



In the matter of Aztec Resources Limited 02
[2006] ATP 30

Catchwords:

Alternative or rival proposals; application prior to negotiations; Disclosure in target's statement; misleading statements; supplementary disclosure; comparative share price charts comparative share price and index charts; effect of capital raisings on share price and over premium; effect of commencing production; truth in takeovers; withdrawal of application

Corporations Act section 636

Aztec Resources Limited 01 [2006] ATP 28;

Guidance Note 16 Correction of Takeover Documents

Mount Gibson Iron Limited, Aztec Resources Limited

These are the Panel's reasons for its decision to consent to Mount Gibson Iron Limited withdrawing its application to the Panel dated 14 September 2006. The application sought a declaration of unacceptable circumstances in relation to disclosure in Aztec's target's statement. It was made under section 657A¹ of the Corporations Act 2001 (Cth).

SUMMARY

1. These reasons relate to an application (the **Application**) to the Panel from Mount Gibson Iron Limited (**Mount Gibson**) dated 14 September 2006 in relation to the affairs of Aztec Resources Limited (**Aztec**).
2. Mount Gibson submitted that there were deficiencies in the disclosure made in Aztec's target's statement (**Target's Statement**) relating to issues including:
 - (a) Aztec's use of comparative share price charts in the Target's Statement;
 - (b) the effect of recent equity raisings on the Aztec share price;
 - (c) Aztec's comments about consolidation of the iron ore industry, and Mount Gibson's activities in the area; and
 - (d) approaches which Aztec said it had received from third parties, and may result in "alternative proposals" for Aztec.
3. Mount Gibson sought a declaration of unacceptable circumstances under section 657A and final orders including corrective disclosure.
4. Following preliminary submissions from parties, and without conceding that the disclosure in the Target's Statement was deficient, Aztec provided a supplementary target's statement (**Supplementary Target's Statement**) to the Panel which addressed a number of the issues raised by Mount Gibson. After reviewing the document, and comments from Mount Gibson, the Panel advised Aztec that the document satisfied the Panel's concerns as to the disclosure issues raised by Mount Gibson, and Aztec published the document.

¹ Unless otherwise specified, all statutory references are to the Corporations Act.

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5. In light of the further disclosure by Aztec, Mount Gibson requested the Panel's consent to the withdrawal of the Application.
6. The Panel considered that Aztec's further disclosure had ensured that the market and Aztec shareholders were adequately informed. The Panel considered that continuing the proceedings would not be likely to benefit the parties or their shareholders, or the market generally. Accordingly, the Panel consented to Mount Gibson withdrawing the Application.

THE PANEL & PROCESS

7. The President of the Panel appointed Brett Heading (sitting Deputy President), Peter Mason and Alice McCleary (sitting President) as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the Application.
8. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.
9. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

APPLICATION

Background

10. Mount Gibson received the Target's Statement on 12 September 2006. Mount Gibson made its Application to the Panel on 14 September 2006.
11. Mount Gibson noted in its Application that *"given the limited timing from the receipt of the Target's Statement on 12 September 2006 and the present scheduled close of the offer at 5pm (Perth, Western Australia time) on 29 September 2006, this application has been made without prior notice to Aztec. Notwithstanding this, Mount Gibson confirms it is willing to dispose of this matter on receipt of appropriate undertakings from Aztec and is willing to work constructively with Aztec and its advisors to that end."*
12. On 18 September 2006, Mount Gibson extended its offer period to 6 October 2006.
13. Mount Gibson's Application raised a number of issues in relation to the Target's Statement.

Misleading use of comparative charts

14. Mount Gibson complained that Aztec's statement in its Target's Statement that *"typically, the value of the shares of companies such as Aztec, whose principal assets are development assets (such as the Koolan Island Project), increase as development risks are mitigated and production commences"* and Aztec's use of comparative share price charts for Oxiana Limited (**Oxiana**) and Kingsgate Consolidated Limited (**Kingsgate**) to demonstrate this statement², were misleading. In Mount Gibson's view:

² In both cases, the company's share price increased at a significant rate after the company reached production stage.

