



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
The Market Herald Limited  
[2023] ATP 7**

**Catchwords:**

*Declaration – orders – association - costs - failure to disclose – power or control – voting power – substantial holding – board spill – lack of independence – extension of time for making application – extension of time for making declaration – conference – underwriting – rights issue – confidentiality*

*Corporations Act 2001 (Cth), sections 12, 249D, 602, 606, 657B, 657C and 671B*

*Australian Securities and Investments Commission Act 2001 (Cth), sections 190, 192 and 194*

*Australian Securities and Investments Committee Regulations 2001 (Cth), regulation 16*

*ASX Listing Rules, rules 3.1 and 10.1*

*Takeovers Panel Procedural Rules 2020, rules 6(1), 11(1), 18 and 19*

*Palmer Leisure Coolum Pty Ltd v Takeovers Panel [2015] FCA 1498, Tinkerbelle Enterprises Pty Limited as Trustee for The Leanne Catelan Trust v Takeovers Panel [2012] FCA 1272, Dyinda Pty Ltd and Ors v First Distribution Services Ltd and Ors [2004] FCA 12, Re Takeovers Panel [2002] FCA 1120, Briginshaw v Briginshaw [1938] HCA 34*

*Guidance Note 4 – Remedies General*

*ASIC Regulatory Guide 128: Collective Action by Investors (RG 128)*

*Tribune Resources Limited [2018] ATP 18, Strategic Minerals Corporation NL 02R, 03R, 04R and 05R [2018] ATP 5, Ainsworth Game Technology Limited 01 & 02 [2016] ATP 9, Merlin Group Limited [2016] ATP 1, Tigers Real Coal Limited [2014] ATP 2, Avalon Minerals Limited [2013] ATP 11, World Oil Resources Limited [2013] ATP 1, Bentley Capital Limited 01R [2011] ATP 13, CMI Limited 01R [2011] ATP 5, CMI Limited [2011] ATP 4, Viento Group Limited [2011] ATP 1, Mount Gibson Iron Limited [2008] ATP 4, LV Living Limited [2005] ATP 5, Winepros Limited [2002] ATP 18*

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

**INTRODUCTION**

1. The Panel, Kelvin Barry, Kerry Morrow and Karen Phin (sitting President), made a declaration of unacceptable circumstances in relation to the affairs of The Market Herald Limited (TMH). The application concerned an alleged association between two of TMH’s substantial shareholders and issues in relation to two entitlement offers. The Panel considered that the two substantial shareholders were associated with each other and one other person and one of those substantial shareholders was associated with other shareholders. The non-disclosure of these associations constituted or gave rise to contraventions of section 671B and were not consistent with an efficient, competitive and informed market. The Panel also considered that the 2022 Entitlement Offer did not disclose the association between the two substantial shareholders and that there were other disclosure deficiencies in the 2022 Entitlement Offer and 2023 Entitlement Offer. The Panel made orders requiring (among other things) disclosure from the associates and TMH in relation to the circumstances found to be unacceptable, the divestment of certain shares, a

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restriction on certain acquisitions and that TMH appoint at least two independent directors in accordance with the process prescribed under the orders. The Panel also had concerns in relation to the conduct of some of the parties and their legal advisers in these proceedings. The Panel also made costs orders.

2. In these reasons, the following definitions apply.

<b>2022 Entitlement Offer</b>	2 for 5 pro rata renounceable entitlement offer of fully paid ordinary shares in TMH at an offer price of \$0.34 per new share to raise approximately \$26.6 million in 2022
<b>2022 Entitlement Offer Booklet</b>	Offer booklet dated 5 September 2022 in relation to the 2022 Entitlement Offer
<b>2023 Entitlement Offer</b>	1 for 6 pro rata renounceable entitlement offer of fully paid ordinary shares in TMH at an offer price of \$0.34 per new share to raise approximately \$15.52 million in 2023
<b>2023 Entitlement Offer Booklet</b>	Offer booklet dated 2 February 2023 in relation to the 2023 Entitlement Offer
<b>Adevinta</b>	Adevinta Oak Holdings B.V.
<b>ASIC Act</b>	<i>Australian Securities and Investments Commission Act 2001 (Cth)</i>
<b>Canaccord</b>	Canaccord Genuity (Australia) Limited
<b>CIP</b>	Capital Investment Partners Pty Ltd
<b>GAB</b>	GAB Superannuation Fund Pty Ltd
<b>GCA</b>	Gumtree, Carsguide and Autotrader Australia, which were acquired by TMH
<b>Gumtree</b>	Gumtree AU Pty Ltd
<b>HotCopper</b>	HotCopper Holdings Limited
<b>Procedural Rules</b>	<i>Takeovers Panel Procedural Rules 2020</i>
<b>Re-election Letters</b>	has the meaning in paragraph 140
<b>Relevant Party</b>	has the meaning in paragraph 307
<b>Relevant Shares</b>	has the meaning in paragraph 307
<b>SG Hiscock</b>	SG Hiscock and Company Limited
<b>TMH</b>	The Market Herald Limited
<b>UIL</b>	UIL Limited
<b>Vendor Loan</b>	Vendor loan of approximately \$60.1 million to TMH by Adevinta to partially fund TMH's acquisition of GCA
<b>Zero Nominees</b>	Zero Nominees Pty Ltd

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#### FACTS

3. TMH is an ASX listed company (ASX code: TMH). It listed on 13 September 2016 as HotCopper.
4. UIL, the applicant, is a Bermuda company listed on the London Stock Exchange. It holds a relevant interest in approximately 23.11% of TMH voting shares.<sup>1</sup>
5. Mr David Brian Argyle holds a relevant interest in approximately 36.92% of TMH voting shares,<sup>2</sup> directly and through Zero Nominees.
6. Mr Gavin Argyle, Mr David Argyle's son, holds a relevant interest in approximately 6.47% of TMH voting shares through GAB.<sup>3</sup> He is, and has been since 2016, a director of TMH, appointed "*following a request from substantial shareholder Mr David Brian Argyle...as nominee to the position of Non-Executive Director.*"
7. Mr Jagdip Sanger holds a relevant interest in approximately 4.92% of TMH voting shares.<sup>4</sup> He was the managing director of TMH from November 2018 until he was formally removed from that position by resolution of the TMH board on 30 November 2022.<sup>5</sup>
8. Mr Alec Pismiris is the chairman of TMH and holds a relevant interest in approximately 0.98% of TMH voting shares.<sup>6</sup> He has been a director since listing in 2016 and became chairman in June 2017.

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<sup>1</sup> As at 27 February 2023

<sup>2</sup> As at 27 February 2023

<sup>3</sup> As at 27 February 2023

<sup>4</sup> As at 27 February 2023

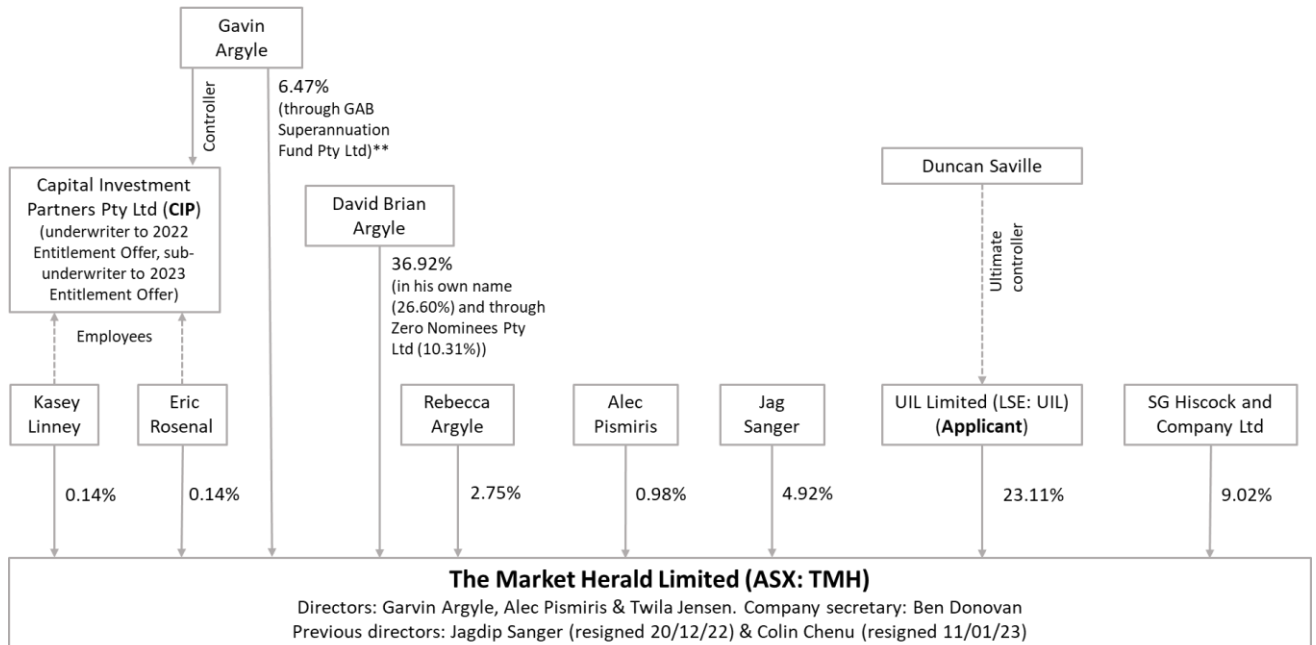
<sup>5</sup> Mr Sanger's removal as managing director was announced to the market on 2 December 2022

<sup>6</sup> As at 27 February 2023

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9. Relevant shareholdings<sup>7</sup>, in diagrammatic form, are as follows:



10. On 26 August 2022, TMH announced, among other things, the acquisition of GCA. It stated that the acquisition would be funded by the Vendor Loan of approximately \$60.1m and the 2022 Entitlement Offer.
11. At this time, the directors of TMH were Mr Pismiris (Non Executive Chairman), Mr Sanger (Managing Director), Mr Gavin Argyle (Non Executive Director) and Mr Colin Chenu (Non Executive Director).
12. The 2022 Entitlement Offer was partially underwritten to 80% by CIP, a company controlled by Mr Gavin Argyle. CIP had entered into sub-underwriting agreements with 6 sub-underwriters for 43.41% of the underwritten amount. The 2022 Entitlement Offer Booklet did not disclose that two CIP employees were sub-underwriters.
13. On 5 September 2022, TMH issued the 2022 Entitlement Offer Booklet which stated (among other things) that “*David Argyle and Gavin Argyle are not considered ‘associates’ as defined under the Corporations Act and as such their shareholdings are not aggregated in accordance with section 606 of the Corporations Act*”.
14. On 19 September 2022, TMH announced that the 2022 Entitlement Offer had closed having received valid applications for approximately 81% of all new shares offered under the entitlement offer and that shortfall shares had also been taken up under the shortfall offer. The announcement further stated that remaining shortfall shares had been “*subscribed for by sub underwriters in accordance with the Company Shortfall dispersion strategy and the Underwriting Agreement*”.

<sup>7</sup> As at 27 February 2023

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15. On 27 September 2022, TMH issued 74,788,852 new shares and on 6 October 2022, TMH issued 3,470,587 new shares, in each case under the 2022 Entitlement Offer.
16. On 6 October 2022, TMH announced the completion of its acquisition of GCA.
17. On 24 October 2022, TMH released the notice of meeting for its annual general meeting to be held on 28 November 2022. The notice of meeting included a resolution for the re-election of Mr Gavin Argyle as a director.
18. On 28 November 2022, TMH held its annual general meeting. TMH subsequently announced (among other things) that Mr Gavin Argyle had been re-elected at the annual general meeting.
19. On 29 November 2022, Mr David Argyle served a section 249D notice on TMH requisitioning a general meeting at which a resolution was to be put to shareholders *"That Mr Jagdip Singh Sangha be removed as a director of [TMH] with immediate effect"*.<sup>8</sup>
20. On 1 December 2022, TMH announced that it had received the section 249D notice.
21. On 2 December 2022, TMH announced (among other things) that:
  - (a) Mr Sanger *"will no longer be Managing Director of the Company. Mr Sanger, however, remains a non-executive director of the Company"*
  - (b) Mr Sanger *"has been placed on leave and during that time will not be performing an executive role in [TMH]"* and
  - (c) *"Non-Executive Chairman Mr Alec Pismiris and Non-Executive Director Mr Gavin Argyle will also increase their involvement to support [TMH] during this transition period."*
22. On 6 December 2022, TMH announced that Adevinta had agreed to waive certain provisions of the Vendor Loan requiring partial payment of the loan by 31 December 2022 and instead required repayment of the full \$60.1 million loan amount by 31 March 2023.
23. On 20 December 2022, TMH announced (among other things) that:
  - (a) *"[Mr Sanger] has resigned from the board of The Market Herald"* and
  - (b) *"as a result of the resignation of Mr Sanger, the requisitioned Section 249D meeting announced on 1 December 2022 will no longer proceed."*
24. In January 2023:
  - (a) Ms Twila Jensen was appointed as an executive director of TMH
  - (b) Mr Chenu resigned as a non executive director of TMH and
  - (c) Mr Tommy Logtenberg, CEO and CFO of Gumtree, was appointed as interim CEO of TMH (which appointment was subsequently confirmed).

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<sup>8</sup> See paragraphs 144 to 147 for circumstances surrounding the preparation and issue of the section 249D notice

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25. On 16 January 2023, TMH announced that Adevinta had agreed to extend the Vendor Loan repayment date from 31 March 2023 to 31 May 2023 “*on commercial terms*”.
26. On 24 January 2023, TMH announced that it would undertake the 2023 Entitlement Offer to raise approximately \$15.52 million to pay down debt associated with the purchase of GCA. The offer was fully underwritten by Canaccord. Canaccord had entered into sub-underwriting agreements with 13 sub-underwriters for 100% of the underwritten amount, including Mr David Argyle, Mr Gavin Argyle, CIP and two CIP employees<sup>9</sup>.
27. On 2 February 2023, TMH issued the 2023 Entitlement Offer Booklet which:
  - (a) disclosed that Mr David Argyle, CIP and Mr Gavin Argyle were related party sub-underwriters of TMH (but did not disclose that the two CIP employees were sub-underwriters)
  - (b) stated (on certain assumptions) that the increase in voting power of Mr David Argyle (37%) and Mr Gavin Argyle (6.4%) would be zero
  - (c) unlike the 2022 Entitlement Offer booklet, did not include any statement regarding whether Mr David Argyle and Mr Gavin Argyle are associated and
  - (d) disclosed a dispersion strategy whereby ‘restricted persons’, being shareholders with a relevant interest of 20% or more in TMH shares and related parties of TMH, were prohibited from applying for TMH shortfall shares in excess of their entitlements under the 2023 Entitlement Offer.
28. On 17 February 2023, TMH announced that the 2023 Entitlement Offer had closed, and that it had received valid applications to subscribe for 36,599,046 new shares, representing approximately 80% of all new shares offered. The announcement stated that TMH had received applications for 1,599,097 new shares from shareholders under the top up facility, which was subject to a bookbuild and allocation process.
29. On 21 February 2023, TMH announced that the bookbuild did not clear above the offer price and that:
  - (a) 1,599,097 shortfall shares would be issued to TMH shareholders under the top up facility and
  - (b) the remaining 7,476,428 shortfall shares would be placed to sub-underwriters other than shareholders who hold a relevant interest in excess of 20% or any related parties.
30. On 27 February 2023, TMH issued 45,674,571 new shares.

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<sup>9</sup> See paragraph 195

## APPLICATION

### Declaration sought

31. By application dated 6 February 2023, UIL sought a declaration of unacceptable circumstances. It submitted that the 2023 Entitlement Offer Booklet:
  - (a) contained misleading statements on the effect of the sub-underwriting, the allocation of the shortfall and voting power of the related party sub-underwriters
  - (b) failed to disclose the association between Mr David Argyle and Mr Gavin Argyle and
  - (c) failed to disclose the effect of the 2023 Entitlement Offer on control of TMH.
32. UIL also submitted that the alleged association had remained undisclosed since TMH listed on ASX in September 2016 resulting in an uninformed market and breaches of the substantial holder disclosure requirements. In addition, UIL submitted that acquisitions by the alleged associates between 2017 and 2018 may have occurred in breach of section 606.
33. UIL raised concerns about the shortfall allocation in the 2022 Entitlement Offer. UIL also raised concerns that the shortfall offer and shortfall allocation policy under the 2023 Entitlement Offer was not genuine, based on the manner Canaccord and TMH proposed to manage the shortfall and the apparent disregard of the shortfall allocation policy under the 2022 Entitlement Offer.

### Interim orders sought

34. UIL sought interim orders to the effect that the 2023 Entitlement Offer be suspended until corrective disclosure was made in relation to the 2023 Entitlement Offer Booklet, and that the alleged associates be restrained from exercising any voting or other rights attached to their TMH shares or acquiring any further TMH shares, including through the 2023 Entitlement Offer, pending determination of the application.
35. We considered, on an urgent basis, UIL's request for an interim order to suspend the 2023 Entitlement Offer and sought submissions from the parties.
36. UIL submitted (among other things) that the extension for the repayment of the Vendor Loan announced on 16 January 2023 meant that there was no urgent need for funds and that UIL was "*not aware of any commercial reason why the rights issue could not be suspended or otherwise extended until the Panel has had an opportunity to properly consider whether to commence proceedings and make its determination*".
37. TMH submitted that the extension for the repayment of the Vendor Loan was in fact conditional on TMH completing the 2023 Entitlement Offer on or before 28 February 2023 and using the net proceeds towards repaying no less than \$15 million. TMH submitted that extending the timetable of the 2023 Entitlement Offer would place TMH in potential breach of its obligations under the Vendor Loan and "*be significantly prejudicial to the interests of TMH and its financial position*".

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38. In circumstances where TMH had an apparent and pressing need for funds<sup>10</sup> and considering that the close of the 2023 Entitlement Offer would not prevent us from addressing any unacceptable circumstances, we decided not to make the interim orders sought by UIL to suspend the 2023 Entitlement Offer or restrict the alleged associates' voting or acquisition rights.

#### Final orders sought

39. UIL sought final orders including to the effect that:
- (a) the alleged associates provide substantial shareholder disclosure and be restrained from exercising any voting or other rights attached to their TMH shares until one month after such disclosure has been made
  - (b) any TMH shares acquired by the alleged associates as a result of "*the unlawful acquisition of voting shares in TMH*" (including in rights issues) be vested in ASIC for sale
  - (c) the alleged associates be restrained from acquiring any further TMH shares for a period of six months and
  - (d) in an ASX announcement, TMH describe the circumstances around and the existence and nature of the alleged association, its effect on voting power and the effect of any Panel orders.

## DISCUSSION

40. The Panel is a specialist, peer review tribunal. When making an assessment of all the material in this matter, we have relied on our skills and experience as practitioners (which has been made known to the parties) and as members of the sitting Panel.<sup>11</sup>
41. 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

42. Referring to the Panel's decision in *Viento Group*,<sup>12</sup> UIL submitted that the following factors were relevant to the Panel deciding to make a finding of association:
- (a) Mr David Argyle and Mr Gavin Argyle acting in concert in relation to TMH's affairs
  - (b) Mr David Argyle and Mr Gavin Argyle having common shareholdings in TMH and the directorship of Mr Gavin Argyle in TMH
  - (c) Mr David Argyle and Mr Gavin Argyle having a number of former or current common investments or directorships in Australian companies

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<sup>10</sup> TMH's need for funds was not disclosed to TMH shareholders which we found to be unacceptable - see paragraph 262

<sup>11</sup> See *Tinkerbell Enterprises Pty Limited as Trustee for The Leanne Catelan Trust v Takeovers Panel* [2012] FCA 1272 at [114]

<sup>12</sup> [2011] ATP 1 at [120] referring to *Mount Gibson Iron Limited* [2008] ATP 4



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- (d) Mr David Argyle and Mr Gavin Argyle being directors in TCC Holdings Pty Ltd and Total Corrosion Control Pty Ltd
  - (e) Mr David Argyle 'nominating' (by request to TMH according to the announcement dated 7 November 2016) Mr Gavin Argyle as a non-executive director of TMH
  - (f) Mr David Argyle serving the section 249D notice on TMH for the removal of Mr Sanger as a director and Mr Gavin Argyle's subsequent increased involvement in TMH following Mr Sanger's resignation the day after the section 249D notice was served and
  - (g) Mr David Argyle being the father of Mr Gavin Argyle.
43. In light of the material provided, we considered that there was a sufficient body of material demonstrated by UIL to support a potential finding of association.<sup>13</sup>
44. TMH, in its preliminary submission, submitted (among other things) that it rejected UIL's assertions that the 2023 Entitlement Offer had been structured in such a way as to allow any shareholders to increase any control over TMH and submitted that instead the 2023 Entitlement Offer included a comprehensive dispersion mechanism with a view to minimising any potential control effects. TMH also submitted that the 2023 Entitlement Offer Booklet fully disclosed the underwriting and the sub-underwriting arrangements under the 2023 Entitlement Offer and "*reflects the factual position as informed to TMH that David Argyle and Gavin Argyle are independent of, and not associated with, each other in relation to TMH*".
45. We considered that several matters raised in the application warranted investigation, including:
- (a) the alleged undisclosed association between Mr David Argyle and Mr Gavin Argyle
  - (b) the circumstances around Mr Sanger's resignation in December 2022 and Mr Chenu's resignation in January 2023
  - (c) the apparent lack of disclosure from TMH around the circumstances of the 2023 Entitlement Offer and the refinancing of the Vendor Loan and
  - (d) the potential breaches of section 606 and section 671B alleged by UIL and the fact that the acquisition of control over voting shares in TMH may not have been taking place in an efficient, competitive and informed market.
46. Accordingly, we decided to conduct proceedings.
47. SG Hiscock, a substantial shareholder of TMH who was listed as an interested party in the application, submitted a Notice to Become Party at the start of the proceedings. To assist us in deciding whether to accept its Notice to Become a Party, we asked SG Hiscock to advise why it considered that it may be able to assist the Panel. In light of SG Hiscock's response, which was limited to its participation as a sub-underwriter in

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<sup>13</sup> *Mount Gibson Iron Limited* [2008] ATP 4 at [15]

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the 2022 Entitlement Offer, and the fact that SG Hiscock is a substantial shareholder of TMH, we decided not to accept it as a party. However we did invite SG Hiscock to make a non-party submission on the brief, which it did.

