



Australian Government

Takeovers Panel

**Reasons for Decision
Mesa Minerals Limited
[2010] ATP 4**

Catchwords:

Acting in concert, association, beneficial ownership notice, divestment of shares, efficient, competitive and informed market, declaration of unacceptable circumstances, equal opportunity, orders, relevant interest, requisitioned meeting, section 602 principles, substantial holding, voting power

Corporations Act 2001 (Cth), sections 12(2)(b), 12(2)(c), 249D, 602, 606, 608, 609, 611, 671B, 672A, 672B, 657D, 657E

RP Austin, IM Ramsay, Ford's Principles of Corporations Law, 13th edition, [23.250], R Levy and N Pathak, Takeovers Law and Strategy, 3rd edition, [3.5], [3.7]

Dromana Estate Limited 01R [2006] ATP 8, Mount Gibson Iron Limited [2008] ATP 4, Orion Telecommunications Ltd [2006] ATP 23

INTRODUCTION

1. The Panel, Diana Chang, Peter Scott (sitting President) and Jane Sheridan, made a declaration of unacceptable circumstances in relation to the affairs of Mesa Minerals Limited. The application concerned an association involving Mighty River (and its controller, Mr Xie) and various parties including Mr Premjit Roy (and companies he owned or controlled), Auvex, companies holding in aggregate more than 20% of Auvex and Mr James Smalley. The association resulted in the voting power of Mighty River and Mr Xie increasing above 20% in Mesa otherwise than under section 611. No substantial holding notice was given reflecting the association and subsequent acquisitions.
2. In these reasons, the following definitions apply.

Auvex	Auvex Resources Limited
Auvex Manganese	Auvex Manganese Ltd
Comtrack	Comtrack Pte Ltd
EMARS	EMARS Mining Pty Ltd
First Requisitioned Meeting	An extraordinary general meeting of Mesa requisitioned by Mighty River and the Other Requisitioning Shareholders under section 249D ¹ to replace a majority of the directors, held on 26 March 2010
Indian Cress	Indian Cress Investments Ltd
Market Energy	Market Energy Ltd
Mesa	Mesa Minerals Limited
Mighty River	Mighty River International Limited

¹ References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

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Mineral Resources	Mineral Resources Limited
Other Requisitioning Shareholders	SJ Crushing Pty Ltd, Janette Carol Crabbe, Stanley Paulo, Roy Kendall, James Smalley, Mousetrap Nominees Pty Ltd and Octifil Pty Ltd
Roleystone	Roleystone Limited
Sea Prince	Sea Prince Resources Ltd
Second Requisitioned Meeting	An extraordinary general meeting of Mesa requisitioned by Mighty River under section 249D to replace a majority of the directors to be held on 28 May 2010 ²

3. In these proceedings, the Panel:
- (a) adopted the Panel's published procedural rules and
 - (b) consented to parties being represented by their commercial lawyers.

FACTS

4. Mesa is an ASX listed company (ASX code: MAS) involved in the development of manganese projects and the commercialisation of manganese secondary processing technologies.
5. Mesa and Auvex, a public unlisted company, are joint venture partners in relation to the development of certain Western Australian manganese projects.
6. On 6 October 2009, Auvex entered into a transaction involving the issue of shares and options and a marketing agreement. Parties included EMARS, Roleystone, Mr Steven Crabbe and Mr Yuzheng Xie. The explanatory statement to the notice of meeting disclosed that EMARS and Roleystone were controlled by Mr Xie and Mr Roy.
7. On 26 November 2009, Mesa issued Auvex with a joint venture notice of default. The notice of default is disputed by Auvex.
8. The Auvex meeting to consider the transaction was scheduled to be held on 27 November 2009 but was adjourned to 2 December 2009. The transaction was approved.
9. Mr Xie and Mr Roy were joint investors in EMARS and Roleystone and, through those companies, in Auvex. Both have sat on the board of Auvex. Both are directors of its wholly owned subsidiary, Auvex Manganese.
10. On 11 January 2010, Mr Peter Cunningham (CEO of Auvex) and Mr Alan Scott (CEO of Mesa) began discussions about a possible merger of Auvex and Mesa.

² Post script - Cancelled on 27 May 2010 after Mighty River withdrew the requisition under s249D

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Discussions progressed, but on 27 January 2010 Mr Cunningham proposed new terms that were not acceptable to Mesa. The discussions concluded unsuccessfully.

11. On 20 January 2010 Mr Xie resigned as a director of Roleystone and Auvex.
12. Also on 20 January 2010, Mr Xie transferred his economic interest in Auvex held through his shareholding in Roleystone to Mr Roy for deferred consideration (according to submissions).
13. On 1 February 2010, Mighty River and the Other Requisitioning Shareholders requisitioned an extraordinary general meeting of Mesa under section 249D to remove the majority of the directors and replace them with their own nominees. Mr Xie is the sole shareholder and director of Mighty River.
14. In a substantial holding notice dated 3 February 2010, the requisitioning shareholders disclosed an 8% shareholding in Mesa (aggregate of 47,874,764 fully paid ordinary shares out of an issued capital at the time of 598,495,831 shares) as follows:

SJ Crushing	4,526,667 fully paid ordinary shares
Ms Crabbe	186,667
Mighty River	20,389,700
Stanley Paulo	5,500,000
Roy Kendall	6,000,000
James Smalley	7,300,000
Mousetrap Nominees Pty Ltd	2,463,396
Octifil Pty Ltd	1,508,234
15. On or about 15 February, and again in or about early March 2010, statements were made on behalf of Mesa which referred to the shareholders who lodged the notice for the First Requisitioned Meeting as being shareholders or associates in Auvex. Mr Xie and some of the Other Requisitioning Shareholders denied this.
16. On 22 March 2010, Mineral Resources announced its intention to make an off-market scrip takeover bid to acquire all the issued shares in Mesa. The consideration is 1 Mineral Resources share for every 70.6 Mesa shares. The bid, recommended by the Mesa board, was scheduled to close on 14 May 2010 and has been extended to 2 June 2010. It has since become unconditional.
17. On 26 March 2010, the First Requisitioned Meeting was held. The resolutions failed by a small margin. Mr Roy attended drinks after a dinner that was held on the night before the meeting attended by Mr Xie, Mr Cunningham (CEO of Auvex and himself a Mesa shareholder), Mr Smalley and others. Mr Smalley said that Mr Roy

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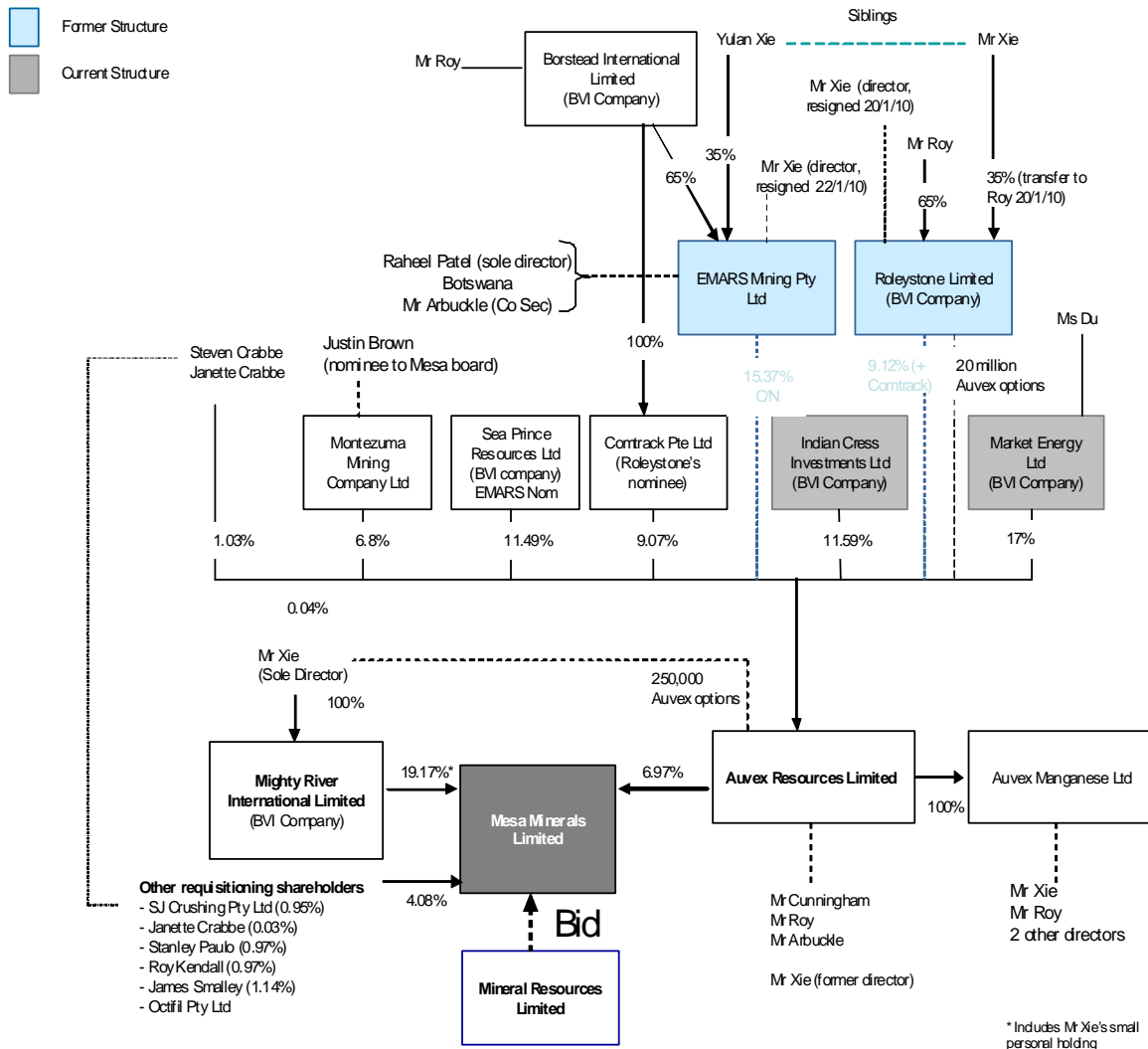
was at the dinner. Mr Roy also attended a lunch after the meeting with Mr Xie, some of the Other Requisitioning Shareholders and Mr Cunningham.

