Australian Government

Takeovers Panel

Reasons for Decision
Echo Resources Limited
[2015] ATP 8

Catchwords:

Association – board spill – relevant agreement – agreement or understanding – acting in concert - decline to conduct proceedings – shareholder meeting – substantial holder notice – disclosure – underwriter – sub-underwriter - control

Australian Securities and Investments Commission Act 2001 (Cth), section 199

Corporations Act 2001 (Cth), sections 12, 173(3), 249D, 249F, 602(a), 657A, 657E, 671B

Procedural Rule 6.1.1 note 2

Attorney-General (Cth) v Alinta Limited [2008] HCA 2, Humes Ltd v Unity APA Ltd (1987) ACLR 641

ASIC Regulatory Guide 128: Collective action by investors

Dragon Mining Limited [2014] ATP 5, Hastings Rare Metals Ltd [2013] ATP 13, IFS Construction Services Limited [2012] ATP 15, Regis Resources Limited [2009] ATP 7, Lion Selection Ltd (No. 2) [2008] ATP 16, Mount Gibson Iron Limited [2008] ATP 4, GoldLink Growthplus Limited [2007] ATP 23, Bowen Energy Limited [2007] ATP 22, Austral Coal Limited 02(RR) [2005] ATP 20, Rivkin Financial Services Limited 02 [2005] ATP 1, Anaconda Nickel Limited 16 & 17 [2003] ATP 15

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

INTRODUCTION

1. The Panel, Garry Besson (sitting President), Richard Hunt and Denise McComish, declined to conduct proceedings on an application by Echo Resources Limited in relation to its affairs. The application concerned the failure to disclose, in a substantial holder notice, an alleged association between certain Echo shareholders, some of whom had requisitioned a general meeting to change the composition of Echo's board. The Panel considered that the evidence of association was not sufficient for it to conduct proceedings.

2. In these reasons, the following definitions apply.

Echo	Echo Resources Ltd
Colbern	Colbern Fiduciary Nominees Pty Ltd
Patersons	Patersons Securities Limited
Requisitioning Associates	Miss Mei Yen Tan, Miss Mei Yen Tan <Australian Shares A/C>, Mrs Sarah Cameron, Mr James Cameron, Ardroy Securities Pty Ltd <Cameron Investment Unit A/C>, Mr Adrian Byass and Mrs Megan Ruth Byass <Oakwood Super Fund A/C>, Valiant Equity Management Pty Ltd <The Byass Family A/C>, Mr Simon Eley and Resmin Pty Ltd

FACTS

3. Echo Resources Limited is an ASX listed company (ASX code: EAR). Echo is a gold, copper and nickel exploration company, with projects in Western Australia and Queensland.

4. On 13 May 2015, Echo entered into an underwriting agreement with Patersons for it to act as lead manager and underwriter to a 3-for-8 non-renounceable pro-rata rights offer to raise approximately $1.52 million.

5. Michael Soucik was a corporate finance director at Patersons and represented Patersons in connection with its role as underwriter of the rights issue.

6. On 14 May 2015, Echo announced the rights issue.

7. On 11 June 2015, Echo completed the issue and allotment of the shares under the rights issue.

8. The rights issue was sub-underwritten by Ernst Kohler (managing director of Echo), Anthony McIntosh (non-executive director), Matthew Longworth (chairman), Nick Gyngell, Mr Soucik (in his personal capacity), James Cameron and Adrian Byass. Each of them (or their related parties) were existing shareholders of Echo.

9. On 25 June 2015, Mei Yan Tan and Sarah Cameron, shareholders who collectively held more than 5% of Echo, sent to Echo:

   (a) a s249D[1] notice requisitioning a shareholder meeting to consider resolutions to remove Mr Kohler and Mr Longworth as directors and

   (b) a notice of intention to convene a meeting under s249F to consider resolutions to appoint Mr Byass and Mr Cameron as directors.

10. On 29 June 2015, Ms Tan and Ms Cameron sent a letter to Echo stating that they intended to put forward an additional resolution to appoint Simon Eley as a director at the meeting convened under s249F.

