



Australian Government

Takeovers Panel

**Reasons for Decision
Auris Minerals Limited
[2018] ATP 7**

Catchwords:

Association – substantial holding disclosure – effect on control – efficient, competitive and informed market – decline to conduct proceedings

Corporations Act 2001 (Cth), sections 12(2)(c), 249D, 602, 606, 656A, 657A, 659AA, 659B, 659C, 671B, 1317B, 1317C(gb) and Chapters 6, 6C

ASIC Regulatory Guide 5: Relevant interests and substantial holding notices, ASIC Regulatory Guide 128: Collective action by investors

Echo Resources Limited [2015] ATP 8, Dragon Mining Limited [2014] ATP 5, Mount Gibson Iron Limited [2008] ATP 4

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

INTRODUCTION

1. The Panel, Tracey Horton AO, Richard Hunt (sitting President) and Bill Koeck, declined to conduct proceedings on an application by Auris Minerals Limited in relation to its affairs. The application concerned alleged association between several shareholders in the context of a requisitioned general meeting and the accuracy of substantial holding notices. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.
2. In these reasons, the following definitions apply.

Auris	Auris Minerals Limited
Investmet	Investmet Limited, Hades Corporation (WA) Pty Ltd and Delta
Requisitioning Shareholders	Resource Management Pty Ltd
Mandevilla	Mandevilla Pty Ltd, Riverview Corporation Pty Ltd, All-States
Requisitioning Shareholders	Finance Pty Limited and Capretti Investments Pty Ltd
March 2017 JV Proposal Proponents	Persons connected with a proposal received by Auris on 27 March 2017 in relation to entering into a joint venture for the majority of Auris' assets
Requisition Meeting	the general meeting of Auris shareholders convened in response to the s249D Notice and scheduled for 20 April 2018

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s249D Notice the request for general meeting of shareholders of Auris pursuant to section 249D¹ signed by the Mandevilla Requisitioning Shareholders and received by Auris on 22 February 2018

Westgold Westgold Resources Limited

FACTS

3. Auris is an ASX listed company (ASX code: AUR). Its principal activity is exploring for gold and base metals at the Grosvenor Project in Western Australia's Bryah Basin.
4. On 22 February 2018, Auris received the s249D Notice from the Mandevilla Requisitioning Shareholders proposing resolutions for:
 - (a) the removal of Ms Bronwyn Barnes and Dr Susan Vearncombe as directors of Auris and
 - (b) the election of Mr Neville Bassett and Mr Brian Thomas as directors of Auris.
5. On 23 February 2018, the Mandevilla Requisitioning Shareholders gave a Form 603 Notice of initial substantial holder indicating that the Mandevilla Requisitioning Shareholders became substantial holders on 21 February 2018 and held voting power of 5.72%.
6. On 7 March 2018, Auris received a request for general meeting of shareholders of Auris pursuant to section 249D, signed by the Investmet Requisitioning Shareholders and proposing a resolution for the removal of Mr Rob Martin as a director of Auris.
7. On 12 March 2018, the Mandevilla Requisitioning Shareholders gave a Form 604 Notice of change of interests of substantial holder, which the applicant submitted disclosed some, but not all, of the interests in Auris held by Mr Martin.
8. On 14 March 2018, Mr Martin and his related entities gave a Form 604 Notice of change of interests of substantial holder, disclosing a change due to an “*association pursuant to section 12(2)(c) ... by reason of shareholders proposing to act in concert in relation to resolution proposed pursuant to section 249D of the Corporations Act to remove Robert Paul Martin as director of the company*”.

APPLICATION

Declaration sought

9. By application dated 29 March 2018, Auris sought a declaration of unacceptable circumstances.
10. Auris submitted that the substantial holder notices given by the Mandevilla Requisitioning Shareholders failed to disclose:
 - (a) all of the interests in Auris held by Mr Martin and

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)

- (b) the interests of all associates of the Mandevilla Requisitioning Shareholders – Auris submitted that the March 2017 JV Proposal Proponents were associated with the Mandevilla Requisitioning Shareholders.

