



**In the matter of Mount Gibson Iron Limited  
[2008] ATP 4**

**Catchwords:**

*Association – relevant agreement – arrangement or understanding – acting in concert – inferences – orders cancelling contract – relevant interest – common directors – common representatives – credibility of evidence – motive for association – common goal – interim orders – final orders – coordinated actions by shareholders – lack of commercial explanation – costs order – section 249D general meeting – prior conduct – statutory declarations – failure to produce evidence – rule in Jones v Dunkel – proxy – acting together – friendship*

*Corporations Act 2001 – sections 12(2), 249D, 606, 608(3), 610, 657A(2), 657D*

*Dromana Estate Limited 01R [2006] ATP 8*

*Alfro-West Mining Ltd v Australian Mining Investments Ltd (1988) 14 ACLR 709*

*Elders IXL v NCSC [1987] VR 1*

*Adstream Building Industries v Qld Cement [1985] Qd R 11*

*Jones v Dunkel (1959) 101 CLR 298*

**INTRODUCTION**

1. The Panel, John Fast (sitting President), Byron Koster and Jennifer Seabrook, made a declaration of unacceptable circumstances.
2. In these reasons the following definitions apply.

<b>Term</b>	<b>Meaning</b>
Allied Group	Allied Group Limited
APAC	APAC Resources Limited
Application	Application by Mount Gibson dated 18 February 2008 concerning its affairs
COL Capital	COL Capital Limited
Gazmetall	Gazmetall Holding (Cyprus) Ltd
Mount Gibson	Mount Gibson Iron Limited
Option Agreement	Agreement for the granting of an option by Gazmetall to Shougang to acquire 79,333,682 shares in Mount Gibson, conditional on completion under the Share Sale Agreement
Proposed Transaction	The transaction proposed pursuant to the Share Sale Agreement and the Option Agreement
Share Sale Agreement	Agreement for the conditional sale of 77,436,215 shares in Mount Gibson by Gazmetall to Shougang
Shougang	Shougang Concord International Enterprises Company Limited, the purchaser of the Mount

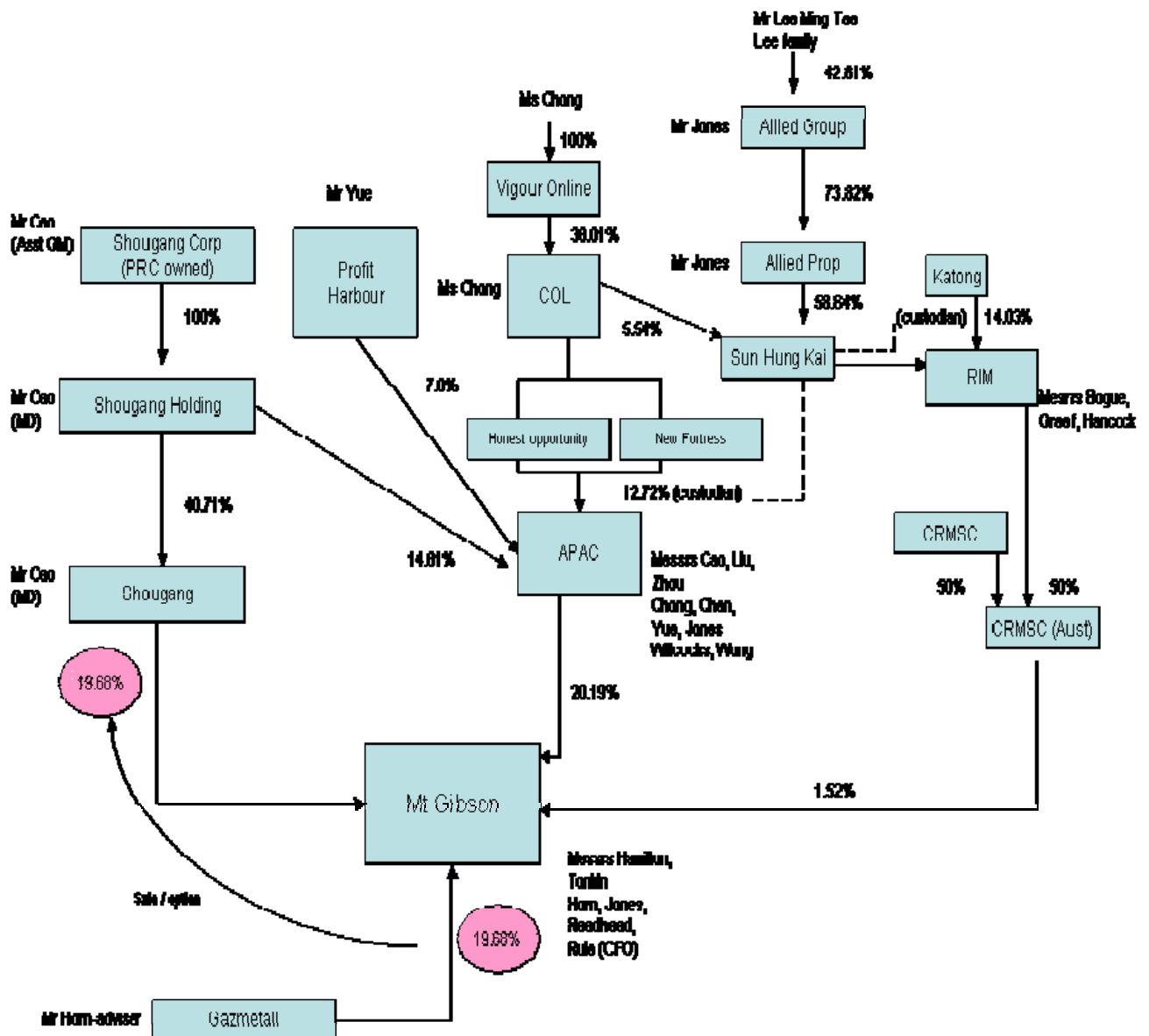
Term	Meaning
	Gibson shares
Shougang Corporation	Shougang Corporation Limited
Shougang Holding	Shougang Holding (Hong Kong) Limited

3. In these proceedings the Panel:
  - (a) adopted the published procedural rules; and
  - (b) consented to parties being represented by their commercial lawyers.

## DISCUSSION

### General

4. Various relationships between the parties with which this matter was concerned are described in the following diagram:



### Application

5. Mount Gibson requested that the Panel declare the circumstances in the application unacceptable on the following grounds:
  - (a) *(Corporations Act, section 657A(2)(c)) because they constituted, constitute or are likely to constitute or gave or give rise to, or will or are likely to give rise to, a contravention of a provision of Chapter 6 of the Corporations Act, namely section 606, which prohibits a person's voting power increasing from below 20% to more than 20% or from increasing if already above 20%;*
  - (b) *(Corporations Act, section 657A(2)(b)) because they impinge on the objectives of Chapter 6 of the Corporations Act set out in section 602 in that:*
    - (i) *(Masel principles[sic]) the acquisition of control of Mount Gibson shares would not be taking place in an efficient, competitive and informed market;*
    - (ii) *(Information requirement) the holders of Mount Gibson shares did not, prior to the proposal being entered, know the identity of the person proposing to acquire a substantial interest or have a reasonable time to consider the proposal and nor were they given enough information to assess the merits of the proposal;*
    - (iii) *(Equal opportunity principle) not all holders of Mount Gibson shares would have an equal opportunity to participate in the benefits accruing through a proposal under which a person would acquire a substantial interest in Mount Gibson; and*
  - (c) *(Corporations Act, section 657A(2)(a)) having regard to their effect on:*
    - (i) *the control, or potential control, of Mount Gibson; and*
    - (ii) *the acquisition of a substantial interest in Mount Gibson."*<sup>1</sup>

### Interim orders

6. Mount Gibson sought interim orders prohibiting:
  - (a) the completion of the Proposed Transaction;
  - (b) each of Gazmetall, Shougang and APAC from exercising any rights in respect of their respective shareholdings in Mount Gibson (including under the Proposed Transaction); and
  - (c) each of Gazmetall and APAC from exercising their ability to increase their respective voting power in Mount Gibson under item 9 of section 611.
7. On 29 February 2008, in order to preserve the status quo, the Panel made interim orders prohibiting completion of the Proposed Transaction until the earlier of determination of the proceedings or two months from the date of the interim order.

