



Australian Government

Takeovers Panel

**Reasons for Decision
Mount Isa Minerals Limited
[2024] ATP 7**

Catchwords:

Decline to conduct proceedings – association – evidence – collective actions – co-directors

Corporations Act 2001 (Cth), sections 12, 203D, 249D, 602, 606

Australian Securities and Investments Commission Regulations 2001 (Cth), regulation 20

Takeovers Panel Procedural Rules 2020, Rule 20(2)

ASIC Regulatory Guide 128: Collective action by investors

Benjamin Hornigold Limited 12 [2023] ATP 10, Firetail Resources Limited [2022] ATP 21, Aguia Resources Limited [2019] ATP 13, Resource Generation Limited [2015] ATP 12, Dragon Mining Limited [2014] ATP 5, Viento Group Limited [2011] ATP 1, Mount Gibson Iron Limited [2008] ATP 4, Orion Telecommunications [2006] ATP 23, Pacific Magnesium Corporation Ltd [2005] ATP 12

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

INTRODUCTION

1. The Panel, Joseph Fayyad, Rebecca Maslen-Stannage (sitting President) and John McGlue declined to conduct proceedings on an application by Lantech Developments Pty Ltd in relation to the affairs of Mount Isa Minerals Limited. The application concerned allegations that certain lenders to, and shareholders and directors of, Mount Isa Minerals were associated and were acting together to affect the composition of the board and to otherwise control and manage the company to the exclusion of other shareholders. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.
2. In these reasons, the following definitions apply.

Amtray	Amtray Pty Ltd
Applicant	Lantech Developments Pty Ltd
Bono	Bono Pty Ltd
C21 Investments	C21 Investments Pty Ltd
Eakin Letter	Has the meaning given at paragraph 8
Mount Isa Minerals	Mount Isa Minerals Limited
Minetoil	Minetoil Pty Ltd
Secu	Secu Pty Ltd

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Sonlen	Sonlen Pty Ltd
Viridian	Viridian Capital Pty Ltd

FACTS

3. Mount Isa Minerals is an unlisted public company with approximately 90 shareholders. The Applicant is a shareholder of Mount Isa Minerals. Mr Scott Drelincourt, Mr Nicholas Huffels and Ms Rebecca Jackson are directors of Mount Isa Minerals, and until 17 April 2024, Mr David Williams was also a director.
4. As at 4 April 2024, the major shareholders of Mount Isa Minerals were C21 Investments, holding a 20.60% interest, and Sonlen, holding a 14.18% interest. Sonlen is also a secured lender to Mount Isa Minerals.
5. In August 2023, after two attempts at an IPO in 2022 and early 2023, Mr Williams was appointed as Executive Chairman and CEO of Mount Isa Minerals to progress a fresh IPO attempt.
6. On 23 February 2024, Mr Williams met with Mr Huffels and Mr Drelincourt who both insisted that Mr Williams immediately sign a letter that they had drafted in which Mr Williams was to resign from all positions with Mount Isa Minerals, effective immediately. Shortly after that meeting, Mr Williams received an invitation to a board meeting with an agenda, which included a proposed resolution to remove him from his roles with Mount Isa Minerals, including his role as a director.
7. On 1 March 2024, Sonlen issued a Notice under section 203D¹ with a resolution to be put at the next General Meeting of Mount Isa Minerals for the removal of Mr Williams as a Director. On 7 March 2024, Mount Isa Minerals received a further Notice from Sonlen under section 249D to put a resolution to remove Mr Williams as a Director.
8. On 20 March 2024, the board of Mount Isa Minerals held a meeting at which it resolved to terminate, on a without cause basis, Mr Williams' appointments as Executive Chairman, CEO and Secretary of Mount Isa Minerals, and as Director and Secretary of each of its subsidiaries, effective immediately on making a payment in lieu of notice, which it did on 21 March 2024.
9. On 26 March 2024, Mount Isa Minerals issued to shareholders a Notice of General Meeting to be held on 18 April 2024 and an accompanying explanatory memorandum. The meeting was to be held in-person at the Blackbutt Hotel in New Lambton NSW without the facilities for virtual attendance, and the sole item of business was to consider a resolution to remove Mr Williams as a Director. The explanatory memorandum did not contain an explanation as to why shareholders should vote to remove Mr Williams.

