



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Scantech Limited  
[2014] ATP 20**

**Catchwords:**

*Association - decline to conduct proceedings - deemed relevant interests - effect on control - efficient, competitive and informed market - Eggleston principles - failure to disclose - option over shares - relevant interest - section 602 principles - substantial holding*

*Corporations Act 2001 (Cth), sections 12, 606, 608, 657A, 671B*

*Australian Securities and Investments Commission Act 2001 (Cth) section 192*

*Australian Securities and Investments Commission Regulations 2001 (Cth) Regulations 18, 20*

*R Levy, Takeovers Law and Strategy, 4<sup>th</sup> ed, 2012, Law Book Co*

*Procedural rule 6.1.1 note 2*

*Mount Gibson Iron Limited [2008] ATP 4, Precious Metals Australia Limited [2002] ATP 5*

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

**INTRODUCTION**

1. The Panel, James Dickson, Peter Hay (sitting President) and Michelle Jablko, declined to conduct proceedings on an application by Scantech Limited, and instead referred the issue to ASIC for it to investigate and consider making an application. The application concerned whether certain shareholders had entered into agreements that created relevant interests in excess of 20% or otherwise created or evidenced an association in breach of Chapter 6.

2. In these reasons, the following definitions apply.

agreement	Call Option and Share Sale Agreement
Forestor	Forestor International Inc
Jakbriash	Jakbriash Pty Ltd
Ouwens	Ouwens Corporate Services Pty Ltd
Scantech	Scantech Limited
Stirling Coleman	Stirling Coleman Capital Ltd

**FACTS**

3. Scantech is an ASX listed company (ASX code: SCD) that designs and manufactures control systems for bulk materials and consults to the coal, cement and minerals industries.

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4. On 27 August 2014, Mr Danny Watson (a 12.01% shareholder in Scantech) signed an agreement for approximately half his shareholding (6.05%) to Forestor. Mr Watson emailed the signed agreement to Mr Steven Lau.
5. Mr Lau returned the agreement countersigned on behalf of Forestor on 2 September 2014.
6. Mr Lau is an employee of Stirling Coleman. At a meeting with Scantech he handed over his business card identifying him as Managing Director Transaction Services with Stirling Coleman. However, in his dealings in this matter it has become apparent that he was not acting in that capacity, but was acting for Mr Colin Oxlade as a personal favour.<sup>1</sup>
7. Under the agreement:
  - (a) Mr Watson granted Forestor an exclusive call option over 1,200,000 shares for 60 days from the date of the agreement
  - (b) the sale price was to be 80 cents per share, being a total of \$960,000
  - (c) the fee for the call option was \$100 and
  - (d) a deposit of 5% (\$48,000) plus the option fee was to be paid within 7 days of execution of the agreement. Upon receipt of cleared funds, 60,000 shares were to be transferred to Forestor or its nominee.
8. The agreement also contained the following provision:

*In consideration for entering into this Agreement, the Transferor has agreed to assign and transfer all proxies votes [sic] for the balance being 1,140,000 shares in the Company (1,200,000 less 60,000 for the deposit) to the Transferee upon receipt of the payment of the five (5) percent deposit as outlined under this Agreement.*
9. No substantial shareholder notices or transfers have been lodged.
10. Some of the details and content of conversations is in dispute, but according to the application –
  - (a) On 5 September 2014, Mr Watson informed Scantech’s managing director Mr David Lindeberg that two other shareholders - Ouwens (12.06%) and Mr John Shepherd (4.95%) - had also agreed to sell their shares
  - (b) On 8 September 2014, Mr Lau called Mr Lindeberg and stated that he controlled Scantech and the directors should resign. The next day he called again to ask Mr Lindeberg to contact Mr John Buckby. He said that Mr Buckby was to be the new chairman of Scantech.
  - (c) On 10 September 2014, the chairman of Scantech Mr Peter Pedler met Mr Buckby, who informed him that a Singaporean consortium was determined to complete the takeover of Scantech.
  - (d) On 11 September 2014, Mr Buckby emailed Mr Pedler saying “*I have been asked to represent the Australian face of the major Singaporean Consortium fronted by Steven Lau (the Consortium), who have identified Scantech as a ‘company they are interested*

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<sup>1</sup> No information on Mr Oxlade has been provided to the Panel

