



## Australian Government

### Takeovers Panel

# Reasons for Decision Minemakers Limited 02 [2012] ATP 13

#### Catchwords:

*Eggleston principles – disclosure - efficient, competitive and informed market - material omission - section 602 principles - target's statement - expert's report - supplementary target's statement - decline to conduct proceedings - no reasonable prospect that it would declare the circumstances unacceptable*

*Corporations Act 2001 (Cth), sections 602, 638*

*ASIC RG 111- Content of expert reports*

*Minemakers Limited [2012] ATP 8, Bowen Energy Limited 02R [2009] ATP 19, Auspine Limited [2007] ATP 18, Becker Group Limited [2007] ATP 13, Universal Resources Limited [2005] ATP 6, National Can Industries Limited 01(R) [2003] ATP 40, National Can Industries Limited 01 [2003] ATP 35, Ranger Minerals Limited [2002] ATP 11, Namakwa Diamond Company NL (No.4) [2001] ATP 15, Namakwa Diamond Company NL (No. 3) [2001] ATP 12*

## INTRODUCTION

1. The Panel, Richard Hunt, Jane Sheridan and Heather Zampatti (sitting President), declined to conduct proceedings on an application by UCL Resources Limited in relation to the affairs of Minemakers Limited. The application concerned the disclosure in Minemakers' target's statement. The Panel considered that the issues raised were for the expert to decide, or were matters that could be addressed in a supplementary bidder's statement, to the extent they were issues, and there was no reasonable prospect that it would declare the circumstances unacceptable.
2. In these reasons, the following definitions apply.

BDO	BDO Corporate Finance (WA) Pty Ltd, the independent expert engaged by Minemakers
Minemakers	Minemakers Limited
Sandpiper Project	an undeveloped sedimentary phosphate deposit in Namibia, partly owned by each of Minemakers, UCL and Tungeni Investments
UCL	UCL Resources Limited
Wonarah Project	Phosphate project in the Northern Territory, wholly owned by Minemakers
Optiro	Optiro Pty Ltd, the independent technical specialist engaged by BDO to value the Wonarah Project and Sandpiper Project

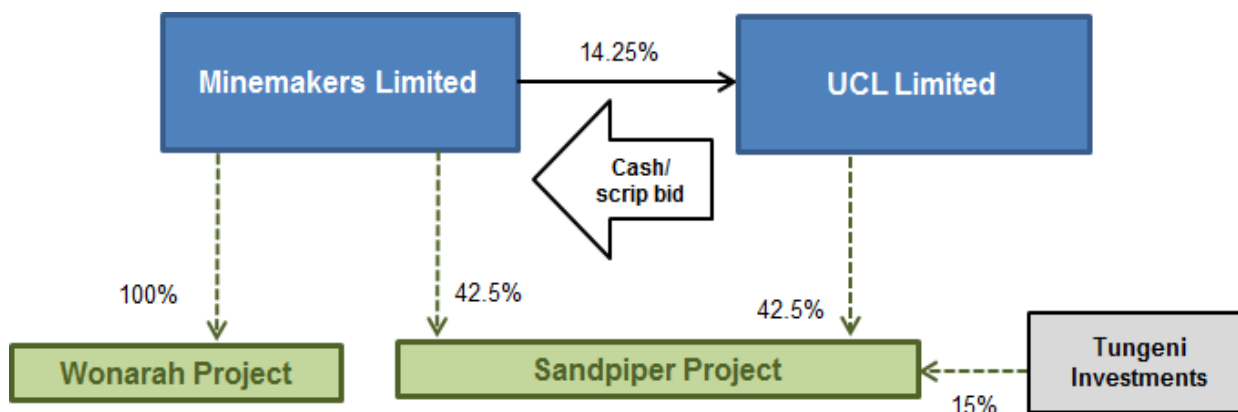
## FACTS

3. Minemakers is a public company listed on ASX (ASX code: MAK), the Toronto Stock Exchange and the Namibian Stock Exchange.
4. UCL is an ASX listed company (ASX code: UCL).

