



**In the matter of Bridgewater Lake Estate Ltd  
[2006] ATP 3**

**Catchwords:**

*Association; contravention of section 606; acted in concert; convertible notes; undertakings; extension of time; Corporations Act 2001 (Cth): sections 606; 657C; 657A; 657E; 657D; Australian Securities and Investments Commission Act 2001 (Cth): section 192  
Bridgewater Lake Estate Ltd; Lowell Pty Ltd; Glebe Asset Management Ltd; Harvest Living Limited; Glebe Administration Board*

**These are the Panel's reasons for not making a declaration of unacceptable circumstances in relation to the affairs of Bridgewater and therefore not making final orders. The application by Lowell Pty Ltd failed to provide sufficient evidence to support its allegations of association between various shareholders of Bridgewater Lake Estate Ltd which, if proven, could have established a contravention of section 606 of the Corporations Act 2001 (Cth).**

**SUMMARY**

1. These reasons relate to an application (the **Application**) to the Panel from Lowell Pty Ltd (**Lowell**) on 11 January 2006 under section 657C of the *Corporations Act 2001* (Cth)<sup>1</sup> in relation to the affairs of Bridgewater Lake Estate Ltd (**Bridgewater**). Lowell applied to the Panel for a declaration of unacceptable circumstances, interim and final orders.
2. These are the reasons for the Panel declining the Application which alleged that certain shareholders of Bridgewater were associates which, if proven, could have established a contravention of section 606.
3. The Panel did not consider, when looking at the series of transactions referred to by Lowell, that there was a convincing case made out that, Mr Tuxworth and persons and entities connected with him on the one side, and Mr Cambridge and persons and entities connected with him on the other side, had acted in concert to acquire or consolidate control of Bridgewater. The Panel considered that for each of the relevant alleged impugned transactions, on an individual basis, and for the pattern of transactions overall, there were bases or explanations which the Panel could not say were unreasonable or uncommercial.
4. On that basis, the Panel considered that Lowell had not provided an argument and some evidence, which suggested that the Panel should reject the commercial explanations for the transactions and patterns of behaviour which the parties submitted.
5. As it has previously said in a number of matters relating to association, the Panel recognised the difficulties which an external person such as Lowell will have in providing hard evidence of associations and agreements, which will frequently not

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<sup>1</sup> Unless otherwise stated, all section references in these reasons are to sections of the Corporations Act 2001(Cth).

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be written or formal, and which if they are illegal, will usually be hidden. On that basis, the Panel considered Lowell's submissions as to what conclusions and inferences the Panel should take from patterns of behaviour where individual transactions might not of themselves be clearly impugnable. However, even taking a broad view of the series of transactions and relationships which Lowell submitted to the Panel were evidence of association and concerted action, the Panel was not convinced that it should reject the submissions of the other parties that the transactions were reasonable, commercial, and not part of any agreement or concerted action to acquire control of Bridgewater.

6. That is not to say that Lowell's submissions were unreasonable, farfetched, or devoid of reasonable concern. However, given the responses by the other parties which at first instance were plausible, the Panel was not convinced that it should accept Lowell's submissions as to association and unacceptability over the submissions of the other parties in the absence of reasonable evidence to the contrary from Lowell.
7. The Panel's decision not to take action was reinforced by submissions from one of the parties that it intended to make a bid for Bridgewater, thus addressing one of the orders which Lowell had proposed as remedying the unacceptable circumstances which it alleged.
8. In the Panel's view, Lowell's submissions were not farfetched but the Application failed largely because of lack of evidence.

## THE PROCEEDINGS

### The Panel & Process

9. The President of the Panel appointed Alison Lansley (sitting President), Byron Koster (sitting Deputy President) and Alastair Lucas as the sitting Panel for the proceedings (the **Proceedings**) arising from the Application.
10. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.
11. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

### Application

12. In the Application, Lowell sought a declaration under section 657A that unacceptable circumstances existed in relation to the affairs of Bridgewater. Lowell submitted that the following constituted unacceptable circumstances:
  - (a) acquisitions by Glebe Asset Management Ltd (**GAM**) of:
    - (i) 200,000 ordinary shares issued by Bridgewater on 25 August 2004;
    - (ii) 148,280 Bridgewater shares on 3 November 2004;
    - (iii) convertible notes issued by Bridgewater on 3 September 2004 and 24 March 2005 and any Bridgewater shares derived from conversion of such convertible notes;

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- (b) acquisitions by Harvest Living Limited (**Harvest Living**) of ordinary shares in Bridgewater comprising approximately 11% of the ordinary shares in Bridgewater.
13. Lowell sought an interim order under section 657E that Harvest Living and GAM be restrained from voting, receiving payment or dividends, transferring or disposing those Bridgewater shares described as being acquired by them in paragraph 12 above until the conclusion of the Proceedings.
  14. Lowell sought an extension of time for making the limb of the Application relating to the acquisitions made of Bridgewater shares in 2004.
  15. Lowell sought the following final orders under section 657D:
    - (a) an order requiring GAM to make a takeover bid to all Bridgewater shareholders on no lesser terms than the amount per share payable upon conversion of the convertible notes issued by Bridgewater on 3 September 2004 and 24 March 2005;
    - (b) an order requiring Harvest Living to make a takeover bid to all Bridgewater shareholders on no lesser terms than offered to selective shareholders of Bridgewater by Harvest Living in November and December, 2005;
    - (c) alternatively orders that the legal title to and beneficial ownership of those Bridgewater shares described as being acquired by GAM and Harvest Living in paragraph 12 above be vested in the Australian Securities and Investments Commission (**ASIC**), a broker be appointed to dispose of those shares in a manner that the Panel sees fit and the proceeds of sale be remitted to GAM and Harvest Living respectively;
    - (d) an order that GAM and Harvest Living pay Lowell's costs for the Proceedings; and
    - (e) such further or other orders as the Panel thinks fit.
  16. Lowell also sought to issue summonses for production of the following documents under section 192 Australian Securities and Investments Commission Act 2001 (Cth):
    - (a) minutes of the directors meeting of Bridgewater held on 25 August 2004;
    - (b) minutes of any other directors meetings of Bridgewater regarding the conversion of any convertible notes issued by Bridgewater to GAM;
    - (c) the shareholder and noteholder registers of Bridgewater as at 21 September 2004, 3 November 2004 and as at the date of the summons; and
    - (d) all letters sent to shareholders of Bridgewater from 1 October 2004 to the date of the summons by Harvest Living.