11. Auris submitted that the effect of the circumstances was that:

- (a) the resolutions proposed to be considered at the Requisition Meeting would give the Mandevilla Requisitioning Shareholders control of Auris and
- (b) there was a breach of section 671B regarding the accuracy of substantial holding notices,

which meant that trading in Auris shares had not taken place in an efficient, competitive and informed market.

Orders sought

12. Auris sought interim and final orders that:

- (a) the Mandevilla Requisitioning Shareholders and their associates be restrained from exercising any voting rights at the Requisition Meeting
- (b) the Mandevilla Requisitioning Shareholders and their associates provide immediate and complete disclosure of all holdings and associations and
- (c) parties who did not disclose their shareholding prior to 9 March 2018 be ordered to vest their shares in ASIC.

DISCUSSION

13. Auris submitted that there were undisclosed associations between the Mandevilla Requisitioning Shareholders and the March 2017 JV Proposal Proponents arising from:²

- (a) a shared goal or purpose – *“the March 2017 JV Proposal Proponents were acting in concert with each other in connection with the affairs of Auris given the participation of all of them in a jointly developed and promoted transaction”*
- (b) structural links – *“the acting in concert continues given the commonality or relationships that exist between the Mandevilla Requisitioning Shareholders and the March 2017 JV Proposal Proponents”* and
- (c) one of the March 2017 JV Proposal Proponents engaging in action that was uncommercial (that action being to drive the March 2017 proposal without being paid by Auris).

14. The Mandevilla Requisitioning Shareholders provided preliminary submissions to the effect that (amongst other things) Auris relied on events and correspondence occurring in early 2017 in relation to a proposed transaction that did not proceed in alleging association and that Auris provided no evidence of an association between some of the March 2017 JV Proposal Proponents (including Westgold) and the Mandevilla Requisitioning Shareholders.

² Referring to ASIC Regulatory Guide 5: Relevant interests and substantial holding notices at [5.138]

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15. Westgold submitted that:
 - (a) there was no evidence provided in the application that there was an association between it and the Mandevilla Requisitioning Shareholders in connection with the s249D Notice and denied the assertion that it and the Mandevilla Requisitioning Shareholders were associated and
 - (b) the application erroneously asserted that there was no commercial basis for the waiver or release by Westgold of then existing pre-emptive rights over Auris' tenements – it indicated that the consideration received for those rights, as well as a concurrent tenement package sale, was part of a commercial transaction between Westgold and Auris.
16. Mr Martin submitted that he and his related entities are only associated with the Mandevilla Requisitioning Shareholders pursuant to section 12(2)(c) by reason of shareholders proposing to act in concert in relation to the resolution proposed to remove him as a director of Auris, as disclosed in the Form 604 he gave on 14 March 2018.
17. Mr Martin further accepted in a preliminary submission that he made an oversight in relation to the disclosure of his voting power in Auris and informed the Panel that he would give an updated Form 604 and Appendix 3Y in relation to his interests.³
18. As it was accepted by the Mandevilla Requisitioning Shareholders that the Mandevilla Requisitioning Shareholders were associates⁴ and that Mr Martin became an associate of the Mandevilla Requisitioning Shareholders in connection with the Requisition Meeting,⁵ the central issue raised by the applicant is therefore whether the Mandevilla Requisitioning Shareholders are associates of the March 2017 JV Proposal Proponents.
19. While we agree with Auris that investors concerned about common issues may become associates for the purposes of substantial holding provisions,⁶ the Panel's starting point is that it is for the applicant to demonstrate a sufficient body of probative material to support the Panel conducting proceedings as to an alleged association.⁷ As the Panel has limited investigatory powers, before we decide to conduct proceedings, *"an applicant must do more than make allegations of association and rely on us to substantiate them"*.⁸

³ On 5 April 2018 the Mandevilla Requisitioning Shareholders gave a Form 604 updating their substantial shareholder notice disclosure, including in relation to Mr Martin's voting power. On 9 April 2018 Mr Martin lodged an amended Appendix 3Y correcting his previous disclosure.

