Australian Government

Takeovers Panel

Reasons for Decision
Ringers Western Limited 02R
[2024] ATP 17

Catchwords:

Review – affirm declaration – orders - contravention of section 606 – section 602 principles – acquisition of shares – pre-emptive rights – tag along – drag along – constitution –relevant interest - directors – member meetings – approved acquisitions – carrying on any business - effect on control –unfair prejudice - compulsory acquisition

Corporations Act 2001 (Cth), sections 20, 602, 606, 608, 609, 611 (items 7 and 8), 657A, 657E, 657EA, Acts Interpretation Act 1901 (Cth), s15AB, Corporations Law, s624, Companies (Acquisition of Shares) Act 1980, s12(e), Companies Act 1961 (Vic), s52

Guidance Note 1: Unacceptable Circumstances, Guidance Note 2: Reviewing Decisions, Guidance Note 4: Remedies General

ASIC Regulatory Guide 5: Relevant interests and substantial holding notices, ASIC Regulatory Guide 74: Acquisitions approved by members

Eastern Field Developments Limited v Takeovers Panel [2019] FCA 311, Village Roadshow Ltd v Boswell Film GmbH (2004) 49 ACSR 27, Foodland Associated Ltd v Garina Pty Ltd (No 2) (1989) 15 ACLR 530, North Sydney Brick & Tile Co Ltd v Darvall (No 2) (1986) 10 ACLR 822, Brownett v Newton [1941] HCA 14

Ringers Western Limited [2024] ATP 8, Mighty Kingdom Limited [2023] ATP 14, A S P Aluminium Holdings Pty Ltd 02R [2023] ATP 9, A S P Aluminium Holdings Pty Ltd [2023] ATP 8, oOh!media Group Limited [2011] ATP 9, Azumah Resources Limited [2006] ATP 34

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

INTRODUCTION

1. The review Panel, Alex Cartel (sitting President), Sandy Mak and John McGlue, affirmed the initial Panel's decision to make a declaration of unacceptable circumstances in relation to the affairs of Ringers Western Limited.[1] The review Panel agreed with the conclusions of the initial Panel for substantially the same reasons subject to the comments below. The review Panel also agreed with the initial Panel's final orders, which included cancelling the Ringers Western shares issued in contravention of section 606,[2] and made a minor variation to address the delay in the orders taking effect due to the review proceedings.

2. In these reasons, the following definitions apply.

[1] *Ringers Western Limited* [2024] ATP 8. All references to the "initial Panel", "initial application", "initial proceedings" and "initial Panel's reasons" relate to that matter.

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

Bombora	Bombora Investment Management Pty Ltd as trustee for the Bombora Special Investments Growth Fund
Bombora Group	Bombora Investment Management Pty Ltd in its own capacity and as manager of the Bombora Special Investments Growth Fund, Evolution Trustees Limited as responsible entity for the Bombora Special Investments Growth Fund, Brebec Pty Ltd as trustee for the Chenoweth Family Trust, Bryan Zekulich, Salam Nader Pty Ltd, Wyaga Investments Pty Ltd as trustee for the TNR Investments Trust, Jarumitoti Superannuation Fund Pty Ltd as trustee for Jarumitoti Super Fund, and Malolo Holdings Pty Ltd
Bonus Share Deed	The "Bonus Share Deed" between Ringers Western and RW Trust in relation to the RW Acquisition, as amended
Bonus Shares	Ringers Western shares to be issued under the Bonus Share Deed or 687,959,705,932 Ringers Western shares issued to the RW Trust under the Bonus Share Deed, as the context requires
Capital Raising	The capital raising undertaken by Ringers Western between 19 February 2022 and late March 2022, following entry into the Share Sale Deed
Consideration Shares	697,410,068 Ringers Western shares issued to the RW Trust in accordance with the Share Sale Deed
Constitution	The constitution of Ringers Western in force at the time the Bonus Shares were issued
Drag Along Rights	The rights and obligations (including restrictions on the disposal of shares) set out in rule 19.5 of the Constitution
Pre-Emptive Rights	The rights and obligations (including restrictions on the disposal of shares) set out in rule 17 of the Constitution
Ringers Western	Ringers Western Limited
RW Proprietary Acquisition	The acquisition of 100% of the shares in RW Proprietary by Ringers Western pursuant to the Share Sale Deed
RW AGM	The annual general meeting of Ringers Western shareholders held on 7 March 2022

RW Proprietary	Ringers Western Pty Ltd
RW Trust	Emma Salerno and James Salerno Junior as trustees for the Ringers Western Discretionary Trust
Share Sale Deed	The "Share Sale Deed" dated 19 February 2022 between Ringers Western, the RW Trust, James Salerno Jr and Emma Salerno, as amended
Tag Along Rights	The rights and obligations (including restrictions on the disposal of shares) set out in rule 18 of the Constitution
Transfer Related Rights	The Pre-Emptive Rights, Tag Along Rights, Drag Along Rights and other powers, rights and obligations set out in rule 16 of the Constitution

FACTS

3. The facts are set out in detail in the initial Panel's reasons in *Ringers Western Limited* 2024 ATP 8. Below is a summary of those facts.

4. Ringers Western (formerly known as BrandUp Limited) is an unlisted public company which has approximately 106 shareholders.

5. On 19 February 2022, Ringers Western entered into the Share Sale Deed with the RW Trust[3] pursuant to which Ringers Western agreed to acquire RW Proprietary. As consideration, Ringers Western agreed to pay $10,000,000 to the RW Trust and to issue the Consideration Shares to the RW Trust.

6. The Share Sale Deed included a condition precedent that Ringers Western receives sufficient funds from its pre-IPO capital raising to be able to fund the cash consideration payable for the RW Proprietary Acquisition.

7. Ringers Western also entered into the Bonus Share Deed with the RW Trust pursuant to which Ringers Western agreed to issue additional Ringers Western shares (i.e. **Bonus Shares**) to the RW Trust to provide an additional $7.7 million in value in connection with the RW Proprietary Acquisition in the event that an "Exit Event" (defined under the Bonus Share Deed to include an initial public offering (**IPO**) listing or sale of all, or substantially all, of the shares in, or assets of, Ringers Western) did not occur within 24 months following completion of the RW Proprietary Acquisition (unless extended).

8. The Bonus Share Deed contemplated that, in the event that an "Exit Event" did not occur, Ringers Western would also issue Bonus Shares to other minority Ringers

[3] The Share Sale Deed was also executed by Matteo Salerno (as trustee for the Ringers Western Discretionary Trust). It included warranties indicating that Matteo Salerno, James Salerno Junior and Emma Salerno were joint trustees, and the only trustees, of the Ringers Western Discretionary Trust. Material provided in the initial proceedings suggested Matteo Salerno was no longer a joint trustee at the time the Bonus Shares were issued.

Western shareholders "*other than the BrandUp Foundation Members*[4] *and other shareholders identified by BrandUp who are not entitled to receive the Bonus Shares*" to "*make whole*" their shareholding proportions "*that would otherwise have been adversely impacted*" by the issue of Bonus Shares to the RW Trust.

9. The Bonus Share Deed included clauses that provided that:

   4(a) "*Nothing in this Deed places an obligation on BrandUp to issue Bonus Shares, where to do so would cause BrandUp or any recipient of the Bonus Shares as applicable to breach or contravene any Law as a result of such issue.*"

   4(b) "*Where Bonus Shares cannot be issued within the period contemplated in clause 3(b)(ii) by the operation of Law, BrandUp must use reasonable endeavours to procure that the Bonus Shares are issued as soon as practicable after the Cut-Off Date including (at BrandUp's cost), convening a general meeting of BrandUp's shareholders to obtain any shareholder approvals required under Law.*"

10. At the time of entry into the Share Sale Deed and Bonus Share Deed, Ringers Western had less than 50 shareholders.

11. On 7 March 2022, Ringers Western shareholders approved at the RW AGM the following ordinary resolution:

    "*That approval is given for the Company to acquire 100% of the share capital of Ringers Western Pty Ltd (RW Acquisition) and to issue approximately 774,239,667 ordinary shares in the share capital of the Company (RW Consideration Shares) to James Gino Salerno, Matteo Thade Salerno and Emma Salerno as trustees for the Ringers Western Discretionary Trust (RW Seller) as part consideration for the RW Acquisition, on the terms set out in the Explanatory Memorandum, and for any director or company secretary of the Company be authorised to do all other things necessary to give effect to the RW Acquisition*".

12. The explanatory memorandum disclosed (among other things):

    (a) that as part of the RW Acquisition, Ringers Western had entered into the Bonus Share Deed

    (b) a summary of the terms of the Bonus Share Deed (this did not include the terms in clause 4(a) and 4(b) above) and that the actual number of shares to be issued under the agreement will be calculated at the relevant time based on the number of shares on issue 24 months after the RW Acquisition and other factors and

    (c) that assuming certain conditions are satisfied it was anticipated the RW Acquisition will be completed by the end of March 2022.

13. Following entry into the Share Sale Deed, between 19 February 2022 and late March 2022, Ringers Western undertook a $15,000,000 Capital Raising pursuant to which

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[4] Defined under the Bonus Share Deed as Brebec Pty Ltd as trustee for the Chenoweth Family Trust, Bryan Zekulich, Salam Nader Pty Ltd, Wyaga Investments Pty Ltd as trustee for the TNR Investments Trust, Jarumitoti Superannuation Fund Pty Ltd as trustee for Jarumitoti Super Fund, and Malolo Holdings Pty Ltd.

certain external investors were issued shares in Ringers Western and became shareholders of Ringers Western.