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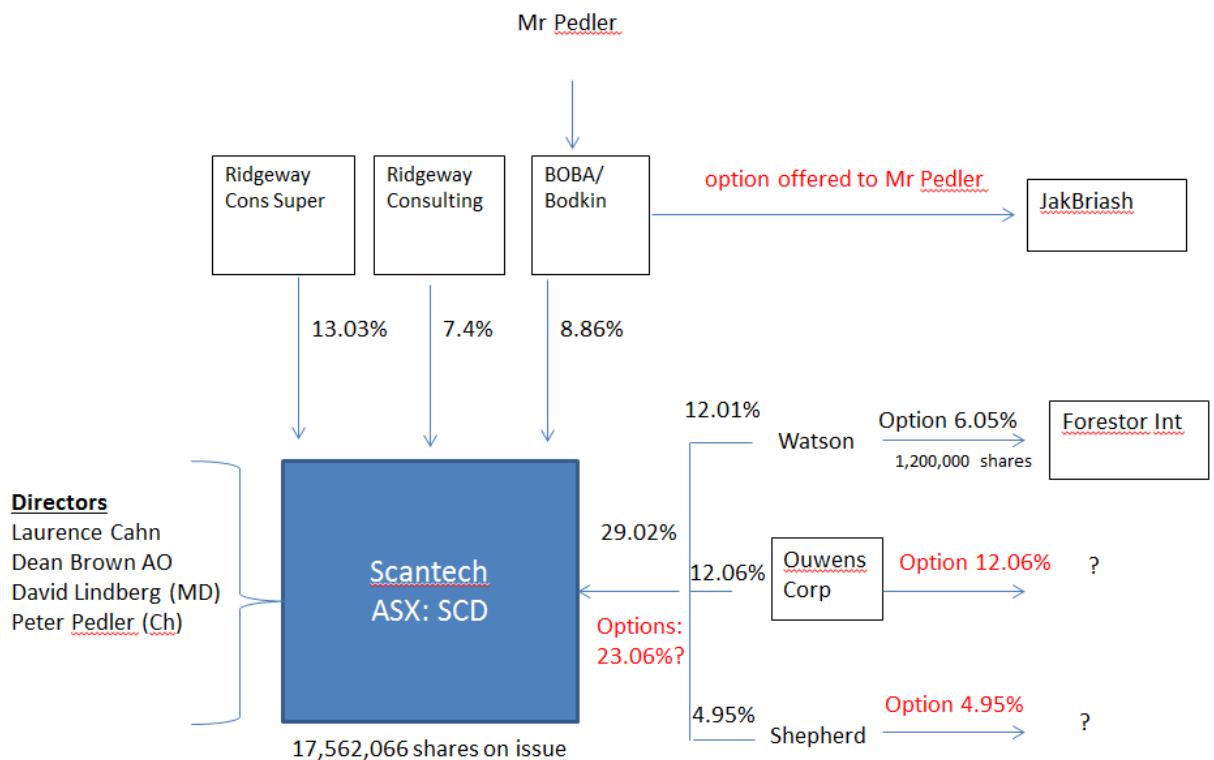
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*in' for the immediate purposes of a potential trade sale and new technology asset vend in. The Consortium would do this on the basis of being a substantial option holder and soon to be shareholder...."*

Mr Pedler replied that Scantech was concerned that its shareholders were being contacted and told that 48% of the company had been acquired by the Singaporean consortium and that the shareholders were required to accept \$0.80 per share for their shares.

- (e) On 16 September 2014, Mr Pedler and Mr Lindeberg met with Mr Lau, Mr Raoul Singh and Mr Buckby. Mr Lau advised that he represented a Singapore consortium that had control of 35% of Scantech and they were determined to obtain 50.1%. Mr Lau and Mr Singh repeated the demand that the board agree to resign.
- (f) On 17 September 2014, Mr Pedler received an email from Mr Buckby attaching a letter from Jakbriash and a draft agreement. The agreement offered a company that Mr Pedler controlled similar terms to those agreed with Mr Watson except that the price was \$1.00 per share. Subsequently, Mr Pedler received a text message from Mr Buckby that he had been asked by the Consortium to offer Mr Pedler \$1.50 per share.