48. Other interested parties, Mr Eric Rosenal, Ms Kasey Linney and Ms Rebecca Argyle declined invitations to become parties. Given our potential findings in relation to these interested parties, we invited them to make non-party submissions and provided them with access to confidential information, including the parties' submissions. Before providing them with access to confidential information, and after seeking submissions from each of them and the parties, we made a direction pursuant to section 190 of the ASIC Act to Mr Rosenal, Ms Linney and Ms Rebecca Argyle preventing or restricting the publication of submissions or evidence made or given to, or matters contained in documents lodged with, the Panel. Mr Chenu was also invited to make non-party submissions and agreed to provide an undertaking to comply with rules 18 (confidentiality) and 19 (publicity) of the Procedural Rules.

#### Scope of findings

49. By raising the non-disclosure of an alleged association that (it was alleged) started in 2016, we had to make inquiries into the history of Mr David Argyle and Mr Gavin Argyle's involvement in TMH, the circumstances surrounding the 2022 Entitlement Offer, the circumstances surrounding the 2023 Entitlement Offer, and the circumstances surrounding the removal of Mr Sanger as managing director of TMH. This has necessarily led to a substantial and wide-ranging inquiry, reflected in the length of these reasons.
50. Parties provided a significant number of submissions in the course of these proceedings. Some of these submissions included allegations of misconduct against Mr Sanger. Determining the truth or otherwise of these allegations is not within our jurisdiction. We did not, and did not have to, test the veracity of these allegations and we make no findings in relation to such matters.
51. Also, we have not sought to test the veracity of all the assertions made, or to chase down every assertion.
52. We remained mindful throughout the proceedings about the prospect that our processes might be used tactically in the context of a wider employment dispute.

#### Conference

53. In response to the Panel's brief, Mr Chenu stated "*[h]aving regard to my obligations of confidentiality set out in my Letter of Appointment as a Non-Executive Director of HotCopper Holdings Limited dated 25 October 2016, I decline to respond to the question.*" Similarly, Mr Sanger submitted that he was "*unable at this time to address Question 19 ... nor the general questions asked of all parties and non-parties, due to contractual restraints imposed on him by the Company.*"
54. After noting that we considered that each of Mr Chenu and Mr Sanger would be able to assist us in our enquiries, we asked TMH to "*waive the restrictions applying to each of them in so far as necessary to allow them to assist the Panel and undertake not to take any detrimental steps against either of them by reason of, or as a consequence of, their assisting*

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*the Panel*". We also noted that if TMH had a particular concern that could be addressed as part of such a release and undertaking.

55. TMH responded that it agreed to the request in relation to Mr Chenu but not Mr Sanger. In relation to Mr Sanger, TMH submitted that it had taken advice from its independent employment lawyers (who advised TMH on the resignation of Mr Sanger) for the purposes of the Panel's request and the advice received by TMH was not to waive the confidentiality obligations between TMH and Mr Sanger, "*given the purpose of the contractual arrangements between those parties*".
56. As TMH refused to waive Mr Sanger's confidentiality obligations to TMH for the purpose of responding to our enquiries in these proceedings, Mr Sanger considered that he was unable to do so without being compelled by law. Accordingly, to obtain his evidence, we issued a summons to Mr Sanger and convened a conference to receive his evidence.
57. We held the conference by videoconference on 1 March 2023 and on 3 March 2023. On 1 March 2023, Mr Sanger answered the questions we had put to him in the form of a written submission. On 3 March 2023, the sitting President re-convened the conference and (after considering questions for Mr Sanger from the other parties) we asked follow-up questions of Mr Sanger, which he answered orally. The conference was then adjourned and subsequently closed on 8 June 2023.
58. Parties were provided with a transcript of the conference and an opportunity to make rebuttal submissions on Mr Sanger's evidence. We also accepted an out-of-process submission from Mr Sanger where he noted that, in his view, there were material errors in the rebuttal submissions of TMH, Mr Gavin Argyle and Mr David Argyle which, he submitted, could be disproved with reference to materials in possession of TMH.
59. We considered there were significant differences in the account of events provided by the parties and decided to issue a further supplementary brief which included a request for certain documents to be provided by TMH.

#### **Association**

60. Section 12 sets out the tests for association as applied to Chapter 6. There are two relevant tests here:
  - (a) section 12(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) section 12(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.
61. A relevant agreement is an agreement, arrangement or understanding:
  - (a) whether formal or informal or partly formal and partly informal and

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- (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.<sup>14</sup>
62. As stated by the Panel in *CMI Limited 01R*,<sup>15</sup> the cases make it clear that there is significant overlap between the concepts of “*acting in concert*” and “*relevant agreement*” in section 12.
63. An understanding means an understanding – “*plainly a word of wide import*”<sup>16</sup> – as to some common purpose or object in relation to the company in question.
64. Often establishing an association requires the Panel “*to draw inferences from patterns of behaviour, commercial logic and other evidence suggestive of association.*”<sup>17</sup>
65. In *Mount Gibson Iron Limited*<sup>18</sup>, the Panel said 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.
66. We note that submissions were made denying individual ‘association’ factors. However, we have considered the totality of the factors.
67. Having reviewed all of the material, we considered possible associations between:
- (a) Mr David Argyle and Mr Gavin Argyle
  - (b) Mr Pismiris and each of Mr Gavin Argyle and Mr David Argyle
  - (c) Mr Gavin Argyle and each of Ms Linney and Mr Rosenal and
  - (d) Mr David Argyle and Ms Rebecca Argyle.

*Association - Mr David Argyle and Mr Gavin Argyle*

#### Family relationship

68. Mr David Argyle is the father of Mr Gavin Argyle. While a familial relationship does not automatically make persons associates, it may be relevant in assessing whether

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<sup>14</sup> Section 9

<sup>15</sup> [2011] ATP 5 at [33]-[34]

<sup>16</sup> *Adsteam Building Industries Pty Ltd & Anor v The Queensland Cement and Lime Co Ltd & Ors* (1984) 14 ACLR 456 at 459

<sup>17</sup> *Winepros Limited* [2002] ATP 18 at [27]

<sup>18</sup> [2008] ATP 4. These factors have been applied in several Panel decisions including *Ainsworth Game Technology Limited 01 & 02* [2016] ATP 9, *Merlin Group Limited* [2016] ATP 1, *World Oil Resources Limited* [2013] ATP 1, *CMI Limited* [2011] ATP 4 and *Viento Group Limited* [2011] ATP 1

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the broader factual matrix establishes association.<sup>19</sup> We consider that it is relevant here.

69. Mr David Argyle and Mr Gavin Argyle have a close personal and professional relationship. Their relationship *“has been disclosed to the market on numerous occasions and Mr David Argyle has always been treated as a related party of [TMH] as reflected in the 2023 Entitlement Offer Booklet.”* There has been no evident change in their relationship.
70. Mr David Argyle has been a long-term client of Mr Gavin Argyle, including at CIP. Before starting CIP, Mr Gavin Argyle worked as a stockbroker and investment banker with Hartleys Limited and Patersons Securities Limited and acted for Mr David Argyle.
71. While Mr David Argyle ordinarily resides in London and has not returned to Australia since February 2022, there were periods during the pandemic when he spent time in Australia. Mr Sanger submitted that Mr David Argyle *“had a desk that he often used at CIP”*. He also submitted that the TMH office *“was contiguous with the CIP office, at one point there was a barrier, relationally there wasn’t a barrier”* and that Mr David Argyle would occasionally be physically in the TMH office.
72. In March 2021, Mr David Argyle lent Mr Gavin Argyle funds to purchase a private residence in Perth. The loan was unsecured and bears interest at 2.5%. Mr Gavin Argyle repaid the loan in part to meet the subscriptions of Mr David Argyle and his sister, Ms Rebecca Argyle, under the 2023 Entitlement Offer. UIL submitted that the manner in which the loan was repaid was *“indicative of the Argyle’s treatment of TMH shares as a familial unit of account and trade”*.
73. We agree. Noting that repayment eliminated the risk of exchange rate losses for Mr David Argyle, we nevertheless think that the terms of the loan and repayment is evidence of close familial ties.
74. While we accept that family relationships are not conclusive proof of an association as submitted by both Mr David Argyle and Mr Gavin Argyle, and that Mr David Argyle and Mr Gavin Argyle are both long-experienced investors who reside in different countries,<sup>20</sup> their family history provides context that we consider is indicative of an association between them.<sup>21</sup> The way in which Mr Gavin Argyle spoke about Mr David Argyle and the influence of the family’s shareholding on the values and direction of the TMH business is also instructive and is indicative of an association between them.
75. For example, in a meeting of GCA staff held on 23 November 2022,<sup>22</sup> Mr Gavin Argyle stated (based on our transcription of a recording of that meeting):

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<sup>19</sup> See, for example, *Bentley Capital Limited 01R* [2011] ATP 13 at [45]-[56], *Avalon Minerals Limited* [2013] ATP 11, [63]-[64] and *Merlin Diamonds Limited* [2016] ATP 18, [47]

<sup>20</sup> Mr David Argyle resides in the United Kingdom and Mr Gavin Argyle resides in Australia

<sup>21</sup> For example, *Bentley Capital Limited 01R* [2011] ATP 13, *Viento Group Limited* [2011] ATP 1, *CMI Limited* [2011] ATP 4 and *CMI Limited 01R* [2011] ATP 5

<sup>22</sup> The GCA staff meeting was recorded

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- (a) *“Family shareholding position, my dad is the largest shareholder and it puts extra responsibility on me in order to you know maintain corporate values and his values in the various business activities. The severity of the staff cutbacks was not in the core values of our family”*
- (b) *“The family position and the board we certainly weren’t aware of the severity of it we thought that the number was 30 we thought that was discussed and that was discussed with Adevinta and that was agreed and they were going to look after those people and that was part of the sales negotiation. From that perspective its obviously not appropriate for me to start talking about ‘core values’ it would seem shallow or contrived. Maybe at another time”*
- (c) *“Core values that are...integral to our family’s successful investment and strategy, style there’s no business plan that you learn... there’s honesty, trust there’s loyalty, these are our core values”*
- (d) *“My dad worked at the World Bank for 35 years in Washington DC, so I’ve had an economic tutor essentially for my whole life in terms of the importance in terms of allocating capital efficiently and not to do things that are experimental”*
- (e) *“The philosophy that my dad taught me”* and
- (f) *“Mea culpas I take responsibility for it because my dad owns all the shares and who else but me is going to come in when situations arise where its somewhat dark and not in terms of what our... why we’re here”.*

76. In our view *“the family links make one part of the factual matrix”*<sup>23</sup> supporting an inference of association.<sup>24</sup>

#### Common knowledge of the relevant facts

77. Mr Gavin Argyle submitted that there were several conversations he had had with his father prior to Mr David Argyle lodging the section 249D notice:
- (a) in February or March 2022, following release of TMH’s half-yearly report for the period ended 31 December 2021. Mr Gavin Argyle submitted *“David Argyle expressed concern about the large decline in TMH’s profits for the period.”*
  - (b) in September 2022, following release of TMH’s annual report for the year ended 30 June 2022. Mr Gavin Argyle submitted *“During this discussion David Argyle expressed concern about the overall direction and management of TMH. During this discussion David Argyle asked Gavin Argyle several questions about the financial affairs of TMH which Gavin Argyle was not able to answer at the time as he did not have sufficient knowledge.”*
  - (c) in November 2022, concerning the debt incurred by TMH to fund the acquisition of GCA that it had announced in August 2022. Mr Gavin Argyle submitted *“During this discussion David Argyle expressed concern with the level of*

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<sup>23</sup> Bentley Capital 01R [2011] ATP 13 at [56]

<sup>24</sup> See, for example, Tribune Resources Limited [2018] ATP 18 and Ainsworth Game Technology Limited 01 & 02 [2016] ATP 9

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*debt incurred by the Company and the management of the Company. Gavin Argyle also expressed concern about the progress of TMH in raising capital to repay the debt.” Mr Gavin Argyle also submitted that “During this discussion, Gavin Argyle discussed with David Argyle his options as a shareholder regarding the management and direction of TMH. This discussion would have involved discussing the fact that a shareholder may requisition a meeting for the removal of a director.”*

78. Mr David Argyle submitted that his infrequent and high-level discussions with Mr Gavin Argyle “did not involve entering into a relevant agreement, a commitment to act in a certain manner or otherwise fettered the discretion of Mr David Brian Argyle or Mr Gavin Argyle to act as each saw fit” and was unlikely to constitute acting as associates or entering into a relevant agreement as set out in ASIC Regulatory Guide 128<sup>25</sup>.
79. Given the context in which these conversations were made and the structural links between Mr Gavin Argyle and Mr David Argyle, we do not consider these conversations to be equivalent to a briefing to an institutional investor and to fall within the examples of conduct where collective action is unlikely to constitute acting as associates or entering into a relevant agreement under ASIC Regulatory Guide 128.
80. TMH submitted that “it is not customary for the TMH Board to brief any shareholders on significant transactions or corporate actions.” Mr David Argyle submitted that he “was not briefed on the details of significant transactions of TMH” and expressed “...his dismay at his failure to be informed about the GCA acquisition...”. However, in a text message on 9 August 2022, before the GCA acquisition was announced on 26 August 2022, Mr Gavin Argyle said to Mr Sanger “Dad is pleased and happy with the deal, so that’s good. Thxs bud.” Mr Sanger replied “So not leaked yet but in the afr tonight” forwarding a link to a news article regarding the sale process for GCA published at 9:35pm on 9 August 2022.
81. Mr David Argyle submitted that “he did not engage in any discussions about the details of the GCA acquisition with Mr Gavin Argyle (or Mr Jagdip Sanger) and was unaware of the transaction with GCA prior to it being announced to the public”. However, the announcement on 26 August 2022 states that “David Argyle has committed to subscribe for his full pro rata entitlement of approximately 37% of the voting shares of the Company under the rights issue, which equates to a total of \$9.82m.” Mr David Argyle submitted that his commitment to subscribe for his entitlement under the 2022 Entitlement Offer did not suggest that “he knew about the details of the GCA Acquisition” or that “his alleged knowledge of the transaction led him to decide to participate in the 2022 Entitlement Offer.” In our view, it is uncommon for any shareholder to commit to investing almost \$10 million in a company without knowing the intended use of the funds.
82. We infer from the above that there was a briefing about the GCA acquisition and consider that the briefing and the discussions between Mr David Argyle and Mr Gavin Argyle on concerns regarding the management and direction of TMH reflect a common knowledge of relevant facts.

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<sup>25</sup> ASIC Regulatory Guide 128: *Collective Action by Investors* (RG 128)

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83. We considered the position that Mr Gavin Argyle is Mr David Argyle's nominee on the board. Nominee directors stand in a complicated position.<sup>26</sup> While they are subject to fiduciary duties that are the same as for other directors, they are generally also subject to an understanding that they 'represent' the person nominating them (usually a major shareholder). While neither Mr David Argyle nor Mr Gavin Argyle have put that argument forward during these proceedings, in our opinion the steps taken went beyond fulfilment of those roles.

#### Common shareholdings and directorships

84. Mr David Argyle and Mr Gavin Argyle share many structural links.
85. Based on the information available from ASIC's register, and our analysis of ASIC's submission setting out a table of common directorships and a table of common shareholdings, Mr David Argyle and Mr Gavin Argyle have, or had, shareholdings in the same 13 public companies, including TMH. They have, or had, shareholdings in the same 12 private companies. They are, or were, directors together of 2 companies<sup>27</sup>.
86. Mr David Argyle submitted that as a long-term client of CIP, he had invested in similar companies as other clients of CIP in line with the investment strategy and recommendations of the firm and, "[a]s such, the investment portfolios of CIP's clients are inevitably similar".
87. There is also the example of an historical structural link between Mr David Argyle and Mr Gavin Argyle in the Federal Court case of *Dyinda*.<sup>28</sup> UIL submitted that the case was evidence of prior collaborative conduct of Mr David Argyle and Mr Gavin Argyle. Mr David Argyle submitted that the case "*does not demonstrate 'a long history of prior collaborative conduct' ... nor a 'shared goal or purpose' relevant to TMH or the present matter.*" While we accept Mr David Argyle's submission, we consider it an example of a structural link.
88. While many of these shareholdings and directorships are historical, which is not surprising given their long careers and we accept that clients of the same investment firm may have similar investments, we considered that the significant structural links between Mr David Argyle and Mr Gavin Argyle further evidence a personal and professional relationship which is close and longstanding.

#### Common dealings

89. The structural links identified above evidence common dealings between Mr David Argyle and Mr Gavin Argyle.

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<sup>26</sup> *Strategic Minerals Corporation NL 02R, 03R, 04R and 05R* [2018] ATP 5

<sup>27</sup> Mr Gavin Argyle submitted that "*Gavin Argyle and David Brian Argyle were only briefly common directors of one company, Total Corrosion Control Pty Ltd*" and Mr David Argyle submitted that "*Mr David Brian Argyle and Mr Gavin Argyle were directors in a tightly held private company, T.C.C. Holdings Pty Ltd*". Based on publicly available information, Mr Gavin Argyle and Mr David Argyle were directors of both companies.

<sup>28</sup> *Dyinda Pty Ltd and Ors v First Distribution Services Ltd and Ors* [2004] FCA 12



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90. Focusing on TMH, Mr David Argyle (directly and through Zero Nominees) and Mr Gavin Argyle (through GAB) each have shares in TMH and have increased their shareholdings over time.
91. Report Card Pty Ltd was the owner of the stock market internet discussion forum, HotCopper. TMH acquired Report Card Pty Ltd upon listing on the ASX. Mr David Argyle initially held a 45.44% interest in Report Card Pty Ltd, which was acquired for a 31.69% interest in TMH (plus cash consideration) as part of TMH's IPO in 2016. Mr David Argyle and Mr Gavin Argyle had discussed the IPO and Mr Gavin Argyle took shares in TMH in the IPO.
92. Both Mr David Argyle and Mr Gavin Argyle have continued to increase their relevant interests in TMH shares and neither have sold any shares since the IPO. Mr David Argyle's relevant interest in TMH shares has increased from the initial 31.69% to the current 36.92%.
93. Mr Gavin Argyle's relevant interest in TMH shares has increased from the initial 2.27% to approximately 6.47%. Notably, Mr Gavin Argyle's relevant interest in TMH shares increased from approximately 4.72% just prior to the 2022 Entitlement Offer to approximately 6.35% shortly following the 2022 Entitlement Offer. This was largely as a result of acquiring 5,060,000 rights in the renounceable market TMH established for the 2022 Entitlement Offer and exercising those rights (in addition to the 3,240,000 rights he was entitled to and exercised as part of the pro-rata offering). He adopted the same strategy in the 2023 Entitlement Offer, although acquiring a much smaller number of rights.
94. Following the 2022 Entitlement Offer, we infer that Mr David Argyle and Mr Gavin Argyle engaged in coordinated buying of shares in TMH from two employees of CIP (see paragraphs 194 to 216 below).<sup>29</sup>
95. Mr Gavin Argyle submitted that "[a]part from the fact the TMH share purchases occurred in the same month, which is coincidental, there is no evidence of coordination of the purchases as between Mr David Argyle and Gavin Argyle". UIL submitted that "the Panel is correct to attribute those events to coordination rather than coincidence where it is the logical inference to be made." We discuss this further at paragraphs 194 to 216 below.
96. We consider that Mr David Argyle and Mr Gavin Argyle have a long history of common dealings and accepted UIL's submissions that there has been "a multi-decade business relationship between the Argyles that continues to this day."

#### Shared goal or purpose

97. Mr David Argyle was (and is) the largest shareholder of TMH. He submitted that each time he acquired shares in TMH "his primary motivation was to maintain his shareholding, having been a longstanding shareholder and original major shareholder of the entity prior to listing on the ASX".

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<sup>29</sup> Noting that our finding of association in relation to the two CIP employees was only with respect to Mr Gavin Argyle.

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98. In 2016, Mr David Argyle requested that Mr Gavin Argyle be appointed to the board of TMH. Mr Gavin Argyle submitted that it was *“a desire of David Argyle to ensure that a company in which he held a major investment is properly directed and managed.”*
99. It appears that Mr Sanger enjoyed a harmonious relationship with Mr David Argyle and Mr Gavin Argyle, being *“warm and close and that of a friend.”*
100. However, the relationship soured. Mr Sanger submitted that a sense had developed that:
- (a) he had become a *“threat”* in that he did not support the 2023 Entitlement Offer
  - (b) he was opportunistic in asking for an incentive following the GCA acquisition and
  - (c) he was putting the agenda of Mr David Argyle and Mr Gavin Argyle at risk by pursuing his funding strategy for the GCA acquisition, which they thought was a *“betrayal.”*
101. We consider that the funding strategy for the company was a major concern for Mr David Argyle and Mr Gavin Argyle, as it could be a threat to Mr David Argyle’s stated objective of maintaining his percentage holding in TMH. We also note that Mr David Argyle submitted that he had concerns about the terms of the Vendor Loan and its impact on TMH’s financial situation.
102. Critical events between August 2022 and November 2022 culminated in the removal of Mr Sanger as TMH’s managing director. We consider these events in detail below and conclude that they showed a shared goal or purpose between Mr David Argyle and Mr Gavin Argyle in relation to TMH.

#### The GCA acquisition and funding

103. Mr David Argyle submitted that Mr Sanger had proposed, and went ahead with, an \$86 million debt without consulting him, effectively leading *“to severe differences of opinion”*. However, in other sections of his submissions, Mr David Argyle stated that Mr Sanger did not consult with him *“regarding the **details** of the transaction”, “he did not know of the **details** of the GCA Acquisition, the Vendor Loan, further financing or possible concerns until this information was announced to the ASX”* and he was *“extremely dissatisfied on reading the **details** of the GCA Acquisition...”* (emphasis added).
104. Mr David Argyle also submitted that, at this time, *“frankly the affairs of TMH were not at the forefront of his mind.”* However, based on his submissions, Mr David Argyle maintained his percentage holding in TMH under the 2022 Entitlement Offer, and he placed a standing buy order with his broker to buy TMH shares on-market between 28 September 2022 and 10 November 2022. He also determined to lodge, and signed, each of signed the Re-election Letters (see paragraphs 138 to 143) and the section 249D notice.
105. Given the background discussed in paragraphs 80 to 82, we infer that Mr David Argyle was aware of the transaction (albeit, perhaps not the *“details”* of the transaction) several weeks prior to its announcement.

