



Australian Government

Takeovers Panel

**Reasons for Decision
Mesa Minerals Limited 01R
[2010] ATP 6**

Catchwords:

Review application, decline to set aside decision, vary decision, set aside orders, 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 249D, 606, 657EA, 671B

Mesa Minerals Limited [2010] ATP 4, Breakfree Limited 04(R) [2003] ATP 42, National Can Industries 01(R) [2003] ATP 40, Taipan Resources NL (No 9) [2001] ATP 4

Takeovers Panel v Glencore International AG [2005] FCA 1628

INTRODUCTION

1. The review Panel, Tom Bathurst QC (sitting President), Catherine Brenner and Andrew Lumsden, affirmed but varied in part the decision of the initial Panel. The review Panel agreed with the initial Panel that associations exist between Mr Xie and Mr Premjit Roy, Auvex, shareholders that own a controlling parcel of Auvex shares and Mr James Smalley in relation to Mesa's affairs. It varied the declaration. Given events since the initial Panel's orders, it set aside the initial Panel's orders.

2. In these reasons, the following definitions apply.

Auvex	Auvex Resources Limited
Mesa	Mesa Minerals Limited
Mighty River	Mighty River International Limited
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
Second Requisitioned Meeting	An extraordinary general meeting of Mesa requisitioned by Mighty River under s249D to replace a majority of the directors to be held on 28 May 2010 ¹

FACTS

3. On 13 April 2010, Mesa applied for a declaration of unacceptable circumstances. It submitted that Mighty River and Mr Xie were associated with Auvex and the

¹ Cancelled on 27 May 2010 after Mighty River withdrew the requisition under s249D

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Other Requisitioning Shareholders and, as a result, the voting power of the associated parties had exceeded 20% in breach of s606² and without disclosure as required under s671B. The facts in the initial matter are set out in the initial Panel's reasons.³

4. The initial Panel's conclusions are set out in its reasons, including that:
 - (a) Mr Xie is associated with Auvex
 - (b) Mr Xie is associated with Mr Roy and Mr Roy controls 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
 - (d) Mr Xie and Mr Roy are associates in relation to Auvex and
 - (e) Mr Xie is associated with Mr Smalley.
5. The initial Panel made final orders, the effect of which was to:
 - (a) allow Mighty River, Mr Xie and Auvex up to 7 days to reduce the combined voting power of the associated parties by accepting the Mineral Resources bid
 - (b) if they did not accept the Mineral Resources bid, vest in ASIC the shares acquired by Mighty River and Auvex in breach of s606 for sale (with the proceeds net of costs to be returned to Mighty River or Auvex as appropriate)
 - (c) freeze voting rights such that the associated parties had no more than 20% effective voting power at any meeting of Mesa and
 - (d) require disclosure of the association and voting power of the relevant parties.
6. On 18 May 2010, Mr Smalley accepted the Mineral Resources bid in respect of all his shareholding in Mesa.
7. On 25 May 2010 Mineral Resources declared its bid unconditional. On the date of our decision, the bid was scheduled to close on 16 June 2010 and Mineral Resources held approximately 54% of Mesa.
8. On 27 May 2010 Mighty River withdrew its requisition for the Second Requisitioned Meeting. Mesa cancelled the meeting on the same day.
9. On 2 June 2010 Auvex accepted the Mineral Resources bid in respect of all its shareholding in Mesa.

REVIEW APPLICATION

10. By application dated 24 May 2010, Mighty River and Mr Xie sought a review of the initial Panel's decision.

² References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

³ [2010] ATP 4

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Interim orders sought

11. The initial Panel's orders required that certain Mighty River and Auvex shares be vested in ASIC and sold, but it allowed Mighty River and Auvex up to 7 days to reduce the collective shareholding of the associated parties by accepting the Mineral Resources bid.
12. On 28 May 2010 (the expiry of this period), Mighty River and Mr Xie sought interim orders to stay the vesting order and extend the period in which they could accept the Mineral Resources bid. Auvex supported the application.
13. We stayed the first 3 of the initial Panel's orders so that no shares would be vested in ASIC pending our consideration of the matter. This had the effect of extending the period in which Mighty River and Auvex could accept the Mineral Resources bid.
14. Mighty River and Mr Xie also sought an interim order requiring Mineral Resources to issue a corrective statement in relation to an announcement it made on 20 May 2010. Mighty River submitted that the announcement wrongly attributed certain statements to it. The acting President declined to make this interim order. He considered that it was not relevant to the circumstances of either the initial application or the review application. We agree.

