



**In the matter of Great Mines Limited  
[2004] ATP 01**

**Catchwords:**

*Content of bidder's statement - supplementary target's statement - expert's report - proceedings concluded based on undertaking - interim orders*

*Corporations Act 2001 (Cth), 657D(2),*

*ASIC Class Order 01/1543, ASIC Practice Note 55*

*Chequepoint Securities Ltd v Claremont Petroleum N L Ors (1986) 4 ACLC 711*

*Ridley MI Pty Limited v Joe White Maltings Pty Ltd (1996) 22 ACSR 319*

**These are our reasons for concluding proceedings in relation to the affairs of Great Mines Limited following acceptance by us of undertakings by Citigold Corporation Limited.**

## **THE APPLICATION & PROCEEDING**

1. These reasons relate to an application (the **Application**) to us from the Australian Securities and Investments Commission (**ASIC**) received on 9 December 2003 in relation to the off-market scrip takeover bid (**Bid**) by Citigold Corporation Limited (**CTO**) (formerly Charters Towers Gold Mines Ltd) for all of the issued ordinary shares in Great Mines Limited (**GML**).
2. We also received a letter from ASIC on 9 December 2003, requesting our consent to amendment of the Application to ensure that it properly refers to the affairs of GML. Further, the letter requested an interim order pursuant to section 657D(2) of the *Corporations Act 2001 (Cth)* (**Act**)<sup>1</sup> that the offers under the Bid be extended in time. We consented to the amendment of the Application and references to the Application in these reasons are to the Application as amended.
3. ASIC alleged that unacceptable circumstances arose from deficiencies in CTO's bidder's statement, specifically:
  - (a) GML shareholders and directors had not received enough information to enable them to assess the merits of the Bid; and
  - (b) the bidder's statement contained misinformation because it contained valuations of CTO and GML which it alleged did not comply with relevant standards (especially the JORC Code and the VALMIN Code and relevant ASIC policy statements and practice notes) and had been prepared for another purpose, namely to assist CTO shareholders to decide whether to approve the Bid at a general meeting; and

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<sup>1</sup> In these reasons, statutory references are to the Act, unless it is otherwise obvious.

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- (c) the bidder's statement contained references to ASIC's "acceptance" of a valuation and to an endorsement by a mining engineer, without their consent.
4. ASIC sought an interim order that the offers under the Bid be extended for a period of 10 business days from the date the Panel made a final decision in relation to the Application. We made an interim order to this effect.
5. ASIC also sought final orders that CTO lodge a supplementary bidder's statement to rectify the issues raised by it in the Application.
6. We concluded the proceeding (the **Proceeding**) arising from the Application following acceptance by us under section 201A of the *Australian Securities and Investments Commission Act 2001 (ASIC Act)* of undertakings (**Undertakings**) offered by CTO to send a letter to all shareholders in GML advising them that:
  - (a) they should disregard the TWA Reports (defined in [15]) and the Supplementary TWA Reports (defined in paragraph [36]) and instead rely on the REC Report provided by GML in its supplementary target statement of 17 December 2003 (defined in paragraph [42]);
  - (b) if they have accepted the offer under the Bid, they will have until a specified date to withdraw their acceptance (such date to be 21 days from the date of dispatch of the letter); and
  - (c) the time for acceptances of the offer will remain open until the time to withdraw acceptances has expired.
7. The Undertakings are set out in Annexure A to these reasons.

## THE PANEL & PROCESS

8. Chris Photakis (sitting President), Marie McDonald (sitting Deputy President) and Simon Withers were the sitting Panel for the Proceeding.
9. We adopted the Panel's published procedural rules for the purposes of the Proceeding.

## APPLICATION

### Factual background - chronology of events leading up to the Application

10. The following description of the facts underlying the Application has largely been taken from the Application and the submissions from the parties.
11. CTO is listed on the stock market of Australian Stock Exchange Limited (**ASX**).
12. GML is an unlisted public company.
13. GML was a substantial shareholder of CTO, holding approximately 9% of CTO's ordinary shares.
14. On 19 August 2003, CTO announced a takeover bid for all the issued ordinary shares in GML by way of a scrip offer of two CTO shares for every three GML

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shares held by GML shareholders. The Bid was to be subject to two defeating conditions:

- (a) the approval of the Bid by non-associated CTO shareholders for the purposes of the related party provisions of the Act (Chapter 2E) and ASX Listing Rule 10.1 – this condition was required due to various associations between the shareholders and directors of each of CTO and GML; and
  - (b) compliance with the condition set out in section 625(3) that CTO shares issued to accepting GML shareholders are admitted to quotation on ASX.
15. On 22 October 2003, CTO lodged a Bidder's Statement (**Bidder's Statement**) with ASIC.
  16. The Bidder's Statement included two reports by Terence Willsted & Associates Pty Ltd (**TWA**), one titled "Independent Valuation of the Mineral Interests of Charters Gold Mines Limited and Great Mines Limited" dated 9 October 2003 (**Valuation Report**) and the other titled "Independent Expert Report" (**IER**) dated 16 October 2003 (together, the **TWA Reports**).
  17. The TWA Reports although attached to the Bidder's Statement were addressed to the directors of CTO and were expressed to be for the purpose of advising CTO shareholders in deciding whether to approve the giving of financial benefits to related parties of CTO. The IER advised that the making of the Bid was not fair, but was reasonable to the non-associated shareholders in CTO (it did not address the issue of the fairness or reasonableness of the bid to GML shareholders).
  18. In a notice of meeting of members dated 17 October 2003 (**Notice of Meeting**), CTO advised its members of business to be considered at its annual general meeting (**CTO AGM**) scheduled for 28 November 2003 which included an ordinary resolution: "Approval of Takeover bid for Great Mines Ltd", under ASX Listing Rule 10.1 and Chapter 2E (**CTO Approval Resolution**).
  19. CTO shareholders were provided a copy of the Bidder's Statement with the Notice of Meeting.
  20. On 4 November 2003, GML attempted to lodge a target's statement (**First Target's Statement**) with ASIC. The GML directors relied on the TWA Reports to recommend in the Target's Statement that GML shareholders accept the Bid.
  21. ASIC did not accept the First Target's Statement for lodgment on 4 November because it did not include an independent expert's report under section 640.
  22. Further, on 4 November 2003, ASIC wrote to the solicitor for GML noting that the TWA Reports in the Bidder's Statement were commissioned by the independent directors of CTO for the purposes of providing information to CTO shareholders in relation to the CTO AGM.
  23. On 7 November 2003, ASIC accepted submissions made on behalf of GML that there were no directors common to both the target and the bidder, and accepted the First Target's Statement for lodgment.

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24. On 7 November 2003, ASIC wrote to GML suggesting, among other things, that GML consider commissioning an independent expert's report for its response to the Bidder's Statement.
25. On 12 November 2003, GML lodged a second target's statement, that ASIC elected to treat as a supplementary target's statement (**Supplementary Target's Statement**). The Supplementary Target's Statement continued to rely upon the opinion expressed in the IER to recommend the Bid, but noted the purposes for which the IER was prepared.
26. On 13 November 2003, ASIC wrote to GML, reiterating that ASIC considered that references to, and reliance on, the IER may be misleading and deceptive in the context of the Supplementary Target's Statement.
27. On 14 November 2003, CTO lodged a prospectus (**Prospectus**) with ASIC, seeking to raise a maximum of \$15 million by the issue of convertible notes. This offer was not underwritten. The Prospectus disclosed that \$7.5m of the proceeds of the issue were to be used to repay a debt owed to Princeton Economics International Limited (in liquidation), an entity incorporated in Turks and Caicos Islands.
28. On 17 November 2003, ASIC wrote to CTO stating that the Act required a supplementary bidder's statement to be lodged to disclose the fact that the Prospectus had been lodged, as well as the impact of the fundraising on the Bid. ASIC's letter also stated that in its view the prospectus level disclosure standard required of a bidder's statement (sections 636(g), 710 to 713) had not been complied with in the Bidder's Statement.
29. On 18 November 2003, ASIC wrote to GML indicating that it considered that a further supplementary target's statement should address the impact of the proposed CTO fundraising.
30. ASIC was informed by the solicitors for GML that GML had commissioned an independent expert to report to the shareholders of GML in a further supplementary target's statement.
31. On 21 November 2003, an order under section 739(3) (**Stop Order**) was made by ASIC in relation to the Prospectus, based on (among other concerns) the fact that there was no trustee appointed in relation to the convertible notes offered, as required by section 283AA. ASIC was advised that a replacement prospectus would be lodged on 10 December 2003.
32. On 21 November 2003, ASIC wrote to CTO noting that no supplementary bidder's statement had then been lodged. ASIC also advised CTO that as the audited financial statements of GML for the financial year to June 2003 were available they should be referred to in a supplementary bidder's statement (rather than the unaudited financial information included).
33. On 25 November 2003, CTO announced the extension of the Bid to 19 December 2003 and wrote to ASIC indicating that it was currently in the process of preparing a detailed supplementary bidder's statement to include the matters

