



Australian Government

Takeovers Panel

**Reasons for Decision
Gondwana Resources Limited 02R
[2014] ATP 18**

Catchwords:

Review – decline to conduct proceedings – association – no error – timing of review application – consent of the President – de novo review

Corporations Act 2001 (Cth), section 657EA

Corporations Regulations 2001 (Cth), regulation 6.10.01

Guidance Note 2: Reviewing decisions

Gondwana Resources Limited 02 [2014] ATP 15; Gondwana Resources Limited 01 [2014] ATP 9; Careers Australia Group Limited 02R [2013] ATP 6; Minemakers Limited 02R [2012] ATP 16; Breakfree Limited 04R [2003] ATP 42; National Can Industries Limited 01R [2003] ATP 40

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

INTRODUCTION

1. The review Panel, Elizabeth Hallett, Robert Johanson (sitting President) and John Sheahan QC, declined to conduct proceedings on a review application by Ochre Group Holdings Limited in relation to the affairs of Gondwana Resources Limited. The review application submitted that there were alleged associations between certain Gondwana shareholders. The review Panel considered that there was no reasonable prospect that it would come to a different conclusion to the initial Panel.
2. In these reasons, the following definitions apply.

Gondwana	Gondwana Resources Limited
Ochre	Ochre Group Holdings Limited
Ochre Industries	Ochre Industries Pty Limited
Relevant Persons	Mr Warren Beckwith, Mr Paul Goodsall, Mr Steven Pynt, Mr Peter Bryant and Mr Duncan Merrin

FACTS

3. The facts are set out in *Gondwana 02*.¹
4. In *Gondwana 01*,² Ochre submitted (among other things) that Gondwana’s proposed 1 for 1 entitlement issue, announced on 15 April 2014, had an unacceptable control effect. The Panel considered whether Gondwana’s directors may have been associates “in the light of their exercise of options and the resolutions approving the issue of

¹ *Gondwana Resources Limited 02 [2014] ATP 15*

² *Gondwana Resources Limited 01 [2014] ATP 9*

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shares and option to them".³ The Panel did not make a finding that Gondwana's directors were associated but did consider that all reasonable steps to minimise the potential control impact of the entitlement issue were not taken and the exercise of the options by the directors of Gondwana and related persons was unacceptable.

5. 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 via Ochre Industries. On 10 June 2014, Gondwana announced it would not proceed with its entitlement issue.
6. Ochre's application in *Gondwana 02* concerned contraventions of s606⁴ as a result of alleged associations between the Relevant Persons (being 3 directors and 2 others), information deficiencies in Gondwana's notice of annual general meeting relating to fundraising resolutions and whether Gondwana's further proposed entitlement issue would frustrate Ochre Industries' bid.
7. On 15 August 2014, the initial Panel in *Gondwana 02* made a declaration of unacceptable circumstances. The initial Panel considered that the entitlement issue was a frustrating action and that there were information deficiencies in Gondwana's notice of annual general meeting. The initial Panel did not make a finding of association, but considered that the failure to comply with the substantial holding provisions by Mr Duncan Merrin (one of the Relevant Persons) was unacceptable.
8. The initial Panel ordered shareholder approval for fundraising during Ochre Industries' bid and that Mr Merrin's undisclosed substantial holding be sold into Ochre's bid if certain conditions were met (in each case for up to 3 months).

APPLICATION

Application

9. By review application dated 19 August 2014, Ochre sought a review of the decision by the initial Panel in *Gondwana 02*. Ochre submitted that:
 - (a) Gondwana had deliberately delayed in providing information in relation to allotments of shares to Relevant Persons and their associates
 - (b) the initial Panel had not properly considered Ochre's submissions in response to the information provided in subparagraph (a) and
 - (c) Gondwana and the Relevant Persons had failed to provide documentary evidence regarding discussions between them in relation to Ochre's bid, exercise of options and future acquisitions of shares and options.
10. After Ochre received a copy of the initial Panel's draft reasons it provided 'Supplementary Application Material',⁵ submitting (among other things) that:
 - (a) since 2007 the directors had issued shares "*to the Relevant Persons, sometimes to the exclusion of any other shareholder, in a way which maintains the Relevant Persons' combined interest*"

