



**Australian Government**

**Takeovers Panel**

**Reasons for Decision**  
**DataDot Technology Limited**  
**[2009] ATP 13**

**Catchwords:**

*Rights Issue – non-renounceable – underwriting – sub-underwriting – potential control impact – reasonable steps to minimise control impact – disclosure of intentions – association – declaration – orders*

*Corporations Act 2001 (Cth), sections 12, 606, 611*

*Guidance Note 17 Rights Issues*

*Gloucester Coal Limited 01R [2009] ATP 9, Bisalloy Steel Group [2008] ATP 29, Mount Gibson Iron Limited [2008] ATP 4, Dromana Estate Limited 01R [2006] ATP 8*

**INTRODUCTION**

1. The Panel, Martin Alciaturi, Braddon Jolley (sitting President) and Alastair Lucas, made a declaration of unacceptable circumstances in relation to the affairs of DataDot. The Panel concluded that all reasonable steps to minimise the potential control effect of the rights issue on DataDot had not been taken, and that once the rights issue was completed there was a material control effect. The Panel also concluded that disclosures in the rights issue letter of offer and substantial holding notices lodged by TM Consulting and Bannaby Investments were inadequate and misleading.
2. In these reasons, the following definitions apply.

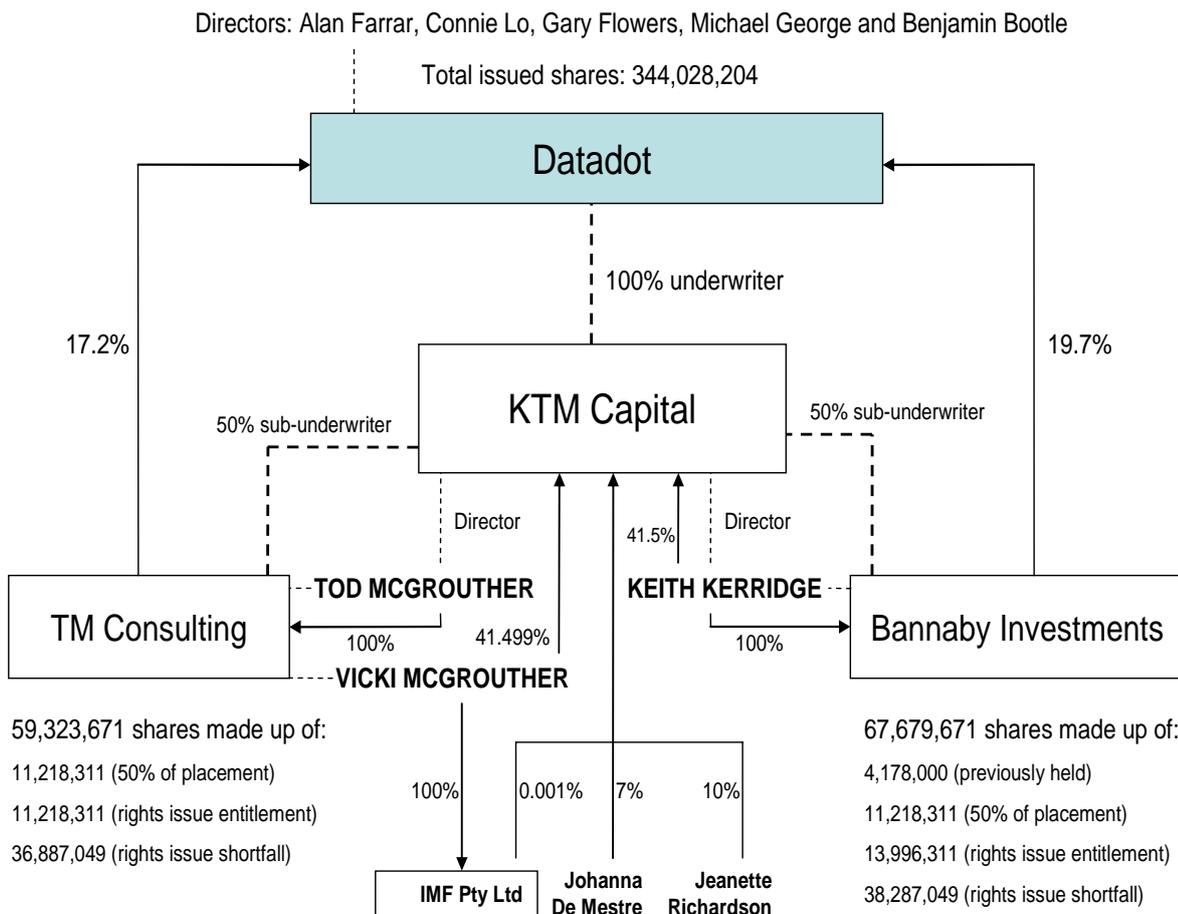
Applicant	Mr William Cleugh
Bannaby Investments	Bannaby Investments Pty Limited
DataDot	DataDot Technology Limited
KTM	KTM Capital Pty Limited
TM Consulting	TM Consulting Pty Limited
3. In these proceedings, the Panel:
  - (a) adopted the Panel’s published procedural rules and
  - (b) consented to parties being represented by their commercial lawyers.