11. Various relationships between the parties are described in the following diagram.



## APPLICATION

### Declaration sought

12. By application dated 26 September 2014, Scantech sought a declaration of unacceptable circumstances. It submitted that a Singaporean consortium had entered, or intended to enter, the agreements and as a consequence there had been contraventions of sections 606(1)(c) and 671B.<sup>2</sup>
13. It further submitted that the Singaporean consortium, or other parties, had asserted that they intended to requisition a meeting to replace the current board of Scantech.
14. It submitted that the circumstances were having an effect on potential change of control of Scantech and breached the objectives and purposes in section 602 in that:
  - (a) the acquisition of control over voting interests was not taking place in an efficient, competitive and informed market
  - (b) shareholders and directors did not know the identity of all persons who have or proposed to acquire a substantial interest in Scantech and
  - (c) shareholders and directors did not have enough information to assess the merits of any proposal.

### Interim orders sought

15. Scantech sought interim orders to restrain Stirling Coleman, Jakbriash, Forestor, Mr Lau, Mr Buckby or any servant or agent of them from:
  - (a) exercising or purporting to exercise any voting or other rights attached to the shares the subject of the agreements or any other agreements to acquire shares in Scantech
  - (b) acquiring or transferring any shares or interests in shares in Scantech and
  - (c) taking any steps to complete the transfer of shares under the agreements or any other agreements to acquire shares in Scantech.
16. We decided to make preliminary inquiries before deciding whether to conduct proceedings and, as there was no vote or other pending corporate action, we did not consider it necessary to make interim orders, at least until after our preliminary inquiries.

### Final orders sought

17. Scantech sought final orders, including:
  - (a) an order cancelling, or declaring voidable, the agreements or any other agreements to acquire shares in Scantech
  - (b) an order cancelling, or declaring voidable, any offer by Stirling Coleman, Jakbriash, Forestor, Mr Lau, Mr Buckby or any servant or agent of them relating to a proposed takeover of Scantech or in connection with the acquisition of shares or interests in shares in Scantech and

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<sup>2</sup> References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

- (c) an order restraining the parties from exercising or purporting to exercise any voting or other rights attached to the shares the subject of the agreements or any other agreements to acquire shares in Scantech.

## DISCUSSION

### Relevant interest

18. Under section 608(1), a person has a relevant interest in securities if the person:
  - (a) is the holder of the securities
  - (b) has power to exercise, or control the exercise of, a right to vote attached to the securities or
  - (c) has power to dispose of, or control the exercise of a power to dispose of, the securities.
19. Under section 608(8), among other things, if a person has given another person an enforceable right in relation to securities (whether enforceable now or in the future), or has granted an option, and the first person has or acquires a relevant interest then the other person is taken to have a relevant interest in the securities.
20. The agreement contains both an option to acquire shares in Scantech and, on payment of the deposit, a proxy to vote all the shares the subject of the agreement. By virtue of section 608(8), the transferee under the agreement has a relevant interest in the securities the subject of the agreement.
21. In the case of the option granted by Mr Watson, Forestor has a relevant interest in the 6.05% of Scantech the subject of that agreement. No substantial holder notice has been lodged, in breach of section 671B.
22. The applicant submitted that it had been informed by Mr Watson that two other shareholders agreed to sell their shares (see paragraph 10(a)).
23. If this is correct, and similar agreements have been entered, it would breach section 606 and there may be further breaches of section 671B.
24. We made preliminary enquiries of Ouwens and Mr Shepherd, asking whether:  
*...during the last 6 months, you have entered an option agreement or have any other agreement, arrangement or understanding regarding the voting or disposal of the shares in Scantech in which you have or had a relevant interest.*
25. We also asked for a copy of any such agreement and a copy of any documentation including file notes, correspondence (including emails), written advices and other records.
26. Ouwens replied that it *“entered into a written agreement concerning an option over its shareholding in Scantech. The option was not to be effective until payment as required by [Ouwens] was made to it. Such payment was not made within the time stipulated by the agreement or otherwise.”*
27. It also said that, as the agreement had a confidentiality provision, it was *“not in a position to provide you with a copy, unless compelled by law.”*

