

Takeovers Panel

Reasons - A S P Aluminium Holdings Pty Ltd 02R [2023] ATP 9

Controllers	Ms Lolita Younes, Mr Paul Nakhle ² and Mr Louis Hanna ³
Controlling Shareholders	the Controllers, Lalspec, Lolita Investments, Michael Three, Michael Four and Youla Holdings
Cooper Transfers	has the meaning given to that term in paragraph 17
Court Proceedings	has the meaning given to that term in paragraph 18
Lalspec	Lalspec Pty Ltd
Lalspec Acquisitions	has the meaning given to that term in paragraph 12
Lolita Investments	Lolita Investments Pty Limited
Michael Four	Michael Four Pty Ltd
Michael Three	Michael Three Pty Ltd
Millard Entities	Mr Michael Millard, Ms Lolita Younes, Lolita Investments, Lalspec, Youla Holdings, Michael Three and Michael Four
November 2020 Acquisitions	has the meaning given in paragraph 41
Sale Shares	has the meaning given in paragraph 25(a)
Seller Shareholders	has the meaning given in paragraph 16
Valuation Report Excerpt	has the meaning given in paragraph 15
Villefranche	Villefranche Investments Pty. Limited, as trustee of the Gates Family Trust
Villefranche Transfers	has the meaning given to that term in paragraph 17
Youla Holdings	Youla Holdings Pty Ltd

FACTS

3. The facts are set out in detail in the initial Panel's reasons for decision in *A S P Aluminium Holdings Pty Ltd*⁴. Below is a summary.
4. ASP is a proprietary company limited by shares which had 51 shareholders as at the date of the initial application. In the past, ASP has at times had less than 51 shareholders.⁵ The net asset value of the ASP group as at 30 June 2022 was \$175.78 million (approximately \$640 per ASP share).
5. ASP is governed by a constitution which contains restrictions on transfers of securities including pre-emptive rights which apply where shares are sold or

² Mr Nakhle is the current CEO of Alspec and a director of ASP

³ Mr Hanna is a partner of KPMG and an adviser to ASP

⁴ [2023] ATP 8

⁵ See paragraph 42 of the initial Panel's reasons

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transferred to entities other than family members or entities majority owned by the existing shareholder and family members.

6. Mr Michael Millard is the principal founder of ASP and is 87 years of age. Mr Millard is married to Ms Lolita Younes. Mr Millard and Ms Younes have been in a relationship since 2010 and married since 2017.
7. ASP Staff is a wholly owned subsidiary of ASP and is the trustee of the Alspec Employee Share Trust, a trust established in or around late 2020 to hold securities on behalf of ASP employees and their associates as part of their employee incentive arrangements from time to time.
8. ASP and ASP Staff are controlled by Ms Younes and her controlled entities. Ms Younes is a director of ASP and a director and company secretary of ASP Staff.
9. Villefranche, is the second largest shareholder of ASP holding 46,834 shares representing 17.02% of the ASP shares on issue. Villefranche has been a longstanding ASP shareholder; its shareholding was originally associated with one of the founding shareholders Mr Daryl Gates (dec.).
10. In late 2020, Mr Millard, through four different entities, controlled 50.73% of the ASP shares. Through a series of transactions which occurred between November 2020 and March 2021, those ASP shares were transferred to Michael Three (13.34%) and Michael Four (37.39%).
11. On 25 March 2021, Lalspec was incorporated. All of the shares in Lalspec are held by Lolita Investments as trustee for The Lolita Discretionary Trust. Ms Younes is the sole director and secretary of Lolita Investments and Lalspec, respectively, and is the appointor and principal beneficiary under The Lolita Discretionary Trust.
12. On 26 March 2021, Lalspec acquired all of the shares in Michael Three and Michael Four (**Lalspec Acquisitions**).
13. ASP and ASP Staff are associates of Lolita Investments, Lalspec, Michael Three, Michael Four and Youla Holdings (and vice versa) under section 12(2)(a)(iii)⁶ because they are all controlled by Ms Younes. Accordingly:
 - (a) ASP and ASP Staff appear to have:
 - (i) voting power in 100% of the shares in those companies (under section 610) and
 - (ii) the same relevant interests in ASP shares as those companies (under section 608(3)(a)) and