14. On 29 March 2022, Ringers Western and the RW Trust agreed to amendments to:
    (a) the Share Sale Deed that increased the monetary consideration under the Share Sale Deed from $10,000,000 to $15,000,000 and
    (b) the Bonus Share Deed with the effect that the value of the Bonus Shares to be issued under the Bonus Share Deed was increased by $640,000.
15. On 30 March 2022, completion occurred under the Share Sale Deed. Ringers Western:
    (a) acquired all of the issued shares in RW Proprietary
    (b) paid the $15,000,000 cash consideration to the RW Trust and
    (c) issued the Consideration Shares to the RW Trust.
16. Following completion Ringers Western shares were held as follows:
    (a) 63.31% by RW Trust
    (b) 23.05% collectively by the Bombora Group
    (c) 13.64% collectively by all other shareholders.
17. On and from 31 March 2022, Ringers Western had more than 50 shareholders and RW Trust was aware of this by 21 June 2022 at the latest.
18. From on or around 11 August 2023, the board of directors of Ringers Western comprised Emma Salerno, James Salerno Junior and Clifford Savala, all directors nominated by the RW Trust.
19. By 31 March 2024, no Exit Event in relation to Ringers Western had occurred.
20. On 2 April 2024, Ringers Western issued 687,959,705,932 Bonus Shares to the RW Trust purportedly in connection with the Bonus Share Deed. Bonus Shares were not issued to any other Ringers Western shareholders.
21. As a result of the issue of the Bonus Shares, RW Trust's holding in Ringers Western increased from 63.31% to 99.94% of all shares on issue.
22. By application dated 26 April 2024, Bombora Group applied to the Panel for a declaration of unacceptable circumstances. Bombora submitted (among other things) that:
    (a) the issue of the Bonus Shares to the RW Trust contravened section 606(1)
    (b) the circumstances were unacceptable having regard to the effect that they have on the control of Ringers Western (section 657A(2)(a)) and
    (c) the circumstances were also unacceptable having regard to the purposes set out in section 602 (section 657A(2)(b)), because:
        (i) there had been interest in acquiring Ringers Western from third party buyers that was ignored or deferred by the Ringers Western board and not communicated to Ringers Western shareholders

(ii) the acquisition of the Bonus Shares did not take place in an efficient, competitive and informed market and

(iii) minority shareholders of Ringers Western were not given any information or an opportunity to consider and assess the merits of the issue of the Bonus Shares.

23. On 4 June 2024 the initial Panel made a declaration of unacceptable circumstances and orders. The initial Panel considered that RW Trust's acquisition of the Bonus Shares:

(a) did not take place in an efficient, competitive and informed market

(b) had a significant effect on control of Ringers Western, with the interests of Ringers Western shareholders other than RW Trust being diluted effectively to nominal percentages and

(c) provided the RW Trust with the opportunity to compulsorily acquire any Ringers Western shares it does not own under Part 6A.2.

24. The initial Panel concluded that the circumstances were unacceptable:

(a) having regard to the effect that the initial Panel was satisfied they have had, are having, will have or are likely to have on:

(i) the control, or potential control, of Ringers Western or

(ii) the acquisition by a person of a substantial interest in Ringers Western

(b) having regard to the purposes of Chapter 6 set out in section 602

(c) because they constituted or constitute a contravention of a provision of Chapter 6.

25. The initial Panel made orders cancelling the Bonus Shares and requiring Ringers Western and the RW Trust to take all steps necessary to give effect to the cancellation.

REVIEW APPLICATION

26. On 5 June 2024, RW Trust sought a review of the initial Panel's declaration of unacceptable circumstances and final orders. In its application, RW Trust submitted (among other things) that:

(a) the Panel's orders do not resolve the issues arising from the Bonus Share Deed in their entirety given the broader contractual nature and context of the dispute and only dealing with elements contrary to Chapter 6 and accordingly:

(i) gives rise to unfair prejudice to RW Trust as it denies RW Trust from receiving the Bonus Shares it is entitled to and as was intended when the Bonus Share Deed was agreed between RW Trust and Bombora

(ii) leaves any future issue of shares under the Bonus Share Deed to be determined in accordance with item 7 of s611 in circumstances where

Bombora Group would control the outcome of the vote contrary to the intended purpose of that exemption and

(iii) does not provide certainty and finality to the matter, meaning Ringers Western will continue to be distracted from operating its business

(b) a 'novel' aspect of the current matter was that Ringers Western only became a Chapter 6 company after the Bonus Share Deed was entered into and, if left to stand, the initial Panel's orders will in the future give rise to abuse as 'sophisticated operators' will be able to effectively 'weaponise' the Panel to retain benefits for themselves.

(c) orders facilitating the issue of shares under the Bonus Share Deed on the basis of an alternative calculation (suggested by Ringers Western in the initial proceedings), under which certain shareholders[5] other than Bombora Group and RW Trust maintain their relative shareholding, would have addressed the unfair prejudice to RW Trust.

Interim orders sought

27. RW Trust sought interim orders to the effect that:

(a) the initial Panel's final orders be stayed pending determination of the review

(b) Ringers Western be restrained from issuing any further shares or from registering any transfer of the Bonus Shares

(c) RW Trust be restrained from:

(i) disposing of or otherwise dealing with any of the Bonus Shares

(ii) exercising any compulsory acquisition rights under Chapter 6A and

(d) Bombora Group provide the Panel and parties with a copy of the minutes of any Ringers Western shareholder meeting dealing with the matter the subject of the review application - including the meeting held on 7 March 2022.

Final orders sought

28. RW Trust sought final orders cancelling the initial Panel's orders and either making no further order or orders to the effect that three business days from the date of the order:

(a) the Bonus Shares be cancelled and

(b) Bombora Group must vote in favour of any resolution under item 7 of s611 to approve a new issue of Bonus Shares that would result in RW Trust holding

[5] These were said to be shareholders collectively holding 12.63% of the shares in Ringers Western. Based on the submission Ringers Western made in the initial proceedings this appeared to exclude some shareholders holding an additional 1.01% of Ringers Western who it was proposed Ringers Western identify as '*not entitled to receive*' bonus shares under the terms of the Bonus Share Deed noted above at paragraph 8.

81.26%, Bombora Group holding 6.11% and 'other shareholders'[6] holding 12.63% of the issued shares in Ringers Western.

DISCUSSION

29. Section 657EA sets out the right to seek review of a decision of the Panel. When conducting a review, the review Panel has the same powers to make a declaration or orders as the initial Panel. The review Panel may also vary or set aside the decision reviewed or substitute a new decision.[7]

30. The role of a review Panel is to conduct a *de novo* review. This means we are not limited to the facts found by the initial Panel.[8] We have considered all relevant material provided to the initial Panel as well as:

    (a) the reasons for decision of the initial Panel (a draft of which was circulated to the parties during the course of our review) and

    (b) the review application and further material and submissions received during the course of the review proceedings.

31. We address specifically only that part of the material we consider necessary to explain our reasoning. Given that, as discussed below, we agree with the conclusions and reasons of the initial Panel for making its declaration and orders, unless otherwise noted, we adopt (and will not repeat) those reasons. Instead, we have focussed below on the concerns raised and matters considered during the course of the review application.

Interim orders request

32. The President of the Panel considered the request for interim orders on an urgent basis and on 6 June 2024 made interim orders to maintain the status quo (Annexure A). The interim orders:

    (a) stayed the initial Panel's orders cancelling the Bonus Shares before they took effect

    (b) restrained Ringers Western from issuing any further shares under the Bonus Share Deed, registering any transfer of the Bonus Shares or from taking any steps towards compulsory acquisition and

    (c) restrained RW Trust from disposing of, or otherwise dealing with, any Bonus Shares or from taking any steps towards compulsory acquisition.

33. We declined to make the order RW Trust sought for the production of the minutes of previous Ringers Western shareholder meetings as we did not consider it

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[6] See footnote 5 above.
[7] s657EA(4).
[8] *Eastern Field Developments Limited v Takeovers Panel* [2019] FCA 311 at [181] and Guidance Note 2: Reviewing Decisions [31].

appropriate or necessary to preserve either the status quo or our power to fashion appropriate final orders.[9]

Preliminary submissions and decision to conduct proceedings

34. Bombora Group made a preliminary submission stating that we should not conduct proceedings because (among other things):

    (a) RW Trust's application did not appear to address the declaration, only the orders and

    (b) the orders do not unfairly prejudice RW Trust, noting:

        (i) they leave the Bonus Share Deed on foot and RW Trust in a position to reissue the shares provided they comply with applicable laws and

        (ii) the Bonus Share Deed provides that Ringers Western did not have an obligation to issue the Bonus Shares where doing so would contravene a law and if that is not possible then that is simply the result of the bargain that was struck between the parties.

35. Ringers Western reiterated some of the submissions it made during the initial proceedings, including that:

    (a) in the alternative, either:

        (i) the relevant time for determining any obligations to comply with Chapter 6 was in 2022 when the Bonus Share Deed was executed or approved – before Ringers Western had more than 50 members

        (ii) shareholder approval for the issue of Bonus Shares complying with item 7 of s611 was obtained at the Ringers Western meeting on 7 March 2022 or

        (iii) members of the Bombora Group did not disclose to RW Trust that Ringers Western would become a Chapter 6 company or to other shareholders the existence and significance of the Bonus Share Deed and it would be against the public interest to make a declaration given their contribution to the unacceptable circumstances and

    (b) the orders made by the initial Panel are unfairly prejudicial to RW Trust and do not resolve all the issues.

36. As noted by the initial Panel, a significant amount of material provided in the initial application canvassed matters that appeared unrelated to the Panel's jurisdiction.

37. We agree with, and adopted, the initial Panel's approach of limiting the scope of our review to the effect of the issue of the Bonus Shares on the control of Ringers Western, including whether the issue contravened section 606.

[9] Guidance Note 4: Remedies General at [10]. It also did not appear to us to be directed to an objective listed in s657D(2) in relation to the circumstances in question.

38. On 27 June 2024, we were provided with a draft of the initial Panel's reasons. We were inclined to agree with the conclusion and reasons of the initial Panel for making its declaration and orders.

39. However, in reviewing material from the initial application we identified that Ringers Western's constitution may contain certain enforceable rights relating to the transfer of shares. At our request, ASIC provided us with the most recent copy of Ringers Western's constitution lodged with it on 4 March 2022. This confirmed that at the time the Bonus Shares were issued, the constitution of Ringers Western contained pre-emptive rights, tag along rights and drag along rights.

40. In summary:

    (a) The Pre-Emptive Rights require any member wishing to sell any Ringers Western shares to first offer them to all current members who are able to 'pre-empt' the sale by instead purchasing the shares themselves.

    (b) The Tag Along Rights apply where a seller, having offered pre-emptive rights to current members, proposes to sell 60% or more of the issued shares in Ringers Western to a third party and entitle current members to give a notice that they wish to 'tag along' to the sale. The seller must use its best endeavours to procure the purchaser to buy those additional shares (on the same terms) and can only sell a proportion of their own holding equal to the proportion of shares held by those tagging-along that the purchaser agrees to buy.

