



Australian Government

Takeovers Panel

**Reasons for Decision
Minemakers Limited
[2012] ATP 8**

Catchwords:

Bidder's statement – deficiencies in disclosure – funding arrangements – accountants certificate – related parties – share prices and premiums – efficient, competitive and informed market – undertaking – declaration – orders – costs order

Corporations Act 2001 (Cth), sections 228(4), 228(6), 602, 636(1), 657A, 657D

Guidance Note 4: Remedies – General, Guidance Note 5: Specific Remedies – Information Deficiencies, Guidance Note 14: Funding arrangements, Guidance Note 18: Takeover documents

ASIC Regulatory Guide 76: Related party transactions, ASIC Regulatory Guide 163: Takeovers – Minimum bid price principle-s621

Goldlink IncomePlus Limited 03 [2008] ATP 21, Skywest Limited 03 [2004] ATP 17, Pinnacle VRB Ltd (No. 4) [2001] ATP 7

INTRODUCTION

1. The Panel, Andrew Low, Jane Sheridan and Heather Zampatti (President), made a declaration of unacceptable circumstances in relation to the affairs of Minemakers. It found that there were disclosure deficiencies and omissions in the bidder's statement lodged by UCL under its off-market takeover bid for Minemakers.
2. In these reasons, the following definitions apply.

Mawarid	Mawarid Mining LLC
MB Holding	MB Holding Company LLC
Minemakers	Minemakers Limited
Sandpiper Project	an undeveloped sedimentary phosphate deposit in Namibia
UCL	UCL Resources Limited
VWAP	volume weighted average price

FACTS

3. The applicant, Minemakers, is an Australian public company listed on ASX (Code: MAK), the Toronto Stock Exchange and the Namibian Stock Exchange.
4. UCL is an Australian public company listed on ASX (Code: UCL).
5. Minemakers and UCL each hold a 42.5% interest in an incorporated joint venture relating to the Sandpiper Project.

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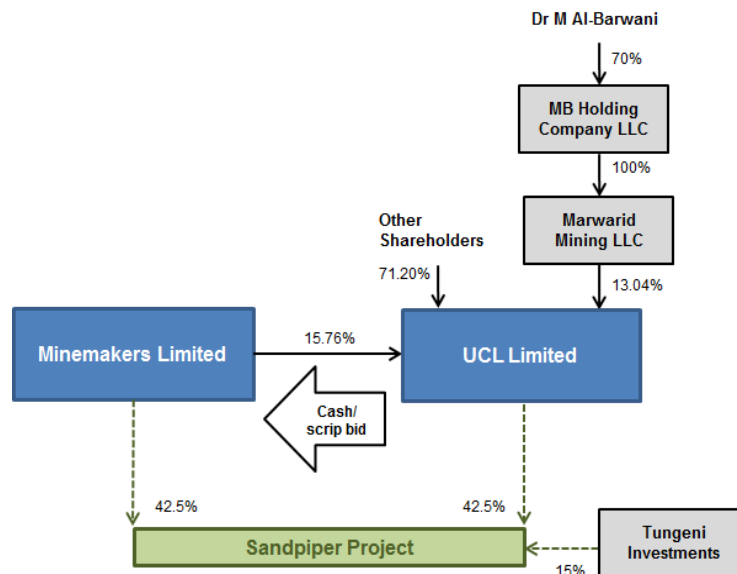
Reasons – Minemakers Limited [2012] ATP 8

6. On 13 February 2012, Minemakers announced an off-market takeover bid for UCL. The bid closed on 22 May 2012. Minemakers received total acceptances of 4.36% taking its shareholding in UCL to 15.76%.
7. On 11 April 2012, UCL and MB Holding entered into a memorandum of understanding regarding a share placement by UCL to MB Holding (or a subsidiary of MB Holding) and a pro rata non-renounceable rights issue.
8. On 12 May 2012, UCL and Mawarid (a wholly owned subsidiary of MB Holding) entered into a subscription agreement, under which Mawarid would be issued 13.04% of UCL's issued capital at A\$0.30 per share. The shares were placed on 15 May 2012.
9. On 17 May 2012, UCL and Mawarid entered into a convertible note agreement for the purpose of supporting the cash component of a takeover bid by UCL for Minemakers. The agreement provided for Mawarid to subscribe for a redeemable convertible note, subject to the satisfaction of conditions precedent, for an amount: *being the lower of:*
 - (i) \$9,000,000; or
 - (ii) *the amount required to fund the cash component of the Takeover Bid in relation to Securities of [Minemakers] where the holder of those Securities has accepted the Offer in accordance with its terms; or*
 - (iii) *that amount which will, on a fully diluted basis, result in [Mawarid's] Voting Power in [UCL] exceeding (sic) 19.9%.*
10. On 18 May 2012, UCL announced an off-market takeover bid for all the shares in Minemakers. Under the offer Minemakers shareholders will receive:
 - (a) 1 UCL share for every 1.6 Minemakers shares held plus
 - (b) A\$0.045 for each Minemakers share held.
11. On 27 May 2012, UCL and Mawarid entered into an underwriting deed under which Mawarid would fully underwrite a 1 for 12 non-renounceable rights issue at A\$0.30 per share.
12. On 28 May 2012, UCL lodged its bidder's statement with ASIC and announced that it would undertake the rights issue. The rights issue is scheduled to close on 26 June 2012. (*Post script: The rights issue closed on 26 June 2012 with subscriptions received for \$327,525.30 leaving under-subscriptions of \$1,970,353.20.*)

