



Australian Government

Takeovers Panel

**Reasons for Decision
Yowie Group Ltd 01 & 02
[2019] ATP 10**

Catchwords:

Declaration – orders – divestment of shares – deemed relevant interests – contravention of s606 – disclosure – substantial holder notice – acquisition of shares – downstream acquisition exemption

Corporations Act 2001 (Cth), sections 606, 607, 608, 611 item 14, 657A, 671B, 912A and 1043A

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

Attorney-General (Cth) v Alinta Ltd (2008) 242 ALR 1

Corporations Bill 1988 (Cth) Explanatory Memorandum

GN 4 – Remedies General

Anomalies in the takeovers provisions of the Corporations Law (March 1994)

The President’s Club Limited 02 [2016] ATP 1, oOh!Media Group Limited [2011] ATP 9, Australian Pipeline Trust 01R [2006] ATP 29, Taipan Resources NL 09 [2001] ATP 4

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

INTRODUCTION

1. The Panel, Robin Bishop (sitting President), Tara Page and Neil Pathak made a declaration of unacceptable circumstances in relation to the affairs of Yowie Group Ltd. The two applications (heard together) concerned contraventions of s606¹ and the substantial holder provisions by Wilson Asset Management (International) Pty Limited (**WAMI**) and contraventions of s606 by Keybridge Capital Limited. The Panel declared the circumstances unacceptable as they constituted or gave rise to contraventions of s606 and, in the case of WAMI, s671B. The Panel made orders, which included vesting shares in ASIC for sale and requiring corrective disclosure.

2. In these reasons, the following definitions apply.

Aurora	Aurora Funds Management Limited
GN 4	Guidance Note 4 – Remedies General
HHY	HHY Fund ²
Item 14	item 14 of s611
Keybridge	Keybridge Capital Limited

¹ Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth), and all terms used in Chapters 6 to 6C have the meaning given in the relevant Chapter (as modified by ASIC)

² References to submissions made by HHY are to submissions made by Aurora on behalf of HHY, as Aurora is the responsible entity of HHY

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Keybridge Acquisition	has the meaning given in paragraph 15 of these reasons
Keybridge Contravention Shares	1,054,148 ordinary shares in the issued capital of Yowie acquired by Keybridge as a result of the Keybridge Acquisition
WAM Group	Wilson Asset Management Group
WAMI	Wilson Asset Management (International) Pty Limited
WAMI Acquisition	has the meaning given in paragraph 12 of these reasons
WAMI Contravention Shares	27,073,809 ordinary shares in the issued capital of Yowie acquired by WAMI as a result of the WAMI Acquisition
Yowie	Yowie Group Ltd

FACTS

3. Yowie (ASX: YOW) and Keybridge (ASX: KBC) are ASX listed companies.
4. HHY (ASX: HHY) is an ASX listed registered managed investment scheme.
5. On 19 January 2018, Keybridge lodged a Notice of change of interests of substantial holder, disclosing that Keybridge had a relevant interest and voting power in 30.89% of HHY units.
6. On 19 February 2018, Aurora in its capacity as responsible entity of HHY, lodged a Notice of change of interests of substantial holder on behalf of HHY, disclosing that HHY had a relevant interest and voting power in 12.32% of Yowie shares.³
7. On 14 May 2018, the WAM Group lodged a Notice of change of interests of substantial holder, disclosing that various entities in the WAM Group (including WAMI) had a relevant interest and voting power in 20.95% of Keybridge shares.
8. On 29 January 2019, Keybridge lodged a Notice of change of interests of substantial holder, disclosing that Keybridge had a relevant interest and voting power in 18.055% of Yowie shares (comprising 5.873% held directly by Keybridge and 12.182% held directly by HHY).
9. On 6 March 2019, the WAM Group lodged a Notice of change of interests of substantial holder, disclosing that various entities in the WAM Group including WAMI had a relevant interest and voting power in 30.98% of HHY units.
10. As at 12 March 2019, WAMI had a direct holding of 1.5% of Yowie shares.
11. On 13 March 2019, Keybridge announced to ASX its intention to make an off-market takeover bid for all of the fully paid shares in Yowie.

³ Held by Aurora in its capacity as responsible entity of HHY

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12. Between 13 and 27 March 2019, WAMI acquired 27,073,809 Yowie shares (the **WAMI Acquisition**).
13. On 22 March 2019, WAMI lodged a Notice of initial substantial holder, disclosing that it had a relevant interest and voting power in 13.00% of Yowie shares (comprising solely of Yowie shares directly held by WAMI).
14. On 27 March 2019, Keybridge made an application seeking a declaration of unacceptable circumstances in relation to the WAMI Acquisition.
15. Between 2 April and 10 April 2019, during the course of proceedings on Keybridge's application, Keybridge acquired 1,054,148 Yowie shares (the **Keybridge Acquisition**).
16. On 11 April 2019, Yowie made an application seeking a declaration of unacceptable circumstances in relation to the Keybridge Acquisition.
17. The relevant shareholdings⁴ as at 11 April 2019 are shown in the table below.