18. On 29 March 2010, the first trading day after the First Requisitioned Meeting, Auvex began to acquire Mesa shares and on 12 April 2010 lodged a substantial holding notice stating that it had voting power in 7.08% of Mesa.
19. On 30 March 2010, the Other Requisitioning Shareholders lodged a notice of ceasing to be a substantial holder prepared by Mighty River's solicitor and circulated "as a courtesy". It said they ceased to be associates of Mighty River and each other (for the purpose of the section 249D meeting) on 26 March 2010.
20. On 1 April 2010, Mighty River (alone) requisitioned the Second Requisitioned Meeting. It proposed identical resolutions to the First Requisitioned Meeting. Mighty River disclosed that it held 114,094,255 ordinary shares equating to approximately 19.03% of Mesa at the time.
21. SJ Crushing increased its holding before the First Requisitioned Meeting. Since the time of the First Requisitioned Meeting, changes in the shareholdings of some parties have occurred as follows:
 - (a) Mousetrap Nominees and Octifil sold their holdings
 - (b) Mighty River increased its holding by 31,634,750 shares
 - (c) Auvex acquired 43,000,000 shares and
 - (d) Mr Smalley sold 300,000 shares.
22. Taking into account adjustments to its issued capital, Mesa submitted that the combined holding of Mighty River, Auvex and the Other Requisitioning Shareholders at 9 April 2010 was 30.29%.
23. The issued capital of Mesa at the date of the declaration was 617,270,831 shares.
24. Mighty River and Auvex increased their holding in Mesa to 19.17% and 6.97% respectively (based on the issued capital at the date of the declaration).
25. The current directors of Auvex are Mr Cunningham, Mr Arbuckle and Mr Roy. The CFO is Mr Bernard Crawford.
26. Since around the time of the Auvex transaction (see paragraph 6), various transfers were executed (including some backdated) which introduced new shareholders onto the Auvex register and removed EMARS (convertible notes) and Roleystone. There were also changes in the directorships held by Mr Xie and Mr Roy. Other investors into Auvex were introduced, such as Market Energy which shared an address with Comtrack (Roleystone's nominee). Mr Xie and Mr Roy were involved in the transfers, in some instances giving instructions and in other instances "facilitating" the transfers.

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27. Various relationships between the parties at 21 May 2010 (the date of the declaration) are described in the diagram.



APPLICATION

Declaration sought

28. By application dated 13 April 2010, Mesa sought a declaration of unacceptable circumstances. It submitted that, in relation to Mesa:

- (a) Mighty River, a company controlled by Mr Xie, was associated with Auvex
- (b) Mighty River and Auvex were associated with the Other Requisitioning Shareholders and
- (c) Mighty River, Auvex and the Other Requisitioning Shareholders were acting in concert.

29. Mesa submitted that the associations gave rise to unacceptable circumstances because:

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- (a) the actions of Mr Xie and the associated parties constituted, constitute or are likely to constitute or give rise to, a contravention of a provision of chapter 6 and chapter 6C, namely:
 - (i) section 606 - the 20% threshold and
 - (ii) section 671B - the substantial holding notice provisions and
 - (b) the acquisition by the associated parties in breach of the Act "*impacts the [Mineral Resources] takeover bid for Mesa*" so as to:
 - (i) interfere with the reasonable and equal opportunity of Mesa shareholders to participate in the offer (s602(c)) and
 - (ii) inhibit the acquisition of control over Mesa shareholders' shares taking place in an efficient, competitive and informed market (s602(a)).
30. Mesa also submitted that there had been a contravention of section 672B - the tracing notice provisions - by Mighty River and Auvex. This claim was subsequently withdrawn in relation to Mighty River.
31. The reason for the association, Mesa submitted, was to gain control of Mesa with the intention of resolving the joint venture dispute, defeating Mineral Resources' bid and effecting a potential merger between Auvex and Mesa.
32. Mesa submitted that the effect of the circumstances was that:
- (a) minority shareholders' interests were prejudiced as there was an existing and continuing unacceptable effect on the control of Mesa
 - (b) Mighty River, Auvex and the Other Requisitioning Shareholders had acquired shares in Mesa to create a stake in excess of the 20% threshold, which threshold was critical to the acquisition of control in Mesa taking place in an efficient, competitive and informed market
 - (c) the illegally acquired Mesa shares would have an effect on the Mineral Resources bid as:
 - (i) the stake would make it more difficult for Mineral Resources to achieve 50.1% acceptances, which was a condition of the bid
 - (ii) even if Mineral Resources achieved more than 50.1%, it was unlikely that it would obtain more than 80% acceptances, so accepting Mesa shareholders would be prevented from obtaining CGT roll-over relief and
 - (iii) the acquisition had resulted in upward pressure on the Mesa share price in circumstances where the market was not fully informed regarding the identity and associations of the purchasers, resulting in an inefficient or false market and
 - (d) Mighty River, Auvex and the Other Requisitioning Shareholders would use their combined voting power in Mesa to replace the current board of directors with their own nominees, for the purpose of controlling Mesa.

Interim orders sought

33. Mesa sought interim orders preventing:
- (a) Mr Xie, Mighty River, Auvex and the Other Requisitioning Shareholders acquiring any further Mesa shares until the application was determined
 - (b) Mesa shares held by those parties being transferred or disposed of during the proceedings and
 - (c) if the proceedings were not completed prior to the Second Requisitioned Meeting, those parties exercising any voting power attaching to shares acquired in breach of the 20% threshold until proceedings are determined.
34. We made an interim order (Annexure A) once we had considered the material and were minded to make a declaration.

Final orders sought

35. Mesa sought final orders (as amended):
- (a) vesting all shares acquired by Mr Xie, Mighty River, Auvex or the Other Requisitioning Shareholders in breach of the 20% threshold in ASIC, to be sold by book-build to non-associated parties with the proceeds of sale (net of costs and expenses) to the account of the associated parties, as appropriate
 - (b) following divestment, those parties be prohibited from acquiring any further Mesa shares other than in a manner prescribed by section 611
 - (c) if Auvex refused to comply with the tracing notice issued under section 672A, all shares held by it be divested and
 - (d) if the divestments referred to above cannot be completed in time, the shares acquired in breach of the 20% threshold not be voted at the Second Requisitioned Meeting and any subsequent meetings of Mesa regarding the composition of the Mesa board.

DISCUSSION

Association and Chapter 6

36. A person must not acquire a relevant interest in issued voting shares in a listed company if, as a result of that transaction, the person's or someone else's voting power in the company increases to above 20%.³
37. *Ford's Principles of Corporations Law* identifies the importance of the association concept:

"The concept of 'associates' performs some very important functions in the Corporations Act. The basic prohibitions in s606 define the 20% threshold by reference to voting power,

³ Section 606(1), subject to exceptions

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*and s610 defines 'voting power' by taking into account the votes of associates of the person whose voting power is to be assessed."*⁴

38. A person has a relevant interest in securities if that person is the holder of the securities, has power to exercise or control the exercise of a right to vote attached to the securities, or has power to dispose of or exercise control over the disposal of the securities.⁵ According to Levy and Pathak: *"The ordinary meaning of 'control' is the positive ability to bring about the result of one's choosing. This would cover an ability to cause securities to be voted or transferred in a particular way."*⁶
39. It does not matter how remote the relevant interest is or how it arises.⁷ Moreover, if a body corporate has a relevant interest in securities, a person will also have a relevant interest in those securities if the person has voting power in the body corporate above 20% or controls the body corporate.⁸
40. A person does not have a relevant interest in securities held by the body corporate merely because the person is a director.⁹
41. In *Mount Gibson*, the Panel said:

"Section 12 sets out the tests of association for the purpose of chapter 6. There are three tests, of which two are relevant here.

- (a) *Section 12(2)(b) - which provides that B is an associate of A if (and only if) B is a person with whom A has, or proposes to enter into, a relevant agreement for the purpose of controlling or influencing the composition of a company's board or conduct of its affairs. This provision treats those who, by arrangement, can control a board or the affairs of the company through the actual owners of shares as the owners; that is "[t]hose who manipulate the strings are to be regarded as the personification of the puppet". The association cannot be unilateral.*
- (b) *Section 12(2)(c) - which provides that B is an associate of A if (and only if) B is a person with whom A is acting or proposing to act in concert in relation to the company's affairs. Again, this provision means having an understanding as to some common purpose or object - not simply two persons separately and coincidentally acting in the same manner."*¹⁰

⁴ RP Austin, IM Ramsay, *Ford's Principles of Corporations Law*, 13th ed, para [23.250]

⁵ Section 608(1)

⁶ R Levy and N Pathak, *Takeovers Law and Strategy*, third edition, para [3.5]. The authors note that the courts have gone a step further to include an ability to *prevent* some action as potentially sufficient to constitute 'control'

⁷ section 608(1)

⁸ section 608(3)

⁹ Section 609(9)

¹⁰ *Mount Gibson Iron Limited* [2008] ATP 4 at [12], footnotes omitted

42. Levy and Pathak put the concept of ‘association’ this way:

“The concept of ‘association’ endeavours to identify all persons who should be grouped together in determining which persons have interests which are aligned and which shares should be treated as forming a single block.”¹¹

43. In *Dromana Estate Limited 01R*, the Panel said:

“Determining associations must depend on the facts of the case, and this will often require analysis of complex circumstances. Moreover, the Panel recognises that issues of association are notoriously difficult for outsiders to prove since access to the type of evidence needed is rarely available. Issues of association frequently need to be decided on the basis of inferences from partial evidence, patterns of behaviour and a lack of a commercially viable explanation for the impugned circumstances.”¹²

Introduction

44. We prepared preliminary findings we were considering making and invited parties to make submissions on the findings. We have taken account of the submissions in finalising our decision and in our reasons for the decision.

The issues before the Panel

45. Mr Xie controls Mighty River, which is acknowledged. He has a relevant interest in the shares that Mighty River holds in Mesa, plus his own shares, taking the total to 19.17%.

46. We think that these proceedings turn on 4 possible scenarios (which may exist independently or in some combination):

- (a) Mr Xie and Auvex are associates in relation to Mesa, leading to him having a voting power of 26.15% in Mesa
- (b) Mr Xie is associated with Mr Roy, who controls Auvex or who has voting power in more than 20% of Auvex, leading to Mr Xie having total voting power of 26.15% in Mesa. Alternatively he is associated with Mr Roy in relation to Auvex
- (c) Mr Xie is associated with Mr Roy and companies that together own or control more than 20% of Auvex are owned or controlled by Mr Xie or Mr Roy or by persons associated with Mr Xie and/or Mr Roy, leading to Mr Xie having total voting power of 26.15% in Mesa
- (d) Mr Xie has voting power in shares in Mesa held by some or all of the Other Requisitioning Shareholders, leading to him having voting power of up to 23.25% in Mesa.