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13. Various relationships between the parties prior to the rights issue are described below.



APPLICATION

14. By application dated 5 June 2012, Minemakers sought a declaration of unacceptable circumstances. Minemakers submitted that the UCL bidder's statement contained material deficiencies and omissions. It also submitted that distribution of the bidder's statement without amendment may mislead Minemakers shareholders and would be contrary to sections 602(a) and 602(b)(iii).¹
15. The application identified some 23 disclosure issues. We conducted proceedings in respect of the following areas of concern:
- (a) identity of the provider of funding
 - (b) terms of the convertible note agreement
 - (c) Mawarid being a related party of UCL
 - (d) capital structure and debt obligations of the combined group
 - (e) Minemakers' and UCL's share price and the takeover offer premium
 - (f) statements about UCL's offer for Minemakers providing better financial terms than Minemakers' offer for UCL and
 - (g) miscellaneous concerns such as clearly marking the document as a replacement bidder's statement and correcting calculation errors regarding Minemakers' shareholding in UCL.
16. We did not conduct proceedings in respect of matters we felt could be addressed by Minemakers in its target's statement, or which were not material.

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

Interim orders sought

17. Minemakers sought interim orders that UCL be restrained, pending the outcome of the Panel proceedings, from despatching the bidder's statement and releasing any other information regarding the offer.
18. On 8 June 2012, we accepted an undertaking from UCL (Annexure A), under which UCL would not, prior to or during the week commencing 11 June 2012:
 - (a) despatch to Minemakers shareholders the bidder's statement or any supplementary or replacement statement and
 - (b) publish (or further publish to the extent already published) such information.
19. On 15 June 2012, we accepted a further undertaking (Annexure B) that extended the period of the original undertaking until completion of the Panel proceedings.

Final orders

20. Minemakers sought final orders that:
 - (a) UCL advise the market that the bidder's statement contained deficient statements and omissions and that it will prepare a replacement bidder's statement
 - (b) if the bidder's statement was despatched prior to the Panel's determination of the application, each accepting Minemakers shareholder be informed that their acceptance had been revoked
 - (c) UCL prepare a replacement bidder's statement
 - (d) UCL not despatch the replacement bidder's statement until the Panel had confirmed that it was happy with the form of the statement
 - (e) UCL offer to compensate persons who acquired or disposed of Minemakers shares (other than through accepting the offer) during the period between lodgment of the bidder's statement and the Panel's determination of the application
 - (f) UCL pay Minemakers costs of the proceedings and
 - (g) such other orders as the Panel considers appropriate.

DISCUSSION

Identity of provider of funding

21. In its bidder's statement, UCL stated that the total amount of the cash component of the consideration (\$10.54 million) would be provided under the convertible note agreement between UCL and Mawarid. This must be incorrect, as the convertible note was to provide up to \$9 million and there are other statements in the bidder's statement that UCL would provide the balance from its own resources.
22. In respect of the convertible note, Minemakers submitted that the bidder's statement failed to provide information to establish that Mawarid had sufficient financial resources to pay the cash consideration under the bid.

23. Section 636(1)(f) requires details of any arrangements under which cash will be provided by a person funding a bid.² In *GoldLink 03*, the Panel said:

*A bidder may fund its bid from any source it chooses. However, it must demonstrate that it (or its lenders) have the financial resources to satisfy its obligations under a bid.*³

24. Similarly, section 631(2)(b) requires that a person not announce a bid if the person is reckless as to whether they will be able to perform their obligations. Guidance Note 14 develops this, providing that a bidder should consider making disclosure in relation to establishing that its funder has the necessary financial resources. It says:

*For [non-financial institution funders] more disclosure may be needed (eg, full accounts, or in most cases an accountant's certificate as to its ability to meet the obligation with disclosure of the content of the accountant's certificate or enough of it to allow shareholders to be satisfied of the sufficiency of the arrangements).*⁴