	Keybridge's holdings	HHY's holdings	WAM Group's holdings
Keybridge	-	-	20.95%
HHY	30.89%	-	30.98%
Yowie	6.35%	12.18%	13.98%

KEYBRIDGE'S APPLICATION

Declaration sought

18. By application dated 27 March 2019, Keybridge sought a declaration of unacceptable circumstances. Keybridge submitted (among other things) that:
 - (a) at all relevant times, WAMI had voting power above 20% in Keybridge and therefore had the same relevant interest in Yowie shares as held by Keybridge pursuant to s608(3)(a)⁵
 - (b) at all relevant times, WAMI had voting power above 20% in HHY and therefore had the same relevant interest in Yowie shares as held by HHY pursuant to s608(3)(a)
 - (c) the WAMI Acquisition caused WAMI's voting power in Yowie to increase from 20% or below to more than 20% in contravention of s606(1)(c)(i) and
 - (d) WAMI had not lodged a substantial holder notice disclosing its relevant interest in Yowie shares (including its deemed relevant interest in Yowie shares held by Keybridge and HHY) in contravention of s671B.

⁴ Ignoring the operation of s608(3)

⁵ And/or pursuant to sections 608(1)(b) and (c) because, as investment manager of HHY, Keybridge had a power to exercise or control the exercise of a right to vote and to dispose or control the exercise of a power of disposal of Yowie shares held by HHY

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19. Keybridge submitted that the effects of the circumstances were unacceptable because they constituted or gave rise to contraventions of s606 and the substantial holder provisions by WAMI.

Interim orders sought

20. Keybridge sought interim orders to prevent the disposal of, or exercise of any rights attaching to, the WAMI Acquisition shares pending final determination of the Panel proceedings.
21. On 28 March 2019, WAMI gave an undertaking not to dispose of the shares it held in Yowie without first giving the Panel Executive 48 hours' notice. Given the undertaking, we decided not to make an interim order.

Final orders sought

22. Keybridge sought final orders, including vesting the WAMI Acquisition shares in ASIC for sale.

YOWIE'S APPLICATION

Declaration sought

23. By application dated 11 April 2019, Yowie sought a declaration of unacceptable circumstances. Yowie submitted (among other things) that:
 - (a) the Keybridge Acquisition caused WAMI's voting power in Yowie to increase from a starting point that was above 20% and below 90% in contravention of s606(1)(c)(ii) and
 - (b) at the time of the Keybridge Acquisition, Keybridge was in possession of inside information in contravention of s1043A.
24. Yowie submitted that the effects of the circumstances were unacceptable because (among other things) they constituted or gave rise to contraventions of s606 and s1043A by Keybridge.

Interim orders sought

25. Yowie sought interim orders to prevent Keybridge from (in effect) voting, selling or otherwise dealing with the Keybridge Acquisition shares.
26. On 12 April 2019, Keybridge gave an undertaking not to dispose of the Keybridge Acquisition shares without first giving the Panel Executive 48 hours' notice. Given the undertaking, we decided not to make an interim order.

Final orders sought

27. Yowie sought final orders including vesting the Keybridge Acquisition shares in ASIC for sale.

DISCUSSION

28. We have considered all the material, but address specifically only that part of the material we consider necessary to explain our reasoning.

Decision to conduct proceedings

29. We did not receive any preliminary submissions in relation to Keybridge's application. Keybridge's application disclosed what appeared to be a clear contravention of s606. We decided to conduct proceedings.
30. We received Yowie's application after we had communicated to the parties that we were minded to make a declaration in relation to Keybridge's application. We received a preliminary submission from Keybridge in response to Yowie's application. Keybridge submitted (among other things) that the Keybridge Acquisition did not contravene s606 because:
- (a) the exemption in Item 14 applied and
 - (b) Keybridge should not be penalised by losing the ability to purchase additional Yowie shares up to the threshold in s606 because of WAMI's prior contravention of s606.
31. It was not clear to us at the time of receiving the preliminary submission that Item 14 applied to the Keybridge Acquisition and so we decided to conduct proceedings in relation to Yowie's application. We decided to deal with Yowie's application together with Keybridge's application pursuant to Regulation 16(1)(a) of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

WAMI ACQUISITION

Discussion

32. On the basis of the material before us, we are satisfied that:
- (a) By 12 March 2019, WAMI had a relevant interest and voting power in 19.73% of Yowie shares (which it had not disclosed in accordance with the substantial holder provisions in s671B) comprising:
 - (i) 1.50% by operation of s608(1) through WAMI's direct holding of Yowie shares and
 - (ii) 18.23% by operation of s608(3)(a) through WAMI's relevant interests in Keybridge⁶ and HHY⁷.
 - (b) As a result of acquiring the WAMI Acquisition shares, by 27 March 2019 WAMI's voting power in Yowie increased from 19.73% to 32.17%.
 - (c) None of the exemptions in s611 applied to the acquisition of the WAMI Acquisition shares.
33. Accordingly, we are satisfied that WAMI had contravened s606 by acquiring the WAMI Acquisition shares.

⁶ And, in relation to Keybridge, through sections 608(1)(b) and (c) as Keybridge is the investment manager of HHY

