



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
DRA Global Limited  
[2022] ATP 16**

**Catchwords:**

*Declaration – orders – costs - unfair prejudice - association – board spill – collective action - failure to disclose – power or control – relevant interest – voting power – substantial holding – leave for legal representation refused*

*Corporations Act 2001 (Cth), sections 9 (definition of ‘relevant agreement’), 12, 64(a), 203D, 249D, 602, 606, 608(1), 657A, 657D, 671B*

*Australian Securities and Investments Commission D Act 2001 (Cth), section 194*

*Takeovers Panel Procedural Rules 2020, Rule 16(2)*

*Guidance Note 4 – Remedies General*

*ASIC Regulatory Guide 128: Collective action by investors*

*Agua Resources Limited [2019] ATP 13, Finders Resources Limited 02 [2018] ATP 9, Caravel Minerals Limited [2018] ATP 8, Indiana Resources Limited [2017] ATP 8, Sovereign Gold Company Limited [2016] ATP 12, Resource Generation Limited [2015] ATP 12, Avalon Minerals Limited [2013] ATP 11, Regis Resources Ltd [2009] ATP 7, Boulder Steel Limited [2008] ATP 24, BigAir Group Limited [2008] ATP 12, Mount Gibson Iron Limited [2008] ATP 4, Rusina Mining NL [2006] ATP 13, Anzoil NL 01 [2002] ATP 19*

*Glencore International AG v Takeovers Panel [2006] FCA 274, Glencore International AG & Anor v Takeovers Panel & Ors [2005] FCA 1290*

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

**INTRODUCTION**

- The Panel, Kelvin Barry, Jeremy Leibler (sitting President) and Tara Page, made a declaration of unacceptable circumstances in relation to the affairs of DRA Global Limited. The application concerned an alleged association between members of DRA’s management and other shareholders in relation to changes proposed to the board of DRA and its operating model. The Panel declared the circumstances unacceptable as they constituted or gave rise to contraventions of section 606<sup>1</sup> and section 671B and were not consistent with an efficient, competitive and informed market. The Panel made orders requiring disclosure from the associates and DRA in relation to the circumstances found to be unacceptable, and restricting the associates, for a period of 6 months, from requisitioning a shareholder meeting to remove or appoint directors, being appointed as director of DRA and exercising their voting rights in relation to the election of directors.

<sup>1</sup> 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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2. In these reasons, the following definitions apply.

<b>Applicant</b>	Haydn von Maltitz, a shareholder of DRA and a director of Laela Bayley Pty Ltd ATF the Number Eleven Trust, also a DRA shareholder
<b>DRA</b>	DRA Global Limited
<b>First DRA Letter</b>	has the meaning given in paragraph 8
<b>Notices</b>	the s203D Notice and the s249D Notice
<b>Requisitioning Shareholders</b>	has the meaning given in paragraph 4
<b>s203D Notice</b>	has the meaning given in paragraph 4
<b>s249D Notice</b>	has the meaning given in paragraph 5
<b>Second DRA Letter</b>	has the meaning given in paragraph 11
<b>Voting Undertakings</b>	has the meaning given in paragraph 7
<b>Voting Undertakings Signatories</b>	has the meaning given in paragraph 7

## FACTS

3. DRA is an engineering, project management and operations management company focused on the mining and minerals resources sector. DRA was founded in South Africa in 1984 and listed on ASX and JSE in July 2021 (ASX: DRA, JSE: DRA).
4. 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 s203D to the directors of DRA of their intention to move resolutions to remove DRA's CEO Mr Andrew Naude and DRA's Chairman Mr Peter Mansell as directors (**s203D Notice**).
5. On 18 February 2022, the Requisitioning Shareholders gave notice under s249D 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 (a former director of DRA), as directors (**s249D Notice**).

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6. On or around the time the Notices were given to the board of DRA, Messrs Hodgkinson, Naylor and Smith, senior executives of DRA, and Mr Dowding, former director and CEO of DRA, discussed a document titled “Project Boomerang”. The “Project Boomerang” document detailed a 3-phase plan, which involved calling a general meeting under the s249D Notice and the entry into voting agreements with DRA shareholders, stating that “[a]ll shareholders who are in agreement with the planned Shareholder Action, should be asked to enter into written irrevocable undertakings in favour of the proposed resolutions” and providing a list of “Endorsing Shareholders”, defined as “Shareholders who are in favour of the proposed Shareholder Action”.
7. Between 17 February 2022 and 22 February 2022 certain DRA shareholders (**Voting Undertakings Signatories**) irrevocably and unconditionally undertook to vote in favour of the resolutions contained in the s249D Notice by signing deeds of irrevocable undertaking (**Voting Undertakings**).
8. On 21 February 2022, DRA’s legal advisers wrote to the representative of the Requisitioning Shareholders (**First DRA Letter**) regarding the Notices, stating potential breaches of section 671B and demanding that the Notices be withdrawn.
9. On 22 February 2022, the Requisitioning Shareholders withdrew the Notices.
10. On 26 February 2022, the board of DRA became aware of the existence of materials including the “Project Boomerang” document and the Voting Undertakings.
11. On 27 February 2022, DRA’s legal advisers wrote to the representative of the Requisitioning Shareholders (**Second DRA Letter**) noting that, at the time of the letter, the board of DRA had come into possession of Voting Undertakings from 62 unique shareholders representing more than 20% of DRA’s current issued capital. The Second DRA Letter stated that “*the representations of Messrs Hodgkinson, Naylor and Smith that a significant number of shareholders support at least some of the resolutions proposed to be moved appear to be well founded*” and added “[h]owever, they have signified that support in a manner which is wholly unlawful in Australia”.
12. On 28 February 2022, DRA announced the proposed date of its AGM, being 17 May 2022.
13. 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*”.
14. 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.
15. 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.*

## APPLICATION

### Declaration sought

16. The Applicant is the Executive General Manager – Corporate Affairs for DRA.
17. By application dated 21 March 2022, the Applicant, in his capacity as a shareholder of DRA and a director of Laela Bayley Pty Ltd ATF the Number Eleven Trust, also a shareholder of DRA, sought a declaration of unacceptable circumstances, submitting that:
  - (a) Messrs Hodgkinson, Naylor, Smith and Dowding and the Voting Undertakings Signatories *"formed an unlawful association covertly to acquire a relevant interest in substantively more than 20% of DRA"*
  - (b) Messrs Hodgkinson, Naylor, Smith and Dowding *"have given a select group of shareholders information as to their intentions (upon taking control of DRA) that have not been shared with all shareholders"* and
  - (c) *"no other party had a reasonable and equal opportunity to respond."*
18. The Applicant submitted that the conduct of Messrs Hodgkinson, Naylor, Smith and Dowding *"infringes the fundamental principles expressed in section 602 of the Act"* and Messrs Hodgkinson, Naylor, Smith and Dowding and the Voting Undertakings Signatories *"contravened section 606(1) of the Act"*.
19. The Applicant submitted that, notwithstanding that the s249D Notice had been withdrawn, *"DRA appears to be in the process of implementing aspects of the 90 Day Plan. The Chairman has communicated pending changes to DRA's "operating model" internally to staff and "organisational changes" have been communicated to the market."*<sup>2</sup>

### Interim orders sought

20. The Applicant sought interim orders that, pending determination of its application:
  - (a) Messrs Hodgkinson, Naylor, Smith and Dowding and the Voting Undertakings Signatories be restrained from exercising any voting or other rights attached to their securities in DRA and
  - (b) Messrs Hodgkinson, Naylor, Smith and Dowding and the Voting Undertakings Signatories be restrained from acquiring any further securities in DRA.