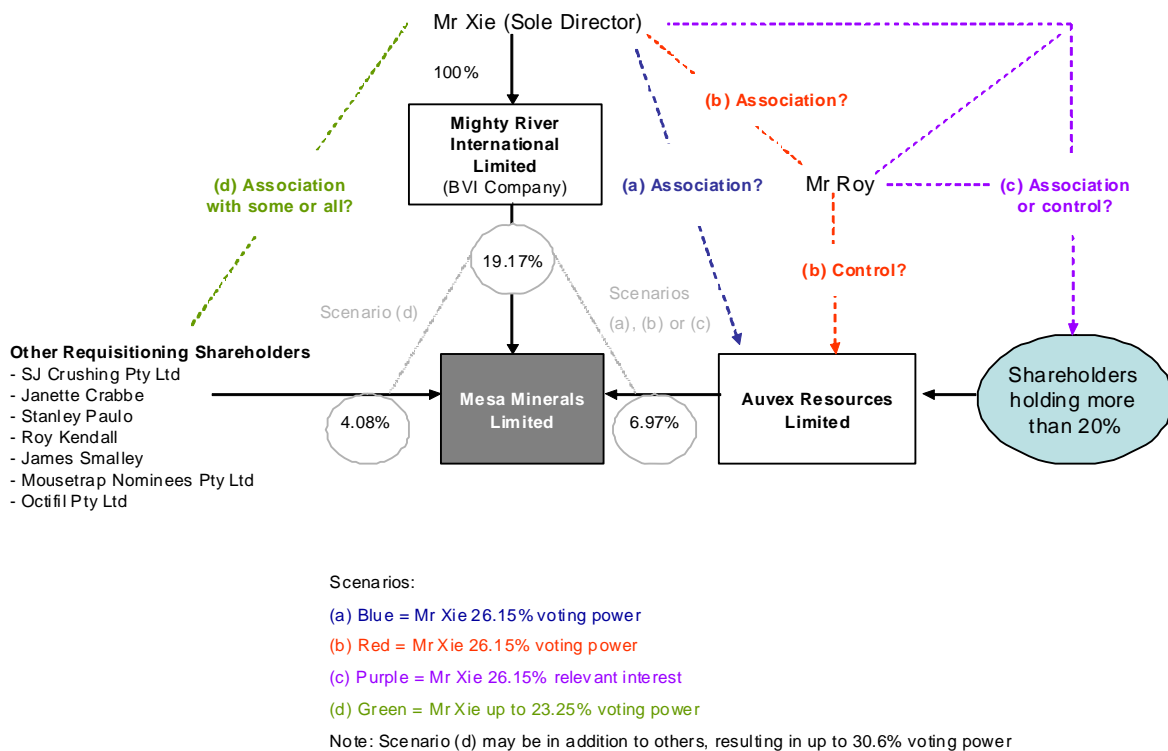
¹¹ R Levy and N Pathak, fn 6, para [3.7]

¹² *Dromana Estate Limited 01R* [2006] ATP 8 at [25]

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47. Diagrammatically:



48. Mesa submitted that Mr Xie controlled Roleystone and EMARS. The holdings of companies with an interest in Auvex have become clearer since the application and these proceedings have developed in response to information that has come to light since. For the reasons below, the circumstances surrounding Roleystone and EMARS remain relevant.

Scenario (a): Mr Xie has 26.15% voting power – association with Auvex

49. Mesa submitted that there are 3 bases on which to conclude that an association exists between Mighty River and Auvex:

- (a) a shared purpose (to block the Mineral Resources takeover and resolve the joint venture dispute) and prior collaborative conduct
- (b) structural links and
- (c) uncommercial common investments and dealings.

50. Mr Xie controls Mighty River. He is the sole director and owns 100% of the shares. Legally Mr Xie and Mighty River are separate, but for practical purposes in this matter they are interchangeable. We considered the role of Mr Xie, rather than the role of the company he controls, although that would be another way to consider the matter.

51. Given Mighty River's 19.17% in Mesa, if Mr Xie and Auvex are associates, he will have voting power in shares that Auvex holds taking his voting power to 26.15%.

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52. On 15 March 2010, Mr Cunningham, CEO of Auvex, held 800,000 Mesa shares in his own name and signed a proxy in respect of 1,214,672 Mesa shares as the director of a private company.
53. Mr Cunningham was not one of the Other Requisitioning Shareholders in relation to the First Requisitioned Meeting.
54. Auvex was not a requisitioning shareholder; it held no Mesa shares at the time of the First Requisitioned Meeting.
55. However Mr Cunningham was involved in activities concerning the First Requisitioned Meeting, including:
 - (a) on 30 January 2010, Mr Xie emailed Mr Le Page, a proposed director of Mesa, seeking a consent to act as a director, but Mr Xie omitted the attachment from his email. Mr Eddington (Taylor Collison), a corporate adviser for Auvex Manganese – and possibly to Auvex on the failed merger - and an agent for two of the requisitioning shareholders (Mousetrap and Octifil), asked for the attachment. Mr Xie provided it by email, specifically including Mr Cunningham to his return email. Moreover, Mr Xie requested that for the document: *“then send to peter [Mr Cunningham], rather the other way since your time is ahead of us!”*
 - (b) Mr Cunningham was sent a copy of the signed section 249D requisition
 - (c) the section 249D requisition was signed by Mr and Ms Crabbe at Mr Cunningham's home, as *“a matter of convenience as Mr Xie was not familiar with our residential address”*
 - (d) there were *“a number of discussions”* between Mr Crabbe and Mr Cunningham in relation to tenders that SJ Crushing had submitted to Auvex and *“Mr Xie may have been present at some of those discussions”*. It is not clear when these conversations took place, but there is at least one conversation that involved Mr Cunningham before the First Requisitioned Meeting. He advised Mr Crabbe that the lawyers for Mighty River had said that the Other Requisitioning Shareholders should lodge a substantial holding notice
 - (e) Mr Eddington sent an email to Mr Cunningham, copied to Mr Xie, on 24 February 2010 commenting on a discussion he had had regarding one shareholder's possible voting at the First Requisitioned Meeting. He concluded *“We need to work on [another shareholder], perhaps Guy or Shane should fly up to Brisbane for the day and see him”*
 - (f) Mr Eddington sent an email to Mr Xie, copied to Mr Cunningham, on 10 March 2010 enquiring as to the possibility that Mr Xie might buy the shares of two other shareholders (although no sale eventuated) and
 - (g) shortly after, Mr Cunningham replied to the email of 10 March 2010 referring to one of the acquisitions, if it could be achieved, as *“a blow to the ‘Alan’ camp and a coup for the evil ‘Yuzheng’ [Mr Xie] camp”*.

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56. Mr Hartwig, a proposed director (and an adviser to Auvex Manganese), reviewed proxy forms.
57. Mr Xie had been a director of Auvex with Mr Cunningham. But this does not explain Mr Cunningham's involvement in the First Requisitioned Meeting. He was not a requisitioning shareholder. He had lodged a proxy, yet travelled to Brisbane for the meeting. He attended a dinner and drinks the night before the meeting and a lunch after the meeting with Mr Xie, Mr Roy, Mr Smalley and some of the Other Requisitioning Shareholders. At least at the lunch Mr Roy and Mr Cunningham were the only parties not ostensibly involved in the First Requisitioned Meeting in some capacity.
58. Auvex submitted that Mr Cunningham “*travelled in his personal capacity as a shareholder of Mesa to the first requisitioned Mesa meeting*”. We do not think that explains his involvement, which we think was more than a personal interest. The reason for Auvex's involvement, we infer, goes beyond the interest Auvex would normally be expected to have. Auvex had an interest in resolving the joint-venture dispute. But it had no shares in Mesa until after the First Requisitioned Meeting.
59. Auvex started buying Mesa shares as Mr Xie approached 20% of Mesa and did so at Mr Cunningham's instigation.
60. Mesa questioned why Mr Cunningham was involved. Mighty River's legal advisers responded in a further submission outside the Panel's normal procedures. The Panel decided to receive the submission. The answer to this question was that Mr Cunningham was a Mesa shareholder who was interested in the outcome of the First Requisitioned Meeting and Mr Xie had intended to invite him to participate as a requisitioning shareholder. It is interesting that Mighty River responded to a question Mesa had asked rhetorically of Auvex. Perhaps the answer was within the knowledge of Mr Xie, but this (at a late stage of the proceeding) was the first reference to Mr Xie wanting to invite Mr Cunningham to participate as a requisitioning shareholder.
61. There are other connections, including:
 - (a) Mighty River's legal advisers prepared the notice of ceasing to be a substantial holder for the Other Requisitioning Shareholders and circulated it “as a courtesy”. The document, once executed, was scanned at Auvex and sent back to the legal advisers. Mighty River submitted that Mr Hartwig scanned the document. We do not know why he would be involved. In our view, being a proposed director is insufficient reason to be so involved
 - (b) Mr Cunningham told Mr Crabbe there was a need to sign, return and lodge the Form 605 without delay and
 - (c) Mr Xie consulted with Mr Crawford as to whether potential purchases of shares in Auvex would proceed.
62. There are other circumstantial indications of Mr Xie's intentions:
 - (a) at the lunch with Mr Roy, Mr Cunningham and the Other Requisitioning Shareholders after the First Requisitioned Meeting, “*In a light moment, Mr Xie suggested that everyone ‘buy Mesa shares.’*” Mighty River submitted “*none of the*

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attendees at that lunch has been net buyers of Mesa shares since that time". We do not accept that. Auvex started buying shares after Mr Cunningham and Mr Roy agreed a strategy to do so on 26 or 27 March 2010 and

- (b) Mr Xie has acknowledged that he wanted Mesa and Auvex to end their dispute, which was the basis of the First Requisitioned Meeting. He told Mr Smalley this.
63. Mr Cunningham and Auvex were involved in respect of the Second Requisitioned Meeting. While a shareholder in Mesa, Auvex was again not a requisitioning shareholder.
64. Mr Cunningham obtained the 'consent to act as a director' from Mr Brown. He had no shares at this point.
65. We are satisfied that Mr Cunningham's involvement was or became an involvement also on Auvex's behalf.
66. Auvex submitted that it bought shares in Mesa as a "*blocking stake to the takeover*" and "*good leverage with the hostile Mesa Board when looking to advance the joint-venture negotiations*". It could not alone acquire a blocking stake to the takeover, which was subject to a 50.1% minimum acceptance condition although it could prevent compulsory acquisition if it had more than 10%, which it doesn't.¹³ It commenced its acquisition of shares ahead of the board resolution approving the acquisition. It appears to have used money for the acquisition advanced from companies that we infer are connected with Mr Xie or Mr Roy.
67. We infer that Mr Xie and Auvex are associates in respect of the affairs of Mesa.
68. Mr Van de Velde, a director of Mesa, said "*Mr Xie also said that he controlled around 27 per cent of shares in Auvex.*" Mr Xie has denied in these terms "*At no stage did I state that I had a 30% control in Auvex*". Mr Xie later qualified that statement by denying that he controlled 30% or any other percentage of shares in Auvex. Mr Warren Brown, a director of Mesa, said "*Mr Xie said words to the effect that he controlled Auvex and that it would continue to acquire Mesa shares.*" Mr Xie denies he had a discussion in which he stated or impressed on Mr Brown that he had any relationship or exercised any control over Auvex. We have decided not to place any weight on any of these remarks as we cannot satisfactorily determine what was actually said.
69. Mesa submitted a comparison of 2 copies of the Form 605 (ceasing to be a substantial holder) signed by Mr Crabbe on behalf of the Other Requisitioning Shareholders. One included an "Auvex Resources Ltd" fax header time stamped 10:20; the other redacted the part of the header which named Auvex. We note that the copy released on ASX contains no part of the Auvex fax header but instead includes a fax header from Canning Bridge local post office time stamped 15:31. We cannot say what occurred, other than that someone appears to have been concerned to conceal Auvex's involvement.