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106. We also infer from the wording of Mr Gavin Argyle's text message to Mr Sanger on 9 August 2022 (see paragraph 80) that it was important to Mr Gavin Argyle that his father was happy with the transaction.
107. Mr Gavin Argyle submitted that *"it is unlikely that the GCA Acquisition would have been agreed but for the commitment of TMH's major shareholder to the rights issue to part-fund the acquisition."* Mr Gavin Argyle appears to suggest that Mr David Argyle was in fact supportive of the proposed GCA acquisition prior to its announcement, although Mr David Argyle maintained that *"he was not aware of the details of the GCA Acquisition"*. We found this apparent contradiction in what ought to be factual matters troubling. Unfortunately, it was not an isolated occurrence in these proceedings.
108. Mr Gavin Argyle provided a list of TMH shareholders (specifically, Mr David Argyle, GAB and Ms Rebecca Argyle) *"whom CIP assumed would take up their entitlements to the 2022 Entitlement Offer for the purposes of CIP agreeing to underwrite 80% of the 2022 Entitlement Offer"*. We infer that the approval sought from Mr David Argyle by Mr Gavin Argyle included his father's commitment to take up his entitlement (noting the significant cash outlay involved). This is also consistent with the timing of CIP coming on board as the underwriter of the 2022 Entitlement Offer. In July 2022, TMH were in discussions to appoint a different broker to manage and underwrite the 2022 Entitlement Offer, but by 10 August 2022 the draft documents named CIP as the underwriter.
109. While acknowledging that boards make decisions, we infer that Mr David Argyle was troubled by Mr Sanger's recommendation *"that the Company take on an \$86 million debt of which almost \$30 million would reflect Mr David Brian Argyle's shareholding percentage"*. He submitted that he had had to *"invest an additional \$15 million in two rights issues in order to maintain his percentage shareholding in a business that he has held a substantial ownership stake in for 20 years"* and that had he not contributed, *"then he would likely no longer be the major shareholder (enabling UIL and associates to become the majority shareholders)"*. He submitted that *"the existing strategy of institutional placements proposed to be executed by Mr Jagdip Sanger...would have been dilutive to shareholders, other than UIL and SG Hiscock"*.
110. Mr Sanger confirmed that part of the funding strategy (sent to the vendor's bankers) on 24 August 2022 included a further equity round in 2023 but at a higher valuation and that the optimum way to do this would be a placement to institutions or a strategic investor.
111. We have no evidence of any proposal that UIL or other entities related to Mr Duncan Saville<sup>30</sup> would provide debt or additional equity funding. Mr Sanger had proposed to Mr Saville that he provide debt funding to TMH at the time of the 2022 Entitlement Offer, but received a *"flat no"*. Nevertheless, there appears to be a level of preoccupation about the involvement of UIL and Mr Saville in TMH that was

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<sup>30</sup> Mr Saville is the controller of UIL (alone and together with one or more associates)

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shared by Mr David Argyle and Mr Gavin Argyle. Concerns about UIL and Mr Saville are evidenced by:

- (a) Mr Sanger's employment contract, which required him to report to the TMH board if he had any contact with (among others) Mr Saville
- (b) Mr Sanger's evidence in conference (given on affirmation) that an "*essential part of my time in the four years that I was in the business, was a real fear from the Argyles which has at times shared (sic) by the board, from the potential machinations of Duncan Saville and UIL*"
- (c) Mr David Argyle's submissions that UIL's application is a "*blatant attempt to destabilise the business at a critical juncture and rid Mr David Brian Argyle of his long-term investment...for which he has given many years of support*" and
- (d) Mr Gavin Argyle texting Mr Chenu on or around 2 December 2022, stating that Mr Chenu was connected to Mr Saville and "*This might be a good time to clarify if any leveraged (sic) applied...I've been preparing a plan for this (scenario) for 5 years*". Mr Chenu responded that he had never met Mr Saville and denied any conflict of interest. He got no explanation for Mr Gavin Argyle's accusation, despite asking for one repeatedly. In the text message, Mr Gavin Argyle concluded "*I said I wasn't going to argue. I've got other options*".

112. Mr Gavin Argyle submitted that "*the Panel has made no proper enquiry into, and has asked no questions about*" UIL's motive in bringing the application, including "*the fact that [UIL] is a provider of debt finance to companies which have subsequently become financially distressed, and which has resulted in [UIL] (or its associates) acquiring substantial control of those companies following a conversion of debt to equity*" and submitted that he rejected any finding based on the Panel's view that he was paranoid about UIL or that his concerns in relation to UIL communicated to Mr Chenu in these circumstances were tenuous or disingenuous. Each party has been given the opportunity to put forward information it considers relevant, examine the information put forward by others and make extensive submissions and rebuttals on issues. We do not accept Mr Gavin Argyle's submission that potentially relevant information was not provided because questions were not asked by the Panel.
113. We consider it is likely that Mr Sanger's pursuit of the funding strategy for the refinancing of the Vendor Loan and the corresponding perceived risk that this may have led to a reduction in the shareholding percentage of Mr David Argyle, or the Argyle family shareholding, was a factor in Mr David Argyle and Mr Gavin Argyle withdrawing their support for Mr Sanger.
114. Mr David Argyle denied any knowledge of conversations between Mr Gavin Argyle and Mr Pismiris regarding the removal of Mr Sanger or any proposals for Mr Gavin Argyle to take on an executive role at Gumtree.
115. In our view this lack of knowledge does not undermine the existence of an agreement or understanding between Mr David Argyle and Mr Gavin Argyle of maintaining the level of control of Mr David Argyle, or the Argyle family, in TMH. Mr Gavin Argyle was aware at the latest in September 2022 that Mr David Argyle

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had concerns about the overall direction and management of TMH. Mr Gavin Argyle felt a responsibility, given his family's shareholding position and his father as the largest shareholder, to "*maintain corporate values and his values in the various business activities*". When Mr Sanger's strategy threatened that control (both directly through a potential dilution) and strategically (by expanding the business beyond its core business<sup>31</sup> or by implementing deep staff cuts), Mr Gavin Argyle acted to neutralise the threat.

#### The conduct allegations

116. Mr Sanger submitted that he was "*told by Mr Gavin Argyle from 15 October 2022 that I would be 'removed' from the business by the Argyle family.*" Mr Gavin Argyle submitted that he does not recall saying this or saying "*words to that effect.*" Mr Chenu submitted that he was of the view that Mr Gavin Argyle had lost confidence in Mr Sanger by 15 October 2022, citing comments made by Mr Gavin Argyle to Mr Chenu at a function that Mr Gavin Argyle hosted on 15 October 2022. Given the submission of Mr Chenu, which is consistent with the submission of Mr Sanger, and the fact that Mr Gavin Argyle does not recall, we accept that such a conversation took place. At around this time, it appeared that Mr Gavin Argyle and Mr Sanger stopped communicating with each other.
117. Mr Chenu, a director of TMH at all material times,<sup>32</sup> submitted that "*From about mid-October and [until] the end of November 2022, concerns were raised regarding the conduct of Jag as managing director of TMH...*". The concerns were raised by Mr Gavin Argyle and were pursued by him.
118. On 6 November 2022, Mr Gavin Argyle sent a text message to Mr Pismiris and Mr Chenu stating (among other things) that he was "*...in the process of putting in a high level plan in replacing Jag aa (sic) MD of the group until a suitable candidate is found*".
119. On 8 November 2022, Mr Gavin Argyle, Mr Pismiris and Mr Chenu held a meeting in the presence of Ms Rhyanna Van Leeuwarden to discuss the future role or involvement of Mr Sanger in TMH, and a proposal by Mr Gavin Argyle that he take an executive role at Gumtree. Ms Van Leeuwarden has been employed by CIP as the "Chief of Staff" since November 2022. At the time of this meeting, Ms Van Leeuwarden was not an employee of CIP, but was consulting to CIP as a contractor. Following that meeting, Ms Van Leeuwarden emailed Mr Pismiris and Mr Chenu requesting that they copy her into future communications with Mr Gavin Argyle relating to his "*interim role at Gumtree*" and "*I will wait to hear how your conversation goes with Jag tomorrow. From there I will begin to map out with Gavin how, when and where he will carry out the requirements of the role.*"
120. On 10 November 2022, Mr Chenu, Mr Pismiris and Mr Gavin Argyle met and, based on a note sent by Mr Pismiris to the attendees and Mr Sanger, agreed that while the financing process was underway, the "*status quo [was] to be maintained with respect to*

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<sup>31</sup> See paragraph 138

<sup>32</sup> Mr Chenu remained a director until 10 January 2023, when Ms Jensen was appointed as a director, and he resigned

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*[Gumtree]...including current positions/roles".* The three directors also agreed that Mr Gavin Argyle be appointed as an *"additional director of GT"* and attend the GCA offices in Sydney, and discussed the terms of a remuneration package for Mr Sanger.

121. On 14 or 15 November 2022, an informal meeting of directors was held, which mainly concerned refinancing. There was no board pack or minutes in relation to that informal meeting. However, Mr Chenu submitted that following that meeting, proposals were circulated regarding Mr Sanger's future role in TMH which severely restricted his executive functions (contrary to what was agreed on 10 November 2022).
122. On 16 November 2022, TMH held a meeting of directors which was also attended by Ms Van Leeuwarden. Mr Sanger submitted that he was then *"instructed by Mr Alec Pismiris to cease all communications with funders and advisors and direct all communications to Ms Rhyanna Van Leeuwarden"* which he found highly concerning as, in his view, she had *"no experience in media, classifieds or leveraged finance"*. He submitted that he was *"effectively removed from all executive duties at TMH by 16 November 2022."*
123. It appeared that Mr Chenu did not agree with how the concerns regarding Mr Sanger were being handled, and that Mr Chenu wanted to afford Mr Sanger procedural fairness. He submitted *"that the allegations regarding Jag's conduct should be substantiated before the Board took the step of completely removing him from his executive role; the allegations should be put to him so that he had the opportunity to respond, and TMH had the benefit of his response, and in the meantime, he should continue to be available to at least assist the process of refinancing the GTA acquisition to completion, and otherwise assist in the management of the group."*
124. From around 23 November 2022 to 25 November 2022, Mr Gavin Argyle together with CIP personnel, Ms Van Leeuwarden and Mr Rosenal, attended the GCA offices in Sydney to undertake what Mr Gavin Argyle submitted was an *"independent investigation into the current position of GCA and the management team leading the transition."* They met with GCA employees. TMH submitted that the decision for Mr Gavin Argyle to attend the GCA office was made by the TMH board (excluding Mr Sanger). TMH was unable to provide any document evidencing this decision or (per our question to TMH) that the interviews with GCA employees were made with the knowledge and approval of the TMH board (see paragraph 128).
125. On 23 November 2022, Mr Gavin Argyle also held a briefing with GCA staff at which he said that his father was the largest shareholder and that put extra responsibility on him. He spoke of the family's core values (see at paragraph 75).
126. The investigation appeared to focus on the conduct of Mr Sanger. Several senior employees of GCA subsequently shared their concerns, directly or indirectly, with Mr Pismiris about the investigation, including that *"some level of investigation exercise on Jag"* did not follow an adequate process to investigate misconduct allegations and noting that *"[i]t is evident they have been here with an agenda which is clearly not in the best interest of our business or our people."*

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127. In contrast, Ms Van Leeuwarden noted in a report to Mr Pismiris and Mr Chenu that “[t]he support for Gavin and the effort he made to fly to Sydney and connect with them and listen was undeniable.” Her report concluded with a suggestion for “a reverse takeover” with the management team of GCA becoming the management team for the TMH group. Ms Van Leeuwarden also noted that “CIP cannot raise any additional funds and Gavin cannot assist the debt financing process any further if the recommendation is not actioned immediately by the board”.
128. Letters were given to GCA staff who had been interviewed (at least some of whom had articulated allegations against Mr Sanger) confirming that “information provided by the employee at the meeting would remain confidential and would not be used against them in any manner.” The letters were signed by Mr Pismiris for and on behalf of the TMH board.
129. On 25 November 2022, the Head of People at GCA at that time emailed Mr Pismiris saying “Gavin has made several accusations [about Mr Jagdip Sanger], if that is indeed the case then there is a proper process that such an allegation needs to follow and investigated (sic) by a neutral party.”
130. Similarly, it appears that the Head of Legal at GCA at that time also had concerns in relation to the investigation. Referring to a text message received from Ms Van Leeuwarden about “the investigation carried out during [their] time in Sydney”, the Head of Legal at GCA sent an email to the Head of People at GCA stating that the investigation “was not an independent process (given Gavin’s role as a director)”. She also queried the formality of the “investigation” given, as Head of Legal, she had not been formally made aware of it. The Head of Legal at GCA also noted that the letters to Gumtree employees (see above at 128) were not necessary given general whistleblower protections but she was told Mr Gavin Argyle wanted to ensure that employees “openly feel comfortable”.
131. On 26 November 2022, Mr Gavin Argyle sent a long text message to Mr Chenu very critical of Mr Chenu’s position. Mr Gavin Argyle stated (among other things) “So you and Alec had the opportunity to conduct the Independent Director Review investigation but didn’t. I did. So with the board authority you need to go as soon as possible if you do not accept the findings.” Following the text message, Mr Chenu submitted that he came to the view that it was unlikely he and Mr Gavin Argyle could continue to work together on the TMH board and he “began to seriously consider resigning”.
132. On 27 November 2022, following an earlier discussion with Mr Gavin Argyle and with the assistance of Ms Van Leeuwarden, Mr David Argyle, signed and sent the Re-election Letters (see paragraphs 138 to 143).
133. At the TMH board meeting on 28 November 2022, Mr Pismiris, Mr Sanger, Mr Chenu and Mr Gavin Argyle were present as was the company secretary, Mr Ben Donovan. Solicitors from Clayton Utz dialled into the board meeting for part of the meeting. During the meeting, concerns raised by Mr Gavin Argyle in relation to Mr Sanger around an intra-group transfer of money were discussed. After discussion, and some explanations by Mr Sanger, Mr Chenu asked Mr Gavin Argyle if “the concerns were now addressed”. Mr Gavin Argyle said he still had concerns. The

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minutes state that Clayton Utz was instructed to provide the Board with legal advice on the concerns of Mr Gavin Argyle and that “ [Mr Chenu] noted that [Mr Gavin Argyle] and [Mr Sanger] could work together on resolving the matter, and that [Mr Gavin Argyle] would take the lead on financing with [Mr Sanger] involved.”

134. TMH submitted that “[n]otwithstanding the wording of the TMH Board minutes, TMH confirms that Clayton Utz were not provided with any instructions following the meeting and did not provide any advice on this matter and were not followed up by TMH to provide advice”.
135. Mr Sanger submitted that following the 28 November 2022 board meeting he was never contacted regarding the money transfer issue.
136. Submissions and rebuttals from TMH, Mr Gavin Argyle and Mr David Argyle include other reasons that they alleged for seeking to remove Mr Sanger. However, these reasons do not appear to have been given at the time. They are not reflected in the board minutes of 28 or 30 November 2022 or the section 249D notice. Mr Sanger submitted that he had no knowledge of the resolution to revoke his appointment as Managing Director that was considered by the board on 30 November 2022 and that he learnt of the matters discussed at that meeting for the first time during these proceedings.
137. We infer that Mr Gavin Argyle had determined to use allegations of misconduct to remove Mr Sanger and was not interested in an explanation. In the face of potential resistance at the board level, a request from his father and TMH’s largest shareholder would be the catalyst for change.

#### The section 249D requisition

138. Mr David Argyle submitted that in late 2021 he had a one-hour face to face conversation with Mr Sanger about a potential acquisition of a financial news website. Mr David Argyle submitted that “based on this discussion, it should have been very clear to Mr Jagdip Sanger that expanding the business of the Company outside of its main or core business ... would have been a concern to Mr David Brian Argyle, as the Company’s largest shareholder”.
139. According to Mr David Argyle, he “determined, after careful consideration over a number of months, to lodge a s249D notice with TMH...”. He submitted that in discussions with Mr Gavin Argyle he “expressed his view that Mr Jagdip Sanger should be removed as a director due to the poor financial performance of TMH Australia and the loan repayment terms (as disclosed to ASX on 26 August 2022) negotiated by Mr Jagdip Sanger when he was Managing Director.” We know that in a conversation occurring in November 2022 “Gavin Argyle discussed with David Argyle his options as a shareholder regarding the management and direction of TMH. This discussion would have involved discussing the fact that a shareholder may requisition a meeting for the removal of a director.”
140. On Sunday 27 November 2022, the day before TMH’s annual general meeting, Mr David Argyle signed two letters (**Re-election Letters**), asking for an extraordinary general meeting at which resolutions be put:



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- (a) *“That Mr Jagdip Singh Sangha, be re-elected as Director” or “that Mr Jag Sanger, be re-elected as Director” and*
- (b) *“That Mr Alec Christopher Pismiris, be re-elected as a Director.”*

141. Mr David Argyle submitted that he believed the process to remove a director would be to vote on the re-election of all the directors. He submitted that he thought all directors would be re-elected except for Mr Sanger *“who would not get his vote for re-election”*. Mr David Argyle’s explanation is difficult to reconcile with the fact that he only issued letters for the “re-election” of Mr Sanger and Mr Pismiris and not Mr Chenu or Mr Gavin Argyle<sup>33</sup>.
142. Mr David Argyle *“asked, via phonecall, for administrative help for a template letter to be drafted.”* Ms Van Leeuwarden, on the instruction of Mr Gavin Argyle, drafted the two Re-election Letters (which appeared to be in the form of final drafts rather than templates) and emailed them to Mr David Argyle on Sunday evening from home (using a personal email address of her partner). Her email said *“As per discussion with Gavin, can you please sign the attached and return to this email address as soon as possible”*. It is not clear why Ms Van Leeuwarden provided two draft letters to Mr David Argyle, and only for the “re-election” of Mr Sanger and Mr Pismiris, when Mr David Argyle had only asked for administrative help for *“a template letter”* to be drafted.
143. Mr David Argyle submitted that he signed the drafts that night and returned them as instructed so Ms Van Leeuwarden *“could print them out for Mr Gavin Argyle to give to Alec Pismiris, on his behalf, on 27 November 2022 as he knew they were meeting the day after”*. CIP submitted that *“Subsequently, most likely on 28 November 2022, either Gavin Argyle or Ms Van Leeuwarden handed copies of the signed letters to Alec Pismiris in a meeting.”*
144. However, after Mr Pismiris received the Re-election Letters, it was submitted that a conversation took place between him and Mr David Argyle. Mr David Argyle submitted that during that conversation he *“realised the best path forward to achieve his objective was to issue the section 249D notice for the removal of Jagdip Sanger as a director. Mr Alec Pismiris provided Mr David Brian Argyle with details of the requirements of the section 249D notice.”*
145. It is clear that Mr David Argyle only “realised” the need for a section 249D notice because Mr Pismiris told him. While TMH initially submitted that Mr Pismiris spoke to Mr David Argyle **after** the section 249D notice was issued, Mr David Argyle’s submission indicates that the call took place **before** the issue of the section 249D notice. TMH’s subsequent submission states that Mr Pismiris *“contacted David Argyle and discussed his letter [referring to the Re-election Letter in respect of Mr Sanger] and clarified that his intention was to submit a section 249D notice”* which must have been before the section 249D notice.

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<sup>33</sup> Although we acknowledge that Mr Gavin Argyle was already up for re-election at TMH’s annual general meeting

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146. In fact, Mr Pismiris drafted the section 249D notice and on 29 November 2022 emailed it to Ms Van Leeuwarden (copied to Mr Gavin Argyle) requesting “*Brian to sign*” and requesting for it to be returned that evening. On the same day, Ms Van Leeuwarden emailed Mr David Argyle, copying Mr Gavin Argyle (but not Mr Pismiris who had made the request), stating “*Hi Brian, Gavin has requested that you please sign the attached document ASAP*” and, early on 30 November 2022, she emailed a signed version back to Mr Pismiris (copied to Mr Gavin Argyle). On receiving the signed section 249D notice, TMH submitted that Mr Pismiris “*recognised his own typographical error in the draft notice provided to David Argyle and corrected the reference from "We" to "I" ... which due to the international time zone difference Alec Pismiris later confirmed with David Argyle.*” As submitted by Mr David Argyle, after correcting the typographical error in the section 249D notice, Mr Pismiris then applied Mr David Argyle’s electronic signature with his approval.
147. Mr Pismiris did not wait to receive the signed section 249D notice from Mr David Argyle before anticipating next steps. He emailed the company secretary on the evening of 29 November 2022 stating “*we have received correspondence from Mr David Brian Argyle seeking to call a meeting pursuant to s249D of the Corps Act to remove Jag as a director*” and asked him to prepare a trading halt request pending an announcement regarding the board composition of the company. He signed off on the request the next morning at 6:23am, attaching the signed notice.
148. Mr Gavin Argyle submitted that, at the time of these emails, “*Ms Rhyanna Van Leeuwarden was engaged in assisting the non-executive Directors of TMH in their communications with other Board members, employees, shareholders, legal advisers and external parties.*” Mr Gavin Argyle sought in his submissions to retain a degree of independence from the section 249D notice process by submitting that:
- (a) “*there was no **actual** discussion between Gavin Argyle and David Argyle concerning the **actual** section 249D requisition notice before it was received by TMH*” (emphasis added)
  - (b) “*The decision of David Argyle to serve the section 249D requisition notice was a decision that he made alone*” and
  - (c) “*[Ms Rhyanna Van Leeuwarden’s] statement [in her 30 November 2022 email] that the request for Mr David Argyle to sign the notice was from Gavin Argyle is incorrect*”.
149. These statements were worded in a way that did not necessarily mean that Mr Gavin Argyle was not involved in the section 249D process. Nevertheless, we consider they are difficult to reconcile with the facts.
150. Mr Gavin Argyle submitted that he spoke to Mr David Argyle about his options as a shareholder regarding the management and direction of TMH shortly before formal steps were taken by Mr David Argyle to remove Mr Sanger. He also instructed Ms Van Leeuwarden to provide Mr David Argyle with administrative assistance in relation to the Re-election Letters, and he was copied in on most correspondence concerning the requisition notice. Even after the requisition notice had been lodged, Mr Gavin Argyle sought to promote the views of his father at the relevant

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extraordinary general meeting, noting in an email *"We will need some words from my dad regarding the NOM/249d for the EGM."*

151. Mr Gavin Argyle also submitted that *"[h]ad Gavin Argyle wanted to requisition a meeting of shareholders to remove Mr Sanger as a director he could have simply and easily arranged for GAB Superannuation (as the holder of more than 5% of the TMH shares) to requisition a meeting of shareholders in accordance with section 249D of the Corporations Act, but he did not do so."* While Mr Gavin Argyle could have arranged for GAB to requisition a meeting in accordance with section 249D, he didn't and instead his father, who is TMH's major shareholder, did and it had the desired effect of leading to Mr Sanger's immediate removal.
152. In the afternoon of 30 November 2022, a TMH board meeting was *"called to deal with several issues around the performance of the Managing Director and a request by shareholders to call a Section 249D meeting"*. Mr Sanger was not present. Indeed, he submitted that he was not informed of the meeting.
153. At the meeting, Mr Chenu *"advised that he wished to abstain from all further resolutions being considered at the meeting today."* Mr Gavin Argyle and Mr Pismiris, being the other two directors present, *"confirmed their intention to vote on all remaining resolutions."*
154. Legal advice from Clayton Utz regarding the validity of the section 249D notice was tabled and the board resolved that *"Mr Jag Sanger's appointment as managing director be revoked immediately (effective as at the date of this resolution)."* The minutes record no discussion about the performance of Mr Sanger or reasons for his removal, other than a reference to the board noting *"[t]here are concerns in relation to Mr Sanger's conduct both raised in the Notice and by Board members"*. However, the section 249D notice did not raise any concerns in relation to Mr Sanger's conduct or otherwise.
155. The board noted that it needed to appoint persons to assist or otherwise be vested with the authority to conduct the business of TMH following Mr Sanger's removal. The board resolved to give acting roles to Mr Gavin Argyle, Mr Pismiris and Mr Logtenberg. Mr Gavin Argyle was given authority to manage:
  - (a) investor and shareholder communications
  - (b) financing arrangements and
  - (c) communications with Adevinta.
156. On 1 December 2022, Mr Sanger was placed on gardening leave.
157. The circumstances surrounding Mr Sanger's investigation and subsequent effective removal from the TMH business by Mr Gavin Argyle and Mr David Argyle (with the support of Mr Pismiris) caused significant friction between Mr Gavin Argyle and Mr Chenu, which is evident from the text message exchanges between the pair described in paragraphs 111(d) and 131 above. Mr Chenu submitted that the exchange described in paragraph 111(d) indicated *"a continuation of [Mr Gavin Argyle's] hostility toward me for not fully supporting him in his efforts to have Mr Sanger removed from TMH, and he therefore also wanted me off the Board"*.

