



Australian Government

Takeovers Panel

**Reasons for Decision
Mineral Commodities Limited 02
[2022] ATP 24**

Catchwords:

Declaration – placement - creep capacity – conflict of interest - rights issue - underwriting agreement – effect on control – need for funds – disclosure – low doc offer document - shortfall shares – dispersion strategy - undertaking

Corporations Act 2001 (Cth), sections 602, items 7, 9 and 13 of 611, 657A(2)(a), 657A(2)(c), 657A(3), 657EA, 671B(4), 671B(6), 708AA

Australian Securities and Investments Commission Act 2001 (Cth), section 201A

ASX Listing Rule 10.11.3

Guidance Note 17 – Rights issues

Thorn Group Limited 01 & 02 [2020] ATP 29, Powerlan Limited [2010] ATP 2

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Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
NO	NO	YES	YES	NO	YES

INTRODUCTION

1. The Panel, Michael Borsky KC, Bill Koeck (sitting President) and Timothy Longstaff made a declaration of unacceptable circumstances in relation to the affairs of MRC. The application concerned a share placement by MRC to Au Mining (MRC’s largest shareholder) and a pro rata non-renounceable rights issue by MRC that was partially underwritten by Au Mining and two directors of MRC. The Panel declared the circumstances unacceptable as it considered that (among other things) insufficient steps were undertaken to mitigate the potential effect on control of MRC and to manage the conflicting roles undertaken by a director of MRC. The Panel accepted undertakings to (among other things) terminate the underwriting agreement between Au Mining and MRC, modify the operation of the Shortfall Facility to the Rights Issue and provide further disclosure to MRC shareholders.

2. In these reasons, the following definitions apply.

- ASIC Instrument 2016/84** ASIC Corporations (Non-Traditional Rights Issues) Instrument 2016/84
- Au Mining** Au Mining Limited (BVI company number 1605835)
- MRC** Mineral Commodities Limited
- Offer Document** the offer document issued by MRC in respect of the Rights Issue published on ASX on 7 October 2022 and despatched to MRC shareholders on 17 October 2022
- Placement** the placement of 23.3 million shares by MRC to Au Mining at an issue price of \$0.075 per share, raising \$1.75 million,

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	that was announced concurrently with the Rights Issue on 3 October 2022 and completed on 5 October 2022
Rights Issue	the partially underwritten 1 for 3 pro rata non-renounceable rights issue to eligible MRC shareholders at an issue price of \$0.075 per new share to raise up to approximately \$14 million, first announced by MRC on 3 October 2022
Shortfall Facility	has the meaning given in paragraph 31
Shortfall Shares	has the meaning given in paragraph 32
Simto	Simto Resources Pty Ltd
Underwriting Agreements	has the meaning given in paragraph 32
Underwriters	Au Mining, Mr Jacob Deysel and Mr Guy Walker

FACTS

3. MRC is an ASX listed company (ASX code: MRC). MRC is involved in the development and extraction of mineral sands and battery minerals.
4. Simto is a private company associated with the former CEO of MRC, Mr Mark Caruso. At the date of the application, Simto held 8.87% of the shares in MRC.
5. Au Mining is a private investment company incorporated under the laws of the British Virgin Islands with investments in the resources sector. At the date of the application, Au Mining held 31.1% of the shares in MRC and was MRC's largest shareholder.
6. Mr Guy Walker is Au Mining's nominee director on the board of MRC and the sole company secretary of Au Mining. Mr Walker was one of the Underwriters of the Rights Issue. At the date of the application, Mr Walker did not own any shares in MRC or Au Mining.
7. Mr Jaycob Deysel is the Managing Director and CEO of MRC and one of the Underwriters of the Rights Issue.
8. On 3 October 2022, MRC announced that it planned to raise up to \$15.7 million through the Placement and the Rights Issue. The Rights Issue would be partially underwritten by:
 - (a) Au Mining, for up to \$6.6 million
 - (b) Mr Jacob Deysel, for up to \$100,000 and
 - (c) Mr Guy Walker, for up to \$100,000.

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9. The Placement resulted in Au Mining increasing its voting power in MRC by 2.9% from 28.2% to 31.1% (the maximum amount permissible under the ‘creep’ exception in item 9 of section 611¹ is 3%) prior to the Record Date for the Rights Issue.
10. On 7 October 2022, MRC lodged the Offer Document with ASX under the ‘low doc’ rights issue regime under section 708AA and ASIC Instrument 2016/84.
11. On 10 October 2022, Au Mining lodged a substantial holder notice in respect of its increase in voting power in MRC as a result of the Placement.
12. On 17 October 2022, MRC announced on ASX that it had despatched the Offer Document to eligible shareholders and that the Rights Issue was open.

APPLICATION

13. By application dated 17 October 2022, Simto sought a declaration of unacceptable circumstances. Simto submitted that the following circumstances (among others) were unacceptable:
 - (a) the likely control effect of the combined Placement, Rights Issue and underwriting on MRC
 - (b) the placement was undertaken without MRC shareholder approval, in potential contravention of ASX Listing Rule 10.11.3
 - (c) Au Mining’s substantial holder notice referred to in paragraph 11 being lodged late and that it did not “disclose the terms of or attach the Underwriting Agreement or any other agreement that may have been entered into in connection with the Placement” and
 - (d) the Offer Document containing material deficiencies in disclosure in respect of the potential impact of the Rights Issue on the control of MRC.
14. Simto submitted that the effect of the circumstances was unacceptable because, having regard to the purposes of Chapter 6 as set out in section 602, the actions of MRC and the Underwriters:
 - (a) had the potential to increase Au Mining’s voting power in MRC from 31.1% to up to 45.23%
 - (b) did not give MRC shareholders sufficient disclosure regarding the identity of any person proposing to acquire a substantial interest in MRC, or their intentions upon assuming control and
 - (c) did not give MRC shareholders an equal opportunity to participate in the benefits of the Placement and the Rights Issue.