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)

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10. On 17 April 2024, Mr Williams resigned as a Director of Mount Isa Minerals with immediate effect. Mount Isa Minerals issued a Shareholder Update on 19 April 2024 which, among other things, informed shareholders of the resignation of Mr Williams.
11. Also on 17 April 2024, Viridian submitted a financing proposal to Mount Isa Minerals to provide funding for its proposed Year 1 exploration program. The offer was to expire on 22 April 2024.
12. On 22 April 2024, Mr Huffels requested that Viridian provide more detail in relation to the financing proposal. On the same day, Viridian replied, indicating that it would procure approximately \$4,000,000 in equity and debt for no fee and that it would extend the offer to 24 April 2024.
13. On 23 and 24 April 2024, Mount Isa Minerals advised that it would not deal with Viridian. On 27 April 2024, the major funder behind Viridian's financing proposal advised that it was not prepared to proceed with Mount Isa Minerals at that time.

APPLICATION

14. By application dated 3 May 2024, the Applicant sought a declaration of unacceptable circumstances. The Applicant submitted that certain *"shareholders of and lenders to [Mount Isa Minerals] have been acting together and together with certain Directors of the Company, in a manner, to the exclusion of other shareholders, to change the composition of the Board and the management of the Company."*
15. The Applicant submitted that *"actions have been taken by the Board of the Company (other than Williams) in consultation with and/or at the direction of a discrete group of shareholders of and lenders to the Company without explanation to the other shareholders as to why and as to what the plans are for the Company upon the removal of Williams."*
16. The Applicant submitted that by *"acting together in the manner outlined in this Application the relevant persons have acquired a relevant interest in each other's shares in the Company and therefore meet the requirements of s.606(1)(c) ... By their conduct and practice the relevant persons have breached s.606 ..."*
17. The Applicant submitted that the effect of the actions to remove Mr Williams *"delayed finalising the Prospectus and opening the IPO and also put on hold the Company pursuing other corporate and capital initiatives."*
18. The Applicant sought a final order (order 1) to the effect that Mount Isa Minerals provide full disclosure to all of its shareholders in relation to:
 - (a) the circumstances (including discussions that took place) that led to:
 - (i) the request by Mr Dreincourt and Mr Huffels for the removal of Mr Williams on 23 February 2024 and
 - (ii) the issue by Sonlen of the Notices under sections 203D and 249D on 1 and 7 March 2024 respectively,
 - (b) the reasons why Mr Dreincourt, Mr Huffels and Ms Jackson recommended that shareholders vote in favor of removing Mr Williams

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- (c) the reasons why the board determined to hold the 18 April 2024 General Meeting in-person without virtual attendance, and at the Blackbutt Hotel in New Lambton rather than in a capital city
 - (d) the plans for the management of Mount Isa Minerals going forward, including raising capital, potential listing and future exploration activities and
 - (e) whether the board intends to proceed with the Viridian financing proposal and if not, the reasons why not.
19. The Applicant also sought a final order (order 2) to the effect that any contract or agreement proposed to be entered into, or which has since 23 February 2024 been entered into, between Mount Isa Minerals or any of its related body corporates and any of C21 Investments, Sonlen, Amtray, Minetoil, Secu, Bono, certain individuals connected to these entities or any associate of any of them, be subject to shareholder approval.

