



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Ringers Western Limited  
[2024] ATP 8**

**Catchwords:**

*Declaration – orders - contravention of section 606 – section 602 principles – acquisition of shares - effect on control – disclosure – compulsory acquisition – Panel procedures – conflict of interest – undertakings*

*Corporations Act 2001 (Cth), sections 602, 606, 611, 644A, 657A(2)*

*Guidance Note 1: Unacceptable Circumstances, Guidance Note 19: Insider Participation in Control Transactions*

*A S P Aluminium Holdings Pty Ltd 02R [2023] ATP 9, A S P Aluminium Holdings Pty Ltd [2023] ATP 8, Webster Limited [2020] ATP 13, Strategic Minerals Corporation NL 06 [2020] ATP 8, Yowie Group Limited 01 & 02 [2019] ATP 10, Molopo Energy Limited 10 & 11 [2018] ATP 12, Warrnambool Cheese and Butter Factory Company Holdings Limited 02 [2016] ATP 11, Condor Blanco Mines Limited [2016] ATP 8, Taipan Resources NL 09 [2001] ATP 4*

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

**INTRODUCTION**

- The Panel, Marissa Freund, Neil Pathak and Nicola Wakefield Evans (sitting President), made a declaration of unacceptable circumstances in relation to the affairs of Ringers Western Limited. The application concerned an issue of shares in contravention of section 606<sup>1</sup> by Ringers Western. The Panel declared the circumstances unacceptable having regard to (among other things) the effect the contraventions were likely to have on the control or potential control of Ringers Western. The Panel made orders, which included cancelling the Ringers Western shares issued in contravention of section 606.
- In these reasons, the following definitions apply.

**Applicants**

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

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

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	Fund Pty Ltd as trustee for Jarumitoti Super Fund, and Malolo Holdings Pty Ltd
<b>Bonus Share Deed</b>	The “Bonus Share Deed” between Ringers Western and the RW Trust in relation to the RW Acquisition, as amended
<b>Bonus Shares</b>	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
<b>Capital Raising</b>	The capital raising undertaken by Ringers Western between 19 February 2022 and late March 2022, following entry into the Share Sale Deed
<b>Consideration Shares</b>	697,410,068 Ringers Western shares issued to the RW Trust in accordance with the Share Sale Deed
<b>Ringers Western</b>	Ringers Western Limited
<b>RW Acquisition</b>	The acquisition of 100% of the shares in RW Proprietary by Ringers Western pursuant to the Share Sale Deed
<b>RW General Meeting</b>	The general meeting of Ringers Western shareholders held on 7 March 2022
<b>RW Proprietary</b>	Ringers Western Pty Ltd
<b>RW Trust</b>	Emma Salerno and James Salerno Junior as trustees for the Ringers Western Discretionary Trust
<b>Share Sale Deed</b>	The “Share Sale Deed” dated 19 February 2022 between Ringers Western, the RW Trust, James Salerno Jr and Emma Salerno, as amended

## FACTS

3. Ringers Western (formerly known as BrandUp Limited) is an unlisted public company which has approximately 106 shareholders including:<sup>2</sup>
  - (a) the Applicants<sup>3</sup> and
  - (b) the RW Trust.

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<sup>2</sup> As at 4 June 2024

<sup>3</sup> Evolution Trustees Limited as responsible entity for the Bombora Special Investments Growth Fund (**Evolution Trustees**) does not legally own shares in Ringers Western. However, Evolution Trustees does have a relevant interest in the shares legally owned by Apex Fund Services Pty Ltd as custodian for the Bombora Special Investments Growth Fund

4. Prior to March 2022:
  - (a) the Applicants owned a majority of the shares in, and controlled, Ringers Western and
  - (b) the RW Trust owned and controlled RW Proprietary.
5. On 19 February 2022, Ringers Western entered into the Share Sale Deed with the RW Trust 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 Acquisition:

*“(Buyer finance) the Buyer having received sufficient funds from its pre-IPO capital raising to be able to fund the Cash Consideration on terms acceptable to the Buyer and the Seller (acting reasonably);”<sup>4</sup>*
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 Acquisition in the event that an “Exit Event” (defined under the Bonus Share Deed to include an initial public offering (**IPO**) or other 100% share sale) did not occur within 24 months following completion of the RW Acquisition.
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 Western shareholders “other than the BrandUp Foundation Members<sup>5</sup> 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.”<sup>6</sup>*
  - 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.”<sup>7</sup>*

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<sup>4</sup> Share Sale Deed, clause 3.1(d)

<sup>5</sup> 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

<sup>6</sup> Bonus Share Deed, clause 4(a)

<sup>7</sup> Bonus Share Deed, clause 4(b)

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10. At the time of entry into the Share Sale Deed and Bonus Share Deed, Ringers Western had less than 50 shareholders.
11. 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 certain external investors were issued shares in Ringers Western and became shareholders of Ringers Western.
12. On 7 March 2022, Ringers Western shareholders approved entry into the Share Sale Deed at the RW General Meeting. This approval did not, however, approve the issue of the Bonus Shares to the RW Trust in accordance with item 7 of section 611.
13. On 29 March 2022, Ringers Western and the RW Trust agreed to amend:
  - (a) the Share Sale Deed to increase the monetary consideration under the Share Sale Deed from \$10,000,000 to \$15,000,000 and
  - (b) the Bonus Share Deed to increase the value of the Bonus Shares to be issued under the Bonus Share Deed by \$640,000.
14. On 30 March 2022, completion occurred under the Share Sale Deed and:
  - (a) Ringers Western acquired all of the issued shares in RW Proprietary, becoming the sole shareholder of RW Proprietary
  - (b) Ringers Western paid the \$15,000,000 cash consideration to the RW Trust and issued the Consideration Shares to the RW Trust and
  - (c) immediately following completion, Ringers Western had 106 shareholders with the following shareholdings:
    - (i) the RW Trust had 63.31%
    - (ii) the Applicants collectively had 23.05% and
    - (iii) other shareholders collectively had 13.64%.
15. On and from 31 March 2022, Ringers Western had more than 50 shareholders.
16. 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.
17. By 31 March 2024, no Exit Event in relation to Ringers Western had occurred.
18. 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.
19. As 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%.

## APPLICATION

### Declaration sought

20. By application dated 26 April 2024, the Applicants sought a declaration of unacceptable circumstances. The Applicants submitted (among other things) that:
- (a) the issue of the Bonus Shares to the RW Trust contravened section 606(1)
  - (b) the circumstances are unacceptable having regard to the effect that they have on the control of Ringers Western (section 657A(2)(a)) and
  - (c) the circumstances are 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.
21. The Applicants submitted that the effect of the circumstances was that:
- (a) the acquisition of the Bonus Shares by the RW Trust was a de facto takeover of Ringers Western, as the RW Trust's shareholding increased to 99.94%
  - (b) as a result of the acquisition of the Bonus Shares, the RW Trust was in a position to seek to exercise compulsory acquisition rights under Chapter 6A in respect of the remaining Ringers Western shares and
  - (c) the acquisition of the Bonus Shares by the RW Trust significantly diluted (to the extent of having rendered worthless) other Ringers Western shareholders' interests, both as to the value of their shareholding and their percentage interest in Ringers Western.

