



**In the matter of Universal Resources Limited
[2005] ATP 6**

Catchwords:

communication by target to shareholders before a target's statement – material omissions – corrective disclosure – undertaking to Panel – valuation – JORC Code – use of comparables – takeover premiums

Corporations Act 2001 (Cth), sections 602(a) and 602(b)(iii)

ASX Listing Rules, rule 5.6 and Appendix 5A

These are the Panel's reasons for declining to make a declaration of unacceptable circumstances in relation to the application made by CopperCo Limited dated 9 February 2005, in relation to the affairs of Universal Resources Limited and CopperCo's bid for all of the ordinary shares and all of the listed options in Universal Resources, and for accepting instead an undertaking by Universal Resources to send a corrective letter in conjunction with its target's statement.

THE PROCEEDINGS

1. These reasons relate to an application (the **Application**) to the Panel from CopperCo Limited (**CopperCo**) dated 9 February 2005 in relation to the affairs of Universal Resources Limited (**Universal**).

THE PANEL & PROCESS

2. The President of the Panel appointed Les Taylor (sitting President), Chris Photakis (sitting Deputy President) and Byron Koster as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the Application.
3. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.
4. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

SUMMARY

5. On 17 December 2004, CopperCo announced its intention to make a takeover bid for all of the shares in Universal. On 14 January 2005, CopperCo further announced a takeover bid for all of the listed options in Universal and lodged its bidder's statement with the Australian Securities & Investments Commission, Australian Stock Exchange Limited (**ASX**) and Universal.
6. The Application concerned disclosures made in a letter which Universal sent to its shareholders on 2 February 2005 in advance of Universal's target's statement (**Universal Letter**). The Panel considered that there were deficiencies in, and omissions from, the Universal Letter in that it included:
 - (a) total 'copper equivalent' resource information in relation to both CopperCo and Universal's resources, without also presenting the breakdown of that 'copper

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equivalent' information into 'Measured', 'Indicated' and 'Inferred' resources and into copper and gold resources (Universal's approach was inconsistent with the disclosure requirements of the JORC Code). Although the Universal Letter may not have been formally required to comply with the JORC Code, the Panel nevertheless considered it confusing, misleading and unacceptable for Universal to write to Universal shareholders during a takeover bid in terms which were inconsistent with the JORC Code;

- (b) an analysis of the comparative values of CopperCo and Universal which was based on the 'Enterprise Value/Tonne of Copper Equivalent' (EV/CuEq) metric, without also highlighting to shareholders:
 - (i) the limitations of that metric;
 - (ii) why Universal chose to use that metric;
 - (iii) that other metrics might result in different comparative values for CopperCo and Universal; and
 - (iv) that it is common for listed companies to trade with different EV/CuEq multiples (in many cases with quite wide differences) and that such differences do not necessarily represent any inappropriate undervaluation or overvaluation of the different companies; and
 - (c) an historical average of takeover premiums and inferred that the premium inherent in the CopperCo bid was demonstrably inadequate by comparison, without also highlighting to shareholders that:
 - (i) the takeover bids included in the average included hostile and friendly bids, and cash and scrip bids;
 - (ii) different types of bids have historically had different premiums; and
 - (iii) aggregation of the different classes of bids may make comparison with CopperCo's hostile scrip bid less meaningful.
7. The Panel considered that it was appropriate that Universal shareholders be provided with a corrective letter to rectify the above deficiencies. Given that Universal was about to dispatch its target's statement to Universal shareholders the Panel considered it sensible to require the corrective letter to be sent to Universal shareholders with the Universal target's statement.
8. On 18 February 2005, the Panel accepted an undertaking from Universal to send a copy of the corrective letter, in the form reviewed by the Panel, to each Universal shareholder at the same time as, and in the same envelope as, the target's statement.
9. Based on that undertaking, the Panel concluded its proceedings on the basis that it was not in the public interest to make a declaration of unacceptable circumstances and that no order was required. In accepting Universal's undertaking, the Panel noted that Universal had confirmed that it would commence dispatching its target's statement (and therefore the corrective letter) by 21 February 2005 (as required by the *Corporations Act 2001* (Cth)).