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158. We consider that, with Mr Sanger and Mr Chenu's resignations, Mr Gavin Argyle with the support of Mr Pismiris (see paragraphs 174 to 193 below), had effective control of the TMH board.

#### Conclusion of shared goal or purpose

159. We consider that Mr David Argyle and Mr Gavin Argyle have a shared goal or purpose in maintaining the level of ownership control of Mr David Argyle, or the Argyle family, in TMH and in turn controlling or influencing TMH's board composition or the conduct of its affairs.
160. While it is possible that this goal has existed since the listing of TMH in 2016, based on the material before us, we find that the goal or purpose existed by no later than 9 August 2022 in relation to the GCA acquisition.
161. In our view, it was at this point that Mr David Argyle and Mr Gavin Argyle went beyond "*the exchange of views or information*" or "*raising general issues [that] may range from corporate governance issues to long-term strategic or commercial risks facing the company*". Mr David Argyle was briefed by Mr Gavin Argyle on a major strategic transaction. The transaction proceeded after Mr David Argyle expressed that he was happy with the deal. Mr Gavin Argyle, through CIP as the underwriter, was able to influence the dispersion of new shares under the 2022 Entitlement Offer. Following the transaction, Mr David Argyle maintained his level of shareholding in TMH while Mr Gavin Argyle increased his. These actions demonstrate Mr David Argyle and Mr Gavin Argyle coming together to pursue or influence a strategy for TMH.
162. The removal of Mr Sanger also served the interests of both Mr David Argyle and Mr Gavin Argyle. Mr Sanger's funding strategy posed a risk that the Argyle shareholding may be diluted and Mr Sanger's post merger integration strategy contradicted the values of the Argyle family. We infer that his removal further evidences the shared goal or purpose of Mr Gavin Argyle and Mr David Argyle of maintaining control of TMH and controlling or influencing TMH's board composition or the conduct of its affairs. In our opinion, it does not matter which of Mr David Argyle and Mr Gavin Argyle initiated the process to remove Mr Sanger - we infer that there was a meeting of minds that steps would be taken (by one or both of them, as necessary) to remove Mr Sanger.
163. First, Mr Gavin Argyle told Mr Sanger that he was to be removed. Mr Sanger's responsibilities, in particular in relation to the re-financing, were subsequently revoked. There was resistance from another board member about Mr Sanger's removal at such a critical time for the business. Following an investigation by Mr Gavin Argyle, together with CIP personnel, Mr Gavin Argyle alleged certain misconduct by Mr Sanger. Again, other board members (and some senior members of GCA staff) questioned the procedures for the handling of the misconduct allegations, as well as their veracity. Around this time, with the assistance variously of Mr Gavin Argyle, Mr Pismiris and Ms Van Leeuwarden, Mr David Argyle first served the Re-election Letters and then served a formal section 249D notice for the removal of Mr Sanger as a director.

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164. Mr David Argyle submitted that *“Mr David Brian Argyle and Mr Gavin Argyle’s actions were pursuant to separate but parallel goals and purposes.... Mr David Brian Argyle’s actions are purely motivated from his position as a major shareholder which independently resulted in separate albeit similar actions to that of Mr Gavin Argyle.”*
165. UIL submitted that *“the timing and sequence of events surrounding the removal of Mr Sanger as managing director of [TMH] where there was coordination of, or otherwise a highly coincidental sequence of, events including the issue of a section 249D notice to remove Mr Sanger as managing director followed by the Board removing Mr Sanger as managing director without any impartiality or shareholder participation”* supports a finding of association between Mr David Argyle and Mr Gavin Argyle. We agree.

#### Conclusion on association between Mr David Argyle and Mr Gavin Argyle

166. The application alleged that Mr David Argyle and Mr Gavin Argyle have been associates since TMH listed in September 2016.
167. ASIC RG 128 deals with collective action by investors wishing to cooperate in relation to their investments. It contrasts investors expressing views and promoting appropriate discipline in decision-making, and investors controlling decision-making.<sup>34</sup>
168. Considering the whole of the material, and drawing appropriate inferences, we consider that Mr David Argyle and Mr Gavin Argyle have an agreement, arrangement or understanding for the purpose of controlling or influencing the composition of TMH’s board or for the purpose of controlling or influencing the conduct of TMH’s affairs, including financing, and that this commenced no later than 9 August 2022.
169. Alternatively, we consider that Mr Gavin Argyle was acting, or was proposing to act, in concert with Mr David Argyle in relation to TMH’s affairs, from no later than 9 August 2022.
170. Mr Gavin Argyle submitted that *“there is insufficient evidence for the Panel to make a finding that an association between Gavin Argyle and Mr David Argyle existed before the date of the 2022 Entitlement Offer Booklet (5 September 2022). Instead, if the Panel is to find an association, then that association can only have arisen sometime after 5 September 2022.”* We disagree. We consider the text message from Mr Gavin Argyle to Mr Sanger on 9 August 2022, which we infer relates to the GCA acquisition before it was made public, to be evidence of Mr Gavin Argyle’s and Mr David Argyle’s common knowledge of relevant facts and shared goal with regards to the GCA acquisition. Therefore, we consider that Mr Gavin Argyle and Mr David Argyle became associated by no later than 9 August 2022.
171. Having said that, we do not rule out that Mr David Argyle and Mr Gavin Argyle may have been associated in relation to TMH from much earlier. There are indications of this, for example:

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<sup>34</sup> ASIC Regulatory Guide 128: *Collective Action by Investors* (RG 128) at [RG 128.3]

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- (a) in conversations around the IPO of TMH and the appointment of Mr Gavin Argyle as Mr David Argyle's nominee on the board of TMH
- (b) in conversations from February or March 2022, when Mr David Argyle raised with Mr Gavin Argyle his concerns about the decline in TMH's profits for the preceding period and
- (c) in Mr Gavin Argyle's several references to his father, during a GCA staff meeting (see paragraph 75), showing the influence of Mr David Argyle on Mr Gavin Argyle's professional and personal life.

172. Noting that our enquiries were primarily focused around the events that took place from August 2022 onwards, we do not have evidence providing us with a sufficient level of satisfaction<sup>35</sup> to make a finding as to their association at an earlier time.

173. There is no evidence that anything has changed to result in the parties disassociating. *Association - Mr Pismiris and each of Mr David Argyle and Mr Gavin Argyle*

174. Mr Pismiris has a long history of working with Mr Gavin Argyle and has a significant number of common shareholdings and directorships with both Mr David Argyle and Mr Gavin Argyle.

175. Mr Pismiris has, or had, shareholdings or is, or acted as, a director in a number of companies in which Mr David Argyle has, or had, shareholdings or is, or acted as, a director (9 public companies<sup>36</sup> including TMH and 5 private companies<sup>37</sup>).

176. Mr Pismiris and Mr Gavin Argyle were both directors of CIP between 2005 and 2007 and according to publicly available information<sup>38</sup>, they founded CIP together in 2005 along with a third co-founder. Additionally, Mr Pismiris has, or had, shareholdings or is or acted as a director in a number of companies in which Mr Gavin Argyle has, or had, shareholdings or is, or acted as, a director (6 public companies<sup>39</sup> including TMH and 6 private companies<sup>40</sup>, including CIP).

177. Mr Pismiris submitted that *"he and Mr David Brian Argyle have never been common directors of any company"* and that to the extent any circumstances may exist or have existed in which him or either of Mr Gavin Argyle and Mr David Argyle was a director and him or either of Mr Gavin Argyle and Mr David Argyle was a shareholder, *"those circumstances were purely coincidental"*. He also submitted that he was a shareholder of four companies which had previously engaged CIP to raise

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<sup>35</sup> *Briginshaw v Briginshaw* [1938] HCA 34

<sup>36</sup> Mr Gavin Argyle also has, or had, shareholdings or is or acted as a director in four of these public companies

<sup>37</sup> Mr Gavin Argyle also has, or had, shareholdings or is or acted as a director in all five of these private companies

<sup>38</sup> Mr Pismiris submitted that CIP was established in August 2004 and that he became a director of CIP in 2005

<sup>39</sup> Mr David Argyle also has, or had, shareholdings or is or acted as a director in four of these public companies

<sup>40</sup> Mr David Argyle also has, or had, shareholdings or is or acted as a director in five of these private companies

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capital and that as a result, Mr David Argyle and Mr Gavin Argyle may have become shareholders, which would have occurred independently of Mr Pismiris.

178. Mr David Argyle submitted that our findings might be misconstrued as they may include two entities in which his son, Mr David Anthony Argyle, was a former shareholder. We confirm that we excluded these entities in our analysis.
179. A number of these common interests are also historical. We nevertheless consider that the extent of these common interests and the length of the relationship are indicia of a close operating environment between Mr Pismiris, Mr Gavin Argyle and Mr David Argyle. An association is not necessarily undermined by examples of separate investments or dealings.<sup>41</sup>
180. Mr Pismiris was intimately involved in the steps that led to the removal of Mr Sanger. He spoke to Mr David Argyle after receipt of the Re-election Letters during which he *“advised David Argyle to prepare a section 249D notice”* and Mr David Argyle realised that this was *“the best path forward to achieve his objective ...for the removal of Jagdip Sanger as a director.”* CIP submitted that *“[s]ubsequently, most likely on 28 November 2022, either Gavin Argyle or Ms Van Leeuwarden handed copies of the signed letters to Alec Pismiris in a meeting.”*
181. Mr Pismiris subsequently drafted the section 249D notice, which he emailed to Ms Van Leeuwarden to coordinate execution by Mr David Argyle. Further, when he noticed the signed section 249D notice contained typographical errors, Mr Pismiris took it upon himself to fix those errors and reattach Mr David Argyle’s signature *“which due to the international time zone difference Alec Pismiris later confirmed with David Argyle”*.
182. TMH submitted that Mr David Argyle did not have *“any secretarial support and being aware of Alec Pismiris’ experience as a company secretary asked for Alec Pismiris’ assistance to prepare a section 249D notice”*.
183. UIL submitted that *“normally a chairperson would not correct a section 249D notice to ensure it is valid”* and that *“Mr Pismiris’ conduct is not consistent with that of an independent chairperson. Mr Pismiris advising a shareholder regarding the valid lodgement of a section 249D notice and a shareholder asking a chairperson for advice regarding the removal of a director is not commercial nor independent”*.
184. We agree with UIL’s submission. Regardless of Mr David Argyle’s need for secretarial support, we would have expected an independent chairman of a listed company to suggest to a shareholder that they seek independent advice rather than engaging in assisting that shareholder to take steps to remove a managing director. We consider that Mr Pismiris was not independent of Mr Gavin Argyle and Mr David Argyle and was actively assisting them to remove Mr Sanger as a director.
185. Mr Chenu submitted that, at the TMH board meeting on 28 November 2022, the directors discussed at length concerns raised by Mr Gavin Argyle in relation to Mr Sanger around an intra-group transfer of money. By the end of the board meeting,

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<sup>41</sup> Bentley Capital Limited 01R [2011] ATP 13 at [79]

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only Mr Gavin Argyle remained concerned about the matter. Despite this, at the TMH board meeting held on 30 November 2022, Mr Pismiris voted (together with Mr Gavin Argyle) in favour of revoking Mr Sanger's appointment as managing director and suspending all his employment duties, effective immediately. The minutes do not record any discussion of the basis for this decision.

186. Mr Pismiris submitted that *"in the period between the two relevant Board meetings on 28 November 2022 and 30 November 2022, significant new information came to light which heightened Mr Pismiris' existing concerns about Mr Sanger's conduct and led him to form the view that Mr Sanger's appointment as Managing Director should be revoked immediately."* We did not place any weight on this submission, noting that Mr Pismiris did not identify the *"significant new information"* in these or any earlier submissions despite abundant opportunities to do so.
187. The involvement of Mr Pismiris in the events surrounding the section 249D notice and his subsequent vote in favour of Mr Sanger no longer being managing director of TMH indicates in our view that Mr Pismiris acted in concert with each of Mr David Argyle and Mr Gavin Argyle in relation to the composition of TMH's board by no later than 29 November 2022.
188. We had preliminary concerns about potential acquiescence by Mr Pismiris with Mr Gavin Argyle and Mr David Argyle prior to 29 November 2022, given he did not appear to challenge the lack of disclosure in the 2022 Entitlement Offer Booklet or Mr Gavin Argyle's *"investigation"* into the affairs of GCA despite concerns raised by GCA employees (see paragraph 129). However, evidence provided by Mr Chenu suggests that both Mr Pismiris and Mr Chenu were advocating for a due process to be followed with regards to Mr Gavin Argyle's *"investigation"*. Mr Chenu also submitted that the view he expressed on 10 November 2022 to Mr Gavin Argyle, being that Mr Sanger should remain in place while the refinancing of the GCA acquisition was incomplete, was, to his recollection, supported by Mr Pismiris. Therefore, we were not satisfied that an association between Mr Pismiris and each of Mr Gavin Argyle and Mr David Argyle existed prior to the date of Mr Pismiris' involvement in the preparation of the section 249D notice.
189. Separately, we consider that TMH (which was represented in these proceedings by Clayton Utz who received instructions from TMH principally via Mr Pismiris) has not been full and frank in responding to our enquires in these proceedings (see also paragraphs 280, 281 and 296 below).
190. For example, when responding to our enquiries as to whether Mr David Argyle had raised any concerns in relation to Mr Sanger's conduct in the 12 months prior to the date of the requisition notice, TMH submitted that Mr David Argyle did not do so, then submitted *"[f]ollowing the receipt of the section 249D notice by TMH, Alec Pismiris contacted David Argyle and briefly spoke with him on the evening of 29 November 2022 regarding the section 249D notice and David Argyle's rationale for serving the section 249D notice. Alec Pismiris recalls that David Argyle informed him that he had served the section 249D notice on TMH given his concerns about Jagdip Sanger's performance as Managing*



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*Director, TMH's financial position and its ability to secure debt to refinance the vendor loan under the Loan Note."*

191. This response invites us to believe that Mr Pismiris only spoke to Mr David Argyle about Mr Sanger's performance and proposed removal after the section 249D notice was lodged, suggesting independence from the process. However, in response to our further enquiries, it became apparent that Mr Pismiris not only spoke to Mr David Argyle before he lodged the section 249D notice, he advised him to lodge the section 249D notice, drafted the section 249D notice for him and affixed Mr David Argyle's signature to it after making corrections and before providing it to the TMH board.
192. We infer that the submissions detailed in paragraph 190 above reflect an attempt to conceal the involvement of Mr Pismiris in the section 249D notice process, which is consistent with Mr Pismiris having an association with each of Mr Gavin Argyle and Mr David Argyle.
193. For the reasons above, from no later than 29 November 2022, we consider that Mr Pismiris was acting in concert with each of Mr David Argyle and Mr Gavin Argyle in relation to TMH's affairs, namely the composition of its board and became associated with each of them under section 12(2)(c).

#### *Association - Mr Gavin Argyle and the employees of CIP*

194. Ms Linney is employed by CIP as an Executive Assistant to Mr Gavin Argyle and has held that role since 1 July 2021. Mr Rosenal is employed by CIP as a General and Investment Manager and has held that position since 30 August 2021.
195. Ms Linney and Mr Rosenal were sub-underwriters to the 2022 Entitlement Offer for sub-underwriting amounts of \$370,460 each representing 1,089,588 shares each. The 2022 Entitlement Offer Booklet did not disclose that two CIP employees were sub-underwriting a portion of CIP's subscription obligation.
196. On 28 September 2022, following the close of the offer on 14 September 2022, TMH paid CIP an underwriting fee of \$851,463.
197. On 30 September 2022, CIP transferred \$640,000 to TMH *"in payment on behalf of Eric Rosenal and Kasey Linney of the subscription amounts payable by Eric Rosenal and Kasey Linney for the shortfall shares placed to them by TMH in their capacity as the respective obligations of subscribers to the placement."*
198. On 6 October 2022, Ms Linney and Mr Rosenal each received a placement of 941,176 new TMH shares for \$320,000 each. CIP submitted, in relation to the subscription amounts paid on their behalf, that *"the loans are made available as part of the employment benefits provided by CIP to its employees"*. CIP submitted that the loans provided by CIP to Ms Linney and Mr Rosenal are pursuant to written agreements and that the loans are not secured and bear interest at 2.5%.
199. For each of Ms Linney and Mr Rosenal, we were provided with a copy of a letter dated 30 October 2022 and only signed by Mr Gavin Argyle on behalf of CIP. Both letters were in identical form but for their recipients. The letters each referred to a

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loan of "\$320,000 for shares into The Market Herald Limited on the 30/09/2022" and earlier loans for acquisitions of shares in two other ASX listed companies in much smaller amounts and dated "28/09/2021" and "22/11/2021". The letters also stated that "[t]hese loans carry a 2,5% interest per annum from their respective drawdown date, must be paid in cash within 5 years and are governed by Western Australian Law".

200. In response to our preliminary findings that the loans were wholly undocumented when made, Mr Rosenal submitted that "*it is ultimately the choice of the parties to decide which format of contract suits them and is appropriate to the specific situation that they decide to formalise*" and that "*[t]his loan document gets updated when required... The Panel was given the latest updated version of the document.*"
201. Given the loan for the acquisition of shares in TMH was the most recent of three loans for the acquisition of shares, the "*latest updated version of the document*" dated 30 October 2022 would have been created for the purpose of documenting that loan, which occurred on 30 September 2022. We therefore still consider that the loans were wholly undocumented when made given we were not provided with any contemporaneous documentation.
202. Each of the two employees of CIP committed a significant amount of money (\$320,000 each). While they had two other investments for which they had been lent funds, these were of a significantly smaller magnitude.
203. Mr Gavin Argyle submitted that "*the arrangements are consistent with arrangements that CIP has had with previous employees of CIP whereby CIP provides funds by way of loan to employees to invest in companies undertaking capital raising arranged or managed by CIP should the employee wish to do so. These employment arrangements may be viewed as generous on CIP's part, but as a privately owned and controlled company CIP is entitled to be generous.*" He denied any arrangement or understanding with the employees.
204. In our view, it is surprising that the loans were not documented when made and that, once the documentation was provided, it consisted of only a very short letter, which was not countersigned by the relevant employee and did not contain key terms and conditions that parties acting at arm's length would usually expect, for example the frequency of any repayments and whether leaving CIP would constitute an event of default or otherwise. We see no commercial basis for this lack of formality.
205. We note the following transactions with respect to TMH shares:
  - (a) on 6 October 2022, Mr Rosenal and Ms Linney each received 941,176 placement shares in TMH
  - (b) on 11 October 2022, Ms Linney disposed of 550,000 TMH shares on market
  - (c) on 13 October 2022 (being T+2 from 11 October 2022), Mr David Argyle (through Zero Nominees) acquired 523,944 TMH shares on market
  - (d) on 18 October 2022, Mr Rosenal disposed of 550,000 TMH shares on market and
  - (e) on 20 October 2022 (being T+2 from 18 October 2022), GAB (Mr Gavin Argyle) acquired 550,000 shares on market.