¹³ In submissions on preliminary findings Auvex submitted that it might avail itself rights under s664E

Scenario (b): Mr Xie has 26.15% voting power – association with Mr Roy who controls Auvex or has more than 20% of Auvex; alternatively association with Mr Roy in relation to Auvex

70. For the reasons below, we are satisfied that Mr Roy, a non-executive director of Auvex, is associated with Mr Xie.
71. In addition to considering whether there is an association between Mr Xie and Auvex directly, we considered whether:
- (a) Mr Roy controls Auvex (or has a relevant interest in more than 20% of Auvex), which gives him a relevant interest in Mesa shares held by Auvex and
 - (b) there is an association between Mr Roy and Mr Xie, which gives Mr Xie voting power in Mr Roy's relevant interest.
72. Given Mighty River's 19.17% interest in Mesa, if Mr Xie is an associate of Mr Roy and Mr Roy controls Auvex, Mr Xie will have voting power in shares that Auvex holds, taking his voting power to 26.15%.
73. The holding position in Auvex has changed. Holdings have been moved or positions unwound since enquiries began in connection with these proceedings, and indeed even before then.

EMARS

74. At the end of 2008, Mr Xie, Mr Roy and Ms Xie agreed to invest \$5 million in Auvex through EMARS. Mr Xie submitted that he contributed \$500,000. Mr Xie's sister, Ms Xie, did not contribute any funds for the acquisition. Mr Roy or his nominee contributed funds on his own behalf and on behalf of Mr Xie¹⁴ "*as an interest free loan from Mr Roy to Mr Xie to be repaid in one year*". (Subsequently, Mr Roy paid deferred consideration to Mr Xie for the transfer of Roleystone shares from Mr Xie net of the amount Mr Xie is said to have invested, as well as net of the loan).
75. Ms Xie's address was given as Mr Xie's address in Western Australia. Mr Xie's preliminary submission appeared intended to convey that the economic interest was Ms Xie's. It said "*... there is no legal presumption that siblings are associates or that one sibling exercises influence over another in a commercial context. We are instructed that Mr Xie does not control [EMARS]*". Mr Xie later submitted that he paid ASIC fees on behalf of Ms Xie, "*because he has access to an Australian bank account*" and was reimbursed when he returned to China.
76. Mr Xie later admitted that it was his economic interest in Auvex held via Roleystone and EMARS.
77. We do not accept that the economic interest was Ms Xie's. Thus, EMARS was owned or controlled by Mr Roy (65%) and Mr Xie (35% through his sister).

¹⁴ \$1,250,000 loan. The total of \$1,750,000 represented 35% of the \$5 million agreed to be invested

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78. A statement on page 3 of Auvex's 30 June 2009 Annual Report said "Mr Xie is a principal of Emars Mining Pty Ltd." Moreover, Mr Xie informed his fellow Auvex directors on 25 September 2009 that EMARS (and Roleystone) were controlled or associated with him.
79. Auvex put a proposal to its shareholders at the adjourned meeting on 2 December 2009. In respect of EMARS, it proposed that shareholders:
- (a) ratify an issue of convertible notes and
 - (b) approve a marketing agreement.
80. Accordingly, EMARS (and Roleystone) obtained their entitlement to interests in Auvex (following shareholder approval under item 7 of section 611) of:
- (a) EMARS, convertible notes convertible into 15 million shares ratified and
 - (b) Roleystone -
 - (i) 10 million shares, 20 million options (in 2 tranches) and a further 62,000 shares ratified
 - (ii) 4.3 million shares to be issued
 - (iii) such further shares in any capital raising (but not an IPO) as would maintain Roleystone's and EMARS' aggregated relevant interest in Auvex to be issued and
 - (iv) 5.7 million shares to Comtrack (Roleystone's nominee) to be issued.
81. In the explanatory memorandum to the Auvex notice of meeting, Auvex stated that, on issue of the above securities, the voting power of Roleystone and EMARS (and their associates) would be:
- (a) on issue of the shares - 24.12%
 - (b) on exercise of all the options - 38.83% and
 - (c) on exercise of all the convertible notes - 46.6%.
82. In the explanatory memorandum the following statements also appear:
- "EMARS, Roleystone and Comtrack Pte Ltd are associates because the 3 companies are acting in concert in relation to the affairs of Auvex. Mr Xie is a shareholder of Roleystone. Mr Roy is a shareholder of EMARS and Roleystone.*
- Roleystone and Comtrack Pte Ltd are Shareholders of Auvex.*
- EMARS is a related party of Auvex because it was controlled by Mr Xie and Mr Roy in the 6 months prior to the date of the meeting and Mr Xie and Mr Roy are directors of Auvex as at the date of the Meeting.*
- Roleystone is a related party of Auvex because it is controlled by Mr Xie and Mr Roy who are directors of Auvex as at the date of the Meeting.*
- Comtrack Pte Ltd is a related party of Auvex because it is controlled by Mr Roy who is a director of Auvex as at the date of the Meeting."*

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83. Mr Xie was then on the board of Auvex. In its submission, Auvex said that the information was provided by EMARS.
84. In the independent expert's report for the Auvex meeting, EMARS is described as part of the "*Roy Group of Companies*." Mr Roy held 65% of EMARS. While section 50AA(3) says that two persons do not control a third merely because they can jointly determine the outcome of its decisions about financing and operating policies, we think here that there is more to evidence control than mere ability to jointly decide.
85. We are satisfied that at the date of the Auvex meeting of members (adjourned on 27 November 2009 to 2 December 2009) Mr Xie and Mr Roy controlled EMARS.
86. Mr Xie's control is consistent with the need for his approval to previous changes sought by Mr Roy. On 24 October 2009 Mr Roy emailed Mr John Arbuckle of DNA Capital that "*I wanted some changes in the Emars PTY (sic) shareholding and directorship. I would like to resign as director and appoint someone else as the director of the company. Also, i (sic) would like to transfer the shares from my name to a Singapore company.*" The changes were effected. Mr Roy indicated that Mr Xie was happy with the restructure whereby EMARS would become "*65% Comtrack and 35% Xie, who is presently a shareholder.*" The share transfer was backdated with Mr Roy's agreement. The most recent ASIC search shows that EMARS is owned 65% by Borstead and 35% by Ms Xie.
87. Mr Xie retired from the board of EMARS on 22 January 2010, 10 days before the First Requisitioned Meeting notice. We note that EMARS, an Australian company, does not now have an Australian resident director. The sole director of EMARS is now Raheel Patel, who lives in Botswana.
88. In March 2010, EMARS executed an amendment and finalisation of financing arrangements with Auvex. Raheel Patel executed the documents, scanned them from Botswana to Mr Roy, who passed them on to Mr Downey of DNA Capital.
89. Mr Xie submitted that he is "*not a director or shareholder of, and does not hold any relevant interest in the securities of, or otherwise control, EMARS, Roleystone or Auvex.*"
90. We infer that EMARS, through Borstead, continues to be owned or controlled by Mr Roy. Ms Xie is still registered as having 35% of the shares in EMARS.

Sea Prince

91. We infer Sea Prince was owned or controlled by Mr Xie or his associate, if not by Mr Roy.
92. The convertible notes in Auvex held by EMARS were exercised and shares issued to Sea Prince and Roleystone. Mr Xie introduced Sea Prince and gave instructions that his interest be transferred to it.¹⁵ Had EMARS taken shares, it would have held

¹⁵ In January or February 2010, Mr Cunningham asked Mr Xie and Mr Roy to contact Sea Prince, Roleystone and Market Energy, holders of Auvex options (although it is not clear how Sea Prince got options), to ask whether they would be exercising the options. He said he did so because Mr Xie and Mr Roy had introduced them

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15 million shares, being approximately 15% of Auvex. Interest on the notes is outstanding.

93. Sea Prince obtained 12,271,700 Auvex shares on conversion of EMARS' convertible notes, representing 35% of the total investment, and bought shares. It holds approximately 11.49% of Auvex.
94. Mr Xie confirmed the numbers for the conversion of the convertible notes to Roleystone, Sea Prince and EMARS. Mr Downey had emailed him that *"You need to sign off the numbers and the allocations between you and Premjit [Mr Roy] so that we can organize a settlement and Bernard can take care of the details."* Mr Xie, not Ms Xie, gave the instructions regarding the conversion of the notes in or around February 2010. Mr Downey from DNA Capital emailed Mr Roy that *"Yuzheng [Mr Xie] has further instructed me that he wants his 35% of the shares to be issued to Sea Prince Ltd (sic). Therefore I will do an assignment of part of the debt from Roleystone to Sea Prince. This will mean that there will be a paper trail to Sea Prince."*
95. Sea Prince was EMARS' nominee, and Mr Xie continued to be involved with it, to the point that Mr Crawford believed Mr Xie would sign exercise notices. He emailed Mr Xie on 24 March regarding Market Energy, adding *"p.s I also have the Sea Prince option conversion documents in the office for you to sign"*.
96. The transfer of Mr Xie's 35% economic interest in Auvex to Sea Prince resulted in repayment of Mr Roy's loan to Mr Xie. How this eventuated has been described to us in a very confusing manner:
"From the funds received by EMARS for the sale of those Auvex shares to Roleystone and Sea Prince, Mr Roy paid Mr Xie the consideration for the transfer of Mr Xie's Roleystone shares, net of the \$1,250,000 which Mr Roy had loaned to Mr Xie and Mr Xie's investment of \$500,000. Accordingly, the loan from Mr Roy to Mr Xie was repaid in full, and Mr Xie had unwound his economic interest in Auvex (held via Roleystone and, with his sister, EMARS). Mr Xie is not a director or shareholder of, and does not hold any relevant interest in the securities of, or otherwise control, Sea Prince."
97. Auvex submitted that on 3 May 2010, Mr Xie emailed Mr Cunningham the execution pages of the Sea Prince subscription agreement. Clearly he continued to be involved beyond an introduction. The page however is not from the Subscription Agreement attached to the submission but from a Heads of Agreement that appears to include a draft underwriting agreement (which Auvex submitted related to the proposed IPO of Auvex Manganese).
98. Moreover, Sea Prince had given money to Auvex.¹⁶ It is unexplained why Sea Prince would put so much money into Auvex ahead of a subscription agreement,¹⁷ or without holding options (some of the money being earmarked for option exercise). We infer this uncommercial behaviour has not come from an independent third party.

