



Australian Government

Takeovers Panel

**Reasons for Decision
Smoke Alarms Holdings Limited
[2020] ATP 2**

Catchwords:

Declaration – orders – interim orders – standing – item 7 s611 resolution – insider participation in control transactions – conflicts of interest – disclosure – independent expert’s report – use of funds – cash flow – solvency
Corporations Act 2001 (Cth), sections 606, item 7 s611, item 9 s611
GN 19: Insider Participation in control transactions, ASIC Regulatory Guide 74: Acquisitions approved by members
Agua Resources Limited [2019] ATP 13, Australian Whisky Holdings Limited [2019] ATP 12, Celamin Holdings NL [2014] ATP 22

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

INTRODUCTION

1. The Panel, Elizabeth Hallett (sitting President), Bill Koeck and John McGlue, made a declaration of unacceptable circumstances in relation to the affairs of Smoke Alarms Holdings Limited. The application concerned disclosure and voting exclusions in relation to an item 7, s611¹ meeting to approve the conversion of convertible notes and exercise of options. The Panel declared the circumstances unacceptable because it considered that appropriate protocols and processes were not implemented to deal with the proposal for a director and his controlled entity to obtain control of the company and had serious concerns about disclosure in the notice of meeting. In light of the company’s precarious financial position and to protect the interests of all shareholders, the Panel made orders requiring the director’s controlled entity to subscribe for the last tranche of convertible notes and to convert all of its convertible notes into shares, and ensuring that the options issued on the conversion of those convertible notes could only be exercised either under the creep exception or a new item 7, s611 approval.

2. In these reasons, the following definitions apply.

- Agreement** has the meaning given in paragraph 5
- Applicants** Greenwich Capital Partners and Anthony Richard Lewis
- Conversion Order** has the meaning given in paragraph 58(ii)
- Fast Future** Fast Future Pty Ltd as trustee for Fast Future Trust

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

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item 7 resolution	has the meaning given in paragraph 8
No Disposal Order	has the meaning given in paragraph 58(iv)
R2-D2	R2-D2 Partners Pty Ltd
SAH	Smoke Alarms Holdings Limited
SAH AGM	has the meaning given in paragraph 8
Shareholder Approval Order	has the meaning given in paragraph 58(iii)
Term Sheet	has the meaning given in paragraph 4
Tranche 3 Order	has the meaning given in paragraph 58(i)

FACTS

- SAH is an unlisted public company with more than 50 members. Its directors are Randall Deer, Cameron Davis and Matthew Driscoll.
- On 26 September 2019, SAH entered into a convertible note commercial term sheet (**Term Sheet**) with Fast Future, an entity controlled by Randall Deer.
- On 24 October 2019, SAH entered into a Convertible Note Issue Agreement (**Agreement**) with Fast Future.
- The Agreement included terms to the effect that:
 - Fast Future could subscribe for up to 3 tranches of convertible notes, entitling the holder to convert each note into 8.33 ordinary shares in SAH at an effective issue price of 12 cents per share.
 - Upon conversion, each share had 3 options attached. Each option was for the issue of an ordinary share in SAH at 12 cents.
 - Interest on the face value of each convertible note at the rate of 10% per annum accrued daily, and could be capitalised by the convertible note holder upon notice to SAH.
 - The notes were not convertible before 12 months after the date of issue and subject to any required shareholder approval for the issue of shares.
- Tranches 1 and 2 of the convertible notes were issued on 26 September 2019 and 25 October 2019, respectively.
- On 12 November 2019, a notice of meeting and explanatory statement was issued by SAH for its annual general meeting (**SAH AGM**). Resolution 2 in the notice of meeting proposed, as an ordinary resolution (**item 7 resolution**):

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That, for the purposes of section 611 item (7) of the Corporations Act 2001 (Cth) and all other purposes, approval is given for:

- (a) *The issue of up to 211,830,604 shares in the Company to Fast Future Pty Ltd ... pursuant to the Convertible Note Issue Agreement between the Company and Fast Future and*
- (b) *The acquisition of a relevant interest of up to 80.04% in the Company by Randall Deer and 79.25% by Fast Future.*

9. The SAH AGM was originally scheduled to be held for 4 December 2019 but was rescheduled to 6 December 2019.

APPLICATION

Declaration sought

10. By application dated 3 December 2019,² the Applicants sought a declaration of unacceptable circumstances. The Applicants submitted that:
- (a) if the item 7 resolution is approved by shareholders, Randall Deer *“will have a controlling interest in the Company of up to 80.05% at a value that may be lower than the fair and reasonable value of the Company”, which is “unfair and unreasonable to the minority shareholders”*
 - (b) the board of SAH *“has not provided any evidence to shareholders that it has considered all available options (i.e. sale of business and assets in part or full) in the best interests of the company”*
 - (c) Randall Deer and his fellow director Cameron Davis, *“until November 2019, held their shareholding in SAH through a corporate vehicle known as R2D2 Partners Pty Limited. R2D2 Partners is a substantial shareholder of SAH...No such notifications of relevant interests by Randall Deer (including associates) have been notified in the Explanatory Memorandum to shareholders”*.

Interim orders sought

11. The Applicants sought an interim order deferring the item 7 resolution *“until an independent expert determines that the proposal is considered fair and reasonable and in the best interests of the Company so Shareholders can be fully informed to vote on Resolution 2”*. The Applicants also sought an interim order that Randall Deer and his associates be excluded from voting for the item 7 resolution.
12. The President considered the request for interim orders on an urgent basis and decided not to make them, noting that the question could be reconsidered by the sitting Panel.³ The President considered that:
- (a) The application was made very close to the date of the SAH AGM.

