



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Globe Metals & Mining Limited  
[2017] ATP 7**

**Catchwords:**

*Decline to conduct proceedings – shareholder approval – voting on a show of hands – out of time – extension of time for making application – unfair prejudice*

*Corporations Act 2001 (Cth), sections 602, 606, 611 item 7, 657A(2), 657C(3)*

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

*Queensland North Australia Pty Ltd v Takeovers Panel [2015] FCAFC 68, Re Ryde Ex-Services Memorial & Community Club Limited (Administrator appointed) [2015] NSWSC 226, Re Print Mail Logistics Ltd [2012] NSWSC 792, McKerlie v Drillsearch Energy Ltd (2009) 72 ACSR 288*

*The President’s Club Limited 02 [2016] ATP 1, Careers Australia Group Limited 03 [2015] ATP 1, Aspen Parks Property Fund 01 & 02 [2014] ATP 19, Austral Coal Limited 03 [2005] ATP 14*

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

**INTRODUCTION**

1. The Panel, Kelvin Barry, Sarah Dulhunty (sitting President) and Nicola Wakefield Evans, declined to conduct proceedings on an application by Ao-Zhong International Mineral Resources Pty Ltd in relation to the affairs of Globe Metals & Mining Limited. The application concerned circumstances surrounding the passing of certain resolutions at the annual general meeting of Globe held on 18 November 2013. Given the lateness of the application, the Panel considered that it would be difficult to investigate the allegations and provide suitable remedies if unacceptable circumstances were found. The Panel considered that there was no reasonable prospect that it would make a declaration of unacceptable circumstances and accordingly, the Panel declined to conduct proceedings.

2. In these reasons, the following definitions apply.

- Ao-Zhong**      Ao-Zhong International Mineral Resources Pty Ltd
- Apollo**        Apollo Metals Investment Co. Ltd
- ECE**            East China Mineral Exploration and Development Bureau
- Globe**          Globe Metals & Mining Limited
- Jiangsu**        Jiangsu Eastern China Non-Ferrous Metals Investment Holding Co. Ltd

**FACTS**

3. Globe is an ASX listed company (ASX code: GBE). It is a Perth based mineral resources company with exploration projects in Africa.

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4. At an annual general meeting of Globe on 18 November 2013 all resolutions were passed on a show of hands. The resolutions included three funding related resolutions (the **funding resolutions**), specifically:
  - (a) ratification of a previous issue of convertible notes to Apollo for purposes of ASX Listing Rule 7.4
  - (b) approval of the issue of equity securities up to 10% of Globe’s issued capital pursuant to ASX Listing Rule 7.1A and for all other purposes and
  - (c) approval under item 7 of section 611<sup>1</sup> and Chapter 2E for the issue of shares to Apollo in its capacity as underwriter of a rights issue, in payment of the underwriting fee and upon conversion of the convertible notes into shares.
5. Following the implementation of the rights issue and the conversion of the convertible notes, Apollo’s shareholding in Globe increased from 0% to 52.37%.
6. Apollo is a privately owned British Virgin Islands company.
7. At the time of the meeting, Ao-Zhong was Globe’s majority shareholder with voting power of 53.6%. Following the issue of shares to Apollo, Ao-Zhong’s shareholding in Globe decreased to 22.5%.<sup>2</sup>
8. Ao-Zhong is (and was at the time of the meeting) wholly owned by Jiangsu. Jiangsu is wholly owned by ECE, a Chinese state-owned entity. At the time of the meeting, ECE owned 51.4% of Jiangsu.

