares in NZNML and NZNMBL, and does not undertake any business activities.

Sensitive Assets

7. The Investment is an overseas investment in significant business assets only.
8. The application does not involve sensitive land.

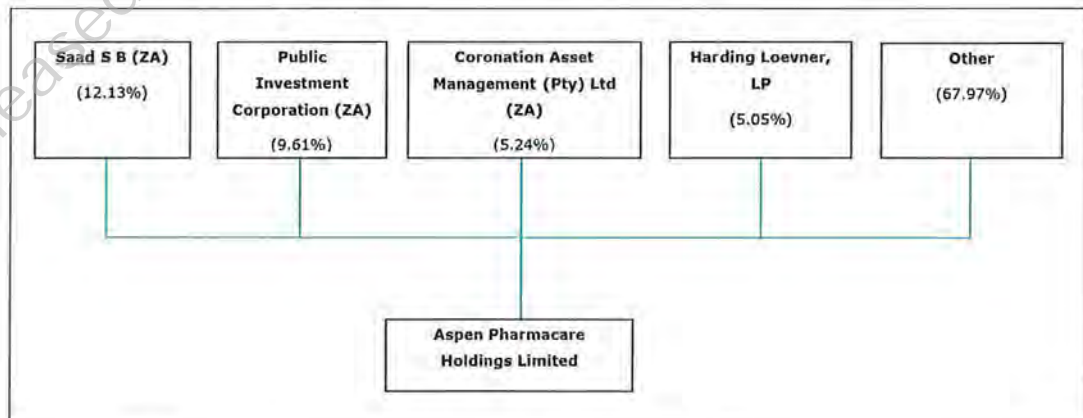
Who is making the Investment

Applicant

9. The Applicant is a global pharmaceutical and nutritional company incorporated in South Africa that has a wide range of products for the treatment of health conditions. The Applicant operates 25 manufacturing facilities across 17 sites, operates in approximately 50 countries, and supplies products to over 150 countries.
10. The Applicant is listed on the Johannesburg Stock Exchange in South Africa, and its shares are widely held. Shareholders with an interest of 5% or more in the Applicant as at 30 June 2018 are:

Investor	Ownership
Stephen Saad (founding shareholder of the Applicant)	12.13%
Public Investment Corporation (South African state-owned entity)	9.61%
Coronation Asset Management Proprietary Limited (privately owned investment firm)	5.24%
Harding Loevner, L.P. (privately owned investment firm)	5.05%

11. The beneficial ownership of the remaining 67.97% of shares in Aspen is held by approximately 48,000 investors as at 30 June 2018.
12. An ownership and control structure of the Applicant is shown below:



13. Stephen Saad and Michael Attridge are Executive Directors and are responsible for the day-to-day management and operation of the Applicant. The remaining directors of the Applicant are Non-Executive Directors and facilitate strategic decisions made by the Executive Directors.

Relevant Overseas Person

14. We have determined that the '**relevant overseas person**' is Aspen Pharmacare Holdings Limited.

Individuals with Control

15. We have determined that the '**individuals with control of the relevant overseas person**' are the directors of the Applicant:
- | | |
|----------------------------|---------------------------------|
| (a) Stephen Bradley Saad | (f) Christopher Nattle Mortimer |
| (b) Michael Guy Attridge | (g) Babalwa Ngonyama |
| (c) Douglas Kuseni Dlamini | (h) David Simon Redfern |
| (d) Roy Cecil Anderson | (i) Sindiswa Victoria Zilwa |
| (e) Linda de Beer | |

Does the Applicant meet the Investor Test criteria?**Business Experience s18(1)(a)**

The relevant overseas person, or the individuals with control of the relevant overseas person, must have business experience and acumen relevant to the overseas investment. There is considerable flexibility in determining what is relevant and more or less specific expertise may be required depending on the nature of the investment. Business experience and acumen that contributes to an investment's success may be treated as relevant even though the investor may have to supplement its experience and acumen by utilising the experience and acumen of others to ensure the investment succeeds.

16. The Investment is the acquisition of a milk formula manufacturing company and an export logistics company.
17. We have reviewed the biographical information provided by the Applicant for each of the individuals with control and note that they collectively have qualifications and extensive business experience in corporate governance, finance, economics, management, accounting and auditing. They have core competence directly relevant to undertaking the Investment.
18. Having regard to the above, we are satisfied that the individuals with control of the relevant overseas persons collectively have business experience and acumen relevant to the overseas investment.

Financial Commitment s18(1)(b)

The financial commitment criterion requires the relevant overseas person to have taken actions that demonstrate financial commitment to the overseas investment.