² Received by the executive at approximately 3pm (Melbourne time)

³ The President considered the application and SAH's preliminary submission. He decided to receive a response to the preliminary submission from the Applicants

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- (b) The funds from the issue of the convertible notes appeared to be needed.
- (c) Conversion of the notes would result in Randall Deer/Fast Future holding below 50% of SAH (excluding the options and any capitalised interest).
- (d) While the explanatory statement was not accompanied by an independent expert's report, there was disclosure of the reasons why SAH decided not to obtain an independent expert's report.
- (e) SAH's preliminary submission indicated that neither Cameron Davis nor any of his controlled entities would vote on the item 7 resolution and SAH would exclude any votes cast by any of them. The explanatory statement contained a voting exclusion statement in relation to Randall Deer, Fast Future and their associates.
- (f) The terms of the convertible notes as described in the explanatory statement provided that Fast Future could convert the convertible notes into SAH shares from the earlier of (i) the date SAH enters into a binding unconditional agreement to sell all the assets of SAH to any person, (ii) the date Fast Future elects to convert the convertible notes, provided that date is after 12 months from the date of issue and (iii) the maturity date, defined as a date 60 months from the date of issue. Accordingly it was likely that a sitting Panel could make interim orders to preserve the status quo and final orders to remedy any unacceptable circumstances.

Final orders sought

13. The Applicants sought the same final orders as their interim orders.

DISCUSSION

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

Decision to conduct proceedings and make interim orders

15. SAH made a preliminary submission. It submitted, among other things, that

"Section 8 of the Company's Explanatory Statement to the AGM Notice of Meeting...provides the reasons why the Board elected not to obtain an IEO [independent expert opinion] for the purpose of Resolution 2. Based on the financial reports of the Company which have been provided to shareholders, the Company is in a very precarious financial position and without the transaction contemplated by Resolution 2 there are serious doubts as to whether the Company can continue to trade. The preparation and distribution of an IEO takes time and money that, due to the Company's circumstances, is unjustified and may jeopardize the transaction and put the Company at risk of insolvency."

"... If the third tranche of convertible notes is not subscribed for, based on the Company's current projections, there is a material risk that the Company could face insolvency as early as January 2020."

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“Further, Fast Future is under no obligation to subscribe for the third tranche of convertible notes, and without the passing of Resolution 2 on Friday 6 December there is a real risk that Fast Future will not subscribe for the third tranche of convertible notes.”

16. SAH submitted that, in response to what it considered was an implication in the application that Randall Deer and Cameron Davis were associates:

“The Company has been informed by Cameron Davis that neither he nor any of his controlled entities will vote on Resolution 2 and the Company will exclude any votes cast by them in relation to Resolution 2, at the meeting on 6 December 2019. In doing so, no admission is suggested that Randall Deer and Cameron Davis are associates.”

17. SAH provided a further submission, which we decided to receive, stating that the item 7 resolution passed by way of a poll and provided details including that:

- (a) 49.5% of SAH’s register and 57.3% of shareholders voted
- (b) 87% (of the total number of shares voted) voted for the item 7 resolution, which was *“greater than 50% of the total register from both a shares and number of shareholders perspective”*
- (c) 13% (of the total number of shares voted) voted against the item 7 resolution, which was *“less than 7% of the total register from both a shares and number of shareholders perspective”* and
- (d) *“...Cameron Davis and his related parties withdrew their proxies. No votes were cast by them on the Resolution. No votes were cast by Randall Deer (or any of his associates) on the Resolution”.*

18. In other circumstances we may have decided not to conduct proceedings because of the lateness of the application.⁴ However in this case we had a number of concerns regarding (among other things) the degree of dilution for shareholders other than Randall Deer and Fast Future, control potentially passing to a director who potentially could be an associate with one of the other two directors, the absence of an independent expert’s report and other disclosure deficiencies. In addition while SAH’s financial statements for the year ended 30 June 2019 and the explanatory statement suggested that SAH may be experiencing some financial difficulties, we were not convinced that it could not have afforded or did not have sufficient time to obtain an independent expert’s report for the purposes of the item 7 resolution.⁵ Accordingly we decided to conduct proceedings.

19. It was likely from the terms of the convertible notes (see paragraph (f)) that none of them had been converted. We considered it was appropriate to make an interim

⁴ Noting that the Panel has stated on a number of occasions that it may not conduct proceedings in relation to board spills if there was delay in making an application, see *Australian Whisky Holdings Limited* [2019] ATP 12 at [26] and *Aguia Resources Limited* [2019] ATP 13 at [24(h)]

⁵ We note that in SAH’s financial statements for the year ended 30 June 2019 the directors concluded that they *“were satisfied that the consolidated entity will be able to fund its operations and continue as a going concern”*

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order prohibiting the conversion of the convertible notes without our consent to maintain the status quo while we considered the application (see Annexure A).⁶

Standing

20. SAH submitted that one of the Applicants, Anthony Lewis, did not have standing, “on the grounds that an advisor to a shareholder of SAH does not have any or any sufficient interest which would be affected by the relevant circumstance and no sufficient interest has been demonstrated”. Anthony Lewis submitted that he did have standing to make the application as he was a director of a company that was a SAH shareholder. We consider that Anthony Lewis as a director of a shareholder has interests that are affected by the circumstances (for the purposes of s657C(2)). In any event, the other applicant was a shareholder in SAH and had standing.⁷

