



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Minemakers Limited 02R  
[2012] ATP 16**

**Catchwords:**

*Eggleston principles – disclosure - efficient, competitive and informed market - material omission - section 602 principles - target's statement - expert's report - review application – decline to make declaration and orders*

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

*ASIC RG 111- Content of expert reports*

*Minemakers 02 [2012] ATP 13, Bowen Energy Limited 02R [2009] ATP 19*

**INTRODUCTION**

1. The Panel, Diana Chang, Robert Johanson (sitting President) and Laurie Shervington, declined to make a declaration of unacceptable circumstances on an application from UCL Resources Limited for a review of the initial Panel's decision in Minemakers 02.<sup>1</sup> The application concerned the disclosure in Minemakers' target statement. The review Panel considered that there was no evidence of any material deficiencies in the expert's report and technical expert's report and there was sufficient disclosure in both reports for Minemakers' shareholders to make their own assessment of value.
2. In these reasons, the following definitions apply.

BDO	BDO Corporate Finance (WA) Pty Ltd, the independent expert engaged by Minemakers
Minemakers	Minemakers Limited
Optiro	Optiro Pty Ltd, the independent technical specialist engaged by BDO to value the Wonarah Project and Sandpiper Project
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	a phosphate project in the Northern Territory, wholly owned by Minemakers

**FACTS**

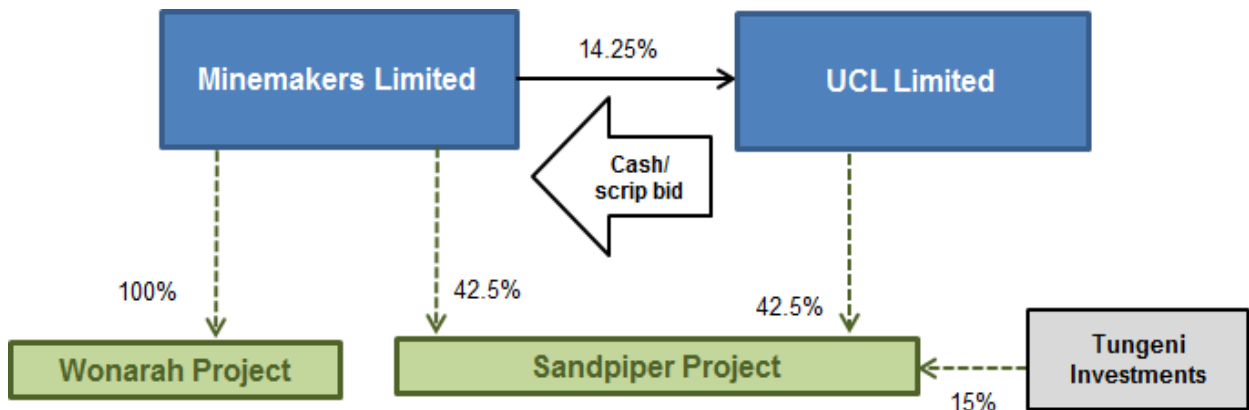
3. The facts are as set out in the initial Panel's reasons. Minemakers is a public company listed on ASX (ASX code: MAK), the Toronto Stock Exchange and the Namibian Stock Exchange. UCL is an ASX listed company (ASX code: UCL).
4. The diagram below, taken from the initial Panel's reasons, details the relationship between the parties.

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<sup>1</sup> [2012] ATP 13

## Takeovers Panel

Reasons - Minemakers Limited 02R  
[2012] ATP 16



## APPLICATION

### Declaration sought

5. By an application dated 14 August 2012, UCL sought a review of the initial Panel's decision. The President consented to the review.
6. UCL submitted that the initial Panel had erred in its decision because (among other things):
  - (a) the reports by BDO and Optiro, which accompanied the target's statement, contained a number of matters that were misleading and which went beyond matters on which experts might disagree and reached conclusions which no reasonable expert could have reasonably arrived at and
  - (b) the presentation of information in the target's statement contravened ASIC and ASX policy and previous Panel guidance.
7. UCL's original application sought final orders, including that Minemakers prepare a supplementary target's statement.