## APPLICATION

### Declaration sought

9. By application dated 25 April 2017, Ao-Zhong sought a declaration of unacceptable circumstances.
10. Ao-Zhong submitted that its intention was to vote against the funding resolutions at the meeting. It sent an employee of Jiangsu as its corporate representative to vote on Ao-Zhong’s behalf at the meeting. Ao-Zhong submitted that the representative understood that he was to vote in favour of the first six resolutions in the Notice of Annual General Meeting and against the last three resolutions (being the funding resolutions). The corporate representative did not speak English and required a translator at the meeting. An ECE employee, who was seconded to Globe, was selected by Ao-Zhong to be the translator. At the meeting, Ao-Zhong’s corporate representative voted in favour of all nine resolutions.
11. Ao-Zhong submitted that the failure of its corporate representative to vote against the funding resolutions was the result of a plan involving several parties for Apollo to obtain control of Globe. Ao-Zhong made a number of allegations including that the order in which the funding resolutions were voted at the meeting was changed.

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<sup>1</sup> Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth) and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

<sup>2</sup> Ao-Zhong’s voting power as submitted in the application

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12. Ao-Zhong submitted that the circumstances surrounding the voting at the meeting were unacceptable and Apollo obtained control of Globe in contravention of section 606 and contrary to the principles in section 602.

#### Final orders sought

13. Ao-Zhong sought final orders including that Apollo's shares in Globe be vested in ASIC for sale.

## DISCUSSION

#### Out of time

14. Ao-Zhong submitted that the application was not out of time because the effect of the circumstances on its voting power in Globe was continuing and, in the alternative, asked the Panel to extend time pursuant to section 657C(3)(b).
15. Section 657C(3) provides that:  
*An application for a declaration under section 657A can be made only within:*  
*(a) 2 months after the circumstances have occurred; or*  
*(b) a longer period determined by the Panel.*
16. There is a distinction between the occurrence of circumstances and their effects; circumstances occur at a particular time whereas the effects of those circumstances may be ongoing.<sup>3</sup> The Panel determines whether circumstances are unacceptable having regard to the effect of the circumstances.<sup>4</sup> The time limit set by section 657C(3) cannot be extended by relying on the ongoing effects of the circumstances. The Panel however has the discretion to extend time under section 657C(3)(b) to receive an application.
17. In exercising its discretion, the Panel has stated that *"it should not lightly exercise that discretion. The time limit was set by the legislature to provide certainty to market participants in the context of takeovers that actions could not be challenged indefinitely."*<sup>5</sup>
18. The Panel considers whether it would be undesirable for a matter to go unheard because it was lodged outside the two month time limit if:
  - (a) essential matters supporting the applicant's case first came to light during the two month period preceding the application and
  - (b) the application made credible allegations of clear, serious and ongoing unacceptable circumstances.<sup>6</sup>
19. The Panel also takes into account the public interest in deciding whether to extend time.<sup>7</sup>
20. Ao-Zhong submitted that details of the unacceptable circumstances only came to light in late 2016. It further submitted that gathering information for purposes of

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<sup>3</sup> *Queensland North Australia Pty Ltd v Takeovers Panel* [2015] FCAFC 68 at [37]

<sup>4</sup> Section 657A(2)

<sup>5</sup> *Austral Coal Limited 03* [2005] ATP 14 at [18]

<sup>6</sup> *Austral Coal Limited 03* [2005] ATP 14 at [19]. The factor in (b) is viewed as incorporating the effects of the identified circumstances, see *The President's Club Limited 02* [2016] ATP 1 at [142]-[144]

<sup>7</sup> See *The President's Club Limited 02* [2016] ATP 1 at [145]-[158]

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making its application was hampered by ongoing investigations by Chinese authorities of relevant persons.

21. Globe submitted in its preliminary submission that the circumstances were “*self-inflicted*” and that the dilution was a direct result of actions by Ao-Zhong’s employees and representatives and Ao-Zhong’s decision not to take up rights under the rights issue.
22. The applicant’s allegations, if made out, potentially involve serious contraventions of various laws in addition to section 606. However, the application has been made long out of time. While certain evidence presented by the applicant only came to light late last year, the results of the meeting were released on the same day as the meeting. The applicant could have taken action promptly after that time. Some of the matters that arguably fell most clearly within the Panel’s jurisdiction were evident then.

