

Takeovers Panel

Reasons – AIMS Property Securities Fund 03 [2023] ATP 5

Applicants	Mr Benjamin Graham atf the Graham Family Trust and Mr Warwick Sauer in his personal capacity and as a director of Baaueer Pty Ltd atf the Baaueer Family Trust
APW	AIMS Property Securities Fund
APW RE	AIMS Fund Management Limited in its capacity as the responsible entity of APW
ASIC	Australian Securities and Investments Commission
Consolidated AIMS Group	Great World Financial Group Holdings Pty Ltd and each of the entities referred to in Part 1 of Annexure A of the substantial holder notice of the Consolidated AIMS Group and Mr George Wang addressed to APW dated 21 September 2022
Hong Kong buyers	See definition in paragraph 2 of AIMS 01 & 02
Independent Expert	PricewaterhouseCoopers Securities Limited
January acquisitions	Has the meaning given in paragraph 77
Mr George Wang	Mr George Wang, including (where the context requires) each of his directly owned and controlled entities referred to in Part 2 of Annexure A of the substantial holder notice of the Consolidated AIMS Group and Mr George Wang addressed to APW dated 21 September 2022
Mr Jason Wang	Mr Jason Wang, including (where the context requires) Wasset Group Pty Ltd
Offer	Has the meaning given in paragraph 7
Statutory Declaration	The statutory declaration given by Mr George Wang dated 29 September 2021
Wang parties	Each of Mr George Wang, Mr Jason Wang and Ms Jenny Wang

FACTS

3. APW is a listed managed investment scheme (ASX code: APW; SGX code: BVP). It has 44,519,083 units on issue.² The units are thinly traded.

² Source: APW Notification of cessation of securities announcement dated 4 November 2022

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4. Some of the background relevant to the application is set out in detail in AIMS 01 & 02, being applications made on 13 and 31 August 2021 by the Applicants.³ In summary:
 - (a) On 24 December 2020, the Consolidated AIMS Group (controlled by Mr George Wang) substantially exhausted its 'creep' allowance to acquire units in APW under item 9 of section 611, having acquired approximately 2.99% of the APW units on issue.⁴ Accordingly, the Consolidated AIMS Group was not able to rely on its 'creep' allowance to acquire further units in APW until 24 June 2021.
 - (b) During the period between 8 January 2021 and 24 June 2021, Mr Jason Wang and Ms Jenny Wang, brother and sister of Mr George Wang respectively, acquired a combined total of 1.48% of the APW units on issue.⁵
 - (c) During the period from 26 July 2021 to 16 August 2021, AIGH (a member of the Consolidated AIMS Group) acquired a further 0.39% of the APW units on issue. Accordingly, Mr George Wang and the Consolidated AIMS Group's interest in APW increased to approximately 43.17%.
5. In AIMS 01 & 02, the Applicants submitted (in summary) that:
 - (a) Mr Jason Wang and Ms Jenny Wang were associates of the Consolidated AIMS Group and Mr George Wang in relation to the affairs of APW
 - (b) Mr Jason Wang and Ms Jenny Wang were 'warehousing' the APW units they had purchased for the benefit of the Consolidated AIMS Group and Mr George Wang and
 - (c) the acquisition of APW units by Mr Jason Wang and Ms Jenny Wang between 24 December 2020 and 24 June 2021 had resulted in contraventions of section 606 by reason of having been undertaken while the Consolidated AIMS Group was not able to utilise the 'creep' exception.
6. Ultimately, the Panel in AIMS 01 & 02 considered that there was not sufficient material to establish the alleged associations and declined to make a declaration of unacceptable circumstances.
7. On 21 July 2022, AIGH issued a Replacement Bidder's Statement in relation to an off-market takeover offer to acquire all or some of the units in APW for A\$1.25 cash per unit (**Offer**). AIGH is a wholly owned subsidiary of Great World Financial Group Holdings Pty Ltd ATF AIMS Discretionary Trust. Mr George Wang is the sole director and shareholder of Great World Financial Group Holdings Pty Ltd and a beneficiary of the trust.

³ The relevant issues arise primarily from the 13 August 2021 application, relating to an alleged association between Mr George Wang, Mr Jason Wang and Ms Jenny Wang. The 31 August 2021 application related to an alleged association between Mr George Wang and the Hong Kong buyers, which are less relevant to this application and is not referred to in the summary

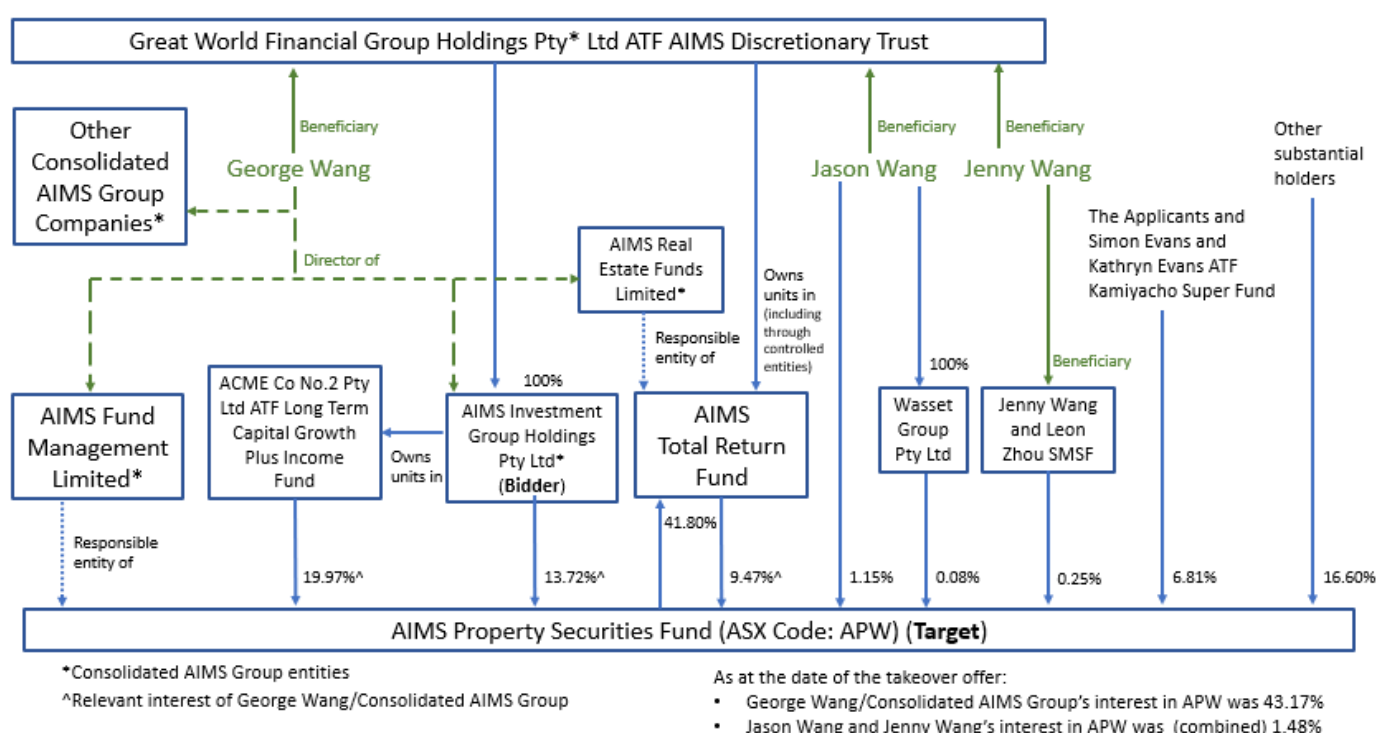
⁴ As submitted by Mr George Wang during the course of the AIMS 01 & 02 proceedings

⁵ Mr Jason Wang held 549,370 APW units and Ms Jenny Wang held 110,231 APW units

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8. On 18 August 2022, APW RE issued its Target's Statement and an Independent Expert's Report in relation to the Offer. APW's Independent Directors recommended that APW unitholders reject the Offer⁶ and the Independent Expert opined that the Offer was neither fair nor reasonable to non-associated unitholders.⁷
9. The Offer closed on 21 September 2022. A substantial holder notice filed that same day disclosed that the Consolidated AIMS Group and Mr George Wang held a 55.38% relevant interest in the units of APW as of 20 September 2022.⁸
10. Unitholdings in APW and the various relationships between the parties as at the date of the Offer are set out in the diagram below:



APPLICATION

Declaration sought

11. By application dated 21 January 2023, the Applicants sought a declaration of unacceptable circumstances. The Applicants submitted that based on an inspection of the APW members' register following the close of the Offer, "*it appears that both*

