Australian Government

Takeovers Panel

Reasons for Decision
Aura Energy Limited
[2020] ATP 10

Catchwords:

Decline to conduct proceedings – association – board spill – tracing notice – nominee directors – collective action

Corporations Act 2001 (Cth), sections 12, 249D, 606, 657A, 671B, 672A, 672B, 672D

ASIC Regulatory Guide 128: Collective action by investors

Guidance Note 4: Remedies General

Aurora Absolute Return Fund [2019] ATP 14, Aguia Resources Limited [2019] ATP 13, Indiana Resources Limited [2017] ATP 8, Resource Generation Limited [2015] ATP 12, Northern Iron Limited [2014] ATP 11, Mount Gibson Iron Limited [2008] ATP 4, Village Roadshow Limited 01 [2004] ATP 4

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

INTRODUCTION

1. The Panel, Alex Cartel (sitting President), Michael Lishman and Tara Page, declined to conduct proceedings on an application by Aura Energy Limited in relation to its affairs. The application concerned whether certain shareholders in Aura Energy were associated, leading to breaches of section 606 and section 671B.[1] The Panel considered that Aura Energy did not provide a sufficient body of material to justify the Panel making further enquiries and considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

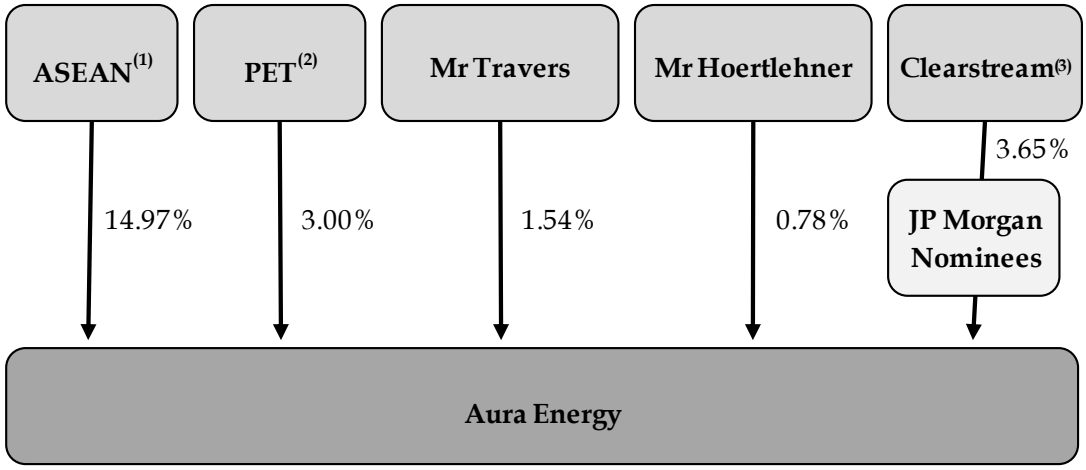
Alleged Associates	ASEAN, PET, John Bennett, Dean Travers, David O'Neil, David Roes and Florian Hoertlehner
ASEAN	ASEAN Deep Value Fund
Aura Energy	Aura Energy Limited
Clearstream	Clearstream Banking SA
Corporations Act	*Corporations Act 2001* (Cth)
EGM	Has the meaning given in paragraph 14
PET	Pre-emptive Trading Pty 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)

FACTS

3. Aura Energy is an ASX listed company (ASX code: AEE).

4. A summary shareholding diagram as at the date of the application is below:[2]



(1) Directors are David O'Neil and David Roes. ASEAN's holding includes shares in which David O'Neil and David Roes have a relevant interest per ASEAN's Form 604 dated 18 May 2020 (released 20 May 2020)

(2) Directors are John Bennett and Julie-Anne Bennett

(3) Based on a holding of 93,379,742 shares

5. On 7 May 2015, PET disclosed via a notice of initial substantial holder a relevant interest in 5.08% of Aura Energy. PET subsequently acquired further Aura Energy shares. Mr John Bennett is a director and shareholder of PET.

6. On 27 July 2018, ASEAN disclosed via a notice of initial substantial holder a relevant interest in 5.14% of Aura Energy. ASEAN subsequently acquired further Aura Energy shares. Messrs David O'Neil and David Roes are directors of ASEAN.

