



Australian Government

Takeovers Panel

**Reasons for Decision
Mighty Kingdom Limited
[2023] ATP 14**

Catchwords:

Decline to make a declaration – undertaking – disclosure – relevant interest – voting power – share issue – shareholder approval – section 602 principles – jurisdiction

Corporations Act 2001 (Cth), sections 249D, 602, 606, 611, 671B, 1041E, 1041H

Australian Securities and Investments Commission Act 2001 (Cth), section 201A

Takeovers Panel Procedural Rules 2020, Rule 19

ASIC Regulatory Guide 74: Acquisitions approved by members

Blackham Resources Limited [2014] ATP 16, Careers Australia Group Limited 02 [2013] ATP 5, LV Living Limited [2005] ATP 5, Focus Technologies Ltd [2002] ATP 8

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

INTRODUCTION

1. The Panel, Bill Koeck (sitting President), Emma-Jane Newton and James Stewart, declined to make a declaration of unacceptable circumstances in relation to the affairs of Mighty Kingdom Limited (**Mighty Kingdom**). The application concerned allegations regarding the failure of Gamestar Studios Pty Ltd (**Gamestar**) to pay for certain shares in Mighty Kingdom that it had acquired under a share subscription agreement, the failure of Gamestar and Imagination Entertainment Pty Ltd to provide updated disclosure of their relevant interest and voting power in Mighty Kingdom, and false and misleading statements made, and misleading and deceptive conduct engaged in, by Gamestar. The Panel decided not to make a declaration after accepting undertakings provided by Mighty Kingdom, Gamestar and other entities controlled by Mr Shane Yeend.

2. In these reasons, the following definitions apply.

2022 AGM	Mighty Kingdom’s 2022 annual general meeting
2023 AGM	Mighty Kingdom’s 2023 annual general meeting
ASIC Act	has the meaning given in paragraph 86
Corrective Statement	has the meaning given in paragraph 82
Explanatory Statement	the explanatory statement that was annexed to the Notice of AGM for the 2022 AGM

Takeovers Panel

Reasons – Mighty Kingdom Limited [2023] ATP 14

First Instalment	the first instalment payable by Gamestar on 15 January 2023 for the Stage 2 Shares pursuant to the SSA Amendment Letter
Gamestar	Gamestar Studios Pty Ltd
Imagination	Imagination Entertainment Pty Ltd
Item 7 Approval	approval required under item 7 of section 611 ¹ to allow Gamestar and its associates to acquire a relevant interest and increase their voting power in Mighty Kingdom to approximately 30.50% following the issue of the Stage 2 Shares under the SSA
Mighty Kingdom	Mighty Kingdom Limited
Notice of AGM	the notice of annual general meeting sent to shareholders for the 2022 AGM
Relevant Shares	has the meaning given in paragraph 22(a)
RG 74	ASIC Regulatory Guide 74: Acquisitions approved by members
Rules	has the meaning given in paragraph 80
Second Instalment	the second instalment payable by Gamestar on 15 February 2023 for the Stage 2 Shares pursuant to the SSA Amendment Letter
Section 249D Meeting	the extraordinary general meeting requisitioned by Gamestar, Imagination and Yeend Super pursuant to section 249D
SSA	the share subscription agreement between Mighty Kingdom and Gamestar entered into on 4 August 2022
SSA Amendment Letter	the letter sent to Mighty Kingdom’s legal representative by Gamestar’s legal representative on 10 January 2023 setting out proposed amended terms of the SSA
Stage 1 Shares	16,228,571 Mighty Kingdom shares to be issued to Gamestar pursuant to the SSA
Stage 2 Shares	98,057,143 Mighty Kingdom shares to be issued to Gamestar pursuant to the SSA
Statements	has the meaning given in paragraph 79
Subscription Price	\$0.035 per Mighty Kingdom share pursuant to the SSA
Third Instalment	the third instalment payable by Gamestar on 15 April 2023 for the Stage 2 Shares pursuant to the SSA Amendment Letter

¹ Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth), and all terms used in Chapters 6 to 6C have the meaning given in the relevant Chapter (as modified by ASIC)

Takeovers Panel

Reasons – Mighty Kingdom Limited [2023] ATP 14

Yeend Entities Gamestar, Gamestar Interactive, Inc, Imagination, Yeend Super and Mr Yeend

Yeend Super Yeend Superannuation Pty Ltd as trustee for Yeend Superannuation Fund

FACTS

3. Mighty Kingdom is a video game developer listed on the ASX.
4. Gamestar and Imagination are Mighty Kingdom's two largest shareholders. On or about the date of the application:
 - (a) Gamestar had a relevant interest in 65,371,429 Mighty Kingdom shares, equal to approximately 13.7% of Mighty Kingdom's issued share capital² and
 - (b) Imagination had a relevant interest in 67,122,212 Mighty Kingdom shares, equal to approximately 14.1% of Mighty Kingdom's issued share capital.³
5. The Yeend Entities, including Gamestar and Imagination, are all entities controlled (either directly or indirectly) by Mr Yeend.
6. On 4 August 2022, Gamestar and Mighty Kingdom entered into the SSA pursuant to which Gamestar would subscribe for:
 - (a) the Stage 1 Shares, subject to the satisfaction of certain conditions and
 - (b) the Stage 2 Shares, subject to the satisfaction of certain conditions including obtaining the Item 7 Approval.
7. On 15 August 2022, completion of Gamestar's subscription for the Stage 1 Shares occurred.
8. On or about 23 August 2022, the Yeend Entities (other than Imagination) lodged a substantial holder notice disclosing a relevant interest in 18,553,765 shares and voting power of 8.85%⁴ in Mighty Kingdom.
9. On 28 November 2022, Item 7 Approval for the acquisition of the Stage 2 Shares was obtained at the 2022 AGM.
10. On or about 15 January 2023, Gamestar and Mighty Kingdom agreed to amend the terms of the SSA on the terms of the SSA Amendment Letter to allow for payment of the Stage 2 Shares to be made in three instalments, subject to further conditions.

