



**In the matter of Azumah Resources Limited  
[2006] ATP 34**

**Catchwords:**

*Acting in concert; agreement to stand as director; removal of directors; association; beneficial ownership notices; declaration of unacceptable circumstances; common directors; disclosure; substantial holder notices; substantial holding; tracing notice; voting arrangements*

*Corporations Act 2001 (Cth), sections 606, 657A, 671B, 672A, 672B*

*Flinders Diamonds Ltd v Tiger International Resources Inc (2004) ACSR 199*

Azumah Resources Limited; Azumah Resources (Ghana) Limited; Bluesky Resources Limited, Bluestar Resources Limited; City Corporate Services Limited; Eaglehand Limited; Falconsand Limited; Redstar Resources Limited; Trailstar Limited

**These are the Panel's reasons for deciding to make a declaration of unacceptable circumstances and orders in relation to the affairs of Azumah Resources Limited.**

**SUMMARY**

1. These reasons relate to an application (the **Application**) to the Panel from Azumah Resources Limited (**Azumah**) dated 26 September 2006 in relation to the affairs of Azumah.
2. In its Application, Azumah sought a declaration of unacceptable circumstances in respect of:
  - (a) the responses of the Bluesky Resources Limited (**Bluesky**), Trailstar Limited (**Trailstar**), Redstar Resources Limited (**Redstar**), Bluestar Resources Limited (**Bluestar**) and Falconsand Limited (**Falconsand**) (the **Vendors**) to tracing notices, which Azumah submitted gave rise to contraventions of section 672B(1) of the Corporations Act (**Act**)<sup>1</sup>;
  - (b) the alleged failure of Henry Wiechecki (**Wiechecki**), Paul Amoako-Atta (**Amoako**), Yaw Benneh Amponsah (**Amponsah**) and David Harper (**Harper**) (the **Controllers**) and Michael Ivey (**Ivey**) to disclose details of substantial holdings and movements in such holdings, which Azumah submitted gave rise to contraventions of section 671B; and
  - (c) the arrangement or understanding that Azumah submitted existed between the Vendors to remove two of the directors of Azumah and replace them with their own nominees (**Relevant Agreement**), which Azumah submitted gave rise to a contravention of section 606.
3. The Panel decided that unacceptable circumstances existed as a result of the inadequate disclosure in the substantial holding notices and tracing notices in relation to the shareholders, Controllers and beneficial owners of the Vendors in respect of their holdings in Azumah and the failure to disclose the Controllers as

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<sup>1</sup> All statutory references in these reasons are to the Act, unless otherwise specified.

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beneficial owners of the Vendors in Azumah's prospectus (**Prospectus**). The Vendors, in total, held more than 35% of the voting shares in Azumah.

4. The Panel decided that the inadequate disclosure in the notices constituted unacceptable circumstances because, in the Panel's view, it constituted, or gave rise to, a contravention of section 671B and 672B. However, the Panel considered that the evidence presented to it did not establish that all of the Vendors were associated or that there had been a contravention of section 606 as submitted by Azumah.

## THE PANEL & PROCESS

5. The President of the Panel appointed Carol Buys, Kathleen Farrell (sitting President) and Heather Zampatti as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the Application.
6. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.
7. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

## APPLICATION

### Background

#### *Capital Structure of Azumah and IPO*

8. Azumah was incorporated on 23 December 2004.
9. On 25 October 2005, Azumah issued the Prospectus in connection with the issue of shares, including:
  - (a) 30,000,000 shares at an issue price of 20 cents each to raise \$6,000,000; and
  - (b) 21,250,000 shares (equating to 34% of Azumah) and 3,000,000 options to the vendors of the entire issued share capital of Eaglehand Limited (**Eaglehand**), a company limited by shares and incorporated in the Isle of Man. Eaglehand was the holder of all of the issued share capital of Azumah Resources (Ghana) Limited, a company incorporated in Ghana, (**Azumah Ghana**). Azumah Ghana was registered as the holder of a Reconnaissance Licence issued under the Mines and Minerals Law, 1986 of Ghana, registered as Land Registry Number 409/2005.
10. The vendors of the shares in Eaglehand were the Vendors. All of the Vendors were incorporated in the Isle of Man and had the same three directors. The Vendors also had the same shareholders (City Corporate Services Limited (**CCS**) and Harbour Nominees Limited (**Harbour**)) and shared the same registered office.
11. The Vendors had sold the shares in Eaglehand to Azumah pursuant to the provisions of a Share Sale Agreement dated 11 July 2005 as varied by a Deed dated 14 September 2005 and a letter agreement dated 19 September 2005 (**Acquisition Agreement**). The consideration payable to the Vendors under the Acquisition Agreement was \$350,000 and the shares and option set out in paragraph 9(b).

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12. The Prospectus contained a summary of the Acquisition Agreement (at p 61). The summary indicated that Amoako and Wiechecki had given detailed warranties regarding Eaglehand, Azumah Ghana and the Reconnaissance Licence and (with the Vendors) had jointly and severally indemnified Azumah in respect of breach of warranties or any failure by the Vendors to perform their obligations under the Acquisition Agreement. However, the Prospectus did not disclose the identity of the shareholders, controllers or beneficial owners of the Vendors, nor did it address the implications of the shares and options to be issued to the Vendors in relation to control or potential control of Azumah.
13. On 6 December 2006, the Vendors were issued with a total of 21,250,000 shares in Azumah as follows:

Name of Vendor	Number of shares	Percentage of Azumah's post-IPO issued capital
Trailstar	4,250,000	6.8%
Redstar	4,781,250	7.65%
Bluestar	4,250,000	6.8%
Bluesky	4,781,250	7.65%
Falconsand	3,187,500	5.1%
<b>Total</b>	<b>21,250,000</b>	<b>34%</b>

14. As at the date of the Application, the shareholding of the Vendors in Azumah was similar to that set out in paragraph 13, apart from Trailstar's holding being 5,046,875 shares, of which 796,875 were issued to Trailstar in consideration of the provision of "seed capital" prior to Azumah's initial public offering (IPO). Accordingly, the aggregate holding of the Vendors in Azumah was 35.28%.
15. In addition to the Vendors' holdings described in paragraphs 13 and 14 above, Azumah's share register disclosed that:
- (a) Wiechecki held 703,125 shares (1.13%);
  - (b) Amoako held 375,000 shares (0.60%);  
(these shares were issued to Wiechecki and Amoako in consideration of the provision of seed capital prior to the IPO); and
  - (c) M Ivey Pty Ltd held 84,614 shares (0.14%).