7. On 10 October 2019, Aura Energy served a demand on PET seeking payment of $456,000 in connection with a placement that took place on or about 5 February 2019.

8. On 11 November 2019, Aura Energy announced that it had received from PET a requisition under section 249D for Aura Energy to convene a meeting to consider, among other things, the appointment of Mr Bennett to the Aura Energy board.

9. On 28 November 2019, Aura Energy commenced legal proceedings against PET in connection with the $456,000 debt allegedly owed to it.

10. On 7 January 2020, Aura Energy held the extraordinary general meeting requisitioned by PET. ASEAN voted in favour of Mr Bennett's election as a director and he was elected.

11. On 12 February 2020, PET announced that it had ceased to be a substantial holder in Aura Energy (as a result of dilution).

[2] Percentages based on 2,557,535,966 shares on issue

12. On 17 February 2020, Mr Bennett requisitioned an extraordinary general meeting (using his powers as a director pursuant to Aura Energy's constitution) to consider the appointment of Mr Florian Hoertlehner and two others to the Aura Energy board.

13. On 20 February 2020, ASEAN requisitioned an extraordinary general meeting (under section 249D) to consider the appointment of Messrs O'Neil and Roes and one other to the Aura Energy board.

14. On 13 March 2020, Aura Energy announced the convening of a meeting to be held on 14 April 2020 to consider the resolutions proposed by Mr Bennett and ASEAN (**EGM**).

15. On 26 March 2020, Aura Energy announced that "*due to the ongoing issues surrounding coronavirus and government directives it has indefinitely postponed the [EGM]*".

16. On 21 April 2020, Aura Energy announced that the EGM would now be held on 21 May 2020.

17. On 21 May 2020, the EGM was held. None of the resolutions were passed.

APPLICATION

Declaration sought

18. By application dated 19 May 2020, Aura Energy sought a declaration of unacceptable circumstances. Aura Energy submitted (among other things) that:

    (a) the Alleged Associates (or any two or more of them) were associates pursuant to sections 12(2)(b) and 12(2)(c)

    (b) the Alleged Associates (or any two or more of them) had breached section 606(1)(c) because their voting power increased from below 20% to in excess of 20% and

    (c) the Alleged Associates (or any one or more of them) failed to comply with section 671B(1) by not disclosing their association and the number of voting shares in Aura Energy in which the other held a relevant interest.

19. Aura Energy submitted that the effect of the circumstances was that trading in Aura Energy's shares had not taken place in an efficient, competitive and informed market and that: "*Buying in excess of the 20% threshold other than by way of one of the permitted exclusions is a breach of one of the key principles of Chapter 6 of the Corporations Act*".

20. Aura Energy also submitted that "*there is a lack of clarity around who is ultimately in control of significant parcels of shares in the Company*" as a result of inadequate responses to tracing notices sent by the company.[3]

Interim orders sought

21. Aura Energy sought interim orders to the effect that the Alleged Associates (and their associates) be restrained from:

[3] Under section 672A

(a) buying further shares in Aura Energy and

(b) disposing of, or exercising any voting rights attaching to, the shares in which they have a relevant interest.

Final orders sought

22. Aura Energy sought final orders to the effect that:

(a) the Alleged Associates (and their associates) make further disclosure and

(b) the shares in Aura Energy acquired by the Alleged Associates (and their associates) be vested in the Commonwealth to be sold by an appointed seller, with the Alleged Associates (and their associates) being prohibited from purchasing any shares which are sold.

DISCUSSION

23. We have considered all the material, but address specifically only that part of the material we consider necessary to explain our reasoning.

Interim orders

24. The EGM (as postponed) was scheduled to be held 2 days after the date Aura Energy made its application. In light of this, and given that Aura Energy requested interim orders affecting voting rights, the Panel executive put Aura Energy's interim order request to the substantive President of the Panel on an urgent basis.[4]

25. Interim orders are usually made to prevent unacceptable circumstances from happening, continuing or getting worse while proceedings are conducted; to preserve the status quo; or to ensure that the Panel's power to fashion the most appropriate remedy in the circumstances is not forestalled by intervening events.[5]

26. The President declined to make the interim orders sought by Aura Energy as:

(a) Aura Energy's application was made very close to the date of the EGM and

(b) the Panel, when convened, likely could (if appropriate) make orders that remedy any unacceptable circumstances (if found).