### Background leading to the Application

#### *Bridgewater*

17. Bridgewater is an unlisted public company having approximately 209 members (counting joint holders as single holders).

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18. In 2000 it entered into contracts with the Victorian Urban Land Corporation (**VULC**) to purchase land (**Bridgewater Estate**) at Roxburgh Park in the northern suburbs of Melbourne.
19. Bridgewater is currently undertaking the development of a retirement village project at Bridgewater Estate.
20. At the time the Application was made and during the Proceedings, the total number of shares on issue in Bridgewater was 2,675,214.
21. At the time the Application was made and during the Proceedings, shareholders in Bridgewater relevant to the Proceedings had the shareholdings set out in the table below:

Shareholder	Shareholding	% holding
Glebe Administration Board	532,367	19.90
Ian Tuxworth	285,390	10.67
Harvest Living Ltd	262,275	9.80
Lowell	238,620	8.92
Cogent Nominees Pty Ltd	62,413	2.33
Marigold Pty Ltd	16,335	0.61

22. At the time the Application was made and during the Proceedings, Bridgewater (as evidenced by a copy of the noteholder register) had the following convertible notes on issue:

Noteholder name	Number of notes	Conversion price	Agreement Date
Glebe Diversified Property Fund*	100,000	\$3.30	3 May 2004
Glebe Diversified Property Fund*	317,500	\$4.00	3 September 2004
Glebe Administration Board	476,190	\$4.20	24 March 2005

\* During the proceedings Bridgewater notified the Panel that it had received deeds of assignment in relation to these convertible notes which when executed would result in the assignment of the convertible notes to Glebe Administration Board. Bridgewater submitted that the deeds were executed by Glebe Administration Board and on behalf of Glebe Diversified Property Fund and that Bridgewater was in the process of executing them.

23. At the time of the Application the directors of Bridgewater were Michael Cambridge, Bruce Darnell, Karen Tripney and Alan Whitehead.

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*3 February 2006, Bridgewater Annual General Meeting*

24. During the Proceedings, Bridgewater held its Annual General Meeting on 3 February 2006 (the **Bridgewater AGM**).
25. The Notice of Annual General Meeting and Explanatory Memorandum stated that the business of the Bridgewater AGM was (among other matters) to elect Bruce Darnell, Karen Tripney and Alan Whitehead as directors. They were elected.

*Vitality Care Commissioning Pty Ltd and Vitality Care Pty Ltd*

26. Vitality Care Commissioning Pty Ltd (**VCC**) is a wholly owned subsidiary of Vitality Care Pty Ltd (**VC**). VC is owned 2/6<sup>th</sup> by Ian Tuxworth, 1/6<sup>th</sup> by Ruth Tuxworth and 50% by other parties. Ian Tuxworth is one of three directors of VC.
27. At the time the Application was made and during the Proceedings, VC held 8,000,000 (8.93%) of the ordinary shares on issue in Harvest Living.
28. Prior to lodgement of the Application, VCC held 104,610 ordinary shares in Bridgewater. VCC disposed of these 104,610 Bridgewater shares on or about 4 January 2006 to various third parties (including Ruth Tuxworth) and to Ian Tuxworth (through Marigold Pty Ltd (**Marigold**), a company in which Ian Tuxworth owns 50% and Ruth Tuxworth owns 50%). Other than the 0.6% Marigold purchased from VCC, the VCC Bridgewater shares that were sold to other parties were then sold by those parties to Harvest Living.

*Glebe Administration Board*

29. Glebe Administration Board (**GAB**) is a registered Australian body. GAB owns Glebe Australia Limited. GAM is a wholly owned subsidiary of Glebe Australia Limited.
30. At the time the Application was made and during the Proceedings, GAB had the following relevant holdings:
  - (a) 532,367 ordinary shares in Bridgewater;
  - (b) 1,600,000 convertible notes in VC;
  - (c) 1,865,625 convertible notes in VCC; and
  - (d) 893,690 convertible notes in Bridgewater.
31. Michael Cambridge is an employee of the Sydney diocesan Secretariat of the Anglican Church Diocese of Sydney. Michael Cambridge's services are outsourced by his employer to GAB for a fee paid to his employer. Michael Cambridge holds the position at GAB of General Manager, Investments.

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#### GAM

32. GAM is the responsible entity for Glebe Diversified Property Fund (**GDPF**) a registered managed investment scheme. Cogent Nominees Pty Ltd (**Cogent Nominees**) is the sub-custodian.
33. At the time the Application was made and during the Proceedings, GDPF had the following relevant holdings:
- (a) 62,413 ordinary shares in Bridgewater (the registered holder is Cogent Nominees); and
  - (b) 9,185,001 ordinary shares in Harvest Living (the registered holder is Cogent Nominees).

#### Harvest Living Ltd

34. Harvest Living is a company listed on the Australian Stock Exchange Ltd (**ASX**).
35. The total number of shares on issue in Harvest Living was 89,579,835.
36. Shareholders in Harvest Living relevant to the Proceedings had the shareholdings set out in the table below:

Shareholder	Shareholding	% holding
SE AF 1 September 201 AS	20,625,010	23.02
Cogent Nominees	9,185,001	10.25
VC	8,000,000	8.93
Michael and Jennifer Cambridge	1,153,000	1.29
Ruth Tuxworth	814,894	0.91

37. At the time of the Application the directors of Harvest Living were Ian Tuxworth, Gregory Leather and Marko Andjelkovic.

#### Stage 6

38. On 28 October 2005 Bridgewater held an Extraordinary General Meeting to approve the sale of Lot S4 at Roxburgh Park (**Stage 6**) to a wholly owned subsidiary of Harvest Living. The following resolution was approved by the shareholders:
- “To endorse, and to...ratify the entering into of the contract dated 26 July 2005 for the sale of Lot S4, Bridgewater Lake Estate to Harvest Living (No. 2) Pty Ltd for \$900,000 plus GST.”*
39. The Explanatory Memorandum for the 28 October 2005 Bridgewater EGM (**Explanatory Memorandum**), stated (among other matters) that:
- (a) Stage 6 is the parcel of land closest to the Aged Care Facility;
  - (b) Stage 6 was purchased in August 2004 for \$300,000; and
  - (c) the development of Stage 6 was not an immediate priority for Bridgewater.