⁷ Held by Aurora in its capacity as responsible entity of HHY

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34. Among other things, we sought submissions from the parties and ASIC as to whether the WAMI Acquisition, if it contravened s606, constituted unacceptable circumstances.
35. Keybridge submitted that s606 is “the cornerstone provision upon which takeover regulation in Australia turns”⁸ and that:
- “...the structure of s657A(2) establishes that every contravention of Chapter 6, 6A, 6B or 6C is per se unacceptable. Whereas paragraphs 657A(2)(a) and (b) refer either to the effect of the relevant circumstances or their likely effect on certain activities or on their being otherwise unacceptable by reference to their effect and the purposes set out in s602, paragraph 657A(2)(c) makes circumstances unacceptable ‘because’ they constituted, constitute or will likely constitute, or they gave rise to, give rise to or will likely give rise to, a contravention of the specified legislation. Accordingly, Parliament has specifically provided that if circumstances involve a contravention then they are unacceptable.”*
36. Keybridge submitted that any contravention of s606 should be regarded as unacceptable because:
- (a) there are well-known and generous exemptions provided in s611 which cover likely circumstances of what would otherwise be an “acceptable” contravention
 - (b) if there were proper reasons why a further exemption would be appropriate in particular circumstances, the relevant person could apply to ASIC for relief under s655A and
 - (c) the general principles underlying the contravention are well-established and common knowledge in the Australian commercial community.
37. Alternatively, Keybridge submitted that the Panel should at least be strongly predisposed to finding unacceptability in circumstances of contravention in the absence of compelling reasons to the contrary, none of which applied to the WAMI Acquisition.
38. Among other things, HHY made similar submissions to Keybridge, stating that it is necessary that unacceptable circumstances follow WAMI’s contravention of s606 as it would:
- “create a highly undesirable market precedent to introduce subjectivity into the terms of s608(3)(a) of the Corporations Act in a circumstance where the section does not concern itself with the intent or circumstance of the party breaching s606 as a consequence of applying s608(3)(a).”*
39. WAMI submitted that its contravention of s606 did not constitute unacceptable circumstances because the contravention was inadvertent and WAMI exerted no influence or control in relation to its holdings in HHY and Keybridge.

⁸ Citing *Taipan Resources NL 09* [2001] ATP 4 at [38] – [40]; *oOh!Media Group Limited* [2011] ATP 9 at [70] – [71]; *The President’s Club Limited 02* [2016] ATP 1 at [178]

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40. WAMI submitted (among other things) that the following information demonstrated the inadvertence of its contravention:
- (a) WAMI's primary activity is to act as investment manager of the listed entities within the WAM Group and its primary purpose is not to purchase shares in listed entities in its own name (having completed such transactions and acquisitions on only a small number of occasions over the last 20 years)
 - (b) to date, all investments made directly in the name of WAMI have been small in size, with no historical instances where WAMI has had to consider the relevant application of s606 in relation to its direct investments and
 - (c) while WAMI has policies and procedures in place to help ensure the WAM Group's ongoing compliance with applicable laws and regulations (including Chapter 6), WAMI had no prior experience of the circumstances relevant to the Panel's proceedings.
41. WAMI submitted (among other things) that, despite holding over 20% in both Keybridge and HHY, it lacked the requisite ability to affect the direction or control of either entity. WAMI submitted that its lack of control was evidenced by historical events, including:
- (a) the failure of entities within the WAM Group to pass unitholder resolutions to wind up HHY in 2016 and 2018
 - (b) the disallowance of votes cast by the custodian for the WAM Group members at Keybridge's AGM held on 22 November 2018 for procedural irregularities and
 - (c) the fact that WAMI had no board representation on either Keybridge or HHY.
42. Yowie made similar submissions to WAMI, referring to WAMI's attempts to wind up HHY and WAMI's opposition to a resolution requisitioned by HHY (and supported by Keybridge) seeking to remove a director of Yowie as examples demonstrating WAMI's lack of influence or control over Keybridge and HHY.
43. In addition, Yowie submitted (among other things) that WAMI's contravention was not unacceptable because:
- (a) a technical breach is insufficient for a declaration of unacceptable circumstances
 - (b) WAMI would have had reasonable prospects of obtaining relief to enable it to acquire the WAMI Acquisition shares without contravening s606 if WAMI had approached ASIC prior to the WAMI Acquisition and convinced ASIC it did not have control or influence over Keybridge or HHY
 - (c) although WAMI's shareholding in Yowie may be inconvenient to Keybridge if Keybridge was "genuinely" interested in compulsory acquisition (which

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Yowie submitted it was not⁹), this of itself does not constitute unacceptable circumstances and

- (d) a prohibition on WAMI obtaining a shareholding in Yowie that could lead to a takeover bid would be inconsistent with the Eggleston principles and detrimental to a competitive market. Indeed, Yowie submitted that Keybridge's reliance on the s608(3) deeming provision to prevent a competitor from building a pre-bid stake would itself appear to be "*illogical, unacceptable and certainly something that should not be endorsed*".

44. ASIC submitted (among other things) that a declaration of unacceptable circumstances should extend to any direct acquisition of Yowie shares by WAMI that increased WAMI's voting power from 20% or below to more than 20% in circumstances where WAMI was not able to rely on an exemption in s611.
45. ASIC also noted that WAMI is the holder of an Australian Financial Services Licence, which imports an additional obligation to comply with (and take steps to ensure its representatives comply with) the takeover and substantial holder provisions in s606 and s671B.¹⁰
46. We do not consider that s657A(2)(c) operates as to provide automatically that any contravention or a likely contravention of Chapter 6, 6A, 6B or 6C is *per se* unacceptable. Such an approach would be inconsistent with the:
 - (a) language in s657A¹¹ and
 - (b) Panel's policy set out in GN 4 which, by way of example, provides that "*an honest and accidental contravention of s606 may not be unacceptable if it has not had any relevant adverse effect*".¹²
47. The Panel may be more inclined to find a contravention of s606 unacceptable, as that section is recognised as one of the cornerstone provisions of Chapter 6.¹³
48. Here we are satisfied that the acquisition of the WAMI Acquisition shares contravened s606 in circumstances where:
 - (a) no exemption in s611 applied
 - (b) WAMI had not given disclosure of its relevant interest and voting power in Yowie shares held by Keybridge and HHY (in contravention of the substantial holder provisions)
 - (c) the acquisitions commenced on the date that Keybridge announced its intention to make a bid for Yowie (noting that the size of the acquisitions