**FACTS**

4. DataDot is an ASX listed company (ASX code: DDT).
5. The interests and relationships of relevant persons at 25 May 2009, the date of the application, are summarised in the following diagram:

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6. By late October 2008, DataDot had cash flow concerns. As a result, the decision was made to raise further capital. It approached a number of potential underwriters and investors.
7. On or about 27 February 2009, DataDot received an offer from KTM to manage a placement of up to 15% of existing capital at 2.5 cents per share and underwrite a 2 for 3 rights issue at 2.5 cents per share.
8. Mr Tod McGrouther and Mr Keith Kerridge are the directors of KTM. Mrs Vicki McGrouther and Mr Kerridge are the major shareholders of KTM.
9. Between 16 and 19 March 2009, KTM approached a number of companies and individuals to discuss whether they would be interested in participating in a capital raising by DataDot at 2.5 cents per share. Insufficient interest was expressed.
10. On or about 19 March 2009, TM Consulting and Bannaby Investments informed KTM that they would be prepared to take up 50% each of the shares under the placement and up to 50% each of the shortfall shares under a rights issue at 1 cent per share.
11. On or about 20 March 2009, KTM advised DataDot that, given the risks involved and the lack of interest from potential investors, it was not prepared to participate in the placement and rights issue at 2.5 cents per share but would be prepared to participate at 1 cent per share.
12. KTM did not revert to the potential investors it had approached in relation to the capital raising at 2.5 cents per share to see whether they would be interested in

participating at 1 cent per share and determined that it would not approach any potential investors to sub-underwrite the rights issue and placement.

13. Sub-underwriting agreements for the rights issue were entered into on 20 March 2009 with TM Consulting and Bannaby Investments.
14. Mr McGrouther is the sole director of, and he and his wife are the only shareholders in, TM Consulting. Mr Kerridge is the sole director and shareholder of Bannaby Investments.
15. Mr Kerridge said that he and Mr McGrouther together decided to make the offer non-renounceable.
16. On 24 March 2009, DataDot entered into an underwriting agreement with KTM appointing KTM as manager and underwriter to DataDot's equity raising.
17. On the same day, DataDot announced the capital raising to ASX.
18. On 26 March 2009, DataDot announced that it had placed 22,436,622 shares at 1 cent. On the same day, TM Consulting lodged a notice of initial substantial holder detailing that it had acquired 50% of the placement shares. Bannaby Investments also lodged on that date a notice of initial substantial holder indicating that it had acquired 50% of the placement shares.
19. Subsequently, DataDot requested that KTM agree to include in the rights issue an offer to DataDot shareholders to take up, in addition to their entitlement, shares not taken up under the rights issue. KTM refused.
20. On 7 May 2009, DataDot announced that the rights issue shortfall was 75,174,098 shares which would be taken up by the underwriter. The total rights issue was 172,014,102 shares.
21. National Investment Trust, a trust controlled by Mr Kerridge, inadvertently failed to lodge an application to participate in the rights issue as a shareholder in DataDot. In deciding how to distribute the shortfall under the rights issue, Mr McGrouther agreed that Bannaby Investments could take up extra shares to make up for the error. Therefore, as sub-underwriters, TM Consulting subscribed for 36,887,049 shares and Bannaby Investments subscribed for 38,287,049 shares.
22. According to substantial holder notices dated 13 and 14 May 2009, TM Consulting has voting power of 17.2% in DataDot and Bannaby Investments has voting power of 19.7% in DataDot following the sub-underwriting.
23. On 26 May 2006, DataDot announced to ASX that it had received a request under s249D<sup>1</sup> to convene a general meeting to consider resolutions on the removal of Mr Michael George and Ms Connie Lo Lin Sye as directors of DataDot. Bannaby Investments made that request.
24. On 12 June 2009, DataDot dispatched the notice of general meeting. The meeting was scheduled to be held on 20 July 2009.<sup>2</sup>

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<sup>1</sup> References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

<sup>2</sup> Subsequent to our decision, the requisition by Bannaby Investments has been withdrawn