¹ Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth) and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

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Interim orders sought

15. Simto sought interim orders to:
- (a) extend the closing date of the Rights Issue to no earlier than 9 November 2022 and
 - (b) restrain MRC from issuing any shares under the Rights Issue until further orders by the Panel had been made.

Final orders sought

16. Simto sought final orders (among other things) that:
- (a) Au Mining be required to provide a new substantial holder notice attaching a full copy of any underwriting agreement and any agreement relating to the Placement (or confirm that no such agreement existed)
 - (b) the issue of the Placement shares be cancelled and
 - (c) either:
 - (i) MRC be prohibited from proceeding with the Rights Issue
 - (ii) MRC only proceed with the Rights Issue if it:
 - (A) provided further disclosure
 - (B) adopted a dispersion strategy that prohibited Au Mining from participating in the Shortfall Facility
 - (C) allocated Shortfall Shares to applicants under the Shortfall Facility in full and
 - (D) substituted Au Mining as underwriter with at least one independent underwriter or
 - (iii) MRC only proceed with the Rights Issue if MRC shareholders approved the acquisition of securities by Au Mining as underwriter under item 7 of section 611.

DISCUSSION

17. We have considered all the material, but address specifically only that part of the material we consider necessary to explain our reasoning.

Decision to conduct proceedings

18. MRC and Au Mining each made a preliminary submission in response to the application, submitting that we should decline to conduct proceedings.
19. MRC submitted, among other things, that we should not conduct proceedings because:
- (a) MRC had a requirement for funding to progress a number of strategic initiatives and had been unsuccessful in obtaining financing through other channels

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- (b) in light of its unsuccessful attempts to secure financing through other channels, the Placement and Rights Issue were the most appropriate and certain funding options available to it
 - (c) it had consulted with ASX in relation to the application of ASX Listing Rule 10.11.3 to Au Mining and ASX made no finding that Au Mining was a related party of MRC for the purposes of that Listing Rule
 - (d) the Offer Document contained an adequate level of disclosure in relation to Au Mining and its intentions in respect of MRC and no further disclosure was necessary and
 - (e) the board of MRC considered that the market price of MRC's shares was not a true reflection of its intrinsic value and that the discount under the Rights Issue *"when coupled with a partially underwritten offer would encourage all MRC shareholders to take up their entitlements"*.
20. Au Mining submitted that we should not conduct proceedings because:
- (a) it did not consider itself to be a related party to MRC under ASX Listing Rule 10.11.3 and
 - (b) *"Au Mining's intention in supporting the Rights Issue, which was only partially rather than fully underwritten, was not to achieve a control outcome"* and any *"impermissible control effects of the Rights Issue are proposed to be mitigated by the parties ensuring compliance with the principles established under"* Guidance Note 17: Rights issues (GN 17).
21. In our view, the application raised concerns that warranted consideration, including the potential control effect of the Placement, Rights Issue and underwriting (together and individually), disclosure to MRC shareholders and the management of conflicts of interest. Accordingly, we decided to conduct proceedings.

Interim orders

22. MRC voluntarily extended the closing date of the Rights Issue to 7 November 2022 (and continued to extend the closing date while the proceedings were ongoing) and submitted that as a result of its actions it did not see the need for the Panel to make the interim orders requested by Simto. Simto supported this submission. Consequently, we did not consider it necessary to make any interim orders.

Control effect of the Placement, Rights Issue and underwriting arrangements

23. As noted above, because of the Placement, Au Mining's voting power increased from 28.2% to 31.1% and could potentially increase further to a maximum of 45.23% as a result of participating in and partially underwriting the Rights Issue (if no other eligible shareholders took up their entitlements).
24. Simto submitted that the Placement and the Rights Issue had been structured in such a way as to further increase the control of MRC by Au Mining. MRC rejected this proposition and argued that the capital raising transactions had been structured in a way that secured the most certain equity funded outcome for MRC. Au Mining also rejected this proposition and submitted that its intention in participating in the

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Placement and partially underwriting the Rights Issue was to demonstrate major shareholder support for the Rights Issue and provide funding certainty for MRC, not to achieve a control outcome.

25. The Offer Document outlined several possible scenarios where Au Mining's voting power in MRC following completion of the Rights Issue could range from as low as 31.14%² to as high as 45.23%³ depending on the level of acceptances from other MRC shareholders. This potential increase in voting power exceeds potential increases in voting power previously found by the Panel to result in an unacceptable effect on control. For example, in *Thorn Group Limited 01 & 02*⁴ the Panel considered that the potential increase in voting power by a shareholder from 30.57% to up to approximately 39.5% was "...likely to have a substantial effect on control and constitute the acquisition of a substantial interest" and "...would likely be decisive at shareholder meetings". Consistent with this decision, we consider that the Placement and the Rights Issue could have a material effect on control of MRC, particularly if a small proportion of MRC shareholders accepted their full entitlement⁵ and Au Mining subscribed for its full commitment of underwritten shares as it had committed to do.
26. Simto submitted that MRC had failed to take sufficient steps to mitigate the potential control effects of the Rights Issue, including because the Rights Issue was not underwritten by an independent professional underwriter and there was no indication of any attempt by MRC to procure the involvement of an independent professional underwriter, nor to seek professional financial advice in relation to a potential equity capital raising.
27. MRC submitted that it had approached or held discussions with a large number of independent parties to investigate a range of fundraising options since at least November 2021. MRC submitted that it engaged an independent party in June 2022 to participate in a placement and potentially participate in underwriting a rights issue, however the party withdrew its support on 30 June 2022. MRC submitted that, following this withdrawal in considering a potential placement and rights issue, it then approached its major shareholders⁶ and, other than Au Mining, they indicated that they were willing to participate in a pro rata capital raising but not a placement. MRC also submitted that it was receptive to receiving financial advice in relation to the Placement and Rights Issue however it did not actually receive any advice as it did not progress a fundraising option with an independent party.
28. In support of its submission, MRC disclosed a significant volume of correspondence and documents recording details of numerous approaches, meetings and other interactions with the independent parties mentioned above in relation to a range of