#### *Owners and controllers of the Vendors*

16. By declarations of trust dated 14 March 2005:
- (a) the holders of shares in Falconsand and Bluesky declared that they held those shares as nominee for Wiechecki; and
  - (b) the holders of shares in Bluestar declared that they held those shares as nominee for Amoako.
17. By declarations of trust dated 21 November 2005:

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- (a) the holders of shares in Trailstar declared that they held those shares as nominee for Harper; and
- (b) the holders of shares in Redstar declared that they held those shares as nominee for Harper (as to 78%) and Amponsah (as to 22%).

#### *Restriction Agreements*

18. As part of the IPO, drafts of restriction agreements were prepared for the Vendors and provided to Azumah. The following disclosures were made in the draft restriction agreements:
- (a) Bluestar disclosed that both CCS and Harbour held the shares in Bluestar on trust for Amoako;
  - (b) Falconsand disclosed that both CCS and Harbour held the shares in Falconsand on trust for Wiechecki;
  - (c) Bluesky disclosed that both CCS and Harbour held the shares in Bluesky on trust for Wiechecki;
  - (d) Redstar disclosed both CCS and Harbour each held one half of the shares in Redstar on trust for Wiechecki and Amponsah jointly; and
  - (e) Trailstar disclosed that CCS held its shares in Trailstar in trust for Wiechecki and Harbour held its shares in Trailstar on trust for Amponsah.
19. The final form of the restriction agreements executed by the Vendors did not contain these references as Australian Stock Exchange Ltd (**ASX**) was advised that as CCS and Harbour were in each case acting as “trustee or nominee”, the “controller” of the shares the subject of the restriction agreements was not required to be a party (refer ASX Listing Rule 9.1.4(b)).

#### *Notice of Initial Substantial Shareholder*

20. On 4 January 2006, Azumah was admitted to the Official List of ASX.
21. On 16 February 2006, each Vendor lodged a Notice of Initial Substantial Holder (Form 603) (**SH Notice**) under section 671B with Azumah, disclosing that it was the holder of the shares set out opposite its name as described in paragraph 13 and in the case of Trailstar the shares described in paragraph 14.<sup>2</sup> The Vendors did not identify any other person or associate having a relevant interest in those shares or controlling the Vendors.
22. None of the Controllers lodged a substantial holder notice.

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<sup>2</sup> It was submitted by the Controllers (and Azumah did not deny) that drafts of the substantial holder notices were prepared by Azumah’s company secretary, Mr Dennis Wilkins (**Wilkins**). The Controllers also submitted that Azumah was aware, at all material times, that Bluestar was controlled by Amoako and that Bluesky and Falconsand were controlled by Wiechecki. Azumah accepted, in general terms, that Wiechecki had told Mr Stephen Ross (**Ross**)(the Managing Director of Azumah) that he, Amponsah and Amoako were, in an unspecified way, behind the Vendors, but maintained that at no time did Wiechecki link an individual with a Vendor company. Azumah submitted also that the draft restriction agreements mentioned in paragraph 18 were an unreliable source of knowledge and were not brought to the directors' attention until after the Prospectus had been lodged.

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#### *Requisition of Meeting*

23. On 6 September 2006, Bluesky sent the following letters to Azumah:
  - (a) Letter A requested the directors to convene a general meeting (**Meeting**) for the appointment of Stephen Stone (**Stone**) and Ivey as directors of Azumah.
  - (b) Letter B gave notice of the moving of resolutions for the removal of Malcolm Macpherson and Erica Smyth as directors of Azumah.
24. Azumah submitted that, prior to receipt of Letters A and B, it had received no notice from Bluesky (or any other Vendor or Controller) of an intention or wish to change the composition of Azumah's board.<sup>3</sup>
25. The Meeting was convened for 3 November 2006.

#### *Tracing notice and voting intention of the Vendors*

26. On 8 September 2006, Azumah despatched notices under section 672A(1) (**Tracing Notice**) to each Vendor.
27. On 13 September 2006, Azumah received responses from the Vendors (each dated 12 September 2006) to the Tracing Notices (**Tracing Notice Responses**). These responses identified each relevant Controller as providing instructions relating to the acquisition of shares in Azumah to the relevant Vendor.
28. None of the Tracing Notice Responses disclosed that any other person had a relevant interest in the shares held by each Vendor.

#### *Voting intentions*

29. On 13 September 2006, Samuel John Bingham (a director and secretary of each Vendor (**Bingham**)) sent an email to Azumah (which was also faxed) (**Bingham Email**) "*forwarding as a matter of courtesy*", letters from each of the Vendors "*indicating the manner in which they intend to vote at the forthcoming members meeting*". Attached to Bingham's email (and fax) were letters (each in identical form) from Bluestar, Redstar, Trailstar and Falconsand, each dated 13 September 2006, and signed by Bingham in his capacity as director. The form of each letter was as follows:

#### *"Notice of intention to appoint directors*

*We have been made aware of the request to make certain changes to the Board of Azumah Resources Ltd. Specifically, we are aware that a shareholder has requested that the company call a general meeting to consider the removal of Mr MacPherson and Ms Smyth. In addition we are also aware a request has been made for the company to call a general meeting for the appointment of Mr Ivey and Mr Stone as directors of the company.*

*As a matter of courtesy we advise that our intention is to vote in favour of all the proposed resolutions at the general meetings when they are held".*

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<sup>3</sup> However, Ivey submitted that, on or around 26 August 2006, he informed Wilkins of his intention and the intention of Stone to nominate as candidates for directorships of Azumah and that this proposal had the support of Wiechecki. Ivey also submitted that he requested Wilkins to communicate this intention to Azumah's board.