11. Also on 29 June 2015, Ms Tan and Ms Cameron requested a copy of Echo's share register for the purpose of convening the s249F general meeting.[2] Echo did not provide a copy of the register by the 7 day statutory deadline and, at the date of the application, still had not provided it.

12. On 10 July 2015, Ms Tan and Ms Cameron sent Echo a second s249D notice requisitioning a general meeting to consider resolutions appointing Mr Byass, Mr Cameron and Mr Eley.

13. Also on 10 July 2015, the Requisitioning Associates[3] jointly lodged a substantial holder notice disclosing their association as a consequence of the first s249D notice. The notice stated that they held collective voting power of 7.56% in Echo.

14. The various shareholdings of the parties are shown in the following diagram.

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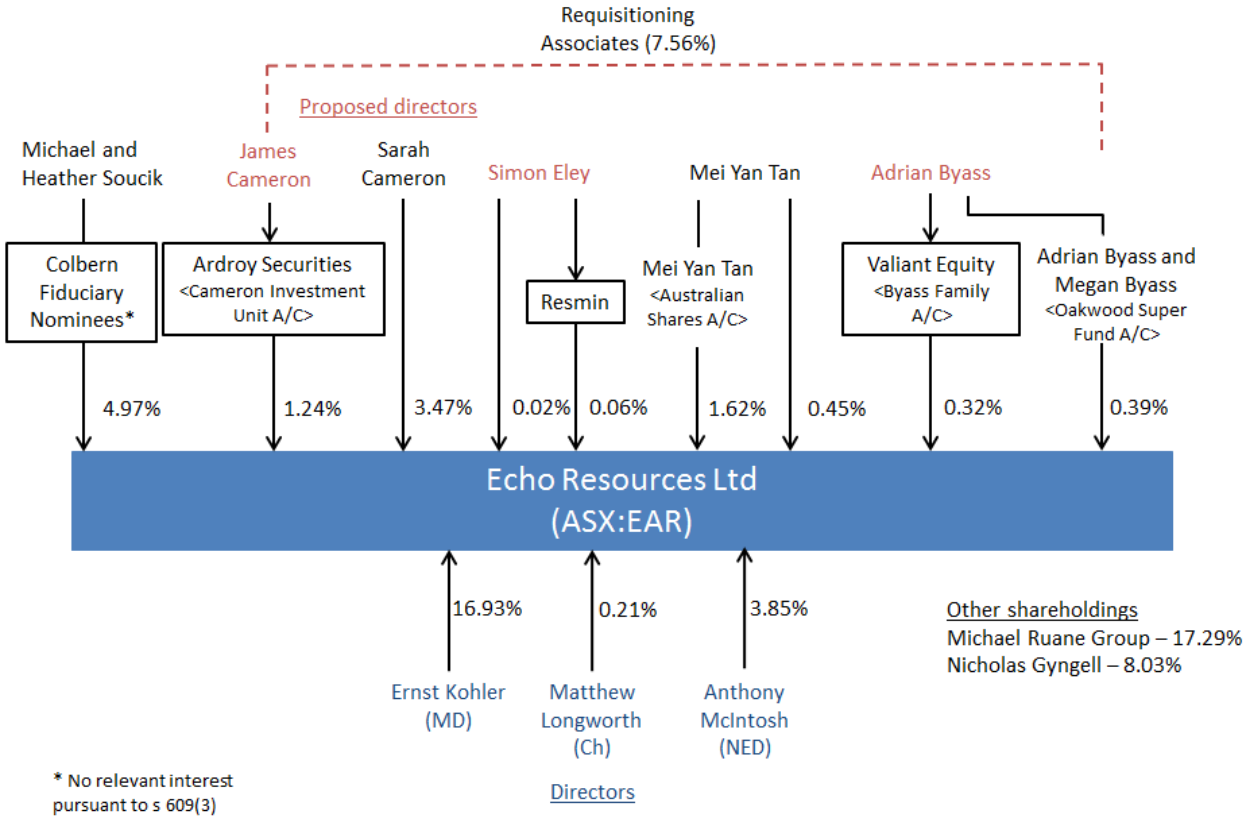
[1] References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

[2] See section 173(3)