⁹ Citing the structure of Keybridge's bid for Yowie (specifically the absence of a minimum acceptance condition and the consideration adjustment mechanism)

¹⁰ Citing sections 912A(1)(c) and (ca)

¹¹ The use of the term "may" in s657A equally confers a discretionary power on the Panel to *not* declare circumstances unacceptable. This discretionary power expressly extends to circumstances "whether or not" they constitute a contravention of the Corporations Act. See also *Attorney-General (Cth) v Alinta Ltd* (2008) 242 ALR 1, in particular at [43] and [81] - [83]

¹² See footnote 28 of GN 4 and the authorities cited therein

¹³ *Taipan Resources NL 09* [2001] ATP 4 at [38]

could potentially provide WAMI with a “blocking stake” to prevent Keybridge from reaching the compulsory acquisition threshold) and

- (d) the material did not demonstrate that WAMI’s contravention of s606 was “inadvertent”, merely technical or otherwise of a nature that was not unacceptable in accordance with the Panel’s policy in GN 4 (noting that WAMI is the holder of an Australian Financial Services Licence).

49. We are satisfied that, as with the takeovers threshold in s606, the operation of the s608(3) deeming provision is well-established and generally well-understood by market participants. Having regard to all of the circumstances discussed in paragraph 48, we do not agree with Yowie’s submission that allowing Keybridge to rely on the s608(3) deeming provision to prevent a potential competitor from building a pre-bid stake is “*illogical, unacceptable and certainly something that should not be endorsed*”. We also do not agree that ASIC would have likely given relief in this situation. ASIC’s submissions in effect confirm that such relief was not likely.

Decision

50. It appears to us that the circumstances of the WAMI Acquisition are unacceptable because they constituted or gave rise to contraventions of s606 and s671B and on that basis we did not need to consider any of the other grounds for a declaration in s657A(2).

KEYBRIDGE ACQUISITION

Discussion

51. On the basis of the material before us, we are satisfied that:

- (a) By 27 March 2019, WAMI’s voting power in Yowie was 32.17%.¹⁴
- (b) As a result of the Keybridge Acquisition, by 10 April 2019 WAMI’s voting power in Yowie increased from 32.17% to 32.65%.¹⁵

52. Among other things, we sought submissions from the parties and ASIC as to:

- (a) whether the Keybridge Acquisition contravened s606 and
- (b) if the Keybridge Acquisition contravened s606, whether the contravention constituted “unacceptable” circumstances.

53. Yowie submitted (among other things) that:

- (a) no exemption in s611 applied to the acquisition of the Keybridge Acquisition shares and
- (b) as a corporate authorised representative of a holder of an Australian Financial Services Licence, Keybridge had made the Keybridge Acquisition while having full knowledge of:
 - (i) the relevant circumstances

¹⁴ See paragraph 32

¹⁵ Through the operation of s608(3)(a) in relation to Yowie shares held by Keybridge and HHY

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- (ii) the operation of s608(3) and
- (iii) the impact of s608(3) on WAMI's voting power in Yowie.

54. WAMI submitted that it was clear to WAMI that *“the Yowie Shares acquired by Keybridge following the commencement of the Panel proceedings is a deliberate contravention of s606”*.

55. Keybridge submitted that the Keybridge Acquisition did not contravene s606 because:

- (a) the acquisition was exempt under Item 14 (as discussed in paragraphs 56 to 57 below) and/or
- (b) of WAMI's prior contravention of s606 by acquiring the WAMI Acquisition shares (as discussed in paragraphs 58 to 61 below).

56. Item 14 provides the following exemption from the prohibition in s606(1):

An acquisition that results from another acquisition of relevant interests in voting shares in a body corporate included in the official list of:

- (a) *a prescribed financial market; or*
- (b) *a foreign body conducting a financial market that is a body approved in writing by ASIC for the purposes of this item.*

57. Keybridge submitted that:

“...where every relevant interest acquired is the result of an acquisition of shares in a listed company, [Item 14] exempts that acquisition from s606.”

“Put simply the purchase by Keybridge of [the Keybridge Acquisition shares] in Yowie (a listed company) only confers a relevant interest on WAMI by reason of WAMI's previous acquisitions of relevant interests in HHY units and Keybridge shares, which are both listed entities. Accordingly, all conditions for the application of [Item 14] are satisfied and the relevant acquisitions do not contravene s606.

“This is so whether the acquisition referred to first in [Item 14] is the acquisition of relevant interests in [the Keybridge Acquisition shares] by Keybridge by its purchase of the [Keybridge Acquisition shares] or the acquisition of relevant interests in the [Keybridge Acquisition shares] by WAMI as a consequence. All stages of the relevant circumstances arise by virtue of acquisitions by the relevant parties of relevant interests in listed securities.”

“...the exception in [Item 14] will only provide an “upstream” effect in respect of a “downstream” acquisition of relevant interests in circumstances where the “middle” entity and the “upstream” entity are not associates. It is, therefore, almost entirely the case that it will only operate in the unusual situation where the “upstream” entity obtains voting power in the securities acquired by the “middle” entity by reason of s608(3)(a) and no other provision.”

58. In addition, or in the alternative, Keybridge submitted that it is *“a fundamental element of the rule of law that those governed by the law are entitled to treat contraventions of the law by others as not impinging on their own rights and entitlements”* and that *“[i]n the case of public legislation, such as the Corporations Act, this also has the consequence*

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that situations that only arise by virtue of a contravention of the Act may be properly ignored by others in determining what conduct is permitted by those others.”