² Assuming all MRC shareholders accepted their full entitlement under the Rights Issue

³ Assuming no MRC shareholders other than Au Mining accepted their entitlement under the Rights Issue and Au Mining subscribed for its full underwritten amount

⁴ [2020] ATP 29 at [71]-[79]

⁵ Which was possible as the trading value of MRC shares at the date of the Panel Application was below the Rights Issue price, and shares generally traded below this level for the duration of the Panel's consideration

⁶ We understand that Simto was not approached to participate in the Placement or underwrite the Rights Issue

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earlier potential transactions, including potential listing on a London or European stock exchange, various potential debt facilities and plant build and offtake transactions. However, in our view, the materials disclosed principally related to a range of other earlier potential transactions, not the proposed Placement and Rights Issue transactions. While the materials demonstrated some limited attempts to garner independent third-party support for the Placement and Rights Issue, MRC did not appear to seek support or advice from broking houses that would customarily be engaged to help market, underwrite (including procuring sub-underwriting) and support capital raising transactions of this nature. Moreover, the attempts to garner independent third-party support for the Placement and Rights Issue generally appeared to be generic in nature and therefore were unlikely to elicit the desired response. Nevertheless, at least one of the independent parties appeared to express interest in supporting these transactions in response to the generic approach by MRC, noting that it *“would be in a good position to source investor interest once the research note is circulated and we have organised roadshow introductions”*. However, MRC immediately rebuffed this party citing the time involved to do this work did not align with MRC’s fundraising timeline.

29. We note that GN 17 at [25] provides pertinent guidance in situations such as this:

“For many companies, a related party or major shareholder is the only realistic source of underwriting (sub-underwriting). Underwriting (sub-underwriting) by a related party or major shareholder does not, of itself, give rise to unacceptable circumstances. However, greater care is needed to mitigate the potential control effects if a related party or major shareholder underwrites (sub-underwrites). The failure of directors to properly canvass professional underwriters or seek out alternatives to a related party or major shareholder underwriter (sub-underwriter) may increase the likelihood of unacceptable circumstances.”

30. From examining the material provided and having regard to GN 17, we were not satisfied that MRC took reasonable steps to engage an independent party to underwrite or sub-underwrite the Rights Issue or otherwise to mitigate the potential effect of the Placement, Rights Issue and underwriting on control of MRC.

Shortfall Facility

31. The Offer Document made the following statements (among others) about the Shortfall Facility:

“Any Entitlement not taken up pursuant to the Offer will form the Shortfall Offer. The Shortfall Offer is a separate offer pursuant to this Offer Document and will close on the Closing Date.

*Eligible Shareholders are entitled to apply for Shares under the Shortfall Offer (**Shortfall Shares**) subject to such applications being received by the Closing Date. The issue price for each Shortfall Share shall be \$0.075, being the price at which Shares have been offered under the Offer.*

Allocation of the Shortfall Shares will be at the discretion of the Company, following consultation with the Underwriters, and will otherwise be subject to the terms of the

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Underwriting Agreements... Shortfall Shares will be allocated in an equitable and proportional manner by reference to existing shareholdings."

32. The definitions section of the Offer Document defined 'Shortfall Shares' as "*the number of Total Underwritten Shares for which valid Applications have not been received by 5:00pm (WST) on the Closing Date*"⁷ and defined 'Total Underwritten Shares' as "*the aggregate of New Shares for which the Company has entered into Underwriting Agreements*". MRC submitted that, to the extent that these definitions implied that the Shortfall Facility was limited to the number of shares subject to the underwriting agreements between MRC and the Underwriters (**Underwriting Agreements**), this was an error. However, the above definitions were (in effect) identical to the definitions for those expressions in the Underwriting Agreements.⁸
33. Simto submitted that MRC's discretion, following consultation with the Underwriters, to allocate Shortfall Shares made the Shortfall Facility "*entirely illusory*" and provided "*no protection to the minority shareholders of MRC against the unacceptable structure of the Rights Issue*".
34. MRC submitted that the Shortfall Shares would be issued to eligible MRC shareholders that had taken up their full entitlement under the Rights Issue and applied for additional Shortfall Shares in an equitable and proportional manner by reference to their existing shareholdings⁹, and then to the Underwriters in proportion to their relevant underwriting commitments and if any Shortfall Shares remained after this process had been exhausted, MRC reserved the right to issue any remaining Shortfall Shares to other unrelated third parties.
35. Au Mining submitted that it considered it necessary that MRC consult with it in relation to the allocation of Shortfall Shares so that Au Mining was satisfied that MRC proposed to allocate any Shortfall Shares in the manner agreed to in the Underwriting Agreement entered into between them. Further Au Mining submitted that the Shortfall Share allocation methodology outlined by MRC was consistent with the Shortfall Share allocation methodology outlined in their Underwriting Agreement. Au Mining submitted that the Shortfall Share allocation methodology proposed for the Rights Issue did not "*differ in any material manner from that detailed in Annexure D of Powerlan Limited [2010] ATP 2*". However, Au Mining contested that MRC had the right to issue Shortfall Shares to "*other external investors*"¹⁰, and no such right was disclosed in the Offer Document nor did a mechanism exist for them to apply.
36. Notwithstanding Au Mining's later revised position in relation to the allocation of Shortfall Shares, we consider that the difference between MRC and Au Mining's

⁷ In contrast to the definition in section 3.11 of the Offer Documents, see paragraph 5

⁸ In light of MRC and Au Mining undertaking to terminate the underwriting agreement between them (see below), we did not need to require any clarifying disclosure in relation to this issue

⁹ Provided that no Shortfall Shares would be issued to an applicant that is a related party of MRC or if the issue of the Shortfall Shares would contravene section 606

¹⁰ In subsequent submissions, Au Mining conceded that MRC could issue Shortfall Shares to other external investors.

