



**In the matter of Consolidated Minerals Limited 03**

**[2007] ATP 25**

**Catchwords:**

*Top-up note – top up payment – matching other bid – Anti-competitive effect – competing bids – efficient, competitive and informed market, auction process upon which Chapter 6 is predicated – enough information to assess merits – no voluntary extension of offer period – no increase of consideration – last and final statement – funding risk – credit risk – meaning of ‘likely’*

Corporations Act 2001 (Cth) 657A, 657D

Boughey v The Queen (1986) 161 CLR 10; Pinnacle 04 [2001] ATP 28; Goodman Fielder [2003] ATP 1

Consolidated Minerals Limited, Pallinghurst Resources Australia Limited, Palmary Enterprises Limited

**These are the Panel’s reasons for making a declaration of unacceptable circumstances in relation to the affairs of Consolidated Minerals.**

**SUMMARY**

1. These reasons relate to an application (the **Application**) to the Panel by Palmary Enterprises Limited (**Palmary**) on 15 October 2007 in relation to the affairs of Consolidated Minerals Limited (**Consolidated Minerals**).
2. The Panel made a declaration of unacceptable circumstances in relation to the affairs of Consolidated Minerals.
3. The Application related to an off market takeover bid made by Pallinghurst Resources Australia Limited (**Pallinghurst**) for all the shares in Consolidated Minerals (**Pallinghurst Offer**). At the time of the Application, the Pallinghurst Offer was for \$4.50 per share, or an alternative of \$4.50 cash and a Top-up note which would become payable to, in effect, match any higher offer from Palmary (subject to conditions).
4. Palmary submitted that unacceptable circumstances had arisen as a result of:
  - (a) the Top-up note; and
  - (b) the statement made by Pallinghurst at 2.16pm on 12 October (**First Statement**) being departed from by the subsequent statement at 4.32pm on 12 October (**Second Statement**).
5. The Panel decided to commence proceedings in respect of both aspects of the Application.
6. On 18 October 2007 the Panel made interim orders that Pallinghurst extend the offer period in relation to the Pallinghurst Offer in accordance with the Corporations Act to close not earlier than 7.00pm (Melbourne time) on 2 November 2007, which Pallinghurst complied with.
7. The Panel ordered that the Top-up note be withdrawn and shareholders who accepted that alternative be given the opportunity to withdraw their acceptances. The Panel would not consider it unacceptable for Pallinghurst to withdraw its last and final statements (with respect to either or both of the no

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increase in price and no voluntary extension aspects). This allows Pallinghurst to increase its offer price in the usual way under the auction process, if it chooses to do so. See annexure B for the orders.

8. The Panel notes that this decision is under review.

## THE PANEL & PROCESS

9. The President of the Panel appointed John Keeves (Sitting President), Alice McCleary (Sitting Deputy President) and Simon Withers as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the Application.
10. The Panel's published procedural rules were adopted for the purposes of the Proceedings.
11. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

## APPLICATION

### Background

#### Pallinghurst Offer

12. On 27 July 2007, Pallinghurst made the all-cash off-market Pallinghurst Offer at \$3.30 for all the shares in Consolidated Minerals (with a minimum acceptance condition of 50.1%).
13. On 5 September 2007, Pallinghurst declared the Pallinghurst Offer unconditional.
14. On 12 October 2007, Pallinghurst made a “further and final” increase to the Pallinghurst Offer and released its second supplementary bidder’s statement. Pallinghurst announced that it was:
  - (a) varying the Pallinghurst Offer to include, as an alternative to the \$4.50 cash consideration, \$4.50 cash plus a Top-up note<sup>1</sup>; and
  - (b) extending the Pallinghurst Offer to 24 October 2007;
15. Originally, Pallinghurst’s proposal was for a top-up payment. On 6 September 2007 Pallinghurst announced an increase of its offer to \$4.10 per CSM share plus “an additional cash payment to CSM shareholders who accepted the Pallinghurst cash offer, in order to match the offer price for CSM shares under any subsequent higher off-market takeover made by a rival bidder.”
16. The top up payment was to be implemented by varying the terms of the Pallinghurst cash offer. It was to be conditional on the rival offer being:
  - cash above \$4.10,
  - for all CSM shares including those issued due to conversion of notes or exercise of options ,

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<sup>1</sup> Shareholders must elect that alternative.

