



Australian Government

Takeovers Panel

**Reasons for Decision
Smoke Alarms Holdings Limited 03
[2022] ATP 3**

Catchwords:

decline to make a declaration, rights issue, underwriting, effect on control, disclosure, dispersion strategy, shortfall shares, need for funds, association

Corporations Act 2001 (Cth), sections 602 and 611 (item 10), Chapter 7

Guidance Note 17 – Rights Issues

Procedural Guidelines

Smoke Alarms Holdings Limited 01 [2020] ATP 2, MacarthurCook Property Securities Fund 01 & 02 [2012] ATP 7, Mount Gibson Iron Limited [2008] ATP 4

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

INTRODUCTION

1. The Panel, Anthony Jarvis, Marina Kelman and Rory Moriarty (sitting President), declined to make a declaration of unacceptable circumstances in relation to the affairs of Smoke Alarms. The application concerned a pro-rata entitlement offer by Smoke Alarms to eligible shareholders. Following receipt of the application, Smoke Alarms revised the entitlement offer from a 2 for 1 offer ratio to a 1 for 1 offer ratio. The Panel considered that, among other things, the revised offer ratio reduced the potential control effect of the entitlement offer. During the proceedings, Smoke Alarms provided further disclosure which addressed the remaining concerns of the Panel. Accordingly, the Panel was not satisfied that the circumstances were unacceptable.

2. In these reasons, the following definitions apply.

Applicants	Mr Anthony Richard Lewis and Greenwich Capital Partners Pty Ltd
Fast Future	Fast Future Pty Ltd
Offer	has the meaning given in paragraph 4
Revised Offer	has the meaning given in paragraph 26
ROIS	has the meaning given in paragraph 4
Second ROIS	has the meaning given in paragraph 27
Shortfall Offer	has the meaning given in paragraph 8
Smoke Alarms	Smoke Alarms Holdings Limited

Takeovers Panel

Reasons – Smoke Alarms Holdings Limited 03 [2022] ATP 3

Synergy 4 Synergy 4 Pty Ltd
Underwriters Fast Future and Synergy 4

FACTS

3. Smoke Alarms is an unlisted public company with more than 50 shareholders. It is highly leveraged and liquidity in its shares is limited.¹
4. On 23 December 2021, Smoke Alarms issued a replacement offer information statement (**ROIS**) in relation to a fully underwritten pro-rata entitlement offer to eligible shareholders of 2 new shares for every 1 existing share held at an issue price of \$0.05 per new share to raise approximately \$7.42 million (**Offer**).
5. The ROIS disclosed that the proceeds of the Offer would be used to strengthen the balance sheet of Smoke Alarms by:
 - (a) *“Paying a debt to the Australian Tax Office of approximately \$1.8 million (approximately 26% of net funds raised).”*
 - (b) *“Repaying a Westpac facility of approximately \$1 million (approximately 14.4% of net funds raised).”*
 - (c) *“[P]aying down debt to Fast Future. The outstanding balance of the Company’s loans to Fast Future is currently \$8,034,414. The Company expects to attribute approximately \$3.0 million for this purpose (approximately 43% of net funds raised)”.*
 - (d) *“Making allowance for the potential acquisition of competitors and other operating businesses in the same or complementary industries in which the Company operates. The Company expects to attribute approximately \$1.2 million for this purpose (approximately 17.3% of net funds raised)”.*
6. The ROIS disclosed that the underwriters, Fast Future and Synergy 4, who had agreed to underwrite 60% and 40% of the Offer respectively, could potentially increase their voting power in Smoke Alarms from 4.40% to 42.2% in the case of Fast Future and from 0.88% to 26.1% in the case of Synergy 4.²
7. The ROIS also disclosed that the Board expected that the two largest shareholders would take up their entitlements, representing between them approximately 30% of the shareholding of Smoke Alarms.
8. The Offer was made in conjunction with a shortfall offer (**Shortfall Offer**), the terms of which are (in summary):
 - (a) any new shares that are not subscribed for under the Offer become shortfall shares the subject of the Shortfall Offer and may be applied for by eligible shareholders and “New Investors”
 - (b) any amounts received by eligible shareholders above their entitlement are deemed to be applications for shortfall shares

