



Australian Government

Takeovers Panel

MEDIA RELEASE

No: TP14/37

Friday, 6 June 2014

Gondwana Resources Limited - Declaration of Unacceptable Circumstances

The Panel has made a declaration of unacceptable circumstances (Annexure A) and accepted undertakings in lieu of making final orders¹ (Annexure B) in relation to an application dated 29 April 2014 by Ochre Group Holdings Limited in relation to the affairs of Gondwana Resources Limited (see TP [14/28](#)).

Background

Ochre is a 17.64% shareholder in Gondwana. On 16 April 2014, when Ochre's holding was 8.27%, Gondwana lodged a prospectus with ASIC in relation to a 1 for 1, non-renounceable entitlement issue at 3.2c per share.² The entitlement issue was to be partially underwritten (50%) by Bellatrix Pty Ltd, a company control by Mr Beckwith (Chairman of Gondwana), whose voting power could have increased to 43.75%. However the underwriting was terminated on 1 May 2014.

On or about 23 April 2014, Gondwana sent 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. The annual general meeting was cancelled on 23 May 2014.

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%. Around the same time, Gondwana rejected an offer from Ochre to underwrite the remaining 50% of the entitlement issue and one of Gondwana's directors raised with his fellow directors whether Ochre would make a bid for Gondwana.

On 16 April 2014, Gondwana had written to its option holders stating in effect that they may not be able to participate in the entitlement issue in relation to any shares issued as a result of exercising their options unless their exercise form and relevant payment was received no later than 27 April 2014. Around 28 to 30 April 2014, Mr

¹ the Panel made a declaration and, should it become necessary, may subsequently make orders

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

Beckwith approached 3 or 4 out of the 16 option holders to encourage them to exercise their 10c options by 30 April 2014 (the record date for the entitlement issue). On or after 30 April 2014, shares were issued to 5 option holders who had exercised their options, including Bellatrix and option holders associated with two other Gondwana directors. As a result of the option exercise, Mr Beckwith increased his voting power in Gondwana to 14.6%.

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.

Declaration

The Panel considered that, while the underwriting had been terminated, the circumstances were unacceptable because (among other things):

- 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 their associates appeared to be a response to Ochre's increased voting power and may contribute to Ochre not proceeding to acquire a substantial interest, including under its bid.

The Panel was also concerned about the standard of disclosure in the entitlement issue prospectus and the uncertainty surrounding the potential control impact of the proposed issue of shares and options to be approved at Gondwana's AGM.

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

Undertakings

The Panel has accepted undertakings from Gondwana in lieu of making orders to the effect that Gondwana:

- increase the minimum subscription under its entitlement issue so as to allow Ochre to subscribe for its full entitlement
- offer shareholders the opportunity to participate in any shortfall under the entitlement issue
- must, if it proceeds with the shareholder approval of further shares and options, disclose the results of the entitlement issue at least 5 business days before the last day for lodgement of proxies and
- make further disclosure in a replacement prospectus for the entitlement issue.

The sitting Panel was Sarah Dulhunty (sitting President), Andrew Low and Sophie Mitchell.

The Panel will publish its reasons for the decision in due course on its website
www.takeovers.gov.au.

Allan Bulman
Director, Takeovers Panel
Level 10, 63 Exhibition Street
Melbourne VIC 3000
Ph: +61 3 9655 3597
allan.bulman@takeovers.gov.au



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ANNEXURE A

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 1³ 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 offer, 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 offer]. 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".

³ 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 s606.⁴ 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.

⁴ All references are to the *Corporations Act 2001 (Cth)* unless otherwise specified

15. The Panel considers that:
 - (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 issue⁵
 - (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

⁵ 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



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ANNEXURE B

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**