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- announced by 27 September 2007 and becoming unconditional no later than 18 October 2007.
17. On 12 September 2007<sup>2</sup> Palmary announced an increase to \$4.50 per share, subject to a number of conditions relating to board recommendation and break fee being satisfied or waived. On 18 September 2007 it announced that the conditions were satisfied.
  18. Also on 13 September 2007, Pallinghurst extended its offer close date. It further extended it on 21 September, 28 September, 5 October, and 12 October.
  19. By further announcement on 12 October 2007, Pallinghurst increased its offer to \$4.50 to match Palmary's offer price. It also offered the alternative of \$4.50 plus the Top-up note. The Palmary bid is the only rival offer that qualifies under the revised conditions of the top up.

#### *Top-up note*

20. The Top-up note is, in effect, to match the difference between any offer from Palmary that is higher than the Pallinghurst Offer, subject to the offer from Palmary:
  - (a) being all cash (or have an all-cash alternative) at an offer price above the cash offer price of the Pallinghurst Offer;
  - (b) being for 100% of the Consolidated Minerals shares on issue and extend to any Consolidated Minerals shares issued during the Palmary offer period due to conversion of Consolidated Minerals convertible notes and exercise of Consolidated Minerals options; and
  - (c) becoming unconditional by not later than 24 January 2008.

#### *Last and final statement*

21. Pallinghurst made the First Statement at 2.16pm. It declared the cash component of the Pallinghurst Offer final *"in the absence of a competing offer for all [Consolidated Minerals] shares that is all cash (or has an all-cash alternative) at an offer price above \$4.50 per [Consolidated Minerals] share."*
22. Pallinghurst made the Second Statement at 4.32pm. It said that it would not increase the cash component of the Pallinghurst offer unless a competing bid is made for all Consolidated Minerals shares at an offer value greater than \$4.50 per Consolidated Minerals share *"that comprises any form of consideration (including without limitation consideration that comprises only cash as either the sole or an alternative form of consideration)"*.
23. The last and final statement related only to the cash component of the Pallinghurst Offer consideration.

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<sup>2</sup> Released on ASX by Consolidated Minerals on 13 September.

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#### Declaration and orders sought

24. Palmary sought a declaration of unacceptable circumstances under section 657A of the Corporations Act 2001 (Cth)<sup>3</sup> and orders under section 657D requiring Pallinghurst to:
- (a) withdraw the Second Statement; and
  - (b) withdraw the alternative consideration under the Pallinghurst Offer comprising \$4.50 in cash plus one “Top-up Note” and treat any acceptances or deemed acceptances of that alternative consideration as null and void.