### Final orders sought

21. The Applicant sought final orders including to the effect that:

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<sup>2</sup> See footnote 9

- (a) Messrs Hodgkinson, Naylor, Smith and Dowding and the Voting Undertakings Signatories be required to provide notice of their substantial holding in DRA and their association in accordance with section 671B
- (b) the shares owned by Messrs Hodgkinson, Naylor, Smith and Dowding and the Voting Undertakings Signatories be vested in ASIC for sale to any non-associated party and
- (c) the Voting Undertakings be declared void.

## DISCUSSION

### Decision to conduct proceedings

22. In *Resource Generation Limited*<sup>3</sup>, the Panel stated that the *"fact that an application involves a proposal to reconstitute a board of directors does not take it outside the purview of the Panel. If, in the context of issues regarding the composition of a company's board, there is an accumulation or exercise of voting power possibly in contravention of s606, without proper disclosure under Chapter 6C or in otherwise unacceptable circumstances, those issues may be treated as control issues for the purposes of s657A."*
23. Here, the application alleged that shareholders who executed Voting Undertakings included shareholders holding a total of 42.7% of DRA and that the plan devised by Messrs Hodgkinson, Naylor, Smith and Dowding involved changing DRA's board via shareholder action and thereafter it was designed to *"fundamentally alter the corporate direction, operating model, and governance structures of DRA"*.
24. DRA submitted, in its preliminary submissions, that it had put the Requisitioning Shareholders on notice that *"the voting arrangements were 'wholly unlawful' in Australia and outlined the serious civil consequences and criminal penalties that could result from the relevant contraventions of the Corporations Act"*.
25. In light of the material provided by the Applicant and the acknowledgement by DRA of its concerns with the Requisitioning Shareholders' conduct, we considered that there was a sufficient body of material demonstrated by the Applicant to support a potential finding of association.<sup>4</sup>
26. However, DRA further submitted that *"[a]s the 'Shareholder's Action' ceased upon the delivery of the signed Withdrawal Notice, the voting undertakings (on their terms) were of no force or effect from 22 February 2022 onwards" and that "[i]n these circumstances, the Independent Directors did not consider it was in the best interests of the Company and its shareholders (as a whole) to undertake further actions in relation to arrangements which, whilst unlawful and concerning at the time they were entered into, had been promptly terminated"*.
27. DRA also submitted that it *"does not agree with (and expressly rejects) the assertions"* of the Applicant that DRA appeared to be implementing aspects of the alleged

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<sup>3</sup> [2015] ATP 12 at [48]

<sup>4</sup> *Mount Gibson Iron Limited* [2008] ATP 4 at [15]. See also *Regis Resources Ltd* [2009] ATP 7, *Boulder Steel Limited* [2008] ATP 24, *BigAir Group Limited* [2008] ATP 12 and *Rusina Mining NL* [2006] ATP 13

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associates' plans. DRA submitted that it had not adopted Project Boomerang, instead the board's actions had prevented the implementation of Project Boomerang (in particular, the *"only formal decisions that have been made regarding executive roles to date are Mr Naude ceasing to be the CEO and Mr Smith being appointed as interim CEO"* and *"the Board does not currently intend to change the number (or identity) of the Company's non-executive directors"*). It further submitted (among other things) that the independent directors have become aware of competing opinions within DRA's executive management team (and shareholder base) regarding DRA's operating model and their focus is to establish DRA's strategic objectives and operating model for the next phase of growth. DRA requested that the Panel *"give due consideration to the potential for Panel proceedings to materially disrupt the activities of the Company's Board and management, in the circumstances"*.

28. While DRA's submission that the Voting Undertakings were of no force and effect and that the shareholder action had ceased upon the withdrawal of the Notices gave us some pause, we considered that several matters raised in the application warranted investigation, including:
- (a) DRA had not disclosed that it had received the Notices at the time of receiving them, and still hadn't made that disclosure at the time of the application.
  - (b) Messrs Hodgkinson, Naylor, Smith and Dowding had not disclosed their substantial holding in DRA as a result of the Notices or as a result of the Voting Undertakings.
  - (c) The extent to which Messrs Hodgkinson, Naylor, Smith and Dowding had prepared an elaborate and thorough plan to force change in DRA's board and management structure, including the removal of Mr Naude as director.
  - (d) Whether those plans had ceased or were continuing, noting that we did not receive preliminary submissions from any of the alleged associates.
  - (e) DRA's subsequent announcement that Mr Naude was stepping down as Managing Director and CEO of DRA and that Mr Smith would take over as Interim CEO.
  - (f) The asymmetry of information that existed among DRA shareholders, with a small group of DRA shareholders, who were also senior executives of DRA or, in the case of Mr Dowding, a founder of DRA, leading a shareholder action by leveraging a larger group of DRA shareholders while leaving the remainder of DRA shareholders oblivious to the shareholder action.
29. We recognise that Panel proceedings require the attention and resources of the board of the company the subject of an application, but this is not a reason for us to ignore serious allegations of the nature presented. Accordingly, we decided to conduct proceedings.
30. In light of the material provided by the Applicant and DRA in its preliminary submissions, and the fact that DRA's AGM was scheduled to take place on 17 May

2022 and no material resolutions were to be considered at the AGM<sup>5</sup>, we did not consider that interim orders were required to preserve the status quo or prevent intervening events from forestalling our ability to fashion the most appropriate remedy in the circumstances<sup>6</sup>.

#### Association

31. Section 12 sets out the tests for association as applied to Chapter 6. There are two relevant tests here:
  - (a) s12(2)(b) - which provides, in essence, that B is an associate of A if (and only if) B is a person with whom A has, or proposes to enter into, a relevant agreement for the purpose of controlling or influencing the composition of a company's board or conduct of its affairs and
  - (b) s12(2)(c) - which provides, in essence, that B is an associate of A if (and only if) B is a person with whom A is acting or proposing to act in concert in relation to the company's affairs.
32. The Panel in previous matters has outlined the relevant decisions on association<sup>7</sup>.
33. Having reviewed all of the material, we considered possible associations between:
  - (a) Messrs Hodgkinson, Naylor, Smith and Dowding and
  - (b) Messrs Hodgkinson, Naylor, Smith and Dowding and the Voting Undertakings Signatories.

*Messrs Hodgkinson, Naylor, Smith and Dowding*

#### Structural links

34. In connection with the proposed shareholder action, Messrs Hodgkinson, Naylor, Smith and Dowding were represented by a common adviser, Moore, including RCS, the legal and secretarial division of Moore in South Africa. Although there was no formal engagement, the email sent to DRA's company secretary attaching the s249D Notice stated:

*"We hereby confirm that we represent the following shareholders of DRA Global Limited:*

- 1. Alistair Hodgkinson;*
- 2. James Smith;*
- 3. Darren Naylor; and*
- 4. Brain [sic] Dowding.*

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<sup>5</sup> One non-executive director was up for election following his appointment by the board to fill a casual vacancy from 1 January 2022

<sup>6</sup> See Guidance Note 4 – Remedies General at [10]

<sup>7</sup> See for example *Resource Generation Limited* [2015] ATP 12 at [56]-[61]

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*Please find attached herewith a notice given pursuant to Section 249D of the Corporations Act 2001, for the attention of the board of directors."*

