



Australian Government

Takeovers Panel

**Reasons for Decision
Gondwana Resources Limited
[2014] ATP 9**

Rights issue - entitlement issue - declaration - undertaking - exercise of options - prospectus disclosure - frustrating action - association - notice of AGM

Corporations Act 2001 (Cth), sections 169(3)(a), 602, 611 (items 7, 10 and 13), 615, 1322(2)

Guidance Note 12: Frustrating Action, Guidance Note 17: Rights issues

Virgin Australia Holdings Limited [2013] ATP 15, Moreton Resources Limited [2013] ATP 14, Real Estate Capital Partners USA Property Trust [2012] ATP 6, Rey Resources Limited [2009] ATP 14, Village Roadshow Limited 02 [2004] ATP 12, Ballarat Goldfields NL [2002] ATP 7, Infratil Australia Ltd 02 [2000] ATP 1

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
NO	YES	YES	YES	NO	YES

INTRODUCTION

- The Panel, Sarah Dulhunty (sitting President), Andrew Low and Sophie Mitchell, made a declaration of unacceptable circumstances and accepted undertakings in lieu of orders in relation to the affairs of Gondwana Resources Limited. The application concerned a 1 for 1 non-renounceable entitlement issue and its potential effect on control. The Panel considered, among other things, that all reasonable steps to minimise the potential control effect of the entitlement issue were not taken.
- In these reasons, the following definitions apply.

Bellatrix	Bellatrix Pty Ltd
Gondwana	Gondwana Resources Limited
Ochre	Ochre Group Holdings Limited

FACTS

- Gondwana is an ASX listed company (ASX code: GDA).
- On 15 April 2014, Gondwana announced a 1 for 1¹ non-renounceable entitlement issue at 3.2 cents per share.² On 16 April 2014, Gondwana lodged a prospectus for the issue of shares under the entitlement issue. The record date for determining entitlements under the entitlement issue was 30 April 2014.
- The entitlement issue was to be partially underwritten (to 50%) by Bellatrix. Bellatrix, which had a relevant interest of 11.84% in Gondwana at the time that the

¹ with a free option for every 2 shares subscribed for and issued

² Gondwana shares closed at \$0.055 on 15 April 2014. The entitlement issue was announced after the close of trade

Takeovers Panel

Reasons – Gondwana Resources Limited [2014] ATP 9

entitlement issue was announced, was controlled by Mr Warren Beckwith. Mr Beckwith is the chairman of Gondwana.

6. According to the prospectus, Bellatrix's relevant interest in Gondwana could have increased to 43.75% as a result of the underwriting, depending on the level of participation by shareholders.
7. The prospectus for the entitlement issue stated that:
 - (a) the directors reserved the right to issue shortfall securities at their absolute discretion
 - (b) shareholders holding less than 20,000 shares (ie, an unmarketable parcel) would be given priority in relation to shortfall allocation and
 - (c) shareholders holding more than 20,000 shares were not to apply for shortfall securities unless directed by Gondwana's directors.
8. Gondwana extended the entitlement issue to foreign shareholders with a registered address in Singapore and the United Kingdom.
9. At the time the entitlement issue was announced, Ochre (the applicant) had a relevant interest of 8.26% of Gondwana. At the time of making the application on 29 April 2014, Ochre had increased its relevant interest to 19.72%. On or about 3 March 2014, Ochre offered to underwrite any proposed entitlement issue by Gondwana.

APPLICATION

Declaration sought

10. By application dated 29 April 2014, Ochre sought a declaration of unacceptable circumstances. Ochre submitted that:
 - (a) the underwriting agreement provided Bellatrix with the opportunity to increase substantially its existing substantial holding and to rely inappropriately on the underwriting exception in item 13 of s611³
 - (b) the Gondwana directors had not taken reasonable steps to minimise the potential impact on control or potential control of Gondwana, having regard to (among other things):
 - (i) the directors not canvassing Ochre whether it would take up its entitlement or participate in any underwriting
 - (ii) the directors not canvassing any other underwriters
 - (iii) the limited shortfall facility
 - (iv) the entitlement issue not being extended to New Zealand shareholders (representing approximately 5% of the shares on issue)
 - (v) Gondwana not obtaining ASIC consent to the appointment of a nominee for the purposes of s615 so the exception in item 10 of s611 would be

³ References are to the *Corporations Act 2001 (Cth)* unless otherwise specified

Takeovers Panel

Reasons – Gondwana Resources Limited [2014] ATP 9

available, the absence of which would prevent Ochre taking up its entitlement in full

- (vi) the entitlement issue not being renounceable
- (vii) the timing of the entitlement issue following shortly after Gondwana had conducted a number of placements and Ochre becoming a substantial holder and
- (viii) the terms of the underwriting being subject to numerous termination events such that Bellatrix was, in effect, not taking shortfall risk.