## DISCUSSION

8. The review proceeding is a *de novo* consideration. We have been provided with:
  - (a) the initial application and review application and
  - (b) the decision media release, decision email and the final reasons of the initial Panel.
9. The initial application "contained a lengthy list of issues set out in a table as a schedule".<sup>2</sup> By contrast, the review application focused on the following issues:
  - (a) Optiro's valuation of the Wonarah Project
  - (b) Optiro's valuation of the Sandpiper Project

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<sup>2</sup> [2012] ATP 13 at [18]

## Takeovers Panel

### Reasons – Minemakers Limited 02R [2012] ATP 16

- (c) BDO's consideration of the value that Minemakers' shareholders would receive under UCL's offer in circumstances where UCL waives its minimum acceptance condition and obtains a minority interest in Minemakers and
  - (d) the 'cover page' of Minemakers' target statement.
10. The initial Panel considered that *"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, which would normally include non-compliance with relevant industry codes*
  - (b) *statements that are plainly false and material to the conclusion*
  - (c) *the expert having reached a conclusion that no reasonable expert could reasonably arrive at*
  - (d) *a question mark over the independence of the expert or*
  - (e) *some other basis taking the issue beyond what might be described as simply matters on which experts might disagree."*<sup>3</sup>
11. We broadly agree with the initial Panel's approach. However the review application pointed to potential material deficiencies in the BDO and Optiro reports, which led us to ask some questions. We also thought that it was appropriate to consider whether the disclosure in the BDO and Optiro reports were *"materially deficient to a degree that would lead to an uninformed market"* for Minemakers.<sup>4</sup>
12. Therefore we decided to conduct proceedings in relation to the issues raised in paragraphs 9(a), (b) and (c). We agree with the initial Panel's reasons in relation to the issue raised in paragraph 9(d)<sup>5</sup> and did not conduct proceedings on this point.

#### Wonarah Project

13. Optiro valued the Wonarah Project mineral resources within the range of A\$62.88 million to A\$78.25 million with a preferred value of A\$70.57 million. Page 33 of the Optiro reports states that:
- The Paris Hills project (6 November 2009) was transacted at a similar stage to the Wonarah project. Based upon this, Optiro considers that the Wonarah project would trade for somewhere in the vicinity of A\$0.45 per tonne of contained P<sub>2</sub>O<sub>5</sub>.*
14. UCL submitted that Optiro had set the low end of its valuation range for Wonarah on the basis of the Paris Hills transaction but took into account a resource downgrade, which was not announced until April 2012. UCL submitted (among other things) that it was *"impossible that the parties to the Paris Hills transaction set the consideration based on the resource downgrade which subsequently occurred"* and that

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<sup>3</sup> [2012] ATP 13 at [20] (footnotes omitted)

<sup>4</sup> *Bowen Energy Limited 02R* [2009] 19 at [21]

<sup>5</sup> [2012] ATP 13 at [37]-[41]

based “on publicly available facts Optiro’s use of this resource downgrade in its calculation is a manifest error and should be reversed”.

15. We asked questions in the brief in relation to Optiro’s use of the Paris Hills transaction. Optiro<sup>6</sup> submitted (among other things) that:
  - (a) it did not use the Paris Hills transaction value to define the bottom end of the valuation range for Wonarah, it was “just one comparable transaction taken into account to determine an appropriate value for Wonarah”. Optiro “also referenced 9 comparable trading companies”
  - (b) it was reasonable to assume that any acquirer would have made its own assessment of the mineral resources at Paris Hills and not relied on the stated extent of mineralisation at that time and
  - (c) in its opinion, the earlier resource estimate was not reported in accordance with JORC guidelines and therefore was inappropriate to use.
16. If Optiro had based its valuation of Wonarah on just the Paris Hills transaction, we may have made further enquiries. However as stated in paragraph 15(a), that was not the case.
17. UCL submitted that the high end of Optiro’s valuation range for Wonarah was based on the mean of the enterprise value per tonne of contained phosphate for Phosphate Australia’s phosphate project and Legend International’s phosphate project. UCL submitted that Phosphate Australia has significant gold assets and therefore the use of Phosphate Australia’s full enterprise value in calculating the mean constituted a manifest error over which no two experts could disagree and had a material impact on the conclusion reached by BDO.
18. Optiro submitted that it had considered “all nine identified rock phosphate companies, including Phosphate Australia and Legend International in forming its opinion on the valuation range” and that it considered that Phosphate Australia and Legend International were the most comparable to Wonarah and “this influenced its professional judgment in selecting the valuation range”. Optiro also submitted that it had taken into account Phosphate Australia’s gold assets in deriving its valuation range.<sup>7</sup>
19. We recognise that technical experts often encounter difficulties in finding comparable transactions and companies for the purposes of valuation. After considering Minemakers and UCL’s submissions, we consider that there was no evidence of any clear fault in Optiro’s methodology in valuing Wonarah. Some of the analysis in Optiro’s report regarding Wonarah could have been better expressed. However, there is sufficient disclosure to enable Minemakers’ shareholders to assess BDO and Optiro’s methodology and conclusions and to come to their own view of the value of Wonarah.

