

# THE TAKEOVER PANEL HEARINGS COMMITTEE

## POSSIBLE OFFER BY

CGNPC URANIUM RESOURCES CO., LTD. ("CGNPC-URC")

## FOR

KALAHARI MINERALS PLC ("KALAHARI")

## RULING OF THE HEARINGS COMMITTEE (THE "COMMITTEE")

### INTRODUCTION

#### **The 10 May Panel Statement**

1. On Tuesday 10 May 2011, the Committee issued Panel Statement 2011/10 announcing that it had dismissed an appeal by Kalahari against a ruling of the Takeover Panel Executive (the "Executive") that CGNPC-URC could not reduce the price of its possible offer for Kalahari from 290 pence per share. This statement sets out the detailed reasons for the dismissal of the appeal. Kalahari decided not to appeal that dismissal to the Takeover Appeal Board.

#### **The Rule 2.4 Announcement**

2. On 7 March 2011, the boards of CGNPC-URC and Kalahari announced that they were in discussions regarding a possible recommended cash offer by CGNPC-URC for Kalahari of 290 pence per Kalahari share. CGNPC-URC did not specify in this announcement any circumstances in which it reserved the right to announce an offer for Kalahari at a lower level of consideration, as would have been permissible under the Takeover Code (the "Code").
3. The indicative offer was subject to a number of pre-conditions including regulatory clearances from authorities in China and Australia and agreement with the Australian Securities and Investments Commission ("ASIC") as to the

terms on which CGNPC-URC could indirectly acquire an interest in more than 20% of Extract Resources Limited (“Extract”).

### **The Code**

4. Under Rule 2.4(c) of the Code, except with the consent of the Panel, any offer announced by CGNPC-URC for Kalahari must be made on terms that are the same as, or better than, those specified in the announcement made on 7 March. Paragraph 4.1.4 of PCP 2004/2, which led to the introduction of Rule 2.4(c), stated that the consent of the Panel should only be granted in "wholly exceptional circumstances". The Rule itself (and the Notes on the Rule) did not refer to any criterion for the grant of consent.

### **Kalahari and Extract**

5. Kalahari’s principal asset is its holding of 42.8% of the issued share capital of Extract. Extract is an international uranium exploration and development company. The principal asset of Extract is its 100% ownership of the Husab Uranium Project ("Husab") in Namibia.
6. Kalahari's shares are traded on the AIM Market of the London Stock Exchange ("AIM") and also the Namibian Stock Exchange. At the indicative offer price of 290 pence per share, Kalahari's issued ordinary share capital had a value of approximately £711 million. At the closing share price on AIM on 5 May of 228 pence, that value was about £560 million.
7. Extract is incorporated in Australia and its shares are listed on the Australian, Toronto and Namibian Stock Exchanges. On 5 May, Extract had a market capitalisation of about £1.3 billion.

## **CGNPC-URC**

8. CGNPC-URC is a wholly-owned subsidiary of China Guangdong Nuclear Power Holding Corporation (“CGNPC”). CGNPC is a nuclear power producer owned by the People’s Republic of China (“PRC”) with material interests in nuclear fuels procurement and production.

## **Fukushima and the Issue**

9. Following the earthquake in Japan on 11 March, and its subsequent impact on the nuclear reactors at Fukushima, the boards of CGNPC-URC and Kalahari reached agreement on a revised indicative offer price of 270 pence per share, which, if made, would be recommended by the Kalahari board. It was contended that the Panel should consent to CGNPC-URC being able, in the event that it were to announce a firm intention to make an offer, to do so at 270 pence per share on the basis that the impact of the events in Japan on uranium production and pre-production companies (such as Kalahari) constituted wholly exceptional circumstances, or otherwise met the principles on which the Code is founded.
10. On 28 April, the Executive ruled, on the basis of the evidence provided to it, that the impact of the events in Japan on the possible offer by CGNPC-URC for Kalahari did not constitute wholly exceptional circumstances and that CGNPC-URC should not therefore be permitted to announce a firm offer for Kalahari at 270 pence per share. As a result of the Executive’s ruling, CGNPC-URC had a choice to announce either:
  - (a) a firm offer for Kalahari at 290 pence per share; or
  - (b) that it had no intention to make an offer for Kalahari.

