



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Blackham Resources Limited  
[2014] ATP 16**

**Catchwords:**

*Association – shareholders agreement – relevant agreement – purpose – efficient, competitive and informed market – substantial holding notices – decline to make a declaration*

*Corporations Act 2001 (Cth), sections 249D, 606, item 7 of 611, 671B, 657E*

*Perpetual Custodians Ltd as custodian for Tamoran Pty Ltd as trustee for Michael Crivelli v IOOF Investment Management Ltd; Murray v Perennial Investment Partners Ltd (2013) 304 ALR 436; Perpetual Custodians Ltd as custodian for Tamoran Pty Ltd as trustee for Michael Crivelli v IOOF Investment Management Ltd; Murray v Perennial Investment Partners Ltd (2012) 91 ACSR 530; ACCC v Universal Music Australia Pty Ltd (2001) 115 FCR 442; Elders IXL Ltd v NCSC [1987] VR 1 at 15; Adsteam Building Industries Pty Ltd v Queensland Cement & Lime Co Ltd (No 4) [1985] 1 Qd R 127*

*Crescent Gold Ltd 02 [2011] ATP 14; Mount Gibson Iron Limited [2008] ATP 4; National Food Limited 01 [2005] ATP 8; Winepros Ltd [2002] ATP 18*

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

**INTRODUCTION**

1. The Panel, Peter Hay, Rodd Levy (sitting President) and Alison Watkins, declined to make a declaration of unacceptable circumstances in relation to the affairs of Blackham Resources Limited. The application concerned contraventions of s606<sup>1</sup> and the substantial holding provisions as a result of an alleged association between certain Blackham shareholders. The Panel considered that there was insufficient evidence of an association at this stage.

2. In these reasons, the following definitions apply.

Blackham	Blackham Resources Limited
Great Central	Great Central Gold Pty Ltd
Gutnick Parties	Great Central, Joseph Gutnick, Mazil and Mordechai Gutnick
Mazil	Mazil Pty Ltd
Perfectus	Perfectus Management Limited
Perfectus Arrangement	Shareholders’ agreement between Polo Investments (49%), Mettiz Capital Ltd (Michael Tang, 2%) and Joseph Gutnick (49%) in Perfectus (into which Great Central had transferred a 13.5% interest in Blackham)
Polo	Polo Resources Limited, a company listed on AIM in the

<sup>1</sup> References are to *Corporations Act 2001* (Cth) unless otherwise indicated

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United Kingdom, and/or its wholly owned subsidiary Polo Investments Ltd

#### FACTS

3. Blackham is an ASX listed company (ASX code: BLK). Its business is minerals exploration and development, particularly the development of the Matilda Gold Project in Western Australia. Mr Joseph Gutnick is a non-executive director of Blackham. He was formerly its chairman.
4. On 1 February 2013, Great Central<sup>2</sup> entered into a \$3.32 million subscription agreement and \$10 million convertible note deed with Blackham. Under the agreement, Great Central was to be issued 15.79 million Blackham shares at \$0.21 per share, in 2 tranches, and was to subscribe for five-year convertible notes. On completion of the subscription, Great Central held 19.3% of Blackham and Mr Gutnick was appointed non-executive chairman of Blackham.
5. On 6 June 2013, Blackham shareholders resolved, for item 7 of s611 and other purposes, to approve Great Central acquiring up to 45.9% of Blackham on conversion of the convertible notes. In the explanatory statement, Mr Gutnick was the only disclosed associate of Great Central.
6. By 7 March 2014, Great Central had converted some of the notes, leaving \$6 million to be paid to Blackham.
7. On 7 March 2014, Great Central lodged a substantial holder notice disclosing a relevant interest in 32.72% of Blackham. Mr Gutnick was shown as having the same relevant interest.
8. On 19 March 2014, Blackham announced that it had received a commitment from Polo to subscribe for 4.76 million shares at \$0.21 per share (approximately 4.5%).
9. On 8 May 2014, Great Central transferred 15,888,495 Blackham shares (approximately 15%) to Perfectus, which was then wholly owned by Mr Gutnick.
10. On 27 May 2014, a shareholders' agreement was entered between Mr Gutnick, Polo Investments and Mettiz Capital Ltd (wholly owned by Mr Michael Tang, executive chairman of Polo and its largest shareholder). Under the agreement, Polo Investments would subscribe for 49% of Perfectus, and Mettiz would subscribe for 2%. The agreement provided for Polo, Mr Gutnick and Mettiz each to have one director. It further provided options to each of Polo and Mr Gutnick to buy the other out. It further provided:
  - (a) Clause 2.1  
*The business of Perfectus shall be investment holding and shall be conducted in the best interests of Perfectus and*
  - (b) Clause 13  
*Mutual consultation and goodwill*