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#### *Chronology*

40. The following paragraphs set out a chronology of those factual matters which led up to the Application.
41. **30 July, 2003:** GAB purchased 71,500 ordinary shares in Bridgewater taking its shareholding to 71,500 of 2,300,214 shares in Bridgewater or 3.1 %.
42. **12 December, 2003:** Michael Cambridge became a director of Bridgewater.
43. **18 December, 2003:** GAB was issued 100,000 ordinary shares in Bridgewater at \$3.30 per share taking its shareholding to 171,500 of 2,400,214 shares in Bridgewater or 7.1%.
44. **3 May, 2004:** GDPF (through its custodian) was issued convertible notes in Bridgewater for \$330,000. The notes were convertible to 100,000 ordinary shares in Bridgewater at \$3.30 per share.
45. **7 July, 2004:** GDPF (through its custodian) was issued convertible notes in Bridgewater for \$247,500. The notes were convertible to 75,000 ordinary shares in Bridgewater at \$3.30 per share.
46. **25 August, 2004:** A Directors' Meeting of Bridgewater was held and was attended by the portfolio manager for GDPF. One of the purposes of the meeting was to discuss Bridgewater obtaining further funding from GAB.
47. **25 August, 2004:** Share certificates 241 for 75,000 ordinary shares and 242 for 100,000 ordinary shares in Bridgewater were prepared by Lowell's Operations Manager who was also at that time Acting Company Secretary of Bridgewater. At all relevant times, until September 2004, Lowell had a service contract to provide secretarial, company and financial services to Bridgewater. GDPF (as nominee of GAB) did not exercise its option to convert its notes nor did it surrender its certificate representing its convertible notes to Bridgewater in accordance with the conversion provisions in the relevant Convertible Note Agreements with Bridgewater.
48. **25 August, 2004:** Bridgewater issued share certificate 243 to GDPF (through its custodian) for 200,000 ordinary shares for \$3.65 per share. After the above transactions, GDPF's (through its custodian) shareholding was 200,000 shares in Bridgewater. GAB's shareholding was 171,500. The aggregate shareholding was 371,500 of 2,600,214 or 14.29%.
49. **25 August, 2004:** The Board of Bridgewater at that time included Ian Tuxworth, Michael Cambridge, Paul Cowan and Graham Bowker.
50. **3 September, 2004:** GDPF was issued convertible notes for \$1,270,000. The notes were convertible to 317,500 ordinary shares in Bridgewater at \$4.00 per share.
51. **September, 2004:** The Bridgewater Shareholder's Register at that date indicated that certificates 241 (75,000 shares in Bridgewater) and 242 (100,000 shares in Bridgewater) were issued to GDPF (through its custodian).
52. **End of September 2004:** At about that time certificates 241 and 242 were cancelled. These certificates were never issued to GDPF.

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53. **25 October, 2004:** GDPF (through its custodian) acquired 171,500 shares in Bridgewater from GAB. After such acquisition GDPF's shareholding was 371,500 of 2,600,214 issued shares in Bridgewater being 14.29%.
54. **3 November, 2004:** GDPF (through its custodian) acquired 148,280 fully paid ordinary shares in Bridgewater from Paul Cowan. GDPF's shareholding (through its custodian) was now 519,780 of 2,600,214 issued shares being 19.99%. Paul Cowan's remaining shares and the shares of the PS Cowan Super Fund were subsequently sold to VCC.
55. **29 November, 2004:** Paul Cowan resigned as a director of Bridgewater.
56. **30 November, 2004:** Graham Bowker resigned as a director of Bridgewater.
57. **February, 2005:** VC lent \$250,000 to Harvest Living.
58. **24 March, 2005:** GDPF (through Cogent Nominees) was issued convertible notes in Bridgewater. The convertible notes were convertible into 476,190 ordinary shares in Bridgewater at a conversion price of \$4.20 per share.
59. **23 May, 2005:** VC acquired by way of subscription 5,000,000 fully paid ordinary shares in Harvest Living in satisfaction of the \$250,000 loan by VC to Harvest Living.
60. **23 May, 2005:** 75,000 Bridgewater shares were issued to GDPF (through Cogent Nominees) as a result of the conversion of notes in Bridgewater held by GDPF (through Cogent Nominees). These notes were converted at a conversion price of \$3.30 per share. These shares were issued following receipt by Bridgewater of relevant conversion documentation from GDPF on 13 May 2005.
61. **26 May, 2005:** VC acquired by way of subscription 3,000,000 fully paid ordinary shares in Harvest Living bringing its shareholding to 8,000,000 fully paid ordinary shares in Harvest Living (approximately 12.92% of Harvest Living at that time).
62. **27 May, 2005:** Ian Tuxworth was appointed as a director of Harvest Living.
63. **31 May, 2005:** Michael Cambridge resigned as a director and Chairman of Harvest Living.
64. **30 June 2005:** Harvest Living (then called Motion Picture Company of Australia Limited) announced that it had signed a Heads of Agreement with Bridgewater to acquire Stage 6.
65. **22 July, 2005:** GDPF (through Cogent Nominees) acquired by way of subscription 9,285,001 fully paid ordinary shares in Harvest Living (approximately 13.04% of Harvest Living at that time). That issue of Harvest Living shares resulted in the dilution of VC's shareholding in Harvest Living to approximately 11.25%.
66. **28 July, 2005:** Harvest Living announced that it had exchanged contracts with Bridgewater regarding the sale of Stage 6 to a wholly owned subsidiary of Harvest Living.
67. **29 August 2005:** GDPF (through Cogent Nominees) sold 100,000 fully paid ordinary shares in Harvest Living on-market.
68. **28 October, 2005:** An Extraordinary General Meeting of Bridgewater approved the sale of Stage 6 to Harvest Living.