In the event of the latter, CGNPC-URC would be subject to Rule 2.8 and, by virtue of Note 6 on Rule 2.4, would not be permitted to announce an offer for Kalahari at less than 290 pence per share for three months following the date of such announcement, even with the agreement of the board of Kalahari (save

to the extent that an event occurred in respect of which CGNPC-URC had reserved the right to set the "no intention to bid" statement aside at the time when that statement was made).

11. On 30 April, Kalahari requested that the Executive's ruling should be reviewed by the Hearings Committee.

### **THE HEARING**

12. The Hearings Committee of the Panel was convened on Tuesday 10 May to hear the appeal of Kalahari. The members of the Committee who were present are named in the Appendix to this Statement.
13. CGNPC-URC, whilst expressly stating that it was not appealing the ruling of the Executive, requested to be present at the hearing and to make submissions to the Committee. Both Kalahari and the Executive consented to this course and the Chairman of the Committee granted the request.
14. At the hearing, the submissions of the Executive were presented by the Director General. Kalahari was represented by Michael Todd QC instructed by Lawrence Graham LLP, and CGNPC-URC was represented by Ashurst LLP and Deutsche Bank.
15. Neither of the parties, nor CGNPC-URC, sought to call any witnesses. Each provided and exchanged written submissions on Friday 6 May.

### **THE CODE**

16. The relevant provisions of the Code are as follows:
  - (a) Rule 2.4(c):

*“Until a firm intention to make an offer has been notified, the Panel must be consulted in advance if any person proposes to make a statement in relation to the terms on which an offer might be made for the offeree company. Except*

*with the consent of the Panel, if any such statement is included in an announcement by a potential offeror or is made by or on behalf of a potential offeror, its directors, officials or advisers and not immediately withdrawn if incorrect, the potential offeror will be bound by the statement if an offer for the offeree company is subsequently made, unless it reserved the right not to be so bound at the time the statement was made. In particular:*

*(i) where the statement concerned relates to the price of a possible offer..., any offer made by the potential offeror for the offeree company will be required to be made on the same or better terms. Where all or part of the consideration is expressed in terms of a monetary value, the offer or that element of the offer must be made at the same or a higher monetary value...; and*

*(ii) where the statement concerned includes reference to the fact that the terms of the possible offer “will not be increased” or are “final” or uses a similar expression, the potential offeror will not be allowed subsequently to make an offer on better terms.*

*See also Note 5.”*

(b) The position under the Code where a potential offeror states an indicative offer price without specifying any circumstances in which it has reserved the right to reduce that price is repeated in Note 5 on Rule 2.4, the relevant part of which provides as follows:

*“Except with the consent of the Panel, where a potential offeror has referred in a statement subject to Rule 2.4(c) to the level of consideration to be paid if an offer is made, that potential offeror will not be allowed subsequently to make an offer for the offeree company at a lower level of consideration unless there has occurred an event which the potential offeror specified in the statement as an event which would enable it to set aside the level of consideration referred to.”*

(c) Rule 2.4(c) was introduced into the Code in 2004 following the consultation on PCP 2004/2. The background to the Rule, and the Code Committee’s view as to the approach to be adopted in applying it, is set out in paragraphs 4.1.1 to 4.1.6 of that consultation paper, which provide as follows:

***“4.1 Reducing a previously stated offer value***

*4.1.1 This issue of the extent to which a potential offeror should be bound by an earlier statement relating to the possible terms of its offer is most obviously in point where a possible offer announcement includes details of the offeror’s proposed offer price. The Code Committee is*

*aware of occasions on which a potential offeror which has included details of its proposed offer price in this way has subsequently sought to be permitted to make a firm offer for the offeree company at a lower value or, at least, to do so with the recommendation of the board of the offeree company.*

