



Australian Government

Takeovers Panel

**Reasons for Decision
Dragon Mining Limited
[2014] ATP 5**

Catchwords:

Association – board spill – relevant agreement – agreement or understanding – acting in concert – common directors – decline to conduct – structural links – shareholder meeting – friendship – uncommercial actions – common investments and dealings – prior collaborative conduct – shared goal or purpose – common knowledge of relevant facts

Corporations Act 2001 (Cth), sections 12, 606, 657C, 671B, 672A

Agricultural Land Trust [2014] ATP 4, Viento Group Limited [2011] ATP 1, Regis Resources Limited [2009] ATP 7, Mount Gibson Iron Limited [2008] ATP 4, 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, Ron Malek, Vickki McFadden (sitting President) and Laurie Shervington, declined to conduct proceedings on an application by Dragon Mining Limited in relation to its affairs. The application concerned an alleged association between two Dragon Mining shareholders in the context of a meeting to change the Dragon Mining board. The Panel considered that the application was not timely and the evidence of association in relation to Dragon Mining was not sufficient for it to conduct proceedings.
2. In these reasons, the following definitions apply.

Allied Group	Allied Group Limited
Allied Properties	Allied Properties Resources Limited
APAC	APAC Resources Limited
Brinkley	Brinkley Mining plc
COL Capital	COL Capital Limited
Dragon Mining	Dragon Mining Limited
Eurogold	Eurogold Limited
FRIL	Future Rise Investments Limited
Mount Gibson	Mount Gibson Iron Limited
SHKIS	Sun Hung Kai Investment Services Limited

FACTS

3. Dragon Mining is an ASX listed company (ASX: DRA).

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4. Eurogold (ASX: EUG) has a 24.45% interest in Dragon Mining and is its largest shareholder. Eurogold has held this interest since March 2012.¹
5. Allied Properties is Eurogold's largest shareholder with a 36.5% interest. Allied Properties is ultimately controlled by Allied Group, which is in turn controlled by the Lee family.² Mr Lee Ming Tee is the founder of Allied Group.
6. Between December 2012 and June 2013, COL Capital acquired a 12.08% interest in Dragon Mining. Ms Shirley Chong Sok Un is the executive chairperson and ultimate controller of COL Capital, with a 72% interest.
7. COL Capital's shares in Dragon Mining are held through COL Capital's wholly-owned subsidiary, FRIL. SHKIS is the registered holder of these shares and holds them as custodian for FRIL.
8. SHKIS is a wholly-owned subsidiary of Sun Hung Kai & Co. Limited, a Hong Kong Stock Exchange listed financial services company with approximately HK\$65 billion in assets under management. Allied Properties (H.K.) Limited has an interest of 56.17% in Sun Hung Kai & Co.³ Allied Group has an interest of 74.99% in Allied Properties (H.K.).
9. Between January 2013 and May 2013, SHKIS (as custodian for FRIL) lodged four substantial holder notices in relation to Dragon Mining shares. No other person or entity was listed as having a relevant interest in these shares or being an associate of SHKIS or FRIL in relation to Dragon Mining.
10. Links between entities associated with Ms Chong and entities associated with the Lee family are shown in the following diagram.

