



Australian Government

Takeovers Panel

Reasons for Decision
Smoke Alarms Holdings Limited 02R
[2020] ATP 4

Catchwords:

Declaration – orders – item 7 s611 resolution – insider participation in control transactions – conflicts of interest – disclosure – independent expert’s report – use of funds – cash flow – solvency – undertaking

Corporations Act 2001 (Cth), s438D, s606, item 7 s611, s657A, s657D, s657EA

Eastern Field Developments Limited v Takeovers Panel [2019] FCA 311

Guidance Note 4: Remedies General

Procedural Rules 4.1.1

Energy Resources of Australia Limited 02R [2020] ATP 3, Smoke Alarms Holdings Limited [2020] ATP 2, Benjamin Hornigold Limited 08R, 10R & 11R [2019] ATP 22

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

INTRODUCTION

1. The review Panel, Teresa Dyson, Denise McComish and John Sheahan QC (sitting President), affirmed the initial Panel’s decision to make a declaration of unacceptable circumstances in relation to the affairs of Smoke Alarms Holdings Limited¹ and accepted undertakings from Fast Future Pty Ltd as trustee for the Fast Future Trust, SAH and Mr Randall Deer (a director of SAH, a beneficiary of the Fast Future Trust and the controller of Fast Future). The review Panel was satisfied that the undertakings sufficiently remedied the unacceptable circumstances identified in the declaration of unacceptable circumstances and, accordingly, revoked the initial Panel’s orders.
2. In these reasons, the following definitions apply.

Agreement	has the meaning given in paragraph 5
Fast Future	Fast Future Pty Ltd as trustee for the Fast Future Trust ²
SAH	Smoke Alarms Holdings Limited

¹ *Smoke Alarms Holdings Limited* [2020] ATP 2. All references to the initial Panel are to the Panel in *Smoke Alarms Holdings Limited*

² Fast Future Pty Ltd was a party to these proceedings in its own right, and references to Fast Future in that context are to Fast Future Pty Ltd

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FACTS

3. SAH is an unlisted public company with more than 50 members. Its directors are Randall Deer, Cameron Davis and Matthew Driscoll.
4. On 26 September 2019, SAH entered into a convertible note commercial term sheet with Fast Future.
5. On 24 October 2019, SAH entered into a Convertible Note Issue Agreement (**Agreement**) with Fast Future.
6. 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.
7. Tranches 1 and 2 of the convertible notes were issued on 26 September 2019 and 25 October 2019, respectively.
8. On 12 November 2019, a notice of meeting and explanatory statement was issued by SAH for its annual general meeting. Resolution 2 in the notice of meeting proposed, as an ordinary resolution:

“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. SAH’s annual general meeting was originally scheduled to be held on 4 December 2019 but was rescheduled to 6 December 2019. At that meeting, resolution 2 was approved.

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10. On 3 December 2019, Greenwich Capital Partners and Mr Anthony Richard Lewis³ sought a declaration of unacceptable circumstances.
11. On 2 January 2020, the initial Panel made a declaration of unacceptable circumstances on a number of bases, including that:
 - (a) the Agreement was a control transaction involving a participating insider and there were conflicts of interest, or potential conflicts of interest, and appropriate protocols and processes were not put in place and
 - (b) the explanatory statement for the item 7 of s611⁴ approval at SAH's annual general meeting contained insufficient or misleading information regarding certain matters.
12. Also on 2 January 2020, the initial Panel made orders that (in effect):
 - (a) Fast Future must subscribe for the remaining tranche of convertible notes
 - (b) 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 all of the convertible notes and
 - (c) other than in reliance on item 9 of s611, the options can only be exercised if new SAH shareholder approval is sought with updated disclosure and an independent expert's report.

