



Australian Government

Takeovers Panel

MEDIA RELEASE

No: TP20/88

Thursday, 17 December 2020

Thorn Group Limited 01 & 02 – Declaration of Unacceptable Circumstances and Orders

The Panel has made a declaration of unacceptable circumstances (Annexure A) and final orders (Annexure B) in relation to an application dated 14 October 2020 by Forager Funds Management Pty Ltd and an application dated 21 October 2020 by Vaspip 2 Pty Ltd, both in relation to the affairs of Thorn Group Limited (ASX: TGA) (see [TP20/59](#) and [TP20/60](#)).

Background

The following facts are in summary form (see the declaration for more background).

On 31 August 2020, Thorn received a section 249D¹ request to call a general meeting of Thorn and a section 249P request to distribute a members' statement.

On 16 September 2020, Thorn announced that, having taken advice, it considered that the requisitioning shareholders' requests were invalid.

On 23 September 2020, Vaspip (one of the requisitioning shareholders) commenced proceedings in the Supreme Court of Victoria seeking orders for Thorn to call the general meeting and relief from any alleged invalidity in the requisitioning shareholders' requests.

On 12 October 2020, Thorn announced that:

- the Thorn Board had declared a fully franked special dividend of \$0.075 cash per share (totalling approximately \$24.2 million) (**Special Dividend**)
- Thorn's dividend reinvestment plan (**DRP**) would apply to the Special Dividend with the last day for elections under the DRP being 20 October 2020 and
- the Thorn Board was considering Thorn's ability to undertake a buy back of Thorn shares for an amount in the order of \$15 million to \$25 million.

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

On 14 October 2020, the Supreme Court of Victoria declared that the requisitioning shareholders' requests were not invalid by reason of a procedural irregularity.

On 28 October 2020, Thorn called an extraordinary general meeting in response to the section 249D request scheduled to be held on 3 December 2020 (**Thorn EGM**). (The Panel made interim orders on 1 December 2020 requiring the Thorn EGM to be adjourned (see [TP20/83](#))).

On 3 November 2020, Thorn paid the Special Dividend and issued shares under the DRP. The total number of Thorn shares issued under the DRP was 60,764,233.

On 5 November 2020, Thorn's largest shareholder, Somers Limited and its associates (**Somers**), gave a substantial holder notice disclosing that its voting power in Thorn had increased from 30.57% to 39.42% (and from 31.57% to 39.42% as a result of their participation in the DRP). Somers received 49,241,938 Thorn shares under the DRP.

At the time Thorn made its announcements on 12 October 2020, paid the Special Dividend and issued shares under the DRP, Thorn's Board consisted of 3 directors, only one of whom was considered independent by Thorn. The other 2 directors were nominated to act as directors by Somers, and the Chair of Thorn is also the Chair of Somers Limited.

Declaration

The Panel considered, among other things, that:

1. It was apparent that the DRP had the potential to have a substantial effect on control of Thorn in a manner inconsistent with the purposes in section 602 given a combination of factors, including:
 - (a) the size of the Special Dividend relative to Thorn's market capitalisation and previous dividends
 - (b) the known or likely preferences of Thorn's substantial shareholders
 - (c) the short time given to shareholders to make an election to participate in the DRP
 - (d) the uncertainty regarding Thorn's plans for further major restructuring
 - (e) the lack of disclosure regarding any control effects of the DRP and the response, or likely response, of Thorn's substantial shareholders to the DRP and
 - (f) the potential effect of a large number of newly issued shares on voting at the Thorn EGM.
2. Thorn did not adequately consider the potential control effects of applying the DRP to the Special Dividend or the potential conflicts of interest of the Thorn Board when considering potential control effects.

3. The effect of applying the DRP to the Special Dividend in the circumstances was likely to have an effect on control and result in Somers acquiring a substantial interest in Thorn.

The Panel considered that the circumstances were unacceptable:

- (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of Thorn or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Thorn
- (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602.

The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in section 657A(3).