¹ Based on Smoke Alarms’ submissions

² Assuming no eligible shareholders participate in the Offer

Takeovers Panel

Reasons – Smoke Alarms Holdings Limited 03 [2022] ATP 3

- (c) all shares applied for by “New Investors” will be deemed to be an application for shortfall shares and
 - (d) the Smoke Alarms Board may allocate shortfall shares at its discretion but will only scale back an application for shortfall shares if the total number of applications for shortfall shares exceed the number of shortfall shares available.
9. The ROIS disclosed that:
- “The associates of the Underwriters may apply for Shortfall Shares; however the Company will only accept applications for Shortfall Shares by an associate of an Underwriter to the extent that the Underwriter’s Relevant Interest in the Company does not exceed 19.99% as a result.”*
10. The Offer was scheduled to close on 28 January 2022 with new shares to be issued on 4 February 2022.

APPLICATION

11. By application dated 5 January 2022, the Applicants (Smoke Alarms shareholders) sought a declaration of unacceptable circumstances. The Applicants submitted (among other things) that:
- (a) neither Fast Future nor Synergy 4 hold an Australian Financial Services Licence and therefore cannot legally underwrite the Offer
 - (b) Mr Cameron Davis (a current Smoke Alarms director) and Mr Randall Deer (a former Smoke Alarms director) are associated
 - (c) Fast Future and Synergy 4 are associated
 - (d) the ROIS “omits the current shareholdings of Cameron Davis and Randall Deer and their associated parties”, “does not highlight the likely change in control of [Smoke Alarms]” and “provides potentially misleading disclosures regarding the release of financial information” and
 - (e) there is no independent expert opinion on the fairness or reasonableness of the Offer.
12. The Applicants also submitted that:
- “The 31 Oct Balance Sheet shows net assets of \$5.729m. The audited financial statements as at 30 June 2021 signed by the directors on 15 November 2021 showed net assets of \$0.747m. There is no explanation in the events after balance date in the audited financial statements of the substantial improvement in the net position of the company of approx. \$5m in four months to 31 October 2021 and if this is the position and there is a rapid improvement why there is a need to raise capital.”*
13. The Applicants sought interim orders as follows:
- (a) the underwriting to the Offer be cancelled
 - (b) interests associated with Cameron Davis and Randall Deer and Synergy 4 be declared associated parties

Takeovers Panel

Reasons – Smoke Alarms Holdings Limited 03 [2022] ATP 3

- (c) an independent expert be required to assess whether the Offer is fair and reasonable and
 - (d) the maximum holding of Smoke Alarms by the alleged associated parties be set at 20% following the Offer.
14. The Applicants sought as final orders the orders set out in paragraph 13(b) and 13(d) above.

DISCUSSION

Conducting proceedings

15. The application was very brief. While brevity is to be encouraged, it is important that information to aid the Panel in considering the application (for example, submissions in support of each claim of unacceptability) is included.³ The Panel's Procedural Guidelines encourage applicants to provide such information. Notwithstanding that the application lacked a lot of information, it raised sufficient concerns regarding control and disclosure and we decided to conduct proceedings in relation to those aspects of it as set out below.

Control effect and disclosure

16. As noted at paragraph 6 above, the ROIS disclosed that Fast Future and Synergy 4 have the potential to increase their voting power to 42.2% and 26.1% respectively following completion of the Offer, which we considered to be significant.⁴
17. We also considered that other matters warranted investigation, including:
- (a) the large size of the Offer and the appropriateness of its pricing
 - (b) the circumstances that led to Smoke Alarms engaging Fast Future and Synergy 4 to act as underwriters
 - (c) the consideration given to including the Shortfall Offer, including the decisions to:
 - (i) give the Board discretion to allocate shares under the Shortfall Offer
 - (ii) enable "New Investors" to participate in the Shortfall Offer and
 - (iii) allow "associates of the Underwriters" to participate in the Shortfall Offer
 - (d) the sufficiency of the disclosure in the ROIS including in relation to Fast Future and Synergy 4 and the individuals/shareholders who stand behind them
 - (e) whether there was an urgent need for funds and
 - (f) whether any consideration was given to the Offer's attractiveness to Smoke Alarms shareholders.

