



Australian Government

Takeovers Panel

**Reasons for Decision
Gondwana Resources Limited 02
[2014] ATP 15**

Catchwords:

Entitlement issue – declaration – orders – frustrating action – association – notice of AGM – explanatory statement – effect on control – underwriting – efficient, competitive and informed market – beneficial ownership notice – continuous disclosure – failure to disclose – interim order – shareholder approval – substantial holding

Corporations Act 2001 (Cth), sections 602, 606, 657A, 657D, 657E, 671B

Guidance Note 12 – Frustrating action

Gondwana Resources Limited 01 [2014] ATP 9; World Oil Resources Limited [2013] ATP 1; Resource Pacific Holdings Ltd [2007] ATP 26; Coopers Brewery Limited 03 [2005] ATP 22; Pinnacle VRB Ltd (No. 08) [2001] ATP 17

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
Yes	No	Yes	Yes	Yes	No

INTRODUCTION

1. The Panel, Christian Johnston, Robert Sultan and Anthony Sweetman (sitting President), made a declaration of unacceptable circumstances in relation to the affairs of Gondwana Resources Limited. Gondwana is subject to a conditional off-market bid by Ochre Industries Pty Limited. The application by Ochre concerned contraventions of s606¹ as a result of alleged associations between certain shareholders of Gondwana, information deficiencies in Gondwana’s notice of AGM and frustrating action as a result of Gondwana’s proposed entitlement issue. The Panel considered that the entitlement issue was a frustrating action and that Gondwana shareholders had not been given enough information about the control impact of the Fundraising Resolutions, but did not make any finding of association. It ordered shareholder approval for fundraising during the bid and that an undisclosed substantial holding be sold into the bid if certain conditions were met (in each case for up to 3 months).

2. In these reasons, the following definitions apply.

AGM	Gondwana’s annual general meeting held on 11 August 2014 at 10:30am (WST)
entitlement issue	Gondwana’s proposed entitlement issue announced on 17 July 2014
Fundraising Resolutions	The following resolutions put to shareholders at the AGM: Resolution 3 – to ratify a prior placement of shares

¹ References are to *Corporations Act 2001* (Cth) unless otherwise indicated

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Resolution 4 – to approve a placement of new options related to the placement under resolution 3

Resolution 5 – to approve a further placement of up to 15,000,000 shares and 15,000,000 free options

Resolution 6 – to approve the adoption of an employee share plan and the issue of securities under it

Resolution 7 – to approve (for ASX listing rule 7.1A purposes) a 10% placement capacity

Gondwana	Gondwana Resources Limited
GMP	GMP Securities Australia Pty Limited
Ochre	Ochre Group Holdings Limited
Ochre Industries	Ochre Industries Pty Limited, a wholly owned subsidiary of Ochre
Relevant Entities	BC Capital Limited, International Business Services Limited, Fern Valley Limited and Finscan Investments Limited
Relevant Persons	Mr Warren Beckwith, Mr Paul Goodsall, Mr Steven Pynt, Mr Peter Bryant and Mr Duncan Merrin ²

FACTS

3. Gondwana is an ASX listed company (ASX code: GDA).
4. On 15 April 2014, prior to the announcement of Ochre Industries' bid, Gondwana announced a 1 for 1 non-renounceable, partially underwritten entitlement issue at 3.2 cents per share.
5. Ochre made an application to the Panel in respect of that entitlement issue. Following a declaration of unacceptable circumstances, Gondwana announced on 10 June 2014 that it would not proceed with that entitlement issue.³
6. On 12 May 2014, Ochre announced its intention to make a conditional off-market bid for all the shares in Gondwana at 8.2 cents per share via Ochre Industries.⁴
7. Ochre Industries' bid opened on 3 July 2014. A defeating condition of the bid is:
11.28 (e)(No Prescribed Occurrences) Between the period beginning on the Announcement Date and ending at the end of the Offer Period, none of the following events occur in relation to Gondwana or any of its subsidiaries:

² These persons were alleged by Ochre to be associates. Messrs Beckwith, Goodsall and Pynt are current directors of Gondwana. Mr Bryant is a former director of Gondwana (retiring from the board on 16 March 2000)

³ See *Gondwana Resources Limited 01* [2014] ATP 9

⁴ Ochre Industries increased its offer to 11.5 cents per share on 18 August 2014

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(iv) *Gondwana or a subsidiary of Gondwana issues shares or grants an option over its shares or agrees to make such an issue or grant such an option (defeating condition).*

