



Australian Government

Takeovers Panel

**Reasons for Decision
Thorn Group Limited 01 & 02
[2020] ATP 29**

Catchwords:

Declaration – orders – costs – interim orders – special dividend – dividend reinvestment plan – buy-back – requisitioned meeting – board spill – effect on control – conflicts of interest – disclosure – efficient, competitive and informed market – media canvassing – Panel procedures – section 602 principles – section 611 exemptions – share issue – cancellation of shares – adjournment of meeting

Corporations Act 2001 (Cth), sections 249D, 249P, 250B(2), 602, 606, 611 (item 9), 611 (item 11), 1322

Australian Securities and Investments Commission Act 2001 (Cth), sections 190, 199

Australian Securities and Investments Commission Regulations 2001 (Cth), regulations 13, 16(1), 16(2)(c)

Vaspip 2 Pty Ltd v Thorn Group Ltd [2020] VSC 700, ASIC v Terra Industries Inc [1999] FCA 525

ASIC RG 6 Takeovers: Exceptions to the general prohibition

National Companies and Securities Commission Policy Statement Release 141, Australian Securities Commission Policy Statement 3 Dividend reinvestment schemes

Guidance Note 1: Unacceptable Circumstances, Guidance Note 4: Remedies General

Regal Resources Limited [2016] ATP 17, Ainsworth Game Technology Limited 01 & 02 [2016] ATP 9, Wollongong Coal Limited [2014] ATP 21, Goldlink IncomePlus Limited 04 [2009] ATP 2, MacarthurCook Limited [2008] ATP 20, Village Roadshow Ltd (No 3) [2004] ATP 22, Village Roadshow Ltd (No 2) [2004] ATP 12, QR Sciences Limited [2003] ATP 37, AMP Shopping Centre Trust 02 [2003] ATP 24, Anaconda Nickel Limited 16 & 17 [2003] ATP 15, Pinnacle VRB Ltd No. 11 [2001] ATP 23

Procedural Rules 1.1.1, 2.3, 6.1.1

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

INTRODUCTION

- The Panel, Robin Bishop (sitting President), John McGlue and Neil Pathak, made a declaration of unacceptable circumstances in relation to the affairs of Thorn Group Limited. The applications concerned the effects of applying a dividend reinvestment plan to a large special dividend declared by Thorn and shares under the plan being issued prior to a delayed spill meeting. The Panel declared the circumstances unacceptable as they were likely to have an effect on control and result in a substantial shareholder of Thorn acquiring a substantial interest in a market that was not sufficiently efficient, competitive and informed and where shareholders did not have a reasonable time, and were not given enough information, to assess the merits of the proposed acquisition by the substantial holder. The Panel made orders cancelling the shares issued to the substantial shareholder.

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2. In these reasons, the following definitions apply.

Board	Thorn's board of directors comprising Mr Warren McLeland, Dr Allan Sullivan and Mr Paul Oneile, and prior to his resignation on 2 October 2020, Mr Kent Bird
confidential documents	has the meaning given in paragraph 165
DRP	Thorn's Dividend Reinvestment Plan the subject of Terms and Conditions dated 20 November 2012
Forager	Forager Funds Management Pty Ltd
ICM	ICM Limited, the investment manager of Somers Limited
Ingot	Ingot Capital Investments Pty Ltd, an associate of Somers Limited
Members' Requests	the s249D Request and the s249P Request
Proposed Buy Back	the proposed buy-back described in paragraph 12(c)
requisitioned meeting	the general meeting requisitioned under the s249D Request by the Requisitioning Shareholders
Requisitioning Shareholders	Vaspip, Narlack Pty Ltd, Ace Property Holdings Pty Ltd, Vanward Investments Limited, Warwick Sauer and Permanent Capital Limited
s249D Request	the section 249D request referred to in paragraph 8
s249P Request	the section 249P request referred to in paragraph 8
Somers	Somers Limited and its associates
Special Dividend	the fully franked special dividend of \$0.075 cash per Thorn share (totalling approximately \$24.2 million) announced by Thorn on 12 October 2020
Summary	has the meaning given in paragraph 167
Thorn	Thorn Group Limited
Vaspip	Vaspip 2 Pty Ltd, an entity controlled by Mr Vasilios Piperoglou

FACTS

3. Thorn is an ASX listed company (ASX code: TGA). It provides leasing of household products to consumers and commercial asset finance to small and medium size enterprises.
4. On 11 May 2020, Thorn's largest shareholder, Somers, gave a substantial holder notice disclosing that it had voting power in Thorn of 30.57%.

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5. On 31 July 2020, Thorn announced that it held \$54.1 million of free cash as at 30 June 2020.
6. On 19 August 2020, Thorn's Chairman told the company's annual general meeting of plans for further major restructuring of the group, which would be placed before shareholders for consideration as early as possible.
7. On 28 August 2020, Thorn received a section 203D¹ notice of intention to propose resolutions for the removal of three of Thorn's then four directors (Mr McLeland, Dr Sullivan and Mr Bird) from the Requisitioning Shareholders, a group of Thorn shareholders, including Vaspip, holding just over 5% of Thorn's issued capital.
8. On 31 August 2020, Thorn received from the Requisitioning Shareholders a request under section 249D to call a general meeting of Thorn shareholders to consider the resolutions and a request under section 249P to give Thorn shareholders a members' statement in relation to the proposed resolutions.
9. On 16 September 2020, Thorn announced that, having taken advice, it considered that the Members' Requests were invalid.
10. On 23 September 2020, Vaspip commenced proceedings in the Supreme Court of Victoria seeking orders for Thorn to call the general meeting and distribute the members' statement and in further submissions filed on 29 September 2020 sought relief under sections 1322(2) and (4) from any alleged invalidity in its Members' Requests.
11. On 2 October 2020, Mr Bird resigned from the Board.
12. On 12 October 2020, Thorn made an announcement headed "Capital management strategy and special dividend" that:
 - (a) Thorn's Board had declared the Special Dividend
 - (b) Thorn's DRP would apply to the Special Dividend with Thorn shares issued at a discount of 2.5% to the volume weighted average price per Thorn share traded over the five day trading period ending on 27 October 2020 and the last day for elections under the DRP being 20 October 2020 and
 - (c) *"In addition to the Special Dividend, the Thorn Board has also been considering, and continues to consider, Thorn's ability to undertake a buy back of Thorn shares for an amount in the order of \$15 to 25 million.*

...

It is the present intention of Thorn's Board to, in January 2021, seek shareholders' approval for the terms of an off-market buy back of Thorn shares, subject to there being no material change in Thorn's circumstances and to Thorn receiving all necessary regulatory approvals and/or authorisations including from the Australian Securities Exchange, the Australian Securities & Investments Commission and the Australian

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

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Taxation Office. The exact size of the buy back will be announced when the proposal is finalised, which is presently expected to be in December 2020."

13. At the time of the announcement, Thorn's Board consisted of 3 directors, two of whom were nominated to act as directors by Somers (Mr McLeland and Dr Sullivan). Mr McLeland, the Chair of Thorn, is also the Chair of Somers Limited.
14. On 14 October 2020, Forager made its application to the Panel.
15. Also on 14 October 2020, the Supreme Court of Victoria declared that, pursuant to section 1322(2), the Members' Requests were not invalid by reason of procedural irregularity.²
16. On 21 October 2020, Vaspip made its application to the Panel.
17. On 28 October 2020, Thorn called an extraordinary general meeting to be held on 3 December 2020 in response to the s249D Request.
18. On 3 November 2020, Thorn paid the Special Dividend and issued shares under the DRP. The total number of Thorn shares issued under the DRP was 60,764,233.
19. On 5 November 2020, Somers gave a substantial holder notice disclosing that its voting power in Thorn had increased to 39.42%. The substantial holder notice disclosed that Somers had acquired additional voting power in Thorn of approximately 0.99% prior to the issue of shares under the DRP and had received 49,241,938 Thorn shares under the DRP.

APPLICATIONS

Thorn Group Limited 01

20. By application dated 14 October 2020, Forager sought a declaration of unacceptable circumstances. Forager submitted (among other things) that:
 - (a) *"the application of the DRP to the Special Dividend is being applied for a purpose other than raising funds or allowing investors to remain invested in Thorn"* and Thorn's reliance on item 11 of section 611 was inappropriate
 - (b) the application of the DRP will enable Thorn's largest shareholder, Somers, to acquire further control over the shares in Thorn in a manner that was unacceptable and was contrary to the policy objectives under section 602
 - (c) *"the DRP (of itself), and also when considered in conjunction with the Proposed Buy Back, will have an effect on control of Thorn in unacceptable circumstances"* and
 - (d) the application of the DRP to the Special Dividend was *"in direct commercial conflict"* with the Proposed Buy Back.
21. Forager sought interim orders that Thorn not issue shares to any shareholders (or in the alternative, to Somers) under the DRP pending determination of its application.

² See *Vaspip 2 Pty Ltd v Thorn Group Ltd* [2020] VSC 700

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22. Forager sought final orders to the effect that Thorn be prohibited from applying the DRP to the Special Dividend or in the alternative, that recipients of the Special Dividend only be allowed to apply under the DRP for the number of shares that would be permissible under the creep exception in item 9 of section 611.

Thorn Group Limited 02

23. By application dated 21 October 2020, Vaspip sought a declaration of unacceptable circumstances. Vaspip submitted (among other things) that:
- (a) Thorn had failed to convene the requisitioned meeting within the 2 month time limit required under section 249D (i.e. by 31 October 2020) and
 - (b) Thorn's failure to convene the meeting when obliged to do so would facilitate an increase in control of Thorn by Somers prior to the meeting through Somers being able to participate in the DRP (under item 11 of section 611) and Somers having more time before the meeting to 'creep' (under item 9 of section 611).
24. Vaspip submitted that Thorn's conduct would, if not remedied, permit Somers to acquire (further) control over voting shares in Thorn other than in an efficient, competitive and informed market.
25. Vaspip sought interim and final orders that votes attaching to any shares acquired by Somers under the DRP and otherwise acquired by Somers after 7pm on 30 October 2020³ not be counted at the requisitioned meeting.

DISCUSSION

26. 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

27. Both Thorn⁴ and Somers made preliminary submissions in response to Forager's application.
28. Thorn submitted that we should decline to conduct proceedings on the basis that Forager's application was purely tactical and without proper foundation stating that it was "*an orchestrated attempt to disenfranchise the Board from pursuing its mandated strategy for Thorn*". Thorn submitted, among other things, that the application of the DRP to the Special Dividend was consistent with Thorn's past practice and, having regard to varying shareholder preferences, provided the opportunity for Thorn shareholders to decide how they wished to receive the Special Dividend.
29. Somers also submitted that we should not conduct proceedings. It submitted that the Special Dividend, the DRP and the Proposed Buy Back were not "*part of a Somers'*

³ Somers did not acquire shares after this date other than pursuant to the DRP so we focused our enquiry on Somers' participation in the DRP

⁴ Thorn established an independent board committee comprising Thorn's independent director, Mr Paul Oneile, and Thorn's CEO and its General Counsel & Company Secretary to consider and respond to the applications

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sponsored plot to seize control of Thorn" but rather Thorn's Board had come up with a proposal which sought to address the diametrically opposed views of Thorn's major shareholders. Somers did not disclose whether it had elected to participate in the DRP (or as a resident of Bermuda, had requested a determination to participate in the DRP as a non-resident shareholder).⁵