³ See Procedural Guidelines at [3.5d]

⁴ Guidance Note 17 – Rights Issues states at [5] that where there is potential for a rights issue to affect control, the Panel considers, among other things, whether the control effect exceeds what is reasonably necessary for the fundraising purpose

Takeovers Panel

Reasons – Smoke Alarms Holdings Limited 03 [2022] ATP 3

Association

18. The Applicants submitted in their application that “[i]n December 2019 the Takeover (sic) Panel found that interests associated with directors Cameron Davis and Randall Deer were associated”. This appears to be a reference to *Smoke Alarms Holdings Limited 01* [2020] ATP 2. However, in that proceeding the Panel noted at [27] (footnotes omitted, emphasis added):

SAH submitted that Randall Deer and Cameron Davis are not associates. We make no findings on this question. We consider, however, that their relationship was such that SAH should have implemented protocols and processes to manage the conflicts of interest or potential conflicts of interest that arose from that relationship. Our concern is based on the business relationship between the two men as described above, in particular their co-ownership of R2-D2 (which had a 14.7% interest in SAH). Matthew Driscoll’s personal observation that they had separate businesses and acted independently from each other is not necessarily inconsistent with them at least having had a close business relationship and does not allay our concern.

19. In *Mount Gibson Iron Limited*,⁵ the Panel said at [15] that “[t]he Panel’s starting point was that it was for Mount Gibson - the applicant - to demonstrate a sufficient body of evidence of association and to convince the Panel as to that association, albeit with proper inferences being drawn.”
20. We considered that the hurdle had not been met in this instance in relation to any of the alleged associations raised in the application (including the alleged association between Mr Davis and Mr Deer and the alleged association between Fast Future and Synergy 4), particularly in view of the lack of any material provided by the Applicants in support of their allegations.⁶
21. Accordingly, we decided not to conduct proceedings in relation to the alleged associations raised in the application.

Australian financial service licensing issues

22. The Australian financial services licensing regime is regulated under Chapter 7 of the Corporations Act. While the existence (or otherwise) of an Australian financial services licence (AFSL) may have a bearing in a particular case on whether circumstances are unacceptable, it was not clear that it was likely to do so in this case on the material provided. If there is a breach of chapter 7 by reason of a person not holding the applicable AFSL, that is a matter for ASIC and hence we consider that this issue, absent a connection to the control effect of the underwriting, is outside our remit.
23. Accordingly, we decided not to conduct proceedings in relation to the Australian financial services licensing issues raised in the application.

⁵ [2008] ATP 4

⁶ In relation to the individuals/shareholders that stand behind Fast Future and Synergy 4, see paragraphs 30(a) and 30(b) and 45 below.

Takeovers Panel

Reasons – Smoke Alarms Holdings Limited 03 [2022] ATP 3

Independent expert

24. In connection with the aspect of the application seeking a declaration of unacceptable circumstances based on the lack of an independent expert's opinion on the fairness or reasonableness of the Offer, Smoke Alarms submitted in a preliminary submission that *"the Company is not required obtained [sic] an independent expert opinion on the fairness or reasonableness of the transaction."*
25. We agree, but that is not necessarily the end of the inquiry. There may be circumstances in which an independent expert's report is warranted. Here, the application did not include any submission as to why there should be an independent expert's report and we did not take this any further.

Revised Offer

26. Following the issue of our brief, Smoke Alarms submitted that it had determined to revise the Offer structure from a 2 for 1 offer ratio to a 1 for 1 offer ratio (**Revised Offer**), halving the size of the offer. Smoke Alarms would therefore only be raising approximately \$3.7 million gross. The proposed timetable was also extended under the Revised Offer into February 2022.
27. Smoke Alarms also provided a copy of a draft Second Replacement Offer Information Statement (**Second ROIS**) in relation to the Revised Offer.
28. The Second ROIS disclosed in relation to the reasoning for revising the Offer:

"Following discussions with the Underwriters after the opening of the Offer, the Board has determined that the original entitlement offer of two New Shares for every one Share held was not essential to achieve the Company's current financial requirements and may not have been at a level that would be preferred by Eligible Shareholders. By reducing the size of the Offer, the Board hopes that more Eligible Shareholders will be desirous of taking up their Entitlements and maintaining their relative percentage ownership of the Company. The reduced size of the Offer will also have a less dilutive effect on Shareholders that do not take up their Entitlement and may result in the Underwriters obtaining a smaller shareholding in the Company following the close of the Offer."
29. The Second ROIS disclosed that under the Revised Offer that:
 - (a) Fast Future's maximum potential voting power following completion of the Revised Offer would be 32.82% (as opposed to 42.2% under the Offer) and
 - (b) Synergy 4's maximum potential voting power following completion of the Revised Offer would be 19.82% (as opposed to 26.1% under the Offer).⁷
30. The Second ROIS also provided updated disclosure in other respects, including:
 - (a) *"Fast Future is a company controlled by Randall Deer (an ex-director of the Company who resigned in March 2020). Fast Future is the Company's primary creditor. Fast Future's associates are Bridgett Deer and Run Fast Pty Ltd. Fast Future's Voting Power is currently 4.40% of the Company's Shares."*

⁷ Assuming no eligible shareholders participate in the Offer

Takeovers Panel

Reasons – Smoke Alarms Holdings Limited 03 [2022] ATP 3

- (b) *“Synergy 4 is a company made up of three investors that each currently have minor shareholdings in the Company. Synergy 4’s associates are CIBAW Pty Ltd, Joseph and Michelle Pagliaro, Kuyura Pty Ltd and J & M Hunter Investments Pty Ltd. Synergy 4 currently has Voting Power of 0.88% of the Company’s Shares.”* We return to this below.
- (c) The proceeds of the Revised Offer would be used to strengthen the balance sheet of Smoke Alarms by paying the debt to the ATO (approximately 35% of net funds raised) and the debt to Fast Future (approximately 65% of net funds raised), and no longer for the purposes of paying the debt to Westpac or for potential acquisitions (see paragraph 5 above).
- (d) In addition to the two largest shareholders in Smoke Alarms, the Board expected a 2% shareholder to take up its entitlement. The Second ROIS also stated:

“For clarity, in the unlikely event that no Shareholders take up their Entitlements other than the three shareholders mentioned above and the associates of the underwriters, Fast Future’s Voting Power following the close of the Offer will be approximately 23.05% and Synergy 4’s Voting Power following the close of the Offer will be approximately 13.3%.”

- (e) Any application monies received prior to the date of the Second ROIS (i.e. under the initial Offer) would be deemed to be an application for the reduced 1 for 1 entitlement with any balance deemed to be an application for shares under the Shortfall Offer, and that any shareholder that applied for new shares prior to receiving the Second ROIS may elect to withdraw their application.
- (f) An updated pro-forma balance sheet which took into account adjustments made during the audit of the 30 June 2021 financial report.⁸
31. The change in the structure of the entitlement offer largely alleviated our concerns regarding the potential control effect.
32. In relation to the circumstances that led to Smoke Alarms engaging Fast Future and Synergy 4 to act as underwriters, Smoke Alarms submitted (among other things) that:

“Fast Future is the Company’s largest creditor and has historically shown interest in providing financial support to the Company. In or about October 2021, the Board canvassed Fast Future to ascertain whether it would be prepared to underwrite (in full or in part) the offer. The Board wanted there to be several underwriters in order to minimise the potential control effects of the offer and advised Fast Future that it was seeking to secure the commitment of other underwriters. It was on this basis that the Board also reached out to various points of contact with different institutional investor groups and approached several parties (brokers and fund managers) to gain an appetite

⁸ The Second ROIS noted that these adjustments had not been included in the ROIS due to an oversight by the Board

Takeovers Panel

Reasons – Smoke Alarms Holdings Limited 03 [2022] ATP 3

on participating in the company's capital raise. It was through this process that the shareholders from Ord Minnett (Synergy 4) showed interest in underwriting the offer."