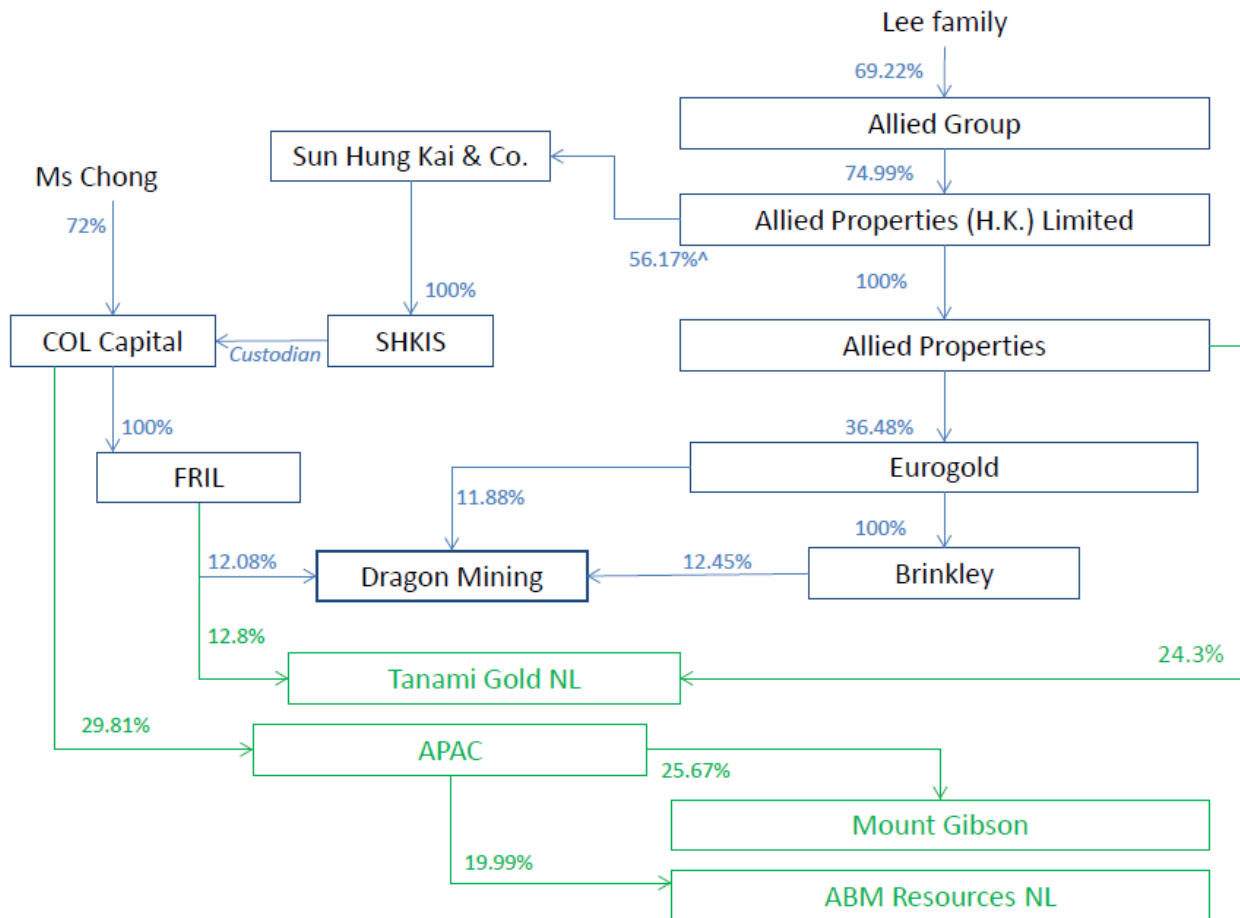
¹ Eurogold increased its interest from 19.99% to 24.45% in March 2012 as sub-underwriter of a renounceable entitlement offer. Eurogold's interest is held directly and via its wholly-owned subsidiary, Brinkley

² The Lee family has a 69.22% interest in Allied Group

³ Allied Properties (H.K.) has disclosed an interest of 72% in Sun Hung Kai & Co. for the purposes of Hong Kong securities law. This interest comprises its owned interest of 56.17% and a further interest of approximately 16% arising from shares pledged as security in favour of one of its subsidiaries

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[^] Allied Properties (H.K.) has a further interest of approximately 16% in Sun Hung Kai & Co. shares arising from shares pledged as security
Links and entities shown in green denote structural links not directly related to Dragon Mining

11. On 9 December 2013, Dragon Mining received a notice from Eurogold requisitioning a meeting to remove certain directors⁴ of Dragon Mining and appoint Mr Arthur Dew and Mr Brett Smith (Mr Dew is a director of Allied Group and other entities related to Allied Group).
12. On 18 December 2013, Dragon Mining issued a beneficial ownership tracing notice under s672A⁵ to FRIL. The response to the tracing notice, received on 23 December 2013, disclosed COL Capital's and Ms Chong's relevant interest in FRIL's Dragon Mining shares. On 24 December 2013, a corresponding substantial holder notice was lodged.
13. The requisitioned meeting was to be held on 7 February 2014. On 13 January 2014, each of Eurogold, Brinkley and FRIL submitted proxies electronically to Dragon Mining's share registry, each voting in favour of the resolutions to effect the change in board composition.⁶