² Based on Mighty Kingdom's issued share capital as at that date

³ As above

⁴ As above

Takeovers Panel

Reasons – Mighty Kingdom Limited [2023] ATP 14

11. On 18 January 2023, Mighty Kingdom announced that it had “*completed Settlement of Tranche 2 of its Share Placement*”. On or about the same day, Gamestar paid the First Instalment to Mighty Kingdom.
12. On or about 19 January 2023, Mighty Kingdom issued the Stage 2 Shares to Gamestar.
13. On or about 31 January 2023, the Yeend Entities (other than Imagination) lodged a substantial holder notice disclosing a relevant interest in 116,610,908 shares and voting power of 32%⁵ in Mighty Kingdom.
14. On 15 February 2023, the SSA Amendment Letter required payment of the Second Instalment by Gamestar, subject to the satisfaction of certain conditions.
15. On 15 April 2023, the SSA Amendment Letter required payment of the Third Instalment by Gamestar, subject to the satisfaction of certain conditions.
16. On 14 June 2023, Mighty Kingdom announced that the conditions to payment for the Stage 2 Shares had been met and that “*Gamestar has informed the Company that settlement of those Tranche 2 commitments is now forthcoming*”.
17. On 18 August 2023, Mighty Kingdom formally requested payment of the Second Instalment and Third Instalment. Gamestar advised Mighty Kingdom that \$200,000 paid to Mighty Kingdom should be used as partial satisfaction for the outstanding amounts owing for the Second Instalment and Third Instalment.
18. On 3 October 2023, Gamestar’s legal representatives asserted in correspondence to Mighty Kingdom’s legal representatives that Gamestar was not required to pay for the outstanding amounts owing for the Second Instalment and Third Instalment on the basis that the conditions for payment had not been satisfied by Mighty Kingdom.
19. On 24 October 2023, Mighty Kingdom announced that the SSA had been terminated due to Gamestar’s “*ongoing failure to meet its obligations in settling payment of circa \$2.1m for a shareholder approved placement of ordinary shares at \$0.035*”.
20. On 15 November 2023, Imagination acquired 65,951,623 shares in Mighty Kingdom from Gamestar.
21. On 20 November 2023, Mighty Kingdom received a request from Gamestar, Imagination and Yeend Super to call a meeting of shareholders pursuant to section 249D.

⁵ As above

APPLICATION

Declaration sought

22. By application dated 20 November 2023, Mighty Kingdom sought a declaration of unacceptable circumstances. Mighty Kingdom submitted that Gamestar:
- (a) had not paid the Subscription Price for 59,657,143 Mighty Kingdom shares it had acquired under the SSA (**Relevant Shares**), and intended to vote the Relevant Shares at the 2023 AGM and subsequent general meetings
 - (b) had, along with Imagination, failed to lodge updated substantial holder notices to reflect their current relevant interest and voting power in Mighty Kingdom shares in contravention of section 671B and
 - (c) made, and continued to make, false and misleading statements and had engaged, and continued to engage in, misleading and deceptive conduct in contravention of sections 1041E and 1041H.
23. Mighty Kingdom submitted that the effect of the circumstances was that Gamestar and its associates were able to exert disproportionate control and influence over Mighty Kingdom contrary to the principles of section 602 and the Item 7 Approval.

Interim orders sought

24. Mighty Kingdom sought interim orders to the effect that Gamestar and its associates be restrained from disposing of, or exercising any voting rights attaching to, the Relevant Shares at the 2023 AGM and subsequent general meetings until Gamestar paid the Subscription Price for the Relevant Shares.

Final orders sought

25. Mighty Kingdom sought final orders to the effect that (among other things) Gamestar and its associates be restrained from:
- (a) disposing of, or exercising any voting rights attaching to, the Relevant Shares until Gamestar paid the Subscription Price for the Relevant Shares
 - (b) receiving any dividends or distributions attaching to the Relevant Shares until Gamestar paid the Subscription Price for the Relevant Shares and
 - (c) making or disseminating any information that is false and misleading, and to issue corrective disclosure to the market and shareholders in relation to any previously made or disseminated false or misleading information.

DISCUSSION

26. We have considered all the material presented to us in coming to our decision, but only specifically address those things that we consider necessary to explain our reasoning.

Interim orders undertaking

27. We considered the interim orders sought by Mighty Kingdom in its application. In light of the upcoming 2023 AGM that was scheduled for 29 November 2023 and the

Takeovers Panel

Reasons – Mighty Kingdom Limited [2023] ATP 14

nature of the resolutions that were proposed to be put to shareholders, we were minded to make interim orders to the following effect to preserve the status quo pending determination of the application:

- (a) Mighty Kingdom keep a record of any votes cast on the resolutions to be considered at the 2023 AGM in relation to the Relevant Shares
 - (b) Mighty Kingdom and its officers not declare the result of any resolution where the voting of the Relevant Shares at the 2023 AGM would determine the outcome of those resolutions and
 - (c) Gamestar not sell, transfer or otherwise dispose of any of the Relevant Shares.
28. We sought submissions from the parties on whether the interim orders should be made, and asked whether Gamestar would be willing to undertake to the Panel not to vote, sell, transfer or otherwise dispose of any of the Relevant Shares.
29. In response to our request for these submissions, the Yeend Entities offered to provide undertakings in lieu of the interim orders.
30. We accepted an undertaking from Gamestar and Imagination as set out in Annexure A to the effect that Gamestar, Imagination and their associates would not vote, sell, transfer or otherwise dispose of any of the Relevant Shares pending the determination of the proceedings, which addressed our concerns.