⁶ Mr George Wang, Executive Chairman of APW RE, abstained from making a recommendation in relation to the Offer on the basis that he has a material personal interest in the outcome of the Offer

⁷ Being a unitholder other than the bidder and/or any other unitholder that is an associate of the bidder

⁸ The substantial holder in the notice of change of interests of substantial holder dated 21 September 2022 is described as "Great World Financial Group Holdings Pty Ltd and Subsidiaries (Consolidated AIMS Group) and George Wang directly owned and controlled entities (see annexure A)". It is noted that in previous substantial holder notices given to APW (for example, on 24 December 2020), the substantial holder is simply described as "Consolidated AIMS Group (see annexure A)" and that there are some differences between the entities listed in Annexure A to those notices

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Jason Wang and Jenny Wang sold (or, largely sold) their APW units to their brother (Mr George Wang) at the \$1.25 offer price" despite:

- (a) the Offer price being "*materially lower*" than the amount that they originally paid for their APW units
 - (b) APW's NTA "*having risen by more than 15% since their purchase of those units*" and "*being 126% higher than the \$1.25 offer*"
 - (c) the Independent Expert opining that the Offer was neither fair nor reasonable
 - (d) APW's Independent Directors recommending that unitholders reject the Offer and
 - (e) "*the sales being entirely inconsistent with the reasons each of them gave the Panel (in AIMS 01 & 02) for acquiring the units in the first place*".
12. Accordingly, the Applicants submitted (among other things) that Mr Jason Wang and Ms Jenny Wang were, when they acquired and sold their APW units and at all times in between, undeclared associates of Mr George Wang and the Consolidated AIMS Group.

Orders sought

13. The Applicants did not seek interim orders.
14. The Applicants sought final orders that (in summary) all APW units sold by Mr Jason Wang and Ms Jenny Wang to Mr George Wang or any other member of the Consolidated AIMS Group (whether on-market or via Offer acceptances), and any APW units still retained by Mr Jason Wang,⁹ be vested with ASIC for sale to any non-associated party, with ASIC to retain any sale proceeds in excess of the net acquisition costs paid by the buyers for those units.

DISCUSSION

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

Decision to conduct proceedings

16. We received a preliminary submission from APW RE submitting that the Panel should decline to conduct proceedings. It submitted (among other things) that:
 - (a) "*many of the matters raised by the Applicant[s] have been dealt with by the Takeovers Panel previously (in AIMS 01 & 02), noting that the outcome of these previous proceedings was that the alleged conduct complained of did not amount to unacceptable circumstances*"
 - (b) the Applicants did not have standing to make the application under section 657C(2)(d)

⁹ The Applicants submitted that, based on their inspection of the APW members' register on 13 January 2023, Mr Jason Wang was listed as "*holding fewer than 13,000 APW units...*"

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- (c) the alleged conduct complained of did not justify the Panel granting an extension of time under section 657B and
- (d) the application “*may be frivolous and vexatious*” and could be dismissed by the Panel under section 658A.
17. We did not receive any other preliminary submissions.
18. Before deciding whether to conduct proceedings, we sought clarification from Mr Jason Wang and Ms Jenny Wang on (among other things) when and how they disposed of any of their APW units since the conclusion of the AIMS 01 & 02 proceedings (i.e. whether their APW units were accepted into the Offer or sold on-market) and to explain their decision to dispose of such units.
19. In response to our questions, Mr Jason Wang confirmed that he had accepted 533,600 APW units (of the 549,370 APW units that he held at that time) into the Offer on 15 September 2022 and submitted that his reasons to accept the Offer included the following:
- “1. The cash rate was consistently increasing on 4 May / 8 June / 6 July / 3 August / 7 September from 0.10% to 2.35%. I predicted the rate would continue rising. The interest rate was no longer “lowest in record” as per my reasons to acquire.*
- 2. The sharemarket was sharply falling due to continued sharply increasing interest rates (as stated in (1) above), fears of global recession and the effect of the war in Ukraine. This dramatic fall included property related stocks in Australia, which fell by approximately 20% - 40%. As the market was volatile and unpredictable, I don’t know when is the bottom and I believe cash is king, so I try to keep most of my money in cash at this stage.*
- 3. AIMS Property Securities Fund 01 & 02 required significant time and money on my end to respond. These are not hassles and costs I anticipated when I initially purchased the stock.*
- 4. With an unpredictable future given (1), (2) and (3), there was a clear increased risk of further costs and time required to hold a large amount of my investments in APW.*
- 5. As stated previously, my acquisition of APW units were “[f]rom my own personal money”. With all the above in mind, I decided it was prudent to liquidate a large portion of my APW units for potential future investment opportunities.*
- 6. In addition, it was better to hold more cash given the increasing household expenses and increasing unpredictable interest rate environment.*
- 7. Since the APW Takeover announcement on 23/06/2022, I found that a lot of shareholders had sold their shares by accepting the off-market takeover offer from APW.*
- 8. From (5), (6) and (7), I took the opportunity to accept the takeover offer from APW, as this may be my only opportunity to exit a large holding at this price and at this difficult time, noting also that I could save broker fees by doing so...”*
20. Mr Jason Wang also confirmed that since accepting into the Offer, he had acquired further APW units at a lower price than the Offer price and that his current holding in APW is “i) 12,805 units in my personal name; and ii) 47,266 units through my Super

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Fund Wasset". Accordingly, between 21 September 2022 and mid-January 2023, Mr Jason Wang had acquired 44,301 APW units since accepting into the Offer.

21. In response to our questions, Ms Jenny Wang confirmed that she had accepted 110,231 APW units into the Offer (being all of her APW units) on 30 August 2022 and submitted that:

"During AIMS Property Securities Fund 01 & 02, we were subjected to undue stress, with what we believe to be time and money wasted for all parties involved. By the conclusion of the case, we had spent almost 20% of the value of our investment in APW in legal fees.

As stated previously, "of my entire family's wealth, APW would be a very, very, small portion". For APW to reach what we believed to be fair value, we were willing to hold the units for a few years, similar to physical real estate. Based on our estimates, those few years would have yielded returns proportional to what we have spent on legal fees in AIMS Property Securities Fund 01 & 02.

Following AIMS Property Securities Fund 01 & 02, we feared further applications from the Applicants, which would undoubtedly cause further losses for us. That complication now outweighs the investment opportunity we saw in APW when we first acquired our units.

Speaking with my husband, we decided to cut our losses short and remove any affiliation with APW stock lest the Applicants somehow would attempt to (in our opinion) vexatiously draw other associations. We thus took the opportunity on 30/08/2022 to accept the APW buy offer and disposed of our units on 21/09/2022, albeit at a loss."

22. In *Mount Gibson Iron Limited*,¹⁰ the Panel said that "[t]he Panel's starting point was that it was for Mount Gibson - the applicant - to demonstrate a sufficient body of evidence of association and to convince the Panel as to that association, albeit with proper inferences being drawn."
23. In this case, we were minded to consider that the further circumstances set out in the application¹¹ (namely, that Mr Jason Wang and Ms Jenny Wang had disposed of all (or a large portion) of their APW unitholdings through acceptances into the Offer), gave additional force to the Applicants' submission that an association existed between Mr George Wang and the Consolidated AIMS Group and Mr Jason Wang and Ms Jenny Wang.
24. Accordingly, we decided to conduct proceedings and made a range of enquiries of the parties, including to better understand the potential control impact of Mr Jason Wang's and Ms Jenny Wang's combined 1.48% APW unitholding.
25. Ultimately, for the reasons discussed below, we have decided:

¹⁰ [2008] ATP 4 at [15]

¹¹ That is, further to the circumstances that existed at the time of the AIMS 01 & 02 proceedings

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- (a) not to make a declaration of unacceptable circumstances in relation to the application. We have extended time for the making of the application under section 657C(3).
- (b) to refer certain issues to ASIC¹² (including in respect of a potential breach of section 606) for it to consider whether any further regulatory action is warranted and/or to make an application to the Panel.

Preliminary matters

Overlap with AIMS 01 & 02

- 26. We note that these proceedings are separate to the proceedings in AIMS 01 & 02. In particular, it is not a review application under section 657EA. However, there is considerable overlap in the allegations and circumstances that are before us now and those which were considered by the Panel in AIMS 01 & 02 (namely, that Mr Jason Wang and Ms Jenny Wang were undeclared associates of Mr George Wang and the Consolidated AIMS Group at the time of acquiring their APW units). The interaction between the two proceedings in light of this overlap is discussed further below.¹³
- 27. Given that these are separate proceedings to AIMS 01 & 02, but noting that the application refers to and relies upon materials submitted as part of those earlier proceedings, we asked the parties for their authorisation to review the materials they submitted as part of the AIMS 01 & 02 proceedings for the purposes of the current proceedings. Without such permission, we would not have access to the earlier materials.
- 28. All parties provided the requested authorisation. Accordingly, we have considered all aspects of the materials submitted by the parties in the AIMS 01 & 02 proceedings as well as any further materials submitted as part of these proceedings before arriving at our decision.