8. On 9 July 2014, Mr Duncan Merrin lodged a notice of initial substantial holder, disclosing a relevant interest in 8.02% of Gondwana shares. The notice was lodged late and did not disclose Mr Merrin's relevant interest in a further 3.79% of Gondwana shares held through Fern Valley Limited, an entity controlled by him.
9. On 11 July 2014, Gondwana issued a notice of AGM and accompanying explanatory statement that included the Fundraising Resolutions. The explanatory statement disclosed that, if resolutions 5 and 6 were passed, the issue of shares during the bid period would trigger the defeating condition and therefore shareholder approval was sought for those frustrating actions.⁵
10. Between 1 May and 4 May 2014, Gondwana shares were in a trading halt. Between 5 May 2014 and 17 July 2014, Gondwana shares were voluntarily suspended.
11. On 17 July 2014, Gondwana announced a 1 for 1 non-renounceable entitlement issue at 3.2 cents per share,⁶ fully underwritten by GMP. It said that GMP was an "*independent international investment bank*".⁷ The entitlement issue was not subject to shareholder approval and was not mentioned in the notice of AGM.
12. On 18 July 2014, Gondwana dispatched its target's statement and its prospectus for the entitlement issue to shareholders.

APPLICATION

Declaration sought

13. By application dated 17 July 2014, Ochre sought a declaration of unacceptable circumstances. Ochre submitted that (among other things):
 - (a) the Relevant Persons were associates and placements of shares to them and exercises of options by them contravened s606
 - (b) Gondwana's notice of meeting and explanatory statement for the AGM contained information deficiencies and, as a result, had an effect on control or potential control of Gondwana without shareholders receiving enough information to assess the merits of the proposals
 - (c) the entitlement issue would trigger the defeating condition of the bid if it proceeded and constituted frustrating action and
 - (d) the voluntary suspension of Gondwana's shares from quotation prevented Ochre from acquiring additional shares on market and prevented other shareholders from disposing of their shares on market.
14. Ochre submitted that the effect of the circumstances was that:

⁵ Ochre specified in its bidder's statement that it would not rely on a breach of the defeating condition if the issue of options pursuant to resolution 4 was approved by shareholders at the AGM

⁶ The last-traded Gondwana share price was 5.5c on 30 April 2014

⁷ GMP is also Gondwana's corporate adviser in respect of Ochre Industries' bid

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- (a) Gondwana shareholders had not been given enough information to assess the merits of the Fundraising Resolutions or make a choice between them and the bid
- (b) the control, or potential control, of Gondwana was likely to be effected otherwise than in an efficient, competitive and informed market and
- (c) Gondwana shareholders had been denied a reasonable and equal opportunity to participate in the benefits of Ochre Industries' bid.

Interim orders sought

- 15. Ochre sought interim orders, pending determination of its application, to the effect that:
 - (a) Gondwana defer the record date and ex-entitlement date for the entitlement issue
 - (b) the Relevant Persons be prevented from exercising any voting rights attached to their Gondwana shares and
 - (c) the Relevant Entities (which Ochre alleged were controlled by the Relevant Persons) not dispose of their Gondwana shares.⁸
- 16. On 18 July 2014, the President made interim orders (Annexure A) that:
 - (a) the ex-entitlement date and the record date for the entitlement issue be deferred and Gondwana must make an ASX announcement to that effect and
 - (b) there be no disposal of, transfer of or grant of any security interest over, any shares or interests in shares in Gondwana held by the Relevant Entities.
- 17. The President declined to make an interim order that the Relevant Persons not exercise their voting rights, having regard to the date for Gondwana's AGM. She noted that the sitting Panel could consider the request again if it considered it appropriate.
- 18. Ahead of Gondwana's AGM, we varied the interim orders (Annexure B) on 8 August 2014, in order to preserve the status quo, to add that Gondwana must not issue or allot, or agree to issue or allot, any new shares, options or convertible notes in reliance on any Fundraising Resolutions passed at the AGM.

Final orders sought

- 19. Ochre sought final orders including to the effect that:
 - (a) the entitlement issue be subject to shareholder approval
 - (b) any prospectus issued in respect of the entitlement issue contain a comparison of the advantages and disadvantages of the entitlement issue and Ochre Industries' bid and state that it will trigger the defeating condition if it proceeds

⁸ Ochre sought, in the alternative, that a holding lock be applied to prevent those shares being transferred

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- (c) the Relevant Persons be prevented from exercising any voting rights attached to their Gondwana shares
- (d) Gondwana shares held in excess of 20% by the Relevant Persons be vested in ASIC for sale and
- (e) resolutions in the notice of AGM relating to ratifying and approving the issue of shares and options not be put to Gondwana shareholders.