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interpretation of MRC's right to allocate Shortfall Shares to other external investors added to the uncertainty of the operation of the Shortfall Facility. We do not consider that the Shortfall Facility as outlined in the Offer Document was clearly designed in a way that mitigated the potential control effect on MRC. We consider that to properly mitigate any potential control effect in this case, Shortfall Shares should be allocated in proportion to MRC shareholders' holdings, as described in *Powerlan Limited*.¹¹

The urgency for making the Placement

37. Simto submitted that:

"There is no apparent commercial justification for conducting the Placement. No disclosures by MRC point to an urgent need for capital, or to the requirement for certainty and speed that a placement provides (for example, to provide funding for an acquisition), let alone provide justification for a private placement to the major shareholder followed by a rights issue partially underwritten by that same major shareholder."

38. MRC submitted that it decided to undertake the Placement in advance of the Rights Issue because:

- (a) it provided it with the initial and immediate funding required to support its planned operational activities and
- (b) it was considered that this would show legitimate and outside equity interest for an issue of further shares and accordingly was a platform from which to launch the Rights Issue.

39. Simto submitted that:

"On the facts, it seems at least as commercially expedient to replace the Placement with an increase in the size of the Rights Issue, which would have mitigated against the concentration of control in the hands of Au Mining by providing all shareholders with the ability to subscribe for new shares."

40. We agree with these submissions made by Simto. We consider that any urgent need for funds (which was not established by the material provided) could have been satisfied in a way that minimised the potential effect on control of MRC. MRC could have potentially undertaken an accelerated component to the Rights Issue, rather than the Placement, and equivalent funding certainty could have been obtained.

Disclosure deficiencies

41. Simto submitted that there were disclosure deficiencies in relation to the Placement and the Rights Issue.

42. In relation to the Placement, Simto submitted that:

- (a) *"The Form 604 Notice of Change of Interests of Substantial Holder in respect of the increase in Au Mining's voting power under the Placement should have been lodged on 7 October 2022 but was not lodged until 10 October 2022"* and

¹¹ [2010] ATP 2 - Annexure D

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(b) *“Au Mining failed to attach the documents required by section 671B(4) of the Act to that notice.”*

43. We consider that while there may have been a breach of section 671B it was unlikely to have any material bearing on our decision as to whether to make a declaration of unacceptable circumstances in the circumstances of this matter including because the control implications of the Placement and Rights issue were fully disclosed in the announcement of 5 October 2022. Accordingly, we consider it was unnecessary for us to determine whether the agreement entered into between Au Mining and MRC with respect to the Placement should have been attached to the notice. We note that ASIC retains the power to take action to enforce any non-compliance with section 671B in due course.

Identity and intentions of potential control party

44. In relation to the Offer Document, Simto submitted that unacceptable circumstances existed because the shareholders of MRC did not have sufficient information in relation to the identity of the person or persons proposing to acquire a substantial interest in MRC or the merits of the proposal and this was contrary to the principle in section 602(b).
45. In particular Simto submitted that the Offer Document contained material deficiencies in relation to:
- (a) the depiction of the substantial shareholders at the time of the Rights Issue
 - (b) the identity of Au Mining (including its place of registration, shareholders and officeholders)
 - (c) Mr Walker’s role in considering and deliberating on MRC’s fundraising and approval of the Underwriting Agreement with Au Mining
 - (d) Mr Deysel’s and Mr Walker’s role in considering the allocation of Shortfall Shares and
 - (e) Au Mining’s intentions in relation to MRC and its business.
46. Au Mining submitted that the Offer Document contained adequate disclosure in relation to its identity and intentions in relation to MRC and its business. It cited sections 3.9(a), 3.10 and 5.2(b) of the Offer Document as containing the relevant information. Further, Au Mining submitted there had been a number of historical disclosures dating from 30 October 2012¹² made about its connection with MRC and that a shareholder could access if it wanted to understand Au Mining’s identity and intentions in relation to MRC and its business. Au Mining cited a range of disclosures including:
- (a) previous substantial holder notices lodged in relation to past changes in its shareholdings in 2018, 2021 and 2022

¹² The date that Au Mining first became a substantial shareholder in MRC

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- (b) the Panel's reasons in *Mineral Commodities Limited*¹³
 - (c) MRC's prospectus in relation to an entitlement issue in 2013
 - (d) MRC's rights issue offer document in relation to a rights issue in 2021 and
 - (e) numerous online articles that referred to Mr Graham Edwards' control and ownership of Au Mining.
47. MRC submitted that it considered the disclosure in the Offer Document in relation to Au Mining's identity and intentions in relation to MRC's business to be current. MRC submitted that Au Mining had reviewed and consented to the disclosures made in the Offer Document in relation to its identity and intentions in relation to MRC.
48. ASIC submitted that the Offer Document should have included disclosure about the individuals and shareholders behind Au Mining as this would have been consistent with the objectives of Chapter 6 and ensured that shareholders were aware of the identity of the person who may acquire a substantial interest in MRC. ASIC further submitted that shareholders would have benefitted from disclosure detailing the rationale for decisions to engage Au Mining as underwriter and any intentions in relation to future shareholding patterns.
49. We recognise that the Offer Document did not purport to be a prospectus. Notwithstanding this we consider that the Offer Document contained inadequate disclosure particularly in relation to the Shortfall Facility, the management of conflicts of interest, the directors and ultimate beneficial owners of Au Mining and Au Mining's business and intentions if it obtained control of MRC. We do not accept that shareholders should be expected to conduct their own inquiries and research to obtain this information.