[3] Excluding Mr Cameron, which was corrected on 13 July 2015 by a replacement substantial holder notice adding Mr Cameron as an associate



15. The shareholdings of the Requisitioning Associates are as follows:[4]

Parties	**Shareholding (Pre-rights issue)**	**Rights issue entitlement**	**Sub-underwriting**	**Acquisitions after 11 June (Post-rights issue)**	**Total shareholding as at 10 July 2015**
James Cameron (and related parties)	2,486,443[5]	932,417	3,146,858	0	6,565,718
Simon Eley (and related parties)	76,478	28,688	N/A	0	105,166
Mei Yan Tan (and related parties)	2,025,860[5]	767,198	N/A	70,000	2,863,058
Adrian Byass (and related parties)	200,000[6]	0	550,000	250,000	1,000,000
					10,533,942 (7.56%)

[4] Unless indicated otherwise, these figures have been sourced from the substantial holder notice dated 10 July 2015.
[5] These are balancing figures, derived from the total shareholdings disclosed in the substantial holder notice of 10 July 2015, less the on-market, sub-underwriting and rights issue take-up figures disclosed in the notice.
[6] Shareholding acquired on 28 May 2015, after the rights issue record date of 20 May 2015

APPLICATION

Declaration sought

16. By application dated 10 July 2015, Echo sought a declaration of unacceptable circumstances. Echo submitted that each of the persons disclosed[7] as Requisitioning Associates, Mr and Mrs Soucik and Colbern Fiduciary Nominees were associated, based on "*a fact pattern and set of circumstances relating to the time period leading up to, during, and after the rights issue*."

17. It submitted that the circumstances had a significant impact on control of Echo as those parties:

    (a) had acquired control over voting shares other than in an efficient, competitive and informed market

    (b) were seeking to use the voting power "*in a coordinated effort to influence the composition of the Echo Board and, ultimately, the conduct of the Company's affairs*" and

    (c) had acquired "*an influential block of shares, and are seeking control of the board without making any offer to acquire the remainder of the shares*."

18. It also submitted that the association had not been disclosed, by reason of the exclusion of Mr and Mrs Soucik and Colbern from the 10 July 2015 notice.

Interim orders sought

19. Echo sought interim orders that pending determination of its application:

    (a) Echo be permitted to postpone the despatch of the notice of meeting in relation to the first s249D notice dated 25 June 2015

    (b) the Requisitioning Associates be prevented from convening a general meeting pursuant to s249F and

    (c) Mr and Mrs Soucik, Colbern and the Requisitioning Associates be prevented from:

        (i) acquiring further shares, increasing their voting power or relevant interest in Echo

        (ii) disposing or transferring any Echo shares and

        (iii) exercising any voting rights attaching to their shares.

20. On 16 July 2015, we considered the request by Echo that it be permitted to postpone the despatch of the notice of meeting in relation to the s249 notice dated 25 June 2015. The deadline for calling that meeting expired on 16 July 2015.[8]

21. We decided not to make the interim order. We consider that, even if we had the power to make such an order,[9] it is unnecessary because it is likely the application

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[7] Disclosure was made on 10 July 2015, the same day the application was made but prior to it being made
[8] Section 249D(5)

will be resolved before the meeting is held. At least 28 days' notice must be given of a general meeting.[10]

Final orders sought

22. Echo sought final orders to the effect that Mr and Mrs Soucik, Colbern and the Requisitioning Associates be declared associates in relation to Echo, that corrective substantial holding disclosure be made and that there be divestment of shares held by them in excess of 5% of voting power in Echo.

DISCUSSION

Preliminary submissions

23. The Requisitioning Associates made a preliminary submission denying an association with Mr Soucik. They submitted that Echo was seeking to avoid, or delay, compliance with the section 249D notices and that the Panel application was motivated by Mr Kohler and Mr Longworth seeking to preserve their positions as directors.

24. Mr Soucik made a preliminary submission. He indicated that he did not want to delay proceedings by becoming a party. We do not accept that this would have caused any delay and in the usual course would expect a person making a preliminary submission to become a party. We agreed in this instance to receive the preliminary submission notwithstanding he had not filed a notice of appearance. Mr Soucik submitted, among other things, that he "*did not have any agreements with the Requisitioning* [Associates]".