## APPLICATION

### Declaration sought

25. By application dated 25 May 2009, the Applicant, a shareholder of DataDot, sought a declaration of unacceptable circumstances. The Applicant submitted that:
- (a) TM consulting and Bannaby Investments are associates in relation to DataDot and the acquisition of relevant interests in DataDot shares by TM Consulting and Bannaby Investments under the placement and rights issue resulted in the voting power of TM Consulting and Bannaby Investments exceeding 20% in breach of s606(1)
  - (b) the circumstances in which TM consulting and Bannaby Investments acquired a relevant interest in DataDot shares are unacceptable as the effect was to:
    - (i) inhibit an efficient and informed market for control of DataDot by failing to disclose information
    - (ii) prevent the holders of DataDot shares from knowing the identity of persons (TM Consulting and Bannaby Investments) who proposed to acquire a substantial interest in DataDot and
    - (iii) deny shareholders an opportunity to receive a control premium in respect of the acquisition of a substantial (or if associates, controlling) interest in DataDot
  - (c) TM Consulting and Bannaby Investments contravened the substantial holder notice provisions by not disclosing their association or their sub-underwriting agreements and
  - (d) the rights issue letter of offer did not disclose the association of TM Consulting and Bannaby Investments or adequately disclose the impact of control on DataDot.

### Interim orders sought

26. The applicant sought interim orders that:
- (a) TM Consulting and Bannaby Investments each be prohibited from exercising voting rights attached to any DataDot shares it held in excess of 9.95% and
  - (b) DataDot produce documents relating to the underwriting of the placement and rights issues.
27. We did not need to make any interim orders.

### Final orders sought

28. The Applicant sought final orders that:
- (a) TM Consulting and Bannaby Investments dispose of any shares that they acquired as a result of, or in connection with, the underwriting arrangement between KTM and DataDot and that any profits (after tax) earned on the sale of DataDot shares be paid to DataDot or that those shares not be able to be voted

- (b) TM Consulting and Bannaby Investments provide substantial holding notices that comply with Chapter 6C and that are prepared on the basis TM Consulting and Bannaby Investments are associates
- (c) TM Consulting and Bannaby Investments pay, in equal shares, the costs of the applicant in relation to the matter and
- (d) any further orders the Panel considered appropriate.

## DISCUSSION

### Rights Issue

29. It was submitted by the Applicant that the rights issue was structured to facilitate control of the company passing to the underwriter or sub-underwriters. In particular, the Applicant submitted that this had occurred as the rights issue was non-renounceable and no shortfall facility was offered to existing shareholders. The Applicant also submitted that DataDot had no real need for the funds.
30. In *Bisalloy Steel Group Limited*<sup>3</sup>, the Panel stated:
- 22. *If a company proposes to implement a rights issue, we would expect it to take reasonable steps to minimise the potential impact of the rights issue on the control of the company.*
  - 23. *Reasonable steps include (in appropriate cases):*
    - (a) *seeking to share participation in any shortfall among existing shareholders (for example, by way of a shortfall facility or back end bookbuild) and*
    - (b) *where the rights issue is to be underwritten or sub-underwritten, seeking to appoint a number of underwriters or sub-underwriters or approaching non-related persons (such as professional underwriters or institutional shareholders) to act as an underwriter or sub-underwriter.*
31. We do not think that all reasonable steps to minimise the potential control impact of the rights issue on DataDot were taken as:
- (a) no facility for shareholders to take up shares in excess of their entitlement was included in the rights issue, even though requested subsequently by DataDot's chairman
  - (b) no inquiries were made of potential sub-underwriters at 1 cent per share other than TM Consulting and Bannaby Investments
  - (c) KTM did not inform DataDot of the sub-underwriters and
  - (d) insufficient disclosure was made in the letter of offer of the sub-underwriting and potential control impact of the rights issue.
32. KTM submitted it did not go back to the investors it had approached when the capital raising was priced at 2.5 cents, after the decision was made to undertake the capital raising at 1 cent per share, because it "*assessed that, even if it had approached the KTM Investors to participate in a placement or sub-underwriting at 1 cent per share, it was unlikely that the KTM Investors would provide significant sub-underwriting support*".
33. KTM stated that it not seek to identify additional sub-underwriters because:

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<sup>3</sup> [2008] ATP 29

- (a) it did not consider it was necessary given the modest size of the rights issue and
- (b) the DataDot share price rallied as a result of the announcement of the capital raising. KTM concluded that there would be significant shareholder support for the rights issue. KTM, Mr Kerridge and Mr McGrouther also “concluded that the opportunities to profit from any shortfall in shares had increased significantly.”