APPLICATION

Background

CopperCo and Universal

10. CopperCo has one material asset, being the Lady Annie Copper Project and satellite deposits. Universal also has one material asset – the Roseby Copper Project. The reported resources at both companies' principal projects are copper and gold.

Universal's letter to shareholders

11. On 2 February 2005, Universal sent the Universal Letter to its shareholders. The Universal Letter:
- (a) advised shareholders that the directors were preparing a target's statement, that shareholders should take no action pending receipt of that target's statement and that the directors of Universal expected that they would be recommending that shareholders reject the CopperCo offer;
 - (b) contained information concerning the EV/CuEq ratio for each of CopperCo and Universal (based on their respective principal projects). Although the letter indicated the total copper tonne equivalent resources for the principal asset of both CopperCo and Universal, it did not break down those resources into 'Measured', 'Indicated' and 'Inferred' resources, nor into gold and copper;
 - (c) indicated that, impliedly on the basis of the comparative EV/CuEq ratio information:
 - (i) 'Universal shares would need to be trading at 59 cents each (and Universal options at 39 cents each) to be ascribing the equivalent value to [Universal's] copper-gold resources as is currently being ascribed to CopperCo's resources.';
 - (ii) 'Clearly, either CopperCo shares are relatively overvalued or Universal shares are relatively undervalued. In either case, the offer terms are not fair on a relative basis.';
 - (d) stated that the average premium paid in takeover offers for companies capitalised at less than \$100 million in the Australian resources sector over the last 5 years was 28.8%; and
 - (e) indicated that, impliedly on the basis of the difference between the average premium presented and the premium inherent in the CopperCo offer, 'the premium offered to take control of Universal is demonstrably inadequate'.
12. The Universal Letter was also lodged with ASX.

Declaration and orders sought in the Application

13. CopperCo sought a declaration that the aspects of the Universal Letter relating to the comparative EV/CuEq valuations of Universal and CopperCo and comparative takeover premium analysis constituted unacceptable circumstances.
14. CopperCo sought orders that:

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- (a) as soon as practicable, Universal send a corrective letter to its shareholders and optionholders and make a corrective announcement to ASX stating clearly:
 - (i) that the correction was prepared and circulated as a result of a declaration of unacceptable circumstances made by the Panel in relation to the affairs of Universal and an order requiring the correction of statements made by Universal;
 - (ii) that the aspect of the Universal Letter relating to the EV/CuEq metric was misleading in a number of respects and that Universal shareholders and optionholders should ignore it;
 - (iii) that the analysis in the Universal Letter relating to the EV/CuEq metric contained no reliable indication of the value of Universal shares or options or CopperCo shares;
 - (iv) that the information in the Universal Letter relating to the EV/CuEq metric provided no basis for concluding that Universal's shares had a value of 59 cents or Universal's options had a value of 39 cents;
 - (v) that the aspect of the Universal Letter relating to takeover premiums was misleading and that Universal shareholders and optionholders should ignore it; and
 - (vi) that the aspect of the Universal Letter relating to takeover premiums should not have concluded, based on Universal's limited analysis, that CopperCo's premium was "demonstrably inadequate"; and
- (b) Universal give the Panel a final draft of the corrective letter and corrective announcement not less than one business day before it is sent to shareholders and optionholders and released to ASX and not send the corrective letter or release the corrective announcement in purported compliance until the Panel has informed Universal that the form of the corrective letter and corrective announcement is considered by the Panel to be appropriate.