Association between Mr Soucik and the Requisitioning Associates

25. In its application Echo noted that Colbern had confirmed that it did not have a relevant interest in the shares held on behalf of Mr and Mrs Soucik as a result of s609(3). We accept that this is the position.

26. Echo submitted that Mr Soucik and the Requisitioning Associates were associated as they had entered into relevant agreements for the purposes of controlling or influencing the composition of the Echo board[11] and were acting in concert in relation to Echo's affairs.[12] It submitted that events before and after the rights issue, "*in the absence of cogent evidence to the contrary*", evidenced an association.

27. It submitted that, during the underwriting negotiations, Mr Soucik had proposed himself and Mr Cameron as the majority sub-underwriters. It submitted that there was no commercially viable explanation for Mr Soucik involving Mr Cameron in the underwriting negotiations. Further, they had told Mr Longworth that "*it was their [sic] intention of the sub-underwriting structure to reduce Mr Kohler's influence on the*

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[9] see *Humes Ltd v Unity APA Ltd* (1987) 11 ACLR 641 at 648. Cf *Attorney-General (Cth) v Alinta Limited* [2008] HCA 2 per Gummow J at [14]
[10] Section 249HA(1)
[11] Section 12(2)(b)
[12] Section 12(2)(c)

Company". No witness statement[13] was provided detailing such a conversation. Email correspondence indicates that Mr Soucik suggested the rights issue to be renounceable. That suggestion was rejected by the board.

28. It also submitted that:

    (a) Mr Soucik had not accommodated a request for Patersons to procure additional sub-underwriters acceptable to Echo, making it necessary for Mr Kohler to bring in Mr Gyngell and

    (b) Mr Soucik invited Mr Byass to participate as a sub-underwriter during the sub-underwriting allocation period without prior notice to the board.

29. Echo submitted that, after the rights issue, Mr Soucik, Mr Cameron and Mr Byass put forward a proposal to appoint Mr Byass as a director on a number of occasions, followed by the s249D and s249F notices when Mr Kohler informed Mr Soucik that he would not support the appointment.

30. Lastly, Echo submitted that it had attempted to identify associations, and notify parties of potential substantial holder notice breaches, but did not receive satisfactory responses. The fact that Echo received responses it considered to be unsatisfactory does not particularly assist its submission that the alleged association exists.

31. The Requisitioning Associates submitted that they were not associated with Mr Soucik in relation to Echo. They submitted that the sub-underwriting negotiations, any alleged history of business relationships and the proposals to appoint Mr Byass were not relevant to the first s249D notice "*which marked the creation of the association between the* [Requisitioning Associates]." They noted a "disconnect" between "*the proposal of Mr Soucik to appoint Mr Byass as a director of the Company, whereas the 249D Notice proposed resolutions for the removal of Mr Kohler and Mr Longworth as directors with further resolutions for the appointment of Mr Byass, Mr Cameron and Mr Eley to be considered at the 249F Meeting.*"

32. We note that Mr Soucik represented Patersons as the underwriter and also participated in the rights issue as a sub-underwriter in his personal capacity. Mr Soucik's participation was disclosed to the board and agreed by it. He was an existing shareholder. We do not think his involvement necessarily supports an inference that he is an associate of another party.

33. As for the Requisitioning Associates, it is clear that they are associated and they have disclosed as much. ASIC considers that where investors have formulated "joint proposals" relating to board appointments, this conduct is more likely to indicate acting as associates.[14] While that may be the case for the Requisitioning Associates, it is not apparent that Mr Soucik's involvement to appoint Mr Byass was part of a joint proposal, however it may be defined. The application submitted that on 16 June 2015, Mr Soucik approached Mr Longworth with a proposal to appoint Mr Byass and that on 18 June 2015, Mr Soucik and Mr Byass organised, and attended, a meeting with

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[13] Section 199 *Australian Securities and Investments Commission Act 2001* (Cth)

[14] *ASIC Regulatory Guide 128: Collective action by investors* at [RG 128.43] and Table 2

Mr Longworth in relation to that proposal. So it is clear that Mr Soucik did, with Mr Cameron and Mr Byass, put Mr Byass forward. This is not denied by the Requisitioning Associates in their preliminary submission. But that may have been because they were of a like mind, or (less likely) simply to facilitate discussions between Mr Byass and Mr Longworth at their meeting on 18 June 2015. There is no evidence of what was said when the approach was made, or at the meeting, or of the voting intentions of the parties.