Commercial objectives of the Applicants

- 29. As noted above, APW RE's preliminary submission submitted that the application "*may be frivolous and vexatious*". It later submitted in response to questions in our brief that it was likely that:
 - (a) the application was made "*out of a sense of grievance following the Takeovers Panel's decision not to declare unacceptable circumstances during AIMS 01 & 02*" and
 - (b) "*the alleged conduct complained of does not appear to have any impact on the Applicants (noting that the Responsible Entity is of the opinion that the Application does not demonstrate the manner in (or the extent to) which the Applicants' interests have been affected (adversely or otherwise)) or any other unitholder*" (footnotes omitted).
- 30. The Applicants submitted that their "*objective in making the application is to ensure that:*
 - (a) *the unacceptable circumstances of which they complain are remedied;*

¹² Including under Regulation 18 of the *Australian Securities and Investments Commission Regulations 2001* (Cth)

¹³ Starting at paragraph [100]

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- (b) *George Wang does not benefit from his wrongful conduct;*
 - (c) *integrity is restored to the market; and*
 - (d) *the interests of APW unitholders (other than the Wangs) are protected.”*
31. The Applicants further submitted that they *“have been forever hopeful that the George Wang-owned APW RE would begin acting in the interests of all APW unitholders, instead of focusing on furthering George Wang’s personal interests.”*
32. In support of its submissions, the Applicants provided *“[s]ome examples of APW RE’s longstanding existing approach”* to furthering Mr George Wang’s personal interests, many of which they had previously referred to in the AIMS 01 & 02 proceedings. In considering these examples, we agree with the Panel in AIMS 01 & 02 that they show *“a history of Mr George Wang seeking to consolidate control in APW, including by taking steps to ensure that resolutions proposed in January 2017 and December 2018 to consider whether to wind up APW were defeated.”*¹⁴
33. We do not consider the application to be frivolous or vexatious or have any reason to question the standing of the Applicants. While we have concluded not to make a declaration mainly because of the limited control effect of the new circumstances, there was a reasonable basis for us to make enquiries and the issues raised affect the interests of all unitholders of APW.

Association

34. In *Viento Group Limited*,¹⁵ relying on *Mount Gibson Iron Limited*,¹⁶ the Panel said the circumstances which are relevant to establishing an association include:
- (a) a shared goal or purpose
 - (b) prior collaborative conduct
 - (c) structural links
 - (d) common investments and dealings
 - (e) common knowledge of relevant facts and
 - (f) actions which are uncommercial.
35. The above ‘indicia’ are a useful guide in identifying and describing relevant circumstances, and we consider whether some or all of these elements exist in the current case below. While each of these may support a finding of association, none alone establish association. Similarly, the absence of one or more of the ‘indicia’ does not preclude such a finding where there is other probative material indicating an association.

Structural links/common investments and dealings

¹⁴ See paragraph 97(a) of the AIMS 01 & 02 reasons

¹⁵ [2011] ATP 1 at [120]

¹⁶ [2008] ATP 4

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36. Paragraphs 31 to 40 of the AIMS 01 & 02 reasons describe the corporate structure of the various entities that were related in some way to Mr George Wang. No material changes to this corporate structure were brought to our attention.¹⁷
37. Paragraphs 41 to 46 of the AIMS 01 & 02 reasons describe the family relationship between Mr George Wang, Mr Jason Wang and Ms Jenny Wang. Nothing was brought to our attention that there has been any change in their relationship.
38. Paragraphs 50 to 58 of the AIMS 01 & 02 reasons set out details of any past or present employment, business or other professional connections or relationships between Mr George Wang, Mr Jason Wang and Ms Jenny Wang. We asked whether there were any updates in respect of this information. We were informed by Mr George Wang, Mr Jason Wang and Ms Jenny Wang that:
 - (a) Jason Wang was appointed a director of APP Securities Pty Ltd and AIMS Capital Pty Ltd on 28 September 2022 and
 - (b) Jenny Wang was appointed a director of Cinon Group Pty Ltd on 16 February 2022.
39. In considering this material, we make the same inference as the Panel did in AIMS 01 & 02 that “Mr George Wang, Mr Jason Wang and Ms Jenny Wang have a close family relationship”.¹⁸

Shared goal or purpose

Coincidences in timing of unit acquisitions

40. The timing of the acquisition of APW units by Mr George Wang and the Consolidated AIMS Group, Mr Jason Wang and Ms Jenny Wang is set out in detail in AIMS 01 & 02.¹⁹ In summary:
 - (a) On 27 May 2020, Mr George Wang and the Consolidated AIMS Group acquired 1,291,000 units (being approximately 2.90% of the APW units on issue) in an off-market transfer.²⁰
 - (b) In the following six-month period, Mr George Wang and the Consolidated AIMS Group substantially exhausted its ‘creep’ allowance, having acquired approximately 2.99% of the APW units on issue also in an off-market transfer²¹. Following this acquisition, the Consolidated AIMS Group was not able to rely on its ‘creep’ allowance to acquire further APW units until 24 June 2021.
 - (c) On 8 January 2021, Mr Jason Wang submitted orders with his broker to acquire a total of 339,681 APW units on-market.²² Between 13 January 2021 and 19 July 2021, Mr Jason Wang acquired a further 209,689 units, representing a total of

¹⁷ See footnote 8 above

¹⁸ See paragraph 59 of the AIMS 01 & 02 reasons

¹⁹ See paragraphs 61 to 69 of the AIMS 01 & 02 reasons

²⁰ As submitted by Mr George Wang during the course of the AIMS 01 & 02 proceedings

²¹ Referred to as the ‘December Transaction’ in the AIMS 01 & 02 proceedings

²² Based on the buy order confirmations provided by Mr Jason Wang during the course of the AIMS 01 & 02 proceedings

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approximately 1.23% of the APW units on issue.²³ Mr Jason Wang paid a total amount of \$709,658.77²⁴ for his APW unitholding. He had never previously owned APW units.

- (d) On 18 January 2021, Ms Jenny Wang submitted orders with her broker to acquire a total of 30,417 units in APW on-market.²⁵ Between 21 January 2021 and 26 February 2021, Ms Jenny Wang acquired a further 79,814 units, representing a total of approximately 0.25% of the APW units on issue.²⁶ Ms Jenny Wang paid a total amount of \$140,173.68²⁷ for her APW unitholding. She had never previously owned APW units.
- (e) On or about 24 June 2021, Mr George Wang and the Consolidated AIMS Group regained full capacity to utilise their ‘creep’ allowance. Subsequently:
 - (i) Between 26 July 2021 and 16 August 2021, AIGH acquired a further 0.39% of the APW units on issue in reliance on its ‘creep’ allowance, increasing the Consolidated AIMS Group’s interest in APW to approximately 43.17%.
 - (ii) Mr Jason Wang purchased 4,300 APW units on 7 July 2021.

41. Following on from the above, the following new acquisitions and disposals have been raised in the course of these proceedings:

- (a) On 30 August 2022, Ms Jenny Wang accepted 110,231 APW units (being all of her APW units) into the Offer.
- (b) On 15 September 2022, Mr Jason Wang accepted 533,600 APW units (of the 549,370 APW units that he held at that time) into the Offer.
- (c) On 26 October 2022, Mr Jason Wang acquired 10,000 APW units at \$1.20 per unit.
- (d) On 10 November 2022, Mr Jason Wang acquired 1 APW unit at \$1.17.
- (e) On 10 January 2023, Mr Jason Wang purchased 34,300 APW units. That same day, Mr George Wang placed a buy order for 239,000 APW units.

42. In AIMS 01 & 02, the Panel was “*minded to conclude that there is more than just coincidences in buying here*”²⁸ in respect of the initial acquisition of APW units by Mr Jason Wang and Ms Jenny Wang on 8 and 18 January 2021 respectively, and the subsequent acquisition of APW units by Mr George Wang and the Consolidated AIMS Group (between 26 July 2021 and 16 August 2021) upon regaining its capacity to ‘creep’, at which time Mr Jason Wang (with one exception) and Ms Jenny Wang stopped purchasing APW units.²⁹

²³ See footnote [22] above

²⁴ See footnote [22] above

²⁵ Based on the buy confirmations provided by Ms Jenny Wang during the course of the AIMS 01 & 02 proceedings

²⁶ See footnote [25] above

²⁷ See footnote [25] above

²⁸ See paragraph 69 of the AIMS 01 & 02 reasons

²⁹ We discuss this further below at paragraph 47

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43. In relation to the ‘new’ circumstances, the Applicants contended that they had identified “yet another ‘coincidence’”. The Applicants submitted that (footnotes omitted):

“It appears that it was on 10 January 2023 at 10:39am that Jason Wang (having bought only 10,001 units in the preceding 3.5 months) bought the further 34,300 APW units he now owns. No more than 76 minutes later his brother George – having bought not a single APW unit since the Offer’s close in September 2022 – placed a buy order for 239,000 APW units...

