



Australian Government

Takeovers Panel

MEDIA RELEASE

No: TP22/61

Monday, 28 November 2022

Mineral Commodities Limited 02 – Declaration of Unacceptable Circumstances and Undertakings

The Panel has made a declaration of unacceptable circumstances (Annexure A) and accepted undertakings in lieu of making final orders¹ (Annexure B and Annexure C) in relation to an application dated 17 October 2022 by Simto Resources Pty Ltd in relation to the affairs of Mineral Commodities Limited (see [TP22/55](#)).

Background

On 3 October 2022, MRC announced an equity raising comprising a placement to its largest shareholder, Au Mining Limited (**Au Mining**) to raise approximately \$1.75 million and a 1 for 3 non-renounceable rights issue to raise up to approximately \$14 million (**Rights Issue**). The Rights Issue was to be partially underwritten by:

- Au Mining, for up to \$6.6 million
- Mr Jacob Deysel (MRC's managing director), for up to \$100,000 and
- Mr Guy Walker (AU Mining's company secretary and a non-executive director of MRC), for up to \$100,000.

Mr Walker was involved in the negotiation of the placement and the underwriting of the Rights Issue by Au Mining, on Au Mining's behalf.

The offer document in respect of the Rights Issue disclosed that Au Mining's voting power could potentially increase to up to 45.23% as a result of the Rights Issue and underwriting of the Rights Issue². No information was disclosed in the offer document concerning the directors, ultimate beneficial owners or business of Au

¹ however, as the Panel has made a declaration, should it become necessary it may subsequently make orders

² assuming Au Mining accepted its full entitlement and no other shareholders accepted their entitlements and taking into account the increase in voting power of Au Mining from 28.2% to 31.1% arising under the placement

Mining, and largely generic information was disclosed in relation to Au Mining's intentions for MRC should it obtain effective control of MRC.

The offer document disclosed that the Rights Issue would include a shortfall facility, with shortfall allocated at the discretion of MRC in consultation with the underwriters, subject to the terms of the underwriting agreements, and would otherwise be allocated in an equitable and proportionate manner by reference to existing shareholders. The disclosure in the offer document of the total number of shortfall shares was uncertain.

No information was disclosed in the offer document around the process undertaken to manage any conflicts of interest potentially arising in connection with the Rights Issue, including the conflict of Mr Walker's duties to MRC and Au Mining.

Declaration

The Panel considered that insufficient steps were undertaken to mitigate the potential effect on control of MRC, inadequate steps were taken to manage the conflict between Mr Walker's duties to MRC and Au Mining, and inadequate disclosure was made in the offer document in relation to Au Mining, the operation of the shortfall facility and the management of conflicts of interest. Accordingly, the Panel considered that the circumstances were unacceptable:

1. having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:
 - (a) the control, or potential control, of MRC or
 - (b) the acquisition, or proposed acquisition, by a person of a substantial interest in MRC or
2. in the alternative, having regard to the purposes of Chapter 6 set out in s602 of the Act.

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 considers that the undertakings sufficiently address the circumstances and that it is not presently necessary to make any orders, although reserves the right to do so in due course.

Undertakings

The Panel has accepted undertakings from MRC³ and Au Mining⁴ in lieu of making final orders to the effect that both parties will terminate their underwriting agreement in relation to the Rights Issue. The undertaking from MRC also, among

³ Refer Annexure B

⁴ Refer Annexure C

other things, deals with the shortfall facility, provides supplementary disclosure in a supplementary offer document and extends the Rights Issue offer for at least 14 days after the supplementary disclosure has been made.

The Panel considers that the undertakings sufficiently address the circumstances and that it is not presently necessary to make any orders, although reserves the right to do so.

The sitting Panel was Michael Borsky KC, Bill Koeck (sitting President) and Timothy Longstaff. The Panel will publish its reasons for the decision in due course on its website www.takeovers.gov.au.