35. On 18 February 2022, in another email to DRA's company secretary, the advisers listed the same shareholders and stated that Messrs Hodgkinson, Naylor, Smith and Dowding "*would like to open discussions with you in respect of the contents of these notices, at the earliest [sic] opportunity.*"
36. Messrs Hodgkinson, Smith and Naylor, and the DRA shareholders they owned or controlled, were referred to as the 'Oxford Consortium'. For example the Voting Undertakings referred to "*the consortium of DRA shareholder (sic) represented by James Smith, Darren Naylor, and Alistair Hodgkinson (the "Oxford Consortium")*". The name 'Oxford Consortium' appears to be a reference to the address of their common advisor.
37. Mr Dowding submitted that it was a representative of Moore that alerted him to concerns regarding the DRA business and that Mr Naylor had raised those concerns with the board but "*could do with some support*". Moore's representative had represented Senet in the acquisition of Senet by DRA. Mr Naylor was previously the MD/EVP of Senet. The representative arranged a call on 24 January 2022 between Mr Dowding and Mr Naylor in which Mr Naylor indicated he had shared his concerns with Mr Hodgkinson, following which Mr Dowding had calls in early February with each of Mr Hodgkinson and Mr Smith. In each case, the men discussed concerns with the DRA business and how to engage with DRA's board.
38. Messrs Hodgkinson, Naylor and Smith know each other in their professional capacities with DRA. Messrs Hodgkinson, Smith and Naylor are members of DRA's management team. Messrs Hodgkinson and Naylor met in 2019 when DRA purchased Senet and, according to Mr Hodgkinson, had worked "*quite closely*" together since July 2021 when their roles had changed. Messrs Hodgkinson and Smith had known each other for approximately 5 years in a transactional capacity.
39. Mr Dowding and Mr Hodgkinson have known each other since the late 1990s, at a time when Mr Hodgkinson was a client of DRA and Mr Dowding was the CEO and Managing Director of DRA and they have kept in contact since.
40. We consider that the above demonstrates the existence of structural links<sup>8</sup> between Messrs Hodgkinson, Naylor, Smith and Dowding.

#### Shared purpose, collaborative conduct and common knowledge

41. 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 came to the view that changes were required in relation to the affairs and the board composition of DRA.
42. 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

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<sup>8</sup> Structural links are some of the circumstances relevant to establishing an association. See *Mount Gibson Iron Limited* [2008] ATP 4



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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”. The email further states “[i]n 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”.

43. In response, Mr Hodgkinson prepared a document titled “Why Change”, which was circulated to Messrs Naylor, Smith and Dowding on 11 February 2022. The document, in one of its iterations, included:

- (a) A section, also titled ‘Why change’, which stated that “[t]here are significant issues relating to certain key individuals, some aspects of strategic direction, excessive overheads, culture and certainly trust. We need to act while we can...”. Mr Hodgkinson referred to “[d]amage done by people who do not have a DRA type culture”.
- (b) A section titled ‘Requirements to initiate change’, which stated that (emphasis added) “[t]he only practical way to initiate change would require significant support from shareholders and senior management to enforce the structural changes that are needed”. The document further provides “[t]here is support for the proposed changes throughout most of the business units... ”
- (c) A section titled ‘Immediate changes needed’ which listed “changes [that] would need to be implemented to start the change to the new way of running the business”, which included, beyond the removal of the CEO and Chairman and the appointment of new directors, “[v]arious other key individuals to move out” and a “Restructured Leadership team to run the business”.
- (d) 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.

44. 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” prepared by Moore. The “Project Boomerang” document described the shareholder action as “an intervention by the DRA shareholder [sic] to force through change in the Company’s board and management structure” and stated that “an urgent course of action is required to re-align the business and to restore the values of DRA”.<sup>9</sup>

45. On 16 February 2022, Mr Dowding contacted Mr Nel about being appointed a director of DRA and whether he would consider an executive position. Mr Nel

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<sup>9</sup> We were also provided with a copy of a document titled the “First 90 Days”. Mr Hodgkinson submitted that it was a working document that he had prepared “to crystalise (and potentially primarily use to communicate) his mindset regarding how the business would operate going forward”. Although he had possibly shared the document with Messrs Naylor and Smith, there was insufficient material to establish that the document represented an agreed view among the three executives

joined subsequent calls among Messrs Hodgkinson, Naylor, Smith and Dowding discussing updates on the shareholder action.

46. We consider that during this time and based on the material described above we can infer that Messrs Hodgkinson, Naylor, Smith and Dowding formed a shared goal in relation to changing the composition of DRA's board or the conduct of its affairs.
47. When asked about the communications made with DRA shareholders for the purpose of seeking their support, Mr Smith<sup>10</sup> submitted that "*Messrs Hodgkinson, Naylor and Smith were separately responsible for approaching allocated groups of DRA shareholders for the purposes of obtaining the Voting Undertakings*". Mr Hodgkinson submitted that "*[t]he communication with the vast majority of the DRA shareholders that provided Voting Undertakings was carried out verbally by Mr Hodgkinson... and then to a lesser extent also Mr Naylor (as to shareholders arising from the Senet acquisition) and Mr Smith as to a smaller minority of the DRA shareholders*". Mr Dowding's submissions state that "*Mr Dowding was requested to assist with making contact to certain individuals, either based on the importance of their support, or simply because Mr Dowding could track them down*".
48. We consider that Messrs Hodgkinson, Naylor, Smith and Dowding collaborated in seeking DRA shareholders' support, including by coordinating their approach for the purpose of obtaining the Voting Undertakings.
49. On 18 February, Messrs Hodgkinson, Naylor and Smith signed the s249D Notice on behalf of the Requisitioning Shareholders, requesting a general meeting be held to consider resolutions to remove Messrs Naude and Mansell and appoint themselves, together with Mr Nel, as directors.
50. Table 2 of RG 128 provides that "*[j]ointly signing a s249D or s249N notice... in these circumstances is likely to be considered entering into a relevant agreement and for these investors to be considered associates*". It further provides that:  
*"Concerns that unacceptable circumstances could exist may arise where the subject matter of the resolution:*
- is the proposed removal of directors to be replaced with new directors who are aligned with the requisitioning investors (i.e. the purpose of the resolution is to facilitate the investors pursuing their plans for the company)..."*
51. In *Caravel Minerals Limited*<sup>11</sup>, the Panel considered it was not clear that the signing of a s249D notice alone was sufficient to establish a relevant agreement between the shareholders who requisitioned the meeting in that case. The Panel stated that:  
*"While there was a shared frustration among the Requisitioning Shareholders with the actions of the Caravel board, we are not satisfied that there was necessarily a 'meeting of*

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<sup>10</sup> The submissions of Mr Smith were made by GSPC Trading and Refining (Pty) Ltd. For ease of reference, these reasons refer to the submissions of GSPC Trading and Refining (Pty) Ltd as Mr Smith's submissions

<sup>11</sup> [2018] ATP 8

*minds' of all who signed the requisition or that it was established that the purpose of all who signed went beyond causing the resolutions to be put to a meeting.”<sup>12</sup>*

52. We consider here that we can infer from the collaborative conduct discussed above that Messrs Hodgkinson, Naylor, Smith and Dowding shared a common goal<sup>13</sup> in wanting to influence the conduct of DRA’s affairs and that their conduct went beyond promoting good corporate governance and had a control purpose and effect.

### Conclusion

53. By reason of the structural links, shared purpose, collaborative conduct and common knowledge between Messrs Hodgkinson, Naylor, Smith and Dowding evidenced in the material before us, we consider that, by no later than 17 February 2022:
- (a) Messrs Hodgkinson, Naylor, Smith and Dowding 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 s12(2)(b) and
  - (b) Messrs Hodgkinson, Naylor, Smith and Dowding 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 s12(2)(c).