Preliminary submissions

20. Mount Isa Minerals provided preliminary submissions on 9 May 2024 rebutting the Applicant's allegations that certain persons had been acting together to the exclusion of other shareholders. Mount Isa Minerals submitted, among other things, that:
- (a) The decision *"to terminate Mr Williams' executive engagement occurred following receipt of independent advice and the assessment by the Directors of the performance of Mr Williams during his engagement with the company."*
 - (b) The process for conduct of the 18 April 2024 meeting *"was undertaken in accordance with the company's constitution ... and in a manner so as to provide all shareholders the opportunity to consider and vote on the resolution... The rationale to hold the meeting in Newcastle without virtual attendance was as follows:"*
 - (i) *"Newcastle is a major metropolitan city ... with an airport and there was a significant shareholder pool located in the city"*
 - (ii) *"quotations from the company's share registry, Automic Registry Services ... showed that the cost of holding a hybrid or fully virtual meeting was much higher than the costs of holding a physical meeting" and "Automic Registry Services would be engaged to manage the proxy voting process to ensure that all shareholders had the ability to vote on the resolution being considered and that such proxy votes would be independently managed"*
 - (c) Mount Isa Minerals is *"committed to keeping shareholders updated in relation to the company ..."* Mount Isa Minerals submitted that shareholder updates were provided on:
 - (i) *"19 April 2024 regarding the resignation of Mr Williams and the results of the shareholder meeting of 18 April 2024" and*
 - (ii) *"2 May 2024 regarding the appointment of Scott Drelincourt as executive chair and Nicholas Huffels as executive director and chief executive officer, together with an update on the company's participation in an upcoming conference and community engagement."*

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- (d) Mount Isa Minerals is still committed to an IPO and intends to *“release a further shareholder update in the coming weeks in relation to the IPO plans of the company and potential timing.”*
21. In relation to the Viridian proposal, Mount Isa Minerals submitted:
- (a) *“Viridian Capital (an associated party of the Applicant) is currently party to an ongoing dispute”* with Mount Isa Minerals.
- (b) While Viridian was notified that, due to the ongoing dispute, Mount Isa Minerals would not engage with Viridian, it *“would be willing to consider any genuine offers that are in the interests of shareholders if the potential third party funder would like to engage directly ...”*
22. The Applicant provided additional submissions on 10 May 2024. While they were out of process², we decided to receive them after we formed the preliminary view that we should not conduct proceedings. The Applicant submitted, among other things, that:
- (a) it was not aware of the *“independent advice”* (see paragraph 20(a)) and *“no such advice was provided to shareholders as part of the notice of meeting nor in the associated Explanatory Memorandum for the General meeting”*
- (b) *“shareholders have been provided with no reason for the removal of Williams ... enquiries of Williams revealed that he is equally unaware.”* When asked, the board’s response was that the reasons were *“confidential to the board”*
- (c) there has been no evidence provided in respect of the cost difference between an in-person and a virtual meeting. The Applicant doubts that a virtual meeting would have been more costly than a physical meeting.
- (d) *“the Applicant believes that only about 8 shareholders of the 90 shareholders were located in Newcastle and in fact many were located in Perth WA”* and
- (e) as most shareholders were not located in Newcastle *“the conduct of the General meeting as a physical only meeting denied shareholders the opportunity to question those Directors”* on their reasons for recommending the removal of Mr Williams.

DISCUSSION

Association

23. The Panel’s starting point for an association matter is that it is for the applicant to demonstrate a sufficient body of evidence of association and to convince the Panel as to that association, albeit with proper inferences being drawn (see *Mount Gibson Iron Limited* [2008] ATP 4 at [15]).³

² See Rule 20(2) of the Takeovers Panel Procedural Rules 2020

³ This test has been cited with approval in recent cases, for example: *Benjamin Hornigold Limited* 12 [2023] ATP 10 at [20] and *Firetail Resources Limited* [2022] ATP 21 at [15]

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24. This test was discussed in *Dragon Mining Limited* [2014] ATP 5 where the Panel said at [59]-[60] (excluding footnotes):⁴

"We are conscious of the risk that some people may read this decision as signalling a raising of the 'association hurdle'. This is not our intention. Our decision in this matter was based purely on the evidence that was submitted to us.

Dromana Estate Limited 01R acknowledges the difficulties that an applicant faces in gathering evidence in association matters. In deciding whether to conduct proceedings on an association case, this must be kept in mind. However, the Panel has limited investigatory powers which means, before we decide to conduct proceedings, an applicant must do more than make allegations of association and rely on us to substantiate them. An applicant must persuade us by the evidence it adduces that we should conduct proceedings."

25. As will be discussed below, we consider that the Applicant did not provide a sufficient body of material to justify making further enquiries.