34. KTM submitted that it opposed DataDot offering shareholders an opportunity to participate in the rights issue shortfall for the same reasons it did not approach other investors to participate in the sub-underwriting. We infer from KTM’s submission that the desire to profit from the transaction was a reason why it refused a request from DataDot to offer shareholders an opportunity to participate in the shortfall. For example, Bannaby Investments submitted:

*In any event, having decided to underwrite the placement, Mr Kerridge had a legitimate desire to take the benefit of any economic upside which could be obtained as a result of the purchase of DataDot shares at \$0.01 each. The economics of the transaction became more attractive from the perspective of Bannaby between the time of the placement and the rights issue.*

35. The sub-underwriting arrangements meant that there was a potential control effect of TM Consulting and Bannaby Investments taking up the shortfall. The nature of underwriting is to ensure the success for the company of the issue and usually, at the same time, to lay off the risk of equity holding to other parties. Sub-underwriters may be less worried if they end up with a holding. In substance what was done here did not amount to a typical underwriting and sub-underwriting. The rights issue was at a sizable discount. It was sub-underwritten by companies controlled by the principals of the underwriter, each a substantial shareholder already as a result of the placement (6.5% and 9.2%). The desire to profit from the equity holding was manifest from submissions and from the actions of the underwriter. KTM did not approach other investors to sub-underwrite the shortfall or allow DataDot to give its shareholders an opportunity to participate above their entitlement under the rights issue.
36. We did not agree with the Applicant that the rights issue being non-renounceable was a method of passing increased control to the underwriter or sub-underwriters. Given current economic conditions and the illiquid market for DataDot shares, a non-renounceable rights issue was a reasonable way for the company to proceed.
37. We also think that the disclosure in the letter of offer was inadequate and this contributed to the potential control impact. Shareholders were not aware of who might obtain a substantial interest in their company by way of sub-underwriting (and their intentions if they did) and therefore were not given enough information to enable them to assess the merits of the rights issue. This may have affected the level of their subscriptions. We detail the disclosure concerns below.

### Association

38. In our view, the control effect of the rights issue was material. There is sufficient evidence in our view to infer an association between TM Consulting and Bannaby

Investments, which means that they have a combined voting power in DataDot of approximately 36.9%.

39. The Applicant submitted that TM Consulting and Bannaby Investments are associates in relation to their holdings in DataDot. It submitted that the relationships of:
- (a) Tod McGrouther and Keith Kerridge controlling KTM
  - (b) Tod McGrouther controlling TM Consulting and
  - (c) Keith Kerridge controlling Bannaby Investments
- together with the actions of KTM, TM Consulting and Bannaby Investments in relation to the DataDot's capital raising indicated that TM Consulting and Bannaby Investments are associates in relation to DataDot.
40. Section 12 sets out the tests of association for the purpose of chapter 6. There are three tests, of which two are relevant here:
- (a) Section 12(2)(b) – which provides that B is an associate of A if (and only if) B is a person with whom A has, or proposes to enter into, a relevant agreement for the purpose of controlling or influencing the composition of a company's board or conduct of its affairs.
  - (b) Section 12(2)(c) – which provides that B is an associate of A if (and only if) B is a person with whom A is acting or proposing to act in concert in relation to the company's affairs.<sup>4</sup>
41. The review panel in *Dromana Estate Limited 01R*<sup>5</sup> stated that:
- Determining associations must depend on the facts of the case, and this will often require analysis of complex circumstances. Moreover, the Panel recognises that issues of association are notoriously difficult for outsiders to prove since access to the type of evidence needed is rarely available. Issues of association frequently need to be decided on the basis of inferences from partial evidence, patterns of behavior and a lack of a commercially viable explanation for the impugned circumstances.*
42. Based on the following factors, we are prepared to draw an inference of association between TM Consulting and Bannaby Investments in relation to DataDot:
- (a) Mr McGrouther and Mr Kerridge are the controlling minds of TM Consulting and Bannaby Investments respectively
  - (b) together they are the controlling minds of KTM
  - (c) they agreed on 1 cent as “an adequate incentive for us to participate in the placement”, of which they each took half
  - (d) they advised DataDot in relation to -
    - (i) the price of the rights issue
    - (ii) making the offer non-renounceable

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<sup>4</sup> See *Mount Gibson Iron Limited* [2008] ATP 4, [12] and *Gloucester Coal Limited 01R* [2009] ATP 9, [31]

<sup>5</sup> [2006] ATP 8, [25]