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raised by ASIC. CTO also indicated that, given the issues raised by ASIC with respect to the Prospectus, it would be inappropriate to lodge a supplementary bidder's statement until they had finalised those matters.

34. On 25 November 2003, and notwithstanding the response of CTO mentioned in [34], ASIC advised CTO that the directors should attend to lodgment of a replacement bidder's statement as a matter of urgency. ASIC referred CTO to subparagraphs 643((1)(c)(i) and (ii). ASIC also noted that it had identified several issues in relation to the Valuation Report and the possibility that it may be misleading or deceptive.
35. On 28 November 2003, the CTO AGM was held and the CTO Approval Resolution passed thus fulfilling the defeating condition of the Bid referred to in [13(a)].
36. On 2 December 2003, ASIC wrote to CTO again, noting that no supplementary bidder's statement had yet been lodged and drawing to CTO's attention the issues raised by ASIC to date.
37. On 3 December 2003, a supplementary Bidder's Statement (**Supplementary Bidder's Statement**) was lodged with ASIC, including a supplementary IER and Valuation Report (**Supplementary TWA Reports**).
38. The Bidder's Statement and the Valuation Report each contain statements or endorsements by Tennent, Isokangas Pty Ltd (**TIP**) a consulting mining engineers group. However, neither the Bidder's Statement nor the Valuation Report include a statement in compliance with section 636(3), that is that TIP has consented to the statement being included in the Bidder's Statement in the form and context in which it is included.
39. The TWA Reports state that the consent of TIP has been obtained in respect of references to their summary report on CTO's Gold Production Plan (**TIP Summary Report**) contained in the Valuation Report. However, ASIC pointed out in the Application that the TIP Summary Report accessible from CTO's website states:

“[This report] has been prepared primarily for the information of the Directors and to assist them in decision-making. It does not represent a ‘Public Report’ as defined in the JORC Code, i.e. it has not been prepared for the purpose of informing investors and their advisers”
40. ASIC submitted that even if the consent requirements in section 636(3) were met in respect of the Bidder's Statement references to the TIP Summary Report, the basis upon which the TIP Summary Report was prepared set out above is such that reliance upon it in the Valuation Report may misinform GML shareholders.

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#### Factual background – events after the Application

41. On 12 December 2003, CTO announced that it had withdrawn the Prospectus and would re-issue the offer as a new convertible note prospectus shortly, essentially on the same financial terms.
42. Also on 12 December 2003, CTO declared the Bid free from all conditions. This meant that compliance with the condition in paragraph 625(3)(c) ceased to be a defeating condition because of the drafting of the Bidder's Statement. ASIC Class Order 01/1543 meant that, whatever other effect subsection 625(3) may have, the condition it implies is not a defeating condition for the purposes of the Act unless a bidder chooses by its drafting (as CTO did) to make it a defeating condition.
43. On 17 December 2003, GML provided us and the parties with copies of a supplementary target's statement (the **Second Supplementary Target's Statement**) and an independent expert's report by Resource Equity Consultants Pty Ltd dated 16 December 2003 (the **REC Report**) which it dispatched to its shareholders on 18 December 2003. The REC Report advised that the Bid was fair and reasonable to GML shareholders.
44. The valuation methodology of the REC Report was quite different from that of the TWA Reports, but the outcomes were broadly consistent. ASIC did not raise any objection to the REC Report in general.
45. On 22 December 2003, ASIC advised us that it did not wish to amend its application in response to the Second Supplementary Target's Statement and the REC Report.

#### Declarations and orders sought in the Application

##### *Interim orders sought*

46. ASIC sought an interim order that the offers under the CTO Bid be extended for a period of 10 business days from the date the Panel makes a final decision in relation to the Application.