30. We also received a request to become a party to the matter and a preliminary submission from Vaspip explaining how its interests were affected by the circumstances and providing information that it considered helpful to the proceedings. Vaspip detailed Thorn's conduct in relation to the Members' Requests and submitted that this conduct, together with the proposed application of the DRP to the Special Dividend, showed Somers' intent to increase its control of Thorn.
31. At the time we considered whether to conduct proceedings, we did not know how many shareholders had elected to participate in the DRP. We were concerned about the potential increase in control that could result from the application of the DRP to the large Special Dividend declared by Thorn. It was unclear to us why Thorn did not avoid the need for new capital by simply declaring a smaller dividend. Conversely, if Thorn wanted to return capital to its shareholders, we queried why it would offer the DRP. We also considered further inquiry was warranted in relation to the potential conflict arising from the majority of the Board being nominees of Somers and the timing of the potential reconfiguration of the shareholder base (resulting from any issue of shares under the DRP) ahead of the requisitioned meeting. We decided to conduct proceedings on Forager's application.⁶
32. After considering submissions on whether we should accept Vaspip as a party to proceedings from Forager (in favour) and Somers (against), we decided to accept Vaspip as a party. However, we advised Vaspip that its preliminary submissions raised issues that could potentially be the subject of a separate application and if Vaspip was seeking a declaration or final orders that were different to those requested by Forager then Vaspip should consider making a separate application.
33. Vaspip lodged its application on 21 October 2020. After we were appointed to hear Vaspip's application, we decided to conduct proceedings on that application and made a direction to hear it together with Forager's application.⁷

Participation in the DRP

34. In its submissions to our brief on 27 October 2020, Somers advised that (through its custodians) it had elected to participate in the DRP for its full dividend entitlement.
35. On 29 October 2020, Thorn's registry, Computershare, advised Thorn that:

⁵ The DRP was only available to a shareholder who was resident in, or whose address on the share register was situated in, Australia or New Zealand, or any other country in which the directors had determined that the offer to participate in the DRP would be made

⁶ Notwithstanding our decision to conduct proceedings, in our brief we gave Forager an opportunity to respond to Thorn's and Somers' preliminary submissions in part because of their length (noting Procedural Rule 6.1.1, Note 3 specifies that "*Preliminary submissions should be brief (generally no more than 2 pages).*")

⁷ Under regulation 16(1)(a) of the ASIC Regulations

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- (a) 915 shareholders had elected to participate in the DRP representing 124,523,564 (or 38.629%) of the total shares on issue
 - (b) of those 915 shareholders, 835 shareholders had standing elections to participate in the DRP
 - (c) a total of 60,764,233 shares would be issued under the DRP based on an issue price of \$0.1537 per share and
 - (d) of the total number of shares to be issued, Somers would receive 49,241,938 Thorn shares.
36. Somers' voting power in Thorn increased from 30.57% (as reported in its last substantial holder notice⁸) to 39.42%. A small portion of this increase was attributable to acquisitions of Thorn shares equal to just below 1% voting power in Thorn prior to the issue of shares under the DRP. Somers had acquired 559,392 shares on-market on 12 and 13 May 2020 and Ingot (an associate of Somers) had acquired 2,650,000 shares on-market between 13 and 19 October 2020

Interim orders

37. On 30 October 2020, we advised parties that given the pending payment of the Special Dividend and issue of shares under the DRP on 3 November 2020, we were minded to make orders to defer both to no earlier than 10 November 2020 in order to maintain the status quo while we continued to consider the matters.
38. In response, we received submissions to the effect that:
- (a) there had been significant trading in Thorn shares and
 - (b) there may be consequences for shareholders by deferring the Special Dividend and the DRP.
39. In view of these submissions, and the focus of the applications which concerned the potential control effect (and disclosure thereof) by the participation in the DRP of Somers, we decided to consider more limited interim orders to defer the issue of shares under the DRP to Somers.
40. We received further submissions from Thorn and Somers objecting to our revised draft interim orders on the basis of potential ASX listing rule issues, potential prejudicial effects on Somers and the possibility that the orders may not be able to be complied with by providing the relevant instructions to Computershare in the time available.
41. Given the limited time that we had available to consider these issues and make interim orders, on 2 November 2020, we made interim orders prohibiting Somers (without our prior consent) from voting, disposing of, transferring or granting any security interest over any shares issued to Somers under the DRP (see **Annexure A**). We considered that these interim orders effectively maintained the status quo to the same extent as the revised draft interim orders referred to in paragraph 39 above, but

⁸ Dated 11 May 2020

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without holding up the Special Dividend. We considered that the circumstances could still be adequately remedied by final relief, if required.⁹

42. In its submissions, Somers suggested some alternative interim orders including that Somers be issued such number of shares to which it would be entitled under its creep allowance with the balance of its entitlement held in cash pending the outcome of proceedings or, *“to bring about a final resolution of this matter today”*, Somers changing its election to 50% cash and 50% shares. We indicated to Thorn and Somers that they were free to undertake any of these options if they considered such actions appropriate and provided submissions as to how those actions dealt with any unacceptable circumstances. No such actions were taken.
43. We reminded parties that we had formed no conclusive views on whether the circumstances were unacceptable, noting that we had yet to receive all the answers and documents from Thorn requested in our brief.¹⁰

Dividend reinvestment exception

44. Item 11 of section 611 provides an exception to the 20% threshold in section 606 for an acquisition that results from an issue of shares in a company to existing holders of shares under a dividend reinvestment plan. The policy of exempting such acquisitions has a long history, with case-by-case relief available before the enactment of item 11.¹¹ The basis for the policy does not appear to have received much attention, possibly because it has rarely caused problems or led to a material increase in control. It clearly overlaps with the policy of other exemptions facilitating capital raising/management¹² but, given the small amounts usually raised under a DRP,¹³ may also have a “gradual and open” policy similar to the creep exception in item 9.¹⁴
45. Somers submitted that the mere fact that someone’s voting power could potentially increase as a result of a corporate action does not, of itself, mean that there are unacceptable circumstances. If this were the case, it submitted, the express exception from the 20% threshold for dividend reinvestment plans *“would have no work to do”*.
46. Somers quoted the Panel in *Village Roadshow Ltd (No 2)* where in the context of a buy-back it stated: *“We do not agree that the increase in VRC’s voting power is unacceptable in and of itself. Because the Buy-back will take place under an express exception from section 606 which must contemplate similar increases in voting power, which are a generic feature of buybacks in companies with substantial holders (the only companies to which the exception*

⁹ See Guidance Note 4 – Remedies General at [12(c)] and [13]

¹⁰ See paragraph 162

¹¹ See National Companies and Securities Commission Policy Statement Release 141, Australian Securities Commission Policy Statement 3 Dividend reinvestment schemes

¹² Items 9, 10, 10A, 12, 13 and 19 of section 611

¹³ Which, as ASIC has noted (in the context of underwriters) usually means an exemption is only required by shareholders that have a significant pre-existing stake but lack creep capacity: ASIC RG 6 Takeovers: Exceptions to the general prohibition at 6.173-6.174

¹⁴ See, in relation to item 9, ASIC RG 6 Takeovers: Exceptions to the general prohibition at 6.57(b)

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could be relevant), it is not open to us to object to the Buy-back, simply on the ground of the increase in VRC's voting power."¹⁵

47. Accordingly, Somers submitted, that Forager needed to demonstrate more than a potential increase in Somers voting power. It submitted that *"Forager needs to demonstrate that the fully franked special dividend, the DRP and the [Proposed Buy Back] are essentially part of a plot to increase Somers' voting power"*.
48. Thorn similarly submitted that *"In the absence of unacceptable circumstances, such as a coordinated plot to deliver control of Thorn to Somers which simply does not exist and cannot be supported by evidence - there is no legitimate basis for the Panel to deprive shareholders who wish to participate in the future of Thorn of the opportunity to reinvest in Thorn by electing to take up shares under the DRP rather than receiving a cash dividend."*
49. This strawman argument of the need for us to find a "plot" was repeated throughout the proceedings by both Thorn and Somers and did not assist us in determining the matter. The Panel's guidance makes clear that: *"The existence of unacceptable circumstances does not depend on conduct or intention. Typically the Panel considers the effect of the circumstances on persons and the market in the light of the principles in s602."*¹⁶
50. Thorn similarly objected to a number of our questions on the basis that they presupposed a motive that the application of the DRP to the Special Dividend was orchestrated to pass control to Somers. The questions in our brief were drafted to better understand the effect of the DRP and the general factual background of this transaction. They did not presuppose any motive.
51. While the Panel has not previously considered the dividend reinvestment exception directly,¹⁷ in our view there is no reason that this exception would be considered differently to other similar exceptions. As noted by the Panel in *QR Sciences Limited*:
"as various of the exceptions in section 611 demonstrate, transactions which are primarily of a capital raising nature can give rise to issues under Chapter 6. In addition to item 10 considered in these reasons, the exceptions in item 11 (Dividend reinvestment), item 12 (IPO fundraising) and item 13 (underwriting of fundraising) all indicate that Parliament acknowledges that capital raising transactions can raise issues which intersect with Chapter 6, notwithstanding that their primary regulation may be located elsewhere in the Act. Where this occurs, a transaction to which section 602 applies arises. In such cases, the information principle expressed in the requirement for an "efficient, competitive and informed market" in paragraph 602(a) and for relevant information to be provided under subparagraphs 602(b)(i)

¹⁵ [2004] ATP 12 at [73]

¹⁶ Guidance Note 1 – Unacceptable Circumstances at [24]

¹⁷ Although there have been matters where the acquisition of shares through a dividend reinvestment plan have formed part of the findings of the Panel. See, for example, in *MacarthurCook Limited* [2008] ATP 20 at [33] where an option to a shareholder to underwrite MacarthurCook's dividend reinvestment plan, together with other actions, constituted a frustrating action and *Ainsworth Game Technology Limited 01 & 02* [2016] ATP 9 at [87] where the Panel inferred that Mr Ainsworth's reason for participating in Ainsworth's dividend reinvestment plan was to ensure that his holding, aggregated with Mrs Ainsworth's, was more than 10% and allowed him (or they) to retain a degree of control over the future of Ainsworth

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and (iii) (see paragraph 37) will apply to the relevant transaction and as well as any other disclosure requirements.”¹⁸ (emphasis added)

52. Similarly, in *Village Roadshow Ltd (No 2)* quoted by Somers above, the Panel found the combined effect of a deficiency of information and the anticipated control effect of the buy-back to be unacceptable.
53. In our view, it is necessary for us to consider whether the issue of shares under the DRP is unacceptable having regard to its effect on control or potential control or having regard to the purposes of Chapter 6 set out in section 602.
54. In our brief, we asked parties about Thorn’s need for capital, the timing of the Special Dividend and application of the DRP, the potential control effect of the DRP and Thorn’s disclosure.

Thorn’s capital management strategy

55. We asked Thorn about its capital management objectives and how they were advanced by the actions described in its 12 October 2020 announcement. Thorn submitted that, as disclosed in that announcement, Thorn’s directors knew by mid-June 2020 that Thorn would hold funds in excess of its requirements and since that time had been considering (together with its external advisers) its ability to return surplus funds to shareholders via a dividend and other alternative methods.
56. Thorn was under pressure from its shareholders to return capital, submitting that the Special Dividend was “*in a large part a decision made by the Board in response to concerns raised by Forager, and Thorn's third largest shareholder, Investors Mutual Limited*”.¹⁹
57. Thorn submitted that Forager had “*repeatedly requested*” that Thorn return capital to shareholders in the form of a fully franked dividend. Thorn referred specifically to calls for a capital return made by Forager in its Australian Shares Fund’s June 2020 performance report and July 2020 monthly report, letters from Forager to the directors of Thorn dated 6 July 2020 and 23 July 2020 and an email sent on 28 September 2020 from Forager’s CEO to Thorn’s Chair. In that correspondence, Forager expressed the view that a return was appropriate in response to Thorn’s cash balance which was larger than Thorn’s market capitalisation and growing as Thorn transitioned its Radio Rentals business model from physical stores to a wholly digital platform.
58. In August a new shareholder emerged expressing a similar view. On 3 August 2020, Vaspip stated in its request to Thorn for a copy of Thorn’s share register: “*The reason for this request is so that we can contact existing shareholders to discuss the possibility of gathering enough shareholder support for a requisition of a general meeting... The aim of calling a general meeting would be to remove the majority of directors and to simply wind the business up and return all surplus capital to shareholders.*”

¹⁸ [2003] ATP 37 at [62]

¹⁹ Investors Mutual Limited ceased to be a substantial shareholder of Thorn on 14 October 2020

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59. In contrast, Somers saw a future in Thorn's business. Forager was aware of Somers' views. In its letter to Thorn's directors dated 23 July 2020, Forager stated that it had conversations with Somers and that its understanding was that Somers "sees a future in Thorn's equipment finance division and would like to see capital committed to that business once an appropriate strategy can be agreed upon". Forager further stated in effect, that if this was to be the case, the Board should consider all available options for restructuring the business.