⁴ The Mandevilla Requisitioning Shareholders made disclosure to this effect – see paragraph 5

⁵ Both Mr Martin and the Mandevilla Requisitioning Shareholders made disclosure to this effect – see paragraphs 7 and 8

⁶ See ASIC Regulatory Guide 128: Collective action by investors (RG 128) at [128.7]. This may be the case, for example, where shareholders seek to change the composition of the board for the purpose of facilitating their plans for the company: see RG 128 at [128.48]

⁷ *Mount Gibson Iron Limited* [2008] ATP 4 at [15]

⁸ *Dragon Mining Limited* [2014] ATP 5 at [58]-[60]

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20. As a practical matter it may be more difficult for an applicant to demonstrate a sufficient body of probative material where it is alleged that a large number of parties have recently commenced acting in concert. In such cases, if there is an association and it continues, it may well become easier over time to demonstrate patterns of conduct or other material to satisfy that requirement. Where that is the case, shareholders or ASIC may seek to apply to the Panel again.
21. In this matter, Auris pointed to material suggesting that:
 - (a) the March 2017 JV Proposal Proponents were connected in March 2017 in relation to a joint venture proposal and
 - (b) there are structural links between some of the Mandevilla Requisitioning Shareholders and some of the March 2017 JV Proposal Proponents.
22. The application indicated that, in aggregate, the March 2017 JV Proposal Proponents and the Mandevilla Requisitioning Shareholders accounted for 17.17% of Auris shares as at 22 March 2018. Auris referred to claims by one of the March 2017 JV Proposal Proponents to “*represent the largest group of shareholders*” and submitted that the Investmet Requisitioning Shareholders claimed he had said to other shareholders that he could control 35% of votes at a meeting of Auris. In our view, however, Auris did not provide any probative material suggesting that the alleged associations involved an aggregation of voting power above 20% or a breach of section 606. Rather, the application focused on alleged contravention of the substantial holding notice requirements of Chapter 6C and the effect of that on the Requisition Meeting.
23. A contravention of Chapter 6C clearly can give rise to unacceptable circumstances.⁹ But in deciding whether that is likely to be the case we need to have regard to, among other things, the purposes in section 602, the provisions of Chapter 6 and, more broadly, the role Parliament intended the Panel to perform.¹⁰
24. If Auris had provided probative material suggesting that a contravention of Chapter 6C was likely, we would have been minded to conduct proceedings and enquire further. That may also have been the case if Auris had provided material suggesting there was likely to be an association, potentially relevant to control, involving more than transient agreement on matters to be considered at the Requisition Meeting.
25. Accordingly we are not satisfied that the application justifies the Panel making further enquiries as to the alleged association between the Mandevilla Requisitioning Shareholders and the relevant March 2017 JV Proposal Proponents,¹¹ beyond that which has already been disclosed.

⁹ Section 657A(2)(c) (referring to contraventions of Chapter 6C)

¹⁰ We note, for example, that there is no takeover bid on foot or proposed and accordingly this is not a dispute that Parliament intended the Panel to be the “main forum” to resolve (see sections 659AA, 659B and 659C). We note also that when ASIC relevantly modifies Chapter 6C (although there was no suggestion of that in this matter), any appeal would lie to the Administrative Appeals Tribunal, not to the Panel: see sections 656A(1)(b), 1317B and 1317C(gb)

¹¹ See *Echo Resources Limited* [2015] ATP 8 at [35] and *Dragon Mining Limited* [2014] ATP 5 at [60]

DECISION

26. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).
27. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any interim or final orders.

Richard Hunt

President of the sitting Panel

Decision dated 5 April 2018

Reasons given to parties 16 April 2018

Reasons published 17 April 2018

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Advisers

Party	Advisers
Auris Minerals Limited	Dentons
Mandevilla Pty Ltd, Riverview Corporation Pty Ltd, All-States Finance Pty Limited and Capretti Investments Pty Ltd	Bennett & Co
Investmet Limited, Hades Corporation (WA) Pty Ltd and Delta Resource Management Pty Ltd	Squire Patton Boggs
Westgold Resources Limited	HopgoodGanim
Mr Robert Martin	DLA Piper