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30. Attached to the Bingham Email was a copy of an email dated 12 September 2006 from Wiechecki addressed to Bingham (**Voting Intention Email**). The subject line of the email was:

*“Henry Wiechecki Re: AZM: indication of a voting intention”.*

The text of the email commenced:

*“John, Draft wording for a letter to indicate voting intention”.*

The remainder of the email is the template for the letter that each of Trailstar, Redstar, Bluesky and Falconsand sent to Azumah on 13 September 2006 as described in paragraph 29.

31. On 12 September 2006, Harper sent an email to Azumah urging Azumah to keep the fact of his interest as a beneficiary of the shares in Azumah held by Redstar and Trailstar a secret and acknowledging that up to that point his identity as a beneficiary had been *“concealed at my request”*.

#### *Ghananian parties*

32. Wiechecki was a geologist who lived and worked in Ghana. Ivey provided consultancy services or advice to Wiechecki in connection with Azumah’s IPO.
33. Amoako was the proprietor of a geological consultancy in Accra, Ghana operated by Terrex Limited and, was engaged by both Azumah and Castle to act for, and represent, them in Ghana.
34. Geodrill, Ghana was a business owned and controlled by Harper. Amponsah was the Financial Controller of Geodrill. Geodrill provided drilling services in Ghana to Azumah and Castle.
35. Amponsah was Managing Director and Amoako was a director of Carlie at the time that Azumah Ghana acquired the Tenement in connection with Azumah’s IPO and Carlie was acquired by Castle in connection with its IPO.

## APPLICATION

### Declaration sought

36. Azumah sought a declaration under section 657A that the following circumstances were unacceptable circumstances:
- (a) each Vendor failed to comply with section 672B by not disclosing the details required by that provision in response to a Tracing Notice;
  - (b) each Controller and Ivey failed to comply with section 671B by not disclosing the details required by that provision upon him beginning to have a substantial holding in Azumah and any movement of at least 1% in that holding;
  - (c) on a date or dates prior to 6 September 2006 and up to 13 September 2006, the Relevant Agreement between each of the Vendors and their respective Controllers themselves to vote their respective voting shares in Azumah to remove incumbent directors of Azumah and to replace them with their nominees.

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#### Orders sought

37. Azumah sought orders that the legal title to and beneficial ownership of the shares held by the relevant Vendors and their respective Controllers be vested in ASIC by transfer of those shares by the holders to the Australian Securities and Investments Commission (ASIC), to sell those shares upon such terms and conditions as the Panel considered appropriate.

## DISCUSSION

#### Prospectus

38. The Panel noted that the Prospectus did not disclose the identity of the shareholders, controllers or beneficial owners of the Vendors, nor did it address the implications of the shares and options to be issued to the Vendors in relation to control or potential control of Azumah.
39. The Panel considered that disclosure in respect of the interests of the Controllers in the Vendors should have been made in the Prospectus to enable investors to make an informed assessment in relation to Azumah's offer of shares and the control or likely control of Azumah after the IPO.

#### Substantial Holder Notice

##### *Further information required by section 671B*

40. Azumah submitted that the SH Notices provided by the Vendors were manifestly deficient as they did not disclose the information required under section 671B. Azumah also submitted that the Controllers did not lodge any substantial holder notice as required under section 671B.
41. The Controllers indicated their willingness to give revised substantial holder notices but did not admit any contraventions of the Act.
42. The Panel determined that the SH Notices failed to provide information required by section 671B, including as follows:
- (a) the notice given by Trailstar failed to:
    - (i) give the information required by paragraph 671B(3)(d) with respect to Harper, an associate acting in concert with Trailstar in relation to Azumah's affairs;
    - (ii) give details of the relevant interest of Harper arising from Harper's power to control the voting and disposal of Azumah shares held by Trailstar;
    - (iii) give details of declarations of trust dated 21 November 2005 under which the shares in Trailstar were held on trust for Harper; and
    - (iv) provide the documents and statements required by section 671B(4).
  - (b) The notice given by Redstar failed to:
    - (i) give the information required by paragraph 671B(3)(d) with respect to Harper and Amponsah, who were associates acting in concert with Redstar in relation to Azumah's affairs;

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- (ii) give details of the relevant interests of Harper and Amponsah arising from the power of Harper and Amponsah to control the voting and disposal of Azumah shares held by Redstar;
  - (iii) give details of declarations of trust dated 21 November 2005 under which the shares in Redstar were held on trust for Harper (78%) and Amponsah (22%); and
  - (iv) provide the documents and statements required by section 671B(4).
- (c) The notice given by Bluestar failed to:
- (i) give the information required by paragraph 671B(3)(d) with respect to Amoako, an associate acting in concert with Bluestar in relation to Azumah's affairs;
  - (ii) give details of the relevant interest of Amoako arising from Amoako's power to control the voting and disposal of Azumah shares held by Bluestar;
  - (iii) give details of declarations of trust dated 14 March 2005 under which the shares in Bluestar were held on trust for Amoako; and
  - (iv) provide the documents and statements required by section 671B(4).
- (d) The notice given by Bluesky failed to:
- (i) give the information required by paragraph 671B(3)(d) with respect to Wiechecki, an associate acting in concert with Bluesky in relation to Azumah's affairs;
  - (ii) give details of the relevant interest of Wiechecki arising from Wiechecki's power to control the voting and disposal of Azumah shares held by Bluesky;
  - (iii) give details of declarations of trust dated 14 March 2005 under which the shares in Bluesky were held on trust for Wiechecki; and
  - (iv) provide the documents and statements required by section 671B(4).
- (e) The notice given by Falconsand failed to:
- (i) give the information required by paragraph 671B(3)(d) with respect to Wiechecki, an associate acting in concert with Falconsand in relation to Azumah's affairs;
  - (ii) give details of the relevant interest of Wiechecki arising from Wiechecki's power to control the voting and disposal of Azumah shares held by Falconsand;
  - (iii) give details of declarations of trust dated 14 March 2005 under which the shares in Falconsand were held on trust for Wiechecki; and
  - (iv) provide the documents and statements required by section 671B(4).
43. The Panel also considered that each of the Controllers failed to give substantial holder notices in accordance with section 671B of the Act.

