



Australian Government

Takeovers Panel

MEDIA RELEASE

No: TP22/39

Tuesday, 10 May 2022

DRA Global Limited - Declaration of Unacceptable Circumstances

The Panel has made a declaration of unacceptable circumstances (Annexure A) in relation to an application dated 21 March 2022 by Haydn von Maltitz in relation to the affairs of DRA Global Limited (**DRA**) (see [TP22/24](#)).

Background

DRA is an ASX listed company (ASX/JSE: DRA).

During January and February 2022, Messrs Alistair Hodgkinson, Darren Naylor and James Smith, senior executives of DRA, and Mr Brian Dowding, a former executive of DRA, came together to discuss and plan operational changes to DRA, including changes to the management and the composition of the DRA board. The four individuals have an aggregate relevant interest in DRA of 11.27%.

On 17 February 2022, Messrs Hodgkinson, Naylor and Smith, on behalf of certain DRA shareholders (the **Requisitioning Shareholders**) gave notice under section 203D of the *Corporations Act 2001* (Cth) to the directors of DRA of their intention to move resolutions to remove Messrs Andrew Naude (Managing Director and CEO of DRA) and Peter Mansell (Chairman of DRA) as directors (**s203D Notice**).

On 18 February 2022, the Requisitioning Shareholders gave notice under section 249D to the directors of DRA requesting a general meeting be held to consider resolutions to remove Messrs Naude and Mansell and appoint Messrs Hodgkinson, Naylor and Smith, together with Mr Jean Nel, as directors (**s249D Notice** and together with the s203D Notice, the **Notices**).

Between 17 and 22 February 2022, at the request of Messrs Hodgkinson, Naylor, Smith and Dowding, other DRA shareholders signed deeds of irrevocable undertaking under which each shareholder, in effect, undertook "to the consortium of DRA shareholder (sic) represented by James Smith, Darren Naylor, and Alistair Hodgkinson" that the shareholder would vote in favour of resolutions to remove Messrs Naude and Mansell as directors and to appoint Messrs Hodgkinson, Naylor and Smith as directors (the **Voting Undertakings**).

On 22 February 2022, the Requisitioning Shareholders withdrew the Notices. The DRA board agreed to engage with the Requisitioning Shareholders on certain proposals including to effect Mr Naude's disengagement from DRA (which Mr Naude had advised he was prepared to do), to appoint an interim CEO and to put resolutions for the appointment of new directors at the annual general meeting (AGM) as nominated by shareholders.

At the time of the withdrawal, the DRA board was not aware of the Voting Undertakings. When the Voting Undertakings came to light, the DRA board advised the Requisitioning Shareholders that it was not in a position to advance the discussions, noting the Voting Undertakings as *"support in a manner which is wholly unlawful in Australia"*.

On 1 March 2022, the adviser of Messrs Hodgkinson, Naylor and Smith confirmed to DRA (among other things) that the Voting Undertakings had no further force and effect and that each of Messrs Hodgkinson, Naylor and Smith had *"no commitment or understanding of any sort between them relating to the composition of the DRA board of directors or the conduct of DRA's affairs"*.

On 3 March 2022, the DRA board notified its staff that it had *"become aware of serious differences of opinion between some members of the Executive Leadership Team about the strategic direction of the Company"* and had made temporary management changes including to stand-aside the management authority of Messrs Hodgkinson, Naylor, Smith, Naude and DRA's CFO, until the board had an opportunity to set the path forward.

On 6 March 2022, the DRA board received a plan prepared by the stood-aside executives to address the differing perspectives within the senior management team.

On 11 March 2022, DRA made an ASX announcement that Mr Naude had informed the board that he would step down as Managing Director and CEO following a hand-over period and that the board had identified Mr Smith to take over as interim CEO effective from the AGM. The announcement did not mention the Notices or any related matters.

On 13 April 2022, the chairman's letter to the notice of AGM referenced the lodgement of a section 249D notice, the temporary standing aside of senior executives and that the board had, in broad terms, endorsed and committed to a plan presented by the executives to the board.

The Panel considered that the market has not been adequately informed, or informed in a timely way, by DRA regarding the matters referred to above (and in more detail in the Panel's declaration).

