



Australian Government

Takeovers Panel

**Reasons for Decision
Finders Resources Limited
[2018] ATP 6**

Catchwords:

Decline to conduct proceedings – disclosure – target’s statement – independent expert’s report – technical expert’s report

Corporations Act 2001 (Cth), sections 638(1), 640, 644, 670C(2)

ASIC RG 111 Content of expert reports

Minemakers Limited 02 [2012] ATP 13

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

INTRODUCTION

1. The Panel, Stephanie Charles, Karen Evans-Cullen (sitting President) and Sharon Warburton, declined to conduct proceedings on an application by Eastern Field Developments Limited in relation to the affairs of Finders Resources Limited. The application concerned disclosure in Finders’ target’s statement (including the accompanying independent expert’s report) in relation to Eastern Field’s bid for Finders. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

- Eastern Field** Eastern Field Developments Limited, a company jointly owned by Procap Partners Limited, PT Saratoga Investama Sedaya Tbk and PT Merdeka Copper Gold Tbk
- Finders** Finders Resources Limited
- Independent Expert** Deloitte Corporate Finance Pty Limited
- Takeover Bid** the off-market takeover bid by Eastern Field to acquire all the ordinary shares in Finders for \$0.23 cash per share
- Technical Expert** Behre Dolbear Australia Pty Ltd, an independent mining expert

FACTS

- 3. Finders Resources Limited is an ASX listed company (ASX code: FND). Its principal activity is the exploration, development and mining of copper and other minerals in Indonesia.
- 4. On 6 October 2017, Eastern Field announced its intention to make an off-market takeover bid to acquire all the ordinary shares in Finders.

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5. On 20 November 2017, Eastern Field dispatched its replacement bidder's statement and offers under the Takeover Bid opened.
6. On 5 December 2017, Finders issued its target's statement in which the independent directors of Finders unanimously recommended that shareholders reject the offer.
7. The target's statement annexed an expert's report prepared by the Independent Expert. The Independent Expert concluded that the Takeover Bid was neither fair nor reasonable to Finders' shareholders (other than Eastern Field).
8. The Technical Expert was engaged to provide input and advice on the appropriateness of the assumptions adopted in the 'life of mine' financial model for Finders' Wetar copper project and to provide an assessment of the fair market value of Finders' exploration assets. Its report was attached to the Independent Expert's report.
9. On 22 December 2017, following correspondence with Eastern Field, Finders issued its first supplementary target's statement.
10. On 14 February 2018, Eastern Field declared its offer unconditional.

APPLICATION

Declaration sought

11. By application dated 1 March 2018, Eastern Field sought a declaration of unacceptable circumstances. Eastern Field submitted that:
 - (a) information that was readily available to Finders, and that Finders' shareholders would reasonably require to make an informed assessment of the value of a Finders' share and whether to accept the offer under the Takeover Bid, had not been provided contrary to s638(1)¹
 - (b) the Independent Expert's report had been prepared on the basis of material assumptions including as to forward looking matters which were overly optimistic and had not been tested, and therefore, there were no reasonable grounds for the inclusion of those assumptions contrary to ASIC RG 111 Content of expert reports at [111.74] and [111.95 – 111.101] and
 - (c) new information had arisen, or circumstances had changed, such that the basis on which the target's statement and Independent Expert's report were prepared were no longer valid contrary to ss638(1) and 644 and ASIC RG 111 at [111.102 - 111.103].
12. Eastern Field submitted that the effect of the circumstances was that the Takeover Bid was not able to occur in an efficient, competitive and informed market and that Finders' shareholders had not been given enough information to enable them to assess the merits of the Takeover Bid.

¹ Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth), and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

Final orders sought

13. Eastern Field sought final orders including that:
- (a) Finders provide specified disclosure in the form of a supplementary target's statement (attaching both a revised Independent Expert's report and revised Technical Expert's report)
 - (b) the specified disclosure be updated at the end of each week while offers under the Takeover Bid remained open and
 - (c) persons who had given non-acceptance statements in relation to the Takeover Bid be released from such statements.

DISCUSSION

14. Eastern Field submitted that Finders should disclose actual and up to date copper cathode production rates and recovery levels at the Wetar project because this was information that target shareholders and their professional advisers would reasonably require to make an informed assessment whether to accept the offer under the Takeover Bid. It also submitted that the effect that production shortfalls was having on Finders' cash position was relevant information required to be disclosed to the market.
15. In its preliminary submissions, Finders submitted that the information sought by Eastern Field: (a) was not material to its shareholders' assessment of the value of a Finders' share and whether to accept the offer under the Takeover Bid and (b) extended beyond what Finders was legally required (referring to its quarterly reporting obligations), or would reasonably be expected, to disclose. It submitted that the fact that two months had elapsed and there was more up to date, non-public information about the operation of the Wetar project did not mean "*new circumstances*" had arisen for the purposes of s644.
16. In our view, the extent to which Finders is required to digress from its standard reporting program during a takeover bid depends on whether the target becomes aware of an omission or misleading statement in the target's statement or of a new circumstance that would have been required to be disclosed under s638, that is material from the point of view of the shareholder.
17. Eastern Field submitted that Finders' shareholders needed actual and up to date production and recovery levels to ascertain (among other things) any trend in production levels "*given inherent uncertainty as to whether production is trending towards nameplate*". We had some sympathy for this concern recognising that valuation is difficult in the ramp up to nameplate capacity phase during which time variations in production and/or recovery may be due to temporary events or represent an underlying design issue. However, it may also be questioned whether Eastern Field's focus on short term production and recovery levels was appropriate given the 'life of mine' financial model used by the Independent Expert to value the Wetar project.
18. Finders submitted that it had provided clarificatory disclosure regarding production in its first supplementary target's statement, noting that it had not intended for

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information it had provided to the Independent Expert on a ‘life of mine’ basis to be taken as a production forecast for any particular period. It submitted that “a ‘new circumstance’ would only arise in relation to March 2018 quarter production to the extent that actual or forecast production for the quarter derogated (or was expected to derogate) from expectations as to the March 2018 quarter production that it would be reasonable for Finders’ shareholders to have, and such derogation were material from the point of view of Finders’ shareholders”.