### Interim orders sought

22. The Applicants sought interim orders to the effect that:
- (a) the RW Trust is restrained from disposing of or otherwise dealing with any of the Bonus Shares
  - (b) Ringers Western is restrained from issuing any further shares or from registering any transfer of the Bonus Shares and
  - (c) the RW Trust is restrained from exercising any compulsory acquisition rights under Chapter 6A.

**Final orders sought**

23. The Applicants sought final orders to the effect that:
- (a) the Bonus Shares are cancelled and
  - (b) the Bonus Share Deed is cancelled.

**DISCUSSION**

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

**Interim orders request**

25. The Applicants requested the interim orders to maintain the “*status quo*” while the Panel considered the application, particularly given the RW Trust could seek to exercise compulsory acquisition rights under Chapter 6A.
26. In its preliminary submission, Ringers Western offered the following undertaking in lieu of interim orders:

*“The Company is restrained from issuing any further shares or from registering any transfer of the Bonus Shares pending determination of this application or until further order.”*

27. In its preliminary submission, the RW Trust offered the following undertakings in lieu of interim orders:

*“Emma and James Salerno Junior as trustees for the Ringers Western Discretionary Trust are restrained from disposing of or otherwise dealing with any of the 687,957,705,932 ordinary shares in Ringers Western Limited issued on 2 April 2024 (Bonus Shares) pending determination of this application or until further order.*

*And*

*Emma and James Salerno Junior as trustees for the Ringers Western Discretionary Trust are restrained from exercising any rights under Chapter 6A of the Act pending determination of this application or until further order.”*

28. In view of the undertakings offered by Ringers Western and the RW Trust, we decided not to make any interim orders and communicated to the parties that we expected Ringers Western to continue to comply with its undertaking and the RW Trust to continue to comply with its undertaking.

**Preliminary submissions and decision to conduct proceedings**

29. Ringers Western made preliminary submissions requesting that we decline to conduct proceedings and submitting (among other things) that:
- (a) the correct characterisation of the issue of the Bonus Shares to the RW Trust is a return of “*free equity*” previously allocated to the Applicants upon completion of the RW Acquisition
  - (b) Ringers Western obtained legal advice, accounting advice and an independent valuation before issuing the Bonus Shares under the Bonus Share Deed

- (c) at the time of executing the Share Sale Deed and the Bonus Share Deed, the RW Trust was not aware that Ringers Western:
    - (i) would be conducting a Capital Raising and
    - (ii) would become a Chapter 6 company through the issue of shares to persons outside of the Applicants or the RW Trust and
  - (d) the true intention of the Applicants is to take control of Ringers Western and remove the RW Trust and accordingly the application is an attempt to evade Ringers Western's obligations under the Bonus Share Deed.
30. We considered that several matters raised in the application warranted investigation, including the potential breach of section 606 alleged by the Applicants and the effect that the acquisition of the Bonus Shares have had on the control of Ringers Western.

### Scope of proceedings

31. The application included a substantial amount of evidence, including a 1,356-page affidavit, which includes various matters that appeared unrelated to the Panel's jurisdiction.
32. In particular, the Applicants submitted that, by mid-2020, there was a dispute underway between the RW Trust and the Applicants about subject matter that is not material and is unrelated to the issue of the Bonus Shares. The parties noted, however, that there is no current or anticipated litigation between the parties.
33. ASIC submitted that the various matters in the application appeared unrelated to the Panel's jurisdiction and consideration of them by the Panel would serve to prolong the resolution of these proceedings in a way contrary to the public interest.
34. ASIC considered that many of the matters raised in the application, particularly those going to issues of corporate governance and the formation and operation of contracts, are more appropriate for a court. ASIC submitted that *"the Panel should not be required to make factual findings on every allegation in the Application and its voluminous evidence, unless that evidence is relevant to the core Chapter 6 issues before it. Similarly, the Panel should not be required to engage on questions of directors duties which are properly the jurisdiction of the courts."*
35. We agree and accordingly decided to focus on the effect of the issue of the Bonus Shares on the control of Ringers Western, including whether the issue contravened section 606.

### Contravention of section 606

36. Section 606 prohibits the acquisition of a relevant interest in voting shares if, because of that transaction, a person's voting power in the company:
- (a) increases from under 20% to over 20% or
  - (b) increases from a starting point that is above 20% and below 90%.
37. The Applicants submitted that the acquisition of the Bonus Shares by the RW Trust contravened section 606 because:

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- (a) Ringers Western is an unlisted public company with more than 50 members
  - (b) the Bonus Shares are voting shares pursuant to the Ringers Western constitution
  - (c) the RW Trust acquired a relevant interest in the Bonus Shares because of a transaction, being the Bonus Share Deed, and
  - (d) because of the acquisition of the Bonus Shares, the RW Trust's voting power in Ringers Western increased from 63.31% to 99.94%.
38. Ringers Western submitted that the acquisition of the Bonus Shares by the RW Trust did not contravene section 606 because:
- (a) the "transaction" (being the Bonus Share Deed) was entered into at a time when Ringers Western was not a Chapter 6 company
  - (b) the Applicants caused Ringers Western to become a Chapter 6 company, and
  - (c) the RW Trust was not aware that Ringers Western was to become a Chapter 6 company.
39. Ringers Western further submitted that section 606 was not contravened because the "transaction" under which the Bonus Shares were issued was not an 'acquisition' of Bonus Shares by the RW Trust but was:
- (a) instead a transaction restitutionary in nature. Ringers Western submitted that the issue of the Bonus Shares to the RW Trust "*was restitution of a notional contingent value that had been issued to Bombora. And that entitlement was received by the RW Trust at the time of execution of the Bonus Share Deed*" or
  - (b) alternatively, was "*more akin to the issue of shares under a Convertible Note or actions that can be taken under a Preference Share arrangement, rather than a takeover*".
40. We considered that these submissions related to (1) the nature of the transaction and (2) the jurisdiction of the Panel. We addressed each of these submissions in turn.

