



Australian Government

Takeovers Panel

**Reasons for Decision
Avalon Minerals Limited
[2013] ATP 11**

Catchwords:

Rights issue – underwriting – deficient disclosure – need for funds – use of funds – choice of underwriter – intentions – identity – reasonable steps to mitigate potential control effect – treatment of foreign shareholders – withdrawal rights – association – substantial holding – failure to disclose – family links – structural links – common investments – placements – nominated shareholder – legal advice – declaration – interim orders – final orders

Corporations Act 2001 (Cth), sections 12, 602, 606, items 9 and 10 of s611, 615, 657A, 657C, 657D, 657EA, 671B, 708AA

Acts Interpretation Act 1901 (Cth), section 15AA

Australian Securities and Investments Commission Act 2001 (Cth), sections 190, 194

Procedural Rules, rules 1.2.2, 4.1.1

Campbell-Maruca & Ors v Registrar of Indigenous Corporations [2012] AATA 678, Kallinicos v Hunt [2005] 65 NSWSC 1181, Gjergja v Cooper (1986) 10 ACLR 577

Guidance Note 17: Rights Issues

Coppermoly Limited [2013] ATP 8, Regis Resources Ltd [2009] ATP 7, Boulder Steel Limited [2008] ATP 24, BigAir Group Limited [2008] ATP 12, Mount Gibson Iron Limited [2008] ATP 4, Orion Telecommunications Limited [2006] ATP 23, Rusina Mining NL [2006] ATP 13, Dromana Estate Limited 01 [2006] ATP 4, Emperor Mines Ltd 01 [2004] ATP 24, InvestorInfo Limited [2004] ATP 6, Email Limited 01 [2000] ATP 3, John Fairfax Holdings Ltd (1997)

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
Yes (three)	No	Yes	Yes	Yes	No

INTRODUCTION

1. The Panel, Sarah Dulhunty, Ron Malek and Nora Scheinkestel (sitting President), made a declaration of unacceptable circumstances in relation to the affairs of Avalon Minerals Limited. The Panel considered that:

- (a) all reasonable steps to minimise the potential control impact of the Rights Issue were not taken and there were material deficiencies in Avalon’s disclosure and
- (b) Tan Sri Abu and Dato Richard Lim were associated and had increased their voting power in Avalon otherwise than as permitted under Chapter 6.¹

2. In these reasons, the following definitions apply.

applicant Sidan Super Pty Ltd as trustee for the Sidan Superannuation Fund, a shareholder in Avalon

Avalon Avalon Minerals Limited

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

Takeovers Panel

Reasons – Avalon Minerals Limited [2013] ATP 11

CPS Capital	CPS Capital Group Pty Ltd
Dato Phillip Siew	Dato Siew Mun Chuang
Dato Richard Lim	Dato Lim Heng Suan
Edward Siew	Siew Mun Wai
Gary Goh	Seng Han Gary Goh
Hannans	Hannans Reward Limited
Legacy	Legacy Iron Ore Limited
Rights Issue	the 1:1 non-renounceable rights issue announced by Avalon on 9 August 2013 at \$0.01 per share to raise approximately \$5.62 million (subsequently increased to approximately \$5.89 million)
Tan Sri Abu	Tan Sri Abu Sahid Mohamed

FACTS

3. Avalon is an ASX listed mineral exploration company (ASX code: AVI). Its main asset is the Viscaria copper-iron project in Sweden.
4. The directors of Avalon are:
 - (a) Crispin Henderson (Chairman and Non-Executive Director)
 - (b) Jeremy Read (Managing Director²)
 - (c) Dato Phillip Siew, Paul Niardone, Edward Siew and Gary Goh (Non-Executive Directors) and
 - (d) Ler Keong Keh (alternate director for Dato Phillip Siew).
5. On 9 August 2013, Avalon announced the Rights Issue and a proposed placement to raise up to \$700,000. The Rights Issue was fully underwritten by Avalon's largest shareholder and former Chairman, Tan Sri Abu. It included the ability for Avalon shareholders to participate in a shortfall facility. Avalon's cleansing notice disclosed that the voting power of Tan Sri Abu after the Rights Issue (if no other shareholders took up their shares) would be 61%.
6. The 9 August 2013 announcement which accompanied the cleansing notice disclosed that (among other things) the funds were to be used to fund preparatory work required for a bankable feasibility study on the Viscaria project and to provide working capital.
7. On 19 August 2013, Avalon made a placement of 26,523,616 shares at \$0.013 per share to Dato Richard Lim for working capital purposes. These shares were issued before the record date for the Rights Issue.
8. On 22 August 2013, Avalon issued a rights issue offer document.

² Terminated as Managing Director on 15 October 2013

Takeovers Panel

Reasons – Avalon Minerals Limited [2013] ATP 11

9. On 5 September 2013, Avalon made another placement of 26,523,616 shares at \$0.013 per share to other parties³ for working capital purposes. This was after the record date for the Rights Issue.
10. On 9 September 2013, the Rights Issue closed. 362,785,491 shares were applied for as entitlements under the Rights Issue and 8,411,014 shares were applied for under the shortfall facility (63.07% of the total available).
11. Tan Sri Abu, Dato Richard Lim and Dato Phillip Siew applied for their full entitlements under the Rights Issue. On 1 October 2013, these shareholders were issued shares based on their applications.⁴
12. Below is a table of the percentage voting power of Tan Sri Abu, Dato Richard Lim and Dato Phillip Siew in Avalon at various times.

Shareholder	% Voting power at 18 August 2013	% Voting power following placement on 19 August 2013	% Voting power following placement on 5 September 2013	% Voting power following shares issued under Rights Issue ⁵
Tan Sri Abu	19.90	19.00	18.18	36.64 ⁶
Dato Richard Lim	8.22	12.35	11.82	12.08
Dato Phillip Siew	4.94	4.72	4.51	4.61

APPLICATION

Declaration sought

13. By application dated 5 September 2013, the applicant sought a declaration of unacceptable circumstances. The applicant submitted that, among other things, the underwriting of the Rights Issue appeared to be structured so that Tan Sri Abu and his associates (Dato Richard Lim and Dato Phillip Siew) would gain control of Avalon, and there were deficiencies in the disclosure in relation to the Rights Issue.

³ JP Morgan Nominees Australia Limited (6,630,910 shares) and Pershing Australia Nominees Pty Ltd <Indian Ocean A/c> (19,892,730 shares)

⁴ As permitted by the Panel's varied interim order – see paragraph 16

⁵ Based on participation of shareholders when Rights Issue closed on 9 September 2013 (ie no additional applications or withdrawals under the reopened Rights Issue ordered by the Panel) and assuming that the underwriting was allowed to proceed

⁶ Includes 18.06% from shares that would have been allocated to Tan Sri Abu as underwriter if the underwriting was allowed to proceed

Interim order sought

14. The applicant sought an interim order that Avalon not issue or allot any new shares under the Rights Issue until the Panel had considered the matter. On 9 September 2013, the President made interim orders to that effect (Annexure A).
15. On 10 September 2013, following a request from Avalon, we extended the interim orders so that Tan Sri Abu could not rely on any right he may have to terminate the underwriting agreement as a consequence of the Panel application or the original interim orders (Annexure B).
16. On 27 September 2013, following an urgent request from Avalon, we varied the interim orders with the effect that (among other things) Avalon could proceed with the Rights Issue only in respect of shares subscribed for by Tan Sri Abu, Dato Richard Lim and Dato Phillip Siew (Annexure C). Avalon made its request in order to “*facilitate the preservation of the company’s continued existence so as to preserve the status quo*” and given the “*very real (and ever increasing possibility) that further delay in accessing the funds raised under the rights issue could result in Avalon’s insolvency*”.

Final order sought

17. The applicant sought a final order that shareholder approval be obtained for the underwriting agreement prior to any shares being issued by Avalon.

DISCUSSION

Application timing

18. Under s657C(3), an application for a declaration must be made “*within 2 months after the circumstances have occurred*” or such longer period determined by the Panel. The application was made within 2 months of the announcement of the Rights Issue.
19. Our enquiries into association related primarily to the issue of shares under the Rights Issue and the 19 August 2013 placement to Dato Richard Lim, both of which occurred within 2 months of the application. We considered the association question in the context of the Rights Issue. However, for avoidance of doubt, we extended time for making the application.