15. CopperCo also sought such further or other orders as the Panel considered appropriate.

DISCUSSION

Letters sent in advance of target's statements

16. The Panel considered that, where Universal's board chose to contact its shareholders in advance of sending its target's statement, and wished to present arguments or information in relation to shareholders' decision as to accept or not (rather than merely a holding statement of "Do nothing until we send you the target's statement"), it was incumbent on Universal's board to ensure that the relevant correspondence met the same standards as a target's statement in relation to the areas which it addressed. For instance, where such correspondence addressed questions of value, the correspondence should have set out any underlying assumptions or material limitations on the analysis presented.

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The JORC Code: Presentation of aggregated resources and failure to reference JORC Code compliant sources

The JORC Code

17. The JORC Code is an industry code, issued by the Joint Ore Reserves Committee of The Australasian Institute of Mining and Metallurgy, the Australian Institute of Geoscientists and the Minerals Council of Australia, and is binding on members of those bodies. The Code has also been incorporated into the Listing Rules of ASX¹ and the New Zealand Stock Exchange, and is widely used by mining companies, even outside Australia.
18. The JORC Code was drafted to improve and standardise disclosures about mineral resources and ore reserves. Prior to the adoption of the JORC Code, disclosures regarding mineral resources and ore reserves were often woefully inadequate or misleading. The terms recommended by the JORC Code for the description of mineral resources and ore reserves have become standard usage in publications by listed companies, and material departures from them risk being misleading.
19. Under the JORC Code, 'Public Reports' of mineral resources must specify the resources as falling into one or more of the categories of 'Inferred', 'Indicated' and 'Measured' and resource categories must not be reported in a combined form unless details for the individual categories are provided. A Public Report must also be based on and fairly reflect information and supporting documentation prepared by a 'Competent Person' (essentially, an appropriately qualified and experienced geoscientist), name that Competent Person and be issued with their (or their employer's) consent.
20. The JORC Code also indicates that for companies issuing summary reports, inclusion of all material information relating to mineral resources is recommended. Further, the JORC Code states that where summary information is presented it should clearly state that it is a summary and provide a reference to the JORC Code compliant Public Report or Reports on which the summary is based.

Aggregation of resources

21. CopperCo submitted that the Universal Letter did not comply with the JORC Code.
22. CopperCo submitted that, under the JORC Code, the Universal Letter was a Public Report and thus should have reported the mineral resources of each of Universal and CopperCo under the categories of 'Measured', 'Indicated' and 'Inferred'.
23. The Panel considered that Universal should not have presented information on the resources of the Roseby Copper Project and Lady Annie Copper Project in copper equivalent terms, without including a breakdown as to how many tonnes of those resources comprised, respectively, 'Measured' copper resources, 'Measured' gold resources, 'Indicated' copper resources, 'Indicated' gold resources, 'Inferred' copper resources and 'Inferred' gold resources.
24. The Panel did not consider it necessary for it to determine conclusively whether the Universal Letter comprised a Public Report within the meaning of the JORC Code.

¹ See ASX Listing Rule 5.6.

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Nor did it consider it necessary to determine whether the Universal Letter comprised a summary of such a report. Rather, the Panel considered that the JORC Code sets a benchmark as to the information the market expects to be provided in material documents in relation to a company's mineral deposits and the information shareholders reasonably require in order to assess assertions based on mineral deposit data. That information includes resource information disaggregated into the 'Measured', 'Indicated' and 'Inferred' categories. Failing to provide that information in the Universal Letter reduced shareholders' ability to form their own assessments of the EV/CuEq information presented and meant that shareholders might be confused by that information.

Referencing JORC Code compliant sources

25. The Panel did not consider that it is current market practice for a document such as the Universal Letter to refer to the JORC Code compliant sources on which the resource figures included in that letter were based or state that it was issued with the consent of an identified Competent Person. The Panel did not consider that to be necessary in the interests of an efficient, competitive and informed market for control of Universal, provided that the relevant information was in fact based on sources which complied in all material respects with the JORC Code (including because those sources had been signed off by an identified Competent Person). That was not an issue in this case.