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69. **October, 2005:** Ian Tuxworth travelled to Queensland twice to meet with shareholders of Bridgewater who were clients of a financial planner from Queensland.
70. **October, 2005:** Letters were sent by Harvest Living to certain Bridgewater shareholders offering to acquire their shares.
71. **11 November, 2005:** Harvest Living announced to ASX that it had or would acquire a “strategic holding” of 11% of shares on issue in Bridgewater for 83 Harvest Living shares per Bridgewater share.
72. **24 November, 2005:** Harvest Living announced it had placed 10,084,500 fully paid ordinary shares for a price of 3 cents per share in consideration of acquisition of shares in Bridgewater. These shares were issued as consideration for the acquisition by Harvest Living of 121,500 Bridgewater shares. Following the acquisition by Harvest Living of those Bridgewater shares, Harvest Living’s holding in Bridgewater was 4.5%.
73. **30 November, 2005:** Ian Tuxworth resigned as a director and Chairman of Bridgewater.
74. **1 December, 2005:** Harvest Living announced that it had appointed Ian Tuxworth as an executive director.
75. **28 December 2005:** GDPF (through Cogent Nominees) transferred 532,367 Bridgewater shares to GAB. Following this transaction, GDPF (through Cogent Nominees) held 62,413 Bridgewater shares and GAB held 532,367 Bridgewater shares. Their aggregate holding in Bridgewater was 594,780 of 2,675,214 or 22.23%.
76. **29 December 2005:** Convertible notes in Bridgewater that were convertible into 476,190 ordinary shares in Bridgewater held by GDPF (through Cogent Nominees) were assigned by way of a deed of assignment to GAB on 29 December 2005.
77. **29 December 2005:** Harvest Living announced that an Extraordinary General Meeting held that day had ratified the issue of 10,084,500 fully paid ordinary shares for a price of 3 cents per share in consideration of acquisition of shares in Bridgewater. That EGM also approved the following resolution:  
*“That the addition by the Company to its existing operation of a new principal activity consisting of the management, marketing and development of senior living and aged care facilities be authorised and approved.”*
78. **30 December, 2005:** Harvest Living announced it had placed 4,357,500 shares for a price of 3.2 cents per share in consideration of acquisition of shares in Bridgewater. These shares were issued as consideration for the acquisition by Harvest Living of 52,500 Bridgewater shares. Following the acquisition by Harvest Living of those Bridgewater shares, Harvest Living’s holding in Bridgewater was 6.5%.
79. **5 January 2006:** Harvest Living announced that it had issued 7,326,825 fully paid ordinary shares to various persons at a price of 3.2 cents per share. These shares were issued as consideration for the acquisition by Harvest Living of 88,275 Bridgewater shares. Following the acquisition by Harvest Living of those Bridgewater shares, Harvest Living’s holding in Bridgewater was 9.8%. The rest of

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the proposed 11% acquisition did not proceed and Harvest Living's holding in Bridgewater was at the time of the Application still 9.8%.

#### Lowell's key submissions

80. In summary, Lowell<sup>2</sup> submitted in its Application and submissions:
- (a) the acquisition of certain parcels of shares in Bridgewater by GAM, GAB and Harvest Living had occurred in contravention of the equal opportunity principle and the efficient, competitive informed market principle, even in the absence of a breach of section 606;
  - (b) the shareholders in Bridgewater had been deprived of the opportunity to be offered a control premium because of those acquisitions as they resulted in GAM, GAB, Harvest Living and their associates obtaining control of Bridgewater;
  - (c) Mr Tuxworth and Harvest Living were associates and, following an acquisition of 262,275 Bridgewater shares by Harvest Living, when aggregated their voting power in Bridgewater exceeded 20% in contravention of section 606;
  - (d) GAM and GAB were associates. Lowell alleged that they were issued 175,000 shares in Bridgewater following conversion of convertible notes in August 2004; this issue was reversed by an unauthorized capital reduction and they contravened section 606 when then they acquired a further 148,280 shares in November 2004;
  - (e) Mr Tuxworth and Mr Cambridge were associates;
  - (f) Mr Cambridge and GAM and GAB were associates;
  - (g) Mr Cambridge, Mr Tuxworth, Harvest Living and GAM and GAB were associates and when aggregated their voting power in Bridgewater exceeded 20% in breach of section 606 as a result of Harvest Living's recent acquisitions of Bridgewater shares, which therefore contravened section 606;
  - (h) the convertible notes GAB holds in Bridgewater conferred control over Bridgewater.
81. The evidence that Lowell put forward from which Lowell submitted the Panel could infer the associations alleged by Lowell included:
- (a) that Mr Tuxworth and Mr Cambridge had at certain times sat on the same boards;
  - (b) the alleged issue of 175,000 shares in Bridgewater to GAB and GAM following conversion of convertible notes in August 2004; reversal of that issue by an unauthorized capital reduction and acquisition of a further 148,280 Bridgewater shares in November 2004;
  - (c) patterns of conduct (for example, the sale of Stage 6).

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<sup>2</sup> Capitalised terms in this letter have the meaning given to them in the Brief provided to the parties on 19 January 2006 unless otherwise expressly stated in this letter.

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#### Particular submissions concerning the directors meeting of 25 August 2004

82. As discussed above, Lowell submitted that:
- (a) GAM and GAB were issued 175,000 shares in Bridgewater following conversion of convertible notes in August 2004;
  - (b) this issue was reversed by an unauthorized capital reduction; and
  - (c) GAM and GAB contravened section 606 when then they acquired a further 148,280 shares in November 2004.
83. This submission by Lowell was a key part of Lowell's evidence to support the associations it alleged and the contraventions of section 606 it alleged.
84. In response to Lowell's allegations, Glebe submitted that:
- (a) Glebe was not aware of and never received share certificates 241 and 242;
  - (b) the relevant convertible note certificates never left the possession of GAM's custodian;
  - (c) GAM continued at all relevant times to receive interest payments on the relevant convertible notes; and
  - (d) Glebe was not aware of any agreement to convert the relevant convertible notes at that time.
85. In summary, Bridgewater submitted that the creation of share certificates 241 and 242 and the shareholder register entry which appeared to indicate that 175,000 shares in Bridgewater were issued to Glebe following conversion of Glebe's convertible notes in August 2004 was a mistake.
86. Bridgewater submitted that Mr Sparrow, who at the time was acting secretary of Bridgewater, had prepared the certificates in anticipation of receiving the documentation required to allow the conversion of the relevant convertible notes. No such documentation was received from Glebe. Bridgewater noted in its submissions that at the relevant time Mr Sparrow was an employee of Lowell and Lowell had a service contract to provide secretarial, company and financial services to Bridgewater. Bridgewater also submitted that share certificates 241 and 242 were mistakenly prepared and were not sent to Glebe.
87. Bridgewater provided an affidavit of Mr Sparrow to the Panel as evidence.
88. Accordingly, Bridgewater submitted that 175,000 shares in Bridgewater were not validly issued to Glebe in August 2004.
89. Lowell had also provided an affidavit of Mr Sparrow to the Panel as evidence supporting its allegations.
90. Mr Cambridge also submitted that the creation of share certificates 241 and 242 was an error and that no shares were ever issued.
91. It was not entirely clear from the parties submissions as to whether Glebe had agreed in principle to convert the relevant notes but the conversion was never completed, agreed to contemplate conversion and decided against it or not agreed to contemplate conversion or otherwise.