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28. Mr Shepherd replied that “*at no time during the preceding 6 months have either myself or any entity under my control entered into any completed sale or option agreement with respect to Scantech shares or voting rights.*”
29. In our view, Scantech’s concerns appear to have substance, at least in so far as they appear to warrant further inquiry, for the following reasons:
- (a) there is a signed agreement with Mr Watson, although there is doubt about whether the transferee (Forestor, a British Virgin Islands company) exists as a registered company according to the researches of the applicant
  - (b) there is, or was, an agreement with Ouwens although it may not be effective. We do not know who the transferee from Ouwens might be. The two agreements we have seen (one signed by Mr Watson and one unsigned by Mr Pedler) nominate different transferees
  - (c) Mr Shepherd may have no “completed” agreement, but it is unclear whether he has, or had, an agreement that is, or was, to be completed. Again, we do not know who the transferee from Mr Shepherd might be.
30. Moreover, Scantech submitted that there were conversations regarding control of the company.
31. It submitted that, between 16 and 19 September 2014, Mr Pedler and another shareholder had communications with Mr Buckby regarding an offer for Mr Pedler’s shares.
32. This is supported by a letter dated 17 September 2014 from Jakbriash to Mr Pedler. In the letter, Mr John Warming, director of Jakbriash, said “*We write following recent discussions with Mr John Buckby, who represents a major Singaporean Consortium to positively position themselves within the share registry of Scantech Ltd*”. The letter enclosed an agreement, in the same form as Mr Watson’s but with Jakbriash as transferee, and asked that Mr Pedler advise by return “*the names, addresses and share numbers regarding the other shareholders having a common interest in sale [sic]*”.
33. Mr Buckby was not a party to the proceedings, but was notified of them as a potentially interested party. He responded to the application:
- I confirm that a number of parties (including me) did attend a meeting at the request of Mr Peddler [sic] on 16 September 2014 with Messrs Pedler and Lindeberg, Chairman and CEO and Director of Scantech. The purpose of the meeting as outlined by Mr Peddler [sic] was to meet Mr Lau for a commercial discussion and see what plans Mr Lau had in mind for Scantech. I said very little at that meeting and took no active role in the meeting. At that meeting, they claimed that they, between themselves and their respective associates, controlled over 51% of the shares in Scantech. Mr Lindberg [sic] said he owned 20% plus and Mr Pedler 15% and they controlled other interests. I was surprised this was so and that they appeared to be acting in concert in this way. They proudly said they had a 100% track record in fending off numerous attempts by minority shareholders to oust management and cause problems and that they were experts in dealing with this. They claimed this happens yearly and has happened for many years.*
34. However there is a text message from Mr Buckby to Mr Pedler, which appears to have been sent on 19 September 2014, in which Mr Buckby says:

*I have been asked by the consortium to offer you (your entities) and your other group that you may have some influence over (total 15%) the offer is \$1.50 per share with an unconditional 21 day settlement ....*

35. There are other curiosities in the matter. For example, Scantech submitted that Mr Lau represented that Stirling Coleman and its associates held options in respect of over 35% of the shares in Scantech and intended to acquire 50.1% of the shares in Scantech. Stirling Coleman has denied any involvement. Mr Lau submitted that he was acting for Mr Oxlade as a personal favour, not Stirling Coleman. Scantech appears to have accepted that Stirling Coleman was not involved in that it made an ASX announcement on 29 September 2014 of Stirling Coleman’s denial.
36. Given that the information contained in the application and other material provided to the Panel (including material provided in answer to questions asked by the Panel) does not present a clear picture, we considered whether conducting proceedings, and therefore the undertaking of an investigation by the Panel itself, would be likely to result in a clear picture emerging.
37. It seems reasonably clear that copies of any agreements will not be forthcoming unless by compulsion. As was said in *Precious Metals Australia Limited*:
- In practice, the great bulk of information which is provided to the Panel in its proceedings is provided voluntarily, in response to offers to hear submissions to accord procedural fairness, and not under summons. This practice is important to the efficient operation of the Panel and the Panel is concerned to ensure that it not be undermined by any party using information received in this way for other purposes.*<sup>3</sup>
38. We can issue summonses to obtain documents<sup>4</sup> and take evidence on oath or affirmation.<sup>5</sup> However, the real question here is - what is the most efficient way to investigate the matter further? Under regulation 20, as soon as practicable after receiving an application we must decide whether to conduct proceedings and, if so, prepare a brief.<sup>6</sup> Relevant factors in the decision include whether the claims would give rise to unacceptable circumstances if established and the strength of the preliminary evidence.<sup>7</sup> The preliminary evidence here is equivocal. In our view, further investigation at this stage would be most effectively done by way of ASIC investigation.
39. The Panel is given a power to make referrals to ASIC. Regulation 18 provides:
- (1) *The Panel may refer a matter to the Commission for the Commission to consider with a view to making an application.*
  - (2) *If the Panel refers a matter to the Commission, the reference must be made:*
    - (a) *in writing; and*