DISCUSSION

Information deficiencies in explanatory statement

20. Ochre submitted that the explanatory statement accompanying the notice of AGM included the following information deficiencies:
- (a) in relation to resolution 3, there was no disclosure that the consequence of ratifying the prior placement and refreshing the company's 15% placement capacity meant that Gondwana would be able to issue shares following the AGM. Any issue would be in breach of the defeating condition if Ochre Industries extended its bid beyond the date of the AGM⁹
 - (b) there was insufficient information as to why Gondwana had abandoned the entitlement issue announced on 15 April 2014
 - (c) there was no disclosure about Gondwana's discussions with third parties in relation to alternative capital raising options (including any entitlement issue in contemplation), given the proposed allotment of a significant number of shares pursuant to resolution 5
 - (d) there was no disclosure about the amount of money raised by Gondwana as a result of the exercise of options on 30 April and 30 June 2014, or of Gondwana's financial position or its immediate funding needs
 - (e) in relation to resolution 5, there was inadequate disclosure in relation to the directors' allocation policy for placing new shares and options and
 - (f) in relation to resolution 7, there was no disclosure that the consequence of approving the company's additional 10% placement capacity meant that Gondwana would be able to issue shares following the AGM. Any issue would be in breach of the defeating condition if Ochre Industries extended its bid beyond the date of the AGM.
21. Ochre submitted that those disclosure deficiencies meant that Gondwana shareholders did not have enough information to assess the merits of the proposals for the fundraising and were unable to make an informed decision on how to vote on the Fundraising Resolutions.
22. Gondwana submitted that the explanatory statement clearly set out the purpose for each resolution, met the requirements of the ASX Listing Rules and was consistent with market practice. Shareholders therefore had all the information they required to decide whether to vote in favour or against each resolution.

⁹ On 24 July 2014, Ochre Industries extended its bid to 21 August 2014

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Gondwana also submitted that ASX was the primary regulator responsible for supervising the content of the notice of AGM and it had approved the notice of AGM.

23. Messrs Beckwith, Goodsall and Pynt made submissions similar to those of Gondwana.
24. ASIC submitted that the explanatory statement:
 - (a) lacked disclosure of how the fundraising alternatives operated in conjunction with each other and with Ochre Industries' bid
 - (b) did not clearly articulate the further need for, and application of, the funds which may be raised under the further placement following Gondwana's recent capital raisings and proposed entitlement issue and
 - (c) should contain details regarding (among other things) the process Gondwana intended to undertake to find and select placees and what other more specific considerations the board intended to take into account in exercising its discretion to place the shares.
25. The Panel has consistently required a target to give its shareholders adequate information (and time to consider that information) in relation to the merits of a bid and any proposed alternative corporate action which may defeat the bid.¹⁰ We consider the explanatory statement to be deficient. It is no answer to say that ASX has approved the notice of meeting. It has a specific remit; ASX approval relates only to the application of the ASX Listing Rules. The explanatory statement did not disclose that, as a result of ratifying the prior placement and approving the additional 10% placement capacity, Gondwana could issue shares or options following the AGM that would trigger the defeating condition. There was also inadequate disclosure of why Gondwana had abandoned the earlier entitlement issue and what alternative capital raising options had been discussed with third parties.
26. In particular, we consider that the explanatory statement did not disclose adequately how the Fundraisings Resolutions interacted with one another, the combined potential effect of the Fundraising Resolutions on control of Gondwana or Ochre Industries' bid, or whether Gondwana intended to issue any shares or options in reliance on the Fundraising Resolutions during the bid period (thereby triggering the defeating condition).
27. Furthermore, in *Gondwana Resources Limited 01*,¹¹ simultaneous capital raisings were proposed but the combined effect of those raisings was not disclosed in material sent to shareholders. The Panel said this created uncertainty about the potential effect on control of Gondwana.¹² It appears that Gondwana has either overlooked or ignored all this guidance.

