



Australian Government

Takeovers Panel

# MEDIA RELEASE

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No: TP19/35

Friday, 31 May 2019

## **Agua Resources Limited – Declaration of Unacceptable Circumstances, Orders and Undertaking**

The Panel has made a declaration of unacceptable circumstances (Annexure A), final orders (Annexure B) and accepted an undertaking (Annexure C) in relation to an application dated 1 May 2019 by Agua Resources Limited (**Agua**) in relation to its affairs (see [TP19/30](#)).

### **Background**

On or about 11 April 2019, Kemosabe Capital Pty Ltd, Henderson International Pty Limited and David Shearwood and Harry Shearwood as trustees for the David K. Shearwood DIY Superannuation Fund (**Shearwood Trust**) (together, the **Requisitioning Shareholders**) gave a notice under s249D<sup>1</sup> to requisition a meeting of Agua shareholders to consider resolutions to remove and replace directors of Agua.<sup>2</sup> Two of the new directors nominated by the Requisitioning Shareholders were Ms Christine McGrath and Mr David Shearwood.

By reason of structural links and the exchange of correspondence, the Panel found the following persons were associated for the purpose of controlling or influencing the composition of the Agua board:

- (a) Messrs Richard McGrath, David Shearwood and Peter Curtis.
- (b) The Requisitioning Shareholders.
- (c) The Requisitioning Shareholders and Messrs Richard McGrath, David Shearwood and Peter Curtis.
- (d) Mr David Buckland and Messrs Richard McGrath, David Shearwood and Peter Curtis.
- (e) Ms Christine McGrath and Messrs Richard McGrath, David Shearwood and Peter Curtis.

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<sup>1</sup> References are to the *Corporations Act 2001* (Cth) unless otherwise indicated.

<sup>2</sup> A second notice under s249D was given on 8 May 2019 such that the resolutions to appoint directors will be considered at a separate meeting to the resolutions to remove directors.

The associates have not disclosed their respective voting power in Aguia shares, in contravention of s671B (as set out in Annexure A).

### **Declaration**

The Panel considered that the circumstances were unacceptable:

- (a) having regard to the purposes of Chapter 6 set out in s602
- (b) in the alternative, because they gave rise to a contravention of s671B.

The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in s657A(3).

### **Orders**

The Panel has made orders requiring disclosure by way of a substantial holder notice (Annexure B). The Panel accepted an undertaking offered by Kemosabe that it will write to all of its clients that hold Aguia shares in relation to the requisition meetings (Annexure C).

The sitting Panel was Amy Alston, Kelvin Barry and Bruce Cowley (sitting President).

The Panel will publish its reasons for the decision in due course on its website [www.takeovers.gov.au](http://www.takeovers.gov.au).

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## ANNEXURE A

### CORPORATIONS ACT SECTION 657A

### DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

#### AGUIA RESOURCES LIMITED

#### CIRCUMSTANCES

1. Aguia Resources Limited is an ASX listed company (ASX code: AGR) (**Aguia**).
2. Shareholders of Aguia and their relevant interests as at 11 April 2019 include:
  - (a) Mr David Buckland, through his controlled entity Baobab Holdings Pty Ltd (**D. Buckland**) – 3.35%
  - (b) Mr Peter Curtis, in his personal capacity (**P. Curtis**) – 0.11%
  - (c) Henderson International Pty Limited (**Henderson**) – 2.15%
  - (d) Ms Christine McGrath, through her controlled entity Houtskar Pty Ltd (**C. McGrath**) – 0.64%
  - (e) Mr Richard McGrath, through his controlled entities Coopster Pty Limited and Kemosabe Capital Limited (**Kemosabe**) (together, **R. McGrath**) – 1.53% and
  - (f) Mr David Shearwood, in his personal capacity and David Shearwood and Harry Shearwood as trustees for the David K. Shearwood DIY Superannuation Fund (**Shearwood Trust**) (together, **Shearwood Parties**) – 4.80%.
3. On or about 11 April 2019, Kemosabe, Henderson and the Shearwood Trust (the **Requisitioning Shareholders**) gave a notice under s249D<sup>1</sup> to requisition a meeting of Aguia shareholders to consider resolutions to remove five of the current directors of Aguia and appoint four new directors nominated by the Requisitioning Shareholders (**First requisition meeting**). Two of the new directors nominated by the Requisitioning Shareholders were Ms Christine McGrath and Mr David Shearwood.

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<sup>1</sup> References are to the *Corporations Act 2001* (CTH) unless otherwise indicated.