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5. Minemakers and UCL each hold a 42.5% interest in an incorporated joint venture relating to the Sandpiper Project.
6. Minemakers owns the Wonarah project.
7. The relationship between the parties is as follows:



8. On 18 May 2012, UCL announced an off-market takeover bid for Minemakers. It is offering one UCL share for every 1.6 Minemakers shares and 4.5 cents cash for each Minemakers share. The board of Minemakers has recommended that shareholders reject the offer.
9. On 13 July 2012, UCL lodged a replacement bidder's statement.<sup>1</sup>
10. On 24 July 2012, Minemakers lodged its target's statement. It included an independent expert report by BDO, which concludes that the offer is neither fair nor reasonable to shareholders. The report was supported by a report by Optiro on the valuation of the Wonarah Project and Sandpiper Project.
11. According to Optiro:  
*In response to the UCL takeover offer, and in reviewing the UCL proposal, Minemakers and BDO requested Optiro prepare an independent valuation of the mineral assets at Wonarah and Sandpiper. In accordance with BDO's instructions, Optiro's valuation of the Sandpiper phosphate project has been carried out by reviewing the approach used by Snowden Mining Industry Consultants Pty Ltd (Snowden) in their 16 March 2012 report.*
12. On 27 July 2012, UCL raised with Minemakers issues that it considered raised concerns with the target's statement. Minemakers responded on 1 August 2012. BDO also responded in respect of valuation issues raised.
13. On 3 August 2012, the day UCL made its application, Minemakers lodged a supplementary target's statement dealing with some of the issues UCL had raised.

<sup>1</sup> See *Minemakers Limited* [2012] ATP 8

## APPLICATION

### Declaration sought

14. By application dated 3 August 2012 UCL sought a declaration of unacceptable circumstances. It submitted that the target's statement contained material misstatements or there were omissions. It submitted:

*In summary, these relate to the following matters:*

- (a) fundamentally flawed and misleading valuations of the Sandpiper and Wonarah projects;*
  - (b) overstatement of Minemakers' cash position;*
  - (c) failing to apply an appropriate discount rate to any funds which may be received on exercise of options before those funds are included as an asset of Minemakers for the purposes of determining its net asset value;*
  - (d) misleading assertions concerning the valuation of Minemakers shares;*
  - (e) misleading assertions concerning the sale of UCL shares in circumstances where UCL obtains control of Minemakers;*
  - (f) misleading valuation of Minemakers' other assets;*
  - (g) failure to provide balanced disclosure generally, in particular by providing a front cover of the target's statement that solely focuses on the disadvantages of the UCL Offer;*
  - (h) misleading references to UCL's 'own' independent expert; and*
  - (i) a number of other errors and inconsistencies.*
15. UCL submitted that the effect of the circumstances was to:
- (a) inhibit, or likely inhibit, the acquisition of control of Minemakers taking place in an efficient, competitive and informed market, contrary to section 602(a) and
  - (b) prevent, or likely prevent, Minemakers shareholders from having enough information to:
    - (i) enable them to assess the merits of the UCL Offer, contrary to section 602(b)(iii) and
    - (ii) know the identity of persons who propose to acquire a substantial interest in Minemakers, contrary to section 602(b)(i).

### Final orders sought

16. UCL sought final orders to the effect that:

- (a) Minemakers prepare a supplementary target's statement correcting the material misstatements in, and omissions from, the target's statement and
- (b) Minemakers lodge the supplementary target's statement with ASIC, send a copy to UCL and ASX and despatch it to Minemakers shareholders.

## DISCUSSION

### Supplementary target's statement

17. In Minemakers' supplementary target's statement lodged on 3 August 2012, Minemakers referred to UCL's concerns and made certain further disclosures. Minemakers also confirmed in the supplementary target's statement that BDO had consulted with Optiro, and did not believe there was any requirement to update its report or modify its opinion in response to UCL's letter.