APPLICATION

13. By application dated 6 January 2020, Fast Future sought a review of the initial Panel's declaration and orders. In response to questions we asked during the course of the proceedings, Fast Future⁵ submitted that:
 - (a) it "*does not request to have [the] Initial Panel's Declaration of Unacceptable Circumstances reviewed*" and that its review application was incorrect in asking for such a review and
 - (b) it sought to have the initial Panel's orders reviewed for a number of reasons, including that:
 - (i) "*The Convertible Note Issue Agreement has not been approved by the SAH shareholders in its totality and the SAH shareholders may not approve the Options that attach to the shares (once the Tranche notes have been converted)*"

³ Mr Lewis declined to provide a notice of appearance for these review proceedings on the basis that he would be overseas. Pursuant to rule 4.1.1 of the Panel's Procedural Rules, a person does not become a party to proceedings until that person provides the Panel with a notice of appearance and that notice of appearance is accepted by the Panel. Accordingly, Mr Lewis was not a party to these review proceedings

⁴ 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)

⁵ Who made joint submissions with Randall Deer

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- (ii) *“Fast Future would not have entered into the Agreement, and would not convert any of the Tranche Notes, to acquire Shares at \$0.12 per Share if Fast Future did not also acquire the accompanying options ... and a proper construction of the Agreement evidences the fact that Fast Future required SAH shareholders to approve the Agreement in its entirety before it would be obliged to subscribe for the Tranche 3 Notes or convert any of the Trace [sic] Notes”* and
- (iii) *“Until the Tranche Notes are converted, Fast Future holds the position of creditor viz-a-viz [sic] SAH but upon the Tranche Notes being converted to Shares Fast Future ceases to be a creditor and becomes purely a shareholder. The rights of a creditor in a possible SAH liquidation are different to the right of a shareholder and Fast Future would have a better prospect of recouping the money it has advanced to SAH if it is a creditor if SAH was to go into liquidation ... Order 2 compels Fast Future to lose the benefits of being a creditor ...”*

DISCUSSION

- 14. The powers of a review Panel are set out in s657EA. Our role is to conduct a de novo review.⁶ We have considered all the materials which the initial Panel had when it considered whether to make a declaration and orders. We also had the initial Panel’s reasons for making its decision.
- 15. We have considered all the material but address only specifically that part of the material we consider necessary to explain our reasoning.

Review of the initial Panel’s declaration

- 16. Despite Fast Future’s submission that it did not request to have the initial Panel’s declaration reviewed, we considered it was appropriate to review that decision given the wording of Fast Future’s review application, which did request such a review. We did, however, give weight to Fast Future’s submission.
- 17. We asked the parties to provide any substantive comments they had in relation to the initial Panel’s reasons and any additional submissions regarding whether we should affirm, vary or set aside the initial Panel’s declaration (or set aside the initial Panel’s declaration and make a new declaration). None of the parties made any submissions in response to our request. We consider that to be significant.
- 18. We agree with the reasoning of the initial Panel in relation to its consideration of the relevant circumstances. In particular, we consider that:
 - (a) SAH’s explanatory statement dated 12 November 2019 contained insufficient or misleading information, including that:
 - (i) it should have been accompanied by an independent expert’s report or a sufficiently detailed directors’ report that complies with ASIC policy and

⁶ *Benjamin Hornigold Limited 08R, 10R & 11R* [2019] ATP 22 at [11] and *Eastern Field Developments Limited v Takeovers Panel* [2019] FCA 311 at [187]

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- (ii) it was misleading for SAH shareholders to be given the impression that the options agreed to be issued pursuant to the Agreement were unlikely to be exercised and
- (b) conflicts were not properly managed due to the lack of adoption of appropriate protocols and processes.

