



Australian Government

Takeovers Panel

Reasons for Decision

Ludowici Limited

[2012] ATP 3

Catchwords:

Declaration – uncertainty – no increase statement – truth in takeovers – efficient, competitive and informed market – indicative non-binding offer – scheme of arrangement – competing bidder – matching right – interim undertakings accepted – appropriate remedies – compensation – unfair prejudice

Corporations Act 2001 (Cth), sections 602, 657A, 657D

Guidance Note 4: Remedies – General

ASIC Regulatory Guide 25 – Takeovers: false and misleading statements

BC Iron Ltd [2011] ATP 6, Ross Human Directions Ltd [2010] ATP 8, Rinker Group Limited 02R [2007] ATP 19, Rinker Group Limited 02 [2007] ATP 17, Summit Resources Limited [2007] ATP 9; Magna Pacific (Holdings) Ltd 02 [2007] ATP 3, Novus Petroleum Ltd [2004] ATP 9, National Can Industries Limited 01(R) [2003] ATP 40, National Can Industries Limited 01 [2003] ATP 35, Pinnacle VRB Ltd (No 11) [2001] ATP 23, Pinnacle VRB Ltd (No 10) [2001] ATP 21, Taipan Resources NL 06 [2000] ATP 15, St Barbara Mines Ltd [2000] ATP 10

INTRODUCTION

1. The Panel, Rod Halstead, Robert Johanson (sitting President) and Sophie Mitchell, made a declaration of unacceptable circumstances in relation to the affairs of Ludowici Limited, on the basis that FLSmidth & Co. A/S did not correct in a timely way a Reuters article that stated its A\$7.20 per share bid to acquire Ludowici was final and would not be raised. By not correcting the article, the acquisition of control over Ludowici shares did not take place in an efficient, competitive and informed market. The Panel declared the circumstances unacceptable having regard to the purposes of Chapter 6 set out in section 602¹ and ordered compensation payable to qualifying sellers of Ludowici shares in the market.

2. In these reasons, the following definitions apply.

FLS	FLSmidth & Co. A/S
Ludowici	Ludowici Limited
Reuters article	An article published by Reuters Copenhagen on 23 January 2012 entitled: “FLSmidth says A\$7.20 per share Ludowici bid final”
Weir	The Weir Group PLC

FACTS

3. Ludowici is an ASX listed company (ASX code: LDW).

¹ Unless otherwise indicated, references are to the *Corporations Act 2001 (Cth)*

Takeovers Panel

Reasons - Ludowici Limited

[2012] ATP 3

4. On 23 January 2012, Ludowici announced it had entered into a Process Agreement with FLS in relation to an indicative, non-binding proposal by FLS to acquire by way of scheme of arrangement all the shares in Ludowici at \$7.20 per share, less any dividends that Ludowici paid to its shareholders prior to completion. The proposal was subject to completion of satisfactory due diligence by FLS and execution of a scheme implementation agreement.

5. The Process Agreement contained a matching right in favour of FLS. Clause 5.5 (a) provided:

During the term of this document, Ludowici must not recommend a Competing Proposal, or enter into any agreement, arrangement or understanding to undertake a Competing Proposal, unless it has first:

- (i) notified FLS in writing of the material terms of the Competing Proposal and the person or persons proposing the Competing Proposal; and*
- (ii) given FLS at least 3 Business Days after provision of that information in which to provide a matching or superior deal to the relevant Competing Proposal (FLS Competing Proposal).*

6. On 23 January 2012, the Reuters article was published. It was titled "FLSmidth says A\$7.20 per share Ludowici bid final" and stated that FLS's "chief executive said the Danish engineering group's A\$7.20 per share bid to acquire Australia-listed company Ludowici ... was final and would not be raised." In the body of the article it said "He answered with a 'no' when asked if he would consider raising the bid."