### Long list of issues

18. The application contained a lengthy list of issues set out in a table as a schedule.
19. As correspondence between the parties makes clear, relevant issues raised by UCL in relation to Minemakers' target's statement were considered by BDO and Optiro.
20. In our view, the Panel should not undertake inquiries into the correctness of an independent expert report in the absence of strong preliminary indications of:
- (a) a clear fault in the methodology,<sup>2</sup> which would normally include non-compliance with relevant industry codes<sup>3</sup>
  - (b) statements that are plainly false and material to the conclusion<sup>4</sup>
  - (c) the expert having reached a conclusion that no reasonable expert could reasonably arrive at<sup>5</sup>
  - (d) a question mark over the independence of the expert<sup>6</sup> or
  - (e) some other basis taking the issue beyond what might be described as simply matters on which experts might disagree.<sup>7</sup>
21. As the Panel said in *Auspine*:<sup>8</sup>
49. As a threshold issue, the Panel considered whether, in the absence of evidence of manifest error, it was appropriate for the Panel to question the conclusions reached by an independent expert.
50. The Panel did not accept *Auspine*'s submission that, in the absence of manifest error or bias, it should not review or overturn the methodology adopted or conclusion reached by an independent expert. Rather, the Panel considered that whether such questioning was appropriate would turn in each case on the relevant facts.

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<sup>2</sup> See for example, *Becker Group Limited* [2007] ATP 13, particularly at [95]-[97]

<sup>3</sup> See for example, *Universal Resources Limited* [2005] ATP 6

<sup>4</sup> See for example, *Ranger Minerals Limited* [2002] ATP 11

<sup>5</sup> See for example, *Bowen Energy Limited* 02R [2009] ATP 19

<sup>6</sup> See for example, *National Can Industries Limited* 01 [2003] ATP 35, affirmed in *National Can Industries Limited* 01(R) [2003] ATP 40

<sup>7</sup> See for example *Namakwa Diamond Company NL* (No. 3) [2001] ATP 12 at [4], affirmed on review *Namakwa Diamond Company NL* (No.4) [2001] ATP 15

<sup>8</sup> *Auspine Limited* [2007] ATP 18

51. *The Panel considered that while there may be circumstances in which such questioning **would** be appropriate, in this instance, there was no material before the Panel to suggest that Lonergan had not been provided with relevant information, or that the conclusions reached suggested a manifest error in determining a valuation range for Auspine shares. Further, the Panel considered that the explanations provided by Lonergan (and set out by Auspine in the DSTS) in response to Gunns' assertions that simple errors had been made in calculating the value range were were (sic) reasonable, and the Panel considered that the issued (sic) had been properly considered and dismissed by Lonergan.*

52. *Accordingly, the Panel concluded that the issues between the parties in this respect were matters on which experts might validly disagree, and hence were suitable for discussion or argument between bidder and target in their respective documents. (original emphasis)*

22. There was no apparent evidence here that, in our view, brought the matter within any of the 5 cases referred to in paragraph 20.

23. We turn to the detail.

### **Valuation of Wonarah Project**

24. The issues in this section of the table deal largely with questions of comparability in valuing the Wonarah Project. UCL submitted that Optiro made a number of errors in the way it considered the project and transactions it identified as being comparable to the Wonarah Project. In our view they are matters for the expert to deal with.

25. Issues were also raised regarding necessary capital expenditure in relation to that project and whether the chosen valuation methodology properly took that into account. Again, these are matters for the expert to deal with.

### **Valuation of Sandpiper Project**

26. The issues in this section of the table concern the approach that should have been adopted, in UCL's view, by Optiro. UCL submitted that Optiro should not have used the Wonarah Project as a comparable project for the purpose of valuing the Sandpiper Project. Again, these are matters for the expert to deal with.

### **Minemakers' cash position**

27. UCL submitted that BDO reported on the cash position of Minemakers in section 10.1 of the target's statement which differed from the cash position disclosed in section 6.3 of the target's statement. It submitted that the BDO report should be amended.

28. BDO sought to use a comparable balance sheet date for the analysis of Minemakers and UCL and, it said in its letter,<sup>9</sup> did not have the more recent numbers. It said that it was considering whether the changed cash balance would reduce the value of Minemakers' shares by a material amount, and if so whether a supplementary report was necessary. This matter should be left to BDO, at least at this stage.