⁶ 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)

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- (b) Lolita Investments, Lalspec, Michael Three, Michael Four and Youla Holdings similarly appear to have the same relevant interests in ASP shares as ASP Staff.
14. On or about 18 March 2021, ASP sent a letter to ASP shareholders providing an update in relation to a range of matters and enclosing a “short survey questionnaire” to gauge ASP shareholders’ interest in selling their ASP shares to ASP and, if so, whether they would be willing “to accept a price as determined by a properly qualified independent expert”.
 15. On or about 6 April 2022, ASP sent a further letter to ASP shareholders attaching an excerpt from a valuation report from Lonergan Edwards & Associates Limited (**Valuation Report Excerpt**). The Valuation Report Excerpt stated (among other things) the “application of [Lonergan Edwards’] adopted discount range indicates a value of the issued shares in Alspeg on a minority interest basis as at 30 June 2021 in the range of \$550 to \$580 per share”.
 16. In response to these letters, various ASP shareholders had conversations with the Chairman of ASP, Mr Robert Barraket, about selling their ASP shares. Following those discussions, various ASP shareholders offered their ASP shares for sale under the pre-emptive rights provisions in ASP’s constitution at prices ranging from \$300 to \$650 per share. Between 2 July 2021 and 18 August 2022, 16 of these shareholders (**Seller Shareholders**) sold their shares to ASP Staff at prices ranging from \$300 to \$400 per share (**ASP Staff Acquisitions**). As a result of the ASP Staff Acquisitions (and acquisitions by Villefranche), the number of shareholders in ASP was reduced from 68 to 51 and ASP Staff increased the percentage of voting shares in ASP it held from 5.90% to 8.96%.
 17. On 11 October 2022, ASP advised Villefranche’s advisers that the Board of ASP had refused to register two transfers of ASP shares which had been sent to ASP for registration, each involving Villefranche and agreed in April 2022 (**Cooper Transfers**) and September 2022 (**Villefranche Transfers**) respectively.
 18. On 23 December 2022, following extensive correspondence between the solicitors for Villefranche and ASP concerning a range of issues, Villefranche commenced court proceedings against ASP to inspect and make copies of books⁷ and against Lolita Younes, Lolita Investments and Lalspec for preliminary discovery⁸ (**Court Proceedings**). The Court Proceedings were discontinued against Lolita Younes, Lolita Investments and Lalspec on 10 February 2023, and discontinued against ASP on 14 April 2023, in each case following the provision of documents by the relevant parties.
 19. On various dates during April 2023, ASP notified its shareholders that a further 13 shareholders had offered their shares for sale under the pre-emptive rights provisions under ASP’s constitution. Eleven of those offers are within the price

⁷ pursuant to section 247A

⁸ pursuant to rule 5.3 of the *Uniform Civil Procedure Rules 2005* (NSW)

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range of \$375-\$400, which is the price range ASP Staff paid for the ASP Staff Acquisitions. These offers were open for acceptance from 12 May 2023.

20. On 2 May 2023, Villefranche made an application seeking a declaration of unacceptable circumstances. Villefranche submitted (among other things) that:
- (a) the Lalspec Acquisitions and the ASP Staff Acquisitions have resulted in contraventions of section 606(1)
 - (b) ASP, Ms Younes and others have attempted to reduce the number of shareholders in ASP to 50 or below so that the takeover provisions no longer apply to ASP, including by refusing to register the Cooper Transfers and the Villefranche Transfers and
 - (c) material price sensitive information in relation to ASP was withheld by ASP and ASP Staff from ASP shareholders at a time when ASP Staff acquired shares from ASP shareholders.
21. The initial Panel declined to make a declaration of unacceptable circumstances. In a media release dated 26 May 2023, the Panel stated that it considered (among other things) that:
- (a) *“the alleged contraventions of section 606 of the Corporations Act 2001 (Cth) raised questions of law and contested factual matters that the Panel considered more appropriate for a court to resolve*
 - (b) *the Panel was not satisfied that on balance the allegations not involving contraventions were necessarily unacceptable in all of the circumstances*
 - (c) *some significant matters that were alleged to comprise or form part of the unacceptable circumstances occurred some time ago*
 - (d) *it would be difficult for the Panel to fully investigate the allegations and contested factual issues*
 - (e) *if unacceptable circumstances were found to have occurred, it would be difficult to provide a suitable remedy in all of the circumstances and*
 - (f) *the applicant appears to have other forums available to it (including the courts) where its claims may be more appropriately ventilated.”*⁹