Randall Deer, Cameron Davis and the SAH board’s consideration of the Agreement

21. Randall Deer⁸ submitted that he was the sole beneficiary of the Fast Future Trust and he controlled Fast Future.⁹
22. As at 13 November 2019, R2-D2 had a relevant interest in 7,895,500 ordinary shares in SAH (14.7%). The Applicants provided a company extract for R2-D2¹⁰ which showed that:
- (a) Randall Deer was the secretary and sole director from 15 April 2015 to 8 November 2019 and
 - (b) Cameron Davis was an alternate director from 23 April 2015 until appointed as a director on 8 November 2019.
23. Randall Deer submitted in relation to R2-D2 that:
- “Fast Future’s entitlement of the SAH shares held by R2-D2 were transferred from R2-D2 to Fast Future in September 2016, I signed the share transfer as part of a larger transaction that unwound Cameron Davis’ and my past relationship (unrelated to SAH)...Because of an oversight, SAH was not made aware of this at the time, hence the register was not changed.”*
- “The proportions of the beneficial holdings prior to the transfer referred to above were Davis (70%) and me (30%).”*
- “Despite the fact that the transfer...was never recorded on the SAH share register, I had no fixed claim to the R2-D2 shares given the transfer in 2016.”*
- “Once discovered that the holding in R2-D2 had not been transferred to Fast Future according to the SAH share register, it was decided that R2-D2 would purchase the shares back off Fast Future, consolidating with the position on the SAH share register. As part of this process I resigned from R2-D2 and I Xavco Pty Ltd (a company of which my wife is a*

⁶ We also prohibited the sale, transfer or disposal of any shares issued pursuant to the conversion of the convertible notes. We sought submissions from the parties prior to making the interim order

⁷ The Panel decided not to pursue a concern it had that an applicant did not have standing when a person who clearly had standing was joined as a co-applicant in *Celamin Holdings NL* [2014] ATP 22 at [25] to [29]

⁸ Who made joint submissions with Fast Future

⁹ He also submitted his wife was “the shareholder of Fast Future”

¹⁰ In a response to SAH’s preliminary submission which we decided to accept

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director) sold its shares in R2-D2 to Samtay Group Pty Ltd. I had not played any active part in the management of R2-D2 since 2016.”

“...Cameron Davis had assumed day to day control of R2-D2 since September 2016 and so I formally resigned as a director.”

24. We asked Randall Deer further questions about his relationship with Cameron Davis. He submitted that Cameron Davis approached him to participate in SAH’s business when Westpac required a personal guarantee in relation to a loan to SAH. Randall Deer put up his personal “balance sheet” guarantee and “in return was offered the opportunity to participate in R2-D2”. In relation to his relationship with Cameron Davis more generally, he submitted that:

“R2-D2 was the last of our common investments. Mr Davis and I have a relationship where over the last 15 years or so we have engaged, on an ad hoc basis, in transactions (or not engaged) depending on each other’s investment appetite at the time.”

“Mr Davis and I have only “co-invested” a maximum of 4 times over 15 years. We are by no means regularly pre-emptive or automatic partners. For example, between us and others we effectively owned Ignite Travel Group, a company I established in 2005 (I held 52% and Mr Davis held 46%). Flight Centre approached Ignite Travel Group to acquire it in 2016. Mr Davis agreed to sell all his shares to Flight Centre but I decided to remain with the company. The transaction was effected in September 2016...”

“Both Mr Davis and I have extensive interests outside of SAH that are unrelated to each other. We have no family connections.”

25. Randall Deer attached an ASX announcement from Flight Centre in relation to its acquisition of the Ignite Travel Group dated 14 September 2016 that stated “The Ignite group’s total transaction value during FY17 is expected to exceed \$100 million”.

26. SAH submitted the following unsworn statement from Matthew Driscoll:

“I have observed through Board meetings that both Mr Deer and Mr Davis often differ in their thinking, whilst I understand they have done a few transactions together I never considered them associates. Over the journey with Smoke Alarms I have had numerous meetings, phone calls and meals together where I have often had some conversations around their separate businesses and still believe they act independently from each other, I am an experienced Company Director on both listed and unlisted companies and take my corporate governance serious, this is how I formed my view.”

27. SAH submitted that Randall Deer and Cameron Davis are not associates.¹¹ We make no findings on this question. We consider, however, that their relationship was such that SAH should have implemented protocols and processes to manage the conflicts of interest or potential conflicts of interest that arose from that relationship. Our concern is based on the business relationship between the two men as described above, in particular their co-ownership of R2-D2 (which had a 14.7% interest in SAH). Matthew Driscoll’s personal observation that they had separate businesses

¹¹ SAH’s lawyers stated in submissions that they had advised on what constituted an associate but were not “asked to consider specifically whether Mr Davis and Mr Deer were associates”.

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and acted independently from each other is not necessarily inconsistent with them at least having had a close business relationship and does not allay our concern.

28. We asked SAH what process was followed by the board to ensure that negotiations in relation to the Agreement were free from any influence, or appearance of influence, from Randall Deer or parties associated with him. SAH submitted that:
- (a) *“Mr Driscoll and Mr Davis in their capacities as directors of the SAH board...had discussions over several days in respect of Mr Deer’s participation in the proposed convertible note offer. Mr Deer was not involved and did not in any way contribute to these discussions.”*
 - (b) Cameron Davis *“took the lead role in negotiating the transaction for SAH following consultation with Mr Driscoll”*.
 - (c) SAH and Randall Deer *“each had independent legal representation throughout the process”*.
29. We also asked SAH to provide all documents evidencing the establishment of any protocols or other arrangements for the management of such conflicts. We received nothing in response.
30. We consider that given the relationship between Randall Deer and Cameron Davis, it was not appropriate for Cameron Davis to have taken *“the lead role”* in SAH’s negotiations with Randall Deer in relation to the Agreement. For the purposes of Guidance Note 19: Insider Participation in Control Transactions, the Agreement was a control transaction involving a participating insider (Randall Deer), who was in a position to influence SAH’s consideration of the Agreement. Given that Randall Deer is a participating insider and his relationship with Cameron Davis, there were conflicts of interest, or potential conflicts of interest, and appropriate protocols and processes should have been implemented. We consider that this was not done.
31. There are two potential consequences of SAH’s failure to manage conflicts that particularly concern us.
32. Firstly, we are concerned at how SAH and Randall Deer negotiated the terms of the Agreement. SAH submitted that *“the interest rate was heavily negotiated between the parties”*. No material was provided to substantiate this submission other than the mere assertion of it. SAH submitted that negotiations commenced on or around 23 September 2019 and the Term Sheet was executed on 26 September 2019, the same day the first tranche of convertible notes was issued. This was a relatively short period to negotiate and execute a transaction of considerable significance for SAH.
33. We are concerned that the terms of the convertible notes were onerous for SAH and its shareholders, in particular that the 10% p.a. interest on the convertible notes accumulated daily. SAH made reference to a previous transaction and submitted that:
- “Broadly the benchmark for the deal was set by the Coppin Hope Agreement. The interest rate under the Coppin Hope Agreement was 15% pa. The board negotiated that rate down to 10% pa. Under the Coppin Hope Agreement Coppin Hope received an establishment fee equal to 6.25% of the face value of the relevant notes. Again Mr Deer sought a similar establishment*