### Final orders

8. Mount Gibson sought final orders:
  - (a) prohibiting completion of the Share Sale Agreement and the Option Agreement;

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<sup>1</sup> Application para B1(a)(2).

- (b) vesting Gazmettal's entire Mount Gibson shareholding in ASIC for disposal by way of a bookbuild; alternatively, compelling Shougang to complete the Share Sale Agreement and the shares then being vested in ASIC; and
  - (c) vesting APAC's entire Mount Gibson shareholding in ASIC for disposal by way of a bookbuild.
9. On 31 March 2008, the Panel made a declaration of unacceptable circumstances and final orders cancelling the Share Sale Agreement and Option Agreement in lieu of the order described in paragraph 8(a). It did not make orders of the type described in paragraphs 8(b) and (c).
10. The Panel declined to make the orders described in paragraph 8(b) because there was insufficient evidence to support a finding that Gazmetall was associated with Shougang or APAC or was otherwise knowingly involved in any dealings between Shougang and APAC. However, the Panel noted the possibility that Gazmetall might enter a subsequent agreement with Shougang for its Mount Gibson shares. If the circumstances had remained unchanged at the time of that subsequent agreement, then of course such an agreement would be entered into by Gazmetall with full knowledge of the circumstances. (Postcript - by announcement on 4 April 2008, Mount Gibson advised the market that the shares had been sold through a bookbuild to institutional investors.)
11. The Panel declined the order described in paragraph 8(c) because the cancellation ordered adequately dealt with the unacceptable circumstances.

**Panel role in association cases**

12. Section 12 sets out the tests of association for the purpose of chapter 6. There are three tests, of which two are relevant here.
- (a) Section 12(2)(b) - which provides that B is an associate of A if (and only if) B is a person with whom A has, or proposes to enter into, a relevant agreement for the purpose of controlling or influencing the composition of a company's board or conduct of its affairs. This provision treats those who, by arrangement, can control a board or the affairs of the company through the actual owners of shares as the owners; that is "[t]hose who manipulate the strings are to be regarded as the personification of the puppet".<sup>2</sup> The association cannot be unilateral.<sup>3</sup>
  - (b) Section 12(2)(c) - which provides that B is an associate of A if (and only if) B is a person with whom A is acting or proposing to act in concert in relation to the company's affairs.<sup>4</sup> Again, this provision means having an understanding as to some common purpose or object - not simply two persons separately and coincidentally acting in the same manner.<sup>5</sup>
13. In *Dromana Estate Limited* 01R<sup>6</sup> the review Panel said:

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<sup>2</sup> *Afro-West Mining Ltd v Australian Mining Investments Ltd* (1988) 14 ACLR 709.

<sup>3</sup> *Elders IXL v NCSC* [1987] VR 1.

<sup>4</sup> The definition picks up the section 53 definition of 'affairs of a body corporate'.

<sup>5</sup> *Adsteam Building Industries v Qld Cement* [1985] 1 Qd R 11.

<sup>6</sup> [2006] ATP 8 at [25]

*“Determining associations must depend on the facts of the case, and this will often require analysis of complex circumstances. Moreover, the Panel recognises that issues of association are notoriously difficult for outsiders to prove since access to the type of evidence needed is rarely available. Issues of association frequently need to be decided on the basis of inferences from partial evidence, patterns of behaviour and a lack of a commercially viable explanation for the impugned circumstances”.*

14. The Panel was prepared to draw inferences that could fairly be drawn, and did so. It took into account that it may – not must – more readily draw an inference that unadduced evidence would not have assisted that party’s case if there is an unexplained failure of a party to adduce evidence.<sup>7</sup> The Panel did not draw any inferences that the unexplained failure meant that the evidence would have been damaging.
15. The Panel’s starting point was that it was for Mount Gibson – the applicant – to demonstrate a sufficient body of evidence of association and to convince the Panel as to that association, albeit with proper inferences being drawn.

#### **A note on the evidence**

16. The material in this matter was voluminous. In the end, the Panel considered the cumulative effect of all of the evidence and drew the necessary inferences for it to reach its decision. What follows is a summary of the key matters.

#### **Key events in the chronology**

17. In 2005, negotiations between Mount Gibson and Shougang Holding resulted in a Participation Agreement in relation to a slurry pipeline and investment in Asia Iron.<sup>8</sup> Ms Shirley Chong (the major shareholder in COL Capital, director of APAC and long-time friend of Mr Lee Ming Tee) was involved although there is some ambiguity about her role.
18. In about June 2006, COL Capital (12.72% shareholder in APAC) twice requested the appointment of Mr Alan Jones to the Mount Gibson board, then it sought the appointment of Dato John Wong. On 12 June 2006, COL Capital requisitioned a general meeting (under section 249D) to consider the appointment of Dato Wong. Subsequently Mr Jones was appointed and the requisition for Dato Wong was withdrawn.
19. On 6 October 2006, Mount Gibson received nominations from RIM Capital (0.18% shareholder in Mount Gibson) and Argyle (1.3% shareholder in Mount Gibson) for consideration at its upcoming AGM<sup>9</sup> for the election of Mr Robert Willcocks and Mr Kin Chan. The nominations were received within approximately an hour of each other.
20. There were conversations about the possible withdrawal of these nominations but they proceeded to a vote. Mr Jones contacted Mr Lee about them. Mr Jones said that he contacted Mr Lee because of Mr Lee’s friendship with Ms Chong and his

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<sup>7</sup> Rule in *Jones v Dunkel* (1959) 101 CLR 298.

<sup>8</sup> ASX announcement of Mount Gibson 15 September 2005.

<sup>9</sup> The 2006 AGM was held on 30 November 2006.

better command of English.<sup>10</sup> Later Mr Jones called Mr Tonkin and/or Mr Rule (Mount Gibson) and said that *"The Chinese are not willing to withdraw the nomination of Willcocks."*

21. On 30 November 2006, Mount Gibson held its AGM. Shougang Holding (through Timely Rich) and COL Capital gave their proxies to Mr Michael Bogue (Managing Director of RIM Capital and former director of APAC) who, it appears, voted the shares in support of the nomination and in the same way as APAC voted. The nomination was nevertheless lost on the vote. The votes cast by Mr Bogue were against the votes of nearly all non-associated Mount Gibson shareholders. They were also against the unanimous board recommendation.
22. In early 2007, Shougang became interested in taking iron ore offtake from Mount Gibson. Ms Chong asked Mr Jones if he could assist. The Panel inferred that, in contacting Mr Jones, Ms Chong had acted on behalf of Shougang.<sup>11</sup>
23. Also, in late 2007/early 2008, APAC expressed an interest in securing offtake from Mount Gibson, through Mr Liu.<sup>12</sup> Mount Gibson advised Mr Jones that it would be reluctant to supply offtake to APAC because it was an unknown trading entity.
24. On 26 April 2007 Mr Cao Zhong (Managing Director of Shougang and Shougang Holding and Assistant General Manager of Shougang Corporation) was appointed an executive director of APAC. He had been invited to join the board by Mr Yue Jialin (a shareholder in APAC through Profit Harbour). On 3 May 2007, Mr Cao became Executive Chairman of APAC.
25. *The Hong Kong meeting.* On 12 June 2007, Gazmetall (Messrs Moshiri, Efendiev, Mitrofanov and Mark Horn – its adviser) and APAC (Messrs Cao, Jaime Che and Liu) met in Hong Kong. Mr Lee also attended. The meeting was described as "social" although at this meeting Mr Lee asked Gazmetall to invest in APAC. A file note<sup>13</sup> was made, after the event, by a junior employee of Metalloinvest (holding company of Gazmetall). According to that note, at the meeting:
  - (a) Mr Lee made a presentation on the investment fund of APAC, which owned 19% of Mount Gibson, and *"on the major shareholder in APAC Resources which was Shougang Corporation"*.
  - (b) Mr Lee talked about the possibility for the Metalloinvest group to become a shareholder in the APAC Resources fund.
  - (c) The reasons for APAC's investment in Mount Gibson was recorded in the following way: *" ... mainly for the purpose of becoming the first Chinese company which would have a major stake in the fastest developing company among all Australian iron ore companies. The intention was that by the time the governing Communist Party of China would issue a directive to invest in foreign iron ore companies, APAC Resources would have the advantage of being the first player on that market."*

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<sup>10</sup> Mr Alan Jones' statutory declaration, 19 March 2008, para 5.