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206. Mr David Argyle submitted that he was unaware of the existence and quantity of TMH shareholdings held by the CIP employees prior to these proceedings and that his acquisition of 523,944 TMH shares on market on 13 October 2022 occurred while he had a standing buy-order with his broker from 28 September 2022 until it was removed on 10 November 2022.
207. Mr David Argyle submitted that TMH has a *“tightly held share register and the shares of TMH [are] thinly traded”* and that he *“traded on only 5 occasions as a result of this standing buy-order due to low selling volume.”* Indeed, between 28 September 2022 and 11 October 2022, the maximum daily trading volume reached by TMH was 64,644 shares. On 11 October 2022, Ms Linney sold 550,000 TMH shares and Mr David Argyle acquired 523,944 TMH shares on 13 October 2022 (T+2). On 18 October 2022, Mr Rosenal sold 550,000 TMH shares and GAB (Mr Gavin Argyle) acquired 550,000 TMH shares on 20 October 2022 (T+2).
208. In our view, the pattern of trading is unusual and remarkably coincidental. Due to relatively low trading volumes on and around this time, we infer that Mr David Argyle and Mr Gavin Argyle acquired the shares sold by the employees.
209. When asked whether there were any agreements or understandings affecting the CIP employees’ ability to deal with the TMH shares held in their name, the submissions from the CIP employees were virtually identical in their format and content. UIL submitted that this was *“demonstrative of their lack of independence”*.
210. Mr Rosenal submitted in response that *“anyone considering this as a “demonstrative lack of independence” ... would no doubt come to the ground-breaking realisation that colleagues talk to each other, especially in a very small company, with three employees, like CIP is. Thus, when the Panel sends the same questions, at roughly the same time, to two people working in the same organisation and about the same matter, it is very likely that these two people (out of three), who are in the exact same situation... will have some obvious similarity in their submissions.”* (original emphasis)
211. Mr Rosenal also submitted that *“the fact that two colleagues discuss and decide to sell the same number of shares is not prohibited by any laws”*.
212. While the similarity in submissions may be explainable in the circumstances, coincidences and patterns in trading may be relevant circumstances that the Panel will take into consideration when finding an association.
213. Considering the whole of the material, and drawing appropriate inferences, we consider that, as a result of the share purchase arrangements with CIP employees of TMH shares and the subsequent partial sell-down of those shares, from no later than 6 October 2022:
- (a) Mr Gavin Argyle had an agreement, arrangement or understanding with each of Ms Linney and Mr Rosenal with respect to their respective holdings of TMH shares for the purpose of the conduct of TMH’s affairs and is associated with each of them under section 12(2)(b) or
  - (b) alternatively, Mr Gavin Argyle was acting, or proposing to act, in concert, with each of Ms Linney and Mr Rosenal with respect to their respective holdings of

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TMH shares for the purpose of the conduct of TMH's affairs and is associated with each of them under section 12(2)(b).

214. This agreement, arrangement or understanding, or concerted action, had material benefits for:
- (a) the employees, who made a profit on the sale<sup>42</sup> and
  - (b) Mr David Argyle and Mr Gavin Argyle, who could not have acquired over one million more TMH shares under the placement without shareholder approval under ASX Listing Rule 10.11 and who, as a result of the acquisitions, became entitled to additional shares under the 2023 Entitlement Offer.
215. This coordination of selling and buying of TMH shares also demonstrates a shared goal or purpose between Mr Gavin Argyle and each of Ms Linney and Mr Rosenal.
216. Despite disposing of 550,000 shares each in October 2022, the CIP employees acted as sub-underwriters of the 2023 Entitlement Offer, increasing their sub-underwriting commitments to \$550,000 (from \$370,460 under the 2022 Entitlement Offer). It appears, based on CIP's submissions, that CIP intended to fund these underwriting commitments pursuant to employment arrangements it has with its employees. The CIP employees did not ultimately acquire any shortfall shares due to the level of take up from TMH shareholders and their position in the shortfall allocation waterfall. However, in the circumstances, we are not satisfied that the association between Mr Gavin Argyle and each of Ms Linney and Mr Rosenal has ended.

#### *Association - Mr David Argyle and Ms Rebecca Argyle*

217. Ms Rebecca Argyle is the daughter of Mr David Argyle. She has been living at the same address as Mr David Argyle for about 10 years.
218. She is also an investor in TMH, having been an investor in Report Card Pty Ltd, along with Mr David Argyle, and acquiring a 4.58% interest in TMH in TMH's IPO. Ms Rebecca Argyle submitted "*My shares at IPO were from the vending of Report Card into Hot Copper.*"
219. Ms Rebecca Argyle took up rights in a TMH entitlement offer in 2019 and in the 2023 Entitlement Offer. She submitted "*I decided to acquire shares at the rights issue in 2019 and 2023 because having done my own evaluations, I concluded it was a rational investment.*"
220. However, her subscriptions to the 2019 and 2023 entitlement offers were funded by Mr David Argyle. She submitted "*In the 2019 rights issue, my father paid for my shares directly to Hotcopper Holdings Limited. The only arrangement is for me to pay my father back when convenient. In the 2023 rights issue, my father told me Mr Gavin Argyle made the payment to TMH for my shares as part of his loan repayment to my father. The only arrangement is for me to pay my father back when convenient.*"

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<sup>42</sup> On 11 October 2022 when Ms Linney sold her shares, TMH shares traded between \$0.39 and \$0.40. On 18 October 2022 when Mr Rosenal sold his shares, TMH shares traded at \$0.41. In each case, this is significantly above the \$0.34 subscription price under the 2022 Entitlement Offer

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221. In respect of the 2023 Entitlement Offer, in February 2023, by way of set off in partial repayment of his loan from his father, Mr Gavin Argyle paid TMH the amount of \$6,183,912.18, comprising:
- (a) \$5,755,560.12 for the subscription by Mr David Argyle in respect of his entitlement to 16,928,118 shares under the 2023 Entitlement Offer and
  - (b) \$428,352.06 for the subscription by Ms Rebecca Argyle in respect of her entitlement to 1,259,859 shares under the 2023 Entitlement Offer.
222. Mr Gavin Argyle submitted:
- “The payment of \$6,183,912.18 for 18,187,977 shares under the 2023 Entitlement Offer was made by arrangement between Gavin Argyle and David Argyle with the funds paid directly to TMH. The purpose of the arrangement was to facilitate receipt by David Argyle of payment for the loan and the effective payment by him and Rebecca Argyle for their entitlements to shares under the 2023 Entitlement Offer in a manner whereby there was no risk of loss of funds due to any change in the exchange rate for A\$ and £ (David Argyle being resident in the United Kingdom)”*
223. The amount of Ms Rebecca Argyle’s subscription represents a significant loan that is undocumented (Ms Rebecca Argyle submitted that “[a]ll agreements are verbal so there are no written agreements”) and repayable to her father at her convenience.
224. Mr David Argyle submitted that a loan between a father and a daughter was not unusual and was not “*indicative of an association and Mr David Brian Argyle did not loan the funds to Ms Rebecca Argyle with the intention she would hold TMH shares on his behalf.*”
225. We disagree. A loan is a structural link and is a factor the Panel will look to when determining whether an association exists. It is particularly relevant when the loan is made by a substantial shareholder of a company to another shareholder, to whom they are related, in order to enable them to acquire additional shares in that same company.
226. Based on Mr Gavin Argyle’s submission, he appears to have accepted that Mr David Argyle was paying Ms Rebecca Argyle’s subscription given that no documentation was provided to indicate any arrangement between Mr Gavin Argyle and his sister in relation to her entitlement subscription. We consider this evidence of close familial ties (see also paragraph 72 above).
227. Ms Rebecca Argyle submitted that living with her parents allowed her to help them with aging and difficult medical issues and did not mean she was incapable of making her own investment decisions. She submitted “*I am astonished that the panel would make a leap of assuming that I was merely a yes-woman being used by my father based on family connection and place of residence. My MBA from Yale University, my business and banking career have simply been disregarded on an apparent assumption that I have been able to be manipulated for my father’s financial benefit*”.
228. The fact that Ms Rebecca Argyle is an educated and skilled professional does not preclude her from being associated with her father in relation to TMH.

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229. Mr Sanger submitted that although Ms Rebecca Argyle was a significant shareholder in TMH, he had never met her and had never had any query of any kind from her, nor did the investor relations teams to his knowledge, which he submitted was *“unusual as without exception those significant shareholders in the Company who are not associated with, or are clients or [sic], Mr Gavin Argyle, contact me often and ask the typical questions that investors ask of management”*. Mr Sanger also submitted *“In my view, the conclusion is that she may be briefed on the merits of the Company as an investment by either Mr Gavin Argyle or Mr David Argyle, which is not inconsistent with them being associated.”*
230. Mr David Argyle submitted that *“there has been no evidence put forward by the parties to the proceedings to demonstrate a shared goal or purpose exists or can be inferred between Mr David Brian Argyle and Ms Rebecca Argyle”*. Mr David Argyle also noted that Ms Rebecca Argyle’s shareholding *“has dropped since her initial shares were granted on the vending of her Report Card shares at the time of TMH’s IPO”*, which was *“entirely inconsistent”* with the alleged shared goal of Mr David Argyle and Mr Gavin Argyle and that there was *“no substantive evidence which would suggest there is a ‘relevant agreement for the purpose of controlling or influencing the composition of a company’s board or the conduct of its affairs’<sup>43</sup>”*. Mr David Argyle also submitted that there was no pattern of common investments and dealings between Ms Rebecca Argyle and Mr David Argyle who *“have had no more than 2-3 common investments throughout their lives. In recent history, their investments in TMH are the only common investment”*.
231. In our preliminary view, a serious question was raised about whether Ms Rebecca Argyle possibly held her TMH shares on behalf of Mr David Argyle and whether, as a result of the family connections, history of involvement, and funding of her investment, she was an associate of Mr David Argyle in relation to TMH.
232. However, Ms Rebecca Argyle was not a party to these proceedings and although she answered our questions, her involvement was limited and so was our access to her evidence. From the large volume of material received in response to our briefs and preliminary findings, there was insufficient material for us to establish, even with proper inferences being drawn, that Ms Rebecca Argyle and Mr David Argyle had an agreement, arrangement or understanding for the purpose of controlling or influencing the composition of TMH’s board or the conduct of TMH’s affairs or that Ms Rebecca Argyle and Mr David Argyle were acting in concert in relation to TMH’s affairs.

#### Disclosure and other issues

##### *2022 Entitlement Offer*

233. In our view, the association between Mr Gavin Argyle and Mr David Argyle should have been disclosed to the market (section 671B) and in the 2022 Entitlement Offer Booklet. We have no reason to believe that the parties have become disassociated.

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<sup>43</sup> *Tigers Real Coal Limited* [2014] ATP 2 at [31]

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234. In the 2022 Entitlement Offer Booklet there is a specific reference that Mr David Argyle and Mr Gavin Argyle are not associated:
- “David Argyle and Gavin Argyle are not considered "associates" as defined under the Corporations Act and as such their shareholdings are not aggregated in accordance with section 606 of the Corporations Act.”*
235. TMH submitted that, in order to make this statement, it had relied on substantial shareholding notices which did not disclose any association between Mr David Argyle and Mr Gavin Argyle and that *“TMH has been advised verbally in the past by Gavin Argyle that he and David Argyle are not associates of each other in relation to TMH”*. It further submitted that *“TMH is entitled to, and it is reasonable for an ASX listed company to, rely on the information available to it and form an opinion of association based on that information. Other than conducting a search of ASIC’s public register of companies to show common directorships... TMH’s only option was to rely on the confirmation from Gavin Argyle to support the information publicly disclosed by each or David Argyle and Gavin Argyle as substantial shareholders of TMH”*.
236. TMH, in a later submission, stated that *“TMH considers it would be unreasonable to expect any ASX listed company such as TMH to have demanded, and been provided with, the same level of information as the Panel, given TMH lacks the authority to compel such information. Therefore, TMH continues to submit that there are no disclosure deficiencies with regard to the Offer Booklets”*.
237. We reject TMH’s submissions. Given the statement positively asserted that Mr David Argyle and Mr Gavin Argyle were not associated, the TMH board should have made further enquires to verify this, including making direct enquires of Mr David Argyle and Mr Gavin Argyle to understand the nature and extent of the relationship between them.<sup>44</sup> Without making these enquiries, the TMH board nonetheless signed-off on a statement explicitly stating that Mr David Argyle and Mr Gavin Argyle are not associates to be included in a capital raising document. In our view this amounts to a substandard level of enquiry, especially in circumstances where it would not have been difficult to make enquiries, particularly, of a current board member. In any event, the Panel’s power to declare circumstances to be unacceptable is very wide and does not require the Panel to decide that anyone caused the relevant circumstances or carries any blame for them. A state of affairs may be unacceptable due to inadvertence, and despite the best of intentions. Whether or not TMH knew about any of the associations, the lack of disclosure in the 2022 Entitlement Booklet (and the 2023 Entitlement Booklet – see below) is unacceptable with regards to the effect it had on the operation of an efficient, competitive and informed market.
238. We also note that the control effect disclosed did not combine the interests of Mr David Argyle and Mr Gavin Argyle. This also, in our opinion, is misleading.

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<sup>44</sup> Noting that there were indications of an association between Mr David Argyle and Mr Gavin Argyle even prior to 9 August 2022, which could have alerted TMH (see paragraph 171)

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239. The 2022 Entitlement Offer Booklet stated that the underwriter (CIP) entered into separate sub-underwriting agreements with six sub-underwriters which aggregated to a total of \$9,240,920 and that “[t]he Company understands that the Current Sub-underwriters... are not Related Parties of the Company”. The six sub-underwriters included (among others) substantial shareholder SG Hiscock and CIP employees Ms Linney and Mr Rosenal.
240. Mr Gavin Argyle submitted that “it is neither legally necessary nor a usual disclosure for an entitlement offer document to disclose the names of sub-underwriters except in the case of sub-underwriters who might acquire control of the company as a result of the sub-underwriting”.
241. Given the connections between Mr Gavin Argyle (a director of TMH), CIP (the underwriter controlled by Mr Gavin Argyle) and Ms Linney and Mr Rosenal (sub-underwriters and both employed by CIP), we consider that the sub-underwriting arrangements with Ms Linney and Mr Rosenal should have been disclosed in the 2022 Entitlement Offer Booklet.
242. On 19 September 2022, TMH announced that the 2022 Entitlement Offer had closed having received valid applications for approximately 81% of all new shares offered under the entitlement offer and that shortfall shares had also been taken up under the shortfall offer. The announcement further stated that remaining shortfall shares had been “subscribed for by sub-underwriters in accordance with the Company Shortfall dispersion strategy and the Underwriting Agreement”.
243. Section 3.5(d)(iii) of the 2022 Entitlement Offer Booklet stated that “the balance of any remaining Shortfall Shares must be subscribed for by the Underwriter or the Underwriter must arrange for institutional investors (who are not current shareholders or Related Parties of the Company) to subscribe for the remaining Shortfall Shares”. TMH submitted that all shareholders who applied for shortfall shares received their full entitlement and that “TMH then placed the remaining shortfall, in consultation with CIP who was engaged as the lead manager and partial underwriter of the 2022 Entitlement Offer, to institutional investors who were not current shareholders or related parties of TMH”. However, 240,000 shortfall shares were allocated to an existing shareholder and 941,176 shortfall shares were allocated to each of Ms Linney and Mr Rosenal who we do not consider could properly be characterised as “institutional investors” given they are individuals and full-time employees of CIP. Accordingly, despite TMH’s submissions and representations to the market, we consider these allocations were not made in accordance with the dispersion strategy described in the 2022 Entitlement Offer Booklet.
244. Of the total 8,557,060 shortfall shares to be allocated, 8,317,060 shortfall shares were placed by TMH to clients and employees of CIP. In evidence, Mr Sanger stated, having looked at the list of names of the ‘unrelated’ sub-underwriters, that apart from one, “every one of those names has an association, friendship or business relationship with the Argyles.”
245. On the other hand, SG Hiscock who had committed to sub-underwrite the 2022 Entitlement Offer up to \$500,000, was told by CIP that there were no shortfall shares



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to allocate to it because the offer had been subscribed to 81% and it was only partially underwritten by CIP to 80%.

246. TMH submitted that “[t]he allocation of the shortfall was consistent with the dispersion strategy outlined in the 2022 Entitlement Offer Booklet, and the shortfall was allocated to independent third parties.” Mr Gavin Argyle submitted that “the Panel considers that the 2022 Entitlement Booklet gave the impression that the shortfall would be allocated fairly to independent third parties. Gavin Argyle disagrees with this view... Nowhere in the 2022 Entitlement Offer Booklet was it stated or represented that shortfall would only be allocated to independent third parties (i.e. third parties independent of CIP or TMH).”
247. We find these submissions difficult to reconcile. Given the broad discretion granted to the TMH board, under the 2022 Entitlement Offer Booklet, to prevent certain shortfall allocations to any sub-underwriters, we consider that SG Hiscock not receiving any shortfall shares may have been within the scope of the dispersion strategy. However, for the reasons outlined above, we consider that TMH’s disclosure on 19 September 2022 that the remaining shortfall shares had been “subscribed for by sub-underwriters in accordance with the Company Shortfall dispersion strategy and the Underwriting Agreement” was inaccurate.

#### Vendor Loan

248. On 5 January 2023, the Vendor Loan was renegotiated, essentially such that the initial pre-payment amount was not required and the loan was to be repaid in full by 31 March 2023. On 16 January 2023, TMH announced that the Vendor Loan was renegotiated again including by an extension for repayment in full until 31 May 2023 “on commercial terms”. The announcement did not disclose that the extension was granted on the condition that “TMH will undertake an Equity Raise (as defined in the 2023 Amendment Letter) of approximately A\$15,500,000 on or before 28 February 2023 and then use the net proceeds towards repaying no less than A\$15 million.”
249. TMH submitted that “the material terms of the Vendor Loan had been disclosed in accordance with TMH’s continuous disclosure obligations under ASX Listing Rule 3.1, and any potential requirement to disclose the condition arose purely as a consequence of the possible delay to the 2023 Entitlement Offer as a result of the Application.”
250. The reference to “commercial terms” in the ASX announcement dated 16 January 2023 is, in our view, vague at best and TMH did not provide any evidence that the material terms of the Vendor Loan had otherwise been disclosed to the market.
251. We consider that the market has not been adequately informed, or informed in a timely way, by TMH regarding the 2023 Entitlement Offer being a condition to the extension of the Vendor Loan.

#### 2023 Entitlement Offer

252. In section 3.6 of the 2023 Entitlement Offer Booklet, under the heading “Possible dilutive effect of the Entitlement Offer”, the booklet states “the Underwriter has entered into separate sub-underwriting agreements with 13 sub-underwriters (**Current Sub-underwriters**), which aggregate to a total of \$15,529,387.23, amounting to 100% of the Underwritten Amount.” (original emphasis)

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253. The 2023 Entitlement Offer was fully underwritten by Canaccord. Canaccord put in place 13 sub-underwriters. There were 9 'unrestricted' sub-underwriters and 4 'restricted' sub-underwriters. The 'restricted' sub-underwriters were CIP, GAB (Mr Gavin Argyle), Mr David Argyle and Zero Nominees (Mr David Argyle). Limits were placed on the 'restricted' sub-underwriters (as well as holders of more than 20%) participating in the shortfall and bookbuild.
254. In section 3.7 of the 2023 Entitlement Offer Booklet, under the heading "Effect on control of the Company" there is a table identifying (among other things) that the shareholdings of Mr David Argyle (37%) and Mr Gavin Argyle (6.4%) would not change following completion of the 2023 Entitlement Offer, regardless of the amount of shortfall but on the assumption that they take up their respective entitlements under the 2023 Entitlement Offer. Despite this, Mr Gavin Argyle actually did increase his relevant interest in TMH under the 2023 Entitlement Offer by exercising 438,159 rights acquired in the renounceable market TMH established for the offer. The capacity for Mr Gavin Argyle to increase his relevant interest in this way was not disclosed in the 2023 Entitlement Offer Booklet.
255. TMH submitted that it *"had not been informed by Gavin Argyle of any decision by himself or GAB to acquire additional rights or the number of any such rights"* and that *"companies are not, nor could it be reasonable to expect them to be, required to analyse a range of possibilities that may occur in the context of an entitlement offer and to then include disclosure based on some hypothetical possibility"*. We consider the situation to be different here. Mr Gavin Argyle, as a director of TMH, approved the 2023 Entitlement Offer Booklet and had the opportunity to raise the possibility of his acquiring additional rights. The other TMH directors could have also asked Mr Gavin Argyle to confirm his intentions, knowing that Mr Gavin Argyle had acquired 5,060,000 rights in the renounceable market TMH established for the 2022 Entitlement Offer (in addition to the 3,240,000 rights he was entitled to and exercised as part of the pro-rata offering). The lack of transparency among TMH directors is concerning and in any event we do not accept it as an excuse to the lack of disclosure.
256. TMH submitted that *"the 2023 Entitlement Offer Booklet adequately discloses that there is no potential increase in voting power in either Gavin Argyle as a result of CIP's (or GAB's) sub-underwriting and the terms imposed on CIP (and GAB) under the sub-underwriting agreement, nor David Argyle."*
257. In the same way as for the 2022 Entitlement Offer Booklet, the aggregated interests of Mr David Argyle and Mr Gavin Argyle have not been combined and in our view this is misleading.
258. In the 2023 Entitlement Offer Booklet the 4 'related' sub-underwriters (see paragraph 253) were identified but not the other 9 'unrelated' sub-underwriters.
259. CIP submitted that this was sufficient because none *"can or will acquire a relevant interest in more than 19.99% of the issued Shares"*. SG Hiscock submitted *"...without knowing the identity of the sub-underwriters and the proposed allocation policy, shareholders do not know whether additional shares may be allocated to the Argyles or their associates, or other related parties of [TMH]."* TMH disagreed. It submitted (reiterating an earlier

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submission) that *“it is not required nor market practice to disclose the identity of sub-underwriters other than those who are related parties or who would acquire a relevant interest in excess of 19.99% of the issued shares in a listed company.”*

260. However, at least 2 of the undisclosed sub-underwriters are associates of Mr Gavin Argyle, namely the CIP employees. UIL submitted that the CIP employees were not *“subject to any of the restrictions imposed on unrelated shareholders such as the Applicant...”*.
261. TMH submitted that, absent the Panel’s conclusion with regards to association, *“it would not have been necessary for their identities to be disclosed as sub-underwriters in the 2023 Entitlement Offer”* and that *“the sub-underwriting commitments of Kasey Linney and Eric Rosenal were so immaterial that they did not warrant disclosure in the 2023 Entitlement Offer Booklet”*. Regardless of the materiality of Ms Linney and Mr Rosenal’s sub-underwriting commitments, the market was misinformed with regards to the aggregate relevant interest in TMH shares held by Ms Linney and Mr Rosenal and their associate, Mr Gavin Argyle. In our view, their identities should have been disclosed.
262. Also, the purpose of the 2023 Entitlement Offer was *“to finance part of the A\$60.1 million required to be repaid under the [vendor loan].”* The announcement of the 2023 Entitlement Offer on 24 January 2023 did not mention the condition that TMH raise approximately \$15,500,000 on or before 28 February 2023 and use the net proceeds towards repaying no less than \$15 million, although it stated the intended use of the funds. Nor did the 2023 Entitlement Offer Booklet. TMH submitted that *“the fact that the 2023 Entitlement Offer was structured to be fully underwritten by an independent third party, Canaccord, and sub-underwritten in the manner disclosed in the 2023 Offer Booklet provided additional certainty of the completion of the 2023 Entitlement Offer prior to 28 February 2023...”* and that *“[a]t the time that the 2023 Entitlement Offer Booklet was prepared and released to the ASX, information relating to the condition of the extension of the repayment of the Vendor Loan... was not material information required to be disclosed in the 2023 Entitlement Offer Booklet”*. In our view, notwithstanding TMH’s confidence in the success of the 2023 Entitlement Offer, the condition was material information and should have been disclosed, at the latest, in the 2023 Entitlement Offer Booklet.
263. There was no information in the 2023 Entitlement Offer Booklet about how the balance of the funds needed for the GCA acquisition was to be obtained. TMH submitted that *“[t]here was not any scenario envisaged by TMH where the Vendor Loan would not be repaid”* and that it was not able to include information on how the balance of funds was to be obtained with certainty given the confidential nature of discussions with various financiers. While we did not expect TMH to disclose the details of confidential information and the parties involved in relation to the repayment of the remainder of the Vendor Loan, we consider that some information about how a company expects to meet a current liability of this size is material in the context of a capital raising and should have been disclosed.
264. The initial letters of sub-underwriting commitment dated 21 January 2023 signed by two of the ‘restricted’ sub-underwriters, GAB and CIP, did not prohibit them from

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applying for TMH shortfall shares in excess of their entitlements under the 2023 Entitlement Offer, despite what was stated in the 2023 Entitlement Offer Booklet.