The VALMIN Code

26. CopperCo also submitted that, although not strictly required to comply with the VALMIN Code, any statements as to value in the Universal Letter should have complied with The Code for Assessment and Valuation of Mineral Assets and Mineral Securities for Independent Expert Reports (the **VALMIN Code**).
27. As its full name suggests, the VALMIN Code is concerned with the preparation of independent expert reports.
28. The Universal Letter did not purport to be an independent expert report. The Panel did not consider that the Universal Letter was required to comply with the VALMIN Code.

Inadequate disclosure as to EV/CuEq methodology

29. CopperCo submitted that the comparison of CopperCo and Universal's EV/CuEq in the Universal Letter was simplistic and misleading and that the inferences which Universal made as to the relative values of the respective companies were also simplistic and misleading.
30. The Panel agreed.
31. The Panel accepted that EV/CuEq is one valuation metric available to persons considering the comparative values of companies in the mining sector. However, it is only one metric, and it is not uncommon for companies to trade at quite different EV/CuEq multiples. One tonne of copper in the ground is not necessarily equivalent to any other one tonne of copper in the ground: for instance, because those two tonnes may have very different extraction costs.

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32. The Panel considered that it was inconsistent with the existence of an efficient, competitive and informed market for control of Universal for the Universal board to have presented information on the basis of the EV/CuEq metric without also highlighting to shareholders the limitations of that metric. In particular, it was misleading for the Universal directors to have omitted to mention possible explanations for the large difference between the EV/CuEq ratios of CopperCo and Universal, other than that the market might have undervalued one company and/or overvalued the other. Such possible explanations could include the market's perception of the relative grade of the two companies' resources, the relative costs associated with developing and operating their projects, the relative risks associated with those projects, the relative states of development of those projects and the relative quality of the respective management teams.
33. The Panel also considered that the Universal directors should have explained to shareholders that using EV/CuEq multiples was only one means of comparing the values of the two companies, that other valuation methodologies may have resulted in different comparative valuations of Universal and CopperCo and why the Universal board selected the EV/CuEq valuation methodology for their analysis. Given that Universal chose to use only one valuation approach, Universal should also have noted that EV/CuEq multiples would not necessarily be the preferred valuation methodology chosen by an independent expert.
34. The Panel also considered that Universal should have explained to shareholders that it is common for listed entities to trade in an informed market on market prices that would imply widely varying EV/CuEq multiples.

Information on historical takeover premiums

35. Given that the Universal Letter presented average information on historical premiums in takeover transactions, the Panel considered that the Universal directors should have ensured that the Universal Letter gave shareholders sufficient information to make their own assessment as to whether the average value was suitable to compare to the transaction which the shareholders were considering.
36. This did not necessarily require that the Universal directors should have presented information on each individual transaction making up the average. However, it did require that Universal shareholders should have been informed of the general nature of the transactions which were included in the average - so that shareholders could assess whether particular transactions or types of transactions had been selectively included or excluded from the sample. Because Universal shareholders were not given this information, they might have assumed that it was reasonable to believe that all of the transactions which made up the average were 'on all fours' with the transaction which they were considering (that is, in the case of CopperCo's bid for Universal, that all of the transactions were hostile scrip bids).
37. The Panel considered that Universal should have mentioned that the 28.8% average premium was an average of premiums paid on hostile and friendly offers, and on cash and scrip bids, and that different premiums have been associated with different types of takeover bids.

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38. During the proceedings, the Panel was provided with a printer's proof of the proposed target's statement. Universal advised that it had not included information on the premiums offered in comparable transactions in the target's statement. As such, the target's statement did not contain any further information on the premium analysis presented in the Universal Letter and could not in any way be said to rectify the associated deficiencies in the Universal Letter.