Gamestar's acquisition of the Stage 2 Shares under the SSA

Panel's jurisdiction and other available fora

31. In its application, Mighty Kingdom submitted that Gamestar should not be entitled to vote the Relevant Shares because it had not paid for them, and if it were entitled to vote those shares, Gamestar would be able to exercise disproportionate control and influence over Mighty Kingdom contrary to the principles in section 602 and the Item 7 Approval. Mighty Kingdom further submitted that:
- (a) although shareholders were provided with the opportunity to approve Gamestar's acquisition of the Stage 2 Shares, and did so through the Item 7 Approval, *"any such approval was on the basis of the information provided, which required Gamestar to pay for such shares"*
 - (b) the failure to pay for the shares had resulted in limited new funding options for Mighty Kingdom, and this would be exacerbated if the resolutions put to shareholders at the 2023 AGM were not passed and
 - (c) shareholders had not been provided with an opportunity to benefit from the acquisition of the Relevant Shares as Gamestar had not paid for the Relevant Shares.
32. We queried whether we had jurisdiction to conduct proceedings, given the issue of payment for the Relevant Shares was contractual in nature and part of a larger

Takeovers Panel

Reasons – Mighty Kingdom Limited [2023] ATP 14

dispute between the parties. We considered whether a court would be the appropriate forum to consider such issues.

33. Mighty Kingdom submitted in its application that the Panel's jurisdiction is broad and that there is "no need for a contravention of the Corporations Act before the Panel decides to intervene, with the intention that the Panel is given a wider power to give effect to the spirit of the Act". Mighty Kingdom also submitted that "it does not depend on the reasons the outstanding subscription price was not paid, or whether or not Gamestar intends to vote the shares that have not been paid for" but rather it was the fact that Gamestar was permitted to hold and vote unpaid shares that was unacceptable.
34. In *Careers Australia Group Limited* 02⁶, the Panel said the following at [28] to [30] and [33] (footnotes omitted):

"[28] The Applicants had submitted in the application that "there are a number of examples of the Panel declaring that unacceptable circumstances exist, even where a corporate act may not offend Chapter 6 or may be expressly within an exception contained in Section 611 of the Corporations Act."

[29] The Applicants responded to White Cloud's preliminary submission noting that the Panel has wide jurisdiction and may examine circumstances relating to contractual matters where the transaction is likely to have an effect on the efficient, competitive and informed market for control of a company.

[30] While what the Applicants submitted is true, it is necessary for circumstances to offend the purposes of Chapter 6 set out in s602 or other policy underpinning the provisions of Chapters 6-6C, or for there to be another relevant public policy issue, before the Panel is the appropriate forum to consider the matter.

[33] While the Panel may have jurisdiction to consider a contract, there would need to be a relevant nexus between the contract terms and their effect on control of a company before the Panel would become involved. For the reasons set out below, we do not consider that to be the case here."

35. Here, we considered there was sufficient evidence provided to conclude that we had jurisdiction over the issues raised by Mighty Kingdom to conduct proceedings. In particular, we had concerns around the validity of the Item 7 Approval, which is within our remit, and accordingly requested submissions from the parties.
36. However, we did not seek to investigate or resolve whether the parties to the SSA had satisfied their contractual obligations, including whether Gamestar was required to pay for the Relevant Shares pursuant to the SSA.

⁶ [2013] ATP 5

Takeovers Panel

Reasons – Mighty Kingdom Limited [2023] ATP 14

Adequacy of disclosure of SSA

37. The resolution put to shareholders of Mighty Kingdom in relation to the Item 7 Approval as set out in the Notice of AGM read as follows:

“That, for the purposes of Item 7, section 611 of the Corporations Act and for all other purposes and subject to Resolutions 8, 9, 10, 11 and 12 being passed, approval is given for:

(a) the Company to issue 98,057,143 Shares to Gamestar Studios Pty Limited ACN 655 647 082 (Gamestar Studios) on the terms and conditions set out in the Explanatory Statement; and

(b) the acquisition of a relevant interest in the issued voting shares of the Company by Gamestar Studios and its associates, otherwise prohibited by section 606(1) of the Corporations Act by virtue of the issue of the 98,057,143 Shares to Gamestar Studios, which will result in Gamestar Studios and its associates' voting power in the Company increasing from 8.85% to 30.50%,

as more particularly described in the Explanatory Statement.”

38. The Explanatory Statement which accompanied the Notice of AGM purported to set out the material terms of the SSA including in relation to the Stage 2 Shares. The Explanatory Statement also purported to include information prescribed by item 7 of section 611 and RG 74. The Explanatory Statement, however, did not include details of negative undertakings provided by Mighty Kingdom under the SSA, which identified certain matters which Mighty Kingdom could not do without the prior written approval of Gamestar. It was a condition of the completion of the subscription for the Stage 2 Shares that Mighty Kingdom not breach those negative undertakings.
39. Mighty Kingdom submitted that the disclosure of the SSA in connection with the Item 7 Approval was not deficient because the material terms of the SSA were summarised in the Notice of AGM. In relation to the negative undertakings in the SSA, Mighty Kingdom submitted that such negative undertakings were not dissimilar to the type of practical control a shareholder with over 30% of a company would practically wield, and as such the non-disclosure of the negative undertakings did not affect the validity of the Item 7 Approval.
40. Mighty Kingdom also submitted that Gamestar could provide undertakings to remedy the unacceptable circumstances to the effect that Gamestar and its associates not vote, sell, transfer or otherwise dispose of the Relevant Shares or receive dividends or distributions with respect to the Relevant Shares. Alternatively, Mighty Kingdom submitted that Gamestar and its associates could provide an undertaking to the effect that they would approve a selective capital reduction by Mighty Kingdom for nil consideration with respect to the Relevant Shares.