265. Of the 13 sub-underwriters, there were only these 2 incorrect letters. This error was not picked up by the signatories or the underwriter until our brief asked about it. The letters were then replaced with updated versions on 17 February 2023. Canaccord submitted that the letters were issued “*Due to an inadvertent clerical error which was noticed when preparing these submissions*”.<sup>45</sup> UIL submitted that the “*coincidence*” was telling. Mr Gavin Argyle submitted that a lack of coincidence would mean that “*Canaccord would deliberately draft sub-underwriting commitment letters in a manner to benefit GAB, CIP or Gavin Argyle*” and would have engaged in deceptive and misleading conduct and given false evidence to the Panel. Given our other findings in relation to the association between Mr Gavin Argyle and Mr David Argyle, we do not consider it is necessary to make a finding on this issue, although the coincidence did give us pause.
266. In our view, the disclosure to the market and in the 2023 Entitlement Offer Booklet is misleading for the reasons above.

#### Extension of time

*Extension of time for application*

267. Under section 657C(3):

*An application for a declaration under section 657A can be made only within:*

- (a) 2 months after the circumstances have occurred; or*
- (b) a longer period determined by the Panel*

268. We sought submissions from the parties on whether we should extend time under section 657C(3) for the making of the application.

269. UIL submitted that “*in its view, it is not strictly necessary for the Panel to exercise its discretion to extend the period of time for the Application to be made*” and that, if the Panel decided to exercise its discretion under section 657C(3), it would be justified with regards to the following circumstances:

- (a) “the relevant circumstances in this matter are the undisclosed associations... and the misleading and deceptive information stated in the 2022 and 2023 Entitlement Offer Booklets;*
- (b) the circumstances are of a sufficiently serious nature such that the Panel would not be exercising its discretion lightly;*
- (c) the interlinked nature, seriousness and extent of the circumstances only became known to the Applicant in the lead up to the 2023 Entitlement Offer given the sequence of events that occurred so rapidly in the period from November 2022 to February 2023. There are also several circumstances that have become apparent only during the course of the Panel Proceedings; and*

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<sup>45</sup> We accepted, based on Canaccord’s submission, that it was an inadvertent error on their part

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(d) *the Applicant does not believe any party was prejudiced by the perceived delay, but that the Applicant would be unfairly prejudiced if an extension were not granted.*"

270. Mr David Argyle submitted that the Panel should not grant the extension of time, submitting that to the extent UIL was "*genuinely concerned about an association between Mr David Argyle and Mr Gavin Argyle, it was a concern that they had held for a long period of time*" and that "*the Applicant delayed, for its own strategic benefit, in bringing the application to the Panel*".
271. ASIC submitted that "*in allegations of undisclosed associations, it is commonplace that the circumstances may not come to light until after the conduct has occurred and as circumstances demonstrating patterns of behaviour emerge.*"
272. We accept UIL's submission that several circumstances of a serious nature only became apparent after they occurred, including during the course of these proceedings. We also agree with ASIC's submission which applies to the relevant circumstances.
273. We considered carefully the principle that the Panel's discretion to extend time should not be exercised lightly. However, in light of the above and given the market continued not to be informed of the aggregate relevant interest in TMH shares held by the associated parties, and given the size of their voting bloc (over 44%), we considered that it was appropriate for us to extend time for UIL's application to the date on which it was made.

#### *Extension of time for declaration*

274. Under section 657B:

*The Panel can only make a declaration under section 657A within:*

- (a) *3 months after the circumstances occur; or*  
(b) *1 month after the application under section 657C for the declaration was made;*  
*whichever ends last. The Court may extend the period on application by the Panel.*

275. Having considered the factors relevant to an application to Court under s657B,<sup>46</sup> we considered that an application for extension of time under s657B was warranted. We sought an extension of time from the Federal Court under s657B, which was granted until 19 May 2023.
276. The Court ordered (among other things) that:  
*"Pursuant to ss 657B and 70 of the Corporations Act 2001 (Cth), and subject to further order, the time within which the plaintiff, comprising the sitting Panel of the Takeovers Panel constituted under s 184 of the Australian Securities and Investments Commission Act 2001 (Cth) (Panel), may make a declaration under s 657A of the Corporations Act, in relation to the affairs of The Market Herald Limited, be extended to 19 May 2023."*
277. An order of confidentiality in respect of certain annexures was also made.

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<sup>46</sup> *Re Takeovers Panel* [2002] FCA 1120, *Palmer Leisure Coolum Pty Ltd v Takeovers Panel* [2015] FCA 1498

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278. We acknowledge the parties' attitude in relation to the Court application, namely that each party either consented to, or did not oppose, the extension.

#### Other matters

279. As a commercial tribunal, the Panel aims for the timely and cost-effective completion of matters while obtaining the best available information<sup>47</sup>. In order for it to achieve these objectives, the Panel relies on the cooperation of parties and their legal advisers in being forthcoming with relevant information in a timely manner and being direct in their dealings with the Panel. Here, we believe that some of the parties and their legal advisers were uncooperative and showed a lack of candour that prolonged proceedings unnecessarily, as detailed below. We were also disappointed that the legal advisers for TMH would not meaningfully engage with us on our concerns regarding their leave to appear, other than to deny any potential overlap and dismiss repeatedly the existence of any 'legal or commercial conflict' arising from their concurrent representation of TMH in these proceedings and Mr Gavin Argyle and GAB in a separate matter against Mr Sanger.

280. First, the minutes of TMH's board meetings on 30 November and 14 December 2022 were initially redacted when provided in response to the brief. The redaction was made without prior compliance with rule 11(1) of the Procedural Rules, which TMH promptly acknowledged and apologised for. Unredacted minutes were subsequently provided to the Panel executive and, after discussion, agreed by TMH to be provided to the parties and the Panel.

281. TMH submitted that *"the redacted parts of the minutes were not relevant to the questions being asked of TMH by the Panel in its brief dated 15 February 2023 and that those areas only became relevant during the Panel proceedings subsequently"*. This was separately reiterated to the Panel by Clayton Utz (legal advisers to TMH) who stated that *"[t]hese redactions relate to matters confidential to TMH and its Board, and which are outside the scope of the Panel's Brief and the proceedings. As such, the areas redacted are not relevant to the Panel proceedings or the Panel's inquiries under these proceedings"*. Contrary to the representations made by TMH and Clayton Utz, in our view, the redacted sections of the minutes of 30 November 2022 contained information directly relevant to our inquiries (including that Mr Chenu had abstained from voting on the resolution to remove Mr Sanger<sup>48</sup> and that Mr Gavin Argyle had assumed some executive duties as alleged in the application<sup>49</sup>). Accordingly, we consider the representations made by TMH and Clayton Utz to be misleading. When asked whether the redactions were reasonable and appropriate, Clayton Utz submitted that they were at the time they were made and reaffirmed its earlier submissions. We do not consider that the redactions were reasonable and appropriate given the direct proximity of the redacted materials to the issues in question. We reiterate the Panel's expectation, set out in LV Living Limited<sup>50</sup>, that *"parties... be forthright and open in*

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<sup>47</sup> Takeovers Panel Procedural Rules 2020 (Cth), Rule 6(1)

<sup>48</sup> See paragraph 153

<sup>49</sup> See paragraphs 42(f) and 155

<sup>50</sup> [2005] ATP 5 at [126]

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*their dealings with the Panel, and to respond to its questions in the spirit in which those questions are asked - erring on the side of more disclosure of salient facts rather than responding purely on the basis of a narrow reading of the Panel's questions".*

282. Second, an increased level of procedural complexity was introduced into these proceedings because TMH refused our request to allow Mr Sanger to answer our questions. The result was the need for us to convene a conference, which had to be adjourned, and summons Mr Sanger to attend and answer questions. TMH submitted that it *"took advice from its long-standing independent employment lawyers"* and that *"TMH believes in all the circumstances that it was in the best interests of the company and its shareholders to follow that advice"*. Given the confidentiality obligations in the Procedural Rules, to which parties undertake to comply with, and the Panel's power to summon witnesses under section 192 of the ASIC Act, it is unclear to us why TMH believed it was in the best interests of the company and its shareholders not to allow Mr Sanger to answer our questions. It is clear, however, that this delayed the proceedings and led to additional time to consider the matter and the parties incurring additional costs.
283. Third, Clayton Utz acted as the legal representative of TMH in these proceedings and advised TMH during the actions taken to remove Mr Sanger from his role (for example, on the validity of the section 249D notice). At the time of receiving TMH's Notice to Become a Party, which we accepted and which included our consent to Clayton Utz acting as TMH's legal representative, we were unaware that Clayton Utz also acted for GAB (Mr Gavin Argyle) in relation to loans to Mr Sanger.
284. Mr Sanger's lawyers advised us in rebuttal submissions to our brief that Mr Sanger had received correspondence from Clayton Utz in relation to a separate matter *"which could be construed as an attempt to discourage Mr Sanger from providing a response to the Takeovers Panel"*.
285. We initially asked TMH whether the fact that Clayton Utz are the solicitors for Mr Gavin Argyle and GAB in relation to a separate matter compromises the information available to us in these proceedings. TMH rejected this suggestion submitting that the matter between Mr Gavin Argyle, GAB and Mr Sanger in respect to which Clayton Utz are advising only Mr Gavin Argyle and GAB (and not TMH) *"is entirely separate and is not in any way related to these Panel proceedings, the matters the subject of these Panel proceedings nor the information provided to, or exchanged between, the Panel and all parties and non-parties to these proceedings"*.
286. In conference, we asked Mr Sanger to provide the correspondence he had received from Clayton Utz on behalf of GAB. He submitted that the matter had started some weeks before the Panel proceedings and that he had been informed by GAB that Clayton Utz would be in contact with him. However, he submitted he had no communication from Clayton Utz until he received a letter from them on 15 February

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2023, the date of our brief, informing him that he was in default of a loan he had received from GAB.<sup>51</sup>

287. Based on this further information, in our preliminary findings, we raised as a concern whether acting as GAB's lawyers should be considered a potential conflict preventing Clayton Utz from acting for TMH. In response Clayton Utz submitted on its own behalf that:

*"It is well established that the principles relating to legal conflicts of interest are based on the proposition that a law practice that is in possession of confidential information of an existing or former client should not act on behalf of another client where there is a 'real and sensible possibility' of the interests of the first or former client being prejudiced as a consequence of the disclosure of that information to the other client. There was not a 'real and sensible possibility' of the interest of GAB being prejudiced by the disclosure of information relating to those proceedings to TMH. TMH had no interest in that matter and is not a party to the matter in respect in which Clayton Utz is acting for GAB.*

*Further, there was no communication between the lawyers acting for TMH in relation to the proceedings and the lawyers acting for GAB. The former were not aware of the email dated 15 February 2023 to which the Panel refers until it was produced in these proceedings.*

*In addition, there is no possibility of a commercial conflict between the interests of TMH in relation to these proceedings and the interest of GAB in relation to its matter."*

288. We understand that firms may be satisfied that they can serve each client after assessing the fiduciary duties owed to each client. The Panel has its own considerations when deciding under section 194 of the ASIC Act to grant leave to a party to be legally represented in proceedings. These considerations are tied to our objectives including to act in a timely and less formalistic manner while seeking to obtain the best available information.
289. In granting leave for legal representation, the Panel considers how it might be assisted by the legal advisers seeking to represent a party. In this regard, for example, the Panel prefers for parties to be represented by their commercial lawyers who have been advising them in the relevant transaction before the Panel.<sup>52</sup> The Panel will consider whether any potential conflict of interest may compromise the information that is made available to it or disrupt proceedings if the conflict requires the legal advisers to cease acting during the course of proceedings. Here, we were particularly concerned that Mr Gavin Argyle (on behalf of GAB) was instructing Clayton Utz in a matter against another party to the Panel proceedings at the same time as Clayton Utz was representing TMH in the Panel proceedings. This placed Clayton Utz in a position where its representation of GAB in the other matter could, for example, be used to influence that other party in the Panel proceedings.

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<sup>51</sup> Mr Gavin Argyle submitted that there had been other correspondence between Mr Sanger and Mr Rosenal leading up to the letter from Clayton Utz that made it apparent that the Clayton Utz letter was not motivated by the Panel proceedings

<sup>52</sup> Panel's Procedural Guidelines, 9.3(d)



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290. Mr Gavin Argyle submitted that *“neither he nor GAB has provided any instruction or direction to Clayton Utz in relation to GAB’s loan to Mr Sanger with the objective, intention or purpose of threatening or pressuring Mr Sanger in relation to these proceedings or with the intention of dissuading Mr Sanger from giving evidence in these proceedings”*. This may be the case, and Mr Sanger acknowledged that this was a personal matter not connected to the proceedings. Nevertheless, the potential existed for the correspondence to be perceived as a threat in relation to these proceedings.
291. We reiterated our concerns arising from Clayton Utz acting contemporaneously for both TMH and GAB, albeit in separate matters, and gave Clayton Utz a further opportunity to address our concerns that the representation of GAB in the other matter could be used to influence that other party in the Panel proceedings.
292. Clayton Utz reconfirmed that the dual representations would not be considered, and did not give rise to, a conflict of interest preventing it from acting for TMH. We asked why it did not disclose to the Panel when submitting TMH’s Notice to Become a Party, that it was acting for GAB in relation to loans to Mr Sanger. Clayton Utz submitted that *“on the basis of a fair review of the Application by UIL, there was nothing to suggest at that point in time that the issues which have arisen in relation to Jagdip Sanger would have arisen... [t]here was nothing in the Application and at the time that TMH submitted a notice to become a party that gave rise to a requirement to disclose that Clayton Utz was acting for GAB in a matter entirely separate from these proceedings”*. Given the application specifically refers to Mr Sanger as an interested party and refers to the section 249D notice being issued by Mr David Argyle to remove Mr Sanger as managing director *“to benefit his son”*, we consider that a conflict should have been considered as a possibility from the start. Even accepting that Mr Gavin Argyle was excluded from giving Clayton Utz instructions on behalf of TMH in relation to the Panel proceedings, we would have expected (at the least) more candour from Clayton Utz about the relationship between Clayton Utz and GAB when the Notice to Become a Party was filed, noting that this may have impacted our consideration of the issue.
293. For example, had this potential conflict been disclosed at the time TMH’s Notice to Become a Party was submitted, we would have considered, and potentially sought submissions, as to whether to grant leave for TMH to be legally represented by Clayton Utz in these proceedings and, if so, whether leave should be subject to any conditions. The Panel is not required to, and does not always, grant leave to appear.<sup>53</sup>
294. Clayton Utz further submitted that it was *“deeply concerned that, despite an extensive series of submissions from both TMH and Clayton Utz which have established the position to the contrary, the Panel is appearing to disregard that compelling evidence and raise questions around a potential conflict of interest when no such legal or commercial conflict arises”*.

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<sup>53</sup> For example, the Panel refused leave for a law firm to appear for a party on conflict of interest grounds in *Avalon Minerals Limited [2013] ATP 11* at [130] to [146]

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295. We are also deeply concerned. Despite the fact that we engaged with Clayton Utz on this topic on several occasions, they failed to acknowledge their clear shortcomings in dealing with the Panel in relation to this matter.
296. Further, we are concerned about the fact that in this matter we needed to go back to the parties several times to get what was often basic information. For example, on 9 February 2023, the Panel executive contacted Mr Gavin Argyle and TMH (and TMH's legal representatives) separately via email requesting contact details for Mr David Argyle and Ms Rebecca Argyle who were both listed in the application as interested persons. TMH's company secretary responded that he would "*make enquiries seeking to obtain the contact information*" but that TMH was not at liberty to divulge personal information without the relevant party's consent. On 15 February 2023, we still did not have a response from TMH or Mr Gavin Argyle. We directed TMH's company secretary that he provide to us the contact details of Mr David Argyle and Ms Rebecca Argyle pursuant to regulation 16 of the ASIC Regulations and we obtained the relevant contact details the following day.
297. In addition, we note that in response to the second supplementary brief dated 14 March 2023, TMH provided us with a significant volume of documents (exceeding 400 pages), many of which could have been provided in response to our earlier enquiries, some of which were not relevant and all of which were uncatalogued. TMH submitted that "*if the Panel considers the documents provided by TMH in response to the second supplementary brief... could have been provided earlier, then the request for those documents that outlined the scope should have been worded more specifically in order to capture those documents.*" We reiterate our expectation that parties be forthright in their dealings with the Panel and adopt a reasonable approach when it comes to disclosure of issues which are relevant to the proceedings. We would have expected a more candid approach to disclosure than has been adopted by TMH. The iterative process that was required for us to obtain relevant information has unnecessarily elongated these proceedings and added to the costs.
298. These were not isolated instances of uncooperative behaviour. Other examples of some of the parties' conduct can be found throughout our reasons<sup>54</sup>, which contributed to us making costs orders along with other circumstances set out below<sup>55</sup>.

#### Declaration

299. It appears to us that the circumstances are unacceptable circumstances:
- (a) having regard to the effect that the Panel is satisfied they have had and are having on:
    - (i) the control, or potential control, of TMH or
    - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in TMH

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<sup>54</sup> See paragraphs 59, 107, 112, 148 to 149, 190 and 191

<sup>55</sup> See paragraphs 318 to 323

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- (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 and constitute a contravention of a provision of Chapter 6C.

300. 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

301. Following the declaration, we made the final orders set out in Annexure B. The Panel is empowered to make 'any order'<sup>56</sup> if 4 tests are met:

- (a) it has made a declaration under section 657A. This was done on 18 May 2023.
- (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. The parties had an opportunity to make submissions and rebuttal submissions in response to our supplementary brief on declaration and orders dated 22 April 2023, our second supplementary brief on declaration and orders dated 11 May 2023 and our supplementary brief on orders dated 25 May 2023. Each party made one or more submissions and rebuttals on our proposed orders.
- (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 given below.

302. Following the release of our statement of preliminary findings, Mr David Argyle submitted that if we made a declaration of unacceptable circumstances, we should only make the following orders which he submitted did not adversely affect other TMH shareholders:

- (a) an order restricting the exercise of voting rights attached to TMH shares for a period of 12 months (e.g. preventing Mr David Argyle and Mr Gavin Argyle from voting any TMH shares acquired in excess of their permitted creep allowance<sup>57</sup> in the period after they became associates)
- (b) an order restricting the acquisition of any further TMH shares by Mr David Argyle and Mr Gavin Argyle that would increase their voting power by more than 3% over a period of two years in reliance on the creep exception and

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<sup>56</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>57</sup> under section 611, item 9

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- (c) an order compelling full disclosure to TMH shareholders of the relationship between Mr David Argyle and Mr Gavin Argyle which the Panel considers should be a matter of public record.
303. We sought submissions on whether the final orders requested by UIL (see paragraph 39) or the remedial orders suggested by Mr David Argyle (described above) would remedy the unacceptable circumstances identified in the proposed declaration and, if not, what alternative orders would be appropriate.
304. We received a wide range of submissions from the parties concerning possible orders (including as to costs, which are discussed separately below).
305. In summary (among other things):
- (a) UIL submitted that we should make the final orders sought in its application, modified to reflect and address the effect of the associations between Mr Pismiris, Mr David Argyle and Mr Gavin Argyle and between Mr Gavin Argyle and the CIP employees found by the Panel.
  - (b) Mr Sanger submitted that we should make the final orders sought by UIL, subject to certain modifications and additions including that:
    - (i) divestment orders (or, alternatively, voting restrictions) be made in respect of all TMH shares acquired by the associates named in the declaration from the date the relevant association commenced (including all shares acquired by the named associates under the 2022 and 2023 Entitlement Offers)
    - (ii) the issue of whether any associations arose prior to the date found by the Panel remain open so that any party may make a further application to the Panel if further evidence that the association arose at an earlier time becomes available
    - (iii) the resources of TMH not be directed against him for the purpose of unduly preventing, inhibiting or penalising him from complying with his duties, and exercising his rights, as a shareholder and as a former officer of TMH, including in relation to his rights as an “eligible whistleblower” under TMH’s Whistleblower Policy and
    - (iv) that the resources of TMH not be directed against Mr Sanger’s partner (also previously employed by TMH) in an unrelated matter until that matter has been properly investigated and resolved.
  - (c) TMH submitted that any divestment order should only be made with respect to TMH shares acquired by Mr David Argyle and Mr Gavin Argyle in breach of section 606 following the date of association found by the Panel (of which there were none).
  - (d) Mr Gavin Argyle submitted that our orders should be limited to corrective disclosure as there was no evidence that any person’s interests have been adversely affected by the circumstances and no acquisitions of TMH shares had been made in breach of section 606. These submissions were endorsed by CIP.

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- (e) Mr David Argyle submitted that divestment orders would be inappropriate and unfairly prejudicial given there had been no breach of section 606, but that he would be willing to undertake to make any corrective disclosure required by the Panel and not to underwrite or sub-underwrite any rights issue outside of his direct entitlement for a period of two years. He also submitted that TMH may wish to provide an undertaking that it will appoint an independent director, with the appropriate skillsets, to fill a causal vacancy on the TMH board in order to address concerns raised by some parties in their submissions in relation to TMH's corporate governance.
- (f) Mr Pismiris submitted that any association between him, Mr David Argyle and Mr Gavin Argyle was not ongoing and therefore any order that would restrict his ability to acquire TMH shares or exercise voting rights in respect of his TMH shares would be inappropriate and unfairly prejudicial.