Orders

The Panel has made orders that, among other things:

- cancel sufficient shares issued under the DRP to Somers to return its voting power to 31.57% being its voting power immediately prior to the issue of shares under the DRP
- require Thorn to pay Somers its Special Dividend entitlement in cash in lieu of the cancelled shares and
- require Thorn to resume the adjourned Thorn EGM on or after Monday, 4 January 2021 and no later than noon on Friday, 15 January 2021, with such date to be notified to shareholders through ASX.

The sitting Panel was Robin Bishop (sitting President), John McGlue and Neil Pathak.

The Panel will publish its reasons for the decision in due course on its website www.takeovers.gov.au.

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Australian Government

Takeovers Panel

ANNEXURE A

CORPORATIONS ACT SECTION 657A

DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

THORN GROUP LIMITED 01 & 02

CIRCUMSTANCES

1. Thorn Group Limited (**Thorn**) is an ASX listed company (ASX: TGA).
2. On 11 May 2020, Thorn's largest shareholder, Somers Limited and its associates (**Somers**), gave a substantial holder notice disclosing that it had voting power in Thorn of 30.57%.
3. On 6 July 2020, Thorn's second largest shareholder, Forager Funds Management Pty Ltd (**Forager**), being the investment manager of Forager Australian Shares Fund who at that time held 15.41% of Thorn, wrote to the directors of Thorn expressing a strong desire for Thorn to return capital to its shareholders and for Thorn to appoint another independent director noting that the existing Board had a majority of non-independent directors.
4. On 23 July 2020, Forager wrote to Thorn's directors repeating its earlier request for a capital return. Forager stated that it had conversations with Somers and that its understanding was that Somers "*sees a future in Thorn's equipment finance division and would like to see capital committed to that business once an appropriate strategy can be agreed upon*". Forager stated in effect that if this was to be the case, the Thorn Board should consider all available options for restructuring the business.
5. On 31 July 2020, Thorn announced that it held \$54.1 million of free cash as at 30 June 2020.
6. On 3 August 2020, a shareholder of Thorn, Vaspip 2 Pty Ltd (**Vaspip**), requested a copy of Thorn's share register stating:

"The reason for this request is so that we can contact existing shareholders to discuss the possibility of gathering enough shareholder support for a requisition of a general meeting... The aim of calling a general meeting would be to remove the majority of directors and to simply wind the business up and return all surplus capital to shareholders."

7. Prior to the meeting of the Thorn Board on 4 August 2020, Thorn's then CFO gave Board members a paper entitled "Options for solving a future TGA share register" that began:

"Problem

'One shareholder' at least would like to invest in the future of TGA with the two Mark 2 business options and potential future other options, but some other shareholders do not and would like their money back out of TGA.

How do we solve for every shareholder?"

8. On 19 August 2020, at Thorn's annual general meeting, the Chair of Thorn stated in his address to shareholders:

"Whilst I am unable to provide any reliable estimate of timing, we are hoping to be in a position to place before shareholders as early as possible, plans for further major restructuring of the group for your consideration."

9. On 28 August 2020, Thorn received a section 203D² notice of intention to propose resolutions for the removal of 3 of Thorn's then 4 directors³ from a group of Thorn shareholders, including Vaspip, holding just over 5% of Thorn's issued capital (the **Requisitioning Shareholders**).

10. On 31 August 2020, Thorn received from the Requisitioning Shareholders a section 249D request to call a general meeting of Thorn shareholders to consider the resolutions and a section 249P request to give Thorn shareholders a members' statement in relation to the proposed resolutions.

11. On 7 September 2020, Somers' investment manager wrote to the Chair of Thorn, in that capacity⁴:

"I am acutely aware of the opposing strategic views of Thorn's major shareholders. As you are aware [the investment manager of Somers], on behalf of Somers Limited & at least one other shareholder have been discussing with the Company's Tax advisers on what the maximum fully franked dividend that Thorn could pay shareholders within the constraints of Thorn's existing capital structure. I understand that this is envisaged to be \$25m, subject to tax / legal sign off.