The Panel considered (among other things) that:

- by no later than 17 February 2022, Messrs Hodgkinson, Naylor, Smith and Dowding were associated for the purpose of controlling or influencing the composition of DRA's board and the conduct of DRA's affairs
- as a result of the association between Messrs Hodgkinson, Naylor, Smith and Dowding, the voting power of each of them increased to approximately 11.27%
- Messrs Hodgkinson, Naylor and Smith and each shareholder providing a Voting Undertaking (the **Other Associated Shareholders**) were associated for the purpose of controlling or influencing the composition of the board of DRA
- as a result of the association between Messrs Hodgkinson, Naylor and Smith and each Other Associated Shareholder, the voting power of each of Messrs Hodgkinson, Naylor and Smith increased above 20%
- in addition, Messrs Hodgkinson, Naylor and Smith acquired a relevant interest in the shares of each Other Associated Shareholder and breached section 606 and
- Messrs Hodgkinson, Naylor, Smith and Dowding had breached section 671B by failing to disclose their aggregate voting power in DRA as a result of their association and changes to their aggregate voting power as a result of the Voting Undertakings.

Even accepting that the Voting Undertakings have ended, the Panel considered there was insufficient material to establish that the association between Messrs Hodgkinson, Naylor, Smith and Dowding has ended.

Declaration

The Panel considered that the circumstances were unacceptable:

- (a) having regard to the effect that the Panel was satisfied they have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of DRA or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in DRA
- (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602
- (c) in the further alternative, because they constituted or constitute a contravention of a provision of Chapter 6 or of Chapter 6C.

The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in section 657A(3).

The Panel is still considering the application in relation to orders.

The sitting Panel is Kelvin Barry, Jeremy Leibler (sitting President) and Tara Page.

The Panel will publish its reasons for the decision in due course on its website www.takeovers.gov.au.

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ANNEXURE A

CORPORATIONS ACT SECTION 657A DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

DRA GLOBAL LIMITED

CIRCUMSTANCES

1. Mr Alistair Hodgkinson is a senior executive of DRA Global Limited (**DRA**) and has a relevant interest in 1.76% of DRA, held directly and by Alistair Ruth (Pty) Ltd.
2. Mr Darren Naylor is a senior executive of DRA and has a relevant interest in 0.82% of DRA, held by Addax Holdings (Pty) Ltd.
3. Mr James Smith is a senior executive of DRA and has a relevant interest in 1.48% of DRA, held by GSPC Trading and Refining (Pty) Ltd.
4. Mr Brian Dowding is a substantial shareholder and former director and CEO of DRA and has a relevant interest in 7.22% of DRA, held by Anchor High Equity Worldwide SNN QI (**Anchor High**).
5. From no later than 24 January 2022, Messrs Hodgkinson, Naylor, Smith and Dowding had numerous conversations, among themselves or with other DRA shareholders, during which they shared the view that changes were required in relation to the affairs and the board composition of DRA, including:
 - (a) On 10 February 2022, Messrs Hodgkinson, Naylor and Smith received an email from Mr Dowding expressing his view on how to approach another DRA shareholder stating “...it is much more important that [the shareholder] understands the depth of feeling about the issues inside the company and is convinced that he must join in on our side. In order that we can be seen to be talking as a coherent group therefore, it is suggested that we have a get together ourselves tomorrow to talk things through and make sure there are no crossed wires”.
 - (b) In response, on 11 February 2022, Mr Hodgkinson provided Messrs Naylor, Smith and Dowding with a document titled “Why Change”, which set out proposed operational changes to DRA, including changes to

the management and the composition of the DRA board. The document stated that “[b]efore proceeding it is critical to ensure that there is sufficient irrevocable support from the key role players” and identified groups of DRA shareholders likely to be supportive.