- 4.1.2 *The argument in favour of allowing a potential offeror to make an offer at a lower price than it had previously indicated in an earlier announcement is that to do otherwise might have the effect of depriving offeree company shareholders of the possibility of considering an offer where the offeror is no longer in a position, or willing, to make its offer at the previously stated price. Not permitting an offer to be made in these circumstances might be considered to operate against the interests of shareholders, particularly where the lower offer is proposed to be made with the recommendation of the offeree company board.*
- 4.1.3 *The counter-argument to the above position, however, is that, since there is no obligation to include details relating to the offer value in a possible offer announcement, it must be the case that the proposed offeror wants to derive some benefit from doing so and that the likely source of this benefit will be shareholders' and the market's reaction to the price. The maintenance of fair and orderly markets is crucial to the objective of the Code of providing an orderly framework within which takeover bids are conducted; the Code should, therefore, guard against the possibility of shareholders and the market being prejudiced by misleading statements or a lack of certainty, as would be the case if an offeror were permitted to make an offer at a lower value than it had previously indicated it was considering.*
- 4.1.4 *Having considered these arguments, the Code Committee is of the view that where an unqualified statement is made by a potential offeror about the price at which it is considering making an offer, the principle of certainty and orderly conduct should prevail over the apparent disadvantages which might result from holding the offeror to the statement in a particular case (especially as the offeror is under no obligation to mention its proposed offer price). Accordingly, in the absence of wholly exceptional circumstances, a potential offeror electing to make such an unqualified statement should not be permitted subsequently to make an offer at below that price [emphasis added]. The Code Committee also believes that the same consequences should apply whether the statement is made in a formal announcement or informally, for example in an interview.*
- 4.1.5 *However, in seeking to establish an appropriate balance between the potential disadvantages to shareholders of being deprived of the possibility of an offer and the undesirable consequences for shareholders and the market if they cannot rely on the accuracy of statements being made by an offeror, the Code Committee also considers, subject to the considerations in paragraph 4.1.6 below, that*

*a potential offeror wishing to include details of its proposed offer price in a possible offer announcement or other statement should be able specifically to reserve the right at the time the preliminary announcement or statement is made subsequently to make any offer at a lower value and to state the circumstances in which it reserves the right to do so. The potential offeror should then be allowed (subject always to any obligation arising pursuant to Rules 6 and 11) to make an offer at a lower price if in the interim there has occurred an event that it had specified in the announcement would allow it to set its previous price aside. In such a case, so long as the circumstances in which the offeror might not be bound by its previous price statement are clearly specified at the time of the original announcement, the Code Committee believes that any concerns about a lack of certainty arising from the offeror's announcement are not sufficient to outweigh the prejudice that offeree company shareholders would suffer if the offeror was prevented from going ahead with its offer if those circumstances subsequently arose.*

4.1.6 *The Code Committee does not believe, however, that a potential offeror should be free to specify any matter whatsoever it chooses as an event which will enable it to set aside its price and subsequently to make an offer at a lower value. In striking the appropriate balance between the competing interests referred to above, the Code Committee considers it important that any permitted reservation should be clear and unambiguous, and also that the fulfilment of the reservation should not depend on the subjective judgement of the offeror or be otherwise within the offeror's control. For example, therefore, a reservation relating to the offeror conducting satisfactory due diligence would not be acceptable as, due to the subjective nature of the reservation, the circumstances in which the offeror could set its price aside would remain uncertain. On the other hand, the recommendation of the board of the offeree company or a firm intention to make an offer for the offeree company being announced by a third party should always satisfy the necessary standard. In relation to any other matter that a potential offeror seeks to include as a reservation, the Code Committee is of the view that the Panel should be consulted in advance with a view to it determining whether the proposed reservation is sufficiently certain that it should be allowed."*

(d) Note 6 on Rule 2.4 stipulates the time period for which the restrictions in Rule 2.4(c) will apply and provides as follows:

*"6. Duration of restriction*

*The restrictions imposed by Rule 2.4(c) will normally apply throughout the period during which the offeree company is in an offer period and for a further three months thereafter.*

*However, where a potential offeror has made a statement to which Rule 2.8 applies but the offeree company remains in an offer period, the restrictions imposed by Rule 2.4(c) will normally apply for three months following the making of the statement to which Rule 2.8 applies.”*

17. It was the submission of the Executive that the rationale for the three month period in Note 6 is to avoid Rule 2.4(c) being circumvented in circumstances where, as in this case, the potential offeror and the offeree company reach agreement on the terms of an offer which are lower than those stated in a previous announcement made by the potential offeror and where the potential offeror did not reserve the right at the time that the initial announcement was made to announce an offer on lower terms than those stated with the agreement of the board of the offeree company. The three month period referred to in Note 6 was introduced as this was consistent with the anti-avoidance provisions in relation to "no increase" and "no extension" statements in the context of Rule 35.1.
18. The effect of the provisions referred to above is that, on the basis that CGNPC-URC did not specify any circumstances in which it reserved the right to announce an offer at a lower level of consideration than that stated in the announcement of 7 March, CGNPC-URC would only be permitted to announce a firm offer for Kalahari at less than 290 pence per share during the offer period and for three months thereafter with the consent of the Panel.
19. There are other provisions of the Code to which the attention of the Committee was drawn. Rule 32.2 provides in relation to "no increase" statements as follows:

*“32.2 NO INCREASE STATEMENTS*

*If statements in relation to the value or type of consideration such as “the offer will not be further increased” or “our offer remains at xp per share and it will not be raised” (“no increase statements”) are included in documents or announcements published in connection with an offer, or are made by or on behalf of an offeror, its directors, officials or advisers, and not withdrawn immediately if incorrect, only in wholly exceptional circumstances will the offeror be allowed subsequently to amend the terms of its offer in any way even if the amendment would not result in an increase of the value of the offer*

*(eg the introduction of a lower paper alternative) except where the right to do so has been specifically reserved.”*

Rule 31.5 adopts an almost identical position in relation to "no extension" statements.

20. The Introduction to the Code at paragraph 2(a) states, in the first paragraph under the heading "Nature and purpose of the Code", that:

*"The Code is designed principally to ensure that shareholders are treated fairly and are not denied an opportunity to decide on the merits of a takeover and that shareholders of the same class are afforded equivalent treatment by an offeror. The Code also provides an orderly framework within which takeovers are conducted. In addition, it is designed to promote, in conjunction with the other regulatory regimes, the integrity of the financial markets."*

21. The Code also contains six "General Principles" and reference has been made to General Principles 3 and 4 which state:

*"3. The board of an offeree company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid.*

*4. False markets must not be created in the securities of the offeree company, of the offeror company or of any other company concerned by the bid in such a way that the rise or fall of the prices of the securities becomes artificial and the normal functioning of the markets is distorted."*

### **THE CORRECT TEST**

22. Both the Executive and Kalahari accepted that the question for the Executive and for the Committee was whether or not the circumstances and effect of the earthquake in Japan were such as properly to be characterised as "wholly exceptional" and such that the Panel should consent to the proposed reduction in the indicative offer price from 290 pence to 270 pence per share.

23. In the submission of CGNPC-URC that approach was challenged. It was said that:

- (a) in contrast to the Code provisions for no increase and no extension statements, Rule 2.4(c) does not make any express reference to "wholly exceptional circumstances" but simply requires "the consent of the Panel";
  - (b) the omission of the words was deliberate following consultation by the Code Committee; and
  - (c) the consequence is that the Panel should consider the overall spirit and purpose of the Code, as stated in particular in General Principles 3 and 4, and all the relevant facts in reaching its decision whether or not to grant consent.
24. The Executive took issue with this submission, relying substantially on the words and explanation for them in the consultation paper, which expressly address and apply the principles set out in the Code in reaching the conclusions expressed. The Executive also pointed to:
- (a) the expressed right at the time an indicative offer is made to make an offer at a lower price if the circumstances in which that might be done are specified, including the recommendation by the board of the offeree company of a lower price;
  - (b) the fact that there is no requirement for an offeror to announce an indicative offer price or to make a "no increase" or "no extension" statement and such statements are voluntary and so may be taken to have been intended to obtain some advantage; and
  - (c) it being of the first importance that offer-related information should be prepared with the highest standards of care and accuracy.
25. Whilst the Committee considers it to be unfortunate that neither Rule 2.4(c) nor the Notes on it make express reference to the criterion of "wholly exceptional circumstances", for the reasons submitted by the Executive and clearly stated by the Code Committee and confirmed by the Code Committee after considering the replies to the consultation paper, the Committee has

concluded that the criterion is entirely appropriate, in particular in circumstances in which it is open to the potential offeror to qualify the indicative price by reference to specific circumstances, including the consent of the offeree board.

26. The Committee also believes that the criterion is well known and accepted by practitioners and endorses the analysis of the Code Committee in paragraph 4.1 of the consultation paper.
27. The Executive submitted that, in the context of this appeal, the relevant circumstances must be financial in nature and such that any decline in the value of the potential offer as a result must itself be wholly exceptional.
28. Kalahari submitted it is not necessary that the "wholly exceptional circumstances" should have a "wholly exceptional effect" on the offeree and accepted only that in order to be relevant they must have a substantial effect.
29. There is, in the view of the Committee, little to be said for debating the meaning of the words. They are ordinary English words; they require "something more" than "exceptional"; they are fact sensitive. The language and context emphasise that consent may only be given in very limited circumstances. In the view of the Committee, it is at least a requirement of the words that the relevant circumstances have an impact upon the very matter for which the consent of the Panel is sought and must at least be such as to justify the making of an offer, should one be made, at the proposed price below the indicative price.