19. In this regard, Finders submitted that its independent directors believe shareholders could expect from its previous disclosure that Finders’ March 2018 quarter copper cathode production would be greater than in the December 2017 quarter (4,100 tonnes) and less than in the June 2017 quarter (6,804 tonnes). Finders also submitted that the independent directors maintain their belief that Finders will achieve production at around nameplate capacity of 28,000 tonnes per annum on an annualised basis during the June 2018 quarter and subsequent quarters consistent with their statements in the first supplementary target’s statement.
20. In response to Eastern Field’s concerns in relation to working capital, Finders submitted that its independent directors maintain their view regarding Finders’ balance sheet position and that no new circumstances have arisen that require additional disclosure at that time.
21. Eastern Field submitted that the Independent Expert had assumed that there would be 16 quarters of continuous production of copper cathode at or above nameplate capacity (7,000+ tonnes of copper per quarter) including in the quarter ending 31 March 2018. It submitted that this was overly optimistic given the Wetar project’s production history and incidents affecting production and recoveries. Eastern Field also submitted that the Independent Expert had assumed that recoveries would be in accordance with modelled leach curves without reconciling against actual recovery results and this was unreasonable, rendering the Independent Expert’s report misleading. It also submitted that, given the new information, the basis on which the Independent Expert’s report was prepared was no longer valid.
22. In response to the application, Finders provided the Independent Expert and Technical Expert with the application and up to date information regarding Finders’ financial position, performance and production (including actual production for January and February 2018 and projected production to 30 June 2018).
23. In a letter to the Panel in response to the application, the Technical Expert reconfirmed that the assumptions in the Independent Expert’s report were reasonably based and appropriate. The Independent Expert performed valuation analysis to directionally test the impact on its valuation of changes in circumstances since the completion of its report which involved updating key assumptions affected by the changes. Having regard to the updated information from Finders and advice from the Technical Expert, the Independent Expert confirmed in a letter to Finders that each change in the key assumptions had an immaterial impact on its valuation analysis (utilising a 10% materiality threshold) and that collectively the changes had a negligible impact on its valuation range and did not alter its opinion that Eastern Field’s offer is neither fair nor reasonable. The Independent Expert (as advised by the Technical Expert) based its review on a more conservative recovery in production

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following the March 2018 quarter (despite the view of the independent directors noted in paragraph 19 above).

24. In our view, taking into consideration the letters of the Independent Expert and Technical Expert, there were no “*strong preliminary indications*” of a “*clear fault in the methodology*”² to justify undertaking inquiries into the correctness of the Independent Expert’s report. As to whether any supplementary disclosure is required, we expect an independent expert, during the bid period, to notify the target if it becomes aware that a material statement in its report is misleading or deceptive or there has been a significant change affecting information included in the report.³
25. While the Independent Expert concluded there had been no material changes in circumstances (having regard to the up to date information) that led to a change in its valuation range, before making a decision we wanted to understand better the operational and financial changes over the last two months. We asked for the percentage change in the directional valuation analysis of the key assumptions, both individually and collectively. We also sought submissions including on the appropriateness of the materiality level in light of the unconditional offer on foot which was then scheduled to close on 16 March 2018.
26. ASIC submitted that in determining what constitutes a change to the information in a report sufficient to warrant supplementary disclosure, consideration should not be limited to the magnitude and impact of individual or aggregate changes to material assumptions and the output of the valuation but rather: “*whether overall there has been a meaningful change in the totality of the information contained in the report and/or the basis for the value proposition put that is relevant to shareholders’ understanding of, and reliance on, the valuation. One reason for this is that changes to assumptions may be material to shareholders due to their qualitative impact even if they are not materially different on an individual basis, or in aggregate, in a quantitative sense. Another is that different shareholders may view changes to some key assumptions as being of greater or lesser import than others.*”
27. After considering the further material, we decided not to conduct proceedings. In making that decision, we relied on the statements made by Finders’ independent directors⁴ and the Independent Expert’s assessment that the changes based on the actual and up to date information are not material.⁵ On balance and considering the totality of the information, we considered that shareholders had sufficient information to assess the merits of the Takeover Bid and there were no material changes that rendered the target’s statement (as supplemented by the first supplementary target’s statement) or the Independent Expert’s report misleading.

² *Minemakers Limited 02* [2012] ATP 13 at [20]

³ See s670C(2) for expert reports included in a target’s statement under s640 and ASIC RG 111.102 for all expert reports

⁴ See paragraphs 19 and 20

⁵ See paragraph 23

DECISION

28. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

Orders

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

**Karen Evans-Cullen
President of the sitting Panel
Decision dated 12 March 2018
Reasons given to parties 4 April 2018
Reasons published 9 April 2018**

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Advisers

Party	Advisers
Eastern Field	Johnson Winter & Slattery
Finders	Ashurst Australia