## DISCUSSION

### An extension of time

92. For the reasons set out below, the Panel decided that the limb of the application relating to an alleged breach of section 606 by Glebe<sup>3</sup> in relation to Bridgewater in 2004 could not succeed. Accordingly, it declined to extend time for making that limb of the Application.

### Section 606

#### *Alleged contravention of section 606 by acquisitions by Glebe in 2004*

93. Lowell submitted that Glebe had contravened section 606 in November 2004, by acquiring 148,280 Bridgewater shares from Mr Paul Cowan. Lowell submitted that this acquisition took Glebe's relevant interest in Bridgewater shares from 19.69% to 25.04%. Lowell submitted that Glebe had already in August 2004 acquired 175,000 Bridgewater shares by converting notes it held in Bridgewater, and that the issue of those shares on conversion of the notes was retrospectively and invalidly sought to be reversed by book entries to avoid the acquisition of the Bridgewater shares from Mr Cowan contravening section 606.
94. While the evidence provided by the other parties was not in all respects ideal in clarifying the situation and although Glebe may have agreed in principle to convert the notes, the evidence (see above) strongly supported Glebe's submission that Glebe did not actually apply to have the notes converted into shares in Bridgewater in 2004, and that the entries made in Bridgewater's books which appear to record such a conversion were made in anticipation of an application for conversion which was not in the end made.
95. If the August 2004 conversion did not occur, the acquisitions and holdings of shares in Bridgewater by Glebe were insufficient to give rise to a breach of section 606 at that time, in November 2004 or in May 2005 following conversion of notes. Similarly, Glebe's holdings in Bridgewater at the time of the Application were insufficient to give rise to a breach of section 606, unless those interests:
- (a) should be aggregated with those of some other person who also holds shares in Bridgewater; and
  - (b) when so aggregated give rise to a breach of section 606,
- an issue which is considered below.

#### *Glebe's convertible note holding*

96. The Panel did not accept Lowell's submission that Glebe's holding of convertible notes in Bridgewater conferred control of Bridgewater in a way contrary to the policy or requirements of Chapter 6. The notes carry no votes and can only be converted into shares in one or another of the ways permitted by sections 606 and 611. If those

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<sup>3</sup> In these reasons a reference to Glebe is a reference to GAM and GAB. Since GAB controls GAM any voting power that either of them has would be aggregated for the purpose of determining a contravention under section 606.

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sections are complied with, only in an exceptional case would the acquisition be contrary to the policy of Chapter 6. None of the evidence presented to the Panel supported any inference about the circumstances under which the notes would be converted, or any inference that they would be converted in a way which would contravene section 606 or give rise to unacceptable circumstances. The Panel considered that if and when concerns about actual unacceptable circumstances arise as a result of future or proposed conversions, an application to the Panel should be made at that time.

#### *Association*

97. Lowell submitted that Harvest Living had acquired the HLL Bridgewater Shares<sup>4</sup> as part of an overall plan by Harvest Living, Glebe, Mr Tuxworth and Mr Cambridge to obtain control of Bridgewater and that the acquisition by Harvest Living of the HLL Bridgewater Shares:
- (a) constituted a breach of section 606;
  - (b) occurred in a market that was not efficient, competitive and informed; and
  - (c) deprived the shareholders of Bridgewater (other than Glebe and Mr Tuxworth) from potentially obtaining a premium for control in respect of their Bridgewater shares that should flow from a change of control.
98. In support of this contention, Lowell submitted that all of Glebe, Mr Tuxworth, Mr Cambridge, and Harvest Living were associates of each other or, at the very least, if all these parties were not associates of each other, Mr Tuxworth and Harvest Living were associates. Lowell submitted that past conduct of these persons, and a number of transactions entered into by Bridgewater, demonstrated the existence of these associations.
99. In considering whether people are associated for the purposes of testing Lowell's submissions, the Panel was primarily concerned with whether there was a real and not merely alleged or hypothetical combination of shares controlled by those people, because they had entered into an agreement for the purpose of exerting control over Bridgewater, rather than whether they might be said to be acting in concert in relation to affairs of Bridgewater unconnected with control<sup>5</sup>. In particular, it asked itself whether it could infer from words, acts or circumstances that any two or more people had agreed to use the relevant interests they each had in shares in Bridgewater or in Harvest Living in combination to control or influence the board or operations of Bridgewater.
100. In considering whether one person is associated with another for this purpose, the Panel considered that people are not associates merely because each pursues a similar goal to the other, if each follows his or her own several interests, without

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<sup>4</sup> "HLL Bridgewater Shares" are the 9.8% of shares in Bridgewater that Harvest Living agreed to acquire by entering into share sale agreements with various Bridgewater shareholders. These shares were acquired in the period from November 2005 to January 2006. Lowell alleged that Harvest Living had acquired 11% of Bridgewater shares in these transactions. However, Harvest Living advised that sale agreements in relation to 1.2% Bridgewater shares did not proceed.

<sup>5</sup> This is consistent with previous readings of paragraph 12(2)(c): National Foods Limited [2005] ATP 8 at paragraph 58.

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agreeing to co-operate or act in any other concerted manner<sup>6</sup>. Where conduct is assessed as evidence of association, it is often difficult to tell whether the conduct merely reveals that people are separately following interests which coincide, or whether they are carrying out an agreement to pool voting power in pursuit of an agreed common goal. One test the Panel applied in this matter to distinguish between these possibilities, particularly where evidence of acting in concert was lacking, was whether one of the possible associates had acted uncommercially (i.e. done something which was inconsistent with their merely following their own several interests and only explicable on the basis that they had subordinated their own interests to a common design).