33. Board minutes annexed to Smoke Alarms' submissions⁹ supported this submission, and the submission was also consistent with Fast Future's and Synergy 4's submissions on this point.
34. In addition, Fast Future submitted that its primary interest in supporting Smoke Alarms was *"to recover its loans and mitigate any potential loss in the value of the shares which its associates hold in Smoke Alarms."*
35. Synergy 4 submitted that its primary motivation for the underwriting was *"to ensure [Smoke Alarms] had an opportunity to survive, as a means of protecting the investment of its associates."*
36. In relation to the time sensitivity of the proposed use of funds, Smoke Alarms submitted that:

"The tax debts of the Company are subject to a payment plan that the Company is currently servicing, however this attracts interest. Importantly, the company is unable to obtain debt finance from banks whilst the ATO debt is present, so in order to refinance the Company's debts, the tax debt needs to be cleared. It is in the best interest of the company to refinance as soon as practicable as the debt to Fast Future is expensive due to the high interest rate."
37. We accept that Smoke Alarms needs the funds that it is seeking to raise under the Revised Offer. The structure of the Revised Offer has ameliorated the potential control effect of the rights issue, and we consider that the revised structure does not give rise to unacceptable circumstances.
38. We turn therefore to the question of disclosure under the Second ROIS.

Further disclosure

39. In its rebuttal submissions, ASIC submitted that the Second ROIS states *"[t]he Board has determined that the original entitlement offer ... was not essential to achieve the Company's current financial requirements"* and that further disclosure was needed to explain the decrease in the funds proposed to be raised, including disclosure as to why Smoke Alarms now considers the reduced proceeds of \$3.7 million to be sufficient for the company to meet its financial requirements.
40. We agree. Moreover, we had some residual concerns in relation to the disclosure in the Second ROIS. Accordingly, prior to making our decision we directed further questions to Smoke Alarms, including those discussed below.
41. We asked Smoke Alarms whether it was willing to provide the further disclosure identified by ASIC in its rebuttal submissions.
42. In response Smoke Alarms proposed the following further disclosure:

⁹ These minutes (which had information redacted from them) were in relation to Smoke Alarms Board meetings held during the period from April to December 2021

Takeovers Panel

Reasons – Smoke Alarms Holdings Limited 03 [2022] ATP 3

“The Company has been repaying the debt to the ATO which has reduced to the balance as above. That debt makes it difficult for the Company to refinance its borrowings on more attractive terms. Hence, the repayment of the ATO debt is a priority. The Fast Future debt bears an interest rate of 9% p.a. which is higher than the rate that may be available to the Company under bank finance. It is therefore in the Company’s interest to apply the balance of the proceeds raised from the Offer in paying down the Fast Future debt. It is the Company’s intention after paying these amounts to refinance at overall more attractive rates.”

43. Smoke Alarms submitted that it would be “patently obvious” to any reader why the Westpac facility was not being repaid and why payments to the ATO and Fast Future were more advantageous to it.
44. We decided not to raise objections to this further disclosure, noting that while it does not fully address ASIC’s issue, it is open for ASIC to raise any residual concerns it may have. ASIC noted in its rebuttal submission that it would be undertaking a detailed review of the Second ROIS upon lodgement.
45. We also asked Smoke Alarms whether it was willing to provide further disclosure regarding the individuals/shareholders who stand behind Run Fast Pty Ltd and CIBAW Pty Ltd, Kuyura Pty Ltd and J & M Hunter Investments Pty Ltd (see paragraphs 30(a) and 30(b) above). In response, Smoke Alarms proposed further disclosure identifying those individuals/shareholders, which sufficiently addressed our concerns.
46. We also asked Smoke Alarms whether it was willing to provide further disclosure explaining why the Board had formed the expectation that certain shareholders would take up their entitlements (see paragraphs 7 and 30(d) above). In response, Smoke Alarms proposed further disclosure, which addressed our concerns, including:

“One of the Company’s directors, Mr Cameron Davis, is a director of R2-D2 Partners Pty Ltd and has advised the Board verbally that R2-D2 Partners Pty Ltd intends to take up its Entitlement. Mr Stoten has verbally advised Mr Davis that he intends to take up his Entitlement. The Board expects that M&M Driscoll Nominees Pty Ltd, a 2% shareholder will also take up its Entitlement. One of the Company’s directors, Mr Matthew Driscoll is a director of that company and has advised the Board verbally that M&M Driscoll Nominees Pty Ltd intends to take up its Entitlement.”
47. We also asked Smoke Alarms whether it was willing to revise its proposed approach to dealing with application monies received prior to the date of the Second ROIS (see paragraph 30(e) above). Our concern was that the deeming of an application under the Offer to be an application under the Revised Offer plus an application for Shortfall shares may be unreasonable. We therefore invited Smoke Alarms to consider if it would instead invite the relevant shareholders to advise how they wished their applications to be treated, and to amend the disclosure in the Second ROIS accordingly.
48. In response, Smoke Alarms submitted (in summary) that if the suggested approach was adopted there was a risk shareholders may not respond, and that under its

Takeovers Panel

Reasons – Smoke Alarms Holdings Limited 03 [2022] ATP 3

proposed approach shareholders already had the ability to withdraw and request a refund should they wish to do so.