Roles of directors

50. Simto submitted that there was a lack of disclosure in the Offer Document in relation to:
- (a) Mr Walker's role in considering and deliberating on MRC's fundraising and approval of the Underwriting Agreement with Au Mining and
 - (b) Mr Deysel's and Mr Walker's role in considering the allocation of Shortfall Shares.
51. We considered this issue to be more material than merely one of disclosure and accordingly we sought to better understand how any potential conflicts had been managed in practice by the MRC board.
52. MRC submitted that it had at all times been aware of the potential conflict of interest posed by Mr Walker's roles as sole company secretary of Au Mining and as nominee director of Au Mining to the MRC board and it had been provided with a standing notice in relation to Mr Walker's non-MRC roles. MRC submitted that it did not

¹³ [2019] ATP 16

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consider Mr Deysel's and Mr Walker's involvement in the underwriting to be material and that their involvement was intended to show support to MRC. MRC further submitted that Mr Walker did not represent MRC in the negotiations of the Placement, Rights Issue or Underwriting Agreement with Au Mining.

53. Au Mining submitted (among other things) that Mr Walker acted as its representative in the negotiation of the Placement, Rights Issue and its Underwriting Agreement and did not separately hold discussions with other MRC board members to persuade or influence voting with respect to these arrangements.
54. The material provided to us supported the parties' submissions that Mr Walker was involved in the negotiation of the Placement and the underwriting of the Rights Issue by Au Mining, on Au Mining's behalf. The material also revealed that Mr Walker appeared to also be involved in the consideration of other fundraising options in his capacity as a director of MRC and was copied in on some email communication in respect of these matters. [REDACTED]
55. In light of this, and given the significant potential control ramifications associated with the transactions being pursued by Mr Walker on behalf of Au Mining, MRC and Mr Walker could have taken further steps to manage the conflict of interest, including by requiring that Mr Walker recuse himself from all MRC deliberations in respect of any alternative fundraising options and establishing effective information barriers between the other MRC directors and Mr Walker.
56. We were provided with a circular resolution dated 1 October 2022 approving a subscription agreement with Au Mining and Underwriting Agreements that stated (among other things) that:
- (a) Messrs Walker and Deysel had "*material personal interests in the execution of the Walker Underwriting Agreement and the Deysel Underwriting Agreement*"
 - (b) noted the operation of section 195 and
 - (c) "*Mr Walker has decided to abstain from voting on the resolution [to approve the entry of the underwriting agreement with him] and Mr Deysel had decided to abstain from voting on the resolution [to approve the entry of the underwriting agreement with him]. However, Messrs Walker and Deysel have signed this document which contains the resolutions in order for this document to be valid as a written resolution of directors without holding a meeting.*"
57. We were also provided with the draft minutes of the MRC board meeting dated 4 October 2022 that state (among other things) that:

"Mr Deysel noted that he and Mr Walker intended to participate in the underwriting of the Rights Issue as a sign of support to the Company's shareholder base. Given this, there may be

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a perceived conflict of interest given such participation and Messrs Deysel and Walker therefore declared an interest in the matter. For the avoidance of doubt, the Board noted Messrs Deysel and Walker's interest and Resolved to allow them to remain in the room whilst there was further discussion on the matter."

"Mr Deysel requested Board approval for himself and executive management to undertake a rights issue at a price of \$0.075c per share on a 1 for 3 basis to raise a further \$14 million and to lodge the Offer Document to commence the Rights Issue process as soon as is reasonably practicable."

58. Neither the 1 October 2022 circular resolution nor the draft minutes of meeting dated 4 October 2022 noted Mr Walker's involvement in representing Au Mining in relation to the proposed fundraising. MRC submitted that we should not draw any inferences in relation to draft minutes of meeting as they had not been finalised. Mr Walker submitted that he did not take an active role as an MRC director in the negotiation of the underwriting. Mr Walker cited the Director's Standing Notice of Interest that he submitted to the MRC board in May 2021 and his conduct in previous MRC board meetings where he had recused himself from deliberations and decisions involving matters that may have posed a conflict of interest as evidence to support his submission.
59. We note that Mr Walker was cognisant of the nature of his roles in MRC and Au Mining. For example, as a representative of Au Mining during the negotiation of the underwriting he sought changes to the Underwriting Agreement to ensure that applications under the Shortfall Facility would be filled before Au Mining subscribed for any shares pursuant to its underwriting commitment. However, overall on balance we consider that the conflicts between Mr Walker's duties to MRC and Au Mining were not adequately managed by the MRC board. In particular, we were concerned that Mr Walker was present during board meetings where the arrangements with Au Mining were discussed. Given his principal role in negotiating these arrangements on behalf of Au Mining, and the potentially significant effect of these arrangements on the control of MRC, we consider it would have been appropriate for Mr Walker to exclude himself while these matters were being discussed.

DECISION

Declaration

60. It appears to us that the circumstances are unacceptable:
- (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of MRC or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in MRC or

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(b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602 of the Act.

61. Accordingly, we made the declaration set out in Annexure A and consider that it is not against the public interest to do so. We had regard to the matters in section 657A(3) of the Act.