7. On 31 January 2012, *The Australian* published an article referring to the Reuters article.

8. On or about 31 January 2012, FLS issued a correction by press release. It carried the headline "[FLS] comments on Ludowici media coverage" and stated:

Certain Australian media today comment on [FLS's] ability to raise the indicated offer price of AUD 7.20 per share, if it should wish to do so, under Australian takeover regulation. ... FLSmidth has not made any statements to the media or others with the intention or which should be interpreted to exclude or restrict FLSmidth from being able to rely on [the] rights of FLSmidth provided for in the Process Agreement. If [FLS] decides to make a binding offer, it does not currently intend to make or increase any such offer at a price above AUD 7.20 per share, but reserves the right to do so.

9. Also on 31 January 2012, Reuters published a further article titled "UPDATE 1-FLSmidth won't rule out higher Ludowici bid". It quoted the CEO as saying: "We have not announced that our bid was final or cut off our options to change it at a later stage".

10. On 3 February 2012, Ludowici released FLS's correction to ASX.

11. On 10 February 2012, Ludowici announced a competing proposal by Weir. It stated that it had received a "competing non-binding, indicative and conditional proposal from the (sic) Weir Group PLC ("Weir") to acquire all of the issued share capital of Ludowici for an indicative price of \$7.92 per share in cash (less any dividends paid or declared by Ludowici before the transaction is completed) under a scheme of arrangement."

12. On the same day Weir confirmed by ASX announcement that it had made the indicative proposal to FLS.
13. On 16 February 2012, following provision of an undertaking by FLS (see paragraph 19), FLS announced that it had entered into a scheme implementation agreement with Ludowici pursuant to which a wholly owned subsidiary of FLS would acquire all Ludowici shares for \$10 per share, less any dividends that Ludowici paid to its shareholders prior to completion.² The scheme implementation agreement was conditional on the Panel's decision (in accordance with the undertaking). The announcement stated (also in accordance with the undertaking):

The proposed increase in the offer price ... will not proceed if the application to the Australian Takeovers Panel ... results in the Panel making orders that have the effect that the offer cannot proceed, including because the Panel determines that the statement, which is the subject of the application was a last and final statement and must not be resiled from.

14. On 23 February 2012, Ludowici announced that Weir had submitted a competing proposal to acquire all Ludowici shares, by scheme of arrangement, for \$10 per share (less dividends) "conditional on the Takeovers Panel making a decision to the effect that FLS cannot offer, or propose to pay, Ludowici shareholders more than \$7.20 per share whether for a specified period or otherwise."
15. On 24 February 2012, Ludowici announced that it had received a revised proposal from FLS for \$11 per share (less dividends), conditional on the Panel's decision in accordance with the undertaking.

APPLICATION

16. By application dated 13 February 2012, Weir sought a declaration of unacceptable circumstances. Weir submitted that FLS had made a last and final statement to which it should be held under the 'truth in takeovers' policy. It submitted that FLS had attempted to resile from the statement, and the effect was that the acquisition of control of Ludowici shares was not taking place, and will not take place, in an efficient, competitive and informed market. This, it submitted, gave rise to unacceptable circumstances.
17. Weir also submitted that the Process Agreement included a matching right that allowed FLS to match with another indicative non-binding proposal, and this hindered an efficient competitive and informed market. Following the entry by FLS into a scheme implementation agreement which was not conditional on due diligence, Weir withdrew this aspect of the application.

² An ordinary and a special dividend were identified in the announcement and the SIA as potentially payable

Interim order sought

18. Weir sought an interim order that FLS not announce, make, propose or participate in a takeover bid, scheme of arrangement or any other transaction which may result in it acquiring control of Ludowici, under which Ludowici shareholders are given the opportunity of receiving more than \$7.20 per Ludowici share.
19. On 16 February 2012, the Acting President accepted an undertaking from FLS (Annexure A), which allowed FLS to make an offer for Ludowici at more than \$7.20 per share, provided it was conditional on the outcome of the Panel proceedings, and included other requirements.
20. The Acting President noted the existence of the matching right under the Process Agreement and considered that the undertaking would maintain a competitive auction without creating an advantage to any party and would minimise the risk of market confusion pending determination of the application.