### *Nature of the transaction*

41. Ringers Western submitted that the correct characterisation of the issue of the Bonus Shares to the RW Trust is a return of "*free equity*" previously allocated to the Applicants upon completion of the RW Acquisition. Ringers Western submitted that the "*free equity*" was effectively contingent consideration given to the Applicants at the time of completion of the RW Acquisition (in the form of the initial ownership allocation) as an incentive to achieve an Exit Event at a specific minimum market capitalisation. Ringer Western submitted that, if that did not occur, the "*free equity*" would be returned to the RW Trust through the Bonus Share issue.
42. The Applicants rejected this submission and submitted that the issue of the Bonus Shares to RW Trust was not the return of value from the initial issue of Ringers Western shares to the Applicants. The Applicant submitted that the suggestion that "*the RW Trust was somehow underpaid or "gave away" value ignores that... it was paid exactly the agreed value of RW Proprietary in cash and shares. It also elides the fact that, if*



*the Bonus Share issue stands, it has been paid \$15 million, yet now also owns over 99% of Ringers Western". The Applicants submitted that the issue of the Bonus Shares was not a rebalancing exercise but was better characterised as "an opportunistic attempt to use the Bonus Share Deed to effect a de facto takeover of Ringers Western."*

43. Ringers Western further submitted that the Bonus Share issue was the consequence of the commercial terms agreed in the Bonus Share Deed and that the Bonus Share issue occurred in accordance with the terms of the Bonus Share Deed. It submitted that the board of Ringers Western had taken independent legal and accounting advice on whether Ringers Western should issue the Bonus Shares and, if so the steps to be taken, the value of Ringers Western and the number and distribution of the Bonus Shares. It submitted that Ringers Western had acted strictly in accordance with that advice.
44. The Applicants rejected Ringers Western's submissions that the Bonus Share issue was the consequence of the commercial terms agreed in the Bonus Share Deed and further submitted that the Bonus Share issue did not comply with the terms of the Bonus Share Deed.
45. In our view, Ringers Western's submission that the issue of the Bonus Shares to the RW Trust was a return of "free equity" is not an accurate commercial characterisation of the transactions underlying the Bonus Share Deed. In addition, we do not need to confirm whether the number of Bonus Shares issued reflected the commercial terms of the Bonus Share Deed, however, we note that certain Ringers Western shareholders other than the RW Trust were also entitled to receive Bonus Shares under the Bonus Share Deed, but none of those shareholders received Bonus Shares.
46. ASIC submitted that (emphasis added):

*"A counterparty to a contract for shares, whether that is the Company or RW Trust as in the present case, should not be entitled to displace Chapter 6 rights legitimately afforded to innocent shareholders, in pursuit of what it regards as its contractual obligations or rights. Rather, the performance of the contract must comply with the requirements of Chapter 6, including seeking shareholder approval where necessary, which is what clause 4 of the Bonus Share Deed contemplated."*
47. We agree with ASIC. We consider 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, including section 606.

### *Jurisdiction of the Panel*

48. The application raised a question as to whether a promise by a non-Chapter 6 company to issue shares in the future, when the company has subsequently attracted the jurisdiction of Chapter 6, may be performed without relying on section 611 or attracting a section 657A declaration.
49. Ringers Western submitted that "If the Panel was to make orders based on unacceptable circumstances, that analogy would mean that the Panel supports the position that exceptions to obligations under Convertible Notes or Preference Shares created by a non-Chapter 6 company become unenforceable when the company obtains more than 50 shareholders". We

consider that Ringers Western’s analogy is misconceived. The conversion of convertible securities into shares may contravene section 606<sup>8</sup> even if the convertible securities were issued prior to the company having more than 50 members. Whether such a contravention would be unacceptable would depend on all the circumstances.

50. The Applicants submitted that no inference should be drawn from the fact that the Bonus Share Deed was entered into when Ringers Western had less than 50 members because, while the entry into the Bonus Share Deed itself did not give rise to the unacceptable circumstances, the issue of the Bonus Shares, purportedly pursuant to the Bonus Share Deed, occurred when Ringers Western had more than 50 members.

51. ASIC submitted that:

*“So far as ASIC is aware, the Application raises a novel question as to whether a promise to issue shares in the future, by a non-Chapter 6 company, may later be performed without relying on s611 or attracting a s657A declaration when the company has subsequently attracted the jurisdiction of Chapter 6. In ASIC’s view, the answer to that question must be no: a company falling within the jurisdiction of s602 is bound to comply with the requirements of Chapter 6.”*

*“It would be contrary to public policy for Chapter 6 to be displaced, whether expressly or impliedly, simply because of a contract between a particular Chapter 6 entity and a counterparty. Further, there is nothing in the Bonus Share Deed that purports to contract out of compliance with the requirements of Chapter 6 – on the contrary, as noted above, clause 4 contemplates that the issuance was subject to legal requirements including potential shareholder ratification. Similarly, there is nothing in Chapter 6 that expressly prohibits the issuance of the Bonus Shares where an exception in s611 applies.”*

52. We agree with ASIC that Chapter 6 is not displaced, expressly or impliedly, because of a contract entered into at the time where a company was not a Chapter 6 entity but later becomes a Chapter 6 entity.

*Capital Raising and the application of Chapter 6*

53. Ringers Western further submitted that it was the conduct of the Applicants that caused Ringers Western to have more than 50 shareholders and it was not until after completion of the RW Acquisition that the RW Trust became aware that Ringers Western had more than 50 shareholders.

54. This gave us some pause. As the Panel has previously noted in *Careers Australia Group Limited*<sup>9</sup> and *A S P Aluminium Holdings Pty Ltd*<sup>10</sup>, unacceptable circumstances may arise where there is a deliberate strategy to reduce the number of shareholders in a company with a view to taking the company outside the ambit of Chapter 6 and depriving shareholders of the benefits and protections afforded under that chapter.

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<sup>8</sup> If a person’s voting power increases from 20% or below to more than 20% or from a starting point that is above 20% and below 90% and no exceptions in section 611 apply, see paragraph 36

<sup>9</sup> [2012] ATP 5 at [21]

<sup>10</sup> [2023] ATP 8 at [69]

55. Similarly, we consider 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.
56. Accordingly, we made further inquiries of the parties 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.
57. We asked the parties whether any consideration the Applicants gave in relation to the application of Chapter 6 to the issue of Bonus Shares prior to undertaking the Capital Raising is relevant to the consideration by the Panel as to whether it is in the public interest to make a declaration.
58. The Applicants submitted that *“The legislation does not mention as a relevant consideration the way in which the corporation came to be a Chapter 6 corporation, nor permit a company to plead ignorance of the composition of its own shareholding.”*
59. The Applicants further submitted that the nature of the agreed transaction between Ringers Western and the RW Trust was such that the parties must have contemplated that Ringers Western would have more than 50 shareholders at some point in the future because (among other matters):
- (a) Ringers Western was incorporated as an unlisted public company and was therefore entitled to raise funds by issuing shares
  - (b) the Share Sale Deed expressly contemplated that there would be a pre-IPO capital raising to fund the cash consideration payable to the RW Trust for the RW Acquisition
  - (c) there is nothing to suggest that the RW Trust was unaware that the Capital Raising was intended to occur through the issue of Ringers Western shares and
  - (d) the intention of the parties, as expressly contemplated in the Bonus Share Deed, was to take Ringers Western to an IPO and Ringers Western must have at least 300 non-affiliated security holders to be listed on the ASX.
60. The RW Trust submitted that the reference to *“its pre-IPO capital raise”* in the Bonus Share Deed was understood by RW Trust to be a pre-IPO capital raise that would not result in an issue of shares to parties outside the Applicants’ shareholdings in Ringers Western. The RW Trust submitted that, while it was aware that certain external shareholders would be issued shares in Ringers Western, it was not expected that the number of shareholders in Ringers Western would increase to 50 or more shareholders. The RW Trust submitted that the Applicants did not disclose to the RW Trust that the proposed shareholding of Ringers Western would make it a Chapter 6 company prior to an IPO.
61. ASIC submitted that, while the alleged lack of disclosure to the RW Trust of the Capital Raising may be relevant to a proceedings about the formation of the Bonus

Share Deed, it is not a justification for prejudicing the Chapter 6 rights of innocent shareholders by diluting their shares. ASIC submitted that the evidence before the Panel does not prove that the Capital Raising was a device to attract the operation of Chapter 6 to prevent the issue of the Bonus Shares, unlike for example situations where individual shareholders might split and transfer their shareholdings to associates to cause a company to reach the 50-member limit.