59. Accordingly, Keybridge submitted that, given WAMI’s contraventions of s606 and s671B, Keybridge was entitled to:
- (a) disregard the increase in the voting power of WAMI and the WAM Group in Yowie caused by the WAMI Acquisition and
 - (b) treat WAMI and the WAM Group as having no voting power more than the voting power attributable to the relevant interests in Yowie shares that Keybridge and HHY have.
60. Disregarding WAMI’s increase in voting power due to the WAMI Acquisition would have the effect that the acquisition of the Keybridge Acquisition shares did not cause WAMI’s voting power in Yowie to increase from 20% or below to more than 20% in contravention of s606.
61. Keybridge submitted that to *“reach any other view involves in effect the Panel condoning a contravention and giving effect to that contravention which is not necessary, and which is not contemplated by s607.”*¹⁶
62. HHY made a similar submission to Keybridge, submitting (among other things) that if Item 14 does not apply, Keybridge’s contravention of s606 *“is solely attributable to the breach committed by WAMI”* acquiring the WAMI Acquisition shares.
63. HHY submitted that Keybridge was entitled to rely on the substantial holder notice disclosures made by WAMI and that, while it was clear Keybridge had serious concerns in relation to the accuracy of those disclosures, Keybridge *“couldn’t be taken to know for sure the true nature and arrangement of associations and relevant interests until such disclosure occurs (or the Panel so orders)”*. Accordingly, it would be unreasonably burdensome to require a person to look beyond substantial holder disclosures to avoid contravening s606.
64. ASIC submitted that the exemption in Item 14 did not apply to the Keybridge Acquisition to exempt it from the operation of s606(1), explaining that:
- “Item 14 exempts an acquisition of a relevant interest by a person ‘that results from another acquisition’. However Keybridge’s acquisition of shares in Yowie resulted in Keybridge acquiring a relevant interest in Yowie shares directly. It did not result in Keybridge acquiring a relevant interest in another entity that s606 would have otherwise prohibited. The fact that WAMI also acquired a relevant interest as a result of the Keybridge Acquisition (which s606(1) does not prohibit as the relevant transaction triggering the acquisition was not entered into by or on behalf of WAMI) does not alter Keybridge’s direct acquisition of a relevant interest in Yowie shares to which s606(1) applies.”*
65. ASIC submitted that the acquisition of the Keybridge Acquisition shares was not exempted under Item 14, notwithstanding that *“the relevant increase in ‘voting power’ for the purpose of s606(1)(c) arises due to WAMI’s acquisition of a relevant interest”*.

¹⁶ Section 607 provides that a transaction is not invalid merely because it involves a contravention of s606

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ASIC submitted this position is consistent with the purpose underlying Item 14 to provide an exemption for downstream acquisitions that would otherwise prevent investment in listed securities, citing *Australian Pipeline Trust 01R* [2006] ATP 29 at [109]:

*“... the Panel considers that Item 14 was introduced in its current form to ensure that the market for control of the Upstream Company securities is efficient and that pre-existing holdings in the Downstream Company should not inhibit the efficient and competitive market for the Upstream Company or be used to make the Upstream Company takeover proof. The Panel considers that Item 14 was not introduced to facilitate acquisition of control of the Downstream Company.”*¹⁷

66. ASIC submitted that Keybridge’s interpretation that Item 14 extends to “upstream” acquisitions and/or acquisitions where the resulting acquisition is not contemporaneous with the original acquisition is inconsistent with both the operation and purpose of the exemption.
67. In addition, ASIC submitted that the Keybridge Acquisition related to the market for control of securities, or control of, the downstream company, Yowie, and had no bearing on control of the upstream company, Keybridge.
68. We agree with ASIC that Item 14 does not apply to the acquisition of the Keybridge Acquisition shares and to otherwise extend it to that acquisition would be inconsistent with both the operation and purpose of the exemption.
69. We are satisfied that the acquisition of the Keybridge Acquisition shares contravened s606 in circumstances where:
 - (a) no exemption in s611 applied (noting that while Keybridge may have held a contrary interpretation of Item 14, Keybridge clearly understood the operation of s606 having made the application in relation to the WAMI Acquisition)
 - (b) Keybridge had serious concerns in relation to the adequacy of WAMI’s substantial holder disclosure (as evidenced by its application in relation to the WAMI Acquisition) and
 - (c) the acquisitions were made during the course of the Panel proceedings in relation to the WAMI Acquisition (an application pursuant to which Keybridge sought orders for the vesting of Yowie shares that Keybridge submitted WAMI had acquired in contravention of s606).
70. We are not satisfied that, as submitted by HHY, our findings will require persons to look beyond substantial holder notice disclosures to avoid contravening s606 in circumstances that may be unacceptable.

¹⁷ See also *Anomalies in the takeovers provisions of the Corporations Law* (March 1994) (where the Legal Committee of CASAC stated at pg 28 that s629 (the predecessor to Item 14) exempted “downstream acquisitions, that is, acquisitions of shares in one company (the downstream company) that result from the acquisition of shares in another company (the upstream company)”) and paragraph 1965 of the *Corporations Bill 1988* (Cth) Explanatory Memorandum.

71. Given our findings discussed in paragraph 69 above, we do not need to decide whether the Keybridge Acquisition was unacceptable by reason of Keybridge being in possession of inside information at the time of the Keybridge Acquisition (in contravention of s1043A). However, without deciding the issue, we are concerned that (in light of all of the circumstances) Keybridge made on market purchases of Yowie shares during the course of the proceedings. While this is a matter for ASIC to pursue here, in an appropriate case we may refer such conduct to ASIC for investigation.