DISCUSSION

15. Based on the evidence before initial Panel we consider that the inferences and conclusions as to association that were drawn by it were reasonable and supportable and were open. We asked the parties if there was any further material they wished to provide. Submissions were made. The submissions did not change our view. We reach the same conclusions as the initial Panel, for substantively the same reasons.
16. Mighty River and Mr Xie submitted that the initial Panel placed insufficient weight on the sworn evidence of the parties. We do not agree. The evidence included sworn statements and other material, such as email records, agreements, share transfer documents, board minutes, shareholder meeting documents, financial records, substantial holder notices and security registers. The initial Panel's reasons clearly indicate that it reached its conclusions on the basis of all this material.
17. Mighty River and Mr Xie submitted that the fact that Mr Smalley had accepted the Mineral Resources bid was evidence that they were not associates. Mr Smalley accepted the bid after he was informed that the initial Panel had made a preliminary finding that he was associated with Mr Xie. We consider that Mr Smalley was associated with Mr Xie. Mr Smalley's acceptance of the bid does not change our view.

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18. Mesa submitted in the review that there were other parties who may have been involved in the associations. The evidence for this was insufficient in our view, and we do not make any findings on it.

DECISION

19. For the reasons above we agree with the initial Panel.

Variation of Declaration

20. Section 657EA(4)(a) provides:

“After conducting a review under this section, the Panel may:

(a) vary the decision reviewed....

In conducting the review, the Panel has the same power to make a declaration under section 657A, or an order under section 657D or 657E, as it has when it is considering an application under section 657C.”

21. In *National Can Industries Limited 01(R)*, the Panel said:

“A review under section 657EA is a de novo reconsideration by us of the matters before the Initial Panel, on the merits, and on the facts as they stand at the date we make our decision. We may re-examine all of the facts and issues and may, as we consider appropriate, vary or set aside the decision of the Initial Panel and substitute our own decision. We may in effect affirm the decision of the Initial Panel by doing neither of those things. Thus, we may declare under section 657A that there are unacceptable circumstances and make orders under section 657D as a consequence, when no declaration or orders were made by the Initial Panel.”⁴

22. Section 657EA was considered by Finkelstein J in *Glencore*. He said:

[6] ... Both the Panel and the parties appear also to have assumed that if the circumstances under investigation were unacceptable in the requisite sense it was necessary for the Panel to make a fresh declaration to that effect. Although this assumption has not been questioned, it is clearly incorrect....

[17] The true position is this. If the Panel is satisfied that the first declaration was appropriately made, then, as I have said, that declaration can be confirmed by the dismissal of the application for review on that aspect. Alternatively, if the Panel believes that the original declaration requires variation the Panel can make the appropriate changes under its power to vary the decision under review (s 657EA(4)(a))....⁵

23. While the initial Panel’s reasons reflect that it was satisfied that all the associations referred to in 4 above were made out, in our view, the declaration was not clear. It stated in paragraph 7 that “one or more” of the associations between Mr Xie and Auvex, Mr Roy (who controls Auvex) and the major shareholders in Auvex

⁴ [2003] ATP 40 at [21], quoted in *Breakfree Limited 04(R)* [2003] ATP 42

⁵ *Takeovers Panel v Glencore International AG* [2005] FCA 1628

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existed. It stated in paragraph 8 that “further or alternatively” Mr Xie and Mr Roy are associated in relation to Auvex.