⁴ Mr Peter Cordin, Mr Kjell Larsson, Mr Tapani Jarvinen and Mr Christian Russenberger. Mr Jarvinen resigned in December 2013. If the resolutions were approved, the board would comprise Mr Peter Gunzberg and Mr Markku Makela (existing directors) and the two Eurogold nominees

⁵ References are to the *Corporations Act 2001 (Cth)* unless otherwise specified

⁶ As at the proxy cut-off date, being 48 hours prior to the meeting, approximately 62% of proxies registered were in favour of the resolutions to effect the change in board composition

APPLICATION

Declaration sought

14. By application dated 2 February 2014, Dragon Mining sought a declaration of unacceptable circumstances. Dragon Mining submitted that Allied Properties, Eurogold and Brinkley were each associated with COL Capital and Ms Chong.
15. Dragon Mining further submitted that the Panel's decision in *Mount Gibson*⁷ established that Mr Lee Ming Tee was associated with Ms Shirley Chong and APAC in relation to Mount Gibson.⁸ Therefore, Dragon Mining submitted that a similar inference could be drawn in relation to Dragon Mining, and accordingly:
 - (a) FRIL's acquisition of Dragon Mining shares contravened s606
 - (b) Allied Properties, Eurogold, Brinkley, COL Capital and Ms Chong had contravened s671B by not disclosing the association in their respective substantial holder notices and
 - (c) COL Capital and Ms Chong had breached s672A by not disclosing the association and other required information in response to the tracing notice.

Interim orders sought

16. Dragon Mining sought interim orders to the effect that:
 - (a) Eurogold, Brinkley and SHKIS (as custodian for FRIL's shares in Dragon Mining) be prevented from acquiring any further Dragon Mining shares until the determination of the proceedings and
 - (b) the meeting scheduled for 7 February 2014, be adjourned or if the meeting was held, Eurogold, Brinkley and SHKIS (as custodian) be restrained from exercising any voting power, until the determination of the proceedings.

Final orders sought

17. Dragon Mining sought final orders to the effect that:
 - (a) Dragon Mining shares acquired by FRIL be vested for sale by ASIC
 - (b) Eurogold, Brinkley and COL Capital be prohibited from acquiring any further Dragon Mining shares other than in a manner permitted by s611 and
 - (c) Eurogold, Brinkley and SHKIS (as custodian) be restrained from exercising any voting power at the meeting scheduled for 7 February 2014.

DISCUSSION

Jurisdiction

18. In *Regis Resources Limited* the Panel noted that it "*will not treat issues about the composition of a company's board as a control issue for the purposes of s657A unless an*

⁷ *Mount Gibson Iron Limited* [2008] ATP 4

⁸ [2008] ATP 4 at [58]

accumulation or exercise of voting power occurs in contravention of Chapters 6-6C or in otherwise unacceptable circumstances".⁹

19. Although the current application was made in response to a proposed change in the composition of the Dragon Mining board, the circumstances complained of relate to potential breaches of Chapters 6 and 6C such that the matter is within the Panel's jurisdiction.

Extension of time

20. Section 657C provides that an application for a declaration of unacceptable circumstances may only be made within two months after the circumstances have occurred or a longer period determined by the Panel.
21. The circumstances giving rise to the alleged breaches of s606 and s671B occurred between December 2012 and June 2013. On one view, the application may be out of time because the circumstances forming the basis of the application (ie FRIL's acquisition of shares and the deficient substantial holder notices) occurred more than two months ago. On another view, the application may be within time because the circumstances are continuing (ie because the alleged association exists and has not been disclosed) or because Dragon Mining only became aware of the non-disclosure of Ms Chong's and COL Capital's relevant interest upon receiving the response to the tracing notice on 23 December 2013.
22. Dragon Mining requested that the Panel exercise its discretion to hear the application. It submitted that it only became aware of the circumstances giving rise to the application when it received the response to the tracing notice on 23 December 2013.
23. We do not need to decide whether to extend time because we have decided not to conduct proceedings.