## DISCUSSION

#### Top-up note

25. The Top-up note is novel. It raises significant policy issues for future bids, as well as for the Consolidated Minerals matter. The Panel was concerned that the Top-up note was not an appropriate mechanism for determining control of Australian companies.
26. The Panel considered that the Top-up note was likely to have an adverse effect on the efficient, competitive and informed market for voting shares in Consolidated Minerals. In so deciding the Panel accepted that “likely” means a “substantial – a ‘real and not remote’ - chance regardless of whether it is less or more than 50 per cent”: *Bouhey v The Queen* (1986) 161 CLR 10, 21 per Mason, Wilson and Deane JJ. The term “likely” is used with that meaning in these reasons.
27. The Top-up note operates to allow Pallinghurst, in effect, to match any higher offer made by Palmary (subject to conditions), even after its bid has closed. Palmary submitted that the effect of the Top-up note was to discourage competing bids, or to “chill the auction process”. Pallinghurst submitted that there was nothing anti-competitive in a bidder electing to match another bid price. It acknowledged that the Top-up note went further by allowing the matching after the offer period has closed. This, it said, enhanced the competitive scenario rather than detracting from it.
28. Pallinghurst further submitted that the Top-up note does not result in a “chilling effect on the auction process” because:
- (a) shareholders do not have to accept it;
  - (b) third parties are not precluded from bidding;
  - (c) it put pressure on Palmary to increase its bid (that is, if shareholders accept the Pallinghurst Offer);
  - (d) an increased offer by Palmary will directly test whether Pallinghurst is a buyer of Consolidated Minerals shares at that price; and

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<sup>3</sup> All section references are to the Corporations Act unless stated otherwise. All references to the “Act” are to the Corporations Act.

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- (e) the Top-up note had the effect of bringing about the \$0.55 increase in the offer by Palmary.
29. The Panel did not accept Pallinghurst’s submissions for the following reasons:
- (a) It is true that shareholders do not have to accept Pallinghurst’s offer, but that is not to the point. A device may be anti-competitive and still leave shareholders with a choice, albeit a less valuable one than might otherwise have been available.
  - (b) It is also true that third parties are not precluded from bidding, but they might be discouraged from doing so although a third party coming in at this stage appears remote.
  - (c)&(d) Whether the Top-up note puts pressure on Palmary and tests Pallinghurst’s resolve are facts still to be tested.
  - (e) The last argument above, that the Top-up note brought about the increase in Palmary’s offer, is not established. In the Panel’s view, Palmary’s increased offer is equally likely to have been a response to Pallinghurst’s \$4.10 offer.
30. Rather the Panel considered that the Top-up note subverts the auction process by inhibiting the usual competitive dynamic between bidders for control of a company. It replaces the normal auction, where competing bidders bid by increments until their offers are declared final, with a system where one bidder has to put forward its best offer and the other has the right to match it or pass. This is likely to reduce competition, not enhance it, and adversely affect the efficiency of the market, and is a departure from the normal rules of a competitive auction on which Chapter 6 is predicated.
31. The Panel considers that arguments about the pro-competitive nature of the Top-up note are not supported. An increase in another bidder’s offer price does not necessarily establish that a Top-up note is pro-competitive, unless it can be shown that the improvement would not have happened without the top up or that the improvement was a better outcome than would have otherwise been the case. The Panel was provided with no evidence of either.
32. It is likely that a Top-up note would discourage competing bids and reduce the price ultimately paid to target shareholders, and thereby interfere with the efficient, competitive and informed market for target shares.
33. A competing bidder could never “beat” the Pallinghurst Offer, since the Top-up note would operate to match every bid. In this case Palmary cannot establish itself as the highest bidder for Consolidated Minerals shares and thereby attract the majority of acceptances. The result is that the market for Consolidated Minerals is likely to be affected in a number of ways:
- (a) If Pallinghurst gets enough shares (ie, if its bid was successful and enough shareholders accepted the Pallinghurst offer to affect control of Consolidated Minerals), it will have, in effect, a final right of refusal in relation to the control of Consolidated Minerals. As noted above, this is a departure from the normal auction process on which Chapter 6 is

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predicated with an adverse effect on the competitiveness and efficiency of the market for control of Consolidated Minerals.