25. The Panel has previously required evidence that a funder had sufficient arrangements in place to meet its funding obligations and did not simply accept a statement acknowledging that the funder had the financial standing to meet its obligations.⁵ Where a financier is a private foreign company that is little known in Australia, this adds to the uncertainty as to whether a bidder is able to pay the consideration offered under the bid.⁶ Mawarid is a private foreign company.
26. UCL submitted that it would disclose a certificate in respect of Mawarid, but the certificate provided was given by Mawarid's chief financial officer. We require a certificate from a reputable, independent accountant or auditor. (*Post script: UCL agreed to include such a certificate.*)
27. We also think that the statement of funding needs to address the various situations should the convertible note not raise \$9 million. If the convertible note will necessarily raise that amount, a clear statement to that effect is required. UCL agreed to include the disclosure.

² Sec 636(1)(f) provides:

- (f) *in relation to the cash consideration (if any) offered under the bid – details of:*
- (i) *the cash amounts (if any) held by the bidder for payment of the consideration; and*
 - (ii) *the identity of any other person who is to provide, directly or indirectly, cash consideration from that person's own funds; and*
 - (iii) *any arrangements under which cash will be provided by a person referred to in subparagraph (ii)*

³ *Goldlink IncomePlus Limited 03* [2008] ATP 21 at [14]

⁴ GN 14 at paragraph [22]

⁵ *Pinnacle VRB Ltd (No. 4)* [2001] ATP 7 at [44], [64]-[65],

⁶ *Pinnacle VRB Ltd (No. 4)* [2001] ATP 7 at [48]

Convertible note agreement

28. The bidder's statement contained limited disclosure regarding the terms of the convertible note agreement. For example, the disclosure did not include:
- (a) a list of all conditions precedent or the sunset date for satisfying them
 - (b) what constituted an event of default
 - (c) the consequences of an event of default on the money being raised and issue price of shares under the convertible note
 - (d) the consequences that a change of control of UCL would have on the money being raised becoming repayable or
 - (e) the impact of the underwriting agreement on the money that was being raised and on the number of shares that might be issued under the convertible note based on various assumptions as to who took up the shortfall.
29. Minemakers submitted that offerees could not properly assess the likelihood of the conditions precedent being met, or the risk of a breach of the convertible note agreement, and therefore could not properly assess whether the subscription sum would be available to fund the offer. It also submitted that the information was material because Minemakers shareholders will, as part of the combined group, have to service the debt.
30. We agree that this information is material for Minemakers shareholders in assessing the merits and risks of the offer and prospects of the combined group and should be included in the bidder's statement. UCL agreed to include the information.

Related party arrangements

31. Minemakers submitted that, as Mawarid was a related party of UCL, the arrangements under the convertible note agreement constituted a related party transaction that needed to comply with Chapter 2E and ASX Listing Rule 10.11. It also submitted that UCL needed to comply with the disclosure requirements in ASIC Regulatory Guide 76.⁷
32. UCL submitted that it and Mawarid were not related parties at the time of signing the subscription agreement.
33. The relevant course of events was as follows:
- (a) on 11 April 2012, UCL and MB Holding entered into a memorandum of understanding for the placement of 15% of UCL's ordinary shares to MB Holding or its subsidiaries. The MOU provided that:
 - (i) MB Holding would have a right to participate in future placements by UCL and

⁷ ASIC Regulatory Guide 76: Related party transactions at paragraph [76.148]

- (ii) *the Directors of [UCL] agree to appoint [MB Holding's] suggested candidate, having assessed that the candidate has suitable professional skills to compliment (sic) the current Board members, upon completion of the Placement*
 - (b) on 6 May 2012, Mr Ian Ross, chairman of UCL, invited Dr Al Barwani to consider joining the board of UCL
 - (c) on 12 May 2012, UCL and Mawarid entered a subscription agreement for 12,121,061 shares in UCL (13.04%). The agreement provided that:
 - (i) following the placement, Mawarid would have the first right to participate in future placements and
 - (ii) on the issue date, UCL would appoint Dr Al Barwani to its board
 - (d) on 15 May 2012, the shares were issued. According to UCL's Appendix 3B lodged with ASX, the shares were issued to raise working capital
 - (e) in an email to Dr Al Barwani dated 15 May 2012, Mr Ross enclosed a formal invitation letter to Dr Al Barwani and said:

I am delighted ... that the documentation in connection with the initial investment of [MB Holding] has now been formalised. We are most excited at the prospect of having your support going forward
 - (f) on 17 May 2012, Mawarid lodged a substantial holding notice. It disclosed the interest of itself, MB Holding and Dr Al Barwani in the 12,121,061 shares in UCL
 - (g) on 17 May 2012, UCL and Mawarid entered the convertible note agreement to support the cash component of UCL's bid for Minemakers
 - (h) on 21 May 2012, UCL announced the appointment of Dr Al Barwani to its board. On that day, Dr Al Barwani lodged an Appendix 3X form⁸ with ASX disclosing a "nil" interest in shares or contracts with UCL and
 - (i) on 22 May 2012, Dr Al Barwani lodged a revised Appendix 3X form with ASX disclosing an indirect interest in the 12,121,061 shares in UCL held by Mawarid and a "nil" interest in contracts.
34. UCL submitted that there had been no discussion of Dr Al Barwani's ownership of MB Holding and the offer of a directorship in UCL was not tied to his interest in MB Holding. It submitted that it was only advised of Dr Al Barwani's interest in MB Holding when it received an email at the time the amended Appendix 3X was lodged with ASX. However, the MOU contemplated the appointment of a suitable candidate suggested by MB Holding.
35. UCL further submitted:
- (a) it was not aware that Dr Al Barwani held an interest in MB Holding until 22 May 2012

⁸ Initial Director's Interest Notice

- (b) it had relied on background documents provided by its corporate adviser as its due diligence on MB Holding and
 - (c) the documents were entered into on arm's length terms.
36. An entity is a related party of a public company at a particular time if the entity believes or has reasonable grounds to believe that it is likely to become a related party of the company.⁹
37. Section 228(4) states that an entity controlled by a director of a public company is a related party of that public company. MB Holding and Mawarid are controlled by Dr Al Barwani. Dr Al Barwani owns 70% of the issued capital of MB Holding. MB Holding owns 100% of the issued capital of Mawarid. Dr Al Barwani was appointed a director of UCL on 21 May 2012.
38. In our view, Mawarid had reasonable grounds to believe that it was likely to become a related party.¹⁰ We take into account the following factors:
- (a) the memorandum of understanding between Mawarid and UCL dated 11 April 2012 recognised that a candidate of MB Holding would be appointed to UCL's board (having assessed the person's suitable professional skills)
 - (b) MB Holding was entitled itself or through its subsidiaries to subscribe
 - (c) the memorandum of understanding was signed by a Mr Usama Al Barwani
 - (d) there was discussion of the appointment of Dr Mohamed Al Barwani on at least 6 May 2012
 - (e) the subscription agreement referred to the "Parties" (being parties to the subscription agreement) having entered the memorandum of understanding
 - (f) the subscription agreement required UCL to appoint Dr Mohamed Al Barwani to its board and
 - (g) the subscription amount was significant, being approximately 13% of UCL.
39. We cannot accept that UCL only knew of Dr Al Barwani's interest in MB Holding on 22 May 2012. There is a substantial holding notice lodged on 17 May 2012 that discloses the interest.
40. Moreover, it is, in our view, unlikely that UCL did not know of Dr Al Barwani's controlling interest in MB Holding prior to the execution of the subscription agreement, particularly given:
- (a) his ownership was apparent from MB Holding's website
 - (b) UCL was aware that Mawarid was a wholly-owned subsidiary of MB Holding
 - (c) it would be highly unusual to make a placement of the magnitude that UCL did without understanding who controlled the placee and

⁹ Section 228(6)

¹⁰ Section 228(6)

(d) Mr Usama Al Barwani signed the MOU, and he and Dr Al Barwani signed the subscription agreement.

41. Accordingly we are prepared to say that the subscription agreement was a related party transaction.
42. In so far as the convertible note is concerned, Minemakers submitted that UCL must have known of Dr Al Barwani's position regarding Mawarid at the time of entering the convertible note agreement (17 May 2012). We agree with that submission. In any event, by that date (in fact on 15 May 2012) Dr Al Barwani had been offered a board seat by UCL. Accordingly, we are prepared to say that the convertible note agreement was a related party transaction.
43. Dr Al Barwani became a director of UCL on 21 May 2012. The underwriting deed, entered on 27 May 2012, was also a related party transaction.
44. Noting UCL's submission that, at the time of signing the subscription agreement, no related party arrangement between Mawarid and UCL existed, we think that the bidder's statement needs to contain the information in ASIC Regulatory Guide 76 at paragraph [76.148] for the subscription agreement, convertible note agreement and underwriting deed. UCL agreed to make this disclosure.
45. We also require that the replacement bidder's statement provide additional related party disclosure. In our view it must include, at least, the dates of entry into the MOU, the subscription agreement, and the underwriting deed; must include details (including dates) of discussions about Dr Al Barwani joining the UCL board and the date of his appointment; and must include details of UCL's relationship with Dr Al Barwani. We also require a detailed explanation of why the agreements are not related party transactions, as UCL maintains. (*Post script: UCL agreed also to make this disclosure.*)