- (e) they simultaneously subscribed for shares in DataDot under the placement and the right issue
  - (f) they took turns in completing KTM's documentation for each other (ie, Mr Kerridge wrote the sub-underwriting offer letter to TM Consulting which Mr McGrouther accepted, and Mr McGrouther wrote the sub-underwriting offer letter to Bannaby Investments which Mr Kerridge accepted)
  - (g) they agreed on the refusal to implement a shortfall facility
  - (h) they agreed to vary the sub-underwriting agreements immediately before the shortfall issue so that Bannaby Investments would receive additional shares from the shortfall to make up for the shares National Investment Trust, which is associated with Mr Kerridge, had missed out on because it failed to exercise its rights and
  - (i) after the issue of the shares, Mr Kerridge "indicated to Mr McGrouther that he intended to make" the s249D request.
43. It is also relevant that KTM made the decision not to contact other investors to sub-underwrite the rights offer at 1 cent, which the sub-underwriters desired in order to take advantage of the profit from the shortfall.
44. Bannaby Investments submitted that the fact that Mr Kerridge and Mr McGrouther were associates in relation to KTM did not make them associates in relation to DataDot. TM Consulting made a similar submission. We agree. However, it does not follow that they cannot also be associates in relation to DataDot. We find they are associates in relation to DataDot for the reasons above, not simply as a result of them being associates in relation to KTM.
45. Bannaby Investments also submitted the decision to take the placement had nothing to do with DataDot but was their usual business practice. Perhaps so, but that does not reduce its impact as a factor in the association we have found.

**Letter of offer disclosure**

46. The Applicant submitted that the disclosure in the rights issue letter of offer was inadequate as it should have identified the aggregate impact of control having regard to the holding of TM Consulting and Bannaby Investments.
47. We are of view that the letter of offer contained insufficient disclosure of:
- (a) the sub-underwriting
  - (b) the potential voting power in DataDot that TM Consulting and Bannaby Investments may have obtained as a result of the sub-underwriting and
  - (c) DataDot's need of funds.
48. Not only did the letter of offer not identify the sub-underwriters, it was misleading to the extent that the intentions of the underwriter were disclosed when the offer had been fully sub-underwritten. It was silent on the intentions of the sub-underwriters. Section 3.3 of the letter of offer states:

*The Company has been advised by the Underwriter that, if it controls the Company, it has no present intention to become actively involved in the management of the Company nor has any present intention*

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*to effect any changes to the operation of the Company and it has no present intention to seek to appoint a director of the board.*

49. We are of the view that the intentions of the sub-underwriters should have been disclosed. As it turned out such disclosure would have been material, and particularly of interest, to shareholders. This is because, subsequently, Bannaby Investments' decided to request DataDot to requisition a general meeting to consider resolutions on the removal of Michael David George and Connie Lo Lin Sye as directors of DataDot.
50. Further, the letter of offer disclosed that DataDot had "*not been notified by the Underwriter that it has appointed a sub underwriter*" and contained the following table outlining the potential effect of the rights issue on the control of DataDot:

<i>If the offer is fully subscribed by Eligible Shareholders</i>	<i>No effect on control</i>
<i>If the rights issue is subscribed to the extent of 50% by Eligible Shareholders and the Underwriter fully subscribes to its entitlement</i>	<i>The Underwriter's shareholding would increase from 0% to 50%</i>
<i>If the rights offer is subscribed by no Eligible Shareholders other than the Underwriter</i>	<i>The Underwriter's shareholding would increase from 0% to 50%.</i>

51. This level of disclosure was insufficient and misleading. Although KTM was the underwriter, the offer had been sub-underwritten (well before the dispatch of the letter of offer, which was shown to the underwriter). The table above did not accurately convey the true potential effect of control because it did not alert shareholders to the involvement of TM Consulting and Bannaby Investments.
52. At a DataDot board meeting on 14 April 2009, before the letter of offer was dispatched to DataDot shareholders, the Chairman of DataDot informed the board that he had telephoned Mr Kerridge and asked him whether KTM Capital had "*any specific intentions if it owned more than 5 per cent of the company*". Mr Kerridge is reported to have replied that:
- *KTM Capital is not intending to hold shortfall shares;*
  - *it intends the shortfall to go to sub-underwriters;*
  - *it has no intention of seeking Board representation;*
  - *it wants to facilitate the company's commercial success;*
  - *it has no plans for control; and*
  - *he is happy for these comments to be recorded.*
53. KTM submitted that DataDot did not request details of the sub-underwriting arrangements and therefore KTM did not provide any such details to DataDot. KTM submitted that the terms of its underwriting agreement permitted it to sub-underwrite to anyone of its choice and, had it been asked, it would have identified TM Consulting and Bannaby Investments as sub-underwriters. In our view this is not an answer to the disclosure deficiencies. KTM reviewed drafts of the letter of offer on two occasions. Indeed, when asked by the chairman of DataDot about KTM's

intentions in relation to DataDot, Mr Kerridge appears to have been incomplete in response.