Final orders sought

21. Weir sought final orders that FLS not depart from its 'no increase statement' or announce, make, propose or participate in a takeover bid, scheme of arrangement or any other transaction under which Ludowici shareholders are given the opportunity of receiving more than \$7.20 per Ludowici share.
22. Weir sought an alternate final order that the Process Agreement be "*cancelled, void and of no force or effect*" but did not pursue this alternative following the undertaking and execution of the scheme implementation agreement between FLS and Ludowici.

DISCUSSION

Conduct proceedings?

23. In a preliminary submission, FLS submitted that the Panel should decline to conduct proceedings in relation to a transaction which was to be implemented by way of a scheme of arrangement, even though the matter was not yet before the Court. It submitted that, as both the FLS and Weir proposals were to proceed by schemes of arrangement, the matters raised in the application would almost certainly be considered by the Court in relation to whichever proposal should proceed.
24. In *St Barbara Mines Ltd*³ the Panel said it "*will generally be reluctant to initiate proceedings where a Court has already commenced its scrutiny of a scheme.*" Here a Court

³ [2000] ATP 10 at [32]

has not commenced its scrutiny of either proposal. Consistent with that and other previous decisions⁴ we decided to conduct proceedings.

Efficient competitive and informed market

25. The Reuters article included the headline "*FLSmidth says A\$7.20 per share Ludowici bid final*". It also included a statement that "*[FLS]'s ... chief executive said the Danish engineering group's A\$7.20 per share bid to acquire Australia listed company Ludowici ... was final and would not be raised.*"
26. FLS submitted that the headline was written by the journalist. This appears to be the case. What is attributed to the CEO, Mr Rasmussen, in the body of the article is: "*He answered with a 'no' when asked if he would consider raising the bid.*"
27. The article was based on a media interview with Mr Rasmussen conducted in Danish and attributed statements to Mr Rasmussen. FLS became aware of the Reuters article on 23 January 2012. On 24 January, it sought, and received, legal advice on the implications of last and final statements in the context of schemes of arrangement. FLS submitted that it did not seek legal advice specifically in relation to whether the Reuters article was a last and final statement. Privilege has been claimed in respect of the advice and we have not seen it. For our purpose, it is sufficient that FLS, and its legal advisers, were aware of the article and FLS had taken advice.
28. Weir submitted that it was "*inconceivable that FLS did not see this article or understand the significance of it in the context of the Australian takeovers regime.*" We agree.
29. FLS submitted that it did not consider that the Reuters article contained any statement by Mr Rasmussen (notwithstanding the headline) that could be construed as a last and final statement. It would appear that based on the explanation provided, Mr Rasmussen did not intend to make a 'last and final statement'. Nevertheless, regardless of whether Mr Rasmussen made a 'last and final statement' or not, in our view, the Reuters article was likely to create uncertainty, and had the potential to mislead or confuse investors, about the status of FLS's proposed price. It required correction to ensure that the market was operating on reliable, accurate information. The effect of the failure to correct the Reuters article was that share transactions were not taking place in an efficient, competitive and informed market. The article should have been corrected immediately after FLS became aware of it. It was not. It might also have been corrected after FLS obtained legal advice. It was not.
30. The article went uncorrected until 31 January 2012. On that date an article appeared in *The Australian* newspaper which discussed the Reuters article. After this article, FLS issued its correction, which was released by delivering it to "Thomson Reuters InPublic International Financial Wire - Denmark" and

⁴ *National Can Industries Limited 01* [2003] ATP 35, *National Can Industries Limited 01(R)* [2003] ATP 40, *Magna Pacific (Holdings) Ltd 02* [2007] ATP 3, *Ross Human Directions Ltd* [2010] ATP 8, *BC Iron Ltd* [2011] ATP 6

published on *Reuters* internationally, and other financial news services on or about 31 January 2012 (Tuesday). The correction was announced on ASX by Ludowici on 3 February 2012 (Friday).