62. We also sought submissions from the Applicants on whether the Applicants received advice in relation to the Capital Raising, Chapter 6 and the Bonus Shares, and whether the Applicants gave any consideration to structuring the Capital Raising such that Ringers Western would have less than 50 shareholders, e.g. by use of nominee or custodial arrangements for some or all of the shareholders.
63. In response to our questions, the Applicants submitted that they did not:
- (a) consider or receive external advice before the entry into the Bonus Share Deed by Ringers Western as to whether the issue of the Bonus Shares would require shareholder approval under Chapter 6 and
  - (b) consider structuring the Capital Raising such that Ringers Western would have less than 50 shareholders, particularly as it had been intended to move towards an IPO in a relatively short period and to raise capital prior to an IPO by issuing shares in Ringers Western.
64. ASIC further submitted that:
- “Since around April 2022, the Company has had more than twice the jurisdictional threshold of 50 members, which is the criterion adopted by the legislature to determine when a company is sufficiently “widely held” to attract the operation of Chapter 6.*
- It was open for the Company to seek shareholder approval under s611 item 7 prior to issuing the Bonus Shares but it appears it did not do so, and there appears to be no other exception in s611 available to it.”*
65. In our view, the evidence provided during proceedings demonstrates that Ringers Western and the RW Trust, through their respective officers, were aware that Chapter 6 applied to Ringers Western for a significant amount of time. In particular, the RW Trust submitted that it received a copy of the Ringers Western share registry on 21 June 2022 that included more than 50 Ringers Western shareholders. The RW Trust was therefore aware for a significant period of time that Ringers Western was a Chapter 6 company.
66. We also note that the capital raising condition precedent in the Share Sale Deed required that Ringers Western’s pre-IPO capital raising was on terms acceptable to both Ringers Western and the RW Trust (acting reasonably).<sup>11</sup> We did not receive any evidence that indicated that the RW Trust did not consider that Ringers Western’s pre-IPO capital raising was on terms acceptable to it. In any event, we consider that the RW Trust impliedly accepted the terms of the Capital Raising on

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<sup>11</sup> Share Sale Deed, clause 3.1(d)

the basis that the completion occurred under the Share Sale Deed on 30 March 2022 and the RW Trust did not provide evidence to the contrary.

67. ASIC submitted that it presently appears open for the Panel to make a declaration of unacceptable circumstances because the issue and acquisition of the Bonus Shares contravened section 606 and none of the exceptions in section 611 apply.
68. We agree with ASIC's view that the issue of the Bonus Shares by Ringers Western and the acquisition of the Bonus Shares by the RW Trust contravened section 606(1), on the basis that Ringers Western was a Chapter 6 company when the Bonus Shares were issued and none of the exceptions in section 611 applied.

**Item 7, section 611**

69. Ringers Western submitted that if, the Panel concludes that section 606 was contravened at the time the Bonus Shares were issued, the exemption in item 7 of section 611 should apply.
70. Item 7 of section 611 provides that an acquisition approved by an ordinary resolution of security holders of the company in which the acquisition is made is exempt from the prohibition contained in section 606.
71. Ringers Western submitted that Ringers Western shareholders approved the issue of the Bonus Shares in accordance with item 7 of section 611 at the RW General Meeting held on 7 March 2022.
72. Ringers Western submitted that the requirements of item 7 were met because:
  - (a) the resolution to approve the transaction at the RW General Meeting referenced an explanatory memorandum which described the Bonus Share Deed and
  - (b) new Ringers Western shareholders who were issued shares in Ringers Western after the RW General Meeting as part of the Capital Raising were provided with some level of disclosure of the proposed issue of the Consideration Shares and potential issue of the Bonus Shares.
73. The Applicants submitted that the resolution approved at the RW General Meeting did not constitute shareholder approval for the purposes of item 7 of section 611 because:
  - (a) the resolution did not expressly approve the Bonus Share Deed but rather resolved to approve the RW Acquisition and the issue of the Consideration Shares to the RW Trust
  - (b) the issue of the Bonus Shares did not occur in accordance with the terms of the Bonus Share Deed as there were no shares issued to the other shareholders entitled to receive Bonus Shares under the Bonus Share Deed and
  - (c) the issue of Bonus Shares was materially different to what was contemplated at the time of entry into the Bonus Share Deed.
74. The Applicants further submitted that the satisfaction of item 7 should be considered at the time of the acquisition of shares, not at the time of agreeing the transaction,

because item 7 of section 611 relates to the approval of the acquisition, not approval of the transaction itself.

75. ASIC submitted that it did not consider that the relevant resolution at the RW General Meeting validly enlivened item 7 of section 611 because the disclosure provided in the explanatory memorandum did not meet the requirements of an item 7 resolution. In particular, ASIC submitted that:
- (a) item 7(b) requires that the members of the company be given all material information, including the identities of the persons who would make the acquisition, and the maximum extent of the increases of voting power that would result from the issue of the Bonus Shares
  - (b) in accordance with *ASIC Regulatory Guide 74: Acquisitions approved by members*, item 7(b)(ii) and item 7(b)(iv) require disclosure of the maximum increase in the voting power of the acquirer and the acquirer's associates as a result of the acquisition and
  - (c) even if it could be shown that shareholders who were issued Ringers Western shares as part of the Capital Raising were provided with some level of disclosure of the proposed issue of the Consideration Shares and potential issue of the Bonus Shares, the disclosure is unlikely to amount to a substitution of an approval under item 7 of section 611.
76. ASIC further submitted that, even if the resolution was found to be a valid item 7 approval, a fresh approval under item 7 should have been sought given the period between the resolution and issue of the Bonus Shares, particularly where a change in circumstances has happened (including the appointment of the trustees of the RW Trust to the Ringers Western board of directors).
77. Accordingly, ASIC submitted that it is of the view that the resolution at the RW General Meeting does not amount to a valid item 7 approval for the issue of the Bonus Shares, and similarly does not meet the information requirements of section 602.
78. We have considered the circumstances of this case and we agree with ASIC. We consider that:
- (a) the satisfaction of item 7 of section 611 should be considered at the time of the acquisition, not at the time of agreeing the transaction
  - (b) the relevant resolution at the RW General Meeting did not validly comply with item 7 of section 611 because:
    - (i) the resolution 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
    - (ii) 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 RG 75.25 or the reports contemplated in RG 74.41 and

- (c) even if the resolution passed at the RW General Meeting had approved the issue of the Bonus Shares, which we do not consider that it did, a fresh approval under item 7 should have been sought given the combination of the following factors:
- (i) the period of time between the resolution and issue of the Bonus Shares
  - (ii) 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
  - (iii) 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.