54. We consider that KTM should have identified the need for additional disclosure of the sub-underwriters (even if not asked) and informed DataDot. Given KTM's experience as a professional underwriter it would have been aware of the disclosure requirements on companies in relation to the control effects of a rights issue. Therefore it should have voluntarily disclosed this to DataDot.
55. In addition the letter of offer was misleading as it did not adequately disclose DataDot's need of funds. Section 3.1 of the letter of offer stated:

*The Rights Issue process...will be used to strengthen the balance sheet and to provide working capital to the Company.*

56. From DataDot's submissions, which included a group cash flow report and board minutes, it was evident that it had cash flow concerns, had been required to implement cost saving measures and was heavily reliant on the success of its proposed capital raising. Although we note that companies are in a difficult position when disclosing such a need for capital, in this instance we do not believe that DataDot's disclosure was sufficient.

### Substantial Holding Notices

57. The Applicant submitted that the substantial holder notices lodged by TM Consulting and Bannaby Investments on 13 and 14 May 2009 were incorrect as they did not disclose they were associates of one another; nor did they attach a copy of the sub-underwriting agreement that each of them had entered into with KTM to acquire the shortfall of the rights issue.
58. We have concluded that TM Consulting and Bannaby Investments are associates in relation to DataDot. We are of the view that TM Consulting and Bannaby Investments failed to comply with their substantial holding notice obligations by:
- (a) failing to disclose that they were associates and
  - (b) failing to disclose their voting power in DataDot.
59. We are also of the view that TM Consulting and Bannaby Investments failed to comply with their substantial holding notice obligations by failing to attach their sub-underwriting agreements with KTM. We do not agree with TM Consulting's submission that it is not market practice for underwriting or sub-underwriting agreements to be attached to substantial holding notices. In any event, the law is clear.

## DECISION

### Declaration

60. It appears to us that the circumstances are unacceptable:
- (a) having regard to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:
    - (i) the control, or potential control, of DataDot or

- (ii) the acquisition, or proposed acquisition, by TM Consulting and Bannaby Investments of a substantial interest in DataDot or
- (b) having regard to the purposes of Chapter 6 set out in section 602
- (c) because they:
  - (i) constituted, constitute, will constitute or are likely to constitute a contravention of a provision of Chapter 6C of the Corporations Act 2001 (Cth) or
  - (ii) gave or give rise to, or will or are likely to give rise to, a contravention of a provision of Chapter 6C.

61. Accordingly, we made the declaration set out in Annexure A.

62. We consider that it is not against the public interest to do so. We had regard to the matters in s657A(3).

### Orders

63. Following the declaration, we made the final orders set out in Annexure B.

64. Under s657D the Panel's power to make orders is very wide. The Panel is empowered to make 'any order'<sup>6</sup> if 4 tests are met:

- (a) It has made a declaration under s657A. This was done on 17 June 2009.
- (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.
- (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 11 June 2009.
- (d) It considers the orders appropriate to protect the rights and interests of persons affected by the unacceptable circumstances or any other rights or interests of those persons. DataDot was in considerable need of funds and engaged a professional underwriter to assist it with capital raising. The identity of the sub-underwriters and the potential for their control was not disclosed so shareholders did not have all the information necessary to decide whether to participate. They also did not have an opportunity to participate beyond their proportionate entitlement under the rights issue. Accordingly we proposed orders consistent with TM Consulting and Bannaby Investments' role as sub-underwriters, to the effect that they divest shares received as sub-underwriters to any shareholder who now wants to subscribe for what were their rights. And we required a dispersion strategy to be put in place for what remained as shortfall.

65. We also made orders to the effect that TM Consulting and Bannaby Investments correct their substantial shareholder notices to reflect that they are associates and attach a copy of the relevant sub-underwriting agreements.

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<sup>6</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

66. KTM submitted that the proposed orders should not exclude TM Consulting and Bannaby Investments from participating in the shortfall. KTM submitted that, had DataDot included a shortfall in the rights issue letter of offer, then it was likely that both TM Consulting and Bannaby Investments would have been able to participate due to their existing holdings in DataDot.
67. We agree, but only to the extent that they have a combined voting power of up to 20%. TM Consulting and Bannaby Investments should only be allowed to obtain a combined voting power of over 20% to the extent that they obtain shares as sub-underwriters after other DataDot shareholders have had an opportunity to acquire any shortfall shares. This is consistent with TM Consulting and Bannaby Investments' role as sub-underwriters. Accordingly we made orders to this effect.
68. We did not make any order as to costs.

