



Australian Government

Takeovers Panel

MEDIA RELEASE

No: TP14/68

Friday, 15 August 2014

Gondwana Resources Limited 02 – Declaration of Unacceptable Circumstances and Orders

The Panel has made a declaration of unacceptable circumstances (Annexure A) and final orders (Annexure B) in relation to an application dated 17 July 2014 by Ochre Group Holdings Limited in relation to the affairs of Gondwana Resources Limited (see [TP14/59](#)).

Background

Gondwana is currently the subject of a conditional off-market bid announced on 12 May 2014 by Ochre Industries Pty Limited, a wholly owned subsidiary of Ochre Group, at 8.2 cents per share for all the shares in Gondwana.

On or about 11 July 2014, Gondwana sent shareholders a notice of annual general meeting and explanatory statement, which included resolutions (among others) to approve the issue of shares and options. The annual general meeting was held on 11 August 2014.

On 17 July 2014, Gondwana announced a fully underwritten 1 for 1 non-renounceable entitlement issue at 3.2 cents per share.

Ochre Group submitted that (among other things):

- Gondwana's notice of annual general meeting contained information deficiencies
- the entitlement issue would trigger a condition of Ochre Industries' bid and was a frustrating action and
- certain shareholders in Gondwana are associates and had contravened s606.¹

Mr Duncan Merrin, a substantial holder of 11.81% of Gondwana shares, 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

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

30 July 2014. Mr Merrin was a substantial holder in Gondwana before Ochre Industries announced its bid.

Declaration

The Panel considered that the circumstances were unacceptable because (among other things):

- in the explanatory statement for Gondwana's annual general meeting Gondwana shareholders had not been given enough information to enable them to understand and assess the control impact of the resolutions and the merits of the resolutions compared with the entitlement issue and Ochre Industries' bid
- if the entitlement issue proceeds it will trigger a condition of Ochre Industries' bid and constitutes a frustrating action but it has not been subject to shareholder approval and
- Gondwana shareholders and the market did not know the identity of a person who had acquired a substantial interest in the company.

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).

The Panel was not satisfied that there was an association between certain Gondwana shareholders and declined to make a declaration in respect of that matter.

Orders

The Panel has made orders to the effect that:

- the entitlement issue be subject to shareholder approval
- any issue of shares, options or convertible notes by Gondwana pursuant to the resolutions passed at its annual general meeting be subject to shareholder approval if they are to be issued during Ochre Industries' bid (this order has effect for a maximum of 3 months after the date of the orders)²
- shareholders must receive disclosure in a form approved by the Panel when seeking shareholder approval for the above actions and
- if Ochre Group obtains a relevant interest of 50% or more of Gondwana shares (excluding its own holding of 15.93% at the commencement of the offer period and Mr Merrin's 11.81% holding) and its bid is unconditional, Mr Merrin must accept 6.81% of Gondwana shares (being his recently disclosed interest of 11.81% less 5%) into the bid unless he has accepted a superior unconditional takeover offer which is recommended by the board of Gondwana (this order has effect for a maximum of 3 months after the date of the orders).

The sitting Panel was Christian Johnston, Robert Sultan and Anthony Sweetman (sitting President).

² Excluding the issue and allotment of 1,250,000 options approved by shareholders at Gondwana's annual general meeting

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

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Australian Government

Takeovers Panel

ANNEXURE A

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 B
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 shares¹ (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
 - (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

¹ Being the number of Gondwana shares in excess of 5% in which Mr Merrin has disclosed a relevant interest

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