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*Draft SH Notices prepared by Azumah's company secretary*

44. It was submitted by the Controllers that drafts of the SH Notices were prepared by Wilkins, Azumah's company secretary.<sup>4</sup>
45. Wiechecki also submitted that he informed Stephen Ross (**Ross**), the Managing Director of Azumah, that he controlled Bluesky and Falconsand.
46. Azumah provided a witness statement from Ross in which he stated:  
*"I do not deny that I knew that Wiechecki and Amoako were behind the Vendors but I deny that Wiechecki ever told me that he controlled Bluesky and Falconsand."*
47. On the basis that Azumah's company secretary had prepared the SH Notices for the Vendors, the Controllers submitted that they believed that the SH Notices were sufficient to satisfy any obligation under the Act and that they sought to rely on the advice implicit in the provision of the notices by Azumah that this was the case.
48. The Panel noted that it is the obligation of the person who has a substantial holding, not the company in which the person holds that interest, to provide the substantial holding information required under section 671B. The Panel's decision in this matter highlights the importance of persons who may be substantial holders obtaining proper professional advice to ensure that they comply with the requirements of Chapter 6C in giving substantial holder notices and responding to tracing notices. The person who has a substantial holding must themselves take ultimate responsibility for ensuring proper completion of such notices. Those who fail to obtain appropriate professional advice in doing so must bear the consequences. Ignorance of the law is not a defence and will not determine whether or not circumstances are unacceptable.
49. The Panel decided that the inadequate disclosure in the SH Notices constituted unacceptable circumstances because, in the Panel's view, it constituted, or gave rise to, a contravention of section 671B of the Act.

### Tracing Notices

50. Azumah submitted that the Tracing Notice Responses provided by the Vendors were manifestly deficient as they did not comply with the requirements of section 672B of the Act.
51. The Panel determined that each Tracing Notice Response failed to provide information required by section 672B(1), including:
  - (a) details required by paragraphs 672B(1)(a) with respect to each Vendor's relevant interest; and
  - (b) names, addresses and details required by paragraphs 672B(1)(b) with respect to the respective relevant interests referred to above in the substantial holder notices discussion.

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<sup>4</sup> This was not denied by Azumah.

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#### Defences to deficient substantial holder disclosure and Tracing Notice Responses

52. The Controllers submitted that they had a number of defences available to them, including under:
- (a) section 671C(2)(a)<sup>5</sup> in relation to deficiencies in the SH Notices; and
  - (b) section 672F(2)(a)<sup>6</sup> in relation to the deficiencies in the Tracing Notice Responses.
53. The Panel did not consider that the submissions of parties concerning defences provided a basis for the Panel to decline to make a declaration of unacceptable circumstances. It was not necessary for the Panel to consider whether any contraventions involved an offence by any person or whether any defences would be available. Such matters can only be conclusively determined by a court. However, the Panel considered the submissions of the parties as one of the factors when considering the appropriate remedy and whether or not the remedy might unfairly prejudice any person.

#### Different treatment of Harper and the Vendors controlled by Harper

54. In submissions from parties, the Panel received evidence that Harper had deliberately sought to keep his identity, as a substantial holder, from both Azumah and the market. The evidence was that Harper sought to do so because he considered that disclosure of his interests in Azumah may, amongst other things, adversely affect his business interests in Ghana.
55. The Panel also noted that, while Wiechecki and Amoako were named in the Prospectus as giving warranties under the Acquisition Agreement, there was no reference to Harper in the Prospectus.
56. Based on the evidence provided, the Panel determined that Harper had intentionally not disclosed his interest in two of the Vendors. The Panel also considered that the market had no knowledge of Harper's interest in Azumah.

#### Association

57. Wiechecki submitted that each of the Vendors obtained a relevant interest in the shares of the others, prior to Azumah's IPO, under the Acquisition Agreement. Clause 5.4 of the Acquisition Agreement provided:
- "Without limiting clause 5.3, the Vendors agree that if, in the future, they wish to sell all of (sic) any of the Azumah Shares or the Azumah Options (or any shares into which the Azumah Options are converted) then they will first advise the Purchaser [ie Azumah] and the Parties will use their reasonable endeavours to facilitate the orderly sale of those Azumah Shares, the Azumah Options or the shares into which they are converted in a manner which seeks to generate the best available sale price."*
58. Wiechecki submitted that clause 5.4 of the Acquisition Agreement, together with a clause concerning warranties given by Wiechecki and Amoako, conferred a negative

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<sup>5</sup> It is a defence if the person who contravenes section 671B proves they contravened that section because of inadvertence or mistake.

<sup>6</sup> It is a defence if the person who contravenes section 672B proves they contravened that section because of inadvertence or mistake.

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control over disposal. In the Panel's view, clause 5.4 fell short of the kinds of pre-emptive rights that have been held to give rise to a relevant interest.<sup>7</sup> The clause requires a Vendor to advise Azumah before selling their shares, but does not specify how much notice must be given or suggest any timeframe within which the "reasonable endeavours" of the parties are to be employed. This suggests that any negative control can properly be regarded as minor or peripheral<sup>8</sup> and does not give rise to a relevant interest. Accordingly, the Panel was not satisfied that the Controllers had a relevant interest in each other's Azumah shares from the time that Azumah was floated.