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- (a) the charts and accompanying wording suggested that the increases in Oxiana and Kingsgate's share price were due solely to their projects progressing from development into production stages;
- (b) by including the Oxiana and Kingsgate share price charts Aztec had represented that Aztec's share price would perform in the same manner; and
- (c) the share price charts showed only positive examples of companies moving from development into production without disclosing examples of companies that had had difficulties moving into the production phase and such disclosure implied that there were no risks involved in the development phase of production.

Price affected by equity raising

15. Mount Gibson also submitted that the statement made by Aztec's directors in the Target's Statement that "*the market price of Aztec Shares was constrained following significant issuance of Aztec equity... In the view of Aztec's Directors, the rights issue price and options exercise price (being 17 cents per share) set a benchmark for Aztec Shares during the currency of these issues, which did not reflect appropriate value for the Company*" was misleading because the Aztec directors proceeded with the equity issues at the relevant price and knowing their consequent effect on Aztec's capital structure.
16. Mount Gibson submitted that the statement was misleading because it implied that the Aztec share price, at the time of Mount Gibson's bid, was "artificially low" and accordingly, the premium offered by Mount Gibson was, in fact, lower than it appeared to be.

3 Way Merger discussions

17. Mount Gibson submitted that statements made in the Target's Statement concerning "3 way merger discussions" which took place between Mount Gibson, Aztec and Gindalbie Metals Limited were misleading as they encouraged speculation as to the likelihood of a possible merger between Mount Gibson and Gindalbie when this was clearly not Mount Gibson's intention.

Alternative proposals and Mount Gibson's blocking stake

18. Mount Gibson complained about statements Aztec had made in its Target's Statement regarding approaches received from third parties:
*"Aztec is engaged in discussions with these third parties, which may or may not result in some other opportunity being presented to Aztec either during the course of the Mount Gibson offer or at some later stage...
You should be aware that acceptance of the Mount Gibson Offer may prevent you from participating in the benefit of any such alternative opportunities."*
19. Mount Gibson submitted that the Target's Statement was misleading because it did not elaborate on the "alternative proposals".
20. Furthermore, Mount Gibson contended that the Target's Statement was misleading because it failed to note that:

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- (a) Aztec's major shareholder, Cambrian Mining plc (**Cambrian**) had granted a call option to Mount Gibson over (at the time of the Target's Statement) 15.24% of Aztec's shares;
- (b) on exercise of the option, Mount Gibson would be in a position to "block" compulsory acquisition; and
- (c) given Cambrian's publicly stated position of support for Mount Gibson's bid, it was likely Cambrian would not vote in favour of any alternative proposal that did not involve a superior offer.

Declaration and orders sought in the Application

21. Mount Gibson requested the Panel to make a declaration of unacceptable circumstances under section 657A(2) of the Act in relation to the affairs of Aztec and a number of final orders under section 657D(2) that:
- (a) Aztec prepare a Supplementary Target's Statement to correct the "misleading" statements raised in the Application.
 - (b) Aztec place corrective advertisements in national and Western Australian newspapers.

DISCUSSION

22. In considering the Application, the Panel noted Guidance Note 16 (Correction to takeover documents) which provides (in relevant part):

The Panel encourages parties to try to resolve disagreements concerning the completeness and accuracy of information provided to [shareholders] and the market promptly and, where possible, without recourse to the Panel's procedures.

The Panel prefers the Critic to give that list promptly and directly to the person responsible for the relevant document rather than communicate indirectly through the press or apply to the Panel immediately. The Panel prefers to see commercial parties try to resolve these information difficulties speedily, directly and cooperatively. It recognises, however, that there is a balance which needs to be struck in this, as negotiations may reduce the time available for an application to be made and considered properly by the Panel before a critical date.