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<sup>2</sup> Mr Gutnick is the sole shareholder and sole director of Great Central

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13.1 *The parties confirm their intention to promote the best interests of Perfectus and to consult fully on all matters materially affecting the development of the Business. Each party shall act in good faith towards the other in order to promote Perfectus's success.*

13.2 *The parties shall keep the organisation and progress of Perfectus under regular review and shall consider, in good faith but without any obligation to agree, any amendments proposed by either to improve the prospects for success of Perfectus.*

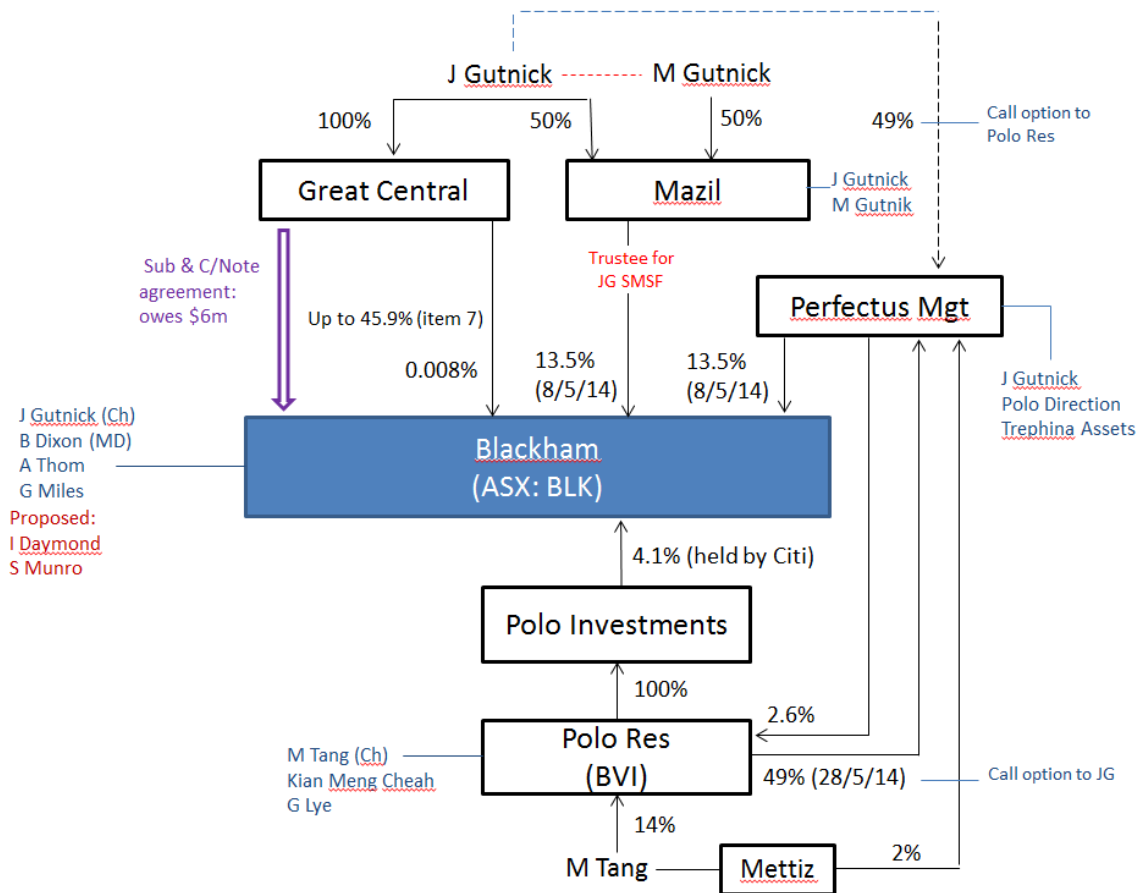
11. On 28 May 2014, Polo announced to AIM that it had entered the shareholders' agreement and had agreed to subscribe for 49% of Perfectus for \$1 million plus \$2 million in Polo scrip (approximately 2.64% of Polo).
12. On 29 May 2014, Polo lodged an initial substantial holder notice disclosing a relevant interest in 19.5% of Blackham (comprising 4.5% held by Polo's nominee and 15% through Perfectus).
13. On or about 25 June 2014, Great Central transferred 15,893,505 Blackham shares (approximately 15%) to Mazil.<sup>3</sup> Great Central retained 8,000 Blackham shares (approximately 0.008%).
14. On 16 July 2014, Mazil requisitioned a shareholders' meeting under s249D to remove all the Blackham directors other than Mr Gutnick and appoint its nominees.
15. On 18 July 2014, Blackham announced:
  - it had restructured its board, with Mr Gutnick being removed as Chairman due to non-attendance at board meetings since November 2013 and
  - Great Central "*remains in default of the convertible note deed...*" and
  - receipt of a section 249D notice for restructure of the board from Mazil.
16. Various relationships between the parties are shown in the following diagram.