101. Consistently with these principles the Panel did not, for example, infer that because Mr Tuxworth had represented Harvest Living in dealings concerning affairs of Bridgewater, he agreed to pool with Harvest Living relevant interests in shares in Bridgewater which he had in a private capacity.

#### **Association between Glebe, Mr Tuxworth, Mr Cambridge and Harvest Living**

102. Consistent with previous Panel decisions, the Panel applied the principle that association of itself is not prima facie a breach of section 606 or sufficient to constitute unacceptable circumstances. Association is simply the basis for aggregating relevant interests held by different persons to determine voting power. However, an acquisition of a relevant interest due to either the formation of an association or the acquisition of voting power by parties who are already associates may be unacceptable and may result in a breach of section 606.
103. Lowell submitted that Glebe, Mr Tuxworth, Mr Cambridge and Harvest Living (the **Alleged Associates**) were all associates in relation to the affairs of Bridgewater. The aggregate voting power of all of these parties in Bridgewater prior to the acquisition by Harvest Living of the HLL Bridgewater Shares was 36.8% (comprising 22.23% relevant interests of Glebe and 14.57% relevant interests of Mr Tuxworth<sup>7</sup>). The aggregate voting power of all of these parties in Bridgewater following the acquisition by Harvest Living of the HLL Bridgewater Shares increased by 5.9% to 42.7%<sup>8</sup>. Lowell submitted that the acquisition by Harvest Living of the HLL Bridgewater Shares contravened section 606 as it caused the Alleged Associates' aggregated voting power in Bridgewater to increase from above 20% to less than 90%.
104. Lowell submitted that a pattern of conduct existed from which the Panel could infer the existence of association between the Alleged Associates under paragraph 12(2)(b) or (c).<sup>9</sup> Lowell submitted that this pattern of conduct included:

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<sup>6</sup> Winepros Limited [2002] ATP 18 at paragraph 33; LV Living Limited [2005] ATP 5.

<sup>7</sup> The 14.57% comprised 285,390 shares Mr Tuxworth held directly (10.67%) and 104,610 shares then held by VCC (3.9%) which Mr Tuxworth had a relevant interest in because VCC is a wholly owned subsidiary of VC in which Mr Tuxworth owns more than 20% of the shares.

<sup>8</sup> Lowell submitted that Harvest Living acquired 11% of Bridgewater and that the aggregated voting power of the Alleged Associates therefore increased by that 11% at that time. The increase would only be 5.9% because 1.2% of the 11% was not acquired by Harvest Living and VCC's 3.9% was sold to Mr Tuxworth's associate Marigold Pty Ltd (0.6%) and persons who then sold to Harvest Living (3.3%).

<sup>9</sup> Obviously, GAM and GAB are associates under paragraph 12(2)(a), as GAB controls GAM.

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- (a) various transactions in respect of Bridgewater which Lowell submitted were uncommercial and which appear to have the purpose of obtaining control of Bridgewater; and
  - (b) the manner in which Bridgewater shareholders were approached by Harvest Living when Harvest Living was starting to acquire its 9.8% holding in Bridgewater, namely, that Mr Tuxworth (who at the time was a director of both Harvest Living and Bridgewater) was Harvest Living's representative at meetings at which certain Bridgewater shareholders discussed the potential sale of their shares in Bridgewater.
105. The Panel considered whether each of the circumstances mentioned by Lowell amounted to evidence of association between some or all of the Alleged Associates. But the Panel considered that there was insufficient evidence to provide a reasonable basis for the submission that the Alleged Associates are associates of each other.
106. The Panel particularly considered the funding of Bridgewater, VC, VCC and Harvest Living by Glebe and the sale of Stage 6 by Bridgewater to Harvest Living.
107. The Panel considered that if it could be shown that both:
- (a) the funding provided by Glebe to both Harvest Living and Bridgewater over time; and
  - (b) the sale of Stage 6 by Bridgewater to Harvest Living,
- were uncommercial, this could support a strong inference that there was an association between some or all of the Alleged Associates in respect of Bridgewater. But the Panel received no evidence to support a conclusion that the sale of Stage 6 by Bridgewater to Harvest Living was not the result of independent commercial decisions by:
- (c) Bridgewater, who was the vendor;
  - (d) Harvest Living, who was the purchaser; and
  - (e) Glebe, who by subscribing for 9,285,001 shares in Harvest Living at a cash price of 5 cents per share, in effect provided much of the funding.
108. The evidence supporting the Panel's conclusion of independent action, and a reasonable commercial basis for the transaction included the following:
- (a) At an Extraordinary General Meeting of Bridgewater on Friday, 28 October 2005, Bridgewater shareholders approved a resolution to ratify the entering into of the contract between Bridgewater and a wholly owned subsidiary of Harvest Living for the sale of Stage 6. The Explanatory Memorandum stated that (amongst other matters):
    - (i) the price that was agreed for the sale of Stage 6 to Harvest Living (that is \$900,000 plus GST) was significantly above the \$300,000 Bridgewater paid for it;
    - (ii) that price was greater than the \$350,368 recorded against Stage 6 in Bridgewater's June 2005 accounts plus a directors' revaluation of \$200,000 which occurred before the change in accounting policy on revaluing land held for sale;