Takeovers Panel

Reasons – Mighty Kingdom Limited [2023] ATP 14

41. The Yeend Entities submitted that, in relation to the negative undertakings, those provisions are typically found in other agreements such as underwriting agreements and debt facility agreements and therefore are not unusual or unreasonable. The Yeend Entities submitted that undertakings would be sufficient to “*dispense with the need for the Panel to make any findings or declarations in this matter*”, to the effect that Gamestar and Imagination not vote, sell, transfer or otherwise dispose of the Relevant Shares until the Relevant Shares are bought back by Mighty Kingdom for nominal consideration and cancelled.
42. ASIC submitted that the Notice of AGM and Explanatory Statement “*should have included disclosure of...the effect of the negative undertakings enumerated in cl 11*” because the negative undertakings provided Gamestar “*with the type of control over the business of Mighty Kingdom that shareholders would expect to fall within the powers of the board*” under Mighty Kingdom’s constitution.
43. Accordingly, ASIC submitted that shareholders voting on the Item 7 Approval were not provided with all information known to Mighty Kingdom and Gamestar that was material to the decision on how to vote, or to assess the merits of the proposal, contrary to item 7 of section 611 and section 602(b)(iii). ASIC also submitted that it did not consider the Item 7 Approval to be valid because shareholders did not receive all relevant material information.
44. In *Focus Technologies Ltd*⁷, the Panel said the following:

“[30] Approval was obtained under item 7 of section 611 for the acquisition by TCPL of shares in Focus on exercise of the options. However, if that approval was not given with adequate and accurate information, or if the resulting acquisition is materially different to that which the shareholders of Focus approved, it is open to the Panel to decide that the circumstances of the acquisition would be unacceptable, when and if it occurs. It would then be open to the Panel to make a declaration to that effect and orders to overcome the unacceptable circumstances.”
45. Further, in *LV Living Limited*⁸, the Panel noted that (among other things) “*the information provided to shareholders did not include all information known to LV Living, Peridon and its associates or ACP that was material to shareholders’ decisions on how to vote on approval resolutions for the purpose of item 7 of section 611*”. Despite the fact that shareholder approval was obtained, the Panel was of the view in that case that the approval was inadequate to prevent unacceptable circumstances existing, and accordingly the Panel made a declaration of unacceptable circumstances and final orders (and accepted undertakings).
46. We agree with ASIC’s submissions that the Explanatory Statement provided to shareholders of Mighty Kingdom in connection with the Item 7 Approval at the 2022 AGM should have included all material information about the conditions to the

⁷ [2002] ATP 8 at [30]

⁸ [2005] ATP 5 at [12(c)]

Takeovers Panel

Reasons – Mighty Kingdom Limited [2023] ATP 14

subscription for the Stage 2 Shares, in particular the control effect of the negative undertakings provided by Mighty Kingdom under the SSA.

47. We therefore consider that it was open to us to find that shareholders were not provided with all material information known to Mighty Kingdom and Gamestar that was relevant to the Item 7 Approval and that the exception to section 606 in item 7 of section 611 did not apply to the acquisition of the Stage 2 Shares by Gamestar (to the extent it resulted in Gamestar and its associates acquiring voting power in excess of 20%).
48. However, in light of the undertakings provided by Mighty Kingdom and Gamestar, as set out in Annexure B and C respectively, to the effect that:
- (a) Mighty Kingdom and Gamestar enter into a buy back agreement, in a form that we do not object to, to allow Mighty Kingdom to buy back and cancel the Relevant Shares (and complete all actions necessary to give effect to that buy back) and
 - (b) Gamestar not vote, sell, transfer or otherwise dispose of the Relevant Shares,
- we need not and have not come to any conclusion as to whether the disclosure made in the Notice of AGM and Explanatory Statement invalidated the Item 7 Approval. We are satisfied that the undertakings are adequate to remedy any unacceptable circumstances that exist in this regard.

Terms of SSA Amendment Letter

49. Following the Item 7 Approval, the parties agreed to the terms of the SSA Amendment Letter, however those terms were not put to shareholders of Mighty Kingdom for their approval under item 7 of section 611. In addition to proposing that the Stage 2 Shares be paid for in three instalments, the SSA Amendment Letter imposed additional conditions including the following:
- (a) the Mighty Kingdom board adopt a capital and operating budget approved by Mr Yeend
 - (b) Mr Yeend be appointed as chief executive officer of Mighty Kingdom to replace Mr Philip Mayes and
 - (c) Mr Simon Rabbitt be appointed as chief operating officer of Mighty Kingdom.
50. Mighty Kingdom submitted that the Item 7 Approval validly applied to the amended terms of the SSA pursuant to the SSA Amendment Letter because the Item 7 Approval permitted Gamestar to acquire a relevant interest and increase its voting power to 30.50% and the material terms of the acquisition remained unchanged. Mighty Kingdom submitted that it did not consider the terms of the SSA Amendment Letter to be a “*materially different*” change in circumstances having regard to RG 74. Mighty Kingdom noted that agreement to the SSA Amendment Letter was “*a necessary compromise that it gave in exchange for the forbearance to sue as offered by Gamestar regarding the alleged non-compliance by the Company*”.

Takeovers Panel

Reasons – Mighty Kingdom Limited [2023] ATP 14

51. The Yeend Entities submitted that the SSA Amendment Letter should not be characterised as an amendment, rather a forbearance of its right to sue. The Yeend Entities submitted that the *“forbearance was offered subject to a number of conditions which, if satisfied, would trigger payment of the balance of the subscription amount under the SSA.”*
52. ASIC submitted that the disclosure of the Subscription Price and timing of the acquisition in the Notice of AGM and Explanatory Statement *“may, on one view, ensure shareholders have approved the consideration for the acquisition while leaving the mechanics of completion to the board of Mighty Kingdom, without invalidating the item 7 approval.”* However, ASIC submitted that on another view *“the terms of the amended SSA go beyond ordinary matters of completion, by inserting new conditions about the corporate structure and governance of Mighty Kingdom that appear to make the transaction “materially different” to the one approved under item 7”*. ASIC submitted that the SSA Amendment Letter likely enlivened the need for fresh shareholder approval in line with its guidance in RG 74.
53. We have concerns about the decision to not put the amended terms of the SSA Amendment Letter to shareholders for fresh approval under item 7 of section 611. RG 74⁹ states that fresh approval under item 7 of section 611 should be sought if:
- “(a) a change in circumstances happens after approval has been obtained but before the acquisition is completed; and*
- (b) the change means the transaction is materially different from the one approved by members.”*
54. We consider that the SSA Amendment Letter contained material changes to the SSA with regards to the conditions to the subscription for the Stage 2 Shares such that the resulting acquisition of the Stage 2 Shares by Gamestar was likely a change in circumstances and therefore different to that which was approved by shareholders under the Item 7 Approval at the 2022 AGM. Again, we consider that it was open to us to determine that shareholders were not provided with the opportunity to consider the changes to the proposal contrary to the requirements of item 7 of section 611 and/or the principles of section 602 and that the exception to section 606 in item 7 of section 611 did not apply to the acquisition of the Stage 2 Shares by Gamestar (to the extent it resulted in Gamestar and its associates acquiring voting power in excess of 20%).
55. However, we consider that the undertakings provided by Mighty Kingdom and Gamestar outlined at paragraph 47 are sufficient to address our concerns about the decision to not put the terms of the SSA Amendment Letter to shareholders for approval and to remedy any unacceptability of the circumstances.