- (b) There would be no point in Palmary employing the same top up mechanism since, logically if each of two bidders offers a Top-up note they will neutralise one another (and perhaps mislead or confuse shareholders) as well as having the practical effect of bringing the auction to an end with two matched bidders.
  - (c) The usual transparency in the auction process, where each bidder can see the other's bid and respond, is distorted. A rival bidder is bidding "into a vacuum" with no indication of the price the other bidder is willing to pay for control. The Top-up note allows Pallinghurst to set the price it is willing to pay for control after it is too late for Palmary to respond (and indeed significantly after Pallinghurst's own offer has closed – in effect allowing Pallinghurst to increase the consideration under its offer after the offer period has closed) These circumstances would not constitute an informed or efficient market.
  - (d) It is unlikely that, in practice, a competing bidder will make more than one bid. If that bid is below the price that the Top-up note issuer is prepared to pay, the competing bidder is denied the opportunity of reassessing its valuation of the target and the price it is prepared to pay for it – and shareholders in the target are denied the benefit of that reassessment. The Top-up note is therefore likely to diminish market competitiveness and efficiency.
  - (e) By contrast, Pallinghurst does get the opportunity to reassess how much it is prepared to pay with the knowledge of Palmary's best price. Again, the Top-up note is therefore likely to diminish market competitiveness and efficiency.
34. As a result of the disadvantageous effects of the Top-up note from the point of view of a rival bidder it is likely that the rival bidder will have a reduced incentive to make a bid (or increase an existing bid) that would have been made in the absence of the Top-up note. A rival bidder is likely to be discouraged from bidding (all other things being equal) in the same way it may have bid in the absence of the Top-up note. Such a deterrent could reduce the number of bidders willing to enter or remain in an auction process, with a detrimental effect on the competitiveness and efficiency of the market for control of a company.
35. In the present case, the Panel considers that Palmary is likely to behave differently as a result of the Top-up note. It is possible that Palmary might bid at the same price – or even a higher price – despite the relative competitive disadvantage (because, for example, of the strategic nature of the target to the bidder), but that does not mean that the Top-up note has not had an adverse effect on the efficient, competitive and informed market for Consolidated Shares, just that the adverse effect of the Top-up note would have been overcome in this particular case. However, the Panel is required (at this point) to make a decision about what is "likely" based on the material before it at this

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time and the complex circumstances of a takeover bid may evolve in seemingly unpredictable ways in the future. That does not mean that unacceptable circumstance may not exist as a result of the Top-up note at the time of the Panel's decision. An analogy may be that an unacceptably large break fee might not in particular circumstances deter a particularly desperate counter bidder. This does not make the circumstances of the break fee acceptable. The Panel might decline to make any orders in such a case if that had already transpired. But the Panel should not wait to see what bids might or might not arise to make a decision about an unacceptable break fee.

36. It could be argued that the Top-up note encourages Palmary to put its best offer on the table in order to test whether Pallinghurst can match the offer. That is one possible outcome. But it is also possible that Palmary may bid cautiously or not at all. In addition, even if Palmary were to put its best offer on the table, absent the Top-up note Pallinghurst would have to *beat* that offer to win the bidding contest. The Top-up note will allow Pallinghurst merely to match the offer to win the bidding contest (if Pallinghurst receives sufficient acceptances). Even in the most positive scenario, it is likely to result in a lower price being offered to Consolidated Minerals' shareholders .
37. These likely effects of the Top-up note mean that there is a real and sensible possibility that the outcome of the auction process (and the behaviour of the parties involved in the auction process) will not be the same as it would have been in the absence of the Top-up note (and other features of Pallinghurst's offer), with an auction conducted under the "normal rules" upon which Chapter 6 is predicated: there is a real and sensible possibility that control of Consolidated Minerals will pass for a value less than the value that would be paid in the absence of the Top-up note in an efficient, competitive and informed market. The Top-up note is likely to have the effect of bringing the auction to an end prematurely.
38. The Top-up mechanism would give Pallinghurst a competitive advantage over Palmary and therefore have an adverse effect on the competition for control of Consolidated Minerals, not unlike the effect that an excessive break fee or other lock up device may have. On break fees the Panel says:

*"A device which has the effect or likely effect of impeding the willingness of current or potential buyers/bidders to advance their proposal ... has the effect of undermining the competitiveness and efficiency of the market for control of the relevant company and generally."*<sup>4</sup>
39. Unacceptable circumstances do not arise merely by a bidder gaining an advantage over another bidder. Indeed, the policy underlying Chapter 6 is to allow the bidder which is prepared to pay the highest price (as opposed to matching the highest price) to ultimately succeed. This benefits the shareholders of the target company. Rather, the Panel was concerned that a bidder employing a Top-up note would be placed at a structural advantage over other bidders, for the reasons given, which would be likely ultimately to

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4 Guidance Note 7 paragraph 7.9(a).

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be to the detriment of target shareholders and an efficient, competitive and informed market.

#### Enough information to assess the merits

40. Palmary submitted that shareholders were not given sufficient information to assess the merits of the proposal because there was insufficient disclosure of funding and credit risks.

#### *Funding risk*

41. The requirement to disclose funding will depend on the facts of the case.
42. It is clear that the purpose of requiring disclosure is so that there are reasonable grounds for shareholders to expect that there is sufficient funding in place and they will actually be paid. Accordingly, it may give rise to unacceptable circumstances if inadequate funding makes a bid illusory: *Pinnacle 4*<sup>5</sup>, *Goodman Fielder*.<sup>6</sup>
43. In this case, the Top-up notes are a mechanism for ensuring a cash payment, one unusual feature of which is that there is no maximum amount. While in practice there will be a maximum amount that Palmary is prepared to pay for control of Consolidated Minerals, that maximum is not known and could significantly exceed what Pallinghurst considers is a likely maximum amount.
44. The Panel had concerns with the level of disclosure regarding the persons providing the funding under the Top-up note in sections 5.5 and 6.3 (in particular) of the second supplementary bidder's statement. The disclosure needs to include information to enable shareholders to make an informed assessment of Pallinghurst's financial position and ability to pay, along with information about the funder's ability to fund.<sup>7</sup> The Panel considered that what was disclosed should have included the risk of Pallinghurst not selling into the Palmary offer and the payment under the Top-up note exceeding what it was able to fund.

#### *Credit risk*

45. Palmary submitted that there was insufficient disclosure in relation to the credit risk attaching to the Top-up notes.
46. The Panel considered that the sort of information required in relation to the Top-up note would be similar to what the market would expect in relation to a debenture that was offered as consideration.
47. The disclosure made by Pallinghurst in the second supplementary bidder's statement fell short of that standard. Palmary submitted that financial statements, and possibly an accountant's report, should have been provided. It also submitted that Pallinghurst had not properly disclosed its financial position (or its anticipated financial position should the Pallinghurst Offer be successful), in relation to its other unsecured payment obligations given that it

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<sup>5</sup> [2001] ATP 28.

<sup>6</sup> [2003] ATP 1.

<sup>7</sup> See guidance note 14.



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had reserved its ability to issue other securities that rank for interest or payment in a winding-up equally or behind the Top-up Notes.

48. The Panel considers that more financial information should have been provided, sufficient to enable Consolidated Minerals shareholder to make an informed assessment of the credit risk associated with the Top-up notes. However, because of the view it has taken and the orders it proposed that the Top-up note be withdrawn, there is no need to detail its concerns further.

#### Final statement

49. The Panel considered the following two aspects to the First Statement:
- (a) “no increase of consideration” statement; and
  - (b) the “no voluntary extension” statement.