¹⁶ Approximately \$2.5 million. See paragraph 132

¹⁷ Post script – A subscription agreement has since been provided, having been received by Auvex on 26 May 2010 and signed by it on 27 May 2010

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99. The involvement of Sea Prince is obscure, and we infer deliberately left so. Mr Xie submitted that Sea Prince was a buyer. There was evident concern at the time of the exercise about a paper trail to Sea Prince. This was not explained. If the buyer was independent, it should not be a concern. Moreover proper corporate governance would necessitate a paper trail.
100. Mr Xie submitted that as far as he was aware Mr Wu owned Sea Prince. Mr Xie submitted that he had transferred his 35% economic interest in Auvex to Sea Prince and one would expect him to know with more certainty with whom he was dealing. Mr Xie submitted that he received from the Sea Prince transaction "*proper commercial consideration from vendor sale*". There has not been produced to us any bank records or journal entries that would support this. Mr Xie remained involved, passing on a message regarding option exercise. Mr Crawford appeared to be of the view that Mr Xie was the person to sign the Sea Prince option exercise.
101. We infer that Sea Prince is not independent, but is ultimately owned or controlled by Mr Xie, Mr Roy or an associate of Mr Xie.

Roleystone

102. In respect of Roleystone, briefly:
- (a) Roleystone was owned or controlled by Mr Roy (65%) and Mr Xie (35%). The explanatory memorandum also referred to Roleystone as a Xie company: "*Roleystone and EMARS, being companies controlled by Mr Xie ...*"
 - (b) Roleystone held approximately 9.12% of Auvex and 20 million options
 - (c) Comtrack, Roleystone's nominee, held approximately 9.07% of Auvex and
 - (d) Roleystone nominated Indian Cress to take approximately 11.59% of Auvex. Indian Cress was incorporated in mid-March 2010 on Mr Roy's instructions to acquire the shares. We infer Indian Cress is ultimately owned or controlled by Mr Roy.
103. The ownership of Roleystone mirrored EMARS; that is, Mr Xie had a 35% interest and Mr Roy a 65% interest. Mr Xie had a meeting with his legal advisers on 7 September 2009. The advisers recorded in the notes of the meeting: "*Roleystone is Emars offshore co. The ownership of the 2 co's is the same.*" We infer that the ownership or control of Roleystone was intended to be the same as for EMARS, at least at this time.
104. Mr Xie was a director of Roleystone. He resigned on 20 January 2010.
105. Mr Xie transferred his shares in Roleystone to Mr Roy on 20 January 2010. Mr Roy 'paid' for the transfer net of the loan he had provided for the joint investment in Auvex (thus repaying the interest free loan). It was submitted that Mr Xie no longer has any interest in Roleystone.
106. The Auvex proposal also included, in respect of Roleystone:
- (a) ratification of an issue of shares and options to Roleystone and
 - (b) agreement to an issue of further shares and options to Roleystone (or its nominee).

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107. The references to Roleystone in the explanatory memorandum to the notice of meeting are quoted earlier in paragraph 82.
108. On 13 April 2010, Mr Roy emailed Mr Crawford, chief financial officer at Auvex, to say “*I Need to transfer all the shares out from Roleystone to the company details below [Indian Cress]...*” The email noted that Roleystone held 12,790,300 shares in Auvex. Mr Roy requested the transfers be prepared urgently “*in order to reflect by tomorrow*”. No explanation for the urgency has been provided. Moreover, the document Mr Crawford produced was signed by Mr Roy on behalf of Roleystone and dated 1 March 2010, which was a date before Indian Cress had been incorporated. Mourant International Ltd “signed” as purchaser and dated the document 13 April 2010. No explanation has been provided for the discrepancies in the dates.
109. In March and/or April 2010, in the context of a possible spin-off float of Auvex Manganese, Mr Roy asked both Mr Cunningham and Mr Crawford separately if options issued by Auvex to Roleystone were transferable.
110. We infer that Mr Roy owned or controlled Roleystone, given his 65% holding and other factors. Perhaps he did so with Mr Xie.
111. In any event, we infer that Mr Roy continues to own or control Roleystone. While Auvex submitted that Mr Roy ceased to be a shareholder or director of Roleystone in March 2010 and later submitted “*he [Mr Roy] understands that the records of Roleystone are currently being updated*”, we have no evidence of that.

Comtrack and Indian Cress

112. Indian Cress holds approximately 11.59% of Auvex. Comtrack holds approximately 9.07% of Auvex. Together they hold approximately 20.66% of Auvex.
113. Indian Cress was incorporated in the British Virgin Islands (as was Sea Prince).
114. We infer that Mr Roy owns or controls Indian Cress and Comtrack. Our reasoning includes:
 - (a) Roleystone’s shares in Auvex were transferred to Indian Cress on the instructions of Mr Roy. It was incorporated in mid-March 2010. Apparently before it had been incorporated, Mr Roy executed the transfer from Roleystone¹⁸
 - (b) Mr Roy is the sole director of Roleystone
 - (c) the email Mr Roy used when he gave those instructions was an address at Comtrack
 - (d) Comtrack was Roleystone’s nominee in respect of shares to be issued upon the initial investment in Auvex. Mr Xie submitted “*Mr Roy told Mr Xie, and*

¹⁸ It appears that the hand-writing inserting the name “Indian Cress” as the transferee is the same as the handwriting inserting “Roleystone” as the transferor.

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Mr Xie agreed, that Roleystone should, and did, nominate Comtrack to subscribe for shares in Auvex"

- (e) Mr Xie submitted: *"As far as Mr Xie is aware, these companies [Roleystone, Comtrack and Borstead] are related to, or represented by, Mr Roy"*
 - (f) Mr Roy is, Auvex submitted, the CEO of Comtrack. He is, Mr Xie submitted, CEO of Borstead. Borstead owns 100% of Comtrack and
 - (g) Auvex returned money to Borstead that it mistakenly thought had come from Roleystone *"at the request of Mr Roy on behalf of Borstead"*.
115. It is reasonable, in our view, based on acknowledged dealings to expect that Mr Roy would use corporate vehicles to hold shares, and we infer that he was buying shares in Auvex (and Mesa through it).
116. On 4 December 2009, Mr Arbuckle, dealing with the transfer to Comtrack, emailed Mr Roy *"... as Auvex has not yet been listed and you and your Singaporean companies are both non-residents I would simply transfer the share in the company at \$1 par value that the share was originally issued to you for. If needed we can backdate the share transfer form to before the agreement was signed with Auvex and just incur a \$212 late lodgement fee with ASIC"*.
117. On 8 April 2010 Mr Smalley, one of the Other Requisitioning Shareholders, emailed Mr Xie regarding proxies he (Mr Smalley) could be relied on for the section 249D meeting in Mesa. He said: *"How do you think you are looking numbers wise now? Has Primjit (sic) [Mr Roy] been buying a few [Mesa shares] to further strengthen our position now that you are near the 19.9% level where you will have to stop?"* Mr Xie replied: *"... Premjit is saying he will buy some [Mesa shares], I think he will."*
118. Auvex bought Mesa shares from 29 March 2010 until 9 April 2010.
119. Auvex said its understanding as to Comtrack was previously provided by Mr Roy. It now understands that Mr Roy is *"not the ultimate beneficial holder or controller of Comtrack but is a representative of Comtrack"*. It identified a company with a British Virgin Islands address as the *"new shareholder of Comtrack"* and another company as that company's director. The shareholder of the director is another company. While Auvex states that Mr Roy has confirmed his understanding that *"His instructions come from the corporate entities registered in the British Virgin Islands"*, it also states that *"Mr Roy has not been able to check his records in relation to Comtrack because he is in transit."* We have heard nothing further on this from Mr Roy. Even if Comtrack's immediate ownership has changed, no evidence was produced to show a proper transfer of assets to a genuinely new owner. We have been provided with only the basic information concerning the first level of new ownership and directorship in Comtrack. No information has been given as to its ultimate ownership or control.
120. We note that Mr Roy was asked, by the corporate services provider that arranged the transfer of shares in Comtrack, to provide the ultimate shareholder/ owner of the Van Nuys Group Ltd (the company that became Comtrack's shareholder). His response was *"[the information] does not need to be furnished. I will speak to him on that."*

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121. The movement in ownership and directorship fits the pattern of moving shares and directorships around.
122. We do not accept that Mr Roy is no longer the owner or controller of Comtrack. We infer that he continues to be so.
123. Similarly, we are not satisfied with a bald denial that Mr Roy is not the ultimate beneficial holder or controller of Indian Cress.
124. We note also Mr Xie addressed two questions (directed to Auvex) in rebuttal submissions using precisely the same words in answer to each question but for necessary changes to names or additional facts. The first question asked Auvex what inquiries it had made about who controlled Indian Cress and Market Energy; the second asked Auvex for a copy of the share and option agreements with Sea Prince. Such responses to questions in the brief reduce our confidence in those responses.
125. Sea Prince holds approximately 11.49% of Auvex. If included with Comtrack (9.07%) and Indian Cress (11.59%), together they hold voting power of approximately 32.15% of Auvex. If Market Energy (17%) is included the total increases to 49.15%.

Auvex

126. We infer that Mr Roy controls Auvex, including because:
 - (a) companies that Mr Roy owns or controls have a relevant interest in more than 20% of Auvex
 - (b) Mr Roy is a director of Auvex, along with Mr Cunningham and Mr Arbuckle. Both he and Mr Arbuckle were nominated by EMARS, a company he owns or controls
 - (c) Mr Roy or Mr Xie introduced Roleystone, Market Energy, Comtrack, Indian Cress and Sea Prince to Auvex
 - (d) money was paid into Auvex, some of which it used to acquire Mesa shares, but it was not clear why at least some of the money had been paid. Auvex received two payments of approximately \$1.5m and \$2.2m that it understood had come from Roleystone, but now understands came from Borstead. It has returned the first of the payments to Borstead and
 - (e) the decision to invest in Mesa was made by Mr Roy and Mr Cunningham, although subsequently we were told Mr Cunningham was the decision's 'instigator'.
127. In addition, we infer Mr Roy has more than 20% voting power in Auvex, giving him a relevant interest in Mesa shares held by Auvex.
128. Auvex commenced buying Mesa shares on 29 March 2010. On 26 and 27 March, Mr Cunningham and Mr Roy discussed buying Mesa shares in Auvex after the First Requisitioned Meeting. On 30 March 2010 Mr Cunningham "informed" Mr Arbuckle, who agreed. According to the records, the board resolved only on 1 April 2010 to acquire up to 10% of the issued capital of Mesa. Auvex submitted

that the board “considered that it would be in the best interests of shareholders of Auvex to acquire a blocking stake to the takeover and would provide good leverage with the hostile Mesa Board when looking to advance Joint Venture negotiations.” Auvex obtained no advice and provided no evidence of the board's deliberations other than the circular resolution recording the decision. Auvex has 6.97% of Mesa, well short of a ‘blocking stake’. This supports our inference that Mr Roy owns or controls Auvex.