Sufficiency of the application

27. After considering Aura Energy's application, we were concerned that the company should have made further enquiries before making it. Although Panel proceedings don't involve formal pleadings, it is still incumbent on applicants to set out their case logically and clearly and to provide appropriate supporting material where relevant. We decided to seek further information prior to deciding whether to conduct proceedings, which we sought from Aura Energy, ASEAN, PET and Messrs Bennett, O'Neil, Roes, Travers and Hoertlehner.[6] We also received preliminary submissions from each of Mr Hoertlehner, ASEAN and PET.

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[4] The substantive President was subsequently appointed to this Panel

[5] Guidance Note 4: *Remedies General* at [10]

[6] The Panel took a similar approach in *Havilah Resources Limited* [2019] ATP 17 at [12]

Association

28. In support of Aura Energy's allegation that the Alleged Associates were associated, the company submitted among other things that:

    (a) On 5 June 2019, "*Peter Reeve, CEO of the Company, received an email from Dean Travers who had previously been described by ASEAN as a representative of ASEAN, seeking a meeting to discuss the intention of a group of shareholders holding approximately 30% of the shares on issue to secure a board seat for a director and make several changes to the way the Company carried on its business*". Aura Energy also provided emails between Aura Energy's CEO, Mr O'Neil and Mr Travers sent during the period January 2019 to July 2019 and a corporate representative form from November 2018 appointing Mr Travers in respect of ASEAN.

    (b) On 13 November 2019, Mr O'Neil (a director of ASEAN) emailed Aura Energy's CEO regarding the resolution of litigation against PET and Mr Bennett's proposed appointment to the board (see paragraph 8). In Aura Energy's submission: "*Although the matter is being defended, the Company considers the request to resolve litigation as uncommercial… The Company also considers it incongruous to appoint a director to the board when a related entity, PET, is [the] subject of Supreme Court of Victoria litigation by the Company, and that it is uncommercial of ASEAN to request this*".

    (c) In January 2020, a series of discussions took place between Mr Bennett and Aura Energy "*in which Mr Bennett represented that he had arranged a replacement for the convertible note which had previously been signed with Lind Global Macro Fund LP*" with the replacement note "*to be sourced via ASEAN*". During that exchange, Mr Bennett allegedly offered to resign as a director if the terms of the ASEAN sourced convertible note were accepted.

    (d) "*The Company contends that John Bennett and representatives of ASEAN are regularly in contact and have common knowledge of relevant facts, including in respect of the replacement convertible note proposed by ASEAN. The support for this comes from the many emails that have passed between John Bennett and the Company where ASEAN is the prime subject, and Mr Bennett's detailed knowledge of the proposed replacement convertible note is apparent…*".

    (e) "*The two requisitions, one from John Bennett and one from ASEAN, subject of the forthcoming EGM, were received only 3 days apart and, if the relevant resolutions were passed at the time the requisitions were received, 6 new directors would be added to the then existing*".

    (f) "*Recent analysis of the voting pattern for the forthcoming EGM, in respect of votes already submitted, concludes that in most cases PET and ASEAN have voted the same way…*".

    (g) In relation to Mr Hoertlehner, "*Mr Hoertlehner is the nominee for PET. Mr Hoertlehner is no less the nominee for PET because his election is subject to shareholder approval. The Company submits that, logically, that individual will be an associate of the nominor*".