    (c) The Drag Along Rights entitle the Board of Ringers Western, subject to certain pre-conditions being met, to give notice to each member requiring them to sell all of their shares to a proposed buyer of 100% of the company's shares.

41. An extract of the relevant Transfer Related Rights is included in Annexure B.

42. We decided to conduct proceedings so that we could further consider the potential impact of the provisions in Ringers Western's constitution on whether a contravention of s606 had occurred and whether, in any event, the circumstances were nonetheless unacceptable. This also provided the parties with an opportunity to make further submissions with the benefit of a draft of the initial Panel's reasons. We communicated our decision to the parties on 28 June 2024.

Notices of appearance from new parties

43. We received notices of appearance from three shareholders in Ringers Western who had not been parties in the initial proceedings. We decided not to accept the notices of appearance but invited the shareholders to make a submission as to whether we should affirm, revoke or vary the initial Panel's declaration and orders. We did not receive any submissions from the shareholders.

Contravention of s606 arising from the issue of the Bonus Shares

44. As observed by the Panel in *A S P Aluminium Holdings Pty Ltd* [2023] ATP 8 (*A S P Aluminium*),[10] rights contained in a company's constitution, such as pre-emptive

[10] *A S P Aluminium Holdings Pty Ltd* [2023] ATP 8 at [43] – [44].

rights over the sale or transfer of other members' securities, can affect the way Chapter 6 applies.

45. ASIC states in Regulatory Guide 5 (citing *North Sydney Brick & Tile Co Ltd v Darvall (No 2)*):[11]

> "*pre-emptive rights that do not fall within [s609(8)] (e.g. because they differ between members or arise under a private agreement) may give rise to a relevant interest in each of the securities that are the subject of pre-emption*".[12]

46. Where pre-emptive rights of this kind apply to all of the shares in the company, section 606 may not operate to prevent existing members acquiring further interests in a company as each member already has voting power of 100% in the company. It may also mean a person who is not a member cannot acquire any shares in the company without acquiring a relevant interest in all the company's shares.[13]

47. The basis of the conclusion in *Darvall*, was that the capacity to prevent a transfer under the pre-emptive rights gave each member power '*to exercise control over the disposal of*' other members' shares.[14] This test is the predecessor to the substantially similar test now found in s608(1)(c), being a power to '*control the exercise of a power to dispose of securities*'. As the Tag Along Rights and Drag Along Rights also had the potential to satisfy this test we sought submissions from the parties on whether the existence of any or all of the Transfer Related Rights in Ringers Western's constitution meant that RW Trust's acquisition of the Bonus Shares did not result in a contravention of s606.

48. ASIC and Ringers Western did not make a submission. Bombora Group submitted, for reasons discussed below, that notwithstanding the Transfer Related Rights "*RW Trust did not have a relevant interest in 100% of the shares on issue in Ringers Western immediately prior to being issued the Bonus Shares. By the issue of the Bonus Shares, the RW Trust acquired a relevant interest in Ringers Western which increased its voting power from 63.31% to 99.94%*" which constituted a breach of s606.

49. RW Trust's submissions in relation to the Transfer Related Rights focussed more generally on what they indicated about the nature of Ringers Western. Citing the Panel's decision in *A S P Aluminum* as authority, RW Trust submitted that "*s606 does not result in a breach on the basis that Ringers Western is more akin to a private company.*" RW Trust also submitted that s606 was not breached as the relevant time for consideration of the breach was when the Bonus Share Deed was entered into.

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[11] (1986) 10 ACLR 822 (*Darvall*).
[12] ASIC Regulatory Guide 5: *Relevant Interests and substantial holding notices* (ASIC RG 5) at RG 5.36.
[13] See ASIC Practice Note 25 *Relevant interests in shares* (PN 25) (28 September 1992) at PN 25.40. See also National Companies and Securities Commission Practice Note No. 342: *Companies (Acquisition of Shares) Act and Codes: Pre-emption Rights* (19 November 1987).
[14] per Mahoney JA at 844-845 (Glass JA agreeing) and Kirby P at 839 considering s9(1)(b) of the *Companies (Acquisition of Shares) NSW Code*.

The Pre-Emptive Rights

50. Bombora Group submitted that the Pre-Emptive Rights fall within the exclusion in s609(8) which was introduced to reverse the effect of *Darvall*[15] where pre-emptive rights in a company's constitution apply to all members on the same terms.

51. RW Trust (referring both to the Pre-Emptive Rights and other rights in clause 5 of the Constitution designed to ensure a first right of refusal to existing members in certain share issues), submitted that "*[t]he Ringers Western constitution gives the same rights to all existing members both in relation to share transfers and share issues*".

52. We agree that the Pre-Emptive Rights are drafted such that '*all members have pre-emptive rights on the same terms*' and therefore under s609(8) did not result in each member in Ringers Western having a relevant interest in each other member's shares.

The Tag Along Rights

53. The Tag Along Rights enabled Ringers Western members who, as part of the Pre-Emptive Rights process, had been notified of the proposed sale of 60% or more of the company's share capital to a third party, to give notice they wish to 'tag along' to the sale. The notice restricts the seller's ability to sell its shares to the proportion of additional securities in all tag along notices the buyer agrees to buy (and if the buyer does not agree to buy any additional shares then the sale must not occur).

54. While the Tag Along Rights do involve a right to restrict disposal in some circumstances there may be a question whether they resulted in RW Trust having a relevant interest in all other members' shares at the time of the Bonus Share issue under the test in s608(1)(c), including because:

    (a) unlike the rights to pre-empt any transfer of shares to a non-member which were considered in *Darvall* to amount to control over disposal, the tag along right depends in part on the size of the stake a member has proposed to sell and the response of a third party which distinguishes it in some respects from that case.[16] The rights inherent in a tag along may be considered more remote in terms of their capacity for a member to 'control' disposal and

    (b) as they only apply to the sale of over 60% of Ringers Western's share capital, they may not have operated at the time of the Bonus Share issue to give RW Trust an interest in other members' shares as collectively these shareholders only held 36.69% of Ringers Western's shares.

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[15] Corporations Law Simplifications Task Force, *Takeovers – Proposal for simplification* (January 1996) p14 (see also p4 item 5(a); Corporate Law Economic Reform Program Bill, Explanatory Memorandum (CLERP EM) para 7.62.

[16] As noted in *Darvall* at 844 a power that is in scope '*minor or peripheral*' may not amount to 'control' over the exercise of the power to dispose. See also *Azumah Resources Limited* [2006] ATP 34 at [58] and the comments of Mr Commissioner Murray QC in *Foodland Associated Ltd v Garina Pty Ltd (No 2)* (1989) 15 ACLR 530 at 554 that '*clearly not every type of negative restriction upon the right to transfer shares in a company will confer upon anyone a relevant interest in all the shares so affected by that restriction*'.

55. Bombora Group submitted that on a proper construction the Tag Along Rights did not give rise to a relevant interest as they are also '*pre-emptive rights on the transfer of securities*' within the meaning of s609(8), stating:

> "*The concept of "pre-emption" in its ordinary meaning includes not just an ability to acquire or appropriate beforehand, but also the ability to anticipate; to act to prevent something from happening by taking action first.*[17] *The phrase "pre-emptive rights on the transfer of the securities" in s 609(8) is capable of referring to a right to pre-empt a sale, as much as a purchase. It is consistent with the reasoning in Darvall […], the subsequent legislative amendment, and the approach in ASP Aluminium to give that phrase this broader meaning.*"

56. Potentially standing against this proposition is the explanation given in the explanatory memorandum to the bill introducing the s609(8) exclusion, which stated that '*[a] right of pre-emption occurs where the members of the company are able to purchase the shares of any other member who proposes to sell their parcel, before any outsider can purchase them*'.[18] However, we consider that Bombora's submission is supported by the plain words of s609(8).[19]

57. As noted above we think there is uncertainty as to whether the Tag Along Rights in this case gave rise to RW Trust having a relevant interest in other Ringers Western members' shares under s608. Even if they did - we prefer the view, consistent with Bombora Group's submission, that s609(8) exempts a relevant interest arising from the Tag Along Rights in this case.

58. We took additional comfort in this view given the Tag Along Rights in Ringers Western's Constitution are triggered in the course of the Pre-Emptive Rights process.[20] We agree with the inclination of the Panel in *A S P Aluminium* to "*give section 609(8) a broad reading to give effect to Parliament's apparent desire to avoid the rather arbitrary effects of the approach in Darvall*".[21] Adopting a narrow interpretation of 'pre-emptive rights' in a way that excludes provisions such as the Tag Along Rights would lead to a similarly arbitrary outcome that the provision was enacted to avoid.

The Drag Along Rights

59. The Drag Along Rights provide that:

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[17] Bombora Group referenced the definitions in the Macquarie Dictionary, Cambridge Dictionary and Merriam-Webster Dictionary.
[18] CLERP EM para 7.62.
[19] Noting the Full Court of the Victorian Supreme Court's admonition (Calloway JA) in *Village Roadshow Ltd v Boswell Film GmbH* (2004) 49 ACSR 27, at footnote 4 that "*Company law must not be allowed to become a feat of detection or a paperchase beyond the resources of all but the most determined litigants.*" See also s15AB(1) and (3) of the *Acts Interpretation Act 1901* (Cth).
[20] The Tag Along Rights only arise after all Ringers Western members have been given a transfer notice setting out their rights under the Pre-Emptive Rights provisions, where the shares not taken up by existing members as part that process represent more than 60% of Ringers Western's issued capital, and the terms of the sale to the external third party are the same as offered to members under their pre-emptive rights.
[21] *A S P Aluminium* at [45].

(a) where a board-appointed financial advisor recommends a trade sale of the company

(b) Bombora accepts the recommendation and

(c) a buyer is identified for all the shares on issue,

the Board of Ringers Western may (with the consent of Bombora if it's still a member) give notice to all members requiring them to sell all of their shares to the buyer. Such a notice halts members' ability to sell their shares under the Pre-Emptive Rights pending completion.