<sup>11</sup> Mr Jones' statutory declaration, 6 March 2008, para 52.

<sup>12</sup> Mr Jaime Che's statutory declaration, 20 March 2008, paras 23 and 24.

<sup>13</sup> Passages were blanked out but a UK solicitor confirmed that the passages did not relate to the shareholding of Gazmetall in Mount Gibson.

- (d) Mr Lee expressed the following concerns about the current situation with Mount Gibson:
- (i) Mount Gibson's sales policy was inefficient. In Mr Lee's opinion, Mount Gibson should sell all its offtake to Shougang<sup>14</sup> and Shougang was ready to buy it. Mr Horn responded that during negotiations Shougang had offered rather low prices.
  - (ii) *"Major shareholders in Mt Gibson (i.e. the Chinese and the Russians) must act as one major shareholder and must coordinate their actions with regards to Mt Gibson."* Mr Horn responded that there were Australian legal issues about doing this.
  - (iii) Mount Gibson must concentrate on decreasing production costs.
  - (iv) *"The representative of either Russian or Chinese party should become Chairman of Mt Gibson."*
  - (v) When the management is too independent it is working largely for itself.
26. The impact of this meeting appears to have reverberated for some time. For example, Mr Horn notes in an email to Mr Tonkin on 15 June 2007 that he thought the APAC representatives and Mr Lee were "interesting" and he would have to mediate carefully to ensure there were no problems. And on about 15 September 2007 when Mount Gibson (Mr Neil Hamilton) met Gazmetall in London (Messrs Horn, Moshiri and Mitrofanov), Mr Hamilton recalls a conversation in which Mr Moshiri expressed suspicion about APAC's intentions in relation to Mount Gibson.<sup>15</sup>
27. In September 2007 Mr Jones made arrangements to meet Mr Liu (CEO of APAC) and the Mount Gibson Chairman (Mr Neil Hamilton) at the offices of Allied Group. Mr Jones stated that, because Mr Lui had poor English, he arranged for Mr Lee to attend as a translator for Mr Liu.<sup>16</sup> In the event, Mr Liu did not attend. However, Mr Lee still attended.
28. During October 2007, although Mr Horn was Gazmetall's adviser responsible for selling its Mount Gibson shares, Credit Suisse became involved on Gazmetall's behalf and discussed the sale of Gazmetall's shares with potential buyers.
29. One of those potential buyers was Shougang Holding (PRC).<sup>17</sup> On 7 October 2007, Credit Suisse discussed the sale of the parcel with Shougang Holding (PRC). Mr Cao was present during that discussion. Apart from Shougang Holding (PRC), Credit Suisse contacted two other buyers. They were apparently unrelated entities to either Shougang or APAC.

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<sup>14</sup> The filenote does not identify which Shougang entity is being referred to, but identifies Mr Cao as a representative of Shougang Corporation.

<sup>15</sup> Mr Neil Hamilton's witness statement dated 18 February 2008, para 15.

<sup>16</sup> Mr Jones' statutory declaration, 6 March 2008, para 42. He uses the expression "facilitator for the meeting".

<sup>17</sup> Gazmetall's submission on brief, para 2.3 does not distinguish which Shougang entity. Mr Cao's statutory declaration 27 March 2008 identifies it as Shougang Holding (PRC), a PRC incorporated company that is a wholly-owned subsidiary of Shougang Corporation.

30. At around this time, Mr Horn received a call from Mr Jones who said that he had heard that Gazmetall may be interested in selling its stake in Mount Gibson and that APAC may be interested in buying it. Mr Horn stated in submissions that he did not know how Mr Jones was aware Gazmetall was interested in selling its stake.<sup>18</sup> He also stated that Mr Jones had said that APAC might be interested in purchasing the stake. Mr Horn therefore arranged to meet APAC on 24 November 2007 (the Beijing meeting).
31. Also, around this time APAC conducted an analyst briefing at which Mr Cao was present. Mr Cao commented on APAC's target market. Shougang Holding was described as a "cornerstone" shareholder in APAC.
32. *The Beijing meeting.* On 24 November 2007 APAC (Messrs Cao and Che and Ms Chong) met Gazmetall (Messrs Moshiri, Horn and others) in Beijing. Mr Lee attended. Mr Cao raised the idea of Gazmetall selling its stake to APAC in exchange for shares in APAC. Mr Cao stated in submissions that he did not take this share swap proposal seriously. Mr Horn did not respond directly to the proposal because he was in discussions with other parties about the sale of the shares.
33. That evening, Mr Horn attended a dinner with Shougang representatives including Mr Cao. No business was apparently discussed.
34. On about 5 December 2007, Mr Horn telephoned Mr Lee to inform him that Gazmetall had decided to sell to another buyer. In early January 2008, it became evident that the sale to this unrelated purchaser would fall through.
35. *The Koolan Island visit.* On about 10 December 2007 Mr Jones arranged a visit to Koolan Island, Mount Gibson's mine site outside Broome, WA. On 3 December 2007, Mr Che had emailed Mr Tonkin regarding visas. He identified the APAC representatives, which did not include Mr Jones or Mr Lee.<sup>19</sup> Mr Tonkin, with whom Mr Jones spoke to make the arrangements, regarded the visit as being for APAC representatives.<sup>20</sup> Mr Lee, however, was included as one of the guests. APAC submitted that Mr Lee attended because he (Mr Lee) was in Australia anyway and was Mr Jones' guest because of his (Mr Lee's) interest in engineering solutions.<sup>21</sup> Mr Jones denies telling Mr Tonkin that Mr Lee represented APAC.<sup>22</sup> As events transpired, when the visit did take place, on 19 December 2007, Mr Jones did not attend for health reasons. However, there is no evidence that he sought to cancel or rearrange the visit by Mr Lee.<sup>23</sup> It appears that none of the APAC representatives that Mr Che identified attended.<sup>24</sup> Mount Gibson submitted that it

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<sup>18</sup> Mr Mark Horn's statutory declaration 5 March 2008, para 37.

<sup>19</sup> Annexure 3 to APAC's rebuttal submission on supplementary brief.

<sup>20</sup> Mr Luke Tonkin's statutory declaration 19 March 2008, para 9.

<sup>21</sup> Mr Jones' statutory declaration 20 March 2008, para 10. APAC's submission on supplementary brief, para 26.

<sup>22</sup> Mr Jones' statutory declaration 20 March 2008, para 9.

<sup>23</sup> Mr Tonkin's statutory declaration 19 March 2008, paras 10 and 11.