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fee but this was not accepted by SAH. Amongst other things, as a compromise for SAH not agreeing to the higher interest rate or the establishment fee Mr Deer requested the options upon the conversion of the notes to shares."

34. A factor that SAH did not take into account in this submission was that Randall Deer was to be given the opportunity to obtain control of SAH as a result of converting convertible notes and exercising options under the Agreement. The Coppin Hope Agreement referred to above only raised \$400,000 and clearly did not have a possible control impact.
35. The unacceptable circumstances arising from not properly managing conflicts could have been partly resolved (at least in relation to the control issues) through shareholders considering the item 7 resolution with proper disclosure, including an independent assessment as to whether Randall Deer was obtaining control of SAH at a premium or a discount (i.e. an independent expert's report). As discussed below, this was not done. SAH had no advice on the value of its shares and whether the conversion price of 12 cents was fair and reasonable.
36. Secondly we are concerned about how SAH considered the Agreement in relation to other alternatives. We asked SAH what steps were taken to seek out other sources of funding. SAH submitted that other than the Coppin Hope Agreement referred to above, *"SAH had spent over a year trying to secure a long term investor on a wide variety of potential terms including offering notes, debt or shares to entice investors without success"*. SAH considered the following possibilities: obtaining loan finance from other sources, selling SAH's underlying business,¹² raising additional funds while acquiring another business and an initial public offering.
37. SAH provided a number of term sheets for significant debt funding with a third party, initially without any explanation. We asked what the current status of this transaction was. SAH submitted that the term sheet was no longer on foot and stated that it:

"...is not negotiating with other debt providers. It became clear to the Board based on its past efforts to obtain debt that there would be little chance of securing any debt from any person who is not sufficiently familiar with the Company's financial circumstances to understand the risks involved."
38. In light of the conflicts of interests that were not managed, as discussed above, we are not confident that SAH adequately pursued other fundraising alternatives.
39. SAH provided us with a monthly cash flow forecast from December 2019 to June 2020 inclusive. It is clear from this forecast that without the additional funds from the third tranche of convertible notes in January 2020, SAH may be in a position where it cannot pay its debts as and when they fall due. SAH also submitted that in relation to its operations, *"December is the quietest period collections wise and January is a 3-payroll period"*. The cash flow forecast and other financial material (including material provided to third party financiers) show a marked increase in revenue for

¹² Noting that SAH sold its NSW and ACT business in February 2019. SAH submitted that Westpac in effect required the proceeds of this sale to be used to pay down SAH's debt to Westpac

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the remainder of 2020, showing upside for SAH and, through the Agreement, Randall Deer.

40. SAH also submitted that Fast Future's position was that *"it needs the option to convert the notes to shares to be unconditional before the (third tranche of) notes are subscribed for"*. We accept that SAH is in a difficult financial position and its options for funding other than from Randall Deer are now limited.¹³ However we are concerned that SAH could have pursued other options earlier to deal with these issues with third parties. In our commercial judgment there was a risk that in light of the conflicts of interests described above that were not properly managed, these other fundraising options were not properly considered. This is an issue we consider is relevant on the question of orders.

Disclosure

Independent expert's report

41. The explanatory statement for the item 7 resolution said *"The Board believes that the investment proposal is in the best interest of all Shareholders ..."* and *"The Board has determined ... that an independent expert's report is not beneficial in the current circumstances"*. The explanatory statement set out reasons for not obtaining an independent expert's report, including *"the extra time required to obtain such a report"*.
42. SAH submitted that based on verbal advice it would take 6 to 8 weeks to obtain an independent expert's report and it would cost in the range of \$25,000 to \$35,000. SAH submitted that both the cost and delay in relation to obtaining an independent expert's report would be materially detrimental to its financial position and it had *"material concerns that Mr Deer would withdraw his commitment if the Company's position was not finalised as soon as possible"*.
43. There was approximately 6 weeks between the signing of the Agreement and holding of the meeting to consider the item 7 resolution and approximately 10 weeks between the signing of the Term Sheet and holding of the meeting. We consider that there was sufficient time for SAH to obtain an independent expert's report and the cost of such a report was not prohibitive.
44. While SAH provided its explanation as to why it did not obtain an independent expert's report in the explanatory statement there was no disclosure to assist SAH shareholders in determining whether Randall Deer was obtaining control of SAH for either a premium or a discount. As discussed in paragraph 35, an independent expert's report would have assisted SAH shareholders in assessing the merits of the item 7 resolution and would have dealt with some of the potentially very substantial control implications of the unacceptable circumstances arising from SAH not properly managing conflicts in an insider deal. We also consider that, irrespective of the issue of conflicts, the explanatory statement should have been accompanied by an

¹³ For example we are prepared to accept that an offer to acquire the Victorian and South Australian business received just prior to 6 December 2019, which would have had to have been applied to further reduce SAH's debt with Westpac, would not have assisted