31. Ludowici submitted that the correction was timely because 31 January 2012 (when *The Australian* article was published) was the relevant date for the Australian market. FLS submitted, in a similar vein, that the Reuters article was not widely disseminated in Australia, so it could not have had an effect on the Australian market. We disagree.

32. Publication on *Reuters* is sufficient to constitute a publication likely to affect the market for securities in Australia.⁵ The Reuters article was available to market participants in Australia, in that it was available to *Reuters* subscribers, including brokers. FLS identified a number of press articles on Ludowici in Australia before 31 January 2012 that did not mention the Reuters article. This does not affect our conclusion on this.

33. FLS submitted that the context of the interview was important:

When asked whether [FLS] was planning to raise its bid, Mr Rasmussen responded "no" since, as explained earlier in the interview, [FLS] had just entered into the Process Agreement at a price far above the market price, and therefore did not expect it to be necessary to raise the price. At no point during the interview did Mr Rasmussen refer to [FLS]'s proposal as "final."

34. FLS also submitted, as part of the context, that the existence of the matching right (contained in the Process Agreement that was announced on the same date as the Reuters article) made it clear that FLS could increase its proposed offer price. We do not think so. The article and the matching right were inconsistent. While part of the context, the existence of the matching right did not clear up the uncertainty.

35. FLS submitted that the variation in the market price for Ludowici shares was immaterial both after the article in *The Australian* and after the correction. We do not find the trading pattern conclusive. Weir submitted that the trading "*no doubt reflected a range of matters as is often the case when share trading is below the initial offer price when a deal is announced.*" We agree. In our view, the fact that the market traded at a discount to FLS's indicative offer price before and after the article in *The Australian* and the correction is not necessarily support for FLS's submission. It might indicate that the market was uncertain about whether FLS would increase its price before the correction.

36. FLS submitted that, despite being aware of the Reuters article, it did not consider that it would mislead, deceive or confuse Ludowici shareholders or the market, and further submitted that "*[i]ssuing a clarification in response to the Reuters Article...would have caused confusion to the market...*" We disagree with both submissions. In particular, a correction would not have misled, deceived or

⁵ *Novus Petroleum Ltd* [2004] ATP 9 at [32]

confused and need not have, as also submitted, “implied that [FLS] was giving consideration to a need for an increase or believed that an increase would be necessary...”.

37. FLS made submissions regarding the application of ‘truth in takeovers’ policy to the article, and in respect of schemes of arrangement generally, so we address this.

Truth in takeovers

38. ASIC’s ‘truth in takeovers’ policy is contained in *ASIC Regulatory Guide 25 - Takeovers: False and misleading statements*. The Panel has endorsed this policy⁶ as a “fundamental tenet” of Australia’s takeover regime.⁷ Under the policy, if a person is misquoted a correction is required.⁸
39. The policy does not expressly apply to schemes of arrangement. This may be because of the significant differences between takeovers and that form of control transaction. Nevertheless, ASIC keeps a watchful eye on statements made in the context of schemes.⁹ Weir submitted “we ask how this policy cannot apply to schemes?” We agree that, generally, the policy should apply in a scheme context. But its application may be different to its application in a takeover context.¹⁰ We believe that the policy should be applied in the circumstances of this case.

Delay

40. Ludowici submitted that the application was too late:

The statement was first published on 23 January.... It was then reported in Australia on 31 January and clarified on the same date. Weir did not approach Ludowici with its indicative non-binding proposal until more than a week after the 31 January Clarification was made. Furthermore, more than two full weeks have passed since the clarification, and the market has traded on the basis that FLS is entitled to revise its proposal. The market has moved on.