29. ASEAN denied that it was an associate of any of the Alleged Associates and submitted among other things that:

    (a) "*Mr Travers and Mr O'Neil are known to each other… Mr Travers was Melbourne-based which made it relatively easy for him to engage with the Company but at no point did this extend to any arrangement or agreement between ASEAN and Mr Travers (or ASEAN and any other shareholder) to agree to support any particular proposal or to act jointly to control or influence the board or affairs of the Company.*"

    (b) "*The email from Mr David O'Neil…on 13 November 2019 was sent as part of a response to attempts by Mr Reeve to have our client alter its voting at the Company's January general meeting. Accordingly, the email should not be viewed as indicative of an association between our client and Mr Bennett, rather a response to Mr Reeve's requests for information on our client's position.*"

    (c) In relation to the voting patterns at the EGM, "*On 8 May 2020, the Company appointed two new directors. As a result, the Board was comprised of 6 directors. The Constitution of the Company permits a maximum of 9 directors at any given time. Accordingly, the director appointment had the effect of potentially frustrating proposed appointments at the general meeting. As a result, our client was forced to reconsider its voting… our client's voting decisions should not be considered by the Panel as indicative of a potential breach of the Corporations Act, rather a reaction to the Company's attempt to frustrate its director appointment resolutions…*".

    (d) In relation to the timing of the requisitions by ASEAN and PET, ASEAN "*made a number of prior attempts over an extended period to engage with the Board constructively and otherwise seek to exercise its rights. Notably, this included notices issued under section 249D and 203D of the Corporations Act in February which were not recognised as valid by the Company*".

30. PET also denied being an associate, and submitted among other things that:

    (a) "*The fact that Mr Bennett called a meeting three days prior to ASEAN requisitioning a meeting indicates a complete lack of coordination between Bennett and ASEAN, in that were they to have acted in concert there would be no reason for two separate mechanisms to be deployed in order to requisition a meeting.*"

    (b) "*ASEAN's representations regarding Mr Bennett are explainable for reasons other than the parties acting in concert. Whilst my clients are not aware of ASEAN's motivations in any sense, it is reasonable to assume that one such motivation might be that the uneconomical pursuit of funds from PET may be a poor use of the Company's resources…*"

    (c) "*The fact that PET and ASEAN voted in favour of some of the same Directors is in no way indicative of any agreement or collusion between them…*"

31. Mr Travers submitted that he was a personal friend of Mr O'Neil and that, from time to time, they would discuss and exchange views on specific companies but he "*[has] no, nor [has] ever had, any agreement to cooperate with David O'Neil on any company including Aura Energy*". Mr Travers submitted that:

(a) he was introduced to Aura Energy's CEO "*by David O'Neil and for a period of time in 2019 I met Peter to discuss the issue [of] Aura Energy's board composition and the need for some fresh blood*"

(b) for a time he acted as a "*communication bridge of sorts*" between Mr O'Neil and Aura Energy's CEO but ceased engaging in that capacity in the months following the meeting he requested in June 2019 (see paragraph 28(a)). We note this is consistent with ASEAN's submissions

(c) he did not know Messrs Roes or Hoertlehner and

(d) he had no common directorships or common shareholdings with Mr Bennett and, in effect, his dealings with him were relatively limited.

32. Mr Hoertlehner submitted that he served on the board of a German company with Mr Roes and that: "*Obviously we spend quite some time in discussing corporate strategy of [the German company]... both at official board meetings… or after board meetings. But that does not make me an associate of Mr David Roes*".

33. The Panel's starting point is that it is for the applicant to demonstrate a sufficient body of material, albeit with proper inferences being drawn, to support the Panel conducting proceedings and inquiring into association.[7] For the purpose of Chapter 6, the associations alleged in this application require two persons to have a relevant agreement for the purpose of controlling or influencing the composition of a company's board or conduct of its affairs, or two persons to act in concert or propose to act in concert in relation to a company's affairs.[8]

34. In this case, Aura Energy sought a declaration that all the Alleged Associates were associates (or any two or more of them in the alternative) but, in relation to some combinations of those persons, did not adduce sufficient material to establish the existence of a relevant agreement[9] or that the persons were acting in concert. For instance, no material was provided which directly linked Mr Travers with Mr Roes or Mr Hoertlehner, or which directly linked Mr O'Neil and Mr Hoertlehner.