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independent expert's report or a sufficiently detailed directors' report that complies with ASIC policy.¹⁴

Randall Deer's intentions relating to the exercise of options

45. The explanatory statement said:

- (a) *"Fast Future has stated that it has no intention of injecting further capital outside of the Convertible Notes, so it is likely that the Investment Agreement will only raise a maximum of \$3,864,000 for [SAH]"* and
- (b) *"Other than subscribing for the Convertible Notes under the [Agreement], Fast Future has no intention of injecting further capital into [SAH]."*

46. However, it also said:

- (a) *"Under the Investment Agreement, the Company may raise up to approximately \$15.45 million in the event all Convertible Notes are converted and all Options are exercised...."* and
- (b) *"If Shareholder approval is not obtained, it is highly unlikely that Fast Future will apply for tranche 2 or tranche 3 of the Convertible Notes."* It also said that Tranches 1 and 2 of the convertible notes had been issued.

47. It is concerning that SAH shareholders may have been confused as to whether Tranche 2 of the convertible notes had been issued at the time of the issue of the explanatory statement. SAH submitted that Tranche 2 was issued on 24 October 2019.

48. We are more concerned that SAH shareholders may have been misled about the likelihood of the options being exercised. SAH submitted that:

"...Mr Deer was firm that any investment was conditional upon receiving the option entitlement. Mr Deer informed SAH that it was his safe guard to be able to fund the business further at short notice without the need for further shareholder meetings."

"The statement in the Notice of Meeting was that Mr Deer did not intend on exercising the options. The purpose of this was to manage the expectations of shareholders as to the amount of capital raised under the Agreement. The Item 7 Approval was however for the full amount of shares possible of being issued under the Agreement. The Board considered that some qualification was needed to be made to shareholders as the Board was only expecting to receive approximately \$3.8 million from the Agreement, not \$11.5 million (if all options were exercised)."

49. In light of SAH's submission that Randall Deer was insistent on the option entitlement, we consider it was misleading for SAH shareholders to be given the impression that those options are unlikely to be exercised.

¹⁴ See ASIC Regulatory Guide 74: Acquisitions approved by members at [74.29]

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Cameron Davis relationship with Randall Deer

50. We consider that Randall Deer’s relationship to Cameron Davis and R2-D2 and any consequent voting power in SAH should have been disclosed in the explanatory statement. We also consider that given the conflicts of interest, or potential conflicts of interest that arise as a result of that relationship, the explanatory statement should have disclosed whether negotiations for the Agreement had been undertaken free from any actual influence, or appearance of influence, from participating insiders and if not, why not.
51. On the question of whether Cameron Davis should have voted on the item 7 resolution, SAH submitted that:
- “The decision to exclude Cameron Davis from voting on the Section 611 Item 7 Resolution was only made following the application to the Takeovers Panel, and was made to address the proposition that Mr Davis had influence over the outcome of the vote on the Section 611 Item 7 resolution. Qualification was made by the Company in its preliminary submissions that the decision to exclude Mr Davis’ votes was not an admission of associateship (sic).”*
52. As noted above, we make no findings on the question of whether Randall Deer and Cameron Davis are associates. However we consider that in the unusual circumstances of this case, including that control is potentially passing to an entity controlled by a director, that it was appropriate for Cameron Davis and his controlled entities not to vote on the item 7 resolution.

SAH’s need for funds and financial position

53. The explanatory statement had a section titled *“Capital raise and use of funds”*. However there was no disclosure as to how SAH intended to use the funds raised under either the convertible notes or through the exercise of the options. We consider that such information should have been included.
54. The explanatory statement did disclose that SAH was in urgent need for the funds and without the Agreement it might become insolvent. However there was little up-to-date financial information for SAH shareholders to come to their own view on this question.¹⁵ We consider that SAH should have disclosed its current financial information in the explanatory statement, including its cash position.¹⁶

DECISION

Declaration

55. We consider that the acquisition of control over voting shares in SAH will not take place in an efficient, competitive and informed market and the holders of the shares

¹⁵ We asked in our brief for SAH’s monthly management accounts for September and October 2019 but did not receive them. We asked subsequently for SAH’s monthly management accounts for September, October and November 2019. What we received in response was still incomplete. For example, while we received cash flow forecasts, we did not receive any information about SAH’s current cash at bank

¹⁶ There were also significant unexplained disparities between financial information provided by SAH to its bankers and that provided to shareholders in the explanatory memorandum

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in SAH have not been given enough information to enable them to assess the merits of the proposal.

56. It appears to us that the circumstances are unacceptable:
- (a) having regard to the effect that we are satisfied they will have or are likely to have on:
 - (i) the control, or potential control, of SAH or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in SAH
 - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602.
57. Accordingly, we made the declaration set out in Annexure B and consider that it is not against the public interest to do so. We had regard to the matters in s657A(3).

Orders

58. Following the declaration, we made the final orders set out in Annexure C. We were not asked to, and did not, make any costs orders. Under s657D the Panel's power to make orders is very wide. The Panel is empowered to make 'any order'¹⁷ if 4 tests are met:
- (a) it has made a declaration under s657A. This was done on 2 January 2020.
 - (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. For the reasons below, 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 20 December 2019. Randall Deer, SAH and ASIC made submissions and ASIC made rebuttals.
 - (d) it considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons. We consider the orders do this, in particular by ordering, in effect, that:
 - (i) By 30 January 2020, Fast Future must subscribe for the remaining tranche of convertible notes (**Tranche 3 Order**).
 - (ii) By 30 January 2020, Fast Future and SAH must amend the terms of the Agreement to allow for the immediate conversion of the convertible notes and Fast Future must immediately exercise the amended right of conversion for Tranches 1, 2 and 3 of the convertible notes pursuant to the Agreement, thereby eliminating the accumulation of interest under the

¹⁷ Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

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convertible notes and minimising Randall Deer’s potential control position on later conversion (**Conversion Order**).