19. In this case we are satisfied that the relevant overseas person has demonstrated financial commitment by:
- (a) entering into the COA and GAA (respectively); and
 - (b) engaging professional advisers in relation to the preparation of this application.

Good Character s18(1)(c)

The decision maker must be satisfied that the individuals with control are of good character. Section 19 of the Act specifies that the decision maker must take the following factors into account (without limitation):

- (a) offences or contraventions of the law by A, or by any person in which A has, or had at the time of the offence or contravention, a 25% or more ownership or control interest (whether convicted or not);
- (b) any other matter that reflects adversely on the person's fitness to have the particular overseas investment.

- 20. The Applicant has provided a statutory declaration stating that the individuals with control are of good character, have not committed an offence or contravened the law as described above and know of no other matter that reflects adversely on their fitness to have the Investment. We are satisfied that the statutory declaration can be relied on as it complies with the requirements of the Oaths and Declarations Act 1957.
- 21. Our open source background checks (together with information supplied by the Applicant) revealed a number of matters involving the name of an entity associated with the Applicant appearing on the offshore leaks database of the International Consortium of Investigative Journalists ("ICIJ") and a number of investigations and legal proceedings undertaken by regulatory authorities in a number of European countries. A summary of these matters, the Applicant's submissions in relation to them, and our assessment of the good character criterion is set out in **Appendix 3**.
- 22. Overall, we are satisfied that the individuals with control of the relevant overseas person are of good character.

Immigration Act s18(1)(d)

Section 15 of the Immigration Act specifies that certain convicted or deported persons are not eligible for a visa or permission to enter or be in New Zealand. Section 16 provides a power to deny a visa or permission to enter New Zealand for other specified reasons, such as if the individual is likely to be a threat or risk to security or public order.

- 23. The Applicant has provided a statutory declaration stating that none of the individuals with control of the relevant overseas person are individuals of the kind referred to in section 15 or 16 of the Immigration Act 2009. We are satisfied that the statutory declaration can be relied on as it complies with the requirements of the Oaths and Declarations Act 1957. We have also conducted open source background checks on those individuals and found nothing relevant to this criterion.
- 24. Therefore, we are satisfied that none of the individuals with control of the relevant overseas person are individuals of the kind referred to in section 15 or 16 of the Immigration Act 2009.

Consent criteria

- 25. As detailed above, we are satisfied that the criteria in section 18 are met, and therefore consent should be granted to the Investment.

Third Party Submissions

- 26. No third party submissions were received.

Appendices

APPENDIX 1 - PROPOSED DECISION 9

APPENDIX 2 - INSTRUCTIONS 12

APPENDIX 3 - GOOD CHARACTER 13

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Appendix 1 - Proposed Decision

Consent for Overseas Person to Acquire Significant New Zealand Business Assets

Read this consent carefully - you must comply with all the conditions. If you do not, you may be subject to fines or other penalties.

Consent

Decision date: 28 November 2018

The following people have been given the following **consent**:

Case	201810210
Consent	Aspen Pharmacare Holdings Limited may acquire the Assets subject to the Conditions set out below.
Consent holder	Aspen Pharmacare Holdings Limited We will also refer to each Consent holder and the Consent holders together as you .
Assets	<ul style="list-style-type: none"> Up to 100% of the ordinary shares in New Zealand New Milk Limited (Company number 3285329) 100% of the ordinary shares in New Zealand New Milk Brands Limited (Company number 5418767)
Timeframe	You have until 1 December 2019 to acquire the Assets.

Conditions

Your Consent is subject to the conditions set out below. These apply to all overseas people who are given consent to acquire significant business assets, including you.

You must comply with them all. Be aware that if you do not comply with the conditions you may be subject to fines or other penalties.

In the Consent and the Conditions, we refer to the Overseas Investment Office as **OIO, us or we**.