- (c) From 11 February 2022, Messrs Hodgkinson, Naylor, Smith and Dowding discussed their concerns about the strategy and leadership of DRA with other DRA shareholders, including through the “Why Change” document and another document titled “Project Boomerang”. The “Project Boomerang” document expresses the concerns of Messrs Hodgkinson, Naylor and Smith, describes a proposed shareholder action to call a general meeting to change the composition of the DRA board and identifies the directors to be removed and appointed.
 - (d) On 16 February 2022, Mr Dowding contacted Mr Jean Nel (a former director of DRA) about being appointed a director of DRA and whether he would consider an executive position and Mr Nel joined subsequent calls among Messrs Hodgkinson, Naylor, Smith and Dowding discussing updates on the shareholder action.
6. On 17 February 2022,
- (a) Mr Hodgkinson in his capacity as a shareholder of DRA and on behalf of Alistair Ruth (Pty) Ltd
 - (b) Mr Naylor on behalf of Addax Holdings (Pty) Ltd, as well as on behalf of K2019098992 (South Africa) (Pty) Ltd and Kilmarnock Investments Holdings (Pty) Ltd and
 - (c) Mr Smith on behalf of GSPC Trading and Refining (Pty) Ltd
- (together, the **Requisitioning Shareholders**), gave notice under section 203D¹ to the directors of DRA of their intention to move resolutions to remove Messrs Andrew Naude and Peter Mansell as directors (**s203D Notice**).
7. On 18 February 2022, the Requisitioning Shareholders gave notice under section 249D to the directors of DRA requesting a general meeting be held to consider resolutions to remove Messrs Naude and Mansell and appoint Messrs Hodgkinson, Naylor and Smith, together with Mr Nel, as directors (**s249D Notice**).
8. Between 17 February 2022 and 22 February 2022, at the request of Messrs Hodgkinson, Naylor, Smith and Dowding (or their intermediaries), certain DRA shareholders signed deeds of irrevocable undertaking (**Voting Undertakings**) that stated (among other things) that the shareholder:

¹ References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

...irrevocably and unconditionally undertake, confirm, warrant and in relation to paragraphs 4.1 to 4.4 below, represent to the consortium of DRA shareholder (sic) represented by James Smith, Darren Naylor, and Alistair Hodgkinson (the "Oxford Consortium") that:

...

4.2 The Shareholder has full power and authority to, and shall, vote with Oxford Consortium, in favour of the Shareholder Action resolutions listed at clause 3 hereinabove; and

4.3 Should the Shareholder be unable to attend the general meeting in order to exercise its vote, hereby agrees to grant proxy over its voting rights in favour of the Oxford Consortium.

4.4 prior to the Shareholder Action being concluded or the Shareholders obligations terminating in accordance with the terms of this deed (whichever is earlier), the Shareholder shall not:

4.4.1 other than pursuant to this deed, enter into any agreement or arrangement or allow to arise any obligation with any person, whether conditionally or unconditionally, which, in relation to the Shareholder's DRA shares, which (sic) would or might restrict or impede the Shareholder's ability to comply with this undertaking.

9. On 21 February 2022, DRA's legal advisers wrote to the representative of the Requisitioning Shareholders (**First DRA Letter**) regarding the s203D Notice and the s249D Notice (**Notices**). Paragraph 32 of the letter provided that if the Notices were withdrawn (by completing the form attached to the letter) so that DRA was not required to make an ASX announcement that the Notices had been lodged (among other things), the DRA board would provide a proposal to the Requisitioning Shareholders including to effect Mr Naude's disengagement from DRA (which Mr Naude had advised he was prepared to do), to appoint an interim CEO and to put resolutions for the appointment of new directors at the annual general meeting (**AGM**) as shareholders may wish to nominate in accordance with DRA's nomination process.
10. On 22 February 2022, the Requisitioning Shareholders signed and returned the withdrawal form under cover of a letter from their representative to DRA (copying Mr Dowding) that stated "*our clients have considered the terms proposed by the board at paragraph 32 of your letter, and hereby accept the offer*".²

² This was also communicated in an email from Mr Hodgkinson to DRA board member Mr Les Guthrie on the same day