60. On 7 September 2020, ICM (the investment manager of Somers Limited) wrote to the Chair of Thorn (in that capacity)²⁰:

"I am acutely aware of the opposing strategic views of Thorn's major shareholders. As you are aware ICM, on behalf of Somers Limited & at least one other shareholder have been discussing with the Company's Tax advisers on what the maximum fully franked dividend that Thorn could pay shareholders within the constraints of Thorn's existing capital structure. I understand that this is envisaged to be \$25m, subject to tax / legal sign off.

In addition to a franked dividend, the Board may want to consider the Company implementing a buy back in the form of tender offer, where shareholders can elect to sell their shares back to the company subject to a maximum price per share. I estimate that the Company could return an additional \$25m to shareholders in the form of a buy back, given the Company's current cash on hand and liabilities...

If a dividend of A\$25m was to be paid then Somers will receive approximately A\$7.6m. Somers would be prepared to lend these funds to Thorn in order for the Company to complete a A\$25m share buyback..."

A copy of this letter was provided to the Board on 8 September 2020.

61. The differing views of Thorn's three largest shareholders and the need to find a resolution was discussed by the Board at a board meeting on 4 August 2020. Prior to the meeting, Thorn's then CFO gave Board members a paper entitled "Options for solving a future TGA share register" that began:

"Problem

'One shareholder' at least would like to invest in the future of TGA with the two Mark 2 business options and potential future other options, but some other shareholders do not and would like their money back out of TGA.

How do we solve for every shareholder?"

62. At the meeting, the Board discussed four options outlined in the paper including the options of a large special dividend with a dividend reinvestment plan (or a dividend followed by a capital raising underwritten by 'One shareholder') and a selective reduction of capital.

²⁰ See paragraphs 13 and 128

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63. From at least mid-July 2020, Thorn's CFO was examining with Thorn's financial adviser Thorn's ability to declare a fully franked dividend. The CFO regularly updated the Board on the progress of this work.
64. Discussions at the Board in relation to declaring a dividend ramped up in September 2020. At a Board meeting held on 15 September 2020, the CFO outlined the steps that needed to be taken to put the Board in a position where it could consider a dividend.
65. The minutes of meeting also record that:
- "The CFO said that the existing dividend reinvestment plan (DRP) needs to be considered and that "we have had a DRP with a 2.5% discount but we have not needed it for some time". If some of the larger shareholders elect to take their dividend in shares, their percentage holdings could increase significantly.*
- The Chair responded that he had only learned today that Thorn had a DRP so thank you for confirming that we do.*
- The Chair observed 2.5% is fairly standard for DRPs in his experience."*
66. At the following Board meeting on 22 September 2020, the Board resolved to implement certain steps required before any dividend could be declared.
67. At the next Board meeting on 29 September 2020, the CFO answered questions from Board members regarding the quantum of a potential franked dividend and the timing of declaring a dividend. The CFO had a preference for waiting to declare a dividend until after Thorn's audited half year results (expected at the end of November). However, following advice provided by Thorn's financial adviser during the meeting, the Board decided that timing was of the essence and requested that the CFO treat the dividend as his highest priority. Reference was made to the "considerable pressure" the Board was under from shareholders to declare a dividend as soon as possible.
68. At the next Board meeting on 6 October 2020, the Board stepped up its pressure on the CFO to complete the steps necessary for a dividend to be declared. The minutes also record a discussion regarding the DRP, the first mention of the DRP since the Board meeting on 15 September 2020. Thorn's General Counsel & Company Secretary reported that a number of investors had standing elections into the DRP already and others would be expected to do so after any Board announcement about a dividend. The Chair noted, in relation to the DRP, that it was open to shareholders "to take the opportunity up and who knows what they will do". Noting that the DRP will add time to the timetable, the Chair stated that the Board will have to accept that Thorn has to allow appropriate time for shareholders to consider the DRP but that as Thorn has a DRP "it should be offering it and shareholders may think it weird if the Board does not do so". The Board agreed in principle to a 2.5% discount rate for the DRP.
69. Three days later the Board met and the CFO confirmed that all steps had been implemented to enable Thorn to proceed to pay a fully franked dividend of up to \$25 million. The Board received, and resolved that it was comfortable with, the written advice of Thorn's financial adviser. This advice related solely to the dividend and made no mention of the DRP.

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70. The Board formally resolved to declare the Special Dividend at a further meeting of the Board on 12 October 2020 and, for the avoidance of doubt, resolved that Thorn's DRP applied to the Special Dividend.

Control effect

71. We asked parties in our brief whether, if Somers had the potential to move from 30.57% to approximately 39.5% (assuming no other shareholders participated in the DRP and an issue price of \$0.155), this would have an effect on control or constitute the acquisition of a substantial interest.
72. Forager submitted that this would have an effect on control noting that the Panel has recognised that:
- "The takeovers code is consistently concerned with fine gradations of control, and does not treat control as an absolute concept... Panels have consistently explained the relationship between unacceptable circumstances and control in terms of increments of control, as have the Courts."*²¹
73. Referring to *Pinnacle VRB Ltd No. 11*, Forager noted that the review Panel found that a transfer of 3.11% of the shares in Pinnacle to a bidder which had already acquired 32% of the shares *"had the potential to have a significant effect on the control of Pinnacle"*.²²
74. Forager submitted that, given voting participation levels at Thorn's three last general meetings,²³ a move by Somers from 30.57% to up to approximately 39.5% would have a material effect on control at a general meeting.
75. ASIC submitted that it broadly shared Forager's views in this regard and that it was open for us to find that the acquisition would have an effect on control.
76. ASIC also considered that it was open to us to find that the increase in Thorn's shareholding through participation in the DRP constituted the acquisition of a substantial interest, noting that it is not limited to any specific increase in a person's voting power, but rather whether the transaction would materially enhance or entrench the acquirer's control. It provided examples of where the Panel has deemed comparable increases in voting power to be acquisitions of substantial interests.²⁴
77. We consider that a potential increase in the disclosed voting power of Somers from 30.57% to approximately 39.5% is likely to have a substantial effect on control and constitute the acquisition of a substantial interest. At almost 40%, Somers' vote would likely be decisive at shareholder meetings.
78. Thorn submitted that it was *"concerned by the speculative and hypothetical nature of questions [from the Panel] which [assumed] control"* and did not comment on whether

²¹ *Village Roadshow Limited 02* [2004] ATP 12 at [34]

²² [2001] ATP 23 at [18]

²³ At Thorn's last three general meetings shareholder participation on all resolutions was approximately 55.7% (2020 AGM), 41.1% (2019 AGM) and 39.7% (2018 AGM)

²⁴ *Anaconda Nickel Limited 16 & 17* [2003] ATP 15 at [32] (acquisition of 5 or 6%), *Goldlink IncomePlus Limited 04* [2009] ATP 2 at [48] (acquisition of 9.9%) and *Wollongong Coal Limited* [2014] ATP 21 at [19] (acquisition of up to 10.6%)

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Somers' potential shareholding if it participated in the DRP would have an effect on control. It submitted that it *"has no reasonable basis to predict shareholder intentions with respect to participation in the DRP"*. It also did not consider it relevant whether an acquisition of shares under the DRP constituted a "substantial interest" because item 11 of section 611 expressly permits such an acquisition.

79. We asked Thorn what consideration the Board gave to the potential effects on control over voting power in Thorn as a consequence of the application of the DRP. In response, Thorn submitted:

*"Thorn again considers that this question presupposes the idea that Thorn selectively activated the DRP in time for the fully franked Special Dividend as part of a tactical attempt to pass control to its major shareholder. The fact is that **the Board did not give consideration to the potential effects on control** over voting power in Thorn as a consequence of the application of the DRP for reasons including:*

(a) the DRP has been applied to each dividend declared by the Board since the DRP was established;

(b) the exception in item 11 of section 611 of the Corporations Act expressly permits the possibility of movements in control as a result of acquisitions under the DRP; and

(c) the Board has no reasonable and verifiable basis to justify speculation in relation to outcomes of the DRP which could be both dangerous and misleading." (emphasis added)

80. There is no record in the minutes of meeting of the Board during the relevant period of consideration that the Board turned its mind to the control effects.²⁵
81. When asked about the CFO's statement on 15 September 2020 that *"If some of the larger shareholders elect to take their dividend in shares, their percentage holdings could increase significantly"*,²⁶ Thorn stated (among other things):

"There was no need for the Board to consider the CFO's comment any further given that the subject matter of the comment was stating nothing more than what any competent director could easily adduce on their own. It would have been entirely inappropriate for the Board to artificially engineer the composition of Thorn's share register based on what it thought the intentions of its shareholders were in respect of participation in the DRP."

82. We do not agree with Thorn's submissions that in effect it was not reasonable for its Board to 'speculate' on shareholder response to the DRP. To the contrary, considering the intentions of shareholders is part of considering how a corporate action may affect control and the failure to do so means that Thorn did not adequately consider the potential control effects of applying the DRP to the Special Dividend.
83. Forager submitted that it was *"not plausible"* that the Board did not consider the potential effects on control stating that the directors *"must have considered any possible control implication of the application of the DRP (consistent with their director's duties)"*.

²⁵ Noting that the minutes were redacted in part

²⁶ See paragraph 65

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Forager's submission is reasonable, particularly given that Thorn was on notice of the differing views of its shareholders. However, given Thorn's submission that the Board did not consider the potential control effects of applying the DRP to the Special Dividend and there is no material to suggest they did, we do not need to make any further findings.

84. Forager also submitted that it was *"implausible that the Thorn directors had no idea what impact the DRP was going to have on control"* given that, among other things, the Chair of Thorn is also the chair of Somers Limited. The overlap in the chairmanship of Thorn and its major shareholder raised concerns for us, including as to what knowledge Mr McLeland had regarding Somers' intentions (if any). While we discuss this further below, again given Thorn's submission to the Panel that the Board *"...did not give consideration to the potential effects on control...as a consequence of the application of the DRP"*²⁷, we did not need to make any inquiries into Mr McLeland's knowledge.
85. We asked Thorn why the Board considered the DRP needed to be applied to the Special Dividend and the consequences for Thorn of not doing so.
86. Thorn submitted that it would have been unusual had the Board not applied the DRP to the Special Dividend (given that it had applied to all dividends since it was established). Thorn also referred us to a 'welcome email' that Computershare sends to new shareholders which provides instructions for dividend payments and advises that shareholders may elect to reinvest their dividends in additional securities through the DRP. It submitted that, if the DRP was not available for the Special Dividend, it would have been misleading to those investors who had received the welcome email. We find this a weak argument and agree with a submission from Vaspip that a welcome email from a registry does not fetter directors' decision making, especially in the case of a Special Dividend representing approximately 36% of market capitalisation.
87. Thorn further submitted that its Board considered that if Thorn did not offer the DRP *"shareholders who believe in and see value in the future business of Thorn and wish to leave their capital invested in Thorn would be denied the opportunity to do so"*.
88. Thorn submitted that there were a *"substantial number of shareholders who may prefer to retain their investment in Thorn"* noting, as evidence, that as at 25 September 2020, approximately 16.5% of Thorn shareholders representing approximately 9% of all shares on issue had standing elections under the DRP. On another view, a 9% participation rate (by shares) could be considered quite low. Thorn presented no material to show that it had consulted with shareholders generally about the desire to reinvest.
89. Thorn also submitted that it *"did not consider it necessary to receive substantive external advice"* in relation to the application of the DRP to the Special Dividend because the

²⁷ See paragraph 79

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DRP had been applied to each dividend declared since it was established and had been operating with a high participation rate since December 2012.