Capital structure and debt obligations of the combined group

46. A number of variables affect the financial structure of the combined group, such as the rights issue and the amount of funding under the convertible note.
47. Minemakers submitted that, if the bid was successful, the combined group would need to service the debt under the convertible note and the information to allow shareholders to make an assessment of that was insufficient.
48. We agree. There is no clear, concise and effective disclosure regarding the debt obligations of the combined group assuming the subscription sum under the convertible note. In addition, we think that the risk factors disclosed in the bidder's statement should include the risk of the combined group not being able to repay the convertible note. UCL agreed to make this disclosure.
49. Minemakers also submitted that there was no reasonable basis to assume that UCL's rights issue would be fully subscribed (as the issue price was substantially higher than the market price). Therefore, it submitted, forward looking information should assume that all the new shares would be issued to Mawarid in its capacity as underwriter.

50. We also consider that the impact of the underwriting on the money being raised and the number of shares that might be issued under the convertible note, based on various assumptions as to who will take up the shortfall in the rights issue, requires disclosure. *(Post script: UCL completed its rights issue on 26 June 2012, before lodgement of the replacement bidder's statement, and has agreed to include disclosure in respect of the outcome. We agree that this simplified disclosure is appropriate.)*
51. In addition, Minemakers submitted that disclosure of the sunset date for satisfying the conditions precedent of the convertible note (17 July 2012) should be disclosed. We agree. UCL agreed to make this disclosure.
52. In the bidder's statement, there are tables setting out UCL's share structure following conversion of the convertible note and completion of the rights issue. The tables involve many scenarios and, in our view, this is not clear, concise and effective disclosure of the shareholding structure of the combined group. The Panel's primary focus is on the quality and accessibility of information for target shareholders.¹¹ UCL agreed to redo the tables following completion of the rights issue.

Share prices, takeover offer premium and comparison of bids

53. Minemakers submitted:
- (a) there is limited disclosure regarding recent UCL share prices
 - (b) in the context of a scrip bid, UCL should follow the best practice guidelines in ASIC Regulatory Guide 163¹² and disclose the highest and lowest closing prices of UCL shares in the four months before the date of lodgment of the bidder's statement with ASIC
 - (c) comparisons of the Minemakers and UCL share prices in the bidder's statement were misleading as they relied on different trading periods and ignored the fact that the UCL share price may have been affected by the takeover offer by Minemakers for UCL (which closed on 22 May 2012)
 - (d) shareholders should be provided with premia based on the VWAP over a number of periods and
 - (e) comparisons of the value of Minemakers' bid for UCL and UCL's bid for Minemakers were misleading for reasons including that the cash component of UCL's offer diluted Minemakers shareholders' interests and Minemakers' offer was made prior to UCL's placement of shares to Mawarid and the rights issue.
54. ASIC submitted that using the most recent practicable share price would assist investors, and there should also be explanations and cautionary statements where there has been any irregular trading.

¹¹ Guidance Note 5 "Specific Remedies – Information Deficiencies" at paragraph [2]

¹² ASIC Regulatory Guide 163: Takeovers – Minimum bid price principle-s621 at paragraph [163.61]

55. In terms of using VWAP, ASIC submitted that there should be a rational basis for the dates used for the VWAP calculations and that this basis was material information which should be disclosed to investors.
56. We agree that statements regarding prices and premia in the bidder's statement are deficient. In particular:
- (a) UCL had not included prices at the most recent practicable date
 - (b) UCL had not clearly explained its reasons for selecting particular dates for comparison
 - (c) comparisons were not like-for-like, as they used share prices for Minemakers and UCL over different periods and
 - (d) value statements were made without a reasonable basis for them being disclosed.¹³
57. UCL agreed to include in the replacement bidder's statement 1, 3 and 6 month VWAPs and a clear explanation, in any reference to share prices or premia, to the fact that the figures may have been affected by the two bids. In determining that VWAP over these periods was an appropriate disclosure in this case, we have had regard to the lack of liquidity in shares of both companies and the impact of corporate action on share prices over shorter periods.
58. We also think it is appropriate to include share prices for the last practicable trading date prior to printing the replacement bidder's statement. UCL agreed to provide this.
59. A table in the bidder's statement compared the number of Minemakers shares per UCL share for each of the two bids, as a way of showing which bid offered better financial terms. We think that, if this is retained, the replacement bidder's statement must include a 6 month VWAP, up to the last practicable trading date prior to printing, and an explanation of the methodology used to arrive at the number of Minemakers shares per UCL share. UCL agreed to do this.