- (iii) Other than in reliance on the creep exception, the options can only be exercised if new shareholder approval is obtained with updated disclosure and an independent expert’s report (**Shareholder Approval Order**).
- (iv) In the absence of shareholder approval, none of Randall Deer, Fast Future or any of their associates may acquire any of the businesses of SAH for a period of 12 months from the date of the orders (**No Disposal Order**).
- (v) SAH disclose the disclosure deficiencies in the original explanatory statement and the effect of our declaration and orders.

59. SAH did not substantially oppose these orders. Randall Deer submitted that (among other things):

- (a) The Tranche 3 Order and Conversion Order were unfairly prejudicial to Fast Future and *“ultra vires because the Panel is in effect writing new terms into the Convertible Note Issue Agreement and then compelling specific performance in accordance with those new terms”*.
- (b) *“Fast Future does not wish to subscribe for Tranche 3 notes prior to approval of the total transaction at a further general meeting of SAH Shareholders. Furthermore, Fast Future does not wish to convert any currently issued notes (Tranches 1 & 2) until such time as the total transaction as originally proposed is approved at a further general meeting of SAH Shareholders”*.
- (c) *“A legitimate and proper Order to correct any finding that the process and validly (sic) of the SAH Shareholder Meeting held on or about 6 December 2019 is tainted would be to annul the resolution taken at that SAH Shareholder Meeting and to order that the SAH Shareholder Meeting be reconvened to properly consider and vote on the Convertible Note Issue Agreement. It would not be proper to attempt to cure an ill convened SAH Shareholder Meeting by changing the terms of the Convertible Note Issue Agreement and thereby condoning the invalidity of the SAH Shareholder Meeting by assuming that the SAH Shareholders would have approved the Convertible Note Issue Agreement if it contained those terms which the Panel has “written into” it. The SAH Shareholder Meeting remains invalid (if that is what the Panel’s finding is) regardless of the terms of the Convertible Note Issue Agreement.”*

60. ASIC submitted that on the one hand SAH shareholders may be prejudiced given the solvency risk to SAH if the Tranche 3 Order was not made. However ASIC submitted that this *“has to be balanced with appropriate consideration as to how Mr Randall Deer’s interests may be prejudiced by this order. Accordingly, on the other hand, ASIC notes that it would be appropriate for the Panel to consider the degree of culpability that Mr Randall Deer has played in the concerns identified by the Panel. This would assist in determining whether such an order may be unfairly prejudicial to Mr Deer.”*

61. In relation to the Conversion Order ASIC submitted that:

- (a) It recognized that it had *“the benefit of materially reducing the control impacts of the Convertible Note Issue Agreement by removing any shares (sic) issuances needed to*

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satisfy any capitalised interest. It also may be beneficial to SAH itself (and in turn its shareholders) given the interest costs savings.”

- (b) It acknowledged that the Conversion Order might mitigate any prejudice against Fast Future and Randall Deer arising out of the Tranche 3 Order. However it submitted that *“these benefits must however be balanced with the fact that this order may be in partial conflict with the Panel’s draft declaration. This is because this proposed order enables Fast Future (and Mr Deer) to immediately obtain up to approximately 40% of the voting power in SAH. This increase in voting power would be prohibited other than through an exception available in section 611. In this case, we assume the relevant exception will be the item 7 of section 611 approval that was obtained on 6 December 2019. The Panel has however identified reservations around the adequacy of the process surrounding, and disclosures made, as part of seeking shareholder approval for the Convertible Note Issue Agreement. In these circumstances, ASIC recognises it may be inappropriate for Fast Future (and Mr Deer) to rely on, and benefit from, that item 7 of section 611 approval previously obtained.”*

62. Following consideration of submissions, including material provided by SAH regarding its financial position, we became concerned about the near term solvency of SAH and considered that, in the difficult circumstances that SAH now finds itself, it was important that SAH had the certainty of receiving the injection of convertible note capital under the Agreement, to protect the interests of all shareholders. We consider that SAH’s solvency is such that it is important in the unusual circumstances of this case to require Fast Future to convert its convertible notes for the reasons noted below, acknowledging that Randall Deer will obtain 40.33% voting power in SAH as a result. The Shareholder Approval Order requires that any further acquisition of control by Randall Deer through exercise of the options be subject to a new item 7 approval with appropriate disclosure.
63. As discussed in paragraph 40, we are concerned that SAH may have had options that it could have pursued earlier to deal with these issues with third parties. The Agreement was an insider deal and Randall Deer was involved in the unacceptable circumstances. In addition as a consequence of the Agreement and SAH’s precarious financial position, without making the orders, it is conceivable that Fast Future could have acquired the underlying business of SAH at a discounted price as a consequence of an insolvency event. Accordingly we consider that the Tranche 3 Order, the Conversion Order (which minimises the accumulation of interest and the control effect) and the No Disposal Order should be made and that Randall Deer and Fast Future are not unfairly prejudiced by our orders.

Elizabeth Hallett

President of the sitting Panel

Decision dated 2 January 2020

Reasons given to parties 15 January 2020

Reasons published 20 January 2020

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Advisers

Party	Advisers
Applicants	NA
Fast Future and Randall Deer	AVA Solicitors
SAH	Cowell Clarke Pty Ltd



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Annexure A

CORPORATIONS ACT SECTION 657E INTERIM ORDER

SMOKE ALARMS HOLDINGS LIMITED

Greenwich Capital Partners and Anthony Richard Lewis made an application to the Panel dated 3 December 2019 in relation to the affairs of Smoke Alarms Holdings Limited (**SAH**).