129. Auvex submitted that it did not know who the ultimate owner or controller was of Indian Cress or Market Energy. We do not accept that Auvex does not know who stands behind such a significant proportion of its share register, particularly when there are obvious links to Mr Roy, a director on Auvex's board. We infer that the response in the submission was obfuscation. This supports our inference that Mr Roy controls Auvex.
130. We infer it is more likely that Mr Xie owns or controls Market Energy but do not exclude the possibility that Mr Roy owns or controls it (and if he did this would also support our inference that Mr Roy controls Auvex).
131. There were also transfers of money from companies that, we infer, are owned or controlled or associated with, Mr Xie.
132. Market Energy and Sea Prince pre-paid approximately \$4.6 million for the exercise of options, subscriptions for shares and transfers of shares in Auvex. Some of the shares are yet to be issued. To take an example, a company called First Link Shipping Co paid \$2,474,513 to Auvex on behalf of Sea Prince. A week later Sea Prince gave Auvex two notices of exercise of options and \$600,000 was used for those exercises (it is not clear how Sea Prince got options). The same week \$960,000 was paid to former shareholders for their transfers of Auvex shares to Sea Prince. Mr Xie was involved in respect of these dealings. Money remains in Auvex - \$914,513.
133. Auvex holds these funds – \$914,513 - in trust on behalf of Sea Prince, which Mr Xie has instructed is to be applied as part payment of money under a subscription agreement (which appears as yet to be signed).¹⁹
134. It is unrealistic to think that companies not controlled by Mr Xie or Mr Roy would hand over money (and large sums relative to Auvex's net assets) indiscriminately to another company not controlled by Mr Xie or Mr Roy.
135. The money mostly came in around the time of the decision made by Mr Roy and Mr Cunningham on behalf of Auvex to start buying Mesa shares. We note that without this money Auvex did not have sufficient funds to fulfil its strategy for acquiring Mesa shares.
136. It may be that Mr Roy controls Auvex together with Mr Xie, or that he simply consults with Mr Xie given their long-standing business arrangements. In our view, this does not prevent Mr Roy having control.
137. Auvex started buying Mesa shares as Mr Xie approached the 20% threshold in Mesa. The Panel said in *Orion Telecommunications*:

¹⁹ See fn 17

“While sequential buying of shares by two entities is not of itself evidence of an association, in the circumstances before the Panel, where there was other probative material indicating an association ... what appeared to be concerted buying activity may be taken to support an inference of an “understanding” constituting a relevant agreement within section 12(2)(b) or a common purpose amounting to acting in concert within section 12(2)(c)....”²⁰

138. We have other probative material in this case.

Association - Mr Xie and Mr Roy

139. Mr Xie and Mr Roy share many links:

- (a) in 2007 and 2008, when Mr Xie was approached to invest in Auvex, he approached Mr Roy
- (b) each was a shareholder in EMARS and Roleystone and, as various documents suggest, were accustomed to liaising with one another concerning dealings in relation to Auvex
- (c) EMARS appears to be jointly held still, and has an interest in Auvex through convertible note interest payments
- (d) Mr Roy lent money to Mr Xie as noted above, on interest free terms, now repaid. The reason for the uncommercial terms was, Mr Xie submitted, because he introduced Mr Roy to the investment and negotiated a good price
- (e) Mr Roy attended the First Requisitioned Meeting, or at least part of it. He spoke to some of the requisitioning shareholders. He had drinks after a dinner the night before the meeting with several people including Mr Smalley, Mr Cunningham and Mr Xie. Mr Smalley said Mr Roy was at the dinner. After the meeting, he had lunch with Mr Xie, Mr Cunningham, Mr Smalley and some of the Other Requisitioning Shareholders. Why Mr Roy was present and the capacity in which he attended the meeting or the functions was not explained until submissions were made on our preliminary findings. Mr Xie submitted that he invited Mr Roy to meet the proposed new directors. Auvex did not hold Mesa shares at this time. Mr Smalley sent an email thanking Mr Xie and Mr Roy for their hospitality. Why Mr Roy should be a host is not explained
- (f) Mr Roy was nominated to the board of Auvex by EMARS. Mr Xie was then a director of Auvex (he resigned on 20 January 2010) and EMARS
- (g) Mr Xie and Mr Roy are directors of Auvex’s subsidiary, Auvex Manganese
- (h) in his submission, Mr Xie said that he had known Mr Roy since late 2005 through their commercial dealings as representatives of various trading companies, were both directors and shareholders of Haoning Emars Shipping Inc, both incorporated Roleystone, agreed to invest jointly in Auvex, and shared directorships in EMARS, Roleystone, Auvex and Auvex Manganese. However, Mr Xie submitted that he no longer had any common investment

²⁰ *Orion Telecommunications Ltd* [2006] ATP 23 at [107]

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with Mr Roy. We do not accept this. Companies associated with Mr Roy are significant investors in Auvex. Auvex is a significant investor in Mesa, as is Mr Xie

- (i) Mr Xie paid ASIC fees on behalf of EMARS. Mr Arbuckle emailed Mr Xie saying “...can you please pay this amount from the directors’ fees that have been (sic) to Premjit [Mr Roy] recently” and
- (j) Mr Xie and Mr Roy were both invited to be observers in Auvex’s proposed IPO due diligence committee. Mr Arbuckle was to become a member of the due diligence committee, but Mr Xie and Mr Roy were not available full time in Perth. The legal advisers were to confirm, “this is acceptable to Mr Xie and Mr Roy”.

140. Mesa submitted that Mr Xie and Mr Roy were long-standing business partners and joint investors in Auvex. It submitted that the strong relationship continues. We agree.

141. We are satisfied that there are:

- (a) structural links between many of the entities holding Auvex shares and Mr Xie or Mr Roy
- (b) common investments and dealings between Mr Xie and Mr Roy and
- (c) uncommercial dealings

such as to make Mr Xie and Mr Roy associates in relation to Mesa, either because they have relevant agreements for the purpose of controlling or influencing the composition of Mesa's board or the conduct of its affairs or because they are acting or proposing to act in concert in relation to Mesa's affairs.

142. The ownership and directorships of companies in relation to shareholdings in Auvex has been a moving feast, for no explained reason. A Byzantine structure has been established. Explanations of the structure are less than transparent. Shares have been transferred, nominees have been identified to take issues of shares, directors have resigned, often at significant times, new companies have been incorporated to take shares and the shareholders and even the directors of some companies are other companies. As recently as the date of the application, Mr Roy was seeking to transfer Auvex shares from Roleystone urgently. No explanation for the constant changes has been provided and no reason for many of them is apparent. Auvex submitted that it is not in a position to explain ownership changes in it. Mr Roy has been unavailable to provide information directly. He has had a lot of opportunity to do so.

143. We infer that the shifts have been to conceal the true ultimate ownership of the holdings. We infer that the ultimate owner or controller of relevant companies owning shares in Auvex is Mr Roy.

144. We infer that Mr Xie and Mr Roy are associates in relation to Mesa.

145. One additional fact may be significant although we have not been provided with an answer. We asked how Mighty River paid for its Mesa shares. If the funds were

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borrowed, we asked for details of the lender, terms and any relationship to a person mentioned in these proceedings. The response we received was as follows:

“It is submitted that the terms of Mr Xie’s financing arrangements are highly confidential and his financiers have no interest in the affairs of Auvex or Mesa. Mighty River’s purchasing of Mesa shares has been funded by a combination of borrowings and its own cash reserves. The funds have been borrowed from business contacts on commercial arm’s-length terms. None of the financing arrangements grant the lender any security over, or any relevant interest in, Mesa or Auvex shares.”

146. The loan appeared unsecured, but Mr Xie submitted that it had been secured by other assets. That no substantive information was provided is, we infer, because the information would not assist him. Had it been otherwise, we think a reasonable respondent seeking to be candid would have provided as much information as possible and would have sought to properly protect confidential aspects.
147. We alternatively infer that Mr Xie and Mr Roy are associates in relation to Auvex.
148. Mr Xie had involvement in transfers and payment of monies concerning the investment in Auvex by various companies when it might be expected that independent companies would prefer to deal directly. Mr Xie submitted that the controllers of those companies were not comfortable dealing in English. But his involvement exceeded, in our view, what might be expected in that regard. This supports inferences that Mr Xie owned or controlled the companies or that his associate did so and that he was associated with Mr Roy in relation to Auvex. If the investing companies are owned or controlled by Mr Roy, Mr Xie’s involvement evidences his ongoing relationship with Mr Roy.
149. In late 2009, Mr Xie indicated that he did not want to continue investing in Auvex, but Mr Roy did. While this may be regarded as evidence that they were no longer associates, in our view it goes only to explaining unwinding of the investment. We are not satisfied that it is evidence that their association ended.

Scenario (c): Mr Xie is associated with Mr Roy and companies that together own or control more than 20% of Auvex are owned or controlled by Mr Xie or Mr Roy or by persons associated with Mr Xie and/or Mr Roy

150. In addition to considering whether there is an association between Mr Xie and Auvex directly, or between Mr Roy (controlling Auvex) and Mr Xie, we considered whether Mr Xie has more than 20% voting power in Auvex so as to obtain a relevant interest in Mesa shares held by Auvex.
151. Mr Xie would have more than 20% voting power in Auvex if he is:
 - (a) associated with Mr Roy (which we address above) and Mr Roy either controls Auvex (which we address above) or himself has voting power in more than 20% of Auvex through companies he is associated with or
 - (b) associated with or controls companies that together own or control more than 20% of Auvex.

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152. Taking the first case, Comtrack and Indian Cress together have more than 20% of Auvex, and we discuss their connection to Mr Roy above.
153. Taking the second case, we looked at Market Energy and Sea Prince. We discuss Sea Prince above.

Market Energy

154. We infer that Market Energy is owned or controlled by, or associated with, Mr Xie. Our reasoning includes:
- (a) Market Energy holds approximately 17% of Auvex. Mr Xie introduced it
 - (b) Mr Xie submitted that in late 2009 he approached Ms Du Xiuying to invest in Auvex through Market Energy. Ms Du was the CFO of another company that Mr Xie traded with. As far as Mr Xie was aware, he submitted, Ms Du owned Market Energy. Ms Du, according to Auvex, is a Chinese national with little or no English
 - (c) Mr Xie actively organised new investors for Auvex, especially Market Energy which is also incorporated in the British Virgin Islands. Market Energy, Indian Cress, Borstead, and Roleystone are all BVI companies with the same registered agent. Mighty River submitted that this was irrelevant since the companies were incorporated by “*a leading company formation specialist with principal offices in Hong Kong, Singapore and Taiwan.*” In our view it is not irrelevant. It is too much of a coincidence, given everything else, not to warrant an inference, in the absence of a proper explanation, that some or all of these companies have come into being as a result of instructions from, or links to, a common source. It is likely that the source was Mr Xie or Mr Roy
 - (d) Mr Xie communicated with Auvex in relation to Market Energy at Ms Du’s request
 - (e) Mr Cunningham gave a presentation on the potential future float of Auvex Manganese at which Ms Du was present
 - (f) Ms Du passed Mr Xie the signed transfer documents for the transfer of Auvex shares to Market Energy in December 2009 from SJ Crushing, Mr Crabbe and Mrs Crabbe and
 - (g) Mr Xie was involved in emails with Mr Crawford concerning the execution of option exercise notices for Market Energy and the transfer by Market Energy of money to Auvex.
155. The acquisition by Market Energy fits the pattern of dispersed holdings with links to Mr Xie.
156. On the information available to date, we infer that Mr Xie owns or controls Market Energy or that it is associated with Mr Xie. Mr Xie arranged for Market Energy to buy into Auvex and has been involved in significant administration on behalf of Market Energy. He has links with its ‘owner’. We think it is likely that Mr Xie is at least associated with Market Energy in respect of the affairs of Auvex.