The identity of the alleged associates

26. The Applicant submitted that lenders to, and shareholders and directors of, Mount Isa Minerals were acting together as associates to control the company to the exclusion of other shareholders. The Applicant identified Mr Drelincourt, Mr Huffels and Solen as persons alleged to be associated in their attempt to remove Mr Williams from his roles with Mount Isa Minerals.
27. However, the first difficulty with substantiating an association between persons in this case is that, while the Applicant did discuss the involvement of other persons, it did not clearly identify which of these other persons were also members of the group of alleged associates.
28. For example, the Applicant included in its application a table illustrating the percentage shareholdings in Mount Isa Minerals as at 4 April 2024 of C21 Investments (20.60%), Sonlen (14.18%), Minetoil (3.05%), Kelray (2.01%), Secu (1.52%), Mr Drelincourt (0%), Ms Jackson (0%) and "Huffels and associates" (2.30%). However, the Applicant did not make clear if the allegation of association was between all or just some of these persons, nor did the Applicant clearly identify any of the other associates of Mr Huffels.
29. Another point of confusion is that Kelray, mentioned here, was not included in the list of entities mentioned in relation to the Applicant's request for final order 2 (see paragraph 19), and Bono, not mentioned here, was included in the Applicant's request for final order 2 (see paragraph 19).⁵

⁴ This passage has also been cited with approval in recent cases, for example; *Benjamin Hornigold* at [21] and *Firetail* at [16]

⁵ While Bono may not have been a shareholder of Mount Isa Minerals, other persons were mentioned in the table with a 0% holding.

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Probative material

30. We also consider that the material provided by the Applicant was not sufficiently probative.
31. For example, the Applicant referred to a discussion that took place on 23 February 2024 between Mr Drelincourt, Mr Huffels and Mr Williams. However, the Panel was not provided with any material such as a statutory declaration from Mr Williams, as to what took place during that discussion. In any case it was also unclear in the application whether Mr Williams was the Applicant's source of information.
32. Another example is the Applicant's description of a conversation that took place on 18 March 2024 between Mr Williams and Mr Duncan (director of Amtray and Minetoil). In the application, the Applicant said: *"despite Williams asking him what the issue was it seemed he had little knowledge of the reasoning behind the issuing of the Notices by Sonlen. All Williams could glean from the conversation was a reference to the "Founders" being concerned about the perceived slow progress of the IPO. Williams understood the reference to "Founders" was at least C21 Investments and Sonlen and probably others within the Group."*
33. On the basis that this conversation took place, the Applicant's account is an account of someone who was not present during that conversation and who cannot give a clear account of what Mr Williams or Mr Duncan may have thought at the time. While the Panel is not bound by the rules of evidence as is a court, probative and reliable material is important, especially in cases involving allegations of association, because the Mount Gibson hurdle is essentially a factual, or evidentiary, hurdle.

Collaboration between directors and investors

34. In *Orion Telecommunications* [2006] ATP 23, the Panel at [102] recognised that "... common directorships may, in appropriate circumstances, be a factor which, in combination with other probative material, supports an inference of association."⁶ While Mr Drelincourt, Mr Huffels and Ms Jackson are co-directors of Mount Isa Minerals, the mere fact that they made a recommendation that shareholders should vote to remove Mr Williams is not, in our view, enough to infer an association between them.
35. As the Panel in *Benjamin Hornigold Limited* 12 [2023] ATP 10 said at [45]: "... it is often the case that directors of a company (who may also be shareholders of that company) will provide recommendations to shareholders to vote in a particular way, and this does not necessarily mean an association exists between those individuals."
36. We do not consider it to be unusual or remarkable that more than one director of a company may be aligned with a recommendation to be put to a general meeting of shareholders that the shareholders should vote to remove a certain director or executive, especially where, as Mount Isa Minerals submitted, independent advice regarding Mr Williams' performance was relied upon.
37. We also do not consider it to be unusual or remarkable that such independent advice was not provided to shareholders ahead of the general meeting. There are many

⁶ See also *Viento Group Limited* [2011] ATP 1 at [120]

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reasons why board members may decide to maintain confidentiality over such advice and their deliberations regarding such advice, especially where that advice may contain sensitive information about the performance of a senior executive. In any case, Mr Williams resigned before the general meeting took place.