### *Associates and Voting Undertakings Signatories*

54. The document titled ‘Why change’ stated that “[m]any Shareholders, Operational Senior Management and a significant portion of individuals from the businesses are not happy with what is happening in the business. There are significant issues relating to certain key individuals, some aspects of strategic direction, excessive overheads, culture and certainly trust. We need to act while we can...”. In an iteration of the document provided by the Applicant<sup>14</sup>, the document provided that “[t]here is confirmed support for this change by well more than 50% of the current shareholding”.
55. Between 17 February and 22 February 2022, as a result of Messrs Hodgkinson, Naylor, Smith and Dowding’s coordinated approach to obtain the shareholder support required under “Project Boomerang”, certain DRA shareholders signed the Voting Undertakings which stated (among other things) that the shareholder:

*“...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:*

...

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<sup>12</sup> At [44] (footnote omitted)

<sup>13</sup> A shared goal or purpose is one of the circumstances relevant to establishing an association. See *Mount Gibson Iron Limited* [2008] ATP 4

<sup>14</sup> Mr Hodgkinson submitted that “[a]lthough a thorough analysis of the documents attached to the Application (as to whether they are exact versions that exist in Mr Hodgkinson’s possession) has not been undertaken, Mr Hodgkinson understands that the [“Why Change”, “The First 90 Days” and “Project Boomerang”] documents are annexed to the Application at Annexure D and Annexure E”

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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."*

56. The Voting Undertaking Signatories also acknowledged and agreed that damages may not be an adequate remedy for any breach by it of any of its obligations, and without prejudice to any other rights or remedies which the Oxford Consortium may have, the Oxford Consortium shall be entitled to the remedies of injunction, specific performance and other equitable relief for any threatened or actual breach of any such obligation.
57. Under section 12(2)(b) a person may be an associate of another person if they have entered into a relevant agreement for the purpose of controlling or influencing the composition of the company's board or conduct of its affairs.
58. A "relevant agreement" is defined in section 9 to include:  
*"an agreement, arrangement or understanding:*  
*a. whether formal or informal or partly formal and partly informal; and*  
*b. whether written or oral or partly written and partly oral; and*  
*c. whether or not having legal or equitable force and whether or not based on legal or equitable rights."*
59. Each Voting Undertaking constitutes a relevant agreement between the shareholder providing the undertaking and Messrs Hodgkinson, Naylor and Smith.
60. We consider that Messrs Hodgkinson, Naylor and Smith and each of the Voting Undertakings Signatories 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 s12(2)(b). In addition, as discussed directly below, Messrs Hodgkinson, Naylor and Smith acquired a relevant interest in the shares of each of the Voting Undertakings Signatories.

### Contravention of section 606

#### *Acquisition of a relevant interest*

61. Section 606(1) prohibits a person from acquiring a relevant interest in issued voting shares by entering into a transaction relating to those shares if, as a result of the transaction, that person's voting power in the relevant entity increases to more than 20%.
62. Under section 64(a), entering into a transaction in relation to shares includes a reference to *"entering into, or becoming a party to, a relevant agreement in relation to the shares or securities"*.
63. By entering into the Voting Undertakings with the Voting Undertakings Signatories, Messrs Hodgkinson, Naylor and Smith acquired a relevant interest in the shares of each Voting Undertakings Signatory by acquiring the *"power to exercise, or control the exercise of, a right to vote"*.<sup>15</sup>

#### *Breach of the 20% threshold*

64. 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 (as an associate of Messrs Hodgkinson, Naylor and Smith) 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.
65. Mr Naylor submitted that *"the circumstances essentially involve an internal management restructure led by the company's own executive employees. Nothing in the Application nor the submissions from the Applicant identifies any attempt by a third party to acquire corporate control or to maintain a substantial holding in DRA other than for the limited legitimate purpose of seeking to effect the internal management restructure. To intervene in the current circumstances would be to unduly limit the capacity for employee shareholders to seek to effect legitimate organisational change through the exercise of their statutory rights to seek board renewal and management change, and in doing so may be against the public interest."*
66. We disagree with this submission. While shareholders are free to discuss and exchange views in the context of promoting good corporate governance, we consider that, as stated in ASIC RG 128<sup>16</sup> *"there is a difference between investors expressing views and promoting appropriate discipline in entity decision making and investors effectively taking control of entity decision making"*. We consider this to be particularly true where shareholders are also employees.

### Contravention of section 671B

67. Mr Hodgkinson has a relevant interest in 1.76% of DRA, held directly and by Alistair Ruth (Pty) Ltd.

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<sup>15</sup> see section 608(1)

<sup>16</sup> RG 128 at [128.3]

## Takeovers Panel

### Reasons – DRA Global Limited [2022] ATP 16

68. Mr Naylor has a relevant interest in 0.82% of DRA, held by Addax Holdings (Pty) Ltd.
69. Mr Smith has a relevant interest in 1.48% of DRA, held by GSPC Trading and Refining (Pty) Ltd.
70. Mr Dowding is a substantial shareholder with a relevant interest in 7.22% of DRA, held by Anchor High Equity Worldwide SNN QI.
71. 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%.
72. As a result of the association between Messrs Hodgkinson, Naylor and Smith and each Voting Undertakings Signatory through the Voting Undertakings, the voting power of each of Messrs Hodgkinson, Naylor and Smith increased above 20%.
73. 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.
74. No substantial holder notices have been lodged 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 Voting Undertakings Signatory 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.
75. Mr Hodgkinson submitted that he *“was not aware of the application of s 671B of the Act or the takeover provisions in Chapter 6 of the Act to the then prevailing circumstances concerning the Oxford Consortium’s actions arising from the Notices”* and that it was his understanding that his advisers had sought Australian legal advice. Mr Smith and Mr Naylor also made submissions to that effect.
76. Given Messrs Hodgkinson, Naylor and Smith’s position as senior executives of an ASX listed company, we are not satisfied that their lack of disclosure was the result of inadvertence or mistake. However, it is not for us to decide whether such a defence could be relied on and, in any event, it does not preclude us from making a declaration because *“[w]e are concerned with unacceptable circumstances rather than with a prosecution”*<sup>17</sup>.
77. As a result of Messrs Hodgkinson, Naylor, Smith and Dowding’s failure to disclose their association in relation to DRA, DRA shareholders were not informed, ahead of DRA’s AGM scheduled on 17 May 2022, that:

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<sup>17</sup> *The President’s Club Limited* [2012] ATP 10 at [48]

- (a) Messrs Hodgkinson, Naylor and Smith, shareholders and senior executives of DRA, and Mr Dowding, a substantial shareholder and former executive of DRA, were associates for the purpose of controlling or influencing the composition of the DRA board or
- (b) there had been an accumulation of voting power in over 20% of the DRA register through the various associations listed in paragraphs 67 to 73 above.

78. We consider that the failure of the associated parties to disclose their association and voting power in substantial holder notices constitutes or gives rise to a material contravention of section 671B.