35. The key associations for which supporting material was provided can be articulated as between PET/Mr Bennett and ASEAN, ASEAN and Mr Travers, and PET/Mr Bennett and Mr Hoertlehner. In relation to the alleged association between:

(a) PET/Mr Bennett and ASEAN – we were initially concerned that the 13 November 2019 email from Mr O'Neil (suggesting that Aura Energy resolve its litigation with PET and appoint Mr Bennett to the board - see paragraph 28(b)) was uncommercial, but having considered ASEAN's submissions (see paragraph 29(b)) and a full copy of the email chain, we are satisfied with ASEAN's explanation of that email. We are also satisfied that little weight should be given to the temporal proximity of Mr Bennett's and ASEAN's requisitions given ASEAN's submission that its previous notices were not

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[7] *Mount Gibson Iron Limited* [2008] ATP 4 at [15]
[8] Section 12(2)(b) and 12(2)(c)
[9] For the purpose of controlling or influencing the composition of Aura Energy's board or the conduct of Aura Energy's affairs (see section 12(2)(b))

recognised as valid by Aura Energy (we also note this submission is consistent with Aura Energy's ASX announcements). We are not satisfied that Mr Bennett's convertible note proposal evidences an association between him (or PET) on the one hand and ASEAN on the other.

(b) PET/Mr Bennett and Mr Hoertlehner[10] – the Panel has previously accepted that a person who agrees to stand for election as a director is not necessarily an associate of a shareholder who nominated that person.[11] In this case, it does strike us as unusual that Mr Hoertlehner and Mr Roes are known to each other (which became known to us through ASEAN's and Mr Hoertlehner's submissions), given the requisitions from Mr Bennett and ASEAN. However, other than the fact that Mr Hoertlehner owns shares in Aura Energy, Aura Energy has not provided any material which establishes Mr Hoertlehner's conduct went beyond "*what might ordinarily be expected where a person merely agrees to be nominated for election as an independent director*".[12]

(c) ASEAN and Mr Travers –based on the material before us, we are not satisfied that sufficient material has been provided for us to conduct proceedings in relation to this alleged association. There is a difference between, on the one hand, investors expressing views on the management and governance of the company and, on the other hand, investors taking control of decision-making (or seeking to do so).[13] The conduct between ASEAN and Mr Travers, which appears to most significantly consist of meeting with the company and suggesting new directors be appointed, is closer to the former. In any event, the material relied upon by Aura Energy (including the June 2019 email from Mr Travers – see paragraph 28(a)), is old and Mr Travers, along with denying the association, has in effect submitted that the circumstances have now changed.

36. In light of the above, we consider that Aura Energy has not provided a sufficient body of material to justify us making further enquiries as to whether there are any associations leading to a contravention of section 606 or a material contravention of section 671B. That is not to say there aren't curiosities: for instance, the connection between Mr Hoertlehner and Mr Roes noted above. Nevertheless, as stated above, it is for the applicant to demonstrate sufficient material to support conducting proceedings. That was not done in this case.

Tracing notice responses

37. In relation to the alleged inadequate responses to tracing notices sent by Aura Energy, the company submitted that:

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[10] We note the application described Mr Hoertlehner as a nominee of PET, but we also note that it was not PET that requisitioned the convening of the meeting to consider, among other things, the election of Mr Hoertlehner. Mr Bennet, in his capacity as a director of Aura Energy, requisitioned the meeting

[11] See *Indiana Resources Limited* [2017] ATP 8 at [19]

[12] *Indiana Resources Limited* [2017] ATP 8 at [20]; *Aguia Resources Limited* [2019] ATP 13 at [73]

[13] See ASIC RG 128: *Collective action by investors* at 128.3, which has been supported in a number of Panel decisions including *Aguia Resources Limited* [2019] ATP 13 at [44], *Aurora Absolute Return Fund* [2019] ATP 14 at [87] and *Resource Generation Limited* [2015] ATP 12 at [62]

(a) On 14 February 2020, Aura Energy served a tracing notice on JP Morgan Nominees Australia Pty Ltd. That entity responded and advised among other things that it held 93,379,742 Aura Energy shares on behalf of Clearstream (a Luxembourg company which provides post-trading and custodial services for its clients).

(b) On 2 March 2020, Aura Energy mailed and faxed a tracing notice to Clearstream and followed up on 30 March 2020.