#### No increase of consideration

50. The Panel considered that the First Statement did not achieve Pallinghurst’s commercial objective, and in that sense Pallinghurst had made an error in the First Statement.
51. Palmary submitted that the Second Statement was not a clarification but a change of position, which Pallinghurst was not entitled to do.
52. The Panel did not consider that the Second Statement was a “clarification” of the First Statement, although so described by Pallinghurst. It agrees with Palmary that it represented a change of position.
53. ASIC RG 25 does contemplate the correction, clarification and withdrawal of last and final statements in certain circumstances. It does not preclude the possibility that there might be a change of position as a result of realising that a mistake had been made (ie, not only between what was intended and what was said, but also between what was intended and what was desirable). Of course the ability to make such a change is very severely circumscribed, and properly so if the market is to be able to rely on due skill and care being applied to statements on which market participants are intended to rely.
54. In this case, the Panel considered that, having regard to the lack of evidence of any adverse market affect arising from the correction of First Statement, and the relatively short time in which the correction was made, unacceptable circumstances did not arise as a result of that correction.

#### No voluntary extension to offer period

55. On 12 October 2007, Pallinghurst said in its second supplementary bidder’s statement:
- “The offer period under the Pallinghurst Offer is being extended until 7.00pm (Melbourne time) on 24 October 2007. Pallinghurst has, however, declared that there will be no further voluntary extensions beyond this date.”*
56. The Panel considered that saying that there would be no *voluntary* extension was misleading given that Pallinghurst could choose to increase the bid consideration (in the limited circumstances in which its last and final statement

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qualification applies) in the last week of the offer period, thus itself triggering an automatic extension of the Pallinghurst Offer under subsection 624(2) of the Corporations Act.

57. The implications of the statement, and the circumstances in which the bid could be extended, would not be readily understood by ordinary market participants, although perhaps sophisticated market participants who read the statement closely enough and had a ready grasp of takeovers law would do so. The Panel considered that it is not good market practice to make statements in this form. Pallinghurst should have clearly identified the qualifications to its last and final statement. It may not be necessary to draft statements for the merely casual reader, but they should be drafted for ordinary readers of reasonable intelligence and who take reasonable care in tending to their affairs. Last and final statements must be made clearly and any material qualifications stated. The Panel does not accept that the statement here was clear enough, and there should have been further disclosure as to the limitations of the statement.
58. Apart from requiring additional disclosure, the Panel did not consider that it would be appropriate to hold Pallinghurst to the ordinarily understood effect of the statement – that is, preventing Pallinghurst from doing anything that would trigger an extension (such as increasing the bid consideration in the final week in circumstances where it was able to do so in light of its qualified no increase statement).

## CIRCUMSTANCES UNACCEPTABLE

59. The Panel considers that the circumstances set out above were likely to affect the efficient, competitive and informed market for Consolidated Minerals shares.
60. It appeared to the Panel that the circumstances were unacceptable having regard to:
  - (a) the effect that the Panel was satisfied that the circumstances have had, were having, or were likely to have, on:
    - (i) the control or potential control of Consolidated Minerals; or
    - (ii) the acquisition or proposed acquisition by Pallinghurst or Palmary of a substantial interest in Consolidated Minerals; and
  - (b) the purposes of Chapter 6 as set out in section 602, in that:
    - (i) the acquisition of control over Consolidated Minerals shares would not take place in an efficient, competitive and informed market; and
    - (ii) Consolidated Minerals shareholders and the directors of Consolidated Minerals were not given enough information to enable them to assess the merits of the Pallinghurst Offer.

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#### Public interest

61. The Panel considered that it was not against the public interest to make a declaration of unacceptable circumstances in relation to the circumstances and the affairs of Consolidated Minerals because:
  - (a) it is in the public interest that an efficient, competitive and informed market be promoted for the acquisition of substantial interests in public companies;
  - (b) shareholders in listed entities should be given clear, accurate, reasonably complete, and not misleading information on which to base decisions to hold or dispose of quoted voting shares; and
  - (c) orders, which create new rights, were available to the Panel. The orders would not unfairly prejudice any person.
62. In deciding to make a declaration of unacceptable circumstances the Panel had regard to the matters in section 657A(3). The Panel has not had, and in its view did not need in this case to have, regard to whether the Circumstances constitute, will constitute or are likely to constitute or give rise to a contravention of Chapters 6, 6A, 6B or 6C of the Act.
63. Under section 657A, the Takeovers Panel declared that the Circumstances constituted unacceptable circumstances in relation to the affairs of Consolidated Minerals. (See Annexure A)