### Disclosure by DRA

79. On 18 February 2022, DRA received the s249D Notice.
80. DRA submitted that *“the receipt of the Requisition Notice was not considered to require immediate disclosure under Listing Rule 3.1 [Continuous Disclosure], in circumstances where the status of the Requisition Notices was unclear, and given negotiations concerning the withdrawal of the Requisition Notices (which was the board’s preferred outcome) were ongoing and remained a realistic prospect”*.
81. On 21 February 2022, DRA’s legal advisers sent the First DRA Letter, which provided (among other things) that if the Notices were withdrawn *“so that DRA is not required to... make an announcement in accordance with the ASX listing rules that requisitions have been lodged”* the board of DRA would provide a proposal to the Requisitioning Shareholders (as discussed below at paragraphs 99 and 101).
82. On 22 February 2022, the Requisitioning Shareholders withdrew the Notices. DRA submitted that *“[a]s the Withdrawal Notice was received within the 2 Business Day time period prescribed under Listing Rule 3.17A.1, DRA was not required to disclose receipt of the Requisition Notices under Listing Rule 3.17A.1”*. While technically correct at that time, we consider that the requisition subsequently required disclosure.
83. On 26 February 2022, the board of DRA became aware of the existence of materials including the *“Project Boomerang”* document and the Voting Undertakings.
84. On 28 February 2022, DRA announced the proposed date of its AGM and the closing date for the receipt of nominations to be considered for election at the AGM. Despite being aware that over 20% of DRA’s shareholders agreed to change the composition of the board in support of the shareholder action initiated by Messrs Hodgkinson, Naylor, Smith and Dowding, DRA did not disclose the Notices, the Voting Undertakings, or any other related information it had become aware of.
85. Again, DRA submitted that the board considered whether disclosure of the information uncovered on 26 February 2022 was required but determined that it did not require immediate disclosure under Listing Rule 3.1 or disclosure under Listing Rule 3.17A.1.
86. On 11 March 2022, a market announcement stated that the suspension of trading in DRA shares would be lifted following an announcement by DRA regarding organisational changes. On that day, DRA announced that Mr Naude was stepping

down as Managing Director and CEO of DRA and that Mr Smith would take over as interim CEO. The announcement did not mention the Notices, the Voting Undertakings or any related matters.

87. In fact, DRA did not make any announcement in relation to the shareholder action until 13 April 2022, when, in DRA's notice of AGM, DRA's Chairman referred to "*a series of event[s]*" that "*were a culmination of stresses and frustrations that had been building in our business for some time*" and stated that "*[t]hese 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*".
88. DRA's notice of AGM also referred to the Panel proceedings stating that "*[w]hile DRA is only involved to a limited extent in the proceedings, the Board has cooperated fully in the process, where required*". To the extent that the application was made in relation to the affairs of DRA, and to the extent that DRA was a party to these proceedings, we consider that DRA was seeking to downplay its role in the proceedings with this statement.
89. The material described above are matters that go to the control of the board of DRA. We consider that DRA's failure to disclose the Voting Undertakings and other subsequent events related to the shareholder action was contrary to an efficient, competitive and informed market.

### Ongoing association?

90. Each of Messrs Hodgkinson, Naylor, Smith and Dowding denied that the 'Oxford Consortium' were continuing to act in concert in relation to DRA.
91. Mr Dowding submitted that "*[u]pon becoming aware of the restrictions under the Corporations Act, prompt action was taken to ensure that any alleged association were (sic) unwound.*"
92. Mr Naylor submitted that "*[n]otwithstanding whether the prevailing circumstances at the time of the lodgement of the section 203D and section 249D notice or entry into the Voting Undertakings may have given rise to unacceptable circumstances, any such circumstances were discontinued on 22 February 2022 (Requisition Withdrawal Date).*"
93. As noted above, 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*".
94. We were provided with a contemporaneous email chain dated 1 March 2022 with the subject line "Removal of Association", in which each of Messrs Hodgkinson, Naylor and Smith confirmed his freedom to decide how to vote his DRA shares and that there was no ongoing understanding between them. Mr Smith's email noted that "*any agreement which may have come into effect between us while acting in our capacity as shareholders of DRA is hereby cancelled*".



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95. We do not accept that withdrawing from an unlawful agreement automatically removes the unacceptable circumstances that arose as a consequence of such agreement.
96. The Voting Undertakings provided that *“the Shareholder’s obligations shall terminate and be of no further force and effect if the Shareholder’s Action dissolves prior to the requested general meeting being held.”* The “Shareholder Action” was defined as the calling of a general meeting of DRA shareholders under s249D. The Applicant submitted that the Voting Undertakings did not identify the s249D Notice by date or limit the Voting Undertakings to the s249D Notice. He also submitted that the Voting Undertakings Signatories had not withdrawn their undertakings by deed.
97. Messrs Hodgkinson, Naylor, Smith and Dowding, as well as DRA, submitted that the Voting Undertakings had terminated on their terms, as well as *“the absence of a factual basis upon which the undertakings could operate”* upon the withdrawal of the Notices. We understand Messrs Hodgkinson, Naylor and Smith also notified the Voting Undertakings Signatories that they had each solicited that the Voting Undertakings had been terminated on or around 1 March 2022.
98. We are prepared to accept the submissions that the Voting Undertakings have ended.<sup>18</sup> However, in light of the matters detailed below (among others), we were not satisfied that the statements by Messrs Hodgkinson, Naylor, Smith and Dowding at paragraphs 93 and 94 established that their association has ended.
99. The Notices were withdrawn on the understanding that, as provided in paragraph 32 of the First DRA Letter:
- “...the board of DRA will provide to the requisitionists, within three working days of the withdrawal of the requisitions, a proposal for the process including timing:*
- (a) to effect Mr. Naude’s disengagement from DRA;*
  - (b) to appoint an interim CEO;*
  - (c) in turn to appoint a new CEO;*
  - (d) for such resolutions to be put in relation to the nomination of new directors for appointment at the annual general meeting as shareholders may wish to nominate, in accordance with the nomination process provided for in the DRA constitution and the ASX listing rules (an announcement of the closing date for which nominations will be made shortly); and*
  - (e) for communications with stakeholders to ensure the stability of DRA’s business activities until the AGM;*
- to be further discussed with representatives of the requisitionists.”*
100. On 22 February 2022, the Requisitioning Shareholders signed and returned the withdrawal form under cover of a letter from their representative to DRA (copying

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<sup>18</sup> The Voting Undertakings were governed by South African law

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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”*.

101. In the Second DRA Letter, on 27 February 2022, DRA’s legal advisers noted 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, however, given the materials that had come to hand<sup>19</sup>, the board was not in a position to advance those discussions. The Second DRA Letter asked that the communications remain confidential while the board resolved a course of action.
102. On 1 March 2022, Mr Smith, on two separate occasions, when notifying DRA shareholders of the cessation of the Voting Undertakings, 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”*.
103. 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.<sup>20</sup> 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.
104. 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.
105. 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.
106. 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.<sup>21</sup> After Mr Mansell noted that this would inflame rather than diffuse the situation and that s249D proceedings were always open to them, Mr Dowding asked

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<sup>19</sup> See paragraph 10

<sup>20</sup> These executives were subsequently reinstated

<sup>21</sup> Using the mechanism set out in the Notice of AGM

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what the reaction would be to nominating two directors, Messrs Hodgkinson and Nel. Mr Mansell responded that *“it might still be seen as confrontational”*.

107. 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. Mr Naude submitted that it was with Mr Mansell’s encouragement that he spoke to Mr Smith about developing a plan *“with the hope of outlining a more sensible way forward for DRA to consider certain changes required by the Oxford Consortium and which would allow the Company to move beyond the impasse which had arisen”*.
108. 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”*.
109. DRA did not receive any director nominations for election at the AGM when the nominations closed on 7 March 2022.
110. On 11 March 2022, DRA announced that Mr Naude would step down as Managing Director and CEO of DRA and that the board had identified Mr Smith to take over as interim CEO from the AGM.
111. On 13 April 2022, in DRA’s notice of AGM, DRA’s Chairman stated that *“the plan presented by the executives to the Board”* had *“in broad terms, been endorsed and committed to by the Board, and its implementation has already begun.”*
112. The conversations between Mr Smith and DRA shareholders and DRA’s Chairman and Mr Dowding appeared to suggest that the shareholder action was still underway. The management changes announced on 11 March 2022 reflected in part the original ‘Oxford Consortium’ requests and the endorsement *“in broad terms”* of the *“the plan presented by the executives to the Board”* announced on 13 April 2022 could infer that the *“3 South African executives”* had found a solution acceptable to them.
113. Mr Naude submitted that the three members of the ‘Oxford Consortium’ now operated together as a de facto executive management committee of DRA, with all aspects of DRA’s business now reporting to them. DRA rejected this submitting that all executives now report to Mr Smith in his capacity as interim CEO who in turn is subject to supervision and direction of the board.
114. It was not clear to us how the board came to select Mr Smith as interim CEO. Mr Naylor submitted that it was *“happenstance these circumstances aligned with part of Project Boomerang”* but it did give rise to an inference that Project Boomerang was adopted.
115. Mr Smith submitted that *“[j]ust because Messrs Hodgkinson, Naylor and Smith happen to be executives of DRA and carrying out the duties under their respective roles, that is not indicative of acting in concert as relevant to Chapter 6 of the Corporations Act.”*