**Braddon Jolley**  
**President of the Sitting Panel**  
**Decision dated 17 June 2009**  
**Reasons published 24 June 2009**



**Australian Government**

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**Annexure A**

**Corporations Act**

**Section 657A**

**Declaration of Unacceptable Circumstances**

**DataDot Technology Limited**

**CIRCUMSTANCES**

1. DataDot Technology Limited (**DataDot**) undertook a 1:1 non-renounceable rights issue at 1 cent per share, as announced on 24 March 2009.
2. The rights issue was underwritten by KTM Capital Pty Ltd (**KTM**). Mr Tod McGrouther and Mr Keith Kerridge are the directors of KTM. Mrs Vicki McGrouther and Keith Kerridge are the major shareholders of KTM.
3. KTM arranged for the rights issue to be sub-underwritten by TM Consulting Pty Ltd (**TM Consulting**) and Bannaby Investments Pty Ltd (**Bannaby Investments**). Tod McGrouther is the sole director of, and he and his wife the only shareholders in, TM Consulting. Keith Kerridge is the sole director and shareholder of Bannaby Investments.
4. It was agreed that the rights issue be sub-underwritten in equal proportions. However, it was subsequently agreed that the sub-underwriters' proportions be changed so that:
  - (a) 36,887,049 shares were issued to TM Consulting and
  - (b) 38,287,049 shares were issued to Bannaby Investments.
5. Following the sub-underwriting, TM Consulting had a relevant interest in 17.2% of DataDot and Bannaby Investments had a relevant interest in 19.7% of DataDot.
6. The Panel considers that TM Consulting and Bannaby Investments are associates under section 12(2) of the Corporations Act in relation to the affairs of DataDot.
7. All reasonable steps to minimise the potential control impact of the rights issue on DataDot were not taken as:
  - (a) no facility for shareholders to take up shares in excess of their entitlement was included in the rights issue, even though requested subsequently by DataDot's chairman
  - (b) no inquiries were made of potential sub-underwriters at 1 cent per share other than TM Consulting and Bannaby Investments
  - (c) KTM did not inform DataDot of the sub-underwriters and

- (d) insufficient disclosure was made in the letter of offer of the sub-underwriting and potential control impact of the rights issue (the **Rights Issue circumstances**).
8. In addition, in the letter of offer there was:
- (a) insufficient disclosure of:
    - (i) the sub-underwriting
    - (ii) the potential voting power in DataDot that TM Consulting and Bannaby Investments may have obtained as a result of the sub-underwriting and
    - (iii) DataDot's need of funds and
  - (b) misleading disclosure in relation to the intentions of KTM, and the potential subscription by KTM (if shareholders did not take up all their entitlements), given that the rights issue had been fully sub-underwritten and relevant disclosure in relation to the sub-underwriters was not included (the **Letter of Offer circumstances**).
9. In addition, TM Consulting and Bannaby Investments each failed to comply with their substantial holding notice obligations by:
- (a) failing to disclose that they were associates
  - (b) failing to disclose their voting power in DataDot and
  - (c) failing to attach their sub-underwriting agreements with KTM (the **Substantial Holding Notice circumstances**).
10. It appears to the Panel that each of the Rights Issue circumstances, Letter of Offer circumstances and Substantial Holding Notice circumstances are unacceptable:
- (a) having regard to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:
    - (i) the control, or potential control, of DataDot or
    - (ii) the acquisition, or proposed acquisition, by TM Consulting and Bannaby Investments of a substantial interest in DataDot or
  - (b) having regard to the purposes of Chapter 6 set out in section 602 of the *Corporations Act 2001* (Cth) or
  - (c) because they:
    - (i) constituted, constitute, will constitute or are likely to constitute a contravention of a provision of Chapter 6C of the *Corporations Act 2001* (Cth) or
    - (ii) gave or give rise to, or will or are likely to give rise to, a contravention of a provision of Chapter 6C of the *Corporations Act 2001* (Cth).
11. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances in relation to the circumstances and the affairs of DataDot.
12. The Panel has had regard to the matters in section 657A(3).

**DECLARATION**

Under section 657A, the Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of DataDot.