41. We do not believe the application was too late. Weir, having entered as a competing bidder, clearly then had an interest in pursuing the application. It pursued it in a timely enough way.

Unacceptable circumstances

42. In our view it is likely that the Reuters article created uncertainty in the market for Ludowici shares. The article also, in our view, had the potential to mislead or confuse investors. FLS was aware of the article from the date of its publication on 23 January and did not correct it until on or about 31 January 2012. The failure to

⁶ *Taipan Resources NL 06* [2000] ATP 15, *Summit Resources Limited* [2007] ATP 9, *Rinker Group Limited 02* [2007] ATP 17, *Rinker Group Limited 02R* [2007] ATP 19

⁷ *Summit Resources Limited* [2007] ATP 9 at [6]

⁸ ASIC RG 25 at [25.50]

⁹ See, for example, the article “*Response to Truth in Takeovers – No Ifs No Buts*”, Belinda Gibson in *The Takeovers Panel After 10 Years*, ed JG Hill and RP Austin, p 99

¹⁰ *Ibid*

correct the article had an effect on an efficient, competitive and informed market for the acquisition of control over Ludowici shares.

DECISION

Declaration

43. It appears to us that the failure to correct the Reuters article gives rise to unacceptable circumstances having regard to the purposes of Chapter 6 as set out in section 602.
44. We consider that it is not against the public interest to make a declaration of unacceptable circumstances. An efficient, competitive and informed market is an important element of the Australian market in control transactions.
45. We have had regard to the matters in section 657A(3). We make a declaration of unacceptable circumstances (Annexure B).

Orders

46. Under section 657D the Panel's power to make orders is very wide. The Panel is empowered to make 'any order'¹¹ including a remedial order, if 4 tests are met:
 - (a) it has made a declaration under section 657A. This was done on 28 February 2012.
 - (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. We are satisfied that there is no unfair prejudice in our orders. We address the question of unfair prejudice below.
 - (c) it gives any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. This was done on 24 February 2012. Each party made submissions and rebuttals.
 - (d) it considers the orders appropriate to either -
 - (i) protect the rights and interests of persons, or groups of persons, affected by the unacceptable circumstances, or any other rights or interests of those persons or
 - (ii) ensure that a takeover bid or proposed takeover bid proceeds as it would have if the circumstances had not occurred. We consider the test in (i) to be applicable here.

Appropriate order?

47. FLS submitted that the Panel should not make any orders. We think orders are necessary to remedy the unacceptable circumstances.
48. Weir submitted that it was appropriate to make orders holding FLS to the 'no increase statement', and that this restriction should continue for 6 months from the date (if any) on which the Weir scheme is voted down. We do not think such an order is the appropriate remedy.

¹¹ Other than one requiring a person to comply with a provision of chapters 6, 6A, 6B or 6C

49. We regard as significant that the indicative offer was conditional on due diligence (and other matters) and included a matching right. The scheme implementation agreement had not at that stage been agreed by the target board (although the target board had publicly stated that it had resolved to recommend the offer assuming a scheme implementation agreement was signed after completion of due diligence). We also regard as significant that the headline and introductory words to the Reuters article were not Mr Rasmussen's words. Moreover, as written the article was ambiguous enough as to whether in fact a 'last and final statement' had been made that to hold FLS to the statement seems to us to exceed what is appropriate.
50. Accordingly, we consider that an order providing compensation for those who can establish to the satisfaction of an arbitrator that they were aware of the Reuters article and at least in part, relied on it and sold Ludowici shares in the market until the Reuters article of 23 January was corrected is appropriate.
51. In making such an order the important question is - what is the upper limit on the amount of compensation? We consider it reasonable to set the amount of compensation payable by reference to the volume weighted average price following FLS's \$10 offer, as the next offer made by FLS. We do not think the compensation should be referable to what might be the final bid made by FLS, or alternatively the final auction price, because we cannot be confident that sellers would have remained shareholders until such time. We think this adequately protects the rights and interests of persons affected by the unacceptable circumstances.