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<sup>3</sup> *Precious Metals Australia Limited* [2002] ATP 5 at [26]

<sup>4</sup> Section 192(1)(a) of the *Australian Securities and Investments Commission Act 2001* (Cth)

<sup>5</sup> Section 192(2) of the *Australian Securities and Investments Commission Act 2001* (Cth)

<sup>6</sup> Regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth)

<sup>7</sup> Procedural rule 6.1.1 note 2

(b) *in sufficient detail to allow the Commission to make a decision about the matter.*<sup>8</sup>

40. Given logistical difficulties and tight time constraints in a Panel hearing, we think this is a suitable case for referral to ASIC with a view to ASIC making its own inquiries and then considering whether it should make an application to the Panel. In part, this will help resolve the difficulty that the applicant faces, namely that it has a limited ability to obtain further evidence. Also, apart from conversations, some at least of which are disputed, no overt actions have been undertaken to take control of Scantech, such as the lodgement of transfers or the issue of a section 249D notice to replace the board. Of course, there is the possibility that there was an attempt to take control of Scantech which failed, because it appears that at least some agreements may have been in existence. Or it may be that the agreements lie dormant until sufficient control is gathered. If so, this would be inimical to the purposes of chapter 6 as set out in section 602.

### Association

41. According to Levy:

*The concept of ‘association’ endeavours to identify all persons who should be grouped together in determining which persons have interests which are aligned and which shares should be treated as forming a single block. The concept is used to identify blocks of shares, people likely to assist a person in acquiring a control block and people who lack the requisite independence.*<sup>9</sup>

42. Mr Lau denied being an associate of any of the parties to the application and denied being a party to any relevant agreement concerning Scantech. He did witness the agreement with Mr Watson but denied meeting with the person who signed on behalf of Forestor. In his preliminary submission he says “*the application presents insufficient evidence that Mr Lau is an associate of any other parties to the application.*”
43. In terms of the test in *Mount Gibson*<sup>10</sup> for conducting proceedings in respect of association, we think that test is satisfied, including in respect of Mr Lau. There is documentary evidence of at least one agreement, suggestions of others, and confirmation of some of the conversations. Mr Lau has been involved in discussions, witnessed a document, and has admitted to acting on behalf of Mr Oxlade. There is an email dated 17 September 2014 from Mr Buckby to Mr Pedler attaching “*documents prepared for Steven Lau and The Consortium*”. Had we conducted proceedings, we would have included the question of association in our enquiries and included Mr Lau in that question.
44. The agreements that we have seen have different transferees. The ultimate controller may be the same person, in which case there may be a contravention of section 606, or there may be different persons, in which case there may be an association in relation to Scantech that gives rise to a contravention of section 606.
45. Investigation may be warranted to ascertain what, if any, links there are between the different transferees.

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<sup>8</sup> Regulation 18 of the *Australian Securities and Investments Commission Regulations 2001* (Cth)

<sup>9</sup> R Levy, *Takeovers Law and Strategy*, 4<sup>th</sup> ed, Law Book Co, 2012 at [3.70]

<sup>10</sup> *Mount Gibson Iron Limited* [2008] ATP 4 at [15]



**DECISION**

46. For the reasons above, 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)*. Instead, under regulation 18 we have referred this issue to ASIC and requested that ASIC investigate with a view to considering making an application to the Panel.
47. Given that we have decided not to conduct proceedings we do not make any orders, including any costs orders.

**Peter Hay**  
**President of the sitting Panel**  
**Decision dated 13 October 2014**  
**Reasons published 17 October 2014**

**Advisers**

<b>Party</b>	<b>Advisers</b>
Stephen Lau	Eaton Hall
Scantech Limited	HWL Ebsworth
Stirling Coleman Capital Ltd	Price Sierakowski