Timing of application

24. On the issue of the timing of the application, COL Capital submitted that "*it is inconceivable that Dragon Mining would have seen FRIL as a substantial shareholder on its register without determining that it was a wholly-owned subsidiary of COL Capital*". It submitted that the timing of the application was tactical to affect the meeting.
25. It appears that Dragon Mining only inquired about the beneficial ownership of FRIL after the board spill meeting was requisitioned. This is despite the fact that between 29 January 2013 and 22 May 2013, four substantial holder notices were lodged by FRIL and SHKIS (as custodian), each disclosing an increase in relevant interest. Had Dragon Mining made even informal enquiries, the relationship between COL Capital and FRIL would have been discovered relatively easily.
26. We do not consider the application to be timely and this is a factor we take into account.

⁹ [2009] ATP 7 at [19], [fn 8]

Association

27. 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.¹⁰
28. Section 12 sets out the tests for association as applied to Chapter 6. Two of the tests are relevant 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.
29. Circumstances which are relevant to establishing an association include:
- (a) actions which are uncommercial
 - (b) structural links
 - (c) common investments and dealings
 - (d) prior collaborative conduct
 - (e) a shared goal or purpose and
 - (f) common knowledge of relevant facts.¹¹
30. Dragon Mining addressed each of these circumstances.

Eurogold's association with Allied Properties

31. Dragon Mining relied on an alleged association between Eurogold and its 36.5% shareholder, Allied Properties. Eurogold submitted that Allied Properties was simply its largest shareholder and that it was not associated with Allied Properties.
32. We accept that the evidence goes no further in this respect than to show a shareholding. However, it does not matter whether Eurogold and Allied Properties are associates. By virtue of s608(3), Allied Properties is deemed to have the same relevant interest in Dragon Mining shares that Eurogold has.
33. Breaches of the *Corporations Act* would arise if an association between Ms Chong and COL Capital, on one hand, and the Lee family or Allied Group, on the other hand, was established.

¹⁰ [2008] ATP 4 at [15]. See also the cases referred to in *Agricultural Land Trust* [2014] ATP 4 at [fn 4]

¹¹ *Viento Group Limited* [2011] ATP 1 at [120]

Actions which are uncommercial

34. Dragon Mining submitted that it was uncommercial for FRIL to appoint SHKIS as its custodian with the power to exercise the voting rights attached to its Dragon Mining shares. Dragon Mining also submitted that this arrangement constituted a structural link between Ms Chong/COL Capital and the Lee family/Allied Group.
35. COL Capital submitted that SHKIS was a professional nominee company within the Sun Hung Kai & Co. group, a listed financial services group with approximately HK\$65 billion in assets under management. The terms of COL Capital's custodian agreement with SHKIS provided that SHKIS may vote shares only in accordance with COL Capital's directions.
36. It is true that SHKIS is a Lee family controlled entity.¹² But against that is the fact that it is a large professional custodian and would be expected to have many such arrangements. Further, under the custodian agreement, SHKIS can only vote shares in accordance with the directions of COL Capital. Accordingly, we do not think the applicant has established that there is, or may be, anything uncommercial about the custodian arrangement or any structural links that evidences an association.

Structural links

37. Dragon Mining submitted that there were multiple common directorships between, on one hand, Ms Chong and her associated entities and, on the other hand, the Lee family and their associated entities:
 - (a) Ms Chong was the executive chairperson of COL Capital and an executive director of APAC (in which COL Capital had a 29.81% interest). APAC was an entity found to be associated with Mr Lee Ming Tee in *Mount Gibson*
 - (b) Mr Lee Ming Tee's son, Mr Lee Seng Hui, was the chief executive officer and executive director of Allied Group and a non-executive director of each of APAC and Mount Gibson (in which APAC had a 25.67% interest)
 - (c) Mr Dew was on the Allied Group, Allied Properties, Tanami Gold NL and Eurogold boards and
 - (d) Mr Alan Stephen Jones was on the Allied Group, Allied Properties, Sun Hung Kai & Co. and Mount Gibson boards (Mr Jones was found to be an associate of Mr Lee Ming Tee in *Mount Gibson*).¹³
38. Allied Properties submitted that there were no common directors between COL Capital on the one hand and Allied Properties, SHKIS or Eurogold on the other. Further, all the common directors referred to by Dragon Mining held their positions before FRIL acquired any shares in Dragon Mining.
39. It is not unusual to have nominees appointed to a board when someone has a significant stake in the company. It is more unusual that persons associated with the Lee family or Allied Group are appointed as nominees in respect of companies in

¹² The Lee family indirectly controls 56.17% of Sun Hung Kai & Co., which owns 100% of SHKIS

¹³ [2008] ATP 4 at [58]

which COL Capital has significant investments (ie APAC and Mount Gibson). While there are some links between these entities, we are not sufficiently persuaded of a pattern of directorships. The relevant people constitute a minority of directors on those boards.