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<sup>6</sup> Minemakers provided a letter from BDO dated 24 August 2012, which contained Optiro and BDO’s responses

<sup>7</sup> Page 33 of the Optiro report states that: “Optiro considers Phosphate Australia would present a premium to the Wonarah project as the company has value associated with their gold project at Tuckanurra, Western Australia and oolitic iron prospectivity in the South Nicholson Basin, Northern Territory”

### Sandpiper Project

20. Optiro stated in its report that, in valuing the Sandpiper Project, it considered it was appropriate to apply a *“50% discount to the unit price identified for the Wonarah Mineral Resource”*.<sup>8</sup>
21. UCL submitted that Wonarah was *“completely dissimilar”* to Sandpiper and Optiro’s approach did not meet the standard in paragraph 1 of the VALMIN Code, which requires that *“expert reports be reliable, thorough, understandable and include all material information required by investors and their advisors when making investment decisions”*.
22. Optiro submitted that it assessed the value of Sandpiper on its valuation of Wonarah, which was determined *“taking into account a number of comparable phosphate projects”*.
23. UCL also submitted that Optiro was aware of a number of other comparable transactions to Sandpiper. In particular, UCL submitted that there were two comparable companies or transactions that were *“objectively more similar to Sandpiper than Wonarah”*, which could have been used to support a higher valuation. One of these, Chatham Rock, was used in valuing Wonarah. In relation to the other, Bayovar, Optiro stated in its report that it was *“a large resource project soon to come into production and presents a unit value greater than would be expected for the Wonarah project”*. Optiro submitted that its approach provided a more reliable estimate of the value of Sandpiper compared to *“just selecting two projects to use as comparable – one of which Optiro believe is not comparable”*.
24. We consider that there was no evidence of any clear fault in Optiro’s methodology in valuing the Sandpiper Project.

### Minimum acceptance condition

25. Section 11 of BDO’s report values the consideration offered by UCL under three assumptions:
  - (a) UCL obtains 100% of Minemakers
  - (b) UCL obtains 50.1% acceptance under the bid, which would satisfy its minimum acceptance condition and
  - (c) UCL waives its minimum acceptance condition.
26. In all three scenarios, BDO valued the consideration offered by UCL on a minority interest basis and compared these valuations to the value of a Minemakers share on a control basis. Page 42 of BDO’s report states that ASIC’s Regulatory Guide 111.31 *“suggests that a comparison should be made between the value of the securities being offered (allowing for a minority discount) and the value of the target entity’s securities, assuming 100% of the securities are available for sale”*.
27. UCL submitted that it was illogical for BDO to apply a control premium to the value of the Minemakers shares that UCL receives when considering the scenario in which UCL waives its minimum acceptance condition and therefore does not acquire control of Minemakers. BDO submitted that it had complied with ASIC Regulatory

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<sup>8</sup> Page 36 of the Optiro report

## Takeovers Panel

Reasons – Minemakers Limited 02R

[2012] ATP 16

Guide 111 and its approach was consistent with market practice. ASIC submitted that it did not agree with UCL's submission and the *"fair value of target shares should not vary depending on the ultimate level of acceptances under the offer"*.

28. We agree with BDO and ASIC's submissions on this issue, although section 11 of BDO's report is complex and could have been better expressed.

### DECISION

29. For the reasons above, we declined to make a declaration of unacceptable circumstances. We consider that it is not against the public interest to decline to make a declaration and we had regard to the matters in s657A(3).

### Orders

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

**Robert Johanson**

**President of the sitting Panel**

**Decision dated 29 August 2012**

**Reasons published 5 September 2012**

## Takeovers Panel

Reasons - Minemakers Limited 02R  
[2012] ATP 16

### Advisers

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