11. On 26 February 2022, the board of DRA became aware of the existence of materials including the “Project Boomerang” document and the Voting Undertakings.
12. On 27 February 2022, DRA’s legal advisers wrote to the Requisitioning Shareholders (**Second DRA Letter**) noting that the DRA board had engaged with Messrs Hodgkinson, Naylor and Smith in an endeavour to progress an exploration of the options identified in paragraph 32 of the First DRA Letter. The Second DRA Letter referred to the Voting Undertakings as “*support in a manner which is wholly unlawful in Australia*” and said that given the materials that had come to hand, the board was not in a position to advance the discussions. The Second DRA Letter asked that the communications remain confidential while the board resolved a course of action.
13. On 28 February 2022, DRA announced the proposed date of its AGM (being 17 May 2022) and advised that the closing date for the receipt of nominations from persons wishing to be considered for election as a director of DRA at the AGM was 7 March 2022.
14. On 1 March 2022, in response to the First DRA Letter and the Second DRA Letter, the advisers of Messrs Hodgkinson, Naylor and Smith wrote to DRA confirming that the Voting Undertakings had no further force and effect, and that each of Messrs Hodgkinson, Naylor and Smith “*acknowledged that they are free to decide how to exercise the voting rights attaching to their shares in DRA*” and that “*there is no commitment or understanding of any sort between them relating to the composition of the DRA board of directors or the conduct of DRA’s affairs*”.
15. Also on 1 March 2022, Mr Smith, on two separate occasions, notified DRA shareholders of the cessation of the Voting Undertakings and noted “*we have achieved what we needed to and the next shareholder meeting will be the AGM in May. I therefore need to release you from the last process via this letter and then you are able to vote again at the AGM*”.
16. On 3 March 2022, in an all-staff communication, the DRA board advised that it had “*become aware of serious differences of opinion between some members of the Executive Leadership Team about the strategic direction of the Company*” and that, until the board had an opportunity to set the path forward, the board had resolved to stand aside the management authority of Messrs Hodgkinson, Naylor and Smith, as well as Mr Naude (CEO and Managing Director) and the CFO.³ Interim appointments were announced to fill those roles including that board members Mr Les Guthrie and Ms Kathleen Bozanic, would assume the roles of Acting CEO and Acting CFO, respectively.

³ These executives were subsequently reinstated

17. Also on 3 March 2022, DRA's shares were placed in a trading halt and on 7 March 2022 were placed into suspension pending an announcement regarding organisational changes.
18. Between 2 and 11 March 2022, DRA (mainly through its chairman, Mr Mansell) had various communications with Messrs Hodgkinson, Naylor and Smith and other DRA senior executives and DRA shareholders including Mr Dowding.
19. On 5 March 2022, Mr Mansell reported to the board via email that he had spoken to Mr Dowding the day before. Mr Mansell reported that Mr Dowding was in a meeting with his adviser (also the adviser of the Requisitioning Shareholders) and Mr Nel "to talk about *"what's next" for them"* to which Mr Mansell said *"the current thinking of the board is to avoid reporting to ASIC or approaching the Panel... the only concern of the board, at this point, is the restoration of stability at DRA and that I thought such action would be counter to that"*. Mr Dowding stated that their current intention was to nominate the same four people as in the s249D Notice as directors at the AGM. After Mr Mansell noted that this would inflame rather than diffuse the situation and that section 249D proceedings were always open to them, Mr Dowding asked what the reaction would be to nominating two directors, Messrs Hodgkinson and Nel. Mr Mansell responded that *"it might still be seen as confrontational"*.
20. On 6 March 2022, DRA's board received a copy of a '10-point plan' prepared by the stood-aside executives to address the differing perspectives within the senior management team.
21. Also on 6 March 2022, Mr Mansell reported to the board via email that he had spoken to Mr Dowding at length and stated that *"[Mr Dowding] denies that he and Jean are the drivers of the initiative. According to him, they are only assisting the 3 South African executives"* and *"[Mr Dowding] was unaware of the 10 point plan. He says that, if the 3 South African executives find a solution acceptable to them, then they have achieved what they set out to do"*. Mr Mansell also reported that Mr Dowding had confirmed *"nobody will be nominated to the board of DRA at the AGM"*.
22. DRA did not receive any director nominations for election at the AGM when the nominations closed on 7 March 2022.
23. On 11 March 2022, DRA released an announcement titled "Senior Leadership Update" which stated *"Andrew Naude has informed the Board that he will step down as Managing Director and CEO of DRA following an appropriate hand-over period"* and *"the Board has identified James Smith...to take over from Mr Naude as Interim CEO effective from the annual general meeting to be held on 17 May 2022"*. The announcement did not mention the Notices or any related matters.
24. On 13 April 2022, the chairman's letter to the notice of AGM included the following disclosure:

...These matters came to a head in February of this year with the lodgement of a Section 249D notice calling on the Board to hold a general meeting to change the composition of the Board. In responding to this matter (and with minimal interference to DRA's core operations) the Board made the decision to temporarily stand aside five senior executives and to place the company's shares in a trading halt, pending leadership changes and a resolved position forward. During this time, the Board and the executive team worked together to develop a plan that would return DRA to stability and that was in the best interests of the future of DRA. While requiring further development, the plan presented by the executives to the Board does not alter the strategic direction of DRA and has, in broad terms, been endorsed and committed to by the Board, and its implementation has already begun. The plan, which the CEO, Andrew Naude, collaborated on and presented to the Board, proposed, among other things, his departure. At the time of going to print, the separation discussions are ongoing.

25. The Panel considers that the market has not been adequately informed, or informed in a timely way, by DRA regarding the matters referred to above.
26. The Panel considers that by no later than 17 February 2022, Messrs Hodgkinson, Naylor, Smith and Dowding:
 - (a) had a relevant agreement for the purpose of controlling or influencing the composition of DRA's board and the conduct of DRA's affairs and were associated under section 12(2)(b) and
 - (b) were acting in concert in relation to DRA's affairs, for the purpose of controlling or influencing the composition of the DRA board, and were associated under section 12(2)(c).
27. As a result of the association between Messrs Hodgkinson, Naylor, Smith and Dowding, the voting power of each of them increased to approximately 11.27%.
28. Each Voting Undertaking constituted a relevant agreement between the shareholder providing the undertaking and Messrs Hodgkinson, Naylor and Smith.
29. The Panel considers that Messrs Hodgkinson, Naylor and Smith and each shareholder providing a Voting Undertaking (the **Other Associated Shareholders**) had a relevant agreement for the purpose of controlling or influencing the composition of the board of DRA and were associated with each other under section 12(2)(b).
30. As a result of the association between Messrs Hodgkinson, Naylor and Smith and each Other Associated Shareholder, the voting power of each of Messrs Hodgkinson, Naylor and Smith increased above 20%.
31. In addition, Messrs Hodgkinson, Naylor and Smith acquired a relevant interest in the shares of each Other Associated Shareholder.

32. As a result of the association between Mr Dowding and Messrs Hodgkinson, Naylor and Smith, the voting power of Mr Dowding also increased as a result of the Voting Undertakings.
33. Even accepting that the Voting Undertakings have ended, there is insufficient material to establish that the association between Messrs Hodgkinson, Naylor, Smith and Dowding has ended.

Contravention of section 606

34. As a result of the acquisition of relevant interests in DRA shares by Messrs Hodgkinson, Naylor and Smith, the voting power of Messrs Hodgkinson, Naylor, Smith and Dowding in DRA increased above 20%. None of the exceptions in section 611 applied and accordingly section 606 was contravened by each of Messrs Hodgkinson, Naylor and Smith.

Contraventions of section 671B

35. In contravention of section 671B, no substantial holder notices have been given disclosing:
 - (a) the total combined voting power in DRA of Messrs Hodgkinson, Naylor, Smith and Dowding and their association in relation to DRA
 - (b) increases in the total combined voting power in DRA of Messrs Hodgkinson, Naylor, Smith, Dowding and each Other Associated Shareholder as a result of the Voting Undertakings being entered into and
 - (c) the reduction in the total combined voting power in DRA of Messrs Hodgkinson, Naylor, Smith and Dowding after they considered that the Voting Undertakings had no further force or effect.

EFFECT

36. It appears to the Panel that:
 - (a) the acquisition of control over voting shares in DRA has not taken place in an efficient, competitive and informed market and
 - (b) the holders of shares in DRA do not know the identity of persons who have acquired a substantial interest in DRA.

CONCLUSION

37. 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 DRA or

- (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in DRA
 - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602
 - (c) in the further alternative, because they constituted or constitute a contravention of a provision of Chapter 6 or of Chapter 6C.
38. 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 DRA.

Tania Mattei
General Counsel
with authority of Jeremy Leibler
President of the sitting Panel
Dated 9 May 2022