60. These rights are stated to be '*at all times while Chapter 6 of the Corporations Act applies to the Company, subject to a resolution under item 7 in the table in section 611 of the Corporations Act being passed (and any necessary relief being provided by ASIC in respect of such resolution).*'

61. Bombora Group submitted that:

> "*The RW Trust did not have a relevant interest in the Ringers Western shares by reason of the Drag Along Rights for a number of reasons.*
>
> *First, the Drag Along Rights are triggered by a recommendation by a Financial Adviser, which is accepted by the Bombora Member. There is no suggestion that either happened here.*
>
> *Secondly, those provisions do not confer any power or control on the RW Trust. The right to give an Exit Drag Along Notice is conferred on the Board. There is no power or control given to RW Trust [...]*
>
> *Thirdly, s609(7) applies. The Constitution is a relevant agreement […] and r 19.5 is conditional in the way subsection (a) requires, does not confer "control over, or power to substantially influence, the exercise of a voting right[s]" within (b) and does not restrict the transfer of shares within (c).*"

62. We think there is some uncertainty as to Bombora Group's first and second points.

63. With regard to the first point, while the Drag Along Rights are not enlivened until certain pre-conditions are met, it is possible the 'accelerator provision' in s608(8) applies in relation to the agreement and/or right in the Constitution for the Board to give a drag along notice directing disposal of each member's shares.

64. With respect to the second point:

(a) notwithstanding they acted in their capacity as trustees, Emma Salerno and James Salerno Junior were the relevant 'persons' (for the purposes of s606) who acquired the Bonus Shares when they were issued to RW Trust, and they constituted the majority of the Board at the time of the issue and

(b) an effect of giving the power to issue a drag along notice to the Ringers Western Board may be that Ringers Western itself had that power. If so, Ringers Western would have a relevant interest in 100% of its own shares under the test in s608: s608(9). If that was the case, RW Trust would be taken to have the same relevant

interest in 100% of Ringers Western shares by operation of s608(3)(a) and/or 608(3)(b).

65. However we agree with Bombora Group's third point that no relevant interest arose as the Drag Along Rights satisfied the requirements of the exclusion in s609(7). The Drag Along Right is drafted such that the power for the Board to give a drag along notice is subject to passage of an item 7 s611 resolution while Chapter 6 applied to the company.

66. While the history of the s609(7) exclusion does not suggest it was introduced to apply to agreements such as this found in corporate constitutions,[22] for the purposes of assessing the impact of the Drag Along Rights on whether there was a breach of s606 in the circumstances it appears to us that the exclusion means RW Trust did not already have a relevant interest in all Ringers Western shares at the time it acquired the Bonus Shares.

Nature of Ringers Western

67. RW Trust submitted that *A S P Aluminum* is authority for approaching the application of Chapter 6 differently where a company's constitution reflects that of "*standard private company*", including because it contains provisions such as the Tag Along Rights and Drag Along Rights[23] as well as other provisions not aligned, or conflicting with, or which as a substitute satisfy the information requirements and intent of, Chapter 6 and this should mean that there was no breach of s606.

68. Bombora Group submitted that:

> "*RW Trust also invites the Panel to adopt an unprincipled and impressionistic approach to the application of Chapter 6 to unlisted public companies on the basis of a decision which expressed reservations about the application of Chapter 6 to proprietary companies. That invitation ought to be rejected. There is no basis for the application of Chapter 6 to the issue of the Bonus Shares other than in accordance with the proper construction of the legislation and established legal principles*."

69. *A S P Aluminium* concerned the application of Chapter 6 to a proprietary company that had more than 50 members. There the Panel stated:

> "*We consider that there may be circumstances or factors which justify the Panel approaching proprietary companies differently for the purposes of Chapter 6, including but not limited to:*
>
> *(a) Proprietary companies need to have no more than 50 shareholders (excluding employee shareholder and crowd-sourced funding (CSF) related shareholders).*[24] *Accordingly, Chapter 6 and the Panel's jurisdiction generally only extends to proprietary companies that have employee shareholders or make a "CSF offer" (as defined in the Act).*

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[22] See *oOh!media Group Limited* [2011] ATP 9 at [50]–[52].
[23] Citing the Panel's comments in *A S P Aluminium* at [47].
[24] Section 113(1).

> *(b) The constitutions of proprietary companies often contain a pre-emptive rights regime and "tag along" or "drag along" rights similar to those in ASP's constitution."*[25]

70. The review Panel in *A S P Aluminium 02R* (while noting that difference in what Chapter 6 or section 602 may require in respect of proprietary companies was not material to their decision) observed that, depending on the circumstance of the particular matter:

> "*a company's status as a proprietary company could be a relevant factor in the exercise of the Panel's discretion in deciding whether to make a declaration […] the presence of a pre-emptive rights regime in a proprietary company's constitution could also be a relevant factor in the exercise of that discretion.*"[26]

71. We do not agree with RW Trust's submission that the comments in *A S P Aluminium* and *A S P Aluminium 02R* cited above extend to determining that a contravention of s606 has not occurred when it has. As the review decision noted '*it is clear that Chapter 6 applies to proprietary companies with more than 50 members as a matter of law*'.[27] Rather they suggest the proprietary status of a company may be a relevant matter to weigh in the Panel's discretion as to whether to make a declaration in response to a contravention. Given this we considered RW Trust's submission in terms of what weight we should put on the nature of Ringers Western in exercising our discretion whether to affirm the initial Panel's decision.

72. Bombora Group submitted that "*an unlisted public company with more than 50 members, such as Ringers Western, is the very category of company to which Chapter 6 expressly applies. There is no basis for the submission that ASP somehow justifies the Panel approaching public unlisted companies differently.*"

73. We agree that an important distinction in the matter before us is that Ringers Western is, and has at all relevant times been, a public company. While RW Trust submitted that Bombora Group and RW Trust 'both regularly operated Ringers Western as if it was a private company' it is neither unusual or novel for a public company to be initially closely held (and operated accordingly) and become subject to Chapter 6 over time as a result of seeking further capital given public companies are not subject to the restrictions applying to proprietary companies. Indeed, that is likely the most common way Chapter 6 comes to apply to an unlisted public company.

74. Further, in so far as Ringers' Western's constitution includes provisions, such as the Transfer Related Rights, which may be said to be more typically found in the constitution of a proprietary company:

    (a) we do not think the comments made by the Panels in *A S P Aluminium* and *A S P Aluminium 02R* (in so far as they relate to constitutional provisions)

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[25] *A S P Aluminium* at [47].
[26] *A S P Aluminium Holdings Pty Ltd 02R* [2023] ATP 9 (*A S P Aluminium 02R*) at [54].
[27] *A S P Aluminium 02R* at [54].

necessarily extends by analogy to public companies – given the focus of those matters on the proprietary status of the company in question and

(b) in any event we do not believe that there is a basis in the circumstances to consider the provisions in the Ringers Western Constitution are incompatible with, a substitute for, or operate to exclude the appropriate application of, Chapter 6 to the company, noting in particular:

(i) the Constitution contains provisions that expressly contemplate the possibility that Ringers Western may become subject to Chapter 6 before listing[28]

(ii) as discussed above, we are of the view that the Transfer Related Rights did not operate to prevent Chapter 6 effectively applying to the issue of the Bonus Shares and

(iii) it is not apparent that the various special rights in the Constitution given to Bombora Group and RW Trust relating to the appointment of directors and other matters create significant obstructions to the application of Chapter 6.[29]

75. The initial Panel stated that "*it is clear that Ringers Western is a Chapter 6 company and the performance of the Bonus Share Deed must therefore comply with the requirements of Chapter 6*".[30] We agree with the initial Panel and do not think shareholders of Ringers Western should be denied the usual protections of Chapter 6 on the basis of the nature of Ringers Western.

Nature of rights under the Bonus Share Deed

76. RW Trust submitted that the issue of the Bonus Shares did not give rise to a breach of s606 because:

(a) from entry into the Bonus Share Deed on 19 February 2022 it had at least an "*equity, mere equity, contingent, contractual or similar,*" giving rise to "*'power and control' to assign the Bonus Share Deed or at least the right to require the issue of the Bonus Shares to a third party*" and

(b) since that time it has had a relevant interest in the Bonus Shares because it held the s608(1) power to 'dispose of or control the exercise of a power to dispose of' the right to the Bonus Shares.

77. This submission is misconceived. As ASIC RG 5 makes clear:

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[28] As previously noted, cl 19.5(b) states that the Drag Along Rights only apply 'until such time that the Company is admitted to the Official List of the Exchange' and are nonetheless subject to a resolution under item 7 of s611 being passed if Chapter 6 applies to the company.

[29] In this regard we note the initial Panel stated that it disagreed with submissions by Ringers Western that "*the control of the board of directors by the nominee directors of a substantial shareholder, or the casting votes held by those nominee directors, amounts to a 100% control or voting power by that substantial shareholder*": initial Panel's reasons at [93]–[94].

[30] Initial Panel's reasons at [47].

> "*the takeover and substantial holdings provisions do not account for unissued shares. Even if an option to have a share issued could be described as a power to control the future disposal of that share, the definition of 'voting share' in s9 only includes issued shares. Further, the accelerator provision (which brings forward the time for recognising a relevant interest under options and other agreements) only applies when the counterparty has a relevant interest in issued shares: s608(8)(a).*"[31]

78. As no relevant interest can arise in a share until it is issued, RW Trust could not have had relevant interests in the Bonus Shares prior to 2 April 2024.

79. RW Trust additionally submitted (among other things) that the right to be issued the Bonus Shares was itself a 'pre-emptive right' and that somehow s609(8) therefore meant the issue of the Bonus Shares did not give rise to a contravention of s606. RW Trust reasoned that:

> "*The Bonus Share issue right is "pre-emptive" as it allows only RW Trust and the Other Shareholders to take those shares. It is also a "right" existing under a contractual document (the Bonus Share Deed). Put together, a "pre-emptive right" provides a shareholder (i.e. RW Trust and the Other Shareholders) the right to obtain existing or freshly issued shares in a company in priority to a third-party acquirer (i.e. Bombora Group).*"

80. This submission similarly misunderstands the operation of s609 as an exclusion from a relevant interest arising (rather than an exemption from s606). In any event, we do not consider a right to receive the Bonus Shares could be considered a 'pre-emptive right', however broad a reading is taken of the concept, much less a right which would fall within the exemption in s609(8) (which requires the right to be given to all members on the same terms).