APPLICATION

22. On 30 May 2023, Villefranche requested the substantive President’s consent to apply for a review of the decision by the initial Panel in *A S P Aluminium Holdings Pty Ltd*¹⁰ pursuant to section 657EA. Villefranche included as part of this request a further request that, should the President provide consent to allow Villefranche to apply for

⁹ See TP23/21

¹⁰ [2023] ATP 8

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review, the President extend the interim orders dated 11 May 2023¹¹ granted in the initial proceedings until the determination of the review proceedings.¹²

23. On the same day, the Acting President granted his consent to the review of the decision, noting (among other things) the seriousness of the allegations made in the initial proceedings and that it did not appear that there would be material prejudice to any party by providing such consent. The Acting President also decided to grant the interim orders requested (see Annexure A) to maintain the status quo, noting that absent those interim orders there was potential for ASP to be removed from the ambit of Chapter 6¹³.
24. With the Acting President's consent, Villefranche made its review application on 30 May 2023 submitting (among other things) as follows:
- (a) *"The Applicant considers that the Initial Panel Decision raises serious questions in respect of the jurisdiction of the Panel, how it should approach contested matters of law and fact and the extent to which the availability of other forums for relief should be a relevant consideration for the Panel in determining whether to make a declaration of unacceptable circumstances."*
 - (b) The initial Panel did not appear to consider whether, in the absence of being able to make a decision as to whether certain allegations that formed part of the initial application constituted a breach of section 606, those circumstances in any event gave rise to unacceptable circumstances, and it appeared that the initial Panel may have been too concerned with requiring evidence that there was a breach of section 606 when it should have instead focused on the alleged conduct and its implications for ASP and the minority shareholders.
 - (c) The fact that an application raises contested matters of fact should not deter the Panel from exercising its jurisdiction; the Panel's jurisdiction is not defined by the availability or suitability of other forums to consider the matters the subject of the application.
 - (d) The Panel is entitled to draw inferences from the fact that questions asked by the Panel have not been answered or that facts alleged by one party have not been rebutted with any substantive evidence or analysis.
 - (e) While the Courts may have jurisdiction in respect of some of the issues raised by the initial application, the Courts do not have jurisdiction to make a declaration in respect of unacceptable circumstances and only have jurisdiction

¹¹ Which, in summary, prohibited ASP, ASP Staff and the Millard Entities (among others) from acquiring any shares in ASP and prohibited ASP from registering any transfers of shares in ASP, without the Panel's consent

¹² The initial Panel had received undertakings on behalf of ASP and ASP Staff and the Millard Entities that they would continue to observe the interim orders dated 11 May 2023 for a further two business days from the date of the initial Panel's decision (being the time period in which a review application may be made)

¹³ For example, completion of the offers referred to at paragraph 19 could result in ASP no longer having more than 50 shareholders – see section 602(a)(i)

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in respect of contraventions of Chapter 6, not the broader policy-based jurisdiction of the Panel.

25. Villefranche sought the final orders it had sought in the initial application, which included (in summary) that:
- (a) the Controlling Shareholders and ASP Staff must not dispose of the shares in ASP held by them that, in aggregate when taken together with the shares in ASP held by the other Controlling Shareholders and ASP Staff, exceed 3.79% of the shares in ASP (**Sale Shares**) (representing approximately 61.81% of the issued share capital)
 - (b) the Controlling Shareholders and ASP Staff must not exercise any voting rights in respect of the Sale Shares and, if any voting rights are exercised, they must be disregarded by ASP
 - (c) the Sale Shares be vested in the Commonwealth for sale by ASIC
 - (d) the Controlling Shareholders, ASP Staff, Mr Millard and their respective associates be prohibited from acquiring any Sale Shares and
 - (e) the Cooper Transfers and the Villefranche Transfers be registered by ASP as soon as possible.
26. Villefranche also sought an alternative order to the effect that ASP must within 4 months make an offer to buy-back the shares of all ASP shareholders other than the Controlling Shareholders and ASP Staff in accordance with section 257A and ASIC Regulatory Guide 110, at a price to be determined by an independent expert appointed by ASIC (**Buy-back Order**).