Undertakings

62. We received submissions in relation to possible final orders and then accepted undertakings voluntarily offered by MRC (Annexure B) and Au Mining (Annexure C) in lieu of making final orders.

63. In summary MRC undertook to:

- (a) terminate the underwriting agreement with Au Mining
- (b) change the operation of the Shortfall Facility to align with the approach of the Panel enunciated in *Powerlan Limited*¹⁴
- (c) not involve Mr Walker in any decision in relation to the allocation of Shortfall Shares
- (d) not allocate any Shortfall Shares to Au Mining
- (e) issue a Supplementary Offer Document which discloses additional or revised details in respect of the following:
 - (i) the termination of the underwriting arrangements with Au Mining
 - (ii) the potential control and dilutionary effects of the Rights Issue
 - (iii) the shortfall allocation process referred to above
 - (iv) the process undertaken to manage any potential conflicts of interest arising in connection with the Rights Issue
 - (v) the directors and ultimate beneficial owners of Au Mining and a description of the business of Au Mining and intentions of Au Mining in the event they obtain effective control of MRC under the Rights Issue and
 - (vi) the funding needs of MRC
- (f) issue a Chairman's letter noting the Panel's declaration of unacceptable circumstances, the termination of the underwriting arrangements with Au Mining and summarising the other material changes from the Offer Document made in the Supplementary Offer Document
- (g) not issue the Supplementary Offer Document and Chairman's letter until a draft had been provided to the Panel and the Panel indicated it had no objection to it

¹⁴ [2010] ATP 2 - Annexure D

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- (h) not close the Rights Issue until at least 14 days after the Supplementary Offer Document and Chairman’s letter had been sent to shareholders and
 - (i) make various other disclosure improvements to reflect submissions made.
64. Au Mining also undertook to terminate the underwriting agreement with MRC.
65. We considered that the undertakings adequately dealt with the unacceptable circumstances. In particular, we considered that our concerns in relation to the commercial rationale for the Placement were ameliorated through MRC and Au Mining undertaking to terminate the underwriting agreement between them.
66. While we accepted the undertakings from MRC and Au Mining (in lieu of making orders), we would be concerned if a major shareholder was allowed to be the sole participant in an offer of shares and subsequent rights issue and underwriting, as occurred in this case, were to occur again in another instance.

Postscript

67. On 3 January 2023, MRC announced¹⁵ on ASX that (among other things) it had received over 70% in valid acceptances under the Rights Issue and that Au Mining’s voting power increased from 31.14% to 33.55% as a result of participating in the Rights Issue.

Bill Koeck

President of the sitting Panel

Decision dated 28 November 2022

Reasons given to parties 12 January 2023

Reasons published 20 January 2023

¹⁵ The announcement was dated 30 December 2022

Takeovers Panel

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Advisers

Party	Advisers
Au Mining	Herbert Smith Freehills
MRC	Steinepreis Paganin
Simto	Gilbert + Tobin
Mr Guy Walker	HopgoodGanim Lawyers



Australian Government

Takeovers Panel

**ANNEXURE A
CORPORATIONS ACT
SECTION 657A**

DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

MINERAL COMMODITIES LIMITED 02

CIRCUMSTANCES

1. Mineral Commodities Limited (**MRC**) is an ASX listed company (ASX: MRC).
2. On 3 October 2022, MRC announced plans to raise up to \$15.7 million by way of:
 - (a) A placement of 23.3 million shares to its largest shareholder, Au Mining Limited (**Au Mining**), at an issue price of \$0.075 per share to raise \$1.75 million (**Placement**).
 - (b) A 1 for 3 non-renounceable rights issue at an issue price of \$0.075 per share to raise up to approximately \$14 million (**Rights Issue**). The Rights Issue was to be partially underwritten by:
 - (i) Au Mining, for up to \$6,600,000
 - (ii) Mr Jacob Deysel (MRC's managing director), for up to \$100,000 and
 - (iii) Mr Guy Walker (Au Mining's company secretary and a non-executive director of MRC), for up to \$100,000 (**Underwriters**).
3. On 5 October 2022, Au Mining's voting power increased from 28.2% to 31.1% as a result of the Placement, the maximum amount permissible under the 'creep' exception in item 9 of section 611 of the *Corporations Act 2001* (Cth) (**Act**). The Form 604 Notice of Change of Interests of Substantial Holder for the increase in voting power was lodged on 10 October 2022. The Record Date for the Rights Issue is 12 October 2022.
4. On 7 October 2022, MRC issued an offer document in relation to the Rights Issue (**Offer Document**), which disclosed (among other things) that:
 - (a) Au Mining's voting power could increase to a maximum of 45.23% as a result of participating in and underwriting the Rights Issue if no other eligible shareholders take up their entitlements under the offer and as a result "AU Mining and its associates may be in a position to potentially influence the financial decisions of the Company, and their interests may not align with those of all other Shareholders".

(b) *“Notwithstanding the potential increase in voting power of AU Mining, the Company understands that, other than as disclosed in this Offer Document and previously announced by the Company, AU Mining does not have a present intention of making any significant changes to the current business plans or management of the Company.”*

5. Section 3.11 of the Offer Document made the following statements (among others) about a shortfall offer (**Shortfall Offer**):

“Any Entitlement not taken up pursuant to the Offer will form the Shortfall Offer. The Shortfall Offer is a separate offer pursuant to this Offer Document and will close on the Closing Date.

*Eligible Shareholders are entitled to apply for Shares under the Shortfall Offer (**Shortfall Shares**) subject to such applications being received by the Closing Date. The issue price for each Shortfall Share shall be \$0.075, being the price at which Shares have been offered under the Offer.*

Allocation of the Shortfall Shares will be at the discretion of the Company, following consultation with the Underwriters, and will otherwise be subject to the terms of the Underwriting Agreements... Shortfall Shares will be allocated in an equitable and proportional manner by reference to existing shareholdings.”