34. Echo submitted that "*Mr Soucik indicated to Mr Longworth that he and Messrs Cameron and Byass had discussed and approved this proposal*." Again, no supporting material was provided to us suggesting that it was a 'joint proposal' or that it otherwise came out of an agreement, arrangement or understanding.

35. It is for the applicant to demonstrate a sufficient body of evidence of association as to warrant the Panel conducting proceedings.[15] Although the Panel's process is inquisitorial in nature, an applicant must do more than make allegations of association and rely on us to substantiate them.[16] We were provided with very little evidence in support of Echo's submissions.[17] In particular, there was no evidence of discussions, such as copies of file notes, correspondence, a statutory declaration or a witness statement.

36. That leaves us with a disclosed association by the Requisitioning Associates and weighing two competing positions regarding the additional alleged association between the Requisitioning Associates and Mr Soucik. Echo's position is that it exists, based on circumstances surrounding the rights issue and board approaches. But the evidence in our view is thin and there are few, if any, other factors (such as prior collaborative conduct or common investments) in support. The Requisitioning Associates and Mr Soucik's respective positions are that it does not exist. They have each denied such an association. In deciding whether to conduct proceedings, one factor we must take into account is the strength of the preliminary evidence.[18] In our view the preliminary evidence here is not sufficient for us to conduct proceedings. It is not uncommon for an underwriter to seek out sub-underwriters. It is not uncommon for a shareholder to put up a nominee for the board. We are not persuaded on the material before us that the former position may be more likely.

37. Accordingly, we do not consider that there is a sufficient body of evidence to establish prima facie, even with the drawing of appropriate inferences, any association beyond that which has already been disclosed.

Control - Jurisdictional issues

38. The Requisitioning Associates submitted, in a preliminary submission, that "…*in the absence of any issue as to control, the Panel is not the appropriate forum to resolve questions*

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[15] *Mount Gibson Iron Limited* [2008] ATP 4 at [15]
[16] *Dragon Mining Limited* [2014] ATP 5 at [60]
[17] Initially, there were no supporting documents provided with the application. The preliminary submission from the Requisitioning Associates provided some relevant supporting documentation. The supporting documents to the application were filed by Echo subsequently
[18] Procedural Rule 6.1.1 note 2

of fact relating to the existence of an association between members or deficiencies in a substantial holder notice." The Requisitioning Associates further submitted:

> *…even if any association [between the Requisitioning Associates and Mr Soucik] could be established by the Company:*
>
> *(a) the Application does not involve a control transaction for the purposes of section 657A of the Act;*
>
> *(b) there is no prospect of breach of sections 602(a) or s606(1) of the Act with a shareholding of 12.53%; and*
>
> *(c) the only issue before the Panel would be alleged contravention of the substantial holding disclosure provisions of the Act.*

39. The Panel routinely considers whether it has jurisdiction as part of its consideration whether to conduct proceedings.[19] Of course, if the Panel lacked jurisdiction there would be no reasonable prospect that it could make a declaration of unacceptable circumstances, so would decline to conduct proceedings.

40. In this context, the Panel's jurisdiction is derived from s657A, which says (relevantly):

> *(2) The Panel may only declare circumstances to be unacceptable circumstances if it appears to the Panel that the circumstances:*
>
> *(a) are unacceptable having regard to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:*
>
> *(i) the control, or potential control, of the company or another company; or*
>
> *(ii) the acquisition, or proposed acquisition, by a person of a substantial interest in the company or another company;*

41. There is no doubt that the Panel has jurisdiction over a rights issue in the context of a board spill.[20] Does it have jurisdiction over a board spill following a rights issue? The question here is complicated by the fact that one of the requisitioning parties took up shares as a sub-underwriter to the rights issue.