306. Mr David Argyle, Mr Gavin Argyle and TMH each strongly rejected the proposed additional orders sought by Mr Sanger (see paragraphs 305(b)(ii) to 305(b)(iv) above), submitting that they were largely or completely outside the scope of the Panel's proceedings and went beyond what was legitimately required to remedy the rights or interests of persons affected by the unacceptable circumstances. We agree and did not make any of those additional orders. Similarly, we consider that the scope of Mr Sanger's suggested divestment and voting restriction orders (see paragraph 305(b)(i)) was too wide, and would be unfairly prejudicial to Mr David Argyle, Mr Gavin Argyle and Mr Pismiris as there was no reasonable basis to prohibit them from retaining the benefit of and exercising the rights in respect of any TMH shares legitimately acquired under the 2022 and 2023 Entitlement Offers on the same terms as other TMH shareholders, once corrective disclosure had been made.

307. After considering the submissions on the potential orders, we ordered that:

- (a) the following shares representing 0.64% of TMH's total issued share capital be vested in the Commonwealth and sold on market by ASIC:
  - (i) 1,974,019 TMH shares held by Mr Gavin Argyle (through GAB) being:
    - (A) the number of TMH shares placed to Ms Linney and Mr Rosenal following the 2022 Entitlement Offer
    - (B) the number of TMH shares to which GAB became entitled under the 2023 Entitlement Offer as a result of its acquisition of 550,000 TMH shares in October 2022, two days after Mr Rosenal sold 550,000 TMH shares on market and
  - (ii) 87,324 TMH shares held by Mr David Argyle (directly or through Zero Nominees), being the number of shares to which Mr David Argyle became entitled under the 2023 Entitlement Offer as a result of his acquisition of 523,944 TMH shares in October 2022, two days after Ms Linney sold 550,000 TMH shares on market
- (b) corrective disclosure be made by each of Mr David Argyle, Mr Gavin Argyle, Mr Pismiris, Ms Linney, Mr Rosenal (**Relevant Parties**) and TMH

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- (c) no voting rights be exercised by any of the Relevant Parties in respect of the TMH shares acquired since the relevant association commenced (**Relevant Shares**) until 21 days after the corrective disclosure is made by the Relevant Party
  - (d) for 12 months from the date of our orders, none of Mr David Argyle, Mr Gavin Argyle and their respective associates, may acquire a relevant interest in TMH shares, except with the prior consent of the Panel or pursuant to a pro rata entitlement offer to all TMH shareholders to maintain (but not increase) the percentage ownership interest in TMH and
  - (e) TMH must appoint two independent directors to the board of TMH who are identified and selected in consultation with an independent recruitment consultant and report to us monthly on progress. For 12 months from the date of an appointment of an independent director, Mr David Argyle and Mr Gavin Argyle must not exercise any voting rights in respect of their Relevant Shares regarding any resolution for the removal of a director the subject of such appointment. If 6 months after the date of our orders (or such later date as we may reasonably consent to), TMH has not appointed at least two independent directors then, until TMH does so, Mr David Argyle, Mr Gavin Argyle and Mr Pismiris must not exercise their voting rights in respect of their Relevant Shares for so long as they are associated with any director of TMH and, in the case of Mr Gavin Argyle and Mr Pismiris, for so long as they are directors of TMH.
308. The divestment orders reduce the voting power of Mr David Argyle and Mr Gavin Argyle to that which it would have been but for the placement of shares to Ms Linney and Mr Rosenal which was made in circumstances that were unacceptable for the reasons identified in paragraphs 194 to 216 above. We consider that these divestment orders are appropriate to ensure that Mr David Argyle and Mr Gavin Argyle did not benefit from the unacceptable circumstances that, in the case of Mr Gavin Argyle, he directly contributed to, and in the case of Mr David Argyle, his associate (Mr Gavin Argyle) directly contributed to.
309. We consider that the corrective disclosure orders are appropriate to protect the interests of other TMH shareholders affected by the unacceptable circumstances who have not been fully and accurately informed of the various relationships of association, with the effect that those TMH shareholders have been unaware of the true identity of the controlling shareholders in TMH for some time, contrary to the principles in section 602(a) and section 602(b)(i). In light of this, and to allow sufficient time for TMH shareholders and the market to digest the effect of the associations, we consider it appropriate that a voting restriction apply in respect of the Relevant Shares until 21 days after the corrective disclosure has been made.
310. We consider that the orders restricting further acquisitions of shares by Mr David Argyle, Mr Gavin Argyle and their respective associates for a period of 12 months is appropriate to restore confidence in the market that no further unacceptable acquisitions of TMH shares will be made by the controlling shareholders during the relevant period. We consider that 12 months is a suitable period to achieve this

objective. Mr David Argyle submitted that he was prepared to provide an undertaking to make all the necessary disclosures to ASIC and TMH in the form and timeframe as directed by us and not underwrite or sub-underwrite any rights issue outside of his direct entitlement for a period of two years. We considered that the undertaking offered by Mr David Argyle did not address the unacceptable circumstances to our satisfaction and considered that our orders were more appropriate in serving the public interest. We also considered, in exercising our discretion not to accept the undertaking, that the offer was not particularly timely.<sup>58</sup>

311. Finally, we consider that the circumstances of this matter, including the disclosure issues identified in relation to the 2022 and 2023 Entitlement Offers and the removal of Mr Sanger through the collective actions of Mr David Argyle, Mr Gavin Argyle and Mr Pismiris in circumstances where their association had not been disclosed to TMH shareholders, demonstrates a significant shortcoming in corporate governance which we consider is only likely to be addressed by the appointment of independent directors. Having regard to the current composition of the TMH board (being Mr Pismiris, Mr Gavin Argyle, who we found to be associates and Ms Jensen, an executive director), we consider that the appointment of any less than two independent directors, one of which is to be appointed as the chair (which position is currently held by Mr Pismiris) would be unlikely to address the loss of independence on the TMH board as a result of the unacceptable circumstances. TMH submitted, in relation to an earlier iteration of the order whereby TMH would only be required to appoint one independent director, that it was prepared to give an undertaking to the effect of that order, subject to two amendments. Firstly, that a special purpose committee be formed to identify the candidate, comprising the full TMH board and Mr Logtenberg and secondly that TMH not be required to disclose the identity of particular candidates to the Panel until the appointment could be announced to the market. We considered that involving the full TMH board in the search for candidates would be contrary to the spirit of our order, which aimed at addressing the loss of independence of the board. Similarly, we considered that not knowing the identity of the candidates prior to their appointment would limit the effectiveness of our order.
312. We did consider the prejudice to Mr David Argyle, who is not a director of TMH, in having his voting rights restricted in the event TMH did not appoint two independent directors within 6 months (see paragraph 307(e)). We considered that, in light of the history of him acting in concert with his son and the fact that Mr Gavin Argyle was appointed as his father's nominee on the board, it was likely that Mr David Argyle would in fact be in a position to influence who came on the board of TMH and therefore it was appropriate that he be affected by the voting freeze in the event TMH did not comply with the order within 6 months.

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<sup>58</sup> Takeovers Panel Guidance Note 4: Remedies General, paras 39-40

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#### Costs orders

313. Section 657D(2)(d) empowers the Panel to make an order that it thinks is appropriate to determine who is to bear the costs of the parties to proceedings.
314. The Panel's approach to costs orders is guided by the following considerations:
- (a) the Panel's primary role is to resolve disputes expeditiously and informally
  - (b) a declaration relates to circumstances, not conduct, and may involve no finding of fault
  - (c) costs orders are the exception not the rule, so may not follow to a 'successful' party and
  - (d) a party is entitled to make, or resist, an application once without exposure to a costs order provided it presents a case of reasonable merit in a businesslike way.<sup>59</sup>
315. Costs orders may be awarded against a party if it:
- (a) presented a case that was not arguable or made unsubstantiated assertions
  - (b) delayed or obstructed proceedings, abused the process or unreasonably refused to negotiate
  - (c) sought an unmeritorious review or put material before a review Panel that it failed to put before the initial Panel
  - (d) wasted time on a particular issue or elongated proceedings (partial costs referable to the additional expenses may be appropriate in this case) or
  - (e) failed to comply with a direction under ASIC regulation 16(1) or Panel order (the costs of the other parties attributable to the failure may be ordered).<sup>60</sup>
316. Costs orders may adversely affect a person, provided it is not unfairly prejudicial.<sup>61</sup>
317. While we acknowledge that costs orders are the exception not the rule, after considering the submissions of the parties and the above factors, we determined to make costs orders requiring:
- (a) TMH to pay the fair and reasonable costs, as determined by the Panel, incurred by UIL, Mr Sanger and ASIC in connection with the conference conducted in these proceedings and
  - (b) TMH and Mr Gavin Argyle to pay a portion of the fair and reasonable costs, as determined by the Panel, otherwise incurred by UIL and Mr Sanger in connection with these proceedings.<sup>62</sup>

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<sup>59</sup> Takeovers Panel Guidance Note 4: Remedies General, para 28

<sup>60</sup> Takeovers Panel Guidance Note 4: Remedies General, para 29

<sup>61</sup> Takeovers Panel Guidance Note 4: Remedies General, para 5

<sup>62</sup> See paragraphs 20 to 22 of Annexure B



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Having regard to the reasons below, we do not consider these costs orders to be unfairly prejudicial.

318. It took more than 3 months from the date of the application for us to make a declaration of unacceptable circumstances. Notwithstanding the tendency for association proceedings to continue for longer than other proceedings, we consider these proceedings were extended as a result of the approach to the proceedings adopted by TMH and Mr Gavin Argyle as detailed below.
319. We consider that TMH hindered the expeditious and informal resolution of these proceedings by unreasonably refusing to waive Mr Sanger's confidentiality obligations for the purpose of responding to our enquiries which resulted in us having to issue a summons and convene a conference to receive his evidence (see paragraphs 53 to 59). This created additional procedural complexity resulting in further costs being incurred by the parties which we consider could have been avoided, or greatly minimised, had it not been for the position taken by TMH. In these circumstances, we consider that TMH should pay the fair and reasonable costs incurred by UIL, Mr Sanger and ASIC in connection with the conference. While Mr David Argyle, Mr Gavin Argyle and CIP also incurred unnecessary costs in connection with the conference, we did not consider it was appropriate to order that TMH reimburse them for these costs given their contribution to the unacceptable circumstances.
320. We also consider that the proceedings were elongated due to the lack of candour and cooperation from Mr Gavin Argyle and TMH in responding to our enquiries which, among other things, made ascertaining seemingly simple factual matters a complex exercise. For example, we had to issue a brief, supplementary brief and second supplementary brief to properly understand the circumstances surrounding the issue of the section 249D notice by Mr David Argyle and the extent to which Mr Gavin Argyle and Mr Pismiris were involved with this process.
321. In the case of Mr Gavin Argyle, we consider that his responses to our enquiries sought to downplay his involvement with the issue of the section 249D notice. For example, he submitted that "*there was no actual discussion between Gavin Argyle and David Argyle concerning the actual section 249D requisition notice before it was received by TMH*" [emphasis added] and that "*[T]he decision of David Argyle to serve the section 249D requisition notice was a decision that he made alone*". We subsequently discovered through further questioning that his role was far more significant than he led us to believe (see paragraphs 148 to 151).
322. Similarly, when responding to our enquiries as to whether Mr David Argyle had raised any concerns in relation to Mr Sanger's conduct in the 12 months prior to the date of the section 249D notice, TMH submitted that "*[f]ollowing the receipt of the section 249D notice by TMH, Alec Pismiris contacted David Argyle and briefly spoke with him on the evening of 29 November 2022 regarding the section 249D notice and David Argyle's rationale for serving the section 249D notice. Alec Pismiris recalls that David Argyle informed him that he had served the section 249D notice on TMH given his concerns about Jagdip Sanger's performance as Managing Director, TMH's financial position and its*

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*ability to secure debt to refinance the vendor loan under the Loan Note.*" This response invited us to believe that Mr Pismiris only spoke to Mr David Argyle about Mr Sanger's performance and proposed removal after the section 249D notice was lodged, suggesting independence from the process. However, in response to our further enquiries, it became apparent that Mr Pismiris not only spoke to Mr David Argyle before he lodged the section 249D notice, he advised him to lodge the section 249D notice, drafted the section 249D notice for him and affixed Mr David Argyle's signature to it after making corrections and before providing it to the TMH board.

323. Other examples of the uncooperative or unhelpful approach of TMH and Mr Gavin Argyle which we consider delayed proceedings and contributed to the increased costs of the parties is the redaction by TMH of board minutes that were relevant to our enquiries (see paragraphs 280 and 281), the reluctance of Mr Gavin Argyle and TMH to assist us to obtain contact details for Mr David Argyle and Ms Rebecca Argyle despite their obvious interest in the subject matter of the application (see paragraph 296) and the production of a significant volume of documents by TMH in response to our second supplementary brief (exceeding 400 pages), many of which could have been provided in response to our earlier enquiries, some of which were not relevant and all of which were uncatalogued (see paragraph 297) despite TMH seeking (and us granting) an extension of time of two business days for providing its submissions.
324. While we accept that parties are entitled to make, or resist, an application once without exposure to a costs order provided it presents a case of reasonable merit in a businesslike way, we do not consider the approach to responding to our enquiries of Mr Gavin Argyle and TMH satisfied this standard. In these circumstances, we considered TMH and Mr Gavin Argyle should pay a portion of the fair and reasonable costs incurred by UIL and Mr Sanger in these proceedings.<sup>63</sup> For the reasons set out in paragraph 319, we did not consider it was appropriate to make an order reimbursing Mr David Argyle, Mr Gavin Argyle and CIP for any costs in these proceedings.
325. Taking into account the parties' submissions and our commercial experience, we determined and fixed the amount of:
- (a) the fair and reasonable costs that TMH was required to pay to UIL, Mr Sanger and ASIC in relation to the conference and
  - (b) the portion of the fair and reasonable costs that TMH and Mr Gavin Argyle were required to pay to UIL and Mr Sanger in relation to other aspects of the proceedings,

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<sup>63</sup> We were minded to extend this order to cover a portion of the costs incurred by Mr Chenu in these proceedings. However, he confirmed to the executive that he did not incur any out-of-pocket costs in connection with the proceedings.

## **Takeovers Panel**

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being a total aggregate amount of \$87,500 (including GST) for TMH and a total aggregate amount of \$65,000 (including GST) for Mr Gavin Argyle.

**Karen Phin**

**President of the sitting Panel**

**Decision dated 18 May 2023 (declaration) and 8 June 2023 (orders)**

**Reasons given to parties 2 August 2023**

**Reasons published 23 August 2023**

## Takeovers Panel

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#### Advisers

Party	Advisers
UIL Limited	Thomson Geer
The Market Herald Limited	Clayton Utz
Mr David Argyle	Sparke Helmore Lawyers
Mr Gavin Argyle	Blackwall Legal LLP
Capital Investment Partners Pty Ltd	Blackwall Legal LLP
Mr Jagdip Sanger	Peloton Legal
Mr Alec Pismiris	Murcia Pestell Hillard Lawyers



**Australian Government**

**Takeovers Panel**

**Annexure A**

**CORPORATIONS ACT  
SECTION 657A  
DECLARATION OF UNACCEPTABLE CIRCUMSTANCES**

**THE MARKET HERALD LIMITED**

**CIRCUMSTANCES**

1. The Market Herald Limited (**TMH**) is an ASX listed company (ASX code: TMH). It listed on 13 September 2016 as HotCopper Holdings Limited (**HotCopper**).
2. Shareholders of TMH and their relevant interests in TMH voting shares<sup>64</sup> include:
  - (a) Mr David Brian Argyle (**Mr David Argyle**), directly and through Zero Nominees Pty Ltd - 36.92%
  - (b) UIL Limited - 23.11%
  - (c) Mr Gavin Argyle, through GAB Superannuation Fund Pty Ltd (**GAB**) - 6.47%
  - (d) Mr Jagdip Sanger - 4.92% and
  - (e) Mr Alec Pismiris, through ACP Investments Pty Ltd and Pismiris Holdings Pty Ltd - 0.98%.
3. On 26 August 2022, TMH announced to the market (among other things) the acquisition of Gumtree, Carsguide and Autotrader (**GCA**), funded by:
  - (a) a 2 for 5 pro rata renounceable entitlement offer of fully paid ordinary shares in TMH at an offer price of \$0.34 per new share to raise approximately \$26.6 million (**2022 Entitlement Offer**) and
  - (b) a vendor loan of approximately \$60.1 million to TMH by Adevinta Oak Holdings B.V. (**Vendor Loan**).
4. At this time, the directors of TMH were Mr Pismiris (Non-Executive Chairman), Mr Sanger (Managing Director), Mr Gavin Argyle (Non-Executive Director) and Mr Colin Chenu (Non-Executive Director).
5. The 2022 Entitlement Offer was partially underwritten to 80% by Capital Investment Partners Pty Ltd (**CIP**), a company controlled by Mr Gavin Argyle. CIP had entered into sub-underwriting agreements with 6 sub-underwriters for 43.41% of the underwritten amount, which included two CIP employees, being:
  - (a) Ms Kasey Linney, Executive Assistant to Mr Gavin Argyle at CIP and

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<sup>64</sup> as at 27 February 2023

## Takeovers Panel

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- (b) Mr Eric Rosenal, General and Investment Manager at CIP.
6. On 5 September 2022, TMH issued the 2022 Entitlement Offer booklet which:
- (a) did not disclose that the two CIP employees were sub-underwriting the offer and
- (b) stated (among other things) that *“David Argyle and Gavin Argyle are not considered ‘associates’ as defined under the Corporations Act and as such their shareholdings are not aggregated in accordance with section 606 of the Corporations Act”*.
7. On 19 September 2022, TMH announced that the 2022 Entitlement Offer had closed having received valid applications for approximately 81% of all new shares offered under the entitlement offer and that shortfall shares had also been taken up under the shortfall offer. The announcement further stated that remaining shortfall shares had been *“subscribed for by sub-underwriters in accordance with the Company Shortfall dispersion strategy and the Underwriting Agreement”*. In fact, the remaining shortfall shares were placed by TMH to clients and employees of CIP<sup>65</sup>, with one exception<sup>66</sup>.
8. On 6 October 2022, Ms Linney and Mr Rosenal each received a placement of 941,176 new TMH shares for \$320,000. CIP paid the subscription amounts on their behalf. This arrangement was described as being loans made by CIP to the employees pursuant to their employment arrangements. The loans were undocumented when they were made<sup>67</sup> and were unsecured.
9. Ms Linney disposed of 550,000 TMH shares on market 5 days after the placement. Mr David Argyle acquired approximately this number of shares at the same time.
10. Mr Rosenal disposed of 550,000 TMH shares on market 12 days after the placement. Mr Gavin Argyle acquired exactly this number of shares at the same time.
11. The Panel has inferred from trading volumes at the relevant times that Mr David Argyle and Mr Gavin Argyle acquired most of the shares sold by the CIP employees.
12. Also on 6 October 2022, TMH announced the completion of its acquisition of GCA.
13. During November 2022, Mr Gavin Argyle discussed with Mr David Argyle his options as a shareholder to requisition a meeting for the removal of a director. Following this discussion, Mr Gavin Argyle instructed a representative of CIP to draft and send Mr David Argyle an example of the type of letter that might be sent

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<sup>65</sup> Noting that the two CIP employees, Ms Linney and Mr Rosenal, are unlikely to be *“institutional investors”*, contrary to the dispersion strategy disclosed in the 2022 Entitlement Offer booklet that stated that the underwriter must subscribe for any remaining shortfall shares or arrange for institutional investors who were not current shareholders or related parties of TMH to do so

<sup>66</sup> 240,000 shortfall shares were allocated to an existing shareholder, contrary to the dispersion strategy disclosed in the 2022 Entitlement Offer booklet

<sup>67</sup> For Ms Linney and Mr Rosenal, the Panel was provided with a copy of letters addressed to each of them dated 30 October 2022 and only signed by Mr Gavin Argyle on behalf of CIP, which referred to a loan of *“\$320,000 for shares into The Market Herald Limited on the 30/09/2022”*

## Takeovers Panel

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by a shareholder who wished to request that a director stand for election at a general meeting.