38. Looking beyond the directors of Mount Isa Minerals to the other potential alleged associates, such as Sonlen and C21 Investments, we agree with what the Panel said in *Pacific Magnesium Corporation Ltd* [2005] ATP 12 at [25]:

“a mere common intention to vote in favour of a particular resolution at a general meeting of a company does not cause persons to become associates of each other.

“Association” would require an added factual element evidencing a relevant agreement or an acting in concert so as come within the definition of associate in section 12(2) of the Act.”

39. Similarly, ASIC Regulatory Guide 128: Collective action by investors (**Reg 128**), provides at Table 1 that:

“investors recommending that another investor votes in a particular way ... is unlikely to make the investors associates or constitute entering into a relevant agreement giving rise to a relevant interest if no undertaking or agreement to follow the recommendation or act in a particular way is obtained.”⁷

40. In this case, the Applicant has not provided any evidence of a relevant agreement or similar understanding between investors that they have agreed to vote in a particular way.
41. While we understand from the application that Mount Isa Minerals had changed its constitution in 2023 to allow for virtual meetings, we also accept that, as Mount Isa Minerals submitted, there was no requirement to hold a virtual meeting. We accept that some shareholders may not have been in a position to attend a meeting in-person in Newcastle, however, we also accept that, as Mount Isa Minerals submitted, proxies were to be managed by Automic Registry Services and the Applicant did not allege any controversy with proxies.

Section 606

42. The Applicant submitted that because of the association between certain persons, they have each acquired a relevant interest in each other's shares in Mount Isa Minerals, amounting to a contravention of section 606.
43. Mount Isa Minerals is an unlisted company with more than 50 shareholders, meeting the requirement under section 606(1)(a)(ii). However, for a contravention of section 606 to occur, there needs to be an acquisition, or transaction (section 606(1)(b)), giving rise to one of the circumstances in section 606(1)(c). The Applicant has not provided any evidence of an acquisition or transaction that would be caught by section 606.

⁷ See also *Resource Generation Limited* [2015] ATP 12 at [106] and *Agua Resources Limited* [2019] ATP 13 at [24]

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44. Even if we were to conclude an association existed between any of the relevant persons, we would not conclude there was a contravention of section 606 without evidence of a relevant acquisition or transaction. As the Panel in *Aguia Resources Limited* [2019] ATP 13 said at [24(d)] when discussing board spills:
- “Even if the aggregate voting power of alleged associates is more than 20%, there is no contravention of s606 unless a person has acquired a relevant interest in shares through a transaction in relation to securities entered into by or on behalf of that person ...”*
45. The aggregated holdings of the alleged associates (including Sonlen, Mr Huffels and Mr Drelincourt) does not add up to more than 20% unless C21 Investments is included in this group of associates. There is little material to infer that C21 Investments is part of the group of associates that included Sonlen, Mr Huffels and Mr Drelincourt. The Applicant did submit that it is *“of note that some of the information in the Eakin letter could only have come from C21 Investments Pty Ltd, a fact confirmed to the Applicant in an email from [C21 Investments’ director]] of 22 March 2024.”* However, we do not think this is sufficient, in the absence of other probative material, to infer an association between C21 Investments and any of the other persons mentioned in the application.
46. The Panel in *Aguia* went on to say at [24(f)]: *“... there may be more reason to be concerned if there is material to suggest that any of the alleged associates had joint plans for the management of the company ...”*⁸ In this case, while the Applicant does appear to be concerned about the alleged associates’ plans for the management of Mount Isa Minerals, the application did not include sufficient material regarding any joint plans for the management of the company.

DECISION

47. 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).

Orders

48. 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.

Rebecca Maslen-Stannage
President of the sitting Panel
Decision dated 13 May 2024
Reasons given to parties 27 June 2024
Reasons published 5 July 2024

⁸ See also *Resource Generation* at [93]

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Advisers

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