Review of the initial Panel's orders

19. As part of our review of the initial Panel's orders, we gave consideration to whether those orders were unfairly prejudicial to Fast Future. This is because the Panel's power to make orders to protect the rights or interests of persons that are affected by unacceptable circumstances,⁷ "*needs to be balanced by the requirement that we cannot make an order if we are satisfied that the order would unfairly prejudice any person (see s657D(1))*"⁸.
20. In considering this question we were mindful of the considerations which prompted the initial Panel to make the orders it did. In particular it was concerned that merely unwinding the transaction would leave SAH in a poor cash situation, such that it might shortly fall into external administration.
21. We asked the parties whether the initial Panel's orders were prejudicial to any person and whether there were alternative orders that might more appropriately remedy the unacceptable circumstances identified in the initial Panel's declaration.
22. SAH submitted that its board would be prepared to convene another general meeting of SAH shareholders to seek a fresh item 7 of s611 approval for "*the conversion of convertible notes and issue of options under the Convertible Note Issue Agreement*" and that an independent expert would be engaged to provide an independent expert's report.
23. Greenwich Capital Partners submitted that it did not believe the initial Panel's orders were prejudicial to any person and did not recommend any alternative orders.
24. ASIC submitted that "*it is likely orders 1, 2 and 5 of the Initial Panel's Orders are prejudicial to Fast Future and Mr Deer. This is because such orders result in differing, and perhaps adverse, outcomes to what Fast Future and Mr Deer would have otherwise expected under the Convertible Note Issue Agreement*". ASIC submitted that alternative orders that may also appropriately remedy the unacceptable circumstances include those that have a similar effect to ordering that none of tranches 1, 2 or 3 of the convertible notes may be converted into SHA shares without fresh item 7 of s611 approval.
25. In addition to the submissions of Fast Future set out in paragraph 13(b), Fast Future submitted that orders 1, 2 and 3 of the initial Panel's orders were prejudicial to Fast Future for a number of reasons, including that they rid "*Fast Future of the beneficial position that it holds as a creditor of SAH*". In our view there was considerable force in this submission, and in those in paragraphs 13(b)(ii) and (iii) above. Fast Future submitted that alternative orders that would more appropriately remedy the

⁷ s657D(2)(a)

⁸ *Energy Resources of Australia Limited 02R* [2020] ATP 3 at [58] (footnotes omitted)

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unacceptable circumstances would include setting aside the Agreement, treating the amounts previously advanced as a loan and ordering SAH to raise additional capital by way of a rights issue (disclosure for which would include an independent expert's report).

26. In relation to Fast Future's rights issue proposal, SAH submitted that it "*supports the notion of conducting a rights issue in principle*", other than the suggestion it provide an independent expert's report. ASIC submitted that the rights issue proposal "*may also have control effects that give rise to unacceptable circumstances having regard to the principles of Chapter 6 in section 602 and specific provisions such as item 10 or 13 of section 611*".
27. We put to the parties, as alternatives, draft orders effectively requiring fresh item 7 of s611 approval for the conversion of the convertible notes and exercise of the options, and draft undertakings effectively agreeing to undertake a rights issue (in the case of SAH) and underwrite that rights issue (in the case of Fast Future and Randall Deer). We asked the parties a number of questions in relation to those alternatives.
28. In response, Fast Future submitted that "*the review Panel could consider making Orders that: Terminate the Agreement; Require Fast Future to lend up to \$3,864,000 to SAH for a period of 1 year at 10% interest per annum; and Make no order as to what will "replace" the Agreement and simply leave SAH to regroup and in time put appropriate arrangements in place to address its future cash flow requirements (which may or may not include another arrangement with Fast Future) but always on terms to be agreed on arm's length with SAH's negotiating counterpart*".
29. SAH submitted that the SAH board "*considers that the proposed loan [i.e. the loan described above] can be agreed by way of undertaking rather than an order of the Panel*" and that it was prepared to offer an undertaking to implement Fast Future's proposal.
30. In considering Fast Future's loan proposal, we considered whether there was the potential for Fast Future to use its status as a creditor to acquire the underlying business of SAH for a discounted price as a consequence of an insolvency event, should SAH become insolvent.⁹ While that is a possibility, the *Corporations Act 2001* (Cth) contains a number of provisions aimed at preventing, or applying consequences to, conduct detrimental to SAH, its members or creditors, or which treats them unfairly.¹⁰ In addition, should any future circumstances arise that may be unacceptable (for instance during any refinancing of the loan or otherwise), an interested person could always bring a fresh application to the Panel.
31. We put to the parties that, subject to being provided with a copy of the proposed facility agreement between SAH and Fast Future and being satisfied that its terms and the termination of the Agreement are apt to address the unacceptable circumstances, we were minded not to make any orders if SAH and Fast Future

⁹ Something considered by the initial Panel, see *Smoke Alarms Holdings Limited* [2020] ATP 2 at [63]

¹⁰ For instance, if an administrator is appointed in respect of a company, s438D requires (among other things) that the administrator lodge a report with ASIC if it appears that a past or present officer or employee, or a member, of the company may have been guilty of an offence in relation to the company

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provided undertakings to implement Fast Future’s loan proposal and Randall Deer provided an undertaking to put Fast Future in the necessary funds. Each of those parties agreed to provide such an undertaking.