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ANNEXURE A

CORPORATIONS ACT SECTION 657A

DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

MINERAL COMMODITIES LIMITED 02

CIRCUMSTANCES

1. Mineral Commodities Limited (**MRC**) is an ASX listed company (ASX: MRC).
2. On 3 October 2022, MRC announced plans to raise up to \$15.7 million by way of:
 - (a) A placement of 23.3 million shares to its largest shareholder, Au Mining Limited (**Au Mining**), at an issue price of \$0.075 per share to raise \$1.75 million (**Placement**).
 - (b) A 1 for 3 non-renounceable rights issue at an issue price of \$0.075 per share to raise up to approximately \$14 million (**Rights Issue**). The Rights Issue was to be partially underwritten by:
 - (i) Au Mining, for up to \$6,600,000
 - (ii) Mr Jacob Deysel (MRC's managing director), for up to \$100,000 and
 - (iii) Mr Guy Walker (Au Mining's company secretary and a non-executive director of MRC), for up to \$100,000 (**Underwriters**).
3. On 5 October 2022, Au Mining's voting power increased from 28.2% to 31.1% as a result of the Placement, the maximum amount permissible under the 'creep' exception in item 9 of section 611 of the *Corporations Act 2001* (Cth) (**Act**). The Form 604 Notice of Change of Interests of Substantial Holder for the increase in voting power was lodged on 10 October 2022. The Record Date for the Rights Issue is 12 October 2022.
4. On 7 October 2022, MRC issued an offer document in relation to the Rights Issue (**Offer Document**), which disclosed (among other things) that:
 - (a) Au Mining's voting power could increase to a maximum of 45.23% as a result of participating in and underwriting the Rights Issue if no other eligible shareholders take up their entitlements under the offer and as a

result “AU Mining and its associates may be in a position to potentially influence the financial decisions of the Company, and their interests may not align with those of all other Shareholders”.

- (b) “Notwithstanding the potential increase in voting power of AU Mining, the Company understands that, other than as disclosed in this Offer Document and previously announced by the Company, AU Mining does not have a present intention of making any significant changes to the current business plans or management of the Company.”

5. Section 3.11 of the Offer Document made the following statements (among others) about a shortfall offer (**Shortfall Offer**):

“Any Entitlement not taken up pursuant to the Offer will form the Shortfall Offer. The Shortfall Offer is a separate offer pursuant to this Offer Document and will close on the Closing Date.

*Eligible Shareholders are entitled to apply for Shares under the Shortfall Offer (**Shortfall Shares**) subject to such applications being received by the Closing Date. The issue price for each Shortfall Share shall be \$0.075, being the price at which Shares have been offered under the Offer.*

Allocation of the Shortfall Shares will be at the discretion of the Company, following consultation with the Underwriters, and will otherwise be subject to the terms of the Underwriting Agreements... Shortfall Shares will be allocated in an equitable and proportional manner by reference to existing shareholdings.”

6. The definitions section of the Offer Document defined ‘Shortfall Shares’ as “the number of Total Underwritten Shares for which valid Applications have not been received by 5:00pm (WST) on the Closing Date”¹ and defined ‘Total Underwritten Shares’ as “the aggregate of New Shares for which the Company has entered into Underwriting Agreements”. To the extent that these definitions implied that the Shortfall Offer was limited to the number of shares subject to the underwriting agreements between MRC and the Underwriters (**Underwriting Agreements**), MRC submitted that this was an error. However, the above definitions are (in effect) identical to the definitions for those expressions in the Underwriting Agreements.
7. The Offer Document did not disclose the directors and ultimate beneficial owner(s) of Au Mining.
8. Mr Walker was nominated by Au Mining to be elected to the board of MRC and is Au Mining’s company secretary. Mr Walker had previously declared to the MRC board his role at Au Mining.

¹ In contrast to the definition in section 3.11 of the Offer Documents, see paragraph 5

9. Mr Walker was involved in the negotiation of the Placement and the underwriting of the Rights Issue by Au Mining, on Au Mining's behalf. Mr Walker was also involved in the consideration of other fundraising options in his capacity as a director of MRC.
10. A circular resolution dated 1 October 2022 approving a subscription agreement with Au Mining² and Underwriting Agreements stated (among other things) that:
 - (a) Messrs Walker and Deysel had "*material personal interests in the execution of the Walker Underwriting Agreement and the Deysel Underwriting Agreement*".
 - (b) Noted the operation of section 195 of the Act.
 - (c) "*Mr Walker has decided to abstain from voting on the resolution [to approve the entry of the underwriting agreement with him] and Mr Deysel had decided to abstain from voting on the resolution [to approve the entry of the underwriting agreement with him]. However, Messrs Walker and Deysel have signed this document which contains the resolutions in order for this document to be valid as a written resolution of directors without holding a meeting.*"
11. The draft minutes of meeting of the MRC board dated 4 October 2022 state (among other things) that:

*"Mr Deysel noted that he and Mr Walker intended to participate in the underwriting of the Rights Issue as a sign of support to the Company's shareholder base. Given this, there may be a perceived conflict of interest given such participation and Messrs Deysel and Walker therefore declared an interest in the matter. For the avoidance of doubt, the Board noted Messrs Deysel and Walker's interest and **Resolved** to allow them to remain in the room whilst there was further discussion on the matter."*