DISCUSSION

27. We have considered all the materials, but address specifically only those we consider necessary to explain our reasoning.

Decision to conduct proceedings

28. The powers of a review Panel are set out in section 657EA. Subsection (4) provides that a review Panel has the same powers to make a declaration or orders as the initial Panel and may vary or set aside the decision reviewed or substitute a new decision. It may also affirm the decision reviewed after conducting proceedings or decline to conduct proceedings and allow the initial Panel's decision to stand.
29. The role of a review Panel is to conduct a de novo review.¹⁴
30. Having considered all the materials which the initial Panel had when it decided not to make a declaration of unacceptable circumstances, the initial Panel's reasons for making its decision and the review application, we decided to conduct proceedings and communicated this to the parties on 13 June 2023.

¹⁴ *Benjamin Hornigold Limited 08R, 10R & 11R* [2019] ATP 22 at [11] and *Eastern Field Developments Limited v Takeovers Panel* [2019] FCA 311 at [187]

Initial Panel’s conclusions and reasons

31. We generally agree with the conclusions of the initial Panel, and the reasons given for those conclusions, and adopt the initial Panel’s reasons subject to our comments set out below.

Lalspec Acquisitions

32. In the initial proceedings, the Millard Entities submitted that there was no contravention of section 606(1) as alleged in relation to the Lalspec Acquisitions because (in summary) Ms Younes had a relevant interest in the ASP shares prior to the Lalspec Acquisitions, and that Mr Millard and Ms Younes were associates in relation to ASP prior to the Lalspec Acquisitions because they had a common understanding that they would work together to control both the composition of ASP’s board and the conduct of ASP’s affairs.¹⁵
33. Paragraph 41 of the initial Panel’s reasons states as follows:
- “...Villefranche’s arguments do not explain why a relationship of association between Ms Younes and Mr Millard could not have resulted in each of them having voting power above 20% in entities through which the other held ASP shares, giving each of them the same relevant interests as those entities under section 608(3)(a). If that were the case, section 610(3) would not apply.”*
34. In the review proceedings, Villefranche submitted that the onus for establishing a relevant relationship of association and the existence of a relevant interest is more appropriately placed on the Millard Entities, and that the Millard Entities failed to provide any evidence that Lalspec was an associate of Mr Millard from its incorporation.
35. Villefranche also submitted it is very unlikely that Mr Millard and Ms Younes were associates in 2010 and the initial Panel was overreaching, based on the evidence it had before it, to suggest that that may have been the case, particularly as no evidence was presented about the relationship in 2010 that demonstrated any association.
36. As part of their rebuttals, the Millard Entities submitted (in summary) that Ms Younes and the entities controlled by her had a relevant interest in the ASP shares held by Mr Millard and the entities controlled by him, and that this relevant interest arose as a result of *“long-standing arrangements between them to jointly exercise the power to control the exercise of rights to vote attached to the securities held by each, and the power to control the disposal of those securities”* which were entered into well before the Lalspec Acquisitions.
37. We consider that it would be difficult for us to find material to rebut both the existence of a relationship of association between Mr Millard and Ms Younes and a relevant interest on the part of Ms Younes prior to the occurrence of the Lalspec Acquisitions. Having regard to all the circumstances including the significant time that has elapsed since the occurrence of relevant events, we have decided not to investigate this aspect of the matter further. We agree with the initial Panel’s view that the alleged contraventions regarding the Lalspec Acquisitions would be more

¹⁵ See paragraphs 37 and 39 of the initial Panel’s reasons

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appropriate for a court to resolve for the reasons it stated.¹⁶ We are also not satisfied on the materials before us that the Lalspec Acquisitions were otherwise unacceptable in the circumstances.