Decision

72. It appears to us that the circumstances of the Keybridge Acquisition are unacceptable because they constituted or gave rise to contraventions of s606 and on that basis we did not need to consider any of the other grounds for making a declaration in s657A(2).

DECLARATION

73. We decided not to accept an undertaking offered by WAMI (the terms of which are discussed in paragraph 78) in lieu of making a declaration in relation to the WAMI Acquisition on the basis that a declaration was more appropriate given the circumstances and our decisions in paragraphs 50 (in relation to the WAMI Acquisition) and 72 (in relation to the Keybridge Acquisition). We made the declaration set out in Annexure A and consider that it is not against the public interest to do so. We had regard to the matters in s657A(3).
74. For the reasons discussed in paragraphs 97 to 102, we decided not to make a declaration in relation to other alleged historical contraventions of the substantial holder provisions.

ORDERS

75. Following the declaration, we made the final orders set out in Annexure B.
76. We were not asked to, and did not, make any costs orders.
77. Under s657D the Panel's power to make orders is very wide. The Panel is empowered to make 'any order'¹⁸ if 4 tests are met:
- (a) it has made a declaration under s657A. This was done on 26 April 2019.
 - (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. For the reasons below, we are satisfied that our orders do not unfairly prejudice any person.
 - (c) it gives any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. This was done on 11 April 2019, 15 April 2019 and 18 April 2019.

¹⁸ Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

- (d) it considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons. The orders do this by:
- (i) vesting Yowie shares held by WAMI acquired in contravention of s606 with ASIC
 - (ii) vesting Yowie shares held by Keybridge acquired in contravention of s606 with ASIC and
 - (iii) requiring WAMI and other related persons¹⁹ to give corrective notice of their respective substantial holdings in Yowie.

Divestment orders – WAMI Contravention Shares

78. WAMI offered an undertaking to:

- (a) sell shares it held in Keybridge on market to reduce its holding in Keybridge to below 20% and
- (b) sell sufficient shares held in Yowie on market to reduce its relevant interest in Yowie shares (including through its unitholding in HHY) to below 20%.

79. We were not satisfied that the undertaking offered by WAMI adequately addressed the circumstances and, given the circumstances, we do not consider it appropriate for WAMI to select which transactions it desires to unwind, and the extent of that unwinding to reverse the contravention. Although WAMI may not have contravened s606 had it taken the steps offered in its undertaking prior to acquiring the WAMI Contravention Shares, we are not satisfied that the unacceptable circumstances would be addressed by allowing WAMI to apply those steps retrospectively (as contemplated by the undertaking).

80. We sought submissions in relation to the terms of an order vesting the WAMI Contravention Shares with ASIC, including whether WAMI should be allowed to participate in the sale process as a purchaser if WAMI first reduced its voting power in Keybridge to below 20%.

81. WAMI submitted that any sale of the WAMI Contravention Shares by ASIC is likely to cause unnecessary pressure to the Yowie share price, which will stifle any competition in relation to Yowie shares, and assist Keybridge in achieving its takeover bid attempt to the detriment of other Yowie shareholders.

82. In addition, WAMI submitted that WAMI, or another company in the WAM Group, should be allowed to participate in the sale process because neither WAMI nor any other member of the WAM Group controls or exerts any influence over Yowie or Keybridge.

83. Yowie also submitted that WAMI should be able to participate in the sale process and that precluding WAMI from acquiring any of the vested shares on market may be unfairly prejudicial to WAMI as it may preclude WAMI from purchasing any Yowie shares on market (so as to ensure it does not breach the Panel's orders).

¹⁹ Including EDWVIC Pty Ltd and Mr Geoffrey Wilson

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84. Keybridge submitted that WAMI should not be able to participate in the sale process, submitting that the disposal of the vested shares is designed to restore the market (which it submitted had been trading in a misinformed, uncompetitive and inefficient fashion by reason of WAMI's contravention) as far as practicable and to re-establish a level playing field. Keybridge submitted that "*[i]t is not consistent with that objective to allow the party whose conduct has necessitated the making of these orders potentially to participate in the conduct that the orders envisage as remedying the unacceptability and restoring the market*".
85. HHY also submitted that WAMI should not be able to participate in the sale process, submitting that it would be more appropriate to restore the status quo before WAMI contravened s606 and that, because WAMI would receive the proceeds of sale, it would have no disadvantage in paying a significant premium to ensure it acquires the divested Yowie shares, without any financial disadvantage to itself.
86. ASIC supported the divestment of the WAMI Contravention Shares and opposed allowing WAMI to participate in the sale process, submitting that:
- "It is a standard term of orders for the vesting and sale by ASIC of securities that persons to whom proceeds are to be remitted are not entitled to purchase securities from the Appointed Seller. This is because allowing a person in that position to do so would potentially result in a significant distortion of the sale process and defeat its purpose."*
87. Further, ASIC submitted that the starting point for a remedy in circumstances where a party has entered into a transaction prohibited by s606 is to unwind that transaction, and that the Panel should not deviate from this approach merely on the basis that the person could have entered into a different series of transactions or caused different circumstances to exist such that it would not have resulted in a contravention.
88. We are satisfied that in the circumstances the orders that ASIC divest all of the WAMI Contravention Shares and prohibiting WAMI from participating in the sale process²⁰ are an appropriate remedy to the unacceptable circumstances, in particular to protect the rights and interests of Yowie shareholders who were unaware of WAMI's deemed relevant interest in Yowie. We are not satisfied that the orders would unfairly prejudice any person.