11. Ochre submitted that the effect of the circumstances was that the entitlement issue would concentrate the control of Gondwana in Bellatrix (and Mr Beckwith) at the expense of other shareholders such that:
- (a) the control, or potential control, of Gondwana was likely to be affected otherwise than in an efficient, competitive and informed market and
 - (b) shareholders would be denied a reasonable and equal opportunity to participate in the benefits accruing to Bellatrix.

Interim orders sought

12. Ochre sought an interim order that Gondwana be prevented from dispatching the prospectus to shareholders and issuing any shares under the entitlement issue pending further order of the Panel.
13. On 1 May 2014, the President declined the request for interim orders on the basis that appropriate remedies were available to the sitting Panel if it found the circumstances unacceptable. On 8 May 2014, we accepted an undertaking from Gondwana that it would not issue its prospectus until the earlier of an order of the Panel or the determination of the Panel proceedings (Annexure A).

Final orders sought

14. Ochre sought final orders to the effect that the entitlement issue be prevented from proceeding or, alternatively, Gondwana obtain shareholder approval for the entitlement issue and the underwriting agreement with Bellatrix for the purposes of item 7 of s611 and the Corporations Act related party provisions.

DISCUSSION

Preliminary submissions

15. Gondwana in a preliminary submission stated that:
- (a) the underwriting agreement with Bellatrix had been terminated
 - (b) the entitlement issue would be made to shareholders with registered addresses in New Zealand and
 - (c) a supplementary prospectus would be prepared and dispatched accordingly.
16. We sought further preliminary submissions from the parties and asked Ochre what aspects of the entitlement issue continued to be unacceptable. Gondwana submitted that it did not believe that we had jurisdiction to conduct proceedings

Takeovers Panel

Reasons – Gondwana Resources Limited [2014] ATP 9

given the termination of its underwriting agreement with Bellatrix. Ochre submitted that this termination alone was not sufficient to address its concerns and also made submissions in relation to the issue of shares upon the exercise of options as disclosed in an Appendix 3B notice lodged on 2 May 2014 and resolutions proposed in Gondwana's notice of annual general meeting approving the issue of shares and options. These issues are discussed below.

Exercise of options

17. The record date for determining entitlements under the entitlement issue was 30 April 2014. On or about 16 April 2014, Gondwana sent a letter to its option holders stating (in bold), among other things, that:

It is your responsibility to ensure the exercise form and relevant payment are received by the Company in reasonable time to ensure these funds clear and the Option conversion process is completed on or before the Record Date [for the entitlement issue]. To ensure that your new Shares are issued prior to the Record Date, the above must be received by 5:00pm (WST) no later than 27 April 2014. If received after this date, issue of new Shares prior to the Record Date cannot be assured.

18. On 2 May 2014, Gondwana lodged an Appendix 3B notice, disclosing that it had issued 2,300,000 shares. The notice was dated 30 April 2014 and disclosed that:
- (a) 1,400,000 shares were issued on exercise of 10c options with an expiry date of 30 June 2014 and
 - (b) 900,000 shares were issued on exercise of 10c options with an expiry date of 30 June 2015.
19. On 5 May 2013, Gondwana lodged three Appendix 3Y notices in relation three Gondwana directors, disclosing that entities controlled by or associated with:
- (a) Mr Beckwith exercised 350,000 June 2014 options and 500,000 June 2015 options
 - (b) Mr Steve Pynt exercised 250,000 June 2014 options and 350,000 June 2015 options and
 - (c) Mr Paul Goodsall exercised 250,000 June 2014 options and 50,000 June 2015 options.⁴
20. Gondwana submitted that Mr Beckwith and Mr Pynt met on or around 28 April 2014 to discuss the June 2014 options and decided that Gondwana "directors should endeavour to encourage the 16 holders of these options...to exercise the options rather than allow them to expire unexercised as this would assist Gondwana's cash position".
21. We asked Gondwana how many of the 16 option holders were contacted. Gondwana submitted that:

Ultimately, Warren Beckwith contacted only 3 other holders of the 30 June 2014 options between 28 and 30 April 2014 by phone, being Paul Goodsall (director), Greg Hancock and

⁴ on 6 May 2014, Gondwana lodged an amended Appendix 3Y notice in relation to Mr Goodsall, which corrected the total number of shares and options held by Mr Goodsall after the share issue

Takeovers Panel

Reasons – Gondwana Resources Limited [2014] ATP 9

*Duncan Merrin, as time was short and these holders were well known and easily contactable.*⁵

22. In total, 2,300,000 shares were issued by Gondwana upon exercise of the options to persons including Bellatrix and associates of Mr Pynt and Mr Goodsall. Some of the option holders paid by cheque or electronic transfer on 30 April 2014, while part of the exercise price of the options held by associates of Mr Pynt and Mr Goodsall was paid by debit to loan accounts in the books of Gondwana in the names of Mr Pynt and Mr Goodsall.
23. Ochre submitted that Gondwana directors “*had acted hurriedly*” in arranging the exercise of the options. Ochre also submitted that:
 - (a) the exercise of some of the options had not been effective as the terms of June 2014 and June 2015 options specified that an exercise of the options was only effective when Gondwana received the full amount of the exercise price in “*cleared funds*” and
 - (b) the shares issued on exercise of the options were not issued by 30 April 2014, the record date of the entitlement issue, because Gondwana instructed Computershare to update Gondwana’s share register and issue holding statements in relation to the shares issued on exercise of the options on 1 May 2014. Computershare confirmed that this had occurred on 5 May 2014.
24. Gondwana submitted that:
 - (a) the options “*were properly and validly exercised on 30 April 2014 and that the Gondwana directors resolved in a board meeting on 30 April 2014 to make the allotment of shares*”
 - (b) section 169(3)(a) required a company’s share register to reflect the date of the allotment of shares, which in this case was 30 April 2014 and
 - (c) the question of when the options were exercised and the shares were issued upon exercise of the options was a procedural matter which only a court could consider under section 1322(2).
25. We do not need to decide whether the shares issued on exercise of the options were issued by the record date of the entitlement issue. We agree with Ochre’s submission that the directors acted hurriedly in organising the exercise of these options and it appears that some of the funds were not cleared by 30 April 2014. Option holders were informed on 16 April 2014 that they should provide the necessary documents and payment by 5.00pm (WST) no later than 27 April 2014 to ensure that any shares issued to them would occur on or before the record date. In the case of the directors’ exercise, no action appeared to have been taken until 28 April 2014. Therefore a few select option holders were given assurances that shares could be issued on exercise of their options by the record date notwithstanding that their exercise form and payment were not submitted to Gondwana by 5pm (WST) on 27 April 2014.

⁵ Gondwana later submitted that 4 option holders had been contacted

Takeovers Panel

Reasons – Gondwana Resources Limited [2014] ATP 9

26. Ochre submitted that the exercise of the options was uncommercial because the exercise price of the options was at an 82% premium to the market price and some June 2015 options were also exercised. Gondwana submitted that:
- (a) the directors who exercised their options “*believed that exercising their options would be more beneficial to*” Gondwana than acquiring the shares on market
 - (b) following the exercise of the options, the exercise price was payable to Gondwana, providing an additional source of needed funds to Gondwana. No funds would flow to Gondwana if shares were acquired on market
 - (c) the directors who exercised their options believed that the long term underlying value of Gondwana was in excess of the exercise price and that exercising options above the prevailing market price would demonstrate their underlying support and belief in the vision and strategic direction of Gondwana to the market and Gondwana’s shareholders and
 - (d) the option holders could, if they exercised their options, participate in an attractive entitlement issue at 3.2 cents per share as well as the 1 for 2 free attaching options.
27. Gondwana submitted that the exercise of the options by the directors was commercial but in our view this was overstated. While the cost of exercising the options could be ‘averaged down’ by participation in the entitlement issue, the directors could have obtained a greater benefit by buying on market.⁶ Also, part of the exercise price was paid out of two directors’ loan accounts, which lessened the positive impact on Gondwana’s cash position.
28. On or about 22 and 23 April 2014, Ochre lodged with ASX substantial holding notices disclosing that it had increased its voting power in Gondwana. On 24 April 2014, Mr Beckwith sent an email to his fellow directors attaching a letter from Ochre and Ochre’s substantial holding notice dated 23 April 2014 and stating (among other things):
- Nathan Featherby [from Ochre] rang me yesterday to ask if he could underwrite the balance of the Rights Issue (50%) that I had not already underwritten. I told Nathan that I doubted the Board would agree with this proposal as the Prospectus had already been lodged and, as the Offer was likely to be fully subscribed anyway, it was not worth the trouble and expense to issue a Supplementary Prospectus for a further underwriting. I told Nathan that I would speak to him again today about this matter but it seems he could not wait...*
- Another reason why Nathan’s request to underwrite cannot be accepted is that a number of long term shareholders and supporters of the Company have already indicated that they would like to take up whatever shortfall is available. Even if Nathan’s motives were just to help the Company, which as it turns out they are not, I consider it would be unfair to allow a “johnny-come-lately” to jump the queue and deprive the others of their allocation.*
29. Mr Goodsall replied to Mr Beckwith’s email stating:
- Is Ochre planning a takeover offer – 19.22% is getting mighty close.*

