

TAKEOVERS PANEL ISSUES GUIDANCE ON SHAREHOLDER REQUISITIONS AND UNDISCLOSED ASSOCIATIONS

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Legal Briefings - By **Rodd Levy, Sam Kings and Amber Kennedy**

The Takeovers Panel recently found that unacceptable circumstances existed in relation to Aguia Resources in the context of a shareholder requisitioned meeting to change the composition of the company's board. Whilst the Panel has generally been reluctant to interfere with shareholders' rights to spill the board, this decision shows that the Panel will step in where there is sufficient evidence of an undisclosed association and intervention is in the public interest.

IN BRIEF

- Despite its general unwillingness to undermine the exercise of legitimate shareholder rights, the Panel will intervene where there is sufficient evidence of an undisclosed association and intervention is in the public interest.
- The decision gives the market guidance on what the Panel will take into account when deciding whether to take action in relation to a board spill.

BACKGROUND

In April and May 2019, Aguia Resources received notices under section 249D of the Corporations Act requesting that the directors call a shareholders' meeting to consider the removal of 4 of the company's 6 directors and the appointment of several new directors. The requisition notice was sent by 3 shareholders (Kemosabe Capital, Henderson International and David and Harry Shearwood as trustees for the David K Shearwood DIY Superannuation Fund) who between them held about 6.60% of the Aguia Resources shares.

Aguia Resources shareholders were to vote on the removal of the directors, and the appointment of the proposed new directors, in mid-June. However, on 1 May 2019, Aguia Resources applied to the Panel for a declaration of unacceptable circumstances. In its application, Aguia Resources alleged there was an undisclosed association between:

- the requisitioning shareholders, plus some other shareholders (who between them held about 7.30% of the Aguia Resources shares); and
- those same shareholders and over 100 other Aguia Resources shareholders (including clients of financial adviser Kemosabe Capital, one of the requisitioning shareholders), who between them held about 22% of Aguia Resources' shares, because they collectively agreed to vote in favour of the resolutions proposed by the requisitioning shareholders.

According to Aguia Resources, these shareholders breached the Corporations Act by not filing substantial holding notices showing their true voting power. Aguia Resources said that some of the shareholders' voting power was also in excess of 20% in contravention of the Corporations Act.

Aguia Resources sought interim orders that the alleged associates be prevented from acquiring or disposing of their shares or voting on the proposed resolutions.

THE TAKEOVERS PANEL'S DECISION

The Panel decided there was sufficient evidence of an undisclosed association between some of the shareholders (including the requisitioning shareholders). Given their shareholdings in Aguia Resources and the fact none of them had issued substantial holding notices, this meant the substantial holding provisions had been breached.

In the Panel's view, this constituted unacceptable circumstances and it was in the public interest for the market to be updated as to the undisclosed arrangements. The Panel made orders requiring each shareholder to give Aguia Resources a notice (which was to be released to the ASX) disclosing the existence and nature of the relevant association and their voting power.

After the decision, the directors who were subject of the proposed removal resolutions resigned from the board. The proposed new directors were appointed by Aguia Resources shareholders at the requisitioned meeting.

TAKEOVERS PANEL ISSUES GUIDANCE

The Panel's decision in *Aguia Resources* gives the market guidance on when the Panel will intervene in a board spill.

In summary:

- the Panel sees the accumulation or exercise of voting power without proper disclosure (including disclosure of any substantial holdings) in the context of board composition as a 'control issue';
- the applicant must show sufficient evidence of an undisclosed association (which may include inferences where appropriate) for the Panel to conduct proceedings, and ultimately to decide there is unacceptable circumstances;
- the Panel is likely to be concerned if the alleged associates have acquired shares around the time the requisition notice is sent, or if it is shown they have collective plans for the company's management;
- even if a person's voting power exceeds 20%, the Panel will need to be convinced the alleged associates acquired a relevant interest in each other's shares by agreeing to vote in favour of the relevant resolutions;
- the Panel is likely to be less concerned if the requisitioning shareholders propose to appoint directors with whom they are not aligned and any alleged association is unlikely to continue after the board is changed;
- a contravention of the substantial holding provisions can give rise to unacceptable circumstances. However, it is less likely to be in the 'public interest' for the Panel to intervene in a potential board spill for a contravention of these provisions alone (especially where it is not material or the market is not misinformed); and
- a delayed application is likely to be viewed poorly and may increase the Panel's reluctance to intervene.

As outlined in our recent article [Thrills and \(board\) spills – the Takeovers Panel again shows it is reluctant to interfere with shareholder requisitioned meetings](#), the Panel had regard to many of the same factors in deciding not to conduct proceedings in *Australian Whisky Holdings* (including the need for sufficient evidence of association and the impact of a delayed application).

The position has also been revisited by the Panel since *Aguia Resources*. In late July, the Panel conducted proceedings in *Aurora Absolute Return Fund*, though, in the end, did not feel there had been a breach of the Corporations Act. In that case – which involved an alleged undisclosed association between unitholders seeking to replace a fund’s responsible entity – the Panel (quoting the *Aguia Resources* decision) noted the importance of shareholders being able to hold directors (or the responsible entity in the case of a managed investment scheme) accountable. The Panel also highlighted that, again as in *Aguia Resources*, it must consider whether any action it may take is in the public interest. The Panel’s approach in *Aurora Absolute Return Fund* reaffirmed the guidance given to the market in *Aguia Resources*.

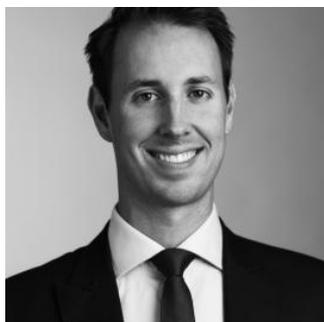
It is clear the Panel is unlikely to take action in relation to a board spill unless certain requirements are met (including that to do so would be in the public interest). While this has not changed since *Australian Whisky Holdings*, the decisions in *Aguia Resources* and *Aurora Absolute Return Fund* give the market guidance on the specific factors the Panel will consider when deciding whether to intervene. This is a welcome development.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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