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116. Messrs Hodgkinson and Naylor made similar submissions. Mr Naylor submitted that the three executives had ceased to take any action in respect of DRA and the composition of the board, other than participating in the 10-point plan discussion.
117. Given the clear expression of their views as the ‘Oxford Consortium’, the executive roles of Messrs Hodgkinson, Naylor and Smith make it very difficult to assess their actions following the withdrawal of the Notices. Considerable caution needs to be exercised where the lines are blurred between executive and shareholder. Executive shareholders need to balance their obligations as executives and as shareholders in the context of Chapter 6.
118. Here, we are not satisfied that we have sufficient material to conclude that the association between Messrs Hodgkinson, Naylor, Smith and Dowding has ended.
119. Mr Naude was also concerned about a continuing association, among other concerns. On 1 March 2022, he proposed two resolutions for the board to consider, one of which was the making of an application to the Takeovers Panel. At a board meeting on 3 March 2022, the board deferred consideration of the resolutions “*given the urgent matters at hand regarding standing aside*” the five executives<sup>22</sup>. We do not know if the board later considered these resolutions. It was concerning to us that an application to the Panel was not formally considered in a timely manner by the board in light of the serious conduct which they knew had occurred, particularly in circumstances where there was continuing asymmetry in the information available to executive shareholders, employee shareholders and non-employee shareholders.

### Other Matters

120. On 7 April 2022, Mr Naude filed a notice to become a party and sought leave to be represented by Bennett + Co.
121. Procedural Rule 16(2) states “*A person not identified in an application as an interested person who wishes to become a party to the proceedings should, when submitting a Notice to Become a Party, explain why they may be a potentially interested person or why they may be able to assist the Panel.*”
122. The letter accompanying Mr Naude’s notice to become a party stated that Mr Naude had reviewed the preliminary submissions and submissions to the brief and considered that certain elements, including his removal as CEO and Managing Director, had not been accurately described and that we had “*not been provided with all relevant correspondence and documentation from DRA*”.
123. We considered that Mr Naude was an interested person in the proceedings, as a DRA shareholder and dissenting director of DRA, and accepted him as a party.
124. Under s194 of the *Australian Securities and Investments Commission Act 2001 (Cth)*, “*A party to Panel proceedings may be legally represented in the proceedings only with the leave of the Panel.*” In granting leave for legal representation, the Panel considers how it might be assisted by the legal advisers seeking to represent a party. If a legal adviser

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<sup>22</sup> See paragraph 103

is advising more than one party, the Panel needs to consider (among other things) whether the potential for conflict might compromise the information that is made available to the Panel and whether an actual or potential conflict of interest requiring the appointment of different solicitors could delay proceedings.

125. While the Panel has rarely refused leave, it has done so in *Avalon Minerals Limited*<sup>23</sup>, where it considered that “[t]he involvement of Bennett + Co in the Panel proceedings, given its past and current roles in this Rights Issue, was likely to muddle an already complex factual situation in which various parties were alleged to be associated”.
126. Bennett + Co are the solicitors for the Applicant. We raised our concerns about the prospect of a potential confidentiality issue or conflict of interest with Bennett + Co and asked them how it foresaw these issues being dealt with.
127. In their response, Bennett + Co focused on the confidentiality issues, noting that “the Applicant has now been provided with DRA’s submissions dated 7 April 2022, and accompanying documents, which should alleviate any concerns the Panel has in respect of confidentiality” and “as EGM Corporate Affairs, the Applicant receives selective information from the Board in any event”. This did not address our concerns in relation to conflict of interest in a satisfactory manner.
128. We consider that there are two significant risks that have not been adequately addressed by Bennett + Co, and are likely unable to be, which are:
- (a) the risk of information from either the Applicant or Mr Naude affecting Bennett + Co’s ability to act for the other party and
  - (b) the risk that the interest of the Applicant and Mr Naude diverge, making it impossible to continue to represent both.
129. In both instances, these risks would interfere with our expeditious disposition of the proceedings as that would require the appointment of different solicitors part way through the proceedings.
130. We decided to refuse leave to Bennett + Co to represent Mr Naude on that basis.

## DECISION

### Declaration

131. It appears to us 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

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<sup>23</sup> *Avalon Minerals Limited* [2013] ATP 11 at [145]

- (c) in the further alternative, because they constituted or constitute a contravention of a provision of Chapter 6 or of Chapter 6C.

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

### Orders

133. Following the declaration, we made the final orders set out in Annexure B. Subsequent to that, we made the costs order set out in Annexure C.

134. Under section 657D the Panel is empowered to make ‘any order’<sup>24</sup> if 4 tests are met:

- (a) it has made a declaration under section 657A. This was done on 9 May 2022.
- (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. In respect of the final orders, this was done on 26 April 2022 and 12 May 2022. Each party made submissions on at least one of these occasions (with the exception of ASIC). In respect of the costs order, this was done on 26 April 2022 and 12 May 2022<sup>25</sup>. Each party made submissions on at least one of these occasions (with the exception of ASIC).
- (d) it considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons. We consider that the orders do this for the reasons below.

### Final Orders

135. On 26 April 2022, we provided draft final orders to the parties that included:

- (a) disclosure by Messrs Hodgkinson, Naylor, Smith and Dowding regarding their association with one another and, in the case of Messrs Hodgkinson, Naylor, Smith, with the Voting Undertakings Signatories
- (b) disclosure by DRA of the unacceptable circumstances and
- (c) a restriction on requisition for Messrs Hodgkinson, Naylor, Smith and Dowding.

136. We sought submissions from the parties on the draft final orders. We also asked parties whether we should consider (among other things) making:

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<sup>24</sup> Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

<sup>25</sup> On 26 May 2022, the Panel sought submissions from the Applicant in relation to the costs incurred by the Applicant in connection with the proceedings, in order for the Panel to finalise its costs order. The Panel was not inviting submissions on substantive issues from other parties.