32. In light of those undertakings, we do not need to determine whether the initial Panel’s orders were unfairly prejudicial to Fast Future or any other person. This is because the undertakings adequately address the unacceptable circumstances by removing the control effect of the convertible notes and options, and have the added effect of not prejudicing SAH’s cash position (at least for the 12 month period of the loan, which allows additional time for SAH to undertake an orderly refinancing and/or equity raising or repay the loan).
33. As stated in Guidance Note 4: *Remedies General*, “the Panel considers that the public interest is generally served by accepting an undertaking that addresses unacceptable circumstances to the Panel’s satisfaction”. We therefore accepted the undertakings from SAH (Annexure A), Fast Future (Annexure B) and Randall Deer (Annexure C).

DECISION

Declaration

34. For the reasons above, it appears to us that the circumstances are unacceptable, as described in the initial Panel’s declaration of unacceptable circumstances. Accordingly, we decline Fast Future’s review application to the extent that it relates to the initial Panel’s declaration of unacceptable circumstances and affirm the initial Panel’s declaration of unacceptable circumstances. In doing so, we had regard to the matters in s657A(3).

Orders

35. Given our view that the undertakings (which were not offered to the initial Panel) adequately address the unacceptable circumstances, and with materially less prejudice to the parties than the initial Panel’s orders, we accept Fast Future’s review application to the extent that it relates to the initial Panel’s orders and revoke the initial Panel’s orders (Annexure D).

John Sheahan QC

President of the sitting Panel

Decision dated 30 January 2020

Reasons given to parties 19 February 2020

Reasons published 21 February 2020

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Advisers

Party	Advisers
Greenwich Capital Partners	N/A
Fast Future and Randall Deer	AVA Solicitors
SAH	Cowell Clarke Pty Ltd



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Annexure A

**AUSTRALIAN SECURITIES AND
INVESTMENTS COMMISSION ACT 2001 (CTH) SECTION 201A
UNDERTAKING**

SMOKE ALARMS HOLDINGS LIMITED 02R

Subject to Fast Future and Randall Deer respectively providing to the Panel the Fast Future Undertaking and the Randall Deer Undertaking, SAH undertakes to the Panel that:

1. SAH will immediately take all actions necessary to terminate the Agreement with no penalty to Fast Future.
2. Subject to Fast Future complying with its obligations under the Fast Future Undertaking, SAH will enter into the Debt Facility (with amounts previously advanced pursuant to the Agreement to be treated as an advance under the new facility).
3. Within 10 business days of the date of this undertaking, SAH will issue a letter, in form and content approved by a member of the Panel, to all shareholders explaining the effect of the Panel's declaration, this undertaking, the Fast Future Undertaking and the Randall Deer Undertaking.

SAH agrees to confirm in writing to the Panel when it has satisfied its obligations under this undertaking.

In this undertaking the following terms have the corresponding meaning:

Agreement	the Convertible Note Issue Agreement between Fast Future and SAH dated 24 October 2019
Debt Facility	a 12 month debt facility made available by Fast Future for an amount of \$3,684,000 at an interest rate of 10% and otherwise on ordinary commercial terms, in substantially the same form as provided to the Panel prior to the date of this undertaking
Fast Future	Fast Future Pty Ltd as trustee for Fast Future Trust
Fast Future Undertaking	the undertaking from Fast Future to the Panel in the form consented to by the Panel prior to the date of this undertaking
Panel	the Panel in <i>Smoke Alarms Holdings Limited 02R</i>
SAH	Smoke Alarms Holdings Limited