⁶ in time for settlement to occur before the record date

Takeovers Panel

Reasons – Gondwana Resources Limited [2014] ATP 9

30. On 6 May 2014, Gondwana received from Ochre an indicative non-binding confidential proposal for the acquisition of 100% of the outstanding shares in Gondwana by off-market takeover. On 12 May 2014, Ochre announced that it intended to make a conditional off-market cash takeover bid for all the shares in Gondwana at 8.2c per share.
31. We consider that the exercise of the options was not a frustrating action because it occurred before a potential bid was communicated to Gondwana.⁷ However we consider that the exercise of the options by the directors of Gondwana and their associates:
- (a) appeared to be in response to Ochre’s increased voting power
 - (b) created uncertainty in the market for corporate control and
 - (c) as a defensive act, may have contributed to Ochre not proceeding to acquire a substantial interest in Gondwana, including under its bid.
32. Also, as a result of the option exercise, Mr Beckwith’s voting power in Gondwana increased to 14.46%. At the time of the option exercise, Bellatrix was still underwriting 50% of the entitlement issue.

Structure of the entitlement issue and control effect

33. The entitlement issue was 50% underwritten by Bellatrix. The prospectus for the entitlement issue disclosed that Bellatrix’s voting power could have increased from 11.84% to 43.75%. This was likely to have had an unacceptable control effect because:
- (a) the offer was non-renounceable
 - (b) shareholders holding less than a marketable parcel (20,000 shares) were instructed in the prospectus that they may apply for shortfall (eligible shareholders holding less than a marketable parcel were to be given priority under the shortfall offer)
 - (c) shareholders holding more than a marketable parcel were instructed in the prospectus not apply for shortfall unless directed by the directors with directors reserving the right to issue any shortfall shares at their discretion and
 - (d) Gondwana rejected an offer from Ochre to underwrite any entitlement issue before the entitlement issue was announced, and rejected a similar offer made after the entitlement issue was announced.
34. The increase in Mr Beckwith’s voting power following the exercise of options exacerbated the potential control effect.⁸
35. Ochre received a notice of meeting for Gondwana’s annual general meeting dated 15 April 2014⁹ that included resolutions to approve the issue of up to 15,000,000

⁷ see Guidance Note 12 – *Frustrating Action*, at [5] - [6]

⁸ similar to *Real Estate Capital Partners USA Property Trust* [2012] ATP 6, at [44] - [47]

Takeovers Panel

Reasons – Gondwana Resources Limited [2014] ATP 9

new shares together with 15,000,000 new options. As a part of this capital raising, which was separate to the entitlement issue, there were also approvals for maximum shares and options to be issued to the following Gondwana directors:

- (a) 2,500,000 new shares and 2,500,000 new options to Mr Beckwith
 - (b) 1,500,000 new shares and 1,500,000 new options to Mr Pynt
 - (c) 1,500,000 new shares and 1,500,000 new options to Mr Goodsall and
 - (d) 1,200,000 new shares and 1,200,000 new options to Mr Jolyon Sinclair.
36. Ochre submitted that there was a strong inference that the structure of the entitlement issue and the contemporaneous inclusion in a notice of meeting of further capital raising resolutions, together with the exercise of options, were “*designed to secure control of the Gondwana (sic) with the current directors*”. Ochre submitted its conclusion was supported by Bellatrix originally underwriting 50% of the entitlement issue when Gondwana had rejected an offer to underwrite from Ochre.
37. Gondwana submitted that, as a consequence of the termination of the underwriting agreement, the key circumstances giving rise to Ochre’s application no longer existed. We consider that this submission was overstated. As a result of the option exercise, Mr Beckwith’s voting power in Gondwana increased to 14.46%. Even after the underwriting was terminated, Bellatrix was able to apply for its full entitlement to increase Mr Beckwith’s voting power up to 18.5%, depending on the level of participation of shareholders. We consider that the potential acquisition of voting power by Mr Beckwith under the entitlement issue, separately and together with the issue of shares through the exercise of options, would result in the acquisition of a substantial interest in unacceptable circumstances, having regard to the effect of those circumstances.¹⁰
38. In *Rey Resources Limited*, the Panel was open to considering whether an underwriter taking up to 12% of a company subject to a takeover bid was a control transaction, noting that it was significant because (among other things) it was “*potentially key to whether the bidder will be able to proceed to compulsory acquisition*”.¹¹ Without an appropriate dispersion strategy, the entitlement issue here may still have an unacceptable control effect, contributed to by: the structure, the refusal of underwriting, the resolutions to approve new shares and options, the option exercise and the potential for a bid by Ochre.
39. In addition, Gondwana submitted that it was not appropriate for it to administer a scale back of any application Ochre may make under the entitlement issue to ensure that its voting power does not exceed 20% in breach of s606. We consider that the prospect of scale back, when other major shareholders would not need to

⁹ On 2 May 2014, Gondwana disclosed the notice of meeting to the ASX. On the same day, Gondwana disclosed that the notice of meeting had been dispatched to shareholders on 23 April 2014 and that the delay in informing the ASX was due to “*the illness of the company secretary at the time dispatch was completed*”

¹⁰ See *Village Roadshow Limited* 02 [2004] ATP 12, at [37] and *Ballarat Goldfields NL* [2002] ATP 7, at [9]

¹¹ [2009] ATP 14, at [16] (footnote omitted). See also *Moreton Resources Limited* [2013] ATP 14, at [24] - [28] and *Virgin Australia Holdings Limited* [2013] ATP 15, [21] - [32]

Takeovers Panel

Reasons – Gondwana Resources Limited [2014] ATP 9

be scaled back, would also have contributed to the unacceptable control effect of the entitlement issue.

40. Moreover, the notice of meeting was prepared at the same time as the entitlement issue prospectus and was dispatched shortly after the prospectus. However, the effect of the potential issues of shares and options under the notice of meeting on the capital structure of Gondwana, its financial position and the possible voting power of the directors of Gondwana was not disclosed in the entitlement issue prospectus. This created uncertainty, particularly about the potential effect on control of Gondwana from the potential issuance of shares equivalent to approximately 68% of the starting number of shares on issue.¹²

Disclosure

41. ASIC submitted that the entitlement issue prospectus was deficient because, among other things, it did not clearly articulate the need for cash given the recent placement or the proposed resolutions to issue shares and options at Gondwana's annual general meeting. We accept that Gondwana was in need of funds, but agree with ASIC's submission and also consider that the entitlement issue prospectus did not disclose adequately or at all:
- (a) how the directors proposed to exercise their discretion to allocate any shortfall under the entitlement issue and
 - (b) the use of funds raised to repay related parties. Page 14 of the entitlement issue prospectus disclosed that \$300,000 of the \$632,110 to be raised under the entitlement issue was to be used to repay short term debt. It was not disclosed that at least part of this short term debt was owed to Gondwana's directors.¹³
42. Gondwana proposed to submit to ASIC a draft replacement prospectus for ASIC's approval.

Association

43. We were initially concerned that the directors of Gondwana may be associates in the light of their exercise of options and the resolutions approving the issue of shares and options to them. We asked in our brief for documents (including board papers, file notes, correspondence, written advices, agreements and other records) in relation to the need for funds, potential control effect, the exercise of options and the notice of meeting for Gondwana's annual general meeting. We received only minutes of directors' meetings in response. This was unfortunate and resulted in

¹² Assuming the entitlement issue was fully subscribed and the 15 million options were exercised. By comparison, the issue of 15 million shares would be equivalent to approximately 43% of the total issued capital assuming only minimum subscription was raised under the entitlement issue.