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<sup>3</sup> Mazil is 50% owned by Mr Gutnick and 50% owned by his son, Mr Mordechai Gutnick. The Blackham shares are held by Mazil as trustee for the Mazil Superannuation Fund

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## APPLICATION

### Declaration sought

17. By application dated 25 July 2014, Blackham sought a declaration of unacceptable circumstances.
18. It submitted that the Gutnick Parties, Polo and Perfectus were associates in relation to Blackham and had contravened s606 and the substantial holding provisions.
19. It submitted that the effect of the circumstances was that:
  - (a) non-disclosure of the association, and the contraventions, resulted in a market that was not efficient, competitive and informed
  - (b) the acquisition by the associated parties (other than Great Central and Mr Gutnick who received item 7 of s611 approval) meant that:
    - (i) the acquisition of shares did not take place in an efficient, competitive and informed market
    - (ii) there was a significant effect on existing and potential control of Blackham and
    - (iii) Blackham shareholders were denied a reasonable and equal opportunity to participate in the benefits of the transaction between Perfectus and Polo.

**Interim orders sought**

20. Blackham sought a litany of interim orders, including that:
  - (a) the associated parties be prevented from acquiring further shares or exercising voting rights
  - (b) the associated parties provide additional disclosure
  - (c) Mr Gutnick be excluded from participating in aspects of directors' meetings and
  - (d) information be provided to the Panel.
21. The Gutnick Parties offered an undertaking not to purchase further shares, or exercise voting rights, until further order of the Panel. Mr Gutnick offered a further undertaking not to participate in any portion of a Blackham board meeting that would create a conflict of interest on his part. Polo did not offer an undertaking. It is also based overseas. So it was simpler to proceed by way of a single interim order rather than part interim order and part undertaking. Therefore, we made interim orders (Annexure A) that Great Central, Mazil, Perfectus and Polo not dispose of, transfer, or grant any security interest over or cause or allow the disposal, transfer or granting of any security interest over ordinary shares in Blackham.
22. A number of the interim orders sought were premature and we did not need to go as far as the Gutnick Parties had offered in order to sufficiently maintain the status quo pending our consideration of the application.

**Final orders sought**

23. Blackham sought final orders to the effect that shares acquired in breach of section 606 be vested and sold and the associated parties be prohibited from acquiring further shares other than as permitted by section 611. It also sought a final order that the associated parties be restrained from voting in relation to the upcoming section 249D meeting.

**DISCUSSION**

**Preliminary submission**

24. The application identified various historical structural links and common investments, a shared goal or purpose in the Perfectus arrangement, which Blackham submitted was uncommercial, and incidents of non-compliance with disclosure requirements.
25. Polo made a preliminary submission denying the association. It submitted that the price paid for the subscription in Perfectus reflected that it was also a shareholder in Perfectus (ie, it retained an interest in the consideration). It also denied requesting a board seat and submitted that it had no involvement in the section 249D notice.

### Conduct proceedings

26. The Perfectus Arrangement clearly warranted an explanation. Co-investment in a vehicle might, of itself, connote an association. Moreover, an email from Mr Gutnick to Mr Dixon (Blackham's managing director) was suggestive of acting in concert in relation to board composition (see paragraph 53). In our view Blackham had demonstrated "*a sufficient body of evidence of association*"<sup>4</sup> to warrant us conducting proceedings notwithstanding Polo's denial.
27. We enquired into 3 areas in particular:
  - (a) the purpose of the Perfectus Arrangement
  - (b) the governance arrangements of Polo and
  - (c) the circumstances surrounding Polo's decision to subscribe for shares in Perfectus.