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- (a) a divestment order
  - (b) an order restricting the voting or acquisition rights of Messrs Hodgkinson, Naylor, Smith and Dowding for a period of time and
  - (c) an order restricting the appointment of any of Messrs Hodgkinson, Naylor, Smith and Dowding or their nominees as a director of the DRA board via casual vacancy for a period of time.
137. Mr Hodgkinson submitted that “*to the extent the Associates were to jointly prepare notices it could and should not be taken to support any view that an ‘association’ between them were prevailing*”. We consider that jointly preparing the notices is for administrative simplicity and does not support an inference of an ongoing association.
138. In relation to the draft final order requiring disclosure by Messrs Hodgkinson, Naylor, Smith and Dowding regarding their association, DRA submitted that “*the simultaneous release of a Notice of Initial Substantial Holder and a Notice of Ceasing to be a Substantial Holder would not materially inform the market and has the potential to cause confusion amongst DRA shareholders*”.
139. We disagree. In *Tribune Resources Ltd*<sup>26</sup>, the Panel made corrective disclosure orders, requiring parties to provide disclosure in the form of substantial holder notices in relation to numerous contraventions of the substantial holding notice provisions relating to over 60% voting power in the company and stated that “*the market has not been informed for some time, and continues to be uninformed to a significant degree, of persons who have substantial interests in, or control of, Tribune and the extent of their holding*”.
140. Given the time period during which there has been non-compliance with the substantial holding provisions and the significant percentage of DRA’s shares involved (over 40%), we consider in this case that the market has not been adequately informed.
141. Mr Hodgkinson submitted that “*attaching the Voting Undertakings to the notice would be unnecessary and may be adverse to, and unfairly prejudicial to, the Other Associated Shareholders*”. We consider that not attaching the Voting Undertakings, and any other relevant document would undercut the underlying purpose of the substantial holding provisions, which is that shareholders have access, on a timely basis, to sufficient information to know who the controllers of substantial blocks of voting shares and their associates are. Having regard to the question of unfair prejudice, the Panel previously stated that “*the Panel must weigh the object of protecting rights or interests affected by the unacceptable circumstances against the prejudice that would flow to any person from the making of an order*”<sup>27</sup>. While we consider that an order requiring the Voting Undertakings be disclosed may prejudice the Voting Undertakings Signatories, any such prejudice is not unfair when it is considered against the

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<sup>26</sup> *Tribune Resources Ltd* [2018] ATP 18 at [68]

<sup>27</sup> *Finders Resources Limited 02* [2018] ATP 9 at [55]. See also *Glencore International AG & Anor v Takeovers Panel & Ors* [2005] FCA 1290 at [51] and *Glencore International AG v Takeovers Panel* [2006] FCA 274 at [124]

detriment to the market if such order is not made. We also note that such order requires only what should have been provided to DRA and the market in any event<sup>28</sup>.

142. In relation to the draft final order requiring disclosure by DRA, DRA submitted that *“DRA queries whether there is any additional substantive material which could be disclosed to DRA shareholders at this point in time, beyond what has been disclosed in DRA’s AGM Notice of Meeting and Chairman’s letter of 13 April”*.
143. We considered that an announcement by DRA would help level the playing field and clear the market as to the impact and status of the shareholder action. We note that the effect of the lack of disclosure by DRA was exacerbated by the fact that DRA’s AGM was scheduled to take place on 17 May 2022.
144. We consider that the transactions that occurred in contravention of section 606 have been remedied upon the termination of the Voting Undertakings and, given the voting power of Messrs Hodgkinson, Naylor, Smith and Dowding in DRA decreased to under 20%, we are not satisfied that a divestment order would be appropriate.
145. The Applicant submitted that we should consider an order restricting the voting or acquisition rights of the Messrs Hodgkinson, Naylor, Smith and Dowding. The Applicant submitted that *“the Associates are able to, and continue to, implement Project Boomerang through their effective management control and if their voting rights are preserved this would also effectively prevent any other shareholders challenging that control through seeking board changes.”*
146. DRA submitted that *“restricting the voting rights of the Associates for a period of time”* had the potential *“to have the unintended effect of magnifying the voting rights of other DRA shareholders.”*
147. We consider that, as the market was misinformed as to who were the substantial holders of DRA and the contraventions of section 606, it was appropriate that there be a voting freeze on the shares held by Messrs Hodgkinson, Naylor, Smith and Dowding.
148. The Applicant also submitted that an order restricting the appointment of Messrs Hodgkinson, Naylor, Smith and Dowding or their nominees as directors was required to avoid undermining the efficacy of the Potential Orders. Mr Naude further submitted that *“Having led or participated in unlawful concert party action undermines such shareholder confidence and should preclude from office within DRA anyone who has conspired in, aided, abetted, counselled or procured such activity”*. We agree with these submissions.
149. In *Anzoil NL 01*<sup>29</sup>, the Panel made orders restricting the ability of the associated parties to be appointed as directors of the company, noting that *“[t]he orders are precautionary, not punitive in intent. That is, we have not made them to punish the parties for past breaches, but because we are concerned that they will continue the course of conduct*

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<sup>28</sup> *Sovereign Gold Company Limited* [2016] ATP 12 at [143]

<sup>29</sup> *Anzoil NL 01* [2002] ATP 19 at [69]



*which led to those breaches, and should be prevented from doing so, in the interests of the holders of the majority of the shares in Anzoil.”*

150. While we consider that restricting the ability of Messrs Hodgkinson, Naylor, Smith and Dowding to exercise some of the rights attached to their shares is undoubtedly prejudicial, in view of the findings we have made that Messrs Hodgkinson, Naylor, Smith and Dowding were acting in concert to change the composition of the DRA board (with the view to fundamentally changing the direction of DRA), those restraints are the minimum necessary to prevent further unacceptable circumstances resulting in the near term from further acts of those parties.<sup>30</sup> Therefore, we are satisfied that the prejudice is not unfair.
151. We made the final orders in Annexure B with the aim of:
- (a) preventing the materialization of a plan which would have been the product of Messrs Hodgkinson, Naylor, Smith and Dowding’s unlawful shareholder action
  - (b) ensuring any asymmetry of information in the market was rectified and
  - (c) should Messrs Hodgkinson, Naylor, Smith and Dowding form the view that they were no longer associated in relation to DRA, with each other or with the Voting Undertakings Signatories as appropriate, requiring them to provide a clear statement to that effect<sup>31</sup>.
152. We also communicated to parties that we were still considering whether to make a costs order.

#### **Costs order**

153. We sought submissions from the parties as to whether a costs order should be made in these proceedings.
154. The Applicant submitted *“the Applicant was put to the time and expense to bring an application in the interests of all DRA shareholders, which arises out of egregious conduct of the Associates in disregard to the takeover provisions of the Corporations Act, and ought properly have been brought by DRA had the Associates not secured effective management control before the Application was made”*.
155. The Panel’s primary role is to resolve disputes expeditiously and informally. We consider that DRA had the opportunity to take action in relation to the conduct of its senior executives by providing disclosure to the market to remove the asymmetry in the information known to its shareholders and either bring its own application to the Panel or raise the issues with ASIC.
156. DRA was fully aware of the unlawful circumstances, the Applicant had repeatedly raised the circumstances with DRA including members of the board and the board

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<sup>30</sup> *Anzoil NL 01* [2002] ATP 19 at [68]

<sup>31</sup> See *Indiana Resources Limited* [2017] ATP 8

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had separately received a request from its Managing Director, Mr Naude, to consider a resolution to bring an application to the Panel.

157. At no point during the proceedings has there been any offer by DRA or any of Messrs Hodgkinson, Naylor, Smith and Dowding to resolve the matter quickly, despite DRA's concerns that the Panel proceedings would materially disrupt its activities.
158. The non-disclosure by Messrs Hodgkinson, Naylor, Smith and Dowding of their substantial holding in DRA and the circumstances of their association was apparent and it should not have required the application to the Panel to run its full course before being remedied.
159. We consider that it is appropriate for the fair and reasonable costs incurred by the Applicant to uncover and seek to remedy the unacceptable circumstances that occurred in relation to the affairs of his employer to be borne by DRA and Messrs Hodgkinson, Naylor, Smith and Dowding.
160. The costs order we made in Annexure C reflects our views expressed above.

**Jeremy Leibler**

**President of the sitting Panel**

**Decision dated 9 May 2022 (declaration), 16 May 2022 (orders), 2 June 2022 (costs orders)**

**Reasons given to parties 29 July 2022**

**Reasons published 8 August 2022**

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### Advisers

Party	Advisers
Haydn von Maltitz	Bennett + Co
DRA Global Limited	Herbert Smith Freehills
Darren Naylor	DLA Piper Australia
GSPC Trading and Refining (Pty) Ltd	Thomson Geer
Alistair Hodgkinson	HopgoodGanim Lawyers
Brian Dowding	Hamilton Locke
Andrew Naude	-



**Australian Government**

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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

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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 203D<sup>32</sup> 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:

*...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*

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<sup>32</sup> References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

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*".<sup>33</sup>
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.

