



Australian Government

Takeovers Panel

**Reasons for Decision
Agricultural Land Trust
[2014] ATP 4**

Catchwords:

*Association - decline to conduct proceedings - unitholder meeting - exclusion from voting - increase in voting power
Corporations Act 2001 (Cth), item 7 of s611*

Takeovers Panel Procedural Rule 6.3.1

Netglory v Caratti [2013] WASC 364, Tinkerbell Enterprises Pty Ltd (as trustee for the Leanne Catelan Trust) v The Takeovers Panel (2012) FCA 1272

Moreton Resources Limited [2013] ATP 14, Avalon Minerals Limited [2013] ATP 11, Touch Holdings Limited [2013] ATP 3, Winpar Holdings Limited [2013] ATP 2, World Oil Resources Limited [2013] ATP 1, Altius Mining Limited [2012] ATP 17, Flinders Mines Limited [2012] ATP 9, Bentley Capital Limited [2011] ATP 8, ComOps Limited [2011] ATP 7, Viento Group Limited [2011] ATP 1, Regis Resources Limited [2009] ATP 7, Boulder Steel Limited [2008] ATP 24, BigAir Group Limited [2008] ATP 12, Mount Gibson Iron Limited [2008] ATP 4, Rusina Mining NL [2006] ATP 13, Dromana Estate Limited 01R [2006] ATP 8

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

INTRODUCTION

1. The Panel, Garry Besson (sitting President), Elizabeth Hallett and Richard Hunt, declined to conduct proceedings on an application by Ann Cathcart Pty Ltd in relation to the affairs of the Agricultural Land Trust. The application concerned a meeting of ALT unitholders to consider a proposed restructure of ALT and whether Emerald Securities Pty Ltd (the holder of 4.4% of ALT) and Mr Allen Caratti (the holder of 26.03% of ALT) were associated so that Emerald Securities should be excluded from voting on certain resolutions. The Panel considered that the evidence presented was not sufficient for the Panel to conduct proceedings.
2. In these reasons, the following definitions apply.

ALML	Agricultural Land Management Limited
ALT	Agricultural Land Trust
Applicant	Ann Cathcart Pty Ltd
Caratti Entities	Mr Allen Caratti, Westralia, Mammoth Construction Pty Ltd, Richtide Investments Pty Ltd and TAAC Pty Ltd and any of their respective associates
Elders	Elders Limited
Emerald Nominees	Emerald Nominees (WA) Pty Ltd

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Emerald Securities	Emerald Securities Pty Ltd
Westralia	Westralia Property Holdings Pty Ltd

FACTS

3. ALT is an ASX listed managed investment scheme (ASX code: AGJ).
4. ALML, a wholly owned subsidiary of Elders, is the responsible entity of ALT.
5. Elders holds 51.96% of ALT. In October 2012, Elders announced its intention to exit its forestry management business, which includes ALT.
6. Mr Allen Caratti holds 26.03% of ALT through Westralia, in which he is the sole shareholder. Westralia is ALT's second largest unitholder.
7. Emerald Securities holds 4.4% of ALT. Mr Hossean Pourzand is a director and 50% shareholder of Emerald Securities (the balance is held by Mr Pourzand's wife, Jenny Pourzand).
8. The Applicant and its associates hold 1.63% of ALT.
9. On 21 November 2013, ALML issued a notice of meeting and explanatory statement for a meeting to be held on 16 December 2013, subsequently adjourned to 31 January 2014,¹ in relation to a proposed restructure of ALT comprising:
 - (a) the cancellation of 60,536,628 ALT units held by Elders (47.48% of the total units on issue), following which Elders would hold 5,700,000 ALT units (8.51%)
 - (b) a 3:4 non-renounceable pro-rata entitlement offer to raise \$3.79 million at \$0.085 per ALT unit. Westralia had committed to subscribe for, or procure other unitholders to subscribe for, not less than \$2 million of the new units and
 - (c) the termination of the lease over the Linkletters property between ALT and Elders.
10. If approved, the proposed restructure would result in the Caratti Entities' 'voting interest' in ALT increasing from 26.03% to 50.85% following the cancellation of Elders' units and up to a maximum of 63.23% following the entitlement offer.² A resolution was proposed for the purposes of item 7 of s611³ to approve the increase in relevant interest (with the Caratti Entities and Elders excluded from voting).
11. Two other resolutions were to be put at the meeting in relation to the proposed restructure: a resolution to amend the constitution to enable the cancellation of Elders' units and a resolution to approve the termination of the Linkletters lease for the purposes of the related party provisions in the Corporations Act and the ASX Listing Rules (with the Caratti Entities and Elders excluded from voting).
12. As a result of the Caratti Entities and Elders being excluded from voting on the item 7 and related party resolutions, Emerald Securities would hold 19.96% of the votes that could be cast.