¹³ Gondwana submitted that its entitlement issue prospectus was a transaction specific prospectus prepared in accordance with s713 and the information about director loans was disclosed in its financial statements. However s713(2)(a) requires disclosure of the effect of the offer on Gondwana – see *Infratil Australia Ltd 02* [2000] ATP 1, at [43]. We consider that this information should have been disclosed in the entitlement issue prospectus.

Takeovers Panel

Reasons – Gondwana Resources Limited [2014] ATP 9

delay in deciding this application. We decided to ask for these documents again in a supplementary brief and received considerably more documentation.

44. After considering the available evidence, we do not consider that it proves Gondwana's directors were associated.

DECISION

Declaration

45. It appears to us that the circumstances are unacceptable having regard to:
- (a) the effect that we are satisfied the circumstances have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of Gondwana or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Gondwana or
 - (b) the purposes of Chapter 6 set out in s602.
46. Accordingly, we made the declaration set out in Annexure B and consider that it is not against the public interest to do so. We had regard to the matters in s657A(3).

Undertakings

47. Following the declaration, we have accepted undertakings from Gondwana (Annexure C) after receiving submissions in relation to possible final orders. The undertakings are to the effect that, if Gondwana proceeds with the entitlement issue, it will:
- (a) increase the minimum subscription to allow Ochre to subscribe for its full entitlement
 - (b) offer shareholders the opportunity to participate in any shortfall
 - (c) if it proceeds to seek shareholder approval for further shares and options, disclose the results of the entitlement issue at least 5 business days before the last day for lodgment of proxies and
 - (d) make further disclosure in a replacement prospectus for the entitlement issue in a form approved by the Panel.
48. We considered making a final order prohibiting any person (or alternatively the directors of Gondwana and their associates) participating in the entitlement issue in respect of shares issued upon exercise of options referred to in the Appendix 3B lodged with ASX on 2 May 2014. Gondwana submitted that such an order would be unfairly prejudicial to the shareholders concerned.
49. Despite some concerns about the actions of the directors in relation to the exercise of options by their associates, we have decided not to make such an order and instead have decided to refer the issue to ASIC for further consideration. We recognise that those options were exercised in the expectation that those

Takeovers Panel

Reasons – Gondwana Resources Limited [2014] ATP 9

shareholders would be able to participate in the entitlement issue and ‘average down’ their 10c per share entry cost.

Other matters

50. Ochre submitted that Steinepreis Paganin, Gondwana’s lawyers, were conflicted because they had previously undertaken work for Ochre. Ochre requested that we withdraw leave to Steinepreis Paganin under s194 of the ASIC Act to represent Gondwana in these proceedings.
51. Gondwana sought independent legal advice on this issue, a copy of which it provided to the Panel. After considering this advice, we decided not to withdraw leave.

Postscript

52. On 10 June 2014, Gondwana announced that it would not be proceeding with the entitlement issue.

Sarah Dulhunty
President of the sitting Panel
Decision dated 6 June 2014
Reasons published 19 June 2014

Takeovers Panel

Reasons – Gondwana Resources Limited
[2014] ATP 9

Advisers

Party	Advisers
Gondwana Resources Limited	Steinepreis Paganin
Ochre Group Holdings Limited	Minter Ellison



Australian Government

Takeovers Panel

Annexure A

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

GONDWANA RESOURCES LIMITED

Gondwana Resources Limited (**Gondwana**) undertakes to the Panel that it will not issue the prospectus lodged with ASIC on 16 April 2014 (including any supplementary or replacement prospectus) relating to the proposed 1 for 1 non-renounceable rights issue by Gondwana until the earlier of:

- an order of the Panel or
- the determination of the Panel proceedings.

**Signed by Steven Pynt of Gondwana Resources Limited
with the authority, and on behalf, of
Gondwana Resources Limited
Dated 7 May 2014**