59. Wiechecki submitted also that the Acquisition Agreement had the effect of making the parties to that agreement associates under either paragraph 12(2)(b) or (c).
60. The Panel has noted previously that, while the definition of 'associate' casts the net widely,<sup>9</sup> the fundamental policy concern is the accumulation and exercise of voting power.<sup>10</sup> The Panel was not persuaded that the Acquisition Agreement, of itself, gave rise to any continuing association for the purposes of Chapters 6 or 6C.

*Has an association or relevant interest arisen subsequently?*

#### *Common directors*

61. Azumah submitted that where two companies have the same boards, the Panel may readily infer that each company would know of the acts and intentions of the other company as and when they happened or were formed.
62. Harper submitted that the directors of CCS and Harbour act under the direction of the relevant Controller in relation to the affairs of each of the Vendors. Harper further submitted that the Controllers act independently of one another.
63. The Panel considered that the mere fact of the common directorships between the Vendors and the shareholders of the Vendors did not, of itself, make them associates since the Panel was satisfied that the directors and shareholders of each Vendor were nominees acting at the direction of the respective Controller of that Vendor.

#### *Ivey*

64. Azumah submitted that Ivey had entered into a relevant agreement with Wiechecki for the purpose of controlling or influencing the conduct of Azumah's affairs.
65. Ivey denied any association with any of the Vendors or Controllers. He submitted that no agreement of any type existed between him and any of the other parties named in the Application other than his consent to act as director.
66. Ivey submitted that he was approached by Wiechecki in July 2006 in relation to becoming a director of Azumah. Ivey agreed to Wiechecki's request on the proviso that Azumah was given notice of the intention to seek to reconstitute the Azumah

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<sup>7</sup> See *North Sydney Brick & Tile Co Ltd v Darvall (No 2)* (1986) 5 NSWLR 681; *Re Kornblums Furnishings Ltd* [1982] VR 123; cf *Foodland Associated Ltd v Garina Pty Ltd* (1989) 14 ACLR 739.

<sup>8</sup> *North Sydney Brick & Tile Co Ltd v Darvall (No 2)* (1986) 5 NSWLR 681 at 689.

<sup>9</sup> Especially on a broad reading of the definition of "affairs" in section 53, as applied to paragraphs 12(2)(b) and (c) by Corporations Regulation 1.0.18.

<sup>10</sup> See: *LV Living Limited* 2005 ATP 5 at [77]-[78]; *National Foods Limited* [2005] ATP 8 at [55]-[58].

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board (and not ambushed at Azumah's upcoming annual general meeting). Ivey also submitted that he suggested to Wiechecki that it may be difficult for him to work with the existing Azumah board and thought that it may be desirable to seek to replace both non-executive directors of Azumah. Ivey indicated that he had himself informed Wilkins (Azumah's company secretary) that he and Mr Stone intended to nominate as candidates for the board with Wiechecki's support. When Wilkins advised Ivey that the existing non-executive directors were not willing to step aside, Ivey advised Wiechecki that he would need to pursue the matter at a general meeting.

67. The Panel considered that, there was no material before it that indicated that Ivey had gone beyond agreeing to stand as a director (and indicating the conditions on which he would be willing to do so) and that that was not a basis for finding that Ivey was associated with any of the Vendors or Controllers.

#### *Requisition of Meeting*

68. Harper and Amoako separately submitted that in early September they were each contacted by Wiechecki, who was concerned about Azumah's share price and believed it was in Azumah's best interests to seek changes to the composition of the board.<sup>11</sup> Both Harper and Amoako submitted that they indicated to Wiechecki that they were not averse to Ivey's appointment. However, there was no evidence to suggest that either Harper or Amoako had encouraged the requisitioning of the Meeting.
69. Azumah submitted that the correspondence contained in the Bingham Email and the Voting Intention Email evidenced that the Vendors and the Controllers were acting in concert in relation to the affairs of Azumah.
70. Harper submitted that the proper inference for the Panel to draw from the Bingham Email and the Voting Intention Email was that Bingham simply adopted the draft provided by Wiechecki as a template for administrative ease. Harper provided a witness statement in which he indicated that, when asked by Bingham how he wanted Redstar and Trailstar to vote at the Meeting, he said, in effect that he would like them both to support the motions. Harper also indicated that he had agreed to Bingham's suggestion that he would write to Azumah "as a matter of courtesy" to let it know how Redstar and Trailstar would vote, but did not tell Bingham how the correspondence should be composed.
71. Amoako submitted that he had not given any instructions to Bluestar or any of its directors to vote his shares in favour of the motions.
72. Wiechecki submitted that the most the correspondence evidenced was that the Vendors may have had the same voting intention. He further submitted that the provisions of Chapter 6 were not intended to render directors of a company immune from the legitimate scrutiny and control of shareholders: *Flinders Diamonds Ltd v Tiger International Resources Inc* (2004) ACSR 199.

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<sup>11</sup> Both Amoako and Harper submitted that Wiechecki referred to Ivey as a potential appointment to the Azumah board. Harper also submitted that Wiechecki indicated that existing board members would be replaced. Amoako submitted that he thought Ivey would be an addition to the board, and had no idea (until later) that Wiechecki was going to requisition a meeting to replace directors.

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73. The Panel considered that although it had been presented with evidence that established that the Vendors had the same voting intentions this did not by itself establish that all of the Vendors were associated, that there was a relevant agreement in relation to voting the Vendors' shares in Azumah, or that there had been a contravention of section 606 submitted by Azumah.

## DECISION

### Declaration

74. The Panel considered that there had been contravention of the substantial holding notice and tracing notice provisions of the Act, particularly in relation to disclosure of the Controllers and beneficial owners of the Vendors. The Panel decided that it appeared to it that the circumstances of the inadequate disclosure in the notices were unacceptable because, in the Panel's view, they constituted, or gave rise to, a contravention of section 671B and 672B.
75. The Panel considered that adequate and timely disclosure of the information required under the substantial holding notice and beneficial ownership notice provisions was important to the efficient, competitive and informed market for shares in Azumah. Therefore, having taken into account the matters set out in section 657A(3), the Panel considered that it was not against the public interest to make a declaration of unacceptable circumstances as a consequence of the failures of adequate and timely disclosure that it had identified. The Panel therefore made the declaration set out in Annexure A.