<sup>24</sup> Mr Tonkin's witness statement dated 18 February 2008, para 50.



would not have allowed Mr Lee to visit the mine site, but for believing Mr Lee was attending as a representative of APAC, one of its then large shareholders.<sup>25</sup>

36. On 18 December 2007, prior to the Koolan Island visit, Mr Tonkin had dinner in Broome with Mr Lee and his son. During that dinner, Mr Lee is reported to have said that:<sup>26</sup>
  - (a) he had met with representatives of the “Russians” and Gazmetall’s stake in Mount Gibson was for sale at about \$2.70 per share;
  - (b) he was interested in Gazmetall’s stake;
  - (c) his companies liked to control entities but not necessarily own them outright; and
  - (d) he would like to place Gazmetall’s stake with “friends”.
37. On 19 December 2007, Ms Chong acquired 300,000 shares in Shougang (being 0.0043% of Shougang's issued capital).<sup>27</sup>
38. On 19 December 2007 Mr Lee visited Koolan Island.
39. In the first two weeks of January 2008, Shougang Holding (PRC), having decided earlier not to purchase Gazmetall’s Mount Gibson shares, suggested to Mr Cao that he contact Mr Horn if Shougang (ie, the Hong Kong listed entity) might be interested.<sup>28</sup> Shougang was therefore aware that the stake was back on the market.
40. *The London meeting.* On 11 January 2008 Gazmetall (Messrs Horn and Moshiri) met with Mr Lee and Ms Chong (accompanying Mr Lee) in London. The meeting was arranged by Mr Lee, on about 23 December 2007 (four days after his Koolan Island visit) as a “courtesy visit”.
41. On about 14 January 2008, Shougang contacted Mr Horn regarding Gazmetall’s shares in Mount Gibson and arranged a meeting. Whether there was one call or two, and whether Mr Cao called or another Shougang representative called, is unclear.<sup>29</sup> Mr Horn stated that he asked for confirmation about legal impediments to Shougang purchasing Gazmetall’s shares and, specifically, about Shougang’s relationship to APAC, as he was concerned to protect the interests of his client.<sup>30</sup>
42. On 18 January 2008, Shougang (Mr Cao and Ms Carmen Cheng) met Gazmetall (Mr Horn) in Hong Kong.<sup>31</sup> The sale to Shougang of Gazmetall’s shares in Mount Gibson was the only business discussed and it was agreed at \$2.60 per share.<sup>32</sup> Mr Horn subsequently liaised with Ms Carmen Cheng (Company Secretary of Shougang) to settle the terms.

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<sup>25</sup> Mount Gibson’s submission on supplementary brief, para 26. Mr Tonkin statutory declaration 19 March 2008, para 11.

<sup>26</sup> Mr Tonkin’s witness statement dated 18 February 2008, para 49.

<sup>27</sup> Ms Chong’s statutory declaration 6 March 2008, para 18.

<sup>28</sup> Mr Cao Zhong’s statutory declaration 6 March 2008, para 16.

<sup>29</sup> Mr Horn’s statutory declaration 5 March 2008, para 27. Compare Mr Cao’s statutory declaration 6 March 2008, paras 17 and 18.

<sup>30</sup> Mr Horn’s statutory declaration 5 March 2008, para 28.

<sup>31</sup> Mr Horn’s statutory declaration 5 March 2008, para 29.

<sup>32</sup> Mr Cao’s statutory declaration 6 March 2008, para 21. Mr Horn’s statutory declaration 5 March 2008, para 29.

43. On 22 January 2008, Mr Cao discussed the principal elements of the deal with other Shougang directors at a remuneration committee meeting.
44. On 25 January 2008, the directors of Shougang were e-mailed with details of the proposed acquisition, Mount Gibson's 2007 annual report, Mount Gibson's most recent quarterly activities report and information regarding the trading prices of Mount Gibson shares for the previous 60 days.<sup>33</sup> The email, by Ms Cheng, stated "*as previously reported by Mr Cao Zhong to the Board, Shougang International is going to acquire an aggregate of 19.76% shareholding in [Mount Gibson]....*"
45. On 28 January 2008, Mr Horn informed Mount Gibson of the proposed sale by Gazmetall.
46. On 30 January 2008, Shougang's board approved the Proposed Transaction. Directors were provided with a memorandum setting out details of the proposed acquisition and board resolutions, the latest drafts of the Share Purchase Agreement an Option Agreement and a draft announcement to the Hong Kong stock exchange.<sup>34</sup> The email by Ms Cheng states: "*Please note that the management intends to enter into the agreements with Gazmetall by tomorrow.... If the board resolutions are agreeable to you, please sign on the resolutions by noon tomorrow and thereafter return the resolutions to me.*" Some questions were asked by directors before authorising entry into the agreements.<sup>35</sup>
47. On 31 January 2008, agreements were entered into and an announcement of the transaction made. The announcement stated the reason for the transaction was "*to secure a long-term and stable source of supply of raw materials for the Group's steel manufacturing operations*".

### **Bases for the application**

48. Mount Gibson built its case essentially around four bases:
  - (a) circumstances surrounding the Proposed Transaction, including a common goal of securing offtake from Mount Gibson;
  - (b) Shougang and APAC's prior conduct in relation to Mount Gibson, including the prior attempts to spill the Mount Gibson board, offtake negotiations and dealings in Mount Gibson shares;
  - (c) structural links between Shougang and APAC, including common directorships and a common point of contact in Mr Lee; and
  - (d) other dealings between APAC and Shougang, such as common investments and dealings by Shougang entities in APAC shares.

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<sup>33</sup> Shougang's submission on second supplementary brief, p4.

<sup>34</sup> Ibid.

<sup>35</sup> Shougang's submission on second supplementary brief, para 5.

**First basis - circumstances surrounding the Proposed Transaction***A. Common goal of securing iron ore offtake*

49. Mount Gibson submitted that Shougang and APAC had a common goal of securing offtake, which was only achievable by them acting together to control Mount Gibson.
50. Acknowledging that each party may have the same objective, and that this alone would not establish that they are acting in concert, the Panel is satisfied that an inference can be drawn that, as between Shougang and APAC, there was a common goal of securing offtake. In the Panel's view, this was the principal motive for their association.
51. The Panel infers that the parties were associated in relation to securing offtake from Mount Gibson. The Panel considers that the strategic importance of securing supply of iron ore in the current climate, particularly for Chinese companies experiencing high demand and rising raw material costs for their products, was a motive for them in the Proposed Transaction.
52. Each of APAC and Shougang had made overtures to Mount Gibson to acquire offtake. Indeed, in its media release concerning the Proposed Transaction, Shougang stated that it acquired Gazmetall's shares to secure supply of raw material. The Panel could find no credible reason why, in early 2007, Ms Chong asked Mr Jones to provide her with assistance in relation to Shougang's off-take negotiations with Mount Gibson, unless APAC and Shougang had a relevant agreement or were acting in concert in relation to Mount Gibson.
53. Whilst it might be argued that having 85% of Mount Gibson's life of mine output already committed under long term supply contracts might have meant that no common goal could be effective, (thereby suggesting that there wasn't a common goal), this state of affairs might also suggest that a sufficiently large 'block' of shares would be required in order to secure enough influence or board positions to effect a negotiation of new supply contracts or a renegotiation of existing supply contracts by Mount Gibson.<sup>36</sup> Shougang submitted that APAC and Shougang would not be able to vote on such matters to grant themselves or their affiliates contracts because they would have a clear conflict of interest.<sup>37</sup> The Panel does not think this is a complete answer to the question of influence, even if it operates to prevent a board member voting on a matter.
54. Shougang Holding is an investment company. It has portfolio investments in six listed companies and eight unlisted companies, in a wide range of industries.<sup>38</sup> Shougang (which drew careful distinctions between the different Shougang entities in its submissions) said it understood that Shougang Holding's objective was to invest in companies which operated in industries that were likely to offer high returns and that it had decided to invest in APAC because it believed that APAC's

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<sup>36</sup> Application paragraph 3.1. See also previous discussion in Mr Tonkin's witness statement dated 18 February 2008, para 28.

<sup>37</sup> Shougang's letter dated 21 February 2008 and submissions on brief, para 4.3.

<sup>38</sup> Shougang's submission on second supplementary brief, para 4.

proposed business case of acting as an acquirer and reseller of iron ore for small to medium steel mills could be potentially quite profitable.