"Mr Deysel requested Board approval for himself and executive management to undertake a rights issue at a price of \$0.075c per share on a 1 for 3 basis to raise a further \$14 million and to lodge the Offer Document to commence the Rights Issue process as soon as is reasonably practicable."
12. MRC did not obtain any independent financial advice in relation to the decision to make the Placement and undertake the Rights Issue.
13. The Panel considers that:
 - (a) The Placement, the Rights Issue and underwriting by Au Mining potentially could have a material effect on control of MRC.
 - (b) Any urgent need for funds could have been satisfied in a way that minimised the potential effect on control of MRC by MRC undertaking an

² under which MRC agreed to make the Placement and Rights Issue and Au Mining agreed to subscribe for the Placement shares and its entitlement under the Rights Issue

accelerated component to the Rights Issue rather than by the Placement, and equivalent funding certainty could have been obtained by a larger underwritten component of the Rights Issue.

- (c) The conflicts between Mr Walker's duties to MRC and Au Mining were not adequately managed.
- (d) MRC failed to satisfy the Panel that it undertook reasonable steps to engage an independent third party to underwrite or sub-underwrite the Rights Issue or otherwise to mitigate the potential effect on control of MRC referred to in (a).
- (e) The Shortfall Offer is not designed in a way that mitigates the effect on control of MRC referred to in (a).
- (f) The Offer Document contains inadequate disclosure, including in relation to the Shortfall Offer, the management of conflicts of interest, the directors and ultimate beneficial owners of Au Mining, description of its business and Au Mining's intentions if it obtains control of MRC.

EFFECT

- 14. The Panel considers that the Placement and Rights Issue could potentially result in Au Mining acquiring control or potential control of, or a substantial interest in, MRC in a way that is contrary to an efficient, competitive and informed market.

CONCLUSION

- 15. It appears to the Panel that the circumstances are unacceptable circumstances:
 - (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of MRC or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in MRC or
 - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602 of the Act.
- 16. 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) of the Act.

DECLARATION

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of Mineral Commodities Limited.

Tania Mattei
General Counsel
with authority of Bill Koeck
President of the sitting Panel
Dated 28 November 2022



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Takeovers Panel

ANNEXURE B

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT 2001 (CTH) SECTION 201A UNDERTAKING

MINERAL COMMODITIES LIMITED 02

Mineral Commodities Limited ACN 008 478 653 (**MRC**) undertakes to the Takeovers Panel (**Panel**) under section 201A of the *Australian Securities and Investments Commission Act 2001* (Cth) as follows:

1. MRC will enter into a deed with Au Mining to terminate the underwriting agreement between MRC and Au Mining dated 30 September 2022 with no additional obligations or liabilities to either party by no later than the date of despatch of the Supplementary Offer Document and Chairman's Letter to MRC shareholders.
2. MRC will deal with any applications for additional shares under the shortfall facility offered under the Offer Document in the following manner:
 - (a) to the extent there is a shortfall between applications received for shares under the Rights Issue and the total number of new shares proposed to be issued under the Rights Issue (**First Shortfall**), each eligible shareholder who has applied for additional shares will be allocated their proportionate share of the First Shortfall having regard to their shareholdings as at the record date. If a shareholder has made a shortfall application but has specified a maximum shortfall application amount which is less than the amount of new shares which that shareholder would otherwise be allocated under this process, that shareholder will be allocated the lesser amount and
 - (b) if, following allocation of the First Shortfall, there remains a shortfall between the allocated new shares and total number of new shares proposed to be issued under the Rights Issue (**Second Shortfall**), the above allocation process will be repeated in respect of the Second Shortfall and any subsequent shortfalls until either all the new shares proposed to be issued under the Rights Issue have been allocated or all shortfall allocations have been satisfied in full.