#### Orders

64. The Panel invited submissions from the parties on the Panel's proposed orders, and considered those submissions.
65. The Panel was satisfied that its orders would not unfairly prejudice any person.
66. The Panel considered:
  - (a) that the orders most appropriately:
    - (i) addressed the effects of the unacceptable circumstances on Consolidated Minerals shareholders or other persons; and
    - (ii) ensured that the Pallinghurst Offer and Palmary Offer proceeded as if the unacceptable circumstances had not occurred;
  - (b) the effects of any proposed orders on any person to whom the orders are directed or any other person were not excessive when compared to the magnitude of the effects of the unacceptable circumstances on Consolidated Minerals shareholders or other person; and
  - (c) that it did not need to take any steps to mitigate any adverse effects of any proposed orders.

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67. The Panel made the orders set out at Annexure B.

**John Keeves**

**President of the Sitting Panel**

**Decision dated 30 October 2007**

**Reasons published 9 November 2007**



**Corporations Act  
Section 657A  
Declaration of Unacceptable Circumstances**

**In the matter of CONSOLIDATED MINERALS LIMITED 03**

**WHEREAS**

**Top-up note**

1. Consolidated Minerals Limited is a listed public company (**Consolidated Minerals**). It is the subject of an off market takeover bid (**Pallinghurst Offer**) by Pallinghurst Resources Australia Limited (**Pallinghurst**) and an off market takeover bid (**Palmary Offer**) by Palmary Enterprises (Australia) Pty Limited (**Palmary**).
2. On 12 October 2007 at 2.16pm Pallinghurst lodged with ASX its second supplementary bidder's statement in relation to the Pallinghurst Offer. This provided for the addition to the existing \$4.50 cash offer consideration of an alternative form of consideration of \$4.50 cash plus a Top-up note.
3. Under the terms of the revised Pallinghurst Offer, Consolidated Minerals' shareholders will only receive the Top-up note if they elect to receive the alternative consideration of \$4.50 cash plus a Top-up note.
4. The Top-up note operates to provide electing shareholders with a potential additional cash payment that would match the offer price for Consolidated Minerals shares under the Palmary Offer, subject to the conditions set out Pallinghurst's second supplementary bidder's statement. The cash payment under the Top-up note (if any) is payable even after the Pallinghurst Offer has closed.

**No Extension Statement**

5. Pallinghurst's second supplementary bidder's statement also provided that:  
*"The offer period under the Pallinghurst Offer is being extended until 7.00pm (Melbourne time) on 24 October 2007. Pallinghurst has, however, declared that there will be no further voluntary extensions beyond this date."* (**No Extension Statement**)
6. The No Extension Statement was misleading because it stated that there would be no *voluntary* extension of the offer period of the Pallinghurst Offer. However, Pallinghurst could choose (in certain circumstances) to increase the bid consideration in the last week of the offer period, thus itself triggering an automatic extension of the Pallinghurst Offer under subsection 624(2) of the Act.

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**Circumstances are unacceptable**

7. It appears to the Panel that the circumstances referred to above (**Circumstances**) are unacceptable having regard to:
  - (a) the effect that the Panel is satisfied that the Circumstances have had, are having, or are likely to have, on:
    - (i) the control or potential control of Consolidated Minerals; or
    - (ii) the acquisition or proposed acquisition by Pallinghurst or Palmary of a substantial interest in Consolidated Minerals; or
  - (b) the purposes of Chapter 6 of the Act as set out in section 602 of the Act.
8. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances in relation to the Circumstances and the affairs of Consolidated Minerals.
9. The Panel has had regard to the matters in subsection 657A(3) of the Act, but has not had regard to whether the Circumstances constitute, will constitute or are likely to constitute or give rise to a contravention of Chapters 6, 6A, 6B or 6C of the Act.