Miscellaneous deficiencies and omissions

60. The bidder's statement contains miscellaneous deficiencies and omissions which we think should be remedied, including clarification of the 'key dates' table under "Important Information" and calculation errors regarding Minemakers' shareholding in UCL.
61. We also think the replacement bidder's statement should be clearly marked "Replacement" on the cover. Although the original bidder's statement was not despatched, it was released to ASX and there is potential for confusion if the two documents are not clearly distinguished.

¹³ See Guidance Note 18: Takeover documents at paragraph [27]

DECISION

Declaration

62. It appears to us that the circumstances are unacceptable:
- (a) having regard to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of Minemakers or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Minemakers and
 - (b) having regard to the purposes of Chapter 6 set out in section 602 and
 - (c) because they constituted, constitute, will constitute or are likely to constitute a contravention of a provision of Chapter 6.
63. UCL did not appear to engage properly with the concerns raised by Minemakers prior to Minemakers lodging the application. There was correspondence, including a proposal to prepare a replacement bidder's statement, but few concessions were made. UCL appeared only to engage properly when it responded to the Panel's brief (in which it conceded virtually all the disclosure points raised).
64. UCL provided a draft replacement bidder's statement to the Panel (and parties) when we indicated that we were minded to make a declaration and orders (ie, in response to the orders brief). The replacement bidder's statement did not adequately address our concerns.
65. We consider that the most practical and timely way to manage the necessary disclosure is by orders. Accordingly, we make the declaration in Annexure C and consider that it is not against the public interest to do so. We had regard to the matters in s657A(3).

Orders

66. Following the declaration, we make the final orders in Annexure D.
67. Under s657D the Panel's power to make orders is very wide. The Panel is empowered to make 'any order'¹⁴ if 4 tests are met:
- (a) it has made a declaration under s657A. This was done on 25 June 2012.

¹⁴ Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

- (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. We are satisfied that our orders do not unfairly prejudice any person. We note that UCL agreed to make the disclosure we sought.
- (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 20 June 2012. Each party made submissions and rebuttals.
- (d) it considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons, or ensure that a takeover or proposed takeover proceeds as it would have if the circumstances had not occurred. The orders do this by requiring that UCL prepare a replacement bidder's statement that addresses the information deficiencies.

68. Consistent with Guidance Note 5,¹⁵ we require that the corrective disclosure be approved by us and a statement be made, in this case to the market, of what corrective disclosure is required. (*Post script: UCL notified the market that there were disclosure deficiencies and the nature of those deficiencies by ASX announcement on 25 June 2012.*)
69. As the corrective disclosure will be in a replacement bidder's statement, it will be sent to all Minemakers shareholders.

Request for compensation order

70. Minemakers sought a final order that UCL be required to offer to compensate persons who acquired or disposed of Minemakers shares (other than through accepting the offer) during the period between lodgment of the bidder's statement and the Panel's determination of the application. We are not inclined to make this order in this case, although we acknowledge that there may be cases where such an order may be warranted.

Costs

71. Minemakers sought an order that its costs in relation to the proceedings be paid by UCL.
72. The Panel's policy is to allow a party to make, or resist, an application once without exposure to a costs order, provided it presents a case of reasonable merit in a businesslike way.¹⁶ The Panel indicated to the parties that it was not minded to make an order for costs, but would be prepared to revisit this issue depending on:
- (a) how promptly UCL provided a draft replacement bidder's statement for consideration by the Panel and parties
 - (b) whether UCL satisfactorily addressed the information deficiencies and

¹⁵ GN 5 at paragraph [21]

¹⁶ Guidance Note 4: Remedies – General at paragraph [27]

- (c) any other relevant considerations not already put to the Panel in the application, submissions and rebuttals.
73. The replacement bidder's statement needed a number of rounds of amendments before we were sufficiently satisfied with the disclosure. It took considerable time to achieve this. We decided we should revisit the question of costs and invite further submissions from the parties.
74. UCL submitted that it had been working to meet the concerns raised and it would not be appropriate to order costs against it. It submitted that the Panel has awarded costs only in limited circumstances, such as when a party wasted time making unsubstantiated assertions; and the circumstances here did not substantiate a costs order being made.
75. We are satisfied that Minemakers was put to additional expense, beyond what might have been required to make a Panel application and prosecute it, by the multiple versions of the replacement bidder's statement that needed to be reviewed before the disclosure was sufficiently satisfactory. Adopting the principle from *Skywest 03*,¹⁷ we consider that UCL failed to conduct itself in a professional and businesslike fashion and the current circumstances warrant the making of a costs order.
76. Accordingly we have varied the final orders to add a costs order for part of the costs involved in the proceedings. We do not think the costs order is unfairly prejudicial to UCL. It is a proportion of the costs sought and, in our view, represents only costs actually, necessarily, properly and reasonably incurred¹⁸ in taking steps that might have been avoided.
77. The variation of orders is Annexure E.

