



Australian Government

Takeovers Panel

# MEDIA RELEASE

No: TP12/09

Tuesday, 28 February 2012

## Ludowici Limited – Declaration of Unacceptable Circumstances and Orders

The Panel has made a declaration of unacceptable circumstances (Annexure A) and final orders (Annexure B) in relation to an application dated 13 February 2012 by The Weir Group PLC in relation to the affairs of Ludowici Limited (see [TP12/04](#)).

### Background

On or about 23 January 2012, Ludowici announced it had entered into a Process Agreement with FLSmidth & Co. A/S in relation to an indicative non-binding proposal by FLS to acquire by scheme of arrangement all the shares in Ludowici at \$7.20 per share.

Following an interview with the chief executive officer of FLS, an article was published on *Reuters*, dated 23 January 2012, titled “*FLSmidth says A\$7.20 per share Ludowici bid final*” (**Reuters article**). 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*”.

On 31 January 2012, *The Australian* newspaper published an article referring to the Reuters article. 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.*” On or about 31 January 2012, Reuters published a further article titled “*UPDATE 1-FLSmidth won’t rule out higher Ludowici bid.*”

The Panel noted, among other things, that the Reuters article:

- was available to market participants in Australia in that it was available to Reuters subscribers, including brokers and
- was not corrected until on or about 31 January 2012. This was despite FLS and its legal advisers becoming aware of the Reuters article on 23 and 24 January respectively.

## Declaration

The Panel considered that, 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.

The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in s657A(3).

## Orders

The Panel has made orders to the effect that, among other things:

- FLS place advertisements in newspapers stating that Ludowici shareholders who disposed of a net number of Ludowici shares between the publication of the Reuters article and the correction may have a right to compensation
- FLS appoint an arbitrator to assess claims for compensation made by Ludowici shareholders and
- FLS compensate any eligible Ludowici shareholder an amount determined by the arbitrator but not to exceed the difference between \$7.20 (being the price offered by FLS which the Reuters article referred to as 'final') and \$9.87 (being the VWAP of Ludowici shares on the day of the announcement of FLS's \$10 offer).

The Panel has not prohibited FLS from proceeding with any offer for Ludowici in excess of \$7.20 per share.

The sitting Panel was Rod Halstead, Robert Johanson (President) and Sophie Mitchell.

The Panel will publish its reasons for the decision in due course on its website [www.takeovers.gov.au](http://www.takeovers.gov.au).

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## **Annexure A**

### **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**



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## **Annexure B**

# **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.

<b>Term</b>	<b>Meaning</b>
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 pays its shareholders prior to completion
Affected Shareholder	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**