In addition to a franked dividend, the Board may want to consider the Company implementing a buy back in the form of tender offer, where shareholders can elect to sell their shares back to the company subject to a maximum price per share. I estimate that

² All statutory references are to the *Corporations Act 2001* (Cth), and all terms used in Chapters 6 to 6C have the meaning given in the relevant Chapter (as modified by ASIC)

³ The Requisitioning Shareholders were not seeking to remove the director appointed as an independent on 14 October 2019, who remains on the Board

⁴ The Chair of Thorn was also the Chair of Somers Limited

the Company could return an additional \$25m to shareholders in the form of a buy back, given the Company's current cash on hand and liabilities...

If a dividend of A\$25m was to be paid then Somers will receive approximately A\$7.6m. Somers would be prepared to lend these funds to Thorn in order for the Company to complete a A\$25m share buyback..."

A copy of this letter was provided to the Board on 8 September 2020.

12. On 16 September 2020, Thorn announced that, having taken advice, it considered that the Requisitioning Shareholders' requests were invalid.
13. On 23 September 2020, Vaspip (one of the Requisitioning Shareholders) commenced proceedings in the Supreme Court of Victoria seeking orders for Thorn to call the general meeting and distribute the members' statement and in further submissions filed on 29 September 2020 sought relief from any alleged invalidity in its section 249D request under sections 1322(2) and (4).
14. On 12 October 2020, Thorn announced that:
 - (a) the Thorn Board had declared a fully franked special dividend of \$0.075 cash per share (totalling approximately \$24.2 million) (**Special Dividend**)
 - (b) Thorn's dividend reinvestment plan (**DRP**) will apply to the Special Dividend with Thorn shares issued at a discount of 2.5% to the volume weighted average price per Thorn share traded over the five day trading period ending on 27 October 2020 and the last day for elections under the DRP being 20 October 2020 and
 - (c) *"In addition to the Special Dividend, the Thorn Board has also been considering, and continues to consider, Thorn's ability to undertake a buy back of Thorn shares for an amount in the order of \$15 to 25 million.*
...
It is the present intention of Thorn's Board to, in January 2021, seek shareholders' approval for the terms of an off-market buy back of Thorn shares, subject to there being no material change in Thorn's circumstances and to Thorn receiving all necessary regulatory approvals and/or authorisations including from the Australian Securities Exchange, the Australian Securities & Investments Commission and the Australian Taxation Office. The exact size of the buy back will be announced when the proposal is finalised, which is presently expected to be in December 2020."
15. On 14 October 2020, the Supreme Court of Victoria declared that, pursuant to section 1322(2), the Requisitioning Shareholders' requests were not invalid by reason of procedural irregularity.
16. On 28 October 2020, Thorn called an extraordinary general meeting in response to the Requisitioning Shareholders' section 249D request scheduled to be held on 3 December 2020.

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17. On 3 November 2020, Thorn paid the Special Dividend and issued shares under the DRP. The total number of Thorn shares issued under the DRP was 60,764,233.
 18. On 5 November 2020, Somers gave a substantial holder notice disclosing that its voting power in Thorn had increased to 39.42%. The substantial holder notice disclosed that Somers had acquired additional voting power in Thorn of approximately 0.99% prior to the issue of shares under the DRP. Under the DRP, Somers received 49,241,938 Thorn shares.
 19. At the time Thorn made its announcements on 12 October 2020, paid the Special Dividend and issued shares under the DRP, Thorn's Board consisted of 3 directors, only one of whom was considered independent by Thorn. The other 2 directors were nominated to act as directors by Somers, and the Chair of Thorn is also the Chair of Somers Limited.

EFFECT

20. At the time of Thorn's 12 October 2020 announcements there was no disclosure of any further major restructuring.
21. The size of the Special Dividend meant that the total potential number of shares that could be issued under the DRP represented approximately 36% of Thorn's market capitalisation.
22. Given the following combination of factors:
 - (a) the size of the Special Dividend relative to Thorn's market capitalisation and previous dividends paid by Thorn (which had not announced a dividend since 23 November 2017)
 - (b) the known or likely preferences of Thorn's substantial shareholders
 - (c) the short period of time given to shareholders to make an election to participate in the DRP
 - (d) the uncertainty regarding Thorn's plans for further major restructuring
 - (e) the lack of disclosure regarding any control effects of the DRP and the response, or likely response, of Thorn's substantial shareholders to the DRP and
 - (f) the potential effect of a large number of newly issued shares on voting at a general meeting requisitioned to replace the Board six weeks before the Special Dividend was announced,

the Panel considers that it was apparent that the DRP had the potential to have a substantial effect on control of Thorn in a manner inconsistent with the purposes in section 602.