Rights Issue

Need for funds

20. Avalon’s board minutes suggest that, from at least early 2013, it was considering options to raise funds to progress the Viscaria project and maintain its solvency.
21. On 15 April 2013, Avalon announced that it had entered into a memorandum of understanding with ZJ Advisory Sdn Bhd (on behalf of unidentified clients) to raise up to \$25 million. On 17 May 2013, Avalon announced that ZJ Advisory had terminated the MOU.
22. Also in May 2013, Avalon entered into a heads of agreement to acquire assets from Hannans. On 4 July 2013, Avalon announced that it had received a statutory

demand alleging that the first \$2 million payable under the agreement was due and payable.⁷

23. Avalon submitted that the statutory demand “*came at a time when Avalon’s share price was suddenly depressed, support for fundraising from the broker community had diminished and Avalon’s capacity to make further placements without shareholder approval...was reduced due to the placements already made*”.
24. We accept that Avalon had legitimate reasons to raise funds, which it did by way of Rights Issue and placement.⁸

Failure to mitigate potential control effect

25. Avalon’s board minutes indicate that it had received a number of proposals prior to undertaking the Rights Issue. These included a proposal in relation to a possible merger. There were also several proposals from Legacy, including proposals in relation to a farm-in/joint venture and an asset sale, all of which were rejected by Avalon. Avalon submitted that the board rejected these proposals because of concerns regarding value, certainty and Legacy’s financial capacity. Generally, board decisions on whether to proceed with these proposals were split.
26. At a meeting on 26 June 2013, the board resolved to undertake a rights issue. At a meeting on 5 July 2013, following the receipt of the \$2 million statutory demand from Hannans, the Avalon board considered urgently raising funds given solvency concerns expressed by the company’s auditors. Crispin Henderson asked whether “*Legacy or anyone else would be open to underwriting a Rights Issue*”. Jeremy Read indicated that he had been involved in a number of discussions with different groups in relation to underwriting a rights issue but without success. Edward Siew “*raised the possibility of obtaining an up-front payment of \$2M from the Malaysian shareholders as part of either a partial underwriting of the Rights Issue or as an off-set against entitlements*”. The board resolved to invite a proposal from Tan Sri Abu on this basis, and both Dato Phillip Siew and Edward Siew “*expressed confidence that they would be able to obtain a proposal...to present to [the] next Board meeting*” (scheduled for 9 July 2013). The board also authorised Jeremy Read to solicit a further offer from Legacy.
27. On or about 8 July 2013, CPS Capital provided Avalon with a proposal to place shares not subscribed for under a rights issue to wholesale investors on a best endeavours basis. In an email from Edward Siew to Jeremy Read (copied to the board) Edward expressed concern that the CPS Capital offer involved the issue of shares to non-existing shareholders without any underwriting risks. At a later board meeting, where this offer was discussed, Edward Siew suggested as an alternative “*that Tan Sri Abu or his Malaysian contacts underwrite the Rights Issue*” and that:

⁷ On 8 October 2013, Avalon announced that Hannans had withdrawn the statutory demand after the parties settled the dispute

⁸ See paragraphs 77 to 90

Takeovers Panel

Reasons – Avalon Minerals Limited [2013] ATP 11

...the Malaysian investors had sought their own legal advice on the regulatory issues and they were advised by Bennett & Co that, should Tan Sri Abu underwrite the Rights Issue, there were no breaches of any Australian laws, including the Corporations Act.

28. Jeremy Read responded by stating that this advice was wrong, a view that was predicated on advice from Avalon's solicitors.
29. On or about 9 July 2013, Legacy offered to continue discussions with Avalon in relation to Legacy fully underwriting a \$5.62 million rights issue, subject to due diligence. Avalon submitted that the underwriting proposal from Legacy was rejected by a majority of directors because it was subject to due diligence, there were doubts about Legacy's financial commitments and *"while an interim funding proposal (prior to closure of the rights issue) was put forward, there was not sufficient certainty as to specific terms"*. However, there appears to be no discussion of this proposal in Avalon's board minutes. Avalon submitted that *"the rejection of the various Legacy Proposals meant that of the remaining available fundraising options...the preferable option (and most likely to succeed and have the support of the Majority Board [being Dato Phillip Siew, Edward Siew, Gary Goh and Crispin Henderson]) was to seek funds from those close to the company"*.
30. ASIC submitted that while the Legacy underwriting proposal was subject to due diligence, the proposal *"gives rise to doubt as to whether Avalon took all available steps to mitigate the potential control effect"* of the Rights Issue.
31. Companies are entitled to manage their capital as they see fit; however, if there is a potential for a rights issue to affect control the directors should carefully consider all reasonably available options to mitigate that effect.⁹ Companies in difficult financial circumstances may not have many options. Nevertheless, those options that are reasonably available should be fully explored.
32. Avalon needed to raise funds. The company did price the Rights Issue at a discount and incorporate a shortfall facility. However, on the information available to the Panel, it had at least one other proposal to fully underwrite a rights issue, which was not fully explored.
33. Tan Sri Abu is Avalon's largest shareholder. The decision to proceed with him as underwriter was made in light of Avalon's funding needs, but also in circumstances where there was conflicting legal advice. The decision was made despite Tan Sri Abu having previously refused to perform his underwriting obligations to Avalon. In or around August 2011, Tan Sri Abu refused to take up underwritten shares representing a \$9.3 million funding obligation under a placement. Given the potential control effect of the underwriting, an independent expert's report was required. Tan Sri Abu submitted that because the independent expert's draft conclusion was that the transaction was not fair, but reasonable, he did not want to *"proceed with any transaction that involved any unfairness to shareholders"*. At the time, Avalon considered whether to take action against Tan Sri Abu, but did not do so.

⁹ Guidance Note 17: Rights Issues at [4]-[5]

Takeovers Panel

Reasons – Avalon Minerals Limited [2013] ATP 11

34. There is no suggestion that the possibility of seeking sub-underwriters (including Legacy) to reduce the control effect of the Rights Issue was considered. We asked Tan Sri Abu whether he was seeking to have the Rights Issue sub-underwritten. He replied “no”, without any further explanation.
35. We consider that all reasonable steps to minimise the potential control impact of the Rights Issue on Avalon were not taken.

Application of rights issue exception

36. Item 10 of s611 allows acquisitions of voting shares exceeding the limit in s606. In order to rely on the exception, a number of conditions must be satisfied, including that every person has a reasonable opportunity to accept the offer and the terms of all the offers are the same.
37. Section 615 allows an issuer to exclude foreign shareholders and retain the benefit of the rights issue exception if a nominee is appointed.¹⁰
38. Avalon did not seek to rely on s615. Rather, its offer document stated that “[s]hareholders outside Australia and New Zealand should ensure they comply with any applicable securities laws in their own country in relation to the Rights Issue.”
39. Avalon’s shareholders are located in a number of countries, including the United States and Sweden. Avalon submitted that, irrespective of whether it may have contravened a foreign law, it nevertheless complied with Australian legal requirements to make the same offer to all shareholders.
40. ASIC submitted that the “*treatment of foreign shareholders under the Offer gives rise to material doubt as to whether the exception in item 10 of section 611 is available*”. It submitted:

It cannot be within the policy of the rights issue exception to effectively require foreign shareholders to conduct their own ‘due diligence’ to ensure offers are valid and lawful in each of their respective jurisdictions. Such an approach would likely be incompatible with the requirement in sub-paragraph (c) of item 10 of section 611 that all persons have a reasonable opportunity to accept offers made to them. Moreover, an imposition on foreign shareholders of this kind amounts to an additional obligation borne only by those foreign shareholders and not shareholders domiciled in Australia or New Zealand – casting doubt on whether sub-paragraph (e) of item 10 of section 611 is satisfied (ie the terms of all the offers are the same).

41. A technical interpretation of the exception in item 10 is reflected in Avalon’s submission; a purposive interpretation is reflected in ASIC’s.
42. We think the better view is that the purposive interpretation reflected in ASIC’s submission is correct. Such an interpretation is consistent with the requirements of section 15AA of the *Acts Interpretation Act 1901* (Cth), which provides:

¹⁰ The Panel has previously stated that where foreign shareholders are excluded and s615 has not been complied with, no person acquiring shares under the rights issue could rely on the rights issue exception – see *Emperor Mines Ltd 01* [2004] ATP 24 at [102] and *Dromana Estate Limited 01* [2006] ATP 4 at [37]

Takeovers Panel

Reasons – Avalon Minerals Limited [2013] ATP 11

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

43. Section 615 recognises that Australian rights issue offers cannot be lawfully or economically made in some foreign jurisdictions. We consider that it is not within the policy of the rights issue exception, particularly in the light of an issuer's ability to rely on s615, for foreign shareholders to be required to undertake their own investigations to determine whether they are legally permitted to accept an offer under a rights issue. It is also possible that such investigations mean that foreign shareholders do not have a 'reasonable opportunity' to accept the offer.
44. However, we do not need to decide the item 10 interpretation question because we consider that the circumstances are otherwise unacceptable. If some shareholders are required to obtain legal advice before accepting the offer, they are not, in our view, given a reasonable and equal opportunity to participate in any benefits of the offer (contrary to s602(c)).