Divestment orders – Keybridge Contravention Shares

89. We sought submissions in relation to the terms of an order vesting the Keybridge Contravention Shares with ASIC, including whether the Keybridge Acquisition should be incorporated into the Panel's vesting orders in relation to the WAMI Contravention Shares.
90. Yowie and WAMI both submitted that the Panel's orders in relation to vesting the WAMI Contravention Shares and the Keybridge Contravention Shares should be consistent. In addition, Yowie submitted that it would be more efficient and cost

²⁰ For the same reasons specified in paragraph 79

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effective for there to be only one sales process and, for similar reasons specified in paragraph 83, that Keybridge should not be precluded from purchasing any of the sale shares on market (to the extent not precluded by s606).

91. ASIC agreed that, should the Panel be minded to find that unacceptable circumstances exist in relation to the Keybridge Acquisition (which we did), it would be appropriate for the Panel to deal with that acquisition at the same time as dealing with the WAMI Acquisition as the circumstances both relate to the acquisition of securities or control in Yowie, which may impact on investors or potential investors in Yowie.
92. ASIC submitted (among other things) that the Panel should either prevent both WAMI and Keybridge from purchasing any of the Yowie shares vested in ASIC or allow Keybridge to participate in the sale process (given the majority of the proceeds under the combined sale process were to be remitted to WAMI).
93. Neither Keybridge nor HHY made submissions in relation to the terms of the proposed orders in relation to the divestment of the Keybridge Contravention Shares.
94. We are satisfied the orders that ASIC divest all of the Keybridge Contravention Shares and prohibiting Keybridge from participating in the sale process as a purchaser are an appropriate remedy given the circumstances.
95. We are also satisfied that it is appropriate for the terms of the orders vesting the WAMI Contravention Shares and Keybridge Contravention Shares to be consistent, save for applying a six month standstill on the ability for Keybridge or its associates to rely on the exemption in s611 item 9.²¹
96. We are not satisfied that the orders would unfairly prejudice any person.

Disclosure

97. ASIC submitted that the declaration of unacceptable circumstances should extend to any Yowie shares acquired directly by WAMI where the acquisition occurred at a time when WAMI had failed to provide accurate disclosure of the commencement of its substantial holding in Yowie or movements of at least 1% of its substantial holding, in accordance with s671B. Accordingly, this would extend our declaration to WAMI's direct holding in 1.5% of Yowie shares which WAMI acquired through a series of transactions between 21 March 2018 and 20 September 2018.
98. ASIC submitted that, consistent with the Panel's declaration of unacceptable circumstances in relation to the WAMI Acquisition, *"where there are breaches of s606 or s671B of the Act in the context of earlier acquisitions, the effect of such circumstances is similarly unacceptable having regard to the purposes of Chapter 6 expressed in s602"*.

²¹ Given the limited time during which the market was uninformed of Keybridge's contravention of s606, we were not satisfied that this order was appropriate in the circumstances

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99. WAMI confirmed that it *“intends to procure that all necessary substantial holding notices required to address any unacceptable circumstances identified by the Panel are filed”*.
100. We consider that in the circumstances it is appropriate to make orders requiring WAMI and other related persons²² to give corrective notice of their respective substantial holdings in Yowie. We are not satisfied that the order would unfairly prejudice any person (particularly in light of WAMI’s confirmation in paragraph 99).
101. We are not satisfied that we should go as far as ASIC proposed and divest WAMI’s direct holding in 1.5% of Yowie shares which it acquired before the WAMI Acquisition given the small size of the holding, the fact that the acquisitions were made over a significant period and because the last acquisition had occurred in September 2018.
102. Throughout the proceedings, the parties alleged that there were a number of additional contraventions of the substantial holder provisions by the parties and/or their associates. Save for the alleged contraventions in relation to WAMI’s deemed relevant interest in Yowie (which are dealt with by these reasons), we were not satisfied that these additional alleged contraventions were directly relevant to the applications made by either Keybridge or WAMI. These alleged contraventions are matters for ASIC to pursue or could be considered by the Panel if a separate application is made.

Robin Bishop

President of the sitting Panel

Decision dated 26 April 2019

Reasons given to parties 15 May 2019

Reasons published 21 May 2019

²² Including EDWVIC Pty Ltd and Mr Geoffrey Wilson

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Advisers

Party	Advisers
HHY	-
Keybridge	Jeremy Kriewaldt Lawyers
WAMI	Kardos Scanlan
Yowie	PwC



Australian Government

Takeovers Panel

Annexure A

CORPORATIONS ACT

SECTION 657A

DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

YOWIE GROUP LTD 01 & 02

CIRCUMSTANCES

1. Yowie Group Ltd (**Yowie**) and Keybridge Capital Limited (**Keybridge**) are ASX listed companies incorporated in Australia.
2. HHY Fund (**HHY**) is an ASX listed registered management investment scheme.
3. Wilson Asset Management (International) Pty Limited (**WAMI**) is a company incorporated in Australia.
4. On 12 March 2019, WAMI had a relevant interest and voting power in 19.73% of Yowie shares comprising:
 - (a) 1.50% by operation of section 608(1)¹ through WAMI's direct holding of Yowie shares and
 - (b) 18.23% by operation of section 608(3)(a) through WAMI's relevant interests in Keybridge² and HHY³.
5. On 13 March 2019, Keybridge announced to ASX its intention to make an off-market takeover bid for all of the fully paid shares in Yowie.
6. Through a series of acquisitions of Yowie shares by WAMI between 13 and 27 March 2019, WAMI's voting power in Yowie increased from 19.73% to 32.17%, other than through one of the exceptions in section 611, resulting in contraventions of section 606.
7. WAMI did not give details of its deemed relevant interest in 18.23% of Yowie shares and other information as required by section 671B.
8. Through a series of acquisitions of Yowie shares by Keybridge between 2 April and 10 April 2019, WAMI's voting power in Yowie increased from 32.17% to 32.65%, other than through one of the exceptions in section 611, resulting in contraventions of section 606.