#### **Whether to conduct proceedings**

23. As discussed below, we may have had concerns about Globe’s item 7 approval at the meeting being approved on a show of hands. However, in determining whether to conduct proceedings, it is relevant to consider, among other things, our ability to investigate the claims and the remedies available. In our view, the considerable period of time that has passed since the meeting took place and the circumstances surrounding the application, makes it difficult for us to investigate the allegations.
24. Further, the lapse of time and possible intervening events likely increases the prejudice to parties affected by any action we might take.<sup>8</sup> If unacceptable circumstances were found to have occurred, it would be difficult for us to provide a suitable remedy to protect the rights or interests of persons affected without unfairly prejudicing any person.
25. The applicant appears to have other forums available to it (most likely the courts) where its claims may now be more appropriately addressed.<sup>9</sup>

#### **Approval on a show of hands**

26. The funding resolutions included an item 7 resolution that could result in a change of control of Globe. That resolution was approved on a show of hands.
27. At the relevant time, Ao-Zhong had four nominee directors on the board of Globe. An annexure to the application indicated that at the board meeting held on 30 August 2013 approving the funding proposals, one nominee director was absent due to illness and of the three director nominees present (by telephone or in person), one voted against the proposal, one voted for the proposal and one abstained. There was nothing in the application to indicate that Ao-Zhong communicated to Globe after the board meeting and prior to the shareholders meeting how it would vote on the funding resolutions. If that was the case, it seems likely that at the meeting the chairman of the meeting would have been uncertain as to how Ao-Zhong would

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<sup>8</sup> See, for example, *Aspen Parks Property Fund 01 & 02* [2014] ATP 19 at [29]

<sup>9</sup> See *Careers Australia Group Limited 03* [2015] ATP 1 at [39]-[43]

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vote. In such circumstances, there may have been a heightened need at the meeting for ensuring that the true will of shareholders was discovered.<sup>10</sup>

28. Globe submitted in its preliminary submission that in the Perth market, when there have been shareholder meetings which seek approvals under section 611, the method of voting at the meeting depends on the proxy position and if proxies are strong, then a show of hands is generally used.
29. We have formed no views on whether there were any relevant factors at the time of the meeting that prompted the need for a poll or what the market practice was in the relevant market. Regardless of such matters, we find it difficult to conceive of circumstances in which passing a change of control resolution for a listed entity on a show of hands would be appropriate.<sup>11</sup> Votes taken on a poll ensure that all shareholders have the opportunity to vote on resolutions whether they are in attendance at the meeting or not. In addition to ensuring that the will of all shareholders eligible to vote is reflected in the results, knowing exactly who and how shareholders have voted is necessary for an acceptable level of transparency and integrity in the process.

## DECISION

30. 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

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

**Sarah Dulhunty**

**President of the sitting Panel**

**Decision dated 3 May 2017**

**Reasons given to parties 29 May 2017**

**Reasons published 20 June 2017**

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<sup>10</sup> A chairman of a meeting has a duty to ensure that the true will of the meeting is ascertained: *McKerlie v Drillsearch Energy Ltd* (2009) 72 ACSR 288 at [24]. See also *Re Print Mail Logistics Ltd* [2012] NSWSC 792 and *Re Ryde Ex-Services Memorial & Community Club Limited (Administrator appointed)* [2015] NSWSC 226 at [104]-[108]

<sup>11</sup> We note ASIC has repeatedly commented on the desirability of conducting a vote on a poll rather than a show of hands, see ASIC reports REP 469 (released 26 February 2016) at [142]-[143] and REP 489 (released 26 August 2016) at [250]-[252]

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### Advisers

Party	Advisers
Ao-Zhong International Mineral Resources Pty Ltd	Norton Rose Fulbright Australia
Globe Metals & Mining Limited	Gilbert + Tobin