³ [2014] ATP 9 at [43]-[44]

⁴ references are to *Corporations Act 2001* (Cth) unless otherwise indicated

⁵ which is permitted – see Guidance Note 2: Reviewing decisions at [33]

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- (b) *“the Relevant Persons have a history of failing to disclose their substantial shareholdings or directors’ interests in Gondwana shares”* and
 - (c) Gondwana denied Ochre its statutory right under s169(3) to inspect Gondwana’s members register, which constituted *“further evidence of conduct to obfuscate the control of Gondwana by the Relevant Persons”*.
11. Messrs Beckwith, Goodsall and Pynt made a joint preliminary submission and Mr Merrin also made a preliminary submission.

DISCUSSION

Timing of the application

12. Both preliminary submissions raised whether the review application was out of time. The Panel Executive emailed the parties on Thursday 14 August 2014 stating that the *“Panel had now finalised its draft declaration and orders, subject to any technical amendments that might be required”* and attached drafts of the declaration, orders and media release. Parties were invited to identify any technical corrections by 7.00pm that day. The final signed declaration and orders were emailed to the parties on Friday 15 August 2014.
13. Messrs Beckwith, Goodsall and Pynt submitted that the Panel’s decision was communicated to the parties on Thursday 14 August 2014 and the review application was made on Tuesday 19 August 2014, therefore the review application was not made within 2 business days of the decision being made, as required by regulation 6.10.01 of the *Corporations Regulations 2001* (Cth).
14. Procedural Rule 7.1.1 states that the Panel’s decision is made on the date that it is communicated to the parties *“in final form”* and note 4 to that Procedural Rule states that the decision in final form will normally be accompanied by a signed copy of the declaration and final orders. This is consistent with Procedural Rule 2.4.1 which states that any *“document provided by the Panel (including the executive) to a person for comment or which is marked as draft is a confidential and incomplete document that is subject to change”*. We consider that for the purposes of regulation 6.10.01 the decision was made on Friday 15 August 2014. Accordingly the review application was made within 2 business days of the initial Panel’s decision.

Review application

15. The review proceeding is a *de novo* consideration.⁶ We have considered:
- (a) all the material before the initial Panel
 - (b) the initial Panel’s draft reasons
 - (c) the review application and Supplementary Application Material from Ochre and
 - (d) the preliminary submissions on the review application.

⁶ Panel’s Procedural Rule 3.3.1; Guidance Note 2: Reviewing decisions at [28]; *National Can Industries Limited 01R* [2003] ATP 40 at [21], *Breakfree Limited 04R* [2003] ATP 42 at [35], [39]-[50] and *Minemakers Limited 02R* [2012] ATP 16 at [8]

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16. We consider that there is no reasonable prospect that we would come to a different conclusion to the initial Panel in relation to frustrating action, disclosure, Mr Merrin's failure to disclose his substantial holding and association. We have decided to decline to conduct proceedings.⁷

Association

17. Messrs Beckwith, Goodsall and Pynt submitted that no new facts existed and Ochre had not provided any evidence that the initial Panel's decision was manifestly incorrect. Mr Merrin made a similar submission.
18. We agree that Ochre in its review application and Supplementary Application Material did not make any substantive new submissions on the question of association. It is, of course, not required to do so.
19. The material in relation to the allotment of shares was originally sought by Ochre during an inspection of Gondwana's register. Gondwana disputed that it was required to provide it and contended that the information requested was not required to be given to Ochre under the Corporations Act. The initial Panel then sought that information in a supplementary brief and Gondwana provided that information late, after the initial Panel had communicated that it was minded to make a declaration on other aspects of the application and stated that it was still considering the association issue. Ochre made further submissions on this additional material. It is apparent that both the late information and the submission were considered by the initial Panel in deciding not to make any finding of association.
20. We also note Mr Merrin's submission that the Panel had already considered the issue of association, at least in relation to Gondwana's directors, on two separate occasions.
21. We agree with the initial Panel's conclusion on the question of association:
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.
*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.*⁸
22. The pattern of placements to the Relevant Persons since 2007 suggests that the Relevant Persons are long term financial supporters of Gondwana, but not necessarily associates. Given Gondwana has a market capitalisation of less than \$2 million, it is not surprising that it has resorted to the same sources to obtain funds

⁷ a review Panel is entitled to decline to conduct proceedings: *Careers Australia Group Limited 02R* [2013] ATP 6

⁸ [2014] ATP 15, [48]-[49]

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over a number of years. In addition the Relevant Persons sold shares in Gondwana during this period.