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157. It is possible that Mr Roy owns or controls, or is associated with, Market Energy. Market Energy shared an address with Comtrack in Singapore. Auvex submitted that, while Market Energy and Comtrack did share the same address, this has changed with the changing directorship and shareholding. Mr Xie submitted in rebuttal that Market Energy and Comtrack never shared the same address. Prior to this, Mr Xie's submission on the point was that sharing an address was not evidence of association. We accept Auvex's submission.

Scenario (d): Association between Mr Xie and the Other Requisitioning Shareholders

158. Mr Xie and the Other Requisitioning Shareholders disclosed an association in connection with the First Requisitioned Meeting. They lodged a substantial holding notice. The Other Requisitioning Shareholders were SJ Crushing, Ms Crabbe, Mighty River, Stanley Paulo, Roy Kendall, Mr Smalley, Mousetrap Nominees Pty Ltd Octifil Pty Ltd.
159. Since then, two of the Other Requisitioning Shareholders (Mousetrap and Octifil) have sold their shares, and we have no evidence that the shares were simply moved to other companies with the same ultimate controllers. Their association has ended. Mr Paulo and Mr Kendall gave proxies to the chairman of the meeting and we are prepared to accept they ended their association at the conclusion of the First Requisitioned Meeting.
160. SJ Crushing acquired more Mesa shares in the lead up to the First Requisitioned Meeting.
161. SJ Crushing and Ms Crabbe became parties to these proceedings and submitted that they played no part in requisitioning the Second Requisitioned Meeting. They submitted that there have been no communications between them, or anyone connected with them, and Mr Xie, Mighty River or Auvex that are relevant to the matter before the Panel in relation to Mesa.
162. Ms Crabbe, in a statutory declaration, declared that she has had no communications with Mr Xie or Auvex.
163. Mr Crabbe, managing director of SJ Crushing, declared that he was aware of the following communications between persons connected with SJ Crushing, Auvex and Mr Xie:
- (a) discussions in relation to the outcome of the First Requisitioned Meeting and the need to file a "*Form 605 as the Requisitioning Shareholders were no longer associated*"
 - (b) his personal assistant had emailed Mr Xie at his request seeking an update on proposed sales of Auvex shares
 - (c) telephone discussions with Mr Xie regarding the status of the prospective Auvex share sales, including, he believed, enquiries as to the number of Mesa shares purchased by Mighty River and
 - (d) discussions with Mr Cunningham and Mr Hewitson, connected with Auvex, regarding tenders SJ Crushing had submitted to Auvex. He said: "*These tenders include the Ant Hill mining project and accordingly during the course of the*

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discussions I believe I would have enquired as to the current status of the dispute between Auvex and Mesa."

164. Mesa submitted that the association arose prior to the formal requisitioning of the meeting because it concerned the composition of Mesa's board rather than the requisitioning of the meeting. We agree. In an email from Mr Crabbe to the legal advisers for Mr Xie on 3 March 2010, Mr Crabbe said "*I hope we have the board on notice that we will unwind anything they do after we served the 249.*" We infer that there was an arrangement or understanding between Mighty River and Other Requisitioning Shareholders in relation to Mesa that went beyond simply requisitioning a meeting.
165. Mesa further submitted that the association was ongoing. It submitted that the association did not cease simply because the meeting had been held. We agree that the holding of the meeting did not automatically end the association.
166. The parties having disclosed an earlier association, we would be prepared to infer that the association continued in the absence of the parties establishing why and how it ended. In particular we considered carefully the continued involvement of Mr Crabbe and Mr Smalley.
167. SJ Crushing submitted that Mr Crabbe "*actively lobbied to engage Mesa members to vote in favour of the resolutions to be put at the First Requisitioned Meeting*" and "*reported his efforts to the parties' co-ordinating the lobbying effort*". Further "*these reports and the progress reports of the lobbying efforts of others often circulated to Mr Xie and the lawyers for Mighty River as similarly interested parties.*"
168. We have sworn statements to the Panel by Mr Crabbe (SJ Crushing) and Ms Crabbe that they do "*not have or propose to enter into a relevant agreement with any of Mr Xie, Mighty River or Auvex for the purpose of controlling influence in the composition of Mesa's board or the conduct of Mesa's affairs*" and are "*not acting, or proposing to act in concert with any of Mr Xie, Mighty River or Auvex in relation to Mesa's affairs*". We have no evidence of any arrangement between them in respect of the Second Requisitioned Meeting, such as might show Mr or Mrs Crabbe communicating with Mr Xie in relation to the Second Requisitioned Meeting or soliciting votes. They may decide to vote the same way as they did in the First Requisitioned Meeting, but that alone is not enough. On the information available to date, on balance, we are inclined to conclude that Mr Crabbe (SJ Crushing) and Mrs Crabbe have established that the association involving them ended.
169. Mr Smalley, although not a party, responded to an invitation to answer questions in a brief.
170. Mr Smalley was very actively involved in respect of the First Requisitioned Meeting:
 - (a) he canvassed shareholder support in favour of the resolutions. He described his involvement as that of an intermediary for clients, but he was more active than such a role would suggest in our view

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- (b) he was involved in efforts relating to the appointment of proxies, by sending a copy to Mr Hartwig, a proposed director, and faxing them to the share registrar and
 - (c) he attended the dinner (with other requisitioning shareholders) before the First Requisitioned Meeting and the lunch afterwards.
171. On the information available to date, on balance, we infer that Mr Smalley remained associated with Mr Xie, including because:
- (a) he was involved in soliciting support for the Second Requisitioned Meeting
 - (b) on 8 April 2010 he emailed Mr Xie stating *“No worries from my end my friend – My clients and I would have sold only a net 500k since the cutoff for last weeks vote (ie 1m sold, 500k bought)”*. He explained his selling and assured Mr Xie that he would sell no more shares
 - (c) in the same email he also said: *“So to sum up you can rely on me for approximately 51m proxies give or take 100k or so.”* His submission indicated that he may have overstated the position, but the email demonstrates the level of his involvement
 - (d) also on 8 April he emailed Mr Xie regarding Mesa share sales. He said *“Since I have not been in the office I have had some clients sell and not had the chance to talk them out of it”*. This suggests an ongoing active role supporting Mr Xie and
 - (e) also on 8 April he emailed Mr Xie to say *“I think we will need around 250m to be safe, with what you've got and myself and my clients that amounts to 165m so need another 85m from elsewhere”*. It is interesting that he separates his position from that of his clients, and refers to ‘we’. The email goes on: *“Throw in Steve/Primjit(sic)/ Guy's/Taylor's etc and we should be getting pretty close”*.
172. As a post-script, we note Mr Smalley’s submission on orders included the following: *“In early April, he [Mr Smalley] became concerned, from ASX announcements relating to Mesa, that Mr Xie’s total shareholding was materially increasing and therefore he reminded Mr Xie, in early April, that he could not go over the 19.9% threshold (including Mr Smalley’s shares) otherwise this could create problems under the Takeovers legislation”*. This confirms the view we had formed when we issued the orders brief that he remained associated with Mr Xie.
173. As a further post-script, since we made our decision Mr Smalley has accepted the Mineral Resources offer and said that he intends to vote his shares in favour of the Mesa board.
174. Accordingly, on the information available to date, we do not infer an association continuing between Mr Xie and the Other Requisitioning Shareholders other than Mr Smalley, which gave Mr Xie voting power over Mr Smalley’s 7,000,000 Mesa shares.²¹

²¹ According to Form 603 lodged by Mr Smalley on 2 June 2010, Mr Smalley accepted his 7,000,000 Mesa shares into the Mineral Resources bid on 18 May 2010 and following the bid being declared free from conditions, Mr Smalley no longer exercises voting power over those shares

175. Adding Mr Smalley's approximately 1.1% of Mesa to scenarios (a), (b) or (c), Mr Xie's voting power would have been approximately 27.3%.

DECISION

Declaration

176. It appears to us that the circumstances are unacceptable. We made a declaration of unacceptable circumstances (Annexure B), having considered that it is not against the public interest to do so and having had regard to the matters in s657A(3).

Orders

177. Under s657D the Panel's power to make orders is very wide. The Panel is empowered to make 'any order'²² if 4 tests are met:
- (a) it has made a declaration under s657A. This was done on 21 May 2010
 - (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. We are satisfied that our orders do not unfairly prejudice any person. They involved 3 things -
 - (i) divestment of shares that were acquired in excess of the 20% limit. We calculated which acquisitions these were. They were by Auvex and Mighty River. We allowed time for Auvex and Mighty River to accept the Mineral Resources bid if they wished, rather than divest the shares by forced sale immediately
 - (ii) restriction on voting shares in excess of the 20% limit and
 - (iii) disclosure of the associations
 - (c) it gives any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. This was done on 19 May 2010. Each party potentially affected by the proposed orders made submissions. Rebuttals were also received and
 - (d) it considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons, or ensure that a takeover or proposed takeover proceeds as it would have if the circumstances had not occurred. The orders do this by remedying the contravention of the 20% limit, and disclosing the associations to the market. By allowing Auvex and Mighty River to accept the Mineral Resources takeover, we reduce the potential impact on them of a forced sale and help to ensure that the takeover proceeds as it would have if the circumstances had not occurred. If they do not accept for any or all of the excess shares, then those shares are to be sold to persons who are not associated with any of the associated parties.

²² Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

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178. Mighty River submitted that the calculation of shares over 20% should be based on the current (larger) issued capital of Mesa. Auvex similarly. We accept that. The purpose of our orders is to remedy existing unacceptable circumstances.
179. ASIC submitted that Auvex and Mighty River were “... on the face of it equally capable of undertaking divestiture in accordance with appropriate orders.” They submitted that there was no need to vest the shares in ASIC for sale as the proposed orders required the appointment of an independent seller and that purchasers provide a statutory declaration that they are not associated with any of the associated parties. Mighty River supported this in rebuttals. We disagree that it would be sufficient to allow the parties to divest themselves, even if through an independent seller. We have found that the parties have associations with various companies and there may well be others not at the moment relevant. Companies could also be established to buy the shares, and it might be impossible to find out in time. Having the independent seller appointed by, and answerable to, ASIC in these circumstances is important.
180. Mr Smalley submitted that at the time he became associated with Mr Xie the total voting power was less than 20% and “later buying of shares in Mesa by Mr Xie, and the later association of Mr Xie with Auvex (which was unknown to Mr Smalley) has created an inadvertent problem for Mr Smalley”. We accept this. However his shares should be counted in the total for the purposes of orders. The declaration and orders took into account the shares then held by Mr Smalley.
181. Mr Smalley further submitted that, having now sold into the bid, he should not be required to lodge a substantial holding notice. We do not agree. It is important for the market to know what the situation was.
182. We do not make any orders as to costs.
183. The applicant also sought an order divesting all the shares held by Mighty River or Auvex if they failed to comply with tracing notices. This was withdrawn as against Mighty River and not really developed during the proceedings in respect of Auvex. We made no declaration or orders on this aspect of the application, and note that we have otherwise ordered the divestment of most the shares Auvex holds.