**Alan Shaw  
Counsel  
with authority of Braddon Jolly  
President of the Sitting Panel  
Dated 17 June 2009**



**Australian Government**

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**Annexure B**

**Corporations Act**

**Section 657D**

**Orders**

**DataDot Technology Limited**

**PURSUANT TO**

1. A declaration of unacceptable circumstances in relation to the affairs of DataDot Technology Limited (**DataDot**) on 17 June 2009.
2. Section 657D of the Corporations Act 2001 (Cth).

**THE PANEL ORDERS**

**Divestment**

1. TM Consulting Pty Ltd (**TM Consulting**) and Bannaby Investments Pty Ltd (**Bannaby Investments**) divest shares they received as sub-underwriters of the DataDot rights issue announced on 24 March 2009 as set out in these orders.

**Offer of shortfall**

2. Within 10 business days of these orders DataDot must, on behalf of TM Consulting and Bannaby Investments, offer eligible DataDot shareholders the 75,174,098 shares obtained by TM Consulting and Bannaby Investments under the rights issue short fall on terms to the following effect:
  - (a) the price is the rights issue price of 1 cent per share
  - (b) the offer is open for 2 weeks from the date the last of the offers is dispatched
  - (c) shareholders who did not take up their full entitlement in the rights issue are offered as many shares as is necessary for them to take up what were their full original entitlements
  - (d) shareholders are invited to apply to buy any shares remaining after the acceptances in order 2(c) have been satisfied in full, provided that applications for remaining shares may be scaled back only if:
    - (i) the number of shares applied for exceeds the number remaining and
    - (ii) the applications are scaled back reasonably and fairly, having regard to the number of applicants, shares applied for and their shareholdings at the close of the rights issue. For avoidance of doubt:
      - (A) the Corporations Act limits apply to the acquisition of shortfall shares

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- (B) TM Consulting and Bannaby Investments may participate in the shortfall on the basis that they are associates and
  - (C) shareholders who accept for shares under order 2(c) are treated as if they had subscribed for those shares pursuant to the rights issue.
  - (e) the money (in cheque or other form acceptable to DataDot) for the shares accepted or applied for (as the case may be) is to be sent to DataDot with the acceptance or application. The money is to be banked in a special purpose trust account no later than the end of the day of receipt.
3. Within 5 business days of the close of the offer, DataDot must:
    - (a) scale back the applications if necessary
    - (b) disclose in a market announcement the scale back and its detailed calculation methodology
    - (c) register the transfers of the shares and
    - (d) pay over the money, and account, to TM Consulting and Bannaby Investments for the shares sold.
  4. TM Consulting and Bannaby Investments must provide proper transfers for the sale of their shares.
  5. DataDot must pay half the reasonable costs of dispatching the offers and processing the acceptances, applications and refunds (if any).
  6. TM Consulting and Bannaby Investments must pay, in aggregate, half the reasonable costs of dispatching the offers and processing the acceptances, applications and refunds (if any), but can decide between themselves the proportion each bears.
  7. DataDot must issue any refund due to an applicant within 5 business days of transfers being completed.
  8. The offer referred to in order 2 must be made in a letter of offer dispatched to eligible DataDot shareholders.

### Disclosure

9. The letter of offer must include detailed disclosure on:
  - (a) the terms of the offer
  - (b) the decision of the Panel
  - (c) the intentions of each of TM Consulting and Bannaby Investments in relation to DataDot should they retain any of the shares received pursuant to the sub-underwriting
  - (d) the control effects on DataDot as a result of the current holdings of TM Consulting and Bannaby Investments recognising their association.
10. A draft copy of the letter of offer must be provided to the Panel for approval prior to its dispatch to DataDot shareholders.

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11. TM Consulting must correct its substantial holder notice dated 13 May 2009 as soon as practicable to:
  - (a) specify that it and Bannaby Investments are associates in relation to their holdings in DataDot; and
  - (b) attach a copy of the sub-underwriting agreement between it and KTM Capital Pty Limited (**KTM Capital**).
12. Bannaby Investments must correct its substantial holder notice dated 14 May 2009 as soon as practicable to:
  - (a) specify that it and TM Consulting are associates in relation to their holdings in DataDot; and
  - (b) attach a copy of the sub-underwriting agreement between it and KTM Capital.

### Definition of eligible shareholders

13. In these orders, **eligible DataDot shareholders** are shareholders who were eligible to participate in the rights issue announced on 24 March 2009.

### Shareholders meeting

14. The meeting that is to be scheduled pursuant to a request under section 249D of the Corporations Act announced on 26 May 2009 must not take place until at least 2 business days after the transfers of the shortfall shares have been registered.

**Alan Shaw**  
**Counsel**  
**with authority of Braddon Jolley**  
**President of the Sitting Panel**  
**Dated 17 June 2009**