... The Applicants submit that it is... almost impossible for the countless unlikely ‘coincidences’ to be ‘coincidences’ at all, but that instead they are all easily explainable: the APW units bought by Jason Wang and Jenny Wang and then sold to George Wang were from day one being warehoused by them for him.”

44. We agreed that the timing of the acquisition of APW units by Mr Jason Wang and the buy order by Mr George Wang on 10 January 2023 was peculiar. We decided to make enquiries in relation to this further coincidence, including Mr Jason Wang’s reasons for purchasing the 34,300 APW units and Mr George Wang’s reasons for placing the buy order and continuing to purchase APW units (given the Consolidated AIMS Group already has control of APW).

45. In response to our question, Mr Jason Wang submitted that:

“The Applicants’ interpretation of Mr Wang having “only” purchased 10,001 units as indicative of association is misguided. The alternative reading of Mr Wang’s purchasing behaviour is simple and commercially sound - Mr Wang considered APW units to be worthwhile investments if able to be acquired at prices below \$1.25.

Consistent with this view, Mr Wang acquired 10,000 units on 26 October 2022 at \$1.20 and 1 unit for \$1.17 on 10 November 2023. Mr Wang cannot recall identifying any other opportunities to transact in significant volumes at prices below \$1.25 in recent months with the exception of 10 January 2023, when, after returning from an interstate holiday on 6 January 2023, Mr Wang identified an opportunity to transact at a relatively substantial portion at a price below \$1.25 per unit.

These were the only times units were trading below \$1.25 when market prices were being monitored by Mr Wang.

... The Applicants’ assertion of coincidence carries little weight in circumstances where:

- (a) APW is very thinly traded (increasing the likelihood that any 2 investors may seek to seize the same opportunities to trade at volume);*
- (b) Mr Wang has already explained his rationale for investing in AIMS;*
- (c) a prior Panel has made a decision on past association; and*
- (d) where the primary basis of the Application relates to Mr Wang selling into the only substantial liquidity event since his initial purchase of APW unit.”*

46. In response to our question, Mr George Wang submitted that (footnotes omitted and references to ‘AIMS’ are to Consolidated AIMS Group):

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“... The rationale for placing an initial order of 239,000 was to see if anyone was willing to sell without adversely affecting the normal forces of supply and demand (if demand is too high relative to supply, price will rise), to maintain parity from a value perspective with the offer price of \$1.25 per unit, which in AIMS’ view continued to represent good value having regard to the previous 12 months trading history of APW.

Neither AIMS nor George Wang had any knowledge that Jason Wang purchased APW units on 10 January 2023. Mr Wang does not discuss purchases of APW units with Jason Wang, or vice-versa.

It made no sense for AIMS or George Wang to collude with Jason Wang to purchase units at the same time as this would decrease sell side liquidity, and the resulting disequilibrium between demand and supply, would inevitably increase the price of APW units. This would be unfavourable to AIMS having regard to the view it had formed of APW’s trading value.

It also makes no sense having regard to AIMS statutory creep entitlements. APW has issued units of 44,519,083. This means that in the 6 month period following the offer closure it was entitled to acquire a maximum 1,335,572 units. AIMS only purchased 12,323 units in January 2023, which at 0.27% was substantially less than its 3% creep entitlement. It follows that there was no need for Jason Wang to buy APW units on any undisclosed basis for AIMS or George Wang as the Applicants appear to be alleging, as each was entitled to directly buy at least another 2.73% combined of APW units (representing an additional 1,096,572 units) up to 21 March 2023...”

47. We are concerned about the multiple coincidences in timing identified in respect of the acquisition of APW units by the Wang parties, namely:
- (a) The initial acquisition of APW units by Mr Jason Wang and Ms Jenny Wang on 8 and 18 January 2021 respectively, which occurred:
 - (i) within two weeks of each-other’s first acquisition of APW units, despite both of them having had a long and extensive history of working within the Consolidated AIMS Group and
 - (ii) in a period when Mr George Wang and the Consolidated AIMS Group was not able to acquire APW units because their ‘creep’ allowance had been substantially exhausted.³⁰
 - (b) Upon regaining full capacity to utilise their ‘creep’ allowance on or about 24 June 2021, the acquisition of 0.39% of the APW units on issue by Mr George Wang and the Consolidated AIMS Group (between 26 July 2021 and 16 August 2021). We note that from the time that Mr George Wang and the Consolidated AIMS Group regained full capacity to utilise their ‘creep’ allowance and until the time of accepting some or all of their APW units into the Offer, with one exception,³¹ neither Mr Jason Wang nor Ms Jenny Wang purchased any APW units.

³⁰ This observation was made by the Panel in AIMS 01 & 02 (see paragraph 66 of the AIMS 01 & 02 reasons), with which we agree

³¹ Being Mr Jason Wang’s purchase of 4,300 APW units on 7 July 2021

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- (c) The subsequent acquisition of APW units by Mr Jason Wang on 10 January 2023 and the placement of the buy order for 239,000 APW units by Mr George Wang that same day (and within 76 minutes of Mr Jason Wang's acquisition).

48. In *Cromwell Property Group*,³² the Panel stated that:

"Where two parties are buying shares consistently over a long period, there will be occasional days where they both trade. While sequential or concurrent buying of shares is not of itself evidence of an association, where there is other probative material indicating an association, behaviour that appears to be concerted buying activity may be taken to support an inference of an association."

49. In this case, we are minded to consider that the timing of all these acquisitions are unlikely to be mere coincidences. We consider it too remarkable for the subsequent circumstances on 10 January 2023 to be simply another coincidence on top of the buying coincidences that were brought to the attention of the Panel during the course of the AIMS 01 & 02 proceedings.

Reasons provided by Mr Jason Wang and Ms Jenny Wang for their acceptances into the Offer

50. As mentioned above, on 30 August 2022, Ms Jenny Wang accepted all of her APW units into the Offer and on 15 September 2022, Mr Jason Wang accepted a large proportion of his APW units that he held at that time into the Offer.

51. Mr Jason Wang's reasons for accepting the Offer are set out above in paragraph 19 and Ms Jenny Wang's reasons for accepting the Offer are set out above in paragraph 21 which were submitted in response to our preliminary inquiries.

52. Further to that, Mr Jason Wang and Ms Jenny Wang jointly submitted in response to our inquiries in the brief that the application *"does not add any force to any claim of association between Mr Jason Wang and Ms Jenny Wang and Mr George Wang / Consolidated AIMS Group"*. Specifically:

"Mr Jason Wang and Ms Jenny Wang disposed of (in the case of Mr Jason Wang, some and in the case of Ms Jenny Wang, all) units by accepting the Offer almost two years after purchasing the relevant units, in vastly different personal and economic circumstances, as outlined by Mr Jason Wang and Ms Jenny Wang..."

... The Panel should not conclude it was unreasonable or uncommercial to accept the Offer. It is not uncommon for shareholders to accept an offer where a target board recommends shareholders reject an unsolicited takeover proposal and where an independent expert provides a report that supports that recommendation. Relevant facts the Panel should be aware of include that:

- (a) *over the Offer Period, Consolidated AIMS Group appear to have been the only entities acquiring substantial parcels of securities, increasing their interest from 19,217,235 Units to approximately 24,653,972 Units (of these only 643,831 Units (less than 12% of the units acquired) were acquired from Mr Jason Wang and Ms Jenny Wang);*

³² [2020] ATP 1 at [40], citing *Orion Telecommunications Ltd* [2006] ATP 23 at [107]

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- (b) *as noted in the Independent's Expert Report (sic) that accompanied the Target's Statement issued on 18 August 2022, the trading price of APW Units was A\$1.02 prior to the announcement of the Offer meaning the Offer was a 22.5% premium to ASX trading prices; and*
- (c) *it was quite possible that Mr Jason Wang and Ms Jenny Wang would have been unable to liquidate their holdings, at reasonable prices, if at all, if they did not accept the Offer. APW is very thinly traded. As stated in the Independent Expert's Report in the 12 months before the announcement of the Offer:*
 - (i) *Units only traded on 105 days out of 256 trading days on ASX with no trading on 151 days;*
 - (ii) *Only 0.95 million units were traded representing approximately 2% of total units..."*

53. We also asked the Wang parties if they had communications with any person in relation to Mr Jason Wang's or Ms Jenny Wang's acceptances into the Offer.