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Randall Deer Undertaking

the undertaking from Randall Deer to the Panel in the form consented to by the Panel prior to the date of this undertaking

**Signed by Cameron Davis
with the authority, and on behalf, of
Smoke Alarms Holdings Limited
Dated 30 January 2020**



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Annexure B

**AUSTRALIAN SECURITIES AND
INVESTMENTS COMMISSION ACT 2001 (CTH) SECTION 201A
UNDERTAKING**

SMOKE ALARMS HOLDINGS LIMITED 02R

Subject to SAH and Randall Deer respectively providing to the Panel the SAH Undertaking and the Randall Deer Undertaking, Fast Future undertakes to the Panel that:

1. Fast Future will immediately take all actions necessary to terminate the Agreement with no penalty to SAH.
2. By 31 January 2020, Fast Future will make available to SAH the Debt Facility (with amounts previously advanced pursuant to the Agreement to be treated as an advance under the Debt Facility).

Fast Future agrees to confirm in writing to the Panel when it has satisfied its obligations under this undertaking.

In this undertaking the following terms have the corresponding meaning:

Agreement	the Convertible Note Issue Agreement between Fast Future and SAH dated 24 October 2019
Debt Facility	a 12 month debt facility for an amount of \$3,684,000 at an interest rate of 10% and otherwise on ordinary commercial terms, in substantially the same form as provided to the Panel prior to the date of this undertaking
Fast Future	Fast Future Pty Ltd as trustee for Fast Future Trust
Panel	the Panel in <i>Smoke Alarms Holdings Limited 02R</i>
SAH	Smoke Alarms Holdings Limited
SAH Undertaking	the undertaking from SAH to the Panel in the form consented to by the Panel prior to the date of this undertaking

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Randall Deer Undertaking

the undertaking from Randall Deer to the Panel in the form consented to by the Panel prior to the date of this undertaking

**Signed by Randall John Deer
with the authority, and on behalf, of
Fast Future Pty Ltd as trustee for Fast Future Trust
Dated 30 January 2020**



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Annexure C

**AUSTRALIAN SECURITIES AND
INVESTMENTS COMMISSION ACT 2001 (CTH) SECTION 201A
UNDERTAKING**

SMOKE ALARMS HOLDINGS LIMITED 02R

Subject to SAH and Fast Future respectively providing to the Panel the SAH Undertaking and the Fast Future Undertaking, Randall Deer undertakes to the Panel that as soon as practicable after the date of this undertaking he will take all steps necessary to ensure Fast Future has the funds to comply with its obligations in relation to the Fast Future Undertaking.

Randall Deer agrees to confirm in writing to the Panel when he has satisfied his obligations under this undertaking.

In this undertaking the following terms have the corresponding meaning:

Fast Future	Fast Future Pty Ltd as trustee for Fast Future Trust
Fast Future Undertaking	the undertaking from Fast Future to the Panel in the form consented to by the Panel prior to the date of this undertaking
Panel	the Panel in <i>Smoke Alarms Holdings Limited 02R</i>
SAH	Smoke Alarms Holdings Limited
SAH Undertaking	the undertaking from SAH to the Panel in the form consented to by the Panel prior to the date of this undertaking

Signed by Mr Randall Deer
Dated 30 January 2020



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Annexure D

**CORPORATIONS ACT
SECTION 657EA
REVOCATION OF ORDERS**

SMOKE ALARMS HOLDINGS LIMITED 02R

The Panel made a declaration of unacceptable circumstances and final orders in relation to the affairs of Smoke Alarms Holdings Limited on 2 January 2020 in *Smoke Alarms Holdings Limited*. A review application was made on 6 January 2020. On 30 January 2020 the Panel affirmed the declaration of unacceptable circumstances made on 2 January 2020 and accepted undertakings from certain of the parties.

THE PANEL REVOKES

The orders made on 2 January 2020 in *Smoke Alarms Holdings Limited*.

**Allan Bulman
Director
with authority of John Sheahan QC
President of the sitting Panel
Dated 30 January 2020**