¹⁰ See, eg, *Coopers Brewery Limited 03* [2005] ATP 22 and *Resource Pacific Holdings Ltd* [2007] ATP 26

¹¹ *Gondwana Resources Limited 01* [2014] ATP 9

¹² *Gondwana Resources Limited 01* [2014] ATP 9 at [40]

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28. Gondwana submitted that, at the time the notice of AGM was dispatched, it had not finalised the terms of the entitlement issue and had not resolved to proceed with the entitlement issue. Accordingly it submitted there was no relevant or material information that it could have meaningfully or sensibly disclosed in the explanatory statement.
29. We disagree. We consider that the explanatory statement should have disclosed details of the entitlement issue in contemplation, its potential effect on control of Gondwana and Ochre Industries' bid and any underwriting and sub-underwriting arrangements in contemplation, or whether no such arrangements were contemplated. Even if Gondwana had not yet resolved to proceed with the entitlement issue, it had been negotiating the underwriting agreement with GMP since mid-June. The fundamental terms of the entitlement issue (the price, size of the offering, renounceability and full underwriting) did not change. Alternatively, Gondwana should have dispatched an updated explanatory statement to shareholders once the entitlement issue had been finalised. Either way, shareholders would have had sufficient time to consider the impact of the entitlement issue before voting at the AGM.

Entitlement issue and frustrating action

30. Ochre submitted that the entitlement issue constituted a frustrating action by Gondwana as it would trigger the defeating condition if it proceeded and it was not subject to shareholder approval.
31. Gondwana submitted that the entitlement issue was not a frustrating action which would give rise to unacceptable circumstances and did not require shareholder approval to proceed because (among other things):
 - (a) the entitlement issue did not have a material effect on the control of Gondwana because (among other things) it was fully underwritten by an independent, professional underwriter
 - (b) there was a fundraising imperative for the entitlement issue to proceed as soon as possible as Gondwana had an urgent need for funds
 - (c) the defeating condition was not commercially critical to Ochre Industries' bid
 - (d) Gondwana had announced its intentions to raise capital (including by way of an entitlement issue) on several occasions prior to the announcement of Ochre Industries' bid
 - (e) Ochre Industries' bid was unlikely to be successful based on (among other reasons) the independent expert concluding that the offer was neither fair nor reasonable
 - (f) all relevant information regarding the entitlement issue and Ochre Industries' bid was provided to Gondwana shareholders at the same time (via the dispatch on 18 July 2014 of Gondwana's target's statement and its prospectus for the entitlement issue). This enabled shareholders to consider and assess each proposal and make a fully informed choice between the proposals and

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decide whether to accept or reject the entitlement issue or Ochre Industries' bid and

(g) obtaining shareholder approval was only one of several ways of giving shareholders a choice between competing proposals.

32. We cannot accept any of these arguments. The Panel's policy on frustrating action states that an action that triggers a condition of a bid is a frustrating action. Whether it gives rise to unacceptable circumstances will depend on its effect on shareholders and the market in light of ss602(a) and (c) and s657A.¹³ The entitlement issue would have triggered the defeating condition if it had proceeded. We consider that it is clearly a frustrating action.

33. In *Coopers Brewery Limited 03*,¹⁴ the Panel said:

The Takeovers Panel's Guidance Note 12 expressly states that shareholders have the right to choose, via an adequately informed meeting, whether or not to accept the rival course which might prevent or frustrate the proposed takeover bid and prevent those shareholders who wished to accept the takeover bid from selling their shares into the bid.

34. Gondwana did not seek shareholder approval for the entitlement issue, which clearly could have a material effect on control. We consider that the defeating condition was commercially critical to the bid. The entitlement issue's completion would double the size of the company's share capital.

35. Despite Gondwana's submissions, we consider that shareholders were not given a choice between the competing proposals. That choice should be exercised by shareholders as a group. The entitlement issue would trigger the defeating condition if Gondwana received even a single subscription. Even if no shareholder subscribed to the entitlement issue, there was full underwriting. And any previously contemplated capital raising proposals had been prevented from proceeding or had been abandoned by Gondwana.

36. By not making the frustrating action subject to shareholder approval, Gondwana failed to give its shareholders a reasonable and equal opportunity to participate in the benefits of Ochre Industries' bid.