Disclosure

45. Avalon disclosed that the money raised under the Rights Issue would be used to:
 - (a) fund preparatory work required for the bankable feasibility study on the Viscaria project
 - (b) investigate and advance business development opportunities
 - (c) provide funds towards the acquisition of tenements and
 - (d) provide working capital.
46. Avalon made a number of submissions regarding its financial position, including that there was a "real risk" that it may become insolvent prior to the conclusion of the matter.¹¹
47. ASIC submitted that Avalon's disclosure on funding "appears materially inconsistent" with Avalon's financial position.
48. We agree. Avalon's disclosure suggested that the funds were required primarily to pursue development opportunities. In our view, it was misleading to Avalon shareholders not to address the critical funding requirements of the company to remain solvent where such failure could have a material impact on a shareholder's assessment of whether to participate in the Rights Issue.
49. Avalon's disclosure also contained very limited information about Tan Sri Abu, other than stating that he was the company's largest shareholder and was underwriting the Rights Issue.
50. Avalon considered its disclosure sufficient given that the "background of the underwriter, his former directorship and prior dealings are on the public record", and the fact the Rights Issue was made in reliance on s708AA.

¹¹ Avalon announced on 12 September 2013 that "if the Company does not get access to some or all of the Offer proceeds, it will likely require alternative funding from another source in order to remain a going concern"

Takeovers Panel

Reasons – Avalon Minerals Limited [2013] ATP 11

51. We do not agree. Tan Sri Abu is a former Chairman of Avalon. He has also refused to perform his underwriting obligations to Avalon under a previous fundraising (see paragraph 33). In our view, Tan Sri Abu's background¹² and Avalon's choice to engage him should have been disclosed to shareholders.
52. Under the Rights Issue, Tan Sri Abu could have increased his voting power in Avalon to up to approximately 61%.¹³ In view of that, Avalon should have sought to ascertain Tan Sri Abu's intentions for Avalon and this should have been disclosed to Avalon shareholders.
53. A number of factors set out in *InvestorInfo Limited*¹⁴ which point to a rights issue (and its benefits) not being genuinely accessible are present here. We are satisfied that the circumstances in relation to the Rights Issue are unacceptable.

Association

54. The applicant raised the issue of association between:
 - (a) Tan Sri Abu and Dato Richard Lim and
 - (b) Tan Sri Abu and Dato Phillip Siew.
55. The applicant submitted that there were a number of common directorships between, and investments by, these Avalon shareholders across a range of companies. It also provided a chronology of the alleged associates' recent acquisitions of Avalon shares, including their participation in placements.
56. We considered that the applicant provided a sufficient body of material to support the Panel conducting proceedings.¹⁵ We did so in the context of the Rights Issue.
57. In considering the alleged associations, we also considered whether Edward Siew acted in concert with Tan Sri Abu and Dato Phillip Siew in relation to the affairs of Avalon.

Association test

58. Section 12 sets out the tests for association as applied to Chapter 6. There are two relevant tests here:
 - (a) s12(2)(b) - which provides, in essence, 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 and
 - (b) s12(2)(c) - which provides, in essence, 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.

¹² See *Coppermoly Limited* [2013] ATP 8 at [35]-[37]

¹³ More if shares held by Dato Richard Lim had been taken into account – see association section of these reasons

¹⁴ [2004] ATP 6 at [38]

¹⁵ *Mount Gibson Iron Limited* [2008] ATP 4 at [15]. See also *Regis Resources Ltd* [2009] ATP 7, *Boulder Steel Limited* [2008] ATP 24, *BigAir Group Limited* [2008] ATP 12, *Rusina Mining NL* [2006] ATP 13

59. In *Mount Gibson Iron Limited*,¹⁶ the Panel said circumstances which are relevant to establishing an association include:
- (a) a shared goal or purpose
 - (b) prior collaborative conduct
 - (c) structural links
 - (d) common investments and dealings
 - (e) common knowledge of relevant facts and
 - (f) actions which are uncommercial.
60. The Panel is a specialist, peer review tribunal. When making an assessment of all the material in this matter, we have relied on our skills and experience as practitioners (which has been made known to the parties) and as members of the sitting Panel.

Preliminary findings

61. Having considered the application, and all submissions and rebuttals, we made preliminary findings and invited comments on them. Our conclusions follow consideration of the responses.
62. We considered the cumulative effect of the material and drew appropriate inferences. In doing so we had in mind that we must be satisfied by logical and probative material and the potential seriousness of a finding of association.

Family links, structural links and common investments

63. There are family and structural links and common investments between former and present directors of, and investors in, Avalon. They include the following:
- (a) Dato Phillip Siew and Edward Siew are brothers
 - (b) Gary Goh's wife is related to Dato Phillip Siew, according to Avalon (which has not been denied)
 - (c) Tan Sri Abu was Chairman of Avalon. The current Chairman, Crispin Henderson, was introduced to the board by Edward Siew. He was invited to join the board at the suggestion of Tan Sri Abu. This followed a process in which another candidate had been identified. Tan Sri Abu has described Crispin Henderson as "*my old friend*"
 - (d) Dato Phillip Siew, Edward Siew and Gary Goh are directors of Avalon
 - (e) Tan Sri Abu, Dato Richard Lim, Dato Phillip Siew and Crispin Henderson are shareholders in Avalon. Dato Phillip Siew invested in Avalon after a discussion with Tan Sri Abu. Dato Richard Lim was "*strongly influenced*" to invest in Avalon because both Tan Sri Abu and Dato Phillip Siew were shareholders

¹⁶ [2008] ATP 4

Takeovers Panel

Reasons – Avalon Minerals Limited [2013] ATP 11

- (f) Dato Richard Lim is a long term acquaintance (in excess of 20 years) and friend of Tan Sri Abu
 - (g) Tan Sri Abu and Dato Phillip Siew are friends, having met at least 30 years ago
 - (h) Tan Sri Abu is Group Executive Chairman of, and 91% shareholder in, Maju Holdings, a Malaysian company. Between September 2012 and August 2013, Edward Siew was retained by the Maju group (his last role being Group Executive Director of Maju Assets)
 - (i) Tan Sri Abu is the Executive Chairman of, and a shareholder in, Ipmuda Berhad (a listed Malaysian company and part of the Maju group). Dato Phillip Siew is an independent non-executive director of, and shareholder in, Ipmuda. Dato Richard Lim is the CEO and Managing Director of, and shareholder in, Ipmuda.
 - (j) Tan Sri Abu was Chairman and Dato Phillip Siew an independent non-executive director of Perwaja Holdings Bhd (a listed Malaysian company and part of the Maju group). They are also shareholders in Perwaja and
 - (k) Tan Sri Abu and Dato Phillip Siew are former independent non-executive directors of Kinsteel Bhd (a listed Malaysian company), in which Tan Sri Abu is also a shareholder.
64. These links show long-standing, and ongoing, connections between Tan Sri Abu, Dato Richard Lim, Dato Phillip Siew and Edward Siew.

Placements to Dato Richard Lim

65. Dato Richard Lim became an Avalon shareholder when he bought 959,854 shares on or about 30 March 2012. He increased his shareholding in Avalon via placements on or about 16 July 2012, 24 December 2012,¹⁷ 27 June 2013 and 19 August 2013.
66. Avalon is the only Australian security Dato Richard Lim has invested in. His investment in Avalon represents approximately 37% of his global portfolio of equities.
67. We now turn to the circumstances surrounding placements to Dato Richard Lim in December 2012, June 2013 and August 2013.

December 2012 placement

68. Avalon provided what it submitted were copies of text messages detailing a discussion between Dato Phillip Siew and its company secretary, Ros Shand, relating to the placement of shares in Avalon. Dato Phillip Siew asked in a text message on 31 October 2012, “I suppose I can’t use my name as I’m a director?”. Ros Shand replied on 31 October 2012, “Yes correct – as Dir you can’t b named as the applicant – as a contact is ok”. We assume that this was because the ASX Listing

¹⁷ Although Dato Richard Lim’s share transaction history indicates that he acquired 4 million shares on 24 December 2012, it appears this relates to his participation in a placement on or about 31 October 2012

Takeovers Panel

Reasons – Avalon Minerals Limited [2013] ATP 11

Rules would require shareholder approval to be obtained for a placement to a director.

69. Dato Phillip Siew replied on 31 October 2012:

Can you organise for me as I'm terribly busy today. 3 blocks – 2m+4m+4m. On 4m block in name of Lim Heng Swan (sic) – his account with Indian Ocean. U can contact him for signature. D other 2 – Will need time to organise as they will use offshore accounts. Is there a simple way of just confirming that we will take up shares instead of getting all those details?

70. Dato Phillip Siew submitted that as “these matters go back to 2012...I have not been able to obtain my copies of these texts”. He recalled assisting with a placement in October 2012 following a request from Jeremy Read. However, notwithstanding this, Dato Phillip Siew has not denied the content in the text messages.

71. We infer that “4m block in the name of Lim Heng Swan” relates to the placement to Dato Richard Lim of 4,000,000 Avalon shares on 24 December 2012 and that his participation was driven by restrictions on the ability of Dato Phillip Siew to take up the shares (given his position as an Avalon director).

72. We consider that the December 2012 placement was the first of 3 occasions (to our knowledge) when Dato Richard Lim had taken shares given restrictions on the ability of other Malaysian shareholders to acquire them.