**DECLARATION**

Under section 657A of the Act, the Takeovers Panel declares that the Circumstances constitute unacceptable circumstances in relation to the affairs of Consolidated Minerals.

**John Keeves**

**President of the Sitting Panel**

Dated 30 October 2007



## Annexure B

### Corporations Act Section 657D Orders

#### IN THE MATTER OF CONSOLIDATED MINERALS LIMITED 03 PURSUANT TO:

1. A declaration of unacceptable circumstances (**Declaration**) in relation to the affairs of Consolidated Minerals Limited (**Consolidated Minerals**) made by the Takeovers Panel (**Panel**) on 30 October 2007 under section 657A of the Corporations Act 2001 (Cth) (**Act**); and
2. Section 657D of the Act,

#### THE PANEL ORDERS THAT

3. As soon as practicable after the date of this order, Pallinghurst Resources Australia Limited (**Pallinghurst**) withdraw from its off market takeover bid for Consolidated Minerals (**Pallinghurst Offer**) the alternative consideration of \$4.50 cash and one Top-up note by issuing a supplementary bidder's statement;
4. All Top-up notes issued by Pallinghurst pursuant to the Pallinghurst Offer be cancelled;
5. Each Consolidated Minerals shareholder who did both of the following:
  - (a) accepted the Pallinghurst Offer after the dispatch of Pallinghurst's second supplementary bidder's statement; and
  - (b) accepted the consideration alternative of \$4.50 and one Top-up note;**(Affected Consolidated Minerals Shareholder)**

has a right to withdraw their acceptance, which is equivalent to the right conferred by section 650E of the Corporations Act (except that the period of notice in paragraph 650E(2)(a) of the Corporations Act shall be 10 business days after Pallinghurst sends the letter referred to in paragraph 6).
6. Pallinghurst as soon as practicable sends:
  - (a) a letter (in a form acceptable to the Panel) to each Affected Consolidated Minerals Shareholder informing them of their withdrawal rights and clearly setting out what the shareholder must do to exercise those withdrawal rights; and
  - (b) a letter (in a form acceptable to the Panel) to each shareholder who accepted the Pallinghurst Offer before the dispatch of Pallinghurst's second supplementary bidder's statement and subsequently elected to receive the consideration alternative of \$4.50 and one Top-up note informing them of the effect of these orders on the alternative.

7. Pallinghurst may withdraw its statement of 12 October 2007 that it has declared the \$4.50 cash component of the Pallinghurst Offer final in the absence of a competing higher offer. If Pallinghurst chooses to withdraw its statement, it must do so by issuing a supplementary bidder's statement no later than 4.00 pm (Melbourne time) on the day after the date of these orders;
8. Pallinghurst may withdraw its statement of 12 October 2007 that there will be no further voluntary extension of the Pallinghurst Offer. If Pallinghurst chooses to withdraw its statement, it must do so by issuing a supplementary bidder's statement no later than 4.00 pm (Melbourne time) on the day after the date of these orders;
9. If Pallinghurst does not withdraw the statement referred to in paragraph 8 above, Pallinghurst must fully disclose to the market all the circumstances in which the offer period could be extended. Pallinghurst must do so by no later than 4.00 pm (Melbourne time) on the day after the orders are made;
10. As soon as practicable after the date of this order, Pallinghurst extend the offer period in relation to the Pallinghurst Offer in accordance with the Corporations Act to close on a date not earlier than 7.00 pm (Melbourne time) on 16 November 2007.
11. If the date of issue of the supplementary bidder's statement is after 9 November 2007, Pallinghurst must further extend its offer until the date 7 days after the day that it issues the supplementary bidder's statement.

**John Keeves**

**President of the Sitting Panel**

Dated 1 November 2007