⁹ At [74.87]

Takeovers Panel

Reasons – Mighty Kingdom Limited [2023] ATP 14

Gamestar's failure to pay for the Relevant Shares

56. Mighty Kingdom submitted that Gamestar failed to pay the Subscription Price for the Relevant Shares in accordance with the terms of the SSA Amendment Letter. Mighty Kingdom submitted that it was Gamestar's failure to pay for the Relevant Shares that affected the validity of the Item 7 Approval because shareholders approved the acquisition "*on the basis that Gamestar pays the subscription price for those shares*" and therefore Gamestar would be in breach of Chapter 6 with respect to the acquisition of the Relevant Shares.
57. ASIC submitted that the validity of an approval under item 7 of section 611 does not require compliance with conditions to an acquisition, or payment of consideration, but rather "*item 7 contains disclosure requirements to ensure that members are able to make an informed decision about whether or not to approve the acquisition*". ASIC also submitted that disputes over whether or not clauses of an agreement have been breached by a party were ultimately contractual in nature.
58. We agree with ASIC's submissions that it is not for us to determine whether parties are in breach of their contractual obligations, or to determine whether Gamestar was obliged to pay for the Relevant Shares. We also agree that item 7 of section 611 does not contemplate payment of consideration or compliance with conditions when the relevant resolution is passed by shareholders. However, the disclosure to shareholders, and therefore the basis on which the Item 7 Approval was given, was that the Stage 2 Shares would be paid for at the time of their issue, and not on a deferred basis as contemplated by the SSA Amendment Letter. At the time shareholders provided the Item 7 Approval, they were not aware that the Stage 2 Shares may be issued, and that Gamestar would be in a position to obtain control over Mighty Kingdom, before the Relevant Shares were paid for, or that there was a risk that they may not be paid for. We therefore consider the fact that Gamestar did not pay for the Relevant Shares may have contributed to the unacceptable circumstances occurring.
59. However, we are ultimately satisfied that the undertakings provided by Mighty Kingdom and Gamestar in relation to the buy back of the Relevant Shares as outlined at paragraph 47 adequately deal with this issue.

Other acquisitions and substantial holder disclosure

60. Following the acquisition of the Stage 2 Shares, the Yeend Entities (other than Imagination) lodged a substantial holder notice to reflect its increased relevant interest and voting power in Mighty Kingdom. In its application, Mighty Kingdom submitted that neither Gamestar nor Imagination had lodged updated substantial holder notices since January 2023, including following the transfer of Mighty Kingdom shares from Gamestar to Imagination, and details of their current associations.

Takeovers Panel

Reasons – Mighty Kingdom Limited [2023] ATP 14

61. Mighty Kingdom submitted that as a result of the failure to disclose updated holdings, Mighty Kingdom shareholders do not know the identities of substantial holders of Mighty Kingdom. Mighty Kingdom submitted that Gamestar and Imagination had contravened section 671B.
62. The Yeend Entities submitted that it would be willing to provide undertakings to make updated disclosure of its holdings in Mighty Kingdom, which would adequately address the issue.
63. The Panel has often not made orders regarding breach of the substantial holding disclosure requirements where parties have voluntarily corrected disclosure and the Panel is satisfied the market is sufficiently informed.¹⁰
64. Here, we consider that the Yeend Entities are likely in breach of their obligations under section 671B. However, we are satisfied that the undertakings provided by the Yeend Entities, as set out in Annexure D, to the effect that they will lodge an updated notice of change of interests of substantial holder, in a form that we do not object to, disclosing:
 - (a) the current relevant interest and voting power in Mighty Kingdom held by each of the Yeend Entities, and their associations
 - (b) any transaction undertaken since the date of the last notice lodged by some of the Yeend Entities
 - (c) copies of any document setting out the terms of any relevant agreement by which the relevant interest was acquired (including any such document that should have been lodged in the last notice lodged by some of the Yeend Entities) and
 - (d) the effect of the separate undertaking provided by Gamestar on or about the date of the undertaking provided by the Yeend Entities,

sufficiently addresses our concerns.

False and misleading statements and misleading and deceptive conduct

65. In its application, Mighty Kingdom submitted that Gamestar had made, and continued to make false and misleading statements, and had engaged in, and continued to engage in, misleading and deceptive conduct, which it said was “*likely to induce persons to dispose of shares in the Company*” and that shareholders would be “*misinformed as to decisions about the acquisition or disposal of the shares in the Company, as well as how to exercise their votes at the AGM*”. Among other things, Mighty Kingdom submitted the statements and conduct were in relation to:

¹⁰ See for example *Blackham Resources Limited* [2014] ATP 16

Takeovers Panel

Reasons – Mighty Kingdom Limited [2023] ATP 14

- (a) the financial position of Mighty Kingdom
 - (b) Gamestar’s position in Mighty Kingdom and
 - (c) the contractual dispute between the parties.
66. Mighty Kingdom also submitted that the statements and conduct were “*compounded by Mr Yeend continuing to represent himself as CEO of the Company in social media, even though he had resigned on or about 1 September 2023*” and that such statements and conduct ahead of the 2023 AGM would lead to limited options for Mighty Kingdom to raise capital given the nature of the resolutions to be put to shareholders.
67. Mighty Kingdom submitted that as a result, Gamestar was in breach of sections 1041E and 1041H, and such statements and conduct were contrary to the operation of an efficient, competitive and informed market.
68. We queried whether it was within our jurisdiction to consider alleged breaches of sections 1041E and 1041H.
69. Mighty Kingdom submitted that it is within the Panel’s jurisdiction to consider such issues given the statements and conduct of Gamestar was “*part of the circumstances surrounding Gamestar’s attempt at exerting inappropriate control and influence over the Company’s affairs*”.
70. ASIC submitted that the Panel “*has a wide jurisdiction and in exercising its powers under s657A may have regard to any matters it considers relevant*” and “*[w]hile the Panel does not have jurisdiction to find a contravention of ss1041E and 1041H, it is entitled to consider the policy of ss1041E and 1041H and may take into account the criminal and civil sanctions which would apply in respect of those provisions in deciding whether to make a declaration of unacceptable circumstances.*”
71. In relation to the effect of the statements and conduct more generally, Mighty Kingdom further submitted that:
- (a) Gamestar’s ability to exert control and influence would continue to be relevant to any general meeting that was called (including the Section 249D Meeting) and would be unacceptable despite the fact that the 2023 AGM had passed with Gamestar unable to vote the Relevant Shares
 - (b) while it appreciated that it could issue its own statements to correct or refute statements made by Gamestar, it viewed its ability to do so as limited given the breadth and quantum of statements made by Gamestar and
 - (c) it was of the view that Gamestar and its associates could provide undertakings to remedy the unacceptable circumstances to the effect that they would not make or disseminate any false or misleading information and would make corrective disclosure to the market and shareholders in relation to all previously made or disseminated false or misleading information.

Takeovers Panel

Reasons – Mighty Kingdom Limited [2023] ATP 14

72. The Yeend Entities denied making any false and misleading statements and stated that they had “*genuine concerns that MKL is now seeking to use exaggerated claims of false and misleading statements...and the Panel’s process as a means to interfere with the rights of the shareholders to determine the composition of the MKL board*” in connection with the Section 249D Meeting. The Yeend Entities also did not agree to provide any undertakings in relation to the alleged false and misleading statements as suggested by Mighty Kingdom.
73. While we may have jurisdiction to consider the alleged statements and conduct of Gamestar in the context of the purposes of Chapter 6 and the broader circumstances alleged by Mighty Kingdom, we are ultimately of the view that the statements can be corrected or refuted by Mighty Kingdom in their own statements to the market and it is for ASIC or a court to investigate and determine contraventions of section 1041E and 1041H. We are also not convinced that there is sufficient evidence to conclude that these aspects of the circumstances are unacceptable.

Further considerations

74. ASIC submitted that, given the nature of the matters raised in the application, “*a determination on these matters of fact and law is likely to substantially prolong the resolution of these proceedings, and in the circumstances ASIC considers the parties are acting appropriately in proposing undertakings to put an end to the proceedings, and that the public interest would be served by the Panel accepting an undertaking that addresses any unacceptable circumstances, providing such undertakings are to the Panel’s satisfaction and address what the Panel may otherwise be inclined to declare unacceptable.*”
75. We agree with ASIC’s submission. We also consider Mighty Kingdom’s financial position and cash flow issues to be relevant to our decision to accept undertakings from the parties. We are of the view that the issues raised by Mighty Kingdom with respect to Gamestar are exacerbated by their effect on Mighty Kingdom’s ability to raise capital and obtain funding. We are also conscious of imposing further financial stress on Mighty Kingdom.
76. Accordingly, we are of the view that it is in the interests of the parties, as well as in the public interest more broadly, to accepting undertakings from the parties to resolve the proceedings.¹¹

DECISION

77. Given the undertakings offered by Mighty Kingdom, Gamestar and the Yeend Entities, we declined to make a declaration and are satisfied that it is not against the public interest to do so. We had regard to the matters in s657A(3).

¹¹ In accepting the undertakings from the parties, we also extended the time for Mighty Kingdom to make its application to the date on which it was made pursuant to section 657C(3)

Takeovers Panel

Reasons – Mighty Kingdom Limited [2023] ATP 14

Orders

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

ADDENDUM – CONTRAVENTION OF PROCEDURAL RULES

79. Following our decision on 15 December 2023 (but before these reasons for decision were published), and prior to the Section 249D Meeting on 19 January 2024, we became aware of statements made and disseminated by Mr Yeend on various public platforms in relation to our decision (the **Statements**), including (among others) the following statement on Mr Yeend’s website at mightyshareholders.com.au:

“Successful Takeovers Panel outcome

Following the AGM, I’m pleased to inform you that the ASX Takeovers Panel, along with ASIC who got involved, reached an agreement with my company, Gamestar+, to withdraw MKL’s (Guthrie and co. ‘s) frivolous claims against the company.

They have always had zero claim against Gamestar+ but took our first \$2M and just wasted it, breaching the Share Subscription Agreement (SSA) which allowed us approval of all monies and effective control of the company meanwhile the MKL Board not declaring that Gamestar+ was given effective control of the company to shareholders. We still have a substantial claim for millions against the company and Directors for its actions on our investment. The Takeovers Panel will release its findings in detail shortly.”

80. Rule 19(3) of the *Takeovers Panel Procedural Rules 2020* (**Rules**) states the following:

“From the relevant time period in Rule 19(1)(a) or (b) until the Panel publishes its reasons for decision, a party must not directly or indirectly cause a decision of the Panel to be misrepresented in any media.”

81. The Panel executive made enquiries of the parties in relation to this, and in particular, requested that Mr Yeend provide submissions as to whether the Statements contravened the Rules and whether Mr Yeend would be willing to clarify the Statements in a supplementary corrective statement.