Approval given at the RW AGM

81. RW Trust reiterated submissions Ringers Western made to the initial Panel that the acquisition arising from the issue of the Bonus Shares was exempt under item 7 of s611 given the shareholder resolution passed by Ringers Western at the RW AGM.

82. The initial Panel concluded that item 7 of s611 did not apply, noting:

    (a) the resolution at the RW AGM did not expressly reference the Bonus Share Deed and instead loosely referred to an explanatory memorandum which only included a high-level explanation of the Bonus Share Deed and

    (b) the notice of meeting documents did not "*disclose the material information required by item 7(b)(ii) and item 7(b)(iv), the matters set out in [ASIC Regulatory Guide 74: Acquisitions approved by members at RG 74.25] or the reports contemplated in RG 74.41*".[32]

[31] ASIC RG 5 at RG 5.154.
[32] Initial Panel's reasons paragraph 78(b)(ii).

83. The initial Panel also noted that even if the resolution passed at the RW AGM had approved the issue of the Bonus Shares (which it did not consider that it did) a fresh approval under item 7 should have been sought given the combination of:

    (a) the period of time between the resolution and issue of the Bonus Shares

    (b) the material change in circumstances, which included Ringers Western becoming a Chapter 6 company by having more than 50 shareholders and the appointment of the trustees of the RW Trust to the Ringers Western board of directors and

    (c) the complicated nature of the Bonus Share Deed and the dispute as to whether the issue of Bonus Shares was in fact in accordance with the terms of the Bonus Share Deed.

84. RW Trust submitted (among other things) that the acquisition of the Bonus Shares satisfies the requirements of item 7 of s611 because:

    (a) the relevant resolution was stated to approve the 'RW Acquisition' and any director or company secretary to '*be authorised to do all other things necessary to give effect to the 'RW Acquisition*'

    (b) the explanatory memorandum went on to note that as part of the 'RW Acquisition' the Bonus Share Deed provided that the company would issue additional shares

    (c) on 30 March 2022 the directors of Ringers Western by circular resolution approved Ringers Western taking such action as is necessary to satisfy the obligations of the Company including 'execution and performance of any Transaction Document' (defined to include the Bonus Share Deed) and

    (d) accordingly the RW AGM and the director's circular resolution in 2022 "*both approved not only the Share Sale Deed, but also the Bonus Share Deed and all actions to be taken under the Bonus Share Deed including issue of the Bonus Shares in 2024.*"

85. RW Trust also submitted that because no minutes of the RW AGM have been produced in the proceedings "*it is not possible to conclude the information requirements under s602 nor the requirements of item 7 were not met*" and given at the time all members were related to Bombora, there was likely discussion of the Bonus Share Deed in greater detail.

86. Bombora Group submitted that the resolution at the RW AGM "*did not and could not meet the requirements of a resolution required under item 7 of s611*" noting that the information required in the exemption regarding the maximum increase in interests arising from the acquisition of the Bonus Shares was not available at that time, as demonstrated by the fact "*Ringers Western considered it necessary to obtain a valuation from Ernst & Young and an opinion from KPMG in order to calculate the number of Bonus Shares to be issued.*"

87. It is clear to us that the resolution did not constitute an approval of the acquisition of the Bonus Shares for the purposes of item 7 of s611:

(a) on its terms the resolution approved Ringers Western's acquisition of RW Proprietary and 'as part consideration' the issue of shares under the Share Sale Deed – the fact the explanatory memorandum disclosed that the parties had also entered into the Bonus Share Deed under which the company may in the future issue further shares does not alter what was approved by the resolution

(b) the authorisation to company officers to do all things necessary to give effect to the acquisition of RW Proprietary does not constitute approval of the issue of the Bonus Shares – this is consistent with the statement in the explanatory memorandum that the acquisition would likely be 'completed' by the end of March 2022

(c) the resolution of the directors following the RW AGM similarly does not change what was approved by the resolution of Ringers Western shareholders and

(d) even if the resolution, explanatory memorandum and circular together could be taken to constitute approval by a company resolution of RW Trust's acquisition of shares under the Bonus Share Deed (which we do not think it could):

(i) the approval did not satisfy item 7(b) of s611 given, as the initial Panel noted, it did not disclose material information relevant to Ringers Western shareholders about the issue of the Bonus Shares (including material information described in ASIC Regulatory Guide 74 and details of the maximum extent of the increase in RW Trust and its associates' voting power required by items 7(b)(ii) and (b)(iv))[33] and

(ii) the issue of Bonus Shares did not in any event conform with the summary information about the Bonus Share Deed referenced in the explanatory memorandum given:

(A) the terms of the Bonus Share Deed were altered after the meeting to increase the value of the Bonus Shares to be issued by $640,000 and

(B) the explanatory memorandum stated the shareholding proportions of certain other shareholders that would otherwise have been adversely impacted by the dilution would be 'made whole'.

88. Given the above, we do not believe that there is any basis for us to conclude that anything that was discussed at the RW AGM would alter our conclusion that item 7 of s611 was not available to RW Trust. In any event it was for RW Trust to demonstrate that the relevant resolution satisfied item 7 of s611 on the basis of the information available to it before it relied on the exemption.

89. We therefore agree with the initial Panel's conclusions for the reasons outlined.

[33] As noted in *Mighty Kingdom Limited* [2023] ATP 14 at [47] the failure to provide material information known to the company or acquirer can result in an acquisition falling outside the exemption.

Whether Ringers Western had 'started to carry on any business'

90. RW Trust also submitted that item 8 of s611 applied to the acquisition. In the initial proceedings, Ringers Western had suggested this exemption applied because the issue of the Bonus Shares resulted from a transaction entered into at a time when Ringers Western had not carried on any business, nor borrowed any money.

91. The initial Panel concluded that item 8 of s611 did not apply as the Bonus Shares were not issued and acquired at a time when Ringers Western had not carried on any business and had not borrowed any money.

92. In its submissions in the review proceedings RW Trust suggested that the exemption applied instead because Ringers Western "*has not commenced carrying on any business and has not borrowed any money even today. All of those activities have been conducted by its wholly owned subsidiary*".

93. Material provided to the initial Panel suggested the Ringers Western Board was involved in overseeing the group's business. This included a Delegation and Operations Policy which stated the Ringers Western (then BrandUp Ltd) Board '*is responsible for the overall direction of the Group and the Business*'[34] and required certain operational decisions to be escalated to the Board for consideration before being approved by the CEO, including the Annual Program that set out how the business was to be conducted.

94. The historical context of the exemption in item 8 of s611 suggests that its operation was intended to be narrow in scope. Its earliest predecessor was s12(e) of the *Companies (Acquisition of Shares) Act 1980* (Cth) which exempted allotments by a company that has '*not commenced any business and has not exercised any borrowing power*'. It was introduced to ensure the new takeover provisions did not apply to certain acquisitions '*through allotments made before it would be necessary to issue a prospectus*'.[35]

95. This appears to reference longstanding requirements contained in the Uniform State Companies Acts that public companies with share capital that had not issued a prospectus were prohibited from commencing any business or exercising borrowing power without filing the equivalent of a prospectus with the relevant authority and confirming directors have paid application and allotment money in respect of their

[34] The Business was defined to be '*the business carried on by [RW Proprietary] from time to time*'. RW Trust also raised concerns the initial Panel's orders would distract Ringers Western from 'operating the business'.
[35] Explanatory Memorandum to the Companies (Acquisition of Shares) Bill 1980 and Companies (Acquisition of Shares-Fees) Bill 1980 (Cth), para 51(e).

shares.[36] Prior to that time any contract entered into by the company was provisional only and not binding on the company.[37]

96. The history of the provision indicates the exemption was intended to be narrowly confined to companies that have only engaged in limited activities of the kind historically available to a public company in the course of forming the company and concluding its initial allotments. This is consistent with the heading to the equivalent provision under the old *Corporations Law*: '*Allotment by newly formed company*'.[38]

97. We note also (to the extent it may apply to the exemption), s20 of the Act states that a reference to a person 'carrying on a business' includes carrying on a business '*whether alone or together with any other person or persons*'.[39]

98. Having regard to the material before us, and the terms and context of the exemption, we do not agree that by 2 April 2024 Ringers Western had not '*started to carry on any business*' and therefore we do not accept that item 8 of s611 applied to RW Trust's acquisition of the Bonus Shares.

99. Accordingly, having considered the additional submissions of the parties (including on the impact of the Transfer Related Rights), we came to the same conclusion as the initial Panel that "*[a]s a result of the issue of the Bonus Shares, the RW Trust's relevant interest and voting power in Ringers Western increased from 63.31% to 99.94%, other than as permitted by one of the exceptions in section 611, resulting in a contravention of section 606.*"[40]

Unacceptable circumstances having regard to effects on control and s602 purposes

100. In addition to concluding that s606 was contravened, the initial Panel concluded that the issue of the Bonus Shares to RW Trust:

    (a) did not occur in accordance with the purposes set out in s602, including because it did not take place in an efficient, competitive and informed market and because Ringers Western shareholders were not properly informed of the issue of the Bonus Shares or given an opportunity to assess the merits of the issue of the Bonus Shares[41] and

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[36] See eg *Companies Act 1961* (Vic), s52(2). This provision appears initially to have had an anti-avoidance role, including with respect to a corresponding provision that prohibited a company that had issued a prospectus open to the public from commencing any business or exercising borrowing power until it had achieved minimum subscription and (if applicable) obtained listing: s52(1). See Company Law Advisory Committee to the Standing Committee of Attorneys-General *Fifth Interim Report on the control of fundraising, share capital and debentures* (October 1970) para 84. These provisions were not carried over into the *Companies Act 1981* (Cth).
[37] See eg *Companies Act 1961* (Vic), s52(4) and *Brownett v Newton* [1941] HCA 14.
[38] *Corporations Law*, s624.
[39] s9 of the Act is to the effect that (unless the contrary intention appears) 'carry on' has a meaning affected by s20.
[40] Initial Panel's declaration of unacceptable circumstances, paragraph 17.
[41] Initial Panel's declaration, paragraph 19(a) and initial Panel's reasons at [101]-[106]. The initial Panel noted a contributor to their view was their conclusion that the decision by Ringers Western to issue the Bonus Shares was not made free of any influence or appearance of influence from the RW Trust.

