Article Information

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Corporate takeovers done lawfully: A guide for unlisted public companies in growth mode

After agreeing to a possible future issue of shares to the sellers of Ringers Western Pty Ltd, the buyer, an unlisted public company, raised capital from new investors and increased to more than 50 shareholders.

When the buyer issued the additional shares in accordance with its agreement, the interests of one of its majority shareholders increased from 63.31% to 99.94%.

The heavily diluted minority shareholders applied for a declaration of unacceptable circumstances, arguing that the takeovers rules in Chapter 6 of the Corporations Act had been breached.

Timeline

Date	Event
Before March 2022	Applicants held majority ownership of Ringers Western Limited (Ringers Western), then known as BrandUp Limited, which had less than 50 shareholders.
19 February 2022	Share Sale Deed between Ringers Western and trustees for the RW Trust for Ringers Western to acquire Ringers Western Pty Ltd ("**RWPL**") from RW Trust.
19 February 2022	Bonus Share Deed entered between Ringers Western and RW Trust: Ringers Western would issue more shares to RW Trust and to certain other Ringers Western shareholders (excluding a number of the Applicants) if an exit (initial public offering (IPO) or 100% share sale) did not occur with two years.
Between 19 February 2022 and late March 2022	Capital raising conducted by Ringers Western where certain external investors became shareholders.
7 March 2022 (general meeting of Ringers Western)	Ringers Western shareholders approved entry into Share Sale Deed. Shareholders did not approve the issue of bonus shares for the purpose of section 606 Item 7.
29 March 2022	Ringers Western and the RW Trust agreed to amend the Share Sale Deed to increase the monetary consideration and the Bonus Share Deed to increase the bonus shares.

30 March 2022 Completion under the Share Sale Deed	Ringers Western acquired all the issued shares in RW Proprietary becoming its sole shareholder. RW Trust had a 63.31% shareholding in Ringers Western, the Applicants had 23.05% and other shareholders altogether had a 13.64% shareholding.
31 March 2022	Ringers Western had more than 50 shareholders.
11 August 2023	Ringers Western board were all nominated by RW Trust. No IPO or share sale had occurred.
2 April 2024	Ringers Western issued 687, 959, 705, 932 bonus shares to RW Trust. RW Trust's relevant interest in Ringers Western increased from 63.31% to 99.94%.
26 April 2024	Applicants sought declaration of unacceptable circumstances.
4 June 2024	The Takeovers Panel made declaration of unacceptable circumstances.
16 July 2024	Panel affirmed declaration of unacceptable circumstances.

Issues

The Applicants argued that Ringers Western was bound by Chapter 6 of the Corporations Act:

- The issue of the bonus shares breached the Corporations Act section 606(1) (which prohibits increases in voting power from a starting point above 20% and below 90%); and
- The principles of the Corporations Act section 602 had been breached because the bonus shares were not issued in an efficient, competitive and informed market:
- The Ringers Western board did not allow interested third party external investors to acquire shares in Ringers Western, and did not communicate the approaches to Ringers Western shareholders;
- The minority shareholders of Ringers Western were not given any information about or the ability to scrutinise the issue of the bonus shares and did not have the opportunity to acquire any bonus shares;
- RW Trust's acquisition of bonus shares meant that a de facto takeover had occurred;
- RW Trust was able to seek compulsory acquisition due to having such a large shareholding in Ringers Western; and
- The acquisition of bonus shares by RW Trust meant that the minority Ringers Western shareholders had the value of their interest in Ringers Western significantly reduced.

The Panel's Decision

- The Panel agreed with submissions made by ASIC that Ringers Western was a Chapter 6 company. Although the Share Sale Deed and Bonus Share Deed were executed while Ringers Western had less than 50 shareholders, the issue of the bonus shares occurred after they had more than 50 shareholders so they were bound by Chapter 6 of the Corporations Act.
- The change in control meant existing Ringers Western shareholders were vulnerable to compulsory acquisition of bonus shares and the issue of bonus shares did breach the Corporations Act.
- The remaining shareholders' interest in Ringers Western had been diluted so their shareholding did not carry any weight in board decisions and could be acquired whether or not the offer was acceptably priced.
- The Panel further agreed with ASIC that the issue of bonus shares did not occur in an efficient, competitive and informed market as the other Ringers Western shareholders were not informed about the issue of bonus shares at the time of capital raising or when the bonus shares were issued, nor were they given the chance to scrutinise the issue of the bonus shares.

Panel's Orders

The Panel made a declaration of unacceptable circumstances, and:

- The bonus shares were ordered to be cancelled, which meant RW Trust's interest in Ringers Western would fall below a 90% voting interest; but
- The Bonus Share Deed was allowed to remain, as Ringers Western still had the ability to issue bonus shares if it complied with the Corporations Act Chapter 6. For example, the company could seek approval from shareholders under the Corporations Act section 611 Item 7.

Review of Decision

The Trustees of RW trust sought a review, at which point the orders were stayed, and other orders were made to preserve the status quo.

The Review Panel affirmed the declaration of unacceptable circumstances, and the orders.

Key Takeaways

- Public unlisted companies with more than 50 shareholders are bound by the same takeovers rules as listed companies.
- As public unlisted companies grow, they need to think ahead about the possible impact of the takeovers rules on agreements that they make while under 50 shareholders.