82. In response to our enquiries, Mr Yeend accepted that the Statements did not accurately describe our decision in this matter, and confirmed that he would be prepared to make the following supplementary corrective statement:

“In my last message to Mighty Kingdom shareholders I included some comments about the outcome of the proceedings started by Mighty Kingdom in the Takeovers Panel. Those comments were not completely accurate and I apologise for any confusion that may have been caused. In particular, the Takeovers Panel proceedings were not withdrawn. Rather, the Takeovers Panel decided to accept undertakings from each of the parties to the proceedings, removing the need for the Takeovers Panel to make any final

Takeovers Panel

Reasons – Mighty Kingdom Limited [2023] ATP 14

orders. You can read the undertakings in full in the media release contained on the Panel's website" (Corrective Statement).

83. We consider that the Statements caused, either directly or indirectly, our decision in this matter to be misrepresented in contravention of Rule 19 of the Rules. We have come to this view on the basis that (among other things) the Statements do not accurately identify that the parties offered undertakings, which were accepted by us, in resolution of the proceedings as outlined in our media release published on the Panel's website following our decision,¹² and because the Statements were made prior to the publication of our reasons for decision.
84. Accordingly, the Panel executive requested that the Corrective Statement be made on 17 January 2024, however Mr Yeend did not take any action until 18 January 2024 when Mr Yeend sent the following email to Mighty Kingdom shareholders:

"Dear Shareholders,

We look forward to the meeting tomorrow.

I'm travelling back from a family holiday and have been made aware by the Takeovers Panel, something I've never been involved with before, that the way I've described the outcome that's not yet published is not correct.

What is correct is that both sides agreed to a position where Gamestar would sell back any unpaid shares to Mighty Kingdom Limited for \$ 1.00.

The Takeovers Panel agreed that the following statement should be released to all shareholders:

"In my last message to Mighty Kingdom shareholders I included some comments about the outcome of the proceedings started by Mighty Kingdom in the Takeovers Panel. Those comments were not completely accurate and I apologise for any confusion that may have been caused. In particular, the Takeovers Panel proceedings were not withdrawn. Rather, the Takeovers Panel decided to accept undertakings from each of the parties to the proceedings, removing the need for the Takeovers Panel to make any final orders. You can read the undertakings in full in the media release contained on the Panel's website."

Please don't hesitate to contact us if you've any questions.

I look forward to a successful EGM tomorrow."

¹² See Takeovers Panel Media Release TP23/45, "Mighty Kingdom Limited – Panel Accepts Undertakings and Declines to Make a Declaration"

Takeovers Panel

Reasons – Mighty Kingdom Limited [2023] ATP 14

85. While Mr Yeend did publish the Corrective Statement prior to the Section 249D Meeting, the Statements continued to appear on public platforms. Therefore, we consider that Mr Yeend did not address our concerns in a satisfactory manner.
86. Parties to Panel proceedings provide an undertaking under section 201A of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) to comply (among other things) with Rule 19. Mr Yeend provided this undertaking at the commencement of the Panel proceedings.
87. We note that the Panel takes non-compliance with undertakings seriously and considers that non-compliance may adversely affect its ability to resolve disputes as quickly and efficiently as possible. The Panel may take various actions in response to a contravention, including publicly reprimanding a party and applying to the Court for an order under section 201A(4) of the ASIC Act.¹³ The Panel expects market participants to comply with their obligations in Panel proceedings.
88. Prior to the publication of these reasons for decision, we published a media release to the market outlining Mr Yeend’s conduct and our ongoing concerns.¹⁴ We will continue to monitor this matter and have reserved our rights to take further action as necessary.

Bill Koeck

President of the sitting Panel

Decision dated 15 December 2023

Reasons given to parties 17 January 2024 (addendum given to parties 24 January 2024)

Reasons published 25 January 2024

¹³ See for example Takeovers Panel Media Release TP20/81, “Keybridge Capital Limited 04, 05 & 06 – Panel Enforces Confidentiality Undertaking”

¹⁴ See Takeovers Panel Media Release TP24/08, “Mighty Kingdom Limited – Contravention of Procedural Rules”

Takeovers Panel

Reasons - Mighty Kingdom Limited
[2023] ATP 14

Advisers

Party	Advisers
Mighty Kingdom	Motus Legal
Gamestar, Imagination, Yeend Super and Shane Yeend	-



Australian Government

Takeovers Panel

Annexure A

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT 2001 (CTH) SECTION 201A UNDERTAKING

MIGHTY KINGDOM LIMITED

Gamestar Studios Pty Ltd (**Gamestar**), Imagination Entertainment Pty Ltd and their associates undertake to the Panel that, without the Panel's consent, they will not, and will ensure that no steps are taken by any person, to:

- vote any shares in Mighty Kingdom Limited (**Mighty Kingdom**) or
- sell, transfer or otherwise dispose of any shares in Mighty Kingdom,

which have not been paid for in full pursuant to the share subscription agreement between Gamestar and Mighty Kingdom dated on or about 4 August 2022 (as amended), until the determination of the proceedings.

**Signed by Shane Yeend of Gamestar Studios Pty Ltd
with the authority, and on behalf, of
Gamestar Studios Pty Ltd
Dated 28 November 2023**

**Signed by Shane Yeend of Imagination Entertainment Pty Ltd
with the authority, and on behalf, of
Imagination Entertainment Pty Ltd
Dated 28 November 2023**



Australian Government

Takeovers Panel

Annexure B

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT 2001 (CTH) SECTION 201A UNDERTAKING

MIGHTY KINGDOM LIMITED

Mighty Kingdom Limited (**Mighty Kingdom**) undertakes to the Panel that it will:

1. within one business day from the date of this undertaking:
 - a. lodge an ASIC Form 280 with ASIC in accordance with section 257E of the *Corporations Act 2001* (Cth) (**Act**) attaching a copy of the draft buy back agreement with Gamestar Studios Pty Ltd (**Gamestar**) in relation to the shares held by Gamestar which have not been paid for in full pursuant to the share subscription agreement between Gamestar and Mighty Kingdom dated on or about 4 August 2022 (as amended) (**Relevant Shares**) in the form that the Panel confirmed on 14 December 2023 that it has no objection to (which for the avoidance of doubt must be conditional on the terms being approved by special resolution passed at a general meeting of Mighty Kingdom with no votes being cast in favour of the resolution by Gamestar or its associates) (**Buy Back Agreement**) and
 - b. inform the Panel, Gamestar and ASIC of the lodgement of the ASIC Form 280
2. within three business days of Mighty Kingdom informing the Panel, Gamestar and ASIC of the lodgement of the ASIC Form 280:
 - a. enter into the Buy Back Agreement with Gamestar and
 - b. provide a copy of the signed Buy Back Agreement to the Panel, Gamestar and ASIC
3. subject to the provisions of the Act and any other applicable legal requirements, take all steps necessary to:
 - a. buy back the Relevant Shares held by Gamestar pursuant to the Buy Back Agreement and
 - b. complete all other actions in connection with the buy back as required under the Act to ensure that the Relevant Shares are cancelled and

Takeovers Panel

Reasons - Mighty Kingdom Limited [2023] ATP 14

4. within one business day of lodgement of any other required documents with ASIC in relation to the buy back, inform the Panel, Gamestar and ASIC of the lodgement of those documents.

Mighty Kingdom agrees to confirm in writing to the Panel when it has satisfied its obligations under this undertaking.

**Signed by Simon Rabbitt of Mighty Kingdom Limited
with the authority, and on behalf, of
Mighty Kingdom Limited
Dated 15 December 2023**



Australian Government

Takeovers Panel

Annexure C

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT 2001 (CTH) SECTION 201A UNDERTAKING

MIGHTY KINGDOM LIMITED

Gamestar Studios Pty Ltd (**Gamestar**) undertakes to the Panel that:

1. without the Panel's consent, it will not, and will ensure that no steps are taken by any person to:
 - a. vote any shares in Mighty Kingdom Limited (**Mighty Kingdom**) or
 - b. sell, transfer or otherwise dispose of any shares in Mighty Kingdom,which have not been paid for in full pursuant to the share subscription agreement between Gamestar and Mighty Kingdom dated on or about 4 August 2022 (as amended) (**Relevant Shares**) and
2. it will:
 - a. within three business days of Mighty Kingdom informing the Panel, Gamestar and ASIC of the lodgement of the ASIC Form 280 with ASIC referred to in the undertaking provided by Mighty Kingdom to the Panel on or about the date of this undertaking, enter into a buy back agreement with Mighty Kingdom in relation to the Relevant Shares in the form that the Panel confirmed on 14 December 2023 that it has no objection to (which for the avoidance of doubt must be conditional on the terms being approved by special resolution passed at a general meeting of Mighty Kingdom with no votes being cast in favour of the resolution by Gamestar or its associates) (**Buy Back Agreement**)
 - b. subject to the provisions of the *Corporations Act 2001* (Cth) (**Act**) and any other applicable legal requirements, take all steps necessary to allow Mighty Kingdom to:
 - i. buy back the Relevant Shares held by Gamestar pursuant to the Buy Back Agreement and
 - ii. complete all other actions in connection with the buy back as required under the Act to ensure that the Relevant Shares are cancelled and

Takeovers Panel

Reasons - Mighty Kingdom Limited
[2023] ATP 14

- c. ensure that no votes are cast against, and that no steps are taken to persuade others to cast votes against, any resolution put to Mighty Kingdom shareholders in connection with the buy back by Gamestar or its associates.

Gamestar agrees to confirm in writing to the Panel when it has satisfied its obligations under this undertaking.

**Signed by Shane Yeend of Gamestar Studios Pty Ltd
with the authority, and on behalf, of
Gamestar Studios Pty Ltd
Dated 15 December 2023**



Australian Government

Takeovers Panel

Annexure D

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT 2001 (CTH) SECTION 201A UNDERTAKING

MIGHTY KINGDOM LIMITED

Gamestar Studios Pty Ltd (**Gamestar**), Gamestar Interactive, Inc, Imagination Entertainment Pty Ltd, Yeend Superannuation Pty Ltd as trustee for Yeend Superannuation Fund, Mr Shane Yeend and their associates (the **Yeend Entities**) undertake to the Panel that:

1. within two business days from the date of this undertaking, the Yeend Entities will provide a draft updated notice of change of interests of substantial holder to the Panel disclosing:
 - a. the current relevant interest and voting power in Mighty Kingdom Limited (**Mighty Kingdom**) held by each of the Yeend Entities, and their associations
 - b. any transaction undertaken since 29 January 2023, being the date of the last notice lodged by some of the Yeend Entities
 - c. copies of any document setting out the terms of any relevant agreement by which the relevant interest was acquired (including any such document that should have been lodged in the last notice lodged by some of the Yeend Entities)
 - d. any other information required by an ASIC Form 604 and
 - e. the effect of the separate undertaking provided by Gamestar on or about the date of this undertaking and
2. as soon as practicable after the Panel confirms that it does not object to the form of the draft disclosure, lodge the updated notice of change of interests of substantial holder with the Australian Securities Exchange.

The Yeend Entities agree to confirm in writing to the Panel when it has satisfied its obligations under this undertaking.

Takeovers Panel

**Reasons - Mighty Kingdom Limited
[2023] ATP 14**

**Signed by Shane Yeend of Gamestar Studios Pty Ltd
with the authority, and on behalf, of
Gamestar Studios Pty Ltd
Dated 15 December 2023**

**Signed by Shane Yeend of Gamestar Interactive, Inc
with the authority, and on behalf, of
Gamestar Interactive, Inc
Dated 15 December 2023**

**Signed by Shane Yeend of Imagination Entertainment Pty Ltd
with the authority, and on behalf, of
Imagination Entertainment Pty Ltd
Dated 15 December 2023**

**Signed by Shane Yeend of Yeend Superannuation Pty Ltd as trustee for Yeend
Superannuation Fund
with the authority, and on behalf, of
Yeend Superannuation Pty Ltd as trustee for Yeend Superannuation Fund
Dated 15 December 2023**

**Signed by Shane Yeend
Dated 15 December 2023**