24. We are satisfied that each of those associations exist. We therefore varied the initial Panel’s declaration to clarify its operation.

Orders

25. The initial Panel made orders to require that Mr Xie’s, Mighty River’s and Auvex’s combined voting power be reduced either by the vesting of identified shares held by Mighty River and Auvex in ASIC or by accepting into the Mineral Resources bid.
26. Auvex utilised the facility in the initial Panel’s orders by accepting into the Mineral Resources bid. As noted, Mr Smalley had already accepted the bid.
27. Therefore, the only shareholders from the associated parties remaining on the Mesa register were Mighty River and Mr Xie, with a combined voting power of less than 20%.
28. Mesa submitted that the Panel should nevertheless order divestment of shares held by Mighty River because unacceptable circumstances existed since 29 March 2010 primarily due to Mr Xie’s involvement; and Mighty River should not benefit from its breach of the Corporations Act. It submitted that the Panel had made similar orders in *Taipan NL No 9*.⁶ In that case there were competing bids by St Barbara and Troy for Taipan. Prior to its bid, St Barbara acquired shares in breach of s606. The Panel made an order divesting the shares held above 20% (1.28%) for essentially two reasons – so that St Barbara did not retain a benefit that was obtained in breach of the Law and so that St Barbara’s takeover bid proceeded as it would most likely have proceeded had the breach not occurred. The Panel did not consider the contravention to be minor because control of Taipan was being closely contested.
29. In this case, there is no bid competing with the Mineral Resources bid and the total voting power held by the associated parties is now below 20%. In the changed circumstances the initial Panel’s orders would apply only to what is at the time of our decision a relatively insubstantial number of shares in the context of the Mineral Resources bid.
30. For these reasons, we decided to set aside⁷ the initial Panel’s orders.

⁶ [2001] ATP 4 at [50]

⁷ under s657EA(4)(b)

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31. We do not make any order as to costs.

**Andrew Lumsden
Deputy President of the sitting Panel
Decision dated 16 June 2010
Reasons published 23 June 2010**



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**CORPORATIONS ACT
SECTION 657EA
VARIATION OF DECLARATION OF UNACCEPTABLE
CIRCUMSTANCES**

MESA MINERALS LIMITED 01R

VARIATION

The declaration made on 21 May 2010 in relation to the matter of *Mesa Minerals Limited* is varied by deleting paragraphs 7 and 8 and substituting new paragraphs 7 and 8 so that the declaration reads as follows:

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 249D⁸ 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 Mesathe following exist:
 - (c) Mr Xie is associated with Auvex
 - (d) Mr Xie is associated with Mr Premjit Roy and Mr Roy controls Auvex and
 - (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, 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, and

⁸ References are to sections of the *Corporations Act 2001* (Cth) unless otherwise indicated

- (b) under section 12(2)(c) in relation to the affairs of Auvex.
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

Mesa means Mesa Minerals Limited

Mighty River means Mighty River International Limited

Mineral Resources means Mineral Resources Limited

Alan Shaw
Counsel
with authority of Andrew Lumsden
Deputy President of the sitting Panel
Dated 16 June 2010



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**CORPORATIONS ACT
SECTION 657EA
REVOCATION OF ORDERS**

MESA MINERALS LIMITED 01R

The Panel made a declaration of unacceptable circumstances and final orders in relation to the affairs of Mesa Minerals Limited on 21 May 2010 in *Mesa Minerals Limited*.

A review application was made 24 May 2010.

On 28 May 2010 interim orders were made staying orders 1, 2 and 3 of the orders made on 21 May 2010.

On 16 June 2010 the Panel varied the declaration of unacceptable circumstances made on 21 May 2010.

THE PANEL REVOKES:

1. the orders made on 21 May 2010 in *Mesa Minerals Limited* and
2. the interim orders made on 28 May 2010 in *Mesa Minerals Limited 01R*.

**Alan Shaw
Counsel
with authority of Andrew Lumsden
Deputy President of the sitting Panel
Dated 16 June 2010**