June 2013 placement

73. On 21 June 2013, Edward Siew sent an email to Ros Shand and Jeremy Read stating:

It appears from the board papers that 66,666,666 shares have been issued but still not yet allocated to a named shareholder/s after the last Aud \$1m remitted from KL.

Please allocate the appropriate part of this block to Tan Sri to increase his shareholding to 19.9% of the issued share capital of the company. The remaining shares are to be allocated to Dato Lim Heng Suan.

74. Ros Shand responded to Edward Siew on 26 June 2013, stating that 42,115,368 shares had been allocated to Tan Sri Abu and 24,551,298 shares had been allocated to Dato Richard Lim.

75. We infer that the decision to place shares to Dato Richard Lim on 27 June 2013 was driven by restrictions on the ability of Tan Sri Abu to take up shares himself (given the reference above to increasing Tan Sri Abu’s shareholding to 19.9%, with Dato Richard Lim to take up the residual shares).

76. We infer from the reference to “66,666,666 shares” being issued, the “last Aud \$1m remitted from KL” and “appropriate part of this block” that the shares to be issued to Tan Sri Abu and Dato Richard Lim were being treated as a single parcel. The allocation of shares does not appear to be referable to financial contributions by each of Tan Sri Abu and Dato Richard Lim.

Takeovers Panel

Reasons – Avalon Minerals Limited [2013] ATP 11

August 2013 placement

77. The Avalon board resolved at its meeting on 17 July 2013 to appoint CPS Capital to manage a placement of up to 53 million shares. After noting that some of CPS Capital's clients were Malaysian shareholders, the directors agreed that the fees to be paid to CPS Capital for placements to existing Malaysian shareholders should be lower (1% rather than 5%).
78. Edward Siew, at a board meeting on 25 July 2013, stated that *"Tan Sri Abu and/or other Malaysian investors would like to participate in the placement up to 50% of the 53M shares that the Company was able to issue"* under the placement. He questioned whether:
- ...the Company needed to engage CPS at all, given that Tan Sri Abu and other Malaysian investors would take 50% of the Placement and charge fees as per past placement practices. Mr Siew suggested the placement shares for Tan Sri Abu could be issued in accordance with past practice and allocated to the nominated Malaysian shareholder, Dato Richard.*
79. The reference to placement shares *"for"* Tan Sri Abu being issued in accordance with *"past practice"* and allocated to Dato Richard Lim as the *"nominated shareholder"* is significant, in our view.
80. There are further references to Dato Richard Lim which suggest that he was acquiring shares on behalf of Tan Sri Abu. On 2 August 2013, Edward Siew sent an email to Linda Cochrane, CFO at Avalon, stating:
- Please be advised that Tan Sri will organize a remittance equivalent to 50% of the Placement...kindly issue the shares in the name of Dato Lim Heng Suan whom I have copied herein for information.*
81. In our view, it is significant that Dato Richard Lim was only *"copied...for information"* and that Tan Sri Abu paid for the shares to be issued in Dato Richard Lim's name.
82. Similarly, the minutes of the Avalon board meeting on 7 August 2013 state that:
- Mr Edward Siew advised that funds to the value of \$344,807 (50%) would be transferred by Tan Sri Abu...with the shares to be allocated to Dato Richard as per previous practice.*
83. Edward Siew submitted that he did *"not recall"* using the words attributed to him in relation to *"past practice"* or *"previous practice"*. In our view, the placements to Dato Richard Lim in December 2012 and June 2013 were examples of the *"past practice"*.
84. Consistent with the email correspondence and board minutes, both Tan Sri Abu and Dato Richard Lim submitted that Tan Sri Abu paid for the August 2013 placement shares issued to Dato Richard Lim. Dato Richard Lim submitted that:
- (a) Tan Sri Abu, in a telephone call, informed him that there was an *"urgent solvency issue"* for Avalon and that Tan Sri Abu had agreed to subscribe to a placement, but was not able to given his 19.9% holding
 - (b) he had logistical difficulties in organising the funds while overseas and

Takeovers Panel

Reasons – Avalon Minerals Limited [2013] ATP 11

- (c) Tan Sri Abu informed him that he had already remitted the money to Australia and that, if Dato Richard Lim wanted, he could apply those funds for the subscription of the shares and subsequently reimburse Tan Sri Abu. Dato Richard Lim accepted Tan Sri Abu's offer.
85. Tan Sri Abu's submission in relation to that call is not materially different. In relation to funding Dato Richard Lim's acquisition, he submitted that "*I trust [Dato Richard Lim] to reimburse me although I am not sure if he has done so yet*".
86. Tan Sri Abu further submitted that the references to Dato Richard Lim being 'nominated' was "*equally consistent with the fact that he was known to the Directors as being a supportive shareholder whenever the Company was in need of capital*".
87. Tan Sri Abu charged a 5% placement fee for the August 2013 placement. Despite the placement being in the name of Dato Richard Lim, the invoice describes the fee as being "*[d]ue to placements by Tan Sri Abu Sahid*". This invoice was in the same form as a previous invoice relating to placements that did go to Tan Sri Abu in April and May 2013.
88. In our view, the acquisition of shares in the August 2013 placement by Dato Richard Lim was not simply the action of a supportive shareholder. This is evident from:
- (a) Dato Richard Lim being described as the "*nominated Malaysian shareholder*"
 - (b) Dato Richard Lim only being "*copied...for information*"
 - (c) Tan Sri Abu funding the shares acquired by Dato Richard Lim and his uncertainty as to whether he had been reimbursed and
 - (d) Tan Sri Abu charging a placement fee for Dato Richard Lim's placement in the same form as his own past placements, suggesting he did not distinguish between placements to himself or to Dato Richard Lim.
89. We infer that Dato Richard Lim acquired the shares on behalf of Tan Sri Abu and that this was driven by restrictions on Tan Sri Abu's ability to acquire further shares in his own name. This is supported by the circumstances surrounding the June 2013 placement to Dato Richard Lim.
90. Dato Richard Lim submitted that his decision to participate in the placement after receiving the call from Tan Sri Abu was made because it was "*not the right time for me to cut my losses*". We have significant reservations as to whether his decision to invest \$344,807 when he was made aware of Avalon's "*urgent solvency*" issue was truly a commercial decision. That supports our inference that he is associated with Tan Sri Abu.

Legal advice

91. We consider it unusual that the same lawyer was engaged for both Tan Sri Abu (as underwriter of the Rights Issue) and Avalon.¹⁸ The materials provided by Avalon suggest that the engagement of Bennett + Co by Avalon was outside the delegation

¹⁸ Discussed further in the other matters section of these reasons

Takeovers Panel

Reasons – Avalon Minerals Limited [2013] ATP 11

of authority of the Avalon board given that Jeremy Read (as Managing Director at the time) was not aware of the engagement.

92. We also note that Dato Richard Lim's submissions in response to our preliminary findings copied in Bennett + Co.

Common goal or purpose

93. We consider that the circumstances surrounding the August 2013 placement to Dato Richard Lim (supported by prior placements, their relationship, structural links and legal advisers) is strongly indicative of a common goal or purpose shared by Tan Sri Abu and Dato Richard Lim to influence the affairs of, and increase their interest in, Avalon.

Conclusion

Tan Sri Abu and Dato Richard Lim

94. Tan Sri Abu and Dato Richard Lim had an understanding amounting to a relevant agreement, or were acting in concert, to increase their interest in Avalon. We consider that this was driven by restrictions on Tan Sri Abu's ability to acquire shares in his own name.
95. We infer that Tan Sri Abu and Dato Richard Lim are associated in relation to the affairs of Avalon, in particular in respect of the acquisition of shares.
96. We consider that by reason of the August 2013 placement to Dato Richard Lim, Tan Sri Abu and Dato Richard Lim increased their voting power in Avalon otherwise than in accordance with Chapter 6. This association has not been disclosed to Avalon shareholders and to the market. Accordingly, the potential control impact of the Rights Issue was even greater than as disclosed.
97. Dato Richard Lim provided general rebuttals to our preliminary findings in relation to association, however he did not address the specific circumstances surrounding the placements.

Tan Sri Abu and Dato Phillip Siew

98. We were initially concerned that Dato Phillip Siew and Edward Siew may also have been acting in concert with Tan Sri Abu, based on their involvement in the placements to Dato Richard Lim and their promotion of proposals that would increase Tan Sri Abu's shareholding in Avalon (while not fully exploring other capital-raising alternatives).
99. Dato Phillip Siew and Edward Siew made similar submissions in response to our concerns, including that:
- (a) they had legitimate reasons to vote against the alternative proposals (including in relation to Legacy's ability to fund any proposal)

- (b) they had lost confidence in Avalon’s management following the decision to enter into an agreement to acquire assets from Hannans at a time when the company did not have certainty of funding¹⁹ and
 - (c) it was reasonable in light of Avalon’s desperate financial predicament to turn to Tan Sri Abu as a ‘financier of last resort’.
100. Edward Siew also submitted that “*on a number of occasions I protested to the Board that I was being asked...effectively to act as a ‘go-between’ between the company and Tan Sri Abu*” and that there was nothing that represents him “*acting in concert with Tan Sri Abu or seeking to achieve a goal*”.
101. Edward Siew (in particular) and Dato Phillip Siew were liaising with Tan Sri Abu and Dato Richard Lim in relation to the placements of shares, and were members of the Avalon board which we consider did not take all reasonable steps to mitigate the potential control effect of the Rights Issue. On balance, we do not think that there is sufficient material before us to infer that they had an agreement, arrangement or understanding, or were acting in concert, with Tan Sri Abu in relation to Avalon. Accordingly, we have not found them to be associated with Tan Sri Abu.
102. We had some concerns and considered making further enquiries in relation to these possible associations, including whether a conference would assist our enquires, but decided not to do so in the light of Avalon’s financial situation and the consequent need to resolve matters expeditiously.