Details	Required date
Standard condition 1: acquire the Assets	
<p>You must acquire the Assets</p> <ol style="list-style-type: none"> by the date stated in the Consent. If you do not, your Consent will lapse and you must not acquire the Assets, and Using the acquisition, ownership and control structure you described in your application. Note, only you – the named Consent holder – may acquire the Assets, not your subsidiary, trust or other entity. 	As stated in the Consent
Standard condition 2: tell us when you acquire the Assets	
<p>You must tell us in writing when you have acquired the Assets.</p> <p>Include details of:</p> <ol style="list-style-type: none"> the date you acquired the Assets (settlement), consideration paid (plus GST if any), the structure by which the acquisition was made and who acquired the Assets, and copies of any transfer documents and settlement statements. 	As soon as you can, and no later than two months after settlement
Standard condition 3: remain of good character	
<p>You and the Individuals Who Control You:</p> <ol style="list-style-type: none"> must continue to be of good character, and must not become an individual of the kind referred to in section 15 or section 16 of the Immigration Act 2009. These sections describe convicted or deported people who are not eligible for visa or entry permission to enter or be in New Zealand and people who are considered likely to commit an offence or to prevent a threat or risk to security, public order or the public interest. <p>The Individuals Who Control You are individuals who:</p> <ol style="list-style-type: none"> are members of your governing body directly or indirectly, own or control 25% or more of you or of a person who itself owns or controls 25% or more of you, and are members of the governing body of the people 	At all times

<p>referred to in paragraph (b) above.</p> <p>To avoid doubt, this includes the members of your governing body.</p>	
<p>Standard condition 4: tell us about changes that affect you, the people who control you, or people you control</p>	
<p>You must tell us in writing if any of the following events happens to any of the Consent holders:</p> <ol style="list-style-type: none"> 1. You, any Individual Who Controls You, or any person in which you or any Individual Who Controls You hold (or at the time of the offence held) a 25% or more ownership or control interest commits an offence or contravenes the law anywhere in the world. This applies whether or not you or they were convicted of the offence. In particular, please tell us about offences or contraventions that you are charged with or sued over and any investigation by enforcement or regulatory agencies or professional standard bodies. 2. An Individual Who Controls You ceases to be of good character; commits an offence or contravenes the law (whether they were convicted or not); becomes aware of any other matter that reflects adversely on their fitness to have the Assets; or becomes an individual of the kind referred to in section 15 or 16 of the Immigration Act 2009 (see standard condition 3). 3. You cease to be an overseas person or dispose of all or any part of the Assets. 4. You, any Individual Who Controls You, or any person in which you or any Individual Who Controls You, hold (or at the time of the event held) a 25% or more ownership or control interest: <ol style="list-style-type: none"> (a) becomes bankrupt or insolvent (b) has an administrator, receiver, liquidator, statutory manager, mortgagee's or chargee's agent appointed, or (c) becomes subject to any form of external administration. 	<p>Within 20 working days after the change</p>

Appendix 2 - Instructions

1. The regulator must grant consent to this overseas investment if it is satisfied that all of the criteria in section 18 of the Overseas Investment Act 2005 (“the Act”) are met. It must decline to grant consent if it is not satisfied that all of the criteria in section 18 are met. The regulator must not take into account any criteria other than those identified in section 18.
2. For completeness, it is noted that the Applicant is seeking consent to acquire significant business assets and not sensitive land. Therefore, the Applicant is not required to demonstrate the Investment will, or is likely to, benefit New Zealand or that that benefit will be, or is likely to be, substantial and identifiable (a requirement of section 16(1)(e)(ii)-(iii) of the Act). Accordingly, the decision of *Tiroa E and Te Hape B Trusts v Chief Executive of Land Information* [2012] NZHC 147, insofar as it found that benefits must be assessed using a with or without approach rather than a before and after approach, is not relevant to the Application.
3. In the attached Report the Overseas Investment Office identifies each of the criteria under section 18 that the regulator is required to consider in this case.

Conditions

4. Conditions may be imposed on any consent that is granted, under section 25. The attached Report recommends some conditions that you may wish to consider imposing in this case.

Decision

5. The decision that you are required to make should be based on information available to you that you consider is sufficiently reliable for that purpose. The information that the Overseas Investment Office has taken into account in making its recommendation is summarised in the attached Report.

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Appendix 3 - Good Character

Introduction

1. As part of the application ("**Application**"), several matters were disclosed about the Applicant and several of the individuals with control in their capacity as directors of the Applicant. We also carried out standard open-source checks, which revealed some additional matters. We have made enquiries about the relevant matters and sought and received comment from the Applicant.
2. The purpose of this Appendix is to outline the relevant matters, the Applicant's comments on these and our assessment of the good character criterion as it applies to the Application (section section 18(1)(c) of the Act).
3. For the purpose of this Application, the individuals with control of the relevant overseas person are set out in the report. We have assessed each of the allegations and consider that, for the reasons set out below, the allegations do not prevent a finding that the individuals with control of the relevant overseas person are of good character.