The Panel **ORDERS** that:

1. Without the consent of the Panel, Fast Future Pty Ltd as trustee for the Fast Future Trust (**Fast Future**), or any person to whom convertible notes issued pursuant to the Convertible Note Issue Agreement dated 24 October 2019 between Fast Future and SAH have been transferred, must not, or not further, convert any of the convertible notes into shares in SAH.
2. Without the consent of the Panel, in respect of any shares already issued pursuant to the conversion of convertible notes referred to in order 1, Fast Future, or any person holding the shares, must not:
 - (a) sell, transfer or otherwise dispose of the shares, including by mortgaging the shares
 - (b) vote the shares or otherwise allow the exercise of the vote attached to the shares
 - (c) exercise any of the other rights attaching to the shares.
3. These interim orders have effect until the earliest of:
 - (i) further order of the Panel
 - (ii) the determination of the proceedings and
 - (iii) 2 months from the date of these interim orders.

Tania Mattei
Counsel
with authority of Elizabeth Hallett
President of the sitting Panel
Dated 10 December 2019



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Annexure B

**CORPORATIONS ACT
SECTION 657A
DECLARATION OF UNACCEPTABLE CIRCUMSTANCES**

SMOKE ALARMS HOLDINGS LIMITED

CIRCUMSTANCES

1. Smoke Alarms Holdings Limited (**SAH**) is an unlisted public company with more than 50 members. Its directors are Randall Deer, Cameron Davis and Matthew Driscoll.
2. As at 12 November 2019, SAH had 55,449,867 ordinary shares on issue.
3. On 26 September 2019, SAH entered into a convertible note commercial term sheet (**Term Sheet**) with Fast Future Pty Ltd as trustee for Fast Future Trust (**Fast Future**), an entity controlled by Randall Deer.
4. On 24 October 2019, SAH entered into a Convertible Note Issue Agreement (**Agreement**) with Fast Future.
5. The Agreement included terms to the effect that:
 - (a) Fast Future could subscribe for up to 3 tranches of convertible notes, entitling the holder to convert each note into 8.33 ordinary shares in SAH at an effective issue price of 12 cents per share.
 - (b) Upon conversion, each share had 3 options attached. Each option was for the issue of an ordinary share in SAH at 12 cents.
 - (c) Interest on the face value of each convertible note at the rate of 10% per annum accrued daily, and could be capitalised by the convertible note holder upon notice to SAH.
 - (d) The notes were not convertible before 12 months after the date of issue and subject to any required shareholder approval for the issue of shares.
6. Tranches 1 and 2 were issued on 26 September 2019 and 25 October 2019, respectively.
7. By reason of the Agreement,¹⁸ Randall Deer's voting power in SAH will increase from 5.7%:

¹⁸ As set out in the notice of meeting described in paragraph 12

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- (a) if all the convertible notes are subscribed for and converted, to 40.33% of SAH
 - (b) if all the options are exercised, to 71.61% of SAH and
 - (c) if all the interest is capitalized, to 80.04% of SAH.
8. R2-D2 Partners Pty Ltd (**R2-D2**) is a company of which Randall Deer was the secretary and sole director from 15 April 2015 to 8 November 2019. Cameron Davis was alternate director until appointed director on 8 November 2019.
 9. A share transfer dated 14 September 2016 signed by Randall Deer as sole director and company secretary of both R2-D2 and Fast Future, purported to transfer 2,463,750 SAH shares from R2-D2 as trustee for the R3-D3 Unit Trust to Fast Future for \$1.00. This transfer was not recorded on the SAH share register. On or about 8 November 2019, this transfer was reversed.
 10. As at 13 November 2019, R2-D2 had a relevant interest in 7,895,500 ordinary shares in SAH (14.7%).
 11. The Agreement was a control transaction involving a participating insider (Randall Deer), who was in a position to influence SAH's consideration of the Agreement. Cameron Davis took the lead role in negotiating the Agreement with Fast Future on behalf of SAH. In view of his connection to Randall Deer, there were conflicts of interest, or potential conflicts of interest, and appropriate protocols and processes were not put in place.
 12. On 12 November 2019, a notice of meeting and explanatory statement was issued by SAH. One of the resolutions sought approval by SAH shareholders under item 7 of section 611¹⁹ for the issue of up to 211,830,604 shares in SAH to Fast Future pursuant to the Agreement.
 13. Randall Deer was a signatory to the circular resolution approving the notice of meeting.
 14. The explanatory statement said:
 - (a) *“Fast Future has stated that it has no intention of injecting further capital outside of the Convertible Notes, so it is likely that the Investment Agreement will only raise a maximum of \$3,864,000 for [SAH]”* and
 - (b) *“Other than subscribing for the Convertible Notes under the [Agreement], Fast Future has no intention of injecting further capital into [SAH].”*
 15. However, it also said:
 - (a) *“Under the Investment Agreement, the Company may raise up to approximately \$15.45 million in the event all Convertible Notes are converted and all Options are exercised....”* and

¹⁹ All statutory references are to the *Corporations Act 2001* (Cth), and all terms used in Chapter 6 have the meaning given in that Chapter (as modified by ASIC)