DECISION

Declaration

103. It appears to us that the circumstances are unacceptable having regard to:
- (a) the effect that the Panel is satisfied the circumstances have had, will have or are likely to have on:
 - (i) the control, or potential control, of Avalon or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Avalon or
 - (b) the purposes of Chapter 6 set out in s602 or
 - (c) the circumstances having constituted or given rise to contraventions of s606 and s671B.
104. Accordingly, we made a declaration (Annexure D) and consider that it is not against the public interest to do so. We had regard to the matters in s657A(3).

Orders

105. Following the declaration, we made final orders (Annexure E). Under s657D the Panel’s power to make orders is very wide. The Panel is empowered to make ‘any order’²⁰ if 4 tests are met:

¹⁹ See paragraph 22

Takeovers Panel

Reasons – Avalon Minerals Limited [2013] ATP 11

- (a) It has made a declaration under s657A. This was done on 7 October 2013.
- (b) It must not make an order if it is satisfied that the order would unfairly prejudice any person. As discussed below, we are satisfied that our orders do not unfairly prejudice any person.
- (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 7 October 2013 and 9 October 2013. Each party potentially affected by the proposed orders was invited to make submissions. Rebuttals were also received.
- (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. The orders do this by:
 - (i) providing shareholders with the opportunity to take up their entitlements, apply for shortfall shares or withdraw their original applications
 - (ii) requiring further disclosure
 - (iii) divesting shares acquired in unacceptable circumstances and
 - (iv) restricting the voting rights of Tan Sri Abu and Dato Richard Lim to 20%.²¹

Reopening the Rights Issue

106. We ordered that the Rights Issue be reopened with additional disclosure provided to eligible shareholders. Eligible shareholders will have the opportunity to take up their entitlements, apply for shortfall shares or withdraw their original applications. Tan Sri Abu, Dato Richard Lim and the Avalon directors have been excluded from participating in the reopened Rights Issue (including from withdrawing) on the basis that they contributed to the unacceptable circumstances (and in the case of the Avalon directors, because they were, or should have been, aware of the information not adequately disclosed to Avalon shareholders in relation to the offer).
107. Avalon and Paul Niardone (an Avalon director who had applied for shares under the Rights Issue) did not raise significant concerns with this exclusion. Jeremy Read submitted that he would not be affected by the exclusion because he did not take up any of his entitlement. Crispin Henderson, Chairman of Avalon, did not make a separate submission to Avalon's.
108. Dato Phillip Siew submitted that excluding him from the reopened Rights Issue disenfranchised him as an Avalon shareholder, did nothing to remedy the unacceptable circumstances and relied on his assumed knowledge.

²⁰ Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

²¹ Subject to being restored at a rate of 3% every 6 months. Also, the restriction does not apply to acquisitions not prohibited by Chapter 6

Takeovers Panel

Reasons – Avalon Minerals Limited [2013] ATP 11

109. We consider that these orders address the unacceptable circumstances in relation to the Rights Issue, other than the control effect. As discussed below, the control effect is to be remedied by a combination of preventing Tan Sri Abu from completing the underwriting, divestment and voting restriction orders. We are satisfied that, given their role and involvement, any prejudice to Tan Sri Abu, Dato Richard Lim and the Avalon directors is not unfair.

Underwriting

110. We ordered that Tan Sri Abu not complete his underwriting obligations.
111. Avalon submitted that Tan Sri Abu should be required to complete his underwriting obligations, to the extent there is a shortfall under the reopened Rights Issue, and then be required to comply with the divestment and voting restriction orders (discussed below).
112. Tan Sri Abu submitted that it would be “*unfairly prejudicial to force [him] not only to take up his own subscription but also to go ahead with the underwriting, when other shareholders were permitted to withdraw*”.
113. The Panel has previously held underwriters to their underwriting commitments on the basis that they had agreed to take the shortfall shares.²² However, in the circumstances, and based on the divestment and voting restriction orders made, we do not think it would be appropriate for the underwriting to be completed.

Divestment

114. We ordered that, after completion of the reopened Rights Issue, any shares held by Tan Sri Abu or Dato Richard Lim in excess of 19.9% and 8.22% respectively (28.12% combined) be vested in the Commonwealth for sale by ASIC. This will restore Tan Sri Abu and Dato Richard Lim to their respective shareholding positions prior to the August 2013 placement.
115. ASIC and Avalon supported the divestment order.
116. Tan Sri Abu and Dato Richard Lim made similar submissions that this order was unfair in that some of the shares each of them took up under the Rights Issue (as permitted by the further interim order – see paragraph 16) would now be vested in ASIC at a likely loss.
117. In *Gjergja v Cooper*²³, Ormiston J said in relation to divestment orders:
*It is difficult to see why the restoration of the position which applied before the contravention, and the consequences flowing from any order effecting that, should be considered unfair or as causing unfair prejudice, unless that restoration was likely to achieve nothing, or its benefits were so minimal or benefited so few shareholders, that the prejudice far outweighed the benefits likely to be attained.*²⁴
118. Our divestment order restores Tan Sri Abu and Dato Richard Lim to their respective shareholding positions prior to the August 2013 placement. We do not

²² For example, see *Coppermoly Limited* [2013] ATP 8 at [43(b)]

²³ (1986) 10 ACLR 577

²⁴ at 595

Takeovers Panel

Reasons – Avalon Minerals Limited [2013] ATP 11

consider that it is likely to achieve nothing. Rather, it ensures that shareholders are not able to benefit from unacceptable acquisitions.

119. Tan Sri Abu submitted that, instead of our divestment order, Avalon shareholders be given the opportunity to approve the voting power of Tan Sri Abu and Dato Richard Lim to the extent that it is greater than 28.12% after completion of the reopened Rights Issue (with the voting restriction applying if approval is not obtained).
120. Avalon and ASIC made submissions that this would not be appropriate, including on the basis that shareholder approval should not be used to 'cure' a past contravention of s606.
121. In view of Avalon's urgent need for funds, we did not consider this an appropriate order.

Voting restriction

122. We ordered that, in addition to the divestment, a voting restriction be imposed.
123. The voting restriction reduces the voting power of the associates to 20% initially, with the limit increasing by 3% every six months (analogous to the 'creep' provision in item 9 of s611). The restriction applies for 18 months from the date the order comes into effect. We consider that the association between Tan Sri Abu and Dato Richard Lim existed from at least the date of the announcement of the Rights Issue (when their voting power was 28.12%). We ordered the voting restriction because their "*failure to advise the market of their association meant the aggregation of, and subsequent increase in, their voting power beyond the 20% threshold did not occur in a properly informed market*".²⁵
124. Given Tan Sri Abu's role in these circumstances, we have applied the voting restriction to Tan Sri Abu individually, with the formula adjusting for any voting power that can be exercised by Dato Richard Lim directly through his shareholding (as that voting power may be exercised freely).
125. Tan Sri Abu submitted that the voting restriction should "*not apply to shares subsequently acquired under one of the exemptions in section 611, other than item 9*". Our order 17 addresses this point as the voting restriction does not apply to any acquisition not prohibited by Chapter 6.

Conclusion on orders

126. In deciding on what would be the most appropriate orders to make, we had regard to Avalon's dire financial circumstances.
127. We consider that our orders provide the most appropriate solution in this matter. They provide non-associated shareholders with appropriate disclosure and the ability to make an informed decision whether to participate in the Rights Issue. They also restore Tan Sri Abu and Dato Richard Lim to their respective shareholding positions prior to the August 2013 placement and prevent them from benefiting from their undisclosed association by restricting their voting power. We

²⁵ *Orion Telecommunications Limited* [2006] ATP 23 at [145]

Takeovers Panel

Reasons – Avalon Minerals Limited [2013] ATP 11

are satisfied that these orders will not unfairly prejudice Tan Sri Abu, Dato Richard Lim or any other person.