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- (iii) that price exceeded a recent valuation by M3 Property in April of 2005 which valued Stage 6 at \$780,000 as part of a valuation of the entire Bridgewater Lake Estate;
  - (iv) the cash proceeds received from the sale would assist in reducing Bridgewater's debt level; and
  - (v) Bridgewater was not prepared to develop Stage 6 as an immediate priority because of development and financial risk involved for Bridgewater and it was unlikely Bridgewater would be able to develop Stage 6 for at least two years.
- (b) Harvest Living's development of Stage 6 as a nursing home complemented and enhanced the value of the other parts of Bridgewater's Roxburgh Park development.
- (c) From Harvest Living's perspective, it was in the process of changing its business from being a film library company and was looking for appropriate businesses to acquire and develop. Therefore, Bridgewater's inability to develop Stage 6 immediately created an opportunity for Harvest Living.
- (d) Glebe's submissions state that:
- (i) Glebe's investments portfolio (which included interests in Bridgewater, Harvest Living and VCC) was managed by a portfolio manager other than Mr Cambridge;
  - (ii) the Panel should, subject to contrary evidence, assume that the portfolio manager would have conducted the portfolio manager's duties in accordance with the interests of the GDPF members diligently, professionally and with independent thought and application. The Panel considers that it is reasonable to infer that, in the absence of contrary evidence, this is the case; and
  - (iii) following allegations in a trade magazine of conflicts of interest between Mr Cambridge's position as director of Harvest Living and GDPF's interests as shareholder in Harvest Living, Glebe formally separated Mr Cambridge from any internal decision making in relation to its investments in Harvest Living.
- (e) The Panel considered that it was reasonable to infer that Glebe could have considered Stage 6 would be a valuable asset given its investment in Bridgewater, and that Harvest Living was the best vehicle to develop Stage 6. On this basis, it would not be inconsistent with the interests of the GDPF members for Glebe to have interests in Harvest Living because Harvest Living was intending to purchase Stage 6 from Bridgewater. The Panel does not consider that Glebe's investment in Harvest Living points to Glebe intending to take control of Bridgewater.
109. The Panel noted that Glebe has over time provided debt and equity funding to Harvest Living and Bridgewater and as a result Glebe currently holds substantial debt and equity positions in those companies. The Panel also noted that Glebe has provided debt funding to VC and VCC.



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110. The Panel considered that its reasoning set out above in relation to the subscription by Glebe for Harvest Living shares in effect to fund the purchase of Stage 6 by Harvest Living also applied to Glebe's funding of Bridgewater over time. The Panel also considered that Glebe had primarily provided debt and equity funding to Bridgewater in response to funding needs of Bridgewater rather than for the purpose of obtaining control of Bridgewater. The Panel accepted Glebe's submissions that it acquired the Bridgewater convertible notes primarily as debt instruments and that it has no intention to convert them.
111. On this basis, the Panel considered that there was not sufficient evidence presented to it to show that any of these transactions were entered into on uncommercial terms given the financial position and prospects of Bridgewater at all relevant times.
112. The Panel also considered whether or not the funding provided by Glebe to Harvest Living, Bridgewater, VC and VCC indicated that the Panel should infer that Glebe intended to acquire control of Bridgewater and these were steps in that process. Even though Glebe itself currently holds 22.23% of the voting power in Bridgewater and holds convertible notes for Bridgewater which if converted would result in Glebe holding an additional 893,690 Bridgewater shares, the Panel considered this of itself was not a sufficient reason for Glebe's holding in Bridgewater to be aggregate with the holdings of Mr Tuxworth and Harvest Living in Bridgewater.

#### **Association between Mr Tuxworth and Harvest Living**

113. Lowell's concern was that Mr Tuxworth and Harvest Living were acting together in order to obtain control of Bridgewater.
114. Lowell submitted that the voting power of Mr Tuxworth and Harvest Living in Bridgewater should be aggregated, primarily on the basis that Mr Tuxworth was an executive director of Harvest Living and because he made offers on behalf of Harvest Living to shareholders of Bridgewater in relation to their Bridgewater shares (which resulted in Harvest Living acquiring the HLL Bridgewater Shares). On this basis, Lowell submitted that as a result of Harvest Living acquiring the HLL Bridgewater Shares there had been a breach of section 606.
115. Mr Tuxworth holds 10.67% of the voting power in Bridgewater and Marigold Pty Ltd (a company controlled by Mr Tuxworth) holds 0.61% of the voting power in Bridgewater. If the voting power in Bridgewater of Mr Tuxworth, Marigold Pty Ltd and Harvest Living were aggregated, the acquisition of the HLL Bridgewater Shares by Harvest Living would result in an increase in voting power in Bridgewater from 11.28% to 21.08% in contravention of section 606.
116. The Panel started from the principle that Mr Tuxworth does not have a relevant interest in Bridgewater shares held by Harvest Living merely because he is an executive director of Harvest Living. Accordingly, the Panel rejected Lowell's submissions on that point.
117. The Panel also noted that there was no evidence provided which indicated that Mr Tuxworth controlled the board of Harvest Living or otherwise had, in his capacity as executive director of Harvest Living, control over Harvest Living's shares in Bridgewater. In fact, the evidence of Harvest Living was that Mr Tuxworth absents himself from discussions of the Harvest Living board regarding Bridgewater.

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118. The Panel then considered Lowell's submissions regarding Mr Tuxworth and Harvest Living, namely, primarily that:
- (a) Mr Tuxworth made offers on behalf of Harvest Living to Bridgewater shareholders which facilitated Harvest Living obtaining the HLL Bridgewater Shares; and
  - (b) when Mr Tuxworth was a director of Bridgewater, Bridgewater sold "Harvest Living" business names owned by Bridgewater to Harvest Living at a price that was uncommercial,
- and this was evidence that Mr Tuxworth and Harvest Living were intending to together obtain control of Bridgewater.
119. While the evidence provided by the other parties was not in all respects ideal in clarifying the situation, the Panel did not consider that the evidence Lowell provided supporting its submissions regarding offers made by Mr Tuxworth on behalf of Harvest Living to Bridgewater shareholders was convincing. Further, the fact that, at the invitation of Mr Dodd, Mr Tuxworth attended (as a representative of Harvest Living) meetings with Bridgewater shareholders who were interested in buying Harvest Living shares, does not necessarily indicate an association between Mr Tuxworth and Harvest Living in respect of the affairs of Bridgewater.
120. The Panel considered that, in the absence of supporting evidence, Harvest Living obtaining the HLL Bridgewater Shares did not indicate that Mr Tuxworth, in his personal capacity as a shareholder of Bridgewater, and Harvest Living were intending together to obtain control of Bridgewater, given:
- (a) the interrelationship between Harvest Living's and Bridgewater's operations; and
  - (b) that Harvest Living had submitted that it had been considering making a scrip bid for Bridgewater for some time. The 9.8% could provide a springboard if the bid proposal came to fruition.
121. Harvest Living disputed that the sale of the "Harvest Living" business names owned by Bridgewater to Harvest Living was an uncommercial transaction.
122. As discussed above, the Panel considered the purchase of the HLL Bridgewater Shares by Harvest Living, the fact that Mr Tuxworth also owned shares in Bridgewater, the fact that Mr Tuxworth was an executive director of Harvest Living and had previously been a director of Bridgewater. It also considered that taken together they did not provide sufficient evidence to establish that Mr Tuxworth and Harvest Living were associated or that their holdings should be aggregated for the purpose of establishing a breach of section 606.
123. Accordingly, the Panel considered that there was insufficient evidence before the Panel that Mr Tuxworth:
- (a) in his personal capacity as a shareholder of Bridgewater cooperated with Harvest Living; or
  - (b) in his capacity as executive director of Harvest Living exercised power over his own and Harvest Living's shares in Bridgewater jointly,

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such that aggregating Harvest Living's and Mr Tuxworth's holdings in Bridgewater could be justified.