### Section 606

28. After Blackham had undertaken share issues, on a fully diluted basis, Mr Gutnick had a relevant interest in approximately 27.008% of Blackham and Polo had a relevant interest in approximately 4.1% (held on its behalf by Citigroup as nominee).
29. The applicant submitted that there were 2 breaches of section 606:
  - (a) Polo's acquisition of voting power above 20% through the acquisition of a relevant interest in Blackham's shares via Perfectus. This is the main focus of the application and it depends on whether the Gutnick Parties and Polo are associates.
  - (b) On 16 September 2013, when Great Central and Mr Gutnick acquired a relevant interest above 20% in Blackham, this resulted in other associates of Great Central acquiring voting power above 20% but these associates were not listed in the item 7 approval. It seems reasonably clear that the Gutnick Parties are associates. Accordingly, Mazil and Mr M Gutnick's voting power in Blackham increased above 20%. The applicant noted that this breach was out of time.
30. If Polo and the Gutnick Parties are associates, the latter's voting power would also be increased by the 4.1% of Blackham in which Polo had a relevant interest.<sup>5</sup>
31. In our view, absent a finding of association, if there are breaches of s606, they are technical and do not warrant Panel intervention in this case. We do not, however, want to be taken as saying that the failure to disclose all relevant information for an item 7 vote (such as listing all associates) would never warrant Panel intervention.

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<sup>4</sup> *Mount Gibson Iron Limited* [2008] ATP 4 at [15]

<sup>5</sup> Mr Gutnick and Great Central perhaps had item 7 approval (query if approval for one transaction allows another), but in any event other parties associated with either of them did not have such approval

**Section 671B**

32. In any event, the applicant submitted that:
- (a) Mr J Gutnick, Mr M Gutnick and Polo had not lodged substantial holder notices
  - (b) the Gutnick Parties had not disclosed the call option under the Perfectus Arrangement
  - (c) Perfectus and Mazil did not lodge initial substantial holder notices and
  - (d) Polo's initial substantial holder notice omitted information required by section 671B.
33. Blackham did not seek final orders in respect of disclosure.
34. Polo lodged a substantial holder notice on 29 May 2014. It should have, but did not, attach the shareholders' agreement. On 8 August 2014, Polo lodged a revised substantial holder notice attaching the agreement. If Polo and the Gutnick Parties are associates, the substantial holding notices are defective and in breach of section 671B. Putting to one side the potential defect of non-disclosure of association, the other possible breaches we leave to ASIC.

**The Perfectus Arrangement**

35. The Perfectus Arrangement is documented by a shareholders' agreement dated 27 May 2014 which requires the parties *"to consult fully on all matters materially affecting the development of the Business."*<sup>6</sup>
36. Polo submitted that the Perfectus Arrangement came about in the following way:
- (a) in early May 2014, Mr Gutnick offered a 15% stake in Blackham to Polo, which was rejected
  - (b) Mr Gutnick then offered to sell Polo a 50% shareholding in Perfectus, which was also rejected as Mr Tang was concerned about the potential for shareholder deadlock in Perfectus and
  - (c) Mr Tang then offered that Polo would subscribe for a 51% interest in Perfectus, which was accepted in principle and further negotiated.
37. The shareholders' agreement was signed on 27 May 2014 and announced by Polo to AIM on 28 May 2014. A substantial holding notice was lodged by Polo on 29 May 2014, although as noted it did not attach a copy of the shareholders' agreement.
38. Polo submitted that this investment was relatively small for Polo and within its authorised investment limit. It submitted that it was commercial for reasons including:
- (a) confidence in the potential of Blackham's gold exploration assets and its management

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<sup>6</sup> Clause 13.1. 'Business' is defined to mean business to be carried on by Perfectus as agreed between the parties from time to time