(c) On 3 May 2020, Clearstream acknowledged receipt of the tracing notice via email and requested the "*ISIN code/codes for which you require the disclosure report/reports*".

(d) On 4 May 2020, Aura Energy "*followed up Clearstream again…however to date has not received a meaningful response*". We note the follow-up was via email to the Clearstream employee who sent the email on 3 May 2020. The follow-up stated: "*It is extremely disappointing that Clearstream has failed to comply and the evidence now available to the Company suggests multiple violations of the Corporations Act. You have been reported to the Australian Securities & Investments Commission and ASIC has opened a file and the Australian Securities Exchange is working with ASIC. I also wish to inform you that I have written to German and Luxembourg regulators…I will forward out[sic] lawyers your name as well as ASIC*". The tone of this email is threatening and is at the least a mischaracterisation of the legal position. Such tone is inappropriate at best.

(e) On 22 April 2020, "*David O'Neil from ASEAN emailed…Computershare, the Company's share registry and asked whether voting access for Clearstream would be activated in respect of the EGM. The Company has no knowledge as to how David O'Neil could have identified that Clearstream had share interests in relation to the Company as there were no public details of this and Clearstream does not appear as a shareholder on the Company's share register*".

38. Aura Energy also submitted that it served tracing notices on ASEAN and PET on 28 April 2020, with the result being that: "*ASEAN responded to the notice disclosing that it had relevant interests in 341,125,337 shares in its own right and through an undisclosed nominee. To date PET has failed to respond to its tracing notice*". While Aura Energy subsequently "*correct[ed] the record*" to state that PET responded on 29 April 2020 to the tracing notice, we expect an applicant to have verified its application prior to making it.

39. In *Village Roadshow Limited 01* [2004] ATP 4, the Panel considered the tracing notice provisions and stated at [78] that:

"*… They are there to promote an informed market for shares in public companies and are in effect anti-avoidance provisions enabling compliance with the substantial shareholding notice provisions. The policy objectives behind the tracing notice provisions are consistent with the purposes outlined in sections 602(a) (ensuring an efficient, competitive and informed market) and 602(b) (knowing the identity of any person who proposes to acquire a substantial interest). Because of the anti-avoidance nature of the provisions, it was not necessary to conclude that the individual parcels were held by associated beneficial owners to find the*

circumstances resulting from breaches in relation to a substantial number of shares were unacceptable."

40. The Panel takes non-compliance with these provisions seriously,[14] and is expressly empowered to declare circumstances unacceptable because they constitute a contravention of them.[15] Given the anti-avoidance nature of the tracing notice provisions, we agree with the Panel in *Village Roadshow Limited 01* that it is not necessary to find an association between beneficial owners in order to find unacceptable circumstances, and accordingly we consider we could have conducted proceedings on just this aspect of the application.

41. However, after reviewing Aura Energy's correspondence with Clearstream, we noticed that Aura Energy appeared to have not paid the prescribed fee to Clearstream for complying with its tracing notice.[16] This was subsequently confirmed by Aura Energy. Under section 672B(2), a person does not need to comply with a tracing notice until 2 business days after the person is paid the prescribed fee. Accordingly, as Aura Energy had not in fact paid that fee, we are not satisfied that Aura Energy has provided a sufficient body of material to justify us making further enquiries in relation to the alleged non-compliance with the tracing notice provisions.

DECISION

42. 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

43. 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.

Alex Cartel
President of the sitting Panel
Decision dated 29 May 2020
Reasons given to parties 2 July 2020
Reasons published 7 July 2020

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[14] See for example *Village Roadshow Limited 01* [2004] ATP 4 and *Northern Iron Limited* [2014] ATP 11 at [53], where a material failure to comply with the tracing notice provisions formed part of the basis for a declaration of unacceptable circumstances as it was "*contrary to the policy objectives of section 602*"
[15] See section 657A(2)(c)(i)
[16] Section 672D(1)

Advisers

Party	Advisers
Aura Energy Limited	Dentons Australia
Dean Travers	-
ASEAN Deep Value Fund	Quinert Rodda & Associates Pty Ltd
Pre-emptive Trading Pty Ltd	Wallmans Lawyers