38. Further, as noted above, ASP's constitution contains pre-emptive rights provisions.¹⁷ Notably, clause 9.3(a)(1) of the constitution contains an exception such that any shareholder is entitled to sell or transfer their shares to members of their family including for example, their wife. Although the Lalspec Acquisitions did not involve the direct transfer of ASP shares (but rather the transfer of shares in entities at a level above ASP in the corporate structure), and hence were not covered by clause 9.3(a)(1) of ASP's constitution, we nevertheless consider the existence of this relatively broad constitutional provision recognising intra-familial transactions to be a relevant factor in our conclusion that the Lalspec Acquisitions were not unacceptable in the circumstances.
39. Villefranche further submitted that "*[i]n any event, it is clear that the incorporation of Lalspec still results in a breach of s 606*" and that this did not appear to have been considered by the initial Panel. We consider that it is unclear that there has been such a breach. In any event, in view of our conclusion above we do not consider that the incorporation of Lalspec in the specific circumstances of this matter was unacceptable.

ASP Staff Acquisitions

40. Villefranche submitted that the initial Panel did not address in its reasons the following matters relating to the ASP Staff Acquisitions:
- (a) that ASP Staff purchased significantly more shares for the employee share trust than genuinely required to incentivise ASP employees
 - (b) that ASP Staff used shareholder funds to make the ASP Staff Acquisitions and then used the shares to further the objectives of the Controlling Shareholder by exercising the voting rights attached to those shares in breach of the Employee Share Trust Deed
 - (c) that ASP Staff failed to answer some questions put to it in the initial proceedings including a question which required it to identify all persons involved in any communications with ASP shareholders that have sold their ASP shares since 1 July 2021, specifying what was communicated and when.
41. Villefranche also submitted that ASP Staff had on 4 November 2020 made acquisitions from shareholders other than the Seller Shareholders of 5.9% (in aggregate) of the shares of ASP (**November 2020 Acquisitions**) which may have been in breach of section 606, and that while the initial application did not rely on this alleged breach, it was raised in submissions¹⁸ and did not appear to have been addressed by the initial Panel.

¹⁶ See paragraph 46 of the initial Panel's reasons

¹⁷ These are extracted in Annexure A of the initial Panel's reasons

¹⁸ In the initial proceedings, ASIC submitted (among other things) that "*[i]f [ASP] was a Chapter 6 entity, the 4 November 2020 acquisitions may have amounted to a contravention of s606 unless an exception applies*"

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42. As part of its submissions, ASP stated as follows:

“...[M]any of the allegations are of the most serious and egregious kind: insider trading; breaches of trust; coercion and pressure against individual shareholders, many of whom are elderly, so as to ensure their entry into share sale transactions... As to the last of these allegations, of course, it should be noted that none of these individuals are parties to the Review Application, nor were they parties to the Initial Application. These are matters in which there is substantial factual dispute between the parties, and involving persons who are not party to these proceedings.”

43. In its rebuttals, Villefranche submitted:

“ASP has written to shareholders about these Panel proceedings on a number of occasions. It was open to any of those shareholders or any other interested person (although it is not clear there are other persons in this category who would not be well aware of the proceedings) not identified in the application to become a party to the proceedings”.

44. As part of its rebuttals, ASP also submitted that the November 2020 Acquisitions *“were carried out for a proper purpose to do with the settlement of litigation in the Supreme Court of Queensland which stemmed from the 2018 litigation”.*

45. While we had some concerns regarding the ASP Staff Acquisitions (i.e. acquisitions after 1 July 2021), we were not satisfied that further investigations were appropriate for the following reasons (among others), which we consider to be interrelated.

- (a) It appeared that in essence this matter was part of a broader longstanding dispute between Villefranche and the Millard Entities. As noted in ASP’s submissions, the Seller Shareholders, being the persons most directly affected by the ASP Staff Acquisitions, were not parties to the Panel proceedings. The circumstances of those acquisitions are disputed and we are reluctant to draw inferences in the absence of an indication of the views of Seller Shareholders regarding those acquisitions.
- (b) We also note that the ASP Staff Acquisitions occurred via a series of transactions, some of which occurred almost 2 years ago and raise contested factual issues.¹⁹ No affected Seller Shareholders had been prompted to come forward by the initial proceedings, or this appeal, and we doubted whether further process²⁰ would prompt a response. In the absence of an indication of concerns by Seller Shareholders, we do not consider it appropriate to investigate those issues, given that the Panel is required to act in a timely manner.²¹
- (c) Further, the ASP Staff Acquisitions concerned a relatively small quantum of shares, being approximately 3.06% of the voting power in ASP. We consider