37. Also and particularly in the context of Ochre Industries' bid, there was a lack of disclosure regarding the sub-underwriting arrangements for the entitlement issue. The underwriting agreement between Gondwana and GMP contained an acknowledgment that GMP intended to enter into sub-underwriting agreements with third parties to fully sub-underwrite the offer. Gondwana's prospectus only disclosed that sub-underwriting arrangements would not result in any sub-underwriter's holding increasing to above 19.9%. It did not specify details of any sub-underwriting arrangements or identify any persons that might acquire, or increase, a substantial holding in Gondwana as a result. Gondwana submitted that it was not aware of any sub-underwriting arrangements having been entered into by the underwriter and that the prospectus set out all information of which it was

¹³ Guidance Note 12 - *Frustrating action* at [6]

¹⁴ *Coopers Brewery Limited 03* [2005] ATP 22 at [103]. See also *Pinnacle VRB Limited (No. 08)* [2001] ATP 17 at [7]

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aware regarding sub-underwriting arrangements. However, given the potential impact on control of Gondwana, Gondwana should have made inquiries in relation to sub-underwriting arrangements and then disclosed those arrangements or whether none were contemplated.

Association between Relevant Persons and Relevant Entities

38. Ochre submitted that the Relevant Persons and their controlled entities (including the Relevant Entities), were associates and either had a relevant agreement or were acting in concert to:
 - (a) maintain control of Gondwana in the hands of its directors and
 - (b) stymie Ochre Industries' bid by (among other things):
 - (i) diluting its shareholding
 - (ii) preventing it from acquiring additional shares on market due to the voluntary suspension of Gondwana's shares and
 - (iii) using their shareholdings to pass the Fundraising Resolutions at the AGM.
39. Ochre submitted that the evidentiary basis for the association included common directorships, common shareholdings and a common pattern of investments and dealings in Gondwana.
40. Gondwana submitted that Ochre had not provided sufficient evidence of association between the Relevant Persons and that the evidence that had been produced demonstrated no more than:
 - (a) *historical common directorships up to 14 years old in companies that were either deregistered or dormant*
 - (b) *portfolio investments by some of the parties in companies managed by other parties and*
 - (c) *Gondwana's directors being appointed directors of Gondwana's subsidiaries.*
41. Messrs Beckwith, Goodsall and Pynt were jointly represented. They submitted that the evidence provided by Ochre was an entirely "*circumstantial case for association*".
42. Mr Bryant submitted that Ochre had done no more than show "*a series of connections between some long-term business contacts and instances of shareholders in Gondwana acting in a separate but coincidental manner*".
43. Mr Merrin, who was separately represented by the same firm as Mr Bryant, submitted that Ochre had "*endeavoured to piece together a series of antiquated and irrelevant relationships in an attempt to evidence an association*" and drew the Panel's attention to the fact that he had never been a director of Gondwana. Some of the submissions by Mr Merrin were substantially the same as those of Mr Bryant.
44. Ochre submitted that the engagement of the same legal advisers by Messrs Beckwith, Goodsall and Pynt, and the engagement of the same legal advisers by Messrs Bryant and Merrin, was a further indication that the Relevant Persons were

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associates as it suggested “*a community of interest as well as common knowledge of facts*”.¹⁵

45. We required Gondwana to provide information (which Ochre had been seeking to inspect through Gondwana’s register) in relation to placements of shares and options it had made to the Relevant Persons (among other shareholders) over the last seven years. Gondwana did so, although it provided the information late.
46. Ochre submitted that the placement information demonstrated a long-standing pattern of Gondwana placing shares and options with Messrs Bryant and Merrin. It submitted that this was suggestive of an arrangement or agreement between the Gondwana directors and Messrs Bryant and Merrin.
47. A number of features suggest an association between the Relevant Persons, including:
 - (a) Messrs Beckwith, Goodsall and Pynt being represented by the same solicitors, and Messrs Bryant and Merrin being represented by the same solicitors
 - (b) a history of common directorships, investments and dealings with each other over more than twenty years
 - (c) the exercise of options by Messrs Bryant and Merrin at 10 cents per share at a time when Gondwana’s share price was considerably lower and
 - (d) numerous placements of Gondwana shares and options with Messrs Bryant and Merrin over a period of more than five years.
48. However, in the end we are not sufficiently persuaded of an association. In our view, the material demonstrates that there were long-standing friendships and business relationships between the Relevant Persons but no more. The material (including the historical placement information) also evidences the fact that Messrs Bryant and Merrin are long-standing supporters of Gondwana.
49. On balance, we consider that the material falls short of establishing an association between the Relevant Persons. The evidence does not go so far as to establish that the Relevant Persons had a relevant agreement or were acting in concert with each other, in respect of Gondwana’s affairs. We are not satisfied that we can draw the necessary inferences based on the material before us and we are not prepared to make a finding that there was an association between the Relevant Persons in relation to Gondwana.