42. 'Control' is a broad concept, which has traditionally been understood in the context of the Chapter 6 purposes set out in s602. In *GoldLink Growthplus*,[21] admittedly not a rights issue case, the Panel considered that it did not have jurisdiction. In that case the applicant had acquired shares before seeking to spill the board. Based on *Bowen Energy*,[22] the Panel concluded "*In the current context, the circumstances complained of do not relate to the acquisition of GoldLink shares, or affect voting power in the company. Rather, they concern alleged 'corporate control', achieved through a transaction affecting the composition of the GoldLink board, without affecting the distribution or exercise of voting power in the company.*" The Panel declined to conduct proceedings.

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[19] Procedural Rule 6.1.1 note 2
[20] *Rivkin Financial Services Limited 02* [2005] ATP 1
[21] *GoldLink Growthplus Limited* [2007] ATP 23
[22] *Bowen Energy Limited* [2007] ATP 22

43. And in *Regis Resources*,[23] the Panel also declined to conduct proceedings where there had been acquisitions of shares prior to the lodgement of a board spill requisition. The Panel said "*this application has more to do with a possible change in the composition of the Regis board, and does not otherwise involve a control transaction for the purposes of s657A or a contravention of s606.*"

44. If the association alleged between the Requisitioning Associates and Mr Soucik is established, the voting power that is aggregated would increase from 7.56% to 12.53%. So, the present inquiry is as to whether there is an effect on control rather than as to whether there is a contravention of s606. There would also, of course, be a question to be addressed regarding disclosure. In the disclosure context, we note *Rivkin Financial Services 01*,[24] which made it clear that the Panel would have jurisdiction in connection with a board composition issue if "*an accumulation of voting power was involved in contravention of section 606 or without proper disclosure under Chapter 6C.*"[25]

45. *IFS Construction Services*[26] is an example where the Panel appeared to be more prepared to consider board control, although the circumstances were unusual. In that case the contest for control of the board occurred in the context of a conditional takeover bid, by a company connected to the 'defending directors', where the change of board would trigger a defeating condition of the bid. Based on *Lion Selection*,[27] the Panel concluded that "*Composition of the board in this context, particularly when a condition of the proposed bid is that the meeting not change the composition of the board, is a matter that we think the Panel can address.*" The Panel made a declaration of unacceptable circumstances in that case.

46. It is by no means so clear that we lack jurisdiction that the preliminary submission would succeed in convincing us not to conduct proceedings. We have declined to conduct proceedings on other grounds, so we do not need to address the jurisdiction question. Had we conducted proceedings, we would have called for submissions on the jurisdiction question. We also note that, even if there is the "*absence of any issue as to control*", on which s657A(2)(a)(i) operates, there is a question about whether there was the acquisition of a substantial interest[28] on which s657A(2)(a)(ii) operates.[29] The latter question could involve the rights issue take-up, the sub-underwriting or, assuming the association with Mr Soucik is established, the aggregation of shares he controls with those of the Requisitioning Associates.

DECISION

47. For the reasons set out in paragraphs 23 to 37, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable

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[23] *Regis Resources Limited* [2009] ATP 7

[24] *Rivkin Financial Services Limited 01* [2004] ATP 14 at [26]

[25] at para [26]. See also, *Hastings Rare Metals Ltd [2013] ATP 13* at [14], *Regis Resources Limited* [2009] ATP 7

[26] *IFS Construction Services Limited* [2012] ATP 15, with the same sitting President as in *Regis Resources*

[27] *Lion Selection Ltd (No. 2)* [2008] ATP 16. That case concerned proxies for a meeting to obtain shareholder approval for asset sales that would amount to a frustrating action and was resolved by undertakings

[28] A term affected by s602A

[29] Similar to the question asked in *Austral Coal Limited 02(RR)* [2005] ATP 20 at [127]. See also *Anaconda Nickel Limited 16 & 17* [2003] ATP 15 at [32]

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

48. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any of the other interim orders, or final orders.

Garry Besson
President of the sitting Panel
Decision dated 17 July 2015
Reasons published 27 July 2015

Advisers

Party	Advisers
Echo	Squire Patton Boggs
Requisitioning Associates	Steinepreis Paganin