**Item 8, section 611**

79. Ringers Western submitted, in the alternative, that the obligation to issue the Bonus Shares was covered by the exception in item 8 of Section 611 because the acquisition of the Bonus Shares pursuant to the Bonus Share Deed resulted from a transaction entered into at a time when Ringers Western had not carried on any business, nor borrowed any money.
80. Item 8 of section 611 provides an exception from the prohibition in section 606 for acquisitions resulting from the issue of securities in a company that has not started to carry on any business and has not borrowed any money.
81. The Applicants responded that item 8 of section 611 should be considered at the time of the acquisition, not at the time of agreeing the transaction, and therefore does not apply to the issue of the Bonus Shares.
82. ASIC submitted that it does not consider that the exception in item 8 of section 611 validly applies to the issue of the Bonus Shares, because section 606(1) regulates the acquisition of a relevant interest in “issued” voting shares. ASIC submitted that:
- “The relevant time to consider the application of s606(1A) and s611 is when the relevant interest was acquired, which was the 2 April 2024. The Bonus Shares were not issued and acquired at a time when the Company had not carried on any business and [had] not borrowed any money, and therefore s611 item 8 does not apply to the acquisition. Even if item 8 were to apply, it would not prevent the Panel from making a declaration of unacceptable circumstances.”*
83. We agree with ASIC that item 8 of section 611 does not apply to the issue and acquisition of the Bonus Shares because 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.

**Section 606(5) mistake**

84. Ringers Western and the RW Trust both submitted that, if the Panel determines there has been a breach of section 606, any breach that occurred was inadvertent or due to a mistake within the meaning of section 606(5).

85. Section 606(5) provides a defence to the prosecution of a person who contravened section 606 where the person proves that the contravention occurred because of inadvertence or mistake or because the person was not aware of a relevant fact or occurrence. In determining whether the defence is available, the person's ignorance of, or mistake on their part concerning a matter of, law is disregarded.
86. Ringers Western submitted that it did not seek to hold another general meeting before the issue of the Bonus Shares because it relied on external legal advice which did not advise that Ringers Western was obliged to do so. Ringers Western submitted that this provides a defence to section 606 under section 606(5) because section 606 was contravened due to inadvertence or mistake.
87. The Applicants noted that the legal advice obtained by Ringers Western did not specifically consider whether the issue of Bonus Shares would contravene section 606 and, if so, whether any section 611 exceptions applied.
88. As noted by the Panel in *The President's Club Limited* [2012] ATP 10, section 606(5) is not relevant because Panel proceedings are not criminal proceedings.
89. In light of the effect on the control of Ringers Western and the significant dilution of the interest of minority shareholders, we were not persuaded that the submitted inadvertence or mistake should lead to a finding that the circumstances were not unacceptable.

### Effect on control

90. The Applicants submitted that the issue of the Bonus Shares to the RW Trust was also unacceptable pursuant to section 657(2)(a) having regard to the effect that it had on the control of Ringers Western.
91. The Applicants submitted that *"the effect of the circumstances on the control of the Company is that they have given rise to a de facto takeover of the Company by the RW Member. The shares acquired boosted the RW Member to a 99.94% shareholding and permit it to seek to exercise rights to acquire the remaining shares under Chapter 6A of the Act."*
92. The Applicants submitted that these effects are unacceptable by reason of:  
*"the lack of any consideration for the Bonus Shares, the lack of a proper takeover bid, the absence of any reasonable justification for issuing and acquiring the shares, and the impact on the minority shareholders' interests. The acquisition of the Bonus Shares has diluted and rendered worthless the shares of the other shareholders. Before the acquisition of the Bonus Shares, the other shareholders held 36.69% of issued share capital valued at \$24.25 million. Those shareholders have now had their shareholdings diluted to a total of 0.06% interest in the Company. Whilst these remaining shareholders held a minority interest prior to the issue of the Bonus Shares, that interest was substantial, had to be taken into account when board decisions were made, and could only be acquired by an acceptably priced offer, which they could refuse if they wished. Now, their interests are likely to be worth virtually nothing, and can be compulsorily acquired. Dilutive effects have been considered as going to unacceptability in the context of rights issues."*



93. Ringers Western submitted that there has been no change to the voting power in or control of Ringers Western as a result of the issue of the Bonus Shares because the Ringers Western constitution prescribed that the two directors appointed by the RW Trust jointly have a casting vote and therefore “*the voting power at a board level of the RW Trust has always been, in effect, 100%*”.
94. We disagree with Ringers Western’s submissions that the acquisition of the Bonus Shares has had no effect on the control or potential control of Ringers Western. As noted above, in our view, the acquisition of the Bonus Shares contravened section 606, and because of the acquisition of the Bonus Shares, the RW Trust’s voting power in Ringers Western increased from 63.31% to 99.94%. We disagree with Ringers Western’s submissions 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.
95. ASIC submitted that the circumstances are unacceptable having regard to the effect on the control of, or acquisition of a substantial interest in, Ringers Western because:
- (a) the material change in control by the issue and acquisition of the Bonus Shares has disenfranchised Ringers Western’s other shareholders, and will leave them vulnerable to compulsory acquisition and
  - (b) the issue and acquisition of the Bonus Shares contravened section 606 and none of the exceptions in section 611 applied.
96. We agree with ASIC. We consider that the issue and acquisition of the Bonus Shares had an effect, or was likely to have an effect, on the control or potential control of Ringers Western or on the proposed acquisition of a substantial interest in Ringers Western, and was unacceptable on that basis.

### **Purposes of Chapter 6**

97. The Applicants submitted that principles set out in section 602 have been breached because the acquisition of control effected by the Bonus Shares did not take place in “*any market, much less an efficient, competitive and informed market*” on the basis that:
- (a) there has been third party interest in the acquisition of Ringers Western which had not been communicated to Ringers Western shareholders, and the approaches have been ignored or deferred by the Ringers Western board which was controlled by the RW Trust
  - (b) no consideration was paid for the Bonus Shares by the RW Trust and
  - (c) minority shareholders were not given an opportunity to consider the proposed issue of the Bonus Shares and were given no information about the potential issue of the Bonus Shares before it occurred.
98. The RW Trust submitted that the original negotiation of the Bonus Share Deed occurred in an efficient, competitive and informed market, other than:

- (a) the RW Trust was not informed that external shareholders would become shareholders in Ringers Western by virtue of the Capital Raising and that Ringers Western would become a Chapter 6 company as a result and
  - (b) external shareholders who were issued Ringers Western in accordance with the Capital Raising were not informed of the details of the terms agreed by Ringers Western and the RW Trust, including in relation to the Bonus Share Deed.
99. As noted above, the RW Trust submitted that this lack of information was caused by the Applicants.
100. ASIC submitted that the circumstances are unacceptable having regard to the principles set out in section 602, noting in particular that the RW Trust's acquisition increasing its voting power to 99.94% did not take place in an efficient, competitive and informed market, because (among other things) the company's shareholders were not given all material information about the Bonus Shares at the time of the Capital Raising or when the Bonus Shares were issued and acquired.
101. We consider that the acquisition of control over Ringers Western voting shares by means of the Bonus Share issue did not occur in accordance with the purposes of Chapter 6 set out in section 602, including 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.