55. There was no formal written investment proposal or business plan in relation to the proposal to acquire APAC shares.<sup>39</sup> Given that Shougang Holding is an investment company, the Panel would have expected to have been furnished with more documentation in support of that case. It infers that the decision was not made as a normal investment decision.
56. Pursuant to the Proposed Transaction, Shougang purchased a \$400 million (approximately) stake in Mount Gibson. This stake was purchased on what seems to the Panel to be very little commercial analysis (see paragraphs 43 and 46). The rationale provided to the Board did not include consideration of an investment strategy by the Shougang Board or the desire through this stake to secure the remaining uncommitted 15% of Mount Gibson's offtake. Further, the value of the Proposed Transaction represented approximately 85.59% of the value of its net assets and 24.80% of the value of its total assets.<sup>40</sup> The Panel would have expected to have seen more documentation in support of such an investment. It infers that the decision was not made as a normal investment decision.

*B. Statements by Mr Lee Ming Tee*

57. Mount Gibson submitted that Mr Lee was a significant adviser to, and influencer of, APAC. Mount Gibson submitted that, given APAC could not increase its shareholding without making a takeover bid for Mount Gibson, APAC and Shougang reached an agreement or understanding whereby Shougang would acquire Gazmetall's shares and APAC and Shougang would act together to control Mount Gibson.
58. The Panel was prepared to draw inferences that Mr Lee was associated with APAC, Ms Chong and Mr Jones and had organised for APAC and Shougang to become associated regarding Mount Gibson's affairs. The Hong Kong meeting is particularly telling. Mr Lee did most, if not all, of the talking at that meeting and advanced a clear position regarding offtake and proposed that the major shareholders should act as one and co-ordinate their actions.
59. Mr Che said that Mr Lee was present at the Hong Kong meeting at his request (based on advice he received from Ms Chong) to translate.<sup>41</sup> The Panel does not accept this submission, and infers that Mr Lee was speaking on behalf of APAC. Moreover, his comments foreshadowed a plan to have an associate acquire the stake in Mount Gibson.

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<sup>39</sup> Ibid.

<sup>40</sup> 2006 Annual Report of Shougang records total assets at HK\$11,259,460,000 and total liabilities at HK\$7,997,432,000. According to the 31 January announcement by Shougang, HK\$1,379,138,989 is payable under the Share Sale Agreement. Applying the same exchange rate to the exercise price as for the option fee, HK\$1,412,932,876 is payable under the Option Agreement.

<sup>41</sup> Mr Che's statutory declaration 20 March 2008, paras 14 (he uses the expression "facilitate APAC") and 16.

60. Similarly, statements are attributed to Mr Lee at other meetings where he stated that he would like his “friends” to have the Gazmetall shareholding in Mount Gibson.<sup>42</sup>

61. The reason advanced by APAC for Mr Lee’s visit to Koolan Island is, in the Panel’s view, not credible and the fact that the visit proceeded even though Mr Jones did not attend (and that Mr Jones did not seek to cancel or rearrange that visit<sup>43</sup>) reinforces the view that Mr Lee attended as a representative of APAC.

C. *Meetings between Gazmetall, APAC and Shougang*

62. The Panel drew inferences from who attended meetings at which the sale of Gazmetall’s shares in Mount Gibson was discussed and the manner of participation in the meetings by those individuals. In particular, the role of Mr Lee was variously described as that of a translator and “facilitator”<sup>44</sup> or as paying a courtesy visit. The Panel does not accept these explanations, but considered that inferences were open for it to draw, which it did, that Mr Lee attended those meetings and acted there in a capacity on behalf of APAC.

63. The Panel also infers that Shougang is the “friend” (the suggestion made by Mr Lee at the 18 December 2007 meeting) with whom the Gazmetall stake was sought to be placed. Based on the order of events, the Panel infers Shougang’s agreement to acquire the Mount Gibson stake was in pursuit of this objective.

64. The reason advanced by APAC for Mr Lee’s attendance at meetings – because of his friendship with Ms Chong<sup>45</sup> – was not, in the Panel’s view, credible. Nor was his attendance at the Hong Kong meeting and his attendance at the meeting in Allied’s office (see paragraph 27) adequately explained. APAC submitted that Mr Lee attended to translate for Mr Liu. The fact that Mr Lee proceeded to attend the meeting even though Mr Lui did not attend reinforces the view that Mr Lee attended as a representative of APAC (even if also originally to act as a translator).

65. The Panel did not consider as credible that certain meetings were described as courtesy visits which, in the Panel’s view were simply too coincidental. The role of translator attributed to Mr Lee’s presence at these meetings was likewise not considered by the Panel to be credible.

66. The Panel invited Mr Lee, through APAC, to provide evidence. According to Ms Chong, he declined because he was not a shareholder or director of APAC.<sup>46</sup> APAC invited the Panel to infer from this refusal that Mr Lee had no interest or role in APAC. The Panel did not accept this submission. Mr Lee was a long standing friend of both Mr Cao and Ms Chong. As a result of these proceedings, Shougang stood to lose its purchase of the shares in Mount Gibson and APAC stood to be regarded as associated with Shougang. The Panel is prepared to draw the inference that his evidence would not have been helpful to APAC or Shougang. In the absence of evidence contradicting statements attributed to Mr Lee, the Panel is

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<sup>42</sup> Mr Tonkin’s witness statement dated 18 February 2008, para 49.

<sup>43</sup> Mr Tonkin’s statutory declaration 19 March 2008, paras 10 and 11.

<sup>44</sup> For example, APAC’s rebuttal submission to supplementary brief, para 22.

<sup>45</sup> APAC’s rebuttal submission, para 10.

<sup>46</sup> Ms Shirley Chong’s statutory declaration 19 March 2008, para 5.

satisfied that the statements attributed to him accurately record the content of the conversations in question and the conduct of Mr Lee at the various meetings. From the evidence the Panel has inferred that Mr Lee did have an interest or role in APAC and a plan for Gazmetall's shares in Mount Gibson.

67. In October 2007, Mr Jones called Mr Horn to ask if Gazmetall was selling its Mount Gibson shares, because APAC would be interested in buying them.<sup>47</sup> The Panel drew the inference that Mr Jones knew of Gazmetall's intention because the information known to Shougang Holding (PRC) (see paragraph 29) had been passed on to APAC by a Shougang entity. The Panel infers that Shougang facilitated the pursuit by APAC of its objective to secure the Gazmettal holding in Mount Gibson.

*D. Shougang's investments*

68. There was no formal written investment proposal or business plan for the investment by Benefit Rich Ltd (wholly-owned subsidiary of Shougang Holding) on 18 October 2006 in APAC shares.
69. Similarly, there was no formal written investment proposal or business plan for the investment by Shougang in Mount Gibson. The documentation provided to the Shougang board was provided as a *fait accompli* (see paragraphs 43 and 46). Yet this was an investment of approximately \$400 million, which represented approximately 85% of the value of Shougang's net assets and 25% of the value of its total assets (see paragraph 56). The Panel does not accept that informal discussions outside board meetings dealt with the issues necessary for such an investment decision involving such a large percentage of Shougang's assets. The Panel infers that the decision by Shougang to enter into the Proposed Transaction was not an independent investment decision of Shougang because of the nature of the documentation produced and the manner in which discussions concerning this investment decision were apparently conducted.

**Second basis - Shougang and APAC's prior conduct in relation to Mount Gibson**

*A. Investor Presentations*

70. Mount Gibson submitted that the investor presentations (see paragraph 31) were designed to encourage investment in APAC by showing the extent of the backing and support that Shougang provided it.<sup>48</sup> APAC disagreed, pointing out that Shougang Holding held more than 19% of APAC at the time. Shougang submitted that none of the three companies (Shougang, Shougang Holding or Shougang Corporation) approved of, or consented to, Shougang Holding appearing in those presentations as it did.<sup>49</sup>
71. The Panel notes that Mr Cao was present at the October presentation by APAC and, indeed, commented at that presentation on APAC's target market.<sup>50</sup> This may not be surprising given that he was APAC's Executive Chairman. However, one would have expected some comment from him in relation to Shougang Holding's position

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<sup>47</sup> Mr Horn's statutory declaration 5 March 2008, para 37

<sup>48</sup> Mount Gibson's rebuttal submission on brief, para 4.2

<sup>49</sup> Mr Cao's statutory declaration 6 March 2008, para 36.