Common investments and dealings

40. Dragon Mining submitted that there were a number of common investments and dealings between Ms Chong associated entities and the Lee family associated entities. In particular:
- (a) APAC had an interest of 25.66% in Mount Gibson shares and Ms Chong/COL Capital had a deemed relevant interest in the same shares by reason of COL Capital holding 29.81% of the shares in APAC
 - (b) APAC had an interest of 19.99% in ABM Resources NL shares and COL Capital had a deemed relevant interest in the same shares by reason of COL Capital holding 29.81% of the shares in APAC and
 - (c) SHKIS (as custodian for FRIL) had an interest of 12.8% and Allied Properties had an interest of 24.3% in Tanami Gold. Also, Mr Lee Seng Hui, Mr Dew and Mr Graeme Sloan (who was also a director of ABM Resources) were directors of Tanami Gold.¹⁴
41. Dragon Mining submitted that these common investments and dealings show that Ms Chong associated entities and Lee family associated entities have a “*propensity to deal with each other in a business context with a view to achieving a common purpose*”.
42. COL Capital submitted that an association does not arise between it and Allied Properties simply because each entity had an investment in Tanami Gold, among other entities. It submitted that it is an investor in the Australian resources sector and has never entered into any written or oral agreements, arrangements or understandings with any Lee family associated entity in relation to any of COL Capital’s investments. It also submitted that it did not control APAC.
43. Apart from Dragon Mining, Tanami Gold was the only common investment submitted. We do not consider the other examples submitted by Dragon Mining – Mount Gibson and ABM Resources – to be common investments as the only connection is the *Mount Gibson* finding that APAC and Mr Lee Ming Tee were associated. We do not consider that the common investments submitted evidence a strong pattern or a sufficient degree of coordinated investment between the relevant parties.

Prior collaborative conduct

44. Dragon Mining referred to *Mount Gibson*, in which the Panel found that Mr Lee Ming Tee was associated with Ms Chong and APAC in relation to Mount Gibson.¹⁵ The

¹⁴ Mr Lee Heng Sui resigned on 7 November 2013

¹⁵ [2008] ATP 4 at [58]

Panel in that matter noted that Ms Chong was a “long-standing friend” of Mr Lee Ming Tee.¹⁶ Newspaper reports have similarly identified their friendship.

45. Dragon Mining submitted that the *Mount Gibson* matter “demonstrates previous collaborative conduct between the Lee Entities and the Chong Entities, prior attempts by COL Capital to use an associated shareholder to spill a board, and a previous circumstance where the Panel made a declaration of unacceptable circumstances with respect to a number of parties that [Dragon Mining] maintains are associated in this application”.
46. COL Capital submitted that Ms Chong’s and Mr Lee Ming Tee’s friendship is not evidence of an association between Ms Chong and COL Capital on the one hand and Eurogold, Allied Properties and Brinkley on the other.
47. Allied Properties also submitted that *Mount Gibson* was of no relevance as it related to the affairs of a different company and to facts – which occurred almost six years ago – unrelated to the circumstances before us. It submitted that there was no evidence of any involvement of Mr Lee Ming Tee in relation to the affairs of Dragon Mining and that *Mount Gibson* made no finding about COL Capital or Ms Chong in relation to Allied Properties, Eurogold or Brinkley.
48. *Mount Gibson* is relevant to the extent that the Panel made findings in respect of Mr Lee Ming Tee’s relationship with Ms Chong (which we would be entitled to presume has not changed in the absence of evidence of change). However, *Mount Gibson* found Mr Lee Ming Tee and Ms Chong (and APAC) to be associated in relation to that company. In the absence of sufficient probative evidence in relation to Dragon Mining, it is therefore of limited significance in this matter. Also, this matter involves the Lee family and its associated entities, not apparently Mr Lee Ming Tee directly.