Unfair prejudice

52. The Panel is required not to make an order if it considers that the order will unfairly prejudice any person.¹² Prejudice is not, in itself, unfair:
*The fact that an order, in remedying unacceptable circumstances, may cause a person prejudice, for example requiring them to pay money or return shares, is not sufficient to demonstrate unfair prejudice.*¹³
53. We think a compensation order does not unfairly prejudice any person.
54. Submissions were made regarding whether holding FLS to its 'no increase statement' would unfairly prejudice Ludowici shareholders. Ludowici made such a submission. Mr Julian Ludowici made a similar submission in his personal capacity as a shareholder and further submitted that the application was "*a ruse by Weir to stop shareholders from achieving the maximum outcome from their investment in [Ludowici].*"
55. FLS submitted that orders preventing it increasing its offer above \$7.20 would be unfairly prejudicial to Ludowici's shareholders and directors, and FLS. In appropriate circumstances, we think preventing a higher offer would not necessarily amount to unfair prejudice.

¹² Section 657D(1), Guidance Note 4: Remedies – general at [5] and [15(c)]

¹³ *Rinker Group Limited 02* [2007] ATP 17 at [70]

Takeovers Panel

Reasons - Ludowici Limited

[2012] ATP 3

56. FLS also submitted that preventing it from increasing its offer above \$7.20 would be disproportionate to FLS's alleged culpability. The culpability of FLS is not in issue to the extent that it would alter our proposed orders. We are concerned with remedying the effect of the failure to issue a timely correction.
57. Weir submitted that there would be no unfair prejudice suffered by Ludowici shareholders, or anyone else, because Ludowici shareholders never had any entitlement to \$10 per share. Weir also submitted that, consistent with previous Panel decisions, unfair prejudice should not result where a party obtains an advantage to which it was not entitled.¹⁴ For the reasons given, we have decided that compensation is the appropriate remedy in this matter.
58. We made the final orders in Annexure C.

Other matters

59. We had some concerns regarding Weir's increased offer price of \$10 per share. It was initially expressed to be open until 5:00pm on 24 February 2012. The parties were aware that the Panel had proposed to meet at 8:00am that morning. It could have been seen as an attempt to influence the Panel. The revised offer was subsequently amended so that it remained open for acceptance until 6 hours after our decision was made public.

Robert Johanson

President of the sitting Panel

Decision dated 28 February 2012

Reasons published 9 March 2012

¹⁴ *Pinnacle VRB Ltd (No 10)* [2001] ATP 21 at [31], *Pinnacle VRB Ltd (No 11)* [2001] ATP 23 at [48]

Takeovers Panel

Reasons - Ludowici Limited

[2012] ATP 3

Advisers

Party	Advisers
Ludowici Limited	Gilbert and Tobin ICS Advisory
FLSmith & Co. A/S	Blake Dawson FIH Partners
The Weir Group PLC	Freehills UBS
Julian Ludowici	NA



Australian Government

Takeovers Panel

Annexure A
Australian Securities and
Investments Commission Act (Cth) Section 201A
Undertaking
FLSmidth & Co A/S

Pursuant to section 201A of the Australian Securities and Investments Commission Act 2001:

*FLSmidth & Co A/S (FLSmidth) undertakes to the Panel that, until the later of the conclusion of the proceedings relating to The Weir Group Plc's application lodged with the Panel on 13 February 2012 (**Application**) or the Panel making further orders in relation to this matter, FLSmidth will not:*