90. We considered whether Thorn had a specific need for the funds that would come from the reinvestment.
91. In its preliminary submissions, Somers submitted that it believed *“Thorn’s business has a potentially promising future. However, if Forager (and others) were to withdraw their capital by partial liquidation, buy-back or otherwise, then Thorn would need fresh capital including from shareholders with a similar view to Somers. Some of that capital can come via the cash that is reinvested via the DRP”*. It further submitted that there was a legitimate and important commercial reason why the DRP should apply to the Special Dividend: *“it will enable cash to be retained in Thorn for the benefit of all shareholders, particularly those who believe these businesses have a future and would prefer to reinvest in those businesses than receive immediate cash returns”*.
92. Vaspip submitted that Thorn’s 12 October 2020 announcement stated that Thorn held excess funds and proposed to imminently spend a further \$15-25 million on the Proposed Buy Back and so it clearly had no need for any capital via the DRP.
93. Forager submitted that Thorn had no need for additional funds and therefore item 11 of section 611 was being used for an inappropriate purpose. Thorn submitted that it is a *“false premise”* that the only reason for applying a dividend reinvestment plan to a dividend is to raise capital. It denied that it was looking to raise a certain quantum of funds through the DRP and referred to its *“legitimate reasons”* for applying the DRP to the Special Dividend described in paragraphs 86 and 87 above. Thorn stated that any decisions in relation to initiatives for its business would be made once Thorn had clarity on its available cash following payment of the Special Dividend and issue of shares under the DRP.
94. We consider the main purpose of the dividend reinvestment plan exception in item 11 of section 611 is to ensure that reinvestment by shareholders of distributed profit is not overly inhibited by the takeovers threshold in section 606 where each holder has an equal opportunity to avoid dilution of their existing holding by participating in the offer.²⁸
95. Thorn strongly objected to our question as to what steps the Board took to minimise any potential control effects. It submitted that it would seem almost impossible to take steps to minimise any potential control effects when it is entirely unclear what potential control effects might eventuate, particularly in circumstances where:
 - (a) in the absence of shareholder intention statements, it is not possible to predict with any degree of certainty what decisions shareholders might take with respect to the fully franked Special Dividend and
 - (b) the issue price under the DRP will only be known at a future date.

²⁸ See paragraph 44

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96. It further submitted that *“If the Panel is suggesting that directors of [a] publicly listed company have an additional duty when conducting a dividend reinvestment plan to minimise any potential control implications by manufacturing outcomes and restricting participation of certain shareholders, Thorn respectfully considers this would be an extremely dangerous precedent to set.”*
97. We are not making any such suggestion or setting a new precedent. The purposes of Chapter 6 are clearly set out in section 602 and need to be considered when relying on an exception in section 611.
98. In most cases, the use of a dividend reinvestment plan will not require close scrutiny. But here there are a combination of factors that justified a serious consideration of the potential control effects.

Size of the Special Dividend

99. First, the size of the Special Dividend meant that the total potential number of shares that could be issued under the DRP represented 35.71% of Thorn’s market capitalisation on the date of declaration.²⁹ Notwithstanding that the DRP had applied to all of Thorn’s last 11 dividends, its past dividends represented no more than between 1.67% and 4.15% of Thorn’s capitalisation at the time of the declaration of the dividend.
100. Forager provided some statistics on the application of dividend reinvestment plans to special dividends. It submitted that over the past 5 years there had been 240 special dividends paid by 155 companies of which 73 special dividends were identified as having dividend reinvestment plans in place.³⁰ Of these, Forager submitted only two were for amounts greater than 10% of the pre-dividend price.³¹
101. As Thorn submitted, the fact that dividend reinvestment plans were applied to almost one-third of all special dividends suggested that could be considered normal commercial practice. However, those statistics also demonstrate that it is rare for amounts to exceed even 10% of the company’s market capitalisation, confirming that the dividend of approximately 36% of the market capitalisation here was highly unusual.

Known or likely preferences of substantial shareholders

102. Secondly, in the circumstances and especially given the large size of the dividend, it was not reasonable for Thorn to proceed without seeking to ascertain whether its largest substantial shareholders intended to participate. Clearly, that would determine the extent of the effect on control and if Somers alone participated in full, the effect would likely be substantial. As Thorn stated above, the control effect of a larger shareholder taking their dividend in shares was *“nothing more than what any*

²⁹ or 34.9% of the market capitalisation on the day before the date of declaration

³⁰ Source - Bloomberg

³¹ Stream Group Limited’s special dividend was 95.2% of the pre-dividend price (or 40.8% of the price on the date of declaration) (the company sold its main asset and distributed almost all of its available cash before acquiring a business in a different industry) and Benjamin Hornigold Limited’s special dividend was 12.8% of pre-dividend price (or 11.4% of the price on the date of declaration)

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competent director could easily adduce".³² While we understand a company's register can change (as it did here with Investors Mutual Limited selling down its shareholding following the announcement of the Special Dividend and prior to the record date), that does not excuse a company from considering whether there is potential for a substantial effect on control and, if so, whether it can be addressed. In our view, it would have been appropriate for Thorn to ask Somers of its intention in respect of the DRP given the known and opposing views of its major shareholders.³³

103. Further, we consider that it was appropriate for Thorn to disclose to its shareholders the potential control effects if Somers elected to participate in the DRP (whether or not Somers' intention was known and notwithstanding that Somers needed a determination from Thorn's directors to participate in the DRP as a non-resident). If no other shareholders elected to participate in the DRP, the potential increase in Somers' disclosed shareholding from 30.57% to approximately 39.5% was material information for shareholders when deciding whether to elect to participate in the DRP. At approximately 39.5%, Somers' ability to impact the outcome of a shareholder vote was significant, particularly in the context of the upcoming requisitioned meeting. The circumstances here are not unlike those arising from a substantial on-market buy-back, where the Panel has required disclosure of known material information regarding a controlling shareholder's intentions.³⁴
104. Thorn submitted that the control implications of the DRP being applied to the Special Dividend would not have been as significant had Forager and Vaspip elected to participate in the DRP. While this may be true, it merely emphasises the uncertainty created by the potential control effects as at the time of announcement. If Thorn could not find a way to reduce that uncertainty it should have been a red flag as to whether the strategy was appropriate.
105. Furthermore, in addition to the lack of predictability and disclosure regarding any control effects, there were other factors that may have, or were likely to have, contributed to a lower participation rate in the DRP (and therefore a larger increase in the control effects).

Restructuring plans

106. There was uncertainty regarding Thorn's plans for further major restructuring. In the Chair's address at Thorn's annual general meeting on 19 August 2020 and disclosed on the ASX, Mr McLeland stated that "*...we are hoping to be in a position to place before shareholders as soon as possible, plans for further major restructuring of the group for your consideration*". However, subsequent to that statement there was no further public announcement. Thorn submitted that it did not currently have any plans for further restructuring over and above those previously disclosed to

³² See paragraph 81

³³ See paragraph 61

³⁴ *Village Roadshow Ltd (No 2)* [2004] ATP 12 at [69e]-[70]. See also the Panel's comments re disclosure of a controlling shareholder's intentions regarding a vote to approve a 20% buy-back in *Village Roadshow Ltd (No 3)* [2004] ATP 22 at [48]-[50]

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shareholders.³⁵ We do not consider that Thorn provided an adequate explanation for this discrepancy.

107. Forager submitted that Thorn's shareholders did not have sufficient information to make an informed decision about reinvesting. First, because Somers' submissions about the future of the business³⁶ were not supported by the publicly available information and secondly, because Thorn had not identified any plans for use of the dividend funds.³⁷ We share Forager's concerns, and together with the potential uncertainty (or expectation) created by the Chair's address, consider that shareholders did not have enough information to enable them to assess the merits of reinvesting in Thorn. More information may have encouraged greater participation in the DRP and reduced the potential control effects.

Election period

108. We also consider that shareholders should have been given a longer period of time to make an election to participate in the DRP. Following the announcement of the Special Dividend on 12 October 2020, shareholders had until 4:00pm on 20 October 2020 to make an election under the DRP. Vaspip submitted that the eight days between announcement and election under the DRP in relation to the Special Dividend contrasted with Thorn's four previous dividends (dating back to June 2016) where the days between announcement and election under the DRP ranged from 39 to 51 days.
109. Thorn submitted that the timetable, including the election period under the DRP, complied with the timetable set out in Appendix 6A to the ASX Listing Rules. It further submitted that "*[g]iven the historically high take up of the DRP by Thorn shareholders on past occasions (averaging approximately 30%), and that all material information that a shareholder may wish to consider before electing to participate in the DRP had been publicly disclosed, Thorn did not consider it necessary to delay the payment of the fully franked Special Dividend any further*".
110. Thorn submitted that Vaspip's comparison of dates was "*highly misleading*" in that it alleged an orchestrated plot to pass control to Somers by rushing through a dividend and applying the DRP. Instead, Thorn submitted that the dates Vaspip listed showed that each time Thorn had declared a dividend, it had complied with the timetables set out in the ASX Listing Rules. It also submitted that it was not unusual for a special dividend to be declared and paid in a shorter period than an interim or final dividend.
111. The fact that a company has complied with the minimum times set out in a Listing Rules timetable is not determinative of whether shareholders have a reasonable time to consider a proposal for the purposes of section 602(b). We consider the eight days between the announcement of the Special Dividend and the election under the DRP was insufficient time to consider the DRP and make an election in the circumstances

³⁵ Being those most recently disclosed in its Annual Report released on 17 July 2020

³⁶ See, for example, paragraph 91

³⁷ See paragraph 106 above

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of a dividend of this size and having such potential control effects. The short period of time may have contributed to a lower participation rate exacerbating the control effects.³⁸

Communications with shareholders

112. In addition to the short election window, Vaspip submitted that Thorn made no real effort to communicate about the DRP to shareholders relying solely on its ASX announcements. Thorn submitted that Computershare sent a communication to shareholders via email on 13 October 2020 in relation to elections, but in any event, the DRP has existed since 2012, the terms of the DRP are on Thorn's website and new shareholders are informed of the DRP in their welcome email.
113. We note that Thorn's ASX announcement on 12 October 2020 did not provide any instructions to shareholders regarding the DRP and an update with election information and a link to a Computershare page was only provided via a further ASX announcement on 19 October 2020, the day before the election period ended. Given the significance of the DRP for potential control, we would have expected better communication including to those shareholders without email addresses on file in order to encourage participation.³⁹

Issue price

114. Vaspip submitted that the calculation of the issue price did not comply with the terms of the DRP because the terms of the DRP require the relevant VWAP calculation to be "*rounded to the nearest cent*" before the discount is applied.⁴⁰ Vaspip submitted that this resulted in the issue price being lower than required by the terms of the DRP with the effect being that extra shares were issued to participants in the DRP. In relation to Somers, Vaspip submitted that Somers received an additional 714,065 shares as a result.
115. Initially, Thorn responded to the concerns by stating that "*Thorn's share registry (not Thorn) prepared the calculations of the DRP price, in accordance with Computershare's standard procedures and without direction by Thorn*". Computershare advised Thorn that the rounding calculations were done "*per shareholding rather than the total amount*". Thorn further advised that "*the methodology used to calculate the DRP price is consistent with how the DRP price has been calculated previously (including rounding being done per shareholding rather than the total amount)*".
116. We were not satisfied with these responses and sought further information from Thorn. Thorn stated that it had engaged a specialist accounting firm to review Computershare's calculations. At the end of our proceedings, we still had no further

³⁸ Conversely, it is possible that shareholders with standing elections may have chosen to cancel their election to participate in the DRP if they understood the potential control effects and had more time to do so. Thorn advised that 24 shareholders opted out of participating in the DRP

³⁹ Computershare's communication was emailed to 3,301 shareholders. As at 30 June 2020, Thorn had over 5,400 shareholders

⁴⁰ We also received and considered a submission from a non-party, [REDACTED], which raised the same calculation issue

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information and were therefore unable to determine the relevance of this issue to the matters before us.