49. In all the circumstances we decided not to take this any further, in particular because Smoke Alarms informed us that no applications had been received from shareholders under the Offer.
50. We also asked Smoke Alarms whether it anticipated that enabling associates of the Underwriters to apply for Shortfall Shares would effectively ensure that the Underwriters obtained voting power of at least 19.99% in Smoke Alarms. We invited Smoke Alarms to refer to *MacarthurCook Property Securities Fund 01 & 02* [2012] ATP 7 in preparing its response.¹⁰
51. In response, Smoke Alarms submitted that enabling associates of the Underwriters to apply for Shortfall Shares would not operate to ensure the Underwriters obtained voting power of at least 19.99%. Smoke Alarms also submitted that:

“Currently, associates of the Underwriters have limited levels of voting rights of approximately 4.4% and 0.88% respectively (see section 3.7 of the Second ROIS). In the highly unlikely event that the associates applied for large numbers of Shortfall Shares:

- This would indicate a high level of acceptances since it is unlikely that the associates alone would be applying for Shortfall Shares;*
- Under the dispersion policy, the Board cannot prefer associates’ applications for Shortfall Shares over applications from other shareholders. Accordingly, in the event that there are applications for more Shortfall Shares than are available, the associates’ applications would be scaled back pro rata to their existing low levels of shareholding, resulting in them receiving proportionately lower numbers of Shares;*
- In the circumstance where there is a scaling back of Shortfall Shares, that implies that there would be no Shares available for issue to the Underwriters.*

It is possible that no shares will be issued to the Underwriters and since it cannot be known prior to the closing of the Offer whether the Underwriters will be issued any shares pursuant to the underwriting agreements, it would be inequitable for the Company at the outset to treat a shareholder, being an associate of an Underwriter, differently from other shareholders by automatically excluding that associate shareholder from the opportunity of participating in the short fall issue. To impose that exclusion from the outset would be inconsistent with the equality principle in section 602(c) of the Corporations Act. However, having regard to the purpose of section 611 item 10, the Company considers that in the event that an Underwriter may acquire voting power exceeding 19.99% where Shortfall Shares issued to an associate contribute thereto, it would be reasonable in that circumstance to not issue Shortfall Shares to the associate.”

52. Smoke Alarms also submitted that the present case can be distinguished from *MacarthurCook Property Securities Fund 01 & 02* in a number of respects, including that

¹⁰ This Panel matter discusses the issue of underwriters participating in shortfall facilities (see e.g. [42]-[53])

Takeovers Panel

Reasons – Smoke Alarms Holdings Limited 03 [2022] ATP 3

“in this matter the underwriters are not shareholders, they cannot participate in shortfall shares and associates are not substantial shareholders and cannot participate in shortfall shares in a 20%+ voting power situation”.

53. We accept Smoke Alarms’ submissions on this and take it no further.
54. Smoke Alarms provided us a copy of a revised draft of the Second ROIS which it intended to lodge with ASIC which included the further disclosures referred to in paragraphs 41 to 46 above.

DECISION

55. For the reasons above, we decline to make a declaration of unacceptable circumstances. We consider that it is not against the public interest to decline to make a declaration and we had regard to the matters in s657A(3).

Orders

56. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

Rory Moriarty
President of the sitting Panel
Decision dated 3 February 2022
Reasons given to parties 22 March 2022
Reasons published 25 March 2022

Takeovers Panel

Reasons – Smoke Alarms Holdings Limited 03
[2022] ATP 3

Advisers

Party	Advisers
Mr Anthony Lewis & Greenwich Capital Partners Pty Limited	-
Smoke Alarms Holdings Limited	Cowell Clarke
Fast Future Pty Ltd	McTaggart Grant
Synergy 4 Pty Ltd	HWL Ebsworth