- make, or take any action likely to cause the making of, any public statement or public proposal that involves FLSmidth offering more than A\$7.20 cash per share in Ludowici Limited (**Ludowici**) (less any dividends paid by Ludowici before such transaction is completed) (**initial consideration**) pursuant to any takeover bid, scheme of arrangement or other transaction that may result in FLSmidth acquiring control of Ludowici, unless FLSmidth accompanies such public statement or public proposal clearly and prominently with a qualification to the effect that the proposed increase above the initial consideration would not proceed if the Panel makes orders that have the effect that such proposed offer cannot proceed, including because the Panel determines that the statement the subject of the Application was a last and final statement and must not be resiled from; or*
- take any steps to enforce any rights under the Process Agreement between FLSmidth and Ludowici dated 23 January 2012 (**Process Agreement**) other than provide a FLS Counter Proposal (as defined in cl.5.5 of the Process Agreement) on or before 15 February 2012 and enter into a scheme implementation agreement relating to the FLS Counter Proposal (**SIA**) which is subject to a condition precedent that the SIA will not becoming binding until the Panel determines the Application.*

Signed by Poul Erik Tofte and Christian Jepson
with the authority, and on behalf, of FLSmidth & Co A/S

Dated 15 February 2012



Australian Government

Takeovers Panel

Annexure B
CORPORATIONS ACT
SECTION 657A
DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

Ludowici Limited

CIRCUMSTANCES

1. Ludowici Limited (**Ludowici**) is an ASX-listed company (ASX code: LDW).
2. On or about 23 January 2012, FLSmidth & Co. A/S (**FLS**) entered into a "Process Agreement" with Ludowici, such that it made an indicative non-binding proposal to acquire by scheme of arrangement all the shares in Ludowici at \$7.20 per share, less any dividends paid by Ludowici before completion. (**acquisition proposal**)
3. On 23 January 2012 Ludowici announced the acquisition proposal to ASX.
4. On or about 23 January 2012, following an interview with the chief executive officer of FLS, an article was published on *Reuters*, titled "*FLSmidth says A\$7.20 per share Ludowici bid final*". The article stated, among other things, that FLS's "*chief executive said the Danish engineering group's A\$7.20 per share bid to acquire Australia-listed company Ludowici ... was final and would not be raised.*" In the body of the article it said "*He answered with a 'no' when asked if he would consider raising the bid*". (**Reuters article**)
5. FLS became aware of the Reuters article on or about 23 January 2012.
6. On 31 January 2012, *The Australian* newspaper published an article referring to the Reuters article.
7. On or about 31 January 2012, FLS issued a press release stating "*Certain Australian media today comment on [FLS's] ability to raise the indicated offer price of AUD 7.20 per share, if it should wish to do so, under Australian takeover regulation. ... If [FLS] decides to make a binding offer, it does not currently intend to make or increase any such offer at a price above AUD 7.20 per share, but reserves the right to do so.*" (**correction**)
8. On or about 31 January 2012, *Reuters* published a further article titled "*UPDATE 1-FLSmidth won't rule out higher Ludowici bid.*"
9. By FLS not issuing the correction until on or about 31 January 2012, the acquisition of control over Ludowici shares did not take place in an efficient, competitive and informed market between the publication of the Reuters article and the issue of the correction.

10. It appears to the Panel that the circumstances are unacceptable having regard to the purposes of Chapter 6 set out in section 602 of the *Corporations Act 2001* (Cth) (**Act**).
11. 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 Ludowici.

Alan Shaw
Counsel
with authority of Robert Johanson
President of the sitting Panel
Dated 28 February 2012



Australian Government

Takeovers Panel

Annexure C
CORPORATIONS ACT
SECTION 657D
ORDERS

Ludowici Limited

The Panel made a declaration of unacceptable circumstances on 28 February 2012.