23. As noted above, Mount Gibson acknowledged in its Application that it had not attempted to resolve the disclosure issues with Aztec before coming to the Panel. The Panel was not satisfied, however, that Mount Gibson's reason for doing so (that the offer was scheduled to close on 29 September) was adequate to excuse Mount Gibson from any attempt at negotiation. At the time the Application was received, the Panel considered that it was highly likely that Mount Gibson would extend its offer given the very low level of acceptances of its bid (less than 1%), and that the closing date of Mount Gibson's offers was within Mount Gibson's control. As noted above, on 18 September 2006, Mount Gibson extended its offer period thereby alleviating some of the urgency of the Application.
24. Accordingly, the Panel encouraged the parties to cooperate in good faith and attempt to resolve the disclosure issues, without the Panel's intervention.

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25. The Panel advised the parties that, based on its preliminary review of the Application, the Panel considered that there were 3 issues which could be addressed by Aztec in supplementary disclosure:
- (a) *Clarification of Aztec's use of comparative charts in its Target's Statement* – the Panel considered that (for example) republishing the Oxiana and Kingsgate charts with the inclusion of the relevant sector index for each of Oxiana and Kingsgate would reduce the risk that Aztec shareholders might be misled if sector wide effects were significant to Aztec shareholders' assessment of the weight or meaning to place on the Oxiana and Kingsgate charts;
 - (b) *alternative proposals* –
 - (i) update: the Panel suggested that Aztec should provide a timely update to the market about the status of any alternative proposals; and
 - (ii) Mount Gibson's 15.24% stake – the Panel considered that there should be an acknowledgement of the stake held by Mount Gibson (as a result of exercising the Cambrian option), and an indication that a person considering an alternative proposal would be likely to take that stake into account when deciding whether or not (and in what form) to make a rival proposal.
26. The Panel indicated that, subject to the above matters, it was not minded to commence proceedings, but said that it may re-consider this in the event that good faith negotiations did not produce an acceptable outcome for all parties.

DECISION

27. Aztec provided further disclosure in the form of a draft Supplementary Target's Statement which addressed (among other things) the issues set out in paragraph 25 above as follows (and noted that those issues were addressed in response to Mount Gibson's Application):
- (a) *in relation to the comparative share price charts*, Aztec provided replacement charts of the share prices of Oxiana and Kingsgate which included the AGC/Macquarie Gold Index, the ASX 200 index and the spot gold price (in US and Australian dollars). The Oxiana share price was also compared against the ASX 300 materials index. The disclosure also contained further cautionary statements that the "Aztec Directors cannot give any assurance that the Aztec Share price will replicate that of Oxiana and Kingsgate" and included a cross-reference to the discussion in the Target's Statement of key risks in the development and ongoing operations of the Koolan Island Project; and
 - (b) *in relation to alternative proposals*:
 - (i) Aztec noted that it continued to be engaged in discussions with third parties in relation to "alternative opportunities" but that none had (at that stage) resulted in another opportunity being presented to Aztec; and
 - (ii) in relation to Mount Gibson's 15.24% stake, Aztec noted the existence of that stake and Mount Gibson's ability to vote and potentially influence the outcome of an alternative proposal. Aztec also noted that Cambrian had accepted Mount Gibson's Offer for the remainder of its holding on 19

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September 2006 and that, if the Offer became unconditional, Mount Gibson would have a shareholding of 31.91% in Aztec. Aztec stated that this was likely to limit the number and nature of alternative opportunities available to Aztec's shareholders.

28. After reviewing the draft document, and Mount Gibson's comments on the draft document, the Panel advised parties that it considered that the document addressed the disclosure issues with which the Panel had had concerns. Aztec then issued the Supplementary Target's Statement.
29. In light of the Panel's advice, and the further disclosure by Aztec described above, Mount Gibson requested the Panel's consent to the withdrawal of the Application.
30. The Panel considered that Aztec's further disclosure had ensured that the market and Aztec shareholders were adequately informed. The Panel considered that continuing the proceedings would not be likely to benefit the parties or their shareholders, or the market generally. Accordingly, the Panel consented to Mount Gibson withdrawing the Application.

Alice McCleary

President of the Sitting Panel

Decision dated 26 September 2006

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