(b) had a significant effect on control of Ringers Western, with RW Trust's voting power in Ringers Western increasing to 99.94% the interests of Ringers Western shareholders other than the RW Trust being diluted effectively to nominal percentages and RW Trust being provided the opportunity to compulsorily acquire Ringers Western shares it does not own under Part 6A.2.[42]

101. Despite coming to the same conclusion that RW Trust's acquisition of the Bonus Shares contravened s606, we sought further submissions on whether, even if the acquisition did not give rise to a breach of s606 (including because of the existence of the Transfer Related Restrictions), the circumstances occasioned by the issue were nonetheless unacceptable having regard to:

(a) the principles in section 602

(b) its likely effect on control or potential control of Ringers Western or the acquisition of a substantial interest in Ringers Western.

102. In doing so we also invited parties to provide any additional submissions on the initial Panel's reasons and whether we should affirm, vary or set aside the initial Panel's decisions and/or orders.

103. Bombora Group submitted that even if there was no contravention of s606 (including due to the Transfer Related Rights), the acquisition of the Bonus Shares still gave rise to unacceptable circumstances for the reasons set out by the initial Panel and various submissions made by themselves and ASIC.

104. We agree with Bombora Group that even if there was no contravention of s606 because RW Trust already had relevant interests and voting power in 100% of Ringers Western shares due to the Transfer Related Rights, RW Trust's acquisition would still be unacceptable. Having concluded that Ringer's Western's shareholders were appropriately entitled to the protections of Chapter 6,[43] we do not consider we should ignore the impact of a substantial acquisition merely because the existence of a pre-emptive rights regime in the company's constitution leads to what was evidently recognised by Parliament (in enacting s609(8)) and even by the Court in *Darvall*,[44] as an unintended outcome.

105. We are similarly of the view that even if the exemptions in items 7 and 8 of s611 did apply to the acquisitions of the Bonus Shares, it would nonetheless be unacceptable to rely on them in the circumstances because:

(a) we agree with the conclusion of the initial Panel in relation to the resolution passed at the RW AGM for the reasons referenced at paragraph 83 above. We did not agree with RW Trust's submission that the change in circumstances

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[42] Initial Panel's declaration, paragraph 19(b) and (c) and *Ringers Western Limited* [2024] ATP 8 at [94]-[96].
[43] Including for the reasoning set out at paragraphs [67]-[75] above.
[44] *Darvall*, Per Kirby P who stated '*I do not for a moment consider that this is the intended operation of the Code*' at 838 and Glass JA who noted he was attracted by arguments that an interpretation of the Code should be taken that would '*avoid certain consequences which would otherwise ensue and which could be described as absurd*' at 840.

between the time of the approval and the issue was 'immaterial' and note additionally our observations above at paragraph 87(d)(ii) and

(b) we consider reliance on item 8 on the basis that Ringers Western's business was conducted through a wholly owned subsidiary would:

(i) enable avoidance of Chapter 6 in a way that renders it substantially devoid of operation and

(ii) be inconsistent with the policy and purposes underlying the exemption having regard to the historical background of that provision as noted in paragraphs 94-96 above and the purposes of Chapter 6 in s602.

106. RW Trust submitted that the initial Panel was mistaken in its consideration of the effect of the issue of the Bonus Shares on control of Ringers Western as it should be considered in light of provision in the Constitution that resulted in RW Trust '*already having a casting vote on all Directors decisions*' and '*being permitted to act in circumstances when all Directors are in conflict*'. This submission confuses control of the company with control of the board.

107. We agree with the initial Panel's conclusion that the issue affected control of Ringers Western.

Strategic enlivenment of Chapter 6

108. The initial Panel stated that "*it may not be in the public interest to make a declaration of unacceptable circumstances in relation to a contravention of section 606 if there is a contemporaneous plan or proposal designed to cause a company to be taken inside the ambit of Chapter 6*" and made inquiries in the initial proceedings "*to determine whether Ringers Western fell within the ambit of Chapter 6 as an ancillary result of a legitimate capital raising, or whether the Capital Raising was conducted by Ringers Western (and led by the Applicants) as part of a deliberate strategy to enliven Chapter 6 and restrict the potential future issue of Bonus Shares under the Bonus Share Deed*".[45]

109. Relevantly the initial Panel:

(a) concluded that the RW Trust was aware that Ringers Western had more than 50 shareholders by 21 June 2022 at the latest

(b) noted that it did not receive any evidence that indicated that the RW Trust did not consider Ringers Western's pre-IPO capital raising was on terms that were acceptable to it (as required by the Share Sale Deed) and in any event RW Trust implicitly accepted those terms given completion under the Share Sale Deed on 30 March 2022) and

(c) having made inquiries found no material which convinced it that minority shareholders, who acquired their shares in Ringers Western for valuable consideration, should not have their interests protected.

[45] Initial Panel's reasons at [55]-[56].

110. RW Trust submitted that the initial Panel failed to recognise what it alleged was a 'plot' by Bombora Group to block the issue of the Bonus Shares and frustrate the Bonus Share Deed. RW Trust asserted (among other things) this involved a number of elements, including that:

    (a) although initially the parties were negotiating the terms of a 'call option deed' as the mechanism to give effect to return what RW Trust referred to as the 'free equity' (ie by returning existing shares held by Bombora Group in the event an exit event was not achieved) Bombora's legal representatives suggested a change to what became the Bonus Share Deed

    (b) RW Trust "*have not previously had any significant commercial or legal exposure to public companies or the Chapter 6 provisions*" while in contrast Bombora's legal representatives practice regularly in high end corporate matters and some Bombora Group members have experience on listed company boards such that "*Bombora Group would have been well aware of the consequences of the change from the [call option deed] to the Bonus Share Deed and the implication of Chapter 6 potentially becoming applicable*"

    (c) shortly prior to completion RW Trust was provided with a shareholder register indicating it had 25 members, noted the only change at completion would be the addition of RW Trust and did not provide the post-completion register until 22 June 2022 and

    (d) Bombora Group has not provided the minutes of the RW AGM.

111. RW Trust additionally suggested the proceedings were brought for the purpose of obtaining a commercial advantage as opposed to a '*proper Chapter 6 purpose*'.

112. Bombora Group denied RW Trust's assertions. Notably Bombora Group pointed to:

    (a) emails exchanged between the parties during negotiations on a share option deed attached to the Share Sale Deed which indicated that in November 2021 Bombora Group's legal representatives had advised Emma Salerno that certain restrictions '*may apply by virtue of s606 Corporations Act*'

    (b) the fact the email attaching the register shortly before completion expressly stated the register was to be updated and then further updated with the RW Trust holding (implying there may be further changes to the register besides merely reflecting RW Trust's holding) and

    (c) no additional evidence being provided that any member of the Bombora Group's intentions were as portrayed by RW Trust.

113. We did not necessarily read much into the November 2021 email as, while it obviously could have alerted Ms Salerno to the existence of s606, the exercise period for the options under the share option deed that was ultimately entered into did not commence until Ringers Western had listed (when it would clearly be a Chapter 6 company). If that was also the case when the terms were being negotiated we do not think it necessarily pointed to the possibility s606 may be relevant to the company prior to listing.

114. On the other hand, the fact the drag along rights in the Constitution (which only applied up until Ringers Western listed) were stated to be subject to item 7 s611 approval expressly contemplated that Ringers Western could become a Chapter 6 company prior to an exit event.

115. Having regard to all the relevant material before us we do not consider there is sufficient evidence to conclude that Ringers Western's status as an unlisted public company with more than 50 members is the result of a deliberate strategy to enliven Chapter 6 in order to avoid the consequences of the commercial terms of the Bonus Share Deed. In so far as RW Trust invited us to infer such a motive merely from what it suggested was a distinction between the relative experience and knowledge of RW Trust and Bombora Group with regards to Chapter 6, or the evolution of negotiations from a call option to a new share issue, we see no basis to do so.

116. Ultimately, the only new material provided by RW Trust in the review proceedings in support of its assertion was the email and share register RW Trust received shortly prior to completion. We agree with Bombora's submission to the extent that the email did not necessarily suggest the only change to the register would be the addition of RW Trust's holding at completion and, in any event, consider it provides no basis to leap to the conclusion there was the 'plot' alleged by RW Trust.

117. We would also observe that even if the email had expressly and unambiguously confirmed that Ringers Western would have more than 50 shareholders at completion, we do not see how it would have resulted in any change to the commercial arrangements settled between RW Trust and Bombora Group in connection with the RW Proprietary acquisition given RW Trust's submission that, whilst it was surprised to learn that Ringers Western had 106 shareholders in or about July 2022, "*the significance of that fact for the purpose of Chapter 6 had not been brought to its attention*".

118. It follows from our conclusion that we do not agree that affirming the initial Panel's decision would lead to 'weaponisation' of the Panel. In any event this submission appears to ignore that there are shareholders in Ringers Western other than RW Trust and Bombora Group entitled to the protections of Chapter 6 that were significantly affected by the issue and acquisition of shares amounting to over 624 times the entire issued share capital of the company (and equally could have brought the same case to the Panel).

119. At the same time it also appears to disregard RW Trust's own responsibility for the commercial agreement it freely entered into. Perhaps most importantly, the Bonus Share Deed very clearly contemplated - and it accordingly formed part of the commercial bargain struck between the parties - that Bonus Shares would only be issued if doing so would not breach or contravene any law. The commercial risk of this was assumed by RW Trust and was for it to measure, and if considered necessary, mitigate.

120. For the reasons above, we affirmed the initial Panel's declaration. In doing so, we had regard to the matters in section 657A(3).

Orders

121. The initial Panel's orders cancelled the Bonus Shares but did not cancel the Bonus Share Deed. Notably the initial Panel considered that:

    (a) while the cancellation of the Bonus Shares prejudiced RW Trust, it was not unfair prejudice as the Bonus Share Deed would remain on foot and the right of RW Trust to receive shares in the future under the Bonus Share Deed in compliance with Chapter 6 is retained. The right for the parties to bring any contractual claims before a Court, was also preserved and

    (b) cancelling the Bonus Shares protects the rights and interests of other Ringers Western shareholders affected by the unacceptable circumstances as they will no longer be diluted effectively to nominal percentage holdings or at risk of having their shares compulsorily acquired by RW Trust.