¹⁹ Including, for example, the nature of the communications between ASP Staff or ASP (or their representatives) and each Seller Shareholder

²⁰ See ASIC Regulations 23, Procedural Guidelines 6(f)

²¹ See *Tinkerbell Enterprises Pty Limited as Trustee for The Leanne Catelan Trust v Takeovers Panel* [2012] FCA 1272 at [54] and ASIC Regulations 13(c), 16, Procedural Guidelines 2(b). A similar observation was made by the initial Panel at paragraph 46(b) of its reasons

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that this weighs against further investigation, particularly in the context of the existing holdings. We also note that, as observed by the initial Panel²², the ASP Staff Acquisitions may have been permitted under the creep exception in item 9 of section 611.

46. In relation to the November 2020 Acquisitions, significant time has elapsed since these occurred. For similar reasons to those noted above in relation to the Lalspec Acquisitions, we consider that whether the November 2020 Acquisitions involved a contravention of section 606 would be more appropriate for a court to resolve. As to whether the November 2020 Acquisitions were otherwise unacceptable, we accept ASP's submission as to the purpose of these transactions,²³ which is consistent with the letter from ASP to shareholders dated 18 March 2021. There was also material indicating that some shareholders (or their controllers) who sold their ASP shares in the November 2020 Acquisitions were former directors of ASP and that Villefranche was aware of the transactions at that time. In the circumstances, we considered it was not appropriate to make further enquiries into these transactions.

Other issues

Lack of suitable remedy

47. The initial Panel had serious concerns as to whether a divestiture order would have been an appropriate remedy in the circumstances of the matter.²⁴ We agree for the reasons given by the initial Panel.
48. As noted above, in the review application, Villefranche sought the Buy-back Order as an alternative order to the divestiture order. Had we been minded to make a declaration, we would similarly have had concerns as to whether the Buy-back Order was appropriate and capable of timely execution.

Status of ASP as a proprietary company

49. The initial Panel observed that the matter raised a policy question concerning how the Panel should exercise its powers and apply the purposes in section 602 to a proprietary company with more than 50 members, and noted (among other things) that it considered there may be circumstances or factors which justify the Panel approaching proprietary companies differently for the purposes of Chapter 6.²⁵ The initial Panel also made reference to ASP's status as a proprietary company in its conclusions on aspects of the matter.²⁶
50. Villefranche submitted that the initial Panel erred when it formed the view that proprietary companies should be held to a lower standard in terms of compliance with Chapter 6 and the principles in section 602, and that "[t]here is no basis for, and the circumstances and factors identified in the Reasons in respect of ASP do not justify, treating ASP as a proprietary company differently to any other company subject to Chapter 6 in respect of the circumstances set out in the Initial Application."

²² See paragraph 60 of the initial Panel's reasons

²³ See paragraph 44

²⁴ See paragraph 94 of the initial Panel's reasons

²⁵ See e.g. paragraphs 47-49 and 88-90 of the initial Panel's reasons

²⁶ See e.g. paragraphs 49, 62, 69 and 85 of the initial Panel's reasons

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51. Villefranche further submitted as follows:

“The primary guidance for the Panel in this respect is the law. It very clearly makes Chapter 6 applicable to ASP as a proprietary company with more than 50 shareholders. If Parliament had intended the statutory regime to apply in a different way to proprietary companies which do not have CSF shareholders but are subject to Chapter 6, it would have provided for it.”

52. In its rebuttals, the Millard Entities submitted that “... Villefranche’s submissions on this issue are confused and misconceived, and in particular to the extent that they attempt to conflate the application of the ‘black letter law’ provisions of Chapter 6 (such as section 606) with the exercise by the Panel of its discretion to make a declaration under section 657[A].”