Good character criterion

4. Section section 18(1)(c) of the Act requires that Ministers, or in this case the Regulator, be satisfied that the relevant overseas person or, (if that person is not an individual) all the individuals with control of the relevant overseas persons are of good character.
5. The term "good character" is not defined in the Act. The majority of the Select Committee reporting back on the Bill in 2005 confirmed that the "good character" test was needed as it is important to ensure that all persons investing in New Zealand are people unlikely to act inappropriately and bring New Zealand into disrepute.
6. When undertaking the good character assessment, the Regulator must be satisfied that the character of all the individuals with control of the relevant overseas person is sufficient so that they should be granted the privilege of owning or controlling sensitive New Zealand assets.
7. Section 19(1) of the Act states that the following factors must be taken into account (without limitation) in assessing whether or not a person is of good character:
 - (a) offences or contraventions of the law by the person, or by any person in which the individual has, or had at the time of the offence or contravention, a 25% or more ownership or control interest (whether convicted or not);
 - (b) any other matter that reflects adversely on the person's fitness to have the particular overseas investment.
8. All relevant matters must be weighted up before making a decision that an individual is of good character. If the decision-maker wishes to rely on a matter to which the applicant has not had an opportunity to respond, then such an opportunity to respond needs to be given to the applicant.
9. How much weight should be given to a particular matter depends on a number of factors, including how closely linked the particular matter is with the investment being made. While submissions on weighting given by the relevant overseas person or individual with control may be considered, the ultimate decision as to the weighting to be given to relevant matters is for the decision-makers.

10. Matters which might be relevant include:
 - (a) Credible allegations of offending or contraventions of the law (assessing whether the allegation is sufficiently linked to an individual with control or relevant overseas person);
 - (b) Investigations, prosecutions or other enforcement action by regulatory or professional bodies;
 - (c) Track record in New Zealand.
11. Matters which are unlikely to be relevant include:
 - (a) Adverse information that does not relate to an individual with control (for example, offences or contraventions by a relevant overseas person which occurred before the particular individual became involved with the relevant overseas person);
 - (b) Where the decision maker is satisfied that allegations about a relevant overseas person or individual with control have been fully investigated by the relevant regulatory or other authority and the person or individual has been cleared of any wrongdoing;
 - (c) Adverse information that does not impact on the character of a relevant overseas person or individual with control.
12. The good character test is applicable to individuals, not entities such as body corporates. However, where the investment is to be carried out by a body corporate, the character of the relevant individuals who control the body corporate will need to be considered. Where an offence or contravention is committed by a person to which an individual had a 25% or more ownership or control interest, this is a mandatory consideration. Where the individual's interest in the person is less than this, there generally must be other grounds to reasonably infer participation by the individual in the alleged wrongdoing.
13. The onus is on the applicants to satisfy the decision maker that all the individuals with control are of good character.
14. If the decision maker has doubts about the character of an individual with control which result in it not being satisfied that the test for good character has been met, then the application for consent must be declined.

Good character matters

15. As a result of the Applicant's disclosures and our open source background checks on the individuals with control, we are aware that a number of European competition regulators are investigating (or have fined) the Applicant for alleged excessive pricing or anticompetitive conduct relating to cancer medicines and other medical supplies.
16. Also, the name of an entity associated with the Applicant (Aspen Global Incorporated) appears on the offshore leaks database of the ICIJ.

Our analysis of the good character allegations

17. We have carefully reviewed the information we have obtained from our open source background checks as well as the Applicant's disclosures, and we advise that:
 - (a) Stephen Saad, the Chief Executive Officer and an Executive Director of the Applicant, approved the pricing of the relevant pharmaceutical products however this was done in reliance on professional advice and guidance provided by independent consultants.

The investigations by the European competition regulators relate to the pricing of pharmaceutical products in European countries, which is a different activity to the investment (acquiring a milk powder manufacturing and exporting business). Also, as the investigations are still in progress it may not be appropriate at this stage to draw any adverse inferences in terms of good character. As a result, on balance we consider that Mr Saad is a person of good character.

The remaining directors of the Applicant were not involved in the product pricing decisions, and as a result we consider that the allegations are not relevant to the character of the remaining directors.

- (b) The ICIJ database notes that there are legitimate uses for offshore companies and trusts. Appearance in the database should not be taken to imply that any persons, companies or other entities in the database have broken the law or otherwise acted improperly. We have no evidence that Aspen Global Incorporated has acted improperly.

Conclusion

- 22. Having regard to the above, we are satisfied that the statutory declaration provided by Michael Guy Attridge can be relied on. Having regard for the statutory declaration and the matters above, we are satisfied that the individuals with control are of good character. We note that the conditions proposed in **Appendix 1** include a requirement that the Individuals with Control (as defined in the conditions) continue to be of good character.

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