Proposed Buy Back

117. Several things concerned us about the Proposed Buy Back, including:
- (a) the incongruence between the issuance of shares under the DRP with a Proposed Buy Back of shares a couple of months later
 - (b) the large range for the amount of the Proposed Buy Back being between \$15- 25 million and the basis for that range and
 - (c) the DRP's potential impact on voting to approve the Proposed Buy Back.
118. The first record of any discussion by the Board of a potential buy-back appears in the minutes of meeting of the Board held on 6 October 2020. The minutes were heavily redacted. All that we could take from those minutes is that there was a desire to make a Board announcement foreshadowing a wish to propose a buy-back and that the Board wanted external advice on what could be disclosed and the timeframe.
119. The discussion at that meeting followed an email exchange on 28 September 2020 in which Thorn's General Counsel & Company Secretary circulated to Board members a memorandum prepared by Thorn's external lawyers on a buy-back process.⁴¹ In response, Mr Bird (who was still a director at that time) stated:
- "I am very surprised in receiving this body of work this evening. This has never been agreed as the preferred course of action and I strongly believe it is not [in] the interests of ALL shareholders. This proposal was provided by a major shareholder and therefore conflicts certain parties on the board.*
- ...
- For good governance, an independent Board sub-committee should be established to consider this proposal/option and work with a corporate adviser to analyse, review and assess the [sic] all options, including winding up the company and returning all money to shareholders."*
120. Thorn submitted that Mr Bird should not have been surprised upon receiving the advice because a selective reduction of capital was presented as one of the four options by the CFO at the Board meeting held on 4 August 2020.
121. Thorn also tried to dispel Mr Bird's assertion that it was acting at the behest of a shareholder. It submitted that it did not know which "proposal" Mr Bird was referring to – Forager's letter of 23 July 2020 or Somers' letter of 7 September 2020.
122. We found this submission disingenuous. Forager's letter of 23 July 2020 did not refer to a buy-back (or selective capital reduction). The letter noted Somers' interest in Thorn's equipment finance business and stated that the Board should consider "all available options for restructuring the business and returning capital in the most effective manner, including demergers, asset sales, capital returns and dividends". Further, Mr Bird

⁴¹ There is no record of any discussion of a potential buy-back at the intervening Board meeting held on 29 September 2020

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referred to the proposal conflicting certain directors on the Board which could only mean that the proposal came from Somers.

123. We asked Thorn about the rationale for proposing a buy-back shortly after applying the DRP to the Special Dividend. Thorn submitted that the rationale for considering a buy-back and publicly disclosing an intention to undertake a buy-back was largely to appease shareholders seeking a capital return and keeping the market fully informed.
124. We have sympathy for the Board and the dilemma it was facing trying to find a solution to the conflicting views of its shareholder base. However, this does not excuse the Board from the need to consider the potential control effects of its proposals involving the issue of shares, on the one hand, and the acquisition of shares, on the other.
125. At the time of ICM's letter to Thorn on 7 September 2020, ICM's intention was not to participate in a proposed buy-back. Rather it was prepared to lend back to Thorn Somers' dividend entitlement to complete a \$25 million buy-back (being the high end of the range for the Proposed Buy Back). Assuming ICM's intention remained the same, the aggregate potential control effects of Somers participating in the DRP (with low participation by other shareholders) combined with non-participation by Somers in the Proposed Buy Back would be significant.
126. These potential control effects concerned us. However, in light of the fact that Thorn was still considering the Proposed Buy Back and, if it proceeded, it was subject to regulatory and shareholder approvals, we did not need to consider the terms of the Proposed Buy Back. We considered that if the Proposed Buy Back proceeded, a new application could address any concerns regarding the impact on voting of shares issued under the DRP at the meeting to approve the Proposed Buy Back.⁴²

Conflicts of interest

127. In their applications, both Forager and Vaspip considered the fact that two of the three directors of Thorn were nominated by Somers was relevant to what constituted the unacceptable circumstances.
128. As noted above, when Thorn made its announcements on 12 October 2020, the Board consisted of three directors, only one of whom (Mr Oneile) was considered independent by Thorn. The other two directors (Mr McLeland and Dr Sullivan) were nominated to act as directors by Somers, and the Chair of Thorn (Mr McLeland) is also the Chair of Somers Limited.
129. Forager submitted that Somers must have known the DRP would apply to the Special Dividend because its nominee directors to Thorn were clearly aware of this.
130. Somers submitted that neither Mr McLeland nor Dr Sullivan are officers or employees of ICM, its investment manager. Somers submitted that it did not know about the availability of the DRP until it was announced on 12 October 2020.

⁴² We note that this concern was ultimately overtaken by our orders

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Although we know that ICM was aware of the proposed \$25 million special dividend as early as 7 September 2020,⁴³ we have no material to indicate that Somers had prior knowledge of the application of the DRP to that dividend (for example, Ingot's purchasing of additional Thorn shares post-dated the announcement). Given Thorn's submission that it did not consider the control effects of the application of the DRP (which served the basis for our declaration, among other things), we did not need to inquire further into Somers' knowledge.

131. While Mr Bird resigned as a director with effect from 2 October 2020, Thorn submitted that he was present during numerous Board discussions in relation to Thorn's capital management plans, including proposed plans to declare a fully franked special dividend with the attaching DRP and *"raised no objections at all during these discussions"*.⁴⁴
132. Given the proximity of Mr Bird's resignation to Thorn's 12 October 2020 announcement, we asked parties to explain the circumstances surrounding that resignation. We also invited Mr Bird to provide submissions on that question, as well as Thorn's statement that he had *"raised no objections at all"* in Board discussions about Thorn's capital management plans.
133. Mr Bird submitted that he disagreed with Thorn's statement and that he had raised objections both during Board deliberations and in written correspondence with the other directors.
134. We accept Mr Bird's submissions. The material that we reviewed⁴⁵ reflected that on several occasions Mr Bird expressed a difference of opinion regarding aspects of Thorn's future business strategies. Mr Bird also expressed a preference for Thorn to undertake an independent review of the full range of options available to Thorn and, shortly before his resignation, put forward a resolution that an independent board committee be established to deal with capital management matters.⁴⁶
135. In each of its letters to the Board dated 13 March 2020, 6 July 2020 and 23 July 2020 Forager raised concerns about the independence of the Chair of the Board and the absence of a majority of independent directors on the Board, particularly in the context of Thorn's capital management strategy. For example, on 6 July 2020, it stated: *"The publication of Thorn's Corporate Governance Statement on Friday makes for interesting reading, especially around the independence of the Chair and the absence of a majority of independent directors. In our opinion, the question of making a return of shareholder capital at this time will be an important test of these statements."*

⁴³ See paragraph 60

⁴⁴ The parties disputed throughout the proceedings whether Mr Bird was a nominee of Forager as submitted by Thorn and Somers and disputed by Forager. For our purposes, nothing particularly turns on whether Mr Bird was a nominee of Forager or not

⁴⁵ See paragraphs 159 to 173

⁴⁶ Thorn submitted, among other things, that the resolution was tabled at a meeting without prior notice and the Chair considered that the resolution could be discussed at the next Board meeting (on 6 October 2020) but Mr Bird resigned before then

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136. Thorn submitted that it took no action in relation to the concerns raised by Forager because the Board did not consider there was any conflict of interest that warranted the establishment of any subcommittee. This was because each shareholder of Thorn would be given an opportunity to participate in, and would stand to benefit equally from, the Special Dividend. In addition, Thorn submitted that no director had any material personal interest in relation to these matters.
137. We asked if the Board specifically considered whether there were any potential conflicts of interest in respect of the decision for the DRP to apply to the Special Dividend. Thorn submitted that it had, stating:
- "Yes, and this is exactly what the Board did at the 15 September 2020 meeting where the decision for the DRP to apply to the Special Dividend was first considered and it was noted that no such conflicts existed."*³
- ...
- ³ See heading "Apologies and Conflicts of Interest" in the 15 September 2020 minutes of meeting."
138. The minutes of the Board meeting held on 15 September 2020 stated the following under the heading "Apologies and Conflicts of Interest": *"The Board noted that the Directors entitled to receive notice had been given notice of the meeting and a quorum was present"*. In the version of these minutes provided to the parties there was a section redacted immediately after this quote. This was unredacted in the version of the minutes provided to the Panel and ASIC and discussed a new topic (i.e. not "Apologies and Conflicts of Interest").
139. Thorn's submission gave parties (and, initially, the Panel) the impression that the redacted material supported its submission that the Board had considered potential conflicts. In fact, there was nothing beyond the heading itself. We assume the impression created was unintended, and this particular issue was not material to our findings, but the Panel expects parties to ensure that submissions are accurate and not misleading, especially when redacting commercially sensitive material.
140. None of the other minutes of meetings of the Board disclosed or reflected any substantive discussion regarding any conflicts or perceived conflicts of interest in relation to any capital management proposals. The minutes of meetings held on 9 and 12 October 2020 stated under the heading "Material Personal Interest": *"The Chair asked whether anyone present had any material personal interest in the agenda items (noting that an interest arising solely from being a shareholder and in common with other shareholders need not be disclosed). The Chair noted that no declarations were made."*
141. In our view, the Board did not adequately consider the potential conflicts of interest of directors when considering the potential control effects of the matters announced in Thorn's 12 October 2020 announcement.
142. If the Board had considered the potential control effects of its proposals, then perhaps the position of the two Somers nominees on the Board could have been discussed and managed differently (for example, external legal advice may have been sought on conflicts and the assessment of approaches favouring Somers' interests).

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143. Conversely, it is possible that the Board's failure to consider the potential control effects of its proposals was the result of not engaging with the potential conflicts of interest of the Board. We find this troubling in circumstances where the independence of the Board was brought to the Board's attention by Forager, Vaspip⁴⁷ and Mr Bird in different settings. However, we did not need to reach a conclusion on this issue.

Board spill

144. Vaspip submitted that after the Requisitioning Shareholders delivered their Members' Requests, Thorn did everything to resist and delay the requisitioned meeting noting:

- (a) Thorn took 17 days to declare that it considered the Members' Requests invalid (being 4 days before it was required to call the meeting⁴⁸)
- (b) Thorn failed to explain why it considered the Members' Requests were invalid in response to requests by Vaspip, only doing so when compelled by the Court and
- (c) despite the Court declaring on 14 October 2020 that the Members' Requests were not invalid, Thorn had failed to convene the meeting by the date of Vaspip's application.

145. We note that Thorn only called the requisitioned meeting on 28 October 2020 to be held on 3 December 2020. Thorn advised that there was no availability to hold the meeting in November.

146. The sections of the minutes of meeting of the Board dealing with the requisitioned meeting were heavily redacted. While we note that the decision for the DRP to apply to the Special Dividend was first considered after the Members' Requests were made⁴⁹ and by late September the Board was keen to declare a dividend as soon as possible⁵⁰, we do not find it necessary to determine whether Thorn deliberately delayed the requisitioned meeting until a date after shares would be issued under the DRP.

147. Vaspip submitted that it was unacceptable that shares to be issued under the DRP be able to be voted at the requisitioned meeting because if Thorn had met its obligation to schedule the meeting by 31 October 2020,⁵¹ those shares would not have been issued in time to be voted at the meeting. Vaspip further submitted that the application of the DRP to the Special Dividend (including the manner and speed in which it had been undertaken) facilitated Thorn's controlling shareholder, Somers, increasing its voting power prior to the requisitioned meeting.

⁴⁷ In the context of the Members' Requests

⁴⁸ Under section 249D(5)

⁴⁹ See Thorn's submission at paragraph 137

⁵⁰ See paragraph 67

⁵¹ Being 2 months after the section s249D Request was given to Thorn for purposes of section 249D(5)

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Reasons - Thorn Group Limited 01 & 02 [2020] ATP 29

148. ASIC submitted that, as a general matter, it was concerning that Thorn had not conducted its affairs to ensure that it could convene the requisitioned meeting within the time frame required under the Corporations Act. However, it submitted that the appropriateness of Somers acquiring and voting any additional shares prior to the delayed requisitioned meeting should be assessed as part of determining the extent to which Somers' acquisition of a relevant interest via the DRP was appropriate.
149. We agree with ASIC and consider that the potential effect on voting of the shares issued under the DRP at a meeting requisitioned six weeks before the Special Dividend was announced is part of the matrix of factors that contribute to the application of the DRP in the circumstances being unacceptable.

