



Australian Government

Takeovers Panel

**Reasons for Decision
Mineral Commodities Limited
[2019] ATP 16**

Catchwords:

Decline to conduct proceedings – association – “two strikes” rule – annual general meeting – spill resolution – spill meeting – board spill – collective action – late application – extension of time to make an application

Corporations Act 2001 (Cth), sections 12, 250U, 250V, 606, 608(3), 657C(3), 671B

Queensland North Australia Pty Ltd v Takeovers Panel [2015] FCAFC 68

Aguia Resources Limited [2019] ATP 13, Australian Whisky Holdings Limited [2019] ATP 12, Jervois Mining Limited [2016] ATP 16, Dragon Mining Limited [2014] ATP 5, Mount Gibson Limited [2008] ATP 4

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

INTRODUCTION

1. The Panel, Michael Borsky QC, Richard Hunt (sitting President) and Karen Phin, declined to conduct proceedings on an application by Mineral Commodities Limited in relation to its affairs. The application concerned whether a shareholder of Mineral Commodities, who had nominated three directors for appointment at a spill meeting convened under sections 250U and 250V¹, was associated with other shareholders in contravention of section 606 and the substantial holding provisions. The Panel did not consider that there was sufficient probative material to satisfy it that proceedings should be conducted. The Panel considered that, even if it had found sufficient material to justify making further enquiries, it would have had reservations as to whether an extension of time for Mineral Commodities to make an application would be warranted. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

2019 AGM	Mineral Commodities’ Annual General Meeting held on 30 May 2019
Au Mining	Au Mining Limited
Connected Parties	Au Mining, Tormin, Montoya, Mr Graham Edwards, Ms Gina Edwards and Mr Guy Walker
Mineral Commodities	Mineral Commodities Limited
Montoya	Montoya Investments Ltd

¹ 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)

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Spill Meeting	The meeting referred to in paragraph 4
Tormin	Tormin Limited

FACTS

3. Mineral Commodities is an ASX listed exploration and mining company (ASX code: MRC).
4. On 30 April 2019, Mineral Commodities issued its notice for the 2019 AGM, which included a resolution for the adoption of the remuneration report and a resolution for the holding of a spill meeting as required by section 250V(1) (in the event that more than 25% of votes were cast against adoption of the remuneration report, constituting a ‘second strike’ under the ‘two strikes’ rule) (**Spill Meeting**).
5. On 16 May 2019, Au Mining (a 26.12% shareholder in Mineral Commodities) sent Mineral Commodities a notice seeking the appointment of three directors, including Mr Guy Walker, in the event that Mineral Commodities was required to convene the Spill Meeting.
6. Mr Guy Walker was at the time a director of Mineral Commodities and the company secretary of Au Mining. Mr Walker and members of his family hold 0.27% of Mineral Commodities ordinary shares.
7. Mr Graham Edwards is a director of Au Mining and has a relevant interest in the Mineral Commodities ordinary shares held by Au Mining - through his interest in Montoya and Montoya’s interest in Au Mining.²
8. Mr Graham Edward’s former wife, Ms Gina Edwards, is the owner of Tormin. Tormin holds 14.12% of Mineral Commodities ordinary shares.
9. At the 2019 AGM:
 - (a) More than 25% of votes were cast against adoption of the remuneration report.
 - (b) The spill resolution was passed.
 - (c) Mr Walker retired and was not re-elected as a director.
10. The Spill Meeting was scheduled to be held on Wednesday, 28 August 2019.

APPLICATION

Declaration sought

11. By application dated Thursday, 22 August 2019, Mineral Commodities sought a declaration of unacceptable circumstances. Mineral Commodities submitted that:
 - (a) The Connected Parties (or at least Mr Walker, Au Mining and Tormin) acted in concert in relation to votes cast on the resolutions put at the 2019 AGM.