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- (b) *“If Shareholder approval is not obtained, it is highly unlikely that Fast Future will apply for tranche 2 or tranche 3 of the Convertible Notes.”* It also said that Tranches 1 and 2 of the convertible notes had been issued.
16. In light of the conflicts of interest described in paragraph 11, an independent expert’s report would have assisted SAH shareholders in assessing the merits of approving the Agreement under item 7 of section 611. The explanatory statement said *“The Board believes that the investment proposal is in the best interest of all Shareholders ...”* and *“The Board has determined ... that an independent expert’s report is not beneficial in the current circumstances”*. The explanatory statement set out reasons for not obtaining an independent expert’s report, including *“the extra time required to obtain such a report”* although there was approximately 6 weeks between the signing of the Agreement and holding of the meeting (and approximately 10 weeks between the signing of the Term Sheet and holding of the meeting).
17. The explanatory statement said *“Fast Future will convert the Convertible Notes into Shares unless the Company defaults under the Investment Agreement, in which case Fast Future may redeem the Convertible Notes for cash.”*
18. The explanatory statement said *“Shareholder approval under section 611 item (7) is only effective if no votes are cast in favour of the resolution by the person proposing to make the acquisition and their associates. It is for these reasons that Randall, Bridget Deer and Fast Future are excluded from being able to vote for the Resolution.”* Subsequently it was decided to exclude Cameron Davis and entities controlled by him from voting.
19. The explanatory statement contained insufficient or misleading information regarding:
- (a) Randall Deer’s relationship to Cameron Davis and R2-D2 and any consequent voting power in SAH
 - (b) the use of the funds to be raised under the Agreement
 - (c) what convertible notes had been issued
 - (d) whether options would be exercised
 - (e) the voting exclusion of Cameron Davis and entities controlled by him
 - (f) current financial information for SAH, including its cash position
 - (g) valuation information to allow shareholders of SAH to ascertain whether it was fair and reasonable to approve the item 7 of section 611 resolution, including an independent expert’s report or a sufficiently detailed directors’ report and
 - (h) whether negotiations for the Agreement had been undertaken free from any actual influence, or appearance of influence, from participating insiders and if not, why not.

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20. By reason of the lack of adoption of appropriate protocols and processes, and disclosure thereof, and by reason of the material deficiencies of information in the notice of meeting, SAH shareholders have not been given enough information to enable them to assess the merits of approving the Agreement under item 7 of section 611.
21. Further, given the benefits that flow to Fast Future from the Agreement, SAH shareholders were entitled to full and detailed disclosure.

EFFECT

22. The acquisition of control over voting shares in an unlisted company with more than 50 members will not take place in an efficient, competitive and informed market.
23. The holders of the shares in SAH have not been given enough information to enable them to assess the merits of the proposal.

CONCLUSION

24. It appears to the Panel that the circumstances are unacceptable circumstances:
 - (a) having regard to the effect that the Panel is satisfied they will have or are likely to have on:
 - (i) the control, or potential control, of SAH or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in SAH
 - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602.
25. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3).

DECLARATION

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of Smoke Alarms Holdings Limited.

Tania Mattei
Counsel
with authority of Elizabeth Hallett
President of the sitting Panel
Dated 2 January 2020



Australian Government

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Annexure C

CORPORATIONS ACT SECTION 657D ORDERS

SMOKE ALARMS HOLDINGS LIMITED

The Panel made a declaration of unacceptable circumstances on 2 January 2020.

THE PANEL ORDERS

1. By 30 January 2020, Fast Future (or any person to whom the rights or benefits under the Agreement have been transferred) must subscribe for Tranche 3 of the convertible notes pursuant to the Agreement.
2. By 30 January 2020, Fast Future and SAH must amend the terms of the Agreement to allow for the immediate conversion of the convertible notes and Fast Future must immediately exercise the amended right of conversion for Tranches 1, 2 and 3 of the convertible notes pursuant to the Agreement.
3. Other than in reliance on the exception in item 9 of section 611 of the *Corporations Act 2001* (Cth) (**Act**), no options issued as a result of the conversion of convertible notes pursuant to the Agreement may be exercised, unless SAH shareholders approve the exercise under item 7 of section 611 of the Act at a further general meeting or meetings of shareholders (**item 7 approval**) for which a notice of meeting and an explanatory statement is issued and which includes:
 - (a) adequate disclosure of:
 - (i) Randall Deer's relationship to Cameron Davis and R2-D2 and any consequent voting power in SAH
 - (ii) use of the funds to be raised via the exercise of the options
 - (iii) current financial information for SAH, including its cash position and
 - (iv) the relationship that existed between Randall Deer and Cameron Davis at the time of negotiations for the Agreement and whether (and what) arrangements SAH had in place to ensure that the negotiations were undertaken free from any actual influence, or appearance of influence, from participating insiders
 - (b) an independent expert's report containing relevant information to enable shareholders to form a view as to whether:

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- (i) a control premium is being paid
 - (ii) a control premium is appropriate, and if so what and
 - (iii) the exercise of any options is fair and reasonable to shareholders other than the proposed exerciser of the options and why that opinion is held and
- (c) a voting exclusion statement that SAH will disregard any votes cast in favour of the item 7 approval by or on behalf of Randall Deer, Fast Future, R2-D2, Cameron Davis or any of their associates, and any person to whom shares will be issued as a result of the exercise.
4. Any notice of meeting, explanatory statement and independent expert's report referred to in order 3 must be provided to ASIC at least 10 business days prior to its dispatch to SAH shareholders.
5. In the absence of further shareholder approval in accordance with the requirements for such in order 3, none of Randall Deer, Fast Future or any of their associates may acquire any of the businesses of SAH for a period of 12 months from the date of the orders.
6. Within 10 business days of the date of the orders, SAH must issue a letter, in form and content approved by a member of the Panel, to all shareholders explaining:
- (a) the deficiencies the Panel found in the notice of meeting and explanatory statement dated 12 November 2019 and
 - (b) the effect of the Panel's declaration and orders.
7. In these orders the following terms apply:

Agreement	The Convertible Note Issue Agreement between Fast Future and SAH dated 24 October 2019
ASIC	Australian Securities and Investments Commission
Fast Future	Fast Future Pty Ltd as trustee for Fast Future Trust
R2-D2	R2-D2 Partners Pty Ltd
SAH	Smoke Alarms Holdings Limited

Tania Mattei
Counsel
with authority of Elizabeth Hallett
President of the sitting Panel
Dated 2 January 2020