4. On 8 May 2019, the Requisitioning Shareholders gave a second notice under s249D to remove four of the current directors of Aguia (**Second requisition meeting**). The First requisition meeting (which now only deals with the resolutions to appoint directors) is scheduled for 11 June 2019 and the Second requisition meeting is scheduled for 17 June 2019.
5. The Panel considers that structural links and correspondence establishes that the following persons are associated for the purpose of controlling or influencing the composition of the board of Aguia (s12(2)(b)) and or acting in concert in relation to the affairs of Aguia for the purpose of controlling or influencing the board of Aguia (s12(2)(c)):
  - (a) Messrs Richard McGrath, David Shearwood and Peter Curtis.
  - (b) The Requisitioning Shareholders.
  - (c) The Requisitioning Shareholders and Messrs Richard McGrath, David Shearwood and Peter Curtis.
  - (d) Mr David Buckland and Messrs Richard McGrath, David Shearwood and Peter Curtis.
  - (e) Ms Christine McGrath and Messrs Richard McGrath, David Shearwood and Peter Curtis.
6. As a result of the various associations between the persons listed in paragraph 5, the following persons' voting power in Aguia shares has increased as set out below.

<b>Person</b>	<b>Voting power</b>
D. Buckland	9.76%
P. Curtis	12.50%
Henderson	8.46%
C. McGrath	7.00%
R. McGrath	12.50%
Shearwood Parties	12.50%

7. In contravention of s671B, no substantial holder notice has been given disclosing the above voting powers in Aguia and the various associations in relation to Aguia.

#### **EFFECT**

8. As a result of the failure to disclose their association, Aguia shareholders are not aware that the persons listed in paragraph 5 are associates for the purpose

of controlling or influencing the composition of the Aguia board ahead of the requisitioned meetings.

## **CONCLUSION**

9. It appears to the Panel that the circumstances are unacceptable:
  - (a) having regard to the purposes of Chapter 6 set out in s602
  - (b) in the alternative, because they gave rise to a contravention of s671B.
10. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3).

## **DECLARATION**

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of Aguia Resources Limited.

**Tania Mattei**  
**Counsel**  
**with authority of Bruce Cowley**  
**President of the sitting Panel**  
**Dated 31 May 2019**



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**ANNEXURE B**

**CORPORATIONS ACT**

**SECTION 657D**

**ORDER**

**AGUIA RESOURCES LIMITED**

The Panel made a declaration of unacceptable circumstances on 31 May 2019.

**THE PANEL ORDERS**

1. By no later than two business days from the date of these orders, each of the Associated Parties must provide to Aguia Resources Limited and the ASX a substantial holder notice in a form acceptable to the Panel (such draft substantial holder notice to be provided to the Panel for its review no later than one business day from the date of these orders), disclosing:
  - (a) all the information required by a Form 603 in respect of each of the Associated Parties and their respective associates and
  - (b) the existence and nature of the association between the Associated Parties.

**Interpretation**

2. In these orders the following terms apply.

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|---------------------------|---|
| <b>Associated Parties</b> | <ol style="list-style-type: none"><li>a) Messrs Richard McGrath, David Shearwood and Peter Curtis</li><li>b) The Requisitioners</li><li>c) The Requisitioners and Messrs Richard McGrath, David Shearwood and Peter Curtis</li><li>d) Mr David Buckland and Messrs Richard McGrath, David Shearwood and Peter Curtis</li><li>e) Ms Christine McGrath and Messrs Richard McGrath, David Shearwood and Peter Curtis</li></ol> |
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|-----------------------|--|
| <b>Requisitioners</b> | Kemosabe Capital Pty Ltd, Henderson International Pty Ltd and Messrs David and |
|-----------------------|--|

Harry Shearwood (in their capacity as the  
trustees of the David K. Shearwood DIY  
Superannuation Fund)

**Tania Mattei**  
**Counsel**  
**with authority of Bruce Cowley**  
**President of the sitting Panel**  
**Dated 31 May 2019**



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## ANNEXURE C

# AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT 2001 (CTH) SECTION 201A UNDERTAKING

### AGUIA RESOURCES LIMITED

Kemosabe Capital Pty Ltd (**Kemosabe**) undertakes to the Panel that within two business days from the day of this undertaking it will provide the Panel with a draft letter for approval by the Panel to all its clients that hold Aguia Resources Limited (**Aguia**) shares attaching a copy of (or link to) the notices of meeting for the general meetings currently scheduled for 11 and 17 June 2019 (**Requisition Meetings**) stating:

1. The background to Kemosabe's requisitions under s249D of the *Corporations Act 2001* (Cth) for the Requisition Meetings including Kemosabe's reasons behind these requisitions.
2. That despite any recommendations that it might make in relation to any of the resolutions to be considered at the Requisition Meetings, all decisions that the client may make in relation to casting of the votes attached to their shares in Aguia are and must be entirely their own.
3. That the Takeovers Panel has required Kemosabe and other Aguia shareholders to disclose that they are associates, attaching a copy of the substantial holder notice disclosing these associations.

Kemosabe further undertakes to dispatch the letter within two business days after the Panel has approved it.

Kemosabe agrees to confirm in writing to the Panel when it has satisfied its obligations under this undertaking.

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**Signed by Richard McGrath**  
**with the authority, and on behalf, of**  
**Kemosabe Capital Pty Ltd**  
**Dated 31 May 2019**