### Insider participation

102. As noted above, from on or around 11 August 2023, the board of directors of Ringers Western comprised Emma Salerno, James Salerno Junior and Clifford Savala, who were all directors nominated by the RW Trust. At the time of the Bonus Share issue, the trustees of the RW Trust, James Salerno Junior and Emma Salerno, were the chief executive officer and chair of Ringers Western, respectively.
103. While the Ringers Western board obtained independent legal<sup>12</sup> and financial advice prior to Ringers Western issuing the Bonus Shares, there was an inherent conflict at the board level with a majority of the board comprising the trustees of the RW Trust to whom the Bonus Shares were issued.
104. Guidance Note 19 – Insider Participation in Control Transactions provides at [5] that (footnotes omitted):

*“There is considerable overlap between the issues which are discussed in this guidance note and legal, fiduciary and statutory duties in relation to conflicts of interests. The Panel's role is to determine whether unacceptable circumstances exist under section 657A having regard to the purposes of Chapter 6 as set out in section 602, not to determine whether there has been a breach of directors' or employees' duties or other obligations under the law. Nevertheless, the overlap does not “prevent the Panel exercising its jurisdiction in relation to matters that do fall within its jurisdiction and role”.”*

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<sup>12</sup> This advice was not obtained from Salerno Law (see below)

105. We have not considered, nor do we think that it is necessary to consider, whether the Ringers Western directors or the trustees of the RW Trust have complied with their respective duties. However, we consider 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.
106. In our view, this contributed to the acquisition of control not taking place in an efficient, competitive and informed market and the Ringers Western shareholders not being given adequate (or in this case, any) information to assess the merits of the issue of the Bonus Shares.<sup>13</sup>

### Other matters

#### *Legal representation and conflict of interest*

107. We were concerned that it appeared in the first instance that Ringers Western and the RW Trust had the same legal representatives. Ringers Western's and the RW Trust's representatives were employees of the same law firm, Salerno Law, and the email address contacts for those representatives used the same domain address.
108. We also noted that the trustees for the RW Trust, Emma Salerno and James Salerno Jr, are directors on the board of Ringers Western and nominees of the RW Trust.
109. Accordingly, we considered whether it was necessary to take any further action, for example by refusing leave for Ringers Western to be represented by Salerno Law. As noted by the Panel in *The Market Herald Limited*<sup>14</sup> the Panel is not required to, and does not always, grant leave to appear.<sup>15</sup>
110. We sought submissions from the parties on what inferences, if any, should be drawn from the fact that Ringers Western and the RW Trust have the same legal representation.
111. Ringers Western submitted that:
- (a) Salerno Law acts only for Ringers Western, not the RW Trust
  - (b) the trustees of the RW Trust are not legally represented
  - (c) one of the trustees of the RW Trust, Emma Salerno, is the chief executive of Salerno Law, which is a "largely administrative role"
  - (d) no inferences should be drawn from the fact that one of the trustees of the RW Trust is the chief executive of Salerno Law which represents Ringers Western and
  - (e) the board of Ringers Western took independent legal and accounting advice in relation to the issue of the Bonus Shares.

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<sup>13</sup> See Guidance Note 19: Insider Participation in Control Transactions at [4]

<sup>14</sup> [2023] ATP 7 at [293]

<sup>15</sup> For example, the Panel refused leave for a law firm to appear for a party on conflict of interest grounds in *Avalon Minerals Limited* [2013] ATP 11 at [130] to [146]

112. The RW Trust submitted that:

- (a) Emma Salerno is both a director of Ringers Western, a trustee of the RW Trust and a partner and chief executive of Salerno Law
- (b) Emma Salerno's role as partner and chief executive of Salerno Law is "a role that is now largely administrative"
- (c) James Salerno is both a director of Ringers Western and a trustee of the RW Trust and
- (d) "the discharge of each role requires different considerations and we have aimed to discharge the duties we have, to each role we serve".

113. In response to the Panel's brief, which included questions on this issue, the RW Trust replied that "The RW Trust does not intend to make submissions but supports those submissions made by Ringers Western."

114. It was unclear to us how the RW Trust could support the submissions made by Ringers Western when, if the parties had complied with the Panel's Procedural Rules, the RW Trust could not have had access to or reviewed Ringers Western's submissions when it made this comment. In addition, while the RW Trust did not provide submissions on the brief, it did make rebuttal submissions on the brief and thereafter continued to make submissions in these proceedings.

115. We also noted that some of Ringers Western's submissions to our questions appeared to be written from the perspective of the RW Trust. For example, Ringers Western submitted (emphasis added):

- (a) "If, despite the above, the Panel concludes that section 606 was contravened at the time the Bonus Shares were issued, the RW Trust relies on the exemptions in section 611."
- (b) "It was not until after completion of the initial acquisition by Ringers Western, that the RW Trust became aware..."

116. ASIC submitted that (emphasis added):

*"The Company's submissions state "Bombora never disclosed to RW Trust at or before 19 February 2022 that ... Bombora intended to carry out a Capital Raising that would result in the Company having more than 50 members." At the outset, ASIC notes the email from the Company's legal representative dated 7 May 2024, in which Counsel notes that he has only taken instructions from, and has at all times only acted in the interests of the Company. It is unclear to ASIC as to how the Company's legal representative has come into possession of information about what was not disclosed to the RW Trust by Bombora, when Counsel has previously confirmed that he does not act for RW Trust. In circumstances where it was the Company that sought to conduct the Capital Raising (though controlled by Bombora), and where the Company is a counterparty to the Bonus Share Deed, it is not clear how the submission at paragraph 1.6 advances the interests of the Company rather than those of the RW Trust."*

117. It appeared to us that there was the potential for there to be a conflict of interest between Ringers Western and the RW Trust.

118. However, in the circumstances of this case, we did not consider it was necessary to take any further action in relation to the potential conflict of interest in relation to Ringers Western's legal representatives, for example by refusing leave for Ringers Western to be represented by Salerno Law.

*Media canvassing*

119. On 4 June 2024, we communicated to the parties our final declaration and set of orders.

120. Also on 4 June 2024, Ringers Western sent a "Shareholder Update" to its shareholders via email. The Shareholder Update provided a summary of the Panel proceedings from Ringers Western's perspective and was sent before the expiry of the time limits referred to in rules 19(1)(a) and (3) of the Panel's Procedural Rules.