DECISION

Material omissions from the Universal Letter

39. The Panel concluded that there were material omissions from the Universal Letter such that the Universal Letter was inconsistent with the existence of an efficient, competitive and informed market for the control of Universal.
40. Accordingly, the Panel considered it appropriate for Universal to issue corrective disclosure. Given the prominence of the claims in the Universal Letter, the Panel did not consider that the fuller treatment of some of the issues in relation to the presentation of resources information and the EV/CuEq analysis in the proposed target's statement would be sufficient to address its concerns. Further, the proposed target's statement in no way addressed the Panel's concerns in relation to the information in the Universal Letter concerning takeover premiums.
41. The Panel was also mindful that the statutory deadline for the dispatch of Universal's target's statement was 21 February 2005 and that, given that CopperCo's bid was then due to close on 4 March 2005 (that is, only two weeks after the date for dispatch of the Universal target's statement), it would not be desirable for the target's statement deadline to be extended unless it was absolutely necessary to do so or the bid was correspondingly extended.
42. The Panel indicated to Universal that it would prefer Universal to dispatch, as soon as possible, a corrective letter in the same envelope as its target's statement.
43. The Panel invited Universal to provide a draft of such a letter. The Panel indicated that the letter must:
- (a) highlight that the corrective letter was required by the Panel in the interests of an efficient, competitive and informed market, and that Universal shareholders should reconsider the contents of the Universal Letter in light of the contents of the corrective letter;
 - (b) present, or refer shareholders to the places in the bidder's statement and target's statement where they could find, the resources of CopperCo and Universal broken down into 'Measured', 'Indicated' and 'Inferred' and into gold and copper resources;
 - (c) set out, or refer shareholders to places in the target's statement where they could find, the limitations on the use of EV/CuEq multiples as a basis for comparative valuation. In particular, the Panel indicated that the corrective letter must draw shareholders attention to the facts that:
 - (i) using the EV/CuEq measure alone assumes that one tonne of copper equivalent in the ground is worth the same as any other tonne of copper

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equivalent in the ground, regardless of the costs involved in extracting it, and that such an assumption is unlikely to be correct;

- (ii) EV/CuEq is only one of the valuation methodologies which was available to Universal, and not necessarily the one which would have been preferred by an independent expert;
 - (iii) listed companies commonly trade on widely varying EV/CuEq multiples; and
 - (iv) because of the limitations of the EV/CuEq valuation methodology, possible explanations for the large difference between the EV/CuEq ratios of CopperCo and Universal include the relative grade of the two companies' resources, the relative costs associated with developing and operating their projects, the relative risks associated with those projects, the relative states of development of those projects and the relative quality of the respective management teams;
- (d) explain why the Universal board chose to use the EV/CuEq methodology in the Universal Letter; and
- (e) draw to the attention of Universal shareholders that the average premium of 28.8% referred to in the Universal Letter was the average premium paid in takeover offers for companies capitalised at less than \$100 million in the Australian resource sector over the last five years, including friendly and hostile offers, and cash and scrip offers, and that comparing the CopperCo bid premium to an average of premiums from differing types of bid may not be an informative comparison.

Undertakings

44. Universal provided a draft of a corrective letter to the Panel and the Panel gave CopperCo an opportunity to make submissions regarding it. The Panel decided that the letter provided by Universal would address the deficiencies identified by the Panel.
45. The Panel accepted an undertaking from Universal to send a copy of the letter, in the form reviewed by the Panel, to each Universal shareholder at the same time as, and in the same envelope as, the target's statement.

No declaration of unacceptable circumstances

46. Based on that undertaking, the Panel concluded its proceedings on the basis that it was not in the public interest to make a declaration of unacceptable circumstances and that no orders were required. In accepting Universal's undertaking, the Panel noted that Universal had confirmed that it would commence dispatching its target's statement (and therefore the letter) by 21 February 2005 (as required by the Corporations Act).

Les Taylor
President of the Sitting Panel
Decision dated 21 February 2005

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