### **"WHOLLY EXCEPTIONAL"?**

#### **The Submissions of the Executive**

30. The Executive rightly accepted that the Japanese earthquake and the consequences for the Fukushima nuclear reactor were exceptional and unforeseeable events, but submitted that:

(a) CGNPC-URC could have reserved the right in the 7 March announcement, on terms acceptable to the Panel, to make an offer at a lower value than 290 pence per share with the agreement of the board of Kalahari. Had they done so, then an offer of 270 pence per share would have been permissible under the Code;

(b) on the evidence, no such reservation was included in the announcement, despite CGNPC-URC wishing to do so, because the Kalahari board wished to send a clear public message that it would not contemplate any further price reduction;

(c) both parties must therefore have known that they were limiting their flexibility in the event of any unforeseen events. Indeed, had the reservations been included, it would have been entirely a matter for the board of Kalahari to consent or not to a lower price had such an event occurred. The fact that Kalahari now consented to a lower price cannot therefore of itself be considered to be exceptional;

(d) Kalahari and CGNPC-URC have considered the events in Japan and the impact which they may have on the value of the proposed offer. Whilst acknowledging that the board of Kalahari considered not only that it negotiated with skill and determination and had achieved an excellent result which it believes to be in the interests of the shareholders of Kalahari, the fact is that the parties have agreed that the indicative offer price should be reduced as a consequence of the events in Japan by 20 pence per share. 20 pence per share represents a discount of only 6.9% from the indicative offer price of 290 pence per share announced on 7 March; and

(e) a discount of such a small amount was "almost immaterial" and was compelling evidence to demonstrate that the relevant circumstances were not wholly exceptional.

## The Submissions of Kalahari

31. Kalahari submitted that:

(a) the events at Fukushima caused material dislocation in the uranium and uranium related equity markets and caused major reviews of the use of nuclear power and the building of nuclear plants throughout the world;

(b) it was on 16 April (some 5 weeks after the earthquake) that CGNPC-URC informed Kalahari that they would be unable to proceed at 290 pence per share due to "being unable to secure certain regulatory approvals on the original pricing terms";

(c) Kalahari was left in no doubt that the offer would not proceed at 290 pence per share. In this context a reduction "only to 270 pence per share was a very good result for Kalahari shareholders". An announcement of the proposed reduction, the ruling of the Executive and this appeal was first made on 3 May;

(d) if the existing proposal were to be withdrawn and no reduced offer permitted, the consequence would likely be that the shares of both Kalahari and Extract would fall further and it is the market reaction to the value of the shares that should be taken into consideration when considering the effect on Kalahari, not the negotiated price reduction;

(e) General Principle 3 recognises the duty of directors to protect shareholders and to permit them to decide on the merits of a bid and consent would enable that to happen. The market recognised that the Panel had a discretion and recognised, if not anticipated, the effect of the events in Japan;

(f) the Panel had misdirected itself by taking account of the size of the price reduction in concluding whether or not wholly exceptional circumstances had occurred; and

- (g) Kalahari summarised a key point of its submission in these terms:

*"The proposed price reduction represents a negotiated solution to accommodate those circumstances, while preserving for the shareholders (i) the right to consider the offer and (ii) the opportunity of obtaining substantially more than they would on a market exit should the offer lapse."*

### **The Submissions of CGNPC-URC**

32. CGNPC-URC expressly stated that it was not appealing the ruling of the Executive but wished to have its views considered. In addition to its submission about the applicability and meaning of "wholly exceptional", CGNPC-URC made the following points:

(a) in view of the interest of a third party, it was "important to Kalahari" to announce the possible offer from CGNPC-URC and both Kalahari and CGNPC-URC were eager to make a joint announcement to demonstrate that the proposed transaction was recommended;