² Au Mining’s substantial holder notice dated 25 January 2018 states that Montoya and Mr Edwards have a relevant interest in Au Mining’s shares in Mineral Commodities pursuant to section 608(3)

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- (b) The Connected Parties (or Mr Walker, Au Mining and Tormin) were proposing to act in concert with the common purpose or object of replacing the existing directors of Mineral Commodities with Au Mining's nominated directors.
 - (c) Mr Walker, Au Mining and Tormin's combined voting power in Mineral Commodities was approximately 40.51%.
 - (d) There have been contraventions of section 606 and the substantial holding provisions, primarily because of the associations referred to above.
12. Mineral Commodities submitted that the effect of the circumstances meant that:
- (a) The control of Mineral Commodities *"has been affected otherwise than in an efficient, competitive and informed market"*.
 - (b) Mineral Commodities' shareholders *"have not been correctly and fully informed of the relationship which exists between the Connected Parties"*.
 - (c) The Connected Parties have secured a degree of control over Mineral Commodities *"by acquiring a significant block of Shares, without making any offer to acquire the remainder of the Shares"*.

Interim orders sought

13. Mineral Commodities sought interim orders to the effect that the Connected Parties be prevented from (a) acquiring, disposing or transferring any Mineral Commodities shares and (b) exercising any voting rights at general meetings of Mineral Commodities, including at the Spill Meeting.

Final orders sought

14. Mineral Commodities sought final orders including that shares in Mineral Commodities held by the Connected Parties *"in excess of 19.9%"* be vested in ASIC for sale and further disclosure.

DISCUSSION

15. We do not consider that there is sufficient probative material to justify conducting proceedings.³ We have considered all the material, but address specifically only that part of the material we consider necessary to explain our reasoning.
16. Each of Mr Guy Walker, Ms Gina Edwards⁴ and Au Mining made preliminary submissions, rebutting the associations alleged in Mineral Commodities' application.
17. Ms Gina Edwards submitted that she and Mr Graham Edwards were divorced in 2011. Mineral Commodities submitted that an employee of a company where Mr Graham Edwards was CEO signed some substantial holder notices on behalf of Tormin in 2012 and 2013. We do not consider that a person assisting a recently divorced spouse with administrative tasks more than 5 years ago is unusual.

³ See *Dragon Mining Limited* [2014] ATP 5 at [27], [58] to [60] and *Mount Gibson Limited* [2008] ATP 4 at [15]

⁴ With Tormin

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18. Mineral Commodities submitted in effect that voting at the 2019 AGM by Mr Guy Walker, Au Mining and Tormin was co-ordinated and that in voting against the remuneration report, Au Mining “*had a degree of confidence that the resolution on the spill meeting would be passed because it nominated three persons to be directors if the resolution were passed*”. In support of this submission, Mineral Commodities stated that Tormin voted in favour of the remuneration report but, consistent with Au Mining, voted in favour of the re-election of Mr Guy Walker and the spill resolution. Mineral Commodities submitted that Au Mining and Tormin voted differently on the remuneration report to avoid arousing suspicion they were acting in concert.
19. Au Mining submitted that material “*of similar voting patterns is not of itself sufficient to permit an inference of association to be drawn.*” We agree in the circumstances of this case. There was no material to suggest a pattern of Au Mining and Tormin voting together prior to the 2019 AGM in a way that would suggest Mr Graham Edwards and Ms Gina Edwards are associates in relation to voting at the 2019 AGM and the Spill Meeting.
20. Mineral Commodities’ application referred to some statements made by Mr Guy Walker and other Mineral Commodities shareholders to support its submission that Mr Graham Edwards and Ms Gina Edwards were associates in relation to voting at the 2019 AGM and the Spill Meeting. The only recent statement is one that Mineral Commodities submitted Ms Gina Edwards made to Mr Mark Caruso (the Chairman and CEO of Mineral Commodities) on 29 July 2019 to the effect that she thought (but was not certain) that she was the holder of an interest in Tormin. We consider that, even if Ms Gina Edwards made a statement to that effect⁵, it only suggests that someone else manages her interests. Ms Gina Edwards submitted that she employs Investec as her investment adviser. She submitted that Mr Graham Edwards has his own investment advisers and only uses Investec to manage his family trust, which he does not control.
21. Mineral Commodities submitted that in the same conversation, Ms Gina Edwards stated that she was happy with the performance of Mineral Commodities and “*very satisfied with management’s performance*”. While this may raise questions as to the consistency of Ms Gina Edwards’ position in the light of voting in favour of the spill resolution, we consider that this is not enough to justify conducting proceedings.
22. Later, on 21 August 2019, Ms Gina Edwards emailed a director of Mineral Commodities seeking to nominate a director at the Spill Meeting but stating that if there was insufficient time to consider her nomination, she expected she would vote with Au Mining’s suggestions at the Spill Meeting. Mineral Commodities submitted that this was “*evidence of apparent communication between Ms Gina Edwards and Edwards and of an existing agreement, arrangement or understanding between them as to the manner in which Au Mining and Tormin will vote at the Spill Meeting*”. It also submitted that Ms Gina Edwards’ explanation for voting with Au Mining (insufficient time to consider her nomination) had “*the hallmarks of a self-serving statement and, as such,*