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23. Thorn did not adequately consider the potential control effects of applying the DRP to the Special Dividend or whether those potential effects were consistent with the purpose of the exemption in item 11 of section 611.
 24. Thorn did not adequately consider the potential conflicts of interest of the Thorn Board when considering the potential control effects of the matters announced in Thorn's 12 October 2020 announcement.
 25. The Panel considers that the effect of applying the DRP to the Special Dividend in the circumstances was likely to have an effect on control and result in Somers acquiring a substantial interest in Thorn:
 - (a) in a market that was not sufficiently efficient, competitive and informed and
 - (b) where shareholders did not have a reasonable time to consider the DRP and its likely effect and were not given enough information to assess its merits.

CONCLUSION

26. It appears to the Panel that the circumstances are unacceptable circumstances:
 - (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:

the control, or potential control, of Thorn or

the acquisition, or proposed acquisition, by a person of a substantial interest in Thorn
 - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602.
27. 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 Thorn.

Tania Mattei
Counsel
with authority of Robin Bishop
President of the sitting Panel
Dated 17 December 2020



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Takeovers Panel

ANNEXURE A
CORPORATIONS ACT
SECTION 657D
ORDERS

THORN GROUP LIMITED 01 & 02

The Panel made a declaration of unacceptable circumstances on 17 December 2020.

THE PANEL ORDERS

1. On 23 December 2020:
 - (a) 41,258,262 of the 46,251,055 DRP Shares issued by Thorn to Somers as beneficial owner, are cancelled
 - (b) Thorn must pay to Somers the sum of \$6,341,394.87, being its Special Dividend entitlement in cash in lieu of the DRP Shares cancelled by Order 1(a)
 - (c) 2,668,018 of the 2,990,883 DRP Shares issued by Thorn to Ingot as beneficial owner, are cancelled and
 - (d) Thorn must pay to Ingot the sum of \$410,074.37, being its Special Dividend entitlement in cash in lieu of the DRP Shares cancelled by Order 1(c).
2. From the date of these orders until completion of the Cancellation Actions, neither Somers nor any of its associates may:
 - (a) dispose of, transfer or grant any security interest over any DRP Shares or any interests in the DRP Shares, or agree to any such disposal, transfer or grant or
 - (b) exercise any voting rights attaching to the DRP Shares.
3. Thorn must as soon as practicable after completion of the Cancellation Actions, release on the ASX market announcements platform, an announcement which states that:
 - (a) 41,258,262 of the 46,251,055 DRP Shares issued to Somers as beneficial owner, have been cancelled and

- (b) 2,668,018 of the 2,990,883 DRP Shares issued to Ingot as beneficial owner, have been cancelled.
4. Thorn must resume the Adjourned Extraordinary General Meeting on or after Monday, 4 January 2021 and in any event by no later than noon on Friday, 15 January 2021 with such date to be notified by Thorn to shareholders through the ASX market announcements platform as soon as reasonably practicable after the date of these orders.
5. In these orders the following terms apply:

Adjourned Extraordinary General Meeting	means the adjourned 3 December 2020 extraordinary general meeting as announced by Thorn on 3 December 2020
Cancellation Actions	the actions specified in order 1
DRP	the dividend reinvestment plan of Thorn
DRP Shares	the shares issued under the DRP in respect of the Special Dividend to Somers as beneficial owner and Ingot as beneficial owner
Ingot	Ingot Capital Investments Pty Ltd
Somers	Somers Limited
Special Dividend	the fully franked special dividend of \$0.075 per share announced by Thorn on 12 October 2020
Thorn	Thorn Group Limited

Tania Mattei
Counsel
with authority of Robin Bishop
President of the sitting Panel
Dated 17 December 2020