Shared goal or purpose

49. Dragon Mining submitted that a shared goal or purpose was demonstrated through the proxy voting of each of Eurogold, Brinkley and SHKIS (acting on FRIL’s instruction) that was registered with Dragon Mining’s share registry.
50. On 13 January 2014, about four weeks before the scheduled meeting, Eurogold, Brinkley and SHKIS lodged proxies and were given sequential voting reference numbers (numbers 95-98),¹⁷ indicating the order in which the proxies were received and registered. Dragon Mining submitted this demonstrated a shared goal, and appeared to be asking us to draw an inference that the lodgement of proxies was coordinated.
51. COL Capital submitted that it independently decided which way it would vote and was unaware of why the proxies lodged by SHKIS (online in Hong Kong upon FRIL’s instruction) were registered sequentially after Eurogold and Brinkley. It submitted that it had not engaged in any discussions with Eurogold or any other Lee family associated entity regarding the meeting.

¹⁶ [2008] ATP 4 at [66]

¹⁷ Eurogold holds its Dragon Mining shares in two parcels

52. We made further enquires and were informed that Eurogold's and Brinkley's proxies were registered approximately three hours prior to FRIL's proxy.
53. It is not clear to us why Eurogold, Brinkley and SHKIS lodged proxies so far in advance of the meeting. We consider this to be unusual, especially to the extent that they all occurred on the same day. However, in the absence of evidence of some coordination regarding the lodgement of proxies, we are not prepared to draw an inference from this.

Common knowledge of relevant facts

54. Dragon Mining submitted that, in light of the other evidence it had submitted, COL Capital, FRIL, Allied Properties, Eurogold and Brinkley "*would have had*" common knowledge of each other's shareholdings and Eurogold's actions to call the meeting.
55. That the parties "*would have had*" common knowledge of each other's shareholdings is an assertion, not evidence.

Conclusion

56. The Panel in *Dromana Estate Limited 01R* said that "*issues of association are notoriously difficult for outsiders to prove since access to the type of evidence needed is rarely available*".¹⁸ This difficulty was evident in the matter before us.
57. However, we consider that Dragon Mining did not demonstrate a sufficient body of material to support us conducting proceedings. The evidence was, for the most part, reliant on the Panel's findings in *Mount Gibson*. While other evidence was presented, the only evidence that related to Dragon Mining directly was the sequential lodgement of proxies.

Scaling *Mount Gibson*

58. We noted at paragraph [27] that before the Panel will conduct proceedings on the issue of association, there must be a sufficient body of material demonstrated by the applicant to support the Panel conducting proceedings. This is sometimes referred to as the '*association hurdle*'.
59. We are conscious of the risk that some people may read this decision as signalling a raising of the '*association hurdle*'. This is not our intention. Our decision in this matter was based purely on the evidence that was submitted to us.
60. *Dromana Estate Limited 01R* acknowledges the difficulties that an applicant faces in gathering evidence in association matters. In deciding whether to conduct proceedings on an association case, this must be kept in mind. However, the Panel has limited investigatory powers which means, before we decide to conduct proceedings, an applicant must do more than make allegations of association and rely on us to substantiate them.¹⁹ An applicant must persuade us by the evidence it adduces that we should conduct proceedings.

¹⁸ [2006] ATP 8 at [25]

¹⁹ We are not suggesting Dragon Mining here did that

FRIL’s substantial holder notices

61. The substantial holder notices lodged by FRIL and SHKIS (as custodian) between January 2013 and May 2013 were deficient in that Ms Chong’s and COL Capital’s relevant interest in Dragon Mining shares was not disclosed. This deficiency was rectified in the substantial holder notice lodged on 24 December 2013.
62. We found it unusual that a sophisticated entity such as COL Capital did not correctly comply with the substantial holder notice requirements initially. However, compliance in relation to the past substantial holder disclosures is a matter for others to pursue.

DECISION

63. 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

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

Postscript

65. On 7 February 2014, the meeting was held and the changes to the Dragon Mining board sought by Eurogold were effected.

Vicki McFadden

President of the sitting Panel

Decision dated 7 February 2014

Reasons published 20 February 2014

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Advisers

Party	Advisers
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COL Capital	Allens
Dragon Mining	Clayton Utz
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