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- (b) the interest was acquired for a mix of cash and shares (issued at a premium) and
  - (c) Polo obtained a call option on Mr Gutnick's 49% of Perfectus, or if Mr Gutnick's call option was exercised Polo could sell out at a profit.
39. The Gutnick Parties' submission supported this. They also submitted that there had been no discussions between them and Polo in relation to the section 249D notice. They added:
- It is obvious that Joseph Gutnick and Polo Resources/Polo Investments are associates on the terms of the shareholders agreement – but only in relation to the shares in the Applicant held by Perfectus.*
40. The Gutnick Parties denied they were acting in concert with respect to Blackham.
41. The business of Perfectus was the holding of the shares in Blackham, a small holding in Polo as a result of the consideration provided for Polo's investment and a loan to Merlin Diamonds Ltd (another company connected to Mr Gutnick of which he is the chairman) to which the cash proceeds of Polo's investment were directed. In our view, the Perfectus Arrangement was, in essence, an arrangement for dealing with Blackham shares.
42. The rationale for the Perfectus Arrangement was not apparent. The shareholders' agreement appeared to suggest that Perfectus may have been simply a vehicle for the parties to act in concert. Therefore, we issued a supplementary brief asking whether the shareholders' agreement gave rise to an association.
43. Given the submission referred to in paragraph 39, we also asked if it was possible to be associates in relation to a single parcel of shares in a company but not other shares. ASIC submitted that it was not possible to be associates in relation to a single parcel of shares in a company. Polo made a similar submission. We agree with both of them on this point.
44. As for the shareholders' agreement, ASIC submitted that it was "*open to the Panel to infer that the purpose of the overall shareholders' agreement was for the parties to retain control or influence the affairs of or act in concert with respect to the holding in [Blackham].*"
45. Polo submitted that:
- (a) Perfectus had assets other than its holding in Blackham
  - (b) the consultation provision in the shareholders' agreement (clause 13) was 'boilerplate' and should not have undue weight placed on it and
  - (c) the subjective purpose of the shareholders' agreement when properly construed was to regulate the parties' rights as shareholders of Perfectus.
46. The Gutnick Parties submitted that no association can exist unless it is found that the relevant agreement was entered for the subjective purpose of controlling or influencing the composition of Blackham's board or the conduct of its affairs. We



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agree but note that there may be “*little practical difference between objective and subjective purpose, for the best evidence of subjective purpose will be objective effect*”.<sup>7</sup>

47. They also submitted that the shareholders’ agreement did not relate to the conduct of Blackham’s affairs. This is the subject of these proceedings. They also submitted that nothing in the shareholders’ agreement gave Polo any relevant interest in the Blackham shares retained by Great Central and Mazil. This is not to the point; if the parties are associated, Polo would have voting power, not a relevant interest, in the Blackham shares retained by Great Central and Mazil.
48. Lastly they submitted that, if it would not have been unlawful or unacceptable to purchase the stake directly, it is difficult to see why it would become unlawful or unacceptable to buy a 51% indirect interest in the same shares. This ignores that there may be a joint venture or an increase in voting power such that the acquisition of the indirect interest breached section 606.
49. The Panel in *National Foods*<sup>8</sup> said that agreements should not be read unduly widely as many agreements relate to the conduct of a company’s affairs that would not ordinarily be treated as within the policy of the association provisions.
50. In view of there being nothing specific in the shareholders’ agreement beyond clause 13.1, the ability of Polo to control Perfectus (through the combined 51% holding of it and Mettiz), the evidence presented on how that agreement was negotiated, and the absence of other evidence (in particular of any consultation regarding the section 249D notice), we think on balance there is insufficient evidence to infer a purpose other than to hold the shares as a common investment. Although the shareholders’ agreement is a different type of agreement to the one the Panel had in contemplation in *National Foods*, we would not read the association provisions as catching this agreement. We note in this respect that Polo submitted it does not consider it necessary to consult with Mr Gutnick as to its intentions to exercise the votes of any shares held as an investment by Perfectus.
51. A finding of association, where one has not been admitted or disclosed previously, is a serious finding for the Panel to make, particularly if it means the parties have committed a breach of s606. It follows that the evidence presented to the Panel must be sufficient to support such a finding. In the words of Marks J, “... *such a finding must be truly available and not the product of mere suspicion or prejudice*”.<sup>9</sup>
52. While shareholders’ agreements such as the Perfectus shareholders’ agreement can give rise to an association, in this case, given the general terms of the agreement, and considering the surrounding circumstances and the material presented, we are not, on balance, inclined to draw the necessary inferences and find that an association in relation to Blackham exists.