¹ The meeting was further postponed to 7 February 2014

² Assuming no other unitholders acquired units under the entitlement offer

³ References are to the *Corporations Act 2001 (Cth)* unless otherwise specified

13. ALT was due to repay its bank facilities by 4 February 2014 unless the proposed restructure was approved and implemented.

APPLICATION

Declaration sought

14. By application dated 24 January 2014 (and corrected on 28 January 2014), the Applicant sought a declaration of unacceptable circumstances. The Applicant submitted that the Caratti Entities were associated with Emerald Securities and as a result:
- (a) unitholders were not fully informed of the matters required by item 7(b) of s611
 - (b) if Emerald Securities voted in favour of the item 7 resolution, s606 would be contravened and
 - (c) the substantial holder provisions had been breached as neither the Caratti Entities nor Emerald Securities had disclosed the association.
15. The Applicant submitted that the proposed restructure of ALT was not occurring in an efficient, competitive and informed market and that unitholders had not been given enough information to enable them to assess the merits of the restructure.

Interim orders sought

16. The Applicant sought an interim order that the item 7 and related party resolutions not be put to members at the 31 January 2014 meeting, or any adjournment of that meeting, until the Panel decided the application.

Final orders sought

17. The Applicant sought final orders, including that:
- (a) Emerald Securities be declared ineligible from voting on the item 7 and related party resolutions and any votes cast be excluded
 - (b) ALML provide unitholders with supplementary disclosure (including substantial holder disclosure) regarding the association between the Caratti Entities and Emerald Securities and
 - (c) the item 7 and related party resolutions not be put at any unitholders' meeting until adequate time had elapsed following supplementary disclosure.

DISCUSSION

Association

18. It is a well-established principle of the Panel that before it will conduct proceedings on the issue of association, there must be a sufficient body of material demonstrated by the applicant, which together with inferences (for example from partial evidence,

patterns of behaviour and a lack of a commercially viable explanation) support the Panel conducting proceedings.⁴

19. 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.
20. In *Viento Group Limited* 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.⁵

Common investments and dealings

21. The Applicant submitted that Mr Allen Caratti and Mr Pourzand have a history of past business dealings which evidence an association, including:
- (a) the establishment of Forest Hope Pty Ltd by Mr Caratti and Mr Pourzand to pursue a residential property development venture. Forest Hope Pty Ltd is owned by entities related to the Caratti and Pourzand families, with each family having one representative on the board
 - (b) the purchase of property by St George's Terrace Pty Ltd, an entity associated with Mr Caratti, from Mr Pourzand. Further, Mr Pourzand (together with his wife Jenny Pourzand) currently holds a registered mortgage over property owned by 220 St George's Terrace Pty Ltd
 - (c) the purchase of other properties by Mr Caratti or entities associated with him from Mr Pourzand and

⁴ *Mount Gibson Iron Limited* [2008] ATP 4 at [15]. See also *Moreton Resources Limited* [2013] ATP 14, *Avalon Minerals Limited* [2013] ATP 11, *Touch Holdings Limited* [2013] ATP 3, *Winpar Holdings Limited* [2013] ATP 2, *World Oil Resources Limited* [2013] ATP 1, *Altius Mining Limited* [2012] ATP 17, *Flinders Mines Limited* [2012] ATP 9, *Bentley Capital Limited* [2011] ATP 8, *ComOps Limited* [2011] ATP 7, *Viento Group Limited* [2011] ATP 1, *Regis Resources Limited* [2009] ATP 7, *Boulder Steel Limited* [2008] ATP 24, *BigAir Group Limited* [2008] ATP 12, *Rusina Mining NL* [2006] ATP 13

⁵ *Viento Group Limited* [2011] ATP 1 at [120]

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- (d) the transfer of ALT units between Emerald Nominees (an entity associated with Mr Pourzand) and Westralia between December 2009 and May 2010.⁶
22. The Caratti and Pourzand families have had, and continue to have, a number of business dealings. Apart from the transfer of ALT units (which we do not consider to be overly significant), these dealings are unrelated to ALT. We do not consider the number and type of dealings submitted by the Applicant sufficiently supports a finding of association.