Australian Government

Takeovers Panel

Annexure B

CORPORATIONS ACT

SECTION 657A

DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

GONDWANA RESOURCES LIMITED

CIRCUMSTANCES

1. Gondwana Resources Limited (**Gondwana**) is an ASX listed entity. The directors of Gondwana are Mr Warren Beckwith (Chairman), Mr Steven Pynt, Mr Paul Goodsall and Mr Jolyon Sinclair. Ochre Group Holdings Limited (**Ochre**), the applicant, is the largest shareholder of Gondwana shares holding 17.64% (having increased its holding from 8.27%).
2. On 16 April 2014, Gondwana lodged a prospectus with ASIC in relation to a 1 for 1¹⁴ non-renounceable entitlement issue with the following features:
 - (a) It was for the issue of 19,753,440 shares at 3.2 cents per share to raise approximately \$632,000.
 - (b) It was partially underwritten (50%) by Bellatrix Pty Ltd, a company controlled by Mr Beckwith, whose voting power in Gondwana could have increased from 11.84% to 43.75%.
 - (c) The entitlement issue provided that:
 - (i) the directors reserved the right to issue any shortfall shares at their absolute discretion
 - (ii) shareholders holding less than 20,000 shares (ie, an unmarketable parcel) would be given priority under the shortfall offer and
 - (iii) shareholders holding more than 20,000 shares were not to apply for shortfall securities unless directed by the directors.
3. On or about 16 April 2014, Gondwana sent a letter to its optionholders in relation to the entitlement issue, which stated among others matters (in bold):

"It is your responsibility to ensure the exercise form and relevant payment are received by the Company in reasonable time to ensure these funds clear and the Option conversion process is completed on or before the Record Date [for the entitlement issue]. To ensure that your new Shares are issued prior to the Record Date, the above must be received by 5:00pm (WST) no later than 27 April 2014. If received after this date, issue of new Shares prior to the Record Date cannot be assured".

¹⁴ with a free option for every 2 shares subscribed for and issued

4. The partially underwritten entitlement issue, as disclosed in Gondwana's 16 April 2014 prospectus, would likely have had an unacceptable control effect.
5. On or about 22 and 23 April 2014, Ochre lodged with ASX substantial holding notices disclosing that it had increased its voting power in Gondwana from approximately 8.27% to 19.73%.
6. On or about 23 April 2014, Gondwana sent to its shareholders a notice of annual general meeting and explanatory statement, which included resolutions to approve the issue of 15,000,000 shares and 15,000,000 options and the issue of some of those shares and options to Gondwana's directors.
7. On or about 23 April 2014, Gondwana declined an offer from Ochre to underwrite the remaining 50% of the entitlement issue. On or about 24 April 2014, Mr Goodsall raised with his fellow directors whether Ochre may make a bid for Gondwana.
8. As at 28 April 2014, Gondwana had on issue 10 cent options with expiry dates of 30 June 2014 and 30 June 2015, held by 16 persons including Bellatrix, and associates of Mr Pynt and Mr Goodsall. On or about 28 April 2014, Mr Beckwith and Mr Pynt agreed that Mr Beckwith would contact some of the other Gondwana option holders to encourage them to exercise their options by 30 April 2014, the record date of the entitlement issue. Only 3 or 4 option holders (or their representatives) were contacted, one of whom was Mr Goodsall.
9. On 29 April 2014, Ochre made its Panel application.
10. On or after 30 April 2014, 2,300,000 shares were issued by Gondwana upon exercise of options to five persons including Bellatrix, and associates of Mr Pynt and Mr Goodsall. The 10 cent option exercise price was at a significant premium to the closing price of Gondwana shares on 29 April 2014 and part of the exercise price of the options held by associates of Mr Pynt and Mr Goodsall was paid by way of debit to loan accounts in the books of Gondwana in the name of Mr Pynt and Mr Goodsall. As a result of the option exercise, Mr Beckwith's voting power in Gondwana increased to 14.46%.
11. On 1 May 2014, in response to Ochre's Panel application, Gondwana and Bellatrix agreed to terminate the underwriting agreement.
12. On 12 May 2014, Ochre announced that it intended to make a conditional off-market cash takeover bid for all the shares in Gondwana at 8.2c per share.
13. The entitlement issue was structured in a way that meant that Ochre, following the increase in its voting power, could not apply for its full entitlement without the risk that its holding may increase above 20%, without an applicable exception to s606.¹⁵ At the same time, Bellatrix may be able to apply for its full entitlement to increase Mr Beckwith's voting power up to 18.5% (depending on the level of participation by shareholders).
14. The potential acquisition of voting power by Mr Beckwith under the entitlement issue, separately and together with the issue of shares through the exercise of options, would result in the acquisition of a substantial interest.
15. The Panel considers that:

¹⁵ All references are to the *Corporations Act 2001 (Cth)* unless otherwise specified