53. As part of its submissions, ASIC submitted:

“...We note that companies falling within the ambit of Chapter 6, regardless of the type of company or the nature of its shareholders, require compliance with the obligations imposed by Chapter 6, including having regard to the overarching purposes of Chapter 6 as expressed in section 602. Section 602(a)(i) is clear in that it applies to the acquisition of control over an unlisted company with more than 50 members taking place in an efficient, competitive and informed market. That finds expression, relevantly, in the s606 threshold which applies to listed companies or unlisted companies with more than 50 members (apart from certain express exclusions). An entity that falls within those categories attracts the principles of Chapter 6 as a matter of law. An entity that has 50 or fewer members, and does not itself fall within Chapter 6, may nevertheless attract Chapter 6 principles if an acquisition in it would result in a contravention regarding shares in a Chapter 6 company. These matters are relevant to the Panel’s jurisdiction in s657A which requires the Panel, under s657A(3)(a)(i)-(ii), to have regard to the provisions of Chapter 6 and its purposes set out in s602. We note that Chapter 6 does not make any express distinctions between entities which fall within its remit.

However, we agree that there may be circumstances which justify the Panel approaching such companies differently, and that such matters may be relevant to the Panel’s consideration of whether to make a declaration. We therefore agree that the Panel may reach different decisions in respect of differently sized companies, but we submit that is because the circumstances themselves differ and the effect of those circumstances differs, rather than the principles and expectations which operate, by reason of law, over any set of circumstances before the Panel...”

54. We agree with ASIC’s submission that it is clear that Chapter 6 applies to proprietary companies with more than 50 members as a matter of law. We also consider that, depending on the circumstances of the particular matter, a company’s status as a proprietary company could be a relevant factor in the exercise of the Panel’s discretion in deciding whether to make a declaration of unacceptable circumstances in relation to the affairs of that company. Further, depending on the circumstances, the presence of a pre-emptive rights regime in a proprietary company’s constitution could also be a relevant factor in the exercise of that discretion. In addition, it may well be that the “efficient, competitive and informed market” in section 602(a) means something different for a proprietary company as opposed to a listed company, and likewise as to what constitutes “enough information” under section 602(b)(iii).

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However, differences in what Chapter 6 or section 602 may require in respect of proprietary companies were not material to our decision in this matter.

DECISION

55. For the reasons above, we agree with the initial Panel's decision and affirm that decision.
56. We make no final orders, including as to costs.

Diana Nicholson
President of the sitting Panel
Decision dated 23 June 2023
Reasons given to parties 12 July 2023
Reasons published 18 July 2023

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Advisers

Party	Advisers
ASP and ASP Staff	Thomson Geer
Millard Entities	Russells GRT Lawyers
Villefranche	Gilbert + Tobin



Australian Government

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Annexure A
CORPORATIONS ACT
SECTION 657EA
INTERIM ORDERS

A S P ALUMINIUM HOLDINGS PTY LTD 02R

Villefranche Investments Pty Limited as trustee of the Gates Family Trust has obtained the Acting President's consent to file an application for a review of the Panel's decision in *A S P Aluminium Holdings Pty Ltd* (which it has informed the Panel it intends to do by no later than 11.59pm on Tuesday 30 May 2023), and has requested interim orders pending the review.

The Acting President ORDERS:

1. Without the consent of the President or, once appointed, the review Panel,
 - (a) the Relevant Persons and their associates must not acquire any shares in ASP and
 - (b) ASP must not register any transfer of shares in ASP.
2. ASP must as soon as practicable and by no later than 5pm (Melbourne time) on Wednesday 31 May 2023 communicate to all shareholders of ASP the effect of these interim orders.
3. In these interim orders the following terms have their corresponding meaning:

ASP	A S P Aluminium Holdings Pty Ltd
ASP Staff Holdings	ASP Staff Holdings Pty Limited as trustee for the ASP Employee Share Trust
Relevant Persons	ASP, ASP Staff Holdings, Ms Lolita Younes, Mr Paul Nakhle, Mr Louis Hanna, Lolita Investments Pty Ltd, Lalspec Pty Ltd, Youla Holdings Pty Ltd, Michael Three Pty Ltd and Michael Four Pty Ltd

4. These interim orders have effect from midnight on Tuesday 30 May 2023 if, and only if, a review application is lodged no later than 11.59pm on Tuesday 30 May 2023 until the earliest of:
 - (i) further order of the President or, once appointed, the review Panel

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- (ii) the determination of the proceedings and
- (iii) 2 months from the date of these interim orders.

**Tania Mattei
General Counsel
with authority of Richard Hunt
Acting President
Dated 30 May 2023**