### Orders

76. The Panel informed parties of its decision to make a declaration, and provided a copy of the declaration, in its email dated 17 October 2006. The Panel invited submissions on orders under section 657D(1) from parties (who included the persons to whom the proposed orders related) and ASIC.
77. The Panel also issued a media release dated 18 October 2006 (**18 October Media Release**) in relation to its decision to make a declaration, which disclosed the details of each Controller's interest in each of the Vendors and their holdings in Azumah. The 18 October Media Release also invited submissions from Azumah shareholders and other persons potentially affected on orders that the Panel might make to remedy the unacceptable circumstances that it had found. The Panel considered that this was appropriate in the particular circumstances of this case to assist it in determining whether and to what extent the rights or interests of Azumah shareholders and/or market participants had been affected by the lack of disclosure the Panel had found. The Panel received 2 submissions from Azumah shareholders, each submitting that the Panel should not make any orders.
78. The Panel sought submissions as to, among other things:
- (a) whether, if each of the Vendors and the Controllers were to make (or undertake to make) further disclosure to correct any failure to comply with Part 6C.1 and Part 6C.2 of the Corporations Act, such disclosure would sufficiently address the unacceptable circumstances such that the Panel should decline to make orders;

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- (b) whether the Panel should make orders vesting any of the Azumah shares in which any of the Vendors or the Controllers had a relevant interest (**Sale Shares**) in ASIC to be sold (with the proceeds less costs and expenses remitted to the holders of those shares) (**proposed vesting orders**).
- (c) whether the Panel should make orders restricting voting of any of the Sale Shares at the meeting convened for 3 November or otherwise (**proposed voting restriction orders**).

#### *Sufficiency of further disclosure*

- 79. Wiechecki and Harper both submitted that, if further disclosure was made by the Vendors and the Controllers, the Panel should decline to make orders. Azumah agreed, provided the further disclosure was made promptly. However, ASIC submitted that the mere lodgement of revised substantial holder notices would not go far enough to protect the rights and interests of persons affected by the circumstances.
- 80. The Panel agreed with ASIC's submission that lodgement of revised substantial holder notices would not, of itself, be adequate to protect the rights and interests of persons affected by the unacceptable circumstances. The Panel considered that the right or interest that should be protected by orders in this case was the right of Azumah shareholders and other market participants to know the information that the Controllers were required to provide under Chapter 6C and, in particular, to know of their identity and status as substantial shareholders. Further disclosure by the Controllers would only go part way to protecting that interest because the information should have been available to persons making decisions concerning the acquisition of Azumah shares at the time they made those decisions.
- 81. The Panel considered that, from the time that Azumah listed, there had been a serious and ongoing lack of information about the identity and interests of the largest substantial holders in the company.
- 82. In the case of Wiechecki and Amoako, the effects of lack of disclosure were mitigated, to some extent, by the fact that their identity was referenced in the Prospectus (though not as Controllers of any of the Vendors). A careful reader, at least, might have inferred, given the statement in the Prospectus that Wiechecki and Amoako had indemnified Azumah against breaches of the Vendors' acquisition agreement, that they would retain some interest in the Vendors. Also the Panel was satisfied that Wiechecki and Amoako did not seek to conceal from Azumah the fact that they had an interest in one or more of the Vendors.
- 83. In the case of the interests of Harper, however, the lack of disclosure was particularly serious given that:
  - (a) his interests were substantial (making him the largest substantial holder in Azumah); and
  - (b) the Azumah Prospectus made no mention of Harper's identity and gave no indication of the size of his combined relevant interests.
- 84. The Panel was particularly concerned in relation to Harper because his identity was deliberately concealed, albeit, he submits, in ignorance of the law. (While admitting

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that he did not want his identity known, Harper submitted that he erroneously believed that the substantial holding notices lodged by Redstar and Trailstar satisfied relevant disclosure obligations.)

85. Accordingly, the Panel decided that a different approach was warranted, in making orders, with respect to Harper (and also Trailstar and Redstar) as opposed to Wiechecki and Amoako.

#### *Proposed vesting orders*

86. ASIC submitted that it would be open to the Panel to make the proposed vesting orders in relation to shares in which a Controller had a relevant interest in excess of the 5% substantial holder threshold. Azumah submitted that such orders would be appropriate only where a party failed to make adequate disclosure. Wiechecki and Harper opposed the proposed vesting orders and submitted that such orders would cause unfair prejudice to them.
87. While the Panel acknowledged the merits of ASIC's submissions concerning the importance of the substantial holding notice provisions, it was not convinced that in the circumstances before it vesting of the relevant shares in ASIC was warranted, even in the case of Harper. The factors that the Panel considered in coming to this decision included:
- (a) all of the parties had relied on notices which they submitted had been prepared by the company secretary of Azumah, rather than having deliberately prepared misleading notices themselves;
  - (b) there had been no association between the parties proven to the Panel;
  - (c) the identity of Wiechecki and Amoako had been disclosed (albeit in relation to other issues) in the Azumah Prospectus (see paragraph 12 above); and
  - (d) there was no evidence produced to the Panel that the non-disclosure had been intended to facilitate any change of, or effect on, control of Azumah, or that it had had any effect on control of Azumah.
88. For similar reasons the Panel was also not satisfied that vesting orders would assist in protecting the rights or interests affected, as described above. Furthermore, the Panel considered that vesting orders had the potential to cause prejudice to Azumah shareholders by interfering with the escrow imposed under Chapter 9 of the ASX Listing Rules. Therefore the Panel considered that it was not appropriate to make orders vesting any shares in ASIC for sale.