##### *Final orders sought*

47. In addition to the interim order, ASIC sought:
  - (a) a declaration that unacceptable circumstances exist in relation to the affairs of GML and in relation to the Bid;
  - (b) final orders that CTO lodge a supplementary bidder's statement (the **Proposed Supplementary Bidder's Statement**) "that":
    - (i) *includes an expert's report or reports that complies with ASIC's Practice Note 43 and employs acceptable mining methodologies which are explained;*  
*or*

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- (ii) *effects an excision of all references to or reliance upon the expert's reports currently included in the [Bidder's Statement and the Supplementary Bidder's Statement (together the **Current Bidder's Statement**)]; and*
- (iii) *removes references to ASIC and the mining engineer's report [contained in the Current Bidder's Statement]; and*
- (iv) *discloses the expert's prior (and possibly ongoing) relationship with [CTO] and removes references to the 'independence' of the expert; and*
- (v) *offers withdrawal rights to GML shareholders who have accepted the CTO bid prior to the issue of the [Proposed Supplementary Bidder's Statement];*
- (c) *That the Bid be extended for a reasonable period after the date of lodgment of the [Proposed Supplementary Bidder's Statement]; and*
- (d) *Any other orders the Panel thinks appropriate to protect the rights of GML shareholders affected by the unacceptable circumstances the subject of this application, or to ensure the [Bid] proceeds (as far as possible) in a way that it would have proceeded if those unacceptable circumstances had not occurred."*

## DISCUSSION

### Provision of experts reports prepared for another purpose

48. On 9 January 2004, CTO sent a letter to GML shareholders, pursuant to the Undertakings, which provides GML shareholders until 30 January 2004 to accept the Bid if they have not done so already or to withdraw their acceptance.
49. In accordance with our recommendation, the letter indicated that GML shareholders should disregard the TWA Reports and the Supplementary TWA Reports as they were prepared for the benefit of CTO shareholders to assist them in their decision in relation to the CTO Approval Resolution and not to assist GML shareholders in their decision of whether to accept the Bid. The letter indicated that GML shareholders should instead rely on the REC Report which was specifically prepared to advise GML shareholders whether they should accept the Bid.
50. We have not made any findings with respect to the concerns of ASIC relating to the TWA Reports because GML provided its shareholders with the REC Report and CTO advised GML shareholders to rely on the REC Report rather than the TWA Reports. ASIC submitted that the TWA Reports and the Supplementary TWA Reports were deficient in material respects, which it detailed in the Application (as summarised at [3]). If GML had not provided the REC Report and CTO had not given and performed the Undertakings, we would have made further investigations to determine whether ASIC's concerns in relation to the TWA Reports and the TWA Supplementary Reports were well founded. Had we found that the issues raised by ASIC were in fact well-founded, we may have made an order that CTO issue a replacement bidder's statement and/or an order that all acceptances be cancelled.

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51. We also took into consideration that at the time the Second Supplementary Target's Statement was issued, the Bid had received acceptances in excess of 92% and that the issue of the REC Report was more likely to confirm a shareholder's decision to accept the Bid than not to accept or to withdraw an acceptance. Further, pursuant to the Undertakings, GML shareholders were offered the opportunity to withdraw their acceptances after they had had time to consider the Second Supplementary Target's Statement.
52. This matter demonstrates that people involved in takeovers should be careful when using in a takeover document a report or document which was prepared for some other purpose. This is not to say that such a report or document should not be provided. It may well contain information that will be useful to target shareholders and which they may not have seen, even if it has been publicly released. If additional information of this kind that is useful to a shareholder's decision is included in a takeover document in this way, we consider that it is important that the company should clearly explain the purpose for which the report was written and why it is providing it to shareholders other than those for whom it was prepared.
53. The principle in *Ridley MI Pty Limited v Joe White Maltings Pty Ltd* (1996) 22 ACSR 319 may apply to require its disclosure. Accordingly, in some circumstances, it may be appropriate to disclose in takeover documents the existence of those other reports or documents and to summarise their content or reproduce them. Where this is done, however, the issuer of the takeover document should make abundantly and unambiguously clear the purpose for which the other report or document was prepared and any consequential limitations on reliance on the other report or document, or the summary of it, by the addressees of the takeover document.
54. The Courts have recognised the need to be very careful when providing a document to assist shareholders to make a decision when the document has been prepared for another purpose. In *Chequepoint Securities Ltd v Claremont Petroleum NL* (1986) 4 ACLC 711, a company provided its shareholders with a report prepared by an expert which enclosed a detailed valuation of properties proposed to be sold by the company. However, the report was provided without any explanation, although it had been prepared for, and was addressed to, the shareholders of the company purchasing the properties. McLelland J. held that the inclusion of the report without further explanation in the material sent to seller's shareholders was likely to mislead those shareholders and could easily be interpreted as something upon which they could rely. With respect to the report his Honour stated:

*"...it had a tendency to mislead its readers into believing that an independent expert believed that the financial gains to be received by [the vendor company] and its shareholders were fair and reasonable consideration for the financial resources to pass from [the vendor company] and those shareholders."*



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55. As with the *Chequepoint* decision, part of the difficulty in this case arose from the use of the word “independent” in describing TWA when reusing the TWA Reports in the Bidder’s Statement, as this word implies that the expert has no interests or obligations which might impair his ability to advise shareholders as to their interests.
56. We do not wish to be understood as saying that there are no situations in which one company can re-use a report commissioned by another, or by it where it was commissioned for another purpose, where to do so will improve the information available to shareholders. Wherever a report is re-used in this way, however, shareholders should be advised of the purpose for which the report was prepared. It would be inappropriate to re-use a report in this way to satisfy a requirement for an independent experts report and in general, it would be misleading to describe a report re-used in this way as independent.

#### Consents of experts

57. The Proceeding also concerned the obtaining of all appropriate consents of TIP to the inclusion in the Bidder’s Statement and Supplementary Bidder’s Statement of statements quoting, or said to be based on, statements by TIP. We were concerned that appropriate consents had not been obtained. However, we received submissions from CTO that all appropriate consents of relevant parties had been obtained even though they were not disclosed in the Bidder’s Statement pursuant to section 636(3).
58. We consider that not only should these consents be obtained, but also that it is imperative that the issuers of takeover documents comply with the requirements of section 636(3) concerning the publication in those documents of the existence and currency of those consents.
59. The consent requirements of section 636(3) are almost identical to those for disclosure documents provided in section 716(2) and the policy behind each of these provisions is identical. ASIC Practice Note 55 (PN 55) adopts the following statement from the Report of the Committee on Company Law Amendment, London HMSO, 1945:  
*“an expert who makes a report and authorised the inclusion of that report or a summary thereof in a prospectus should be liable to those who subscribe on the faith of that prospectus unless he can show that he had a reasonable ground for believing the statement to be true up to the time of the allotment of the shares or debentures comprised in the offer.”*
60. We consider this to be important. Shareholders should know who is responsible for statements and be able to rely appropriately on the reputation of experts. The provision of consent statements in takeover documents, like disclosure documents, demonstrates that expert statements have been appropriately made and can be relied on.
61. Further, PN 55.6 and 55.7 set out other reasons why it is important to obtain consents and include statements of consent in relevant public documents.

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## **DECISION**

### **Undertakings and conclusion of Proceeding**

62. In light of the provision of the Undertakings accepted by us by from CTO, we concluded the Proceeding on the basis that it appeared to us that no declaration of unacceptable circumstances was appropriate and no final orders were required.

### **Legal representation and costs**

63. We consented to the parties being legally represented by their commercial lawyers in the Proceeding.

**Chris Photakis**

**President of the Sitting Panel**

**Decision dated 8 January 2004**

**Reasons published 6 February 2004**

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**Annexure A - Undertakings provided by CTO during the Proceeding**

**Undertaking**

**By: Citigold Corporation Limited (CTO)**

**To: The Takeovers Panel (Panel)**

**Date: 9 January 2004**

Pursuant to subsection 201A(1) of the *Australian Securities and Investments Commission Act 2001 (Cth)*, CTO undertakes to the Takeovers Panel that it will:

1. send all shareholders in GML a letter, in a form approved by the Panel, advising shareholders that:-
  - (a) they should disregard the TWA Reports and instead rely on the REC Report provided by GML;
  - (b) if they have accepted the offer under the Bid, they will have until a specified date to withdraw their acceptance (such date to be 21 days from the date of dispatch of the letter); and
  - (c) the time for acceptances of the offer will remain open until the time to withdraw acceptances has expired.
2. give effect to the statements made in the letter to GML shareholders, specifically with respect to withdrawal of acceptances and the time for acceptances of the offers under the Bid.