121. On 6 June 2024, the Panel published our decision media release.

122. Rules 19(1) and (3) of the Panel's Procedural Rules provide:

(1) *"A party must not directly or indirectly cause, participate in or assist the canvassing in any media of any issue that is before (or likely to be before) the Panel in proceedings:*

a. *until the proceedings are determined or the time limit within which an application under section 657EA of the Corporations Act may be made for review of a Panel decision has expired, whichever is longer*

b. *and if a request is made, or proposed to be made, to vary, revoke or suspend any final orders, from the time the person becomes aware of the request or proposed request until it is determined by the Panel.*

*For the purposes of Rule 19, media refers to a means of communication through which the subject information reaches or influences people widely, including (but not limited to): radio, television, newspapers, magazines, letters, the internet, emails, social media and online platforms.*

...

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

123. As this communication was sent to Ringers Western shareholders by email, it falls within the definition of "media" for the purpose of rule 19 of the Procedural Rules.

124. Rules 19(2) of the Panel's Procedural Rules provides:

(2) *"Rule 19(1) does not apply to statements that, without discussing merits:*

a. *identify the parties or the subject matter of the application or the broad nature of the unacceptable circumstances alleged or the orders sought or*

b. *describe any decision of the proceedings,*

*to the extent such matters have been disclosed publicly by the Panel."*

125. The Panel takes compliance with its Procedural Rules and Procedural Guidelines seriously. The Panel requires parties to Panel proceedings to give an undertaking to Takeovers Panel the Panel (and each other party) under section 201A of the *Australian Securities and Investments Commission Act 2001* (Cth) to comply with rule 18 and rule 19 (publicity) of the Procedural Rules.
126. Ringers Western submitted that the Shareholder Update was issued in error due to the fault of Ringers Western's legal representative. Ringers Western's legal representative submitted that the communication of the Panel's final decision was misunderstood by Ringers Western and it was only on that basis that the Shareholder Update was released to all shareholders.
127. We were concerned that the Shareholder Update was sent by Ringers Western in breach of rule 19 of the Procedural Rules. However, we are prepared to accept Ringers Western's apology and explanation as to why the Shareholder Update was released before the Panel's decision had been made public on the basis that we do not consider that the Shareholder Update incorrectly summarised the Panel's decision. However, because the Shareholder Update referenced submissions made by Ringers Western that were not public, we required Ringers Western to send these reasons to all Ringers Western shareholders without providing further comment.

## DECISION

### Declaration

128. It appears to us that the circumstances are unacceptable:
- (a) having regard to the effect that we are 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.
129. Ringers Western submitted that a breach of section 606 does not necessarily mean that unacceptable circumstances have occurred or that it is in the public interest to make a declaration of unacceptable circumstances. Ringers Western quoted that the Panel's guidance in Guidance Note 1 that the Panel "*must have regard to the spirit of the takeover rules in section 602 in deciding whether the circumstances are unreasonable and whether it is in the public interest to make the declaration...*".<sup>16</sup>
130. ASIC submitted that it is relevant for the Panel to consider, for the public interest test in section 657A(2), the Applicants' intentions regarding Chapter 6 and the Bonus Shares prior to the Capital Raising. ASIC considered that the Panel's decision may,

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<sup>16</sup> ASIC Guidance Note 1 – Unacceptable Circumstances Para 20

for example, signal the Panel's views as to whether or not a capital raise may be used to attract the operation of Chapter 6 for an ulterior purpose and frustrate a contract.

131. ASIC noted the Panel's commentary in *A S P Aluminium Holdings Pty Ltd* [2023] ATP 8 where the Panel stated:

*"We agree that unacceptable circumstances may arise where there is a deliberate strategy to reduce the number of shareholders in a company with a view to taking the company outside the ambit of Chapter 6 and depriving shareholders of the benefits and protections afforded under that Chapter."<sup>17</sup>*

132. ASIC further submitted that:

*"It generally follows that the inverse may also give rise to unacceptable circumstances. That is, where there is a plan or proposal designed to cause a company to be taken inside the ambit of Chapter 6, unacceptable circumstances may also arise if, generally, the plan or proposal is contrary to the public interest. When dealing with this kind of circumstance, a Panel's considerations might weigh up whether the Company fell within the ambit of Chapter 6 as an ancillary result of a legitimate capital raising, or whether the capital raising was conducted for mixed purposes, with both legitimate and unacceptable purposes that may need to be weighed against one another.*

*Generally, there may be more complex public interest considerations in circumstances of a plan to bring a company within, rather than outside, the ambit of Chapter 6, because the Panel will have to weigh up the interests of existing shareholders who subscribed during the capital raising. This may also require consideration of the interaction between the policies of Chapters 6 and 6D."*

133. ASIC submitted that, based on the materials currently before the Panel, ASIC does not consider it against the public interest for the Panel to make a declaration of unacceptable circumstances.
134. We agree with ASIC.
135. Accordingly, we made the declaration set out in Annexure A and consider that it is not against the public interest to do so. We had regard to the matters in section 657A(3).

## Orders

136. Following the declaration, we made the final orders set out in Annexure B. We were not asked to, and did not, make any costs orders. The Panel is empowered to make 'any order'<sup>18</sup> if 4 tests are met:
- (a) it has made a declaration under section 657A. This was done on 4 June 2024.
  - (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. We are satisfied that our orders do not unfairly prejudice any person. While our order cancelling the Bonus Shares prejudices the RW

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<sup>17</sup> *A S P Aluminium Holdings Pty Ltd* [2023] ATP 8 at [69]

<sup>18</sup> Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

Trust, we do not consider that the order unfairly prejudices the RW Trust because the RW Trust retains its right to receive Bonus Shares under the terms of the Bonus Share Deed.

- (c) it gives any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. This was done on 7 May 2024 and 16 May 2024. Each party made submissions and rebuttals.
- (d) it considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons. The orders do this by cancelling the Bonus Shares which:
  - (i) had a significant effect on the control of Ringers Western, with the interests of Ringers Western shareholders other than the RW Trust being diluted effectively to nominal percentages and
  - (ii) provided the RW Trust with the opportunity to compulsorily acquire any Ringers Western shares it does not own under Part 6A.2.

137. While there were some matters that initially gave us some concern<sup>19</sup>, there was no material which convinced us that minority shareholders, who acquired their shares in Ringers Western for valuable consideration, should not have their interests protected.
138. The Applicants submitted that, unless the Bonus Share Deed is cancelled, the RW Trust could cause Ringers Western to undertake the same process of issuing Bonus Shares again, because Ringers Western will remain under the control of the RW Trust at the board level, and via the RW Trust's majority shareholding.
139. Section 657D(2) provides that the Panel cannot make an order "*directing a person to comply with a requirement of Chapter 6*". Accordingly, any further issue of Bonus Shares in contravention of section 606 would constitute a new circumstance. If such circumstance occurred, a sitting Panel may determine that it would be appropriate for Ringers Western to be liable to a costs order.
140. The RW Trust submitted that the RW Trust would be unfairly prejudiced if the Bonus Share Deed was cancelled because that would allow the Applicants to "*pocket an \$8M windfall and evade complying with the terms of the transaction documents taken together and the commitment they made to RW Trust and was imperative to the deal terms as a whole*".
141. We took into account the parties' submissions and determined that it would not be appropriate to make an order cancelling the Bonus Share Deed. We consider that Ringers Western should not be prevented from issuing Bonus Shares in accordance with the Bonus Share Deed where that issue complies with Chapter 6 (i.e. by obtaining item 7 approval). In addition, the rights of the parties to the Bonus Share Deed to bring any contractual claims before a Court are preserved.