#### Association between Mr Cambridge and Glebe

124. Lowell submitted that Mr Cambridge was associated with Glebe in relation to Harvest Living and Bridgewater primarily because of his position as General Manager, Investments in Glebe.
125. The Panel considered there was insufficient evidence for it to infer that Mr Cambridge was associated with Glebe in relation to Harvest Living and Bridgewater, given:
- (a) Glebe's submissions regarding the management of its investment portfolio, namely, that:
    - (i) responsibility for investment decisions regarding Glebe's investments have at all relevant times been held by the two portfolio managers, Ms Fisher and Ms Ong;
    - (ii) no evidence was submitted to suggest that either of Ms Fisher and Ms Ong is an associate of any of the relevant parties; and
    - (iii) absent any evidence to the contrary, the Panel should conclude Ms Fisher and Ms Ong conducted their duties diligently, professionally and with independent thought and application;
  - (b) that Mr Cambridge did not hold any shares in Bridgewater and the holding which he has in Harvest Living was inconsequential (1.29%).
126. Even if the Panel rejected the submissions by Glebe regarding the management of its investment portfolio by a portfolio manager (other than Mr Cambridge) and on this basis found an association between Mr Cambridge and Glebe, this association no longer affects voting of Glebe's holdings as it is clear that Glebe expressly withdrew from Mr Cambridge all authority to make any investment decisions or to exercise any rights attached to existing investments in Bridgewater, Harvest Living and VC by way of a memorandum from the chief executive officer of Glebe in September 2005. The Panel noted that Glebe submitted that Mr Cambridge's authority (to the extent that he had any) in respect of any investment decisions or to exercise any rights attached to existing investments in Bridgewater, Harvest Living and VC was withdrawn on the basis that Glebe had attracted adverse publicity alleging Mr Cambridge was acting improperly under conflicts of interests.

#### Association between Mr Tuxworth and Mr Cambridge on the one hand and Mr Tuxworth and Glebe on the other

127. Lowell alleged that Mr Tuxworth and Mr Cambridge were associates, and that assuming that Mr Cambridge and Glebe were associates it followed that Mr Tuxworth and Glebe were also associates in relation to the affairs of Bridgewater.
128. The Panel considered there was insufficient evidence before it to support any aggregation of the shares of Mr Tuxworth with any shares controlled by Mr Cambridge or by Glebe primarily on the basis that Mr Cambridge did not hold any

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shares in Bridgewater and did not control how Glebe deals with its shares in Bridgewater.

129. On the basis that the Panel considered that Mr Cambridge and Mr Tuxworth were not associates in relation to the affairs of Bridgewater, the Panel did not find that Mr Tuxworth and Glebe were associates. In any event, the Panel considered there was no evidence presented to it of an association between Mr Tuxworth and Glebe.
130. As discussed above, Lowell alleged that Bridgewater had facilitated an unauthorised capital reduction of 175,000 shares on issue in Bridgewater that had resulted from the conversion of notes Glebe held in August 2004 to ensure that when Glebe acquired shares in November 2004 it did not breach section 606. Lowell submitted this was evidence of an association between Mr Cambridge, Mr Tuxworth and Glebe. The Panel rejected this submission regarding association on the basis that it did not accept that Glebe had converted the notes and that Bridgewater had issued those 175,000 shares to Glebe.

#### *Mr Tuxworth's relevant interest*

131. Lowell submitted that assuming VC and Glebe were all associates of Mr Tuxworth, if the voting power in Harvest Living of VC, Glebe and Mr Tuxworth were aggregated it would exceed 20% and accordingly Mr Tuxworth would have a relevant interest in shares held by Harvest Living in Bridgewater under section 608(3).
132. VC and Glebe's holdings in Harvest Living did not at the time of the Application together exceed 20%. VC and Glebe's relevant interests in Harvest Living may for a short period of time have exceeded 20% in the period during which Harvest Living agreed to acquire the HLL Bridgewater Shares. It was diluted to below 20% by the issue of Harvest Living shares to acquire the HLL Bridgewater Shares. If it was assumed that VC, Glebe and Mrs Tuxworth were all associates of Mr Tuxworth, their voting power in Harvest Living would be aggregated and it would exceed 20%. Accordingly Mr Tuxworth would hold a relevant interest in shares in which Harvest Living had a relevant interest.
133. That said, the Panel did not find an association existed between Glebe and Mr Tuxworth or between Glebe and VC. Accordingly, even assuming VC and Mrs Tuxworth are associates of Mr Tuxworth his voting power in Harvest Living would not exceed 20%.

#### **The scrip bid proposed by Harvest Living**

134. In its submissions, Harvest Living stated that it had been planning to make a scrip bid for Bridgewater for some time and that bringing this intention into fruition could be a way of resolving the proceedings. Among other things, the scrip bid Harvest Living proposed would offer Bridgewater shareholders 83 Harvest Living shares for every Bridgewater share, which was consistent with the scrip ratio that existed when Harvest Living obtained the HLL Bridgewater Shares and was consistent with one of the orders requested by Lowell. As the Panel decided not to make a declaration of unacceptable circumstances, the Panel considered it did not have a role to play in respect of the scrip bid proposed by Harvest Living. The Panel considered that if and when concerns about actual unacceptable circumstances arise as a result of or in

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connection with Harvest Living making a formal scrip bid for Bridgewater, application to the Panel should be made at that time.

## **DECISION**

### **Decision**

135. For the reasons set out above, the Panel decided to decline the Application.

### **Orders**

136. As the Panel did not make a declaration of unacceptable circumstances, it made no orders.

137. The Panel also declined to make orders as to costs.

**Alison Lansley**

**President of the Sitting Panel**

**Decision dated 10 February 2006**

**Reasons published 31 May 2006**