#### *Proposed voting restriction orders*

89. ASIC submitted that it would be open to the Panel to make the proposed voting restriction orders in relation to shares in which a Controller has a relevant interest in excess of 5%. ASIC submitted that such an order would protect the rights and interests of Azumah shareholders not connected to the Vendors or the Controllers by ensuring that substantial holders who were not known to the market at the time the affected persons became shareholders did not exercise their voting power and affect control of the company.

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90. Wiechecki submitted that voting restriction orders would go beyond what was reasonably necessary to remedy the unacceptable circumstances given that the market was aware, through the Prospectus, of the interests of the Vendors, Wiechecki and Amoako. Wiechecki submitted also that voting restriction orders could have the unjust effect of affecting voting outcomes in respect of a director responsible for the Prospectus, and directors who held office when Azumah's secretary prepared drafts of the substantial holder notices given by the Vendors.
91. Even if, as the Vendors submitted, Azumah's secretary had prepared drafts of the Vendors substantial holder notices, the Panel did not consider that any such conduct on the part of Azumah's officers would lessen the nature or effect of the lack of disclosure by the Vendors and the Controllers.
92. The Panel considered that in deciding whether to make voting restriction orders it needed to weigh the object of protecting the rights and interests affected against the prejudice to any person that would flow from the making of its orders.
93. The Panel noted that factors weighing against making voting restriction orders, included:
  - (a) the prejudice to persons whose votes are affected; and
  - (b) the potential for such orders to impair the ability of the general meeting to replace directors. The Panel ordinarily seeks to avoid such an outcome unless it is necessary to address an unlawful aggregation of voting power or other unacceptable circumstances. See, for example, *Grand Hotel Group* [2003] ATP 34 at [53].
94. The Panel considered that it would not be appropriate to make voting restriction orders, having regard to the above factors, in the case of Wiechecki and Amoako. However, in the case of Harper, Trailstar and Redstar (and having regard to the factors discussed in paragraphs 82 to 85 which distinguish Harper's circumstances), the Panel considered that it was appropriate to make voting restriction orders in order to protect the right of other shareholders and market participants to know the identity of substantial holders. The Panel considered that none of the shares in which Harper had a relevant interest should be voted, and that this restriction should continue until 31 December 2006. The Panel considered that this would allow sufficient time for the market to absorb and respond to Harper's disclosure before Trailstar and Redstar exercised any voting rights.
95. The Panel accepted that the voting restriction order would cause prejudice to Harper, Trailstar, Redstar and Amponsah, but considered that such prejudice was not unfair given their failure to comply with Chapter 6C and also:
  - (a) in Harper's case, the fact that his identity was deliberately concealed; and
  - (b) in Amponsah's case, the fact<sup>12</sup> that he had directed the shareholders of Redstar to take instructions from Harper.

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<sup>12</sup> Stated in Amponsah's submissions.

## Takeovers Panel

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96. Accordingly, the Panel concluded that it was not satisfied, having regard to the circumstances and the Panel's findings, that any prejudice caused by the orders to Harper, Trailstar, Redstar and Amponsah was unfair.

#### *Proposed cancellation of general meeting*

97. Azumah submitted that Azumah shareholders may not have adequate time to consider the Panel's final decision and orders before the general meeting convened for 3 November 2006 (**the 3 November general meeting**), and accordingly that meeting should be cancelled (with the relevant business to be dealt with at Azumah's AGM, which would be held before the end of November).
98. The Panel decided that it was not necessary or appropriate to cancel or postpone the 3 November general meeting. The Panel considered that the disclosures made in its 18 October Media Release had provided the shareholders with adequate time before the 3 November general meeting to assimilate the details of each Controller's interest in each of the Vendors and their holdings in Azumah. The Panel also considered that there was sufficient time before the meeting for shareholders to be informed of and consider the Panel's final orders. Accordingly the Panel concluded that it should not make an order to cancel or postpone the general meeting.

#### **Costs**

99. The Panel did not receive any application for an award of costs, and made no order for costs.

**Kathleen Farrell**

**President of the Sitting Panel**

**Decision dated 17 October 2006**

**Reasons published 18 December 2006**



## Annexure A - Declaration

### Corporations Act Section 657A

### Declaration of Unacceptable Circumstances

#### In the matter of Azumah Resources Limited

#### WHEREAS

1. The Takeovers Panel (**Panel**) has received an application from Azumah Resources Limited (**Azumah**) in relation to the affairs of Azumah.
2. On 25 October 2005, Azumah issued a prospectus in connection with the issue of shares and options in Azumah (**Prospectus**). The Prospectus disclosed that Azumah had entered into an acquisition agreement with Trailstar Limited (**Trailstar**), Redstar Resources Limited (**Redstar**), Bluestar Resources Limited (**Bluestar**), Bluesky Resources Limited (**Bluesky**) and Falconsand Resources Limited (**Falconsand**) (collectively, **the Vendors**) and Mr Paul Amoako - Atta (**Amoako**) and Mr Henry Wiechecki (**Wiechecki**), under which the following purchase consideration was payable to the Vendors:
  - (a) A\$350,000
  - (b) shares in Azumah equating to 34% (rounded up to the nearest whole number) of Azumah shares on issue immediately following its admission to the official list of ASX; and
  - (c) 3,000,000 options to acquire shares in Azumah.
3. By declarations of trust dated 14 March 2005:
  - (a) the holders of shares in Falconsand and Bluesky declared that they held those shares as nominee for Wiechecki; and
  - (b) the holders of shares in Bluestar declared that they held those shares as nominee for Amoako.
4. By declarations of trust dated 21 November 2005:
  - (a) the holders of shares in Trailstar declared that they held those shares as nominee for Mr David Harper (**Harper**); and
  - (b) the holders of shares in Redstar declared that they held those shares as nominee for Harper (as to 78%) and Mr Yaw Benneh Amponsah (**Amponsah**) (as to 22%).
5. The Prospectus did not disclose the identity of the shareholders, controllers or beneficial owners of the Vendors, nor did it address the implications of the shares and options to be issued to the Vendors for control or potential control of Azumah.
6. On 4 January 2006, Azumah was admitted to the Official List of Australian Stock Exchange Ltd.