54. Mr Jason Wang and Ms Jenny Wang confirmed that they:

"each made individual investment decisions and that neither had any communication with any other persons including Mr George Wang or each other (excluding, in the case of Ms Jenny Wang, her spouse), in relation to the disposal of APW Units".

55. Mr George Wang responded that he was:

"kept apprised of and generally monitored the acceptance of the Offer by APW members from time to time. However, Mr Wang did not communicate with Jason or Jenny Wang about the offer or whether they proposed to accept it, did not communicate with any other person in relation to Jason or Jenny Wang's disposal of their APW units, and did not become aware of their disposals until after they had occurred".

56. The Applicants submitted in relation to Ms Jenny Wang's acceptance into the Offer that:

"Jenny Wang did not even seek to maximise her sale price. George Wang's Offer was for \$1.25 per unit. When on 30 August 2022 Jenny Wang accepted that \$1.25 offer, for the entire preceding seven weeks APW units had without fail traded above \$1.25. Yet to avoid any further suggestion she might be warehousing APW units for her brother, she sold her units at a below-market price directly to that very employer-brother."

57. In a similar vein, the Applicants submitted in relation to Mr Jason Wang's acceptance into the Offer that:

"Jason Wang did not even seek to maximise his sale price. George Wang's Offer was for \$1.25 per unit. For most of the period after the Offer was announced, APW units traded above \$1.25. Yet to avoid any further suggestion he might be warehousing APW units for his brother, Jason Wang sold his units at a below-market price directly to that very brother."

58. We asked Ms Jenny Wang and Mr Jason Wang for any further submissions in response to the Applicants' submissions. Ms Jenny Wang and Mr Jason Wang jointly submitted that:

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“It is unsurprising that APW units traded around the offer price (albeit at low volumes) following announcement of the Offer – both slightly higher and slightly lower depending on the attitude of individual sellers and buyers and their personal circumstances. Takeover offers often represent liquidity events for thinly traded securities. With respect to the Mr Jason Wang and Ms Jenny Wang’s individual transactions they respond as follows:

- (a) *Mr Jason Wang notes that following the announcement of the Offer to 13 February 2023 and excluding 5 September 2022, 13 September 2022 – 19 September 2022 and 13 December 2022 (where substantial parcels of shares were sold albeit at the Offer Price) the average trading volume of APW was 4,197 units and the volume never exceeded the size of Mr Wang’s holdings. Mr Wang did not consider that a market sale transaction would offer him the opportunity to sell his units at the volume he held.*
- (b) *Ms Jenny Wang notes that during the period 15 February 2022 - 30 August 2022, there were only 63 days where APW units were traded on market and on 36 days of these days (over 50%) volume did not rise above 10,000 units. APW volume never exceeded the size of Ms Wang’s holdings in this period. She is not a professional investor and does not monitor the market every day. Given her intent to dispose of all units (sic) and the stress Ms Wang and her spouse now associate with APW (due to the AIMS 01 & 02 proceedings), it is understandable that Ms Wang does not consistently monitor APW trading activity. Following the announcement of the Offer, Ms Wang took the opportunity to liquidate all of her APW holding in one transaction at a price close to her buy price.”*

59. We do not consider the reasons provided by Mr Jason Wang and Ms Jenny Wang for accepting into the Offer to be strongly persuasive and are not easily reconcilable with their reasons for acquiring the APW units, which they submitted in the AIMS 01 & 02 proceedings.³³

Conclusion on association between Mr George Wang and the Consolidated AIMS Group, Mr Jason Wang and Ms Jenny Wang

60. In *Molopo Energy Limited 03R, 04R and 05R*,³⁴ the Panel stated that “*[o]ften establishing an association requires the Panel to ‘draw inferences from patterns of behavior, commercial logic and other evidence suggestive of association.’*”
61. In this case, we consider that there are new circumstances which give additional force to the proposition that an association existed between Mr George Wang and the Consolidated AIMS Group, Mr Jason Wang and Ms Jenny Wang. In particular, we have serious concerns regarding the conduct of the Wang parties in relation to APW, having regard to the circumstances that were before the Panel in AIMS 01 & 02 and

³³ See paragraphs 70 to 91 of the AIMS 01 & 02 reasons. The Panel in AIMS 01 & 02 were “initially concerned that the explanations given by Mr Jason Wang and Ms Jenny Wang in their submissions on the Supplementary Brief for why they decided to invest in APW were not included in their original submissions or rebuttal submissions on the Brief” but decided not to infer anything from this after receiving a submission from Mr Jason Wang and Ms Jenny Wang that English was not their first language and that they had retained legal representation late in the proceedings (see paragraph 90)

³⁴ [2017] ATP 12 at [56], citing *Winepros Limited* [2002] ATP 18 at [27]

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the circumstances that followed, including the multiple coincidences in timing identified in respect of the acquisition of APW units (as discussed in paragraphs 40 to 47 above).

62. However, we consider that, even if the alleged association was established, there was limited potential for any control effect in relation to APW (which we discuss below) and so declined to make a declaration of unacceptable circumstances. Given our conclusion on the control effect, we ultimately do not need to decide on the question of association.

Control effect

63. The application concerned the APW unitholdings of Mr Jason Wang and Ms Jenny Wang which, prior to their acceptances into the Offer, represented together 1.48% of the APW units on issue. Noting that since the close of the Offer, Mr George Wang and the Consolidated AIMS Group hold at least a 55.38% interest in APW (and therefore have control of APW), it appeared to us that Mr Jason Wang and Ms Jenny Wang's combined 1.48% holding had limited potential for any control effect in relation to APW. Given this, we asked parties whether the Panel should make a declaration of unacceptable circumstances.

64. The Applicants submitted that the Panel should make a declaration of unacceptable circumstances. They submitted that (footnotes omitted):

"...in assessing the possible control effect, the relevant percentage interest of George Wang is not that which he held at the close of the Offer, but instead it is that which he held immediately before his brother and sister commenced buying APW units. That interest was 42.78%.

Adding 1.48% to that holding had, or would likely have had, a material control effect on APW. In December 2018, when a vote proposing that APW be wound up was held, the 'yes' vote garnered support from unitholders with 38.3% of all APW units on issue, whilst the 'no' vote (including some 37%-40% then held by George Wang) received 44.36%.

Those numbers demonstrate that a voting shift of just a few critical percentage points would have resulted in APW then being liquidated. Later adding a further 1.48% to George Wang's holding was thus critical to George Wang increasing his control and reducing the risk of a subsequent successful wind-up vote."

65. Mr George Wang submitted that Panel should not make a declaration of unacceptable circumstances, including because:

- (a) *"As the Panel has observed, the application does not affect the control of APW. It also does not concern a substantial interest in APW. The elements of section 657A(2) are therefore not satisfied.*
- (b) *There is no contravention of Chapter 6 as described in section 602 or Chapters 6A, 6B or 6C for the purposes of section 657A(2) and (3)..."*

66. Mr Jason Wang and Ms Jenny Wang jointly submitted that "[t]he de minimis control impact of Mr Jason Wang and Ms Jenny Wang's prior holding, coupled with the fact that Consolidated AIMS Group's interest exceeds the 50% threshold for Board control means

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there is no basis for the Panel to conclude that Mr Jason Wang and Ms Jenny Wang's former holdings could have an impact on the control of AIMS or the interests of minority holders."