Statements attributed to Mr John Caratti

23. The Applicant submitted two statutory declarations – one from the Applicant’s solicitor and another from the Applicant’s partner – which described conversations between each declarant and Mr John Caratti, Mr Allen Caratti’s brother. According to the declarations, during these conversations Mr John Caratti described to each declarant statements made by Mr Pourzand to Mr John Caratti including that:
- (a) Mr Allen Caratti had encouraged Mr Pourzand to purchase ALT units because Allen *“had a plan to eventually take over ALT and would need Houssean [sic] Pourzand’s votes for achieving the takeover and that...Mr Allen Caratti had guaranteed to pay Houssean Pourzand 20c per unit to buy the units [held by Emerald Securities] back from him eventually”*
 - (b) following an offer from Mr John Caratti to purchase Emerald Securities’ ALT units at 9 cents per unit, Mr Pourzand said he *“would only sell the ALT units at 20c and that he had given Allen Caratti a right of first refusal at that price because Allen Caratti had always guaranteed he would buy them back at that price”* and
 - (c) Mr Pourzand would vote in favour of the proposed restructure as *“Allen got me into this. I’m going to support his plan. It’s the only way I’ll get my money back”*.
24. The Applicant submitted that Mr John Caratti’s conversations with Mr Pourzand evidenced a ‘relevant agreement’ between Mr Allen Caratti and Emerald Securities or Mr Pourzand and that it *“can and should be inferred that Pourzand is acting at Allen Caratti’s instruction”*. The Applicant also submitted that Mr Allen Caratti and Mr Pourzand were acting, or proposing to act, in concert in relation to the meeting to approve the proposed restructure.
25. ALML submitted that it had received confirmation from Mr Allen Caratti’s and Mr Pourzand’s respective legal advisers that there was no association as alleged. Similarly, Mr Caratti denied the association in his preliminary submissions.
26. The statements attributed to Mr John Caratti are second hand. However, we are not bound by the rules of evidence and may act on logically probative material from any source.⁷

⁶ The Applicant’s submissions were based on Change in Substantial Holding notices lodged separately by Emerald Nominees and Westralia

⁷ Procedural rule 6.3.1. See also *Tinkerbelle Enterprises Pty Ltd (as trustee for the Leanne Catelan Trust) v The Takeovers Panel* (2012) FCA 1272

27. While we have no reason to doubt that the declarants have accurately described the conversations each had with Mr John Caratti, we have considerable doubts about the probative value of the statements attributed to Mr John Caratti given:
- (a) he was unwilling to give a statement and no explanation was given as to why
 - (b) the declarations lacked specificity in relation to key matters, such as when certain conversations between Mr John Caratti and Mr Pourzand had occurred and
 - (c) Mr Allen Caratti submitted that he had an '*extremely acrimonious*' relationship with his brother, a fact which has been borne out in a recent decision of the Supreme Court of Western Australia.⁸
28. The Applicant first made allegations of association in mid-December 2013. Despite approximately six weeks having elapsed since, the Applicant's case largely relied on the statements attributed to Mr John Caratti. If there was further or better evidence, we might have expected to see it.⁹

Timeliness

29. The application was made one week before the scheduled meeting date of 31 January 2014 and on the Friday before a long weekend (and the annexures to the application were not provided until Tuesday, 4 February 2014). This timing created an urgency around the matter and would have likely required us to, had we decided to conduct proceedings, make an interim order to delay the meeting to preserve the status quo.
30. ALML submitted that, if the meeting was delayed, the interests of unitholders would be placed in "jeopardy" and unitholders would suffer "prejudice" as there was "no guarantee that [ALT's bank facility] will be further extended [beyond 4 February 2014] or that ALT will have the continuing support of the banking facility". Similarly, Elders submitted that any delay in implementing the proposed restructure would place further strain on Elders' financial position.
31. The prejudice that we were told would arise from delaying the meeting was a factor we considered in making our decision.

Postscript

32. Shortly after our decision was communicated to the parties, but before we had published it, ALML announced our decision. ALML also announced that it had postponed the meeting by a week to 7 February 2014 because unitholders "may have been influenced by" this application and the extra week would provide sufficient time for them to consider the implications of our decision. Further, ALML announced that it had discussed the postponement with its financiers and expected to receive an extension of time to repay its bank facilities. We are pursuing further inquiries about this.

⁸ *Netglory v Caratti* [2013] WASC 364

⁹ Even accepting *Dromana Estate Limited 01R* [2006] ATP 8 at [25] that "issues of association are notoriously difficult for outsiders to prove since access to the type of evidence needed is rarely available"

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33. Parties to proceedings give undertakings that they will not disclose details of proceedings except in limited circumstances, for example where disclosure is required in accordance with a party's continuous disclosure obligations. We do not consider that such an obligation arose in this matter. At a minimum, ALML should have consulted us prior to its announcement. Disappointingly, it did not do so.

DECISION

34. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001 (Cth)*.

Orders

35. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make an interim order.

Garry Besson
President of the sitting Panel
Decision dated 30 January 2014
Reasons published 12 February 2014

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Advisers

Party	Advisers
Mr Allen Caratti and Westralia	Torrens Legal
ALML	Kelly & Co Lawyers
Applicant	Mills Oakley Lawyers
Elders	Herbert Smith Freehills