Request for variation of interim orders

150. On 24 November 2020, Somers sought a variation of our interim orders such that they not apply in respect of the requisitioned meeting. It submitted that the interim orders caused Somers unfair prejudice by denying them "*their proper voting entitlement*" at the meeting (in contrast to other recipients of shares under the DRP) when Somers "*has done nothing wrong*". Somers also submitted that the interim orders did not maintain the status quo because they reduced Somers' aggregate voting power to less than the percentage of their pre-DRP voting rights.
151. We sought submissions on Somers' variation request. We also asked parties whether Thorn's Chair had the power to adjourn the meeting and whether such an adjournment would give rise to any contravention or offence.
152. On 30 November 2020, after considering submissions, we advised that we were not minded to vary the interim orders as requested by Somers. In our view, if the meeting had been held within the two month period set by section 249D(5), none of the DRP shares would have been issued before the meeting. While we recognise that the effect of the interim orders may prejudice Somers over other shareholders who received DRP shares, we were not prepared to make an order preventing those other shareholders (who were not parties to the proceedings) from voting.
153. After receiving the interim orders variation request, we had advised parties that we were minded to make a declaration of unacceptable circumstances and we were considering orders, in both cases subject to receiving submissions. On balance, we preferred additional time to resolve the matters before the meeting occurred or a vote was taken. If Thorn was not prepared to adjourn the meeting before resolutions were voted on, we were willing to consider a request for an order to adjourn the meeting for one week.
154. Thorn submitted that given that the final outcome of the proceedings and the scope of any orders remained uncertain, it believed that it would be in the best interests of its shareholders to adjourn the meeting until after the conclusion of proceedings. Only Forager was not in support of delaying the meeting.

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155. ASIC submitted that it appeared Thorn had already contravened section 249D irrespective of whether a deferral or adjournment occurred. We agree.⁵² Accordingly, we considered that it was open to us and appropriate in the circumstances to make orders requiring a deferral or adjournment of the meeting if we considered additional time necessary.
156. On 1 December 2020, we varied our interim orders to include an order requiring the requisitioned meeting to be adjourned to a date, between 7 and 14 days after the determination of our proceedings, to be notified by Thorn in an ASX announcement (see **Annexure B**).
157. Considering section 250B(2) and Thorn's constitution, we did not consider it necessary to make any interim orders (as requested by Thorn) regarding when proxies may be received in relation to the adjourned meeting.
158. Vaspip submitted that the adjournment should be accompanied by an order requiring Thorn to make a disclosure to shareholders. We considered this a matter for any final orders.

Confidential documents

159. In most matters the Panel does not find it necessary to use its formal powers to require the production of documents. Rather, parties usually voluntarily provide documents in response to a request by the Panel or, where necessary, identify documents in respect of which privilege is claimed⁵³ or request to withhold or redact confidential material⁵⁴ in accordance with the Panel's Procedural Rules. Generally, this works well, with co-operation and for the benefit of all parties, and promotes the objectives of the Panel acting fairly and reasonably, with as little formality and in as timely a manner as the legislation and a proper consideration of the matter permits.⁵⁵
160. In this matter, Thorn's approach to the proceedings required us to take additional steps than those usually required for documents to be produced.
161. In our brief dated 23 October 2020, we asked Thorn to provide copies of all papers and minutes of the Board discussing Thorn's capital management plans during the prior 12 months, including the minutes recording the approval of the Special Dividend, the application of the DRP to the Special Dividend and the proposal to conduct the Proposed Buy Back.
162. At the time when submissions were due on the brief, Thorn requested that we make a direction under Rule 2.3 of the Panel's Procedural Rules that documents requested

⁵² The Court declared "pursuant to s 1322(2)" that the Members' Requests were not invalid by reason of procedural irregularity: *Vaspip 2 Pty Ltd v Thorn Group Ltd* [2020] VSC 700 at [78]. Section 1322(2) provides that a proceeding "is not invalidated because of any procedural irregularity unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice... and by order declares the proceeding to be invalid". It appears to follow that the Members' Requests were always valid due to the operation of section 1322(2) and the Court's order on 14 October 2020 merely confirmed that the Court would *not* declare them to be invalid

⁵³ Procedural Rule 2.3.2

⁵⁴ Procedural Rule 2.3.1

⁵⁵ ASIC Regulations 13, 16(2)

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in the brief be withheld from us and all parties to the proceedings, except ASIC. Thorn suggested that ASIC could see the documents so as to confirm (or otherwise) *“that there is no information in these documents that is inconsistent with the submissions lodged by Thorn or that would result in any procedural fairness issue”*.

163. Thorn claimed client legal privilege over certain documents and also submitted that for some *“disclosure of commercially sensitive confidential information of Thorn to certain shareholders of Thorn is inappropriate”*. Thorn stated that it did not have the time or resources to review and redact such confidential information. It submitted that no parties would be prejudiced because the documents did not disclose anything materially significant in the context of the two applications that was not otherwise summarised in its response to the brief.
164. We considered that only ASIC receiving the documents was of limited assistance to us in understanding the circumstances, particularly when Thorn had failed to answer a number of questions in the brief. We requested that Thorn provide to all parties the documents, other than legal advices, redacted only for privileged material. After providing an extension to the deadline for receipt of the requested documents, Thorn said it was impossible for it to meet the deadline and would provide an update. After not hearing from Thorn, we were concerned the delays may potentially interfere with our ability to fulfil our functions in the timely way required⁵⁶ and indicated to Thorn that we were minded to issue a summons if the documents were not provided.
165. Without the issue of any summons, Thorn provided to all parties certain documents heavily redacted for privileged material and for *“various confidential and sensitive commercial and business information”*. Given the heavy redaction, we advised that we intended to issue the summons.⁵⁷ Ultimately, however, we agreed that Thorn could provide certain documents to us and ASIC only, redacted only for legal conclusions (**confidential documents**). We advised Thorn that to the extent the confidential documents or any submissions from Thorn on those documents were relevant to our decisions, it would be necessary for us to satisfy procedural fairness (for example, by giving other parties certain excerpts of unredacted information only or the substance of the information without revealing details that can remain confidential). We agreed that before providing to the other parties any excerpts or a summary of the information, we would consult with Thorn first.
166. Further problems arose, significantly delaying the proceedings, including Thorn repeatedly finding documents (including an additional 11 minutes of meeting of the Board) not provided earlier due to what Thorn described as inadvertent error.
167. Between 30 November and 10 December 2020, we consulted with Thorn on a 2-page summary of the substance of the information contained in the confidential documents to the extent that we considered it credible, relevant and significant to the

⁵⁶ Under regulation 13 of the ASIC Regulations

⁵⁷ We were also minded to make a direction under section 190 of the ASIC Act to restrict the publication of the material produced under the summons. Ultimately, we did not make this direction

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draft declaration (**Summary**). We indicated in effect that the Summary would substitute for providing the confidential documents to parties. Thorn objected to this but did not identify any commercially sensitive information for redaction or rewording.

168. Prior to making our declaration, we gave all parties an opportunity to make any submissions in relation to the Summary.
169. Thorn opposed our approach but provided no submissions on the information in the Summary. It submitted that our approach was improper, including because it was inconsistent with an objective of the Panel to complete proceedings in a timely and cost-effective manner.⁵⁸ We consider the opposite is true. We considered our obligations to act in as timely a manner (“having regard to the time available before the decision must be made”) as the ASIC Act and Corporations Act and a proper consideration of the matters permit⁵⁹ in forming the view that the Summary should be provided to parties, and that the Summary is sufficient.
170. Somers submitted that nothing in the Summary was relevant.
171. Forager submitted that the material in the Summary was sufficiently supported by the material all parties had seen and that we should rely on the material in making the declaration and orders.
172. Vaspip submitted in effect that we should not give weight to Thorn’s minutes of meeting. In the Summary, we noted that all copies of the minutes of meeting of the Board (the signature lines and dates of which had been redacted) were unsigned (except one) and undated. (Thorn submitted that these versions were identical to the signed PDF versions but Word versions were used for the redaction exercise.) We expect to receive signed and dated minutes. However, in the circumstances of this matter we did not pursue this issue any further.
173. After considering these submissions, we concluded that the information in the Summary was credible, relevant and significant and supportive of our findings and conclusions.

Conclusion

174. The exception in item 11 of section 611 is there to allow shareholders to reinvest back into a company to fund continuing operations and future growth. Its purpose is not for passing control to a shareholder at a discount using the company’s own funds. The assessment of the control effect is different, for example, to that undertaken for a rights issue where there is a genuine need for funds.
175. In our view, the size of the Special Dividend and the existence of substantial shareholders on Thorn’s register, together with the contributing factors described above,⁶⁰ made it inevitable that applying the DRP to the Special Dividend could have

⁵⁸ Rule 1.1.1 of the Panel’s Procedural Rules

⁵⁹ Under regulations 13 and 16(2)(c) of the ASIC Regulations

⁶⁰ See paragraphs 99 to 113 and 149

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a significant effect on control that was inconsistent with the purposes in section 602. It is not difficult to calculate the potential control effects of one or more substantial shareholders participating in the DRP using reasonable assumptions to estimate the issue price. This was not only appropriate but, in our view, required in the circumstances to ensure that those potential control effects were consistent with the purpose of item 11 of section 611 having regard to the purposes set out in section 602.

176. Most dividend reinvestment plans will not require scrutiny for the purpose of relying on the item 11 exception.⁶¹ In this matter, it was an unusual combination of factors that led to the circumstances being unacceptable including the failure to consider the control effects of the large Special Dividend particularly in light of the known or likely preferences of Thorn's major shareholders, the failure to disclose the potential control effects, the issue of DRP shares before the requisitioned meeting to replace Somers' nominees on the Board (and such meeting had not been held by the date it was required to be held) and the failure of the Board to consider the potential conflicts of interest of directors when considering the potential control effects.
177. For the reasons discussed above, we considered that the effect of applying the DRP to the Special Dividend in the circumstances was likely to have an effect on control and result in Somers acquiring a substantial interest in Thorn:
- (a) in a market that was not sufficiently efficient, competitive and informed and
 - (b) where Thorn shareholders did not have a reasonable time to consider the DRP and its likely effect and were not given enough information to assess its merits.

Media canvassing

178. Thorn alleged Forager breached its media canvassing undertaking by commenting on matters before the Panel in a report and a letter to Thorn shareholders published on its website. Thorn submitted that the breaches provided context to its concerns about providing commercially sensitive information to the parties in these proceedings. We sought submissions from parties in relation to Thorn's allegation.
179. Forager submitted that its letter was provided in the context of Thorn and Somers contacting shareholders in relation to the requisitioned meeting.
180. Parties are not prevented from expressing opinions or soliciting shareholders in relation to upcoming meetings provided they do not discuss the merits of an application before the Panel.
181. We consider that Forager overstepped the mark in one paragraph of its letter to Thorn shareholders. While Forager disagreed with this conclusion, it confirmed that it would not engage in any further communication with shareholders (or in the media) of this nature while the proceedings continued.
182. We did not consider that Forager used materials from the proceedings that disclose any confidential information or that any interim order against Forager was required.

⁶¹ See paragraph 44

DECISION

Declaration

183. It appears to us that the circumstances are unacceptable:

- (a) having regard to the effect that we are satisfied they have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of Thorn or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Thorn
- (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602.

184. Accordingly, we made the declaration set out in **Annexure C** and consider that it is not against the public interest to do so. We had regard to the matters in section 657A(3).

Orders

185. Following the declaration, we made the final orders set out in **Annexure D** and costs orders set out in **Annexure E**.