¹ Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth), and all terms used in Chapters 6 to 6C have the meaning given in the relevant Chapter (as modified by ASIC)

² and, in relation to Keybridge, through sections 608(1)(b) and (c) as Keybridge is the investment manager of HHY

³ held by Aurora Funds Management Limited in its capacity as responsible entity of HHY

CONCLUSION

9. It appears to the Panel that the circumstances outlined above are unacceptable because they constitute or give rise to contraventions of section 606 and, in the case of WAMI, section 671B.
10. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3).

DECLARATION

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of Yowie.

Allan Bulman
Director
with authority of Robin Bishop
President of the sitting Panel
Dated 26 April 2019



Australian Government

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Annexure B

**CORPORATIONS ACT
SECTION 657D
ORDERS**

1. The WAMI Sale Shares are vested in the Commonwealth on trust for WAMI.
2. The Keybridge Sale Shares are vested in the Commonwealth on trust for Keybridge.
3. ASIC must:
 - (a) sell the Total Sale Shares in accordance with these orders and
 - (b) account to WAMI and Keybridge respectively for the proceeds of sale (on a pro rata basis), net of the costs, fees and expenses of the sale and any costs, fees and expenses incurred by ASIC and the Commonwealth (if any).
4. ASIC must:
 - (a) retain an Appointed Seller to conduct the sale and
 - (b) instruct the Appointed Seller:
 - (i) to use the most appropriate sale method to secure the best available sale price for the Total Sale Shares that is reasonably available at that time in the context of complying with these orders, including the stipulated timeframe for the sale and the requirement that none of:
 - (A) WAMI or its associates may acquire, directly or indirectly, any of the WAMI Sale Shares and
 - (B) Keybridge or its associates may acquire, directly or indirectly, any of the Keybridge Sale Shares
 - (ii) to provide to ASIC a statutory declaration that, having made proper inquiries, the Appointed Seller is not aware of any interest, past, present, or prospective which could conflict with the proper performance of the Appointed Seller's functions in relation to the disposal of the Total Sale Shares
 - (iii) unless the Appointed Seller sells Total Sale Shares on market, that it obtain from any prospective purchaser of:
 - (A) WAMI Sale Shares, a statutory declaration that the prospective purchaser is not associated with WAMI or its associates and

- (B) Keybridge Sale Shares, a statutory declaration that the prospective purchaser is not associated with Keybridge or its associates and
 - (iv) to dispose of all of the Total Sale Shares within 3 months from the date of its engagement.
- 5. The Company, WAMI and Keybridge must do all things necessary to give effect to these orders, including:
 - (a) doing whatever is necessary to ensure that the Commonwealth is registered with title to the Total Sale Shares in the form approved by ASIC and
 - (b) until the Commonwealth is registered, complying with any request by ASIC in relation to the Total Sale Shares.
- 6. None of WAMI or its associates may, directly or indirectly, acquire any of the WAMI Sale Shares.
- 7. None of Keybridge or its associates may, directly or indirectly, acquire any of the Keybridge Sale Shares.
- 8. WAMI and its associates must not otherwise dispose of, transfer, charge or vote any WAMI Sale Shares.
- 9. Keybridge and its associates must not otherwise dispose of, transfer, charge or vote any Keybridge Sale Shares.
- 10. None of WAMI or its associates may:
 - (a) take into account any relevant interest or voting power that any of them had, or have had, in the WAMI Sale Shares when calculating the voting power referred to in Item 9(b) of s611 of the *Corporations Act 2001* (Cth), of a person six months before an acquisition exempted under Item 9 of s611 or
 - (b) rely on Item 9 of s611 earlier than six months after these orders come into effect.
- 11. None of Keybridge or its associates may take into account any relevant interest or voting power that any of them had, or have had, in the Keybridge Sale Shares when calculating the voting power referred to in Item 9(b) of s611 of the *Corporations Act 2001* (Cth), of a person six months before an acquisition exempted under Item 9 of s611.
- 12. Nothing in these orders obliges ASIC to invest, or ensure interest accrues on, any money held in trust under these orders.
- 13. Within two business days after the date after these orders, WAMI and other related persons¹ must give corrective notice of their respective substantial holdings in the Company in a form approved by the Panel.

¹ including EDWVIC Pty Ltd and Mr Geoffrey Wilson

14. Orders 3, 4, 5, 6 and 7 come into effect three business days after the date of these orders. All other orders come into effect immediately.
15. The parties to these proceedings and ASIC have the liberty to apply for further orders in relation to these orders.

Interpretation

16. In these orders the following terms apply.

Appointed Seller	an investment bank or stock broker
ASIC	Australian Securities and Investments Commission, as agent of the Commonwealth
Company	Yowie Group Ltd
Keybridge	Keybridge Capital Limited
Keybridge Sale Shares on market	1,054,148 ordinary shares in the issued capital of Company held by Keybridge in the ordinary course of trading on Australian Securities Exchange and not by crossing or special crossing
Total Sale Shares	the Keybridge Sale Shares and WAMI Sale Shares
WAMI Sale Shares	27,073,809 ordinary shares in the issued capital of Company held by WAMI
WAMI	Wilson Asset Management (International) Pty Limited

Allan Bulman
Director
with authority of Robin Bishop
President of the sitting Panel
Dated 26 April 2019