<sup>50</sup> Mr Cao's statutory declaration 6 March 2008, para 37.

as well, particularly if he did not agree with the characterisation of it by APAC. Although Mr Cao submitted that Shougang Holding was not given any opportunity to read or approve the presentation, the Panel considered that the fact Mr Cao commented at the October presentation on APAC's position constituted approval of the content of the entire presentation, including Shougang Holding's position as described in the presentation. The Panel does not accept that his silence about Shougang's position arose because he took the view that his only function at the presentation was as a director of APAC.

*B. Prior attempts to spill the Mount Gibson board*

72. Mount Gibson submitted that Shougang and APAC-related entities had previously attempted to spill the Mount Gibson board.
73. COL Capital (12.72% shareholder in APAC) twice requested the appointment of Mr Jones to the Mount Gibson board, and then Dato John Wong. Following Mr Jones' appointment, nominations for two other directors were received, one of them from a company in which Allied Group had at least a 14% shareholding. The nominations were received within approximately an hour of each other, which appeared to the Panel to be too coincidental. The Panel infers that they were part of an attempt to gain greater influence over the affairs of Mount Gibson. This is supported by Mr Jones' comments regarding the discussions about having the nominations withdrawn, particularly insofar as Mr Lee was contacted for that purpose (see paragraph 20). The Panel does not consider that Mr Jones contacted Mr Lee because of Mr Lee's friendship with Ms Chong and better command of English. The Panel infers that Mr Lee was making or controlling the making of the decision about the board nominations.
74. Additionally, in a curiously timed transaction, an entity related to Shougang Holding acquired 19,754,646 shares (approximately 3.58%) in Mount Gibson, in April 2006. They were sold to an APAC-related entity shortly after the 2006 AGM.<sup>51</sup> These shares were voted in the same way as APAC's shares in support of the nominations and against the re-elections of Mr Willis and Mr Macliver. Shougang Holding gave its proxy to Mr Bogue after APAC (Mr Yue Jialin) contacted Mr Cao and asked if it would be willing to appoint an APAC representative as proxy. It was submitted to the Panel that Shougang Holding agreed because it had recently become a shareholder in APAC and did not have a strong preference for any of the candidates for election to the board. The Panel did not accept this reason as credible.
75. The Panel was satisfied that COL Capital, which from the evidence it was satisfied was associated with APAC, had attempted to influence the composition of Mount Gibson's board and that Shougang Holding had agreed to participate in this by agreeing to support the nominations at the AGM.
76. The evidence of association between COL Capital and APAC includes:
  - (a) COL Capital is a substantial shareholder in APAC (it was submitted by Mount Gibson to be a 12.72% shareholder through interposed entities);

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<sup>51</sup> Application, para 4.1.

- (b) Ms Chong's (Executive Chairman of, and a significant shareholder in, COL Capital) role, which in the Panel's view was significant in giving effect to APAC's intentions regarding Mount Gibson;
  - (c) COL Capital withdrew its request for a general meeting to have its nominee (Dato Wong) appointed to the Mount Gibson board (whom Mount Gibson had declined to appoint) upon Mount Gibson agreeing to appoint Mr Jones to its board; and
  - (d) COL Capital sold its holding in Mount Gibson to APAC in October 2006 and Mr Jones remained on the Mount Gibson board after that sale.
77. The Panel drew an inference that Shougang Holding and COL Capital were associated in relation to controlling or influencing the board of Mount Gibson at the time of the 2006 AGM. The Panel did not consider that this alone led to the inference that Shougang and APAC were associates in relation to the Proposed Transaction. However, Shougang Holding and Shougang are associated, and COL Capital and APAC are associated, and this prior association and pattern of behaviour made the Panel more comfortable in its conclusion (on the evidence and by drawing inferences) that Shougang and APAC were associates in relation to the Proposed Transaction.

### Third basis - structural links between Shougang and APAC

#### A. Shareholding structure

78. The diagram at paragraph 4 identifies shareholding relationships, which in the Panel's view support its conclusions. In particular, Shougang Holding has a 14.81% shareholding in APAC. Shougang Holding decided to invest in APAC in October 2006 (after APAC came out of receivership and control passed to Profit Harbour) on being approached by Mr Yue Jialin (owner of Profit Harbour and subsequently Chairman of APAC).<sup>52</sup>

#### B. Shougang and APAC common directorship - Cao Zhong

79. Mr Cao is the managing director of both Shougang and Shougang Holding, and Executive Chairman of APAC. He joined the board of APAC at the invitation of Mr Yue, not by being nominated by Shougang Holding.<sup>53</sup>
80. Mr Cao has attended many of the critical meetings. He has been a long-standing friend of Mr Lee's. He did not speak at meetings where it might be expected that he would, and appeared to allow Mr Lee to speak on behalf of APAC, and at other times, Shougang entities.<sup>54</sup> The Panel is satisfied that he did not distinguish between the interests of Shougang entities and the interests of APAC. It drew an inference that the interests were not divergent, and that there was a common purpose as between Shougang and APAC.

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<sup>52</sup> Shougang's submission on brief, annexure R, identifies Shougang Holding's interest in APAC at 23.83% on 1 January 2007 reducing to 14.81% on 29 February 2008.

<sup>53</sup> Mr Cao's statutory declaration 6 March 2008, para 29.

<sup>54</sup> For example, at the Hong Kong meeting.



81. When providing information to the Panel about the Beijing meeting, Mr Cao stated that he attended with Ms Chong “and others”.<sup>55</sup> Subsequently the Panel was advised that Mr Lee was present. He had been a friend of Mr Cao’s for 20 years, but was not mentioned by name. Moreover, this was the meeting in which Mr Cao raised the suggestion of an exchange of Gazmetall’s Mount Gibson shares for APAC shares. Initially his evidence did not disclose who made the suggestion. As it transpired, the suggestion had been made by Mr Cao.<sup>56</sup> And yet he stated to the Panel that he “did not regard this as a serious proposal”<sup>57</sup>. The Panel considered that Mr Cao was seeking to downplay APAC’s interest in the Mount Gibson share parcel and Mr Lee’s role.
82. While the Panel accepts that Mr Cao's competence in English may be such that he required a translator to participate in business meetings, the Panel prefers the view that, for reasons given elsewhere, the role of Mr Lee or Ms Chong was not, as submitted to the Panel, to attend relevant meetings in a capacity of a translator, or at any rate only to translate. The Panel draws the inference that they were present at meetings in their capacity as representatives of APAC as well.
83. The Panel notes that:
- (a) Mr Cao signed board minutes for APAC that were in English,<sup>58</sup>
  - (b) emails regarding the investment proposal for Shougang’s acquisition of the Mount Gibson shares were sent to Mr Cao in English,<sup>59</sup>
  - (c) Mr Cao swore statutory declarations for the Panel in English. They involved some complicated concepts that required close reading.<sup>60</sup>
84. In the Panel’s view, it is hard to understand the need for Mr Lee or Ms Chong to have attended certain meetings, even accepting that a translator might still be employed to ensure that there was no miscommunication (which in the Panel’s experience is not unusual at business meetings involving multiple languages). As noted, the Panel prefers the view that the role of Mr Lee or Ms Chong was not, as submitted to the Panel, to attend in a capacity of a translator, or at any rate only to translate. The Panel draws the inference that they were present at meetings in their capacity as representatives of APAC as well.
- C. *Shougang and APAC common representative – Shirley Chong*
85. At the time of the application to the Panel, Ms Chong held 300,000 shares and COL Capital held 2 million shares<sup>61</sup> in Shougang, out of an issued capital of 7 billion

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<sup>55</sup> Mr Cao’s statutory declaration 6 March 2008, para 30.

<sup>56</sup> Shougang’s submission on supplementary brief, para 23.

<sup>57</sup> Mr Cao’s statutory declaration 6 March 2008, para 30.