122. RW Trust submitted that if we are to affirm the declaration then we should either:

    (a) set aside the initial Panel's orders and make no orders – on the basis that the Panel may not be able to deal with all issues concerning the dispute over the Bonus Share Deed so the entire matter is better dealt with by a Court or

    (b) instead make orders that deal with Bombora Groups' effective control over the outcome of any item 7 s611 resolution.

123. Bombora Group's control was said to arise in two ways:

    (a) under the Constitution,[46] general meetings of Ringers Western can only deal with the election of a chair and adjournments unless a quorum consisting of a representative of certain members of Bombora Group and a representative of RW Trust – so Bombora Group can prevent a meeting being held by non-attendance and

    (b) RW Trust would be excluded from voting on any resolution for the purposes of item 7 of s611 to approve the acquisition by RW Trust of shares under the Bonus Share Deed leaving Bombora Group with a majority of remaining available votes.

124. Alternative orders previously referenced at paragraph 28(b) above were proposed by RW Trust which they said would address Bombora Group's control of any general meeting and would have less of an impact on control.

125. RW Trust also submitted that not making orders dealing with Bombora Group's control over any meeting to approve an item 7 s611 resolution would result in unfair prejudice. RW Trust also expressed concern that the orders "*do not address the obvious challenge faced by Ringers Western in giving effect to the words of the Bonus Share Deed, which provide that RW Trust "receive an additional $8.34M (as amended by side letter) in value" and "make whole" Other Shareholders, in circumstances where due to the drastic drop in value of Ringers Western, there is not sufficient equity to do so.*"

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[46] Ringers Western Constitution, cl 24.8.

126. We do not agree that orders cancelling the Bonus Shares result in unfair prejudice to RW Trust. The initial Panel's orders effectively do no more than return Ringers Western and RW Trust to the situation they were in prior to the issue of the Bonus Shares that was contrary to the law (and potentially as a result, contrary to the terms of the Bonus Share Deed in light of cl 4(a) and (b)) and/or the purposes of Chapter 6.

127. The aim of the orders is to address the unacceptable circumstances arising from that share issue. However Bombora Group may choose to vote at a future meeting is a future circumstance. It is not the role of Panel in exercising its discretion to make orders under s657D (or in reviewing the exercise of such a discretion as we are) to alter the ordinary rights of parties merely to address difficulties they may be encountering complying with Chapter 6 because of the consequences of commercial arrangements they have entered into or the desire to achieve what they suggest is the commercial intent of contractual arrangements.

128. The fact that this is not our role, nor is it to deal with any claims the parties may have falling outside the remit of Chapter 6, does not mean we should refrain from addressing unacceptable circumstances where appropriate. We do not agree with RW Trust's submissions that we should not intervene if we cannot resolve all the disputes between the parties. As the initial Panel noted, and as we have noted earlier in our reasons, there are also other parties affected by the unacceptable circumstances in this case.

129. Having considered all the relevant material, and the submissions received from the parties we agreed that the initial Panel's orders were the appropriate orders to make to address the unacceptable circumstances.

130. Given the initial Panel's orders had been stayed during the review proceedings it was necessary to make a minor variation to ensure that once the interim orders lapsed the cancellation order took effect prospectively. The variation order we made is set out in Annexure C.

Alex Cartel
President of the sitting Panel
Decision dated 4 July 2024
Reasons given to parties 9 September 2024
Reasons published 13 September 2024

Advisers

Party	Advisers
RW Trust	
Ringers Western	Salerno Law
Bombora Group	Bartley Cohen

Australian Government
Takeovers Panel

Annexure A

CORPORATIONS ACT
SECTION 657EA
INTERIM ORDERS

RINGERS WESTERN LIMITED 02R

On 5 June 2024, RW Trust made an application to the Panel seeking a review of the Panel's decision to make a declaration of unacceptable circumstances and orders in *Ringers Western Limited* and requesting a stay order pending the review.

The President ORDERS:

1. That Final Orders 1, 2, 3 and 4 be stayed.

2. Ringers Western and the RW Trust must not take any steps to compulsorily acquire any shares in Ringers Western.

3. RW Trust must not dispose of, or otherwise deal with, any of the Bonus Shares and Ringers Western must not register any transfer of the Bonus Shares.

4. Ringers Western must not issue any further shares under the Bonus Share Deed.

5. These interim orders have effect until the earliest of:

   (i) further order of the President or the Panel

   (ii) the determination of the proceedings and

   (iii) 2 months from the date of these interim orders

Definitions

Bonus Share Deed	The "Bonus Share Deed" between Ringers Western and the RW Trust in relation to the acquisition by Ringers Western of Ringers Western Pty Ltd, as amended
Bonus Shares	687,959,705,932 Ringers Western shares issued to the RW Trust under the Bonus Share Deed

Final Orders	The final orders made in Ringers Western Limited on 4 June 2024
Ringers Western	Ringers Western Limited
RW Trust	Emma Salerno and James Salerno Junior as trustees for the Ringers Western Discretionary Trust

Tania Mattei
General Counsel
with authority of Alex Cartel
President
Dated 6 June 2024

Australian Government
Takeovers Panel

Annexure B

EXTRACT OF RINGERS WESTERN'S CONSTITUTION

16 Transfer of Equity Securities – restrictions on transfer

16.1 Application

This rule 16 will apply until such time that the Company is admitted to the Official list of the Exchange.

16.2 Restriction

A Member must not Transfer or grant any Encumbrance over any of its Equity Securities, except in accordance with rules 16 (Transfer of Equity Securities – restrictions on transfer, 17 (Transfer of Equity Securities – Pre-Emptive Rights), or 37 (Default).

16.3 Restriction on Transfers by RW Member

Prior to the earlier of an Exit Event or the date that is two (2) years from the date of completion of the Share Sale Agreement, the RW Member must not Transfer or grant any Encumbrance over any of its Equity Securities, without the prior written consent of the Board and Bombora unless the RW Member is required to Transfer Equity Securities under rule 37 or any other rule requiring the RW Member to Transfer Equity Securities.

16.4 Holder of Encumbrance must comply

Without limiting rule 16.2, before granting any Encumbrance over any of its Equity Securities, a Member must ensure that the proposed holder of the Encumbrance enters into a deed with or for the benefit of the parties under which it undertakes:

(a) not to Transfer of give Possession or Control over any Equity Security unless the transferee complies with rules 16 and 17; and

(b) to release the Equity securities from the Encumbrance (and where the Encumbrance is a PPS Security Interest, to remove the registration of the PPS Security Interest from the PPS Register) to enable completion of any Transfer of those Shares under any compulsory transfer provision contained in this document.

16.5 Completion

At completion of the sale of any Equity Securities under this document:

(a) each buyer of the Equity Securities must pay the purchase price to each seller; and

(b) each seller of the Equity Securities must Transfer title to, and Possession and Control of, the Equity Securities to the buyer free from Encumbrances.

16.6 No Revocation

Subject to rule 17.8(a), a Member may only revoke or withdraw a Transfer Notice, an Offer Notice, or an Acceptance Notice once given or taken to have been given if all other Members consent in writing.

16.7 Attorney

With the exception of the RW Member and Bombora, each Member:

(a) severally and irrevocably appoints any two Directors jointly as its agent and attorney with power to complete any sale of the Equity Securities held by that Member under this document and to do anything on behalf of the Member that it is required to do, but has failed to do, including the power for any two Directors together on behalf of that Member to:

(i) sign all necessary documentation to complete the sale;

(ii) any lock-up or escrow agreements;

(iii) warrant and represent, and to agree that it is a condition of any document, that the Member has the capacity to enter into the documents and has good title to, and Possession and Control of, all its Equity Securities, free from any Encumbrance;

(iv) receive the purchase money and hold it on trust for that Member; and

(v) sign a receipt for the purchase money as a good discharge of the purchaser's obligations;

(b) declares that it is bound by, and will ratify and confirm, anything done by any Director under this power of attorney; and

(c) declared that this power of attorney is given for valuable consideration and is irrevocable.

16.8 Permitted Transfers

Rules 16 (except rules 16.1 and 16.8) and 17 do not apply to a Transfer by a Member:

(a) of its Shares under an offer for sale of Shares in conjunction with an IPO; or

(b) of all of its Shares to an Affiliate of the Member or the Transfer from an Affiliate of a Member to another Affiliate of the Member but if the transferee under rule 16 ceases to be an Affiliate of the Member, then the relevant Equity Securities must be promptly transferred by the transferee back to the transferring Member.

16.9 Board must refuse to register Transfers

The Board must refuse to register any Transfer of any Equity Securities:

(a) if it is in favour of a person who is, or persons one of whom is, a minor, a bankrupt or otherwise subject to any Insolvency Event; or

(b) if it is not lodged at the registered office of the Company (or at another place specified by the Board) and, other than a Transfer signed under rule 16.7, is not

accompanied by the relevant certificates (if any) and any other evidence the Board reasonably requires to show the right of the transferring Member to make the Transfer.

16.10 Board must register Transfers

Subject to rule 16.9 and 17.11, the Board must register any Transfer of any Equity Securities made in accordance with this document.

17 Transfer of Equity Securities – Pre-Emptive Rights

17.1 Application

This rule 17 will apply until such time that the Company is admitted to the Official List of the Exchange.

17.2 Transfer Notice

A Member wanting to Transfer any of its Equity Securities (**Seller**) must give to each Member (**Offeree**) (at the same time) notice (**Transfer Notice**) (with a copy to the Board) setting out:

(a) that the Seller wants to Transfer a specified number (which may be all or some only of its total holding) of Equity Securities (**Transfer Securities**);

(b) the class or classes of Transfer Securities;

(c) the cash price per Transfer Security (**Specified Price**);

(d) the name of the proposed transferee of the Equity Securities; and

(e) any other terms of sale of the Transfer Securities,

and attaching a copy of the offer (if any) from the proposed transferee.

17.3 Entitlement of Offerees to the Transfer Securities

The Transfer Notice is an offer by the Seller to each Offeree to sell on the terms set out in the Transfer Notice, conditional on the Seller receiving acceptances from one or more of the Offerees for the Transfer of all of the Transfer Securities. Each Offeree may buy the number of Transfer Securities calculated in accordance with the following formula:

$$N = A \times \frac{B}{C-D}$$

where:

N = the number of Transfer Securities the Offeree may buy (**Allocation**).

A = the total number of Transfer Securities.

B = the number of Shares held by the Offeree on the date of the Transfer Notice.