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<sup>33</sup> This was also communicated in an email from Mr Hodgkinson to DRA board member Mr Les Guthrie on the same day

## Takeovers Panel

### Reasons – DRA Global Limited [2022] ATP 16

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.<sup>34</sup> 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.
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*”.

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<sup>34</sup> These executives were subsequently reinstated

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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



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- (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

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Reasons – DRA Global Limited  
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- (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**



**Australian Government**

**Takeovers Panel**

**Annexure B**  
**CORPORATIONS ACT**  
**SECTION 657D**  
**ORDERS**

**DRA GLOBAL LIMITED**

The Panel made a declaration of unacceptable circumstances on 9 May 2022.

**THE PANEL ORDERS**

1. As soon as practicable after approval by the Panel of draft notices provided to the Panel reflecting any changes requested by the Panel (with draft notices to be provided to the Panel within five business days of the date of these orders):
  - (a) Alistair Hodgkinson, Darren Naylor and James Smith must give to DRA and the ASX, either separately or combined:
    - (i) a notice in the form of ASIC Form 603 "Notice of initial substantial holder" and, if applicable, a notice in the form of ASIC Form 604 "Notice of change of interests of substantial holder", disclosing:
      - (A) the existence and nature of their association and their association with Brian Dowding,
      - (B) the existence and nature of their association with the Other Associated Shareholders,
      - (C) copies of any document setting out the terms of any relevant agreement that contributed to the situation giving rise to the need for disclosure, including (but not limited to) the Notices and the Voting Undertakings,
      - (D) any transaction undertaken during the period covered by the notice and
      - (E) any other information required by an ASIC Form 603,
    - (ii) if any or all of Alistair Hodgkinson, Darren Naylor and James Smith are of the view that they no longer are associated with each other or with Brian Dowding or with the Other Associated Shareholders, in relation to DRA, a notice in the form of ASIC Form 605 "Notice of ceasing to be a substantial holder" or, if applicable, a notice in the form of ASIC Form 604 "Notice of change of interests of substantial holder", disclosing:

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- (A) how and when the association ceased,
  - (B) copies of any document evidencing the ceasing of the association, including (but not limited to) the Release from Undertaking and
  - (C) any other information required by an ASIC Form 605 or, if applicable, an ASIC Form 604, and
- (iii) an explanatory covering letter to accompany the notices referred to in paragraphs 1(a)(i) and 1(a)(ii) and
- (b) Brian Dowding must give to DRA and the ASX:
- (i) a notice in the form of ASIC Form 604 “Notice of change of interests of substantial holder”, disclosing:
    - (A) the existence and nature of his association with Alistair Hodgkinson, Darren Naylor and James Smith,
    - (B) copies of any document setting out the terms of any relevant agreement that contributed to the situation giving rise to the need for disclosure,
    - (C) any transaction undertaken during the period covered by the notice and
    - (D) any other information required by an ASIC Form 604,
  - (ii) if Brian Dowding is of the view that he is no longer associated with Alistair Hodgkinson, Darren Naylor and James Smith, in relation to DRA, a notice in the form of ASIC Form 604 “Notice of change of interests of substantial holder”, disclosing:
    - (A) how and when the association ceased,
    - (B) copies of any document evidencing the ceasing of the association and
    - (C) any other information required by an ASIC Form 604 and
  - (iii) an explanatory covering letter to accompany the notices referred to in paragraphs (1)(b)(i) and (1)(b)(ii).
2. As soon as practicable after approval by the Panel of a draft ASX announcement provided to the Panel reflecting any changes requested by the Panel (with the draft ASX announcement to be provided to the Panel within five business days of the date of these orders), DRA must make the ASX announcement:
- (a) explaining the Panel’s declaration and orders, DRA’s knowledge of the circumstances found to be unacceptable and DRA’s role in the proceedings and

## Takeovers Panel

Reasons – DRA Global Limited  
[2022] ATP 16

- (b) providing an update of:
- (i) any changes to the senior leadership arrangements since DRA’s announcement dated 11 March 2022, explaining why those changes have been made,
  - (ii) any progress on the executive search and
  - (iii) any progress on the review of DRA’s operating model,

and send a copy of that announcement to DRA shareholders (via the method of communication recorded with DRA’s share registry for each DRA shareholder).

3. For a period of 6 months from the date of these orders, each Associate and his associates must not provide a notice of intention to move a resolution to remove a director of DRA, requisition or call a general meeting of DRA to consider resolutions for the removal or appointment of a director, or otherwise nominate for appointment a director to the DRA board.
4. For a period of 6 months from the date of these orders, DRA must not:
- (a) put before a general meeting of DRA any resolution to appoint as a director a person who has, at any time before the date of these orders, been nominated for appointment as a director of DRA by an Associate or his associates and
  - (b) otherwise appoint any Associate or a nominee of any Associate to the DRA board.
5. For 6 months from the date of these orders, each Associate and his associates must not exercise, or allow the exercise of, and DRA must disregard, their voting rights in shares in DRA in respect of any resolution for the appointment or removal of a director of DRA.
6. All references to “associates” in Orders 3, 4 and 5 refer to associates existing at any time after the date of these orders.
7. In these orders, the following definitions apply:

<b>Associates</b>	Alistair Hodgkinson, Darren Naylor, James Smith and Brian Dowding
<b>DRA</b>	DRA Global Limited
<b>Notices</b>	the s203D notice dated 17 February 2022 and the s249D notice dated 18 February 2022 provided to DRA
<b>Other Associated Shareholders</b>	the DRA shareholders that entered Voting Undertakings

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Reasons - DRA Global Limited  
[2022] ATP 16

**Release from Undertaking** document dated 28 February 2022 and signed by Alistair Hodgkinson, Darren Naylor and James Smith releasing the relevant DRA shareholders from their obligations under the Voting Undertakings

**Voting Undertakings** the deeds of irrevocable undertakings signed by DRA shareholders on or around 18 February 2022 in favour of "*the consortium of DRA shareholder (sic) represented by James Smith, Darren Naylor, and Alistair Hodgkinson*"

**Tania Mattei**  
**General Counsel**  
**with authority of Jeremy Leibler**  
**President of the sitting Panel**  
**Dated 16 May 2022**



**Australian Government**

**Takeovers Panel**

**Annexure C**  
**CORPORATIONS ACT**  
**SECTION 657D**  
**ORDER**

**DRA GLOBAL LIMITED**

The Panel made a declaration of unacceptable circumstances on 9 May 2022 and final orders on 16 May 2022.

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

**THE PANEL ORDERS**

1. Within 30 days of the date of this order, DRA and the Associates must pay to the applicant, Haydn von Maltitz, \$76,229.90 plus GST representing the fair and reasonable costs incurred by the applicant in connection with these proceedings through 26 May 2022, in the following proportions:
  - (a) DRA must pay to the applicant \$38,114.95 plus GST and
  - (b) each Associate must pay to the applicant \$9,528.74 plus GST.
2. In this order, the following definitions apply:

<b>Associates</b>	Alistair Hodgkinson, Darren Naylor, James Smith and Brian Dowding
<b>DRA</b>	DRA Global Limited

**Allan Bulman**  
**Chief Executive**  
**with authority of Jeremy Leibler**  
**President of the sitting Panel**  
**Dated 2 June 2022**