186. Under section 657D the Panel's power to make orders is very wide. The Panel is empowered to make 'any order'⁶² if 4 tests are met:

- (a) it has made a declaration. This was done on 17 December 2020.
- (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 27 November 2020, 8 December 2020 and 17 December 2020. Each party made one or more submissions and rebuttals on our proposed orders.⁶³
- (d) it considers the orders appropriate to 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 cancelling shares issued to Somers and Ingot under the DRP and requiring Thorn to pay them their Special Dividend entitlements in lieu of the cancelled DRP shares. The orders also require Thorn to resume the requisitioned meeting within specified dates.

⁶² Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

⁶³ Ingot became a party to the proceedings on 14 December 2020 on the basis that it was a person to whom our proposed orders were directed

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187. We sought submissions on several possible orders, namely, a divestment of the DRP shares issued to Somers, a voting freeze on Somers' DRP shares and the cancellation of Somers' DRP shares.
188. Somers strongly opposed these potential orders on the basis that nothing in the declaration referred to any acts of Somers that caused the circumstances we consider unacceptable and therefore, we would be exercising our powers improperly including by not taking into account a relevant consideration.
189. For two reasons, previously enunciated in *AMP Shopping Centre Trust 02*,⁶⁴ the fact that a person was not directly involved in causing any unacceptable circumstances is not necessarily a bar to the Panel's power to make an order affecting that person. First, section 657A is not directed at "unacceptable conduct" but rather at "unacceptable circumstances" and remedying those circumstances. A person's lack of culpability may be relevant as to whether an order is unfairly prejudicial⁶⁵, but does not necessarily prevent the Panel making an order affecting that person.
190. Secondly, while the declaration is directed at Thorn, it is not correct to say that Somers was not involved in the circumstances. It elected to participate in the DRP for its full dividend entitlement. It did so after Forager made its Panel application.⁶⁶ Accordingly, it would have been aware of its potential maximum voting power increase (using an estimated issue price) from Forager's application, if not before. It should have realised there was a risk that the Panel would consider that increase to be inconsistent with the purposes in section 602.
191. After considering submissions on the potential orders, we made a cancellation order. In our view, this order puts Somers in the same position it would have been had it not elected to participate in the DRP. In contrast to a divestment order, the cancellation order removes the dilutionary impact of the share issue and does not put downward pressure on the share price. Similarly, we did not consider a voting restriction to be as effective at protecting the rights or interests of other Thorn shareholders because it would allow Somers to keep the shares it obtained at a discount and would not remedy the dilution.
192. The cancellation order may cause prejudice to Somers or Ingot, but we are not satisfied that it unfairly prejudices Somers or Ingot given their involvement in the circumstances and the fact that the order puts each of them in the position they would have been had the unacceptable circumstances not occurred.⁶⁷
193. Ingot submitted that it was not appropriate for us to punish Ingot for the decisions made by the Board on the basis that Somers nominated two directors to the Board, stating also its view that Ingot is separate from Somers.⁶⁸ We have not made any

⁶⁴ [2003] ATP 24 at [44]-[46]

⁶⁵ *ASIC v Terra Industries Inc* [1999] FCA 525 at [97(g)]

⁶⁶ Somers submitted that its lawyers provided advice from Bermudian lawyers to Thorn on 18 October 2020 and its custodian formally applied to participate in the DRP on 20 October 2020

⁶⁷ *Regal Resources Limited* [2016] ATP 17 at [60]

⁶⁸ That is Somers is managed by ICM whereas Ingot makes its own investment decisions

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findings imputing knowledge of the application of the DRP to Somers. The unacceptable circumstances enhanced the control of Somers and its associates (including Ingot) and in the circumstances we see no reason to differentiate between Somers and its associates.

194. Thorn initially submitted that requiring it to pay Somers its Special Dividend entitlement (of approximately \$10 million) on short notice would unfairly prejudice Thorn and its business *“as Thorn continues to pursue a number of initiatives and continue its previously announced strategy..., all of which requires significant capital”*. We found this submission surprising in light of some of Thorn’s previous submissions. Thorn later submitted that it was prepared to pay Somers.
195. Thorn and Somers submitted that as an alternative we could order a ‘re-run’ of the DRP for those shareholders who did not participate with disclosure as to ‘control’ and with the shares being issued before the requisitioned meeting. In our view, this alternative may have been available to us if the Special Dividend and DRP had been deferred by interim order. However, we were persuaded by Thorn and Somers not to order any deferral.
196. ASIC suggested that it was open to us to only cancel DRP shares acquired in excess of Somers’ creep capacity because the market was aware that Somers was entitled to rely on creep as and when available.
197. In circumstances where Thorn shareholders had inadequate information about the likely effects of the DRP, we do not consider it appropriate to allow Somers to keep DRP shares up to its creep capacity. However, we permitted Somers to keep a specified number of DRP shares in order for it to retain the percentage of voting power it held immediately prior to the DRP.
198. In relation to the requisitioned meeting, we agreed with Forager and ASIC that the meeting should not be held over the Christmas and New Year period. However, given that the 7 to 14 days window set out in our varied interim order fell over the period from 23 to 30 December 2020, we moved the meeting date window to between 4 and 15 January 2021. We also did not consider it necessary for Thorn’s ASX notice to include a new paragraph requested by Vaspip regarding proxies, noting that as a matter of law proxies can be lodged at least 48 hours before the resumption of the adjourned meeting. We accepted that Thorn would advise shareholders of this in its ASX announcement in accordance with its stated intention.

Costs Orders

199. After considering parties’ submissions, we made a further order requiring Thorn to pay a portion of the costs actually, necessarily, properly and reasonably incurred by Forager and Vaspip in the course of the proceedings from 19 November 2020 (being the date of our supplementary brief) to and including 16 December 2020 (being the day before we made our declaration and orders).
200. While costs are the exception in Panel proceedings and Thorn was entitled to resist the applications, we consider that Thorn delayed and, at times, obstructed the proceedings from progressing in a timely and cost-effective manner including by

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deflecting our questions and not providing documents when requested. This necessitated us seeking multiple submissions from parties at a cost to those parties. Examples of this include (i) a supplementary brief being necessary in part to give parties an opportunity to provide submissions on answers and documents provided by Thorn after the deadlines in the initial brief, and (ii) two rounds of substantive submissions and rebuttals on a draft declaration being necessary in part to give parties an opportunity to provide submissions on the relevance of documents only provided by Thorn in response to the supplementary brief⁶⁹ and to address information in the Summary.⁷⁰

201. We fixed amounts Thorn was required to pay after considering Forager's and Vaspip's invoices for the specified period and, based on our commercial judgment, deducting costs we considered were not actually, necessarily, properly and reasonably incurred in relation to the proceedings.
202. The costs orders provided a process for cost assessment if Thorn objected to the amounts we fixed.

Robin Bishop

President of the sitting Panel

Decision dated 17 December 2020 (declaration and orders), 24 December 2020 (costs orders)

Reasons given to parties 9 April 2021

Reasons published 19 April 2021

⁶⁹ Notwithstanding questions in the Panel's initial brief requesting relevant correspondence and Board papers, Thorn only provided the letter dated 7 September 2020 from ICM to the Chair of Thorn (see paragraph 60) and the Board paper titled "Options for solving a future TGA share register" (see paragraph 61) with its submissions on the supplementary brief and with its rebuttal submissions on the supplementary brief, respectively

⁷⁰ The Summary was prepared in part to address the inability of Thorn to provide in a timely manner the 11 additional minutes of meeting (see paragraph 166) to the other parties redacted for confidential information

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Reasons - Thorn Group Limited 01 & 02
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Advisers

Party	Advisers
Forager	Mont Lawyers
Ingot	Thomson Geer
Somers	Herbert Smith Freehills
Thorn	MinterEllison
Vaspi	Deffenti & Queiroz Lawyers



Australian Government

Takeovers Panel

Annexure A

CORPORATIONS ACT SECTION 657E INTERIM ORDERS

THORN GROUP LIMITED 01 & 02

Forager Funds Management Pty Ltd made an application to the Panel dated 14 October 2020 and Vaspip 2 Pty Ltd made an application to the Panel on 21 October 2020, both in relation to the affairs of Thorn Group Limited (**Thorn**).¹

The Panel ORDERS:

1. Without the prior consent of the Panel, neither Somers Limited nor any of its associates may:
 - (a) dispose of, transfer or grant any security interest over any shares issued to it under Thorn's dividend reinvestment plan in respect of the special dividend announced by Thorn on Monday, 12 October 2020 (the **DRP Shares**) or any interests in the DRP Shares, or agree to any such disposal, transfer or grant or
 - (b) exercise any voting rights attaching to the DRP Shares.
2. These interim orders have effect until the earliest of:
 - (i) further order of the Panel
 - (ii) the determination of the proceedings and
 - (iii) 2 months from the date of these interim orders.

Tania Mattei
Counsel
with authority of Robin Bishop
President of the sitting Panel
Dated 2 November 2020

¹ The matters are being heard together under a direction of the Panel



Australian Government

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Annexure B

CORPORATIONS ACT SECTION 657E FURTHER INTERIM ORDERS

THORN GROUP LIMITED 01 & 02

Forager Funds Management Pty Ltd made an application to the Panel dated 14 October 2020 and Vaspip 2 Pty Ltd made an application to the Panel on 21 October 2020, both in relation to the affairs of Thorn Group Limited (**Thorn**).¹

The Panel ORDERS:

1. The interim orders dated 2 November 2020 are revoked and replaced by these further interim orders.
2. Without the prior consent of the Panel, neither Somers Limited nor any of its associates may:
 - (a) dispose of, transfer or grant any security interest over any shares issued to it under Thorn's dividend reinvestment plan in respect of the special dividend announced by Thorn on Monday, 12 October 2020 (the **DRP Shares**) or any interests in the DRP Shares, or agree to any such disposal, transfer or grant or
 - (b) exercise any voting rights attaching to the DRP Shares.
3. The Chair of the extraordinary general meeting convened by Thorn to be held on Thursday, 3 December 2020 must open the general meeting and, before putting to a vote any resolution notified by the notice of meeting dated 28 October 2020, adjourn the meeting to an adjourned meeting to be resumed on a date between 7 and 14 days after the determination of the proceedings with such date to be notified by Thorn to shareholders through the ASX market announcements platform as soon as reasonably practicable after the determination of the proceedings.
4. These interim orders have effect until the earliest of:
 - (i) further order of the Panel
 - (ii) the determination of the proceedings and

¹ The matters are being heard together under a direction of the Panel

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**Reasons - Thorn Group Limited 01 & 02
[2020] ATP 29**

(iii) 2 months from the date of these interim orders.

**Tania Mattei
Counsel
with authority of Robin Bishop
President of the sitting Panel
Dated 1 December 2020**



Australian Government

Takeovers Panel

Annexure C

**CORPORATIONS ACT
SECTION 657A**

DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

THORN GROUP LIMITED 01 & 02

CIRCUMSTANCES

1. Thorn Group Limited (**Thorn**) is an ASX listed company (ASX: TGA).
2. On 11 May 2020, Thorn's largest shareholder, Somers Limited and its associates (**Somers**), gave a substantial holder notice disclosing that it had voting power in Thorn of 30.57%.
3. On 6 July 2020, Thorn's second largest shareholder, Forager Funds Management Pty Ltd (**Forager**), being the investment manager of Forager Australian Shares Fund who at that time held 15.41% of Thorn, wrote to the directors of Thorn expressing a strong desire for Thorn to return capital to its shareholders and for Thorn to appoint another independent director noting that the existing Board had a majority of non-independent directors.
4. On 23 July 2020, Forager wrote to Thorn's directors repeating its earlier request for a capital return. Forager stated that it had conversations with Somers and that its understanding was that Somers "*sees a future in Thorn's equipment finance division and would like to see capital committed to that business once an appropriate strategy can be agreed upon*". Forager stated in effect that if this was to be the case, the Thorn Board should consider all available options for restructuring the business.
5. On 31 July 2020, Thorn announced that it held \$54.1 million of free cash as at 30 June 2020.
6. On 3 August 2020, a shareholder of Thorn, Vaspip 2 Pty Ltd (**Vaspip**), requested a copy of Thorn's share register stating:

"The reason for this request is so that we can contact existing shareholders to discuss the possibility of gathering enough shareholder support for a requisition of a general meeting... The aim of calling a general meeting would be to remove the majority of directors and to simply wind the business up and return all surplus capital to shareholders."
7. Prior to the meeting of the Thorn Board on 4 August 2020, Thorn's then CFO gave Board members a paper entitled "Options for solving a future TGA share register" that began:

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“Problem

‘One shareholder’ at least would like to invest in the future of TGA with the two Mark 2 business options and potential future other options, but some other shareholders do not and would like their money back out of TGA.