128. *Post script: following our final orders, Avalon announced the appointment of CPS Capital to partially underwrite the reopened rights issue for \$2.1 million. CPS Capital subsequently appointed Phoenix Copper Limited to sub-underwrite the reopened rights issue for \$2.1 million.*

Costs

129. We do not make any costs orders.

Other matters

Refusal of leave to appear

130. The applicant and Avalon filed notices of appearance and became parties. Avalon sought leave to be represented by GRT Lawyers, which was given.
131. Tan Sri Abu filed a notice of appearance and became a party. He sought leave to be represented by Bennett + Co, which was refused.
132. Bennett + Co are the solicitors for Avalon's Rights Issue.²⁶ There was nothing before the Panel to suggest that they were no longer the solicitors for the Rights Issue, which meant that they represented, and continued to represent, Avalon in that respect. We raised a concern about the prospect of a potential conflict of interest requiring the appointment of different solicitors part way through the Panel proceedings or the compromise of information that could be made available to the Panel.
133. Bennett + Co denied that there could be a conflict or that information could be compromised, given that (among other things) both the company and Tan Sri Abu had approved Bennett + Co acting. The solicitors for Avalon responded that "*Avalon did not approve Tan Sri Abu retaining Bennett + Co to act on his behalf*" (original emphasis).
134. There may have been confusion about this, Avalon's company secretary having contacted Bennett + Co to ask that they "*urgently contact Edward and/or Philip re 'association' issue (Tan Sri Abu, Philip & Dato Richard) as alleged in the application to the Takeovers Panel by Sidan Super*".
135. Following the receipt of the advice from Avalon's solicitors that the company did not consent, there was correspondence exchanged seeking to establish whether Avalon had, or did now, consent to Bennett + Co acting for Tan Sri Abu.
136. On 12 September 2013, Bennett + Co advised the Panel:
- I am informed that at a Board Meeting late yesterday the issue of Bennett + Co's representation for Tan Sri Abu Sahid was raised and the Board indicated that Avalon took the position that it was not appropriate for the Board to either consent or object to Bennett + Co acting, this being a private matter between Tan Sri Abu and this firm accordingly the company raises no objection to our appearance on behalf of Tan Sri Abu.*

²⁶ Although Bennett + Co is not acting for Avalon in relation to the reopened Rights Issue

Takeovers Panel

Reasons – Avalon Minerals Limited [2013] ATP 11

137. However, the solicitors for Avalon responded that certain directors expressed objection and in circumstances where Avalon had not consented to Bennett + Co acting for the underwriter, it was inappropriate that they be granted leave. They said that the board had been unable to reach a consensus view on the matter, and accordingly, no party moved, seconded or voted on any resolution one way or another. We were informed that the board meeting went as follows:

...the matter of Bennett + Co acting for Tan Sri Abu was raised by Mr Ler (being alternate for Phillip Siew (Siew Mun Chuang)) for discussion. Mr Ler suggested that Avalon should consent to Bennett + Co acting for Tan Sri Abu. Mr Edward Siew and Mr Ler then left the meeting as it was decided that they should be excluded from the discussion of matters the subject of the Panel proceedings.

Jeremy Read and Paul Niardone expressed objection in that they considered Bennett + Co to be conflicted. (Bennett + Co currently have instructions to act for Avalon in regards to the rights issue and also in respect of the statutory demand made by Hannans Reward Ltd. Aside from that, Bennett + Co were previously providing independent advice to Edward Siew, Phillip Siew and Gary Goh. It is uncertain whether Bennett + Co have any current instructions from those parties. In these circumstances it is questionable whether any consent would have been informed in any case.)

The remaining two directors present (the Chairman, Crispin Henderson and Gary Goh) did not seem to express a conclusive view on the matter and as such it would have been futile to put it to the vote.

138. The Panel has rarely refused leave. It has done so once before, in *Email Limited 01*.²⁷ That case concerned a request for interim orders, including for the issue of summonses and the referral of questions to the court. Email sought “an order” granting it leave to be legally represented. The Panel refused leave on the basis that it did not need to resolve any issues of law in order to decide the preliminary issues. It allowed the parties to raise the issue of legal representation again in connection with proceedings to resolve the substantive issues.

139. Section 194 of the *Australian Securities and Investments Commission Act 2001* (Cth) says:

A party to Panel proceedings may be legally represented in the proceedings only with the leave of the Panel.

140. The section in that form was introduced in the CLERP amendments that took effect on 13 March 2000 as part of the revitalisation of the Takeovers Panel. Previously section 194 provided that parties were entitled to legal representation before the Corporations and Securities Panel. CLERP Paper No. 4 refers to a number of amendments:

... in light of recent experience, where the Panel referred to the legislative provisions as being excessively prescriptive and suggested that the Panel be conferred with greater powers to conduct inquiries without those inquiries becoming unduly legalistic. It would be desirable to enable the Panel to conduct its proceedings as informally as is consistent

²⁷ [2000] ATP 3

Takeovers Panel

Reasons – Avalon Minerals Limited [2013] ATP 11

*with providing parties with a fair hearing and the expeditious resolution of the matter. Particular regard would be given to measures to avoid excessive legalism in proceedings.*²⁸

141. It appears that this comment came about as a result of the decision of the CSP in *Fairfax*:

*The Panel is of the view that legal representation should not be denied to the parties but the parties must be the only persons entitled to address the Panel (with legal advice available) so that there will be direct dialogue between the relevant players and the Panel members as to the matters referred to the Panel. Suitable protection provisions similar to those given to ASC examinations (confidentiality provisions and the like) should be included.*²⁹

142. In deciding to refuse leave to Bennett + Co, we had regard to the principles enunciated in *Kallinicos v Hunt*³⁰ (noting that this case related to quite a different power, namely the court's inherent jurisdiction to restrain lawyers from acting), including:

- (a) *The test to be applied... is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice*
- (b) *The jurisdiction is to be regarded as exceptional and is to be exercised with caution and*
- (c) *Due weight should be given to the public interest in a litigant not being deprived of the lawyer of his or her choice without due cause.*³¹

143. It is clear, and hardly surprising, that Avalon did not consent to Bennett + Co acting for the underwriter. It acted, and continued to act, as solicitor for the Rights Issue.³²

144. It seemed apparent to us that there was significant potential for conflict of interest. One example is in respect of the additional interim order we made preventing the underwriter relying on rights of termination in the underwriting agreement for the time being (see paragraph 15). Such an order advantaged the company and disadvantaged the underwriter. A solicitor whose duties included advancing the interest of both sides would have been placed in an impossible position in knowing how to respond. It does not matter that other lawyers were retained by the company to deal with the Panel application.

145. Moreover, it seemed apparent to us that information difficulties were likely to arise. The involvement of Bennett + Co in the Panel proceedings, given its past and current roles in this Rights Issue, was likely to muddle an already complex factual situation in which various parties were alleged to be associated.

²⁸ Takeovers: Corporate Law Economic Reform Program, Proposals for Reform: Paper No. 4, p39

²⁹ *John Fairfax Holdings Ltd* (1997), decision handed down 29 September 1997, section 8.2 of the reasons

³⁰ *Kallinicos v Hunt* [2005] 65 NSWSC 1181, applied in *Campbell-Maruca & Ors v Registrar of Indigenous Corporations* [2012] AATA 678

³¹ *Ibid* at [76], authorities and other irrelevant aspects of the test omitted

³² Bennett + Co is not acting for Avalon in relation to the reopened Rights Issue

Takeovers Panel

Reasons – Avalon Minerals Limited [2013] ATP 11

146. Noting that refusal should be exceptional and parties should normally be entitled to the lawyer of their choice, we refused Bennett + Co leave to represent Tan Sri Abu in the Panel proceedings. When communicating our decision we made it clear that we are not seeking to prevent Tan Sri Abu engaging other lawyers, which he did.

Non-party's submission

147. Following the Panel's media release that the application had been made, the Panel's executive received a letter from an Avalon shareholder. From time to time the Panel's executive receives correspondence in relation to a matter before a Panel, and the executive must assess whether it is a submission for the sitting Panel to consider receiving or simply a comment or complaint. In this case it was considered a submission.

148. The decision whether a Panel will receive such correspondence is always a case by case one. Having been informed of the general subject matter contained in the correspondence, we made an assessment that it might be helpful to us in deciding the matter, so we agreed to receive it provided the person submitting it was prepared to show it to the parties, which he was.

Variation to procedural rules

149. Dato Richard Lim, Dato Phillip Siew and Edward Siew were invited to become parties to the matter, however did not file notices of appearance. Nevertheless, given their relevance to our enquiries and the potential for them to be affected by any decision, we invited submissions from them and provided copies of the documents on receiving undertakings that they would keep the information confidential. In providing Dato Richard Lim, Dato Phillip Siew and Edward Siew with the documents, we directed, pursuant to s190 of *the Australian Securities and Investments Commission Act 2001 (Cth)*, that:

...these proceedings before the Panel are confidential, and no person who has access to any material provided in these proceedings, that is not public (other than by a breach of confidentiality), may cause or authorise the publication of any of that material or of any report in which such material forms part. The Panel further directs that this does not prevent a statement that mentions any or all of the following, but no other, matters:

- (a) that proceedings have been initiated*
- (b) the parties to the proceedings*
- (c) the matter to which they relate and*
- (d) the broad nature of the unacceptable circumstances alleged and the orders being sought, without arguing the merits of the case.*

150. Under rule 4.1.1 of the Panel's Procedural Rules, a person does not become a party until the notice of appearance is accepted by the Panel. In order to ensure that Dato Richard Lim, Dato Phillip Siew and Edward Siew had the right to apply for

Takeovers Panel

Reasons – Avalon Minerals Limited [2013] ATP 11

review of a decision of the Panel under s657EA(1), we directed, pursuant to procedural rule 1.2.2,³³ and notwithstanding procedural rule 4.1.1, that:

Dato Richard Lim, Dato Phillip Siew and Edward Siew be treated as, and have all the rights of, parties to the proceedings.