(b) the inclusion of the price in the 7 March Rule 2.4 announcement was required by Kalahari in the light of the third party interest which had been publicly announced. The CGNPC-URC advisory team recommended that wording should be included in the Rule 2.4 announcement reserving the right for CGNPC-URC to make an offer at a lower price "with the recommendation of the Kalahari board" since this wording is generally considered standard language. CGNPC-URC believed the Kalahari board rejected the wording because it could not envisage any circumstances in which the directors could, in the exercise of their fiduciary duties, recommend a lower offer. Alternatively, Kalahari may have wanted to ensure that CGNPC-URC had no room for further renegotiation;

(c) from CGNPC-URC's perspective, the long term prospects for nuclear power and uranium pricing were fundamentally affected by the Fukushima events. CGNPC-URC had originally sought a greater reduction but Kalahari refused and 270 pence per share was the negotiated compromise. From

CGNPC-URC's perspective, the transaction was still viable at 270 pence per share but was finely balanced;

(d) in light of the events, CGNPC-URC had discussions with the PRC regulators who indicated that it was unlikely that the PRC regulatory approvals would be forthcoming absent a reduction in the indicative offer price of 290 pence per share;

(e) CGNPC-URC believed paragraph 2(a) of the Introduction to the Code neatly encapsulated the issue faced by the Panel. It explains that the Code is designed principally to ensure that shareholders are treated fairly and are not denied an opportunity to decide on the merits of a takeover. It goes on to set out what CGNPC-URC regarded as important but secondary objectives which are to provide an orderly framework within which takeovers are conducted and to promote, in conjunction with other regulatory regimes, the integrity of the financial markets;

(f) in the view of CGNPC-URC, the impact of the Japanese earthquake on Kalahari and its interest in Extract was exceptional and material. The fact that the price revision required was not exceptional reflected a whole range of factors and judgments on the part of CGNPC-URC;

(g) General Principle 3 meant that the Panel should intervene to enable Kalahari shareholders to decide on the merits of the proposed offer; and

(h) CGNPC-URC believed that no General Principle 4 concerns should arise in this case if the parties were permitted to proceed at the lower price, in particular because:

(i) the Rule 2.4 announcement contained a significant number of pre-conditions which must be satisfied or waived before a firm Rule 2.5 offer announcement could be released and, in the circumstances, the announced price was only one of many variables which would have

to be taken into account by the market when assessing the impact on the price of Kalahari securities of the possible offer price; and

(ii) the effect on the market of denying the revised offer to be made was likely to be more pronounced than if a revised offer was permitted and would not appear to assist any Kalahari shareholder who might have placed reliance upon an offer, if made, being at 290 pence per share and no lower and sold shares. It simply increases the number of Kalahari shareholders who will be adversely affected because no offer at all will be made.

### COMMENT

33. The Committee has carefully considered these submissions. It makes the following observations:

(a) a number of “precedents” were cited by the participants to the appeal. None were of any real assistance. The issue is, as stated, fact sensitive and the precedents are readily distinguishable from the present facts;

(b) the Committee was provided with reports and figures which demonstrate and support the submission of Kalahari noted at paragraph 31(a) and which also record that many uncertainties remain. It is not of course suggested that the events had any direct impact on Husab;

(c) in the period following the 7 March announcement and between the earthquake on 11 March and the announcement of the proposed revision to the price on 3 May:

(i) Kalahari (on 14 April) referred publicly and favourably to the proposed offer of 290 pence per share;

(ii) Kalahari was first informed on 16/17 April by CGNPC-URC that a firm intention to make an offer would not be forthcoming unless

the 290 pence price was renegotiated and, after negotiation, the 270 pence price was then agreed;

(iii) the Executive was first consulted on 16 April and, following written submissions, confirmed on 28 April its preliminary view, expressed on 18 April, that consent would not be given;

(iv) the announcement by Kalahari on 3 May of the proposed reduction in price and of this appeal was made with the consent of CGNPC-URC. The announcement stated that there could be no certainty that an offer would be made even if the appeal succeeded and noted that CGNPC-URC retained the right to make an offer for Kalahari at 290 pence per share irrespective of the outcome of the appeal;

(v) between 14 March and 5 May, over 59 million shares were traded in Kalahari. During that period Kalahari shares closed at prices ranging from 209 to 275 pence per share. There are approximately 245 million Kalahari issued shares; and

(vi) there can of course be no certainty as to the considerations which influenced those who elected to sell and to buy Kalahari shares in this period, but it is not correct to focus only on the interests of current shareholders in any offer that might be made.