C = the total number of Shares held by all Members on the date of the Transfer Notice.

D = the number of Shares held by the Seller on the date of the Transfer Notice, including the Transfer Securities.

17.4 Response by Offerees

Each Offeree may give the Seller an unconditional notice (**Acceptance Notice**) (with a copy to the Board) within 20 Business Days after receiving a Transfer Notice (**Acceptance Period**), stating:

(a) that it accepts its Allocation or a specified lesser number of Transfer Securities; and

(b) if it wants to buy more than its Allocation, that it offers to buy an additional specified number of Transfer Securities (not exceeding the total number of Transfer Securities minus the number of Transfer Securities accepted by it under rule 17.4(a)) if the other Offerees do not accept in full their Allocations.

17.5 Entitlement of Offerees to Transfer Securities above their Allocations

If the total number of Transfer Securities offered to be purchased under rule 17.4(b) exceeds the number of Transfer Securities for which acceptances have not been received under rule 17.4(a) (**Excess Transfer Securities**), then the Excess Transfer Securities available must be allocated between all accepting Offerees who have given notice under rule 17.4(b) in their Respective Proportions, until all of the Excess Transfer Securities are allocated, or until all offers under rule 17.4(b) have been satisfied.

17.6 Offeree's failure to respond

An Offeree who fails to give the Seller notice under rule 17.4 within the Acceptance Period is taken to have rejected the offer.

17.7 Where Offerees agree to buy all Transfer Securities

If the Offerees agree to buy all Transfer Securities, on the fifteenth Business Day after the Acceptance Period, each Offeree must buy from the Seller and the Seller must sell to the Offerees the Transfer Securities:

(a) at the Specified Price; and

(b) (unless otherwise agreed between the Offerees) in the proportions calculated under rule 17.3 adjusted, as applicable, under rule 17.5.

17.8 Where Offerees do not agree to buy all Transfer Securities

If the Offerees do not agree to buy all Transfer Securities, the Seller must within five Business Days after the Acceptance Period give notice to the Offerees (with a copy to the Board):

(a) withdrawing all offers contained in the Transfer Notice (except if the Transfer Notice has been taken to be given under rule 37.2) and advising whether or not it wishes to sell the Transfer Securities to another person under rule 17.10; or

(b) advising that it wants to proceed with the sale:

(i) to accepting Offerees of that number of Transfer Securities for which acceptances have been received; and

(ii) to another person of those Transfer Securities for which there are no accepting Offerees.

17.9 Sale to accepting Offerees

If the Seller gives a notice under rule 17.8(b), each accepting Offeree must buy from the Seller and the Seller must sell to the accepting Offerees the number of Transfer Securities the accepting Offeree agreed to buy under rule 17.4(a) plus the number of Excess Transfer Securities the accepting Offeree agreed to, and is entitled to, buy under rule 17.5:

(a) within five Business Days after the Offerees receive the notice; and

(b) at the Specified Price.

17.10 Sale to another person

If the Seller gives a notice under rule 17.8(a) advising that it wishes to sell all the Transfer Securities to another person or under rule 17.8(b)(ii), the Seller may, subject to compliance with rule 17.11, sell those Transfer Securities (**Remaining Securities**) to another person:

(a) at any time within 90 Business Days after giving the Transfer Notice;

(b) at a price per Transfer Security not less than the Specified Price; and

(c) on terms no more favourable to the buyer than those offered to the Offerees.

17.11 Consent of the Board

If a Seller wishes to transfer its Remaining Securities in accordance with rule 17.10 the Seller must, before completing the proposed sale of the Remaining Securities to another person under rule 17.10, obtain the prior written consent of the Board by resolution by simple majority. This consent must not be unreasonably withheld or delayed. In deciding whether consent is being unreasonably withheld, the Board may consider (without limitation):

(a) whether the other person can demonstrate that it is able to meet all anticipated costs and liabilities relating to the Remaining Securities;

(b) whether the transfer is a bona fide sale to a willing transferee;

(c) whether the sale transfer is in the best interests of the Company; and

(d) whether the other person is, or is likely to become, a competitor of the Business.

18 Tag along right

18.1 Application

This rule 18 will apply until such time that the Company is admitted to the Official List of entities that ASX has admitted.

18.2 Member tag along

If a Seller gives a notice under rule 17.8 that it wishes to sell some or all of its Transfer Securities to a third party under rule 17.10 and those Transfer Securities represent 60% or more of the Company's Share Capital, any other Member may give notice (**Tag Along Notice**) to the Seller (with a copy to the Board) requiring the Seller to use its best endeavours to procure the proposed transferee (**Buyer**) to buy the same proportion of that Member's total holding of Equity Securities equal to the

percentage of the Seller's total holding of Equity Securities that the Transfer Securities represent.

18.3 Restriction on sale where tag along

If a Tag Along Notice is served on the Seller, the Seller must:

(a) use its reasonable endeavours to cause the Buyer to buy the Equity Securities specified in all Tag Along Notices on the same terms as the Transfer Securities are sold to the Buyer; and

(b) only sell such proportion of the Transfer Securities to the Buyer as equals the proportion of the Equity Securities specified in all Tag Along Notices that the Buyer has agreed to buy on the same terms as the Transfer Securities are sold to the Buyer,

and if, despite the Seller's reasonable endeavours, the Buyer refuses to buy any of the Equity Securities specified in all Tag Along Notices on the same terms as apply to the Transfer Securities, then the Seller must not sell the Transfer Securities to the Buyer and each Tag Along Notice lapses.

19 Exit Event

19.1 Application

This rule 19 will apply until such time that the Company is admitted to the Official list of the Exchange.

19.2 Requirement to appoint Financial Adviser

The Bombora Member (for so long as it is a Member) may request the Board to, at any time, appoint a particular adviser (including an investment bank, financial adviser or stockbroker) (**Financial Adviser**) to act on behalf of a Company to:

(a) make a recommendation to the Bombora Member, the Board and the Company, on whether to proceed with an IPO or Trade Sale or whether to commence preparations concurrently for more than one of those options, to obtain the highest valuation of the Company and the best return on exit for all Members;

(b) include in the recommendation an indicative value of the Equity Securities held by the Members, the Company and the Business as a whole; and

(c) if the Bombora Member accepts the recommendation and the terms of the proposed IPO or Trade Sale (as applicable) meets the requirements set out in the Bonus Share Deed, manage the process of preparing an IPO and conducting a Trade Sale (as applicable).

19.3 Implementation

(a) If, after the date of appointment of the Financial Adviser:

(i) the Financial Adviser has made a recommendation under rule 19.2(a) and the Bombora Member (for so long as it is a Member) has agreed to accept the recommendation in accordance with clause 19.2(c), the Bombora Member may instruct the Board to instruct the Financial Adviser to

immediately implement its recommendation in accordance with rule 18 in an orderly and, if appropriate, competitive process; or

(ii) the Financial Adviser has not made a recommendation under rule 19.2(a), the Bombora Member (for so long as it is a Member) may request that the Board appoint another Financial Adviser to make a recommendation under rule 19.2(a).

(b) For the avoidance of any doubt, the Bombora member has no instruction rights in relation to any IPO or Trade Sale unless the terms of the proposed transaction meets the requirements for an Exit Event (as defined in the Bonus Share Deed) as set out in the Bonus Share Deed.

19.4 Requirements for decision making

(a) The Board's decision to appoint a Financial Adviser in accordance with rules 19.2 or 19.3(a)(ii), and to implement a recommendation of the Financial Adviser under rule 19.3(a)(i) may only be made with the prior written consent of the Bombora Member (for so long as it is a Member).

(b) For the avoidance of doubt, if the Bombora Member has requested the Board appoint a Financial Adviser in accordance with rules 19.2 or 19.3(a)(ii) and/or to implement a recommendation of the Financial Adviser under rule 19.3(a)(i), each Director must use all reasonable endeavours to ensure the Board complies with that request, to the extent within their control.

19.5 Drag along right

(a) Subject to rule 19.5(b), if a recommendation by the Financial Advisor to seek a buyer for a Trade Sale is accepted by the Bombora Member in accordance with 19.2(c) and a potential buyer in good faith for a Trade Sale is identified, the Board may (with the prior written consent of the Bombora Member for so long as it is a Member) give notice to the Company and each of the other Members (**Exit Drag Along Notice**) specifying:

(i) the proposed purchase price, and other terms, for the Trade Sale (**Sale Terms**), which must be at least as favourable to the other Members as the proposal contained in the recommendation by the Financial Adviser;

(ii) the proposed settlement date, which must not be more that 180 days after giving the Exit Drag Along Notices (**Settlement Date**);

(iii) the name of the proposed buyer (**Exit Buyer**); and

(iv) either:

(A) in the case of a Trade Sale being the sale of the Share Capital, the requirement for all Members to sell all of their Equity Securities to the Exit Buyer on the Sale Terms; or

(B) in the case of the Trade Sale being the sale of assets only, requiring the Company to enter into an agreement for, and to complete, the Trade Sale.

(b) Rule 19.5(a) is, at all times while Chapter 6 of the Corporations Act applies to the Company, subject to a resolution under item 7 in the table in section 611 of

the Corporations Act being passed (and any necessary relief being provided by ASIC in respect of such resolution).

19.6 Settlement of sale

If an Exit Drag Along Notice is given:

(a) so that the completion of the sale to the Exit Buyer may occur on the Settlement Date, a Member may not give a Transfer Notice under rule 17.2.

(b) on the Settlement Date, the purchase price payable by the Exit Buyer must be dealt with under rule 20.

Australian Government
Takeovers Panel

Annexure C

CORPORATIONS ACT
SECTIONS 657EA AND 657D
VARIATION OF ORDERS

RINGERS WESTERN LIMITED 02R

The Panel in *Ringers Western Limited* made a declaration of unacceptable circumstances and final orders on 4 June 2024.

On 5 July 2024 the review Panel decided to affirm the initial Panel's declaration of unacceptable circumstances.

THE PANEL ORDERS

The final orders made on 4 June 2024 are varied by:

1. Replacing "three business days after the date of these orders" in Order 3 with "on 18 July 2024".

2. Replacing "for a period of three business days after the date of these orders" in Order 4 with "on or before 18 July 2024".

Tania Mattei
General Counsel
with authority of Alex Cartel
President
Dated 15 July 2024