14. On 27 November 2022, the representative of CIP sent Mr David Argyle drafts of two letters, each addressed to Mr Pismiris as Chairman of TMH, that requested an extraordinary general meeting of TMH be held for shareholders to consider the re-election of Mr Sanger and Mr Pismiris as directors. In her email, the CIP representative requested that the letters be signed and returned "*as soon as possible*". That evening, Mr David Argyle signed and returned the two letters to the CIP representative. He asked that the letters be given to Mr Gavin Argyle for him to give to Mr Pismiris "*as he knew they were meeting the day after*". In fact, Mr Pismiris only received the letters on 29 November 2022.
15. On 28 November 2022, at a board meeting of TMH, the directors discussed (among other things) concerns raised by Mr Gavin Argyle in relation to Mr Sanger around an intra-group transfer of money. By the end of the board meeting, only Mr Gavin Argyle remained concerned about the matter. During the board meeting, the directors also discussed concerns around the status of re-financing the Vendor Loan.
16. In the evening of 29 November 2022, Mr Pismiris contacted Mr David Argyle regarding his letters. During this discussion, Mr David Argyle "*realised the best path forward to achieve his objective was to issue the section 249D notice for the removal of Mr Sanger as a director*". Following this discussion, Mr Pismiris drafted, after Mr David Argyle requested assistance, a section 249D<sup>68</sup> notice and sent it to the CIP representative (copied to Mr Gavin Argyle) for "*Brian to sign*"<sup>69</sup> and requesting that it be returned that evening. The notice called for a general meeting at which a resolution was to be put for Mr Sanger to be removed as a director. On receiving the signed section 249D notice the next morning, Mr Pismiris recognised a typographical error in the notice, corrected it and then applied Mr David Argyle's electronic signature to the notice with his approval.
17. Later on 30 November 2022, Mr Gavin Argyle and Mr Pismiris (Mr Chenu abstaining) voted at a board meeting of TMH that Mr Sanger's "*appointment as managing director be revoked immediately*". Mr Sanger submitted that he was not informed of the meeting and he did not attend. At this meeting, each of Mr Gavin Argyle and Mr Pismiris were given some managerial responsibilities.
18. On 2 December 2022, TMH announced (among other things) that:
  - (a) Mr Sanger "*will no longer be Managing Director of the Company. Mr Sanger, however, remains a non-executive director of the Company*"
  - (b) Mr Sanger "*has been placed on leave*" and
  - (c) "*Non-Executive Chairman Mr Alec Pismiris and Non-Executive Director Mr Gavin Argyle will also increase their involvement to support [TMH] during this transition period.*"

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<sup>68</sup> Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth)

<sup>69</sup> Mr David Argyle's middle name is Brian and he is occasionally referred to by that name

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19. On 20 December 2022, TMH announced (among other things) that:
  - (a) *“Mr Jag Sanger has resigned as Managing Director with immediate effect”* and
  - (b) *“as a result of the resignation of Mr Sanger, the requisitioned Section 249D meeting announced on 1 December 2022 will no longer proceed.”*
20. In January 2023:
  - (a) Ms Twila Jensen was appointed as an executive director of TMH
  - (b) Mr Chenu resigned as a non-executive director of TMH and
  - (c) Mr Tommy Logtenberg, CEO and CFO of Gumtree, was appointed as interim CEO of TMH (which appointment has subsequently been confirmed).
21. On 16 January 2023, TMH announced that it had reached an agreement with Adevinta Oak Holdings B.V. to extend the repayment of the Vendor Loan to 31 May 2023 *“on commercial terms”*. The announcement did not disclose that the extension was conditional on TMH completing an entitlement offer on or before 28 February 2023 and using the net proceeds towards repaying no less than \$15 million of the Vendor Loan.
22. On 24 January 2023, TMH announced a 1 for 6 pro rata renounceable entitlement offer of fully paid ordinary shares in TMH at an offer price of \$0.34 per new share to raise approximately \$15.52 million (**2023 Entitlement Offer**) to pay down debt associated with the purchase of GCA. The offer was fully underwritten by Canaccord Genuity (Australia) Limited (**Canaccord**). Canaccord had entered into sub-underwriting agreements with 13 sub-underwriters for 100% of the underwritten amount, including Mr David Argyle, Mr Gavin Argyle, CIP and the two CIP employees.
23. On 2 February 2023, TMH issued the 2023 Entitlement Offer booklet which:
  - (a) disclosed that Mr David Argyle, CIP and Mr Gavin Argyle were related party sub-underwriters of TMH but did not disclose that the CIP employees were sub-underwriters
  - (b) stated (on certain assumptions) that the increase in voting power of Mr David Argyle (37%) and Mr Gavin Argyle (6.4%) would be zero
  - (c) unlike the 2022 Entitlement Offer booklet, did not include any statement regarding whether Mr David Argyle and Mr Gavin Argyle are associated and
  - (d) disclosed a dispersion strategy whereby ‘restricted persons’, being shareholders with a relevant interest of 20% or more in TMH shares and related parties of TMH, were prohibited from applying for TMH shortfall shares in excess of their entitlements under the 2023 Entitlement Offer. In fact, the letters of sub-



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underwriting commitment dated 21 January 2023 signed by 'restricted' sub-underwriters, GAB and CIP, did not contain that prohibition.<sup>70</sup>

24. Mr David Argyle and Ms Rebecca Argyle<sup>71</sup> each took up their full entitlement under the 2023 Entitlement Offer. Their aggregate subscription amounts, which were substantial, were paid to TMH by Mr Gavin Argyle. It was submitted by Mr Gavin Argyle that this payment was by way of set off in partial repayment of loan arrangements between Mr Gavin Argyle and Mr David Argyle.

#### **Association between Mr David Argyle and Mr Gavin Argyle**

25. Mr Gavin Argyle is Mr David Argyle's son. They share or have shared many connections, structural links and dealings.
26. Mr David Argyle and Mr Gavin Argyle have each owned shares in TMH since its IPO and have both increased their shareholdings over time. On 7 November 2016, following a request by Mr David Argyle, Mr Gavin Argyle was appointed as his nominee to the position of non-executive director of TMH (then HotCopper). They have discussions about the financial performance and management direction of TMH.
27. As Mr David Argyle's nominee, Mr Gavin Argyle was concerned to ensure that Mr David Argyle's core values and principles were reflected in the values and the direction of the TMH business, noting in a meeting of all GCA staff following the GCA acquisition that "*my dad is the largest shareholder and it puts extra responsibility on me in order to you know maintain corporate values and his values in the various business activities*".
28. Mr David Argyle appeared to have been briefed on the GCA acquisition before it was announced to the market. On 9 August 2022, in a text message which appears to relate to the GCA acquisition, Mr Gavin Argyle texted Mr Sanger saying "*...Dad is pleased and happy with the deal, so that's good...*".
29. Mr David Argyle was unhappy with the terms of the Vendor Loan when it was announced on 26 August 2022. In September 2022, Mr David Argyle expressed to Mr Gavin Argyle his concerns about the overall direction and management of TMH. During a similar discussion in November 2022, Mr David Argyle expressed his concern with the level of debt incurred by TMH and the progress of TMH in raising capital to repay the debt. During this discussion, Mr Gavin Argyle discussed with Mr David Argyle his options as a shareholder to requisition a meeting for the removal of a director.
30. The Panel considers that from no later than 9 August 2022 the conduct between Mr David Argyle and Mr Gavin Argyle in relation to TMH had a control purpose and effect that went beyond good corporate governance. The Panel considers that the following circumstances, among others, demonstrate actions taken in pursuit of a

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<sup>70</sup> Canaccord submitted that, when preparing submissions in response to a brief issued by the Panel, it noticed the inconsistency and the letters of sub-underwriting commitment for GAB and CIP were re-issued on 17 February 2023 to reflect the dispersion strategy described in the 2023 Entitlement Offer booklet

<sup>71</sup> Ms Rebecca Argyle is the daughter of Mr David Argyle and sister of Mr Gavin Argyle

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shared goal or purpose of Mr David Argyle and Mr Gavin Argyle to maintain the level of ownership control of Mr David Argyle, or the Argyle family in TMH:

- (a) the early briefing of Mr David Argyle on the GCA acquisition
- (b) the ability of CIP as underwriter to influence the dispersion of new shares under the 2022 Entitlement Offer
- (c) Mr David Argyle and Mr Gavin Argyle concurrently acquiring most of the TMH shares sold by the CIP employees shortly after those shares were placed to them in October 2022
- (d) steps taken to remove Mr Sanger including proposals for Mr Gavin Argyle to take an executive role at GCA, restrictions placed on Mr Sanger's executive functions and an investigation undertaken by Mr Gavin Argyle and CIP personnel into the conduct of Mr Sanger with the view to his removal and
- (e) Mr David Argyle's section 249D notice for the removal of Mr Sanger, the timing of the request and the assistance of CIP personnel and Mr Pismiris in the provision of the request.

31. Considering the whole of the material, and drawing appropriate inferences, the Panel considers that from no later than 9 August 2022:

- (a) Mr David Argyle and Mr Gavin Argyle have an agreement, arrangement or understanding for the purpose of controlling or influencing the composition of TMH's board or for the purpose of controlling or influencing the conduct of TMH's affairs, including financing, and are associated under section 12(2)(b) or
- (b) alternatively, Mr Gavin Argyle is acting, or was proposing to act, in concert with Mr David Argyle in relation to TMH's affairs and are associated under section 12(2)(c).

#### **Mr Pismiris and each of Mr David Argyle and Mr Gavin Argyle**

32. Considering the whole of the material, and drawing appropriate inferences, the Panel considers that as a result of his involvement with Mr David Argyle's section 249D notice and his subsequent vote in favour of Mr Sanger no longer being managing director of TMH, from no later than 29 November 2022, Mr Pismiris acted in concert with each of Mr David Argyle and Mr Gavin Argyle in relation to TMH's affairs, namely the composition of its board, and became associated with each of them under section 12(2)(c).

#### **Mr Gavin Argyle and each of Ms Linney and Mr Rosenal**

33. Considering the whole of the material, and drawing appropriate inferences, the Panel considers that as a result of the share purchase arrangements with CIP employees of TMH shares and the subsequent partial sell-down of those shares, from no later than 6 October 2022:

- (a) Mr Gavin Argyle has an agreement, arrangement or understanding with each of Ms Linney and Mr Rosenal with respect to their respective holdings of TMH

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shares for the purpose of the conduct of TMH's affairs and is associated with each of them under section 12(2)(b) or

- (b) alternatively, Mr Gavin Argyle is acting, or proposing to act, in concert with each of Ms Linney and Mr Rosenal with respect to their respective holdings of TMH shares for the purpose of the conduct of TMH's affairs and is associated with each of them under section 12(2)(c).

#### Conclusion on associations

- 34. There is insufficient material to establish whether any of the associations detailed above have ended.
- 35. Accordingly:
  - (a) shareholders in TMH, and the market, are not informed, and continue not to be informed, of the aggregate relevant interest in TMH shares held by the associated parties and
  - (b) there have been numerous contraventions of the substantial holder provisions in section 671B in relation to TMH.

#### Disclosure

- 36. The 2022 Entitlement Offer booklet did not disclose:
  - (a) the association between Mr David Argyle and Mr Gavin Argyle. However, it did include a statement that "*David Argyle and Gavin Argyle are not considered 'associates'... and as such their shareholdings are not aggregated in accordance with section 606 of the Corporations Act*", without TMH making appropriate inquiries to verify this statement
  - (b) the aggregated control effect of the 2022 Entitlement Offer by reason of the association and
  - (c) the sub-underwriting arrangements with employees of CIP.
- 37. The Panel considers that the market has not been adequately informed, or informed in a timely way, by TMH regarding the 2023 Entitlement Offer being a condition to the extension of the Vendor Loan.
- 38. The 2023 Entitlement Offer booklet did not disclose:
  - (a) the association of Mr David Argyle and Mr Gavin Argyle
  - (b) the association of Mr Pismiris and each of Mr David Argyle and Mr Gavin Argyle
  - (c) the association of Mr Gavin Argyle and each of Mr Rosenal and Ms Linney (who were again sub-underwriters of the offer)
  - (d) the aggregated control effect of the 2023 Entitlement Offer by reason of the associations
  - (e) the possibility that the voting power of Mr David Argyle and Mr Gavin Argyle could be increased by acquiring rights on market (which Mr Gavin Argyle did)

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- (f) that raising no less than \$15 million by 28 February 2023 under the 2023 Entitlement Offer was a condition to the extension for the repayment of the Vendor Loan and
- (g) information in relation to how TMH intended to fund the balance of the Vendor Loan.

#### **EFFECT**

39. It appears to the Panel that:

- (a) the acquisition of control over voting shares in TMH has not taken, and continues not to take, place in an efficient, competitive and informed market
- (b) the holders of TMH shares and the market in general has not known, and continues not to know, the identity of persons who may acquire a substantial interest in TMH.

#### **CONCLUSION**

40. 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 and are having on:
  - (i) the control, or potential control, of TMH or
  - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in TMH
- (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 and constitute a contravention of a provision of Chapter 6C.

41. 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 The Market Herald Limited.

**Tania Mattei**  
**General Counsel**  
**with authority of Karen Phin**  
**President of the sitting Panel**  
**Dated 18 May 2023**



**Australian Government**

**Takeovers Panel**

**Annexure B**

**CORPORATIONS ACT  
SECTION 657D  
ORDERS**

**THE MARKET HERALD LIMITED**

The Panel made a declaration of unacceptable circumstances on 18 May 2023.

**THE PANEL ORDERS**

**Divestment Order**

1. The Sale Shares are vested in the Commonwealth on trust for GAB and Mr David Brian Argyle.
2. ASIC must:
  - (a) sell the Sale Shares in accordance with these orders and
  - (b) account to GAB and Mr David Brian Argyle for the proceeds of sale, net of the costs, fees and expenses of the sale and any costs, fees and expenses incurred by ASIC and the Commonwealth (if any).
3. ASIC must:
  - (a) retain an Appointed Seller to conduct the sale and
  - (b) instruct the Appointed Seller:
    - (i) to use the most appropriate sale method to secure the best available sale price for the Sale Shares that is reasonably available at that time in the context of complying with these orders, including the stipulated timeframe for the sale and the requirement that none of the Relevant Parties may acquire, directly or indirectly, any of the Sale Shares
    - (ii) to provide to ASIC a statutory declaration that, having made proper inquiries, the Appointed Seller is not aware of any interest, past, present, or prospective which could conflict with the proper performance of the Appointed Seller's functions in relation to the disposal of the Sale Shares
    - (iii) unless the Appointed Seller sells Sale Shares on market, that it obtain from any prospective purchaser of Sale Shares a statutory declaration that the

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prospective purchaser is not associated with any of the Relevant Parties and

(iv) to dispose of all of the Sale Shares within 6 months from the date of its engagement.

4. TMH, GAB and Mr David Brian Argyle must do all things necessary to give effect to these orders, including:
  - (a) doing whatever is necessary to ensure that the Commonwealth is registered with title to the Sale Shares in the form approved by ASIC and
  - (b) until the Commonwealth is registered, complying with any request by ASIC in relation to the Sale Shares.
5. None of the Relevant Parties may, directly or indirectly, acquire any of the Sale Shares.
6. GAB and Mr David Brian Argyle must not otherwise dispose of, transfer, charge or vote any Sale Shares.
7. Nothing in these orders obliges ASIC or the Commonwealth to invest, or ensure interest accrues on, any money held in trust under these orders or exercise any rights (including voting rights) attaching to, or arising as a result of holding, the Sale Shares.

#### **Corrective Disclosure Orders - Relevant Parties**

8. As soon as practicable after and subject to approval by the Panel under Order 9, each Relevant Party must give to TMH and the ASX, either separately or combined:
  - (a) a notice in the form of ASIC Form 603 "Notice of initial substantial holder" or a notice in the form of ASIC Form 604 "Notice of change of interests of substantial holder", as applicable, disclosing:
    - (i) the existence and nature of their association with each other Relevant Party with whom they are associated,
    - (ii) any transaction undertaken during the period from the date of commencement of the association through to the date of the notice and
    - (iii) any other information required by an ASIC Form 603 or an ASIC Form 604, as applicable, and
  - (b) if any of the Relevant Parties is of the view that they are no longer associated with any of the other Relevant Parties in relation to TMH, a notice in the form of ASIC Form 605 "Notice of ceasing to be a substantial holder" or a notice in the form of ASIC Form 604 "Notice of change of interests of substantial holder", as applicable, disclosing:

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### Reasons - The Market Herald Limited [2023] ATP 7

- (i) how and when the association ceased,
  - (ii) copies of any document evidencing the ceasing of the association, and
  - (iii) any other information required by an ASIC Form 605 or an ASIC Form 604, as applicable, and
- (c) an explanatory covering letter to accompany the notices referred to in paragraphs (a) and (b),

(in relation to each Relevant Party, the notices, together with accompanying covering letter, is the **Disclosure**).

9. A draft of the Disclosure must be provided by each Relevant Party to the Panel within five business days of the date of these orders for review and approval by the Panel. Any changes requested by the Panel must be reflected in the draft of the Disclosure in a form acceptable to the Panel. The Panel will only approve a notice under Order 8(b) disclosing the cessation of an association if the Relevant Party can provide a reasonable basis for the cessation.
10. TMH must publish the Disclosure on its ASX Announcements Platform within 1 business day of receiving the Disclosure.
11. A Relevant Party must not exercise, and TMH must disregard, any voting rights in respect of its Relevant Shares and must not dispose of, transfer, charge or otherwise deal with its Relevant Shares until the date that is 21 days after the Relevant Party has complied with Order 8.

#### **Corrective Disclosure Orders - TMH**

12. As soon as practicable after and subject to approval by the Panel under Order 13, TMH must give the ASX an announcement explaining the Panel's declaration and orders.
13. A draft of the ASX announcement must be provided by TMH to the Panel within five business days of the date of these orders for review and approval by the Panel. Any changes requested by the Panel must be reflected in the draft of the ASX announcement in a form acceptable to the Panel.

#### **Acquisition Restriction**

14. For 12 months from the date of these orders, none of Mr David Brian Argyle, Mr Gavin Argyle and their respective associates may make any acquisition of a relevant interest in TMH shares, except:
  - (a) with the prior consent of the Panel or
  - (b) pursuant to a pro rata entitlement offer to all TMH shareholders in order to maintain (but not increase) the percentage ownership interest in TMH.

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### Reasons - The Market Herald Limited [2023] ATP 7

15. For the avoidance of doubt:
- (a) Order 14 does not prohibit Mr David Brian Argyle, Mr Gavin Argyle and their respective associates from committing to take up their entitlement at the time of or prior to a capital raising and
  - (b) for 12 months from the date of these orders, none of Mr David Brian Argyle, Mr Gavin Argyle and their respective associates (including in the case of Mr Gavin Argyle, CIP) may underwrite or sub-underwrite any entitlement offer of TMH shares without the prior consent of the Panel.

### Independent Directors

16. TMH must commence a process to identify and select suitably qualified candidates for directorship to the board of TMH who are independent, and are identified in consultation with an independent recruitment consultant, with the view to appointing at least two of the candidates to the board of TMH. Once selected, the existing board of TMH must consider the appointment of at least two of the candidates, one of which as the chair. If the existing board of TMH does not approve at least two of the candidates, one of which as the chair, TMH must identify and select other candidates in accordance with this Order 16 until at least two appointments are approved (each time, an **Appointment**).
17. Every month after the date of these orders until the date of the second Appointment and prior to the date of each Appointment, TMH must:
- (a) report to the Panel the steps it has undertaken to identify, select and appoint at least two independent directors to the board of TMH in accordance with Order 16 and
  - (b) provide a report to the Panel prepared by an independent recruitment consultant disclosing:
    - (i) the steps undertaken by the independent recruitment consultant to assist TMH in identifying, selecting and appointing at least two independent directors to the board of TMH in accordance with Order 16 and
    - (ii) the identity and background of any candidate for directorship to the board of TMH selected in accordance with Order 16, including (to the extent known after making reasonable enquiries of the candidate and TMH) any connection that candidate has, or has had, with any of:
      - (A) the Relevant Parties
      - (B) UIL or Mr Duncan Saville
      - (C) CIP
      - (D) Mr Jagdip Sanger and



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(E) TMH.

18. For 12 months from the date of an Appointment, Mr David Brian Argyle, Mr Gavin Argyle and their respective associates must not exercise, or allow the exercise of, and TMH must disregard, any voting rights in respect of their Relevant Shares regarding any resolution for the removal of a director the subject of such Appointment.
19. If 6 months after the date of these orders or such later date as the Panel may reasonably consent to (**End Date**), TMH has not appointed at least two directors in accordance with Order 16, then from the End Date until the date that the second Appointment is approved in accordance with Order 16:
  - (a) Mr Gavin Argyle and his respective associates must not exercise, or allow the exercise of, and TMH must disregard, any voting rights in respect of his Relevant Shares for so long as he is a director of, or is associated with any director of, TMH
  - (b) Mr Alec Pismiris and his respective associates must not exercise, or allow the exercise of, and TMH must disregard, any voting rights in respect of his Relevant Shares for so long as he is a director of, or is associated with any director of, TMH and
  - (c) Mr David Brian Argyle and his respective associates must not exercise, or allow the exercise of, and TMH must disregard, any voting rights in respect of his Relevant Shares for so long as he is associated with any director of TMH.

#### Costs

20. Within 30 days of the date of this order, TMH and Mr Gavin Argyle must pay to UIL \$80,000 excluding GST in the following proportions:
  - (a) TMH must pay to UIL:
    - (i) \$5,000 excluding GST, representing UIL's Conference Costs and
    - (ii) \$37,500 excluding GST, representing a portion of UIL's Residual Costs and
  - (b) Mr Gavin Argyle must pay to UIL \$37,500 excluding GST, representing a portion of UIL's Residual Costs.
21. Within 30 days of the date of this order, TMH and Mr Gavin Argyle must pay to Mr Jagdip Sanger \$65,000 plus GST in the following proportions:
  - (a) TMH must pay to Mr Jagdip Sanger:
    - (i) \$15,000 plus GST, representing Mr Jagdip Sanger's Conference Costs and
    - (ii) \$25,000 plus GST, representing a portion of Mr Jagdip Sanger's Residual Costs and

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- (b) Mr Gavin Argyle must pay to Mr Jagdip Sanger \$25,000 plus GST, representing a portion of Mr Jagdip Sanger's Residual Costs.
22. Within 30 days of the date of this order, TMH must pay to ASIC \$1,000 excluding GST representing ASIC's Conference Costs.

#### Other

23. The parties to these proceedings and ASIC have the liberty to apply for further orders in relation to these orders.

#### DEFINITIONS

24. In these orders the following terms apply.

<b>Appointed Seller</b>	an investment bank or stock broker
<b>Appointment</b>	has the meaning set out in Order 16
<b>ASIC</b>	Australian Securities and Investments Commission, as agent of the Commonwealth
<b>CIP</b>	Capital Investment Partners Pty Ltd
<b>Conference Costs</b>	the fair and reasonable costs, as determined by the Panel, incurred by a party in connection with the conference conducted in these proceedings
<b>Disclosure</b>	has the meaning set out in Order 8
<b>End Date</b>	has the meaning set out in Order 19
<b>GAB</b>	GAB Superannuation Fund Pty Ltd
<b>on market</b>	in the ordinary course of trading on Australian Securities Exchange and not by crossing or special crossing
<b>Relevant Parties</b>	Mr David Brian Argyle, Mr Gavin Argyle, Mr Alec Pismiris, Ms Kasey Linney and Mr Eric Rosenal and any of their respective associates
<b>Relevant Shares</b>	the number of TMH shares listed below for each Relevant Party:  Mr David Brian Argyle (held directly and through Zero Nominees) - 46,691,158  Mr Gavin Argyle (held through GAB) - 10,686,482  Mr Alec Pismiris (held through ACP Investments Pty Ltd and Pismiris Holdings Pty Ltd) - 750,000

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Ms Kasey Linney - 391,176

Mr Eric Rosenal - 391,176

<b>Residual Costs</b>	the fair and reasonable costs, as determined by the Panel, incurred by a party in connection with these proceedings through 25 May 2023, excluding any costs incurred by a party in connection with the conference conducted in these proceedings and the Panel's application for an extension of time under section 657B of the <i>Corporations Act 2001</i> (Cth)
<b>Sale Shares</b>	1,974,019 TMH shares held by GAB 87,324 TMH shares held by Mr David Brian Argyle (directly or through Zero Nominees)
<b>TMH</b>	The Market Herald Limited
<b>TMH shares</b>	ordinary shares in the issued capital of TMH
<b>UIL</b>	UIL Limited
<b>Zero Nominees</b>	Zero Nominees Pty Ltd

**Tania Mattei**  
**General Counsel**  
**with authority of Karen Phin**  
**President of the sitting Panel**  
**Dated 8 June 2023**