Breach of substantial holder notice provisions

50. In response to the Panel’s brief, Mr Merrin confirmed that he controlled Fern Valley Limited, an entity holding 3.79% of Gondwana shares. Mr Merrin submitted that, due to administrative error,¹⁶ he had not aggregated Fern Valley Limited’s holding of Gondwana shares with his other relevant interests in Gondwana and, as

¹⁵ *World Oil Resources Limited* [2013] ATP 1 at [188(b)]

¹⁶ Mr Merrin submitted that he managed Fern Valley Limited on behalf of his son and did not realise that he had a relevant interest in the Gondwana shares held by it

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a consequence, had omitted its holding from his substantial holding notice lodged on 9 July 2014.

51. Mr Merrin made corrective disclosure on 30 July 2014 noting his relevant interest in Gondwana was 11.81%.
52. Mr Merrin's failure to aggregate his relevant interest in Gondwana shares is long-standing and, as a result, he has contravened s671B on several occasions. One consequence of Mr Merrin's non-disclosure is that, at the time it announced its bid, Ochre Industries was not aware that Mr Merrin was a substantial holder in Gondwana (having a relevant interest at that time in approximately 8.78% of Gondwana shares). This gives rise to unacceptable circumstances in our view.

Voluntary suspension of Gondwana's shares

53. Ochre submitted that the voluntary suspension of Gondwana's shares prevented it from acquiring additional shares on market. It also prevented other Gondwana shareholders from disposing of their shares on market (at a potential premium as a result of the announcement of Ochre Industries' bid).
54. Gondwana submitted that the voluntary suspension was necessary in order to manage its continuous disclosure obligations and to avoid shares being traded on an uninformed basis while it finalised its preferred fundraising options.
55. The voluntary suspension of Gondwana's shares was lifted before the application was made and no orders were sought so we did not consider this matter.

DECISION

Declaration

56. It appears to us that the circumstances are unacceptable:
 - (a) having regard to 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
 - (b) having regard to the purposes of Chapter 6 set out in s602 and
 - (c) because they constituted a contravention of a provision of Chapter 6C.
57. Accordingly, we made the declaration set out 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).

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Orders

58. Following the declaration, we made the final orders in Annexure D. We did not make any costs orders. Under s657D the Panel's power to make orders is very wide. The Panel is empowered to make 'any order'¹⁷ if 4 tests are met:
- (a) it has made a declaration under s657A. This was done on 15 August 2014
 - (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. For the reasons below, we are satisfied that our orders do not unfairly prejudice any person
 - (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 8 August 2014. Each party other than Mr Bryant made submissions and rebuttals and
 - (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 as described below.
59. Gondwana must obtain shareholder approval for the entitlement issue. Gondwana must also obtain shareholder approval for any issue or allotment of shares, options or convertible notes during the restricted period, being the earlier of Ochre Industries' bid closing or being withdrawn or three months after the date of the orders.¹⁸ The directors appear to have engaged in excessive or inappropriate defensive action in response to Ochre Industries' bid. It was therefore no comfort that some of the Fundraising Resolutions were simply capacity building, leaving it to the directors to decide when to place shares. The Fundraising Resolutions give the Gondwana directors the ability to issue shares in reliance on the company's refreshed placement capacity and thereby frustrate Ochre Industries' bid. Any issue during the restricted period should be subject to shareholder approval.
60. The order in relation to Mr Merrin is to redress the fact that Ochre Industries was unaware of Mr Merrin's substantial holding above 5% when it announced its bid. We have addressed any unfair prejudice to Mr Merrin by allowing him to accept a superior unconditional takeover offer recommended by the board of Gondwana and providing that the order has effect for a maximum of three months.

Anthony Sweetman
President of the sitting Panel
Decision dated 15 August 2014
Reasons published 28 August 2014

¹⁷ Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

¹⁸ We imposed the three month limit on this order to recognise that Gondwana should not be prevented from acting on resolutions passed by its shareholders indefinitely

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Advisers

Party	Advisers
Applicant	Minter Ellison
Gondwana	Steinepreis Paganin
Warren Beckwith Paul Goodsall Steven Pynt	Clayton Utz
Peter Bryant BC Capital Limited	King & Wood Mallesons
Duncan Merrin International Business Services Limited Fern Valley Limited	King & Wood Mallesons



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ANNEXURE A

**CORPORATIONS ACT
SECTION 657E
INTERIM ORDER**

GONDWANA RESOURCES LIMITED 02

Ochre Group Holdings Limited made an application to the Panel dated 17 July 2014 in relation to the affairs of Gondwana Resources Limited (**Gondwana**).