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<sup>7</sup> *Perpetual Custodians Ltd as custodian for Tamoran Pty Ltd as trustee for Michael Crivelli v IOOF Investment Management Ltd; Murray v Perennial Investment Partners Ltd* (2013) 304 ALR 436 at [90], quoting *ACCC v Universal Music Australia Pty Ltd* (2001) 115 FCR 442

<sup>8</sup> *National Food Limited 01* [2005] ATP 8 at [58]. See also *Crescent Gold Ltd 02* [2011] ATP 14 at [39]

<sup>9</sup> *Elders IXL Ltd v NCSC* [1987] VR 1 at 15

**Other evidence of association**

53. On 28 May 2014, as part of email correspondence between Mr Gutnick and Mr Dixon regarding Blackham's funding position, Mr Gutnick wrote "*It's time we had board control.*" Blackham submitted that this demonstrated a shared goal of influencing and changing the composition of its board. However, there is no evidence of Polo's involvement in the email.
54. There is also an email from Mr Dixon to Mr Gutnick, Mr Tang and others saying:  
*Following my discussions with [Mr M Gutnick] I propose subject to Board approval:  
...We restructure the board as follows...* (the proposal included Polo nominating a director to the board).
55. In rebuttal submissions, Polo submitted that "*at no time were any of the Gutnick Parties authorised to make any representations on behalf of [Polo]*".
56. Also on 28 May 2014, Mr Dixon emailed Mr Tang saying "*Congratulations on your increased stake in Blackham.*"
57. And on 17 June 2014, Mr Dixon emailed Mr Tang inviting Polo to subscribe for further shares to maintain its interest following a proposed placement by Blackham.
58. None of the correspondence from Blackham suggests a concern about association. Indeed, Polo is considered to have the capacity to acquire a further relevant interest.
59. In *Perpetual Custodians*<sup>10</sup> Stevenson J referred to various tests for association, reinforcing the position that:
  - (a) there must at least be an understanding between the parties as to their common purpose or object<sup>11</sup> and
  - (b) a mere concurrence of views is not sufficient.<sup>12</sup>
60. The Gutnick Parties submitted that "*In this case, there is no evidence upon which it could be inferred that such a meeting of the minds exists.*" We do not have evidence on which to infer otherwise.
61. In the absence of such evidence, we are not prepared to draw an inference of association.

**DECISION**

62. For the reasons above, we declined to make a declaration of unacceptable circumstances. We consider that it is not against the public interest to decline to make a declaration and we had regard to the matters in s657A(3).

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<sup>10</sup> *Perpetual Custodians Ltd as custodian for Tamoran Pty Ltd as trustee for Michael Crivelli v IOOF Investment Management Ltd; Murray v Perennial Investment Partners Ltd* (2012) 91 ACSR 530 at [102], accepted at (2013) 304 ALR 436 at [103]

<sup>11</sup> *Adsteam Building Industries Pty Ltd v Queensland Cement & Lime Co Ltd (No 4)* [1985] 1 Qd R 127 at 132

<sup>12</sup> *Winepros Ltd* [2002] ATP 18 at [33]

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### Orders

63. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

**Rodd Levy**  
**President of the sitting Panel**  
**Decision dated 20 August 2014**  
**Reasons published 3 September 2014**

### Advisers

<b>Party</b>	<b>Advisers</b>
Blackham Resources	Steinepreis Paganin
Great Central, Joseph Gutnick, Mazil and Mordechai Gutnick	Cornwall Stoddart
Polo Resources, Polo Investments and Perfectus Management	Hunt & Humphry



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**Annexure A**

**CORPORATIONS ACT  
SECTION 657E  
INTERIM ORDER**

**BLACKHAM RESOURCES LIMITED**

Blackham Resources Limited made an application to the Panel dated 25 July 2014 in relation to its affairs.

The Panel ORDERS:

1. The persons listed in Schedule A must not dispose of, transfer, grant any security interest over or cause or allow the disposal, transfer or granting of any security interest over ordinary shares in Blackham Resources Limited.
2. These interim orders have effect until the earliest of:
  - (i) further order of the Panel
  - (ii) the determination of the proceedings and
  - (iii) 2 months from the date of these interim orders.

**Schedule A**

Great Central Gold Pty Ltd

Mazil Pty Ltd

Perfectus Management Limited

Polo Investments Limited

Polo Resources Limited

**Alan Shaw  
Counsel  
with authority of Rodd Ashton Levy  
President of the sitting Panel  
Dated 4 August 2014**