6. The definitions section of the Offer Document defined ‘Shortfall Shares’ as *“the number of Total Underwritten Shares for which valid Applications have not been received by 5:00pm (WST) on the Closing Date”*¹⁶ and defined ‘Total Underwritten Shares’ as *“the aggregate of New Shares for which the Company has entered into Underwriting Agreements”*. To the extent that these definitions implied that the Shortfall Offer was limited to the number of shares subject to the underwriting agreements between MRC and the Underwriters (**Underwriting Agreements**), MRC submitted that this was an error. However, the above definitions are (in effect) identical to the definitions for those expressions in the Underwriting Agreements.
7. The Offer Document did not disclose the directors and ultimate beneficial owner(s) of Au Mining.
8. Mr Walker was nominated by Au Mining to be elected to the board of MRC and is Au Mining’s company secretary. Mr Walker had previously declared to the MRC board his role at Au Mining.
9. Mr Walker was involved in the negotiation of the Placement and the underwriting of the Rights Issue by Au Mining, on Au Mining’s behalf. Mr Walker was also involved in the consideration of other fundraising options in his capacity as a director of MRC.
10. A circular resolution dated 1 October 2022 approving a subscription agreement with Au Mining¹⁷ and Underwriting Agreements stated (among other things) that:
- (a) Messrs Walker and Deysel had *“material personal interests in the execution of the Walker Underwriting Agreement and the Deysel Underwriting Agreement”*.
- (b) Noted the operation of section 195 of the Act.

¹⁶ In contrast to the definition in section 3.11 of the Offer Documents, see paragraph 5

¹⁷ Under which MRC agreed to make the Placement and Rights Issue and Au Mining agreed to subscribe for the Placement shares and its entitlement under the Rights Issue

(c) *“Mr Walker has decided to abstain from voting on the resolution [to approve the entry of the underwriting agreement with him] and Mr Deysel had decided to abstain from voting on the resolution [to approve the entry of the underwriting agreement with him]. However, Messrs Walker and Deysel have signed this document which contains the resolutions in order for this document to be valid as a written resolution of directors without holding a meeting.”*

11. The draft minutes of meeting of the MRC board dated 4 October 2022 state (among other things) that:

*“Mr Deysel noted that he and Mr Walker intended to participate in the underwriting of the Rights Issue as a sign of support to the Company’s shareholder base. Given this, there may be a perceived conflict of interest given such participation and Messrs Deysel and Walker therefore declared an interest in the matter. For the avoidance of doubt, the Board noted Messrs Deysel and Walker’s interest and **Resolved** to allow them to remain in the room whilst there was further discussion on the matter.”*

“Mr Deysel requested Board approval for himself and executive management to undertake a rights issue at a price of \$0.075c per share on a 1 for 3 basis to raise a further \$14 million and to lodge the Offer Document to commence the Rights Issue process as soon as is reasonably practicable.”

12. MRC did not obtain any independent financial advice in relation to the decision to make the Placement and undertake the Rights Issue.

13. The Panel considers that:

- (a) The Placement, the Rights Issue and underwriting by Au Mining potentially could have a material effect on control of MRC.
- (b) Any urgent need for funds could have been satisfied in a way that minimised the potential effect on control of MRC by MRC undertaking an accelerated component to the Rights Issue rather than by the Placement, and equivalent funding certainty could have been obtained by a larger underwritten component of the Rights Issue.
- (c) The conflicts between Mr Walker’s duties to MRC and Au Mining were not adequately managed.
- (d) MRC failed to satisfy the Panel that it undertook reasonable steps to engage an independent third party to underwrite or sub-underwrite the Rights Issue or otherwise to mitigate the potential effect on control of MRC referred to in (a).
- (e) The Shortfall Offer is not designed in a way that mitigates the effect on control of MRC referred to in (a).
- (f) The Offer Document contains inadequate disclosure, including in relation to the Shortfall Offer, the management of conflicts of interest, the directors and ultimate beneficial owners of Au Mining, description of its business and Au Mining’s intentions if it obtains control of MRC.

EFFECT

14. The Panel considers that the Placement and Rights Issue could potentially result in Au Mining acquiring control or potential control of, or a substantial interest in, MRC in a way that is contrary to an efficient, competitive and informed market.

CONCLUSION

15. It appears to the Panel that the circumstances are unacceptable circumstances:
- (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of MRC or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in MRC or
 - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602 of the Act.
16. 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) of the Act.

DECLARATION

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of Mineral Commodities Limited.

Tania Mattei
General Counsel
with authority of Bill Koeck
President of the sitting Panel
Dated 28 November 2022



Australian Government

Takeovers Panel

ANNEXURE B

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

MINERAL COMMODITIES LIMITED 02

Mineral Commodities Limited ACN 008 478 653 (**MRC**) undertakes to the Takeovers Panel (**Panel**) under section 201A of the *Australian Securities and Investments Commission Act 2001* (Cth) as follows:

1. MRC will enter into a deed with Au Mining to terminate the underwriting agreement between MRC and Au Mining dated 30 September 2022 with no additional obligations or liabilities to either party by no later than the date of despatch of the Supplementary Offer Document and Chairman's Letter to MRC shareholders.
2. MRC will deal with any applications for additional shares under the shortfall facility offered under the Offer Document in the following manner:
 - (a) to the extent there is a shortfall between applications received for shares under the Rights Issue and the total number of new shares proposed to be issued under the Rights Issue (**First Shortfall**), each eligible shareholder who has applied for additional shares will be allocated their proportionate share of the First Shortfall having regard to their shareholdings as at the record date. If a shareholder has made a shortfall application but has specified a maximum shortfall application amount which is less than the amount of new shares which that shareholder would otherwise be allocated under this process, that shareholder will be allocated the lesser amount and
 - (b) if, following allocation of the First Shortfall, there remains a shortfall between the allocated new shares and total number of new shares proposed to be issued under the Rights Issue (**Second Shortfall**), the above allocation process will be repeated in respect of the Second Shortfall and any subsequent shortfalls until either all the new shares proposed to be issued under the Rights Issue have been allocated or all shortfall allocations have been satisfied in full.
3. MRC will accept all valid applications for additional shares under the shortfall facility made by eligible shareholders, except where acceptance of an application or the issuance of shares would be to a related party of MRC, would contravene section 606 of the *Corporations Act 2001* (Cth) or where the number of shares in respect of which valid applications have been received under the shortfall facility would (when

taken together with all other valid applications received under the Rights Issue) exceed the total number of shares proposed to be issued under the Rights Issue (in which case, MRC will accept all valid applications up to the maximum number of shares proposed to be issued under the Rights Issue in accordance with the allocation described in paragraph 2(a)).

4. MRC will not involve Mr Walker in any decision making in relation to the allocation of shortfall.
5. For the avoidance of doubt, no shortfall will be allocated to Au Mining.
6. Subject to compliance with paragraph 8, MRC will issue a supplementary offer document to its shareholders (**Supplementary Offer Document**) which discloses additional or revised details in respect of the following:
 - (a) the termination of the underwriting arrangements with Au Mining
 - (b) the potential control and dilutionary effects of the Rights Issue
 - (c) the shortfall allocation process referred to above
 - (d) the process undertaken to manage any potential conflicts of interest arising in connection with the Rights Issue
 - (e) the directors and ultimate beneficial owners of Au Mining and a description of the business of Au Mining and intentions of Au Mining in the event they obtain effective control of MRC under the Rights Issue and
 - (f) the funding needs of MRC.
7. Subject to compliance with paragraph 8, together with the issue of the Supplementary Offer Document, MRC will issue a succinct cover letter from its Acting Chairman, Mr Russell Tipper, (**Chairman's Letter**) to its shareholders noting:
 - (a) the Panel's declaration of unacceptable circumstances
 - (b) the termination of the underwriting arrangements with Au Mining and
 - (c) summarising the other material changes from the Offer Document made in the Supplementary Offer Document.
8. MRC will not issue the Supplementary Offer Document or the Chairman's Letter until:
 - (a) drafts of the Supplementary Offer Document and the Chairman's Letter have been provided to the Panel and
 - (b) the Panel has provided written confirmation that it does not object to the form or content of the Supplementary Offer Document or the Chairman's Letter.
9. MRC will not close the Rights Issue offer until at least 14 days after the Supplementary Offer Document and Chairman's Letter have been sent to its

shareholders. MRC will ensure that shareholders that have elected to receive communications from MRC by email will be emailed a copy of the Supplementary Offer Document and Chairman's Letter on the same day as hard copies of those documents are mailed to MRC shareholders that have not elected to receive communications from MRC by email.

10. In preparing and sending the Supplementary Offer Document and Chairman's Letter to its shareholders, MRC will comply with the *Corporations Act 2001* (Cth) and any other applicable regulatory requirements, including policy or guidance issued by ASIC or ASX.
11. Paragraphs 9, 11 and the definitions of this undertaking come into effect immediately. All other paragraphs come into effect on the Effective Date.

In this undertaking, the following terms have the corresponding meaning:

Au Mining	Au Mining Limited (BVI company number 1605835)
Declaration	The Declaration of Unacceptable Circumstances made by the Panel in Mineral Commodities Limited 02
Effective Date	Either: (a) if an application for review of the Panel's decision in Mineral Commodities Limited 02 is not made under s657EA of the <i>Corporations Act 2001</i> (Cth), immediately after 11.59pm (Melbourne time) on the second business day after the date the Declaration is communicated in final form or (b) if an application for review of the Panel's decision in Mineral Commodities Limited 02 is made under s657EA of the <i>Corporations Act 2001</i> (Cth), when a review Panel has communicated its decision in final form either not to conduct proceedings or to affirm the Declaration
Offer Document	The offer document issued by MRC in respect of the Rights Issue published on ASX on 7 October 2022 and despatched to MRC shareholders on 17 October 2022
Placement	The placement of 23.3 million shares by MRC to Au Mining at an issue price of \$0.075 per share, raising \$1.75 million, that completed on 5 October 2022

Rights Issue

The 1 for 3 pro rata non-renounceable rights issue to eligible MRC shareholders at an issue price of \$0.075 per new share to raise up to approximately \$14 million, first announced by MRC on 3 October 2022

**Signed by Russell Tipper, Chairperson
with the authority, and on behalf, of
Mineral Commodities Limited
Dated 25 November 2022**



Australian Government

Takeovers Panel

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

MINERAL COMMODITIES LIMITED 02

Au Mining Limited (BVI company number 1605835) (**Au Mining**) undertakes to the Takeovers Panel under section 201A of the *Australian Securities and Investments Commission Act 2001* (Cth) that it will enter into a deed with Mineral Commodities Limited ACN 008 478 653 (**MRC**) to terminate the underwriting agreement between Au Mining and MRC dated 30 September 2022 with no additional obligations or liabilities to either party by no later than the date of despatch of the Supplementary Offer Document and Chairman's Letter to MRC shareholders as contemplated in the undertaking to the Panel given by MRC dated on or about the date of this undertaking.

Signed by Graham Edwards (Director)
with the authority, and on behalf, of
Au Mining Limited
Dated 24 November 2022