How do we solve for every shareholder?”

8. On 19 August 2020, at Thorn’s annual general meeting, the Chair of Thorn stated in his address to shareholders:

“Whilst I am unable to provide any reliable estimate of timing, we are hoping to be in a position to place before shareholders as early as possible, plans for further major restructuring of the group for your consideration.”

9. On 28 August 2020, Thorn received a section 203D¹ notice of intention to propose resolutions for the removal of 3 of Thorn’s then 4 directors² from a group of Thorn shareholders, including Vaspip, holding just over 5% of Thorn’s issued capital (the **Requisitioning Shareholders**).

10. On 31 August 2020, Thorn received from the Requisitioning Shareholders a section 249D request to call a general meeting of Thorn shareholders to consider the resolutions and a section 249P request to give Thorn shareholders a members’ statement in relation to the proposed resolutions.

11. On 7 September 2020, Somers’ investment manager wrote to the Chair of Thorn, in that capacity³:

“I am acutely aware of the opposing strategic views of Thorn’s major shareholders. As you are aware [the investment manager of Somers], on behalf of Somers Limited & at least one other shareholder have been discussing with the Company’s Tax advisers on what the maximum fully franked dividend that Thorn could pay shareholders within the constraints of Thorn’s existing capital structure. I understand that this is envisaged to be \$25m, subject to tax / legal sign off.

In addition to a franked dividend, the Board may want to consider the Company implementing a buy back in the form of tender offer, where shareholders can elect to sell their shares back to the company subject to a maximum price per share. I estimate that the Company could return an additional \$25m to shareholders in the form of a buy back, given the Company’s current cash on hand and liabilities...

¹ 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 The Requisitioning Shareholders were not seeking to remove the director appointed as an independent on 14 October 2019, who remains on the Board

³ The Chair of Thorn was also the Chair of Somers Limited

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Reasons - Thorn Group Limited 01 & 02 [2020] ATP 29

If a dividend of A\$25m was to be paid then Somers will receive approximately A\$7.6m. Somers would be prepared to lend these funds to Thorn in order for the Company to complete a A\$25m share buyback..."

A copy of this letter was provided to the Board on 8 September 2020.

12. On 16 September 2020, Thorn announced that, having taken advice, it considered that the Requisitioning Shareholders' requests were invalid.
13. On 23 September 2020, Vaspip (one of the Requisitioning Shareholders) commenced proceedings in the Supreme Court of Victoria seeking orders for Thorn to call the general meeting and distribute the members' statement and in further submissions filed on 29 September 2020 sought relief from any alleged invalidity in its section 249D request under sections 1322(2) and (4).
14. On 12 October 2020, Thorn announced that:
 - (a) the Thorn Board had declared a fully franked special dividend of \$0.075 cash per share (totalling approximately \$24.2 million) (**Special Dividend**)
 - (b) Thorn's dividend reinvestment plan (**DRP**) will apply to the Special Dividend with Thorn shares issued at a discount of 2.5% to the volume weighted average price per Thorn share traded over the five day trading period ending on 27 October 2020 and the last day for elections under the DRP being 20 October 2020 and
 - (c) *"In addition to the Special Dividend, the Thorn Board has also been considering, and continues to consider, Thorn's ability to undertake a buy back of Thorn shares for an amount in the order of \$15 to 25 million.*
...
It is the present intention of Thorn's Board to, in January 2021, seek shareholders' approval for the terms of an off-market buy back of Thorn shares, subject to there being no material change in Thorn's circumstances and to Thorn receiving all necessary regulatory approvals and/or authorisations including from the Australian Securities Exchange, the Australian Securities & Investments Commission and the Australian Taxation Office. The exact size of the buy back will be announced when the proposal is finalised, which is presently expected to be in December 2020."
15. On 14 October 2020, the Supreme Court of Victoria declared that, pursuant to section 1322(2), the Requisitioning Shareholders' requests were not invalid by reason of procedural irregularity.
16. On 28 October 2020, Thorn called an extraordinary general meeting in response to the Requisitioning Shareholders' section 249D request scheduled to be held on 3 December 2020.

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17. On 3 November 2020, Thorn paid the Special Dividend and issued shares under the DRP. The total number of Thorn shares issued under the DRP was 60,764,233.
18. On 5 November 2020, Somers gave a substantial holder notice disclosing that its voting power in Thorn had increased to 39.42%. The substantial holder notice disclosed that Somers had acquired additional voting power in Thorn of approximately 0.99% prior to the issue of shares under the DRP. Under the DRP, Somers received 49,241,938 Thorn shares.
19. At the time Thorn made its announcements on 12 October 2020, paid the Special Dividend and issued shares under the DRP, Thorn's Board consisted of 3 directors, only one of whom was considered independent by Thorn. The other 2 directors were nominated to act as directors by Somers, and the Chair of Thorn is also the Chair of Somers Limited.

EFFECT

20. At the time of Thorn's 12 October 2020 announcements there was no disclosure of any further major restructuring.
21. The size of the Special Dividend meant that the total potential number of shares that could be issued under the DRP represented approximately 36% of Thorn's market capitalisation.
22. Given the following combination of factors:
 - (a) the size of the Special Dividend relative to Thorn's market capitalisation and previous dividends paid by Thorn (which had not announced a dividend since 23 November 2017)
 - (b) the known or likely preferences of Thorn's substantial shareholders
 - (c) the short period of time given to shareholders to make an election to participate in the DRP
 - (d) the uncertainty regarding Thorn's plans for further major restructuring
 - (e) the lack of disclosure regarding any control effects of the DRP and the response, or likely response, of Thorn's substantial shareholders to the DRP and
 - (f) the potential effect of a large number of newly issued shares on voting at a general meeting requisitioned to replace the Board six weeks before the Special Dividend was announced,

the Panel considers that it was apparent that the DRP had the potential to have a substantial effect on control of Thorn in a manner inconsistent with the purposes in section 602.

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23. Thorn did not adequately consider the potential control effects of applying the DRP to the Special Dividend or whether those potential effects were consistent with the purpose of the exemption in item 11 of section 611.
24. Thorn did not adequately consider the potential conflicts of interest of the Thorn Board when considering the potential control effects of the matters announced in Thorn's 12 October 2020 announcement.
25. The Panel considers that the effect of applying the DRP to the Special Dividend in the circumstances was likely to have an effect on control and result in Somers acquiring a substantial interest in Thorn:
 - (a) in a market that was not sufficiently efficient, competitive and informed and
 - (b) where shareholders did not have a reasonable time to consider the DRP and its likely effect and were not given enough information to assess its merits.

CONCLUSION

26. It appears to the Panel that the circumstances are unacceptable circumstances:
 - (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of Thorn or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Thorn
 - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602.
27. 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 Thorn.

Tania Mattei
Counsel
with authority of Robin Bishop
President of the sitting Panel
Dated 17 December 2020



Australian Government

Takeovers Panel

Annexure D

**CORPORATIONS ACT
SECTION 657D
ORDERS**

THORN GROUP LIMITED 01 & 02

The Panel made a declaration of unacceptable circumstances on 17 December 2020.

THE PANEL ORDERS

1. On 23 December 2020:
 - (a) 41,258,262 of the 46,251,055 DRP Shares issued by Thorn to Somers as beneficial owner, are cancelled
 - (b) Thorn must pay to Somers the sum of \$6,341,394.87, being its Special Dividend entitlement in cash in lieu of the DRP Shares cancelled by Order 1(a)
 - (c) 2,668,018 of the 2,990,883 DRP Shares issued by Thorn to Ingot as beneficial owner, are cancelled and
 - (d) Thorn must pay to Ingot the sum of \$410,074.37, being its Special Dividend entitlement in cash in lieu of the DRP Shares cancelled by Order 1(c).
2. From the date of these orders until completion of the Cancellation Actions, neither Somers nor any of its associates may:
 - (a) dispose of, transfer or grant any security interest over any DRP Shares or any interests in the DRP Shares, or agree to any such disposal, transfer or grant or
 - (b) exercise any voting rights attaching to the DRP Shares.
3. Thorn must as soon as practicable after completion of the Cancellation Actions, release on the ASX market announcements platform, an announcement which states that:
 - (a) 41,258,262 of the 46,251,055 DRP Shares issued to Somers as beneficial owner, have been cancelled and
 - (b) 2,668,018 of the 2,990,883 DRP Shares issued to Ingot as beneficial owner, have been cancelled.
4. Thorn must resume the Adjourned Extraordinary General Meeting on or after Monday, 4 January 2021 and in any event by no later than noon on Friday, 15

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January 2021 with such date to be notified by Thorn to shareholders through the ASX market announcements platform as soon as reasonably practicable after the date of these orders.

5. In these orders the following terms apply:

Adjourned Extraordinary General Meeting	means the adjourned 3 December 2020 extraordinary general meeting as announced by Thorn on 3 December 2020
Cancellation Actions	the actions specified in order 1
DRP	the dividend reinvestment plan of Thorn
DRP Shares	the shares issued under the DRP in respect of the Special Dividend to Somers as beneficial owner and Ingot as beneficial owner
Ingot	Ingot Capital Investments Pty Ltd
Somers	Somers Limited
Special Dividend	the fully franked special dividend of \$0.075 per share announced by Thorn on 12 October 2020
Thorn	Thorn Group Limited

Tania Mattei
Counsel
with authority of Robin Bishop
President of the sitting Panel
Dated 17 December 2020



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Annexure E

**CORPORATIONS ACT
SECTION 657D
ORDERS**

THORN GROUP LIMITED 01 & 02

The Panel made a declaration of unacceptable circumstances on 17 December 2020 and final orders on 17 December 2020.

Pursuant to section 657D(2)(d) of the *Corporations Act 2001* (Cth)

THE PANEL ORDERS

1. Within 10 business days of the date of this order, Thorn Group Limited (Thorn) must, subject to paragraph 2:
 - (a) pay to the applicant, Forager Funds Management Pty Ltd, \$36,958.00 (plus GST) and
 - (b) pay to the applicant, Vaspip 2 Pty Ltd, \$40,556.00 (plus GST),in each case, representing the costs actually, necessarily, properly and reasonably incurred in the course of the proceedings from 19 November 2020 to 16 December 2020 (inclusive).
2. If, within 5 business days of the date of this order, Thorn gives written notice to the Panel and the relevant payee objecting to the amount fixed in paragraph 1(a) or 1(b), the following applies in place of each subparagraph to which Thorn objects:
 - (a) Within 10 business days, the relevant payee must provide Thorn with an itemised bill of their costs actually, necessarily, properly and reasonably incurred in the course of the proceedings from 19 November 2020 to 16 December 2020 (inclusive).
 - (b) Within 5 business days of receipt of the bill, Thorn must tell the Panel and the relevant payee whether it will pay the bill. If Thorn indicates that it will pay, it must do so within 10 business days of receipt of the bill.
 - (c) If Thorn tells the Panel and the relevant payee it will not pay the bill:
 - (i) the Panel will appoint an independent cost consultant to assess the costs and

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- (ii) the relevant payee must provide a bill of costs incurred in the course of the proceedings from 19 November 2020 to 16 December 2020 (inclusive) in taxable form and make its file available to the cost consultant.
- (d) Within 10 business days of the assessment:
 - (i) the assessed costs must be paid by Thorn and
 - (ii) the consultant's costs must be paid:
 - (A) by the relevant payee, if the cost consultant reduced the costs by 10% or more or
 - (B) otherwise, by Thorn.

**Tania Mattei
Counsel
with authority of Robin Bishop
President of the sitting Panel
Dated 24 December 2020**