- (a) all reasonable steps to minimise the potential control impact of the entitlement issue were not taken and
 - (b) the exercise of the options by the directors of Gondwana and their associates appeared to be a response to Ochre's increased voting power, creates uncertainty and may contribute to Ochre not proceeding to acquire a substantial interest, including under the takeover bid it announced on 12 May 2014.
16. Further, the prospectus for the entitlement issue did not disclose adequately or at all:
- (a) the proposed issue of new shares and new options, including to directors, as set out in a notice of AGM, and the potential effect on control of Gondwana of that issue¹⁶
 - (b) Gondwana's need for funds
 - (c) how the directors propose to exercise their discretion to allocate any shortfall under the entitlement issue and
 - (d) the use of funds raised to repay a related party or parties.
17. Further, the proposed issue of new shares and new options creates uncertainty about the potential effect on control of Gondwana.
18. It appears to the Panel that the circumstances are unacceptable having regard to:
- (a) 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 Gondwana or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Gondwana or
 - (b) the purposes of Chapter 6 set out in s602.
19. 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 s657A(3).

DECLARATION

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of Gondwana Resources Limited.

Allan Bulman
Director
with authority of Sarah Dulhunty
President of the sitting Panel
Dated 6 June 2014

¹⁶ On 23 May 2014, Gondwana announced that the AGM had been cancelled and a new notice of annual general meeting would be sent to shareholders



Australian Government

Takeovers Panel

Annexure C

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

GONDWANA RESOURCES LIMITED

Gondwana Resources Limited (**Gondwana**) undertakes the following to the Panel:

1. Gondwana will make an ASX announcement as to whether it intends to proceed with the entitlement issue dated on or about 16 April 2014 (**Entitlement Issue**) by close of trading Tuesday, 10 June 2014.
2. In respect of the structure of the Entitlement Issue, Gondwana will, subject to the Entitlement Issue proceeding:
 - (a) Increase the minimum subscription for the Entitlement Issue so as to allow Ochre Group Holdings Limited (**Ochre**) to subscribe for its full entitlement without its voting power exceeding 20%.
 - (b) Offer eligible shareholders the opportunity to participate in any shortfall by applying for shares in excess of their entitlement (**Additional Shares**).
 - (c) Ensure that the directors will exercise their discretion so as to allocate any shortfall under the Entitlement Issue in the following order (subject to law, including compliance with the provisions of the Corporations Act and the ASX Listing Rules):
 - (i) to eligible shareholders with less than a marketable parcel on the record date who apply for Additional Shares, that number of shares which would be required to increase their shareholding to a marketable parcel;
 - (ii) then, in respect of any shortfall remaining, to shareholders who apply for Additional Shares, provided that if there is not sufficient shortfall to satisfy those applications, they be scaled back on a pro rata basis; and
 - (iii) once all applications for Additional Shares have been satisfied in full, to any person as determined by the directors in their discretion in accordance with ASX Listing Rule 7.2, Exception 3.
3. Subject to the Entitlement Issue proceeding, Gondwana will prepare and dispatch to its shareholders a replacement prospectus for the Entitlement Issue, in a form approved by the Panel, which contains additional disclosure in respect of:
 - (a) Gondwana's need for funds;

- (b) how any shortfall will be allocated;
 - (c) the impact of the Entitlement Issue on Ochre's takeover bid (unless there is no impact);
 - (d) the potential effect on control of the Entitlement Issue;
 - (e) the use of proceeds raised under the Entitlement Issue to repay short-term debt owed to related parties (including the names of those related parties); and
 - (f) whether Gondwana intends to issue new shares and new options, as was set out in Resolutions 5 to 9 of Gondwana's notice of annual general meeting dated 23 April 2014 and the possible effect on the voting power of the directors in Gondwana if those new shares and new options were issued.
4. Subject to the Entitlement Issue proceeding, if Gondwana issues a notice of meeting containing resolutions similar in effect to any of Resolutions 5 to 9 of Gondwana's notice of annual general meeting before the Entitlement Issue has either been withdrawn or completed, Gondwana will disclose the results of the Entitlement Issue in a supplementary explanatory memorandum dispatched to Gondwana shareholders at least 5 business days before the last day for lodgement of proxies for that meeting.

**Signed by Steven Pynt, Director of Gondwana Resources Limited
with the authority, and on behalf, of
Gondwana Resources Limited
Dated 6 June 2014**