THE PANEL ORDERS

1. Within 15 business days from the date of these orders, FLS must appoint an Arbitrator, who must be a retired justice of the Federal Court or a State Supreme Court, to assess claims made under these orders.
2. An Affected Shareholder is entitled to compensation if the Affected Shareholder can establish to the satisfaction of the Arbitrator that:
 - (a) the Affected Shareholder disposed of a net number of Ludowici shares during the Relevant Period
 - (b) the Affected Shareholder (or a market participant who advised an Affected Shareholder or operated a discretionary account) was aware of the Reuters article at the time the Affected Shareholder sold Ludowici shares and, at least in part, relied on it and
 - (c) some compensation is payable.
3. The Arbitrator must provide a copy to FLS of any material he or she receives from an Affected Shareholder under order 2 and allow FLS a fair opportunity to make written submissions to the Arbitrator.
4. The amount of compensation is to be determined by the Arbitrator but must not exceed the difference between A\$7.20 per Ludowici share and A\$9.87 (being the VWAP of Ludowici shares on the day of FLS's 16 February announcement). The Arbitrator must take into account:
 - (a) the Ludowici share price at the time of the sale
 - (b) the price obtained by the Affected Shareholder
 - (c) the reasons given in a sworn statement by the Affected Shareholder for selling and
 - (d) the likelihood that the Affected Shareholder would have sold irrespective of the Reuters article.
5. The compensation is payable for the net number of Ludowici shares in which an Affected Shareholder disposed of a beneficial interest during the Relevant Period.

6. FLS must compensate any Affected Shareholder the amount determined by the Arbitrator by a date not later than 10 business days after the determination of the amount.
7. The Arbitrator must make a decision within one month of FLS receiving a claim form from an Affected Shareholder.
8. FLS must, within 20 business days of the date of these orders, cause to be published in one newspaper with a national circulation in Australia and one newspaper in each Australian State and Territory circulating in that State or Territory, a notice that is approved by the Panel and is not smaller than 15 cm by 20 cm and placed in the general or business news section of those newspapers which clearly states:
 - (a) the effect of, and a summary of the reasons for, the orders (including how the Arbitrator will determine claims and that claims must be supported by a sworn statement)
 - (b) a description of the group of persons likely to be Affected Shareholders
 - (c) how Affected Shareholders qualify to receive payment
 - (d) what an Affected Shareholder must do to obtain a claim form
 - (e) the applicable time periods in which Affected Shareholders must act to receive payment under the orders
 - (f) the phone number of an enquiry line that can be called in relation entitlements under these orders and
 - (g) that the Affected Shareholders have 10 business days to register to receive a claim form.
9. The information in the notices published under order 8 must also be published on ASX and prominently on FLS's website and Ludowici's website no later than the first publication under order 8.
10. The Panel must approve the claim form and the terms on which FLS appoints the Arbitrator.
11. The claim form must be dispatched to claiming Affected Shareholders within 15 business days of the date of first publication under order 8.
12. To be entitled to payment an Affected Shareholder must sign and return a claim form (together with a sworn statement) within 10 business days from the dispatch of the claim form.
13. FLS must pay the costs of giving effect to these orders.

Definitions

14. In these orders the following definitions apply.

Term	Meaning
16 February announcement	announcement on 16 February 2012 released to ASX that FLS has agreed to pay A\$10 per Ludowici share for all Ludowici shares, which it will acquire by scheme of arrangement, less any dividends Ludowici

Affected Shareholder	pays its shareholders prior to completion a person who disposed of a beneficial interest in a net number of Ludowici shares during the Relevant Period
correction	the FLS media release dated 31 January 2012 titled " <i>FLSmidth comments on Ludowici media coverage</i> " through the Thompson Reuters InPublic International Financial Wire - Denmark
FLS	FLSmidth & Co. A/S
Relevant Period	period from publication of: (a) the Reuters article to (b) the correction
Reuters article	the article published by Reuters dated 23 January 2012 titled " <i>FLSmidth says A\$7.20 per share Ludowici bid final</i> "

Alan Shaw
Counsel
with authority of Robert Johanson
President of the sitting Panel
Dated 28 February 2012