The President ORDERS:

1. The ex-entitlement date and record date for the entitlement issue announced by Gondwana on 17 July 2014 are deferred.
2. As soon as practicable, Gondwana make an ASX announcement that the ex-entitlement date and record date referred to in order 1 have been deferred to dates to be determined.
3. There be no disposal of, transfer of or grant of any security interest over any shares or interests in shares registered in the names of the shareholders in Gondwana set out in **Schedule A**.
4. These interim orders have effect until the earliest of:
 - (i) further order of the Panel
 - (ii) the determination of the proceedings and
 - (iii) 2 months from the date of these interim orders.

Schedule A

BC Capital Limited

International Business Services Limited

Fern Valley Limited

Finscan Investments Limited

Alan Shaw
Counsel
with authority of Vickki McFadden
President
Dated 18 July 2014



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ANNEXURE B

**CORPORATIONS ACT
SECTION 657E
INTERIM ORDER**

GONDWANA RESOURCES LIMITED 02

The interim orders made on 18 July 2014 are varied in accordance with the following marked-up amendment so that the Panel's ORDERS are as follows:

1. The ex-entitlement date and record date for the entitlement issue announced by Gondwana on 17 July 2014 are deferred.
2. As soon as practicable, Gondwana make an ASX announcement that the ex-entitlement date and record date referred to in order 1 have been deferred to dates to be determined.
3. There be no disposal of, transfer of or grant of any security interest over any shares or interests in shares registered in the names of the shareholders in Gondwana set out in **Schedule A**.
4. Gondwana must not issue or allot, or agree to issue or allot, any new shares, options or convertible notes in reliance on any resolutions passed at its annual general meeting scheduled to be held on 11 August 2014 at 10:30am (WST) or any adjournment of that meeting.
- 4.5. These interim orders have effect until the earliest of:
 - (i) further order of the Panel
 - (ii) the determination of the proceedings and
 - (iii) 2 months from the date of these interim orders.

Schedule A

BC Capital Limited

International Business Services Limited

Fern Valley Limited

Finscan Investments Limited

Allan Bulman
Director
with authority of Anthony Sweetman
President of the sitting Panel
Dated 8 August 2014



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Takeovers Panel

ANNEXURE C

CORPORATIONS ACT SECTION 657A

DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

GONDWANA RESOURCES LIMITED 02

CIRCUMSTANCES

1. Gondwana Resources Limited (**Gondwana**) is an ASX listed entity. It is subject to a conditional off-market bid by Ochre Industries Pty Limited (**Ochre**), a wholly owned subsidiary of Ochre Group Holdings Limited at 8.2 cents per share. One of the conditions of the bid is:

11.28 (e)(No Prescribed Occurrences) Between the period beginning on the Announcement Date and ending at the end of the Offer Period, none of the following events occur in relation to Gondwana or any of its subsidiaries:

- (iv) *Gondwana or a subsidiary of Gondwana issues shares or grants an option over its shares or agrees to make such an issue or grant such an option*
2. On or about 11 July 2014, Gondwana sent shareholders a notice of annual general meeting and explanatory statement, which included the following resolutions:
 - (a) Resolution 3 – to ratify a prior placement of shares
 - (b) Resolution 4 – to approve a placement of new options related to the placement under resolution 3
 - (c) Resolution 5 – to approve a further placement of up to 15,000,000 shares and 15,000,000 options
 - (d) Resolution 6 – to approve the adoption of an employee share plan and the issue of securities under it and
 - (e) Resolution 7 – to approve (for ASX listing rule 7.1A purposes) a 10% placement capacity.
3. On 17 July 2014, Gondwana announced a fully underwritten 1 for 1 non-renounceable entitlement issue of 24,433,440 shares at 3.2 cents per share to raise approximately \$781,870.
4. The explanatory statement for the annual general meeting did not disclose adequately or at all:

- (a) how the fundraisings relate to one another, their combined potential effect on control of Gondwana and Ochre's bid, and whether it is intended to issue any shares or options (or agree to do so) in reliance on the resolutions above during the bid period
 - (b) the proposed entitlement issue (which was in contemplation) and its potential effect on:
 - (i) control of Gondwana or
 - (ii) Ochre's bid
 - (c) any sub-underwriting arrangements in contemplation for the proposed entitlement issue or whether no such arrangements were contemplated.
5. Further, if the entitlement issue proceeds, it will trigger a condition of Ochre's bid but it has not been subject to shareholder approval.
 6. Further, a substantial shareholder in Gondwana, Mr Duncan Merrin, failed to disclose his substantial holding until 9 July 2014 and then made incomplete disclosure until a substantial holder notice correcting previous notices was lodged on 30 July 2014 disclosing a relevant interest in 11.81% of Gondwana shares.
 7. The Panel considers that Gondwana shareholders:
 - (a) have not been given enough information to enable them to assess the merits of the proposed resolutions
 - (b) have not been given a reasonable and equal opportunity to participate in any benefits accruing to holders through Ochre's bid and
 - (c) did not know the identity of a person who had, or proposed to, acquire a substantial interest in the company.
 8. 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 Gondwana or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Gondwana
 - (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 a contravention of a provision of Chapter 6C of the Act.
 9. 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).

DECLARATION

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

Alan Shaw
Counsel
with authority of Anthony Sweetman
President of the sitting Panel
Dated 15 August 2014



Australian Government

Takeovers Panel

ANNEXURE D
CORPORATIONS ACT
SECTION 657D
ORDERS

GONDWANA RESOURCES LIMITED 02

The Panel made a declaration of unacceptable circumstances on 15 August 2014.

THE PANEL ORDERS

1. Shareholder approval required for entitlement issue

The latest entitlement issue must not proceed without shareholder approval and the record date for the latest entitlement issue must be no earlier than 5 business days after the date of any such approval.

2. Shareholder approval required for issue of shares, options or convertible notes

2.1 Any issue or allotment of, or agreement to issue or allot, shares, options or convertible notes during the restricted period as a consequence of or in reliance on any of resolutions 3, 4, 5, 6 and 7 passed at Gondwana's AGM must not proceed without shareholder approval for that particular issue or allotment, or agreement to issue or allot.

2.2 Order 2.1 does not apply to the issue or allotment of 1,250,000 options approved under resolution 4.

3. Gondwana to provide adequate disclosure when seeking shareholder approval

Any notice of general meeting seeking shareholder approval pursuant to order 1 or 2 must be accompanied by an explanatory statement in a form approved by the Panel.

4. Divestment of shares in which Duncan Merrin has a relevant interest

Duncan Merrin must not dispose of a relevant interest in, transfer or grant any security interest over, or cause or allow the disposal of a relevant interest in, transfer or grant of any security interest over, 1,664,346 Gondwana shares¹⁹ (constituting 6.81% of Gondwana shares). However:

- (a) he may accept an offer by a bidder other than Ochre (or cause it to be accepted) if:
 - (i) it is superior to Ochre's bid
 - (ii) it is recommended by the board of Gondwana

¹⁹ Being the number of Gondwana shares in excess of 5% in which Mr Merrin has disclosed a relevant interest

- (iii) it is an offer for all the shares in Gondwana
 - (iv) it is unconditional and
 - (v) he is not required to comply with order 4(b).
- (b) he must accept Ochre's bid (or cause it to be accepted) for no less than 1,664,346 Gondwana shares if:
- (i) Ochre obtains a relevant interest under its bid in 50% or more of Gondwana shares (excluding all the undisclosed Gondwana shares and the 3,891,856 Gondwana shares Ochre Group Holdings Limited had a relevant interest in prior to Ochre's offer opening) and
 - (ii) it is unconditional.
- (c) order 4 applies only during the restricted period.

5. Definitions

In these orders the following terms have the following meanings:

AGM	Gondwana's annual general meeting held on 11 August 2014 at 10:30am (WST)
Gondwana	Gondwana Resources Limited
latest entitlement issue	Gondwana's proposed entitlement issue announced 17 July 2014
Ochre	Ochre Industries Pty Limited, a wholly owned subsidiary of Ochre Group Holdings Limited
restricted period	From the date of these orders until the earlier of the close of Ochre's takeover offer or its withdrawal and the date that is three months from the date of these orders
undisclosed Gondwana shares	2,886,016 Gondwana shares (constituting 11.81% of Gondwana shares) in which Duncan Merrin has a relevant interest as disclosed in his substantial holder notice of 30 July 2014

Alan Shaw
Counsel
with authority of Anthony Sweetman
President of the sitting Panel
Dated 15 August 2014