(d) The Committee has already referred to the evidence relating to the fall in the price of uranium and related equity markets following the earthquake. However, it is also to be noted that Husab is not expected to produce uranium before late 2013 or early 2014, when it is expected that it will be one of the three largest uranium mines in the world, and fluctuations in the prices of commodities for a number of reasons are not uncommon. The evidence also clearly demonstrates the continued expectation of substantial increases worldwide in nuclear generating capacity over both the medium and the long term and particularly so the PRC. Indeed to date the evidence is that the long-

term price of uranium has suffered only a modest fall. Further, the fact that CGNPC-URC has agreed to a price of 270 pence per share (and not ruled out a higher price) is at the least good evidence of the perceived value of Kalahari following the earthquake.

## **DECISION**

34. The Committee considers that:

(a) it is of the first importance to the maintenance of market integrity, itself one of the key objectives of the Code, that the market can rely upon public statements made in bid situations. That is the rationale not only of Rule 2.4(c) but also of Rules 31.5 and 32.2 and many other Rules of the Code;

(b) that objective is not qualified by or to be balanced against General Principle 3 that shareholders should not be deprived of the opportunity to decide on the merits of a bid. The Committee accepts the submission of the Executive that General Principle 3 is the principle upon which the provisions of the Code restricting matters which might frustrate an offer are based. That has no relevance in the present context, which is concerned with a specific Rule applicable to a specific transaction;

(c) it was open to CGNPC-URC and Kalahari to make an announcement which did not include the price of 290 pence per share. It was also open to them, having included the price, to provide expressly that the price might be reduced if the board of Kalahari consented to the reduction. Whatever the reason that that was not done, it remains the case that it was a deliberate decision not to provide for unforeseen circumstances in which the board might think such a reduction appropriate;

(d) the “wholly exceptional circumstances” test is as a matter of both language and principle rightly to be applied as indeed requiring something wholly exceptional to justify departure from the terms of the 7 March announcement; and

(e) the Committee considers that an assessment of the factors to which it has referred comes down in favour of the ruling of the Executive.

35. In summary:

(a) it is of the first importance to the integrity of the market that, as the Code Committee expressed it, “the principle of certainty and orderly conduct should prevail over” any apparent disadvantages arising from an inability to reduce the price unless the circumstances are indeed “wholly exceptional” which, in the circumstances of this matter, the Committee does not consider that they are;

(b) it was a deliberate decision of the parties to announce the proposed price and to provide no mechanism for dealing with circumstances in which agreement might be made to reduce it; and

(c) the impact of the earthquake in Japan (itself an exceptional and unforeseeable event) on the value and price of the shares in Kalahari remains uncertain as the events occurred only some two months ago and the parties themselves have assessed that impact by a reduction in price of only 6.9%.

For these reasons, the Committee unanimously determined that the appeal by Kalahari should be dismissed.

25 May 2011

## APPENDIX

### HEARINGS COMMITTEE MEMBERS

The members of the Hearings Committee who constituted the Committee for the purpose of this hearing were:

<b>Body Represented</b>	<b>Individual's Name</b>	<b>Position or Firm</b>
	Sir Gordon Langley	Chairman, Hearings Committee
	Antony Beevor	Deputy Chairman, Hearings Committee
	David Challen	Deputy Chairman, Hearings Committee
	Sir David Lees	Independent Member, Hearings Committee
	Campbell Christie	Independent Member, Hearings Committee
<b>Association for Financial Markets in Europe</b>	Mark Warham	Barclays Capital
<b>Association for Financial Markets in Europe, Corporate Finance Committee</b>	Mark Seligman	Credit Suisse Securities (Europe)
<b>Association for Financial Markets in Europe, Securities Trading Committee</b>	Jim Hamilton	Investec
<b>Association of British Insurers</b>	Jim Stride	AXA Investment Managers
<b>Association of Private Client Investment Managers and Stockbrokers</b>	John Hall	Brewin Dolphin
<b>British Bankers' Association</b>	Kate Cheetham	Lloyds Banking Group
<b>Confederation of British Industry</b>	Steve Cowden	Reed Elsevier
<b>National Association of Pension Funds</b>	Mark Hyde Harrison	Barclays Bank
<b>Secretary to the Committee</b>	Charles Penney	Addleshaw Goddard LLP