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<sup>19</sup> See paragraph 53 to 68 above.



**Takeovers Panel**

**Ringers Western Limited  
[2024] ATP 8**

**Nicola Wakefield Evans  
President of the sitting Panel  
Decision dated 4 June 2024  
Reasons given to parties 27 June 2024  
Reasons published 11 July 2024**

## Takeovers Panel

Ringers Western Limited  
[2024] ATP 8

### Advisers

Party	Advisers
Applicants	Bartley Cohen
Ringers Western	Salerno Law
The RW Trust	-



**Australian Government**

**Takeovers Panel**

**Annexure A**

**CORPORATIONS ACT  
SECTION 657A**

**DECLARATION OF UNACCEPTABLE CIRCUMSTANCES**

**RINGERS WESTERN LIMITED**

**BACKGROUND**

1. Ringers Western Limited (formerly known as BrandUp Limited) (**Ringers Western**) is an unlisted public company which has approximately 106 shareholders including:<sup>1</sup>
  - (a) 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 (collectively, the **Bombora Group**)<sup>2</sup> and
  - (b) Emma Salerno and James Salerno Junior as trustees for the Ringers Western Discretionary Trust (**RW Trust**).
2. Prior to March 2022, the Bombora Group owned a majority of the shares in, and controlled, Ringers Western and the RW Trust owned and controlled Ringers Western Pty Ltd (**RW Proprietary**).
3. On 19 February 2022, Ringers Western entered into a “Share Sale Deed” (**Share Sale Deed**) with the RW Trust pursuant to which Ringers Western agreed to acquire RW Proprietary (**Share Sale**). As consideration, Ringers Western agreed to pay \$10,000,000 to the RW Trust and to issue 697,410,068 ordinary voting shares in Ringers Western to the RW Trust (**Consideration Shares**).
4. 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 Share Sale:

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<sup>1</sup> As at 15 May 2024

<sup>2</sup> Evolution Trustees Limited as responsible entity for the Bombora Special Investments Growth Fund (**Evolution Trustees**) does not legally own shares in Ringers Western. However, Evolution Trustees does have a relevant interest in the shares legally owned by Apex Fund Services Pty Ltd as custodian for the Bombora Special Investments Growth Fund

*“(Buyer finance) the Buyer having received sufficient funds from its pre-IPO capital raising to be able to fund the Cash Consideration on terms acceptable to the Buyer and the Seller (acting reasonably);”<sup>3</sup>*

5. Ringers Western also entered into a “Bonus Share Deed” (**Bonus Share Deed**) with the RW Trust pursuant to which Ringers Western agreed to issue additional Ringers Western shares (**Bonus Shares**) to the RW Trust providing an additional \$7.7 million in value in connection with the Share Sale in the event that an “Exit Event” (defined under the Bonus Share Deed to include an initial public offering or other 100% share sale) did not occur within 24 months following completion of the Share Sale. The Bonus Share Deed also contemplated that Bonus Shares would be issued to minority Ringers Western shareholders “other than the BrandUp Foundation Members<sup>4</sup> 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 (as detailed in the Bonus Share Deed).
6. The Bonus Share Deed included a clause that provided that:

*“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.”<sup>5</sup>*
7. At the time of entry into the Share Sale Deed and Bonus Share Deed, Ringers Western had less than 50 shareholders.
8. 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 certain external investors were issued shares in Ringers Western and became shareholders of Ringers Western.
9. On 7 March 2022, Ringers Western shareholders approved entry into the Share Sale Deed at an annual general meeting of Ringers Western shareholders. However, this approval was not an approval of the issue of the Bonus Shares to the RW Trust in accordance with item 7 of section 611.<sup>6</sup>
10. On 29 March 2022, Ringers Western and the RW Trust agreed to amend (a) the Share Sale Deed to increase the monetary consideration under the Share Sale Deed from \$10,000,000 to \$15,000,000 and (b) the Bonus Share Deed to increase the value of the Bonus Shares to be issued under the Bonus Share Deed by \$640,000.
11. On 30 March 2022, completion occurred under the Share Sale Deed and:

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<sup>3</sup> Share Sale Deed, clause 3.1(d)

<sup>4</sup> 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

<sup>5</sup> Bonus Share Deed, clause 4(a)

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

- (a) Ringers Western acquired all of the issued shares in RW Proprietary, becoming the sole shareholder of RW Proprietary
  - (b) Ringers Western issued the Consideration Shares to the RW Trust and
  - (c) immediately following completion, Ringers Western had 106 shareholders with the following shareholdings:
    - (i) the RW Trust had 63.31%
    - (ii) the Bombora Group had 23.05% and
    - (iii) other shareholders had 13.64%.
12. On and from 31 March 2022, Ringers Western had more than 50 shareholders.
13. The RW Trust was aware that Ringers Western had more than 50 shareholders by 21 June 2022 at the latest.
14. 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.
15. No Exit Event in relation to Ringers Western has occurred.

#### **CIRCUMSTANCES**

16. 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 shareholder.
17. As 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.
18. The decision to issue the Bonus Shares was not made free of any influence or appearance of influence from the RW Trust.

#### **EFFECT**

19. As a result of the matters referred to above, it appears to the Panel that the 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 the 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.

## CONCLUSION

20. It appears to the Panel that the circumstances are unacceptable circumstances:
- (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:
    - (i) the control, or potential control, of 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.
21. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3).

## DECLARATION

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of Ringers Western Limited.

**Tania Mattei**  
**General Counsel**  
**with authority of Nicola Wakefield Evans**  
**President of the sitting Panel**  
**Dated 4 June 2024**



**Australian Government**

**Takeovers Panel**

**Annexure B**

**CORPORATIONS ACT  
SECTION 657  
ORDERS**

**RINGERS WESTERN LIMITED**

The Panel made a declaration of unacceptable circumstances on 4 June 2024.

**THE PANEL ORDERS**

1. The Bonus Shares are cancelled.
2. Ringers Western and the RW Trust take all steps necessary to give effect to Order 1.
3. Orders 1 and 2 come into effect three business days after the date of these orders.
4. Ringers Western and the RW Trust must not take any steps to compulsorily acquire any shares in Ringers Western for a period of three business days after the date of these orders.

**Definitions**

5. In these orders the following terms apply:

<b>Bonus Share Deed</b>	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
<b>Bonus Shares</b>	687,959,705,932 Ringers Western shares issued to the RW Trust under the Bonus Share Deed
<b>Ringers Western</b>	Ringers Western Limited
<b>RW Trust</b>	Emma Salerno and James Salerno Junior as trustees for the Ringers Western Discretionary Trust

**Tania Mattei**  
**General Counsel**  
**with authority of Nicola Wakefield Evans**  
**President of the sitting Panel**  
**Dated 4 June 2024**