67. APW RE was "of the opinion that the alleged conduct complained of, which, if proven, would only likely constitute a minor or technical breach of section 606 of the Corporations Act, does not justify the declaration of unacceptable circumstances...", submitting that the impact on the control of APW if the alleged association was established "is entirely immaterial" in the context of Mr George Wang's current relevant interest.
68. ASIC submitted that it "does not consider that the "potential for any control effect," and any declaration, should be limited to a quantitative assessment of voting power", that "the concept of "control" should be considered broadly" and "[a]lthough the combined holdings of Mr Jason Wang and Ms Jenny Wang may be relatively small compared to Mr George Wang's/Consolidated AIMS Group's holding, and it may not be clear that those holdings significantly impact those entities' control, those holdings are still relevant to "the control, or potential control" of the company...", noting that "the circumstances being alleged are an association including a person holding 55.38%, who is likely to have some control of the company..."
69. We agree with the Applicants that there are circumstances in which "a voting shift of just a few critical percentage points" could be significant. This was acknowledged in AIMS 01 & 02 where the Panel stated in relation to Mr George Wang's relevant interest (footnotes omitted):
- ".... Having a relevant interest in APW of 42.78% as at December 2020, an additional 1.48% interest in the hands of his siblings (although a small percentage relative to the size of his existing unitholding):*
- (a) *provided Mr George Wang with additional comfort in relation to voting on future ordinary resolutions of APW. For example, it would be less likely for unitholders to be able to replace APW RE as the responsible entity for APW under s601FM(1), should this be put to a vote in the future. We consider this to be of elevated significance having regard to previous closely contested resolutions in relation to the winding up of APW and*
 - (b) *shortened the period of time required for Mr George Wang to utilise his 'creep' allowance to exceed 50% voting power and obtain absolute control of voting on future ordinary resolutions of APW. We consider this to be of elevated significance having regard to Mr George Wang's previous use of his 'creep' allowance (see paragraph (c) below) and the illiquid market for trading in APW units (see paragraph (d) below)."*
70. However, Mr George Wang and the Consolidated AIMS Group now hold at least 55.38% of the units in APW. They have now obtained control of APW and have the ability to control voting on ordinary resolutions of APW. In contrast, at the time of the AIMS 01 & 02 proceedings, Mr George Wang and the Consolidated AIMS Group had not yet reached a 50% stake in APW and therefore the combined 1.48% interest of Mr Jason Wang and Ms Jenny Wang may have had more significance.
71. We asked the Applicants if they had any further submissions to make on the relevance or significance now of Mr Jason Wang's and Ms Jenny Wang's 1.48%

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holding in the context of resolutions related to APW, noting also that on 26 August 2022, the extraordinary resolution to wind up APW was not passed by the requisite majority (the ‘for’ vote garnered support from 13.80% of all unitholders, while the ‘against’ vote received 68.13% and therefore, it did not appear to us that “a voting shift of just a few critical percentage points” would have been material here).

72. In response, the Applicants submitted that (footnotes omitted):

“...Even when looked at solely in the context of George Wang’s current 55.38% holding, the 1.48% formerly held by Jason Wang and Jenny Wang is still material and relevant to the control that George Wang continues to build.

The Panel has referred to the 26 August 2022 resolution for winding up APW, in which 13.80% of the register voted ‘for’ and 68.13% voted ‘against’. The 68.13% included the circa 20% held by [the Hong Kong buyers] – each of whom declared to the Panel in AIMS 01 & 02 their absolute independence of George Wang (an independence that George Wang himself confirmed in those same proceedings).

That independence being so, [the Hong Kong buyers’] vote on any matter cannot be predicted (and neither can the vote of anyone other than George Wang).

Thus, whilst with a 55%+ holding George Wang can be certain of being able to pass or reject an ordinary resolution, he is still a very long way off absolute control in relation to matters requiring a special resolution. Given the various legal obligations of APW’s responsible entity, legally he also does not have the power to control day-to-day matters that fall to the responsible entity.

Moreover, as the Panel has held previously “[a] transaction that increases or maintains the relative positions of large shareholders and reduces the free float materially could have an unacceptable control effect.”

Apart from those times when an event directly relevant to APW or its units triggers increased trading in APW, the stock trades very thinly indeed...”

73. We do not consider that the Applicants’ submissions provided any further clarity on the relevance or significance of Mr Jason Wang’s and Ms Jenny Wang’s 1.48% holding in the context of Mr George Wang and the Consolidated AIMS Group’s current interest in APW, noting the following:

- (a) It was not made clear to us what matters requiring a special resolution were relevant to APW, noting that resolutions for the wind up of a scheme³⁵ and removal of a responsible entity (and an appointment of a replacement responsible entity)³⁶ do not require a special resolution to be passed.
- (b) The Applicants submitted that “given the various legal obligations of APW’s responsible entity, legally [Mr George Wang] also does not have the power to control day-to-day matters that fall to the responsible entity.” It was unclear to us what was being contended or how the 1.48% holding of Mr Jason Wang and Ms Jenny Wang was relevant.

³⁵ See section 601NE

³⁶ See section 601FM

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- (c) In AIMS 01 & 02, the Applicants submitted that the Hong Kong buyers were associates of Mr George Wang. However, in these proceedings, the Applicants now seek to rely on a contradictory position that the Hong Kong buyers are not associates of Mr George Wang to form an argument that Mr George Wang is a “long way off absolute control in relation to matters requiring a special resolution.”
 - (d) While Ms Jenny Wang accepted into the Offer on 30 August 2022 which was before Mr George Wang and the Consolidated AIMS Group had obtained control of APW, we do not consider that her acceptance provided momentum for the Offer (to cause Mr George Wang and the Consolidated AIMS Group to obtain more than 50% of APW) given that there was a steady stream of acceptances into the Offer prior to her acceptance.
 - (e) Mr Jason Wang accepted into the Offer on 15 September 2022 which was after Mr George Wang and the Consolidated AIMS Group had obtained control of APW.
 - (f) While the materials before us show that Mr George Wang likely had a control intent in relation to APW, ultimately he reached control through a takeover bid which is a legitimate and appropriate mechanism provided for under the *Corporations Act 2001* (Cth).
 - (g) The impact of making final orders to vest Mr Jason Wang and Ms Jenny Wang’s unitholdings in APW (and the APW units originally held by Mr Jason Wang and Ms Jenny Wang that were accepted into the Offer) with ASIC (which was sought by the Applicants) was unclear having regard to the matters in section 657D(2).³⁷
 - (h) Given Ms Jenny Wang no longer has an interest in APW units and Mr Jason Wang’s voting power in APW is less than 1%, a failure to disclose the current combined interest of Mr George Wang and Mr Jason Wang is unlikely to be unacceptable.³⁸
74. Accordingly, while we are minded to consider that there were new circumstances which supported the existence of the alleged association, we ultimately consider that, even if the alleged association was established, there was limited potential for any control effect in relation to APW.
75. Given the unclear and limited control effect, we did not consider it against the public interest to decline to make a declaration of unacceptable circumstances.³⁹

Referral to ASIC

³⁷ If the Panel makes a declaration of unacceptable circumstances, it may make orders: (a) to protect rights or interests affected by the unacceptable circumstances or (b) to ensure (as far as possible) that a bid proceeds as if the unacceptable circumstances had not occurred

³⁸ See *Tribune Resources Limited* [2018] ATP 18 at [67] and [68]

³⁹ See section 657A(2)

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76. Following placement of the buy order on 10 January 2023, Mr George Wang has lodged a number of Appendix 3Y Change of Directors' Interest Notices which disclose that AIGH has acquired the following interests:
- (a) 6,494 APW units on 10 January 2023, 3 APW units on 12 January 2023 and 1 APW unit on 13 January 2023 – see Appendix 3Y Notice lodged 16 January 2023
 - (b) 5,809 APW units on 19 January 2023 and 9,000 APW units 20 January 2023 – see Appendix 3Y Notice lodged 23 January 2023 and
 - (c) 16 APW units on 23 January 2023 – see Appendix 3Y Notice lodged 30 January 2023.
77. We had concerns that these APW units acquired by Mr George Wang and the Consolidated AIMS Group (through AIGH), which total 21,323 APW units or 0.0475% of the APW units on issue (**January acquisitions**), may have been made in contravention of section 606. This is because:
- (a) Section 606(1) prohibits a person acquiring a relevant interest in voting shares or interests through a transaction in relation to securities that increases that person's (or someone else's) voting power in a regulated entity from 20% or below to more than 20%, or from a starting point that is above 20% and below 90%. In this case, Mr George Wang and the Consolidated AIMS Group are captured by the latter.
 - (b) Item 9 of section 611 provides an exception (the 'creep' exception) to the general prohibition that permits acquisitions that increase a person's voting power to a point no greater than 3% higher than it was six months before, provided the person's voting power has been 19% or higher since that time.
 - (c) In this case, the January acquisitions occurred during the period 10 to 23 January 2023. It appeared to us that these acquisitions were not permitted under the 'creep' exception because:
 - (i) Adding the January acquisitions (totaling 0.0475% of the APW units on issue) to Mr George Wang and the Consolidated AIMS Groups' voting power as at the close of the Offer (which was 55.38%), Mr George Wang and Consolidated AIMS Group's voting power in APW increased to approximately 55.4275%.
 - (ii) The resulting voting power of approximately 55.4275% is more than 3% higher than Mr George Wang and the Consolidated AIMS Group's voting power of at least 43.17% six months prior (between 10 and 23 July 2023).⁴⁰
78. To clarify our analysis, we sought submissions from the parties as to whether the January acquisitions had contravened section 606, or whether item 9 of section 611 or some other exception applied. We also sought submissions on whether the January acquisitions were within the scope of the application.