151. We sought submissions from the parties and the proposed ‘additional’ parties before making the direction. None of the ‘additional’ parties objected to the direction. Avalon submitted that:

...In the circumstances, the Additional Parties have been invited to and have already made submissions on matters before the Panel and accordingly, the Proposed Variation is likely to increase the costs of the Parties involved and delay finality of the Proceedings.

...Notwithstanding, Avalon is prepared to be guided by the Panel as to whether the Proposed Variation is appropriate in the circumstances.

152. We considered the variation to the procedural rules appropriate and made the direction.

Nora Scheinkestel
President of the sitting Panel
Decision dated 7 October 2013
Reasons published 11 November 2013

³³ This rule provides that the procedural rules apply to each application and proceeding unless the Panel directs otherwise (with the direction prevailing if inconsistent with a rule)

Takeovers Panel

Reasons – Avalon Minerals Limited [2013] ATP 11

Advisers

Party	Advisers
Avalon Minerals Limited	GRT Lawyers (until 17 October 2013) Allens (from 21 October 2013)
Dato Phillip Siew	NA
Dato Richard Lim	NA
Edward Siew	NA
Sidan Super Pty Ltd as trustee for the Sidan Superannuation Fund	NA
Tan Sri Abu Sahid Mohamed	Paul Fletcher & Co



Australian Government

Takeovers Panel

Annexure A

CORPORATIONS ACT SECTION 657E INTERIM ORDERS

AVALON MINERALS LIMITED

Sidan Super Pty Limited as trustee for the Sidan Superannuation Fund made an application to the Panel dated 5 September 2013 in relation to the affairs of Avalon Minerals Limited.

The President **ORDERS:**

1. Avalon must immediately take all action necessary to postpone the commencement of deferred settlement trading of new shares to be issued under the rights issue announced by Avalon on 9 August 2013.
2. Avalon must not issue or allot any new shares under the rights issue without the prior approval of the Panel.
3. Any money received by Avalon as subscriptions for new shares under the rights issue must be held:
 - (a) separately from all other Avalon funds and
 - (b) on trust for the subscribers.
4. These interim orders have effect until the earliest of:
 - (a) further order of the Panel
 - (b) the determination of the proceedings and
 - (c) 2 months from the date of these interim orders.

Allan Bulman
Director
with authority of Vicki McFadden
President
Dated 9 September 2013



Australian Government

Takeovers Panel

Annexure B

CORPORATIONS ACT SECTION 657E VARIATION OF INTERIM ORDERS

AVALON MINERALS LIMITED

The interim orders made on 9 September 2013 are varied by adding a new paragraph 4, so that the Panel ORDERS as follows:

1. Avalon must immediately take all action necessary to postpone the commencement of deferred settlement trading of new shares to be issued under the rights issue announced by Avalon on 9 August 2013.
2. Avalon must not issue or allot any new shares under the rights issue without the prior approval of the Panel.
3. Any money received by Avalon as subscriptions for new shares under the rights issue must be held:
 - (a) separately from all other Avalon funds and
 - (b) on trust for the subscribers.
4. Tan Sri Abu Sahid Mohamed must not rely on any right he may have to terminate the underwriting agreement between him and Avalon by reason of or as a consequence of the application to the Panel in this matter or these interim orders.
5. These interim orders have effect until the earliest of:
 - (a) further order of the Panel
 - (b) the determination of the proceedings and
 - (c) 2 months from the date of these interim orders.

Alan Shaw
Counsel
with authority of Nora Scheinkestel
President of the sitting Panel
Dated 10 September 2013



Australian Government

Takeovers Panel

Annexure C

**CORPORATIONS ACT
SECTION 657E
VARIATION OF INTERIM ORDERS**

AVALON MINERALS LIMITED

The interim orders made on 9 September 2013 (as varied on 10 September 2013) are further varied by replacing them with the following orders:

1. Avalon must not issue or allot any new shares under the rights issue, other than the excluded shares, without the prior approval of the Panel.
2. Any money received by Avalon as subscriptions for new shares under the rights issue, except for any money received for the excluded shares, must be held:
 - (a) separately from all other Avalon funds and
 - (b) on trust for the subscribers.
3. Tan Sri Abu Sahid Mohamed, Dato Lim Heng Suan and Dato Siew Mun Chuang must not:
 - (a) acquire any Avalon shares, other than the excluded shares or
 - (b) dispose of, transfer or grant a security interest over any excluded shares, or agree to any such disposal, transfer or grant.
4. Tan Sri Abu Sahid Mohamed must not exercise or rely on any right he may have to terminate the underwriting agreement between him and Avalon by reason of or as a direct or indirect consequence of the application to the Panel in this matter or any interim orders made.
5. These interim orders have effect until the earliest of:
 - (a) further order of the Panel
 - (b) the determination of the proceedings and
 - (c) 2 months from the date of these interim orders.
6. In these interim orders, **excluded shares** means any new shares subscribed for under the rights issue (including under the shortfall facility and underwriting agreement) by Tan Sri Abu Sahid Mohamed, Dato Lim Heng Suan and Dato Siew Mun Chuang, whether directly or indirectly.

Takeovers Panel

**Reasons – Avalon Minerals Limited
[2013] ATP 11**

**Allan Bulman
Director
with authority of Nora Scheinkestel
President of the sitting Panel
Dated 27 September 2013**



Australian Government

Takeovers Panel

Annexure D

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

AVALON MINERALS LIMITED

CIRCUMSTANCES

1. Tan Sri Abu Sahid Mohamed (**Tan Sri Abu**) is the largest shareholder and a former director and Chairman of Avalon Minerals Limited (**Avalon**).
2. On 9 August 2013, Avalon announced a 1 for 1 non-renounceable rights issue at \$0.01 per share to raise approximately \$5.62 million (subsequently increased to approximately \$5.89 million) (**Rights Issue**).
3. Avalon shareholders at this time included:
 - (a) Tan Sri Abu – 19.9% and
 - (b) Dato Lim Heng Suan (also known as **Dato Richard Lim**) – 8.2%.
4. The Rights Issue was fully underwritten by Tan Sri Abu.
5. Avalon's notice under s708AA(2)(f)³⁴ stated that if no other shareholders took up any of their entitlements the maximum voting power of the underwriter after the Rights Issue would be 61%.³⁵
6. All reasonable steps to minimise the potential control impact of the Rights Issue on Avalon were not taken. Other capital-raising alternatives available to Avalon were not fully explored.
7. Avalon did not seek to comply with s615 in relation to the Rights Issue. Rather, Avalon sent offers to all shareholders and indicated in the offer document that shareholders outside Australia and New Zealand should ensure that they comply with any applicable securities laws in their own country.
8. There were material information deficiencies in relation to Avalon's offer, including inadequate disclosure concerning Tan Sri Abu, as underwriter of the Rights Issue, his intentions, association with Dato Richard Lim and Avalon's need for and use of funds.

³⁴ All references are to the *Corporations Act 2001* (Cth) unless otherwise specified

³⁵ If the voting power of Dato Richard Lim was included, the maximum voting power of the underwriter would have been approximately 65%

Takeovers Panel

Reasons – Avalon Minerals Limited [2013] ATP 11

9. On 19 August 2013, Avalon raised \$344,807 through a placement at \$0.013 per share to Dato Richard Lim, increasing his interest in Avalon to 11.8% (the **Placement**).³⁶ The Placement was funded, at least initially, by Tan Sri Abu.
10. Dato Richard Lim was nominated to take the Placement by a director of Avalon, Siew Mun Wai (also known as Edward Siew). Dato Richard Lim agreed to take the Placement at the request of Tan Sri Abu, who told Dato Richard Lim he could not subscribe for the shares because his shareholding had reached 19.9%.
11. A similar approach had been taken to placements to Dato Richard Lim earlier in 2013 and in 2012.
12. Tan Sri Abu and Dato Richard Lim each subscribed for their full entitlement under the Rights Issue.
13. The Panel considers that Tan Sri Abu and Dato Richard Lim (the **Associates**) are associated:
 - (a) under s12(2)(b) for the purpose of controlling or influencing the conduct of Avalon's affairs and
 - (b) under s12(2)(c) in relation to Avalon's affairs.
14. The Associates did not disclose the increase in their voting power resulting from their association and the Placement in accordance with Chapter 6C.
15. Immediately following the Placement the Associates had voting power of 31.36% and the Placement and the increase in their voting power occurred otherwise than as permitted under Chapter 6.
16. If the Rights Issue proceeds and Tan Sri Abu is allocated shares as underwriter, it is expected that the voting power of the Associates would increase to 48.72%.³⁷
17. It appears to the Panel that the circumstances are unacceptable having regard to:
 - (a) the effect that the Panel is satisfied the circumstances have had, will have or are likely to have on:
 - (i) the control, or potential control, of Avalon or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Avalon or
 - (b) the purposes of Chapter 6 set out in s602 or
 - (c) the circumstances having constituted or given rise to contraventions of s606 and s671B.
18. 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 s657A(3).