## Takeovers Panel

### Reasons for Decision – Azumah Resources Limited

7. On 16 February 2006, each Vendor lodged a substantial holder notice (Form 603) (**Substantial holder notices**) under section 671B with Azumah, disclosing that it had become a substantial holder on 8 December 2005. Each Vendor disclosed that it was the registered holder of the following number and percentage of Azumah shares, but did not identify any other person or associate having a relevant interest in those shares:
- (a) Trailstar – 5,046,875 (8.08%);
  - (b) Redstar – 4,781,250 (7.65%);
  - (c) Bluestar – 4,250,000 (6.80%);
  - (d) Bluesky – 4,781,250 (7.65%);
  - (e) Falconsand – 3,187,500 (5.10%).
8. Each Substantial holder notice failed to provide information and documents required by section 671B, including as follows:
- (a) The notice given by Trailstar failed to:
    - (i) give the information required by paragraph 671B(3)(d) with respect to Harper, an associate acting in concert with Trailstar in relation to Azumah’s affairs;
    - (ii) give details of the relevant interest of Harper arising from Harper’s power to control the voting and disposal of Azumah shares held by Trailstar;
    - (iii) give details of declarations of trust dated 21 November 2005 under which the shares in Trailstar were held on trust for Harper; and
    - (iv) provide the documents and statements required by section 671B(4).
  - (b) The notice given by Redstar failed to:
    - (i) give the information required by paragraph 671B(3)(d) with respect to Harper and Amponsah, who were associates acting in concert with Redstar in relation to Azumah’s affairs;
    - (ii) give details of the relevant interests of Harper and Amponsah arising from the power of Harper and Amponsah to control the voting and disposal of Azumah shares held by Redstar;
    - (iii) give details of declarations of trust dated 21 November 2005 under which the shares in Redstar were held on trust for Harper (78%) and Amponsah (22%); and
    - (iv) provide the documents and statements required by section 671B(4).
  - (c) The notice given by Bluestar failed to:
    - (i) give the information required by paragraph 671B(3)(d) with respect to Amoako, an associate acting in concert with Bluestar in relation to Azumah’s affairs;
    - (ii) give details of the relevant interest of Amoako arising from Amoako’s power to control the voting and disposal of Azumah shares held by Bluestar;

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### Reasons for Decision – Azumah Resources Limited

- (iii) give details of declarations of trust dated 14 March 2005 under which the shares in Bluestar were held on trust for Amoako; and
  - (iv) provide the documents and statements required by section 671B(4).
- (d) The notice given by Bluesky failed to:
- (i) give the information required by paragraph 671B(3)(d) with respect to Wiechecki, an associate acting in concert with Bluesky in relation to Azumah's affairs;
  - (ii) give details of the relevant interest of Wiechecki arising from Wiechecki's power to control the voting and disposal of Azumah shares held by Bluesky;
  - (iii) give details of declarations of trust dated 14 March 2005 under which the shares in Bluesky were held on trust for Wiechecki; and
  - (iv) provide the documents and statements required by section 671B(4).
- (e) The notice given by Falconsand failed to:
- (i) give the information required by paragraph 671B(3)(d) with respect to Wiechecki, an associate acting in concert with Falconsand in relation to Azumah's affairs;
  - (ii) give details of the relevant interest of Wiechecki arising from Wiechecki's power to control the voting and disposal of Azumah shares held by Falconsand;
  - (iii) give details of declarations of trust dated 14 March 2005 under which the shares in Falconsand were held on trust for Wiechecki; and
  - (iv) provide the documents and statements required by section 671B(4).
9. Each of Wiechecki, Harper, Amponsah and Amoako has failed to give substantial holder notices in accordance with section 671B of the Corporations Act.
10. On 13 September 2006, Azumah received responses from the Vendors (**Tracing Notice Responses**) to tracing notices issued by Azumah under section 672A(1) of the Corporations Act.
11. Each Tracing Notice Response failed to provide information required by section 672B(1) of the Corporations Act, including:
- (a) details required by paragraphs 672B(1)(a) with respect to each Vendor's relevant interest; and
  - (b) names, addresses and details required by paragraphs 672B(1)(b) with respect to the respective relevant interests referred to in recital 8 above.
12. Under section 657A of the Corporations Act, the Takeovers Panel declares that the circumstances described in each of recitals 5, 8, 9 and 11 constitute unacceptable circumstances in relation to the affairs of Azumah.

Kathleen Farrell

**President of the Sitting Panel**

**Dated 17 October 2006**



## Annexure B - Panel Final Orders

### Corporations Act Section 657D Final Orders

#### **In the matter of Azumah Resources Limited**

Pursuant to section 657D of the Corporations Act 2001 (**Act**) and pursuant to a declaration of unacceptable circumstances made by the Panel on 17 October 2006, the Takeovers Panel HEREBY ORDERS:

- (1) that the Holders must not exercise any voting rights in respect of the Relevant Shares prior to 31 December 2006; and
- (2) that Azumah and each Holder have the liberty to apply for further orders in relation to the matters covered by order (1).

#### **Schedule 1 - the Relevant Shares**

- (A) 39,000 Shares held by Harper;
- (B) 5,046,875 Shares held by Trailstar; and
- (C) 4,781,250 Shares held by Redstar.

#### **Schedule 2 - Glossary**

**Azumah** means Azumah Resources Limited.

**Harper** means Mr David Harper.

**Holdings** means Harper, Trailstar, Redstar and Mr Yaw Benneh Amponsah.

**Redstar** means Redstar Resources Limited.

**Relevant Shares** means the Shares listed in Schedule 1.

**Shares** means ordinary shares in Azumah.

**Trailstar** means Trailstar Limited.

Signed by Bruce Dyer (at the direction and with the authority of the sitting Azumah Resources Panel)

Dated 26 October 2006