⁴⁰ Based on its notice of change of interests of substantial holder addressed to APW dated 21 July 2022, which discloses that the Consolidated AIMS Groups' interest in APW has been 43.17% since 16 August 2021

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79. The Applicants submitted (among other things) that:
- (a) the January acquisitions contravened section 606
 - (b) the creep exception *“cannot be relied on by George Wang for any of the acquisitions if at any time from 23 July 2022 onwards he had a maximum voting power in APW of less than 52.38% – and, based on his own disclosures, George Wang did have a voting power in APW of less than 52.38% until around 16 September 2022. Moreover, the interpretation that item 9 must be read on its face and not combined with other section 611 exceptions is consistent with sections RG6.51 – RG6.58 of RG6”* (footnotes omitted). The Applicants’ noted that RG6.51 – RG6.58 of ASIC RG 6 states, among other things, that *“[o]ne result of the particular formulation of the 3% creep exception is that it is not cumulative with the other exceptions in s611”* and
 - (c) the January acquisitions *“are within the scope of the Application”* and that *“[t]hese acquisitions, and the warehousing of units by Jason Wang and Jenny Wang, are within a series of transactions that are all part of the same scheme: a scheme by which George Wang acquires APW units and further control of APW when the law, for very good reason, says he must not.”*
80. APW RE submitted (among other things) that:
- (a) *“The acquisition of 21,323 (equivalent to 0.047% of the Fund’s issued unit capital) units increased Mr George’s Wang’s relevant interest in the Fund’s units from 19,217,235 (equivalent to 43.17% of the Fund’s issued unit capital) to 19,238,558 (equivalent to 43.21% of the fund’s issued unit capital) a change of 0.047% over the relevant 6 month period (excluding the increase due to or during the Takeover Bid) which is substantially less than that which is permitted by item 9 of section 611 of the Corporations Act.”*
 - (b) *“From our review of the current application... which mainly concerned allegations regarding the affairs of the Fund prior to and during the Takeover Bid – we see no basis for including the [January] acquisitions.”*
81. Mr George Wang submitted that the January acquisitions had not contravened section 606 as the acquisitions were *“substantially less than its 3% creep entitlement”*. He also submitted that:
- (a) *“For the abundance of caution, we note that the APW units acquired through the offer are not counted as on market purchases for the purpose of calculating the 3% creep rule. This is because the intended purpose of the exception prescribed under item 9 of section 611 was to limit the speed with which control of companies could be acquired other than by formal takeover or similar procedures, and further, the acquisition of securities via an offer is also an exception to s 606⁴¹. AIMS complied with the law in both instances.”*
 - (b) Consideration of the January acquisitions was *“outside the scope of the Panel, because the application is directed towards units sold by Jenny Wang and Jason Wang (not acquisitions by AIMS or George Wang)...”*.
82. ASIC considered that:

⁴¹ Section 6.48 of ASIC Regulatory Guide 6: Takeovers: Exceptions to the general prohibition

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- (a) *“...in absence of any explanation provided by Mr Wang or AIMS Investment Group Holdings Pty Ltd and having regard to the entities identified in substantial holding notices provided by or in relation to ‘Consolidated AIMS Group’ previously, it appears that the above acquisitions have resulted in a contravention of section 606.”*
- (b) *“...it is open to the Panel to determine that the acquisitions fall within the scope of the current application... To the extent that the acquisitions on 10 January 2023 relate to Mr Wang’s existing 55.38% holding in APW units, ASIC considers that the Panel may consider those circumstances to be relevant to its consideration of the “control or potential control” of the company.”*
83. Mr Jason Wang and Ms Jenny Wang did not provide any submissions on these questions.
84. While we did not invite rebuttal submissions on these questions, we received a submission from Mr George Wang in response to ASIC’s submission. We decided to receive it. Mr George Wang submitted (among other things) that:
- (a) *“The Offer comprised an exception to section 606 of the Act by operation of item 1 of section 611 of the Act (being the takeover bids exception). That is what the Act says, and there are no qualifying words to suggest otherwise.”*
- (b) *“Whilst Mr Wang is aware of the matters the subject of the Applicant’s (but not ASIC’s) submissions regarding RG6.51 – RG6.58 of RG6, it is submitted that ASIC’s guidance has been taken out of context and that to read it as such is inconsistent with the Act and principles of statutory construction.”*
- (c) *“As there are no qualifying words within the legislation which indicate that items 1 (being the takeover bids exception) and 9 (being the ‘creep’ exception) of the Act must apply separately to the exclusion of all other exceptions. The creep exception may apply regardless, and certainly within the 6 months immediately following the conclusion of the takeover offer exception contained in item 1 of s611 as it was a public takeover offer in this instance. Had the legislature wanted to preclude this it could have readily done so by use of express words if that were its intent.”*
- (d) *“... Mr Wang, in acquiring units through the Offer, was relying on the takeover exception contained in section 611 (item 1). In the period post the Offer (i.e. the January transactions), Mr Wang was relying on the creep exception, and in fact has not had to place any reliance on an overlap of the exception in respect of the January transactions as is erroneously suggested by the Applicants, and impliedly by ASIC in its submission (we say impliedly because ASIC has not attempted to explain its reasoning).”*
- (e) *“The January transactions are also clearly outside the scope of the Application (which in any event was brought out of time without proper justification). The proper course is for the Panel to determine, as a threshold question, whether to conduct proceedings in respect of the January transactions.”*
85. Having considered the submissions, in our view, the potential breach of section 606 was not an issue logically connected with the application⁴² (being an application concerned with an alleged association). In addition, we note that the potential breach

⁴² *BreakFree Limited 04(R)* [2003] ATP 42 at [47]

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was a matter raised by us (as opposed to the parties) following submissions received in response to the brief.

86. Instead, we have decided to refer the matter under Regulation 18 of the ASIC Regulations to ASIC for it to consider whether to make an application to the Panel. In coming to our decision to refer the matter to ASIC, we note ASIC's submission above in paragraph 82(a) and refer to Mr Wang's Statutory Declaration in which he states that he "*consistently ensured that [AIMS Group] did not breach the 3% / 6 month rule in making any acquisitions*".
87. In addition, as noted above, we had other concerns regarding the conduct of the Wang parties, including the multiple coincidences in timing of the acquisitions and disposals of APW units and the contradictory nature of some of the explanations for these transactions. We have decided also to refer these matters to ASIC for it to consider whether further regulatory action is warranted.

Extension of time

88. The application was made on 21 January 2023, which was more than 2 months after Mr Jason Wang and Ms Jenny Wang accepted some or all of their APW units into the Offer.
89. Section 657C(3) provides that:
"An application for a declaration under section 657A can be made only within:
(a) two months after the circumstances have occurred; or
(b) a longer period determined by the Panel."
90. In *Webcentral Group Limited 03 [2021] ATP 4*, the Panel articulated the following factors as relevant in considering whether to extend time under section 657C(3)(b):
"(a) the discretion to extend time should not be exercised lightly
(b) whether the application made credible allegations of clear and serious unacceptable circumstances, the effects of which are ongoing
(c) whether it would be undesirable for a matter to go unheard, because it was lodged outside the two month time limit, if essential matters supporting it first came to light during the two months preceding the application and
*(d) whether there is an adequate explanation for any delay, and whether parties to the application or third parties will be prejudiced by the delay."*⁴³
91. The Applicants requested an extension of time under section 657C(3)(b) and made submissions in support of this request including that:
"...the latest relevant step in the series of concerning transactions was concealed until 13 January 2023, when Mr Sauer inspected APW's unitholders' register, such register detailing the sale of APW units by Jenny Wang and Jason Wang after 31 August 2022.

⁴³ [2021] ATP 4 at [86] (footnotes omitted)

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Upon identifying that fact, the Applicants immediately began considering and then preparing this application.

The relevant conduct is such that it will always be concealed unless happenstance reveals it. The Panel should not allow the conduct to go unchecked in this case merely because that happenstance occurred more than two months after the relevant conduct."

92. We requested submissions from the parties on whether we should extend time.

93. As part of his submissions that we should not extend time, Mr George Wang stated:

"The Applicants have failed to provide an adequate explanation, or any evidence, to the Panel about the delay, including as to why they did not seek to inspect the register at an earlier point in time...

... the Applicants have also failed to establish any credible allegations of clear, serious and ongoing unacceptable circumstances...

Furthermore, as noted above, the evidence before the Panel in AIMS 01 & 02 demonstrates that the Applicants are activist minority unitholders. The Panel can reasonably infer from this that the Applicants were closely monitoring APW's trade price and trades and that there is no credible justification for their delay in accessing the register to ascertain the position in relation to Jason Wang's and Jenny Wang's transactions."