<sup>58</sup> Although no evidence was produced during the proceedings that the version provided to the Panel was a translation, the Panel has since been told by Shougang that minutes were accompanied by a Chinese language explanatory memorandum.

<sup>59</sup> Although no evidence was produced during the proceedings that the emails provided to the Panel had been explained to Mr Cao in Chinese, the Panel has since been told by Shougang that they were.

<sup>60</sup> Although no evidence was produced during the proceedings that the versions produced to the Panel were translations (and the brief specifically requested that they be formally translated if necessary), the Panel has since been told by Shougang that the statutory declarations were prepared as a result of discussions with Mr. Cao which were conducted in Chinese.

shares. Ms Chong has also been a friend of Mr Lee's for over 20 years and of Mr Cao's for approximately 4-5 years.

86. The Panel is satisfied that Ms Chong attended at least some of the meetings in connection with the sale of Gazmetall's shares in Mount Gibson as a representative of APAC. APAC's attendance at those meetings arose because of its planned association with Shougang. At other meetings however, Ms Chong's role was more ambiguous and the Panel has not drawn any inference from them.
87. However, the Panel has inferred that Ms Chong's request of Mr Jones to assist Shougang to negotiate for offtake (see paragraphs 22 and 52) is also evidence of an association between APAC and Shougang.

*D. Role of Alan Jones*

88. Mr Jones said that he is a non-executive director of three listed Allied Group companies.<sup>62</sup> He is a director of APAC. He was invited to join the board of APAC by Ms Chong, in July 2007. He is a non executive director of a company in which Mr Lee's family has an "interest", Mulpha Australia Ltd<sup>63</sup>; and, from 1985 to 2005, he was the managing director of Mulpha. Mr Jones arranged meetings for Mr Lee, and had discussions with him in connection with the affairs of Mount Gibson. The Panel is satisfied that Mr Jones is a nominee of Mr Lee. The Panel is satisfied that Allied Group is an associate of Mr Lee.
89. Mr Jones was nominated to the board of Mount Gibson by COL Capital, an entity that the Panel is satisfied is associated with APAC (see paragraphs 75 and 76).
90. Mr Jones sat on the boards of Allied and APAC, which the Panel infers was because he was an associate of Mr Lee.
91. The Panel draws the inference that, if Mr Jones was not acting on instructions to further the interests of Mr Lee and APAC regarding Gazmetall's shares in Mount Gibson, he was keeping information lines open that allowed Mr Lee and APAC to further their interests for themselves. One example of this is that Mr Jones had contact with Mr Lee in relation to the 2006 nominations to Mount Gibson's board. Mr Jones stated that he called Mr Lee, not Ms Chong, because of Mr Lee's superior English<sup>64</sup> but the Panel draws the inference that he called Mr Lee because Mr Lee was organising and behind the nominations.

*D. Common point of contact – Lee Ming Tee*

92. For the reasons given earlier, the Panel is satisfied that Mr Lee has links to APAC and to Shougang. The Panel infers that Mr Lee represents APAC and organised the association of APAC with Shougang.
93. The Panel has formed the view that Mr Lee is a successful and busy executive with many interests. Certainly, he is sufficiently influential to arrange "courtesy visit" meetings with a number of other international businessmen. He is said to have

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<sup>61</sup> Ms Chong's statutory declaration 6 March 2008, para 19.

<sup>62</sup> Mr Jones' statutory declaration 6 March 2008, para 29. Annexure 8 to the Application shows Mr Jones as a director of Sun Hung Kai Securities Limited, Allied Properties (H.K.) Limited and APAC.

<sup>63</sup> Mr Jones' statutory declaration 6 March 2008, para 24. The Lee's interest is in Mulpha's holding company.

<sup>64</sup> Mr Jones' statutory declaration 19 March 2008, para 5.

obtained no benefit from his attendance at various meetings.<sup>65</sup> The Panel could find no credible reason why he would commit his time, and spend money travelling to different parts of the world, for no apparent direct or indirect benefit to him or to any entity associated with him. The Panel infers that Mr Lee attended the meetings with the intention of obtaining a benefit, namely so as to arrange the placement of the Gazmetall stake in Mount Gibson with either APAC or with an associate of APAC.

#### **Fourth basis - Other dealings between APAC and Shougang**

##### *A. Prior investments*

94. COL Capital and Shougang entities have had prior business dealings together. Shougang Concord Technology Holdings Limited is a wholly owned subsidiary of Shougang Holding. In turn, it owned Printronics Group Ltd, which owned Printronics Electronics Ltd. On 11 July 2007, COL Capital (through its wholly-owned subsidiary, Famous Mount Investments Ltd) agreed to acquire 40% of Printronics Electronics for HK\$181 million (approximately). Printronics Electronics had made losses in the previous two years and its net asset value was approximately HK\$18 million. The reason for the deal was said to be to expand COL Capital's core business in strategic investment, although the disclosure to the Hong Kong Exchange did not illuminate the transaction greatly.
95. Mount Gibson submitted, and the Panel accepted, that this transaction demonstrated that APAC-related entities and Shougang-related entities have a propensity to deal with each other in a business context with a view to achieving common purposes.
96. This prior involvement also made the Panel more comfortable in its conclusion (on the evidence and by drawing inferences) that Shougang and APAC were associates in relation to the Proposed Transaction.

##### *B. Placement in APAC*

97. In October 2007, APAC placed 400 million shares to Shougang Holding for on-sale to other investors. Shougang Holding's shareholding in APAC declined as a result of the placement. Shougang and APAC submitted that the placement was structured and conducted in a manner consistent with market practice in Hong Kong.<sup>66</sup>
98. Nevertheless the Panel took the view that, while the placement is not conclusive evidence that the parties were associated for the purposes of the Proposed Transaction, it is a fact which added to the Panel's conclusion that there was an association between APAC and Shougang.

#### **Unacceptable circumstances by reason of association**

99. The Panel was satisfied that Shougang is an associate of APAC because:
  - (a) it is a person with whom APAC has a relevant agreement for the purpose of controlling or influencing the conduct of Mount Gibson's affairs; and/ or

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<sup>65</sup> Ms Chong's statutory declaration 10 March 2008, para 11.

<sup>66</sup> Shougang's submission on brief, para 25. APAC' submission on brief, para 25.1.

- (b) it is a person with whom APAC is acting in concert in relation to Mount Gibson's affairs.
100. The Panel is satisfied that Shougang and APAC were not simply two persons separately and coincidentally acting in the same manner.
101. Under section 606(1)(c), a person must not acquire a relevant interest in issued voting shares in a company if, because of the transaction, that person's or someone else's voting power in the company increases to more than 20% (but below 90% if the starting point is above 20%).
102. Under section 610, a person's voting power is that person's and their associates' votes as a percentage of the total votes.
103. Shougang's entry into the Share Sale Agreement and Option Agreement caused, or its acquisition of Gazmetall's shares in Mount Gibson would cause, its voting power to increase to more than 20% and APAC's voting power to increase from more than 20% to less than 90%.
104. The Panel has considered the policy of the takeovers provisions, the size of the voting power concerned here, the circumstances of the acquisition and the public interest and it appears to the Panel that, pursuant to section 657A(2)(c), the circumstances are unacceptable because they constitute or give rise to a contravention of chapter 6.

**Unacceptable circumstances by reason of effect**

105. Alternatively, Mount Gibson submitted that, even if Shougang and APAC were not associates within the meaning of section 12 of the Act, if the proposed transaction proceeded Shougang and APAC would control approximately 40% of Mount Gibson. The relationship between Shougang and APAC was therefore such that:
- (a) control of Mount Gibson would be acquired other than in an efficient, competitive and informed market; and
  - (b) the acquisition would be unacceptable having regard to -
    - (i) Mount Gibson's shareholders not having an opportunity to consider the proposal;
    - (ii) Mount Gibson's shareholders not having an equal opportunity to participate in any benefits resulting from the proposed transaction; and
    - (iii) the diminution of the potential for other parties to make a takeover bid for Mount Gibson.<sup>67</sup>
106. Shougang submitted that it was not open for the Panel to make a declaration of unacceptable circumstances unless the Panel actually determined that APAC and Shougang were associates for the purposes of section 12 of the Act. The Panel did make that determination.
107. The Panel considered that the relationship between APAC and Shougang gave rise to unacceptable circumstances because of the effect on control or potential control of Mount Gibson because the parties were associated and because of their

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<sup>67</sup> Application para B1(b)(2).

relationship. Further the Panel considers that the entry into the Share Sale Agreement and the Option Agreement of itself gave rise to unacceptable circumstances.