Heather Zampatti
President of the sitting Panel
Decision dated 25 June 2012
Reasons published 12 July 2012

¹⁷ *Skywest Limited 03* [2004] ATP 17 at [83]; see also Guidance Note 4 Remedies – General at paragraph [28(d)]

¹⁸ See GN 4 at paragraph [33]

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Reasons - Minemakers Limited
[2012] ATP 8

Advisers

Party	Advisers
Minemakers Limited	Corrs Chambers Westgarth
UCL Resources Limited	Eakin McCaffery Cox



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Annexure A

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

MINEMAKERS LIMITED (Minemakers)

UCL RESOURCES LIMITED (UCL) undertakes to the Panel that it will not, prior to or during the week commencing 11 June 2012:

1. despatch to Minemakers shareholders the original bidder's statement lodged with ASIC on 28 May 2012 or any supplementary bidder's statement or replacement bidder's statement and
2. publish (or further publish to the extent already published) such information.

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

**Signed by Chris Jordinson, Managing Director
with the authority, and on behalf, of UCL
Dated 8 June 2012**

Annexure B

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

MINEMAKERS LIMITED (Minemakers)

UCL RESOURCES LIMITED (UCL) undertakes to the Panel that it will not, before the completion of the Panel proceedings brought by Minemakers by application dated 5 June 2012:

1. despatch to Minemakers shareholders the original bidder's statement lodged with ASIC on 28 May 2012 or any supplementary bidder's statement or replacement bidder's statement and
2. publish (or further publish to the extent already published) such information.

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

This undertaking replaces the undertaking dated 8 June 2012.

**Signed by Chris Jordinson, Managing Director
with the authority, and on behalf, of UCL
Dated 15 June 2012**



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Annexure C

CORPORATIONS ACT

SECTION 657A

DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

MINEMAKERS LIMITED

CIRCUMSTANCES

1. On 18 May 2012, UCL Resources Limited (**UCL**) announced an off-market takeover bid for all the shares in Minemakers Limited (**MAK**).
2. Under the offer, MAK shareholders will receive:
 - (a) 1 UCL share for every 1.6 MAK shares held and
 - (b) 4.5 cents cash for every MAK share held.
3. On 28 May 2012, UCL lodged its bidder's statement with ASIC. There are material information deficiencies in the bidder's statement, including in relation to:
 - (a) proposed funding of UCL's bid
 - (b) related party transactions
 - (c) capital structure of the combined group and
 - (d) recent sales prices of MAK and UCL shares and the offer premium.
4. It appears to the Panel that the circumstances are unacceptable:
 - (a) having regard to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of MAK or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in MAK and
 - (b) having regard to the purposes of Chapter 6 set out in section 602 of the *Corporations Act 2001 (Cth)* (**Act**) and
 - (c) because they constituted, constitute, will constitute or are likely to constitute a contravention of a provision of Chapter 6 of the Act.
5. 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 MAK.

Alan Shaw
Counsel
with authority of Heather Zampatti
President of the sitting Panel
Dated 25 June 2012



Australian Government

Takeovers Panel

Annexure D

**CORPORATIONS ACT
SECTION 657D
ORDERS**

MINEMAKERS LIMITED

The Panel made a declaration of unacceptable circumstances on 25 June 2012.

THE PANEL ORDERS

1. UCL Resources Limited (**UCL**) immediately advise the market, in a form approved by the Panel, of the following:
 - (a) its bidder's statement lodged with ASIC on 28 May 2012 contains information deficiencies in the areas identified in the Schedule (**information deficiencies**)
 - (b) the nature of the information deficiencies and
 - (c) it will lodge, and send each Minemakers Limited (**MAK**) shareholder, a replacement bidder's statement, in a form approved by the Panel, which addresses the information deficiencies.
2. UCL prepare a replacement bidder's statement as soon as practicable, in a form approved by the Panel, which addresses the information deficiencies.
3. UCL not, before lodgment of the replacement bidder's statement:
 - (a) despatch to Minemakers shareholders the original bidder's statement lodged with ASIC on 28 May 2012 or any supplementary bidder's statement or replacement bidder's statement or
 - (b) publish (or further publish to the extent already published) such information.