OTHER MATTERS

184. The material was voluminous, with attachments running to many hundreds of pages. Many attachments were not numbered. This was most unhelpful and caused us difficulty identifying and numbering each document so as to ensure we had the right attachment referred to in the submissions.

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185. Mr Xie submitted that Mr Roy should be given the opportunity to address the Panel's findings. The Panel put its preliminary findings to the parties and, for relevant parts, Mr Smalley. Mr Roy is a director of one of the parties. The Panel specifically asked for Mr Roy's responses to some questions in its supplementary brief. Auvex submitted that it had asked Mr Roy about the Panel's preliminary findings and questions the Panel had asked, but Mr Roy has not responded. We think he has been given every opportunity to address issues before the Panel and preliminary findings the Panel was considering making.
186. We also became concerned with some changes or shifting of emphasis which occurred in some submissions:
- (a) Auvex submitted that the decision to invest in Mesa was made by Mr Roy and Mr Cunningham as directors; then submitted that Mr Cunningham was the "*instigator of Auvex's strategy to acquire Mesa shares*"
 - (b) Auvex submitted "*Auvex acquired its interest in Mesa following consideration of this step by its board*". However, it started acquiring its interest before the board meeting that approved the acquisition of the interest
 - (c) Auvex first submitted that it acquired its Mesa shares following consideration by the board, then submitted that the acquisition had been discussed on 26 or 27 March, then submitted that the strategy for the acquisition had been agreed on 26 or 27 March
 - (d) Mr Xie in subsequent submissions recalled information when prompted by statements or documents submitted by others, or acknowledged that communications he could not recall had happened, or further searched his records and found further relevant documents although asked to produce them in the first place. Mr Xie submitted that he had been "*extremely candid about the nature of his business dealings with all parties*". We do not agree
 - (e) Mr Xie made a submission that siblings were not associated by reason of being siblings, later acknowledging in a submission that it was his economic interest in Auvex held via Roleystone and EMARS and
 - (f) Mr Smalley denied any association then submitted he had contacted Mr Xie in April when he became concerned that Mr Xie was nearing the 20% threshold (the calculation including Mr Smalley's shares).

Peter Scott
President of the sitting Panel
Decision dated 21 May 2010
Reasons published 4 June 2010



Australian Government

Takeovers Panel

Annexure A

CORPORATIONS ACT SECTION 657E INTERIM ORDERS

MESA MINERALS LIMITED

Mesa Minerals Limited (**Mesa**) made an application to the Takeovers Panel dated 13 April 2010 in relation to its affairs.

Mighty River International Limited (**Mighty River**) has requisitioned a general meeting of Mesa under section 249D of the Corporations Act 2001 (Cth) scheduled to be held on 28 May 2010.

The Panel ORDERS:

1. Mighty River, Mr Yuzheng Xie and Auvex Resources Limited (**Auvex**) not dispose of, transfer or charge any shares they hold in Mesa.
2. If, notwithstanding order 1, a transfer of any shares held in Mesa by Mighty River, Mr Xie or Auvex is lodged, Mesa not register the transfer.
3. Mighty River and Auvex not exercise any voting rights in respect of the following shares held by them in Mesa:
 - 3.1. Mighty River: 12,569,181 Mesa shares
 - 3.2. Auvex: 35,938,408 Mesa shares.
4. If, notwithstanding order 3, any voting rights in respect of the shares specified in order 3 are exercised, Mesa disregard those votes.
5. These interim orders have effect until the earliest of:
 - (i) further order of the Panel
 - (ii) the determination of the proceedings and
 - (iii) 2 months from the date of these interim orders.

**Alan Shaw
Counsel
with authority of Peter Scott
President of the Sitting Panel
Dated 19 May 2010**



Australian Government

Takeovers Panel

Annexure B

**CORPORATIONS ACT
SECTION 657A
DECLARATION OF UNACCEPTABLE CIRCUMSTANCES**

MESA MINERALS LIMITED

CIRCUMSTANCES

1. Mesa is a listed company (ASX Code: MAS) with issued capital of 617,270,831 ordinary shares.
2. Mighty River holds 118,294,255 Mesa shares and Mr Yuzheng Xie holds 12,500 Mesa shares. Mr Xie is the sole shareholder and director of Mighty River and controls it. Mighty River has approximately 19.17% voting power in Mesa.
3. Auvex holds 43,000,000 Mesa shares (approximately 6.97%).
4. Mr James Howard Nigel Smalley holds 7,000,000 Mesa shares (approximately 1.13%).
5. Mineral Resources has made a takeover bid for all the shares in Mesa, currently due to close on 2 June 2010.
6. Mighty River has requisitioned an extraordinary general meeting of Mesa under section 249D²³ to replace a majority of the board of Mesa scheduled to be held on 28 May 2010.
7. The Panel considers that:
 - (a) under section 12(2)(b) for the purpose of controlling or influencing the composition of Mesa's board or the conduct of Mesa's affairs, or
 - (b) under section 12(2)(c) in relation to the affairs of Mesaone or more of the following exist:
 - (c) Mr Xie is associated with Auvex
 - (d) Mr Xie is associated with Mr Premjit Roy and Mr Roy controls Auvex or
 - (e) Mr Xie is associated with Mr Roy and companies that together own or control more than 20% of Auvex are owned or controlled by Mr Xie or Mr Roy or by persons associated with Mr Xie and/or Mr Roy.
8. Further or alternatively, the Panel considers that Mr Xie and Mr Roy are associated:
 - (a) under section 12(2)(b) for the purpose of controlling or influencing the conduct of Auvex's affairs, or
 - (b) under section 12(2)(c) in relation to the affairs of Auvex.

²³ References are to sections of the *Corporations Act 2001* (Cth) unless otherwise indicated

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9. Further, the Panel considers that Mr Xie and Mr Smalley are associated:
 - (a) under section 12(2)(b) for the purpose of controlling or influencing the composition of Mesa's board or the conduct of Mesa's affairs or
 - (b) under section 12(2)(c) in relation to the affairs of Mesa.
10. Mr Xie, Mighty River and Auvex's voting power in Mesa has increased as a result of acquisitions beyond the 20% threshold in section 606 other than through one of the exceptions in section 611 and without disclosure under Chapter 6C.
11. It appears to the Panel that the circumstances are unacceptable:
 - (a) having regard to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of Mesa or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Mesa or
 - (b) having regard to the purposes of Chapter 6 set out in section 602 or
 - (c) because they constitute or give rise to a contravention of sections 606 and 671B.
12. 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 Mesa.

DEFINITIONS

In this declaration:

Auvex means Auvex Resources Limited

Market Energy means Market Energy Ltd

Mesa means Mesa Minerals Limited

Mighty River means Mighty River International Limited

Mineral Resources means Mineral Resources Limited

Alan Shaw
Counsel
with authority of Peter Scott
President of the sitting Panel
Dated 21 May 2010



Australian Government

Takeovers Panel

Annexure C

CORPORATIONS ACT SECTION 657D ORDERS

MESA MINERALS LIMITED

The Panel made a declaration of unacceptable circumstances on 21 May 2010.

THE PANEL ORDERS

Divestment order

1. Any Sale Shares not accepted into the Mineral Resources takeover bid for Mesa within 7 days of the date of these orders are vested in ASIC for it to:
 - 1.1. sell them in accordance with these orders and
 - 1.2. account to Auvex and Mighty River for the proceeds of sale, net of the costs, fees and expenses of the sale and any costs, fees and expenses incurred by ASIC.
2. If the Mineral Resources bid for Mesa closes with conditions under the bid not satisfied or waived, or if acceptances into the bid with respect to Sale Shares are withdrawn for any reason, any Sale Shares which had been accepted into the bid are vested immediately in ASIC for it to:
 - 2.1. sell them in accordance with these orders and
 - 2.2. account to Auvex and Mighty River for the proceeds of sale, net of the costs, fees and expenses of the sale and any costs, fees and expenses incurred by ASIC.
3. If shares are vested in ASIC under either orders 1 or 2 :
 - 3.1. ASIC must retain an investment bank or stock broker (**Appointed Seller**) to conduct the sale as determined by the Appointed Seller, in its absolute discretion, to be the most appropriate method to get the best available sale price for the Sale Shares in the context of complying with these orders.
 - 3.2. ASIC must instruct the Appointed Seller:
 - 3.2.1. to provide to ASIC a statutory declaration that, having made proper inquiries, the Appointed Seller is not aware of any interest, past, present, or prospective which could conflict with the proper performance of the Appointed Seller's functions in relation to the disposal of the Sale Shares
 - 3.2.2. that none of the Associated Parties or any of their associates may purchase any of the Sale Shares
 - 3.2.3. to obtain from any prospective purchaser of Sale Shares a statutory declaration that it is not associated with any of the Associated Parties and
 - 3.2.4. to dispose all of the Sale Shares within 2 months from the date of its engagement.

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4. Other than accepting into the Mineral Resources takeover bid for Mesa, Auvex and Mighty River must not dispose of, transfer or charge any Sale Shares.
5. Until the first to occur of:
 - 5.1. the Sale Shares vesting in ASIC and
 - 5.2. the Sale Shares being transferred to Mineral Resources in accordance with the takeover bid following an acceptance by Auvex or Mighty River as referred to in order 1,if, notwithstanding these orders, a transfer of any of the Sale Shares is lodged otherwise than to give effect to these orders, Mesa must not register the transfer. This order applies as far as it is practicable for Mesa to comply with it.

Voting order

6. Until completion of these orders:
 - 6.1. Auvex cannot exercise any voting rights in respect of Mesa shares and
 - 6.2. Mighty River can only exercise voting rights over 105, 241, 019 Mesa shares

Substantial holding disclosure order

7. As soon as practicable each of the Associated Parties give notice of their combined substantial holding as required under Part 6C.1 in relation to their voting power in Mesa and their association, including disclosing:
 - 7.1. the name of each associate who has a relevant interest in voting shares in Mesa
 - 7.2. the nature of their association with each associate and
 - 7.3. the relevant interest of each associate.

Interim order

8. For avoidance of doubt the interim order dated 19 May 2010 is discharged.

Definitions

ASIC means Australian Securities and Investments Commission

Associated Parties means Mighty River, Auvex or Mr James Howard Nigel Smalley or any of their associates

Auvex means Auvex Resources Limited

Mighty River means Mighty River International Limited

Mineral Resources means Mineral Resources Limited

Sale Shares means the following shares:

- (a) 34,932,471 Mesa shares held by Auvex
- (b) 9,920 118 Mesa shares held by Mighty River

Alan Shaw

Counsel

with authority of Peter Scott
President of the sitting Panel
Dated 21 May 2010