³⁶ After dilution as a result of another Avalon placement on 5 September 2013. As a result of the placements Tan Sri Abu's interest was reduced to 18.2%

³⁷ Based on participation of shareholders when the Rights Issue closed on 9 September 2013

Takeovers Panel

**Reasons – Avalon Minerals Limited
[2013] ATP 11**

DECLARATION

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of Avalon.

**Allan Bulman
Director
with authority of Nora Scheinkestel
President of the sitting Panel
Dated 7 October 2013**



Australian Government

Takeovers Panel

Annexure E
CORPORATIONS ACT
SECTION 657D
ORDERS

AVALON MINERALS LIMITED

The Panel made a declaration of unacceptable circumstances on 7 October 2013.

THE PANEL ORDERS

Completion of rights issue and additional disclosure

1. Tan Sri Abu must not complete his obligations to acquire the underwritten shares under the underwriting agreement with Avalon.
2. Avalon must reopen the rights issue for a period sufficient to allow Avalon time to comply with the following orders and disclose in a market announcement that it has done so.
3. Within 10 business days of the date of these orders, Avalon must send a letter to eligible shareholders stating that:
 - (a) the rights issue has reopened and that:
 - (i) if they did not take up their entitlement in full they may do so and
 - (ii) they may apply for the shortfall (including shares available due to withdrawn applications under order 3(b)) in addition to their entitlement and
 - (b) eligible shareholders who had validly applied for shares under the rights issue have the right to withdraw their application,
in accordance with the following:
 - (c) eligible shareholders must be allowed 2 weeks from the date the last of the letters referred to in this order 3 is dispatched to apply for remaining shares or withdraw their application
 - (d) the money (in cheque or other form acceptable to Avalon) for the shares applied for is to be sent to Avalon with the application
 - (e) Avalon must return any application money to applicants who withdraw their applications under order 3(b) and
 - (f) Avalon must return any surplus application money to applicants, without interest, where the number of shares applied for under the shortfall is greater than the number of shares allocated to an applicant.

Takeovers Panel

Reasons – Avalon Minerals Limited [2013] ATP 11

4. The letter to eligible shareholders referred to in order 3 must be in a form approved by the Panel and disclosed to ASX prior to despatch. It must include:
 - (a) adequate disclosure in relation to the following:
 - (i) Avalon's need for, and use of, funds
 - (ii) Tan Sri Abu's association with Dato Richard Lim
 - (iii) the original outcome of the rights issue
 - (iv) the Panel's decision in this matter
 - (v) the funding implications of the reopened rights issue without the underwriting agreement with Tan Sri Abu, or information on any new underwriting arrangement and
 - (vi) the possible control effect of the reopened rights issue and
 - (b) application and withdrawal forms.
5. Until the close of the reopened rights issue, Avalon must:
 - (a) not issue or allot any remaining shares and
 - (b) hold any money received as subscriptions for the remaining shares separately from all other Avalon funds and on trust for the subscribers.
6. Within 5 business days of the close of the reopened rights issue, Avalon must:
 - (a) scale back the applications under the shortfall if necessary
 - (b) issue the shares
 - (c) disclose in a market announcement the scale back, its detailed calculation methodology and the outcome of the reopened rights issue
 - (d) issue any refund due to an applicant under orders 3(e) and 3(f) and
 - (e) notify the Panel and ASIC in writing that it has completed the requirements of paragraphs (a) to (d) of this order 6 and the number of sale shares (with detailed calculations) of each associated party to be vested in the Commonwealth under order 9.
7. Until completion of orders 1 to 6, the associated parties must not dispose of, transfer, grant a security interest over (or agree to any such disposal, transfer or grant) or vote any Avalon shares held by either of them.

Substantial holding notices

8. Within 2 business days after the date of these orders, the associated parties must give notice of their substantial holding in Avalon and their association in accordance with s671B.³⁸

Divestment of shares by associated parties

9. The sale shares belonging to each associated party are vested in the Commonwealth on trust for each of them respectively.

³⁸ References are to the *Corporations Act 2001* (Cth) unless otherwise specified

Takeovers Panel

Reasons – Avalon Minerals Limited [2013] ATP 11

10. ASIC must:
 - (a) sell the sale shares in accordance with these orders and
 - (b) account to the associated parties for the proceeds of sale, net of the costs, fees and expenses of the sale and any costs, fees and expenses incurred by ASIC and the Commonwealth (if any).
11. ASIC must:
 - (a) retain an appointed seller to conduct the sale and
 - (b) instruct the appointed seller to:
 - (i) use the most appropriate sale method to secure the best available sale price for the sale shares that is reasonably available at that time in the context of complying with these orders, including the stipulated timeframe for the sale and the requirement that none of the associated parties or their respective associates may acquire, directly or indirectly, any of the sale shares
 - (ii) 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
 - (iii) unless the appointed seller sells sale shares on market, obtain from any prospective purchaser of sale shares a statutory declaration that the prospective purchaser is not associated with any of the associated parties and
 - (iv) dispose of all of the sale shares within 3 months from the date of its engagement.
12. Avalon and the associated parties must do all things necessary to give effect to these orders, including:
 - (a) doing whatever is necessary to ensure that the Commonwealth is registered with title to the sale shares in the form approved by ASIC as soon as reasonably practicable after orders 9 to 16 come into effect and
 - (b) until the Commonwealth is registered, complying with any request by ASIC in relation to the sale shares.
13. None of the associated parties or their respective associates may acquire, directly or indirectly, any of the sale shares.
14. The associated parties must not otherwise dispose of, transfer, grant a security interest over (or agree to any such disposal, transfer or grant) or vote any sale shares.
15. Nothing in these orders obliges ASIC to invest, or ensure interest accrues on, any money held in trust under these orders.

Restrictions on voting and additional acquisitions

16. In addition to order 14, for 18 months from the date this order comes into effect, Tan Sri Abu and his associates (excluding Dato Richard Lim) must not exercise, and

Takeovers Panel

Reasons – Avalon Minerals Limited [2013] ATP 11

Avalon must disregard, any voting rights in respect of shares in excess of 'A' % voting power in Avalon (as calculated in the formula below).

$$A = B - C$$

where:

B is 20% + 3% for each 6 month period following the date of these orders³⁹

C is the voting power of Dato Richard Lim in Avalon at the time (excluding any shares held by Tan Sri Abu)

17. Order 16 does not apply to any Avalon shares acquired which increase the voting power of the associated parties after the date of these orders where such acquisition is not prohibited by Chapter 6. However, the associated parties and their respective associates must not make any acquisition of Avalon shares that, but for item 9 of s611, would contravene s606 until order 16 ceases to apply in relation to any Avalon shares held by any of them.

Effect

18. Orders 9 to 16 come into effect immediately upon completion of orders 1 to 6. All other orders come into effect immediately or as otherwise specified in that order.

Interpretation

19. In these orders the following terms apply.

appointed seller	an investment bank or stock broker
ASIC	Australian Securities and Investments Commission, as agent of the Commonwealth
associated parties	Tan Sri Abu Dato Richard Lim
Avalon	Avalon Minerals Limited
Dato Richard Lim	Dato Lim Heng Suan
eligible shareholders	shareholders of Avalon who were eligible to participate in the rights issue, other than Tan Sri Abu, Dato Richard Lim and Avalon directors (and their associated entities)
on market	has the meaning in s9
record date	the record date for the rights issue, being 19 August 2013

³⁹ Consistent with the 'creep' exception in item 9 of s611

Takeovers Panel

Reasons – Avalon Minerals Limited [2013] ATP 11

remaining shares	new shares to be issued under the rights issue other than the 'excluded shares' (as defined in the interim orders dated 27 September 2013)
rights issue	the 1 for 1 non-renounceable rights issue at \$0.01 per share announced by Avalon on 9 August 2013 to raise up to approximately \$5,890,000
sale shares	such number of ordinary shares in the issued capital of Avalon held by the associated parties after completion of the reopened rights issue, to the extent that their voting power in Avalon (excluding any shares held by the other associated party) is greater than: <ul style="list-style-type: none">• 19.90% in respect of Tan Sri Abu and• 8.22% in respect of Dato Richard Lim
Tan Sri Abu	Tan Sri Abu Sahid Mohamed

Allan Bulman
Director
with authority of Nora Scheinkestel
President of the sitting Panel
Dated 14 October 2013