⁵ We note that we did not have any sworn statement by either Mr Mark Caruso or Ms Gina Edwards in relation to the conversation between them

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should be ignored". We think that this email could alternatively support an inference that she had made her decision independently. In any event, discussion between Ms Gina Edwards and Mr Graham Edwards to exchange views in relation to the affairs of Mineral Commodities⁶ is not of itself unacceptable.⁷

23. There was some material to suggest that Mr Guy Walker assisted with the administration of Au Mining and, historically, Tormin. We consider that this does not provide us with sufficient material to conduct proceedings to determine whether this relationship is (or was) more than just advisory in nature.
24. Mineral Commodities submitted in effect that the Panel should exercise its discretion to extend the time under section 657C(3)(b) for Mineral Commodities to make its application if the Panel considered the application was made out of time.⁸ Mr Guy Walker, Au Mining and Ms Gina Edwards all submitted that Mineral Commodities had been aware of most, if not all, of the fundamental facts that it sought to rely upon since 2013.
25. We agree that Mineral Commodities has been aware of the relationships between the Connected Parties for some years and Mineral Commodities submitted that an allegation of association was put to it in 2017. Notwithstanding this, Mineral Commodities delayed in bringing its application until a few days before the Spill Meeting without, in our view, an adequate explanation for that delay.
26. In *Aguia Resources Limited*⁹, the Panel stated that a "*delay in making an application in the context of a requisitioned meeting may increase the Panel's reluctance to interfere with the legitimate right of shareholders to exercise voting rights*".¹⁰ In our view, the Panel would need to be provided with compelling material regarding contraventions of section 606 or material contraventions of the substantial holder provisions for it to intervene on an application to affect voting at a company meeting with less than a week's notice.
27. Accordingly, even if we had found sufficient material to justify making further enquiries, we would have had reservations as to whether an extension of time under section 657C(3) to make the application would be justified in these circumstances.

⁶ Both Au Mining and Ms Gina Edwards submitted that Au Mining and Tormin had discussed particular matters in relation to Mineral Commodities (including Au Mining's concerns as to the lack of independence of Mineral Commodities' board)

⁷ See, for example, *Jervois Mining Limited* [2016] ATP 16 at [27]

⁸ Mineral Commodities submitted that it "*acknowledged that elements of the 'unacceptable circumstances' as a whole may have occurred more than two months before the application was made (section 657C(3)(a))*". However it submitted "*that the nature of the 'unacceptable circumstances' in this case commenced on a date unknown and, in any event, as at the date of this application are continuing. That is, there is a continuing state of affairs; namely, persons acting in concert or proposing to act in concert in relation to the affairs of*" Mineral Commodities. We consider that it is likely that, if we had conducted and had been minded to make a declaration of unacceptable circumstances, we would have also determined that the application had been made out of time - see *Queensland North Australia Pty Ltd v Takeovers Panel* [2015] FCAFC 68 at [50] to [76]

⁹ [2019] ATP 13 at [24(h)]

¹⁰ Referring to *Australian Whisky Holdings Limited* [2019] ATP 12 at [24] to [26]

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DECISION

28. 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

29. 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.

Richard Hunt

President of the sitting Panel

Decision dated 27 August 2019

Reasons given to parties 13 September 2019

Reasons published 17 September 2019

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Advisers

Party	Advisers
Au Mining	Allens
Mineral Commodities	Steinepreis Paganin
Mr Guy Walker	Tottle Partners
Tormin/Ms Gina Edwards	Shakespeare Martineau