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<sup>9</sup> Attached to the letter Minemakers sent UCL

**Exercise of options**

29. UCL submitted that BDO had not appropriately valued the cash Minemakers might receive on the future exercise of a number of options. This is a matter for the expert.

**Market value of Minemakers shares**

30. The issues in this section of the table concern the use of quoted market prices, choice of indices used, application of those indices to the value of Minemakers shares and appropriate discounts given that Sandpiper is not controlled by a single entity. This, too, is a matter for the expert.

**Minemakers holding of UCL shares**

31. If UCL obtains 50.1% but less than 100% of Minemakers, then Minemakers would need to sell the UCL shares held by it. UCL submitted that, should this happen, there was no basis for the expert to assume the shares will be sold at a discount.
32. Whether it is appropriate to assume a discount or not in these circumstances is also a matter for the expert.

**Minimum acceptance condition**

33. UCL submitted that BDO should have valued the Minemakers shares that UCL will acquire (if it gets 50.1% but not 100%) on a minority interest basis not on a control premium basis in circumstances where the value of the consideration that Minemakers shareholders would receive was treated in this way. BDO responded that it was required to do as it did under RG 111.
34. There is no apparent evidence of BDO making any error or failing to apply correctly or at all an applicable industry standard.
35. This is a matter for the expert.

**Valuation of Minemakers other assets**

36. UCL submitted that, in the target's statement, where Minemakers said the UCL offer materially undervalued its assets, Minemakers sought to "*deconstruct UCL's value and then apply the resulting valuation of Sandpiper to determine an implied value for its other assets.*" Minemakers responded that Sandpiper was effectively UCL's only asset. We think there is no issue here.

**Cover page**

37. When the target's statement was lodged with ASX a page preceeded it stating reasons why shareholders should reject the UCL offer. UCL submitted that this was not balanced disclosure.
38. Looking on ASX, it appears that the outside front cover page comprises the page complained of and the inside front cover page is the usual cover page one would find on a target's statement.
39. The application did not complain about this being a different document to the one lodged with ASIC (ie, Minemakers having acknowledged in its letter to UCL that the page complained of did not form part of the target's statement).

40. We have looked at the disclosure in the page. The page lists the reasons why shareholders should reject UCL's offer and points to the section in the target's statement where its detailed reasons can be found. We think there is no issue here.
41. While there could be examples where this style of disclosure would give rise to unacceptable circumstances, for example because of the content of that page, it is unexceptionable in this case because the target has merely listed the reasons to reject an offer that it is not recommending. Indeed, we would expect it to do so in the target's statement. Similarly, a bidder will list the reasons why shareholders should accept an offer.

#### **Independent expert references**

42. UCL submitted that the target's statement makes references to UCL's "own" independent expert, implying that the expert's independence may have been compromised.
43. We think there is no issue here. Such language is common parlance and its use here did not, in our view, necessarily imply that the appointing party had a right to influence the independent expert.

#### **Other issues**

44. The issues in this section of the table include a number of errors in calculations.
45. In our view, the errors that appear to have been made in the target's statement should be corrected. We indicated our position and Minemakers responded that it would prepare and lodge a supplementary target's statement.

#### **DECISION**

46. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

#### **Orders**

47. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

#### **Other matters**

48. The application length exceeded 10 pages.
49. UCL submitted that the first two columns of the submissions table set out the issues raised by UCL and Minemakers' response, and that this was done because of the format of the correspondence between the parties and to make the application as easy as possible for the Panel to consider.
50. We generally find tables helpful and would not like to discourage parties from supplying them, but in this case the table ran for 22 pages and, given the amount of detail, tended to obscure the arguments. Had we conducted proceedings, we would have required the applicant to rewrite it, identifying precisely and concisely what

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errors existed in the methodology of either expert and what other bases for intervention existed.

**Heather Zampatti**  
**President of the sitting Panel**  
**Decision dated 10 August 2012**  
**Reasons published 14 August 2012**

### Advisers

Party	Advisers
Minemakers Limited	Corrs Chambers Westgarth
UCL Resources Limited	McCullough Robertson