94. Mr Jason Wang and Ms Jenny Wang jointly submitted that we should not exercise our discretion to extend time on the basis that:

"The Applicants are plainly highly interested in transactions impacting APW. If the Applicants intended to make an Application to the Panel in respect of the Offer they should have sought the APW register immediately following its closing."

95. APE RE also submitted that the alleged conduct complained of by the Applicants did not justify an extension of time.

96. ASIC noted the Applicants' assertion "*... that relevant information in relation to the Application was not known to it until 13 January 2023 and that upon identifying that information the Applicants immediately began considering and then preparing the Application. The Application was made on 21 January 2023.*"

97. ASIC also submitted that:

"Given the size of the holdings of Mr Jason Wang and Ms Jenny Wang, they were not required to lodge substantial holding notices in relation to those holdings alone. Although the relevant 'Consolidated AIMS Group' entities were required to lodge substantial holding notices in relation to acceptances received into the takeover bid by AIMS Investment Group Holdings Pty Ltd, and did so, it would not necessarily be apparent from these notices the identities of the holders who disposed of their securities into the bid.

ASIC also notes that in allegations of undisclosed associations or 'share warehousing', it is commonplace that the circumstances may not come to light until after the conduct has occurred."

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98. We accept the Applicants' submission that they first became aware of the relevant circumstances following inspection of the APW unitholders' register on 13 January 2023 and note that the application was made swiftly thereafter. We also note the submissions made by ASIC.
99. Accordingly, having regard to the factors in *Webcentral Group Limited 03*⁴⁴ as set out above, we decided to extend time to hear the application including because it would be undesirable for this matter to go unheard given essential matters supporting it first came to light during the two months preceding the application.

Other matters – a re-hearing?

100. As mentioned above, despite the overlapping allegations and circumstances with the AIMS 01 & 02 proceedings, the application before us was separate to the AIMS 01 & 02 proceedings and importantly, not a review application pursuant to section 657EA.
101. In our brief, we asked parties whether the current application was essentially a re-hearing of the matters before the Panel in the AIMS 01 & 02 proceedings and how the outcome of those proceedings should affect our approach to considering the current application.
102. The Applicants submitted that the current application did not comprise a re-hearing and that *“properly, the outcome of AIMS 01 & 02 should not affect the Panel's approach to considering the issues raised in the Application.”* The Applicants further submitted that:

“AIMS 01 & 02 involved an application for a declaration of ‘unacceptable circumstances’ and related orders. The Panel reviewed the evidence then available, and decided that that then available evidence did not warrant a declaration of unacceptable circumstances.

The (current) Application is founded on additional evidence that did not exist at the time of AIMS 01 & 02; that additional evidence is fresh, cogent, compelling and highly relevant to an assessment of whether a declaration of unacceptable circumstances is warranted.

Moreover, the new evidence is part of a series of transactions that can only be analysed once the last relevant transaction of that series is before the Panel. The Panel cannot be forever bound to a finding made at a particular point in time on the basis of then-available evidence, when subsequent transactions materially change the relevant factual matrix and available body of evidence...”

103. APE RE submitted (among other things) that the current application *“essentially amounts to a rehearing of AIMS 01 & 02”*.
104. Mr George Wang also submitted that the application was a re-hearing on the basis that *“the application concerns the same units which were the subject of findings made by the Panel in AIMS 01 & 02. The only difference (insofar as AIMS 01 & 02 related to Jenny Wang and Jason Wang) is that this application concerns the disposal of their units through the Offer”* (emphasis in the original).

⁴⁴ [2021] ATP 4

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105. Mr Jason Wang and Ms Jenny Wang jointly submitted (among other things) that *“[t]he Applicants in this case are seeking to re-litigate the same association, based fundamentally on the same circumstances... The Applicants are substantively asking the Panel to revisit acquisitions that occurred almost two years ago.”*

106. ASIC submitted that:

“ASIC notes that the present application raises allegations that Jason Wang and Jenny Wang were undeclared associates of George Wang when they acquired their APW units, which were circumstances already considered by the Panel in AIMS 01 & 02. However, the present application also raises circumstances and allegations of association that have occurred following the AIMS 01 & 02 proceedings.

ASIC considers that the Panel should take care in having regard to its power to re-hear matters, and the public interest in the finality of decisions impacting a person’s rights. Whether an administrative decision by a statutory tribunal, like the Takeovers Panel, is final or may be ‘re-heard’ depends ultimately on a proper construction of the statute conferring the power on the tribunal...

ASIC considers that where new circumstances are placed before the Panel, the performance of the Panel’s functions and duties may become enlivened, and such an occurrence would not amount to a re-hearing of circumstances previously considered. However, the Panel should take care where an application or aspects of it essentially seek a ‘re-hearing’ that is not in the form of a review application under s657EA, which may imply limitations on the Panel’s power to re-hear matters beyond a particular time period. To the extent that the application asserts that certain associations presently exist, and does not ask the Panel to re-hear an application in respect of the associations alleged at the time of the AIMS 01 & 02 proceedings, the Panel will be dealing with a new set of circumstances...

Section 657A(3)(b) provides the Panel with wide discretion to have regard to any matters it considers relevant in exercising its powers under s657A. While the outcome of the AIMS 01 & 02 proceedings is not binding on the Panel, ASIC considers that the Panel may, at its discretion, have regard to those proceedings in considering whether new circumstances set out in the application establish an association. Such an approach would not amount to a re-hearing where the Panel determines whether associations currently exist, and not whether the associations alleged to exist in the AIMS 01 & 02 proceedings existed at that time...

... In considering the present application and the new circumstances put before it, the Panel is entitled to consider patterns of behaviour or other evidence suggestive of association, which may require having regard to evidence of conduct prior to and following AIMS 01 & 02.”

107. The circumstances in which we find ourselves, concerning two sequential Panel proceedings with substantively overlapping circumstances and allegations, and in which the former proceeding was not reviewed, is unique in the Panel’s history so far.

108. Given that we do not need to make a finding on the question of association (in light of the limited control effect), we ultimately do not need to decide how the

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conclusions of the AIMS 01 & 02 proceedings should affect our approach to the current application (in other words, whether we are bound by the Panel's findings in AIMS 01 & 02). While it is certainly open to another Panel to come to a different view, our initial views are as follows:

- (a) The Panel is not bound by the rules of evidence.⁴⁵ Accordingly, it would appear that rules of evidence such as *res judicata* or issue estoppel do not apply *per se*.
- (b) We agree with ASIC's warning that the Panel should take care where an application (or aspects of it) essentially seek a 're-hearing' that is not in the form of a review application.
- (c) Here, we consider that the current application raised new evidence (i.e. Mr Jason Wang's and Ms Jenny Wang's acceptances into the Offer) which was not before the Panel in AIMS 01 & 02. While we ultimately considered that Mr Jason Wang's and Ms Jenny Wang's disposal of their APW units through the Offer was not sufficient additional material to justify a declaration of unacceptable circumstances, there may be other instances where new evidence like this completes the factual pattern (e.g. a share warehousing story in the context of an alleged association).
- (d) Accordingly, while a previous Panel may have considered that an association could not be established between the alleged associates prior to the new evidence emerging, where fresh evidence comes to light which essentially 'completes' the story or adds to a pattern of behaviour, we do not think that a later Panel should necessarily be bound by the previous Panel's findings. Rather, we think that the circumstances would need to be re-assessed again having regard to the new factual matrix, inclusive of the evidence that has emerged.

DECISION

109. For the reasons above, we declined to make a declaration of unacceptable circumstances. We consider that it is not against the public interest to decline to make a declaration (noting also our comment in paragraph 75 above) and we had regard to the matters in section 657A(3).
110. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

Nicola Wakefield Evans
President of the sitting Panel
Decision dated 1 March 2023
Reasons given to parties 21 April 2023
Reasons published 11 May 2023

⁴⁵ Rule 22(1) of the *Takeovers Panel Procedural Rules 2020* (Cth)

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Advisers

Party	Advisers
Mr Benjamin Graham atf the Graham Family Trust and Mr Warwick Sauer in his personal capacity and as a director of Baauer Pty Ltd atf the Baauer Family Trust	Deffenti & Queiroz Lawyers
AIMS Fund Management Limited as responsible entity of AIMS Property Securities Fund	K&L Gates
Consolidated AIMS Group ⁴⁶	Gadens Lawyers
Mr George Wang	Gadens Lawyers
Mr Jason Wang	Ashurst
Ms Jenny Hong Huan Wang	Ashurst

⁴⁶ Excluding AIMS Fund Management Limited in its capacity as responsible entity of AIMS Property Securities Fund