23. Ochre submitted that there was a pattern of failure to disclose substantial holding and directors' interests by the Relevant Persons, which "*should not be taken to be examples of the Relevant Persons being inept or a serious failure of elementary corporate governance, but conduct engaged in for the purpose of obfuscating the Relevant Persons in relation to their shareholding in Gondwana*". We consider that failure to disclose substantial holdings was more likely due to other reasons, perhaps even a disregard of compliance obligations, and the initial Panel dealt with the most egregious of those non-disclosures.
24. We consider that the common directorships between the Relevant Persons were mostly historical. They are indicative of long-standing friendships and business relationships but we are not prepared to infer association without something more. We also consider that Gondwana's actions in relation to its first and second entitlement issues and disclosure deficiencies do not support an inference of association but rather defensive action.⁹
25. Like the initial Panel, we do not think the register information finally disclosed to Ochre creates the basis for an inference of association. Gondwana's delay in providing material to the initial Panel and the other parties, while less than ideal, was not, Gondwana submitted, deliberate, but rather was a result of the time required to source the requested information. It does not give rise to an inference supportive of a finding of association.
26. Ochre's case for association relied on circumstantial evidence, as most association cases must. The mere fact that the evidence was circumstantial did not stand in the way of a finding of association. Circumstantial evidence can be extremely powerful. And at least where 'concert' is relied on to found association, reliance on circumstantial evidence will usually be essential. However, for the reasons given above, the circumstances relied on by Ochre were not sufficient in our view to justify a finding of association in relation to Gondwana.¹⁰

Other matters

27. The review application was stated to be made "*in relation to the initial Panel making no finding that the Relevant Persons...were associates and not requiring the Relevant Persons to provide additional information and an explanation regarding the matters*" raised in Ochre's submissions in response to the late information provided by Gondwana. We consider therefore that Ochre attempted to limit its review application to the question of association.
28. We consider that we are not confined to review only that aspect of the initial application, despite the framing of Ochre's application. This is consistent with the review being *de novo*. Therefore as discussed above, we have considered all of the initial Panel's decision.

⁹ the initial Panel considered that Gondwana's directors "*appear to have engaged in excessive or inappropriate defensive action in response to Ochre Industries' bid*" [2014] ATP 15 at [59]

¹⁰ *Blackham Resources Limited* [2014] ATP 16 at [51]

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29. If the view is taken that Ochre could limit its review application to the issue of association, Ochre may have been required to obtain the consent of the Panel President to make the application under s657EA(2) as the initial Panel did not make a declaration of unacceptable circumstances or other order in relation to association. It may also be arguable that Ochre's limitation of its review application gives rise to an obligation to obtain consent, even if the view is taken that the review Panel would not be limited to a review of only that aspect of the decision.
30. Ochre did not seek that consent prior to making its review application. There is a possible argument that Ochre was required to obtain such consent within the 2 business days following the initial Panel's decision.
31. We do not need to decide these questions because of our conclusion in respect of the merits (ie decline to conduct a review) and we formed no view as to the merits of these possible arguments. If we had decided to conduct proceedings, we would have sought submissions on these issues.

DECISION

32. For the reasons above, we do not consider that there is any reasonable prospect that the review application will result in a different outcome to that of the initial Panel.
33. Accordingly, we have decided not to conduct proceedings in relation to the review application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

Orders

34. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any orders.

Robert Johanson

President of the review Panel

Decision dated 28 August 2014

Reasons published 12 September 2014

Advisers

Party	Advisers
Applicant	Minter Ellison
Gondwana	Steinepreis Paganin
Warren Beckwith, Paul Goodsall and Steven Pynt	Clayton Utz