### Decision

#### *Circumstances unacceptable*

108. It appears to the Panel that the circumstances of Shougang's proposed acquisition of Gazmetall's shares in Mount Gibson are:
- (a) unacceptable having regard to the effect that the Panel is satisfied that the circumstances have had, are having, or are likely to have, on the control or potential control of Mount Gibson,
  - (b) unacceptable because they:
    - (i) constituted, constitute, will constitute or are likely to constitute a contravention of a provision of chapter 6; or
    - (ii) gave, or give rise to, or will or are likely to give rise to, a contravention of a provision of chapter 6, and
  - (c) otherwise unacceptable having regard to the purposes of chapter 6 set out in section 602.
109. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances in relation to the circumstances and the affairs of Mount Gibson.
110. The Panel has had regard to the matters in section 657A(3) of the Act.
111. Accordingly, under section 657A of the Act, the Panel declared that the circumstances constituted unacceptable circumstances in relation to the affairs of Mount Gibson. A copy of the declaration is annexure A.

#### *Orders*

112. Under section 657D, the Panel is empowered to make "any order"<sup>68</sup> including a remedial order. A remedial order includes an order cancelling any agreement in connection with the acquisition of securities or relevant interest in securities.<sup>69</sup>
113. Four tests must be met:
- (a) the Panel has made a declaration under section 657A. This it did on 31 March 2008.
  - (b) the Panel must not make an order if it is satisfied that the order would unfairly prejudice any person. The Panel was satisfied that the order would not unfairly prejudice any person. While it would involve some prejudice to Shougang, it was not unfair prejudice. No other party appeared to have any legitimate claim of prejudice.
  - (c) the Panel must give any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. The Panel sought

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<sup>68</sup> Other than an order requiring a person to comply with a provision of chapters 6, 6A, 6B or 6C.

<sup>69</sup> Paragraph (k) of the definition of "remedial order" in section 9.

submissions on its proposed orders. The time for submissions was very short. This was due to the deadline under the contract (for conditions to be met) expiring on the same day as the Panel made its declaration, namely 31 March 2008. The parties did not make submissions opposing the Panel's proposed orders.

- (d) the Panel must consider the orders appropriate to either –
- (i) protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons; or
  - (ii) ensure that a takeover or proposed takeover proceeds as it would have if the circumstances had not occurred.

The Panel considered the orders appropriate protect the rights and interests of persons affected by the unacceptable circumstances.

114. Mount Gibson, in its application, sought an order prohibiting completion of the Proposed Transaction. Instead, the Panel proposed cancelling the Share Sale Agreement and Option Agreement. The Panel considered that this order gave better effect to the intention of the Panel without leaving potential rights and obligations extant under the agreement (although the Panel notes that as events transpired the agreement would have ended according to its terms).
115. Accordingly, the Panel ordered that the Share Sale Agreement and Option Agreement be cancelled. A copy of the orders is annexure B.
116. Mount Gibson made further submissions that other orders should be made, which the Panel has not accepted. See the discussion at paragraphs 9 to 11.

#### *Costs*

117. Mount Gibson applied for its costs on the basis that it was required to undertake a detailed factual inquiry and had incurred significant out-of-pocket costs.
118. Mount Gibson's application was more than 100 pages long, plus hundreds pages of annexures. The Panel's briefs, and the parties' submissions and rebuttals, were extensive, in part because of this. Consistent with the intention of the legislation to have matters dealt with in a timely way, it is important to be succinct and on point.
119. Mount Gibson made a credible case, but almost overwhelmed it by the volume of additional material, which caused the proceedings to be longer than might have been the case. Given the length and structure of the application and the volume of material, each party has incurred costs beyond what, in the Panel's view, may have been necessary.
120. Accordingly the Panel has concluded that the costs should lie where they fall and makes no order as to costs.

**John Fast**

**President of the Sitting Panel**

**Date of decision: 31 March 2008**

**Date reasons published: 7 May 2008**



**Annexure A**  
**Corporations Act**  
**Section 657A**  
**Declaration of Unacceptable Circumstances**

**In the matter of MOUNT GIBSON IRON LIMITED**

**WHEREAS**

1. Mount Gibson Iron Limited is a listed public company (**Mount Gibson**).
2. Gazmetall Holding (Cyprus) Ltd (**Gazmetall**) entered a proposed transaction with Shougang Concord International Enterprises Company Limited (**Shougang**) under which it agreed:
  - (a) to sell approximately 9.74% of Mount Gibson shares to Shougang and
  - (b) to grant Shougang an option to acquire its remaining holding of approximately 9.98% of Mount Gibson shares(together the **Proposed Transaction**).
3. APAC Resources Limited (**APAC**) at the time of the application held approximately 20.19% of Mount Gibson shares.
4. The Panel considers that Shougang is associated with APAC:
  - (a) under section 12(2)(b) of the Corporations Act for the purpose of controlling or influencing the conduct of Mount Gibson's affairs, or alternatively
  - (b) under section 12(2)(c) of the Corporations Act in relation to the affairs of Mount Gibson.
5. By reason of the Proposed Transaction, Shougang's and APAC's voting power in Mount Gibson is increased to approximately 39.91% other than through one of the exceptions in section 611 of the Corporations Act.
6. The Panel considers that the circumstances surrounding the Proposed Transaction are unacceptable because they constitute or give rise to a contravention of section 606 of the Corporations Act.
7. In the alternative, it appears to the Panel that the circumstances surrounding the Proposed Transaction:
  - (a) are unacceptable having regard to the effect that the Panel is satisfied that the circumstances have had, are having, or are likely to have, on:
    - (i) the control or potential control of Mount Gibson; or
    - (ii) the acquisition or proposed acquisition of a substantial interest in Mount Gibson; or
  - (b) are otherwise unacceptable having regard to the purposes of Chapter 6 set out in section 602 of the Act.

8. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances in relation to the circumstances and the affairs of Mount Gibson.
9. The Panel has had regard to the matters in subsection 657A(3) of the Act.

## **DECLARATION**

Under section 657A of the Act, the Takeovers Panel declares that the circumstances set out above constitute unacceptable circumstances in relation to the affairs of Mount Gibson.

**Alan Shaw**

**Counsel**

**With authority of John Fast**

**President of the Sitting Panel**

**Dated 31 March 2008**





**Annexure B  
Corporations Act  
Section 657D  
Orders**

**IN THE MATTER OF MOUNT GIBSON IRON LIMITED**

**PURSUANT TO:**

10. A declaration of unacceptable circumstances in relation to the affairs of Mount Gibson Iron Limited (**Mount Gibson**) made by the Takeovers Panel (**Panel**) on 31 March 2008 under section 657A of the Corporations Act 2001 (Cth) (**Act**); and
11. Section 657D of the Act,

**THE PANEL ORDERS THAT**

12. The share sale agreement between Gazmetall Holding (Cyprus) Ltd (**Gazmetall**) and Shougang Concord International Enterprises Company Limited (**Shougang**) dated 31 January 2008 for the sale of 77,436,215 shares in Mount Gibson by Gazmetall to Shougang (**Share Sale Agreement**) is cancelled; and
13. The option agreement between Gazmetall and Shougang dated 31 January 2008 granting an option by Gazmetall to Shougang to acquire 79,333,682 shares in Mount Gibson, conditional on completion under the Share Sale Agreement, is cancelled.

**Alan Shaw  
Counsel  
with authority of John Fast  
President of the Sitting Panel  
Dated 31 March 2008**