SCHEDULE

(1) Identity of provider of funding

- (a) Disclosure of the accounts for, or an accountant's certificate in respect of, Mawarid Mining LLC (**Mawarid**)
- (b) Disclosure of details of the convertible note agreement with Mawarid, including:
 - Conditions precedent
 - Events of Default
 - The consequences of an event of default on the money being raised and on the issue price of shares under the convertible note
 - The consequences of an event of default, and in particular the change of control event, on the money being raised becoming repayable and

- The impact of the underwriting agreement (for the 1:12 non-renounceable rights issue announced to ASX on 28 May 2012) on the money being raised and the number of shares that might be issued under the convertible note based on various assumptions as to who takes up shortfall
- (c) A statement that the additional funds required to fund the cash component of the bid (ie the difference between the funds raised under the convertible note and the cash required to fund the bid) are provided from the bidder's own resources
- (d) Disclosure of an estimate of the likely amount of additional funds required in each of the following scenarios:
- 50.1% acceptance
 - 100% acceptance
- (e) Disclosure, given the impact of the underwriting agreement on the convertible note, based on various assumptions as to who takes up shortfall, of the amount of additional funds required.
- (2) Related party disclosure**
- (a) Prominent disclosure that Mawarid is a related party of UCL
- (b) The information required by ASIC RG [76.148].
- (3) Capital structure of the combined group**
- (a) Clear, concise and effective disclosure regarding the debt obligations of the combined group assuming the subscription sum under the convertible note is:
- \$9 million
 - The amount required to fund the cash component of the bid where 50.1% of MAK shareholders accept
 - The amount required to fund the cash component of the bid where 100% of MAK shareholders accept and
 - The amount that will, on a fully diluted basis, result in Mawarid's voting power being 19.9%
- The disclosure should also show the difference between Mawarid taking up all of the rights issue and Mawarid taking up only its pro rata shareholding
- (b) Clear, concise and effective disclosure, in a table, of the shareholding structure of the combined group (for both 50.1% acceptance and 100% acceptance) assuming the subscription sum under the convertible note is:
- \$9 million
 - The amount required to fund the cash component of the bid where 50.1% of MAK shareholders accept
 - The amount required to fund the cash component of the bid where 100% of MAK shareholders accept and

- The amount that will, on a fully diluted basis, result in Mawarid's voting power being 19.9%

The disclosure should also show the difference between Mawarid taking up all of the rights issue and Marawrid taking up only its pro rata shareholding

- (c) disclosure that UCL has provided Mawarid with a first right to participate in future placements.

(4) MAK and UCL share prices and the takeover offer premium

- (a) Disclosure of MAK and UCL share prices:

- on the last practicable trading date prior to printing of the replacement bidder's statement
- as 1-month VWAP up to the last practicable trading date prior to printing of the replacement bidder's statement
- as 3-month VWAP up to the last practicable trading date prior to printing of the replacement bidder's statement and
- as 6-month VWAP up to the last practicable trading date prior to printing of the replacement bidder's statement

- (b) If a comparison of UCL's offer for MAK to MAK's offer for UCL is retained:

- only a 6-month VWAP up to the last practicable trading date prior to printing of the replacement bidder's statement must be used to arrive at the number of "MAK shares per UCL share" and
- the methodology used to arrive at the number of "MAK shares per UCL share" must be disclosed

- (c) Disclosure, in any reference to share prices, that the prices may have been affected by (as the case may be):

- MAK's bid for UCL, together with the date the bid was announced and concluded and
- UCL's bid for MAK, together with the date the bid was announced

- (d) Disclosure, in any reference to offer premium, that the calculation may have been affected by (as the case may be):

- MAK's bid for UCL, together with the date the bid was announced and concluded and
- UCL's bid for MAK, together with the date the bid was announced.

(5) Other disclosure

- (a) Clarification of the key dates table under "Important Information"

- (b) Amendment of references to MAK's shareholding in UCL

- (c) Reference to the replacement bidder's statement as a 'replacement', including on the front cover.

Alan Shaw
Counsel
with authority of Heather Zampatti
President of the sitting Panel
Dated 25 June 2012



Australian Government

Takeovers Panel

Annexure E

**CORPORATIONS ACT
SECTION 657D(3)
VARIATION OF ORDERS**

MINEMAKERS LIMITED

Pursuant to section 657D(3) of the *Corporations Act 2001* (Cth)

THE PANEL ORDERS

The final orders made on 25 June 2012 are varied by adding the following paragraph:

4. Within 10 business days of the date of this order for costs, UCL must pay to Minemakers \$13,704.00 representing the costs actually, necessarily, properly and reasonably incurred in the course of the proceedings in attending to the following:
 - a) Preparation of submissions and rebuttal submissions in response to the Panel's supplementary brief on orders (\$6,421)
 - b) Reviewing second draft of the replacement bidder's statement (\$2,168)
 - c) Reviewing the third draft of the replacement bidder's statement (\$4,215) and
 - d) Reviewing the fourth draft of the replacement bidder's statement (\$900).

Alan Shaw
Counsel
with authority of Heather Zampatti
President of the Sitting Panel
Dated 11 July 2012