3. MRC will accept all valid applications for additional shares under the shortfall facility made by eligible shareholders, except where acceptance of an application or the issuance of shares would be to a related party of MRC, would contravene section 606 of the *Corporations Act 2001* (Cth) or where the number of shares in respect of which valid applications have been received under the shortfall facility would (when taken together with all other valid applications received under the Rights Issue) exceed the total number of shares proposed to be issued under the Rights Issue (in which case, MRC will accept all valid applications up to the maximum number of shares proposed to be issued under the Rights Issue in accordance with the allocation described in paragraph 2(a)).
4. MRC will not involve Mr Walker in any decision making in relation to the allocation of shortfall.
5. For the avoidance of doubt, no shortfall will be allocated to Au Mining.
6. Subject to compliance with paragraph 8, MRC will issue a supplementary offer document to its shareholders (**Supplementary Offer Document**) which discloses additional or revised details in respect of the following:
 - (a) the termination of the underwriting arrangements with Au Mining
 - (b) the potential control and dilutionary effects of the Rights Issue
 - (c) the shortfall allocation process referred to above
 - (d) the process undertaken to manage any potential conflicts of interest arising in connection with the Rights Issue
 - (e) the directors and ultimate beneficial owners of Au Mining and a description of the business of Au Mining and intentions of Au Mining in the event they obtain effective control of MRC under the Rights Issue and
 - (f) the funding needs of MRC.
7. Subject to compliance with paragraph 8, together with the issue of the Supplementary Offer Document, MRC will issue a succinct cover letter from its Acting Chairman, Mr Russell Tipper, (**Chairman's Letter**) to its shareholders noting:
 - (a) the Panel's declaration of unacceptable circumstances
 - (b) the termination of the underwriting arrangements with Au Mining and
 - (c) summarising the other material changes from the Offer Document made in the Supplementary Offer Document.
8. MRC will not issue the Supplementary Offer Document or the Chairman's Letter until:

- (a) drafts of the Supplementary Offer Document and the Chairman's Letter have been provided to the Panel and
 - (b) the Panel has provided written confirmation that it does not object to the form or content of the Supplementary Offer Document or the Chairman's Letter.
9. MRC will not close the Rights Issue offer until at least 14 days after the Supplementary Offer Document and Chairman's Letter have been sent to its shareholders. MRC will ensure that shareholders that have elected to receive communications from MRC by email will be emailed a copy of the Supplementary Offer Document and Chairman's Letter on the same day as hard copies of those documents are mailed to MRC shareholders that have not elected to receive communications from MRC by email.
10. In preparing and sending the Supplementary Offer Document and Chairman's Letter to its shareholders, MRC will comply with the *Corporations Act 2001* (Cth) and any other applicable regulatory requirements, including policy or guidance issued by ASIC or ASX.
11. Paragraphs 9, 11 and the definitions of this undertaking come into effect immediately. All other paragraphs come into effect on the Effective Date.

In this undertaking, the following terms have the corresponding meaning:

Au Mining	Au Mining Limited (BVI company number 1605835)
Declaration	The Declaration of Unacceptable Circumstances made by the Panel in Mineral Commodities Limited 02
Effective Date	Either: <ul style="list-style-type: none"> (a) if an application for review of the Panel's decision in Mineral Commodities Limited 02 is not made under s657EA of the <i>Corporations Act 2001</i> (Cth), immediately after 11.59pm (Melbourne time) on the second business day after the date the Declaration is communicated in final form or (b) if an application for review of the Panel's decision in Mineral Commodities Limited 02 is made under s657EA of the <i>Corporations Act 2001</i> (Cth), when a review Panel has communicated its decision in final form either not to conduct proceedings or to affirm the Declaration

Offer Document	The offer document issued by MRC in respect of the Rights Issue published on ASX on 7 October 2022 and despatched to MRC shareholders on 17 October 2022
Placement	The placement of 23.3 million shares by MRC to Au Mining at an issue price of \$0.075 per share, raising \$1.75 million, that completed on 5 October 2022
Rights Issue	The 1 for 3 pro rata non-renounceable rights issue to eligible MRC shareholders at an issue price of \$0.075 per new share to raise up to approximately \$14 million, first announced by MRC on 3 October 2022

**Signed by Russell Tipper, Chairperson
with the authority, and on behalf, of
Mineral Commodities Limited
Dated 25 November 2022**



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Takeovers Panel

ANNEXURE C

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT 2001 (CTH) SECTION 201A UNDERTAKING

MINERAL COMMODITIES LIMITED 02

Au Mining Limited (BVI company number 1605835) (**Au Mining**) undertakes to the Takeovers Panel under section 201A of the *Australian Securities and Investments Commission Act 2001* (Cth) that it will enter into a deed with Mineral Commodities Limited ACN 008 478 653 (**MRC**) to terminate the underwriting agreement between Au Mining and MRC dated 30 September 2022 with no additional obligations or liabilities to either party by no later than the date of despatch of the Supplementary Offer Document and Chairman's Letter to MRC shareholders as contemplated in the undertaking to the Panel given by MRC dated on or about the date of this undertaking.

**Signed by Graham Edwards (Director)
with the authority, and on behalf, of
Au Mining Limited
Dated 24 November 2022**